



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

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December 10, 1973

Arrowhead Industries, Incorporated
Post Office Box 58036
Houston, Texas 77058

Attention: Mr. Hugh O. Lea
General Counsel

Gentlemen:

This is in reply to your letter of October 2, 1973, and prior correspondence, protesting the award of a contract to another firm under request for proposals (RFP) No. 9-BB332-5-3-8P, issued November 21, 1972, by the Lyndon B. Johnson Space Center (JSC), National Aeronautics and Space Administration (NASA), Houston, Texas.

Essentially, it is your position that NASA failed to provide a fair competitive evaluation of proposals and improperly selected for award the proposal of Alpha Building Corporation. For the reasons stated below we must deny your protest.

This procurement covered minor construction and alteration services (less than \$10,000 for each job order) for JSC facilities and for those occupied by JSC at Ellington Air Force Base. The scope of the construction activity covered by the statement of work required a broad variety of skills and would be affected by the rate and nature of the task order flow. Accordingly, the responsibilities of the contractor extended beyond a conventional construction effort in that it was necessary to plan, schedule, coordinate and manage the flow of tasks without loss of time and efficiency.

The RFP advised prospective offerors that the Government was particularly interested in unique and innovative approaches to the efficient performance of the services. The type of contract proposed by NASA was a cost-plus-fixed-fee/award-fee. Offerors were advised that proposals would be evaluated by a Source Evaluation Board for the quality of the service proposed. The major evaluation criteria under Mission Suitability, which would be assigned numerical ratings and weightings, were listed in the solicitation in the following order of relative importance:

[Protest Alleging Agency Did Not Evaluate Proposals Fairly]

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- Most Important - Operating Plan
- Very Important - Key Personnel
- Important - Organization and Staffing
- Less Important - Company Experience

In addition, the RFP advised that proposed costs and other factors were to be analyzed and considered in making the selection but were not to be scored.

After completing its evaluation, the Board assigned numerical scores and adjective ratings for each of the major evaluation criterion, as follows:

<u>Evaluation Criterion</u>	<u>Alpha</u>	<u>Arrowhead</u>
Operating Plan	350-Excellent	280-Good
Key Personnel	229-Good	202-Good
Organization and Staffing Plan	160-Good	100-Good
Company Experience	126-Good	84-Good
TOTAL POINTS	865	666

Alpha's proposed costs, as evaluated, amounted to \$1,816,800 as opposed to evaluated costs of \$2,114,000 for Arrowhead.

Upon consideration of the Board's evaluation, the Source Selection Official concluded that Alpha's proposal represented the greatest value to the Government since it offered overall technical superiority combined with the lowest proposed cost and fee. This official summarized the Board's findings upon which he based his selection as follows:

"The significant strengths and weaknesses of each firm submitting a proposal are outlined below in descending order of merit as evaluated by the SEB:

"The Alpha Building Corporation proposal received an overall rating of a high good. Their proposal received both the highest total numerical score in mission suitability and in each of the four categories scored thereunder. Their operating plan contained no significant weaknesses and thus was scored excellent. The plan reflected an excellent understanding of the work to be performed. The proposed management review of operations, the authority and responsibility of managers, and the proposed degree of field supervision were rated excellent. Additional significant strong points included an optimized workflow, workload planning, and strong consideration of functional area relationships. The plan for cost estimating, scheduling, and control of work was rated

highly effective. The organization and staffing plan was rated good. Functions were logically grouped, spans of control were manageable, and sound techniques were proposed to meet shifting or peak workloads. Key personnel assigned were considered good overall. The proposed Project Manager and his staff have good background and related experience. Alpha's company experience was rated as good. While no cost-type contracting experience was noted, the references were considered relevant and recent. The plan for utilization of company experience was considered good.

"The Arrowhead Industries, Inc., proposal was rated a low good overall. They received the second highest numerical score in mission suitability. The operating plan presented was rated good in that it dealt with the primary requirements well and reflected a good understanding of the work to be performed. The principal shortcoming was the complexity of the operational procedures, resulting chiefly from an overstructured, topheavy staffing arrangement. Further, the intent to achieve some critical operational control through the use of foremen was considered inappropriate. The overall grade for key personnel was in the low good range. The personnel proposed in general were considered good with the exception of the Field Operations Manager who was proposed for a position encompassing responsibilities which extended beyond his background and experience. Arrowhead's organization and staffing plan was rated fair. While an autonomous project organization was proposed, its structure was considered to have too many separate elements at the top level, thus reflecting a topheavy structure with high potential for impeding smooth and fast workflow on the many relatively small tasks that are contemplated by this procurement. This topheavy management approach was considered a key weakness in Arrowhead's proposal, with effects reaching into such areas as operating plans and cost. Arrowhead's company experience was rated fair overall. No previous cost-type contract experience was cited. Relevance rated fair, recency good, and the utilization plan fair. None of the key personnel proposed have participated in the referenced experience with Arrowhead."

