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

31142

B-177637

July 5, 1973

Communications Satellite Corporation
950 L'Enfant Plaza South, SW.
Washington, DC. 20024

Attention: Mr. David C. Acheson

Gentlemen:

Reference is made to your letter of March 5, 1973, and prior correspondence, protesting against the award of a contract to Harris-Intertype Corporation, Radiation Division, under request for proposals (RFP) No. DAAB07-73-R-0001, issued by the United States Army Electronics Command, Fort Monmouth, New Jersey.

The RFP solicited proposals on a fixed-price-incentive basis for the fabrication of one Satellite Communications Earth Station in accordance with United States Army Satellite Communications Agency (SATCOM) technical requirement SCA-2140 dated June 1, 1972, repair parts, tools and test equipment, 36 months of onsite operation and maintenance, and contract data items.

Section "D" of the RFP, as revised by amendment No. 1, sets forth an evaluation and award criteria that based the contract award on the best overall proposal with appropriate consideration given to (1) Technical Proposal, (2) Past Performance, (3) Management, and (4) Cost and Cost Realism, in that order of importance. Offerors were advised that of these four factors, the Technical Proposal was the most important and bore a greater weight than all the other factors combined.

Section D.4, part II, of the RFP, as amended, warned the proposer that he is responsible for including sufficient details (without reference to cost) to permit a complete and accurate evaluation of the proposal strictly from a technical standpoint. Additional notifications as to the requirement for the proposals to contain detailed and complete information were presented in sections D.5a, D.5b, D.5b(1), D.5c and D.5d of the RFP, as amended. Also, section D.3A of the RFP, as amended, cautioned the proposer that "parroting" of the RFP words, with a statement of intent to perform, does not reveal the bidder's understanding of the problem or his capability to solve it.

Three proposals were received by August 21, 1972, the closing date for receipt of proposals, and evaluated by SATCOM. The evaluation

disclosed that of the three proposals received, only your proposal was considered technically unacceptable and not susceptible of being made acceptable without major revision. On October 19, 1972, the contract was awarded to Harris-Intertype Corporation, Radiation Division, and by letter of the same date you were advised of the award.

You contend that SATCOM's failure to conduct negotiations with Comsat is a clear violation of the requirements of 10 U.S.C. 2304(g), as implemented by paragraphs 3-504 and 3-805 of the Armed Services Procurement Regulation (ASPR) that discussions be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered. You maintain that SATCOM acted arbitrarily and capriciously in rejecting your proposal since it was an unqualified commitment to do the work at a price substantially below that quoted by the next lowest offeror. You allege that Comsat submitted enough technical data to be in the competitive range, so as to require SATCOM to conduct negotiations with Comsat and that SATCOM failed to take price into consideration in determining if the proposal was in the competitive range. In your view the reasons given by SATCOM for rejection of your proposal are trivial and are based on an inaccurate reading of your proposal.

You urge in this connection that a few instances of insufficient detail should not have been considered an adequate reason for rejecting a proposal without discussions, citing 47 Comp. Gen. 29 (1967); 45 id. 417, 427 (1965); and B-159795, November 30, 1966. On the record before us, we must conclude that no basis exists for our Office to interpose a legal objection to the rejection of Comsat's proposal.

With respect to the evaluation of your technical proposal, the Project Manager, SATCOM, made the following comments in his technical evaluation memorandum of September 21, 1972:

> In accordance with the referenced Evaluation Plan, this bidder's proposal is judged to be technically unqualified, and nonresponsive to the procurement solicitation. This proposal, in the main, is devoid of technical content beyond a very superficial level. The discussion of system and subsystem requirements and design approaches are, for the most part, a direct playback of the Government's specification requirements. The treatment of the critical design tradeoffs which involve the budgeting of subsystem performance, including the antenna system, is lacking in detail and backup data and is, therefore, unacceptable. This bidder made no definite indication of vendor selection which again cast doubt on his method of approach in such important equipment areas as the antenna and parametric receiver amplifiers.

> This bidder implies that the detailed technical specifications covering system and subsystem performance interface, etc. will be prepared after he receives the contract, and that these documents would then be used to procure the subsystems. The line of reasoning this bidder appears to take is that their reputation for past successes can be used as a substitute for the kind of proposal that the RFP calls for. This approach is, of course, totally unacceptable. The deficiencies of this bidder's proposal are so numerous and so serious that there is no way to seek "clarification" while avoiding a major revision of their proposal. * * *

Further elaboration of the inadequacies in the Comsat technical proposal is provided in a memorandum dated January 5, 1973, from the Executive Officer, SATCOM. A copy of this memorandum was made available to you for comment. In response to your reply letter of March 5, 1973, we requested and received a supplemental report from the contracting officer. In light of this supplemental report (a copy of which was furnished to you) and the other material of record bearing on the evaluation of Comsat's proposal, we cannot say that SATCOM's technical assessment of the proposal was an arbitrary abuse of administrative discretion. See, e.g., 48 Comp. Gen. 314, 317-318 (1968).

We recognize that a consideration of the severity of the informational deficiencies in Comsat's proposal cannot be completely divorced from the disputed technical questions involved. However, we disagree with your suggestion that a blanket offer of compliance by Comsat is an adequate substitute for the detailed technical information required by the solicitation. In this context, we think our decision 52 Comp. Gen. 382 (B-174070, December 21, 1972) is controlling and requires rejection of your contentions that discussions must be held with an offeror who submits a proposal which is technically unacceptable by reason of the omission of material technical information and that, in any event, price must be considered before the proposal is rejected.

