



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

B-178822

October 10, 1973

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Hirsch, Wright, Link & Adams
105 Jefferson Street
Burlington, Iowa 52601

Attention: Gene R. Kralik, Esquire

Gentlemen:

Reference is made to your letter dated September 10, 1973, and prior correspondence, protesting on behalf of Midwest Manufacturing Corporation against the sole-source negotiation and proposed award of a contract to Instapak Corporation under request for proposals (RFP) No. F04607-73-R-0265, issued at Norton Air Force Base, California.

The RFP contemplates a requirements type contract for certain chemicals for use with the Instapak Model 601 Console, which is dispensing equipment for in-place foam packaging. After dispensing these chemicals, an expanding foam results and hardens in the shape of the item being packaged. The record indicates that the Air Force has tested Instapak's dispensing system and finds it to be the only known equipment which is simple to operate, requires a minimum of skill, and does not need continuous purging. Therefore, the Air Force has approved the use of such system.

Apparently, the Air Force plans to lease the Instapak dispensing equipment on a monthly basis. Since Instapak's chemical products are the only ones which are guaranteed by the company to work properly in its equipment, the Air Force proposes to award a requirements contract to Instapak as the sole source supplier of the necessary chemical product pursuant to the negotiation authority in 10 U.S.C. 2304 (a)(10) and Armed Services Procurement Regulation (ASPR) 3-210.2(1).

It is your position that this contemplated lease and purchase arrangement constitutes a violation of the Sherman Antitrust Act, 15 U.S.C. 1, and the Clayton Antitrust Act, 15 U.S.C. 12, et seq. Moreover, you object to restricting the procurement to Instapak since Midwest would be able to determine the suitable chemical formulation and furnish a competitive bid for equivalent chemicals "if the chemical and physical requirements of the foam were set out in the specifications."

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Our Office is not directly concerned with enforcement of the anti-trust laws and any question arising with regard to violation of such laws is properly for consideration by the Department of Justice. 47 Comp. Gen. 223, 224 (1967). In bid protest cases our Office is primarily concerned with determining whether the award of a Government contract is in accordance with the requirements of applicable procurement laws and regulations.

The Air Force has advised that foam-in-place supplies are constantly being developed within the industry and it is evaluating those products of firms which submit them for evaluation. The Air Force has indicated its willingness to evaluate your commercial product to determine whether it will meet the Air Force's requirements. For the time being the Air Force will only lease rather than purchase the necessary dispensing equipment because of the changing technology and advancement in foam material and equipment. The Air Force eventually expects to be able to develop a competitive method of purchasing both equipment and chemicals. The Air Force contends that in the interim it is more cost effective to rent Instapak equipment and purchase chemicals which are known to be compatible rather than wait until a competitive procurement can be effected.

Generally, negotiated procurements are required to be on a competitive basis to the maximum practicable extent. ASFR 3-102(c). Only the actual minimum needs of the Government may be procured and supplies and services must be described in a manner which will encourage maximum competition and eliminate insofar as possible any restrictive features which might limit acceptable offers to one supplier's product, or the products of a relatively few suppliers. ASFR 1-1201(a).

For the present, however, we cannot say that the Air Force decision to purchase Instapak chemicals is arbitrary or made in bad faith. The Air Force apparently does not have access to Instapak's chemical formulations and is not aware of any other foam chemicals which are compatible with the Instapak equipment. Since the Air Force will lease the equipment, testing of untried chemicals would not be feasible. Moreover, you do not contend that Midwest is presently in a position to supply compatible chemicals in the absence of some further statement by the Air Force regarding the chemical and physical requirements of the foam.

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However, we have recommended to the Secretary of the Air Force by letter of today, copy enclosed, that reasonable efforts be taken to develop competition in connection with the foam-in-place program to reduce as much as possible the practice of procuring prequalified products to the exclusion of others.

Sincerely yours,

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

Enclosure