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

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APR 30 1965

Arpolt Corporation
Warsaw, Indiana

Gentlemen:

Reference is made to your telegram of January 15, 1965, and your letter of January 20, 1965, protesting the award of a contract to another bidder under invitation for bids No. ANC(A)28-017-65-40 issued by the Picatinny Arsenal, Dover, New Jersey.

The cited invitation solicited bids--to be opened on November 16, 1964--for furnishing 110 containers, shipping and storage atomic warhead section X9483M2. Preproduction samples were to be furnished within six months from date of award and the remaining quantity was to be delivered to the Government at "the rate of 25 each per month commencing within 10 months from date of award until completion." The lowest bid received was your bid in the amount of \$94,817.80. The next lowest bid, discount considered, was \$104,238.75. Your bid was rejected for reasons herein-after set out and an award to the second lowest bidder was made on January 12, 1965, or within the 60-day acceptance period as provided for in the invitation.

The invitation contained on pages 15 to 18, inclusive, certain provisions and stipulations with regard to the use of Government-owned property in a bidder's possession. Paragraph 1 on page 15 is in part as follows:

"If, in performing the work bid upon, the bidder plans to use any items of Government property (including any items of Special Tooling) in the bidder's possession under a facilities contract or other agreement with the Government independent of the IFS, the bidder shall so indicate by checking the box below and by identifying such facilities contract and/or other agreement authorizing such use. In order to be responsive, the bidder must at the time of bid opening be in fact authorized to use each item of such Government Property for performing the work bid upon. Evidence of such authorization shall be submitted upon request from the Contracting Officer. * * *"

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Also, paragraph 4, page 16, provided in part as follows:

"a. For purposes of equalization of competitive advantage, the use of such Government Property, including special tooling, shall be evaluated by adding to the proposed price of the item(s) bid upon, the following rates for each month of the proposed production period. Bidder should not include in their bid prices any provision for payment of a Use Charge for such property.

Equipment - 1% per month of the acquisition cost.

Special Tooling - 1-2/3% per month of the acquisition cost.

Real Property - 5% per year of land acquisition cost and 8% per year of acquisition costs of improvements thereon computed for the proposed production period.

"b. For purposes of evaluation only, the proposed production period shall be considered to be twelve (12) months commencing with the month of November 1964 and ending with the month of October 1965 for Item 1;"

Since you indicated in your bid that it was based on the use of Government-owned property in your possession as identified by a contract number, certain questions arose when the bids were being evaluated, particularly as to your authority to use such property and the equalization of the competitive advantage held by you in the anticipated use of such property. Therefore you were contacted and requested to furnish the contracting office with a copy of your equipment contract and with evidence that you were authorized to use this equipment "for performing the work bid upon." The evidence you furnished with your letter of December 7, 1964, shows that you had the approval of the equipment or facilities contracting officer to use such equipment during the period from June 30, 1964, through December 31, 1964. There was nothing in the invitation which specifically indicated that the Government-owned equipment was to be used during the entire production period or that you were required to have authority for its use during the entire period. However, considering

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the fact that the Government had a total of 60 days for acceptance--bid opening being November 16, 1964, and award being made on January 12, 1965--it was abundantly clear that your authority to use the equipment for a period through December 31, 1964, could not be considered as being in fact authorized, at time of bid opening, to use the equipment "for performing the work bid upon" as required by the quoted paragraph 1, page 15, of the invitation. Nor does the fact that you were authorized subsequent to bid opening to use the equipment after December 31, 1964, satisfy the requirements of the invitation. To hold otherwise would in effect permit you, after the amounts of all the bids were disclosed, to have the option of making yourself eligible for award by securing and furnishing such authority or, if you felt at a later date that you did not wish to accept an award, you could choose not to apply for authority for further use of the equipment. In our decision of March 25, 1965, B-155770, we held that an authorization expiring February 28, 1965, which would have permitted only three months' use of Government-owned equipment on a contract requiring deliveries over an 11-month period commencing May 1965, could not be considered as adequate for the performance of the contract.

In your letter of January 20, 1965, you allege that the primary purpose of the invitation requirements as to Government-owned equipment was to determine that a bidder would not obtain a competitive advantage by use of such equipment without charge. Also, since this matter did not go to the substance of the bid, you contend that your bid should not have been rejected, citing in support thereof our decisions B-152723, December 30, 1963, and B-154626, July 17, 1964. In B-152723, two contracts were awarded to one bidder under invitations which did not authorize the use of Government-owned equipment and all bids were evaluated on an equal basis after determining that the low bid was submitted by a responsible bidder. Subsequently it was decided to permit use of Government-owned equipment at a reduction in contract price. Since all bids had been evaluated on the same basis, we held that there was no competitive advantage to the contractor. In B-154626, there was not involved any question of evaluation because of the contemplated use of Government-owned equipment but other questions arose as to whether certain matters did or did not go to the substance of the bid under consideration.

Also, in your letter of January 20, 1965, you refer to certain provisions of the Armed Services Procurement Regulation (ASPR) such as paragraphs 2-404.1, 2-405 and 2-407.1. The gist of your argument, in referring to these provisions, is that you were authorized at time of bid opening to use

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each item of Government property which you indicated you intended to use and that in any event the contracting officer should have waived any deficiency in the evidence you furnished since the item of property, namely a shear, which you intended to use, was a minor production requirement and would have been used very little during the 12-month evaluated production period. In the first place, as pointed out hereinabove, the invitation required that "In order to be responsive, the bidder must at the time of bid opening be in fact authorized to use each item of such Government Property for performing the work bid upon" (underscoring supplied). At the time of bid opening you were authorized to use the item of Government property only up to December 31, 1964, which clearly did not meet the invitation requirement to be responsive. As to whether the matter should be considered so trivial that the contracting officer should have waived it as an informality, within the purview of ASFR 2-405, it may be pointed out that in B-154759, November 16, 1964, we upheld the right of the contracting officer to refuse to waive the requirements as to the authorization of a bidder to use Government property in the contemplated performance of a contract. Aside from the monetary value of the equipment it must be recognized that where the bidder conditions its bid upon the use of such property and the required authorization cannot thereafter be obtained from the facilities contracting officer, there would be serious doubt that the bidder if awarded the contract would be liable for any excess costs that might be incurred by the Government if it failed to perform. We must conclude, therefore, that the contracting officer had no authority to waive the involved requirement.

Accordingly, your protest is denied.

Very truly yours,

Joseph Campbell

Comptroller General
of the United States