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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Information Ventures, Inc.

File: B-293541

Date: April 9, 2004

Bruce H. Kleinstein, Esq., for the protester.
Mike Colvin, Department of Health and Human Services, for the agency.
Henry J. Gorczycki, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency contemplated a sole source purchase under simplified acquisition procedures, and its December 31, 2003, announcement of the intended award established a response period for capability statements from potential sources of 1 ½ business days (until January 5, 2004), the agency did not provide potential sources with a reasonable opportunity to respond, particularly where the record does not show a need for the short response period and the agency knew of the requirement well in advance of issuing the notice.

DECISION

Information Ventures, Inc. (IVI) protests a sole source award to Metaworks, Inc. under request for quotations (RFQ) No. 263-04-(FQ)-0009, issued by the Department of Health and Human Services (HHS), National Institutes of Health (NIH), for research services associated with developing a list of drugs requiring additional study, and providing that list to Congress, as required by the Best Pharmaceuticals for Children Act (BPCA), 42 U.S.C.A. § 284m(a) (West 2003).

We sustain the protest.

On December 15, 2003, HHS published a pre-solicitation notice--for solicitation No. 263-04-(DR)0016--on the Federal Business Opportunities (FBO) website, www.fedbizopps.gov. The notice stated that, for each drug on a list to be provided, the contractor would perform an assessment of the relevant literature using a standardized search methodology, document the search methodology, and identify all information about the effect of the drug on neonates and children under the age

of 18. Agency Report (AR), Tab 3, Pre-solicitation Notice. The notice requested responses by December 18.

On December 18, IVI contacted the agency and raised a number of concerns about the pre-solicitation notice. Of relevance here, IVI complained that the notice did not include essential details about the work to be performed, and did not allow adequate response time. In light of IVI's inquiry, the agency apparently became aware that its notice had failed to advise that the agency intended to award this contract to Metaworks on a sole source basis, and had not advised potential offerors about how to respond to the intended sole source procurement. AR, Tab 1, Statement of Facts, at 1.

On December 31, in recognition of the issues raised by IVI, the agency issued what it terms a "revised notice." This "revised notice" was, in fact, an RFQ sent directly to IVI by e-mail. There is no evidence in the record that this RFQ was sent to any other potential offeror; nor is there any evidence that a second notice--revised or otherwise--was published on the FBO website. The RFQ required responses by noon on January 5, 2004.

Several provisions of the RFQ are relevant here. First, the RFQ referenced the BPCA, which requires HHS to develop, prioritize, and publish annually a list of drugs for which pediatric studies are needed. The RFQ stated that in order to begin assessing whether certain drugs should be included on the 2005 list, the agency "requires a state-of-the-art systematic literature review, meta-analysis and [collaboration] with experts in pediatric research," and requires this review within a short time frame. RFQ at 2-3.

In addition, the RFQ advised that the agency anticipated making a sole-source award to Metaworks, "pursuant to the authority [at] 41 U.S.C. 253(c)(1) as set forth in [Federal Acquisition Regulation (FAR) §] 6.302-1." Id. at 2. In this regard, the RFQ stated that deliverables would include monthly progress reports, a preliminary draft report, and a final report by March 31, 2004. Id. at 4. Finally, the RFQ advised that any interested source should submit information to demonstrate its ability to perform these requirements by January 5, 2004. Id. at 1.

Following its receipt of the RFQ on December 31, 2003, IVI attempted without success to contact the contracting officer on December 31, and again on the next business day, Friday, January 2, 2004. When IVI was unable to reach agency personnel, it filed this protest before close of business on January 2. During the course of this protest, on January 23, NIH awarded a sole source contract to Metaworks for a total price of $95,000.

The protester essentially alleges that the RFQ did not provide adequate time or information to prepare a response, and that the agency did not have a reasonable basis for concluding that Metaworks was the only source able to perform the services.

As a preliminary matter, the RFQ and the agency's report incorrectly advise that the agency was proceeding pursuant to subpart 6.3 of the FAR, which provides the authority for contracting without full and open competition. Although there are also instances where the agency states that this is a simplified acquisition, its arguments here are cast under the rules applicable to larger procurements. In fact, this procurement is governed by the simplified acquisition procedures at FAR part 13, not the procedures at FAR subpart 6.3, because the agency estimates that the value of these services will not exceed $100,000. See FAR §§ 6.001(a), 13.003(a).

Under the Federal Acquisition Streamlining Act of 1994 (FASA), simplified acquisitions--used to purchase supplies and services, including construction, research and development, and commercial items, the aggregate amount of which does not exceed $100,000 (FAR §§ 2.101, 13.000, 13.003(a))--are excepted from the general requirement that agencies obtain full and open competition through the use of competitive procedures when conducting procurements. See 41 U.S.C. §§ 253(a)(1)(A), (g)(1), and (g)(4) (2000). Part 13 of the FAR establishes procedures for simplified acquisitions, which are designed to promote efficiency and economy in contracting, and to avoid unnecessary burdens for agencies and contractors. To facilitate these objectives, FASA only requires that agencies obtain competition to the maximum extent practicable. 41 U.S.C. § 427(c); FAR § 13.104; see Information Ventures, Inc., B-290785, Aug. 26, 2002, 2002 CPD ¶ 152 at 2-3.

Under the maximum-extent-practicable standard applicable to simplified acquisitions, an agency "may solicit from one source if the contracting officer determines that the circumstances of the contract action deem only one source is reasonably available (e.g., urgency, exclusive licensing agreements, or industrial mobilization)." FAR § 13.106-1(b)(1); see Information Ventures, Inc., supra, at 3. We review protests of the sole source determinations made in these procurements for reasonableness. See Ultraviolet Purification Sys., Inc., B-226941, Sept. 10, 1987, 87-2 CPD ¶ 229 at 3 (sustaining protest of sole source justification under predecessor small purchase procedures).

