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

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OCT 29 1973

National Biomedical Research Foundation
Georgetown University Medical Center
3900 Reservoir Road, NW.
Washington, D. C. 20007

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Attention: Dr. Robert S. Ledley
President

Gentlemen:

By letter dated October 2, 1973, and prior correspondence, you protested the award of a contract to the Jet Propulsion Laboratory (JPL) of the California Institute of Technology (CIT) by the National Institute of Child Health and Human Development, National Institutes of Health, Department of Health, Education and Welfare. Request for proposals (RFP) NICHD-CHS-72-3 was issued on March 15, 1972, by the Mental Retardation Branch of NICHD. The solicitation sought proposals for a cost type contract "* * * to develop fully the automated analysis of chromosomes, including the new cytogenetic banding techniques, to the point where it will be available for routine automated use in antenatal and postnatal diagnosis of chromosome disorders" and "* * * the development of a prototype system which can be used in a research setting and has the capability for clinical application in hospitals and laboratories."

Although you raise many specific arguments, it is generally your position that JPL either did not propose to do what the solicitation required, or does not possess the capability to perform in accordance with the terms of the solicitation and, in addition, that the evaluation of the proposals was conducted improperly. Consequently, you request that the contract with JPL be canceled and that a contract be awarded to the National Biomedical Research Foundation (NBRF).

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[Protest of HEW Contract Award]

PUBLISHED DECISION
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We agree that certain irregularities did occur in this procurement; however, we do not feel that they were such as to require cancellation. We are, however, bringing these irregularities to the attention of the Secretary of Health, Education and Welfare, with the expectation that such irregularities will not occur in future procurements.

Your protest raises numerous specific issues which we will consider in detail after we set forth the history of this procurement. Initially, by letter of November 1, 1971, you queried Dr. Felix de la Cruz, Special Assistant for Pediatrics, National Institutes of Health, Department of Health, Education and Welfare, about the possible interest of NICHD in an unsolicited proposal for a contract for an automatic chromosome analysis system. Dr. de la Cruz prepared a Contract Request dated December 10, 1971, recommending sole-source award to NBRF. The contracting officer, however, denied the request because he felt that the proposal was not unique or of a sufficiently novel character to justify a sole-source award.

Five proposals were received in response to the RFP and three were determined to be within the competitive range. The three competitive offerors, their proposed costs, and their respective technical rankings were as follows:

JPL	$353,510	93
NBRF	$267,297	83
New England Tufts	$636,177	72

The proposals were evaluated by an ad hoc technical evaluation panel composed primarily of non-Government scientists. Following evaluation of the proposals the panel felt that certain clarifying information was needed from NBRF and JPL. NBRF supplied this information by letter of August 15, 1972. With respect to JPL's proposal, the panel had doubts whether JPL actually had on hand certain operational equipment as asserted in its proposal. Therefore, the panel conducted an on-site investigation of JPL's facilities. No on-site investigation was made of NBRF's facilities or of New England Tufts' facilities. After this clarifying

information was obtained, all three offerors were invited to submit any further technical or cost revisions in their proposals. Only New England Tufts elected to submit a revision in its proposal, but the review panel considered the revision to be technically insignificant.

Subsequently, the Contract Specialist performed a best-buy analysis taking into consideration the technical evaluation, price analysis and past performance history. JPL's proposal was deemed to offer the greatest advantage to the Government, price and other factors considered. Therefore, award was made on February 1, 1973, to JPL in the form of a cost reimbursement interagency agreement with the National Aeronautics and Space Administration as a task order under an existing NASA contract with JPL.

It is your contention that in several instances JPL did not propose to do what the RFP required. For example, the RFP requires that the prototype system be capable of "chromosome spread image scanning of glass slides directly from the microscope or from photomicrographs" (underlining supplied). You argue that JPL does not input the image of good chromosome spreads directly into the computer; "rather the chromosome image from the microscope is first put onto magnetic tape which is then manually carried to the computer for input for analysis." It is also your position that JPL does not propose scanning chromosomes from photomicrographs.

In regard to the first issue, the contracting officer insists that JPL does have the capability to input the chromosome image directly into the computer, but "because of the limited need to use such equipment to date, JPL has resorted to manually carrying data to the computer for input for analysis."

