



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Marine Research Specialists

File: B-265869

Date: January 2, 1996

Eiji Imamura, Marine Research Specialists, for the protester.
Fred Kopatich, Esq., and Alden F. Abbott, Esq., Department of Commerce, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly failed to provide a common basis for competition or obtain full and open competition where it timely provided some offerors with reports prepared under the incumbent contract, which the solicitation stated would be made available, but advised the protester to seek the information under the Freedom of Information Act; only provided the protester with this material information 2 days before the proposal due date; and then declined to extend the proposal due date, which effectively resulted in the protester's being able to submit a proposal on a common basis.

DECISION

Marine Research Specialists (MRS) protests the agency's failure to timely provide certain information under request for proposals (RFP) No. 50-DGNF-5-00079, issued by the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA) for a marine recreational fishing survey.

We sustain the protest.

NOAA issued the RFP on July 11, 1995, to obtain a contractor to conduct the 1996 "National Marine Fishery Statistics Survey" (NMFSS), with options to conduct the survey in 1997 and 1998.¹ The RFP contained detailed instructions for the preparation of technical, management, and price proposals, and set forth a best

¹The NMFSS consists of a telephone survey of recreational fishing by residents in coastal counties and a field intercept survey of anglers returning from recreational fishing trips. The purpose of the NMFSS is to collect statistics on the status of marine recreational fishery resources.

value evaluation scheme whereunder technical and management factors were weighted equally to cost.

The RFP statement of work (SOW) with accompanying appendices detailed the requirements for conducting the survey, including the sampling population, the survey procedures, and the required questions. The SOW further advised that "reports of the results of previous surveys were available upon request." Amendment No. 0001, issued on August 15, changed the closing date from August 26 (a Saturday) to August 25, and identified the specific reports that were available on request.

In February 1995, NOAA notified the marine research firms on its mailing list, including MRS, of the upcoming procurement and sent each a copy of the current contract's SOW.² On July 6 (just prior to issuance of the RFP), MRS contacted the contracting officer to request various documents related to the incumbent contract, including the reports generated under that contract.³ Instead of furnishing MRS with the reports, the contracting officer advised MRS that these reports, as well as the additional requested information, had to be obtained from the agency's Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1994), office, not the contracting office. Other potential offerors who requested these survey reports after the RFP was issued on July 11 were provided them by the contracting office in a timely manner.

As directed by the contracting officer, MRS immediately filed a FOIA request for the documents with the NOAA FOIA office on July 7. On July 24, the FOIA officer requested that MRS pay certain fees to offset the cost of releasing the documents, which MRS paid the next day by overnight mail. MRS never received any further response from the FOIA office.

On August 21 and 22, MRS contacted the contract specialist and contracting officer to complain that it had not received the reports or other information requested pursuant to FOIA and that this put MRS at a disadvantage in submitting a proposal. According to MRS, it sought more time to submit a proposal in view of the impending August 25 closing date.⁴ The agency then provided MRS with the

²The current contract's SOW also included the provision that reports generated under the previous contract were available upon request.

³MRS also requested a copy of the incumbent's actual contract and its technical proposal for that contract.

⁴The contracting officer states that "at no time during this conversation did [MRS] ask for a specific extension of time to submit a proposal." The protester states that
(continued...)

voluminous reports by overnight mail on August 22. MRS timely protested on August 24 requesting that the closing date be extended. The agency did not extend the closing date and has received proposals.⁵

MRS protests that the agency failed to timely provide it with the reports referenced in the RFP's SOW, which prevented MRS from submitting a competitive proposal. MRS argues that the reports generated under the incumbent contract were critical to producing a superior proposal under this best value procurement, and that MRS was denied an equal opportunity to participate in the competition because of the agency's failure to provide this information in a timely manner.⁶

The Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253(a)(1)(A) (1994), requires contracting agencies to obtain full and open competition through the use of competitive procedures, the dual purpose of which is to ensure that a procurement is open to all responsible sources and to provide the government with the opportunity to receive fair and reasonable prices. Custom Envtl. Serv., Inc., 70 Comp. Gen. 563 (1991), 91-1 CPD ¶ 578; Catamount Constr. Inc., B-225498, Apr. 3, 1987, 87-1 CPD ¶ 374. In furtherance of these goals, it is the contracting agency's affirmative obligation to use reasonable methods for the dissemination of solicitation materials; significant deficiencies on the part of the agency that contribute to a firm's failure to receive solicitation materials will result in our sustaining a protest, so long as the protester availed itself of every reasonable opportunity to obtain the materials. Id.

