DECISION

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

FILE: B-187435 DATE: March 15, 1977

MATTER OF: Informatics, Inc.

DIGEST:

1. Where RFP requires offerors to assume file system of incumbent contractor which may not exceed 20,000 files and contracting agency has available data that shows file contains less than 1,500 files and has contained that amount for substantial period of time, such information should have been included in RFP to allow offerors to realistically price proposals. Recommendation is made that negotiations be reopened and another round of best and final offers be received and evaluated.

2. Record does not support allegation that contractor gained unfair competitive advantage by conducting test to prove certain capability to contracting agency with view to modifying contract. Conduct of test was within discretion of agency in area of contract administration and fact that capability was required under pending solicitation of contract does not alter finding.

On May 28, 1976, the Department of Commerce (Commerce) issued request for proposals (RFP) No. 6-36995 for the preparation of patent data for patent full text data bases for the Patent and Trademark Office. On August 12, 1976, a contract was awarded to International Computaprint Corporation (ICC) for the requirement, which award has been protested to our Office by Informatics, Inc. (Informatics).

For a clear understanding of the protest, a review of the history of the Patent and Trademark Office's requirement and prior solicitations for the service is necessary.

Under the contract, the contractor will be furnished a number of approved patents per week which are to be converted into machine language on magnetic computer tape. Several different types of tapes are to be produced for various uses. Master tapes are to be prepared containing the full text of the approved patents which will be available for distribution to industries desiring to store current patent

information on computers. A second type of tape required will be used by the Government Printing Office (GPO) on its Linotron machine to print the official Gazette of the United States Patent and Trademark Office. Other types of tapes required are for reissues, defensive publications, designs and plants. An index to the official Gazette must also be prepared by the contractor.

ICC was awarded the initial competitive procurement in April 1970. Since 1970, ICC's contract has been extended during a series of attempted procurements which never resulted in the award of a new contract. Before the instant RFP was issued, Commerce sought to procure the services under invitation for bids No. 6-36976, which was canceled on May 14, 1976, following our recommendation in International Computaprint Corporation, 55 Comp. Gen. 1044 (1976), 76-1 CPD 289.

RFP 6-36995 requires the contractor to photocompose complex work units including tables, equations and chemical diagrams whereas under the earlier solicitations, these items, mainly chemical diagrams, were omitted from the tapes and instead, the diagrams were hand-pasted in the final print of the Gazette.

Informatics' first basis of protest is that the RFP contained inaccurate information and estimates which misled Informatics and any other offeror except the incumbent, ICC.

The RFP contained the following information with regard to the "Patent Application Suspense File" in the Scope of Work statement:

> "B. Patent Application Suspense File
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> "Contractor must establish and maintain an automated system capable of storing a subsidiary file or full-text patent application data equivalent to an estimated 20,000 patent applications resident in the Series 4 Suspense Files. At the beginning of a contract year, and without cost to the government, the P & TM Office reserves the right to require the contractor to receive and implement an existing Suspense File (in the Version II format) which may not exceed 20,000 Series 4 patent applications. * * *"

The Series 4 patents are patent applications made available to the contractor for data preparation prior to the patents being approved for publication, usually because the necessary fee has not yet been

paid. These Series 4 patents are processed by the contractor and put in a suspense file. When the fee is paid, the Patent Office advises the contractor of such payment and the Series 4 patent is removed from the suspense file and is published as a Series 3 patent in the Gazette. If the fee is not paid by the applicant within 3 months, the application is considered abandoned and the contractor is advised to delete the Series 4 patent from the suspense file.

Informatics argues that it based its proposal on establishing the capability of handling 20,000 Series 4 patents in the suspense file and upon having to assume the incumbent contractor's suspense file, which may contain up to 20,000 Series 4 patents. However, Informatics states that during a meeting with Commerce officials, following the award to ICC, it was advised that there were currently no Series 4 patents in the contractor's weekly workload. Thereafter, Informatics requested copies of the Patent Office records which reflected the suspense file activity under the ICC contract. These records show the number of Series 4 and Series 3 patents given to the contractor on a weekly basis from July 3, 1973, to December 14, 1976, and the total Series 4 patents resident in the suspense file each week. These figures show a steady decline in the number of Series 4 patents given to the contractor and a corresponding decrease in the size of the suspense file. As the number of Series 4 patents declined, the number of Series 3 patents increased so that the total number of patents given to the contractor weekly stayed within the weekly workload estimate contained in the contract. The following chart summarizes the records of the Patent Office on a 6-month basis showing the maximum and minimum number of each type of patents given to the contractor and the fluctuation in the suspense file during that 6-month period:

