



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

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November 29, 1973

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AIR MAIL

General Dynamics Corporation
Electronics Division
Post Office Box 2566
Orlando, Florida 32802

D6002466

Attention: Mr. L. F. Channave
Director of Contracts

Gentlemen: DCA 3764

We refer to your telefax message dated September 6, 1973, and subsequent correspondence, protesting against the award of a contract to AEL-EMTECH Corporation under request for proposals (RFP) No. N00019-73-R-0187 (RFP -0187), issued by the Naval Air Systems Command (NAVAIR), Washington, D.C.

Your basic contention is that the contracting officer arbitrarily and capriciously excluded your firm from consideration for award. Additionally, you allege that the procuring agency improperly made award to AEL-EMTECH after receipt of your protest.

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The above-referenced solicitation was issued on June 27, 1973, for the supply of AN/AR-75 radio receivers and related supplies and services, including technical data. Part III, Section L of the RFP provided that any resulting contract would contain the clause "Technical Data--Withholding of Payment (1972 APR)" which as set forth in Armed Services Procurement Regulation (ASPR) 7-104.9(h) states:

"(a) If 'Technical Data' (as defined in the clause of this contract entitled 'Rights in Technical Data'), or any part thereof, specified to be delivered under this contract, is not delivered within the time specified by this contract or is deficient upon delivery (including having restrictive markings not specifically authorized by this contract), the Contracting Officer may until such data is accepted by

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the Government, withhold payment to the Contractor of ten percent (10%) of the total contract price or amount unless a lesser withholding is specified in the Schedule. Payments shall not be withheld nor any action taken pursuant to this paragraph, when the Contractor's failure to make timely delivery or to deliver such data without deficiencies arises out of causes beyond the control and without the fault or negligence of the Contractor within the meaning of the clause hereof entitled 'Default.'

"(b) After payments total ninety percent (90%) of the total contract price or amount and if all technical data specified to be delivered under this contract has not been accepted, the Contracting Officer may, withhold from further payment such sum as he considers appropriate, not exceeding ten percent (10%) of the total contract price or amount unless a lesser withholding limit is specified in the Schedule.

"(c) The withholding of any amount or subsequent payment to the Contractor shall not be construed as a waiver of any rights accruing to the Government under this contract."

The solicitation also included the clause "Reserve Pending Execution of Release (1963 OCT)", which provided:

"(a) After payment of eighty percent (80%) of the total contract price, further payments shall be withheld until a reserve of one percent (1%) of the total contract price, but in no event more than twenty-five thousand dollars (\$25,000), shall have been set aside such reserve to be paid to the Contractor at the time of final payment. The Contractor and each assignee under an assignment in effect at the time of final payment shall execute and deliver at the time and as a condition precedent to final payment, a release in form and substance satisfactory to and containing such exceptions as may be found appropriate by the Contracting Officer, discharging the Government, its officers, agents and employees of and from liabilities, obligations and claims arising under this contract.
(1963 OCT) (NPD 7-150)

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"(b) The Contracting Officer may permit total or partial payment, prior to execution and delivery of the release, of the amount withheld pursuant to paragraph (a) above, upon finding that the final settlement of the contract is being delayed for a reason beyond the control of the Contractor. (1961 FEB) (NAVAIR 7-150)"

Five firms responded to the solicitation, and on August 6 and 7, 1973, negotiations were conducted with the four offerors determined to be within the competitive range. General Dynamics' initial offer was premised upon a reduction from 10 to 5 percent of the amount withheld under the "Technical Data--Withholding of Payment" clause and upon the deletion of the "Reserve Pending Execution of Release" clause.

