COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

JAN 10 1949

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Switlik Parachute Company, Inc.,
Lalor & Hancock Streets,
Trenton 7, New Jersey.

Gentlemen:

Further reference is made to your letter of June 18, 1948, and subsequent correspondence relative to your protest against the action of the Navy Department in disregarding the bid of your company and making award of a contract to the General Textile Company on invitation to bid No. 6123-O issued by that Department for the procurement of a quantity of parachutes.

The invitation to bid requested bids for the furnishing of specified type parachutes on two distinct bases or lots, under lot 1 the Government to assume all patent liability in connection with the articles required, and under lot 2 the contractor to assume such liability. A tabulation of the bids received appears as follows:

Bidder		Lot #1	Lot #2
Pioneer Parachute Company, Inc.		$603,680.	$ —
General Textile Mills, Inc.		620,000.	620,000.
Reliance Manufacturing Company		610,000.	—
Switlik		548,000.	666,800.
Less 1% discount	Net	542,520.	660,132*

It is your contention that since your bid on lot 1 was the lowest bid received in response to the invitation, the contract properly should have been awarded to your company. Such contention appears to be based upon an assumption on your part that the Government was and is the owner, or entitled to the use of, a patent on a similar parachute alleged to be the equal of the patented article requested; that no claims for infringement would be required to be paid by the United States or that, if such claims were asserted and paid, they would not amount to the difference between your low bid on lot 1 and the bid of the General Textile Mills, Inc., on lot 2.

By letter of July 27, 1948, the matter of your protest was brought to the attention of the Secretary of the Navy with the request that a complete report thereon be furnished this Office. In a report dated

August 12, 1948, the Navy Department advised this Office that the procurement of the parachutes was found necessary in the interests of the military preparedness program; that it was considered essential that only parachutes known to perform satisfactorily should be procured; that research and tests conducted by the Naval Ordnance Laboratory indicated that the baseball type of parachute requested was the only type so far evolved which was known to be satisfactory for the purposes required by the Navy; that the Navy Department was aware of the serious question of possible patent infringement present in the matter; and that in view thereof and of the urgency of the procurement and the purposes for which the parachutes were intended, it was not considered advisable to request performance type bids.

It is, of course, axiomatic that the determination of the nature and type of articles or supplies which will best fill the needs of the United States is a matter solely within the province of the administrative departments and agencies of the Government. In the present case, it was administratively determined that the particular type of parachute on which bids were invited—to which certain patent rights were held by General Textile Mills, Inc.—best fitted the needs of the Government, and that, since there was present a serious question of possible patent infringement, it was deemed in the best interest of the Government to award a contract therefor on lot 2 of the invitation under the terms of which the contractor would assume liability for any patent infringement.

Your contention that award should have been made to you as low bidder on lot 1 of the invitation—under which basis the Government would have assumed liability for any patent infringement—appears to be premised on the theory that any claim for infringement which might be required to be paid by the United States would not amount to the difference between your low bid on lot 1 and the bid of the General Textile Mills, Inc. And, for these same reasons, you question the propriety of the request of the Navy Department for bids on the basis set forth under lot 2 of the invitation. However, it is evident that a determination of the possible liability of the United States for damages for patent infringement is a matter not subject to definite ascertainment and, under such circumstances, is a matter properly to be considered in the evaluation of bids. Thus, even if bids had been submitted on the basis set forth in lot 1 of the invitation only, it would not follow that your bid, being low from the standpoint of price alone, necessarily would be viewed as representing the bid most advantageous to the Government. Obviously, in such circumstances sound practice would require a determination as to the possible liability of the United States for patent infringement. A determination that a bid submitted by the patent owner—under which the total cost to the United States was definitely established—although not the lowest bid as to price, represented the bid most advantageous to the United States, clearly would afford justification

for the award of a contract to such patent owner when consideration is given to the possible liability of the United States for patent infringement in the event of award to a low bidder who offered no protection against patent infringement.

In the present case it was administratively determined that the bid of the General Textile Mills, Inc., while not low from the standpoint of price, represented, upon a consideration of all the various factors, the bid most advantageous to the United States.

In view of the foregoing, there appears no proper basis upon which this Office would be warranted in questioning further the action of the Navy Department in the matter.

Respectfully,

(Signed) Lindsay C. Warren

Comptroller General
of the United States.