



Decision

Matter of: CueBid Technologies, Inc.

File: B-422290.2; B-422290.3; B-422290.4; B-422290.5

Date: April 24, 2024

Eyal Ben-Gal for the protester.

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DIGEST

Protest that agency improperly canceled solicitation is denied where the agency reasonably determined that the solicitation no longer met its needs.

DECISION

CueBid Technologies, Inc. (CueBid), of Palmview, Texas, protests the cancellation of request for proposals (RFP) No. 191BWC24R0003, issued by the United States' section of the International Boundary and Water Commission (USIBWC), for sludge dryer alternatives. The protester argues that the agency's decision to cancel the solicitation lacks a reasonable basis and that the cancellation is a pretext to avoid resolving CueBid's protest grounds.

We dismiss the protest in part and deny the protest in part.

BACKGROUND

On December 22, 2023, the agency issued the solicitation, seeking proposals "to provide sludge dewatering/drying technology or alternatives for reducing the weight and volume of daily sludge production with maximum drying efficiency for the Nogales International Wastewater Treatment Plant (NIWTP)," located in Rio Rico, Arizona. Agency Report (AR), Tab 5, RFP at 1.¹ The NIWTP currently treats approximately 15

¹ Citations are to the Adobe PDF page numbers. Unless otherwise noted, citations to the solicitation are to the initial version of the RFP.

million gallons of raw sewage daily. AR, Tab 6, RFP Statement of Objectives (SOO) at 1. The final dewatered sludge is disposed of at a nearby landfill, which has indicated that it is “nearing capacity.” *Id.* at 2. As other landfills are located farther away from the NIWTP, the agency was “interested in reducing the weight and volume of generated sludge” to lower its disposal costs. *Id.* The agency consequently sought proposals to provide recommendations for upgrades or innovative technology to improve the existing dewatering and drying process at the NIWTP. *Id.* at 1. The RFP contemplated the award of a single fixed-price contract, with an anticipated 1-year period of performance. RFP at 4; AR, Tab 6, SOO at 1. The contract’s estimated value was between \$1 million and \$5 million. AR, Tab 7, RFP amend. 1 at 1.

On January 12, 2024, the agency issued amendment 1 to the solicitation. *Id.* This amendment informed offerors that the RFP was “primarily a service contract” under three separate North American Industry Classification System (NAICS) codes: 236210 (Industrial Building Construction); 333310 (Commercial and Service Industry Machinery Manufacturing); and 423830 (Industrial Machinery and Equipment Merchant Wholesalers).² *Id.*

CueBid filed its initial protest with our Office on January 18, arguing that the solicitation was defective, and that the agency had conducted an improper site visit. Protest at 1. The protester contended, for example, that despite being an apparent solicitation for services, the RFP had identified three different NAICS codes “related to construction and supply categories,” thereby “instilling ambiguity in the subject matter of the Solicitation.” *Id.* at 2. CueBid further asserted the RFP failed to include any “actual evaluation criteria.” *Id.*

On January 24, the agency issued amendment 2 to the RFP, “based on the Contracting Officer’s decision after concerns were raised by CueBid’s GAO Pre-Award Protest.” AR, Tab 8, RFP amend. 2 at 1; AR, Tab 11, Small Business Administration (SBA) Contracting Officer’s (CO) Response at 1. That amendment removed the three separate NAICS codes and replaced them with a single NAICS code, 562211 (Hazardous Waste Treatment and Disposal). AR, Tab 8, RFP amend. 2 at 1. Amendment 2 also established the solicitation as a total small business set-aside, and informed offerors that the agency would provide the solicitation’s evaluation criteria in a forthcoming amendment. *Id.*

CueBid then filed an appeal with the SBA’s Office of Hearings and Appeals (OHA), on January 31, challenging the solicitation’s assigned NAICS code. AR, Tab 12, SBA OHA

² NAICS is the standard used by federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the business economy of the United States. NAICS areas are designated by a unique number, or code. *The Elec. On-Ramp, Inc.*, B-421229.4, Feb. 22, 2023, 2023 CPD ¶ 58 at 5 n.6.

Decision at 1. After CueBid submitted this appeal to OHA, the agency “pause[d]” the solicitation’s proposal deadline.³ AR, Tab 9, RFP amend. 3 at 1.

On February 16, the agency canceled the RFP because the contracting officer determined that the “underlying solicitation did not adequately meet the needs of the USIBWC.” AR, Tab 10, RFP amend. 4 at 1. CueBid filed a supplemental protest on February 22, arguing that the agency had applied “pretextual grounds” for canceling the solicitation. Supp. Protest at 1. We required the agency to respond to CueBid’s supplemental protest challenging the agency’s cancellation decision.

