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COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

B-176704

JAN 8 1973

Southwest Manufacturing Co.
P. O. Box 2222
El Paso, Texas 79951

Attention: Mr. Charles Munoz
President

Gentlemen:

By telegram dated August 7, 1972, and subsequent correspondence, you protested the award of a single year contract to Teledyne Brown Engineering (Brown) under multi-year invitation for bids (IFB) DAH01-72-B-0782, on the ground that the U.S. Army Missile Command (MICOM) did not employ the lowest available transportation rate in its evaluation of your bid. It is your contention that computation of the transportation charges utilizing the rates offered by Southwest would demonstrate its bid on the multi-year basis was low. Southwest also protests the issuance of the IFB without consideration of small businesses or minority owned firms. Southwest further alleges that Brown's bid was a "buy-in" in contravention of the Armed Services Procurement Regulation and that Brown conspired to restrict competition by requesting certain subcontractors not to quote rates to any other firm.

For reasons to be stated, we conclude that the contract awarded Brown was not legally objectionable and, consequently, the protest is denied.

The IFB required bids for minimum/maximum quantities of ballistic serial targets (BATS) for the multi-year requirements for fiscal year (FY) 73 through FY-76, as well as for the first program year (FY 73) alone. Prices were also required for various ancillary hardware items, which comprised a minor portion of the overall price and weight of the BATS. The IFB apprised bidders that bids would be evaluated to determine the lowest overall cost to the Government for both the first program year requirement alone and the multi-year requirement, taking into account the transportation costs to the Government from point of origin to Pueblo Army Depot, Colorado, for the minimum quantities stated exclusive of option quantities.

Bidders were required to state the guaranteed maximum shipping weight and dimension and agree to a contract price reduction in the

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event the actual shipping weight exceeded the weight listed in the bid. Bidders were also required to show their f.o.b. point of origin. All shipments were to be transported under a Government Bill of Lading, shipping instructions to be issued after award.

Southwest and Brown were the only bidders. Brown bid \$200 per BAT for the first program year alone and \$218 per BAT for the multi-year requirement. Southwest bid \$231 per BAT for the single year requirement and \$214 on the basis of the multi-year requirement. The Military Traffic Management and Terminal Service, in accordance with ASFR 19-301.2(a), upon request, evaluated the transportation charges as \$13.03/unit for Brown and \$9.26/unit for Southwest. The evaluated unit prices were:

	<u>Southwest</u>	<u>Brown</u>
Single year	\$240.26	\$213.03
Multi-year	223.26	231.03

Including the other items required by the IFB, the total evaluated prices were:

	<u>Southwest</u>	<u>Brown</u>
Single year	\$1,012,280	\$ 887,010
Multi-year	4,631,060	4,727,840

The evaluation followed the method prescribed by ASFR 1-322.3(h) to compare the single year price with the multi-year price to determine the lowest overall per unit cost to the Government as follows:

"To determine the lowest evaluated unit price, compare the lowest evaluated bid or offer in the first program year alternative against the lowest evaluated bid or offer on the multi-year alternative as follows:

- (i) multiply the evaluated unit price for each item of the lowest evaluated bid or offer on the first program year alternative times the total number of units of that item required by the multi-year alternative, and then
- (ii) take the sum of these products for all the items, plus the dollar amount of any administrative costs of the Government which are to be used in the evaluation, and finally

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- (iii) compare this result against the total evaluated price of the lowest bid or offer on the multi-year alternative."

On the foregoing basis, Southwest's multi-year bid of \$4,631,060 was compared to Brown's projected single year bid of \$4,358,210, a total difference of \$272,850.

Southwest has contended that the transportation rates of \$5.39 and \$6.00 a unit quoted to it by the Atchafalpa, Topeka and Santa Fe Railway Company and ICX, respectively, should have been utilized by MICOM in the evaluation of the Southwest bid instead of the \$9.26 rate used. Our Transportation and Claims Division made an evaluation of transportation rates and deems the following rates to be applicable to the procurement:

<u>From</u>	<u>Rail</u>	<u>Motor</u>
Huntsville, Alabama	\$13.314/unit	\$24.375/unit
El Paso, Texas	9.167/unit	15.45/unit

For the minimum 20,000 units for the multi-year requirement, the total evaluated rail transportation charges for Brown would be \$266,280 and \$183,340 for Southwest, or \$82,940 less for Southwest. However, exclusive of transportation costs, Brown's evaluated single year bid was \$280,000 less than the Southwest bid for the total multi-year unit requirement. Therefore, while our analysis has indicated that the transportation rate used by MICOM was \$.284 too low for Brown and \$.093 too high for Southwest, the competitive standing of the two bidders was unaffected. Further, we note that neither of the rates Southwest contends applies to its bid would change the standing of the bidders.

You have alleged that Brown's bid is a "buy in." In that regard, our Office has held that Armed Services Procurement Regulation (ASPR) 1-311 which sets out specific actions to be taken by the contracting officer in the event "buying in" is thought to be occurring or has occurred does not afford a basis for rejection of a bid. B-174184, May 24, 1972.

You have questioned why the IFB was not set aside for small business nor consideration given to the fact that Southwest was a minority owned enterprise. ASPR 1-706.5(a)(1) provides for a small business set-aside--

"* * * if the contracting officer determines that there is reasonable expectation that bids or proposals will be

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obtained from a sufficient number of responsible small business concerns so that awards will be made at reasonable prices. Total set-asides shall not be made unless such a reasonable expectation exists. * * *

In this case, the contracting officer has indicated that small business firms had never produced the BATS and on the previous unrestricted procurement all bidders were large business firms so that it was not anticipated that a sufficient number of small business firms would bid to assure sufficient competition. Since there were only two bidders on the immediate IFB and you were the only one represented to be a small business, the lack of competition among small business sources was as anticipated. Further, the determination of whether a procurement should be set aside is a matter within the ambit of sound administrative discretion and since there is no clear showing of abuse of that discretion here, our Office cannot object to the failure of a procurement to be set aside. 50 Comp. Gen. 383/(1970); 45 Comp. Gen. 228/(1965).

Moreover, the solicitation was unrestricted and you were not entitled to any special consideration by virtue of the fact that you are a minority owned firm or that you employ minority group members.

Finally, you have contended that Brown conspired to restrict competition for the solicitation. In that regard, one of the certifications each bidder makes on Standard Form 33 is that "No attempt has been made or will be made by the offeror to induce any person or firm to submit or not to submit an offer for the purpose of restricting competition." ASPR 1-115(f) provides that when a certification is suspected of being false or there is an indication of collusion, the matter shall be processed in accordance with ASPR 1-111. The latter section provides for the Secretary concerned or his representative to refer to the Attorney General any evidence of a noncompetitive practice. Thus, if you have evidence to support your allegation, it should be furnished to the Department of the Army for possible coordination with the Department of Justice.

Very truly yours,

R.F. KELLER

Comptroller General
of the United States