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

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B-114839

MAR 20 1979

The Honorable George Hansen
House of Representatives

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Dear Mr. Hansen:

This is is response to your letter of February 15, 1979, requesting that we review the conclusions reached in our letter of February 6, 1979, concerning the propriety of the noncompetitive award of a construction contract by the Corps of Engineers (Corps), Department of the Army, to J.A. Jones Construction Company (J.A. Jones).

AGC 00305 (Army)

DLG 00833

The contract, awarded on a sole-source basis, was for the relocation of certain military installations and bases in the Panama Canal Zone (Canal Zone) in anticipation of the October 1, 1979 effective date of the Panama Canal Treaty (Treaty), ratified by the Senate of the United States on April 18, 1978. You object to the complete absence of competition in the procurement procedures employed by the Corps in light of the existence of other firms qualified to perform the work. Our initial letter to you was based upon a written report presented to our Office by the Corps. In connection with your February 15, 1979 request, however, we conducted a field audit of the contract and correspondence files at the Corps' Mobile Alabama Office (Mobile), AGC 00340 which awarded the contract, and interviewed Mobile personnel involved in the selection process. Our findings follow.

As early as November 17, 1977, apparently in anticipation of the ratification of the Treaty, the Corps' Office of Chief of Engineers (OCE) granted authorization to Mobile to proceed with final design of an FY 78 (Fiscal Year 1978) project in the programmed amount of approximately $3.3 million, for the construction of temporary facilities (interim Phase I project) for units

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that would be displaced by the entry into force of the Treaty. (Article II of the Treaty provided, prior to the Brooke reservation, that the Treaty would enter into force, subject to ratification, six calendar months from the date of the exchange of the instruments of ratification. Pursuant to Article XIII, property transfers from the United States to Panama would then have occurred.) While this initial design authorization directive for the temporary facilities was modified several times before its ultimate cancellation on June 7, 1978, Mobile, throughout early 1978, before the Treaty was ratified and for sometime thereafter, was operating under the assumption that the FY 78 $3.3 million interim Phase I project would be the construction requirements, i.e., the necessary alterations to facilities that would be required as a result of the transfer of property provisions of the Treaty.

On February 6, 1978, Mobile wrote, in pertinent part, the following letter to the Corps' South Atlantic Division (SAD):

> "Pursuant to ECI [Engineer Contract Instructions] 3-102(b)(1)b and ECI 3-408, request authority to negotiate construction contract(s) and/or letter contract(s) for construction of Phase I, FY-78 Alterations to Facilities in the Canal Zone.
>
> "The Panama Canal Treaty requires certain facilities be vacated within six (6) months after ratification and the construction necessary to facilitate these moves must begin immediately after that date. Because of the time constraints, it will be necessary to negotiate and mobilize contractor(s) in a matter of days. [The] current estimated cost of Phase I construction is $3,200,000.
>
> "A copy of the proposed determinations and findings by the Contracting Officer is inclosed.

> "It is further requested pursuant to ECI 3-408 that authority be furnished to enter into a single source negotiated letter contract with Wilson and Savage, Inc., 1890 Brooks Road, Memphis, Tennessee, in the event that ratification occurs prior to completion of final design. The Contractor is presently on site and the only contractor with sufficient organization to proceed immediately without final design to accomplish this task within the required time restraint. The value of a letter contract cannot be determined since ratification date is not known and status of design cannot be determined."

The determination and findings (D&F) submitted with the letter to justify negotiations cited 10 U.S.C. § 2304(a)(2) as authority, which permits the Corps to dispense with formal advertising when the "public exigency" will not permit the delay incident to advertising. Also submitted along with the D&F was a "Justification to support sole source negotiation--Letter Contract", which stated, in part, as follows:

> "Time is of the essence as the amount of construction to be placed is of considerable magnitude and the relocation by Using Agency of six (6) months after treaty ratification is critical. Sole source letter negotiation will permit a construction start in a matter of hours, wherein competitive negotiations will require several days." (Emphasis added.)

On March 3, 1978, OCE granted "unlimited authority * * * to negotiate, including sole source, construction contracts for Phase I, FY 78 Alterations to Facilities in the Canal Zone."

On April 18, 1978, the Treaty was ratified by the Senate, but, under the Brooke reservation, the required transfer of property date was extended to October 1, 1979, the revised entry into force date of the Treaty.

The following day, OCE again granted final design authority to Mobile for the FY 78 Interim Phase I project. On April 24, 1978, OCE additionally authorized final design of FY 80 Phase II permanent facilities, which were to ultimately replace the temporary facilities to be built under the FY 78 Interim Phase I project. The estimated cost of FY 80 projects (project Nos. 146-162), as set forth in the authorization directive, was approximately $29 million.

