

# DECISION



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

61527

FILE: B-185979  
B-186682

DATE: September 21, 1976

MATTER OF: Consolidated Controls Corporation

97996

## DIGEST:

1. Findings in support of determination to negotiate under public exigency is final under 10 U.S.C. § 2310(b) and legal sufficiency of such findings cannot be questioned by this Office. Further, failure to indicate in RFP basis for negotiation was not prejudicial where award selection was based on price and not delivery.
2. Extension of time for delivery where first article testing is waived for only offeror in competitive range without amending solicitation is in keeping with ASPR § 3-805.4(b) where change would not materially affect proposals of other offerors.
3. Decision whether to place a product on QPL is a matter within discretion of procuring agency, which will not be questioned by this Office unless shown to be unreasonable.
4. Validity of Government cost estimate for first article testing is upheld where protester has not carried burden of affirmatively proving estimate to be unrealistic.

This decision involves the following two requests for proposals (RFP) issued by the Naval Regional Procurement Office (NRPO), Naval Supply Systems Command:

### Solicitation

### Issued

NO0140-76-R-0317

October 29, 1975

NO0140-76-R-1044

June 2, 1976

Each solicitation requested proposals for differing quantities of electrical Temperature Indicator Kits. Both solicitations have been challenged by Consolidated Controls Corporation (CCC). The protester has requested consolidation of the cases since similar issues are raised under each RFP. Each protest will be discussed, in turn, below.

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Protest under RFP -0317

The closing date for receipt of proposals under RFP -0317 was November 24, 1975. By letter dated February 2, 1976, counsel for CCC protested to NRPO against an award being made to any other offeror. However, a contract had been awarded to Consolidated Airborne Systems, Inc. (CAS), on January 22, 1976, prior to the receipt of CCC's letter. After NRPO had denied the protest on February 24, 1976, CCC filed a protest with our Office on March 1, 1976.

In its initial letter of protest CCC challenged the use of public exigency for justification of the negotiated procurement and the use of \$10,000 as the realistic estimate of the cost to the Government for first article testing.

The Determination and Findings issued by the contracting officer on September 18, 1975, states that due to the urgency of the procurement the subject contract may be negotiated under the "public exigency" exception of 10 U.S.C. § 2304(a)(2) (1970), as implemented by Armed Services Procurement Regulation (ASPR) § 3-202.2(vi) (1975 ed.), which authorizes procurement by negotiation when the purchase request cites a Uniform Movement and Issue Priority System designator of 1 through 6, inclusive. In this instance, the procurement was assigned a priority designator of 5. Findings in support of a determination to negotiate under the public exigency exception are made final by 10 U.S.C. § 2310(b) (1970), and this Office is precluded from questioning the legal sufficiency of such findings. 52 Comp. Gen. 57, 62 (1972).

Additionally, CCC contends that the delivery schedule was the primary factor in making the award selection and prejudicial to CCC since the RFP did not disclose that the procurement was negotiated because of public exigency. The record indicates that the contract was awarded on the basis of price and not the delivery schedule. Therefore, the failure of the RFP to indicate the authority for negotiation was public exigency did not affect CCC's proposal in any manner.

With regard to CCC's objection to the RFP containing an evaluation factor of \$10,000 for first article testing, section 20.2(b)(1) of our Bid Protest Procedures (4 C.F.R. Part 20 (1976)), provides that protests based upon alleged improprieties in a solicitation which are apparent

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prior to the closing date for receipt of proposals must be filed prior to the closing date to be considered timely. The alleged impropriety in the solicitation was apparent prior to the closing date. Since CCC's protest was not filed with either NRPO or our Office until after the closing date for receipt of proposals, it is untimely and not for consideration on this issue. Whether the question presents a significant issue under section 20.2(c) of our Bid Protest Procedures is academic as the protest under RFP -1044 will consider the exact issue.

RFP -0317, under Lot I, required two first articles to be submitted for approval within 150 days after the effective date of the contract. The production quantity was to be delivered within 90 days after satisfactory completion of first article testing. Lot II (waiver of first article testing) required delivery within 90 days after the contract date. The solicitation stated:

"Bids offering delivery of a quantity under such terms and conditions that delivery will not clearly fall within the applicable REQUIRED delivery period specified above will be rejected as nonresponsive and offers on such basis may be deemed unacceptable." (Emphasis added.)

