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

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December 14, 1972

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Dynalectron Corporation
2233 Wisconsin Avenue, N.W.
Washington, D.C. 20007

Attention: David L. Reichardt, Esq.

Gentlemen:

We refer to your letters of June 12 and September 7, 1972, protesting against the award of a contract to the Bell Aerospace Company under request for proposals (RFP) No. DAAG05-72-B-0198, issued by the United States Army, San Francisco Procurement Agency, Oakland, California.

The RFP covered maintenance services for the United States Army Combat Developments Experimentation Command and provided for award of a cost-plus-award-fee contract, to be negotiated pursuant to 10 U.S.C. 2304(a)(10), for a 1-year period with an option to the Government for two extended periods of performance of 1 year each. As of April 21, 1972, the closing date for receipt of proposals, the proposals of 12 of the 57 prospective offerors solicited had been received. These proposals, as requested in the RFP, were submitted in two separate parts: one containing the technical proposal and the other containing the cost proposal. Each proposal was to be evaluated with a possible 80 points allotted to the technical proposal and a possible 20 points to the cost proposal.

The technical portion of each proposal was submitted to the Technical Evaluation Board for its study and evaluation. Five proposals were found by the Board to be technically acceptable. Of the possible 80 points allotted to this portion of the evaluation, Bell Aerospace received 73.454 points and the Dynalectron Corporation 78.139 points. Subsequently, the cost portion of each proposal was evaluated according to a formula adopted prior to the issuance of the RFP for such evaluation. Under the cost evaluation, the Bell Aerospace proposal received 16.57 points for a total score of 90.024 and the Dynalectron proposal received 9.27 points for a total score of 87.409. Following the evaluations, the contracting officer made an analysis of all the proposals from both a price and technical aspect. He then met with key personnel involved with the procurement to further review the proposals and to discuss the desirability of making award on the basis of the initial proposals without negotiations. The

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result of this discussion was the decision to make award to Bell Aerospace, whose proposal had received the highest total evaluation score, without negotiation. In view of this decision, the contracting officer on May 25, 1972, referred the proposed award to the procurement agency Board of Awards. The Board recommended award to Bell Aerospace, and award was made to that firm on May 26.

It is your position that the procurement activity, in violation of title 10 of the United States Code and section 3 of the Armed Services Procurement Regulation (ASPR), illegally awarded the contract to Bell Aerospace without conducting negotiations with Dynalectron and all other offerors as required by law. You contend that because this procurement was initiated under 10 U.S.C. 2304(a)(10), authorizing the negotiation of a contract when it is impracticable to obtain competition, it would be inappropriate to make award without negotiation inasmuch as 10 U.S.C. 2304(g) and ASPR 3-805.1(a)(v) state that award without negotiations may be made only where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the item that acceptance of an initial proposal without discussion would result in fair and reasonable prices. You contend in this respect that the very use of the "impracticable to obtain competition" exception to the requirement for formal advertising presupposes that competition, sufficient to allow award without negotiation is lacking. As a further indication that competition sufficient to warrant award without negotiation was neither achieved nor contemplated, you point out that the RFP required the submission of cost and pricing data, required under ASPR 3-807.3(f) only where there is no adequate price competition. In addition to your arguments as to the adequacy of the competition achieved in this instance, you point out that ASPR 3-805.1(a)(v) requires negotiation where pricing uncertainty exists and you advance two reasons for concluding that pricing uncertainty did in fact exist in this case.

First, you contend that because certain types of labor will be used under the contract which were not specifically described in the applicable Department of Labor wage determination, the contracting officer was required by ASPR 12-1005 to verify by analysis of cost and pricing data the conformance of wages proposed for those types of labor by each offeror with similar labor categories specified in the wage determination and that the failure to do so resulted in uncertainty as to pricing. Second, you maintain that the procurement activity failed to conduct a proper evaluation of the cost proposals in that it conducted only a price analysis under ASPR 3-807.2(b) instead of the cost analysis which you contend was required in this situation by ASPR 3-807.2(c). You conclude that this alleged deviation from

regulatory requirements also results in pricing uncertainty. Finally, you contend that the formula used to score the cost proposals should have averaged only the proposals of the technically acceptable offerors rather than including in the average the cost proposals of technically unacceptable offerors. Accordingly, you request that either the award to Bell Aerospace be set aside and discussions with all offerors be held on the basis of a proper evaluation of cost proposals or that the award be cancelled and the procurement be resolicited.

Respecting the propriety of a negotiated contract award without discussions as a general proposition, you acknowledge that the RFP in paragraph 10(g) of the Solicitation Instructions and Conditions provided that the Government could award the contract based on the initial offers received without any discussion with the offerors of their offers. In this regard, ASPR 3-805.1(a)(v), implementing 10 U.S.C. 2304(g), provides as follows:

> "(a) After receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors (including technical quality where technical proposals are requested) considered, except that this requirement need not necessarily be applied to:
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> * * * * *
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> "(v) procurements in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price. (Provided, however, that in such procurements, the request for proposals shall notify all offerors of the possibility that award may be made without discussion of proposals received and hence, that proposals should be submitted initially on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government. In any case where there is uncertainty as to the pricing or technical aspects of any proposals, the contracting officer shall not make award without further exploration and discussion prior to award. * * *"

As indicated above, however, your protest assumes that because the justification for negotiation was that it was "impracticable to obtain competition" and because cost and pricing data, which is not to be required unless adequate price competition is lacking, was called for, there was, in fact, no competition sufficient to support an award without negotiation. This position is not in accord with the facts. As you know, 12 proposals were received in response to the instant RFP, five of which were determined to be technically acceptable so as to allow evaluation in accordance with the RFP terms. In this instance, ASPR 3-210.2(vii) was relied on in a Determination and Findings made final by 10 U.S.C. 2310(b) to justify the use of exception 10. That subparagraph is set out below:

> "When the contemplated procurement is for technical non-personal services in connection with the assembly, installation, or servicing (or the instruction of personnel therein) of equipment of a highly technical or specialized nature; * * *."

