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**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** Jack Faucett Associates, Inc.

**File:** B-279347

**Date:** June 3, 1998

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Jack G. Faucett for the protester.

Michael Colvin, Department of Health and Human Services, for the agency.

Jennifer Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

In acquisition conducted using simplified acquisition procedures via Federal Acquisition Computer Network (FACNET), agency failed to give interested vendors a reasonable opportunity to respond to a notice of intent to award on a sole-source basis where sole-source purchase order was issued only 1 day after FACNET notice of intent was issued.

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## **DECISION**

Jack Faucett Associates, Inc. protests the National Institutes of Health's (NIH) issuance on a sole-source basis of a purchase order to Social and Scientific Systems, Inc. (SSSI) under request for quotations (RFQ) No. QJC-80273, to support the participation of NIH's Office of Loan Repayment and Scholarship (OLRS) at meetings of the American Medical Students Association (AMSA). The protester contends that companies other than SSSI, including itself, could have furnished the services sought, but were not given a reasonable opportunity to respond to the RFQ.

We sustain the protest.

NIH issued the RFQ through the Federal Acquisition Computer Network (FACNET) on February 18, 1998.<sup>1</sup> The acquisition was conducted using the simplified

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<sup>1</sup>FACNET, a government-wide electronic data interchange systems architecture, was designed to provide for electronic data interchange of acquisition information between the government and the private sector, employ nationally and internationally recognized data formats, and provide universal user access. See 41 U.S.C.A. § 426(a), (b)(3) (West Supp. 1998); Federal Acquisition Regulation (FAR) § 4.501. It was intended to create an electronic marketplace for procuring supplies and services in which agencies can post notices of and receive responses to

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acquisition procedures set forth in FAR part 13. The FACNET notice stated that the agency intended to procure the services on a sole-source basis from SSSI, and that quotations were due by 5 p.m. on February 20. An accompanying statement of work described the particular tasks to be performed; these included making reservations (for hotel rooms, an exhibit booth, airline tickets, and buses), arranging equipment rentals, acquiring prize ribbons and signs, and assisting the Director of OLRs in staffing an exhibit booth at the AMSA meetings. On February 19 (i.e., 1 day after issuance of the RFQ and prior to the stated closing date for receipt of quotations), the agency issued a purchase order in the amount of \$67,080 to SSSI.

Jack Faucett protested to our Office on February 24, arguing that NIH had failed to afford interested vendors a reasonable opportunity to respond to the RFQ, as required by FAR § 13.003(i)(2).<sup>2</sup> Jack Faucett also argued that the solicitation of only one source was not justified since the services sought, which are routine and administrative in nature, are available from a large number of firms or individuals. See FAR § 13.106-1(b)(1) (authorizing soliciting from one source if the contracting officer determines that, in the circumstances of the contract action, only one source is reasonably available).

The agency asserts that it reasonably determined that only SSSI was capable of satisfying its needs. In this regard, the contracting officer determined that SSSI was the only firm whose staffers were sufficiently familiar with OLRs programs to enable them to assist the Director of OLRs in staffing the OLRs exhibit booth at the AMSA meetings. Further, in the agency's view, given that it reasonably determined that only SSSI could meet its needs, the 1-day period between issuance of the FACNET notice and issuance of the sole-source purchase order satisfied the requirement to furnish potential vendors an opportunity to respond to the notice of intent to award on a sole-source basis.

Generally, agencies are required to provide public notice of proposed contract actions for amounts above \$25,000 in the Commerce Business Daily (CBD) and to give potential sources a reasonable opportunity to respond. 41 U.S.C.A. § 416(a)

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<sup>1</sup>(...continued)

solicitations, post notices of contract awards, and issue orders where practicable; and private sector users could access notice of solicitations, receive orders, and access information on contract awards. See 41 U.S.C.A. § 426(b)(1), (2). We note that the statute was amended recently to substitute the term "electronic commerce" for the term FACNET and to make other changes not relevant here. See Pub. L. No. 105-85, § 850, 111 Stat. 1847, 1850 (1997).

<sup>2</sup>FAR § 13.003(i)(2) provides that contracting officers shall "[e]stablish deadlines for the submission of responses to solicitations that afford suppliers a reasonable opportunity to respond (see [FAR §] 5.203)."