	SR-4	SR-3	Suspense File
7/3/73 - 12/25/73	1,400 - 860	90 - 230	16,152 - 14,159
1/1/74 - 6/28/74	1,240 - 0	567 - 283	15,677 - 12,447
7/2/74 - 12/31/74	1,166 - 0	1,273 - 232	13,206 - 10,076
1/7/75 - 6/24/75	795 - 0	962 - 374	9,665 - 5,025
7/1/75 - 12/30/75	364 - 0	1,375 - 905	5,653 - 584
1/6/76 - 6/29/76	0	1,845 - 1,316	572 - 0
7/6/76 - 12/14/76	0	1,510 - 1,004	0

Informatics contends that the misleading information contained in the RFP caused it to overprice its proposal by substantially more than the $2,423.60 difference in the evaluated prices of ICC and Informatics. Informatics argues that the above-quoted portion of the statement of work caused Informatics to increase its overhead costs in its proposal as neither the maintenance of the suspense file nor the assumption of the incumbent's suspense file is a reimbursable contract item, which was separately priced in the RFP. Further, as ICC was the incumbent, it knew the real state of the suspense file, and therefore was not misled by the RFP estimates of 20,000 files.

Commerce, in response to the above argument, states that the figures contained in the RFP were not firm figures of the size of the suspense file, which changes from week to week owing to the addition and deletion of Series 4 patents to the file. The figures were placed in the RFP to show the maximum that would be required of the contractor.

Before proceeding to the merits of this basis of the protest, the contention by Commerce that this ground of protest is untimely under our Bid Protest Procedures (4 C.F.R. part 20 (1976)) must be discussed.

Commerce contends that acceptance of Informatics' position that the information regarding the suspense file was crucial to the pricing of a proposal leads to the conclusion that the absence from the RFP of definite estimates for the suspense file was a defect apparent from the face of the solicitation which should have been protested prior to the closing date for receipt of initial proposals. See 4 C.F.R. § 20.2(b)(1). Commerce also relies on a recent decision by our Office (Data 100 Corporation, B-185844, October 21, 1976, 76-2 CPD 354), which held that a protester alleging that a Government estimate omitted from the RFP was necessary to properly compute its price had to protest such omission prior to the closing date for receipt of proposals to be timely.

We believe Data 100 is distinguishable from the instant protest. In Data 100, the solicitation contained no estimates or guidance with regard to a requirement of the solicitation. Therefore, we found that if the protester needed this information to compute his proposal price, it should have been apparent prior to the closing

date for receipt of proposals and should have been protested at that time. Here, the RFP contained figures relating to the suspense file and based on what Informatics learned at the meeting, it now alleges it was misled by the figures in the RFP. Accordingly, we find this issue to be timely protested and will proceed to the merits.

It is clear that the disputed clause demands two distinct requirements of the contractor. First, he must establish and maintain a suspense file capable of storing data equivalent to an estimated 20,000 patent files. Secondly, he may be required to receive and implement an existing suspense file which may not exceed 20,000 Series 4 files

Commerce contends that under the first requirement the contractor had to be able to maintain a suspense file equivalent to 20,000 patent applications. Unlike the second portion which indicates the receipt of the suspense file at the beginning of the contract year, no time is indicated as to when that capability might be called upon. Commerce states that it used the 20,000 figure for the capability it needed based on the maximum size of the file. An application is normally abandoned in 90 days if the necessary fee has not been paid. Thirteen issues occur in a 90-day period and the most files that can be sent the contractor with notice of an increase is 1,400 plus 15 percent or 1,610 per week. Assuming no fees were paid and all the files sent the contractor were Series 4 files, the largest the suspense file could get before the oldest Series 4 files were deleted from the file would be 20,930 (1,610 x 13 = 20,930). Commerce contends it still requires this capability.

Informatics states it was misled by the 20,000 figure and incorporated in its overhead a significant sum, which exceeded $8,423.60, to establish such a file, while ICC, which knew the present state of the suspense file, probably only priced it as a contingency in its overhead, if at all.

We find Commerce has justified its inclusion of the 20,000 file figure in the first portion of the clause and, under the terms of the solicitation, a contractor would be required to maintain a file that size at no extra charge to the Government. If ICC did price its proposal as alleged by Informatics, it did so at its own risk and, in the event the suspense file reversed its current trend, would suffer the financial consequences.

Whereas the first requirement related to a capability that could be called upon during the life of the contract, the second requirement must only be fulfilled once, at the beginning of the contract year. As noted below, we believe this distinction to be critical.

Commerce and Informatics disagree about the amount of control Commerce is capable of exerting on the Series 4 suspense file. Informatics argues that the number of Series 4 files in the suspense file is within the control of Commerce and, therefore, the use in the RFP of the 20,000 file figure was misleading because at the time the solicitation was issued there were no Series 4 files in suspense and only 1,247 Trial Voluntary Protest Program (TVPP) files. There is a dispute whether the TVPP applications are a part of the Series 4 suspense file, but it is not necessary to resolve that question in view of our position below.

