

DECISION



18593
P.L.-
MARIS

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

FILE: B-201176

DATE: June 22, 1981

MATTER OF: Panafax Corporation

DIGEST:

Protest is sustained where agency record discloses that protester was prejudiced by improper disclosures made by agency personnel prior to submission of best and final offers, enabling awardee to gain improper competitive advantage. In order to protect integrity of and confidence in competitive system, recommendation is made that contract be terminated and award made to protester, notwithstanding agency's undocumented claim that this would be costly and cause disruption to operations.

Panafax Corporation protests the award of a contract by the Internal Revenue Service (IRS) to Rapicom, Inc. under request for proposals (RFP) No. IRS-81-10. The contract is for the lease of 72 facsimile machines.

As its bases for protest, Panafax asserts that the cost evaluation was inconsistent with the RFP's evaluation criteria, and that IRS technical personnel were made privy to the pricing structure of all offerors prior to the request for best and final offers.

IRS denies any impropriety in the cost evaluation procedures and while admitting that pricing information was revealed to its technical personnel, asserts that its investigation into the allegations satisfied it that there was no evidence of any prejudice to Panafax as a result of the disclosure. Our review of the record, however, convinces us that the protest should be sustained regardless of the merits of the protester's assertions in its original protest. In this respect, IRS states that its investigation revealed that while no prices were disclosed outside the agency, the identity of Panafax as an offeror, and the

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fact that it was offering a newly developed machine, were revealed to Rapicom prior to submission of its best and final offer. IRS further states that this information enabled Rapicom to identify the machine model that Panafax was offering and determine an approximate offered price. IRS admits that Panafax was prejudiced by the disclosure made by IRS technical personnel and that the disclosure gave Rapicom an improper competitive edge. IRS also notes that a referral has been made to the Department of Justice for a possible criminal investigation of this matter and states that if any criminal conduct is established by the investigation, appropriate action will be taken.

On the basis of the information contained in the IRS report, Panafax requests relief in the form of a termination for convenience with award to Panafax, and recovery of proposal preparation costs. Panafax argues that the contract would not have been awarded to Rapicom but for the illegal conduct of IRS personnel and notes that it was the only other competitive offeror on the procurement. (Initially three firms responded to the solicitation; however, the third offeror did not respond to IRS' request for clarification of initial offers.) Panafax also emphasizes that upon submission of its best and final offer, Rapicom reduced its lease price per machine by about 27 percent to within one dollar of that proposed by Panafax.

IRS, however, has concluded that the most appropriate remedial action is nonexercise of the option to renew the equipment lease at the end of the current contract year (September 30, 1981) rather than a termination of the Rapicom contract. IRS argues that termination would be too costly and would cause serious disruption to its operations. IRS also argues that Panafax cannot independently request relief based on the information disclosure revealed in IRS' report on the matter, since this was not an issue raised in Panafax's initial protest to this Office.

We disagree with the IRS position. Until Panafax received IRS' report, it evidently was unaware that such a disclosure had taken place. Further, Panafax did initially express concern over the disclosure of pricing information to IRS technical personnel; while this did not include an allegation that technical information had been disclosed to a competitor, it did evidence a belief that a disclosure had been made to Panafax's prejudice.

The IRS report makes it clear that the improper disclosure to Rapicom gave it a competitive edge over Panafax. It is acknowledged that this disclosure enabled Rapicom to determine what equipment its competitor was offering and at approximately what price. Not only was this disclosure contrary to section 1-3.805-1(b) of the Federal Procurement Regulations (1964 ed.), but it was also in violation of the fundamental principle of competitive procurement, embodied in the Federal statutes and regulations, that all competitors be given the opportunity to compete on a common basis. See, e.g., International Business Machines Corp., B-194365, July 7, 1980, 80-2 CPD 12. Here, award was to be made to the offeror whose offer met all of the requirements of the RFP at the lowest price. Since Panafax's proposal was found to be technically acceptable, it appears likely that it would have remained the low offeror if the improper disclosure had not been made.

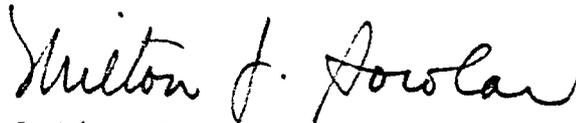
Under these circumstances, we do not believe that sufficient remedial relief would be provided by IRS's agreement not to exercise any contract renewal options. Accordingly, in order to protect the integrity of and confidence in the competitive procurement system, we recommend that Rapicom's contract be terminated and award made to Panafax. We make this recommendation notwithstanding IRS' claim that a termination would be costly and result in a disruption to its operations (which we note, has not been documented or explained in any detail). Honeywell Information Systems Inc., 56 Comp. Gen. 505 (1977), 77-1 CPD 256. In this regard, with respect to disruption of IRS operations, it appears that any such disruption would also occur if the contract renewal options were not exercised, as suggested by IRS.

In light of our recommendation, we find it unnecessary to consider Panafax's request for proposal preparation costs or to address certain additional allegations which were raised by Panafax in its comments on IRS' report to this Office.

The protest is sustained.

Since this decision contains a recommendation for corrective action, we have furnished a copy to the Congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176

(1976), which requires the submission of written statements by the agency to the House Committee on Government Operations, Senate Committee on Governmental Affairs, and House and Senate Committees on Appropriations concerning the action taken with respect to our recommendation.

A handwritten signature in cursive script that reads "Milton J. Rowland".

Acting Comptroller General
of the United States