

**DECISION**



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

51063

FILE: B-182560

DATE: September 26, 1975

MATTER OF: The Franklin Institute

97403

**DIGEST:**

Where Agency representative brought protester's employee into meeting with competitor without disclosing relationship and discussion may have given protester competitive advantage, RFP should be revised to eliminate advantage, if that can be done without sacrifice to Agency interests, since such action would enhance competition and provide opportunity for all interested parties to compete. However, if Agency interests call for continuing procurement in form that precludes elimination of possible competitive advantage, protester may be excluded from portion of procurement involving possible advantage.

On August 8, 1974, the Contracts Management Division of the Environmental Protection Agency (EPA) issued request for proposals (RFP) WA-74-E371 for operation and maintenance of a "solid waste information retrieval system" (SWIRS). The period of contract performance was stated to be for the period from January 1, 1975, through December 31, 1975. An option period of one additional year was also provided.

BACKGROUND

Prior to August 1974 SWIRS was operated by The Franklin Institute under contract with EPA. The computer system ("hardware and software") necessary for the operation was furnished to Franklin by EPA using a system located at the National Institutes of Health (NIH). Some time during 1974 EPA decided to change from the NIH system to a system provided by a private contractor. The change was to be made under RFP -E371.

THE AUGUST VISIT

On August 8 or 9, 1974 (the Agency and the parties to the protest do not agree on the precise date involved), EPA's SWIRS

project officer, in the company of one of Franklin's employees, visited the Rockville, Maryland, office of Informatics, Inc. By letter dated October 18, 1974, Informatics' counsel alleged that at the August visit the officer introduced his companion to Informatics' employees as his "technical representative." Informatics further alleged that discussions were then held relating to the "technical approach that Informatics \* \* \* was planning to include in its proposal in response to RFP-E371." (This approach, we understand, permits data to be "inputted" (placed in) the computer system via the preparation of magnetic tapes; by contrast, the prior method of inputting under Franklin's SWIRS contract involved the use of a "remote computer communication terminal.")

Informatics also alleged that cost data relating to its technical approach were also discussed. Both the technical approach and costs in question allegedly related to the contents of an unsolicited proposal that Informatics had previously submitted to EPA. The company further alleged that it was planning to resubmit its unsolicited proposal in response to the subject RFP.

Informatics therefore asserted that Franklin had obtained an "enormous advantage," in violation of law, in competing against Informatics under RFP -E371. Consequently, among other requests, Informatics' counsel requested EPA to disqualify Franklin from responding to "\* \* \* RFP WA-74-E371 or any other RFP dealing with the SWIRS project."

#### EPA INVESTIGATION

Thereafter, EPA began an internal investigation of the August visit. Concurrently, Informatics filed a protest with our Office to the same effect as set forth in its earlier correspondence with EPA.

On November 4, 1974, EPA decided to: (1) cancel the existing RFP; (2) issue a revised RFP dividing work requirements so that multiple awards might be made; (3) disqualify Franklin from "\* \* \* eligibility for award of any task involving placing [inputting] into machine readable form previously abstracted and indexed data" (Franklin was advised of this decision by letter dated December 3, 1974); and (4) remove its project officer from the procurement. After receiving news of this decision, Informatics withdrew its protest before our Office.

REVISED RFP

The newly issued RFP contained (on page 6 of the solicitation package) a statement that work tasks had been divided into two tasks (task I required the contractor to deliver "clean copy" on all input (abstracts) to the task II contractor; task II required the preparation of magnetic computer tape for placement in the SWIRS data bank); that separate technical and pricing proposals were to be submitted for each part; and that it was anticipated that multiple award by task might be made. The period of performance under the basic contract was stated to be for 12 months from January 1, 1975, through December 31, 1975. Two successive 1-year option provisions were also provided for the period from January 1, 1976, through December 31, 1976, and from January 1, 1977, through December 31, 1977.

