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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Information Ventures, Inc.

File: B-297225

Date: December 1, 2005

Bruce H. Kleinstein for the protester.
Margaret H. Whittaker for ToxServices LLC, an intervenor.
Davis Young, Esq., Department of the Navy, for the agency.
Paul N. Wengert, Esq., and Michael R. Golden, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Where record shows that agency overstated its needs by requiring vendors to submit multiple examples of toxicology reports because agency report only justifies need to review one sample report, protest is nonetheless denied where protester has failed to show that it could have met requirement for even one sample report, and thus the overstated requirement did not result in competitive prejudice to the protester.

DECISION

Information Ventures, Inc. (IVI), a small business, protests the terms of the synopsis and request for quotations issued by the Department of the Navy, Naval Supply Systems Command, for toxicology research and support services for the Navy Environmental Health Center (NEHC) under request for quotations (RFQ) No. N00189-05-T-0534. IVI objects that the synopsis was defective, that the RFQ overstated the Navy's needs by requiring vendors to submit nine sample toxicology reports for evaluation, and that the RFQ improperly classified the required services as a commercial item.

We deny the protest.

The Navy issued the RFQ on September 7, 2005. The RFQ sought quotations to provide toxicology services for a base period and 4 additional years on a fixed-price

basis.¹ The vendor would provide various services, such as conducting “rigorous scientific research/review of the literature and other information to identify specific toxicological data needed to make a scientifically sound determination and provide timely and accurate comments.” As deliverables, the RFQ specified toxicological profiles for 40 chemicals, and responses to regulatory comments regarding the development of toxicological profiles. RFQ at 9-11.

The RFQ provided that the agency would evaluate technical capability on a pass/fail basis, and would select the successful vendor (from among those that had received a “pass” on the technical factor) on the basis of a tradeoff between past performance and price. The technical evaluation was to consist of six technical subfactors, with a rating of “fail” on any one subfactor resulting in an overall technical rating of “fail.” RFQ at 6-7. For example, the first of the technical subfactors was described as:

a. Proficient Development of Human Health Risk Assessment Reports following EPA [the Environmental Protection Agency]’s Risk Assessment Guidance for Superfund (RAGS)-The provider shall be regularly engaged in writing the toxicological aspects of Human Health Risk Assessment Reports following RAGS. Experience documentation must include at least 3 risk assessment documents showing completed toxicity assessments. DoD [Department of Defense] reports are preferred.

RFQ at 7 (emphasis in original).²

On September 13, prior to the due date for submission of quotations, IVI filed its protest with our Office.

¹ As initially issued, the RFQ indicated that it was unrestricted. RFQ at 1. However, on September 12, the Navy issued an amendment to state “that this is a 100% Small Business Set-aside requirement.” RFQ amend. 1.

² Subfactor “a” (as quoted above) specified submission of “at least 3 risk assessment documents,” and subfactor “d” required “at least 3 reports,” to determine the technical capability of a firm, while subfactors “b,” “c,” and “e” each specified “at least 1 risk assessment document” or “at least 1 report.” The final subfactor did not specify submission of a sample report. RFQ at 7. The protester argues that the six subfactors together required nine separate sample reports, Protest at 3-4; Protester’s Comments at 5, while the Navy argues that a vendor could meet the RFQ requirement with “as few as 3 written reports because a single report submission could satisfy one or more of the Technical Capability subfactors.” Supplemental Legal Memorandum at 9. For purposes of this decision, it is sufficient that neither party disputes that the RFQ required submission of multiple reports to establish a firm’s technical capability in performing this work.

In its agency report, the Navy submitted a statement from an environmental engineer responsible for the requirement. As background, the environmental engineer observed that the Navy is responsible for the clean-up of hazardous chemicals at multiple sites around the world. She explained that establishing the toxicity profiles for emerging contaminants is a “crucial step in the Navy’s pollution prevention program and environmental restoration program at contaminated sites.” Agency Report (AR), Tab C, Statement of Environmental Engineer, at 2.

In her declaration, the environmental engineer explained that “[w]hile the Environmental Protection Agency has established toxicity profiles for many hazardous chemicals, there are many hazardous chemicals that do not have a toxicity profile, or the established toxicity profile for a chemical has become obsolete due to new scientific research and findings.” She further explained that toxicological profiles prepared under the order would be used by the Navy to determine the exposure levels deemed safe for human health. AR, Tab C, Statement of Environmental Engineer, at 2. Her statement supports the conclusion that performance of these services will affect the Navy’s judgments on the consequences of human exposure to hazardous chemicals.

In explaining the justification for the challenged requirement for sample reports in the RFQ, the environmental engineer states that

I also drafted the requirements in the solicitation’s Technical Capability factor for the contracting officer. . . . The technical factors serve to show that the interested offeror is knowledgeable of the concepts, science, and analysis techniques well known to toxicologists and human health risk assessment professionals. To that end, the solicitation asks interested offerors to submit as few as at least one report, a writing sample if you will, to demonstrate their proficiency with a series of standard human health risk assessment and toxicology reports, such as “predicting chemical toxicity.” The types of reports the solicitation required interested offerors to submit are the standard work product of professionals in the field.

