DECISION

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

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FILE: B-181738 DATE: June 5, 1975

MATTER OF: Dynalectron Corporation
Lockheed Electronics Company, Inc.

DIGEST:

1. Objection to RFP evaluation factors made 10 months after receipt of initial proposals is untimely, but where issue is part of request for reconsideration which has become involved in litigation before U.S. District Court, and suspension of litigation proceedings indicates court's interest in receiving GAO decision, untimely issue is addressed on merits along with other issues raised by request.

2. Where reading of evaluation factors statement in NASA RFP gives reasonably clear indication of relative importance of various factors, requirement that offerors be informed of importance of cost in relation to technical and other factors is satisfied. Description of statement of work as "level of effort" did not establish cost as overriding evaluation factor, because offerors were asked to exercise flexibility and discretion in proposing support services of greater scope and complexity than those performed under predecessor contract.

3. Upon further consideration, decision is affirmed that insufficient basis exists to conclude NASA failed to conduct written or oral discussions required by 10 U.S.C. § 2304(g) (1970). Controverted areas of protester's proposals--low level of effort; planned demotions of technicians; and salary reductions of key personnel--were deficiencies, not strengths, ambiguities, or uncertainties, and agency could reasonably judge that deficiencies were not required to be discussed under circumstances present.

4. Where GAO previously judged probable cost evaluation to be doubtful in certain respects, actions taken by NASA source selection official--in considering certain cost data and reaching determination that neither cost reevaluation nor reconsideration of selection decision is warranted--are responsive to intent of GAO recommendation. Under circumstances, additional analysis in area of application of G&A cost rates does not appear to be required.

PUBLISHED DECISION
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5. Withholding from protester of certain procurement information furnished by agency in connection with protest does not establish that protest procedure is unfair. Where protester does not avail itself of disclosure remedy under Freedom of Information Act, but relies instead on information made available through agency's protest reports, and agency indicates withholding of procurement sensitive information is appropriate, withholding by GAO of such information is proper under bid protest procedures.

Dynalectron Corporation, in a letter to our Office dated January 24, 1975, requested reconsideration of our decision in regard to its protest against the selection by the National Aeronautics and Space Administration (NASA) of Lockheed Electronics Company, Inc. (LEC), for final negotiations leading to the proposed award of a contract for site support services under request for proposals (RFP) No. 9-WSRE-3-3-1P (Dynalectron Corporation et al., B-181738, January 15, 1975, 54 Comp. Gen. ____).

The principal contentions presented by Dynalectron in its request are that the RFP should be canceled because it failed to list the relative importance of price vis-a-vis other evaluation factors; that a statement in our decision that Mission Suitability was the most important of the evaluation criteria is erroneous; and that NASA in several respects violated the requirement of 10 U.S.C. § 2304(g) (1970) regarding the conduct of "written or oral discussions."

By letter dated February 11, 1975, to our Office NASA responded to the recommendation which was contained in our decision. The NASA Administrator stated essentially that after full consideration of our decision, the Source Selection Official (SSO) had concluded that neither a reevaluation by the Source Evaluation Board (SEB) nor a reconsideration of the selection was warranted under the circumstances, and that NASA intended to proceed with the contract award to LEC.

On February 12, 1975, Dynalectron instituted Civil Action No. 75-0208 in the United States District Court for the District of Columbia (DYNALECTRON CORPORATION v. THE HONORABLE JAMES C. FLETCHER et al.). The complaint requested, inter alia, a declaratory judgment stating that award to LEC is contrary to law and

regulations; permanent injunctive relief in furtherance of the declaratory judgment; preliminary injunctive relief enjoining defendants from making an award to LEC until our Office rendered a decision on the request for reconsideration; and that the preliminary injunctive relief be continued, in the event of an adverse decision by our Office, until the court has an opportunity to conduct a due process hearing and to render a decision on the merits of plaintiff's request for a declaratory judgment.

The complaint and supporting papers indicate that many of the issues involved in the protest, as well as the points raised in Dynalectron's request for reconsideration and NASA's response to the recommendation contained in our decision, were raised by Dynalectron before the District Court. In short, the propriety of NASA's source selection of LEC was put into issue in the litigation.

