



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

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B-176334

January 16, 1973

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PAE International
600 South Harvard Boulevard
Los Angeles, California 90005

Attention: Mr. Edward A. Shay
President

Gentlemen:

Your letters of June 23 and September 1, 1972, protest the award of a contract to Taihei Dengyo Kaisha, Ltd., by the United States Army Procurement Agency, Japan, under request for proposals (RFP) DAJBI7-72-R-0139, on the ground that procedural errors prejudicial to PAE took place during negotiations leading to the award of a contract to your competitor.

The subject RFP requested offers for a services contract for the operation, maintenance and repair of utility plants, systems and facilities at certain United States Forces installations in Japan and was negotiated pursuant to 10 U.S.C. 2304(a)(6), which permits negotiation where the property or services involved are to be procured and used outside of the United States. The RFP was issued on February 1, 1972, and set February 22 as the proposal submission date. The initial offers of the three offerors determined to be responsible and within the competitive range, expressed in Japanese yen as required by the RFP, are set out below:

PAE International	¥350,148,888 (Corrected)
Kawabata Kensetsu	387,801,588
Taihei Dengyo	390,384,000

(The RFP stipulated a yen to dollar ratio of 308 to 1)

Following negotiations, final offers were submitted, with PAE electing to resubmit its initial offer because no changes in specifications or scope of work resulted from negotiations. In this context, PAE believed that its original offer was realistic and reasonable. All three final offers were within 1½ percent of the Government's estimate of ¥347,824,275. The final offers are set out below:

Taihei Dengyo	¥345,860,000
PAE International	350,148,888
Kawabata Kensetsu	352,106,892 (Corrected)

Award was made to Taihei Dengyo, the incumbent contractor, on May 22, 1972.

You contend, in view of the reasonableness of PAE's initial offer as compared with the Government's estimate and the fact that no changes in scope of work were made during negotiations, that award should have been made on the basis of initial proposals in this instance as contemplated by the right reserved in the RFP to dispense with negotiations and by the caution therein that offerors should submit their best offers initially. You further question the fact that the Government's estimate was not formulated until March 15, 1972, some 6 weeks after proposals were submitted. In this regard, you speculate that the PAE offer influenced the Government estimate, since the two figures were close.

Also, you contend that the revelation of the Government's estimate to offerors during negotiation constituted an "auction technique" prohibited by paragraph 3-005.1(b) of the Armed Services Procurement Regulation (ASPR) because you suspect that the other offerors had been made aware of the fact that the PAE price offer and the Government estimate were extremely close. In this regard, you state that it was rumored during negotiations that PAE's price was 15 percent less than that submitted by Taihei Dengyo and that PAE's price and the Government estimate were "approximately the same." You also state that you were contacted by a labor union representative who had information that PAE had submitted the lowest initial offer. You conclude that the above-summarized facts, coupled with the reduction of the incumbent contractor's proposal price by some \$43,000,000 (roughly \$140,000), to just slightly less than the Government estimate and the PAE offer, provide clear evidence of collusion between Government personnel and the incumbent contractor. You request, in the light of these circumstances, that the contract awarded to Taihei Dengyo be canceled, or, in the alternative, that the option to renew the contract for an additional year not be exercised so that the procurement for the next fiscal year may be opened to competition.

The Army's administrative report, a copy of which was furnished to you, advises that written or oral discussions are customarily conducted by the procuring activity in all procurements which have either "a high dollar value or an operational significance" in accordance with ASPR 3-005.1(a). The report concedes that the Government estimate utilized during negotiations was not formulated until March 15, 1972, significantly after receipt of initial proposals. However, the reports take the position that this estimate was merely a refinement of an estimate formulated well before proposal submission on the basis of the actual procurement requests submitted by the

Army and Navy installations at which the services covered by the RFP were to be performed. This earlier estimate was in the amount of ¥350,214,912, exclusive of certain reimbursable costs, and was reportedly only \$214 more than the PAE offer. It is further stated that the refined estimate was formulated by the Contract Pricing Branch of the procuring agency on the basis of the RFP manning tables and known manning levels, fiscal year 1972 pricing information, and the fiscal year 1973 using activity cost estimates; and that pricing branch personnel were "permitted no access to the four offers received on 22 Feb 72 during preparation of the Government estimate."

On the question of divulgence of PAE's initial offer by Government personnel, the report states that "At no time prior to award was the price offered by PAE, or any other offeror, disclosed to any person outside the concerned US Government procurement personnel" and states further that the conduct of this procurement was personally reviewed by the Commanding Officer, United States Army Procurement Agency, Japan. Also, the report points out that the difference between the PAE and Taihei Dengyo offers was closer to 11 percent than it was to 15 percent, indicating that PAE's before-award information with respect to the range of offered prices was erroneous and probably based on speculation rather than on any concrete information.

