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

40189

November 14, 1973

Cosmos Industries, Incorporated
c/o Sullivan, Beaugregard, Meyers & Clarkson
804 Ring Building
1200 Eighteenth Street, NW.
Washington, D.C. 20036

Attention: Henry G. Beaugregard, Esquire

Gentlemen:

In the letter of September 18, 1973, and prior correspondence, you have protested against the rejection of your proposal under request for proposals (RFP) No. N00039-73-R-C267(Q), issued on January 17, 1973, by the Naval Electronic Systems Command (NAVELEX), Department of the Navy, for a quantity of VHF-FM (55 channel) transceivers. For the reasons set forth below your protest is denied.

As background, contract No. N00039-69-C-1504 for production of a quantity of AN/ERC-34 units, a type of maritime telephonic equipment, was awarded to your firm on July 15, 1968. The Navy advises that the AN/ERC-34 was intended to meet the requirements of the International Telecommunications Union, which allocates communication frequencies and prescribes uses thereof. Subsequent to the award of the contract for the AN/ERC-34 to your firm, Congress enacted Public Law 92-63, August 4, 1971, which requires certain categories of motor vessels operating on navigable waterways of the United States to have a radiotelephone capability on the navigational bridge and also requires a listening watch. NAVELEX reviewed the AN/ERC-34 capabilities and determined that this equipment would meet the requirements of the statute. However, your contract with Navy for the AN/ERC-34 was terminated for default on August 11, 1972. Thereafter, the Navy felt that it was no longer feasible to use the AN/ERC-34 as the means of meeting the requirements of Public Law 92-63, since it was special equipment requiring extensive lead time for design and production.

[Protest of Proposal Rejection]

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The Navy therefore made a survey of available commercial equipment, which indicated that such equipment might meet the essential requirements of Public Law 92-63.

As a result of these considerations NAVELEX issued the subject RFP, which it felt was the most feasible and rapid means of complying with the statute and thereby minimizing the risk of collision. The negotiation authority used was 10 U.S.C. 2304 (a)(2), which provides for an exception to the advertising requirements on the basis of urgency. The solicitation called for 300 transceivers for fiscal year 1973 under alternate A, and for 528 transceivers for fiscal years 1973 and 1974, on a multi-year basis, under alternate B. The RFP also provided that a sample of the equipment offered must be submitted to Navy for evaluation within 45 days after issuance of the solicitation. NAVELEX has advised that this sample requirement was included to assure that the equipment would meet its particular needs. In addition, offerors were advised to submit descriptive literature and documentation to substantiate that the equipment offered met or exceeded the minimum requirements of the specification. In the event that existing data was not available, offerors were required to describe in detail how the equipment offered would meet the requirements of the specification. Offerors were also advised that proposals must address the areas of reliability, maintainability, quality assurance, and electrical and environmental performance levels. Each of these areas was briefly described. In addition, offerors were instructed that proposals were to include: (1) any proposed modifications with an analysis of the effect of such modification on the performance of the equipment and required Federal Communications Commission (FCC) approval; (2) an explanation of any deviations from the requirements of the specification and solicitation; (3) identification of areas wherein performance of the equipment offered exceeded minimum specified levels, with substantiating data; and (4) any factors considered during design of the equipment offered which would provide assurance that the provisions of the specification and solicitation would be met. Offerors were advised that proposals would be evaluated for conformance with requirements of the specification and solicitation and for levels of performance that were higher than the minimums in the following areas, which were listed in the order of importance:

- (1) MTBF Hours (predicted)
- (2) Vibration and shock
- (3) Spurious emissions
- (4) Selectivity and Receiver
Spurious response
- (5) Maintainability

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The RFP then provided details with respect to the minimum specification level, an intermediate improvement level, and the highest improvement level for each of the above factors.

Six proposals were received on February 26, 1973, the closing date for receipt of proposals. These proposals were evaluated by the Navy and only the proposal from Canadian Commercial Corporation was considered acceptable. While you protested the rejection of your proposal to our Office prior to award, Navy determined that the equipment was urgently required and an award was made to Canadian Commercial on June 20, 1973.