JPL, in its letter of May 18, 1973, responded to this contention in the following manner:

> "Using the JPL scanner, images may be scanned, digitized, and fed directly into a computer system made up of two computers connected by a data link."

You argue that "directly" does not permit the use of a data link connecting two computers. However, we think that the interpretation given this provision by JPL and NICHD is not unreasonable. Therefore, we have no grounds for objection. In this regard, we should note that questions concerning the interpretation of specifications and whether an offeror's proposal in fact meets those specifications are generally left to the contracting agency and will not be overturned by this Office unless clearly arbitrary or unreasonable. B-169633(2), January 4, 1972.

Your next contention is that JPL does not propose scanning chromosomes from photomicrographs as required by the above provision. In this connection, you argue that since certain provisions of the RFP require scanning from a microscope, an offeror proposing only film scanning would not comply with these other requirements. Therefore, you argue that both capabilities are required. NICHD agrees that JPL did not propose film scanning, but insists that the RFP does not require scanning from photomicrographs. NICHD argues that the intended meaning of the language, "chromosome spread image scanning of glass slides directly from the microscope or from photomicrographs" (underlining supplied), provides an option to scan either from a microscope or from photomicrographs.

Since the provisions you cite appear to specifically call for microscope scanning, we tend to agree that to read the provision in question as providing an option is questionable. However, the fact remains that JPL's proposal of only microscope scanning was determined to meet the Government's actual needs. Furthermore, you have not alleged any basis for concluding that you were thereby prejudiced. Therefore, we are unable to conclude that NICHD's determination in this regard was arbitrary or unreasonable. B-169633(2), supra.

You next contend that JPL does not have the capability to automatically direct the motion of the microscope stage to detect good chromosome spreads and to record coordinates to the nearest 1.25 microns of the center of each chromosome spread as required by the RFP. You state that the best JPL can do is to record coordinates to the nearest 7.50 microns of the center of a chromosome spread.

JPL contends that it possesses both of these capabilities. In regard to the former capability JPL states that:

"The NICHD site visit committee viewed a demonstration of the automatic spread location capability of ALMS. This capability is a software simulation of an automatic spread location hardware now under development and described in JPL's proposal. When the spread location process is initiated, a software routine (SRCH) commands the microscope stage to make a rapid 10 mm traverse. Simultaneously, the scanner continuously performs a cursory scan of the image to detect chromosome spreads. The computer analyzes the incoming scan data and records the coordinates of stage positions containing chromosome spreads. After completion of the traverse, the stage automatically returns to the coordinates of each spread in sequence for display to the microscope operator."

In regard to the ability to record to the nearest 1.25 micra the coordinates of a chromosome spread, JPL states that:

"A software routine (VSET) commands the microscope to perform a cursory scan of the image and computers vertical and horizontal boundaries of the spread thereby defining a minimum enclosing rectangle. The program then calculates and records the center of this rectangle. SRCH and VSET can be executed automatically in sequence to first locate stage coordinates and then locate and record the center of each spread. The net result of this process is a fully automatic location of (1) the stage coordinates of fields containing chromosome spreads and (2) the coordinates of the center of each chromosome spread within its field. This procedure, while not being our preferred method of operation, serves clearly to satisfy the RFP requirements, notwithstanding our use of a 15 micron stage translation step size."

The scientific review panel and the contracting officer agreed that JPL's proposal satisfied these RFP requirements. We do not find that their judgment was unreasonable in this respect.

You also contend in this connection that JPL does not claim the capability of locating chromosomes within a low power field. However, as JPL points out, "no such low power search capability is required by the RFP. Even if the RFP had included such a requirement the above precedure would be adequate since it operates at both low and high power." Accordingly, we think that this aspect of your protest is without merit.

You next contend that JPL's pattern-recognition programs do not, as required by the RFP, include syntax-directed pattern recognition. There seems to be some disagreement between you, JPL and the agency concerning the definition of syntax-directed pattern recognition. Although we concede that you are qualified in the area of pattern recognition, we must defer to the agency's technical determination that JPL offered a generic equivalent to syntax-directed pattern recognition.

You also allege that JPL does not comply with the RFP requirement for access to "a programming system that enables on-line computer console interaction with the disk memories of the computer for the evaluation and display of large masses of data in a file * * * [and] the capability to perform analysis of variance, t-tests, and other statistical tests, or to display histograms and scattergrams." In particular, you state the JPL lacks statistical interaction.

