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

B-178498

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December 11, 1973

Quest CleanAir Ventilator Company
4215 N. Williams Avenue
Portland, Oregon 97217

Attention: Mr. James A. Ruscigno
General Manager

Gentlemen:

We refer to your letter dated April 20, 1973, and subsequent correspondence, protesting the award of contract N00638-73-C-0368, to Gaylord Industries (Gaylord) under request for quotations (RFQ) 73-Q-V326, issued March 26, 1973, by the United States Naval Supply Center (NAVSUP), Long Beach, California.

The subject RFQ solicited offers for five grease interceptor hoods similar or equal to hoods as shown on Naval Ship Systems Command (NAVSHIPS) drawings and a NAVSHIPS technical manual, each referencing Gaylord model "RA" ventilator. Additionally, the referenced RFQ noted individual procurement specifications for each of the hoods. Specification 9 for each of the hoods noted the following requirement:

- "9. Shock and Vibration: The unit shall meet all requirements for shock resistance (Grade B) and shall have been qualified by shock testing in accordance with MIL-STD-901 as specified by General Specifications for Building Ships of the U. S. Navy Section 072. The unit shall also be resistant to vibration and shall have been qualified by vibration testing in accordance with MIL-STD-167 as specified by General Specifications for Building Ships, Section 073."

By April 5, 1973, two proposals were received as follows:

Quest CleanAir Ventilator Company (Quest)	\$7,427
Gaylord	\$8,865

[Protest of Navy Contract Award]

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On April 11, 1973, the contracting officer was notified by Naval Ship Engineering Center (NAVSEC) that the Quest hoods were not technically qualified for shipboard use as specified in the RFQ. Based on this information, contract N00638-73-C-0368 was awarded on April 11, 1973, to Gaylord, the brand name manufacturer.

It is your contention that the Quest hoods are equal to the required hoods and would represent a \$1,438 savings over the Gaylord hoods. Additionally, you urge that you have supplied NAVSUP with hoods in the past " * * * in which case all the specifications were written to procure identical equipment to that required for Contract N00638-73-C-0368."

The contracting officer's notification from NAVSEC that the Quest hoods were not technically qualified appears to have stemmed in part from an evaluation memorandum from the Commander of the Long Beach Naval Ship Yard. The evaluation noted the following major design discrepancies:

"a. Electrical equipment on hoods must be compatible with 440V A.C. power service to hood and controls in lieu of 115V A.C. as provided on some previous units.

"b. Not qualified by performance tests. Efficiency of grease removal by cartridge is unknown. Principal of grease removal differs from Gaylord Hoods.

"c. Not qualified for shipboard use by shock testing per MIL-S-901.

"d. Not qualified for shipboard use by vibration testing per MIL-STD-167.

"e. Damper control unit on units installed to date is poorly constructed and has caused burn out of numerous solenoids.

"f. Fire dampers are not spring operated as required by General Specs but instead are gravity operated."

However, the record indicates that the Navy's major concern with the Quest hoods was that they had not been tested as required by the ninth specification (shock and vibration test, supra). As indicated

by a National Bureau of Standards letter dated August 15, 1972, to your Office, Quest was both aware of the necessity for test approval and apprised of the necessary procedures to undergo such a test. In this regard, we note from the Navy's report to this Office the following:

"* * * While some action has been initiated, no positive plans for testing with NAVSEC and/or the National Bureau of Standards were made as of 11 April 1973 * * *. Further, once plans were made a minimum of 30 days would be required for the test and an additional 60 days required for the results of the tests.

* * * * *

"* * * The required installation date of 21 May 1973 did not allow sufficient time to test the Quest hoods prior to delivery.

"* * * The risk associated with installation of a 'non-approved' ventilating hood in an otherwise potentially fire hazardous shipboard galley was considered sufficient to justify the higher cost by the USNSY, NAVSEC and the Contracting Officer."

In this connection, we note that specification 9 vibration tests were waived for the Gaylord hood and presumably would have been waived for the Quest hoods. However, we also note by Department of the Navy, Puget Sound Naval Shipyard, "Quality and Reliability Assurance Department Report" of October 16, 1967, that the Gaylord hood had successfully passed the specification 9 shock test.

We have held that the establishment of procedures, including the responsibility of determining the testing necessary for product acceptability, is within the ambit of the expertise of the cognizant technical activity. B-176256, November 30, 1972. In B-165631, June 25, 1970, where the principal basis of the protest was that the item had not undergone sufficient testing, we rejected the protest noting that the "acceptability of the resuscitator was determined on the basis of the test data and reports actually of record, and which were submitted by the personnel or activities having primary responsibility for the material or conclusions contained therein." We have consistently held that since engineering determinations are matters primarily of administrative discretion, we will not substitute our opinion for that of the technical activity assigned the duty to oversee part acceptability. B-172901, B-173039, B-173087, October 4, 1971.

Since in the instant case appropriate NAVSEC personnel determined that the RFQ mandatory testing was necessary, that the Quest hood had not yet passed such a test, and in light of the Navy's installation time constraints, there is no basis for our Office to interpose an objection to the Navy's determination in this matter.

In regard to your contention that you have supplied NAVSUP with similar hoods in the past, we note that none of these procurements contained shock tests as specified in RFQ 73-Q-V326.

Although not a matter raised in your correspondence with this Office, we note with concern that the RFQ failed to comply with the provisions of paragraph 1-1206.2(b) of Armed Services Procurement Regulation which states, in pertinent part, that "'Brand name or equal' purchase descriptions should set forth those salient physical, functional, or other characteristics of the referenced products which are essential to the needs of the Government." In this regard, our decision B-157857, January 26, 1966, cited with approval in 49 Comp. Gen. 274 (1969); and B-173290, October 19, 1971; B-175955, July 25, 1972, sets forth the following well-established rule:

"* * * Bidders offering 'equal' products should not have to guess at the essential qualities of the brand name item. Under the regulations they are entitled to be advised in the invitation of the particular features or characteristics of the referenced item which they are required to meet. An invitation which fails to list all the characteristics deemed essential, or lists characteristics which are not essential, is defective, 41 Comp. Gen. 242, 250-51 * * *."

As indicated above, the RFQ failed to set forth all of the salient characteristics of the brand name hood which the Navy considered necessary for its needs. Thus according to the rule stated in the above-cited decisions, the RFQ was defective and no award should have been made thereunder. However, we are of the opinion that cancellation of the instant award would not be in the best interest of the Government since the hoods have already been delivered. We have held that the failure of an invitation (see ASPR 1-1206.5(a) describing similar applicability of formally advertised "equal" rules to negotiated procurements) to list salient characteristics does not necessarily require cancellation of the contract. 43 Comp. Gen. 761 (1964), B-175955, July 25, 1972. In the case of similar procurements in the future, Navy has assured us that they will take appropriate steps to avoid repetition of the above error.

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While proper procurement procedures were not followed in the solicitation in question, we note with approval the fact that Quest has been given an opportunity to submit its hoods for testing by the Navy and the National Bureau of Standards. It therefore appears that Quest will be afforded an opportunity to compete in future procurements of hoods, assuming that its hoods successfully pass the required tests.

In accordance with the above considerations, your protest must be denied.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States

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