

Mu. Wolcott



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Information Ventures, Inc.

File: B-241641

Date: February 14, 1991

Bruce H. Kleinstein, Ph.D., J.D., for the protester.
James F. Trickett, Department of Health & Human Services, for the agency.
Glenn G. Wolcott, Esq., Paul I. Lieberman, Esq., and John F. Mitchell, Esq., GAO, participated in the preparation of the decision.

DIGEST

1. Protester who did not submit a quotation under a solicitation is an interested party to protest allegedly defective specifications because of his interest as a potential competitor under a revised solicitation if the protest is sustained.
2. Issuance of request for quotations using small purchase procedures is proper where services will be obtained for less than \$25,000.
3. Requirement for face-to-face meetings between the agency and contractor is reasonable in procurement for editing services where several government personnel must be involved in discussions, the text to be edited contains complex equations and formula, and the size of the documents precludes transmission of workable copy by telecopier.
4. Award does not constitute impermissible personal services contract where the government does not supervise or control contractor's personnel.

DECISION

Information Ventures, Inc. (IVI) protests the use of small purchase procedures, and allegedly restrictive requirements under request for quotations (RFQ) No. KW37459, issued by the National Institute of Environmental Health Sciences, (NIEHS), Department of Health and Human Services (HHS), for copy-editing and proofreading services.

We deny the protest.

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On September 19, 1990, NIEHS published an announcement in the Commerce Business Daily (CBD) of its intent to issue the protested solicitation. On September 25, NIEHS issued the RFQ pursuant to the small purchase procedures of the Federal Acquisition Regulation (FAR), Part 13.

As initially issued, the RFQ sought quotations by October 15, for an estimated 1400 hours of copy-editing, mark-up, and proofreading services to support publication of Environmental Health Perspectives, a scientific journal. The RFQ provided that the contractor must pick up and deliver material in person in order to discuss and resolve technical problems, and must also attend weekly meetings at the agency to discuss progress and problems. The RFQ provided that meetings could be scheduled on 24 hours notice.

On October 11, IVI filed its protest with our Office asserting that: (1) the RFQ was improperly issued less than 15 days after the CBD notice appeared; (2) the October 15 submission date did not provide adequate time to prepare quotations; (3) certain provisions of the RFQ were ambiguous; (4) the procurement should not be conducted under small purchase procedures; and (5) the requirement for face-to-face meetings with the agency overly restricted competition.

On October 22, in response to IVI's protest and questions from other prospective participants, NIEHS issued an amended RFQ which clarified the provisions IVI had alleged were ambiguous and extended the submission date to November 29. The amended RFQ continued to require weekly face-to-face meetings between the contractor and the agency, but established a fixed schedule for such meetings to accommodate advance planning.

PRELIMINARY ISSUES

The agency first notes that IVI did not submit a quotation on November 29, and argues that IVI is therefore no longer an interested party to protest the RFQ. We disagree. Where, as here, a protest involves allegedly defective solicitation specifications, a protester's interest as a potential competitor under a revised solicitation if the protest is sustained is sufficient for it to be considered an interested party. Smith & Wesson, B-229505, Feb. 25, 1988, 88-1 CPD ¶ 194.

The agency asserts that its amendment of the RFQ and extension of the submission date renders academic IVI's objections to the issuance date of the RFQ, the date for submission of quotations, and the alleged ambiguities in the RFQ. Since IVI has not rebutted the agency's position on these matters in its

comments on the agency report, we deem these issues to be abandoned. See TM Sys., Inc., B-229220, Dec. 10, 1987, 87-2 CPD ¶ 573.

SMALL PURCHASE PROCEDURES

IVI protests that this RFQ should not have been issued under the FAR's small purchase procedures which are intended to be used for purchases of less than \$25,000. IVI asserts that the agency has underestimated the cost, arguing that:

"[i]f copy editor labor rates are utilized together with appropriate indirect costs and appropriate other direct costs (e.g., travel, fax, etc.), the estimated annual cost of performance including maintaining a support staff for back-up exceeds \$25,000."

The agency states that it anticipated procuring the services for less than \$25,000 on the basis of the prior year's cost for these services which did not exceed \$25,000. Further, the agency states that it intended to cancel the RFQ and issue a request for proposals if all quotes received exceeded \$25,000 and could not be negotiated to fall within the small purchase limit.