On June 7, 1978, OCE notified Mobile that a "determination has been made that those facilities in FY 78 [project] which were to accommodate interim moves will not be necessary. Previous design authorization * * * which involves interim facilities is hereby cancelled."

On July 10, 1978, Mobile was informed by OCE of the cancellation of FY 80 project Nos. 146-162 and the insertion in lieu thereof of project Nos. 167-171 into the FY 79 military construction program. Final design was authorized. The previous Phase II FY 80 permanent facilities were "repackaged" into FY 79 project Nos. 167-171, as follows:

Project No.	Description	Est. Cost ($000)
167	Test Facs.	773
168	Facs. for 193d Inf. Bde	12,019
169	Facs. for 210th Avn Bn	15,185
170	Facs. for 470th M.I.	4,590
171	Various Facs.	[illegible]33

Thus, the "repackaged" FY 79 projects were for the construction of permanent facilities with a programmed amount of approximately $33 million for Army facilities. No temporary facilities were to be built. Further, the directive informed Mobile that Congress had been notified of "Section 612" action on June 26, 1978, to permit award of a maximum of five Architect Engineer (A-E) contracts with fees in excess of $225,000. (P.L. 89-568, Title VI, § 612, Sept. 12, 1966, 80 Stat. 756, as amended, requires that in the case of any public works project

for which design and architectural services are estimated to cost $225,000 or more, the Secretary of Defense must describe the project and report the estimated cost of such services to Congress not less than 30 days prior to the initial obligation of funds).

After the necessary 30 days waiting period, on July 27, 1978, Mobile proceeded to evaluate and select the A-E firms best qualified to perform the services in connection with the $33 million FY 79 projects. On July 28, letter contracts were awarded to five A-E firms to prepare detailed design analysis, specifications and drawings required for the proposed construction. The A-E letter contracts all had a target definitization date of November 30, 1978. Upon definitization on November 30, 1978, the contracts generally provided for an established completion date of the design work by March 1979.

On July 28, 1978, Mobile wrote the following letter to OCE:

> "It is anticipated that the Mobile District will be requested, in the very immediate future, to proceed with the rehabilitation and construction of new facilities incident to implementation of the Panama Canal Treaty.
>
> "Information currently available indicates that the work will involve rehabilitation, alteration and construction of new facilities at an estimated cost of $36.9 million. Provisions of the Panama Canal Treaty require the transfer of various U.S. military facilities to Panama over the first five years of the Treaty, with initial transfers to take place on 1 October 1979, the effective date of the Treaty's entry into force (T-Day).
>
> "Five A-E contracts are proposed for the design work but will not be completed before construction must start.

* * * * *

"Pursuant to ECI 3-102(b)(2)a, authority to use a CPFF [Cost Plus Fixed Fee] construction contract in accordance with DAR (ASPR) 3-405.6 and ER [Engineer Regulation] 415-345-230.

"Request authority * * * to allow immediate selection action required by ER 415-345-230 prior to receipt of funds. No award of contract will be made prior to receipt of funds."

The D&F, which cited 10 U.S.C. § 2304(a)(10) as the authority to negotiate, stated, in part:

"The U.S. Army Engineer District, Mobile, proposes to procure by negotiation a cost-plus-fixed-fee construction contract for Rehabilitation of Present Facilities and Construction of New Required Facilities to Implement the Panama Canal Treaty at Various Military Bases in the Canal Zone. The estimated cost of the proposed procurement is $36.9 million.

"Procurement by negotiation of the above requirement is necessary due to the Panama Canal Treaty requiring certain facilities be turned over to the Panamanian Government beginning 1 October 1979 and the fact that plans and specifications for all work required cannot and will not be finalized before May or June 1979. It is necessary that construction begin during the 1st Quarter of FY 79 to meet the requirements of the Treaty and to have the Defense components involved operate satisfactorily during the transition and beyond.

> "Use of formal advertising for the procurement of the above services is impractical because time required to formalize plans and specifications, advertise and award a contract would preclude completion and occupancy of the required facilities within the time frame established by the Treaty."

Four days previously, Mobile had developed a list of seventeen major qualified construction firms to determine their interest in a cost-plus-fixed fee construction contract in the Canal Zone. The estimated cost of the project, over a two year period, was approximately $35 million. Mobile personnel telephonically contacted all seventeen of the major construction firms. Fourteen firms stated that they were interested and three stated that they were not.