> We have held that a proposal must be considered to be within the competitive range so as to require negotiations unless it is so technically inferior that meaningful negotiations are precluded. 48 Comp. Gen. 314, supra. However, in that same case, we also recognized that the determination of competitive range, particularly with respect to technical considerations, is a matter of administrative discretion which will not be disturbed absent a clear showing that the determination was arbitrary or capricious.

In the present situation, Teledyne's proposal was found to be technically unacceptable for a number of reasons, some of which involved the omission of certain information from the proposal. In FAA's view, these omissions were related to basic requirements of the system to be procured and warranted rejection of Teledyne's proposal. Under these circumstances, your reliance on B-173716, supra, is misplaced, since in that case we found that the rejected proposal was merely "informationally deficient" and not technically unacceptable. See B-169903, July 31, 1970.

Furthermore, we do not believe that a duty should be imposed on the procuring activity to request information or clarifications regarding material omitted from a proposal when that omission is related to a basic requirement. B-174056, June 1, 1972.

We believe the cases you cite are easily distinguishable from the instant situation. In 45 Comp. Gen. 417 (1966), the agency elected to conduct negotiations only with one offeror, who was determined to be technically superior to the other offeror. We concluded that it was improper to exclude the other offeror from negotiations based on a determination that the offeror's proposal was merely technically inferior and not technically unacceptable. In 47 Comp. Gen. 29 (1967) the protestant (Honeywell) was excluded from negotiations because it failed a "benchmark" or live test demonstration. Since there was a substantial price savings between the Honeywell proposal and the only proposal found to be in the competitive range and it appeared that Honeywell was capable of passing the benchmark test within a relatively short time we held that its proposal should not be deemed technically unacceptable merely because of failing the benchmark test. Here, of course, there was an administrative determination that the Teledyne proposal was technically unacceptable as compared to the three proposals found to be acceptable. While you contend that the Teledyne proposal offers a substantial price savings to the Government, we are unable to conclude that the Teledyne proposal was readily capable of being made technically acceptable.

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The words "including price" were added to 10 U.S.C. 2304(g) in response to an Army procurement of M-16 rifles in which awards were made to 2 offerors on the basis of the technical superiority of their proposals, without regard to price. The history of that procurement reveals that the Army originally evaluated four

proposals as technically acceptable, but subsequently determined that it would be best assured of having its needs satisfied by accepting the two highest rated technical proposals, regardless of price. The Army then awarded letter contracts to those offerors without looking at the price proposals of the other 2 offerors. Because the contract prices were significantly higher than the price proposals of the unsuccessful offerors, concern was expressed in Congress that public funds were unnecessarily expended, and legislation was introduced "for the express purpose of prohibiting in the future the waste of public funds which occurred * * * in the M-16 Contract awards." 114 Cong. Rec. 20736. This was more fully explained as follows:

> "The purpose of this section is to close the loophole which allowed the Army to make the recent awards for the procurement of M-16 rifles without considering price proposals from all qualified bidders. It would insure that on future negotiated procurements of this type mentioned the military departments will have to consider at least ceiling prices proposed by all qualified bidders." H. Rept. No. 1669, 90th Congress, 2d sess. 10.

Although we respect the views of Congressman Ichord and recognize that there is some support for the position you take, we do not believe that 10 U.S.C. 2304(g) requires that price must be considered in all instances in determining what proposals are in a competitive range. To accord such an interpretation to the law would place procurement officials in the unreasonable position of having to consider the price proposals of all offerors, no matter how deficient or unacceptable the accompanying technical proposals might be. We do not believe that Congress intended such a result. Rather, it seems to us that Congress wanted to insure that the prices proposed by qualified offerors who submit acceptable proposals would be considered prior to the making of awards to higher priced offerors on the basis of technical considerations alone.

We think this view is supported by our previous decisions, including those you cite in your letters. We have stated, both before and after enactment of the 1968 law, that competitive range encompasses both price and technical considerations, 45 Comp. Gen. 417 (1966); 47 id. 29 (1967); 50 id. 1 (1970), and that the negotiation of a contract without price competition on the basis that a particular offeror would furnish services

of a higher quality than any other offeror was contrary to 10 U.S.C. 2304(g). 50 Comp. Gen. 110 (1970). Our concern in these cases stemmed from the absence of either meaningful or actual price competition as required by statute, and we objected to the elimination from competition of all but one offeror without appropriate consideration of price.

These decisions do not indicate, however, that price must be considered in all instances in determining competitive range. Our statements that both price and technical considerations are encompassed in "competitive range" mean that in appropriate cases either factor can be determinative of whether an offeror is in a competitive range, and we have frequently recognized that price need not be considered when a totally unacceptable technical proposal is submitted. B-168190, February 24, 1970; B-169903, July 31, 1970; B-160671, August 31, 1970; B-170317, February 2, 1971; see, also, 49 Comp. Gen. 309 (1969) and 50 id. 565 (1971). * * *

In view of the foregoing, the protest is denied.

Sincerely yours,

Paul G. Dazbling

Acting Comptroller General
of the United States