JPL's letter of May 18, 1973, notes, however, that one of its programs, BOLD, "allows the computer operator to execute interactively any program in the VICAR library, including many statistical programs. Thus, our programming system permits interactive statistical analysis." You argue that JPL is attempting to redefine "interaction" to cover a program which is not, in fact, interactive. However, the contracting officer reports that a pre-award survey was conducted of JPL's facilities and it was determined that JPL has a programming system which fulfills this requirement of the RFP. Therefore, once again, we must defer to the agency's technical determination on this issue.

You next argue that JPL fails to meet the RFP requirement for "a high speed digital computer which can be dedicated to the development of the prototype system." Essentially, it is your position that JPL does not have a dedicated computer because it still employs batch processing, and batch processing is the opposite of dedication.

JPL disputes this contention. JPL claims that batch processing is the opposite of time sharing rather than of dedication. Furthermore, JPL states that:

> "Using batch processing with our complex of computers allows us to achieve adequate dedication. Our IBM 360/44 computer is dedicated to image processing at all times and to biomedical image processing six hours each day. Our IBM 1130 computer is dedicated to the ALMS at all times. The PDP 11/40 mini-computer to be purchased for use under this contract will be totally dedicated to the prototype system. * * * The RFP does not, in our view, require total dedication of all these machines but only sufficient access to properly perform the work."

It appears the evaluators felt that JPL satisfied the RFP requirement for a "dedicated" computer as that term is used in connection with this procurement. Since such determination is the prerogative of the procuring agency and appears reasonable, we cannot agree with your contention.

The RFP also provides that offerors have a "* * * staffed and currently operating cytogenetic laboratory capable of experimenting and developing new staining techniques as well as perfecting known staining methods and improving quality of chromosome spreads." You contend that JPL does not possess this capability.

The contracting officer states that although JPL does not have its own cytogenetic laboratory for the purposes of this contract, JPL will subcontract the cytogenetic work to the City of Hope Hospital. In this connection, the evaluators considered and approved

this arrangement. The contracting officer also notes that you proposed to subcontract with the University of Colorado Medical School to fulfill the RFP requirement for a cytogenetic laboratory.

We think that a reasonable interpretation of the RFP and applicable regulation (FPR 1-1.1203-2) permits the type of subcontracting for cytogenetic support which you and JPL propose. While a cytogenetic laboratory and qualified personnel are essential to performance of this contract, an offeror's compliance with this requirement is a matter of responsibility, that is, capacity to perform, rather than responsiveness. Therefore, under the cited regulation, the question is whether JPL had the facilities and personnel or "the ability to obtain them" by the time performance was due. Since the subcontract arrangement for the required services was approved, we see no basis for our Office to object.

You next contend that there are certain capabilities or facilities which JPL claims they must have in order to perform the tasks required by the RFP and that the development of these capabilities is dependent upon successful completion of future research to be performed under NIH Research Resources Grant RR-00443. Therefore, you claim that since no one can guarantee the results of future research that JPL cannot fulfill the responsibility requirement of FPR 1-1.1203-4 which, provides as follows:

> "Except to the extent that a prospective contractor proposes to perform the contract by subcontracting * * * acceptable evidence of his 'ability to obtain' equipment, facilities, and personnel * * * shall be required. If these are not represented in the contractor's current operations, they should normally be supported by a commitment or explicit arrangement, which is in existence at the time the contract is to be awarded, for the rental, purchase, or other acquisition of such resources, equipment, facilities, or personnel."

In this connection, the contracting officer points out that one of the major reasons for the technical panel's site visit to JPL was to ascertain JPL's ability to obtain equipment, facilities and personnel as stated in its proposal. The technical panel was

satisfied with JPL's ability to do so. Since such determination relates to responsibility and the record reasonably supports the Board's affirmative determination, there is no basis for our Office to disagree. 49 Comp. Gen. 553 (1970). Furthermore, the contracting officer noted that the "* * * site visit also investigated grant progress and determined that there was no diversion of grant funds from the project and that there would be no overlap with grant support." In these circumstances, we see no basis for your contention in this regard.

