



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

B-177659

July 10, 1973

31160

Alton Iron Works, Inc.  
P.O. Box 150  
Albertson, New York 11507

Attention: Mr. Theodore J. Hoffberg  
Treasurer

Gentlemen:

We refer to your letter dated February 14, 1973, and previous correspondence, protesting against the award of a contract to the Star Manufacturing Company (Star) under requests for proposals (RFP) DSA400-73-R-2574 and -1919, issued by the Defense General Supply Center (DGSC), Richmond, Virginia.

RFP DSA400-73-R-2574, issued on November 14, 1972, was a public exigency procurement for 1,542 hot cups in accordance with the following description:

FSN 7310-151-6569

HOT CUP, ELECTRIC;  
115 VOLTS, 400 CYCLE  
THE CUP MUST BE EQUIPPED WITH A THERMOSTAT THAT  
SHALL INTERRUPT THE CURRENT WHEN THE TEMPERATURE  
OF THE LIQUID CONTAINED WITHIN THE CUP IS  
BETWEEN 170 DEG AND 190 DEG F. ALSO THE CUP  
MUST BE UL APPROVED, W/COVER  
STAR MFG, FSCM 90362, P/N 3-115C

Paragraph C8 in the invitation indicated that specifications, plans, or drawings were not available. Two offers were received by the November 24, 1972, opening date. You submitted the low offer of \$29,220.00 and Star (the manufacturer referenced in the description above) offered a price of \$32,395.85. However, your offer was for your copy of the Star product specified in the solicitation. By letter dated December 5, 1972, you were informed that " \* \* \* due to the very urgent need for the Hot Cups, time was not available to the Contracting Officer to have your alternate offer evaluated for possible award in this instance." Therefore, award was made to Star.

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Your position is that the award violated paragraph 1-1206 of the Armed Services Procurement Regulation (ASPR) in that the brand name product in the purchase description was not followed by the words "or equal." You contend that this unsynopsized procurement was a subterfuge by DGSC to avoid awarding any contract to your company. You state that you were the low bidder on a previous procurement "for essentially the same item." DGSC canceled the invitation by citing the need for necessary changes in the specifications which were never accomplished and then proceeded to procure the item under the part number you allege that your competitor had assigned to its hot cup. This cup had borne the same Federal stock number as that product previously supplied by your concern under a prior contract. You maintain that the Small Business Administration regulations required that any purchase of this item made within 6 months of the date of the certificate of competency (COC) pertaining to you had to be made from you.

You were awarded contract DSA400-72-C-1647 on September 29, 1971, under an advertised procurement soliciting bids on 2,470 electric food warming cups in accordance with the following description:

FSN 7310-211-4660

**CUP FOOD WARMING ELECTRIC**

Steel outer shell, chromium plated - copper  
inner shell - power data, 115 volts, AC,  
400 cycles

First Article Approval Required

MIL SPEC MIL-H-21303C Dtd 27 Jan 71

**TYPE II**

Delivery was required by January 24, 1972, but was extended to May and June 1972, when options were exercised which increased the quantity by 1,235 units. Meanwhile, invitation for bids (IFB) DSA400-72-B-6576 was issued on April 21, 1972, for 1,135 food warming cups in accordance with the same description. After bid opening on May 12, 1972, information was received from a consignee that the cups you furnished under contract DSA400-72-C-1647 were not satisfactory. DGSC made additional tests of the cups which disclosed two possible areas of nonconformance to the specifications and four areas in which changes were desired in the specification. Apparently, it was possible for a bidder to conform to the specification yet still submit an unsatisfactory item. Therefore, it was determined that the later IFB should be canceled since the military specification MIL-H-21303C dated January 27, 1971, was inadequate and that the procurement of the quantity and type of cup to meet the needs of the Government should be solicited under revised purchase information data.

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In accordance with a Determination and Findings dated August 10, 1972, authorizing negotiation due to public exigency, RFP DSA400-73-R-1919 was issued on August 25, 1972. The contract was awarded to Star on September 21, 1972, for 3,000 hot cups in accordance with the identical description confirmed in RFP DSA400-73-R-2574. The protest on the award made under RFP -1919 is essentially the same as that made under RFP -2574.

The provisions of 10 U.S.C. 2304 (a)(2) permit negotiations of contracts if the public exigency will not permit the delay incident to advertising. ASPR 1-1003.1(c)(iv) 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."

Although use of the "public exigency" exception does not in and of itself cloak the contracting officer with authority to procure items on a noncompetitive basis, he is vested with a considerable amount of discretion to determine the amount of competition consistent with the exigency of the situation. Our Office does not question the contracting officer's decision to make a sole-source award unless it is clear from the written record that he acted in an arbitrary or capricious manner in abuse of that discretion. See 44 Comp. Gen. 590 (1965).

In the instant case it was determined that it was not feasible to permit procurement by competition since there was no definitive specification. Due to the urgency, we will not question the decision to limit the procurement to a satisfactory product of a specified manufacturer or the determination that time was not available to permit the evaluation of the alternate product you offered. Since the record establishes the public exigency for each negotiated procurement of the hot cups, we see no legal basis upon which we may object to those administrative determinations.

With respect to the COC issued by SBA, we note that it was issued for the contract to be awarded under the advertised procurement which was canceled because of the necessity to revise the specification, and that the SBA regulation in 13 CFR 124.8-15 provides that the COC has application to the "specific Government procurement contract" for which it is issued. Moreover, the COC does not pass upon the adequacy of the specifications, but only upon the capacity and credit aspects of your responsibility as a contractor.

In view of the foregoing, the protest is denied.

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While it is unfortunate that the specification revision has required so much time, we have been advised that DSA has received the proposed new modification to military specification MIL-H-21303C and upon its acceptance should be able to reestablish procurement of this item by formal advertising. In a separate letter of today to DSA, we have urged that, in view of the time that has elapsed since the specification was determined to be unsatisfactory for competitive procurements, if an appropriate specification that provides for competitive procurement has not now been approved, steps be taken to accomplish such approval before there are any further procurements of the item involved.

**Sincerely yours,**

**Paul G. Danbling**

**Acting Comptroller General  
of the United States**