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

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B-177758

July 13, 1973

Jacob H. Fischman, Esq.
100-03 70th Avenue
Forest Hills, New York 11375

Dear Mr. Fischman:

Your letter of April 25, 1973, and prior correspondence, on behalf of Consolidated Airborne Systems, Incorporated (CAS), protested against award of a contract to another firm under request for proposals (RFP) No. F33657-73-R-0012, issued July 14, 1972, by the Directorate of Specialized Subsystems, Wright-Patterson Air Force Base, Ohio.

The RFP solicited technical and price proposals for a fixed quantity of temperature indicators. Six offerors responded (including CAS) and their proposals were submitted for evaluation. After a review of the price proposals, the contracting officer suspected a possible mistake in the CAS price. Accordingly, the contracting officer when writing to CAS concerning deficiencies in the technical portion of its proposal, included the following statement in a letter dated October 18, 1972:

> 1. Reference subject RFP, the Contracting Officer questions your ability to perform work bid on at prices quoted because of the large differential between your prices and others quoted.

The contracting officer also sent letters to the other five offerors requesting pricing data and technical clarifications. The letters sent to CAS and the other offerors also stated that the closing date for negotiations, at which time the offeror's "best and final" offer must be received, was November 3, 1972. CAS verified its price by letter dated October 31, 1972, and although the five other offerors lowered their prices, CAS' initial price was still low as of November 3, 1972. Consequently, the contracting officer requested the cognizant Defense Contract Administration Services (DCAS) office to make a preaward survey of CAS. A complete award was recommended by report dated November 17, 1972. However, by letter dated November 22, 1972, the contracting officer requested that each offeror certify the use or non-use of jewel bearings. Also, each offeror was notified that the closing date for receipt of this certification was November 30, 1972, and any revisions to the proposal received after the closing date would be treated as a late proposal. Two offerors lowered their prices, which resulted in the displacement of

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CAS as low offeror by the General Electric Company (GE). A contract was awarded to GE on December 29, 1972, whereupon protests were sent to the procuring activity and to this Office.

You contend that the procuring activity did not negotiate in a manner which was fair and equitable and did not conduct meaningful negotiations in compliance with 10 U.S.C. 2304(g). In this regard, you contend that CAS was misled by the request for price verification in the letter of October 18, 1972, into believing that its price was so low that it would receive the award and, therefore, it was not necessary to lower its price. Furthermore, you contend that only CAS was misled as the letters to the other offerors did not question their prices; therefore, when the other offerors responded with price reductions you assert that CAS should have been advised of the misleading information. You suggest that this could have been accomplished by simply advising CAS that it should disregard the price question raised in the October 18 letter. You also contend that the preaward survey which was conducted also indicated to CAS that it was to receive the contract. Finally, you state that prices were "fixed" as of November 22, 1972, and that the only revisions permitted by the letter of that date related to the jewel bearing certification. Since CAS' offer was low at that time, you contend the contract should have been awarded to CAS. Therefore, you urge that the contract awarded to GE be canceled and awarded to CAS.

Section 2304(g) of Title 10 of the United States Code, as implemented by ASPR 3-805.1, requires that written or oral discussions be held with all offerors within a competitive range. We have held that the content and extent of discussions necessary to satisfy this requirement turns upon the particular facts of each individual case. 52 Comp. Gen. 161, 164 (1972). In a recent case we said, based upon a review of our decisions, that what constitutes discussions "* * * has depended ultimately on whether an offeror has been afforded an opportunity to revise or modify its proposal, regardless of whether such opportunity resulted from action initiated by the Government or the offeror." 51 Comp. Gen. 479, 481 (1972). In the instant case, it is our view that discussions were held through the medium of the October 18, 1972, letter, as all offerors were advised of certain technical deficiencies and of the requirement to furnish pricing data and were afforded an equal opportunity to revise their proposals in these respects. In addition, CAS was advised of the contracting officer's doubt as to the validity of its price. Furthermore, as required by ASPR 3-805.1(b), the letter advised of the "closing date for negotiations" and for submission of best and final

offers and included notification that any revision to a proposal received after the closing date will be treated as a late proposal.

Although CAS apparently failed to realize that negotiations were being conducted and that its competitors might reduce their prices, we find no basis for concluding that this resulted from any deficiency or inequity in the negotiation process. Furthermore, we do not view the statement concerning the CAS price in the October 18 letter as a basis for concluding that CAS was improperly or intentionally misled. It appears that the contracting officer had a legitimate basis for raising a question as to the validity of the price as it was 18 percent lower than the next low offer. In the circumstances, it is our view that as of the November 3, 1972 closing date negotiations had been conducted fairly and did comport with 10 U.S.C. 2304(g).

Remaining for consideration is the effect of subsequent events. Because CAS was the prospective awardee, a preaward survey was conducted on November 15, 1972 and an affirmative recommendation made in a report dated November 17, 1972. While this recommendation was under consideration, and the contracting officer was attempting to resolve what he considered discrepancies in the report, it apparently came to the attention of procuring personnel that the RFP did not contain the required certificate relative to jewel bearings. Therefore, by letter dated November 22, 1972, all offerors were so advised and notified that the closing date for receipt of the certificate was November 30, 1972. In addition, the letter included the statement that--

> Any revisions to your proposal received after the closing date will be treated as a late proposal.

As a result, two offerors revised their prices and CAS was displaced as the low offeror.

Although the above letter did not specifically state that negotiations were reopened and did not request "best and final" offers, it is our view that this was the intent and effect. We base our view on the fact that inclusion of the certificate was required in any contract awarded; that the requirement for the use of jewel bearings procured from the William Langer plant could conceivably have an effect on price; and that the letter established a cut-off date for receipt of the certificate and specifically authorized "revisions." Therefore, we cannot conclude that the reopening of negotiations and consideration of the revised proposals was an abuse of discretion or violative of competitive negotiation procedures.

The Air Force recognizes, however, that the November 22 letter could have more clearly advised offerors that the negotiations were being reopened. It reports that action has been initiated as the result of our recommendation in another case. See B-176302, February 16, 1973, copy enclosed, to improve negotiating procedures.

Finally, you have contended that in fairness to CAS the contracting officer should have advised it that the price question raised in the letter of October 18 was no longer applicable. As stated, the contracting officer suspected CAS had made a mistake in price based on the initial prices received. He concluded that the Government had a duty to advise CAS of the suspected mistake. While the contracting officer recognizes that this information might have induced CAS only to verify its proposed price and not consider the possibility of price reductions by its competitors, he felt that for the Government to have advised CAS of such reductions by others would have constituted an unauthorized disclosure of information.

In this connection, ASPR 3-805.1(b) provides that auction techniques are strictly prohibited in conducting competitive negotiations and cites as an example the act of informing an offeror that his price is not low in relation to that of another offeror. It seems to us that if the contracting officer had followed the negotiating procedure which you suggest regarding the October 18 price question, this would have constituted an auction technique within the meaning of the regulation. While we recognize that CAS may have been induced by the October 18 letter only to verify its price, we do not believe that the contracting officer's failure to advise CAS further in this regard was unreasonable in view of the cited regulation.

Accordingly, we find no basis to question the validity of the award, and your protest is denied.

Sincerely yours,

Paul G. Dembling

Acting Comptroller General
of the United States