



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

30885

B-178206

May 8, 1973

Dempster Brothers, Inc.
c/o Carrier Corporation
Carrier Tower
P. O. Box 1000
Syracuse, New York 13201

DLG-06206 ✓

CNF-01625 ✓

Attention: Walter E. Farnholtz
Senior Attorney

Gentlemen:

This is in reply to your letter dated April 10, 1973, requesting reconsideration of our decision, B-178206, April 4, 1973, wherein we declined to consider your protest under IFB M67001-73-B-0029, issued by the Marine Corps, for the reason that it was untimely filed.

Your request for reconsideration is made on the basis of section 20.2(b) of our Interim Bid Protest Procedures and Standards (4 CFR 20.2(b)) which permits consideration of an untimely protest if "issues significant to procurement practices" are raised. In this connection you allege that the Marine Corps failed to include the patent indemnity clause in the subject invitation as required by Armed Services Procurement Regulation 9-103 and you contend that this impropriety is such that it invalidates any award made on the basis of the invitation to any bidder other than the patent holder. You suggest that since your firm holds patents on the subject equipment it is "the only responsive bidder under ASPR 9-103 by necessarily supplying indemnification mandated by the regulation." While you also disagree with our decision of April 4 regarding the timeliness of your protest, you fail to state any reason for such disagreement which would require revision of our position as to timeliness.

As you point out, ASPR 9-103 and 9-103.1 provide guidelines for mandatory inclusion or exclusion of the clause. ASPR 9-103 provides for general use of the clause in contracts for construction or supplies (presumably the instant case) when the supplies " * * * normally are or have been sold or offered for sale to the public in the commercial

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open market or which are the same as such supplies with a relatively minor modification thereof * * *." ASPR 9-103 further lists circumstances requiring the exclusion of the clause. In addition to prescribing the standard patent indemnity clause, ASPR 9-103.1 provides for the use of the clause in formally advertised procurements for supplies " * * * when it has been determined in advance of issuing the invitation for bids that the supplies (or such supplies apart from relatively minor modifications to be made thereto) normally are or have been sold or offered for sale by any supplier to the public in the commercial open market."

In our decision to you of April 4, 1973, we cited our decision, 52 Comp. Gen. 20 (1972), which states on page 23 that "Issues significant to procurement practices or procedures' refers . . . to the presence of a principle of widespread interest." As indicated above, the mandatory use of the subject clause pursuant to ASPR guidelines is conditioned upon the making of certain determinations. Accordingly, we do not view the possible erroneous exclusion of the patent indemnification clause in an isolated instance as raising a significant procurement issue of wide application so as to warrant consideration of your untimely protest pursuant to section 20.2(b) of our Interim Bid Protest Procedures and Standards.

For the reasons stated above, your request that we consider the merits of your protest is denied.

In view of the substantive statements made in your letter of April 10 we wish to bring to your attention, for information purposes only, our decision, 39 Comp. Gen. 760, 762 (1960), wherein we concluded that a low bidder may not be rejected on the basis that the Government might incur liabilities under 28 U.S.C. 1498 for patent infringement. Also see 45 Comp. Gen. 13, 16 (1965) wherein we held that patent infringement liability is not for evaluation in the consideration of bids.

Sincerely yours,

Paul G. Dembicki

For the Comptroller General
of the United States