Your next argument concerns JPL's failure to propose any telephone communication capabilities in its prototype system. The applicable RFP provision states that:

> "If economically feasible the system should have the capability for telephone communication of findings directly from the computer to remote user consoles and for remote interrogation of the computer data files from laboratories via telephone lines."

The contracting officer states that telephone communication capability is "available to JPL for performance of this contract." Although JPL expresses uncertainty about the economic feasibility of telephone communication, it states that "the JPL proposal describes a computerized data management system accessible by telephone which can be used to evaluate the economic feasibility of telephone communication. * * * Thus, as required by the RFP, JPL will investigate the economic feasibility of this approach and implement the capability if feasible." Therefore, it appears that JPL intends to comply with the requirement "if economically feasible." In any event, the RFP did not provide that telephone communication capability was a prerequisite for award.

The RFP also requires the contractor to: "Develop statistical programs for use with the system." You claim that JPL does not propose to do so.

The contracting officer states that it was determined that statistical support is available to JPL. JPL, in its letter of May 18, 1973, states that its proposal "clearly sets forth plans

for proposed statistical analysis development. * * * Further that proposal includes plans for a patient data file implemented on a large scale computer system."

You concede that a statistical patient data file is proposed, but not for the prototype system.

JPL argues that the prototype system actually consists of two components:

> "(1) A mini-computer based automated microscope system for automatic karyotyping, and (2) a patient data file and a set of biostatistical analysis programs suitable for use on large scale computer systems."

You contend that JPL's statistical programs cannot be used with the first component of its system because the statistical programs require a large scale computer system rather than the mini-computer proposed by JPL. Furthermore, you state that JPL's statistical programs cannot be used with the second component of its proposed system because it too does not contain the required large scale computer system.

JPL, in its final submission of June 15, 1973, states that the "biostatistical programs we propose to develop can clearly be used with the prototype system, even though these programs cannot be executed on that system."

Based upon our review of the record on this point, we believe there is some doubt whether JPL's proposal was in full compliance with these requirements. As you note, apparently 2 of the evaluators were concerned about this matter and recommended review of JPL's performance to insure compliance. In view thereof, we believe this matter should have been clarified prior to award. Nevertheless, we do not believe that the failure to do so is a sufficient basis for canceling an otherwise valid award.

You have also raised several questions concerning the propriety of the evaluation process, contending primarily that the stated evaluation criteria and scoring procedure were not followed.

The RFP states that:

"* * * proposals will be evaluated in accordance with the following factors, * * *

"1. The offeror's analysis of the proposed project; evidence of his understanding of the problem; and soundness and feasibility of the procedures proposed in consideration of Part I, Sections A and B of this Request for Proposals. (30)

"2. Adequacy of the facilities and resources available or set forth in Part I, Section C Facility Requirements. (30)

"3. Experience, qualifications, competence and availability of the offeror's investigative team. (20)

"4. Recognition and discussion of anticipated major problems together with suggested solutions; originality of ideas presented and flexibility for redirection. (20)"

The RFP further states that "Each proposal will be evaluated separately and independently on the basis of the above factors by an initial review panel composed mostly of nongovernmental scientists."

It appears, however, that the scientists comprising the technical panel reviewed the proposals on the basis of their overall merit and then recommended either approval or disapproval. There is no specific discussion in the reviewers' comments of any of the four evaluation criteria set forth in the RFP. Nor is there any indication that the reviewers assigned numerical scores based on those criteria. The numerical scoring apparently was done for the benefit of the Contract Review Committee by the contracting officer or project officer who attempted to structure a consensus of the reviewers' comments and, on the basis thereof, assign numerical scores for each of the four evaluation criteria. We read the RFP as indicating that the

scoring would be done by the individual panel members. We note, however, that all of the reviewers recommended approval of the ITL proposal and disapproved of your proposal. Therefore, it is clear that the relative technical ranking of the proposals would not have changed if the proposals had been individually scored by the members of the panel. Therefore, we fail to see how you were prejudiced.

You next allege that the contracting officer did not award the contract to the lowest responsive, responsible offeror and that the economic analysis conducted by the contract specialist was arbitrary and capricious. You also contend that the information used to evaluate your prior performance history was "slanderous" and inaccurate.