Moreover, it is a fundamental principle of competitive negotiation that offerors must be treated equally by a procuring activity. University Research Corp., 64 Comp. Gen. 273 (1985), 85-1 CPD ¶ 210; EMS Dev. Corp., 70 Comp. Gen. 459 (1991), 91-1 CPD ¶ 427. An essential element of that treatment involves providing offerors with the same information concerning the agency's requirements so as to provide a

⁴(...continued)

the agency made clear during the conversations that the closing date would not be extended and that since it had been given none of the requested information at that time it did not know precisely how much time would be required.

⁵No award has been made.

⁶To the extent that MRS through its protest seeks to obtain the remaining information it requested pursuant to its FOIA request it must avail itself of the remedies available under FOIA. See LNM Corp., B-247669, Apr. 29, 1992, 92-1 CPD ¶ 405.

common basis for the submission of proposals. Id.; see Federal Acquisition Regulation (FAR) § 15.410 (c) (any information that is given to a prospective offeror under a negotiated procurement must be promptly furnished to all other prospective offerors as a solicitation amendment if the information is necessary in submitting a proposals, or if the lack of such information would be prejudicial).

NOAA argues that MRS is primarily to blame for its delayed receipt of the incumbent's survey reports because, unlike the other offerors, MRS did not seek the reports from the contracting office during the proposal preparation period until shortly before the closing date. However, 2 working days prior to issuing the RFP the contracting officer instructed MRS to obtain the reports from the agency's FOIA office. Consequently, the protester's actions in seeking this information through FOIA channels, as directed, was entirely reasonable and consistent with the RFP's advice that such reports would be made available. See Qualimetrics, Inc., B-262057, Nov. 16, 1995, 95-2 CPD ¶ 228. NOAA offers no explanation as to why MRS was directed to obtain the reports from the FOIA office and the record indicates that MRS diligently sought the reports from the office to which it was directed by the cognizant contracting official up until it became clear that they would not be obtained in time for use in the preparation of its proposal. As stated above, NOAA did not refer any other requester to the FOIA office; instead, it timely furnished the reports to all other prospective offerors who requested the reports.

NOAA maintains that in any event the information was immaterial because the SOW was sufficiently detailed to allow MRS to prepare a proposal. NOAA, however, on its own initiative, made these reports available upon request, presumably in recognition of the importance that these documents might serve to prospective offerors, and the other offerors did indeed request and receive these reports. On this record, we cannot say that, notwithstanding the level of detail in the SOW, access to the reports would not enhance an offeror's understanding of, and ability to satisfy, the agency's requirements.

We conclude that MRS was treated unequally by not being given the same timely access to the reports as were given the other offerors and that the agency's actions effectively prevented MRS from submitting a proposal on a common basis with the other offerors. Further, we conclude that the agency exacerbated the situation by not extending the closing date as requested by the protester, with the result that the

agency did not obtain full and open competition.⁷ See University Research Corp., supra; EMS Dev. Corp., supra; Catamount Constr. Co., supra.

We recommend that NOAA establish a new closing date and allow MRS to submit a proposal. MRS also is entitled to the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1995). MRS should submit its certified claim for costs directly at the agency within 60 days of receiving this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

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⁷NOAA asserts that the CICA mandate for full and open competition was not violated because, given the number of offers received (we do not disclose the number of offers because no award has been made), it obtained adequate competition. However, our review indicates that the competition was not so great that it could be said that the mandate for full and open competition was realized because the absence of even one offeror here due to the agency's improper action diminishes the level of competition. See, e.g., Davis Enter., B-249514, Dec. 4, 1992, 92-2 CPD ¶ 389; Abel Converting, Inc. v. United States, 679 F.Supp., 1133 (D.D.C. 1988).