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

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December 7, 1972

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Cadwalader, Wickersham and Taft
1000 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attention: Stephen N. Shulman, Esq.

Gentlemen:

Further reference is made to your letter dated February 16, 1972, and subsequent correspondence, on behalf of John Wiley & Sons, Inc. (Wiley), protesting the award of contract No. 1-35956 to a consortium of the American Institute of Physics and the American Chemical Society (AIP/ACS) by the National Bureau of Standards (NBS), Department of Commerce. The contract is for the publication and marketing of physical and chemical reference data, during the calendar years 1972 and 1973, using compilations presented in camera-ready form by the National Standard Reference Data System.

The initial issue for our consideration is whether this protest should be dismissed as untimely. In June 1971, NBS decided to contract with AIP/ACS instead of a commercial publishing house, such as Wiley. By letter of June 24, 1971, and an undated letter of about June 30, 1971, Wiley was advised that NBS was establishing a publishing arrangement with AIP/ACS. This contract was executed on July 29, 1971. There was no communication from Wiley regarding the award for 5 months after this notification. On December 1, 1971, Wiley protested to the Department of Commerce against the award to AIP/ACS. Discussions concerning the protest were held in December 1971 and January 1972, and on February 16, 1972, the protest was denied by the contracting agency. You filed a protest with this Office on the same day.

This protest presents no argument which could not have been known upon the execution and public availability of the AIP/ACS contract in July 1971. However, we recognize that our bid protest regulations in effect in 1971 set no specific time limits for the filing of such protests which, if exceeded, could result in the dismissal of a subsequent protest to our Office. On December 23, 1971, our Office promulgated the "Interim Bid Protest Procedures and Standards" which are applicable to protests received by our Office on and after February 7, 1972. Wiley's protest to our Office was made within 5 days of

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notification of adverse agency action and, therefore, is timely under these procedures and standards. 4 CFR 20.2(a).

Your initial basis for protest is that in enacting the Standard Reference Data Act, 15 U.S.C. 290, 290a-f (hereafter "the act"), "* * * the Congressional purpose was to achieve * * * dissemination [of data compiled and evaluated under the act] by using private publishing houses." You contend that the award to a consortium of two professional societies is in conflict with this congressional purpose and excludes commercial publishing houses "from a role the Act specifically sought to give them."

The need which the act seeks to fulfill has been described as follows:

> "[The act], which was enacted on July 11, 1968, established within the Department of Commerce a standard reference data system to be administered by the National Bureau of Standards. The act declared the policy of the Congress to make critically evaluated reference data readily available to scientists, engineers, and the general public. To carry out this policy, the Secretary of Commerce was directed to provide or arrange for the collection, compilation, critical evaluation, publication, and dissemination of standard reference data.
>
> "In essence, the standard reference data system seeks to deal with one aspect of the broad science information problem by producing and disseminating compilations of critically evaluated data on the physical and chemical properties of materials. This includes, for example, measurements of the amount of energy released when chemical elements combine to form new compounds, or the ability of various substances to conduct electricity or heat under certain conditions. The boiling point of a liquid, the mass of an atom, the amount of heat released when a given substance burns, the rate at which an undesirable pollutant decomposes in water - these are examples of the kind of quantitative numerical data that are focused on. Since substances behave the same way in Laboratory B as they do in Laboratory A, such data, once accurately measured, can be used over and over

by scientists and engineers throughout the world. When data of this kind are extracted from the technical literature of the world, evaluated by a specialist, and compiled for convenient use, we call them 'Standard Reference Data.'

