



Office of the General Counsel

B-230204.3

August 30, 1988

The Honorable Dean A. Gallo
House of Representatives

Dear Mr. Gallo:

This is in response to your letter to our Office dated July 11, 1988, forwarding correspondence from the Armament Engineering Company (AEC) regarding Department of the Army solicitations for engineering services. Most of the matters raised by AEC's in its correspondence to your office initially were raised in protests filed with our Office challenging the awards under the Army solicitations, and largely were addressed in our decisions (copies enclosed) finding no merit to the protests. We nevertheless discuss AEC's principal concerns below.

A theme running through AEC's letter, and carried over from its protests, is the contention that the firms receiving the contract awards under these procurements were able to offer the lowest prices because they proposed unreasonably low labor rates, rates at which AEC believes the awardees cannot possibly perform satisfactorily. In the procurements here, the Army determined that the proposed rates were not so low that they would impair the contractors' ability to attract and retain competent professional employees. This type of business judgment by the procuring activity is not subject to objection unless it is shown that the determination was made in bad faith; AEC failed to show that this was the case.

AEC claims it never intended to question the awardees' ability to perform but, rather, is only challenging the firms' hourly rates. The proposed rates themselves, however, are not a basis for denying an offeror a contract where, as here, a firm, fixed-price contract will be awarded. Since this type of contract places upon the contractor the risk and responsibility for all contract costs and resulting profit or loss, we have recognized that the only proper consideration for the contracting agency, even where it appears a firm has bid below cost, is whether the contract price is too low to permit satisfactory performance. Again, the Army determined that the awardees under the solicitations in question will be able to perform.

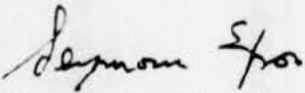
AEC also states in its letter that the evaluation of proposals was inconsistent with the requirements of the Brooks Act, which establishes procedures for architect-engineering (A-E) service contracts. The Army determined, however, that the solicitations did not cover the type of A-E services subject to the Brooks Act, and AEC did not argue otherwise prior to award, even though the solicitations did not indicate that the Brooks Act procedures would be used. Because AEC did not timely protest on this ground, we did not consider the issue.

AEC further complains in its letter that the awardee under one solicitation calling for technical data packages for the production of training projectiles had an improper conflict of interest: the firm's primary business was the production of the projectiles, and there was no contractual restriction on the contractor's later being permitted to compete to manufacture the projectiles under its own specifications. The record indicated, however, that production of the projectiles (based on the technical data packages furnished under this contract) would not be competed but, rather, would be performed by the Army in-house at agency machine shops. As the awardee thus would not be in a position in the future to compete under its own technical data packages, we found there was no improper organizational conflict of interest. AEC reiterated its conflict of interest argument in a reconsideration request to our Office (B-228445.2; B-228582.2) which we denied, finding AEC had not presented any evidence warranting changing our decision. AEC's letter here again raises this argument, and our conclusion remains the same.

As suggested by the matters discussed above, AEC's letter is largely devoted to disagreement with our prior decisions; based on the records in those cases, we stand by their correctness. AEC criticizes our reliance, without conducting our own independent investigations, on the agency's positions on several protest issues. As we have stated to AEC, however (B-228445.2; B-228582.2), our Office generally does not conduct investigations to establish the validity of protest grounds; rather, the burden is on the protester to submit all documentation and information necessary to demonstrate that its position is correct. Absent sufficient evidence, supporting a protester's arguments, there simply is no basis for finding improper agency action. This was the case with the procurements challenged by AEC.

If you are in need of further assistance, the attorney handling this matter is David Ashen, who can be reached at [redacted].

Sincerely yours,

for 
James F. Hinchman
General Counsel

Enclosures