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

B-177317

DEC 29 1972

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Attention: Matthew S. Perlman, Esq.

Gentlemen:

Further reference is made to your letter dated October 25, 1972, and subsequent correspondence, protesting on behalf of KMS Industries, Inc. (KMS), against award to Programming Methods, Inc. (PMI) under RFP 5-76034/715 (RFP-715) issued by the Goddard Space Flight Center (GSFC), National Aeronautics and Space Administration (NASA).

The above-referenced solicitation was for nonpersonal services, utilizing professional and nonprofessional skills associated with data processing, needed for operation of the National Space Science Data Center (NSSDC). The RFP contemplated award of a cost-plus-award-fee contract for a period of two years, commencing January 1, 1973, with an additional one-year extension available to the Government.

PMI and KMS (the incumbent contractor) were among eight firms which submitted proposals on the closing date of May 1, 1972. The proposals were then evaluated by a Source Evaluation Board (SEB) under criteria established prior to issuance of the RFP. Written and oral discussions were conducted with the six offerors, including PMI and KMS, considered to be within a competitive range. Proposal revisions submitted as a result of these discussions were also evaluated by the SEB.

In its report of August 17, 1972, the SEB concluded that PMI was the best qualified technically and KMS was next best. The scores of PMI and KMS, while substantially higher than the four other offerors in the competitive range, were so close to each

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other that the two firms were considered relatively equal technically. However, KMS's estimated costs and ceiling exceeded those of PMI by a significant amount for the anticipated three-year life of the contract.

On August 22, 1972, the SEB's conclusions were presented to the GSFC Director who, acting as selection official, selected PMI for award since its proposal was superior in all respects and its overall estimated costs were the lowest. The selection was announced on August 24, 1972, and upon its request, KMS was debriefed at GSFC the following day.

It is administratively reported:

> "The GSFC Contracting Officer did not submit a notice of intent to make a service contract, Standard Form 98, to the Department of Labor prior to initiating this procurement since his recent experience in filing notices for procurements at GSFC involving similar job skills led him to conclude that no determination was applicable. In fact, a Category B response, indicating that 'As of this date, no wage determination applicable to the specified locality and classes of service employees has been made,' had been returned two years earlier in response to the prior procurement of the disputed services now being performed by KMS. Further, approximately one year before the present solicitation was issued, the Department of Labor had, by letter dated February 1, 1971 * * *, advised GSFC in connection with another procurement that programmers, writers, clerks, and secretaries '* * * are not service employees.'"

Therefore, the solicitation and submission of proposals, subsequent negotiations, evaluation of proposals, and selection of the intended contractor under RFP -715 were all conducted in the absence of a wage determination by the Department of Labor under the Service Contract Act of 1965, 41 U.S.C. 351-57 (1970). However, on August 25, 1972, the Department of Labor issued Wage Determination No. 72-118, prescribing minimum hourly wages and fringe benefits for certain classes of keypunch operators, secretaries, stenographers, typists and computer operators in a geographic area which includes GSFC.

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On October 25, 1972, you protested to this Office in light of your understanding that the Department of Labor was taking the position that the wage determination must be made applicable to the instant procurement. Under these circumstances, the contract will require the payment of wages different from those upon which the evaluation of proposals was made. Therefore, you assert, NASA should be required to amend RFP -715 to incorporate the wage determination, and the contract should be awarded on the basis of an evaluation of revised proposals received thereunder.

By letter of October 27, 1972, the Department of Labor advised NASA that in the former's opinion the contract contemplated by RFP -715:

> "* * * is one which has as its principal purpose the furnishing of services through the use of service employees, and as such is subject to the Service Contract Act. * * * Wage Determination No. 72-118 * * * would have application to this contract, and should be incorporated therein."

