DIGEST — L-Cont

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

B-173638

OCT 26 1971

AIR MAIL

Mr. Eugene A. Wille
"function (Hawaii)"
P. O. Box 3565
Honolulu, Hawaii 96811

Dear Mr. Wille:

Reference is made to your letter of July 16, 1971, to the Commanding General, U. S. Army Electronics Command, protesting the award of a contract to Federal Electric Corporation (FEC) under Request for Quotation DAAB07-71-Q-0429. Copies of this protest were referred to this Office on July 21, and in view of such referral we have been advised that the Army does not intend to reply to your protest.

Your basis of protest is that FEC's quotation is so unrealistically low that it will be impossible for FEC to perform at the price quoted, and that acceptance of its quotation violates the Government's policy of avoiding quotations which are so low as to indicate the offeror is "buying" the contract. You also allege that the Government's price analysis may have been inadequate, and you request reevaluation of the pricing aspects of the FEC proposal, together with a copy of the FEC costing package to enable you to point out areas of unrealistic, erroneous and/or omitted costs. Finally, you advise that notice of award was not sent to you on a timely basis.

Request for Quotation DAAB07-71-Q-0429 solicited 21 firms to quote on services and materials to operate and maintain a broadcast station in the Republic of Vietnam for 12 months (FY-72) with an option for 12 additional months (FY-73). The two parts of the statement of work listed periods of operation, minimum manning requirements, maintenance and overhaul schedules, construction of some new facilities, acquisition of equipment, reports and data preparation. Three firms submitted proposals on May 18, 1971. All proposals were technically acceptable, and the prices proposed before negotiation were:

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	FY-72	FY-73 (option)
Page Communication's Eng., Inc.	$385,089	$181,390
"function (Hawaii)"	$400,526	$264,456
FEC, ITT Service	$348,658	$186,590

Negotiations were conducted with you on June 14, FEC on June 15 and with Page on the 16th. Each firm was requested to submit its final and best price by June 21, 1971, with these results:

	FY-72	FY-73 (option)
FEC-ITT	$257,588	$137,855
"function (Hawaii)"	$386,251	$232,397
Page	$369,273	$180,417

Since FEC offered the most favorable price for both the initial year and the option year, the record indicates that its labor hours, skill classifications and labor rates were carefully examined and compared with the other offerings. The other proposed costs for construction, spare parts, tools, and other requirements were also examined and found to be reasonable and to meet the contract requirements. This analysis confirmed that FEC's quotation provided for adequate and reasonable contract performance. Therefore, a contract was awarded to FEC on June 30, 1971. The record indicates that notice to the unsuccessful offerors was sent out under date of July 1, 1971, and it would appear that such notice meets the minimum information prescribed by the Armed Services Procurement Regulation, specifically ASPR 3-508.3(a) which reads:

> "Post-Award Notice of Offerors.
>
> (a) Promptly after making all awards in any procurement in excess of $10,000, the contracting officer shall give written notice to the unsuccessful offerors that their proposals were not accepted, except that such notice need not be given where notice has been provided pursuant to 3-508.2(a). Such notice shall include:

(i) the number of prospective contractors solicited;

(ii) the number of proposals received;

(iii) the name and address of each offeror receiving an award;

(iv) the items, quantities, and unit prices of each award; provided that, where the number of items or other factors makes the listing of unit prices impracticable, only the total contract price need be furnished; and

(v) in general terms, the reasons why the offeror's proposal was not accepted, except where the price information in (iv) above readily reveals such reason, but in no event will an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.

Additional information as to why an offeror's proposal was not accepted should be provided to the offeror upon his request to the contracting officer, subject to the limitation in (v) above."