Commerce responds that it cannot control the size of the suspense file for various reasons and, therefore, the second requirement only stated the maximum size file an offeror would have to assume. Commerce states that the "may not exceed 20,000" files means from 0 to 20,000 files and an offeror had no right to expect that the file at the beginning of the contract year would equal 20,000 files.

Regarding the factors beyond the control of Commerce which affect the size of the suspense file, Commerce cites productivity of the examining corps, personnel hiring freezes, new Patent Office programs and budgetary limitations.

According to Commerce high productivity by the examining corps increases the number of fee requests, which causes more fee-paid cases, and reduces the number of non-fee-paid cases that go into the suspense file. However, Commerce argues that this productivity is affected by hiring freezes, which are impossible to predict.

The new programs referred to by Commerce are the TVPP and the Proof Copy to Applicant Program and it is contended both of these programs would cause more files to enter the suspense file.

Commerce states the most important unpredictable influence is budgetary limitations. Since the cost of keyboarding Series 4 files is almost half that of the complete publication process, the Patent Office can reduce expenditures by reducing the number of published patents per issue while increasing Series 4 keyboarding.

While our Office recognizes that certain of the above factors could have an effect on long-range estimating of the size of the suspense file, we believe that the Commerce Department could have more accurately predicted the size of the suspense file a new contractor would have to receive at the beginning of the contract year (4 months after issuance of the RFP).

Regarding the productivity of the examining corps, Commerce notes that there had been a hiring freeze for over 1-1/2 years which was not lifted until after the award to ICC. However, Commerce states productivity would not be affected for 18 months after the freeze is lifted, the normal training period for an examiner. Therefore, even if the hiring freeze had been lifted the day after the RFP was issued, it would have had no effect on any estimate of the size of the suspense file at the beginning of the contract year.

Concerning the TVPP, the program had expired by its own terms prior to the issuance date of the RFP and would have had no subsequent effect on the size of the suspense file. The Proof Copy to Applicant Program was not to be implemented until after the new contract was awarded and also had no effect on the file size.

Commerce refers to a budget cut made after the award to ICC which will affect the size of the suspense file because more files will have to be sent to Series 4 files to conserve funds. However, no budget cut arose between the issuance of the RFP and the beginning of the contract year and, indeed, none was likely, because it was the last quarter of the fiscal year.

Based on the above and the historical data available to Commerce, we find a more accurate and greatly reduced estimate of the size of the suspense file at the beginning of the contract year should have been included in the RFP in order to permit offerors to compete on an equal basis. The absence of such information would operate to the competitive disadvantage of any offeror competing against the incumbent contractor. The historical data shows (disregarding TVPP's) that no Series 4 files were sent to the contractor after the middle of August 1975 or 9 months prior to the issuance of the RFP (except for 2 weeks which included 67 and 41 Series 4 files prior to October 1975). The suspense file reached zero for the issue for April 20, 1976, more than a month prior to the RFP issuance. These facts, coupled with the steady decline of the suspense file from 16,152 to 0 over a 3-year period, we believe show a trend which should have been conveyed to offerors.

We recognize that the RFP did not state any minimum number of applications in the suspense file which the contractor would have to receive and implement at the beginning of the contract year; it merely stated a maximum of 20,000. While the agency cannot predict the precise number, it has a duty to include a figure which is reasonably related to reality. Inclusion of a figure without regard to the circumstances, apparently because it had been used in earlier solicitations, is prejudical to competitors other than the incumbent and prevents the maximization of competition contemplated by the procurement statutes and regulations.

There is a dispute in the record as to the cost impact on Informatics' proposal caused by the failure to state the actual number of files in the suspense file or a more realistic estimate. Commerce states the cost impact would be less than the difference in the Informatics and ICC proposals and Informatics alleges that it allowed costs in its proposal which greatly exceeded this difference. We do not believe it is necessary to determine this amount exactly. Due to the closeness of the two proposals (Informatics - $10,891,829.60; ICC - $10,883,166.59), we find a reopening of negotiations to permit another round of best and final offers the only real means to determine the amount of such a cost impact. If ICC is not the low responsible offeror after this competition, its contract should then be terminated and award made to Informatics. If ICC is the low offeror and its price is less than the current contract, the contract should be modified to conform to the newly offered price. This manner of recompetition will permit Commerce to continue to receive its data preparation needs during the reopening of negotiations.

While the above result would normally render a discussion of the other issues raised by Informatics unnecessary, because of a collateral request of Informatics in connection with another contention, namely, the addition of an evaluation factor to any ICC proposal submitted on a resolicitation, one additional issue must be discussed.