The Solicitor of Labor reiterated that position in a letter to our Office dated November 15, 1972, which concluded:

> "The request of KMS Industries, Inc., that NASA entertain revised proposals on the basis of an amended RFP is a matter within the jurisdiction of the contracting agency and it would be inappropriate for the Department of Labor to offer any comment relative to that request."

In view of the foregoing, and of certain amendments to the Service Contract Act which were enacted subsequent to issuance of the RFP and receipt of proposals, NASA decided not to contest the Department of Labor's assertion that a wage determination could be made mandatory for application so late in the procurement process. Accordingly, NASA waived the provisions of section 12.1005-3(ii) of its Procurement Regulation and agreed to incorporate Wage Determination No. 72-118 in the contract awarded for the instant procurement.

However, it is NASA's position that a recompetition is not required since the original selection rationale (that PMI offers the highest technical qualification at the lowest estimated cost) remains valid after consideration of the higher wage rates required by Wage Determination No. 72-118. This position is based upon the fact that, after the present protest was filed, KMS and PMI provided

separate proposals to provide services pending resolution of the protest. Adjustments were made in each of these proposals for the wages required to be paid under Wage Determination No. 72-118, both as to classified employees and other employees whose wages had to be conformed to those of the classified employees. From the revised wage schedules proposed by KMS and PMI, NASA prepared cost estimates showing the adjustments necessary to incorporate the wage determination into each firm's proposal.

NASA's estimate relating to KMS's proposal was furnished you, and by letter of December 19, 1972, you contended that the estimate was in error. In support of this contention, you attached schedules showing the impact of the wage determination upon both classified employees and non-professional service employees whose wages were conformed to those of the classified employees. Upon examination of your letter of December 19, 1972, and its attachments, NASA agreed its initial estimate was in error and accepted your calculations. NASA then recalculated the effect of the wage determination upon PMI's proposal in precisely the same manner as shown in Attachment A to your letter of December 19, 1972.

NASA's revised cost estimates show that for the three-year period of the contract, KMS's total estimated costs exceed those of PMI by more than $650,000. Overhead and General and Administrative expense (G&A) rates in existence before the adjustments for the wage determination were used in calculating the cost estimates. In this connection, you have stated (exclusive of proprietary information):

> "Under KMS's accounting system, the increase in wages required by the Service Contract Act applicability has the effect of increasing the base against which overhead costs must be spread. This automatically decreases the overhead rate. We have endeavored to calculate this decrease but we have found it impossible to do so because the rates in question, both overhead and G&A, have changed since the proposal was submitted for a variety of reasons which have nothing to do with the applicability of the Service Contract Act. Giving our current overhead and G&A rates applicable to this work would be misleading because we cannot attribute the full drop to the Service Contract Act. It suffices to say that if we submitted our revised

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proposal today, the overhead rate would be * * * lower than the overhead rate set forth in the proposal and the G&A rate would be * * * of that set forth in the proposal."

However, even when the reduced overhead and G&A rates you suggest are applied, KMS's estimated costs still exceed those of PMI.

From our review of the record, we must agree with NASA's conclusion that "the relative cost position of the two firms remains essentially unchanged by the incorporation of Wage Determination 72-118," and that the rationale for the initial selection of PMI therefore remains valid. Accordingly, we do not believe NASA has abused the discretion committed to it in declining to solicit revised proposals, and your protest must be denied.

In reaching this decision we are acutely aware that competition in the selection of a contractor should be based on the circumstances expected to apply in actual performance. We do not generally favor deciding the competition on any other basis. It has been our position that the order of bidders should be based on prices computed using the wage rates which will actually prevail. It is normally not proper to arrive at prices under new wage rates by extrapolating from the prices submitted under the old rates. However, in this case, the general approach cannot be taken because of the enactment of the amendments to the Service Contract Act, the unanticipated change in Department of Labor policy, and the unacceptable delay which would result from a resolicitation and complete reevaluation of offers.

Very truly yours,

PAUL G. DEMBLING

Acting Comptroller General
of the United States