"The significance of the standard reference data can be illustrated by understanding the process by which measurements of the properties of substances are made available to scientists and engineers. Property measurements are produced as a result of the research done by millions of scientists and engineers throughout the world, and are published in various scientific journals and reports. Therefore, while these data are available to anyone who is prepared to search the literature to find them, it is quite often difficult to locate a specific number or value in the millions of pages of scientific literature. Of equal importance is the fact that once the number or value is located, it is difficult to determine just how reliable such information is. Only a specialist in the field can tell which number is most likely to be correct, and it is these specialists who, working with the National Bureau of Standards, select a single value or range of values as the best or 'standard' value to be incorporated in the standard data system. The data may then be used with maximum confidence, and scientists and engineers may depend upon the reliability of the measurements without having to again conduct the experiments.

"Standard reference data are used daily as basic reference materials by scientists and engineers in Government, industry, and universities, and are necessary for such diverse fields as transportation, electronics, construction, and the manufacturing of commercial goods, medicines, and products." House of Representatives: H. Rept. No. 92-974, 92d Cong., 2d sess. 4-5 (1972).

Thus, the objective of the act is to "make critically evaluated reference data readily available to scientists, engineers and the general public." 15 U.S.C. 290. In order to accomplish this purpose, the Secretary of Commerce is authorized and directed (15 U.S.C. 290b):

"to provide or arrange for the collection, compilation, critical evaluation, publication, and dissemination of standard reference data."

Section 5 of the act (15 U.S.C. 290d) states in pertinent part:

> "Standard reference data conforming to standards established by the Secretary may be made available and sold by the Secretary or by a person or agency designated by him. To the extent practicable and appropriate, the prices established for such data may reflect the cost of collection, compilation, evaluation, publication, and dissemination of the data, including administrative expenses * * *." (Emphasis added.)

Section 6(a) of the act (15 U.S.C. 290e(a)) authorizes the Secretary to receive copyright on behalf of the United States in any standard reference data which he prepares or makes available and he "may authorize the reproduction and publication thereof by others." (Emphasis added.)

Thus, we do not find an express provision in the act requiring the use of commercial publishing houses in the dissemination of the data. We agree with the administrative position that, on its face, the act commits certain discretion to the Secretary of Commerce in that the standard reference data can be made available and sold by the Secretary or by a person or agency he may designate, and that he may make the data available or authorize the reproduction thereof by others.

We now turn to the legislative history of the act to discern whether "a person or agency designated by him" and "by others" in Sections 5 and 6(a) of the act, respectively, were intended by Congress (insofar as private publishers are concerned) as exclusive references to commercial publishing houses, or whether these terms include other organizations such as professional societies.

On June 28 through 30, 1966, hearings were held before the Subcommittee on Science, Research, and Development, of the House Committee on Science and Astronautics, on a bill (H.R. 15638, 89th Cong., 2d sess., superseded by H.R. 16897) prior to the one (H.R. 6279) eventually enacted as the Standard Reference Data Act. The prior bill contained the same language as that quoted above from 15 U.S.C. 290d and 290e(a). The first witness before the subcommittee was Dr. Donald Hornig, Director, Office of Science and Technology. In discussing the effort required to support the proposed Standard Reference Data System (SRDS), Dr. Hornig stated (pages 6 and 7 of the hearings):

> "The level of activity should be one which will result in a viable program; that is, one where the solutions or rate of improvement at least exceed the rate

of growth of the problem or activity. The projections that the National Bureau of Standards has made, which you will hear about from them, to attain a fully operational level are consonant with my own experience in dealing with this kind of data and my feelings as to a viable level of effort.

"It would take time to build to such a level due to organizing and staffing requirements and the limited number and availability of qualified people. The cost of such a program would be small compared to the research and development effort itself. In my judgment, it is still premature to decide that the Federal Government will operate at least all of the information distribution part of the standard reference data system in all its aspects and forms. Perhaps the private publishing industry would be willing to undertake a large share of the information dissemination responsibility. Professional scientific and engineering societies may also wish to participate." (Emphasis added.)

Dr. Hornig continued in his prepared remarks (page 9):

"* * * it is not expected that the Federal departments and agencies would operate the national information systems, although in some cases they might. The SRDS enlists the cooperation of all sectors of our scientific and technical community in this planning, support and operation of the system. I consider it very important to encourage and support the information-handling activities in the private sector." (Emphasis added.)

