

Proc II



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

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B-182149

March 2, 1979

[Protest of Contract Award to NASA By City of Los Angeles]

General Research Corporation
P.O. Box 3587
Santa Barbara, California 93105

DLG 00430

ATTN: Mr. William L. Sargeant
Government Contracts Counsel

Dear Mr. Sargeant:

-DLG 01076

This refers to the protest of Public Safety Systems, Inc. (PSSI), of the award of a contract by the city of Los Angeles to the National Aeronautics and Space Administration pursuant to a grant received by the city from the Department of Justice, Law Enforcement Assistance Administration. The contract in question was awarded on July 15, 1974. A response on the issues raised by the protest has been withheld for a number of reasons, including a question as to the jurisdiction of the General Accounting Office to consider the matter and, most recently, because of the issue raised in the protest concerning the propriety of NASA's participation in the matter.

In light of the time that has elapsed since the protest was originally filed in our Office, we would like to briefly advise you of our views on each of the issues raised and to inform you concerning what future action we plan to take on the matter. We do not plan to reiterate the facts and circumstances involved in this case, with which you are quite familiar.

One of the issues raised concerned an organizational conflict of interest question. The issue arose because of the involvement of the Jet Propulsion Laboratory, an instrumentality of NASA, in an earlier phase of the project undertaken by the city of Los Angeles. We believe that, in the context of procurement by a Federal grantee, the concept of fundamental fairness as reflected in regulations and cases involving direct Federal procurement, requires prior notice to a contractor that its acceptance of the first contract would bar it on grounds of organizational conflict of interest from competing for an ensuing contract. We cannot concur that the competitor in this case should have been precluded from participation in the procurement

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letter

conducted by the city of Los Angeles on the basis of an alleged organizational conflict of interest where the prior contract is unavailable, there is no other indication of such contract having contained a clause notifying the contractor of his potential exclusion and, finally, because the results of the study under the prior contract were made available to all firms solicited by the grantee.

Another question raised concerned the type of contract to be awarded under this request for proposals. In sum, we believe that the grantee's failure to indicate in the RFP the type of contract it contemplated awarding was not in itself prejudicial to an offeror who, in fact, offered the type of contract desired by the grantee.

Concerning the manner in which discussions were conducted by the city of Los Angeles officials, we do not believe that PSSI was improperly excluded from the discussions where the RFP identified proposal evaluation procedures to be followed by the city and, after evaluation was complete, the grantee conducted discussions only with the selected source, since the record reveals a reasonable basis for the grantee's conclusion that PSSI's proposal did not provide a sufficient basis for assuring performance of the required tasks.

The most troublesome issue in this case concerns the participation of NASA as the contracting party with the city of Los Angeles. The essence of the PSSI protest is that it is improper for an agency of the Federal Government to compete with private enterprise for contracts to be awarded by a municipality utilizing Federal grant funds. This is an issue to which the LEAA has not addressed itself either in its correspondence with you nor in its administrative report to our Office.

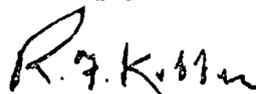
However, in separate correspondence, NASA has invoked as authority for entering into this contract Sections 2473(c) (5) and (6) of Title 42, United States Code. This legislation authorizes the agency to "enter into and perform contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate with any agency or instrumentality of the United States, or with any State, territory, or possession, or with any political subdivision thereof, or with any person, firm, association, corporation, or educational institution." The legislation also authorizes NASA "to use, with their consent, the services, equipment, personnel, and facilities of Federal and other agencies with or without reimbursement, and on a similar basis to cooperate with other public and private agencies and instrumentalities in the use of services, equipment, and facilities." The NASA letter to you also relied upon a prior GAO decision (53 Comp. Gen. 278 (1973)), but we believe that the issue of the propriety of the NASA participation in that instance was not directly before our Office for decision.

The contract between the city of Los Angeles and the National Aeronautics and Space Administration recites that NASA has available to it, through its contract with the California Institute of Technology (CALTECH), the services of the Jet Propulsion Laboratory of CALTECH and that it is in the public interest to provide specialized technical services which JPL has available to it. The work under the contract in this instance is to be performed by the Jet Propulsion Laboratory pursuant to the separate contract between NASA and CALTECH. It is clear from the above statutory language that NASA is authorized to enter into contracts and other cooperative arrangements with educational institutions. It is also clear from the facts that are of record together with the NASA letter to you that NASA has authorized JPL to enter into agreements with other Federal and nonfederal instrumentalities to perform work that is not directly required by NASA, subject to the proviso that NASA retain administrative control over the utilization of JPL's resources. In fact, the organizational conflict of interest question arose in this case only because JPL had had the prior phase contract with the city of Los Angeles.

The issue you have raised also presents the question whether NASA or JPL is the real party in interest in this case. You have asserted that JPL is to be viewed as essentially nothing more than an instrumentality of NASA, but it is equally possible to view JPL as having an organizational identity and purpose of its own, with the overriding proviso that since it exists pursuant to a separate contract between NASA and CALTECH, both of those institutions have a control responsibility over the activities of JPL.

Since a decision by our Office on this issue could in no way affect the performance of this particular contract, we are inclined to prefer to address the issue you have raised in a broader context. For that reason, we are planning to initiate in our Procurement and Systems Acquisition Division a survey to accumulate additional information about this type of contracting activity by JPL, and perhaps by other centers operated by the National Aeronautics and Space Administration. If as a result of this additional work we have concerns about the propriety of NASA's permission to JPL to enter into this type of activity, we will consider making a report including possible recommendations for administrative or legislative action. We hope you appreciate our desire to address this important issue in a context broader than is permitted by the record developed in this particular case and with greater information about the patterns of this activity of JPL than we can ascertain at present.

Sincerely yours,



Deputy Comptroller General
of the United States