In addition, regardless of whether a simplified acquisition is competed or reserved for only one source, the simplified acquisition procedures require synopsis of procurements in excess of $25,000 in accordance with the Small Business Act, 15 U.S.C. § 637(e), and the Office of Federal Procurement Policy Act, 41 U.S.C. § 416 (2000). Exceptions to this synopsis requirement are set forth in the regulations, but none are applicable here (nor has the agency asserted that any are applicable). See FAR §§ 13.105, 5.101(a)(1), 5.202. A synopsis must provide an "accurate description" of the property or services to be purchased and must be sufficient to allow a prospective contractor to make an informed business judgment as to whether to request a copy of the solicitation. 15 U.S.C. § 637(f) (2000); FAR § 5.207(c); see Pacific Sky Supply, Inc., B-225420, Feb 24, 1987, 87-1 CPD ¶ 206 at 4-5.

Finally, after synopsizing a procurement, agencies must provide potential offerors a reasonable opportunity to respond. 41 U.S.C. § 426(c); FAR §§ 5.203(b), 13.003(h)(2); see Sabreliner Corp., B-288030, B-288030.2, Sept. 13, 2001, 2001 CPD ¶ 170 at 6-7. What constitutes a reasonable opportunity to respond will depend on "the circumstances of the particular acquisition, such as complexity, commerciality, availability, and urgency." FAR § 5.203(b). In short, the fundamental purpose of these notices, including the circumstance where an agency contemplates a sole-source award, is to enhance the possibility of competition. Pacific Sky Supply, Inc., supra.

With respect to the protester's contention that it was not provided sufficient time to submit a response to this RFQ, we agree. Other than the New Year's Day holiday and the weekend following it, the agency allowed a total response time here of 1 ½ business days. The agency states that this brief response time was necessary in order to meet the March 31 date mandated under the BPCA (AR at 1); however, there is no such mandate in the BPCA. Simply put, the BPCA does not set a March 31 deadline for any task to be performed by HHS. Rather, the BPCA requires that HHS issue a list of drugs each year, beginning no later than 1 year after the BPCA was enacted (on January 4, 2002). 42 U.S.C.A. § 284m(a)(1). More importantly, the present procurement is associated with preparation of the 2005 list, not the list for the current year 2004. Although we agree that reasonable time limits must be set for the completion of preliminary services leading to the publication of the 2005 list, there is nothing in the record to support the agency's contention that these services had to be completed by March 31, 2004.

Moreover, we note that the need to prepare this list is a recurring requirement, and the agency had prepared a statement of work (SOW) for this associated research effort by October 1, 2003. In addition, the record shows that Metaworks had prepared a draft proposal by October 24. AR, Tab 2, at 8-9 (the SOW), 12 (Metaworks' Draft Proposal). Under these circumstances, a response time of 1 ½ business days was not a reasonable amount of time to require IVI to prepare a submission to demonstrate its capabilities. Accordingly, we sustain the protest on this basis. See Jack Faucett Assocs., Inc., B-279347, June 3, 1998, 98-1 CPD ¶ 155 at 3-4 (1 day response time without reasonable justification is unreasonable).

The record here also discloses that the agency's sole-source determination may not be reasonable. We first note in this regard that the agency has never synopsized its intent to make a sole-source award to Metaworks. Although the agency points out that it received no responses (other than the protester's) to the December 15 pre-solicitation notice, the agency also acknowledges that the pre-solicitation notice was misclassified as "medical services," rather than as "other scientific and technical consulting services." AR, Tab 1, Statement of Facts, at 4. The document that the agency terms a "revised notice" was, in actuality, an RFQ apparently issued only to IVI. Given these flaws, the agency's actions may have denied potential sources (other than the protester) the opportunity to respond to a proper synopsis of the agency's intended sole-source. In addition, in its justification of its sole source

determination, the agency describes Metaworks' skills and experience, and states that Metaworks is "the leading provider" of these services. AR, Tab 2, at 10 (Sole Source Justification). This description, on its face, suggests that there are other providers of these services, and that the agency is aware of them. Finally, we note that the protester claims that it, too, can provide these services. Protester's Comments at 5. In short, there is little here to support the determination that only Metaworks could provide these services. See Ultraviolet Purification Sys., Inc., supra, at 4; Jack Faucett Assocs., Inc., supra, at 4.

During the course of this protest, HHS proceeded with award based upon a written finding that "contract performance will be in the best interests of the United States." AR, Tab 6, Override Determination at 1. The finding referenced FAR § 33.104(c)(2)(i), which sets forth regulations for proceeding with performance during protests after award, not protests filed before award, as here. Thus, the override determination was inconsistent with the Competition in Contracting Act of 1984.[1] See 31 U.S.C. § 3553(d)(3). As a result of this override, performance of the work is now complete. Since no other meaningful relief is available, we recommend that the agency reimburse the protester its costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1) (2004). The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel

[1] Although an agency has authority under CICA to authorize performance of a contract during a protest filed after award with either a "best interest" or an "urgent and compelling" finding, it does not have that option during a protest filed before award. Compare 31 U.S.C. § 3553(c)(2) (protests filed before award), with 31 U.S.C. § 3553(d)(3)(C) (protests filed after award). Since this is not the first instance we have seen of this agency proceeding with an award in the face of a protest on the basis of a pre-award best interest determination, see, e.g., Information Ventures, Inc., B-293518, B-293518.2, Mar. 29, 2004, 2004 CPD ¶ ___ at 5 n.4, our Office, by letter dated today, is bringing this matter to the attention of the Secretary of HHS.