



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

no log number.

B-176483

January 26, 1973

099443

Dear General Robinson:

We refer to reports dated August 18 and November 14, 1972, concerning the protest of Smith & Wesson Electronics Company under Request for Proposals (RFP) DSA 400-72-R-6927, issued by the Defense General Supply Center on April 6, 1972, for a requirement of electronic sirens, Federal Sign and Signal Corporation part number, P15A W/SA-24. Although the RFP did not solicit sirens on an "or equal" basis, it did not specifically exclude alternate products from consideration or indicate that award could not be delayed for testing and approval of other manufacturers' sirens.

The subject procurement was negotiated under the authority of 10 U.S.C. 2304(a)(10). Armed Services Procurement Regulation (ASPR) 3-210.2 (xiii), which implements that statutory authority, provides that purchases and contracts may be negotiated "when it is impossible to draft, for a solicitation of bids, adequate specifications or any other adequately detailed description of the required supplies or services." In this regard, the record shows that on March 17, 1972, the contracting officer determined that it was impracticable to obtain competition for the sirens by formal advertising, as follows:

"Findings

"The Defense General Supply Center proposes to procure by negotiation 250 each, FSN 6350-907-8629 Siren, Electronic, Federal Sign and Signal Corp P/N P15A W/SA-24 as authorized by PR S-43283-2067-OH. The estimated cost of the proposed procurement is \$32,250.00.

"The Air Force has stated that the only acceptable item is Federal Sign and Signal Corp' P/N P15A W/SA-24.

"Use of formal advertising for procurement of the above described equipment is impracticable because it is impossible to draft, for a solicitation of bids, adequate specifications or any other adequately detailed description of the equipment.

"Determination

"The proposed contract is for property or services for which it is impracticable to obtain competition by for-

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Four proposals for the requirement were received by the Center on April 26, 1972, the closing date for the procurement. Smith & Wesson submitted the lowest unit price for the requirement at \$98.25 and offered to supply its Stephenson-Magnum Part No. 1-004-0061-01, for which descriptive literature was included with the offer. The second-lowest offeror, Federal Sign and Signal Corporation, offered to supply the part shown in the solicitation at \$108.00 each.

On May 2, 1972, the contracting officer requested the Center's Directorate of Technical Operations to evaluate Smith & Wesson's proposal. On May 8, 1972, the Director of Technical Operations returned the contracting officer's request without an evaluation. The Director told the contracting officer that the procurement item description was an "F" coded, sole source procurement; that the military using activity, the San Antonio Air Materiel Area (SAAMA), Department of the Air Force, had previously advised DSA that samples of any item offered for the specified part would not be evaluated without testing by SAAMA; that SAAMA had previously advised Smith & Wesson (formerly Stephenson Company) of this testing requirement and, notwithstanding such advice, the company had never furnished SAAMA with a sample for testing. In view thereof, and inasmuch as Smith & Wesson did not submit a test sample with its proposal, the contracting officer states that he made an award for the requirement to Federal Sign on June 23, 1972. We are further advised that the contractor completed shipment of the items on September 8, 1972.

The record does not indicate that immediate award was essential or that there was insufficient time to secure and test a Smith and Wesson sample before awarding the contract to the higher offeror. The testing procedures at SAAMA for the sirens seem uncomplicated and are reported as follows:

"Mr. Ruiz stated there were no specific tests that had to be passed; that when a siren was received it would be completely disassembled and the various components inspected for burrs, sharp edges, workmanship, wiring, ability to withstand weathering, hard knocks, vibration and corrosion, etc. The unit was then reassembled and powered to observe its functioning. If things appeared satisfactory, Mr. Ruiz would obtain permission from a security police chief to install the siren on one of his vehicles for a period of two to three weeks. Mr. Ruiz would be kept informed as to the performance of the item and if satisfactory, he would then notify the manufacturer that its item was qualified."

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Smith & Wesson maintains that neither SAAMA nor DSA requested it to submit a sample of its product for testing; that a specification should have been prepared for the requirement; and that the award to Federal Sign should therefore be cancelled.

