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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Great South Bay Marina, Inc.

File: B-293649

Date: May 3, 2004

Dominic S. Rizzo, Esq., for the protester.
Pete Raynor, Esq., National Park Service, for the agency.
Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Agency had a reasonable basis to cancel a concession contract prospectus in order to reconsider its requirements, where it determined that stated estimate of amount contractor would be required to commit to improvement of government-owned facilities was inaccurate, and that recompeting the requirement after revising estimate could increase competition.

DECISION

Great South Bay Marina, Inc. (GSBM) protests the decision by the National Park Service (NPS) to cancel the prospectus seeking proposals for the award of a concession contract at Fire Island National Seashore. GSBM argues that the agency lacked a reasonable basis to cancel the prospectus.

We deny the protest.

The prospectus contemplated the award of a 10-year concession contract to provide, among other things, snack bar, maintenance, and restaurant services. The prospectus also required offerors to commit to invest \$3,016,000 in the Concessions Facilities Improvement Program (CFIP), which would encompass substantial rehabilitation and reconstruction of government-owned facilities on the island. GSBM was the only offeror that responded to the prospectus. An evaluation panel reviewed the offer and determined that it was unacceptable based on a finding, among other things, that GSBM had estimated the cost of the CFIP at only \$1,458,648, and thus did not commit to invest \$3 million as required. The panel recommended that NPS cancel the prospectus and review the estimate. In reviewing this recommendation, the Regional Director considered the fact that, prior to the

closing date for the prospectus, NPS had received letters from two potential offerors complaining that the required CFIP investment was too high. The Director determined that, even if the GSBM offer were found acceptable, it was in the public's interest to cancel the prospectus and reassess the CFIP investment requirements.

JURISDICTION

NPS argues, as a preliminary matter, that our Office lacks jurisdiction in this matter because the prospectus involves a concession contract, and not a solicitation for the procurement of property or services. We disagree. Our authority to decide bid protests derives from the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-56 (2000), and encompasses written objections by interested parties to “a solicitation or other request by a federal agency for offers for a contract for the procurement of property or services.” Where the government invites offerors to compete for a business opportunity such as a concession contract, the performance of which also involves the delivery of goods or services to the government, the value of which is not *de minimis*, the contract is one for the procurement of property or services within the meaning of CICA and, therefore, is encompassed within our Office's bid protest jurisdiction. Shields and Dean Concessions, Inc., B-292901.2, B-292901.3, Feb. 23, 2004, 2004 CPD ¶ 42.

Here, in addition to providing visitor services, the contractor is required to provide substantial rehabilitation and construction services to the government; indeed, as discussed, the cost of these services is the focus of the protest. These services are valued at more than \$3 million in the prospectus (and at about \$1.5 million in the protester's offer). We have found services valued at over \$800,000 not to be *de minimis* for purposes of establishing our jurisdiction over the award of a concession contract, Shields and Dean Concessions, Inc., *supra*, and we see no reason to reach a different conclusion with regard to the substantially higher-valued construction services here. Since the required construction and rehabilitation are clearly not *de minimis*, this protest falls within our jurisdiction.

CANCELLATION

GSBM protests that, in canceling the prospectus, the agency improperly relied on letters from other potential offerors instead of performing an independent analysis of the prospectus to determine if it was flawed. GSBM notes that the agency earlier had advised GSBM that the prospectus would not be canceled.

While CICA governs the manner in which most procurements are conducted, it exempts those covered by “procurement procedures that are otherwise expressly authorized by statute.” 41 U.S.C. § 253 (a)(1). The National Park Service Concessions Management Improvement Act of 1998, 16 U.S.C. § 5951 *et seq.* (2000) (the 1998 Act) establishes such procedures for the award of NPS concession contracts. Starfleet Marine Transp., Inc., B-290181, July 5, 2002, 2002 CPD ¶ 113 at 10. Where CICA and the implementing Federal Acquisition Regulation (FAR)

(see FAR §§ 1.104, 2.101) do not apply, we review the record to determine if the agency's actions were reasonable and consistent with any statutes and regulations that do apply. Quick! The Printer, B-252646, July 20, 1993, 93-2 CPD ¶ 42 at 4. The regulations implementing the 1998 Act set out the following standard for canceling a prospectus: "The Director may cancel a solicitation at any time prior to award of the contract if he determines in his discretion that this action is appropriate in the public interest." 36 C.F.R. § 51.11 (2004). Applying this standard, we find no basis to object to the cancellation.

As discussed, the evaluation panel recommended that the Director cancel the prospectus because it appeared that the agency's estimate was significantly overstated and was impeding competition. Considering this recommendation, together with the two prospective offerors' objections to the agency estimate as being too high to make the contract profitable (neither submitted an offer), the Director determined that it was in the public interest to cancel the prospectus and review the estimate with the goal of achieving greater competition. We see nothing improper in this determination. Although the protester complains about the agency's reliance on the letters, they clearly constituted evidence of the effect of the CFIP estimate on the procurement; together with GSBM's offer, which priced the work at approximately half the agency's estimate, the letters reasonably indicated that the CFIP estimate was problematic, and may have contributed to the receipt of only a single offer. It follows that the agency reasonably relied on this evidence in concluding that canceling, reviewing and reissuing the prospectus could result in increased competition. The prospect of increased competition generally provides a reasonable basis for an agency to cancel a solicitation. See A-Tek, B-286967, Mar. 22, 2001, 2001 CPD ¶ 57 at 3. The fact that the agency at one time indicated that the prospectus would not be canceled does not establish that the cancellation was improper.

The protest is denied.

Anthony H. Gamboa
General Counsel