The first aspect of your protest concerns certain alleged improprieties in the solicitation. You contend that the specifications set forth in the RFP are a degradation of the specifications in your original contract for the AN/SRC-34, and that the commercial equipment offered in response to the specifications in the solicitations does not meet the Navy's requirements. You have urged that the specifications were written around the equipment of a particular manufacturer. You have asserted that the channel 88 receive frequency requirement is a violation of the "laws of this country". In addition, you have referred to paragraph C.7 of Department of Defense (DOD) Directive 5000.1, dated July 13, 1971, and contend that this procurement involves a non-beneficial "change" to an already developed system and is therefore contrary to the cited Directive.

The alleged improprieties in the specification in the subject RFP should have been apparent to you prior to the closing date for receipt of proposals. However, you did not protest to our Office until two months after the closing date for receipt of proposals, at which time Navy had substantially completed its evaluation of the proposals. Section 20.2(a) of our Interim Bid Protest Procedures and Standards, 4 CFR 20.2(a), states in pertinent part:

"* * * Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of proposals. * * *"

It is our view that your protest against the alleged improprieties in the solicitation is untimely and therefore is not for consideration at this time. B-177654, May 4, 1973; B-177592, June 19, 1973,

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and B-178168, June 21, 1973. In any event, with respect to your contention that the channel 88 frequency requirement violates certain laws, the FCC would be the proper forum to consider that contention.

The second aspect of your protest concerns the rejection of your proposal as unacceptable. In this regard, the contracting officer determined on the basis of a technical evaluation that your proposal was materially deficient with respect to certain information which was required by the RFP and deficient because the equipment sample submitted with your proposal failed the testing requirements. Therefore, it was determined that your proposal was not within a competitive range for further consideration and discussion. The deficiencies set forth in the Navy's report encompassed the following:

"(1) the reliability prediction data, (2) maintainability prediction data, or (3) quality assurance information required by subparagraphs 1(c)(1), (2) and (3) respectively of paragraph 13 was not provided. Cosmos also failed to provide information relative to Voltage Standing Wave Ratio (VSWR), equipment temperature degradation limits, or as to whether the equipment would meet the modulation acceptance bandwidth of $\pm 10\%$ as required by subparagraph 1(c)(4). Further, contrary to the requirements of subparagraph 1(d), Cosmos did not state how the equipment proposed would be modified to meet channel 13 RF power output requirements and additionally Cosmos proceeded to propose the wrong modification concerning the 'channel 88' receive requirement by describing how their equipment would be altered to provide a transmit only capability instead."

In response, you assert that you were offering an AN/SRC-34 as previously approved under your defaulted contract; that your proposal referred to your "original" technical proposal and data contained therein; that your proposal "tabulated" the differences between the current specifications and the specifications in your terminated contract; that you offered to modify your equipment to meet the RFP specifications; that such details as the reliability prediction and maintainability had already been submitted to Navy; and that the "88 channel capability" was a "trade-off" which could have been incorporated into your system.

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The determination of which firms are within a competitive range is a matter of administrative discretion which will not be questioned by our Office unless shown to be clearly arbitrary. In determining which proposals are in a competitive range, the agency is entitled to judge the merits of the proposal as submitted and informational deficiencies properly may be considered in determining whether a proposal warrants further consideration. Where a proposal is so materially deficient that it could not be made acceptable except by major revisions, there is no requirement that discussions be held with the offeror. B-176294, October 27, 1972; B-174904, April 14, 1972.

In this case the RFP set forth a requirement for various types of information to be included in the technical proposal. The RFP also gave details with respect to the evaluation criteria. The deficiencies in the proposal you submitted have already been stated. You have urged that the Navy should have considered information that it already had in its possession which you furnished under the AN/SRC-34 contract. The Navy reportedly had several files which contained information furnished under the AN/SRC-34 contract. Your proposal only made general references to information in the Navy's possession. These general references left it unclear what information in the Navy's possession was to be incorporated into your proposal and thus the Navy would have had to guess as to your intentions. Since your proposal as submitted was determined by the Navy to be materially deficient it was rejected. Based on our review we cannot say that Navy abused its discretion in making this determination.

Moreover, it is reported by the Navy that your sample failed during testing. The Navy has reported that the first sample you submitted could not be tested because of certain difficulties such as squelch control, a channel indicator mechanical problem and a modulation deviation maladjustment. Since the Navy was unable to test or evaluate your unit, the contracting officer notified you of the difficulties on April 11, 1973. Thereafter, you substituted a second piece of equipment. The Navy found that your second sample did not meet the specification requirements of at least 60 decibels or the FCC minimum requirement of 57 decibels governing transmitter spurious emissions. In addition, your equipment failed to demonstrate compliance with minimum performance requirements relating to channel receive capability, transmitter radio frequency power output, and audio power output. The Navy advises that your unit completely failed during vibration tests and that as a result of this failure certain of the other required tests could not be performed.