The contracting officer has provided our Office with the following account of his discussions with your firm, the accuracy of which you have, not disputed:

"During the discussions with GD General Dynamics, I raised the issue that they had taken exception to two General Provisions in their covering letter to their response to the RFP, and advised them that those exceptions would not be agreed to or modified in any way as requested by GD. The two exceptions were the Technical Data Withholding of Payment Clause and the Reserve Pending Execution of Release Clause. GD asked for the rationale of including these two clauses. I explained that NAVAIR had found through experience that the best way to ensure that all the requirements in the contract had been fulfilled was to hold back money or to maintain the right to hold back money. GD felt that the Reserve Pending Execution of Release Clause was not appropriate for a Fixed Price Contract. I read the clause and advised them that it was only suitable for a fixed price contract. I further advised GD that through the discussions with other offerors, a number of ambiguities that required clarification were raised, some issues regarding technical data requirements were raised and other points raised to the extent that these clarifications, changes in the data requirements and other modifications

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were to be included in an amendment to the RFP which would accompany the BFO letter. It was further explained to GD that this was being done in order to be equally fair and consistent to all offerors and that what was being clarified or modified for one would be modified for all. GD was advised that no other offeror had requested changes in these two clauses and that we had no intent of changing them in any event. I further advised GD that if they persisted in taking exception to these clauses, that it would be definite consideration in the evaluation for award since the RFP states that the award would be based on price and other factors and not price alone. I also advised GD that both of the clauses related to a risk factor having monetary value and that if we would grant a modification to one offeror we would grant that same modification to all offerors and it was our intent not to change or modify either of these two clauses."

By letter dated August 14, 1973, the contracting officer furnished General Dynamics with changes to the solicitation, a list of deficiencies and desired clarifications peculiar to General Dynamics' proposal, and a request for submission of best and final offer by August 21, 1973. Although the exceptions which General Dynamics had taken to the solicitation were not enumerated in the list of "deficiencies and clarifications", the contracting officer's letter stated: "Your submission shall clearly indicate exceptions, if any, to the solicitation. Exceptions may disqualify you from further consideration."

General Dynamics timely submitted its best and final offer, which included the following statements:

"The terms and conditions of the subject solicitation are acceptable with the following exceptions:

Part III - General Provisions

Section L - General Provisions

**ASPR7-104.9(h) - Technical Data -
Withholding of Payment:**

In view of the discussions pertaining to this clause which were held during our meeting of 7 August 1973, it is requested that

this clause be modified to provide for withholding of payment in an amount not to exceed 5% of the contract value.

NPD/NAVAIR 7-150 - Reserve Pending Execution of Release;

It is again requested that this clause be deleted since it appears to be inappropriate for use under a fixed price contract."

An attempted withdrawal of these exceptions after the common cutoff date for best and final offers was rejected by the procuring activity.

Evaluation of the proposals disclosed that your price of \$574,312.64 was the lowest received, and AEL-EMTECH's price of \$583,323 was second low. The contracting officer determined that the above-discussed exceptions to the solicitation disqualified your firm from consideration for award. On September 7, 1973, the contract was awarded to AEL-EMTECH as the lowest qualified offeror.

You contend that you were not adequately forewarned that the exceptions which you took to the terms of the RFP would lead to disqualification; that the contracting officer acted arbitrarily and capriciously in requiring an excessive amount to be withheld under the "Technical Data--Withholding of Payment" clause; and that the "Reserve Pending Execution of Release" clause was inappropriate for a firm fixed-price solicitation.

You suggest that the contracting officer exhibited bad faith in disqualifying your firm from award without first explicitly advising you in writing, that the exceptions which you had taken would result in disqualification. In this connection, you emphasize that the contracting officer's letter of August 14, 1973, calling for best and final offers, did not specifically mention the exceptions which you had taken and contained only a general statement that "Exceptions may disqualify you from further consideration."

However, we believe the contracting officer's letter must be read in light of the negotiations which preceded it. We have been furnished no reason to reject the contracting officer's statement,

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quoted above, that he advised your firm during negotiations that "these exceptions would not be agreed to or modified in any way" as you had requested; that your persistence in requiring the exceptions "would be a definite consideration in the evaluation for award"; and that if a modification were permitted, it would be extended to all offerors. Under these circumstances, we believe General Dynamics was adequately advised of the consequences which might flow from its continued insistence upon the two exceptions to the terms of the solicitation.

You further maintain that the contracting officer acted arbitrarily in requiring that the maximum permissible amount of 10 percent of the total contract price be withheld under the "Technical Data--Withholding of Payment" clause. You state that the amount thus withheld is so much greater than the value of the data itself that it is unreasonably excessive.