At the conclusion of Dr. Hornig's prepared remarks, the following colloquy occurred with the subcommittee Chairman, Mr. Daddario (pages 10 and 11):

"Mr. DADDARIO. Thank you, Dr. Hornig.

"I have a question that involves the idea that you express at the bottom of page 7. You say:

"I consider it to be very important to encourage and support the information handling activities in the private sector.

"Could you give this committee an idea as to what you mean, and how you think it might develop?

"Dr. HORNIG. Well, for instance, and I am now speaking of information in general, rather than just the Standard Reference Data System, the chemical literature is published by the American Chemical Society. I don't know the exact count, but they publish some 15 or so different journals in various areas of chemistry.

"In physics there is the American Physical Society that publishes the original literature. The American Biological Society publishes biological literature. The Engineering Society publishes engineering journals. So these are all private activities. In fact, the primary scientific literature publication is entirely in private hands. But they have great difficulties. There are many problems of coordination.

"The most difficult one is--I mean information that is published in the chemical literature--how does it get into the hands of an engineer who doesn't read the very specialized publications of the Chemical Society, for example. This is what produces the problem.

"So we have very many journals, but most practicing engineers and very few scientists, even if they read 20 or 30 journals a month, can even dent the total amount of literature publication.

"Then there are many inventions to deal with this. The Chemical Society, for example, publishes something called Chemical Abstracts. The Physical Society publishes Physics Abstracts. These are attempts to publish small abstracts of the journals and classify them by author, subject, and so on, so people can find them. Well, the number of abstracts gets so excessive that they then publish annual indexes to the abstracts.

"They used to publish 10-year indexes to the indexes but now the volume of data has gotten so great that the Chemical Society has simply decided it can't publish any more decennial indexes. It is just overwhelmed. It can't afford it.

"The question is they are giving up. So we are working together. There is now a program between the Science Foundation, the National Institutes of Health, the Department of the Army, and Chemical Abstracts to work on means of developing computerized ways of handling this information. So this is an example of Federal-private cooperation. This indexing is absolutely essential because otherwise the people who need it, who are the engineers, the people in industry, the people in universities, won't have access to the work we have paid quite a lot of money for.

"Mr. DADDARIO. You see nothing in this bill which would bar the private sector from participating in this activity?

"Dr. HORNIG. Oh, no. There are, of course, excellent examples in the past of the cooperation of the Bureau of Standards with the American Petroleum Institute in putting together critical data (thermodynamic data), the data on hydrocarbons. It was the Petroleum Institute which collected the standard samples of hydrocarbons from which the data were taken--that made the compilation. So there are many examples of cooperation."

A subsequent witness was Dr. J. Herbert Hollomon, Assistant Secretary of Commerce for Science and Technology. During Dr. Hollomon's testimony, Congressman Vivian inquired whether the standard reference data should not be published by the Government Printing Office. This exchange followed (page 51):

"Mr. VIVIAN. It seems to me the question of whether all Government publications should go through the Government Printing Office at all is itself a question, because there are pretty stringent laws already existing requiring that they be published through the Government Printing Office.

"Mr. DADDARIO. If you would yield, the example you have given, Dr. Hollomon, the means to get that done seems already to be available to you.

"Dr. HOLLOMON. How?

"Mr. FELTON. Under contract.

"Dr. HOLLOMON. If we did all that work under contract, that would be so. But if the work happened to be done in the Bureau of Standards--

"Mr. FELTON. I thought most of this work was going to be done out-of-house by experts in the field.

"Dr. HOLLOMON. Both. We intend to do both. It depends on whether we have the expertise. Other Government agencies can do likewise. For example, AEC does certain publications that meet their criteria and some are printed privately at this time."

