

DIGEST

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COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

B-176678

JAN 17 1973

Pak-Mor Manufacturing Company  
1123 S.E. Military Drive  
San Antonio, Texas 78214

Attention: Mr. John F. Bastian  
Assistant to the President

Gentlemen:

Reference is made to your letter of November 9, 1972, and prior correspondence, protesting against the pending award of a contract for refuse collection vehicles to Dempster Brothers, Inc., under invitation for bids (IFB) DAAB07-72-B-0122, issued by the U.S. Army Tank-Automotive Command.

Although Pak-Mor's bid prices were slightly lower than Dempster's for the items being procured, its bid was ultimately rejected for being nonresponsive because an accompanying letter took exception to the patent indemnity clause of the IFB. The basis for this exception, as well as the contention that the IFB contained a restrictive specification, is the language of specification 3.7.1 which Pak-Mor contends spells out a device covered by a Dempster patent. It is our conclusion that the rejection of Pak-Mor's bid was justified in this instance.

Specification 3.7.1 states:

"\* \* \* The compaction and ejection plate shall be provided with a means of releasing, when materials wedge between the top of the packer plate and the roof of the body. The release shall be obtained on the withdrawal stroke and shall not permit waste to fall into the reverse side of the compaction and ejector plate."

In the original administrative report, it is stated that the using activity contends that the specification reflects a performance rather than a design requirement. Moreover, the requirement is justified on the grounds of safety and the minimization of downtime. Specifically, it is noted that personnel entering the container body of the vehicle to manually dislodge wedged material could sustain serious or fatal injury through the inadvertent actuation of the compaction plate. It also states that downtime may become prohibitive when the compaction plate is damaged by wedged material.

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In its response, Pak-Mor takes issue with the using activity's position and contends that no specific instance of jamming, injury, or downtime due to wedging of material has been reported to it. Pak-Mor also notes that personnel within the compaction unit can be protected by turning off the power source to the unit.

As a result of this reply, our Office requested further advice concerning the safety aspects of the using activity's position. The gist of that reply (copy enclosed) is that while no actual injuries have been reported there is always the possibility that the power source to the compaction unit will be inadvertently activated while cleaning is in progress.

On the basis of the present record, we cannot conclude that there is not a reasonable basis for the specification requirement. Although no injuries have resulted from an inadvertent activation of the compaction unit, it appears that the possibility of such an occurrence still remains even though operating procedures may require the interruption of power to the compactor. Since equipment of the type required by the specification would eliminate the need to enter the compaction unit of the vehicle in the first instance and, thus, eliminate the possibility of injury, we believe the requirement is justified without the necessity of having to prove that injuries have resulted from present equipment. Consequently, we do not consider the specification requirement to be an undue restriction on competition.

With respect to the question of possible patent infringement, our Office has taken the position that section 1498 of title 28, United States Code, authorizes the Government to utilize or permit the use of patented inventions under a Government contract without a license, subject to payment of reasonable compensation for such use. See B-166072(1), March 28, 1969; B-157485, November 26, 1965. Moreover, we have held on facts similar to those of the instant case, that the existence of section 1498, *supra*, obviates any basis for relaxing a specification even if it actually infringes on an existing patent. B-166788, July 31, 1969. Infringement of a patent, therefore, does not provide a basis for finding a specification restrictive.

Since the patent indemnity clause is required by Armed Services Procurement Regulation (ASPR) 9-103 and 9-103.1 and since the exception taken to that clause by Pak-Mor obviously had an impact on price and attempted to limit the Government's rights under the clause, a valid basis existed for finding its bid nonresponsive in accordance with the requirements of ASPR 2-402.2.

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Accordingly, your protest is denied.

Very truly yours,

PAUL G. DEMBLING  
For the Comptroller General  
of the United States

Enclosure