Dynalectron's motion for a temporary restraining order was denied by the District Court on February 13, 1975, and recourse by Dynalectron to the United States Court of Appeals for the District of Columbia Circuit in an attempt to overturn the District Court's denial was unsuccessful. On or about February 18, 1975, NASA awarded a contract to LEC for the first year's services. Also, our Office was advised that on or about February 26, 1975, plaintiff and defendants stipulated that all further proceedings in the case would be suspended until our Office rendered a decision on the request for reconsideration, and for a period of 5 days thereafter, to allow defendants an opportunity to file an opposition to plaintiff's motion for a preliminary injunction should it be necessary for defendants to take this action. We understand that the stipulation was signed by the parties and the presiding judge.

Ordinarily, our Office will not render a decision on the merits of a protest where the issues involved are likely to be disposed of in litigation before a court of competent jurisdiction. See Nartron Corp. et al., 53 Comp. Gen. 730 (1974). The same rule applies where the issues in a request for reconsideration before our Office become involved in litigation. See Cincinnati Electronics Corporation et al., B-175633, January 25, 1974. However, this practice is subject to the exception that we will render a decision where the court expresses an interest in receiving our decision. See, for example, 52 Comp. Gen. 706 (1973) and Descomp, Inc., 53 Comp. Gen. 522 (1974).

In the present case, we believe that the above stipulation is to be reasonably regarded as an expression of the court's interest in receiving our decision on the merits of Dynalectron's request for reconsideration. For the reasons which follow, our decision of January 15, 1975, is affirmed upon reconsideration. Also, Dynalectron's protest is now denied.

Dynalectron presents two arguments in regard to the RFP's statement of evaluation factors and criteria. This statement is quoted at pages 7-8 of our decision of January 15, 1975. Dynalectron first contends that because the RFP failed to indicate the relative importance of price vis-a-vis the other evaluation factors, it should have been canceled because the record indicates that such failure resulted in prejudice to the competing offerors, citing Signatron, Inc., B-181782, December 26, 1974, 54 Comp. Gen. ____. This decision has since been affirmed on reconsideration (Signatron, Inc., B-181782, April 2, 1975).

In this regard, our Bid Protest Procedures and Standards require that protests based upon alleged improprieties in solicitations which are apparent prior to the closing date for receipt of proposals shall be filed prior to the closing date for receipt of proposals. 4 C.F.R. § 20.2(a) (1974). Therefore, a protest at this late stage of the procurement against the sufficiency of the RFP's statement of evaluation factors is clearly untimely and not for consideration. See BDM Services Company, B-180245, May 9, 1974. However, since the court may be interested in this matter, it is appropriate under the circumstances to address the issue for the record. See, in this regard, 52 Comp. Gen. 161, 163 (1972).

Dynalectron next contends that statements in our decision that Mission Suitability was the most important of the RFP's evaluation criteria are erroneous, because the RFP made no specific reference to the relative importance of the various factors. That issue will also be addressed.

The protester has cited the Signatron decision for the following general principle which has been recognized in a number of decisions of our Office:

> "* * * [I]ntelligent competition requires, as a matter of sound procurement policy, that offerors be advised of the evaluation factors to be used and the relative importance of those factors. We believe that each offeror has a right to know whether the procurement is intended to achieve a minimum standard at the

> lowest cost or whether cost is secondary to quality. Competition is not served if offerors are not given any idea of the relative values of technical excellence and price. See Matter of AEL Service Corporation et al. * * * [53 Comp. Gen. 800 (1974)]; 52 Comp. Gen. 161 (1972)."

Signatron involved a situation where the RFP specified "Approx. 75%" for "Technical Considerations" and "Approx. 25%" for "Management Capability"; it was separately stated that "price and other factors" would be considered. Thus, although the RFP mentioned price as a factor, no indication of its relative importance was given. Our decision found that this and other deficiencies in the RFP were material deviations from the statutory and regulatory negotiation requirements such as to require the reopening of negotiations. See, also TGI Construction Corporation et al., B-181287, March 20, 1975, 54 Comp. Gen. ____, where we found the RFP to be defective because it listed five evaluation factors (four technical factors and cost) in a single sentence without giving any indication of their relative order of importance.