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You question whether it was necessary for FAVELEX to test the AN/ERC-34 since the Navy had spent two and one-half years on testing the same equipment under your AN/ERC-34 contract and had already approved it. You also point to 30 AN/ERC-34 units which you have delivered to Litton Industries to further substantiate your position that it was not necessary to test your units. You urge that the Engineering Progress Summary from the Defense Contract Administrative Services Region (DCAER), a copy of which was furnished to you, further supports your position that the units you supplied to Litton were compliant with the specification requirements for transmitter spurious emissions, as well as in other respects. You contend that the failure of your sample resulted from a short in the audio power which was due to a faulty test procedure used by the Navy's test personnel and while this may have been inadvertent, it nevertheless caused your unit to fail the tests to which it was subjected. You have advised that upon examination of the test unit returned to you by the Navy, you found that the unit was in a damaged condition. You advise further that by replacing the power supply module you were able to restore the unit to an acceptable performance level. You contest the Navy's statement that your system did not have a "channel 88 receive capability". You state that this is attributable to the new specification which set up a channel 88 receive capability on a different band but that the Navy knew where to locate the receive frequency for channel 88 on the AN/ERC-34. Finally you question why the Navy did not contact you concerning the difficulties encountered in testing your unit.

It is the Navy's view that sample testing was necessary. Regarding the approval of the first article under your defaulted contract the Navy has advised that this was a conditional approval and that there were specification waivers in a number of areas. With regard to your performance under the Litton contract, the Navy points to the DCASR's Engineering Progress Summary, which stated that your progress was unsatisfactory. Also, there was a question whether Litton's acceptance of your units would suffice for the Navy's purposes. The Navy has disputed your conclusion that the testing of your sample was faulty, based on its review of the facts and circumstances, and denies that its testing procedures contributed to the failure of your test sample. We have no legal objection to requiring preaward samples in negotiated procurements if it is necessary to restrict the award to those offerors whose products have passed prescribed tests. See B-165685(1), July 24, 1969. Since the Navy was procuring off-the-shelf commercial equipment on an urgent basis, we believe the

sample requirement was reasonable. With regard to the contention that testing of your sample should have been waived, the record does not in our view establish that the items previously supplied either under your defaulted contract or to Litton would justify our Office in taking exception to Navy's determination to require you to furnish a sample. Concerning the assertion that the Navy's testing of your unit was faulty, the record is far from clear as to whether your sample failed because of an inherent defect or because of the Navy's test procedures. Therefore, there is no basis for our Office to question a determination which is primarily within the cognizance of the Navy's technical personnel.

We have held that the automatic exclusion from negotiation of an offeror on the basis of a failure of a preaward sample without identifying the causes thereof or without consideration of competitive range is inconsistent with 10 U.S.C. 2304(g), and applicable regulations. B-168071, April 2, 1971. However, in the instant case, the unacceptability of your proposal was not based only on the failure of your sample, but on the material deficiencies in your proposal referred to above. Therefore, we cannot say that further discussion relating to the failures in your sample was required in this case.

You have also asserted that the evaluation was inconsistent with the recommendations in B-178211, May 21, 1973, a Report to Congress entitled "Ways to Make Greater Use of the Life Cycle Costing Acquisition Technique in DOD". In this regard, you refer to possible cost savings deriving from spare parts and software support for the AN/ERC-34 as compared to commercial equipment.

With respect to life cycle costing, the Navy has advised that it did not have sufficient information to make such an evaluation in this procurement since your equipment had not been introduced into the Government's inventory. Further, the Navy advises that the imminent effective date of Public Law 92-63 and the collision hazards resulting from navigation without bridge to bridge communication made life cycle cost considerations inappropriate in this case. We do not have any basis for disagreeing with the Navy's conclusions in this regard.

Finally, you have also raised a number of contentions concerning the default termination of your AN/ERC-34 contract. We have no comment with respect to these contentions since this matter is not within the cognizance of this Office and is

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presently the subject of an appeal before the Armed Services
Board of Contract Appeals:

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States