

competency procedures. A copy of each of the decisions is enclosed for your information.

The information reported to have been developed by the subcommittee is that the request for proposals divulged to industry at large on exclusive invention developed by Custom Packaging; that the engineering effort proposed by Custom Packaging approximated the engineering requirement estimated by the contract review panel; that the lower Custom Packaging proposal is due largely to low labor and overhead rates, and that Custom Packaging apparently offered a performance bond guaranteeing delivery at its offered fixed price.

As indicated in the decision to the attorney for Custom Packaging, the determination whether Edgewood Arsenal incorporated in the request for proposals proprietary information disclosed by Custom Packaging on its previous unsolicited proposal was technically beyond the competence of our Office because of the scientific engineering concepts involved. With respect to the statement that the engineering effort proposed by Custom Packaging approximated the engineering requirement estimated by the contract review panel, as we noted in the decision to the Small Business Administration, the proposal evaluation committee found the Custom Packaging proposal to be largely repetitious of the information in the request for proposals and it was not supported by performance data or calculations confirming the proposed design. While it is true that Custom Packaging did use in its price proposal lower labor and overhead rates than were utilized by Nortronics in its proposal, the Nortronics price proposal was increased by the fact that it estimated substantially more man-hours for the effort than were estimated by Custom Packaging.

The record furnished our Office by the Department of the Army in connection with the June 29 decisions does not show that Custom Packaging proposed to offer the Government a performance bond. However, even if such a tender was made, it would have been of questionable value, since, while such a bond would have provided some protection to the Government, it would not have insured the development of the weapon within the desired time frame. Of course, Edgewood Arsenal had no assurance that Nortronics would develop the weapon within the allotted time, but from the evaluation of its proposal, administrative personnel believed that there was a greater probability of successful development in the approach offered in the Nortronics proposal. In that connection, the Nortronics proposal was rated on a weighted basis by the proposal evaluation committee at an 865 total, whereas Custom Packaging was rated lowest of all nine proposals at a total weighted rate of 250.

With respect to negotiations, 10 U.S.C. 2304(g) provides:

"In all negotiated procurements in excess of \$2,500 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: Provided, however, That the requirements of this subsection with respect to written or oral discussions need not be applied to procurements in implementation of authorized setaside programs or to procurements where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices and where the request for proposals notifies all offerors of the possibility that award may be made without discussion."

ASPR 3-805.1 which prescribes the negotiation procedure to be followed in the selection of offerors for negotiation and award is an implementation of that statutory provision. While ASPR 3-805.1(a) provides that after receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered, ASPR 3-805.1(d) provides that the procedures set out in ASPR 3-805.1(a) may not be applicable in appropriate cases and that research and development contracts may be properly influenced by the proposal which promises the greatest value to the Government in terms of possible performance, technical quality, ultimate productibility, growth potential and other factors rather than the proposals offering the lowest price or probable cost and fixed fee.

In decision B-161483, July 14, 1967, 47 Comp. Gen., p. 29, referenced in your letter, our Office held that the failure of a low proponent to pass a benchmark test