Another witness was Dr. Frederick Seitz, President, National Academy of Sciences, who stated (pages 79-80):

"Certainly the most notable effort to provide critical tables of standard reference data is the International Critical Tables of Numerical Data of Physics, Chemistry, and Technology. * * *

"The entire enterprise was made possible by the cooperation of the American Chemical Society and the American Physical Society, together with essential support from industry, which contributed funds totaling $200,000. This famous collection of numerical data was the result of cooperative efforts by some 400 scientists in 18 different countries. Seven volumes with a total of approximately 3,500 pages were published in the years 1926-30, constituting the longest single compilation of critical data in the history of science up to that time. These volumes provided scientists and engineers with a compact set of authoritative tables giving them the data needed in their research, development, and engineering activities."

The next witnesses before the subcommittee were Curtis G. Benjamin, Chairman of the Board, McGraw-Hill Book Co., and W. Bradford Wiley, President of Wiley. At the inception of Mr. Benjamin's testimony, the subcommittee Chairman, Mr. Daddario, and member, Mr. Waggonner, observed (page 87):

"Mr. DADDARIO. Well, I am pleased to hear that, Mr. Benjamin, because during the course of the testimony it seemed to me there was some definite indication

as to private participation and dissemination of the material. What the process to bring it about would be was not clear, which gave us concern here in the committee. You have recognized, I think, that this was the case. I am pleased that you have had this discussion. We will also, as a committee, look at this matter very carefully. I have indicated time and time again that we are not bound to the language of this bill.

"Mr. BENJAMIN. Yes. Mr. Wiley will have a little more to say to this point specifically.

"Mr. WAGGONNER. Mr. Chairman, I don't believe the testimony of yesterday does any more than show that it would be possible to contract with private industry. It doesn't state any real intention of so doing.

"Mr. DADDARIO. If you will recall, Mr. Waggonner, during the first day of testimony Dr. Hornig made some remarks about the participation by private publishers in the dissemination of the information."

As shown above, Dr. Hornig's statement was concerned with publications of professional societies, which Congressman Daddario equated to private publishers. Further, Mr. Benjamin stated during the course of his testimony (page 96):

"Mr. BENJAMIN. I will say this, and this follows Mr. Wiley's statement. With our concern over this whole problem of Government monopoly of scientific and technical information, we technical publishers would prefer to have everything possible done outside of Government agencies. The prospect of in-house programs of scientific and technical information--publishing programs--that would be directly in competition with publishers, gives us nightmares. Mr. Wiley and I have served on the Science Information Council, in San Francisco, and a number of other Government committees, and we know how often this sort of thing is proposed, and it is knocked down usually one way or another.

"In general we say from [our] point of view everything possible should be done out of the Government

agency. We would much prefer to see this done in a professional society than in a Government agency, because a professional society obviously has much more flexibility than a Government agency. It has flexibility in arranging publication and distribution, getting royalties, and this sort of thing." (Emphasis added.)

Report No. 1836, of the House Committee on Science and Astronautics, which accompanied H.R. 16897 contained the following statement (page 8):

"In those cases where the Secretary holds the copyright, he could enter into a contract with a commercial publishing organization providing the latter a license to publish and disseminate the data. In contracting for the publication of standard reference data by commercial publishers, the committee expects that the Secretary will take full advantage of competitive bidding and will seek the greatest monetary return for the Government, while at the same time endeavoring to have the data published at the lowest price consistent with the overall objectives of the program. If the Government itself publishes the material under copyright, it may either sell the material under the authority of the bill or enter into a contract with a private distributor for the distribution, depending upon the best means for reaching the prospective users of such data. It should be pointed out, however, that this bill in no way modifies or supersedes the laws relating to public printing and documents codified in title 44, United States Code, and the regulations promulgated thereunder."