You have raised a number of objections to NASA's selection of Alpha. First, you question NASA's evaluation and scoring of the technical proposals. In your opinion your proposed operating plan was not "topheavy", but rather reflected the exact requirements of the solicitation. In

addition, you believe that the NASA evaluators erroneously disregarded the capabilities and experience of your key personnel. It is your contention that Arrowhead was the only firm responding to all the requirements of the solicitation and that the number and quantity of management personnel proposed by Alpha did not meet the stated requirements.

Moreover, you contend that the NASA evaluators did not properly evaluate Alpha's cost proposal. You assert that the evaluators were unduly concerned with the quantum of costs proposed rather than with the realism of the proposed costs, contrary to the RFP and NASA regulations. With regard to the realism of Alpha's proposed costs, you assert that the NASA evaluators failed to consider Alpha's existing collective bargaining agreements which require Alpha to pay wages in excess of the prevailing wage rates and fringe benefits as determined by the Secretary of Labor in accordance with the Davis-Bacon Act. Also, you contend that the NASA evaluators failed to consider certain other factors associated with Alpha's union shop mode of operation. You point out that in contrast to Alpha, your firm does not operate under a union shop type arrangement.

In addition, you have alleged that union pressure was brought to influence the award selection; that a key person proposed by both Alpha and your firm subsequently associated himself only with Alpha, and that Alpha may not be a small business firm. Finally, you have alleged that NASA has obstructed our review of your protest by refusing to provide us with detailed evaluation data and relevant material which would reveal to us the lack of a proper evaluation by NASA.

In this connection, the documents furnished by NASA for our review include the solicitation, the proposals of Alpha and your firm; the Source Evaluation Board Report which, in part, details the evaluation processes utilized, the records of the negotiation and states the Board's findings and conclusions with respect to the various proposals. We have also been furnished with statements by the Source Selection Official, the contracting officer and by NASA's Director of Procurement. In our view these documents set forth the rationale for the NASA's award selection. In addition, we have obtained and considered at your request, the DCAA reports regarding the proposals of Alpha and your firm.

Initially, we should point out that it is not our function to evaluate these proposals in order to determine which proposal should have been selected for the award. Source selection is the responsibility of the contracting agency since it must bear the major criticism for any difficulties or expenses experienced by reason of a defective analysis. Therefore, it is our view that the administrative judgment in these matters is entitled to great weight and should not be disturbed unless shown to be arbitrary. 52 Comp. Gen. 198, 205 (1972).

With respect to the technical evaluation the record shows that although the evaluators rated your operating plan as "good", they also found some shortcomings. In this regard the evaluators stated that:

"The principal shortcoming of the [Arrowhead] plan was its extensive complexity which resulted from the proposed establishment of many separate operating elements to perform specified functions. This led to an overly complex workflow for the size of the operation, and rather complex operational interfaces with potential conflicts of responsibility."

Similarly, the evaluators found that your organization and staffing plan was only fair because the plan was fragmented into "ten rather narrow-band functional areas above the level of foreman, each manned with one or more persons, resulting in a high ratio of personnel to manage, organize, and support the work of the craftsmen." Furthermore, the NASA evaluators noted that "the corporate entity submitting the proposal offers relatively little of its expertise to the organization."

The Alpha operating plan, on the other hand, was rated "excellent". Also, as noted above, Alpha received higher scores than Arrowhead in the other technical (Mission Suitability) areas.

Although you have disputed NASA's evaluation of your technical proposal, you have not provided us with a basis for reaching a conclusion that the NASA evaluation was arbitrary. Rather, it appears to us that the evaluation was conducted in good faith and in accordance with the solicitation evaluation criteria. As previously stated, in these matters the administrative judgment must be afforded great weight. On the basis of the record before us, we find no reason to question NASA's judgment.

Your primary objection to the NASA award selection process, however, concerns its evaluation of Alpha's cost proposal. You believe that Alpha's proposed costs were unrealistically low and that the NASA evaluators failed to properly evaluate these costs. Basically you assert that the NASA evaluators failed to consider the effects of Alpha's union shop mode of operation, on its proposed costs. In this regard, you cite certain inefficiencies which you associate with the union shop (for example, the use of steward time for union business) and Alpha's existing collective bargaining agreements which you state were not considered by NASA in evaluating Alpha's proposed costs.

Concerning inefficiencies in the union shop mode of operation the contracting officer states that during the negotiations it became apparent that the working arrangements which Alpha intended to implement with union personnel would depart substantially from past

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arrangements which may have resulted in certain inefficiencies. The contracting officer further states that in evaluating the proposals the NASA evaluators recognized that both the open shop and union shop modes of operation carried with them the potential for certain favorable as well as unfavorable influences on the efficiency of the operation.

