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

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B-179441

December 28, 1973

Coulter Electronics, Incorporated
10757 Tucker Street
Beltsville, Maryland 20705

Attention: Mr. Michael J. LaBhera
Regional Manager

Gentlemen:

Reference is made to your letters of August 9 and October 12, 1973, protesting against the award of a contract to the Fisher Scientific Company under solicitation No. DABB03-73-R-0233, dated June 7, 1973, issued at Fort George G. Meade, Maryland. For reasons discussed below, your protest is denied.

The purchase request submitted by the Post Medical Supply Officer, Kimbrough Army Hospital, to the Procurement Division, Fort Meade, Maryland, was for a Fisher Hematology System--- Autocytometer II and attachments manufactured by the Fisher Scientific Company. The purchase request was accompanied by a statement of justification for purchasing only Fisher equipment. Pursuant thereto, the contracting officer prepared a Determination and Findings dated June 6, 1973, justifying negotiation of the procurement in lieu of formal advertising under authority of 10 U.S.C. 2304(a)(7) on the basis that only Fisher's equipment would meet the Government's needs. The D&F included the following:

"2. Procurement by negotiation of the above described medical equipment is necessary because it is an exclusive product developed and designed by Fisher Scientific Company, 711 Forbes Avenue, Pittsburg, PA 15219. The cell enumeration process utilized by this machine involves a photoelectric element which is far superior to other units that utilize electric fields for counting or the antiquated vacuum system. The system has been approved by OTSG.

"3. Use of formal advertising of the above described equipment is impracticable because only Fisher Scientific Company, the designer, developer and sole manufacturer of the equipment, is sufficiently familiar with the design and operation characteristics of the equipment to furnish the equipment required."

[Protest Against Equipment Contract Award]

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The request for proposals was issued on June 7, 1973, specifying Fisher equipment, and a copy forwarded to Fisher Scientific Company. The RFP was scheduled for return by June 25, 1973. Prior to that date you requested and were provided a copy of the request for proposals. Both you and Fisher submitted proposals. The contracting officer forwarded your proposal to the Kimbrough Army Hospital for technical evaluation as to the acceptability of the Coulter equipment offered. After receiving assurance from the using facility that the Coulter equipment was not acceptable, award was made to Fisher.

The administrative report includes the following explanations as to why the procurement was restricted to Fisher equipment and as to why your equipment was determined unacceptable to the needs of the using facility:

"E-1 a. The Fisher Autocytometer II has a built-in test feature that enables the operator to insure that the counting and readout circuits are functioning properly, and to locate the difficulty if there are any. The Coulter System Model D2 is based on the interpretation of an oscilloscope pattern which can not be correlated directly with functioning component systems.

"b. The Autocytometer II is based on positive pressure and has no mercury-vacuum system as the Coulter D-2. Many problems can be initiated from a mercury spillage which must be removed immediately to preclude hazardous conditions to personnel.

"c. Repair time in correcting problems associated with mercury contamination will cause additional delays in performing required laboratory analysis. Due to the large amount of glassware in the Coulter Model D-2, repairs are often magnified by improper seals around stopcock and cracks in glass accessories. This problem does not exist in the Fisher Model.

"d. The Coulter D-2 provides an indirect count because the principle is based on the fact that red & white cells, as well as other cells, are poor electrical conductors. The Autocytometer II counts the actual number of cells per specific volume and as the cells enter the microcounting chamber they are observed by the photomultiplier tube which converts the number of cells into a direct count.

"E-2. The Hemoglobin attachment for the Fisher Autocytometer II can determine the hemoglobin content of blood samples automatically, at the same time a white cell count is made. On the Coulter System D2 the operator must perform two operations, a white count and a two minute wait is required for color development in a hemoglobin determination.

"E-3. The diluters must be compatible with Fisher Autocytometer II. Diluters are designed and tested with other manufactured components of a system (such as Fisher's) and to obtain the best results should not be interchanged. This is also true with reagents because research and production are vital and based on component systems that have met specifications established by Government Agencies."

