UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-222369

April 22, 1986

The Honorable Richard K. Willard
Assistant Attorney General
Civil Division
Department of Justice
Washington, D.C. 20530

Attention: Paul J. Ehlenbach, Esq.
Commercial Litigation Branch

Subject: Sperry Corp. v. United States, et al.
Cl. Ct. No. 90-86C

Dear Mr. Willard:

This is in response to your letter dated March 20, 1986, requesting a litigation report in connection with the subject suit. For your purposes, we think it necessary to reply only to those numbered averments in the complaint that directly bear upon the propriety of the bid protest decision which is the basis for the action.

Plaintiff asserts that our decision in System Development Corp., B-219400, Sept. 30, 1985, 85-2 CPD ¶ 356 (copy enclosed), and the contracting agency's subsequent compliance with the remedy recommended in that decision, were violative of the terms of the solicitation at issue in the case and federal procurement law and regulation (1). We deny the assertion and respond that our decision was consistent with our statutory authority to determine whether a solicitation for a contract, or a proposed award or award of a contract, complies with statute and regulation. 31 U.S.C.A. § 3554(b)(1) (West Supp. 1985), as added by section 2741(a) of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175, 1201. Based upon

the administrative record (copy enclosed), we concluded for the reasons stated below that the contract had been improperly awarded to Sperry and recommended to the Secretary of the Army that the contract be terminated for the convenience of the government. We also recommended that System Development Corporation (SDC) be awarded the balance of the requirement. See 31 U.S.C.A. § 3554(b)(1)(D) and (E).

We found that the award to Sperry was improper because it was not consistent with the only reasonable interpretation of the RFP's requirements. Reading the solicitation as a whole and in a manner which gave effect to those provisions concerning the agency's need for TEMPEST-certified equipment ((7) and (8)), it was our view that SDC was correct in its assertion that TEMPEST certification was a requirement that had to be met at the time proposals were submitted, rather than at the time of delivery. Although Sperry had argued that its offered equipment complied with TEMPEST standards for the suppression of compromising electromagnetic emanations through the simple expedient of placement in shielded enclosures (9), Sperry offered little support for its position. Rather, SDC submitted significant evidence, not disputed by the contracting agency, that the TEMPEST certification process could involve a substantial engineering and manufacturing effort in order to reconfigure existing equipment to meet TEMPEST standards. In any event, the key fact remained that Sperry's equipment was not TEMPEST-certified at the time of proposal submission.

Hence, we determined that the agency had misapplied its own stated criteria in evaluating competing proposals on the basis that TEMPEST certification was not required until the time of delivery. Since it was only through the issuance of our decision that the agency was advised of the evaluation impropriety, the fact that the agency did not point out any deficiencies to Sperry during negotiations or require Sperry to present TEMPEST certification at the time of the operational test ((10) and (12)) does not validate Sperry's argument that we erred in concluding that TEMPEST certification was necessary at the time of proposal submission.

We also concluded in our decision that even if we were to accept the agency's interpretation of the RFP, the agency's evaluation was still improper because Sperry was given the maximum possible number of evaluation points for the TEMPEST feature even though Sperry had yet to obtain TEMPEST certification for its equipment (16). Specifically, we stated that Sperry should not have received the full 20,000 evaluation points on the basis of what was, essentially, only a promise to meet the requirement. We did not, however, determine the exact number of points Sperry should have received under the TEMPEST criterion.

Because the relative scoring of proposals was quite close (46,100 total points for Sperry versus 44,150 for SDC) (13), we concluded that, under either view of the matter, the agency's misapplication of the TEMPEST certification requirement precluded SDC from receiving an award to which it was otherwise entitled. Contrary to Sperry's assertion (19), its contract was fairly terminated for the convenience of the government because the firm would not have been the highest-scoring offeror but for the agency's improper evaluation of proposals with regard to TEMPEST certification.

Accordingly, we believe our decision with its recommendation that appropriate corrective action be taken was legally correct and proper within the statutory bid protest function of this Office.

In response to your request that we furnish information as to when a claim under 41 U.S.C. § 605 was submitted to the contracting officer, the Army has advised us that it is unaware that any such claim has been submitted. Our agency contact in this matter is Frank Sando, Esq., who may be reached at (202) 697-3462. Our records also indicate no claim or other demand against the plaintiff which might furnish the basis for a counterclaim or setoff in this case.

As indicated, we are enclosing a copy of the administrative record of the protest. We will hold the original file in the event it becomes necessary to

introduce the original documents into evidence. If we can be of any further assistance, please contact Richard Moorhouse, Esq., of my staff at (202) 275-9740.

Sincerely yours,

Ronald Berger

Ronald Berger
Deputy Associate
General Counsel

Enclosures