With respect to your first point of protest, to the effect that FEC's offer was so unrealistically low as to be impossible of performance, the record discloses that a comprehensive cost analysis was forwarded by the Contract Price Analyst to the contracting officer on June 22, 1971. Included was a summary of negotiations from a cost standpoint and a more detailed item by item analysis of the proposed and negotiated figures of the FEC proposal, which in total price was the most favorable of the three, both as originally proposed and as finally negotiated. Also, as negotiated, FEC was the low bidder by a substantial margin on both the basic period (FY 72) and for the option year (FY 73). In addition to total prices, an analysis was made of the direct labor costs by job title, hours to be utilized, and wage rates employed in the cost package. All were found to be realistic and adequate for the work described in the RFQ. In a similar manner overhead rates, material costs, subcontracting, travel and subsistence, and other costs were found valid. In view of the foregoing, it would appear that the FEC quote was sufficiently validated, and we are unable to agree with your allegation that the offer was unrealistically low.

Concerning your allegation that FEC might be "buying" the contract on a loss or no profit basis, we believe the cost analysis discussed above tends to minimize this possibility. Additionally, while the Government does not favor the practice of "buying in," it is not illegal, and the option for fiscal year 1973, which may be exercised solely at the Government's discretion, establishes a future fixed price for services which further reduces the contractor's opportunity to make up any deficit through subsequent over pricing. Such an option is one of the precautionary techniques suggested in ASPR 1-311/to protect the Government against "buying in" tactics. That regulation defines and discusses "buying in" as follows:

> "(a) 'Buying in' refers to the practice of attempting to obtain a contract award by knowingly offering a price or cost estimate less than anticipated costs with the expectation of either (i) increasing the contract price or estimated cost during the period of performance through change orders or other means, or (ii) receiving future 'follow-on' contracts at prices high enough to recover any losses on the original 'buy-in' contract. Such a practice is not favored by the Department of Defense since its long-term effects may diminish competition and it may result in poor contract performance. Where there is reason to believe that 'buying in' has occurred, contracting officers shall assure that amounts thereby excluded in the development of the original contract price are not recovered in the pricing of change orders or follow-on procurements subject to cost analysis.

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"(b) To avoid or minimize the opportunity for 'buying in' on a procurement which is likely to be succeeded by one or more 'follow on' procurements, the Government should obtain from the contractor a binding price commitment covering as much of the entire program concerned as is practicable. Such a commitment may be secured through employment of one of the following procurement techniques:

(1) multi-year procurement, with a provision in the solicitation that a price may be submitted only for the total multi-year quantity (see 1-322.2); or

(2) priced options for additional quantities which, together with the quantities being firmly contracted for, equal the anticipated total program requirements (see 1-1504).

"(c) In addition to the use of the techniques noted in (b) above, it is important that other safeguards be provided against the contractor's recovering, through subsequent over-pricing, from any initial loss situation due to 'buying in.' For example, see 3-813 with respect to the amortization of non-recurring costs, and 3-801.2(c) concerning price quotations which the contracting officer considers unreasonable."

With regard to the application of this regulation, we have consistently held that it does not afford a basis for rejection of a bid, since there is no specific provision therefor in the regulation and there are specific precautionary actions set forth to guide the contracting officer when 'buying in' is suspected, or is a possibility. See B-171609, May 12, 1971; 50 Comp. Gen. 50 (1970) and cases cited therein.

Your concern about the adequacy of the Government's price analysis was discussed above. While your recollection of a telephone conversation with the Government price analyst is to the effect that procurement personnel were surprised at FEC's low price, but had no basis to challenge or verify FEC's costing package, we can only conclude that you misunderstood the meaning of his comments, since the record indicates that a thorough and complete price analysis was made before the contract was awarded.

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Regarding the timeliness of the notice to you of the award to FEC, the above summary of facts indicates the action taken was timely and met the requirements of ASPR 3-508.3(a) and the 14 day period before your receipt would appear to be attributable to the distance involved. It does seem that some more rapid means of communications could have been employed and also that more complete information about the award and the position of the other competitors would have allayed your concern. This, however, is not a factor that could affect the legality of award. 48 Comp. Gen. 357, 361 (1968).

Concerning your request for a copy of FEC's costing package, it is the Department's position that this is confidential and proprietary information which may not be disclosed without the consent of FEC. In view of the provisions of ASPR 3-508.3(a)(v) quoted above, we see no basis for disagreement with the Department on this point.

Accordingly, your protest must be denied.

Very truly yours,

R.F.KELLER

Deputy Comptroller General
of the United States