AR, Tab C, Statement of Environmental Engineer, at 3.

An agency may reasonably restrict competition through the use of specific solicitation requirements so long as those requirements are needed to meet the agency’s needs. JT Constr. Co., B-244404.2, Jan. 2, 1992, 92-1 CPD ¶ 1 at 4. Where a procurement involves matters of human life and safety, an agency has greater discretion to establish requirements that achieve the highest possible level of reliability and effectiveness. See, e.g., Marine Transp. Lines, Inc., B-224480.5, July 27, 1987, 87-2 CPD ¶ 91 at 4; American Airlines Training Corp., B-217421, Sept. 30, 1985, 85-2 CPD ¶ 365 at 6.

IVI argues that the agency requirement for sample reports did not ensure that the personnel involved in writing the sample reports would perform the services for the Navy, that the Navy could have met its needs through other means, and that “appropriate personnel qualification factors” would have met the Navy’s needs. Protester’s Comments at 10. Here, in light of the environmental engineer’s statement indicating the importance of demonstrated vendor competence to provide reports that will support judgments affecting human health, we conclude that the Navy could reasonably require vendors to submit “experience documentation” in the form of “at least one report.” However, in light of the environmental engineer’s apparent satisfaction with a single report, the record before our Office does not support the requirement in the RFQ for multiple reports.

Our Office requested a supplemental agency report reconciling the environmental engineer’s statement that “as few as at least one report” was sufficient, with the RFQ requirement for multiple reports. The supplemental agency report included an additional statement from the environmental engineer, in which she noted that a vendor could “satisfy the RFQ’s Technical Capability Factor with as few as 3 reports.” However, she once again failed to justify the reason for requiring more than one report:

In evaluating the interested contractor’s technical proposal materials, I was only interested in their demonstrating sufficient proficiency and experience with the capabilities stated in the RFQ. I was not concerned about obtaining a particular number of reports.

Supplemental AR, Tab 1, Supplemental Statement of Environmental Engineer, at 2.

Upon receipt of the supplemental agency report, our Office asked the protester to describe in its comments to the supplemental agency report “the presence or absence of prejudice to the protester from the alleged errors in the context of the supplemental agency report,” including how the protester had been impaired from competing (or otherwise competitively prejudiced) by the RFQ requirement for multiple sample reports, “as contrasted with the situation if only 1 report had been required.” Fax from GAO to Parties (Nov. 16, 2005).

In response, IVI did not argue that it could have met the requirement for a single report, regardless of the time available,³ but instead argued that

IVI was not a ‘commercial source’ for the required services. It did not regularly offer and sell the services being sought . . . Its ability to

³ The protester did not submit a quotation under the RFQ by the closing date. Contracting Officer’s Statement at 4. The protester argues that the closing date was improperly shortened by the unjustified use of commercial item procedures. Protest at 3.

compete was impaired by the requirement to prepare a submission in 13 days that required it to submit “at least” three reports for each of two Technical Criteria sub-factor areas and “at least” one report for three Technical Criteria sub-factor areas. As a result, the RFQ’s document submission requirement unduly and unreasonably restricted competition.

Protester’s Supplemental Comments at 10.

We will deny a protest where, notwithstanding that a solicitation overstated an agency’s requirements, the protester has not shown competitive prejudice; that is, unless the protester demonstrates that, but for the agency’s actions, it would have had a substantial chance of receiving the award (or, in these circumstances, submitting an acceptable quotation).⁴ McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Here, the Navy has only supported a requirement for a single sample report, not the multiple sample reports specified in the RFQ. Nevertheless, and even after our Office identified the issue, IVI has made no attempt to show that it could have met the agency’s requirement for a single report, regardless of the time provided. As such, IVI has not been competitively prejudiced by the requirement for multiple reports in the RFQ.

The protest is denied.⁵

Anthony H. Gamboa
General Counsel

⁴ The Navy explains that each of the five vendors that submitted a quotation, furnished at least nine sample reports. Supplemental Contracting Officer’s Statement at 4. There is no evidence in the record to suggest that any firms—other than the protester—were excluded from the competition by the requirement for multiple sample reports. Nor is there any indication that the content or pricing of any of the quotations that were submitted would have been different if the requirement had not been included. See Ktech Corp.; Physical Research, Inc., B-241808, B-241808.2, Mar. 1, 1991, 91-1 CPD ¶ 237 at 6 (protest denied where waiver of requirement was not competitively prejudicial to competitors). Thus the protester has not shown that any actual or potential vendor was prejudiced by the requirement for multiple sample reports, as opposed to a single sample report.

⁵ Because the agency has justified a requirement that IVI has not shown that it could meet, we conclude that IVI is not an interested party to challenge other aspects of the procurement. See Vertol Sys. Co., B-293644.6 et al., July 29, 2004, 2004 CPD ¶ 173 at 8.