(West Supp. 1998); FAR §§ 5.101, 5.203(b). This requirement extends to proposed sole-source awards using simplified acquisition procedures (i.e., for amounts between \$25,000 and \$100,000). FAR §§ 13.003(i)(2), 13.105(a). Although certain contract actions using FACNET are exempt from the CBD notice and response time requirements, see 41 U.S.C.A. § 416(c)(1)(A) and (B); FAR §§ 5.202(a)(13) and (14), 13.105(a)(1), this does not mean that public notice and an opportunity to respond are not required where FACNET is used; instead, it means that when an acquisition is conducted via FACNET, public notice may be furnished via FACNET rather than via the CBD. In fact, 41 U.S.C.A. § 426(c), governing notice and solicitation regulations for FACNET, provides in pertinent part:

Each minimum period specified for a notification of solicitation and each deadline for the submission of offers under a solicitation shall afford potential offerors a reasonable opportunity to respond.

Accordingly, before proceeding with any contract action conducted via FACNET, for an amount estimated to be between \$25,000 and \$100,000, the contracting officer must provide public notice and afford potential offerors a reasonable opportunity to respond. 41 U.S.C.A. § 426(c); FAR §§ 5.203(b), 13.003(i)(2). What constitutes a reasonable opportunity to respond will depend on the circumstances of the particular acquisition, and contracting officers are to consider factors such as the complexity, commerciality, availability, and urgency of the acquisition when establishing a response time. FAR § 5.203(b).

Here, NIH issued a purchase order to SSSI the day after it issued the RFQ via FACNET. NIH asserts without explanation that it considers 1 day to be reasonable under the circumstances here; we do not agree. The fact that the agency believed that only one source could meet its needs, and did not expect to receive acceptable responses to its FACNET notice, does not remove the requirement to furnish a reasonable time for potential vendors to respond. While a short response time could be appropriate depending on the product or services being acquired, we cannot conclude that the 1 day provided here was reasonable for potential vendors to formulate a response to the statement of work. To be able to respond intelligently to the notice, offerors should have been given more than 1 day to calculate their pricing and devise their approach to meeting the agency's needs. Moreover, the agency has provided no explanation for its urgency in obtaining these apparently fairly routine and predictable services; the protester argues that the urgency could have arisen only due to a lack of advance planning on the agency's

part. In these circumstances, we find that NIH violated 41 U.S.C.A. § 426(c), as implemented by FAR § 5.203(b), by failing to furnish potential offerors a reasonable opportunity to respond to the agency's notice of intent to award to SSSI on a sole-source basis.<sup>3</sup>

To the extent that the agency is arguing that the protester was not prejudiced by the contracting officer's failure to afford it a reasonable opportunity to respond because it could not have furnished an acceptable quotation due to its lack of familiarity with OLRs programs, we do not think that the record demonstrates a lack of prejudice. The statement of work plainly emphasizes the administrative functions related to supporting the agency's participation in the planned meetings (for example, reserving hotel rooms, preparing prize ribbons, and setting up exhibit booths). While the SOW says that the contractor must have "strong knowledge" of NIH in general and of OLRs programs specifically in order to support the Director of OLRs at the exhibit booth,<sup>4</sup> there simply is no basis in the record here to conclude that no other offeror could have hired individuals with the requisite level of familiarity with OLRs or that such familiarity could not be obtained in the 3-week interval between issuance of the RFQ and the initiation of performance. Moreover, had this acquisition been initiated at a reasonable time prior to when the services were needed, it is likely that other firms would have been in a position to compete for the work.

Since the services at issue have now been substantially performed, we do not recommend cancellation of the purchase order to SSSI. Instead, we recommend that the protester be reimbursed for the expenses it incurred in filing and pursuing its protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1998). In accordance

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<sup>3</sup>Jack Faucett also argued that the procurement should have been set aside for small business concerns pursuant to FAR § 13.003(b)(1). The agency's response is that a set-aside is not required where there is only one source that can perform the work and that source is a large business. Given that we sustain the protest based on the agency's failure to provide reasonable notice, and, as explained below, the services at issue have been performed, we need not address the set-aside issue.

<sup>4</sup>Specifically, the statement of work states that the contractor is to "[h]ave two contractor staff attend the conference to support the Director, OLRs, with set-up and staffing of the exhibit booth, arrangements for the poster session, assistance to NIH judges attending the conference, and other general support."

with section 21.8(f)(1) of our Regulations, Jack Faucett's certified claim for such costs, detailing the time expended and the cost incurred, must be submitted directly to the agency within 60 days after receipt of the decision.

The protest is sustained.

Comptroller General  
of the United States