In regard to this phase of the evaluation, the RFP provided that:

> "A separate cost analysis and evaluation will be performed by the Contract Specialist."

Furthermore, it provided that:

> "A best-buy analysis will be performed, taking into consideration the results of the technical evaluations, price analysis, past performance history, and the ability to complete the work within the required time frame."

Although the contracting officer concedes that your estimated cost was $75,413 lower than the award amount, he notes that in selecting an offeror for an R&D contract an offeror's cost estimate "* * * reflects the basic assumptions underlying his technical or developmental approach, which may not demonstrate the degree of technical competence or capability deemed necessary for successful prosecution of the work. In the last analysis * * * the primary consideration in source selection is determining which offeror is likely to perform the contract in a manner most advantageous to the Government, price and other factors considered."

The following is the contracting officer's cost and best-buy analysis:

		NBRF	JPL
"(1)	Proposed Cost	$265,297	$353,510
(2)	Additions/deletions	+ 27,528	- 10,800
(3)	Testing	-	- 36,088
(4)	Additional Computer Items	40,000	-
(5)	Equipment adoption	X	-
	Comparable Costs	$334,825 + X	$306,622

"(1) Proposed cost is the basic price each offeror gave as his response to the RFP requirements. The JPL price is for their stand-alone option which was the only one of two offered meeting the requirements.

"(2) Additions to the NBRF proposal is for the laser scanner offered as an option, but required to provide the item set forth in the RFP. The deletion from the JPL proposal is for equipment negotiated out of their estimated cost which was not considered essential for contract performance.

"(3) The NBRF proposal contains no cost data for testing. Their technical proposal on page 73 only states 'when completed, a pilot application will be made of the prototype system.' If they were to be considered for award, NBRF would be required to perform testing similar to that proposed by JPL. Since this cost cannot be accurately estimated for NBRF, the costs proposed by JPL for testing have been deleted from the JPL proposal to enable an equal comparison of both proposals without the cost element to meeting testing requirements.

"(4) The final result of the RFP requirement is for the development of a prototype system which can be used in a research setting and has the capability for clinical application in hospitals and laboratories (page 2 of RFP). The JPL stand-alone option will meet this requirement.

One reviewer notes of the NBRF proposal, 'one major weakness of this proposed system is that it is built around a dedicated IBM 360/44. It would be vastly better if a stand-alone device for at least partial analysis was available, with communication to a major computer in a batch mode as required.' Another writes, 'the total budget (of NBRF) is one of the lowest with any proposal which was submitted. This was due, at least in part, to a lack of purchases of expensive scanner and computer.' A third adds, '* * * it is difficult to compare his budget with others. Presumably if one of the others who proposed to construct completely new equipment were funded, the title to that equipment would vest in the Government. With NBRF it would not - it seems likely that this cost, when added to the NBRF proposed budget, would make it much more comparable with some of the others proposed.' JPL proposed an option 'hybrid' system comparable to NBRF. The difference in equipment costs only between the JPL 'hybrid' and 'stand-alone' systems is $40,000. As a minimum, this cost is added to the NBRF proposal as a reasonable estimate of cost required to convert the NBRF system to a 'stand alone' system, if possible.

"(5) All ad hoc reviewers note that extensive modifications have been required of similar equipment delivered by NBRF previously. No cost figures were cited. For this reason an 'X' factor has been used in the evaluation. This is an important 'past performance history' evaluation criteria for the best buy analysis as stated in the Request for Proposals."

You have challenged the validity of the above analysis, except for the proposed costs and the deletion of $10,800 from JPL's costs. You contend that the addition of $27,528 to your costs was erroneous because the laser scanner was offered as an option and not necessary for compliance with the RFP requirements; that the deletion for testing was erroneous because your proposal contained figures for various personnel who were obviously connected with testing and, in any event, JPL's proposal shows testing costs of $5,760, rather than $36,088; that the addition of $40,000 to your costs for computer equipment because JPL's proposal included such figure was erroneous since you owned the necessary equipment; and that the addition of an

unknown quantity represented by "X" for equipment modification was based upon erroneous information as to equipment previously furnished to commercial sources.