DISCUSSION

CueBid argues that the agency has no reasonable basis to cancel the RFP, and that the cancellation is a pretext to avoid resolving CueBid’s protest allegations. Supp. Protest at 1, 4. The agency responds that it reasonably canceled the RFP to ensure the solicitation accurately reflects the agency’s needs. Contracting Officer’s Statement (COS) at 3; Memorandum of Law (MOL) at 1-3. We have considered the arguments raised by CueBid, and while we do not address them all, we find no basis on which to sustain the protest.

Challenges to Agency’s Actions Under Canceled Solicitation

In its initial protest, CueBid contended that the solicitation was “defective,” and expressed “concerns over irregularities encountered during the mandatory site visit.” Protest at 1. Prior to the agency report due date, the agency informed our Office that it had “cancelled the solicitation at issue because it did not adequately meet or reflect the needs of the Agency.” Req. for Dismissal at 1; AR, Tab 10, RFP amend. 4 at 1.

After the agency canceled the solicitation, CueBid filed a series of supplemental protests that continued to challenge the agency’s actions under that solicitation. See, e.g., Supp. Protest at 1-2 (challenging agency’s failure to adequately consider CueBid’s prior “unsolicited proposal” when later issuing RFP); 2nd Supp. Protest at 1-11 (protesting agency’s actions during pre-proposal conference and site visit, as well as the agency’s failure to consider CueBid’s unsolicited proposal and request for information submission); 3rd Supp. Protest at 1-8 (contesting agency’s actions concerning CueBid’s unsolicited proposal and alleging the agency “misled and misrepresented solicitation information.”).

We dismiss all of CueBid’s protest challenges related to the agency’s actions under the canceled solicitation. The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our

³ On March 14, during the pendency of this protest, the SBA’s OHA issued its decision, granting CueBid’s appeal challenging the NAICS code assigned to the canceled solicitation. AR, Tab 12, SBA OHA Decision at 10. We address OHA’s conclusions later as it relates to CueBid’s challenge to the cancellation of the solicitation.

role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. *Honeywell Tech. Sols., Inc.*, B-407159.4, May 2, 2013, 2013 CPD ¶ 110 at 3. Here, the agency's cancellation of the RFP renders academic CueBid's protest grounds contesting the agency's actions under that canceled solicitation. *Dyna-Air Eng'g Corp.*, B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132 at 1 ("The cancellation of a solicitation renders a protest academic."). We do not consider academic protests because to do so would serve no useful public policy purpose. *Id.*

Bad Faith

Throughout the protest process, CueBid raises numerous allegations of bias and other misconduct on the part of agency procurement officials and legal representatives. For example, the protester argues that the agency showed "bias toward the ideas of others." Supp. Protest at 2; 2nd Supp. Protest at 8. The protester also generally alleges that agency personnel and legal representatives purposely misrepresented solicitation information and even sought to mislead our Office. 2nd Supp. Protest at 1 (alleging a "pattern of misrepresentation of information" by the agency and that the agency sought to "mislead the GAO and conduct the procurement in bad faith."); 3rd Supp. Protest at 1-8 (asserting agency misrepresentation of solicitation requirements and material misrepresentation). The agency denies any allegations of misconduct. MOL at 3-4.

Taken together, CueBid's arguments essentially allege the agency acted in bad faith. As a general matter, government officials are presumed to act in good faith, and a protester's contention that contracting officials were motivated by bias or bad faith must be supported by convincing proof. *Cyberdata Techs., Inc.*, B-417084, Feb. 6, 2019, 2019 CPD ¶ 34 at 6. The burden of establishing bad faith is a heavy one. Evidence establishing a possible defect in an agency's actions is generally not sufficient in itself to establish that the agency acted in bad faith; the protester must also present facts reasonably indicating, beyond mere inference and suspicion, that the actions complained of were motivated by a specific and malicious intent to harm the protester. *Lawson Envtl. Servs., LLC*, B-416892, B-416892.2, Jan. 8, 2019, 2019 CPD ¶ 17 at 5 n.5.

Here, beyond the protester's unsupported allegations that the agency was biased in favor of the "ideas of others," and speculation that the agency purposely misrepresented information, CueBid has presented no evidence of bias or bad faith on the part of agency personnel. Our Office will not consider allegations based on mere inference, supposition, or unsupported speculation. *Id.* As such, the protester's general assertions and unsubstantiated suspicions do not amount to an allegation of bad faith meriting review by our Office. *Id.*; *Cyberdata Techs., Inc.*, *supra* ("[T]o the extent that [protester] is alleging bad faith on the part of the agency, we conclude that [protester] fails to meet the standard to support such an allegation.").

