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

B-177397 June 27, 1973

3132

Ordnance Research, Inc.
c/o Sellers, Conner and Cuneo
Attorneys and Counselors
1625 K Street, N. W.
Washington, D. C. 20006

Attention: Whilden S. Parker, Esq.

Gentlemen:

We refer to your telefax of November 6, 1972, and subsequent correspondence concerning your protest under Request for Proposals (RFP) No. F08635-72-R-0152, issued by the Department of the Air Force on May 26, 1972, for design, development, testing, and fabrication of target markers (long duration). Since this is a negotiated procurement before award, we are restricted in our recitation of the facts.

You maintain that the Department improperly failed to give you enough time to submit a proposal on a cost basis. For the reasons discussed below, we cannot agree with your complaint.

The RFP, as issued, provided that offerors were required to submit fixed-price proposals; that proposals to use a different type contract should set forth specifically why the type of contract proposed would be more beneficial to the parties; and that the Department would finally determine the type of contract during negotiations.

Your concern and several other companies submitted proposals by July 6, 1972, the amended closing date for the submission of proposals. Thereafter, the Department made a technical evaluation of the proposals. The evaluators subsequently decided that the proposals of your company and other concerns should be clarified; therefore, by letter of August 25, 1972, the contracting officer requested offerors to answer several questions. The letter also provided that the written answers and any revisions to an offeror's proposal were to be submitted on a fixed-price basis by September 6, 1972.

~~700873~~ 091355

All offerors submitted the requested written information; oral discussions were thereafter held with offerors in October 1972. With respect to the final negotiations held with your company on October 13, 1972, you state that you discovered that the Department had negotiated with other offerors on a cost basis, rather than on the fixed-price basis proposed by your company; that you requested an extension of the final closing date set for receipt of best and final offers on October 16 in order to prepare your own cost proposal; and that the Department did not consent to your request.

The contracting officer disagrees with your statement. He reports that the Department's negotiator advised you that he had set October 16, 1972, as the closing date for receipt of other offerors' final responses; that he then offered to extend the October 16 closing date to give you additional time to submit a proposal on a cost basis; that you chose not to submit a revised proposal on a cost basis; and that in view of your decision the closing date was not changed.

After best and final proposals were received on October 16, the Department made its last technical evaluation in November 1972. In brief, the evaluators decided that the costs proposed by some offerors were unrealistic; that the risk attending the use of a fixed-price contract would be unacceptable; and that a cost-type award should therefore be made.

Clearly, there is an irreconcilable conflict between your allegations about the opportunity given you to submit a revised proposal on a cost basis and the administratively reported facts on that issue. Although you contend that the affidavit, which you have submitted, stating your version of the facts should resolve the dispute in your favor in the absence of an affidavit supporting the administrative position on these circumstances, it is not our practice to solicit sworn statements from either the protesting concern or the procuring agency in such matters. Consequently, we must reject your argument that inferences as to the correctness of your statement of the facts may be drawn from the absence of an affidavit supporting the administrative version of the facts. Without any probative evidence other than the statement from each side, we are required to accept the administrative version of the facts.

In this regard, you acknowledge that other Department officials subsequently offered to allow you to submit a cost proposal for the procurement in November 1972. You maintain, however, that this offer was hypothetical since these officials said that the pendency of your protest with this Office precluded the Department from taking action.

Our reading of the Department's November 15, 1972, memo of this subsequent offer does not support your view. Paragraph 3 of the memo, a copy of which has been given to you, states that the pendency of the protest required the procuring activity to await a "decision from higher authority as to the outcome of the protest and any actions to be taken." In our view, this statement meant that the procuring activity could not take any action, without the approval of higher authority, which would adversely affect your protest; but we do not believe it meant that the activity could not take action to remove the basis for the complaint, that is, the alleged failure of your concern to receive an equitable opportunity to submit a cost proposal. Indeed, we are not aware of any statutory or regulatory prohibition against a procuring activity recognizing the merits of a protest, and effecting remedial action before an award, notwithstanding the pendency of a protest with this Office. In this connection, see paragraph 2-407.8(b) of the Armed Services Procurement Regulation (ASPR). On this record, we cannot conclude that you were denied an equitable opportunity to submit a cost proposal for the requirement.

You also argue that the RFP required offerors to submit fixed-priced proposals. Assuming, for the purpose of discussion, that your interpretation is correct, we must disagree with the suggestion, implicit in your argument, that the Department could not change the contract type during negotiations. ASPR 3-805.1(a) provides, in this regard, that when, during negotiations, a substantial change occurs in the Government's requirements, such change shall be made in writing as an amendment to the request for proposals, and a copy shall be furnished to each prospective contractor. Although a formal amendment, advising offerors to submit proposals on a cost basis, was not issued here, we must conclude that this defect was technical in nature only since all offerors were given an equitable opportunity to submit cost proposals.

You also question the selection of a cost-type contract for this procurement. The record shows, in this regard, that on November 6, 1972, the Assistant for Procurement, Directorate of Procurement and Production, determined, under the authority of 10 U.S.C. 2306(c), that it would be impracticable to obtain the requirement except under a cost-type contract. This determination was based on findings that the work to be performed involved such uncertainties in contract performance so as to preclude use of a fixed-price award; that definite drawings or specifications were unavailable; and that the developmental and research work involved was not entirely specific. We believe these

findings were prompted, in part, by the stated reluctance of several offerors to enter into a fixed-price contract for the requirement without further definition of the statement of work. Although you submitted a fixed-price proposal, the evaluators determined that you were "not fully aware of the job ahead" and that you had seriously underestimated ultimate costs for the work as follows:

> It is unanimously agreed by the evaluation team and this office that ORI is not fully aware of the job ahead of them. * * * In light of the fact that ORI has no configuration management division as such, and has underbid other bidders by at least 100% in data costs, there is a high probability that configuration drawings could be substandard. In that case, the Government would have to go into their production run either with ORI to maintain technical continuity or with sub-standard essential data (i.e., Form 1 Cate e, g drawings) to a more suitable production contractor. Obviously we would have to remake the essential data at our own expense or place ORI in a "cost growth" position of possibly some $15,000 to $20,000. This would place them within $15,000 to $20,000 of their PTA. (In essence, * * *, ORI has underestimated their target by some $20,000 in the area of data above.)

On the present record, we cannot question the judgment evidenced by these findings which, in our view, reasonably support the determination, or conclude that the findings are not entitled to finality under 10 U.S.C. 2310(b).

Since we do not find that a basis has been presented upon which this Office can legally object to the Department's decision to award on a cost basis, your protest must be denied.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States