We find no basis to question the agency's determination that the services will be acquired for less than \$25,000, and, in fact, the agency advised that it has received a quotation for under \$25,000. The fact that the protester may have intended to offer its services for an amount exceeding \$25,000 is not relevant. When an agency anticipates obtaining goods or services for less than \$25,000, issuance of an RFQ under small purchase procedures is proper. FAR § 13.000; East West Research, Inc., B-239516, Aug. 29, 1990, 90-2 CPD ¶ 178.

We also find without merit the protester's assertion that the solicitation requirements were better suited for a request for proposals under a negotiated procurement. The FAR provides that, for acquisitions not exceeding \$25,000, agencies are to use small purchase procedures "to the maximum extent practicable." FAR § 13.103. Based on our review of the record, we find no persuasive evidence that the requirements in question are of such complexity or present such difficulties that they render impracticable the use of small purchase procedures.

OVERLY RESTRICTIVE REQUIREMENTS

IVI argues that the requirement that the contractor meet with the agency to discuss progress and problems overly restricts competition to companies within the agency's immediate

vicinity. IVI maintains that use of telecopiers, telephones, and overnight delivery service would adequately meet the agency's needs.

The agency responds that face-to-face meetings are necessary to meet the actual, minimum needs of the government. The contracting officer states that in the past the agency has attempted to rely on telecommunication devices, but this approach has proved unacceptable due to various factors, including: (1) the need for several government participants to be involved in the discussions; (2) the complexity of the subject matter involved, including editing of mathematical equations and chemical formula; and (3) the large number of manuscripts to be edited (approximately 40 per publication). Further, the contracting officer notes that the contractor will be required to proofread and edit galley proofs. These proofs are extensive in size and reduction to accommodate telecopier transmission renders the proofs illegible. Finally, the agency states that it needs to review and discuss the layout of the journal as a whole. If revisions regarding layout matters, such as table and figure configuration are not discussed in the context of the entire publication, additional editing time may be required threatening timely publication of the journal.

Although the protester has expressed its continued disagreement with the agency's conclusion in this regard, it has not identified a specific error in the agency's justification, nor presented any convincing argument that the requirement is unreasonable. Accordingly, we find no basis to object to the requirement.

PERSONAL SERVICES CONTRACT

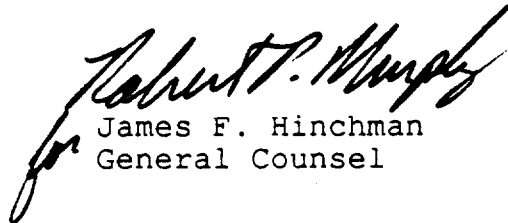
In responding to the agency report, the protester has objected that the agency's justification for face-to-face meetings with the contractor demonstrates that the agency is actually seeking to create an impermissible personal services contract. We disagree.

A personal services contract is characterized by the employer-employee relationship it creates between the government and the contractor's personnel. FAR § 37.104; Logistical Support, Inc., B-224592, Dec. 23, 1986, 86-2 CPD ¶ 709. Each contract must be judged in light of its particular circumstances. Monarch Enters., Inc., B-233303 et al., Mar. 2, 1989, 89-1 CPD ¶ 222. The FAR provides that the "key question" in determining if a contract is for personal services is whether the government will exercise "relatively continuous supervision and control of contractor personnel performing the contract." FAR § 37.104(c)(2). The FAR also enumerates several other factors to be considered in

making this judgment, including whether performance is on-site and whether the principal tools for contract performance are furnished by the government. FAR § 37.104(d).

Under these factors, the requirements of this contract do not create an employer-employee relationship between the government and the contractor's personnel. We do not find that the requirement for weekly on-site meetings with the agency constitutes "relatively continuous supervision and control." Also, the majority of the services to be performed by the contractor will be performed off-site, and the principal tools and equipment to be used by the contractor belong to the contractor and are not furnished by the government. Accordingly, we find no basis to conclude that the agency is creating an impermissible personal services contract.

The protest is denied.


for James F. Hinchman
General Counsel