Finally, with respect to PAE's claim that the divulgence of the Government estimate during negotiations constituted an auction technique, the report takes the position that so long as PAE's price was not revealed to other offerors, and so long as no offerors were advised that the Government estimate was a price which had to be met, no auction occurred. The report also points out that there is no statutory or regulatory prohibition against the divulgence of the Government's estimate during negotiations leading to a supply contract.

For reasons set out below, your protest must be denied.

Although ASPR 3-805.1, which implements 10 U.S.C. 2304(g), permits the award of a contract on the basis of initial proposals where proper notification thereof is provided offerors and where the circumstances otherwise warrant, the exercise of such right is discretionary. In fact, the section expresses a preference for discussions. In this regard, the regulation states that discussions "shall be conducted" with all responsible offerors within a competitive range but that the discussion requirement "need not be applied to" certain situations including procurements where adequate competition clearly demonstrates that a reasonable price will be achieved. Further, subparagraph (a)(v) of section 3-805.1 states that:

B-176334

"* * * 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. * * *"

See, also, 47 Comp. Gen. 279 (1967); 50 id. 246, 251 (1970).

We therefore must conclude that the practice of the Japan Procurement Agency of conducting negotiations in all procurements with "high dollar value or operational significance" is not subject to objection on the record before us.

On the question of the timing of the formulation of the Government's estimate, the file reflects that a Military Interdepartmental Purchase Request dated January 12, 1972, from the United States Navy Public Works Center, Yokosuka, Japan, for that portion of the fiscal year 1973 services to be performed at naval facilities in the amount of \$76,464, or ¥23,550,912 at the stated currency exchange rate of ¥308 to \$1, was in the hands of the procuring agency before proposal submission. Likewise, a Purchase Request and Commitment dated December 7, 1971, from the Army's Director of Facilities Engineering for Japan for the Army's portion of the fiscal year 1973 services in the amount of \$1,053,755 converted to ¥326,664,000 for the fixed-price portion of the proposed contract was also in the hands of the procuring agency before proposal submission.

Although the Army's fixed-price estimate as expressed in yen was incorrectly converted at an exchange rate of approximately 310 to 1 rather than the stipulated 308 to 1 rate, it was added to the previously mentioned Navy figure to reach a preproposal rough Government estimate of ¥350,214,912. While we think that the better approach would have been to have finished the refinement of the Government's detailed estimate before proposal submission, we cannot conclude that the competitive position of PAE was prejudiced.

Similarly, we must conclude that the record does not substantiate the allegation that PAE's price was compromised during negotiations. In this regard, as indicated above, the administrative report has denied, following a review by the head of the procuring agency, that PAE's price was revealed. You have advanced no evidence that the PAE price was in fact revealed other than an inference drawn from the fact that the Government estimate divulged to offerors was close to the amount of the PAE offer and unsubstantiated allegations with respect to rumors reported to you during negotiations that PAE was low.

B-176334

While we are not unmindful of your position that the circumstances warrant an independent investigation of your suspicions that the PAE price was leaked, we cannot conclude on the record that sufficient grounds exist for our Office to recommend that an investigation of your allegations be conducted.

Concerning the alleged prohibited auction technique, ASPR 3-805.1(b) provides, in pertinent part, as follows:

"Whenever negotiations are conducted with more than one offeror, auction techniques are strictly prohibited; an example would be indicating to an offeror a price which must be met to obtain further consideration, or informing him that his price is not low in relation to that of another offeror. On the other hand, it is permissible to inform an offeror that his price is considered by the Government to be too high. * * *"

In our opinion, the use of the Government estimate as a negotiating tool was not proscribed by this regulation since PAE's price was not divulged. As indicated above, the administrative report has denied that any information with respect to the PAE offer was provided other offerors. Therefore, the record does not establish that offerors were advised that their prices were not low as compared to other offerors. Further, in our opinion, the advice to offerors of the amount of the Government estimate did not constitute an indication of a "price which must be met," within the scope of the cited regulation. The term "auction" connotes direct price bidding between two competing offerors, not the negotiation of a price between an offeror and the Government provided an offeror's standing with respect to his competitors is not divulged. Therefore, the use of the Government estimate as a negotiating tool was more in the nature of advice to those offerors to whom it was divulged that they should consider whether their initial offers might be "too high," a technique specifically sanctioned by ASPR 3-805.1(b).

Accordingly, we must conclude, on the basis of the present record, that the award of the contract to Taihei Dengyo will not be questioned by our Office.

Very truly yours,

Paul G. Dembling

For the Comptroller General
of the United States