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"J. Although the Coulter D-2 system may be available at lower cost, the Fisher Autocytometer II counts cell optically, through an electronic method, and will best benefit the laboratory and Kimbrough Army Hospital. It also will require less maintenance thereby effecting only a minimum training of personnel. The design, numerical digital scale, modern optical and mechanical design are absent in the model offered. In addition based on the literature of the Coulter Model D2 they are offering a portable model, primarily used by small clinics."

You disagree with the foregoing technical conclusions. You contend that the Coulter equipment employs the most accurate method of metering a blood sample and that your mercury manometer system poses no problems in spillage or cleaning. You also contend that the use of glassware assists metering and counting operations; that the glassware is protected by plastic coating thus insuring that breakage can occur only through negligence; and that the Coulter equipment, in addition to the visibility provided by the glassware, has a three-way monitoring system to insure that the instrument is functioning properly. You question the comment that Fisher's principle of counting is more accurate than the Coulter instrument and cite publications and papers concerning the topic. You also contend that the Coulter instrument referred to in the above report is an old model and not comparable at all to the "new generation instrument containing modern electrical solid state circuitry with no electronic vacuum tubes." You also disagree with the Army's

position concerning "threshold" settings for red and white cell counts and contend that the Coulter equipment is equal to the Fisher equipment in this respect. It is also your position that while the Army is correct in stating that a digital readout is superior to a scale interpretation, it is wrong in saying that Fisher has the digital readout when the opposite is true. Finally, you note that your proposed price was lower than Fisher's contract price.

As stated, the negotiation authority cited for this procurement was 10 U.S.C. 2304(a)(7), which provides:

> "(a) Purchases of * * * property * * * shall be made by formal advertising in all cases in which the use of such method is feasible and practicable * * * If use of such method is not feasible and practicable, the head of an agency, subject to the requirements for determinations and findings in section 2310, may negotiate * * * if, (7) the purchase or contract is for medicine or medical supplies * * *."

The regulatory implementation of the statutory authority to negotiate is found in Armed Services Procurement Regulation (ASPR) 3-207.

As noted above, the determinations and findings required by statute was made and such D&F is final as to the justification for negotiation. See 10 U.S.C. 2310(b).

Concerning the restriction of this procurement to Fisher equipment, our Office has approved restriction of competition on various bases where the circumstances warrant. See 50 Comp. Gen. 210, 214 (1970), and cases cited. An example cited (on page 213) is where it is determined that only a particular product meets the essential needs of the agency. In accord with our decisions, ASPR 1-1206.1(b) provides that a purchase description may be based upon a brand name in lieu of a specification and--

> "The words 'or equal' should not be added when it has been determined * * * that only a particular product meets the essential requirements of the Government, as, for example, * * * (ii) procurements negotiated under 3-207 for specified medicines or medical supplies where it has been determined that only a particular brand name product will meet the essential requirements of the Government * * *."

In the instant case, we believe that a satisfactory basis for restricting the competition to the Fisher equipment was furnished the contracting officer by the using facility and such justification was embodied in the D&F. Nevertheless, your proposal to furnish Coulter equipment in lieu of that specified was evaluated by the using activity and determined less than sufficient to meet its needs. While you have taken issue with certain of the technical conclusions reached by the agency, we are unable to conclude on the basis of the record that these conclusions were erroneous or arbitrary. Although you contend that the Fisher equipment does not have digital readout capability, we are unable to accept the validity of this contention in view of the statement of the Acting Chief of the using activity, when referring to the Fisher equipment presently in its possession, that "Counts are easier for out-technicians to interpret because of the digital read-out."

Therefore, we see no basis to disturb the award or interfere with the contract performance.

Sincerely yours,

R.F.KELLER

[Deputy] Comptroller General
of the United States