The contracting officer states that the Center repeatedly attempted to have SAAMA develop a purchase description to permit competitive procurement of the siren, as follows:

"On 15 July 1970 this Center's Director of Technical Operations (Director) requested SAAMA to develop a purchase description adequate for competitive procurement of the siren * * *. By reply dated 25 August 1971 SAAMA advised that the requested purchase description would be forwarded in December 1971 * * *. In connection with the instant RFP, the Director on 4 May 1972 made telephonic inquiry to SAAMA relative to the status of the purchase description or specification that SAAMA was to have prepared. In the discussion which followed SAAMA advised that none had been prepared * * *. According to SAAMA no specification was contemplated for the siren since SAAMA had been instructed in a letter from the Department of Defense not to prepare specifications for 'off the shelf' items * * *. It is understood that SAAMA proposes future procurements on the basis of manufacturers' part numbers with additional part numbers being added when SAAMA's testing is favorably completed."

In this regard, we are also advised that SAAMA has furnished the following reply, dated September 29, 1972, concerning its current position on the desirability of developing a purchase description for the subject item:

"'Purchase description' will not be developed because of the difficulty of covering each and every requirement (tolerances) of each and every source (e.g., db output, current output, tone-sound generation circuits, installation bracket, and compatibility with 2-way communication set)."

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While it is stated that the subject requirement was an "F" coded (sole source) item, it is noted that at the time of issuance of the RFP another siren, manufactured by R. E. Dietz Company, appears to have been qualified by SAAMA. Also, it is apparent that the using activity would consider other products for award if samples of such other products had passed the qualification testing at the activity. The RFP did not, however, advise offerors of the characteristics on which the sirens would be tested and evaluated in qualifying alternate products.

Although it is stated that Smith & Wesson was informally advised of the testing procedures prior to the closing date for the RFP, we do not believe such informal advice constituted an adequate substitute for including in the RFP the requirement for samples on alternate products and listing the characteristics of the sirens on which the testing and evaluation would be conducted. In this regard, ASPR 3-501(a) provides that solicitations of proposals shall contain the information necessary to enable a prospective offeror to prepare a proposal properly, and we fail to see how other prospective offerors, including Smith & Wesson, could have intelligently prepared a proposal without precise, written information as to the standards which have to be met for qualifying their products. In furtherance of this general requirement, ASPR 3-501(b), Section C(x) provides for including in a solicitation any requirements for samples or descriptive literature, and ASPR 3-501(b), Section F(i) contemplates that the solicitation will contain a description of the needed item in sufficient detail to permit full and free competition.

Concerning Smith & Wesson's allegation that a specification should have been prepared for the procurement, we do not believe that the record adequately refutes such contention. SAAMA's position, as stated above, is not that SAAMA cannot develop a purchase description for the item, but that it would be difficult to do so. As noted previously, ASPR 3-210.2(xiii), which was cited by the contracting officer as authority for negotiating the requirement, contemplates impossibility of drafting adequate specifications or any other adequately detailed description of the item as a basis for negotiation, not mere difficulty or inconvenience. We do not believe it can be seriously contended that purchase descriptions and/or specifications have not been developed for more complex items than the siren, and entailing much more difficulty than that which can be reasonably contemplated by SAAMA in preparing a purchase description or specification for the siren. We are not persuaded by the material of record that it would have been impracticable to develop a purchase description, as set out under ASPR 1-1206, for the subject procurement or for additional procurements of the item.

In this connection, it would appear that where the acceptability of an item can be decided under test procedures of the type applied by SAAMA to the instant item, such test procedures, and/or the acceptable test results, could be converted without undue effort into the salient characteristics contemplated for an "or equal" purchase description by ASPR 1-1206.2(b). Also, since it is noted that there were seven previous procurements of the sirens in 1970 and 1971, it appears that consideration should be given to whether there will be continuing procurements of the item so as to require the preparation of Federal and Military specifications for the siren.

In view of the above conclusions, it is our opinion that the subject award to Federal Sign was improperly made. While the completion of the subject contract precludes, for practical considerations, its cancellation as sought by Smith & Wesson, we recommend that action be taken to insure that future solicitations for this item contain all information necessary to permit any bidder to offer an equal item.

In this connection, we believe it appropriate to call to your attention the announced intention of the Center to issue a solicitation for 170 additional sirens under the authority of ASPR 3-210.2 (xiii). Under the present circumstances, we are not persuaded that the development of a purchase description which would permit competition for the items would be either impossible or impracticable. Additionally, we question whether the qualification procedure followed by SAAMA on these items is not inconsistent with, and prohibited by, the provisions of Part 11, Section 1, of the ASPR.

In view thereof, we recommend that the question of developing a purchase description for these units be reexamined, and that we be advised of the results thereof.

The files forwarded with the reports of August 18 and November 14 are returned.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States

Lieutenant General Wallace H. Robinson, Jr.
Director, Defense Supply Agency