The bill passed the House but was not acted upon by the Senate during the 89th Congress. In 1967, Congressman Miller introduced H.R. 6279, which was identical to the prior bill except for a minor technical amendment. The report accompanying H.R. 6279 contained the same statement quoted immediately above from Report No. 1836 (House of Representatives: H. Rept. No. 260, 90th Cong., 1st sess. 8 (1967)). Following its passage by the House, H.R. 6279 was referred to the Senate Committee on Commerce. The committee report upon the bill spoke of "encouraging participation of private publishing houses

to provide for the widest possible dissemination of reference data at minimum cost to the Government" (Senate: S. Rept. No. 1230, 90th Cong. 2d sess. 2 (1968)), and referred (page 6) to the dissemination of some kinds of reference data by "private publishers" and "private channels." The bill, as amended in a respect not relevant to this protest, was passed by the Senate on June 18, 1968. The House agreed to the Senate amendments on June 27, 1968, and the measure was approved on July 11, 1968.

Our examination of the legislative history of the act leads us to the conclusion that it was the intention of Congress to vest the Secretary of Commerce with considerable discretion in the administration of the act. In addition, we do not find that Congress intended that all standard reference data be published and disseminated under contract with private, as opposed to governmental, organizations. In those instances where the data is to be made available through private sources, we agree with the observation of the Department of Commerce that:

> "there is no language in the legislative history which may reasonably be construed to restrict the Secretary's discretion requiring him to use only for-profit publishing companies or precluding him from using nonprofit associations in the dissemination and sale of the data products."

In summation, we do not find that the act or its legislative history supports the view that the terms "person or agency designated by him" and "by others" in Sections 5 and 6(a) of the act, respectively, should be limited (as it relates to private publishers) to commercial publishing houses, such as Wiley, to the exclusion of professional societies.

Furthermore, we observe that on two occasions subsequent to the execution of the AIP/ACS contract, representatives of the Department of Commerce testified before the House Subcommittee on Science, Research, and Development of the Committee on Science and Astronautics, with reference to an extension of the authorization of appropriation in the act (15 U.S.C. 290f). This is the same subcommittee which initially considered the proposed legislation which became the act.

The subcommittee was informed of the AIP/ACS contract and, in the report accompanying the bill to authorize further appropriations (H.R. 13034), recognized the arrangement, without objection, in the following statement:

"As to the distribution of Standard Reference Data documents, since 1964, the Standard Reference Data Program has published forty three compilations of data in its primary series, the NSRDS-NBS series. The total number of documents produced on behalf of the Standard Reference Data System (including the NSRDS-NBS Series identified above, plus bibliographies, monographs, computer programs, expository publications and status reports) is 122. The total distribution of all documents is estimated to be approximately 270,000 copies.

"Most of these documents have in the past been published and disseminated through the Government Printing Office. The National Bureau of Standards has recently formalized a cooperative program with the American Institute of Physics and the American Chemical Society under which these two organizations will handle the printing, distribution and marketing of a Journal of Physical and Chemical Reference Data. This Journal will be similar in appearance to other scientific journals. Initially, it will appear four times a year and will provide a minimum of 1200 pages of compilations of reference data. Compilations on individual subjects will probably also be available for individual purchase as hard-bound books. It is anticipated that this new form of publication will provide not only wider distribution of the output of the Standard Reference Data Program but a substantially higher level of actual use by the scientists and engineers who need this kind of technical information." (House of Representatives: H. Rept. No. 92-974, 92d Cong. 2d sess. 5 (1972)).

The Senate report accompanying H.R. 13034 is silent concerning the AIP/ACS contract. (Senate: S. Rept. No. 92-832, 92d Cong., 2d sess. (1972)). The appropriation authorization was subsequently enacted. (Section 2 of the act of June 22, 1972, Pub. L. 92-317, 86 Stat. 234).

You next contend that the award to AIP/ACS was violative of the requirement of competition contained in Federal Procurement Regulations (FPR) 1-1.301-1, and that Request for Proposals No. NBS-1089-71 (RFP -1089) to which several commercial publishing houses responded did not disclose that it was for informational or planning purposes,

and was issued without a definite intention to award a contract. You maintain that failure to make an award under RFP -1089 was, therefore, a violation of FPR 1-1.314.