Challenge to the Cancellation of the Solicitation

After the agency canceled the RFP, CueBid filed a supplemental protest challenging that cancellation. Specifically, the protester argues that the agency has “presented no reasonable basis” for the cancellation, and that any rationale proffered by the agency is merely “pretextual.” Supp. Protest at 1, 4. The agency responds that it reasonably canceled the solicitation based on concerns with “the solicitation content and a need to reassess the Agency’s needs and resources.” MOL at 1.

In a negotiated procurement, such as this one, an agency has broad authority to decide whether to cancel a solicitation, and to do so, need only establish a reasonable basis. *VSE Corp.*, B-290452.2, Apr. 11, 2005, 2005 CPD ¶ 111 at 6. A reasonable basis to cancel exists when, for example, an agency concludes that a solicitation does not accurately reflect its needs. *Computer World Servs. Corp.*, B-416042, May 22, 2018, 2018 CPD ¶ 191 at 3. Moreover, an agency may properly cancel a solicitation regardless of when the information precipitating the cancellation first surfaces or should have been known. *Id.* This is so even when the cancellation occurs during the pendency of a protest. See *Tien Walker*, B-414623.2, B-414623.3, July 10, 2017, 2017 CPD ¶ 218 at 3.

Where, as here, a protester has alleged that the agency’s rationale for cancellation is but a pretext—that the agency’s actual motivation is to avoid resolving CueBid’s protest—we will closely examine the reasonableness of the agency’s actions in canceling the acquisition. *Advancing Tech. Sys. II*, B-415464.4, B-415464.5, Dec. 10, 2018, 2018 CPD ¶ 416 at 4. Notwithstanding such closer scrutiny, and even if it can be shown that pretext may have supplied at least part of the motivation to cancel the procurement, the reasonableness standard applicable to cancellation of a solicitation remains unchanged. *Lasmer Indus., Inc.*, B-400866.2 *et al.*, Mar. 30, 2009, 2009 CPD ¶ 77 at 4.

Here, the agency issued amendment 4, canceling the RFP because the “underlying solicitation did not adequately meet the needs of the USIBWC.” AR, Tab 10, RFP amend. 4 at 1. The agency explains that while it “has a need for a sludge drying mechanism for [the] wastewater treatment plant,” the agency wanted to “re-assess the parameters of the drying mechanism that it will procure and make changes accordingly to the solicitation.” MOL at 2. Specifically, the contracting officer identified the following reasons:

First, the Agency must reassess what type of ancillary services a drying mechanism will require. That is, the Agency must reassess whether a more extensive design must be procured along with or prior to procurement of a drying mechanism. . . . Second, the Agency must reassess the extent of construction that will be required for attachment or addition of the mechanism to the NIWPT, if any. . . . Third, the Agency must reassess whether the funds budgeted for the project are sufficient to cover additional construction and design, if they are necessary. . . . Fourth, the Agency wants to ensure the evaluation criteria and method in

the solicitation are adequate to allow the Agency to determine which vendor will most efficiently meet the needs of the Government.

COS at 3.

For its part, CueBid challenges each rationale as pretextual. For example, the protester questions the agency's need to reassess "what type of ancillary services a drying mechanism will require." Amended Comments at 4-5. The protester has not demonstrated, however, that the agency's need to reassess the mechanism's overall design, including the extent of any ancillary work, is unreasonable, where CueBid itself concedes that "no ancillary services or drying mechanisms were clearly defined" in the solicitation. *Id.* at 4. Moreover, CueBid's initial protest alleged that the solicitation was ambiguous "over what the government aims to procure and what services it requires," a lack of clarity the agency now seeks to rectify. Protest at 2. As such, we find nothing pretextual about, or unreasonable with, the agency's articulated need to reexamine the scope of the drying mechanism's design, including any ancillary services. *AE Works, Ltd.*, B-419528.2, May 5, 2021, 2021 CPD ¶ 195 at 4 (concluding "the agency's stated intention to reevaluate its requirements and update the procurement accordingly provides a reasonable basis for its decision to cancel the solicitation.").

