

EATON

DECISION



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

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PLII

[Protest Against Terms of Solicitation]

FILE: B-197481

DATE: October 14, 1980

MATTER OF: Christie Electric Corporation *CPG 602116*

DIGEST:

1. Field of eight bidders and award to one other than original manufacturer rebuts allegation that procurement was "tantamount to" sole-source.
2. Procuring agency's actions -- development of performance specifications, competitive procurement of both equipment meeting those specifications and design data, and subsequent competitive procurement using design specifications -- meet statutory and regulatory requirements for maximum practical competition.
3. Use of design specifications does not provide automatic basis for determining that solicitation unduly restricts competition, unless design requirements are beyond Government's minimum needs. Procuring agency's determination that it is essential for additional units to be compatible with current equipment provides rational basis for use of design specifications.

Christie Electric Corporation (Christie) protests the terms of a solicitation issued by the Navy's Aviation Supply Office (ASO), Philadelphia, Pennsylvania, *AGC00159* for 74 each charger/analyzers, designated NBC-1A, for maintenance of aircraft batteries. We are denying the protest.

Christie alleges that the invitation for bids, No. NOO383-80-B-0142, which contains detailed design specifications and drawings, is "nothing more than

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a cover for what is tantamount to a sole-source procurement" from Utah Research and Development Company (Utah). Christie did not bid, but filed its protest before opening; the Navy has since made award to Essex Electro Engineers, Inc. In this connection, Christie contends that the Navy improperly refused to specify "or equal" or "or superior" equipment, which would have allowed consideration of its charger/analyzer. A Christie "pulse charger," which is virtually identical to its current model RF80GT, the firm states, was tested in 1971 by the Naval Ammunition Depot, Crane, Indiana, and found better and more efficient than the conventional methods of recharging batteries now being procured by ASO.

In addition, Christie points out, it has previously supplied both the Air Force and the Navy with charger/analyzers, use of which Christie alleges has resulted in cost saving and "zero defects." According to Christie, its equipment is capable of meeting the same performance requirements as the design specified, and would have afforded a potential 50 percent saving over the NBC-1A, which Christie estimates will be priced from \$6,000 to \$8,000 per unit. Christie currently holds a General Services Administration schedule contract for the equipment with a base price of \$3,630 per unit.

Christie further argues that the specifications violate Defense Acquisition Regulation (DAR) § 1-1201(a) (1976 ed.), which requires that supplies and services be described in a way which will eliminate, if possible, any features which might limit acceptable offers to the products of a single or relatively few suppliers. Christie also argues that their use is contrary to 39 Comp. Gen. 101 (1959), in which our Office stated that a specification requiring a particular manufacturer's product or component is unduly restrictive, even if other manufacturers may duplicate that product, unless it has been determined that nothing else will meet the Government's needs.

Christie also cites a 1977 decision by our Office, Christie Electric Corporation, B-188622, December 8, 1977, 77-2 CPD 441, which involved a sole-source procurement by

the Army of battery charger/analyzers for use with the Lance missile. According to Christie, this equipment, also manufactured by Utah, was the Army equivalent of the NBC-1A. The thrust of our decision, Christie states, is that while our Office will not decide whether equipment of a design different from that specified is technically acceptable, there must be some method by which a procuring agency can make such a determination. The use of design specifications, precluding consideration of commercially available, functionally equivalent equipment, unduly restricts competition, Christie concludes.

The Navy responds by presenting a detailed history of its charger/analyzer procurements since 1968. At that time, the Navy states, it had no specifications covering charger/analyzers, and there was nothing available commercially which would meet its needs. Under the direction of Naval Air Systems Command, three field activities, including the one at Crane, Indiana, whose report Christie relies on, developed an experimental specification for a charger/analyzer for use with nickel cadmium and silver zinc batteries. This effort led to a 1969 solicitation incorporating performance specifications and requiring the successful bidder to furnish the Navy with detailed drawings and technical manuals. Utah was the successful bidder; it received a contract in 1970 and, "with significant design and developmental effort," began manufacturing the NBC-1, predecessor to the NBC-1A.

The Navy acknowledges that it procured additional charger/analyzers sole-source from Utah before the design data required by its contract became available, but states that it had always intended to use that data in subsequent purchases so that all its charger/analyzers--which are coded as repairable items--could be supported by the same spare parts and the same technical manuals, regardless of manufacturer. The contracting officer states:

"* * * The Navy had no intention of continuing to buy to the * * * performance specification, thereby subjecting itself to the possibility of getting a markedly different piece of equipment with each procurement, equipment that * * * would comply with the performance

requirements * * * yet bear no internal similarity whatsoever to other charger/analyzers bought under this specification.
* * * "

Once it had acquired the data package, the Navy competitively procured charger/analyzers meeting the design specifications for its own use in 1976 and 1977, once from Utah and once from another manufacturer. It now has a total of 245 units.

