



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

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April 24, 1973

Wachtel, Wiener and Ross
Attorneys at Law
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attention: Daniel M. Ross, Esq.

Gentlemen:

Further reference is made to your letters of January 22 and April 2, 1973, protesting on behalf of Ojus Industries (Ojus) against the award of a contract to any other firm under IFB DSA700-73-B-1788 (IFB -1788), issued by the Defense Construction Supply Center (DCSC), Columbus, Ohio.

Your initial basis for protest was that all bidders other than Ojus were nonresponsible in that they were unable to meet the required delivery schedule. Award of a contract under the solicitation has been withheld pending our decision.

IFB -1788 was issued on January 2, 1973, for the supply of 31,000 rolls of barbed concertina tape under Item No. 0001. An equal quantity was set aside for negotiation with labor surplus area concerns in accordance with the clause "Notice of Labor Surplus Area Set-Aside (1972 JUL)" set forth in the solicitation. Provisions C27 and C27a of the IFB provided for first article approval pursuant to testing by the contractor, as to which Provision C27a stated in part:

(f) The Government reserves the right to waive the requirement for first article testing and approval. Offerors who have examined and tested a first article which was identical to the FAN called for by this solicitation and secured approval under a prior Government contract shall furnish the following information in the space provided below or by separate attachment to their offers:

1. Name and address of Government agency approving article: _____

[Protest of Defense Construction Supply Center Award]

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2. Contract date and number:

3. * * *

(g) In the event the requirement for first article testing and approval is waived, the delivery time will be reduced by the number of days allocated for the submission of the test report and approval seventy-four (74) as specified in paragraph (b) of Prov. C27 unless the offeror specifies a different period of reduction below:

Number of Days reduction in delivery time for waiver of first article test report: _____

The solicitation required delivery within 134 days after date of award if first article tests were to be performed. Under paragraph (g) of Provision C27a, quoted above, delivery is accelerated by 74 days if first article testing is waived unless the bidder specifies a lesser period.

Four bids were recorded at the bid opening on January 18, 1973. After the application of discounts and evaluation of the transportation cost to the Government under origin bids, the bidders stood as follows in regard to Item No. 0001:

	Evaluated Unit Price f.o.b. Origin	Evaluated Unit Price f.o.b. Destination
Mac-Smith Indus., Inc.	\$7.5694	\$7.4970
Lindy's Indus., Inc.	7.5462	7.68
Kaiser Steel Corp.	7.6562	7.77
Ojus Indus., Inc.	8.3318	8.2516

Item No. 0002 of the schedule represented a price for conducting the first article test, if required. One bidder entered "No Charge" for this item and the other three left the "Amount" column blank, which by the terms of the IFB was to be construed as "No Charge." Therefore, it was determined that acceptance of Mac-Smith's f.o.b. destination bid would result in the lowest overall cost to the Government.

D-177873

Mac-Smith made no entries in the blanks provided in paragraphs (f) and (g) of Provision C27a, quoted above. However, in view of the fact that Mac-Smith's first article test reports on the same item had previously been approved under contracts DSA 700-73-C-1057 and -1147, the procuring activity proposed to waive first article testing, thereby accelerating the delivery schedule to 60 days after contract award.

A preaward survey of Mac-Smith was then conducted by the Defense Contract Administration Services Office (DCASO), Miami. Based upon the premise that first article testing would be waived and the delivery schedule accelerated, DCASO-Miami recommended no award be made to Mac-Smith because its present contracts require its entire production capability. However, since Mac-Smith offered to furnish the first article test report at no charge and was capable of meeting a delivery schedule of 134 days after award of contract, the contracting officer determined it to be in the best interests of the Government to award Items Nos. 0001 and 0002 to Mac-Smith with a 134-day delivery schedule.

It is the position of this Office that the decision whether to grant a waiver of first article testing is a matter of administrative discretion, to the exercise of which we would not object in the absence of a clear showing of arbitrary or capricious action. D-175015(1), September 29, 1972, affirmed upon reconsideration November 20, 1972, copies enclosed. We note that under Mac-Smith's bid, the first article testing would be performed at no charge, the lowest price would be obtained and the required delivery schedule would be met. We therefore believe that the contracting officer did not abuse the discretion committed to him in determining that the waiver of first article testing for Mac-Smith should not be granted, and that an award of Items Nos. 0001 and 0002 to Mac-Smith would be in the best interests of the Government. Since Mac-Smith is capable of meeting the delivery schedule of 134 days which results from such an award, your contention that Mac-Smith is not a responsible prospective contractor for the proposed award is considered to be without merit.

Although Ojus was aware during the formulation of its bid that Mac-Smith had obtained first article approval under prior contracts, it was not until your letter of April 2, 1973, that you contended that Mac-Smith's failure to make entries in paragraphs (f) and (g) of Provision C27a rendered its bid nonresponsive. The omission of this information from Mac-Smith's bid was, or should have been, apparent to you at the bid opening which was held approximately 10 weeks before

B-177873

your contention was made. We therefore are of the opinion that your protest was untimely filed insofar as it concerns the responsiveness of Mac-Smith's bid and other effects of the omission by Mac-Smith of entries under paragraphs (f) and (g). 4 CFR 20.2(a).

In view of the foregoing, your protest is denied.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States

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