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

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JAN 24 1973

Pierson, Ball & Dowd
1000 Fing Building
Washington, D.C. 20036

Attention: Richard O. Duvall, Esq.

Gentlemen:

Reference is made to your letter dated December 14, 1972, and prior correspondence, on behalf of Page Airways, Inc. (Page), protesting against the award of a contract to Remington Rand Office Systems under invitation for bids (IFB) No. 5-51216/580, issued by the National Aeronautics and Space Administration (NASA), Goddard Space Flight Center (GSFC).

For the reasons hereinafter stated, the protest is denied.

The IFB solicited bids for a stock retrieval system "Remington Rand Randtric平 MH or equal in accordance with the following specifications," one of which read "10 Metal Skins - unit enclosed except over master column rear access door in each aisle."

Bidders proposing to furnish an "equal" product were cautioned to read and comply with the brand name or equal clause of the IFB inserted therein in accordance with paragraph 1-1206-3 of the NASA Procurement Regulations. That clause informed bidders that bids proposing "equal" products should clearly identify the products offered and that the Government would determine the equality of the product on the basis of the information furnished by the bidder or identified in the bid as well as other information reasonably available to the purchasing activity. Bidders were specifically cautioned that, to insure that availability to the purchasing activity of sufficient information on products offered, "the bidder must furnish as a part of his bid all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the procurement office to (i) determine whether the product offered meets the requirements of the Invitation for Bids and (ii) establish exactly what the bidder proposed to furnish and what the Government would be binding itself to purchase by making an award." The brand name or equal clause further provided:

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"(2) If the bidder proposes to modify a product so as to make it conform to the requirements of the Invitation for Bids, he shall (i) include in his bid a clear description of such proposed modifications and (ii) clearly mark any descriptive material to show the proposed modifications.

"(3) Modifications proposed after bid opening to make a product conform to a brand name product referenced in the Invitation for Bids will not be considered."

As a result of the rejection of the low bid as nonresponsive, Page, the second low bidder, became next in line for award. Page's bid offered to furnish as an "equal" product to the brand name a stock retrieval system manufactured by Automated Functions, Inc., model No. 2300/S. The Page bid referred to and included a commercial brochure describing that model apparently in response to the descriptive material requirement in the brand name or equal clause and indicated that the standard model No. 2300 of its supplier would be modified for the procurement. The contracting officer rejected the Page bid as nonresponsive after submitting the bid for a technical review. In summary, it is reported that the bid was rejected because the commercial brochure submitted with the Page bid failed to describe in detail the modifications required to be made to the Automated Functions, Inc., equipment in order to meet several of the salient specification requirements set forth in the IFB. Therefore, the contracting officer was unable to determine whether the system offered in the Page bid would meet the minimum specifications of the IFB. In view thereof, the contract was awarded to Remington Rand Office Systems, the next low bidder, offering the brand name.

As stated above, one of the salient characteristics of the brand name required of an "equal" product was that the system or unit be enclosed with metal skins, except for a master column rear access door in each aisle. The inclusion of this salient characteristic in the IFB must be regarded as material and essential to the needs of the Government and Page has not contended otherwise. The commercial brochure submitted by Page indicates that its proposed system can be placed "inside or outside" and states:

"It is perfectly feasible to have either the storage area or home base in an exterior location. Special protective roofing units can be constructed to avoid direct precipitation."

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**"ASK ABOUT SPECIAL ROOFING UNITS AVAILABLE FOR
OUTDOOR APPLICATIONS."**

We subscribe to the following quotation from the report to our Office by the NASA Director of Procurement, previously furnished to you, re-stating the rationale of the GSFC technical and contracting personnel in describing this deficiency in the Page bid:

"As to Page's next failure, we see no ambiguity, since the brochure attached to Page's bid did not comply, alternatively or otherwise, with the purchase description requirement for:

"'Metal skins - unit enclosed except over master column rear access door in each aisle.'

"In this regard, compare the equipment depicted in the Automated Functions brochure with that in the Bandtrive brochure. In no case is the Automated Functions' equipment pictured as enclosed in the required metal skin, while the Bandtrive equipment is pictured as enclosed in all cases (see the photographs on pages numbered 2, 7, 8, 9, and 10).

"Page's allusion to the 'special protective roofing units' mentioned on page 6 of the Automated Functions brochure does not make its bid responsive, since there is no evidence that Page intended to include such a roof in its bid. In any event, the Automated Functions optional roofing, such as would 'avoid direct precipitation' is not the equivalent of the required metal enclosures, even if Page's bid was interpreted as offering said roofing. As can be seen from the photograph of the single Bandtrive unit pictured on page numbered 9 of its brochure, the Bandtrive units are enclosed on the sides as well as covered on top. While nowhere pictured, since the Automated Functions optional roofing is described as capable of avoiding 'direct precipitation,' it must be only a partial covering, and therefore not equivalent to Bandtrive's complete skin. The automated stock retrieval system purchased here is intended for use in storing electronic equipment. Such equipment is both sensitive and expensive. The Bandtrive,

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or alternative equipment offering a complete metal enclosure, would provide desired protection against dust and dirt, as well as possible pilferage of these electronic parts, which is not obtainable from open storage units. Accordingly, no matter how Page's bid is interpreted, it cannot be read as complying with this significant requirement of the Government, which requirement was identified as a salient characteristic."

