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

B-177392

June 19, 1973

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Austin Electronics
450 West First Avenue
Roselle, New Jersey 07203

Attention: Mr. Kenneth H. Ruzie
Division Manager

Gentlemen:

Reference is made to your telegram dated May 18, 1973, requesting reconsideration of our decision dated May 16, 1973, wherein we denied your protest against the rejection of your proposal under request for proposals (RFP) N61339-72-R-0091, issued by the United States Naval Training Equipment Center (NTEC), Orlando, Florida.

In our decision of May 16, 1973, your protest was found to be untimely under section 20.2(a) of our Interim Bid Protest Procedures and Standards. In this regard, we observed that:

* * * the contracting officer advised you of the rejection of your proposal by letter of November 13, 1972, and that you did not file a protest in our Office until December 5, 1972. * * *

In your telegram of May 18, 1973, you advised us that a timely protest was filed by Austin Electronics (Austin) with NTEC by telegram of November 21, 1972. In our review of the record, we did not find this initial date of protest mentioned or specifically referred to in any correspondence previously submitted by Austin or by the Navy. However, by letter of June 5, 1973, with enclosures, the Deputy Chief of Naval Material (Procurement and Production) furnished us with information demonstrating that the protest was timely filed with NTEC and that Austin subsequently filed a timely protest with our Office. Accordingly, we turn to a consideration of the merits of the protest.

This protest involves the proposed procurement of one CH-47 helicopter operational flight trainer with visual system and support items negotiated under the authority of 10 U.S.C. 2304(a)(11). The contracting officer advises that in order to provide for maximum competition, the requirement was solicited under three RFP's which permitted proposals to be submitted for the flight simulator only

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(RFP N61339-72-R-0090--Group I), the visual system only (RFP N61339-72-R-0091--Group II), or the complete unit (RFP N61339-72-R-0142--Group III). Each RFP is identical, except for instructions concerning the group of items being solicited. In this regard, section "D," Evaluation and Award Factors, of the General Instructions of RFP -0091, states that:

Under this solicitation (RFP N61339-72-0091) offers are being solicited for Group 2 only. Groups 1 and 3 are being solicited under separate Request for Proposals. Group 1 and 3 items are listed in the attached schedule only for the information of prospective offerors. Any proposals received under this solicitation for Groups 1 and 3 will be considered as unsolicited and will not be considered for award, since this solicitation solicits proposals for Group 2 only. Proposals for Group 2 are being solicited under this RFP to determine the technical expertise and state-of-the-art of the visual systems industry. An award, if technical and price considerations warrant, will be made for the Visual System and related items (Group 2). Under the aforementioned separate RFPs, another contract may be awarded for the CH-47 OIT and related items including the responsibility for integration of the Visual System (Group 1). However, the Government reserves the right to make only one award for the CH-47 OIT including Visual system and related items (Group 3) provided after evaluation of proposals under another solicitation it is determined that such an award would be more advantageous to the Government, price and other factors considered.

Potential sources were sought by advertisement in the May 25, 1972, issue of the Commercial Business Daily of Advanced Research and Development Synopsis Nos. 72-81 and 72-82. Austin responded to the synopsis; however, the June 20, 1972, technical evaluation report concluded that Austin was not qualified for any part of the procurement. A supplementary evaluation report on Austin dated July 12, 1972, reached the same conclusion and it was, therefore, recommended that Austin not be solicited. Nevertheless, due to its continued interest in the procurement, Austin was sent the RFP for the visual system. This action was taken in response to its July 6, 1972, telegram, which included the statement that: "Although we feel that we are eminently qualified on both portions of the device, we are specifically interested in the visual attachment."

All proposals received by the August 31, 1972, closing date were forwarded for technical evaluation. A preliminary review of the

proposals revealed areas which had to be clarified in each proposal in order to permit an evaluation. In a letter dated September 29, 1972, Austin was advised of uncertainties in its proposal and requested to provide written answers to 37 questions. During the week of October 2, 1972, Austin participated in a clarification conference to discuss the answers. Subsequently, Austin was notified that its technical and price proposal had been evaluated and determined not to fall within a competitive range, price and other factors considered. Award is being withheld pending our resolution of the protest.

Austin contends that its proposal would have been within a competitive range if it had been given the opportunity to respond to the entire procurement or if it had been invited to submit a final price as was allegedly stated would be the procedure if the written technical responses were satisfactory. Austin also questions the technical evaluation of its proposal.

Given the fact that NTEC considered Austin to be unqualified for the entire procurement, we think its decision to furnish Austin an RFP covering only the area of special interest identified in the July 6, 1972, telegram was a reasonable reaction. If Austin wished to question NTEC's response, we believe it was incumbent upon it to raise the issue in a timely manner, certainly no later than the closing date for receipt of proposals. See section 20.2(a) of our Interim Bid Protest Procedures and Standards, 4 CFR 20.1 - .12. In this posture, Austin must bear the consequences of any competitive advantage accruing to an offeror who was able to submit a proposal for the entire requirement.

With respect to the technical evaluation of Austin's proposal, it is apparent from a review of the record that Austin's proposal was evaluated in a manner consistent with the evaluation of the proposals of the other offerors. While Austin's proposal was scored "technically acceptable," NTEC's evaluation rated it the lowest of the acceptable technical proposals submitted in response to the RFP. When contrasted with the most favorable proposal, Austin's technical proposal was considered to be inferior and its price proposal significantly higher. On this basis, the contracting officer determined that negotiations with Austin would be meaningless. Accordingly, it was excluded from the competitive range.

NTEC takes issue with the allegation that Austin was told it would be invited to submit a final price if its technical proposal was acceptable. NTEC states that during the technical conferences all offerors were instructed that if technical clarifications resulted in cost changes, cost revisions should also be submitted with the technical revisions. Austin does not contend that it was denied an opportunity

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to submit cost revisions. We note in this connection that revisions to cost proposals were received. While we believe that offerors should have been advised in writing of the opportunity to submit cost revisions, there is, of course, no suggestion that you were prejudiced by the oral advice. In this context, if NTEC did make the statement as alleged, the statement inaccurately described the latitude afforded contracting officers in determining which proposals are within a competitive range, price and other factors considered. And, since Austin was afforded the opportunity to submit its best initial technical and price proposal, it was not prejudiced if the statement was in fact made.

We have consistently recognized that a reasonable degree of administrative discretion is permissible in evaluating technical proposals and in determining whether a proposal is within the competitive range, and such determination will not be disturbed in the absence of a clear showing that there has been an arbitrary abuse of discretion, e.g., 48 Comp. Gen. 314, 317-318 (1968). On the basis of the record before us, we cannot conclude that there has been an abuse of discretion. Since Austin's proposal was determined not to be within the competitive range, NTEC was not required to conduct price negotiations. 52 Comp. Gen. 382 (B-174870, December 21, 1972).

Accordingly, the protest is denied.

Sincerely yours,

PAUL G. DEMBLING

[For the Comptroller General
of the United States