This basis of Informatics' protest is that ICC gained an unfair competitive advantage from an unauthorized research and development effort for which it was improperly compensated by the Government.

As noted above, the instant RFP required the contractor to photocompose chemical diagrams. The prior contract, under which ICC was performing since April 1970, did not require such photocomposition as it was beyond the state of the art at that time. However, the contract sought the gradual introduction of complex work units including chemical diagrams into the data base as technological advances allowed. Informatics contends that ICC was improperly allowed by Commerce to photocompose chemical diagrams which was not authorized by the then current contract. Informatics alleges such action permitted ICC to develop and refine its techniques in this area, while being compensated by the Government for such work and gave ICC a competitive advantage since Informatics had to develop such techniques using its own resources.

ICC and Commerce argue that the capability to photocompose chemical diagrams was developed by ICC at its own expense and independent of any Government assistance.

ICC states that it began to partially photocompose chemical diagrams in early 1975 by including latter symbols and horizontal single and double bonds. This limited photocomposition was done because of the lack of many special characters on the GPO Linotron machine necessary for chemical diagrams. In January 1976, ICC began to include vertical and diagonal bonds in the data base. Subsequently, ICC approached Commerce and advised that it possessed the ability to include benzine rings in the data base and requested a modification to the contract to allow such photocomposition. ICC states it developed this ability on its own Videocomp machine, which is more sophisticated and possesses more special characters than the Linotron machine. ICC's request to demonstrate its ability to convert from the Videocomp to the Linotron resulted in a test run on the Linotron machine on May 18, 1976. Commerce states that the results of the test run convinced it of ICC's ability to photocompose chemical diagrams. Informatics argues that chemical diagrams produced by ICC exceeded the error rate permitted by the RFP and, therefore, the test run did not prove ICC's photocomposition ability. Commerce states that the errors were due to human mistakes in keyboarding and not to deficiencies in ICC's software and, therefore, did not alter Commerce's belief in ICC's ability.

Subsequently, ICC included photocomposition of chemical diagrams in the Gazette issues of August 3, 10, and 17, which work was actually performed in July 1976, due to the normal delay between a contractor processing the patents for an issue and the issue actually being produced by GPO. ICC states it included these items in the three issues in the expectation that a modification to the contract would be issued authorizing such work. However, Commerce decided not to issue the modification because ICC requested that the change in the scope of the work under the contract be gradually implemented at a buildup rate of 20-25 percent per month. Commerce determined that this delayed implementation would not produce the desired cost savings. Also, Commerce states that the Patent Office did not have a sufficient staff of proofreaders to check the chemical diagrams and, therefore, no modification was issued.

Regarding the use of the GPO Linotron machine for the May 18, 1976, test run, we find nothing improper in such use by ICC in attempting to convince Commerce as to its ability to photocompose chemical diagrams in order to have its then current contract modified. While Informatics argues that the conducting of the May 18 test run less than 2 weeks prior to the issuance of the instant RFP was

improper because ICC's contract would end shortly and, therefore, a modification for such a short period of time would not give the Government any substantial benefit, we believe it is within the discretion of the contracting agency in the administration of the contract to determine when to modify an existing contract. Accordingly, we find nothing improper in connection with the May 18 test run. We have long recognized that firms may enjoy a competitive advantage by virtue of their incumbency or their particular circumstances. Aerospace Engineering Services Corp., B-184850, March 9, 1976, 76-1 CPD 164.

Informatics also contends that the use of the GPO Linotron machine by ICC for the production of the three August issues of the Gazette, noted above, resulted in ICC getting a further competitive advantage, since such use for chemical diagrams was not authorized because no contract modification followed the May 18 test run. Upon our review of the entire record, we do not find that ICC gained any substantial competitive benefit from the three runs, as it had previously developed the capability to photocompose chemical diagrams by the May 18 test run.

Finally, in connection with the issue of ICC photocomposing chemical diagrams, Informatics contends that ICC billed the Government at an improper rate which rate was to be used for billing equations under the contract, and therefore ICC received substantially higher payments than if it had hand set the chemical diagrams instead of the unauthorized photocomposition. Commerce advises that it has reviewed the invoices submitted by ICC and has found nothing improper in the billing method used by ICC. As the contracting agency is convinced of the correctness of its payments under the contract and such payments are in the realm of contract administration, which our Office does not review, the protest on the issue is denied. Further, as we find that ICC gained no unfair competitive advantage in this area, the request by Informatics that in any future solicitations an evaluation factor be added to ICC's price to balance such alleged unfair competitive advantage is denied.

As the decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

Deputy Comptroller General
of the United States