As another example, CueBid argues that the agency's desire to reexamine its construction needs is invalid given that the SBA has determined that there was no construction involved in the canceled solicitation. Amended Comments at 6. In its decision, OHA noted that "there seems to be some confusion in the [contracting officer's] NAICS code designation for the instant Solicitation," and that "the solicitation requires the contractor to propose a solution, not to actually implement the solution proposed." AR, Tab 12, SBA OHA Decision at 9-10. Ultimately, OHA concluded that, based on the solicitation's description of its requirement, the appropriate NAICS code should have been 541330 for "Engineering Services" rather than 562211 for "Hazardous Waste Treatment and Disposal." *Id.*

The agency explains that it now intends to fully assess to what extent construction will be necessary to adequately meet its actual needs. COS at 3. In the agency's view, where the earlier (canceled) solicitation's requirement was for engineering services to propose a solution--and not to implement that solution--that earlier requirement is likely inadequate if the agency reassessment determines that its actual needs will also require construction of the solution (*i.e.*, sludge drying mechanism). *Id.*; MOL at 1-3. The protester's objection here gives us no basis to question an otherwise reasonable decision by the agency to reassess how much construction will be required to fulfill its requirement for a sludge drying mechanism. *KGL Logistics*, B-404340, Jan. 26, 2011, 2011 CPD ¶ 60 at 2-3 (cancellation reasonable where agency must reassess its needs before proceeding with procurement).

We have reviewed the protester's other objections to the agency's rationale for canceling the solicitation, and we find them equally unavailing. For example, CueBid contests the agency's need to "reassess whether the funds budgeted for the project are

sufficient to cover additional construction and design,” even though CueBid’s own protest contended that the solicitation “implies that funding may not be available.” COS at 3; Protest at 5. Now, while acknowledging that “[t]he contracting officer’s concern about budget sufficiency for additional construction and design is noted and important,” CueBid nevertheless argues the agency’s rationale is pretextual. Amended Comments at 6-7.

An agency’s lack of funding for a procurement is a reasonable basis for cancellation, as agencies may not award contracts that exceed available funds. *VetPride Servs., Inc.*, B-401435, July 28, 2009, 2009 CPD ¶ 156 at 2. Moreover, it is not our role to question the unavailability of funds. *Id.* at 3. Under the circumstances presented here, we find no basis to object to the agency’s expressed need to reevaluate the extent of available funding for its requirement. *T. W. Recycling*, B-413256, Sept. 16, 2016, 2016 CPD ¶ 261 at 4. While CueBid disagrees with each of the agency’s rationales, a protester’s disagreement with the agency’s judgment concerning the agency’s needs and how to accommodate them does not establish that the agency’s judgment is unreasonable. *Dynamic Access Sys.*, B-295356, Feb. 8, 2005, 2005 CPD ¶ 34 at 4.

Finally, CueBid also takes issue with the agency’s decision to cancel, rather than amend the solicitation. In the protester’s view, the agency’s need to refine its requirements and evaluation criteria provides an “insufficient rationale” for cancellation where any adjustments can be made “by issuing diligent and meaningful solicitation amendments.” Amended Comments at 11. The agency responds that, as it refines its need for a sludge dryer, “the changes that must be made to the solicitation may be such that it would change the scope of work and amending the solicitation would not be appropriate.” MOL at 2.

Where the record reflects that there is a reasonable basis to cancel the solicitation, we will not find that the agency abused its discretion, even though it could have taken a different course of action by amending the solicitation. *QBE LLC*, B-421737.2, Oct. 26, 2023, 2023 CPD ¶ 242 at 4. Here, we find that the agency’s need to ensure the adequacy of its evaluation criteria and identification of its requirements set forth a reasonable basis for cancellation. *TaxSlayer LLC*, B-411101, May 8, 2015, 2015 CPD ¶ 156 at 6-10 (agency reasonably canceled solicitation based on concerns regarding whether requirements and evaluation criteria were adequately structured to reflect the agency’s needs). Although the protester argues that it was improper for the agency to cancel, instead of amend the RFP, an agency may properly cancel a solicitation where, as here, it has a reasonable basis for doing so. *Id.*

Based on the rationales advanced by the contracting officer, we find the agency’s overall basis for canceling the solicitation to be reasonable and supported by the record. AR, Tab 10, RFP amend. 4 at 1; *Computer World Servs. Corp.*, *supra* at 3. We also find there is no support for CueBid’s assertion that the cancellation was a pretext to avoid addressing the firm’s protest allegations. Absent anything in the record to substantiate CueBid’s claim and, given that government officials are presumed to act in good faith, we find that the allegation of animus or bias lacks merit. *Henry’s Aerial*

Serv., Inc.; Evergreen Flying Servs., Inc., B-414238.7, B-414238.9, Aug. 10, 2017, 2017 CPD ¶ 257 at 8 (cancellation reasonable where solicitation no longer reflected agency's needs).

The protest is dismissed in part and denied in part.

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