CITATIONS ONLY

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

released

B-184627

NOV 18 1976

The Honorable Richard L. Roudebush
Administrator, Veterans Administration

Dear Mr. Roudebush:

This is with reference to your letter of September 15, 1976, apparently in response to our request to be kept informed of the steps taken to preclude a recurrence of the procurement deficiencies noted in our decision in G. A. Braun, Incorporated, B-184627, August 6, 1976, 76-2 CPD 131. In this decision we held that the Veterans Administration (VA) erred in purchasing laundry equipment from the Pellerin Milnor Corporation on a sole source basis where the contracting officer's findings indicated that several manufacturers could satisfy the Government's needs. We further noted that the record did not support use of negotiation procedures under the exception for research and development contracts, 41 U.S.C. § 252(c)(11) (1970).

Your letter states that your interpretation of the decision is that there were two main issues as follows:

"1. Negotiation of a sole-source procurement of laundry equipment was not proper since the contract prescribed no test procedures or reports; and,

"2. Several manufacturers could satisfy the Government's needs with a washer/extractor automated laundry system."

You then pointed out that the purchase order to Pellerin Milnor Corporation provided for inspection and acceptance procedures, warranties and legal remedies if the equipment does not perform.

Your interpretation of our decision is not precisely in accord with the meaning we sought to convey. The main issue was the

authority for buying on a sole source basis under 41 U.S.C. § 252(c)(10) or (11) a product to perform a function which was already being adequately performed by products of other suppliers. It should be noted here that authority to negotiate under either of these sections does not, in itself, justify a sole source procurement. FPR 1-1.301-1 and 1-1.302-1(b). 41 U.S.C. § 252(c)(10) and (11) read as follows:

> "(c) All purchases and contracts for property or services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if --
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> * * * * *
>
> "(10) for property or services for which it is impracticable to secure competition;
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> "(11) the agency head determines that the purchase or contract is for experimental, development, or research work, or for the manufacture or furnishing of property for experimentation, development, research, or test: * * *."

In justifying the sole source procurement of the Pellerin equipment, the Determinations and Findings (D&F) relied upon the authority of 41 U.S.C. § 252(c)(10) as implemented by Federal Procurement Regulations (FPR) § 1-3.210(a)(1). FPR § 1-3.210(a)(1) permits purchase without formal advertising when the property or service can be obtained from only one person or firm, that is, a sole source of supply. As pointed out in the decision, the test required by this section is whether Pellerin is the only manufacturer capable of satisfying the Government's needs when the record indicated that the Government's needs could be satisfied by the automated laundry equipment of at least two other manufacturers whether or not a possible competitor is maintaining a level of production. See Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402, where we stated:

> "Sole-source awards are authorized in circumstances when needed supplies or services can be obtained from only one person or firm. Federal Procurement Regulations (FPR) 1-3.210(a)(1) (1964). However, because of

> the general requirement that procurements be conducted on a competitive basis to the maximum practicable extent, see FPR 1-3.101, agencies must adequately justify determinations to procure on a sole-source basis. Such determinations, while subject to close scrutiny, see e.g., Winslow Associates, 53 Comp. Gen. 478 (1974) and B-178740, May 8, 1975; BioMarine Industries; Genral Electric Company, B-180211, August 5, 1974, will be upheld if there is a reasonable or rationale basis for them. Winslow Associates, B-178740, supra; H. J. Hansen Company, B-181543, March 28, 1975; North Electric Company, B-182248, March 12, 1975."

In applying these principles to this case, the decision held that although the Pellerin product was obtainable only from one source, it was not established that the Government's needs could be satisfied only by the Pellerin product. The correspondence received during the development of the case indicated that the real reason for the sole source procurement was the desire to increase the number of companies vying for the laundry equipment contracts. Therefore, the decision discussed 41 U. S. C. § 252(c)(11) and FPR § 1-3.211 which permit negotiation if the agency head determines that the purchase is for property for experimentation, development, research or test. On the record submitted, however, there was no evidence that the agency head ever made such a determination in this case and, in any case, it was questionable that the VA had funds authorized for such research, development or test activities in the laundry equipment field. Moreover, a sole source procurement under 41 U. S. C. § 252(c)(11) seemed inconsistent with the manufacturer's assertion and the solicitation requirement that the components already had substantial successful operating experience and with the absence of any provision for the kind of testing or reporting normally associated with contracts for property for experimentation, development, research or test. The fact that the contract provides for inspection and acceptance procedures and legal remedies if the equipment does not perform does not distinguish the contract from any other supply contract. Warranties are more commonly used in supply contracts than for those primarily for research, development or testing. The record indicated to us that the procurement reflected a cautious and expensive approach to an already developed and tested product. Incidentally, we note that the report furnished this Office did not contain the final contract test provision which was added to the solicitation at the time of award.

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In addition, the D&F stated that FPR sections 1-3.807.4, 1-3.814-1(a), 1-3.814-2(a) and 1-3.814-3(a) which pertain to the cost and pricing data and audit requirements, were inapplicable because the proposed prices were "based on catalog or market prices of commercial items sold in substantial quantities to the general public." FPR 1-3.807-1(b)(2)(C) states that prototype or experimental units cannot be considered as meeting the requirement that the supplies be "sold in substantial quantities." Such an exemption would seem to be incompatible with a determination that the Pellerin equipment needs any testing beyond that normally required in supply contracts. The VA's statement that because portions of the Pellerin system were custom designed, it was not possible to project a more accurate estimate than $275,000 seems inconsistent with the decision to impose no cost or pricing data or audit requirements. Further, if the Pellerin equipment actually meets the catalog or market price exemption at a price of $400,000, it is difficult to understand how it will successfully compete with the present suppliers.

Sincerely yours,

R.F.KELLER

Deputy Comptroller General
of the United States