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

31161

B-177847

July 10, 1973

Akin, Gump, Strauss, Hauer & Feld
602 Madison Office Building
1155 15th Street, NW.
Washington, D. C. 20005

Attention: Laurence J. Hoffman, Esq.

Gentlemen:

Reference is made to your letter of May 11, 1973, and prior correspondence, protesting on behalf of Texas Instruments Incorporated (TI) the award of contract No. DOT-FA73WA-3228 to General Dynamics, Electronics Division (GD), by the Department of Transportation (DOT), Federal Aviation Administration (FAA).

You object to the award on the grounds that the procurement should have been advertised rather than negotiated; that award should have been made to TI on the basis of its initial proposal; that the agency improperly considered a late price reduction by GD; that the Office of the Secretary of Transportation (OST) unlawfully intervened in certain procurement decisions made by FAA; and that award to GD may violate the provisions of the Buy American Act. You request that the award to GD be set aside, and that award be made to TI on the terms specified in its previous proposal.

For the reasons which follow, the protest is denied.

Request for proposals (RFP) WA4M-2-7630 was issued on March 17, 1972, for the design, development, fabrication and installation of certain airport surveillance radar equipment, specifically, 31 units of the system described as the ASR-8. Separate cost and technical proposals were solicited. Amendment No. 2 to the RFP dated May 11, 1972, changed the type of contract to be awarded from cost-plus-fixed-fee to fixed-price-incentive, with five items, involving data and certain support services, on a fixed-price basis. The amendment also eliminated the requirement that offerors submit cost or pricing data.

Timely proposals were received from TI and GD on May 23, 1972, with target prices as follows:

PUBLISHED DECISION
53 Comp. Gen.....

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TI	$17,495,027
GD	20,362,025

The technical proposals were referred to a technical evaluation team, which furnished its report to the contracting officer by letter dated June 7, 1972.

FAA conducted an analysis of TI's proposed price, which included examination of data at TI's plant on July 10, 1972. In the meantime, GD, by telegram of June 29, 1972, had modified its proposal by reducing its target price to $16,568,000.

After analysis of the TI price, FAA desired to make an award to TI on the basis of the initial proposals. However, by letter of July 24, 1972, to the Administrator, the Acting Assistant Secretary for Administration of DOT expressed the view that the proposed award to TI could not be supported on the basis of adequate price competition or price analysis and recommended that FAA abide by the requirements of the Federal Procurement Regulations (FPR) by securing the submission of detailed cost or pricing data, conducting audits, and negotiating with the offerors.

Both offerors submitted cost or pricing data and technical revisions to their proposals. The cost proposals were audited and negotiations were conducted separately from November 15-20, 1972. At the conclusion of the discussions, best and final offers were obtained, as follows:

GD	$17,656,625
TI	21,025,731

FAA recommended award to TI. However, as a result of a decision by the Under Secretary of Transportation, award was made to GD on January 12, 1973, as the lowest technically acceptable offeror.

Your initial contention is that the procurement should have been formally advertised rather than negotiated. The contract was negotiated pursuant to 41 U.S.C. 252(c)(10), which provides that contracts may be negotiated for property or services for which it is impracticable to secure competition. FPR sec. 1-3.210(a)(13) lists the impossibility of drafting adequate specifications, the basis relied upon in the agency's Determination and Findings, dated March 17, 1972, as one of the instances where the cited statutory authority may be used.

Our Interim Bid Protest Procedures and Standards (4 CFR 20.1, et seq.) provide that protests based upon alleged improprieties in solicitations which are apparent prior to the closing date for receipt of proposals shall be filed prior to the closing date for receipt of proposals. TI did not question the use of negotiation procedures until after the award of the contract in January 1973. As one of the leading suppliers of ASR equipment to FAA in the past, and as the supplier of the previous system, the ASR-7, it would appear that TI was uniquely qualified to call the procuring agency's attention to the reasons why it believed it was not impossible to draft adequate specifications for the "next generation" of ASR equipment, the ASR-8 system. In any event, when the agency decided to procure the ASR-8 by negotiation, the appropriate time to protest this method would have been before the closing date for receipt of proposals when remedial action might have been possible. In the circumstances, this portion of your protest must be regarded as untimely and will not be considered. Your other contentions are considered below.

Your contention that award should have been made on the basis of the initial proposals is based upon amendment No. 2 to the RFP, May 11, 1972, which stated in part:

> Your proposal should be submitted on the most favorable basis as to price, technical approach, delivery or time for completion, and other factors, since the Government proposes to make an AWARD WITHOUT further discussions or negotiations. Therefore, cost and price analysis information is no longer required.

This, you argue, induced TI and others to compete with the expectation that award would be made without discussions and submission of cost or pricing data. Thus, an award on a basis of other than initial proposal was improper. You believe that the Government should have determined that adequate price competition, as defined in FPR sec. 1-3.807-1(b), existed since there were two responsive proposals. In this regard, you characterize the technical evaluation report as indicating that GD's proposal was technically acceptable and inferior to TI's.

