



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

B-179007

November 12, 1973

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Reavis, Pogue, Neal & Rose
1100 Connecticut Avenue, NW,
Washington, D. C. 20036

Attention: W. Stanfield Johnson, Esq.

Gentlemen:

We are in receipt of your letter of October 2, 1973, with enclosures, and other communications, protesting on behalf of Arvin Systems, Inc. (Arvin), against two procurement actions by the Aeronautical Systems Division of the Department of the Air Force. Arvin has protested the award of contract F33657-72-C-0841 to TEAC Corporation of Tokyo, Japan (TEAC), on May 8, 1972, and the issuance of request for proposals (RFP) F33657-73-R-0944 on a sole-source basis to TEAC on June 30, 1973.

Initially, your protest questions the award of contract F33657-72-C-0841 to TEAC. Award was made to TEAC on May 8, 1972. However, you protested to our Office on June 27, 1973, 13-1/2 months after the final adverse agency action. Section 20.2(a) of the Interim Bid Protest Procedures and Standards states in pertinent part that:

"* * * In other cases, bid protests shall be filed not later than 5 days after the basis for the protest is known or should have been known, whichever is earlier. * * *

Since your initial contentions now question an adverse agency action occurring many months ago, this aspect of your protest is clearly untimely and will not be considered.

The essence of your protest against the sole-source RFP can be summarized as follows: (1) the Air Force has violated 10 U.S.C. 2304(n) by acting arbitrarily in its determination to solicit a foreign source on a sole-source basis, and in not soliciting potential domestic sources, including Arvin, for the production of all or part of this equipment; and (2) that the Air Force has abused its discretion in waiving the Buy American Act, 41 U.S.C. 10a-d. Your second contention is a permutation of the first since waiver was predicated on the determination that only TEAC (a foreign source) has demonstrated the ability to meet the requirements of the RFP as of this date. See Armed Services Procurement Regulation 6-103.2.

[Untimely Bid Protest]

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In a report on the protest to our Office, the Department of the Air Force has restricted disclosure of portions of the report which are dispositive to the outcome of this protest, because they contain proprietary or trade secret information. This material contains the Air Force's justification for waiver of the Buy American Act and the contemplated sole-source procurement to TEAC. We can state, however, that the Air Force acquired no data rights from TEAC under contract F33657-72-C-0341. This award was solely for the procurement of preproduction test models and was not a research and development project. Therefore, the Air Force purchased only the finished products and not the data rights to such products. In addition, an investigation of proprietary and trade secret information was made by a representative of our Office at Wright-Patterson Air Force Base. The restricted nature of the contents of the information we have received prevents our disclosure of further details. However, we have carefully scrutinized the actions taken by the Air Force and are satisfied that there is no reason to object to any portion of the proposed award of a contract to TEAC.

We are aware of your proposal of October 18, 1973, wherein Arvin offers to meet all of the requirements of RFP F33657-73-R-0944. Our Office has always recognized the necessity for procurements to be on a competitive basis to the maximum extent practicable and the duty of contracting agencies to foster competition. H.G., 52 Comp. Gen. (7-175988), May 16, 1973. However, from the facts in the record it appears that Arvin has yet to prove its ability to be a viable competitor with TEAC for this procurement. Arvin's initial proposal was rejected by the Air Force in mid-1972. Arvin then submitted an unsolicited proposal No. 73-C-26 on August 2, 1973. This proposal was evaluated and determined to be unsatisfactory by letter dated August 17, 1973, due to a lack of technical, management, logistical and pricing data. Your letter of October 23 appears only to extend this already unsatisfactory proposal. No further data has been submitted in accordance with the Air Force response of August 17, although the Air Force, consistent with its duty to foster competition, was and is prepared to consider further submissions from Arvin demonstrating its ability to meet the Air Force's requirements. Therefore, our Office has no concrete basis for objecting to the Air Force's assessment of Arvin's ability to furnish the required services. On the other hand, we do have evidence of TEAC's ability to perform.

Accordingly, your protest must be, and is, denied.

Sincerely yours,

Paul G. Dabbling

For the Controller General
 of the United States