On September 11, 1978, OCE approved Mobile's request to negotiate a cost-plus-fixed-fee contract in the reduced amount of $10.9 million, and further stated:

> "Pursuant to the provisions of APP [Army Procurement Procedures] 1-403.50, you are authorized to proceed with the contractor selection procedures and negotiations contained in ER 415-345-230. * * * [Y]ou may take all actions short of awarding the contract prior to receipt of funds."

Thus, at this point, September 11, 1978, Mobile had been granted authority to negotiate a contract from the available qualified contractors who had expressed interest in the construction projects. An OCE directive, dated September 18, 1978, formally reduced the FY 79 military construction projects to reflect a new Phase I amounting to $10.9 million, to be constructed by October 1, 1979. Mobile had been informed that this directive was on its way prior to September 11, 1978, whereupon the five A-E firms were directed to expedite and concentrate on the new Phase I design. The concept of this Phase I was to move the displaced units to their permanent locations, but construct minimum essential facilities necessary for operations. Design schedules of the A-E firms

were reestablished for completion of the new Phase I design in December 1978. On October 4, 1978, more than three weeks after Mobile had been authorized to negotiate a cost-plus-fixed-fee contract, it requested approval from OCE to issue a letter contract to Perini Corporation (Perini), Framingham, Massachusetts, on grounds that:

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> "Investigation indicates Perini is associated with two of the largest and most experienced Panamanian contractors which will assure an immediate, adequate and continuous supply of skilled construction labor, equipment, and management capabilities to initiate procurement requirements and complete construction of the initial construction phase by 1 October 1979."

This request was apparently based on a September 22, 1978 letter received from Perini by Mobile in response to telephone inquires from Mobile personnel during September. On October 6, 1978, OCE granted approval for the letter contract but specifically stated that "this approval for letter contract does not constitute sole source authority. A copy of the written determination to justify sole source negotiation, signed by the contracting officer and approved by one level higher, must support your contract award." On October 16, 1978, ten days later, Mobile submitted a letter requesting authority to enter into a sole-source letter contract with Perini. The attached D&F, relying on 10 U.S.C. § 2304 (a)(2), was not a D&F justifying sole source negotiations but rather was simply a D & F justifying negotiations on grounds of "public exigency". Approval of the procurement was nevertheless granted on October 19, 1978. From the beginning of October, Mobile personnel had engaged in several discussions with Perini throughout the month. On October 31, 1978, Perini advised Mobile that it could not obtain the top management that it felt was required to manage the construction projects and withdrew from consideration. Shortly thereafter, Mobile contacted J.A. Jones and Morrison-Knudson Company, Inc. (Morrison-Knudsen), two firms known by Mobile through prior personal dealings to be absolutely reliable. While aware

that several firms which had expressed interest were capable and qualified to perform the work, Mobile personnel felt that, in view of the importance of the construction project, they could only trust a firm which they knew from personal dealings to be absolutely reliable. Mobile chose J.A. Jones since Morrison-Knudsen already held a large construction contract with the Corps. Mobile therefore requested authority to negotiate a letter contract sole-source with J.A. Jones on November 3, 1978. The rationale given in the November 3 message from Mobile to SAD was as follows:

> "Jones has available management personnel from international group to immediately start mobilization at the site. Jones has readily available procurement resources, plant and financial capability which are vital to successful completion of the initial construction phase by 1 October 1979."

This request was approved by SAD on November 5, 1978. On November 13, the letter contract was awarded to J.A. Jones.

Thus, the procurement procedures employed by the Corps resulted in sequential sole-source negotiated procurements with two successive firms to the exclusion of any competition from other potential sources. The question presented is whether the Corps was justified in foregoing not only formal advertising but all competition.

One of the exceptions to the formal advertisement requirement of 10 U.S.C. § 2304(a) (1976) is 10 U.S.C. § 2304(a)(2), the "public exigency" exception. Defense Acquisition Regulation § 3-202.2 (1976 ed.), which implements this section, provides:

> "Application. In order for the authority [to negotiate due to public exigency] of this paragraph 3-202 to be used, the need must be compelling and of unusual urgency, as when the Government would be seriously injured, financially or otherwise, if the

> supplies or services were not furnished by a certain date, and when they could not be procured by that date by means of formal advertising. When negotiation under this authority, competition to the maximum extent practicable, within the time allowed, shall be obtained. * * *." (Emphasis added.)

The authority to negotiate for an item or service does not give the contracting officer the authority to negotiate with only one source to the exclusion of other available qualified sources. To the contrary, 10 U.S.C. § 2304(g) (1976) provides:

> "In all negotiated procurements in excess of $10,000 in which rates or prices are not fixed by law and in which time of delivery will permit, proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured * * *." (Emphasis added.)

