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

31186

B-177822

July 16, 1973

Linguistic Systems, Incorporated
116 Austin Street
Cambridge, Massachusetts 02139

Attention: John J. Moss
President

Gentlemen:

Your submission of April 4, 1973, and prior correspondence, protested the rejection of your bid and award of contract to another firm under request for proposals (RFP) No. 68-72-5-436, issued April 14, 1972, by the Environmental Protection Agency (EPA), Research Triangle Park, North Carolina.

The RFP advised prospective offerors that a cost-plus-fixed-fee (CPFF) contract was anticipated and that the estimated period of performance was 12 months, with options to renew for two additional 12-month periods. The scope of work was defined in part as requiring the contractor to locate, screen, copy, catalogue, abstract, index, record, and microfile approximately 2205 documents dealing with air quality research, development and control. The documents are to be found in approximately 1100 primary and 23 secondary publications containing 130,000 articles. It was estimated that 60 percent of the articles are published in English and 40 percent in foreign languages.

Two offers were received and the technical proposals were submitted for evaluation by three professionals from the Air Pollution Technical Information Center (APTIC). Based on the technical evaluation reports, the contracting officer determined that Linguistic's proposal was not technically acceptable and, therefore, not for further consideration. A CPFF contract was awarded on December 4, 1972, to the only other offeror, The Franklin Institute Research Laboratories, since its proposal was considered acceptable both as to price and technical factors. Procuring activity personnel held a debriefing conference after the award was made at which time you were advised of the weaknesses of your proposal.

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You state that Linguistic's proposal was technically acceptable as evidenced by the acceptable rating given by the same evaluators upon the same evidence in connection with a proposal submitted by Linguistic for similar work within two weeks of the subject RFP opening. Furthermore, you contend that negotiations should have been held with your firm in order to correct certain alleged erroneous calculations involving the technical proposal. Your proposal stated that approximately 90 percent of the English language sources have abstracts already written and 90 percent of the 20 secondary source references are merely duplications of the primary source references. Also, you note that 40 percent of the Japanese journals have already been completely processed under EPA contracts. Consequently, you contend that your proposed time to perform is correct and that EPA incorrectly evaluated your proposal. Since you believe that the proposal was technically acceptable, you contend that the actual reason for its rejection was a belief that Linguistic was incapable of performing. In this regard, you contend that EPA personnel should have referred the matter to the Small Business Administration (SBA) for consideration of the issuance of a "Certificate of Competency" (COC). You also believe that the use of a CPFF contract in lieu of a fixed price contract restricted competition and that the successful offeror was favored by having a previous contract for this type of work and, therefore, knew how the technical proposals would be evaluated.

Since the successful offeror began to incur costs relative to the contract prior to award and with EPA approval, you believe that a contract was awarded secretly to the other offeror. You protest the withholding of notification that your proposal was technically unacceptable until after the contract was awarded as a violation of Federal Procurement Regulations (FPR) section 1-3.805-1(b). Finally, you believe that the RFP was for a three year effort and that the cost involved to perform for three years is so significant that an environmental impact statement was required prior to issuance of the RFP.

In response to your contentions, it is reported that Linguistic's proposal was rejected on technical grounds because the proposal did not show an understanding of the scope of work. The record shows that the three evaluators from APTI developed a scoring system for their technical evaluation based upon the criteria set forth in the RFP. The maximum possible score was set at 8.00. After independent evaluations by the three evaluators, the average

technical score for your proposal was 3.05 and 6.19 for Franklin. Furthermore, the record shows that the three evaluators agreed that your proposal was "so inferior technically as to preclude any possibility of meaningful negotiation(s)". In this connection, we quote the following from the narrative evaluation:

> This proposed manpower is incredibly lower than anything in the evaluators' experience; it seems grossly underestimated; a basic and critical misunderstanding of the problems connected with processing this volume of material is thus apparent. It was unanimously determined that this proposal is unclarifiable in this regard.
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> The proposal contains no evidence of the specific locations where each journal will be screened. The propocal states that all 1100 primary serials are located at MIT's libraries and the Countway Library of Harvard Medical School. However, such an assertion cannot be considered as acceptable evidence of the kind required (such as a library's serials list would be). This makes their misunderstanding even more apparent.
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> The proposal contains other apparent inconsistencies. At one point it asserts that 90% of the English-language sources have abstracts already written, and at another point it asserts that it is 90% of all the serial items that have prior existing English abstracts.
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> The proposal also implies that it will use prior existing English abstracts whenever they are available. In view of the stipulation in the scope of work that informative abstracts covering certain substantive information shall be prepared, this approach is grossly illogical and inconsistent with the requirement expressly solicited.