In contrast, we believe the RFP in the present case provided several indications of the relative importance of cost:

--The initial sentence in the RFP's evaluation statement--which states that the SEB is interested in the quality of service and the probable cost--would indicate that these were the two most important factors, with quality of service, or Mission Suitability, being the foremost consideration.

--The first sentence in the numbered paragraph 2--referring to the "major criteria" identified above (in the discussion of Mission Suitability)--is a further indication that Mission Suitability was to be considered most important.

--The subsequent statement that offerors should not minimize the importance of responding in regard to factors which were not numerically weighted (Cost and Other Factors) would indicate that it was believed to be desirable to caution offerors against placing overwhelming importance on Mission Suitability considerations to the exclusion of Cost and Other Factors, which, although of lesser importance, were nevertheless to be accorded some importance in evaluating the proposals and reaching a source selection decision.

--The grammatical structure of the RFP's statement of evaluation factors and criteria as a whole, that is, a heading entitled "B. Evaluation Criteria and Relative Importance:," followed by numbered paragraphs "1. Mission Suitability:," "2. Cost:" and "3. Other Factors:" would further tend to indicate that Mission Suitability was most important, followed in descending order of importance by Cost and Other Factors.

We would also note that the RFP advised offerors that award of a cost-plus-award-fee contract was contemplated. In this regard, NASA Procurement Regulation 18-3.805-2 (41 C.F.R. § 18-3.805-2 (1974)) provides, inter alia, that where a cost-reimbursment type contract is involved, estimated costs and proposed fees should not be considered as controlling in selecting a source, and that the primary consideration is which contractor can perform the contract in a manner most advantageous to the Government. The RFP also advised offerors that their proposed costs would be analyzed and presented to the SSO for his consideration. We believe that consideration of these facts would give offerors further insight into the relationship between proposed costs and probable costs (estimated price) and their relationship to the other evaluation factors in a procurement of this type.

In view of these considerations, we believe the RFP gave a reasonably clear indication of the relative importance of the various factors. This is not to say, of course, that the RFP statement represented an ideal exposition of the evaluation factors, but merely that, in our opinion, it met a minimum standard of legal sufficiency.

We note that Dynalectron has additionally contended that since, as recognized by our prior decision, the RFP specified a "level of effort" based upon NASA's minimum needs and contained a detailed description of the technical requirements involved in fulfilling those needs, the overriding factor for evaluation and source selection should have been cost.

It is correct that both NASA's source selection statement and our decision described the RFP as specifying a "level of effort." However, it is also clear that the level of effort was not specified in complete and exact detail. Labor categories and their estimated hours were set forth in the RFP, but labor skill mixes and the quantum of management requirements were not. Dynalectron's protest itself, of course, repeatedly emphasized these points and the fact that the RFP explicitly accorded to offerors flexibility

and discretion in preparing their proposals. Our prior decision also recognized these facts. Also to be noted is NASA's view that the work called for in the RFP was to be of greater scope and complexity than the work performed in the past. See, in this regard, the discussion of this point in our prior decision and the discussion infra.

In this light, we cannot agree that the work called for in the RFP had the effect of establishing cost as the most important evaluation factor. In addition, since the SSO, based upon the results of the evaluation, found "significant" Mission Suitability differentials among the competing offerors, it is not apparent why he should have turned to the cost factor as the overriding basis for a selection decision.

In the request for reconsideration, Dynalectron next contends that NASA failed to meet the requirement for conducting "written or oral discussions" (10 U.S.C. § 2304(g) (1970)). The protester's position can be summarized as follows: Dynalectron contends that it reasonably interpreted the RFP as being directed more towards the cost of continuing the level of past performance than to what it terms "increased and unnecessary technical excellence." Thus, in Dynalectron's view, the technical deficiencies found by NASA were not actually deficiencies, but strengths, since Dynalectron's proposed low level of effort was what the RFP called for. At the very least, viewing the issue most favorably to NASA, the alleged "deficiencies" should have been regarded as ambiguities or uncertainties which NASA should have clarified in the discussions. In this regard, Dynalectron contends that our decision erroneously stated that the protester admitted that certain controverted aspects of its technical proposals were "weaknesses," which should have been discussed so that the proposals could have been revised to accommodate NASA's desires.

