



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

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December 26, 1973

Stassen Kostas and Mason
2300 Two Girard Plaza
Philadelphia, Pennsylvania 19102

Attention: Theodore M. Kostos, Esquire

Gentlemen:

We refer to your letter dated September 17, 1973, on behalf of Boston Pneumatics Incorporated (BPI), and prior correspondence from BPI, protesting against the award of a contract under solicitation No. FPNTF-B6-19382-SA-5-18-73, issued by the General Services Administration (GSA). We also refer to our letter dated October 11, 1973, forwarding to you GSA's response to your letter of September 17, 1973.

The solicitation, issued on April 18, 1973, contemplated a requirements-type contract for three different items of pneumatic riveters for the period beginning on the date of award through January 31, 1974. Bid opening was scheduled for May 18, 1973. In view of your protest, bid opening was postponed until August 20, 1973. On October 15, 1973, GSA determined that the award could no longer be delayed and on November 6, 1973, award was made to the Huck Manufacturing Company.

Basically, you allege that the solicitation contained technical requirements and testing procedures that were arbitrary and restrictive of competition.

First, you state that the "Design and Construction" specifications applicable to Items 1, 2 and 3 were arbitrary and restrictive of competition because the requirements therein regarding operation under certain air pressure and consumption limitations, pulling capacity, stroke, and certain pneumatic hydraulic double action shift mechanisms had nothing to do with riveting. You ask why the Government did not "merely ask for riveters that will pull the rivets it wants to pull, and test for riveting only, without using all the part number complications, simulated tests, etc.?"

[Protest of GSA Contract Award]

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Initially, it should be noted that your literature indicates that your products comply with the design specification requirements which you allege are unduly restrictive. As one example, you state with regard to Item 1 of the IFB Schedule that the requirement that the tool "weigh not more than 8 pounds (less nose assembly)" is "arbitrary", for "if our tool weighs 10 pounds it would not be acceptable. Eight pounds is considered by us to be too light, and restrictive." Yet the "Instructions and Maintenance Manual" and the catalog sheet pertaining to your product list its weight as 6 1/2 pounds, including the nose assembly. Similarly, with regard to Items 2 and 3 of the IFB Schedule, you maintain that the requirement that the riveter "weigh not more than 11 pounds (less nose assembly)" is "arbitrary, restrictive", and you "Recommend change to 15 lbs, max." However, your catalog describes your product as weighing 10 pounds, including the nose assembly. A parallel situation exists with respect to other specification requirements which you allege are unduly restrictive of competition but which are set forth in your literature as design features of your product. Under these circumstances, it is difficult to perceive how your competitive position has been prejudiced by the provisions of which you complain.

In response to your objections to the testing requirements outlined in the specification, GSA states that the actual installation of a large quantity of rivets and the testing of each tool is expensive, time consuming, and impractical. Furthermore, GSA advises that all of the specified performance requirements which must be met during the tests are directly related to, and are essential to assure conformance to the stated technical requirements in the solicitation. In this regard, GSA states that:

"The Government is not merely procuring tools that will work intermittently or under constant corrective supervision of the contractor, the Government is procuring tools which will perform a specific job or task with reliability, efficiency, durability, and safety. These qualities can only be assured with proper testing."

We have consistently held that the determination of the Government's requirements and the drafting of the specification to meet

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those requirements are responsibilities vested in the procurement activity. We will not question its actions in these areas unless it is clearly shown that the activity abused its administrative discretion, B-176570, January 17, 1973; B-175153, April 20, 1972. In view of the claims in BPI's operating manual and catalog that it can meet or perform all of the technical requirements included in the specification, and since BPI has not shown any abuse of administrative discretion, we cannot conclude that the "Design and Construction" clauses and test requirements were arbitrary and restrictive of competition.

BPI also contends that GSA's failure to permit personnel from BPI to be present to witness the tests of bid samples was "arbitrary, illegal and capricious."

In this regard, GSA states:

"With respect to the protestor's request to be present during the course of bid sample evaluation, GSA, for good policy reasons, aside from the obvious administrative burden involved, cannot accommodate such a request. Bid sample evaluation by its very nature requires subjective determinations. 'Workmanship,' for example, requires an evaluation which is not objectively measurable, and requires the inspectors to exercise a qualitative judgment. Under our procedures, bid sample examination and testing are normally conducted in the presence of three qualified GSA officials; one representative from each of our Offices of Procurement, Standardization, and Quality Control. Objective test results are meticulously documented and are available for inspection by your Office upon request. Subjective determinations are made in all cases involving bid samples. And, in the case of rejection of a particular sample, the bidder is informed of the specific reason(s) his sample has failed. Presence of the bidder would chill and hinder the free and frank communication and expression of opinion between the inspectors and could lead to the acceptance of products which do not conform to the Government specifications."

We believe that the procuring activity, in order to determine whether the articles offered conform to the specifications, may

institute such testing procedures as it deems necessary so long as the procedures assure that the bid samples will be fairly and conscientiously evaluated in accordance with the requirements of the purchase description. We believe that these standards were met in this procurement. The fact that BPI did not have a representative present during the testing did not render the testing procedures unfair to BPI.

While you may object to the subjective determinations which were made during the tests, Section 1-2.202-4 of the Federal Procurement Regulations (FPR) clearly permits such determinations. Subsection (b) thereof provides:

"* * * It may be appropriate to require bid samples * * * where the procurement is of products that must be suitable from the standpoint of balance, facility of use, general 'feel', color, or pattern, or that have certain other characteristics which cannot be described adequately in the applicable specifications. Where, however, based on the criteria set forth in this § 1-2.202-4, the use of bid samples is justified, the samples may be examined for any required characteristics, whether or not such characteristics may be adequately described in the specifications." (Underscoring supplied.)

Lastly, you claim that the solicitation provision requiring that the nose assemblies and accessories be fully interchangeable with certain tools "currently in the DOD system" and produced by another manufacturer, was restrictive of competition, since drawings of that model were not supplied with the solicitation. Essentially you are alleging that you could not comply with the solicitation because you did not know what is required by the purchase description.

In this regard GSA states:

"Our Standardization Division advised that the purchase description in question was developed in consultation with the protester. Mr. Bernard P. Elkin, President of Boston Pneumatics, has discussed the descriptions in the solicitation on numerous occasions with GSA technical personnel. It is their

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view that Mr. Elkin fully understands the interchangeability requirement in the DOD system * * *.

"* * * the protester was given the opportunity to review the description in the proposed form, and he agreed with the concept of the 'accessories' paragraph as written * * *. On one occasion, the protester even demonstrated his accessories and showed our technical personnel how they could fit the riveters."

Under these circumstances, we must conclude that BPI fully understood the interchangeability requirements of the solicitation. Furthermore, GSA determined that the nose assemblies and accessories supplied by the contractor must be fully interchangeable with existing tools in order to provide continuous logistic support. Based on the record, we do not find that the interchangeability requirement was inadequately set forth in the solicitation or that such a requirement was unnecessary to meet the legitimate needs of the Government.

In view of the foregoing, we do not regard the procuring agency's specification requirements or testing procedures to be unduly restrictive of competition, and your protest is therefore denied.

Sincerely yours,

R.F.KELLER

|Deputy* Comptroller General
of the United States