You contend in this regard that the brochure submitted by Page reveals a capability for supplying the desired metal skins by indicating that roofing could be provided for exterior applications and that "It would follow that if the bidder can cover the system for exterior applications, it could also provide a covering for interior use." You also point out that Page's statement in its bid that the offered standard system of its supplier would be modified to meet NASA's requirements sufficiently established the bidder's legal obligation to provide a system in conformity with the specifications.

We do not agree with your contention. What is in issue is not whether Page or its supplier intends to furnish or has the capability of furnishing the required system, but rather whether the bid contains descriptive material which would enable the contracting agency to determine that the system offered will meet the needs of the Government as specified in the salient characteristics. With respect to the requirement for a unit enclosed with metal skins, the descriptive literature submitted by Page with its bid, standing alone, without further explanation or elaboration, does not disclose conformance with that salient feature specified in the IFB to be material and essential to the needs of the Government. Nor can we say that contracting officials need speculate as to whether descriptive material showing sufficient cover for an outside application can logically be construed as offering sufficient cover for a completely enclosed interior application.

Our Office has frequently held that, in response to a solicitation containing a brand name or equal clause substantially similar to the clause used in the instant IFB, it is incumbent upon each bidder offering other than the referenced item to provide with its bid sufficient descriptive data to enable the contracting agency to determine that the item offered will meet the needs of the Government as specified. Moreover, even if the statement in the Page bid that the standard model would be modified to meet NASA requirements can be considered a blanket statement by Page

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offering to meet all specification requirements, that fact does not substitute or compensate for inadequate descriptive data or overcome variances in bid data so as to render the bid responsive. See B-174524, January 26, 1972; B-173305, September 29, 1971; B-171533, April 8, 1971; 46 Comp. Gen. 1, 4 (1966); 50 id. 193, 201 (1970); and 51 id. 237, 239, 240 (1971).

Furthermore, assuming that the brochure submitted by Page could be considered to indicate that the standard model of Page's supplier would be modified to supply the metal skins as specified, our conclusion would not be different. As required by the brand name or equal clause, such modifications would have had to been clearly identified in the bid so as to assure equality and compliance with that material and essential requirement of the specification. Since the descriptive material submitted with the bid does not describe any proposed modifications, such a contention cannot be accepted. See B-170173, November 5, 1970; B-168609, March 6, 1970; B-167648(1), December 17, 1969; and 45 Comp. Gen. 312, 316 (1965). In view of our conclusion that the deficiency as to the metal skins portion of the specifications was fatal to the responsiveness of the Page bid, we need not discuss the other deficiencies alleged by NASA to have rendered the bid nonresponsive.

Your contention that NASA improperly utilized the "brand name or equal" mode of procurement and should have resorted to a purchase description specification will not be considered since it was untimely raised. See 4 CFR 20.2. However, we will consider your otherwise untimely contention that NASA improperly failed to designate Page's supplier as a brand name since representatives of our Office raised the point in a conference attended by representatives of all interested parties and NASA.

We have furnished you a copy of the GSFC report to our Office setting forth a chronology of the events leading up to the issuance of the IFB. It discloses that approximately 3½ months prior to the issuance of the IFB, several representatives of GSFC visited Page's supplier. In pertinent part, the report states:

"* * * During November and December of 1971, an extensive search of the industry was conducted to try and find other companies which might produce this type of machine. Companies contacted included:

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- "1. American Machine and Foundry Company
- "2. Anver Company
- "3. P. M. C. Company
- "4. IBM
- "5. General Electric.

"The response from each of these companies was very similar. They did not manufacture such an item but because the state of the art was advancing very rapidly they might be able to provide us with one at some future time. To their knowledge, no one had developed this type of system.

"In the latter part of December, it came to the attention of Goddard personnel that there was another manufacturer of an automated stock retrieval system, Page Airways Inc. Page Airways was contacted and GSFC was referred to Automated Functions, Inc.

"On January 4, 1972, Automated Functions was visited by several members of the Management Services and Supply Division. As a result of this field trip it was determined that:

- "1. Development of the memory unit on the Automated Functions machine had not yet been completed, therefore, the Remington Rand machine was approximately 50% faster.
- "2. The cost of the two machines was relatively equal.
- "3. The Remington machine was generally a more complete system in that it was an enclosed system which included containers and racks and was a fully tested working system."

In this regard, you state that, by the date of IFB issuance, components of an alleged "equal" system to the brand name listed here were being manufactured and that the company was prepared to take orders.

We must concur with the technical judgment of GSFC with respect to the unacceptability of the allegedly "equal" system at the time of the visit to Page's supplier since the system clearly had not been completed

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to the full satisfaction of technical personnel. Further, we subscribe to the observation of the NASA Director of Procurement that designation of the system of Page's supplier prior to release for marketing on the date the IFB was issued would have resulted in an inherently indefinite and ambiguous purchase description. Moreover, the record is devoid of any evidence that in the 3½-month hiatus between the GSFC visit and the IFB issuance there was any contact between GSFC and Page's supplier. While you allege that NASA should have ascertained prior to the issuance of the IFB the current status of the system being completed by Page's supplier, we note that in the 1½ months between IFB issuance and bid opening, neither Page nor Automated Functions took action to advise GSFC of the current status of the new system. Another reason for the failure of GSFC to further inquire may have been due to the issuance of the formal procurement request 6 days after the visit.

In any event, we observe that Page had an opportunity to participate in the procurement. The firm might very well have received the award but for its failure to translate its capability to furnish an acceptable system into a bid supported by adequate descriptive literature. In the circumstances, we find no basis to interpose a legal objection to the award of the contract that was made.

Very truly yours,

Paul G. Dembling

For the Comptroller General
of the United States