

DECISION

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

60827

FILE: B-185717

DATE: April 30, 1976

MATTER OF: Disposables Inc.

98995

DIGEST:

Where contract for coveralls was based on offer not conforming to RFP in that stitching in required sample was single instead of double and contractor has submitted same nonconforming offer on 10 RFP's in past which resulted in contracts, contract is not nullity.

Disposables Inc. protested the award to Safety Consultants, Hawaii, for coveralls negotiated pursuant to the public exigency exception to advertising, 10 U.S.C. § 2304(a)(2) (1970), by the Naval Supply Center, Pearl Harbor, under request for proposals (RFP) No. N00604-76-R-0011.

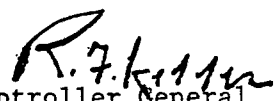
Paragraph F11 of the RFP specifications required the coveralls to have "French, double stitched seams." Paragraph F13 required a sample coverall to be submitted with the proposal and stated that the sample would be tested or evaluated to determine compliance with the characteristics in paragraph F11. Paragraph F13 stated further that the failure to conform to all characteristics would result in rejection of the offer.

The basis for the protest is that the sample coverall furnished by Safety Consultants did not meet the stitching specifications. Based on a review of the situation made after the protest, the contracting agency has advised that Disposables' allegation is correct. However, the agency has stated that the contracting officer submitted the Safety Consultants sample for technical review prior to award and was advised then that the sample was in conformance with the RFP specifications. Further, the contracting agency has stated that it considered terminating the contract when it learned of the improper award, but decided that it would be in the best interests of the Government to allow the award to stand. The basis for the conclusion was that when the specification matter was brought to the

attention of the contractor it agreed to provide the coveralls according to the specifications at the contract price and, if the contract was terminated, there would be termination costs, delayed delivery which could create a health hazard, because the coveralls are required for working with asbestos, and resultant unwillingness of workers to perform which would delay repairs and services to ships in the Third Fleet.

Disposables' disagreement with the foregoing is that it would not be in the Government's interest to continue the contract, since it is "null and void." However, the contracting agency has also advised that single stitched coveralls have been accepted under the same double stitched specifications in 10 other RFPs that resulted in contracts with Safety Consultants between 1973 and 1975. In that connection, a contract is not a nullity where the contractor has responded to the same type of solicitation in the same nonconforming manner on a number of past occasions which resulted in contracts with the contractor. Albano Cleaners, Inc. v. United States, 455 F.2d 556 (Ct. Cl. 1972). Also, see Broken Lance Enterprises, Inc., B-181704, April 22, 1975, 75-1 CPD 245, where it was held that, although a contractor's offer could not be accepted under the terms of the RFP, the contract, while improper, was not palpably illegal, since the contractor neither directly contributed to the improper actions of the Government nor was on direct notice of them prior to award.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States