As to CCC's contention that the offer of a delivery schedule in excess of the required time rendered CAS's proposal "nonresponsive," the concept of competitive range--whether the proposal is or can be readily made acceptable--is incompatible with responsiveness. The competitive range is determined on the basis of price or cost and other salient factors and includes all proposals which have a reasonable chance of being selected for award. ASPR § 3-805.2(a), *supra*. Therefore, the test of "responsiveness" as used in formal advertising is not applicable in a procurement by negotiation. Linolex System Inc., et al., 53 Comp. Gen. 895, 896-97 (1974), 74-1 CPD 296.

Here, the instructions stated that proposals offering a delivery schedule in excess of the required delivery period may be deemed unacceptable. In this regard, the only two offerors who could qualify for waiver of first article testing (CAS and ITT Barton) submitted proposals for Lot II with delivery dates in excess of 90 days after the contract date. Barton's proposal offered delivery in 180 days, while CAS initially proposed delivery in 120 days after the date of contract. Barton was determined not to be in the competitive range because its price of \$89,460 was more than twice that of CAS. In

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its "Best and Final" offer, CAS increased the time for delivery under Lot II to 210 days. The contracting officer did not amend the delivery dates for Lot II since he determined that Barton's offer would not be significantly affected by an extension in delivery from the 180 days proposed to 210 days. Since the protester was not qualified to compete for an award based on waiver of first article testing, the contracting officer contends CCC was not prejudiced by the acceptance of a longer delivery date than than contained in the RFP for Lot II. ASPR § 3-805.4(b), supra.

CCC, on the other hand, contends that since award of the contract was based primarily on price, an extension of the delivery schedule under Lot I could have allowed CCC to lower its price so as to be the low offeror under either Lot. After adding the \$10,000 evaluation factor for testing CCC offer was \$45,700 under Lot I as compared to the overall low offer of CAS under Lot II at \$44,268.

As stated previously, the procurement had been assigned priority designator 5 based on the need to have the units available for the scheduled ship installation. To have added a 210-day delivery after the first article test report period of 150 days would have resulted in a delivery schedule of 360 days after the contract date. The agency report states that it was not possible to extend the time for delivery beyond 240 days without jeopardizing the timely availability of the units for installation. We do not feel under the circumstances that the Navy was required to allow the same amount of delivery time under Lot I and Lot II as there was a rational basis for not doing so and the time allowed under Lot II did not exceed the delivery schedule of Lot I.

#### Protest under RFP -1044

CCC contends that the Navy should not be allowed to procure an end-item for which prequalification is desired, without giving prospective contractors an opportunity to prequalify such as by means of establishing a Qualified Products List (QPL).

A Federal or Military specification is the only medium for establishing a requirement for QPL. ASPR § 1-1102, supra. We have recognized that ASPR § 1-1202(a), supra, mandates the utilization

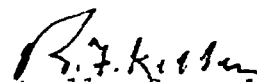
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of a Military specification where available. 53 Comp. Gen. 295 (1973); 50 id. 691 (1971); 43 id. 680 (1964). Additionally, we have held that the determination as to whether an existing Federal specification or Military specification will meet the actual needs of the agency in a particular situation and the drafting of appropriate contract specification to reflect those needs are primarily the responsibility of the agency concerned, which our Office will not question unless such determination can be shown to have no reasonable basis. Ampex Corporation, 54 Comp. Gen. 488 (1974) 74-2 CPD 355. The decision, then, whether a product should be placed on a QPL is a matter within the discretion of the procuring agency.

On the basis of the record before us, CCC has not shown the Navy's determination that an existing Military specification will not meet the actual needs of the agency to be unreasonable.

Finally, CCC contends the Government cost estimate of \$10,100 (increased \$100 from RFP -0317) for first article testing is unrealistic. CCC estimates the cost should be less than \$5,000. The agency, in its report, gives detailed justification for the cost figure of \$10,100. In this regard, the protester has the burden of affirmatively proving his case. We do not believe that burden has been met where conflicting statements of the protester and the contracting agency constitute the only evidence. Reliable Maintenance Service, Inc., Request for Reconsideration, B-185103, May 24, 1976, 76-1 CPD 337.

Accordingly, the protests are denied.

  
Acting Comptroller General  
of the United States