Initially, it should be noted that the agency concedes that the cost of your proposal should not have been increased for the laser scanner. The contracting officer maintains that if any costs for testing were included in your proposal they were obscure. With regard to the JPL figure of $36,088, he states that this figure was based upon privileged cost and pricing data furnished by JPL. The $40,000 figure was reportedly added to your costs to equalize the fact that title to equipment to be purchased by JPL would vest in the Government, whereas the same would not be true in your case because you did not propose to purchase any new equipment.

It is our view that the contracting officer's cost and best-buy analysis is of doubtful validity. First, we believe that the RFP should have been more explicit as to the information to be considered in the evaluation of these factors and as to the relative weight of such factors. Second, it has been conceded that the figure for the laser scanner was erroneously added. Third, if testing cost information was obtained from JPL, such information should have also been requested from you. Fourth, we see no basis for adding the $40,000 to your costs as there was no provision in the RFP concerning such factor. Finally, you have furnished information which indicates that the basis for considering any need to modify your equipment was tenuous. However, we do not believe the latter factor was significant in the analysis as no money figure was ascribed to it.

Notwithstanding our view as to the validity of the cost and best-buy analysis, we do not believe that cancellation is justified in view of the nature of the procurement and applicable regulation, FPR 1-3.805-2, which provides:

> "In selecting the contractor for a cost-reimbursement type contract, estimated costs of contract performance and proposed fees should not be considered as controlling, since in this type of contract advance estimates of cost

> may not provide valid indicators of final actual costs. There is no requirement that cost-reimbursement type contracts be awarded on the basis of either (a) the lowest proposed cost, (b) the lowest proposed fee, or (c) the lowest total estimated cost plus proposed fee. The award of cost-reimbursement type contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. The cost estimate is important to determine the prospective contractor's understanding of the project and ability to organize and perform the contract. The agreed fee must be within the limits prescribed by law and agency procedures and appropriate to the work to be performed (see § 1-3.808). Beyond this, however, the primary consideration in determining to whom the award shall be made is: which contractor can perform the contract in a manner most advantageous to the Government."

We note that the technical review panel was unanimous in its recommendation that JPL be selected based upon technical considerations. Therefore, we do not believe any substantial prejudice resulted from any errors in the cost analysis.

Moreover, it is our opinion based upon a review of the record that the panel's recommendation of JPL was based primarily upon its affirmative findings with respect to JPL's proposal and ability to successfully complete the project, rather than upon any negative opinions expressed by some of the panel members as to the performance of your equipment under earlier commercial contracts. Hence, we do not ascribe any particular significance to the validity of those opinions insofar as the recommendation of JPL is concerned.

With regard to your contention that it was improper to conduct a site visit of JPL's facilities and not of yours, we think that this is a matter of judgment to be decided by the contracting agency and absent a showing that such decision is unreasonable, we will not question the decision. The decision to make a site visit to

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...'s facilities was based upon the panel's question as to the ...istence of certain equipment referenced in JPL's proposal. ...though consideration was given to visiting your facilities, the ... was rejected because at least two of the panel members were ...iliar with your facilities as a result of a recent visit in ...nection with a grant. In these circumstances, we do not ...lieve the decision was arbitrary.

Finally, you question the legality and propriety of the type ... contract awarded to JPL. The mechanism for award was an ...ragency Agreement with the National Aeronautics and Space ...nistration (NASA), whereby this project was incorporated as a ... order under an existing contract between NASA and JPL. Your ...tention is based upon the premise that since chromosome analysis ...neither related to nor based on space technology, the work called ... is not within the scope of the NASA contract.

JPL argues, however, that the term space technology "encompasses ...siderably more than rocketry and propulsion, fields which were ... ago phased out at JPL. Rather, both that term and an important ...t of JPL's work for NASA include and are directed toward the ...ntific experiments and instrumentation which are placed on-board ...ecrafts." Furthermore, the contracting officer advised that this ... order was concurred in by both NASA and the General Counsel ... the Department of Health, Education and Welfare, and that the ...ific authority for negotiation of this interagency agreement ... 42 U.S.C. 2473(b)(5) and (6).

In view of the circumstances reported and the statutory authority ..., we have no basis to question the propriety of the interagency ...ment.

Although, as we have pointed out, there were deficiencies in ... conduct of this procurement, we find no compelling reason to ...urb the existing contract with JPL. Therefore, we must deny ... protest.

Sincerely yours,

For The Comptroller General
of the United States