Dynalectron further points out that it had no knowledge of the guidelines used by the SEB in the technical evaluation. Dynalectron believes that the application of these guidelines created certain ambiguities in the evaluation process, because the SEB erroneously determined that Dynalectron technicians would be demoted. The protester contends that NASA had a full opportunity to correct these mistakes through discussions with it. However, NASA did not discuss these matters, but mistakenly concluded (1) that the skills mix and management effort proposed by Dynalectron were per se too low; and (2) that there was doubt that Dynalectron could furnish even the low level of effort proposed, because of demotions of technicians and salary reductions of key personnel.

Dynalectron implies that, if NASA had discussed these matters, the agency first of all would have realized that Dynalectron's interpretation of the RFP was correct and, therefore, that the low level of effort proposed was actually an appropriate and desirable response to the RFP. In any event, NASA would, at a minimum, have understood that there was no deficiency in Dynalectron's low level of effort per se, because there were in fact no planned demotions or salary reductions.

Before addressing the question of discussions, we must first note that the above contentions were advanced by Dynalectron in its protest, were considered, and were rejected. Our earlier decision found, for instance, that the protester had not shown that NASA's interpretation of the RFP as calling for a work effort of increased scope and complexity was incorrect. Likewise, we rejected the protester's arguments concerning the unreasonableness of the SEB's evaluation of the proposed demotions and salary reductions in the Dynalectron offers. Our earlier decision also noted that while all of the contentions presented had been considered, the decision nevertheless focused upon those central issues which were believed to be dispositive of the protest. In this light, we see no difficulty with Dynalectron's contention that our decision incorrectly stated that the protester had admitted weaknesses in its proposals which could have been corrected as a result of discussions so as to accommodate NASA's desires. In reaching our prior decision, we considered the protester's arguments that its low level of effort was a "strength" or an "ambiguity." Our conclusion then, as now, was that we could not object to NASA's determination that the controverted aspects of the proposals were actually weaknesses or deficiencies. See the discussion infra We would also note that Dynalectron's submissions to our Office at several points indicated its willingness to revise its proposals to accommodate NASA's desires if given the opportunity to do so (for example, pages 25 and 36 of Dynalectron's September 30, 1974, letter to our Office).

Moving to the question of discussions, our earlier decision found an insufficient basis to conclude that where there was any departure by NASA from the statutory requirement for written or oral discussions.

In regard to Dynalectron's argument that its proposed low level of effort was actually a "strength," and that NASA should have conducted discussions so as to correct its own misunderstandings,

we would again note that Dynalectron has not shown that NASA's view of the RFP as calling for a work effort of increased scope and complexity is incorrect. In this light, we see no basis to conclude that NASA should have regarded Dynalectron's proposed low level of effort as a strength.

In addition, we see no reason why a proposed low level of effort per se should have been regarded as ambiguous or uncertain. It is true that, in certain circumstances, discussions would be required where the proposals indicate that one or more offerors have reasonably placed emphasis on some aspect of the procurement different from that intended by the solicitation--because, unless this difference in meaning was removed, the offerors would not be competing on the same basis. See 51 Comp. Gen. 621, 622-623 (1970) and NASA Procurement Regulation Directive (PRD) No. 70-15 (revised), September 15, 1972, section III.e(2)(ii). In the present case, we note that Dynalectron was the incumbent contractor. As such, we believe it could reasonably be regarded as having some understanding of the peculiarities and nuances involved in the performance of site support services at White Sands Test Facility. In fact, it may be that, of all the offerors, Dynalectron was in the best position to understand what the RFP called for. In these circumstances, we cannot say that NASA erred in failing to regard Dynalectron's reading of the RFP, as evidenced by its proposals, as being a reasonable misunderstanding of what the solicitation requested. Likewise, we cannot say the agency should have regarded the proposed low level of effort submitted by an experienced contractor as being ambiguous or uncertain. We believe that under these circumstances the proposed low level of effort could reasonably be regarded as a weakness resulting from the offeror's lack of diligence, competence, or inventiveness in preparing its proposal. See 51 Comp. Gen., supra, at 622; NASA PRD No. 70-15, September 15, 1972, section III.e(2). Under these circumstances, we cannot say that NASA failed to conduct required discussions.

