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DECISION



X. H. ...
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**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540**

FILE: B-191322

DATE: July 7, 1978

MATTER OF: Miltope Corporation

DIGEST:

1. Protest against alleged infringements of patents is not for consideration since remedy is court action against Government for money damages under 28 U.S.C. § 1498 (1970).
2. Where protester does not contest prior knowledge of alleged noncompliance with specification of item supplied by approved source listed in solicitation, protest at time of being advised of award on basis of unacceptability of approved source's item instead of prior to closing date for submission of initial proposals is untimely filed and not for consideration on merits.

The Miltope Corporation protests the contract awarded to PSI Peripheral Support under Defense Electronics Supply Center, Defense Logistics Agency (DLA), request for proposals No. DLA900-78-R-0391 on the bases that Miltope has the exclusive rights to the two patents covering the item being purchased and that the Naval Ships Engineering Center specifically advised the DLA that the PSI drive solenoid is not acceptable to the Navy. Later (as a part of its comments on the DLA report to our Office) Miltope also advised that another office in the Department of the Navy, as well as the United States Air Force Cryptologic Labs, has continuously complained of the rubber peeling off the pinch rollers of the item.

As regards the issue of possible patent infringements, the exclusive legal right afforded to Miltope is under 28 U.S.C. § 1498 (1970), wherein it is provided that any suit by the holder of a patent that is allegedly infringed in the process of the performance of a Government contract shall be against the Government for money

damages and not against the Government contractor. In view of this, we do not consider the merits of protests based upon patent infringement allegations. Nautel Maine, Inc., B-106326, May 4, 1976, 76-1 CPD 301.

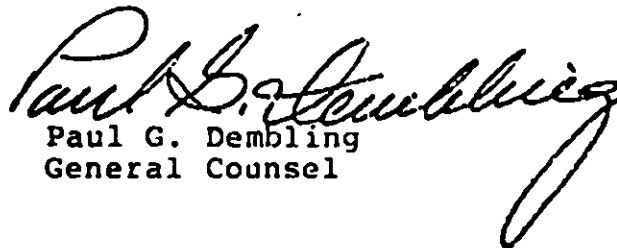
DLA acknowledges that the Navy is investigating a problem with the PSI item in one of its several end item applications (periodic readjustment of the solenoid every 30 days instead of the required 90 days). It is also noted that since the PSI item has not been removed by the Naval Electronics Systems Command from its approved item status whether or not to make an award on the PSI item is a discretionary matter with the contracting officer. DLA further notes that PSI was listed in the solicitation as an approved source for the item and since the Miltope protest against this alleged apparent impropriety was filed after Miltope became aware of the award to PSI instead of prior to the closing date for the receipt of initial proposals, this portion of the protest was not timely filed under our Bid Protest Procedures (4 C.F.R. § 20.2(b)(1) (1977)), and should not be for consideration.

Miltope replies that the more frequent adjustments needed on the PSI item indicate a shorter life span due to excess wearing and thus a more frequent need for replacement parts. Therefore, it believes because of added cost required by the more frequent need for replacement parts the award to PSI at an only \$4.69/item lesser cost is tantamount to fraud, and that the DLA should enforce the obtaining of items meeting the specification by using the complete manufacturing drawings for the item which Miltope supplied the Department of the Navy with unlimited rights approximately 1 year ago.

Since Miltope does not contest that it had reason to believe that the PSI item did not meet the specification prior to the closing date for the receipt of initial proposals, we must agree that the protest was untimely filed with our Office and therefore is not for our consideration on the merits.

Accordingly, we will not consider the protest.

With regard to the contention that PSI is furnishing defective items, as noted above, the Navy is investigating this charge. The further contention that Miltope's manufacturing drawings should be used to purchase the item is a matter for determination by the agencies involved and not our Office.


Paul G. Dembling
General Counsel