The record shows that NBS considers the Standard Reference Data Program to have three major objectives:

> "1. To provide reliable reference data on physical and chemical properties. This involves retrieval of experimental measurements reported in the primary scientific literature, evaluation of these results by experts, and selection of recommended values with an estimate of their accuracy.
>
> "2. Dissemination of these reference data in a form which will reach those scientists and engineers who need them.
>
> "3. Upgrading the quality of experimental measurements by pointing out sources of error and other defects in measurement techniques. If the general practice of measurement science and technology can be improved, there will be less need for costly evaluation of conflicting results, and the overall efficiency of the national investment in research and development will be raised."

The initial distribution channel for standard reference data was the Superintendent of Documents, Government Printing Office. However, it was concluded that the limited accessibility of this data provided little incentive for experienced scientists to voluntarily participate in evaluation efforts. The limited circulation of the published material also impeded the standards of practice in measurement laboratories. Additionally, it was concluded that the cost recovery provisions of the act could not be satisfied under the traditional policy of the Superintendent of Documents, in which the selling price reflects only the direct cost of printing and distribution.

Alternative approaches to the dissemination of standard reference data included commercial publishing houses, professional societies and the National Technical Information Service (NTIS). Unique

advantages were seen in a possible effort with one or more professional societies. It was thought that a suitable cooperative program with a professional society might encourage its members to voluntarily contribute compilations and reviews and would provide a suitable medium for society members to make substantive contributions to critical evaluation of data. Another benefit which was anticipated related to the difficulty of deciding which technical areas were to be emphasized with the limited funds available. It was thought that a close coupling to a large group of users of reference data through their professional societies might provide responses indicating in which areas data was needed. Furthermore, cooperation with professional societies appeared to offer an opportunity to improve quality control over the primary measurements of physical property data. The ability of the societies to reach generators of experimental data was considered of value in this respect.

It is administratively reported that the majority of the data currently being produced under the Standard Reference Data Program is classified as "physical and chemical properties." Most of the measurements which provide the raw material of the program are conducted by physicists and chemists. Additionally, a survey of buyers of NSRDS publications showed 70 percent to be physicists or chemists. Therefore, NBS looked first to the physics and chemistry community in considering societies. The American Chemical Society and the American Institute of Physics with its affiliated societies have a combined membership of approximately 160,000, which comprises over 85 percent of the estimated 183,000 physicists and chemists in the United States. Therefore, NBS decided that AIP and ACS should form the nucleus of any cooperative arrangement.

On September 18, 1970, the Director of NBS wrote to the Directors of AIP and ACS, proposing discussions concerning a cooperative relationship with the professional societies which would include the publication and distribution of reference data. It was the opinion of NBS that such an arrangement would best accomplish the objectives of the Standard Reference Data Program. However, there was no assurance that the professional societies would participate in the program or establish an effective working relationship with each other.

In view of the uncertainty of participation by the professional societies, and the need to revise NBS' publication policy, NBS simultaneously pursued the more limited goal of obtaining publication and distribution of standard reference data by commercial publishing houses.

This was done by the issuance on October 1, 1970, of RFP -1089 to a number of such concerns, including Wiley. The record shows that at about the same time, the possibility of using NTIS or the Superintendent of Documents was also examined. Thus, several alternative methods for the publication and distribution of standard reference data were being explored at approximately the same time.