In this connection, ASPR 9-504(a) provides:

"Timely delivery of data is particularly important to the operation and maintenance of equipment as well as competitive procurement of follow-on quantities of contract items and of items broken out from an assembly or equipment. The clause set forth in 7-104.9(h) is designed to assure timely delivery of data. The clause permits a withholding not exceeding ten percent (10%) of the total contract price or amount, but the Contracting Officer may specify a lesser amount in the Schedule if circumstances warrant. A case-by-case determination as to the amount to be withheld shall be made by the Contracting Officer after considering the estimated value of the data to the Government. * * *"

It is clear that the contracting officer regarded a withholding of 10 percent of the contract price to be necessary to assure the timely delivery of the technical data, and this action was within the discretion committed to him by ASPR 9-504(a). We do not believe that the possibility that the amount withheld pursuant to the "Technical Data--Withholding of Payment" clause may exceed the price of the data renders the contracting officer's determination arbitrary and capricious, considering the importance of such data to the operation and maintenance of the equipment.

You next contend that the contracting officer erred in his insistence that the fixed-price contract resulting from RFP -0187 contain a "Reserve Pending Execution of Release" clause, quoted above. In this regard, Navy Procurement Directions (NPD) 32-402 states in pertinent part:

"(a) All fixed-price types of contracts which provide, in addition to payment of a fixed price for the articles and services covered thereby (whether stated as a single amount or as separate amounts), for (i) adjustment of the fixed price for labor or material escalation, (ii) separate reimbursement of premiums for and related cost of overtime or shift work, or (iii) indemnity by the Government against third-party liabilities of the contractor, and all cost-reimbursement contracts, shall provide that the contractor and any assignee shall, as a condition precedent to the final payment under the contract, execute a release of all claims against the Government, its officers, agents and employees under or arising from the contract (see NPD7-150). Each of such contracts shall further provide for the withholding until final payment of such amount or amounts as in the opinion of the contracting officer will be adequate to obtain execution of the release to which the Government is entitled
* * *."

* * * * *

"(d) Nothing in this NPD precludes the inclusion in contracts other than those within (a) above, of an appropriate provision requiring a release as a condition precedent to final payment by the Government."

The inclusion of a "Reserve Pending Execution of Release" clause in RFP -0187 was therefore expressly permitted by NPD 32-402(d). Although you question the necessity for such a clause, we regard the

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propriety of including such a clause in a contract to be a matter within the discretion of the contracting agency. See 51 Comp. Gen. 609, 610 (1972).

Finally, you allege that the procuring activity improperly proceeded with an award to AEL-EMTECH on September 7, 1973, despite prior notice of your protest. The record shows that your initial telegram of protest was dispatched to GAO, with a copy to NAVAIR, on September 6, 1973. The telegram was received at the Naval Communications Station, Cheltenham, Maryland, at 7:04 PM EDT the same day. The message was then read by personnel in the commercial refile section at Cheltenham, who receive and readdress incoming messages to a wide variety of Washington-area Navy installations.

Your telegram did not specifically request handling on a "Priority" basis, and its contents did not alert the Cheltenham operators to the need for handling on other than "Action Routine" basis. Cheltenham therefore relayed the telegram, marked "Action Routine", to the Naval Telecommunications Center, Arlington, Virginia, where it was received on September 7 at 10:07 AM EDT.

At 1:37 PM EDT on Friday, September 7, the Naval Telecommunications Center placed the message in a basket for pickup by NAVAIR. However, the last message pickup by NAVAIR of "Action Routine" communications for that day had already been made at 1:00 PM EST. No further pickup of those messages was made until 6:00 AM EDT on Monday, September 10, at which time your telegram was received by NAVAIR and was delivered to the contracting officer at approximately 3:15 EDT that afternoon.

Our Office received its copy of your telegram at 9:07 AM EDT on September 7, whereupon it was processed with other incoming communications. Although we telephonically advised NAVAIR early that afternoon of the receipt of your protest, an award had already been made to AEL-EMTECH.

It therefore appears that NAVAIR made award to AEL-EMTECH prior to being notified of your protest, and that the protest has properly been regarded as one filed after award.

For the foregoing reasons, your protest is denied.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States