This subparagraph obviously does not preclude competition among qualified concerns; neither does reliance on the negotiation authority of exception 10 presuppose an absence of adequate competition, since that exception merely states that competition by means of the preferred method of formal advertising is impracticable.

Finally, ASPR 3-807.1(b)(1) defines "adequate price competition" as follows:

> "a. Price competition exists if offers are solicited and (i) at least two responsible offerors (ii) who can satisfy the purchaser's (e.g., the Government's) requirements (iii) independently contend for a contract to be awarded to the responsive and responsible offeror submitting the lowest evaluated price (iv) by submitting priced offers responsive to the expressed requirements of the solicitation. * * *"

While requirement (iii) of the above definition is for literal application only in the fixed-price environment, we think it obvious that "competition" was obtained here.

While it is true, as you point out, that ASPR 3-807.3(a) dictates that cost and pricing data should not be requested when the price negotiated is based on adequate price competition, that section is for application only after proposals have been received and a determination

as to whether or not competition has in fact been achieved is possible, since the requiring of cost and pricing data is contemplated at any time prior to the award of a contract. That cost and pricing data may be required at the time offers are solicited in situations where it is later determined that competition exists is evidenced by ASPR 3-807.3 (g)(2), which states that in such situations, no certificate of cost and pricing data should be required.

We note also that in addition to the existence of adequate competition, the administrative report takes the position that "prior solicitation on same basis and two and one half years of performance of the incumbent contractor under a CPAF contract including the negotiation of prices for two follow-on option periods" provides the accurate prior cost experience stipulated by the statute and regulations as sufficient justification for award on the basis of initial proposals.

With respect to your argument concerning the contracting officer's alleged failure to verify the conformance of wage rates for work categories not enumerated in the applicable Department of Labor wage determination to similar categories covered by the wage determination by analysis of cost and pricing data, the administrative report states that on the basis of the cost data furnished, the contracting officer by price analysis reached a judgment that the offeror's conformed rates were realistic. However, the actual conformance agreement on wage rates of personnel not specifically described in the applicable wage determination can only occur after award when the contractor and its employees are ascertainable. Prior to award, the contracting officer can only make a judgment as he did, as to whether the average hourly rates, as proposed by each offeror, appear to include realistically conformed rates. In this regard, ASPR 12-1005 requires only that such rates be conformed in accordance with the contract clause required by the Service Contract Act of 1965 which by its terms requires only that conformance be accomplished after award by means of agreement between the contractor, the affected contractor employees, and the Government. Our review of the record indicates that this area of proposed costs was carefully examined by the contracting officer during proposal evaluation. We therefore conclude that his subsequent determination as to the realism of the pricing therein, and consequently as to the certainty of the pricing, is not subject to question.

Regarding your contention that a cost analysis, instead of merely a price analysis, should have been made on the Bell Aerospace proposal prior to any award, we note ASPR 3-807.2, which states in part:

"(a) General. Some form of price or cost analysis is required in connection with every negotiated procurement action. The method and degree of analysis, however is dependent on the facts surrounding the particular procurement and pricing situation. Cost analysis shall be performed * * * when cost or pricing data is required to be submitted under the conditions described in 3-807.3; however, the extent of the cost analysis should be that necessary to assure reasonableness of the pricing result, taking into consideration the amount of the proposed contract and the cost and time needed to accumulate the necessary data for analysis. Price analysis shall be used in all other instances to determine the reasonableness of the proposed contract price. * * *"

Inasmuch as the cost and pricing data called for in the RFP were not required because adequate competition was achieved, the requirement in ASPR 3-807.2(c) for cost analysis by its own terms does not apply. Further, the quoted ASPR section clearly reserves to the contracting officer's discretion the nature and extent of cost analysis to be conducted.

Finally, we see no reason to object to the use of the cost evaluation formula adopted for and applied to the procurement. We have previously held, in spite of the contention that a more equitable method of evaluation could have been adopted, this exact method of evaluation to be proper and acceptable in view of the thorough consideration of all available evaluation methods by competent technical personnel which preceded its adoption for the particular procurement and in view of the equal and unbiased application of this evaluation formula to all offerors. B-174003, February 10. 1972. Also, as concerns the application of the formula, while it might have been more desirable, as you contend, for the activity to have computed the mean price offered from only the price of those proposals found to be acceptable technically instead of the prices offered by all 12 originally submitted proposals, we do not feel the activity's action in this respect to have prejudiced the interests of Dynalectron. Any increase or decrease in the price offered would have affected the cost proposals of Dynalectron and Bell Aerospace in an equal manner and in no way would have affected the evaluation point differential between the two proposals on this portion of the evaluation scoring. Additionally, the administrative report states that the validity of the evaluation formula was tested by comparison with a Government prepared estimate and, as indicated earlier, by cost experience under a prior contract. Hence, the formula provided a reasonable measure of cost estimate reasonableness.

In view of the above considerations, the protest is accordingly denied.

Very truly yours,

R.F.KELLER

Deputy Comptroller General
of the United States