The letter dated June 7, 1972, from the evaluation team chairman to the contracting officer states that the TI proposal was found to be complete, adequate and responsive in all substantive areas. With regard to the GD proposal, the letter states:

> The General Dynamics proposal, while it could probably be upgraded, cannot be considered complete, adequate, and responsive as it now stands.

* * * * *

> * * * It is not unreasonable to assume that, given the opportunity and more time, the General Dynamics proposal could be upgraded. It is the opinion of the team, however, that contract award to General Dynamics based on the proposal as submitted would result in unacceptably high risk to the Government.

These findings were iterated in a second letter dated June 30, 1972, from the team chairman:

> From analysis of the General Dynamics ASR-8 technical proposal, the evaluation team concluded that, as submitted, the proposal was not technically complete, adequate and responsive.
>
> It was the opinion of the team, however, that the proposal could be made complete, adequate and responsive through technical negotiations.
>
> Such negotiations, and the resultant design changes would cost time and money; a realistic assessment of the time or money involved would not be possible without some initial contact with the offeror.

For the following reasons, we agree with the Government's position that adequate price competition did not exist in the circumstances. The clear import of the technical evaluation report is that GD's initial proposal was technically unacceptable overall, though susceptible of being upgraded to an acceptable level through technical discussions. Since only one offeror, TI, submitted a fully acceptable offer, the criteria of adequate price competition set forth in FPR sec. 1-3.807-1(b)(1)--at least two responsible offerors who can meet the Government's requirements--were not met. In addition, we do not believe the second exception in FPR sec. 1-3.805-1(a)(5) to the requirement that discussions be conducted with all responsible offerors within a competitive range--namely, where accurate prior cost experience with the product clearly demonstrates that the price is fair and reasonable--could properly have been invoked here. Although FAA did conduct analysis of the TI price, comparing it with a Government estimate based upon the cost history of the previous airport surveillance radar system, the ASR-7, with the added complexity of the ASR-8 system factored in, this is not equivalent to accurate prior cost experience with the ASR-8 system. Even if the ASR-8 is regarded as substantially the same as the ASR-7, the accuracy of such price analysis would appear to be questionable in view of the fact that the ASR-7 has been procured on a sole-source basis from TI since fiscal year 1969.

In any event, award could not have been made prior to the submission of cost or pricing data as required by FPR sec. 1-3.807-3(a). See 46 Comp. Gen. 631 (1967), wherein we held that a finding of adequate price competition could not serve as a basis to dispense with the requirement for cost or pricing data where award of a fixed-price-incentive contract was contemplated. The record does not show that the exceptional case waiver authority provided in FPR sec. 1-3.807-3(b) was exercised here.

From the foregoing, it appears that award on the basis of the initial proposals was not possible. Even if it were conceded, for the purposes of argument, that a proper finding of adequate price competition could have been made, and that such a finding could properly serve to dispense with the requirement for cost or pricing data, it is not apparent why the agency's decision to enter into discussions and obtain cost or pricing data could be regarded as arbitrary.

A decision to take exception to the requirement for discussions with all offerors within a competitive range and to make an award on the basis of initial proposals is discretionary in nature. B-176334, January 16, 1973. Also, we have stated that where negotiation is employed, its flexibility should be used to insure that competition is enhanced rather than limited, 51 Comp. Gen. 637, 640 (1972), and that the primary consideration in negotiated procurement is discussion with all offerors within a competitive range to determine whether deficient proposals—initial proposals which are not fully responsive to specifications—are reasonably subject to being made acceptable. 51 Comp. Gen. 431 (1972); 50 id. 59 (1970). In the circumstances, it is our view that the agency's departure, after receipt of initial proposals, from its stated intent to make an award on the basis of those proposals, cannot be regarded as giving rise to an inference of arbitrariness. See, in this regard, 47 Comp. Gen. 279 (1967).

Your contention concerning GD's late modification of its proposal is that the Government improperly accepted and considered it. GD's modification to its initial offer was stated in a telegram of June 29, 1972, as follows:

> GENERAL DYNAMICS HAS REVIEWED THE WORK PLAN ESTABLISHED FOR THE ASR-8 PROGRAM AND HAS DEVELOPED AN IMPROVED APPROACH UTILIZING ADDITIONAL CORPORATE FACILITIES WHICH WILL RESULT IN A SIGNIFICANT REDUCTION IN CONTRACT PRICE. IN THIS NEW PLAN THE PROGRAM WILL CONTINUE TO BE MANAGED BY OUR ELECTRONICS OPERATION IN SAN DIEGO, CALIFORNIA TOGETHER WITH THE ENGINEERING AND PROCUREMENT MANAGEMENT. HOWEVER, AN APPROPRIATE AMOUNT OF THE PRODUCTION ACTIVITY

WILL BE ACCOMPLISHED IN OUR ELECTRONICS FACILITY AT GARLAND, TEXAS, RESULTING IN REDUCED COSTS. THIS PLAN IS CONSISTENT WITH OTHER RADAR PROGRAMS NOW UNDER CONTRACT WITH THE GOVERNMENT AND TAKES OPTIMUM USE OF THE ADVANTAGES OF EACH OF THE GENERAL DYNAMICS CORPORATE FACILITIES.