FRANKLIN'S PROTEST

By letter dated December 11, 1974, to EPA, counsel for Franklin protested its exclusion from task II of the reissued RFP.

The general thrust of Franklin's protest, as amplified in further correspondence, was that its employee who was at the August meeting with EPA's officer, although not introduced as a Franklin employee, was not exposed to proprietary information. Franklin later alleged that the August visit was for a proper purpose and was unrelated to proposals that could be submitted under the RFP existing at the time of the visit; that, at the time of the visit, Franklin had no reason for believing that the method of "inputting" to the computer system would be changed to require the preparation of magnetic tapes (the method of "inputting" was changed by a September 1974 RFP amendment); that no cost figures relating to work under the existing RFP were exposed at the meeting; and that the discussion related solely to selection of the Government-furnished computer system for future SWIRS work and "\* \* \* not to work which Informatics might \* \* \* [subsequently propose]." Consequently, Franklin insisted that an "after the fact" appearance of impropriety had been created which previously did not exist.

EPA'S PROTEST ANALYSIS

EPA's response to Franklin's protest is mainly evidenced in the written record before our Office in two documents--a January 14, 1975, memorandum signed by the contracting officer and the Head, ADP Contracts Unit, and a January 17, 1975, letter to Franklin's attorney signed by the Head, ADP Contracts Unit.

Both documents refer to the factual dispute existing between Informatics and Franklin as to the things that were discussed at the August visit; observe that if Informatics' allegations were true EPA would have to bar Franklin from consideration for the "compromised" part of the work (task II); and conclude that, since Franklin's employee failed to identify himself as such during the visit, EPA would assume that Informatics' version of the events discussed was correct.

The January 14 memorandum specifically states that the August visit concerned discussion of an "\* \* \* alternate method to \* \* \* on-line keying \* \* \* for inputting data to the data bank" (the method employed under the prior SWIRS contract). This position is repeated at another point in the memorandum where it is recited that the "\* \* \* discussion involved methods or equipment which were possible alternate ways of performing a portion of SWIRS work \* \* \*."

#### DECISION

We agree that Franklin's employee should have been identified at the beginning of the visit. Whatever the motive or cause of the failure to do so, and even assuming the failure was caused in part by EPA's officer, any information obtained as a result, even if not immediately related to the contents of an existing solicitation, should not be allowed to accrue to Franklin's possible competitive advantage under a revised solicitation.


An award to Franklin under the revised solicitation for the task II work would, by provoking suspicion and mistrust, reduce confidence in the competitive bidding system. We are, however, mindful of the need to maximize competition and to give all interested parties an opportunity to compete for the contract. Where circumstances permit, we have favored eliminating an undue advantage to one bidder--because he was improperly provided information not available to other bidders--by resoliciting with information needed to compete intelligently made available to all interested parties. See 49 Comp. Gen. 251 (1969). In the cited case such information could properly be made available by the Government.

We think it is desirable, where it can be done without compromising the Government's needs, to eliminate in this manner any improper advantage which may have been gained by a competitor, since the advantage is thereby eliminated without reducing competition. This could be done by restoring the original method of "inputting" called for under the prior SWIRS contract. Whether

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such an approach would satisfy the needs of the Government is within the reasonable discretion of EPA. If EPA concludes, after reviewing the matter, that its interests call for continuing the procurement under the current two-task RFP, we find no basis to object to the EPA position that Franklin should be excluded from competing for task II. On the other hand, if EPA concludes that its mission will be as well served by reverting to the original "inputting" method, we believe the RFP should be modified accordingly and all parties, including Franklin, given the opportunity to compete.

We recognize that an EPA cost study shows that the inputting method under task II of the current RFP could be less costly than the procedure presently in use. Cost is a legitimate factor for consideration. However, it is not the only factor and may not necessarily be controlling. We believe that the approach to be followed should be selected based on a full consideration of all pertinent factors.

  
Deputy Comptroller General  
of the United States