As to your question regarding the realism of NASA's evaluation of direct labor costs; the record shows that Alpha's cost proposal was evaluated in accordance with the then current prevailing wage rates as determined by the Secretary of Labor. We are advised by NASA that the prevailing wage rates were consistent with the wage rates paid by the incumbent contractor. Furthermore, NASA advises (and the Department of Labor has informally confirmed) that in the past, the prevailing wage rates generally have reflected the rates contained in the collective bargaining agreements between the local Associated General Contractors of which Alpha is a member and the various building trade unions. The evaluators relied on the prevailing wage rates in performing their cost analysis on the assumption that the rates contained in Alpha's collective bargaining agreements did not significantly deviate from the prevailing rates. While we tend to think that NASA should have reviewed Alpha's collective bargaining agreements if only to determine their applicability to, and impact upon, the instant contract, nevertheless, we do not think that NASA's use of the prevailing wage rates in this case resulted in an arbitrary cost evaluation.

In our opinion the conclusion of the United States Court of Appeals in Kentron Hawaii, Limited v. Warner, 480 F. 2d 1166 (1973), is equally applicable to your protest. The Court pointed out that while not every judgment in that case was a model of prescience, appellants' claims would have required the Court to substitute its own decisions in place of those made by the Government officers to whom primary discretion had been committed. The Court constricted its review to an insistence on procedural fairness and it required that the bounds of discretion be respected. We think NASA's actions meet that test.

Several additional allegations were raised in your correspondence which were acknowledged by the contracting officer's report, and responded to, as follows:

"A. Allegation of Union Pressure

"1. Arrowhead's Position (Letter 3-5-73): 'Another factor which has become apparent, and will be further documented, is the ugly head of pressure having been applied by certain elements of organized labor to block Arrowhead from receiving work as an open shop contractor.'

"2. Response: I have verified with the Source Selection Official that there was absolutely no pressure on him, either directly or indirectly, from any union element to select a union construction contractor in connection with this procurement.

"B. Alpha May Not Be A Small Business Firm

"1. Arrowhead's Position (Letter 3-19-73): 'The enclosed data would seem to demand of your responsibility a question of the status of Alpha Building Corporation' (NASA Procurement Regulation 1.703(b)(2))!'

"2. Response: In the above referenced letter; Arrowhead points out that a Mr. Walter Soland was a stockholder in the Alpha Building Corporation, and furnished a copy of the incorporation document of Alpha Building Corporation filed with the Texas Secretary of State. Mr. Soland is the owner of Soland Electric Company, a local electrical contractor.

"The JSC Small Business and Industry Assistance Officer has verified the status of both Alpha Building Corporation and Soland Electric Company as being small business concerns. The appropriate forms and certifications on file with that office for both firms are in order. Notwithstanding the fact that Mr. Walter Soland, as an individual, owns stock in Alpha Building Corporation, neither company controls the other nor is there any evidence that a parent company controls both. It is noted that had the annual receipts for both firms been considered together, the average annual receipts for the preceding 3 fiscal years would not have exceeded the \$7,500,000 standard set by definition for a small business concern for this procurement.

"C. Alpha 'Proselyted' One of Arrowhead's Key Personnel

"1. Arrowhead's Position (Letter 3-2-73): 'There was an apparent proselyting of Arrowhead's key personnel conducted by Alpha, with immediate report thereof to the Source Board after the subject person was privy to the Q&A by the Source Board of Arrowhead's proposal.'

"2. Response: The individual to whom Arrowhead refers is Mr. James H. Morris. Mr. Morris is currently employed by the incumbent support services contractor. Generally when a continuing support services procurement is out for recompetition, proposers attempt to line up certain incumbent key personnel in the event they are successful. Mr. Morris was initially proposed as a key person by both Alpha and Arrowhead, and he ultimately, as a matter of his own choice, elected to associate himself only with Alpha. Mr. Morris' commitment to Alpha was in writing at the time Alpha submitted their proposal. At the time Mr. Morris notified Arrowhead that he intended to join Alpha if they were awarded a contract (see Attachment 2), Arrowhead did not regard this as anything out of the ordinary. Evidence of this may be found in Arrowhead's letter of January 27, 1973, which is included herein as Attachment 3. It should be noted that Mr. Morris participated in both oral discussions and that the one with Arrowhead took place after the one with Alpha. However, Alpha submitted no changes of any kind to their proposal after orals which would indicate input from Mr. Morris. They only confirmed answers to cost questions asked at the orals."

We consider the above responses to your allegations by the contracting officer to be reasonable.

Accordingly, your protest is denied.

Sincerely yours,

R.F.KELLER

Deputy Comptroller General
of the United States