The Navy argues that although our Office generally views performance specifications as less restrictive than design specifications, the latter are legitimate provided there is a good reason for their use. In this case, the Navy continues, there are numerous such reasons: the charger/analyzers are complex, relatively expensive pieces of equipment which the Navy has bought over a period of 10 years and plans to continue buying into the mid-1980's; each will require periodic maintenance on a regular schedule, occasional overhaul and repair, and replacement of spare parts. All these tasks will be simpler and considerably less expensive if the charger/analyzers are procured in accord with detailed design specifications, the Navy maintains. In addition, the Navy states, strict adherence to design specifications avoids subjecting each new manufacturer's equipment to extensive environmental testing such as that which was performed in connection with the 1970 Utah contract.

The Navy further argues that our decision in the earlier Christie case is not germane, since type classification and the regulations requiring it are unique to the Army, and since that case involved a sole-source procurement, rather than a "fully competitive" one.

[The Navy concludes that its minimum needs have reasonably been determined to include the acquisition of essentially identical units, for which identical operation and maintenance manuals, overhaul and repair manuals, test equipment, and spare parts can be used. The same needs could not be met, the Navy states, by utilizing performance specifications or an "or equal" purchase description listing salient characteristics. This determination, the Navy maintains, should not be questioned or overturned unless Christie makes a clear showing that it is unreasonable.]

At the outset, we find no validity to Christie's allegation that this procurement is tantamount to a sole-source to Utah. This was a formally advertised procurement; the Navy has provided us with an abstract of bids which shows that eight firms competed for award and among these, Utah was fifth-low. The Navy states that all eight bidders advise that they are manufacturers, rather than dealers or distributors of Utah equipment. We believe that a field of eight bidders and an award to one other than the original manufacturer effectively rebuts the allegation that this was tantamount to a sole-source procurement.

As for our decision in the earlier Christie case, we believe it is clearly distinguishable. In that case, we upheld the award because the equipment was urgently needed to maintain Lance missile operational capability--a factor not present here. We found, however, that the Army Regulation (AR) on type classification, which encompasses acquisition and control of Army materiel, required non-expendable equipment such as battery charger/analyzers to be tested and approved prior to procurement, without any determination that the item being type-classified was the only one which would meet the Army's minimum needs. We stated that this prequalification of a single product was inconsistent with the statutory and regulatory requirements for competition, and recommended that the regulation be changed to provide a procedure for evaluation and testing of equipment which might serve the Government's needs equally as well as that which had been type classified.

Christie does not stand for the proposition that the procurement of a product to design specifications is unduly restrictive per se whenever commercially available, functionally equivalent products may be available. [Christie was only concerned with a regulatory procedure which appeared to preclude consideration of these alternate products as adequate to meet the Government's minimum needs. See Christie Electric Corporation, supra, and AR 71-6, July 12, 1973 [superseded by AR 70-61, October 1, 1978].

The Navy has no comparable regulations. Thus, [the issue in this case is confined to whether a particular solicitation, rather than an entire regulatory scheme, is unduly restrictive.]

In this context, we believe the Navy's actions -- development of performance specifications in 1969 - 1970, competitive procurement not only of equipment meeting those specifications but also of design data, and subsequent competitive procurement to the resulting design specifications -- meet the statutory and regulatory requirements for maximum practical competition. See 10 U.S.C. 2304(g) (1976); DAR § 3-101(d) (1976 ed.); see generally Dumont Oscilloscope Laboratories, Inc., B-185267, April 16, 1976, 76-1 CPD 259; cf. Hoffman Electronics Corporation, 54 Comp. Gen. 1107 (1975), 75-1 CPD 395, in which we upheld an Air Force decision to limit competition for production contracts to developmental contractors under the Department of Defense's "prototype" method of procuring major defense systems. In Hoffman, as here, the protester claimed and attempted to demonstrate that it had developed and could furnish comparable equipment, while the procuring agency argued that the competition sought and obtained before award of the development contracts satisfied all statutory and regulatory requirements.

Thus, [we agree with the Navy that the use of design specifications does not provide an automatic basis for determining that a solicitation unduly restricts competition, unless the design requirements are beyond the Government's minimum needs.] G.A. Braun, Inc., B-189563, February 1, 1978, 78-1 CPD 89; see also Constantine N. Polites & Co., B-189214, December 27, 1978, 78-2 CPD 437.

[The Navy has determined that it is essential that additional units be compatible with its current stock of charger/analyzers in terms of operation, maintenance, and repair. We find this provides a rational basis for the Navy's use of design specifications in this instance.] Our Office has upheld similar use of compatibility and interchangeability requirements for equipment to be used in an existing military supply system when a procuring agency was required to provide continuous logistic support. Boston Pneumatics, Inc., B-185000, May 27, 1976, 76-1 CPD 345 and cases cited therein.

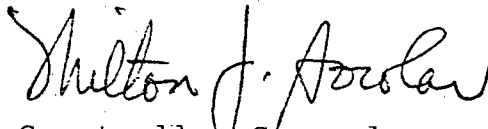
Even if we assume for the sake of argument that use of Christie's commercially available charger/analyzer would result in lower initial acquisition costs, we cannot question the Navy's determination that its minimum needs at

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this time include compatibility with existing equipment.
See Tele-Dynamics Division of Ambac Industries, Inc.,
B-187126, December 17, 1976, 76-2 CPD 503.

The protest is denied.

A handwritten signature in cursive script, reading "Milton J. Fowler".

For the Comptroller General
of the United States