RFP -1089 was not issued to AIP and ACS. In the judgment of the contracting agency, there was no satisfactory alternative to treating the professional societies and the commercial publishing houses separately. As indicated above, NBS viewed the professional societies as being uniquely capable of achieving certain objectives of the Standard Reference Data Program. It is the administrative position that:

> "* * * if the societies had been required to respond to the RFP, as written, since it dealt only with publication services, NBS would have had no legitimate basis for including in its evaluation of the proposals the broader objectives it hoped to reach through an association with the societies. On the other hand, broadening the terms of the RFP to include the maximum objectives under the program * * * would have made it virtually impossible for the for-profit publishers to respond at all to the solicitation.
>
> "* * * It was always contemplated that if the RFP resulted in an advantageous and responsive proposal and the society aspect did not materialize, a contract would be awarded to that publisher. If the societies agreed to work together, and they came forth with a proposal predicated upon the terms of the RFP, that proposal together with the other advantages that NBS believed would accrue from its association with the societies, would be competitively evaluated with the responsive proposals resulting from the RFP, and a contract awarded to the prevailing party. * * *"

Four proposals were received by November 25, 1970, the due date established by RFP -1089. By letter of January 20, 1971, NBS sought clarification of Wiley's proposal, which was supplied on February 2, 1971.

By letter of May 27, 1971, AIP and ACS submitted a joint proposal for the publication and dissemination of a "Journal of Physical and Chemical Reference Data." Upon receipt thereof, NBS did not "simply put aside" the proposals of the commercial publishing houses as you allege, but evaluated the various options available to it. NTIS was eliminated as a publication mode since its ability to meet the market for the standard reference data output was not comparable to commercial publishing houses or the professional societies. The Superintendent of Documents was also removed from consideration in view of a determination that funds collected from the sale of Government Printing Office publications could not be returned to NBS, eliminating the possibility of cost recovery.

The AIP/ACS proposal was then evaluated in conjunction with those of the commercial publishing houses submitted under RFP -1089. Primary and equal emphasis in the evaluation was given to: (1) the ability of the publisher to achieve maximum dissemination of the standard reference data system output to the scientific community, and (2) to the predicted cost recovery to the Government. Wiley's proposal was deemed acceptable in regard to the first factor, it being recognized that Wiley has an effective promotion and sales organization. However, it was thought that AIP/ACS had a substantial advantage over a commercial publishing house in that those societies have direct access to approximately 160,000 members, who constitute a large fraction of the individuals to whom the present standard reference data system output is directed. In comparing ability to reach the institutional market, figures submitted by the publishers showed that institutional subscriptions to AIP and ACS journals were two-to-three times greater than those to the journals of commercial publishing houses. Another advantage of the AIP/ACS proposal was the inclusion of the "Journal of Physical and Chemical Reference Data" in the comprehensive information service of the societies, including microfilm editions of society journals, abstract and current title journals and magnetic tape announcement services. In view of the above, the evaluators concluded that AIP/ACS could most effectively disseminate the standard reference data system output to the market to which it is directed.

In regard to the second factor, it was concluded that the AIP/ACS proposal would result in significantly greater recovery of costs to the Government. You observe that the AIP/ACS contract provides that the subscription price of the "Journal of Physical and Chemical Reference Data" will be "$20 per year to members of AIP and ACS for their personal use and $60 per year to all others." You suggest that this

defeats the Congressional purpose underlying section 5 of the act, 15 U.S.C. 290d, to recover "the cost of collection, compilation, evaluation, publication, and dissemination of the data * * *." However, the contracting agency was of the opinion that the low subscription price to AIP and ACS members, combined with the societies' built-in access to a large membership, would result in returns from individual subscriptions considerably in excess of those available from commercial publishing houses.

A lesser evaluation factor was the degree of flexibility offered in the forms of published output and the degree of control of NBS over these forms. NBS was particularly interested in assuring that reference data be made available both in a journal-type format and as separate monographs which could be used in laboratories and offices. The AIP/ACS proposal guaranteed the availability of every data compilation in separate offprint form, as well as in the journal itself. AIP/ACS would also undertake to publish as a supplement to the journal every long monograph the technical validity of which was approved by an Editorial Board. The proposals of the commercial publishing houses carried no provision for marketing the shorter compilations as separate publications, and the publisher would make the decision on acceptance of the longer monographs based on considerations of commercial marketability. It was the opinion of NBS that the latter arrangement would be unduly restrictive of the objective of making the standard reference data available to the scientific and technical community. While NBS would retain the option of publication through the Government Printing Office of any item rejected by a commercial publishing house, as indicated above, this was not viewed as resulting in any cost recovery to NBS. Therefore, the AIP/ACS proposal was deemed superior in this respect.

