



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

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DIGEST - L - Cont

MAY 27 1968

B-163316

MAY 27 8

Pacific Wood Treating Corporation
111 West Division Street
Ridgefield, Washington 98642

Attention: Mr. William G. Cooney
Executive Vice President

Gentlemen:

Further reference is made to your telegram of March 21, 1968, and supplemental letters of March 22, April 6, April 16, and May 10 and 11, 1968, and enclosures, protesting an award to any bidder other than your company under Department of the Navy invitation for bids No. N00024-67-B-1040.

The invitation was issued on June 26, 1967, for the construction of sixteen ocean minesweepers, nine of which involved Fiscal Year (FY) 1966 or 1967 program funds and seven involved Fiscal Year (FY) 1968 funds. The United Kingdom was given an opportunity to bid competitively for the minesweepers because they were defense items selected pursuant to a United States-United Kingdom arrangement of February 26, 1966. However, in regard to this, the invitation contained the following:

"Note: Your attention is called to the proviso of the shipbuilding and conversion Navy appropriation of the Department of Defense Appropriation Act, as passed by the House of Representatives, H.R. 10736, 'That none of the funds herein provided shall be used for the construction of any naval vessel in foreign shipyards.' In the event that such provision becomes law, this IFB will be appropriately amended."

Subsequently, a limiting proviso, known as the "Byrnes Amendment," was enacted as a part of the Department of Defense Appropriation Act, 1968, to provide that none of the funds for Navy shipbuilding and conversion shall be used for the construction of any naval vessel in foreign shipyards. Public Law 90-96, September 29, 1967, 81 Stat. 236. The invitation was thereafter amended to reduce the number of minesweepers from sixteen to nine involving FY 1966-67 funds.

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Four bids were received in response to the invitation, as amended, as follows:

<u>Bidder</u>	<u>Total Bid</u>
Pacific Wood Treating Corporation Ridgfield, Washington	\$49,317,111
Martinolich Shipbuilding Corporation Tacoma, Washington	\$49,661,071
United Kingdom Ministry of Defense	\$55,000,000
Peterson Builders, Inc. Sturgeon Bay, Wisconsin	\$56,996,280

Your company, the apparent low bidder, was determined to be non-responsible pursuant to Armed Services Procurement Regulation (ASPR) 2-407.2. You protested this determination of nonresponsibility in your March 21, 1968, letter. The next lowest bidder, Martinolich Shipbuilding Corporation, failed to acknowledge an amendment to the invitation that resulted in a significant effect on the costs and, pursuant to Department of Defense policy set forth in ASPR 2-405, Martinolich was determined to be nonresponsive.

Following a review of United States policy under the United States-United Kingdom arrangement of February 26, 1966, it was determined by the Department of Defense on April 8, 1968, that the United Kingdom's bid should be eliminated from further consideration. Thus, the high bid submitted by Peterson Builders, Inc., would be the only bid remaining for consideration under the invitation. This bidder's price was substantially in excess of the Department of the Navy's estimate for the ships and, for this reason, the bid was regarded as offering an unreasonable price. In view of the foregoing, and the need of the Department for sixteen standardized minesweepers, it has been administratively determined to be in the best interest of the Government to cancel the invitation and to make no award thereunder. See ASPR 2-404.1(b)(v1). We find no basis to disagree with this determination to cancel the invitation.

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Your initial protest, based on the rejection of your bid as nonresponsible, was later supplemented to protest the rejection of all bids and the cancellation of the invitation by the Department of the Navy.

It is provided at 10 U.S.C. 2305(c) that contracts shall be awarded pursuant to formal advertising only to "the responsible bidder" under the invitation. Consistent with this statutory requirement, ASPR 1-904.1 precludes awards unless the contracting officer first makes an affirmative determination that the prospective contractor is responsible within the meaning of ASPR 1-902. However, the Department was unable to make such a determination due to your contemplated method of performing the contract. See ASPR 2-404.2(g). Under the small business procurement procedures (ASPR 1-705.4), the matter was referred to the Small Business Administration (SBA) for determination whether a certificate of competency (COC) should be issued to your firm. On the basis of information that your company would subcontract 100 percent of the work to another firm, SBA found that your company was ineligible for a certificate of competency. In this regard, paragraph 4(b) of SBA National Directive (ND) 615-LA states:

"(b) A manufacturing, construction, or service concern shall not be eligible for a COC unless it performs a significant portion of the contract, measured in dollar value, with its own facilities and personnel on its own payroll."

SBA concluded that you would not be performing "a significant portion of the contract, measured in dollar value with its own facilities and personnel on its own payroll." Your firm therefore was ineligible under the COC procedures.

In the circumstances, the Department of the Navy's determination of nonresponsibility is not subject to question particularly since it has been affirmed by the SBA action. Moreover, we have consistently held that the determination of the responsibility or non-responsibility of a prospective contractor is a matter reserved to the administrative contracting officer as to which we accord finality in the absence of evidence of arbitrary or capricious action. 46 Comp. Gen. 371, 372.

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With reference to your protest against cancellation of the invitation, we must advise that the cancellation action was in accordance with law and regulation. It has long been held that a procuring agency has the right and, in certain circumstances, the duty to reject all bids and resolicit the procurement under appropriate circumstances. The statute providing for procurement under formal advertising procedures specifically authorizes the head of the agency to reject all bids when he determines such action to be in the public interest. See 10 U.S.C. 2305(c).⁴ Consequently, where a procuring agency determines for substantial reasons that the public interest requires such action, invitations may be cancelled and the procurement resolicited without valid objection by interested bidders.

Regarding the purported future action of the Department of the Navy with reference to this procurement, we understand that the Naval Ship Systems Command intends to resolicit its requirements for sixteen ocean minesweepers within the next several weeks under negotiation procedures. We further understand that only a limited number of United States shipbuilders are qualified to build ocean minesweepers of the type here involved, and that formal advertising is not considered feasible or practicable since the delivery schedule for the new procurement will be tighter than under the previous invitation. Other reasons assigned by the Department for the use of negotiation procedures in procuring the sixteen ships are that it will permit testing of the reasonableness of prices offered against current cost or pricing information and that it will afford flexibility in establishing delivery schedules consonant with the needs of the Fleet. Thus, it is concluded that procurement by negotiation, with the solicitation directed to all qualified sources, will be in the best interests of the Government.

Any answers to your queries regarding the dollar value of the proposed sixteen ship contract would merely be conjectural at this date since proposals have not been submitted for evaluation and negotiation.

In view of the foregoing, your protest is denied.

Very truly yours,

FRANK H. WEITZEL

Assistant Comptroller General
of the United States