The Defense Acquisition Regulation further provides:

> "1-300.1 Competition. All procurements, whether by formal advertising or by negotiation, shall be made on a competitive basis to the maximum practicable extent.
> "3-101(d) Negotiated procurements shall be on a competitive basis to the maximum practical extent."

In short, the statutes and implementing regulations, although allowing negotiation due to a "public exigency", require the procuring activity to obtain competition to the maximum extent practicable within the time available. Non-Linear Systems, Inc.; Data Precision Corporation, 55 Comp. Gen. 358 (1975), 75-2 CPD 219.

On September 11, 1978, Mobile had been granted authority to negotiate a cost-plus-fixed-fee contract and to proceed with contractor selection procedures and

negotiations as contained in ER 415-345-230 (the Corps' negotiation regulation for cost-plus-fixed-fee construction contracts). This regulation does not provide for sole-source negotiations and generally contains, as further explained below, competitive selection procedures to assure that the contractor selected is the best qualified to do the work under consideration. We do not question the Corps' initial decision to employ a cost-plus-fixed fee contract since designs, drawings, and specifications at the time were not completed (and were not scheduled to be completed for Phase I until December 1978). In this regard, the Corps' own regulation recognizes that the use of the cost-plus-fixed-fee contracting procedure is appropriate when reliable cost estimates cannot be prepared and gives the example of a situation where, as here, construction must proceed with design. Similarly, since the design and specifications were still unavailable, we do not question OCE's approval of Mobile's request to use a letter contract on October 6, 1978, nearly a month after Mobile had been granted final negotiation authority. While a letter contract should not be used when any other type of contract is suitable, the regulations generally provide that a letter contract may be entered into when the nature of the work involved prevents the preparation of definitive requirements, such as specifications, design, and drawings. Defense Acquisition Regulation § 3-408(b). However, Defense Acquisition Regulation § 3-408(c)(2) also provides: "A letter contract shall not be entered into without competition when competition is practicable."

In our letter to you of February 6, 1979, we stated that due to time constraints, it was not feasible to have meaningful price competition in this procurement. While due to the incomplete status of the drawings, designs, and specifications, realistic cost proposals by contractors could not have been submitted, this does not mean that no competition was feasible or required. Generally, in situations where a cost-plus-fixed-fee or letter contract is employed, such as where construction must proceed with design and preparation of definitive requirements and specifications are not possible,

competition with respect to price, fixed-fee or estimated reimbursable cost is generally meaningless and unimportant as a selection factor, as the fixed-fee is a small part of the overall cost of the construction and the reimbursable cost proposed by a contractor is largely a guess at best. The Corps' own regulation recognizes this. ER 415-345-230, paragraph 2-02.

In such situations, however, competition as to capability may be feasible and practical. Given only a general description of the proposed work, construction contractors having basic capability to perform the work could submit capability proposals, in which they are afforded the opportunity to relate to the procuring activity their particular qualfications and competence for the specific project under consideration. Again, the Corps' regulations recognize these procedures. ER 415-345-230, paragrapn 2-02. Such capability proposals could contain specific contractor information, such as management personnel to be furnished, available equipment, plan of mobilization, financial capacity, past performance record and other factors.

Based on our review of the full record now before us, we feel that, given the several weeks available to the Corps after being granted final negotiation authority, competition could and should have been introduced, at least to the extent of soliciting capability proposals, albeit on an expedited basis, from a reasonable number of the major firms that had already expressed interest in the project as early as July 1978. Such action by the Corps would have fulfilled its statutory and regulatory obligation to obtain competition to the maximum extent practicable and could have been accomplished within the time available. In this regard, we note that the Corps' initial sole-source justification in February 1978 stated that "competitive negotiations [would] require several days" only.

Had the Corps sought competition, we believe it would have been able to expeditiously evaluate the capability of each firm solicited to meet the specific requirements of the proposed project. See ER 415-345-230, paragraph 2-02. Such a competitive approach would have avoided the sequential sole-source procedures employed in the procurement in which the final selection

of J.A. Jones was made on a questionable and somewhat unusual basis (i.e., that Jones was a highly qualified firm not presently under contract with the Corps). Thus, we believe that the Corps' initial actions resulted in a procurement that was not competed to the maximum extent it could have been as required by the statutes and implementing regulations. Of course, once Perini withdrew its expression of interest in the procurement, it appears the Corps had little choice but to proceed as it did.

Moreover, we are also convinced that the Corps personnel acted in good faith and in a dedicated manner to accomplish the construction mission assigned to them. Construction is currently proceeding and in view of the stated urgency of the procurement, we do not believe that the procurement deficiencies noted above warrant a recommendation for termination of the contract.

We trust that the foreging will be helpful.

(SIGNED) [illegible] STAATS

Comptroller General
of the United States