In regard to the technician demotions, Dynalectron's request states:

> "* * * NASA made no effort to inquire of Dynalectron as to how it intended to provide its technician work force. Thus, Dynalectron was not afforded an opportunity to explain that it did not intend to demote any technicians on the job and that the new skills mix configuration would be

obtained through (1) normal attrition, (2) transfers of people between the WSTF work force and other Dynalectron work forces in the same area, and (3) upgrading skills of lower level technicians. Dynalectron could not have anticipated in its original proposal that it would have had to give such explanations, since it could not be aware of NASA's concern about the skills mixes as reflected in its 'Nominal guidelines.' * * *"

Initially, this does not appear to be a situation where discussions might be required because a proposal was deemed weak for failing to include substantiation for a proposed approach. 51 Comp. Gen., _supra_, at page 623. Dynalectron's proposals contained information concerning its technician manning and staffing and, based upon the information, the NASA evaluation judged Dynalectron's proposals to be deficient in this respect. Our earlier decision found that both the application of the technical guidelines and the resulting evaluation had not been shown to be objectionable. An additional consideration is that to discuss such a deficiency raises the possibility of unfairness to other offerors resulting from discussions--because Dynalectron would have been given the opportunity to improve its proposals in this area. Thus, discussions might have promoted a leveling effect among Dynalectron and other offerors whose proposals were stronger in this area. This justification for foregoing discussions would be more persuasive if there were a risk of transfusion of novel approaches between proposals, which does not appear to be involved here. In sum, while we do not necessarily believe that discussions of this point would have been undesirable or unwise from a standpoint of sound negotiation practices, at the same time we do not believe a sufficient basis exists to conclude that NASA's declining to hold discussions was legally objectionable.

Concerning the proposed salary reductions, Dynalectron's request states:

"The error that NASA made and the error that has been adopted by the GAO is in looking only to the Best and Final Cost Proposal to determine Dynalectron's intention. The salaries were also stated for Key Personnel in the Technical Proposal and those did not change at all in the 'Best and Final Offer.' A review of the two proposals must at least result

in an inconsistency which would have to be resolved by a request for clarification. * * *"

In this regard, we note the following facts with reference to Dynalectron's Alternate Proposal No. 2 (the same observations apply with reference to Dynalectron's basic and Alternate No. 1 proposals). The initial technical proposal, dated March 1974, included Key Personnel Resumés containing descriptions of the individuals' education, experience, etc. These resumés also contained blanks for "Proposed Annual Salary," which were filled in with lump-sum dollar amounts. Also, the initial cost proposal, dated March 1974, contained cost information on Key Personnel consisting, inter alia, of the total number of work hours per person; salary rates per hour; and total base labor costs per person.

The best and final technical proposal, dated May 20, 1974, included material on Key Personnel, described as an "addendum," which contained information concerning the identity and background of various personnel. The best and final technical proposal, as Dynalectron observes, does not contain information regarding proposed salaries. The best and final cost proposal, dated May 20, 1974, indicated the total work hours per person, which were unchanged from those indicated in the initial cost proposal. Also, as found by NASA, there were certain reductions in salary rates. In addition, the "INTRODUCTION" to the best and final cost proposal contains the following statement: "The cost proposal portion of this volume is complete and cross-reference to our Alternate proposal No. 2 dated March 1974 is not necessary."

In view of the foregoing, we believe the SEB could reasonably look to the salary information in the best and final cost proposal as superseding the initial proposal's salary information and as being the final indication of the protester's intent in regard to proposed salaries. Therefore, we cannot conclude that there was an inconsistency between the technical and best and final cost proposals which should properly have been viewed as requiring clarification through discussions.

Dynalectron has further contended that the question of whether its proposed G&A costs are absolute dollar amounts or ceiling rates could have been resolved by a simple inquiry in the discussions. In this regard, our decision treated the issue of the nature of the G&A ceiling and concluded that the ceiling as requested and proposed is a percentage rate and not an absolute dollar amount. Dynalectron had not contested this conclusion. Therefore, we see

no basis to consider further the nature of the G&A ceiling as it relates to the requirement to conduct discussions.