Furthermore, the contracting officer states that the technical acceptability of your proposal under the other solicitation referred to was not considered controlling for this procurement because of the difference in the magnitude of the jobs ($22,620 versus $246,323). We have recognized

that a reasonable degree of administrative discretion is permissible with respect to technical considerations. Therefore, we will not disturb an administrative determination that a proposal is technically unacceptable and not within a competitive range in the absence of a clear showing that such a determination was an arbitrary abuse of discretion. 48 Comp. Gen. 314 (1968). We have reviewed the reasons noted above for the rejection of your technical proposal and cannot conclude that the agency personnel acted arbitrarily in their determination that Linguistic's proposal was not within a competitive range. B-176504, December 21, 1972; B-176294, October 27, 1972.

Although it may appear that rejection of your technical proposal for failure to understand the scope of work implies that your responsibility as a prospective contractor was a factor, we held in B-170890, November 18, 1970, that a determination of this nature relates to the question of whether the proposal is technically acceptable and within a competitive technical range for negotiation procedures and does not involve matters of capacity and credit which must be judged by SBA. See 15 U.S.C. 637 (b)(7) and 46 Comp. Gen. 893 (1967). Consequently, it was not necessary for the contracting officer to institute certificate of competency procedures when he rejected your offer.

Concerning the use of a CPFF contract in the subject procurement, we note that CPFF contracts are authorized by 41 U.S.C. 254(b), when the head of an agency determines that such a method of contracting is likely to be less costly than other methods or that it is impractical to secure property or services of the kind or quality required without the use of a cost, CPFF or incentive type contract. A determination under 41 U.S.C. 254(b) was made in the instant case and such determinations are afforded finality by 41 U.S.C. 257(a); 50 Comp. Gen. 565, 578 (1971). It should also be noted that your protest in this regard is untimely under our Interim Bid Protest Procedures and Standards, as protests based upon alleged improprieties in an RFP are required to be filed in our Office prior to the closing date for receipt of proposals. 4 CFR 20.2(a).

In B-176504, December 21, 1972, we held that where a cost type contract is to be awarded it need not be awarded to the lowest priced offeror in that proposed costs are only estimates and offers to perform work on a cost-reimbursement

basis need not be evaluated on a strict price basis. See FPR 1-3.805-2. Furthermore, we held in that case that where the technical proposal is unacceptable, the low estimated price of that offeror is not for consideration. Also, we do not agree that the use of a CPFF contract favored the incumbent contractor in that all offerors were notified of the anticipated use of this type of contract and of the evaluation criteria upon which each proposal would be rated.

Your proposal was rated technically unacceptable as the result of a report dated June 9, 1972; however, agency personnel did not notify you of the unacceptability of your proposal until a contract was awarded on December 4, 1972. Although the applicable FPR regulation permits (but does not require) notification to an offeror that his proposal is unacceptable, we believe that notification that a technical proposal has been determined "unacceptable" so as to preclude meaningful negotiation should be given as soon as such determination is made unless there are compelling reasons dictating the withholding of such notification. See FPR 1-3.805-1(b). However, we have held in situations where there is such a regulation (ASPR 3-508-2) that notification is procedural in nature and the failure to notify an unsuccessful offeror provides no legal basis for disturbing an award. B-174660, February 7, 1972; B-166190(1), February 24, 1970. Furthermore, we have been advised that EPA personnel are in the process of formulating regulations that will insure prompt notice of unacceptable proposals.

Although the contract was not awarded until December 4, 1972, the contractor had been previously notified that if a contract was awarded to it that costs not to exceed $41,054, incurred before contract date, would be reimbursable if such costs incurred after the date of the contract would have been reimbursable thereunder. In view of these provisions, we do not agree that a contract was secretly awarded, but rather the offeror was given the option of beginning work at its own risk. We do not believe that the contract can be disturbed on this basis.

The RFP defined the period of performance as 12 months with options to renew for 24 additional months. We do not agree that the terms of the RFP require a three year effort. In any event, the question whether an environmental impact statement is required for a particular procurement is a

matter primarily for administrative determination by the agency involved. See B-175600, October 4, 1972. We find no reason to conclude that the contracting agency abused its discretion in this regard.

Accordingly, your protest is denied. We are returning your sample work as requested.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States