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S. G. Riback



Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Tolen Information Services  
**File:** B-246647  
**Date:** March 23, 1992

Steve Tolen for the protester,  
Benny R. Henson, National Credit Union Administration, for  
the agency,  
Scott H. Riback, Esq., and John M. Melody, Esq., Office of  
the General Counsel, GAO, participated in the preparation of  
the decision.

### DIGEST

1. Agency was not required under modified General Accounting Office recommendation to recompete software requirement satisfied during base year of improperly awarded contract.
2. Where agency acquires only limited technical data rights in software necessary for contract performance, agency may properly require offerors to obtain license from software vendor; fact that licensing requirement may limit competition does not render solicitation unduly restrictive, since software is reasonably related to agency's minimum needs.

### DECISION

Tolen Information Services protests the terms of request for proposals (RFP) No. NCUA-92-0001, issued by the National Credit Union Administration (NCUA) for the conducting of asset-liability management training courses. Tolen argues that the solicitation is inconsistent with the recommendation in our decision National Credit Union Admin. --Request for Modification of Remedy, B-240979.2; B-240981, May 24, 1991, 91-1 CPD ¶ 504, and that the RFP requirement that offerors obtain a license to use an asset-liability management simulation model owned by one of its competitors, Brick and Associates, is unduly restrictive of competition.

We deny the protest.

The current RFP arises out of two previous protests filed by Tolen. In those protests, Tolen argued that the agency had improperly awarded two contracts to Brick, one for the acquisition of an asset-liability software package and one

for conducting training courses. We sustained Tolen's protests, finding that the awards to Brick, the second-low offeror, on the basis of initial offers were improper. Tolen Info. Servs., B-240979; B-240981, Dec. 21, 1990, 90-2 CPD ¶ 518. We recommended that NCUA engage in discussions with the competitive range offerors, solicit best and final offers (BAFO), and make awards in accordance with each solicitation's evaluation scheme. We also recommended that NCUA terminate for the convenience of the government the contracts awarded to Brick should that firm no longer be in line for award. Additionally, we awarded Tolen its bid protest costs, including attorneys' fees.

After the issuance of our first decision, NCUA requested that we modify our recommendation. In its request, NCUA stated that it would be impracticable to terminate the contracts awarded to Brick. The agency proposed that Brick be allowed to perform the base year of the contracts, and stated that it would refrain from exercising two 1-year options available under each contract and instead would conduct discussions, solicit BAFOs, and make appropriate awards for the option years. In our decision, National Credit Union Admin.--Request for Modification of Remedy, B-240979.2; B-240981, supra, we modified our original recommendation in accordance with NCUA's request. We also awarded Tolen its proposal preparation costs.

Tolen now argues that the agency has acted improperly by not soliciting BAFOs for the options under the prior RFPs, and instead issuing the current RFP. According to Tolen, the agency's approach is inconsistent with our modified recommendation. This is significant because the new RFP does not include a requirement for software (or software maintenance) and thus deprives Tolen of the opportunity to compete for the software, an opportunity it believes it would have had under our recommended approach. Tolen also argues that the current RFP is unduly restrictive because it requires offerors to obtain a license for the Brick software and possess a demonstrated knowledge of, and ability to provide instruction in the use of the Brick simulation model. Tolen alleges that these solicitation provisions improperly favor Brick and, because Brick has allegedly declined to sell Tolen a license to use the software, exclude Tolen.

We find the agency's actions unobjectionable. While the recompetition approach NCUA is using is different from the reopened discussions/BAFOs approach in our recommendation, this is a matter of form over substance. Our interest in making our original and modified recommendations was in assuring that a further competition would be conducted; issuing a new solicitation serves this interest.

Tolen's real concern, of course, is not the method of competition chosen by NCUA, but its belief that the new RFP has excluded it from competing for the software-related portions of the original requirement, contrary to our modified recommendation. However, Tolen would not have been entitled to compete for the software-related requirements under any circumstance. Our recommendation neither stated, nor was intended to imply, that the agency should reopen the competition for the software requirement. Because Tolen did not file its original protest in our Office within 10 calendar days of the award, NCUA was not required to suspend performance of the contract. 31 U.S.C. § 3553(d)(1) (1988). Consequently, the agency acquired the Brick software, which apparently was delivered soon after the base period of performance commenced. The options under the software RFP did not include additional software.<sup>1</sup>

We generally will not recommend as corrective action that an agency purchase items it already has purchased, albeit under an improperly awarded contract. See Comspace Corp., B-237794, Feb. 23, 1990, 90-1 CPD ¶ 217. In such circumstances, we may instead award the protester its proposal preparation costs. See The Aydin Corp., Dept. of the Army--Recon., B-224908.3; B-224908.4, May 19, 1987, 87-1 CPD ¶ 527. We awarded Tolen its proposal preparation costs in modifying our recommendation. This portion of the protest therefore is denied.

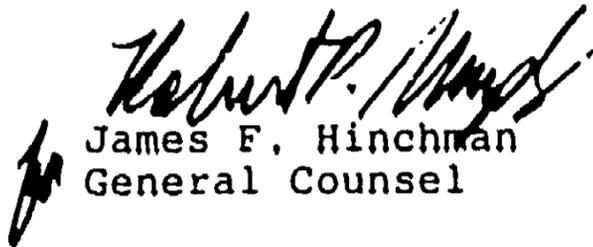
We also find the licensing requirement unobjectionable. The record shows that when it purchased the Brick software, NCUA obtained only limited technical data rights, see Federal Acquisition Regulation (FAR) § 52.227-14, under which it is not permitted to furnish the information to parties outside the government. In cases such as this, where an agency is unable to furnish offerors data necessary to the performance of a contract, it properly may require that offerors obtain permission to use the data from the holder of the proprietary rights. See, American Diesel Eng'g. Co., Inc., B-245534, Jan. 16, 1992, 92-1 CPD ¶ \_\_\_\_\_. So long as the data is reasonably related to the minimum needs of the agency, the fact that there is only limited competition, or even only one source, does not render the requirement unduly restrictive. Id. Since the asset-liability management

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<sup>1</sup>While our recommendation did accept the agency's proposal that the software maintenance options be included in the reopened competition, it is clear that the maintenance in fact cannot be performed by other than the owner of the software, and Tolen does not argue otherwise.

simulation model is necessary for the agency to meet its training needs, and the agency has purchased the Brick model and has limited rights in it, the agency properly may require offerors to obtain a license to use the model.<sup>2</sup>

The protest is denied.

  
James F. Hinchman  
General Counsel

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<sup>2</sup>We do think NCUA should make every effort to obtain the technical data rights necessary for it to conduct a more competitive acquisition for its future requirements. See Univox California, Inc.; Univox Int'l, Inc.; Cosmodyne, Inc., B-225449.2 et al., Dec. 9, 1987, 87-2 CPD ¶ 569.