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

B-177668

April 24, 1973

Ocean Systems, Inc.  
11440 Isaac Newton Industrial Square North  
Reston, Virginia 22070

Attention: Mr. E. A. Brown  
Manager, Government Systems

Gentlemen:

We are in receipt of your letter of March 28, 1973, and prior correspondence, protesting the award of a contract by the Naval Ship Systems Command to Ocean Search, Inc., under request for proposals (RFP) N00024-72-N-0569(Q) for aircraft salvage, deep recovery, and related ocean engineering services.

You contend that the award should have been made to your company because it was determined to be capable of performing the services and proposed rates which were lower than those offered by Ocean Search. In that connection, you have stated that when "best and final" offers were solicited "price became the primary basis for making award of a contract." In support of that position, you have stated:

"Best and final" are commonly used "words of art" in the Government contracts field which are always used in connection with price. Whenever this term is quoted it indicates that an award will be made to the lowest bidder.  
\* \* \*

Further, you contend that the actual reason you were not selected for the award was because your proposal was downgraded as you had indicated that the overhead rate would be 127 percent whereas it had been 162 percent in the past and for failing to price a TV camera for a hypothetical job order.

You are correct that your company was determined to be capable of performing the contract services. However, the "Basis for Award" provision in the RFP provided that the primary consideration in determining to whom award would be made would be which contractor could perform the contract in a manner most advantageous to the Government. In that regard, each offeror's candidates for the key positions of senior project manager,

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project manager and project coordinator were evaluated against the following criteria: (1) the candidate's previous experience in search and recovery at the level at which he would function under this solicitation; (2) other search and recovery experience; (3) other general maritime experience; (4) special training of a related nature; (5) any special circumstances which might be of importance in evaluating the candidate's ability to perform in the given position.

For senior project manager, a position which requires "a senior management individual qualified to be in charge of tasks of the greatest difficulty and importance," Ocean Search's candidates were both evaluated as highly qualified based primarily on their extensive experience (while employees of Ocean Systems) and training. On the other hand, Ocean Systems' candidates were evaluated less favorably. One was determined not qualified because of insufficient maritime experience, having just entered the maritime industry in October of 1971, and for not possessing any demonstrated competence in specific search or recovery operations. His qualifications also were downgraded for failure to exhibit any specialized related training such as in submarines and/or salvage diving. Ocean Systems' second candidate was determined to have sufficient training. He, however, lacked the experience sought since he had never before been a senior project manager and had participated in relatively few aircraft search and recovery operations. Therefore, he was categorized as a potential senior project manager, but not a proper candidate for the present job.

The other key personnel requested in the solicitation were a project manager, "a highly qualified individual who may be assigned to assist a Senior Project Manager in performance of a task or to be in charge of a task to which no Senior Project Manager is assigned," and a project coordinator, "a qualified person, based at the Contractor's Washington, D.C. area office and continuously available for assignment in any aspect of a specific task, whose function is to provide liaison [sic] communication, and planning services between the Project Manager and the Supervisor of Salvage throughout the duration of the task. He is the operational interface in the material and personnel aspects of the task with responsibilities corresponding to those of the Logistics Coordinator in his field."

For these positions, Ocean Search's candidates were all rated either highly qualified or qualified by virtue of specific search and recovery experience, particularly with aircraft, and/or extensive training in either engineering or other related areas. On the other hand, the only candidate proposed by Ocean Systems who was evaluated as qualified was a candidate for the project manager position. His qualifications for the job were based on engineering orientation and background in diving, salvage and mooring. Ocean Systems' other candidate for the position was deemed not qualified because of inexperience in aircraft salvage and deep recovery.

Further, the person proposed by Ocean Systems for the position of project coordinator was evaluated as not qualified, having had little experience as a project coordinator or in any other maritime operations capacity. In addition, his contract administration specialist background was not deemed particularly applicable or relevant to the position of project coordinator.

While you contend that your candidates for the various positions did possess certain attributes that qualified them for the various positions, it is not the function of our Office to evaluate proposals or to substitute our judgment for that of the contracting officials. B-167302, October 17, 1969, and B-175480, August 3, 1972. Moreover, it does not appear that the contracting agency abused the broad discretion it has to select the contractor who can perform the contract in the manner most advantageous to the Government. B-173427, March 14, 1972. See, also, M. Steinthal & Co. v. Seaman, 455 F. 2d 1289 (1971).

Although you have contended that the reason your proposal was not selected was because of the overhead rates you offered and the failure to quote a price for a TV camera, the agency record indicates that the reason Ocean Search was selected was that it was considered to be better qualified to perform. In that regard, on August 8, 1972, memoranda in the record recognized that the rates offered by your company were about 20 percent less than those quoted by Ocean Search and stated:

2. In spite of the lower rates quoted by Ocean Systems, we have decided to select Ocean Search because, in our professional opinion, the key to success or failure of the type of salvage operations contemplated under the RFP depends directly on the qualification and experience of key contractor personnel. By reference (a) we have provided a comparison of personnel qualifications offered by Ocean Systems and Ocean Search which clearly indicates that from a technical or operational standpoint, Ocean Search is superior.

3. In our opinion, the operational consideration involved far outweighs the financial considerations and accordingly request that the subject RFP be awarded to Ocean Search, Inc.

From the foregoing, it is apparent that price was considered in the evaluation of proposals and it was determined that the qualifications of the successful offeror outweighed that factor. In 50 Comp. Gen. 110 (1970), it was held that in a negotiated procurement it is within the discretion of the contracting agency to determine that it is to the Government's advantage to award a contract to other than the low offeror.

With respect to your contention that "best and final" are terms of art pertaining to price and that the solicitation of your "best and final offer" after discussions with you indicated an intention to make price the prime consideration in the selection of the contractor, we observe that the August 3, 1972, letter that made the solicitation, referred to deficiencies in the proposal and indicated that the purpose of the letter in requesting "best and final offers" was to provide an opportunity to submit revisions. Thus, the terms were not used in the special sense that you have indicated. Further, nowhere in the letter is it stated that price will be the principal consideration in the selection of the contractor. In the circumstances, the letter appears to have been no more than compliance with ASPR 3-805.1(b) which provides that:

\* \* \* Whenever negotiations are conducted with several offerors \* \* \* all offerors selected to participate in such negotiations \* \* \* shall be offered an equitable opportunity to submit such price, technical, or other revisions in their proposals as may result from the negotiations. \* \* \*

The quoted section does not restrict the solicitation of revised offers to price. Moreover, in D-172836(1) and (2), September 29, 1971, our Office upheld an award to other than the low offeror even though best and final proposals were solicited prior to the award selection.

In view of the foregoing, the protest is denied.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General  
of the United States

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