



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

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May 11, 1973

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AIR MAIL

Patty Precision Products Company  
Box 570  
6 Miles West Highway 66  
Sapulpa, Oklahoma 74066

Attention: Mr. Harry R. Patty, Jr.  
President

Gentlemen:

This is in reply to your message dated December 20, 1972, and subsequent correspondence, protesting any contract award under RFP No. N00019-73-R-0064, issued by the Naval Air Systems Command (NAVAIR), Washington, D.C., for a quantity of 434, BRU-10A/A bomb racks.

Essentially, you contend that the Navy improperly refused to allow you to compete for an award under the subject RFP, and you believe the Navy should have given favorable consideration to your qualifications to produce the item.

The Navy's report states that the solicitation was issued on December 11, 1972, with an opening date of December 20, 1972, pursuant to the authority in 10 U.S.C. 2304(a)(2) which permits negotiation of contracts if the public exigency will not permit the delay incident to advertising. We are advised that the procurement was not publicized in the Commerce Business Daily "Synopsis of U.S. Government Proposed Procurement, Sales and Contract Awards," since urgency precluded allowing more than 15 days for receipt of proposals. (See Armed Services Procurement Regulation (ASPR) 1-1003.1(c)(iv) which exempts a procurement from the requirement for publication in the Synopsis if it is "of such urgency that the Government would be seriously injured by the delay involved in permitting the date set for receipt of bids, proposals, or quotations to be more than 15 calendar days from the date of transmittal of the synopsis or the date of issuance of the solicitation, whichever is earlier.") On December 19, 1972, your firm requested and was

[Improper Competition Limitation]

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denied a copy of the RFP. Nevertheless, you submitted an offer on December 20 which was not the lowest received. On December 21, 1972, the Navy decided to award the contract to Talley Industries, Inc., notwithstanding your protest, because of the urgent need for this equipment.

The subject RFP was restricted to Varo, Inc., and Talley, the only firms which have in the past produced and are now successfully producing these bomb racks. It was believed that delivery requirements did not afford the requisite time for first article testing which would be required of any new producer. In this connection it is reported that the BRU-10 bomb rack series has had a troubled history in its procurement and in fleet use. Both Talley and Varo initially encountered serious production problems which have been attributed to the complex and sophisticated manufacturing techniques involved, and to a technical data package which required extensive working experience to achieve consistently successful results. Accordingly, it is the Navy's position that the bomb racks and their methods of production are of such complexity that no firm other than Varo and Talley could be awarded a contract to produce them unless that contract contained provisions for first article testing prior to full production. The Navy further contends that a contract with a first article provision "unavoidably requires" a minimum of 18 months from award to commencement of production. This represents a production lead time which is 8 months longer than that of a prior producer.

You object to the Navy's tailoring the procurement to previous producers, and to its refusal on December 19, 1972, to furnish you a copy of the subject RFP because of such restriction. It is our understanding that you are a small business concern and except for the urgency in this case, the question of your capacity to meet the delivery schedule would be for final determination by the Small Business Administration (SBA). You contend that the authority to negotiate because of public exigency does not provide for restricting the procurement to previous producers and, in effect, you object in this instance to the prequalification of offerors. Moreover, you believe that you are qualified to produce the bomb racks sooner than either of the two firms solicited despite the fact that your firm would be required to produce first articles. You also indicate that this view is shared by specialists within the Naval Air Systems Command and the Government's representatives who performed a recent preaward survey on your firm for the identical item. Accordingly, you request that we require the Navy to cancel the contract awarded to Talley.

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Generally, when a solicitation for proposals has been limited as a result of a determination that only a specified firm or firms possess the capability to meet the requirements of a procurement, requests for proposals are required to be furnished upon the request of firms not solicited, but only after advice has been given to such firms as to the reasons for the limited solicitation and as to the unlikelihood of any other firm being able to qualify for a contract award under the circumstances. ASPR 1-1002.1. Accordingly, we must conclude that the Navy's refusal on December 19 to furnish you a copy of the subject RFP after you had been advised of the reason for the restriction, was improper. However, for the reasons stated below we do not believe that an adequate basis has been presented for questioning the legality of the resulting contract award.

First, there is no dispute as to the Navy's representation that there was a critical need for making the contract award on December 21 in order to insure timely deliveries which were urgently needed. Moreover, we believe that prior experiences with the item provide some rational basis in support of the requirement for first article testing for new producers which in turn resulted in the action of restricting the procurement to prior producers. It is also noted that because of the urgency which existed at the time of award the contracting officer would not have been required, as in the normal case, to refer to the SPA any dispute concerning a small business firm's capacity. See ASPR 1-705.4(c)(iv). Assuming that there is merit in your contention regarding the favorable view of your capacity held by NAVAIR specialists and expressed in the preaward survey, there is no legal requirement that a contracting officer adopt such views if he has his own rational basis for concluding otherwise.

While we do not find the contract to be legally objectionable we, nevertheless, have considerable reservations as to the adequacy of the planning leading up to the instant procurement. In this connection, there is enclosed a copy of our letter of today to the Secretary of the Navy wherein we note the improper refusal to furnish you an RFP and suggest that future procurements be planned so as to permit maximum competition for the award.

Sincerely yours,

PAUL G. DEMPING

Acting Comptroller General  
of the United States