GENERAL DYNAMICS IS PLEASED TO OFFER THE FOLLOWING REDUCED PRICE FOR THE ASR-8 PROGRAM.
SOLICITATION WA4M-2-7630

FIXED PRICE INCENTIVE ITEMS
1, 2, 3, 4, 5, 6, 7, 8, 10 (A. B. C. E. H.) 14

TARGET COST		$15,062,000
TARGET PROFIT (AT 10 PERCENT)		1,506,000
TARGET PRICE	16,568,000	
CEILING PRICE (AT 120 PERCENT)		18,074,000
FIRM FIXED PRICE ITEMS 9, 11, 12, 13		$550,000

ALL OTHER TERMS AND CONDITIONS OF OUR OFFER REMAIN UNCHANGED.

This reduced GD's target price from $20,362,025 to $16,568,000, making it lower than TI's initial target price. You believe that the price reduction significantly influenced the decision not to make an award on the basis of the initial proposals. In addition, you have made repeated allegations that TI's price had been leaked to unauthorized persons and suggest that this, in conjunction with the circumstances surrounding GD's price reduction, shows that TI's interests were prejudiced.

With regard to your contention that TI's price was leaked, the agency has stated:

> The price proposals from Texas Instruments and General Dynamics were handled in accordance with standard Federal, Departmental, and FAA Procurement Procedures to insure the integrity of the competitive system and the proposals received. If Texas Instruments has information concerning any unauthorized disclosure of pricing information to General Dynamics, or if Texas Instruments was itself the recipient of such information concerning the General Dynamics' proposal, we urge that they come forward with specifics which would permit us to investigate the matter.

You have been unable to provide any evidence to substantiate your allegations and, under the circumstances, no basis exists to conclude that TI's interests were prejudiced.

It does not appear that the agency ever decided if it was proper to consider GD's proposal as modified by the late price reduction as the basis for a contract award, nor do we find it necessary to decide this issue. It appears that some consideration was given to GD's modified proposal as a basis for deciding to enter into discussions with both offerors. The agency's action in this regard was proper, since GD's late price reduction fairly indicated that negotiations would prove highly advantageous to the Government. 47 Comp. Gen., supra; B-176407, September 27, 1972. Regardless of the propriety of considering the late price reduction for this purpose, however, the agency was legally required to enter into discussions and secure the submission of cost or pricing data for the reasons indicated previously.

We have considered and rejected your contention that the action by OST in disregarding FAA's recommendation to award the contract to TI, whose final offer was found to be technically superior, after the close of negotiations, was "unlawful." Enclosure C to the RFP, as amended, provided that proposals were to be evaluated in accordance with the technical evaluation criteria set forth in Enclosure A, as amended. (consisting of 18 factors, each of equal weight), as well as on the basis of price. Since the RFP did not make technical considerations paramount, we believe that both price and technical considerations were to be accorded substantially equal weight. B-176763, April 11, 1973, 52 Comp. Gen. ____. Thus, the contracting officer's action in consummating a contract with a responsible offeror, low in price by more than four million dollars, which had submitted a technically acceptable final offer, was a proper exercise of procurement judgment.

In addition, the agency has submitted, in response to your protest that OST intervened in this procurement in an unlawful manner by overriding FAA determinations to award the contract to TI, a memorandum of law entitled "Power and Authority of the Secretary of Transportation" dated October 17, 1968. A copy of the memorandum is enclosed. We believe that the information contained therein adequately disposes of your views on the authority of the Secretary of Transportation to become involved in FAA procurement actions.

Finally, you have contended that the award to GD may violate the provisions of the Buy American Act, 41 U.S.C. 10a-d. You state that one of GD's subcontractors is a French concern, Thompson CSF, and that you believe that the agency may not have taken proper steps to assure Buy American Act compliance.

In this regard, the agency states in its March 27, 1973, report that:

The award to General Dynamics does not violate the provisions of the Buy American Act. Thompson, as a subcontractor, is not delivering an end product or any components as specified in the Government's contract with General Dynamics, but is instead furnishing certain design efforts to be utilized by General Dynamics in producing the end product. Further, the dollar amount of the Thompson subcontract is $1.6 million which is substantially below 50 percent of the value of the total end product cost cited by the Act.

In view of the foregoing, the protest is denied.

Sincerely yours,

Paul G. Dembling

Acting Comptroller General
of the United States