Dynalectron further contends that the application of the G&A percentage rates to probable costs in the SEB's cost evaluation should have been discussed with the offerors. Dynalectron contends that when an offeror's direct costs are adjusted upwards in the probable cost evaluation, the G&A percentage rate applied to such costs should decrease, citing Lockheed Propulsion Company et al., 53 Comp. Gen. 977 (1974). Dynalectron points out that in the Lockheed Propulsion Company case, both offerors' costs had been increased in the probable cost evaluation, and our Office found that the procedure employed by the SEB in applying G&A rates thus was consistently applied to all offerors. The protester points out that in the present case, NASA's application of the ceiling percentage rates to probable costs operated solely to its detriment, since its probable costs had been increased in the evaluation, while LEC's had been decreased. Dynalectron contends that the G&A rates applied to its probable costs should have been lower, and that the rates applied to LEC's probable costs should have been higher.

Further, the protester contends that once the SEB had determined to adjust the offerors' probable costs, it was then obligated to inquire of the offerors whether the adjustments had any impact on the G&A "amounts or rates" proposed, so that the matter could have been clarified at that time and resolved in a fair and equitable manner.

We do not believe this issue involves the requirement to conduct discussions. As to the nature of the G&A ceiling requested and proposed, see the discussion of this point in our prior decision, and supra. Rather, the issue raised relates to the propriety of the probable cost evaluation itself as regards this aspect of the proposals.

In this connection, we would note that our earlier decision made the following recommendation to NASA:

> "* * * The only question for consideration is what recommendation, if any, is mandated by our doubts concerning certain aspects of the probable cost evaluation. (See pp. 19-21.) In this regard, we note that although a cost reevaluation might reveal an increase

in the probable cost differential between Dynalectron and LEC, this development would not necessarily have a decisive effect on the selection decision, since a wider differential might not exceed the range of uncertainty which exists in estimating for cost-type contracts over a period of years.

"Accordingly, we recommend that the SSO determine, in light of the views expressed in this decision, whether a reevaluation of costs is called for under the circumstances, or whether our doubts relating to the evaluation of the criterion which was second in importance are not, in the SSO's judgment, of sufficiently serious impact to affect the validity of his selection decision. In the event the SSO determines that a cost reevaluation is called for, we recommend that he then determine whether the results of the reevaluation mandate a reconsideration of his selection decision."

An addendum to the Source Selection Statement, dated February 11, 1975, describes the actions taken in response to our recommendation:

"We decided to explore whether the probable magnitude of additional cost differences between proposals based on nonnormalized staffing plans could be assessed on the basis of data previously developed by the SEB in its evaluation. Such data were available, and calculations based thereon were submitted to us by the Chairman of the SEB. In the light of these data we found it unnecessary for present purposes to consider further whether or not the methodology employed by the SEB in evaluating the probable cost to the Government of direct labor was doubtful in this procurement.

"The calculations presented to us did not use a normalized probable cost for direct labor. Instead, individualized direct labor probable costs were estimated based upon adjusted individual direct labor staffing proposals. The latter probable costs were substituted for the previously SEB normalized costs for direct labor, and the remainder of the costs were calculated on the basis of the same rationale as the SEB used in its original evaluation.

"In arriving at the individualized adjusted direct labor probable costs, neither the direct labor plans proposed by the firms nor the SEB direct labor guidelines were employed. Rather, the individualized staffing plans were arrived at by utilizing the original SEB approach to establishing the Mission Suitability scores. This approach set up a range of acceptability, from 20 percent below the numbers in the various labor categories in the Government's estimated staffing plan to 20 percent above. Where a proposed labor category fell within the range, no penalty in Mission Suitability score was assessed whereas a penalty was assessed for proposing staffing outside of the range.

"Following this rationale, it was feasible to construct individualized direct labor staffing plans for both Lockheed and Dynalectron by accepting the staffing where the actual numbers of people proposed in a skill category fell within the range, but adjusting the staffing for skill numbers outside the range up or down to the outer perimeter of the range. This adjustment process resulted in an upgrading of the Dynalectron work force, although not as much as would be the case if adjusted to the Government guideline. The Lockheed adjustments under this approach were not as sizable, since the Lockheed staffing either fell within the range or was closer to the outer perimeter of the range than was Dynalectron.