The final consideration by NBS was the degree to which the publication medium would attract high-quality contributions which were not directly supported by the standard reference data program. It was recognized that Wiley publishes respected journals in the fields of physics and chemistry. However, it was thought that by virtue of the AIP and ACS journals' long tradition, larger circulation and general reputation for quality, a standard data reference system publication by AIP/ACS would provide greater incentive for distinguished scientists to carry out critical data evaluations on their own initiative, without the necessity for full financial support of NBS. This would enable NBS to increase the amount of evaluated data without a corresponding increase in expenditure of money.

The AIP/ACS proposal thus was deemed superior to those of commercial publishing houses in all of the areas discussed above, and it was recommended that a contract be negotiated with AIP/ACS. A contract was then negotiated with AIP/ACS under the authority of 41 U.S.C. 252(c)(4).

As indicated above, we regard the Secretary of Commerce as being vested with considerable discretion in the administration of the Standard Reference Data Act. Pursuant to a delegation of authority from the Secretary, NBS explored several potential sources for the publication and dissemination of standard reference data, including the Government Printing Office (GPO), National Technical Information Service (NTIS), commercial publishing houses, one or more professional societies, or a combination thereof. The examination of these sources occurred roughly in parallel. The GPO and NTIS were ultimately eliminated from further consideration for reasons set forth above.

Although a consortium of AIP/ACS possessed certain inherent characteristics, which in the judgment of NBS uniquely qualified those professional societies, you observe that FPR 1-1.301-1 requires all contracts to "be made on a competitive basis to the maximum practicable extent." In view of the particular objectives and circumstances involved, as outlined above, we do not believe the record clearly demonstrates that this provision of FPR was not adequately observed by NBS in its efforts to obtain proposals from qualified sources, and in the awarding of the contract to the professional societies. Even where an award was made to a nonprofit professional organization under a sole-source solicitation, we held that the standard to be applied in determining the propriety of the award is one of reasonableness and unless it is shown that the contracting officer acted arbitrarily, there is no legal basis to question the award. B-175953, July 21, 1972. From our review of the record, we are unable to conclude that the negotiation of the contract with AIP/ACS represented an arbitrary action by the contracting officials involved.

Although, as shown above, AIP/ACS was regarded as uniquely qualified to accomplish the purposes of the Standard Reference Data Act, there was no assurance that AIP/ACS would participate in the program when RFP -1089 was issued to the commercial publishing houses. You maintain that RFP -1089 should have contained a statement that it was for informational or planning purposes only, as provided by FPR 1-1.314, which states:

> "It is the general policy of the Government to solicit bids, proposals, or quotations only where there is a definite intention to award a contract.

However, in some cases requests for informational or planning purposes may be justified. In such cases the request shall clearly state its purpose, explaining that the Government does not intend to award a contract on the basis of the request, or otherwise pay for the information solicited; * * *."

The record shows that in the event AIP/ACS had been unable to form a cooperative arrangement or submit an acceptable proposal, award would have been made to one of the offerors under RFP -1089. Moreover, upon receipt of the AIP/ACS proposal, it was evaluated in conjunction with the proposals received from commercial publishers under the RFP. Only after the completion of this evaluation, and the finding that the AIP/ACS proposal was the most advantageous to the Government, was it recommended that award be made to AIP/ACS. Under these circumstances, we do not agree that RFP -1089 was issued for informational or planning purposes since there had been no decision not to make the award to a commercial publisher at the time of the solicitation.

In view of the foregoing, your protest is denied.

Very truly yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States