"We recognized that the staffing calculated through this approach would not necessarily represent a work force for any of the firms which the SEB would find totally acceptable. Nevertheless, we agreed that this calculation of individualized direct labor staffing for the firms formed an acceptable basis upon which to calculate individualized probable direct labor costs for analysis purposes. It would represent the most favorable costing of direct labor for Dynalectron. Adjustment to a labor force acceptable to the SEB would be less favorable to Dynalectron.

"When the appropriate cost factors were applied to the calculated staffing, a total probable proposal cost was derived which could be compared with the previous SEB total probable costs which had been premised upon a normalized probable cost for direct labor. The comparison indicated that the spread between Lockheed and Dynalectron total probable costs would be increased

less one percent over the first two years, and thus the total difference between the two, considering the total dollar value of the procurement, was not materially increased. Furthermore, we noted that the increased difference between the total probable costs would be less if the direct labor staffing were to be adjusted closer to a totally acceptable staffing plan instead of to the outer perimeter of the range of acceptability for the competitive range evaluation under Mission Suitability. In light of the foregoing analysis, it did not appear reasonable to reconvene the SEB to determine totally acceptable direct labor staffing plans, because the adjustments to the outer perimeter of acceptability did not materially alter the total probable cost differences.

"We concluded from the foregoing examination, analysis and calculations that the doubts expressed by the Comptroller General regarding the methodology used by the Source Evaluation Board do not, under the circumstances, have a sufficiently serious impact to affect the validity of the source selection decision. Taking into account the high level of the technical and managerial services required and the range of uncertainty which exists in estimating for multiyear cost reimbursement type contracts, it was our judgment that the significant technical advantage of Lockheed still outweighed the slight possible cost advantage of Dynalectron. In view of this judgment, we determined that neither a cost reevaluation by the SEB nor a reconsideration of the selection decision was required under the circumstances."

We view the actions taken as being responsive to the intent of our recommendation. As regards Dynalectron's argument concerning G&A adjustments, the basic concept cited is, as noted in the Lockheed Propulsion Company decision, supported by accounting principles. However, in view of the relatively small portion of overall costs comprised by G&A, and after review of the data submitted by NASA, we cannot say that further analysis or adjustment in this area must be regarded as requisite to a minimally adequate evaluation. Therefore, on the present record we do not have any further recommendations to make in regard to the probable cost evaluation or the source selection decision.

Several additional points presented by the protester must be considered.

Concerning the manning and staffing areas, Dynalectron has again contended that the DCAA auditor who analyzed Dynalectron's basic best and final cost proposal correctly understood the proposal and clearly recognized that no reductions in salaries were proposed. Dynalectron suggests that the auditor be contacted so as to ascertain his understanding of this matter.

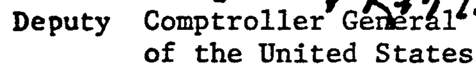
This contention was considered and rejected in our decision, and Dynalectron has presented no evidence indicating why our disposition of this question was incorrect. Accordingly, we see no basis to reconsider our initial decision on this issue.

Dynalectron also contends that the withholding from it by NASA of a "substantial amount of the procurement information" (see page 5 of our January 15, 1975, decision) raises a substantial question of due process in the protest procedure, in that a protester is charged with a heavy burden of proof but is not afforded any means by which to obtain information necessary to carry that burden.

We do not agree that Dynalectron was without the means to obtain information which it believed to be necessary to present its case. The fact that information was withheld by NASA does not mean it was necessarily unobtainable by the protester. Dynalectron could have attempted to obtain NASA procurement documents by pursuing a disclosure request under the Freedom of Information Act, 5 U.S.C. § 552 (1970). To our knowledge, the protester did not avail itself of this alternative, but instead relied on the information which became available in NASA's reports on the protest furnished to our Office. Where a protester has not sought disclosure of records from the agency, and the contracting agency has indicated to our Office its belief that withholding of certain information is appropriate, withholding of that information by our Office under our Bid Protest Procedures and Standards is proper. See Unicare Health Services, Inc., B-180262, B-180305, April 5, 1974.

Lastly, the correction of a typographical mistake in our decision of January 15, 1975, should also be noted for the record. The second sentence in the last paragraph on page 6 should have read as follows: "Offerors were requested to provide complete and detailed information on all evaluation factors

for the first two contract years. For the third, fourth and fifth years, offerors were requested to submit detailed staffing and manning information and summary cost information."



Deputy Comptroller General
of the United States