

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: AeroSage LLC

File: B-410648.2; B-410648.3

Date: March 20, 2015

David M. Snyder, AeroSage LLC, for the protester.

Jeanne S. Morris, Esq., Department of Veterans Affairs, for the agency.

Robert T. Wu, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's decision to cancel a solicitation and award an order to a single source is denied where the record shows that the agency's order was reasonable under the circumstances, and provides no basis to question the agency's decision to cancel the original solicitation.

DECISION

AeroSage LLC, of Tampa, Florida, protests the decision by the Department of Veterans Affairs (VA) to cancel solicitation No. VA241-15-Q-0003 and the award of order No. VA241-15-P-0353 to Innovative Federal Operations Group, LLC, of Vista, California, for the delivery of 20,000 gallons of fuel oil to an agency facility in West Haven, Connecticut. AeroSage argues that the agency's cancellation of the original solicitation, after awarding the same requirement under a separate procurement, was improper.

We deny the protest.

BACKGROUND

The agency issued solicitation No. VA241-15-Q-0003 (original solicitation) on October 7, 2014, as a small business set-aside for the purchase of an estimated quantity of 30,000 gallons of fuel oil to be delivered to the West Haven VA Medical Center (WHMC) over a one-year performance period. Agency Legal Memorandum at 1. On October 10, prior to the closing time for the solicitation, AeroSage submitted a timely protest arguing that the solicitation improperly failed to include an economic price adjustment clause, lacked a definite quantity, and was required to

be set aside for service-disabled veteran-owned small businesses (SDVOSB). Id. During the pendency of the protest, the VA informed our Office that, due to a diesel fuel emergency declared by the WHMC, the decision was made to procure fuel oil on an emergency basis, utilizing a separate procurement from that which was then under protest.

The record shows that, on November 26, the VA issued order number VA241-15-P-0353 to Innovative Federal Operations Group, LLC, for the one-time purchase of 20,000 gallons of fuel oil, for a total purchase price of \$70,760.00. Agency Report (AR), exh. J, Purchase Order, at 1. Based on the emergency purchase of fuel oil, the agency informed our Office that it no longer needed the fuel being procured under the protested procurement, and intended to cancel the solicitation. On December 9, our Office dismissed the protest as academic due to the agency's cancellation of the solicitation. AeroSage LLC, B-410648.1, Dec. 9, 2014. This protest followed.¹

DISCUSSION

AeroSage primarily argues that the agency improperly awarded an order to Innovative Federal during the pendency of a protest for the same requirement. Protest at 4-5; Comments at 1. The protester argues, in essence, that in order to make an award for the fuel oil requirements, it was required to do so in compliance with the provisions of 31 U.S.C. § 3553(c)(2), which authorizes the award of a contract notwithstanding a pending protest where the head of the procuring activity responsible for award of the contract makes a written finding that urgent and compelling circumstances will not permit waiting for a decision from our Office. Id. at 4. AeroSage argues that the award here was improper because the head of the procuring activity made no such finding prior to the agency making award of the contract. Id. at 5. We disagree.

The Competition in Contracting Act (CICA) provides that a contract may not be awarded in any procurement after the agency has received notice of a protest with respect to such procurement from our Office and while the protest is pending. 31 U.S.C. § 3553(c)(1). CICA's stay provisions, as they are called, operate to preserve

¹ AeroSage also asks that we reconsider our decision to dismiss its protest challenging the terms of the original solicitation as academic. Protest at 5. This request does not provide a basis for us to reconsider our decision. Since the VA cancelled the original solicitation, there was no longer a basis to consider the firm's challenge to that solicitation. Moreover, even if we were to sustain this protest, the agency has indicated that it no longer has a need for the supplies that were to be purchased under the original solicitation. Therefore, the resolution of the protester's challenges to the original solicitation would be academic. See Platinum Servs., Inc.; WIT Assocs., Inc., B-409288.3 et al., Aug. 21, 2014, 2014 CPD ¶ 261 at 2 n.1.

the status quo for a protester while its protest contentions are being resolved. Norvar Health Servs.--Protest and Reconsideration, B-286253.2 et al., Dec. 8, 2000, 2000 CPD ¶ 204 at 5; see also Carahsoft Tech. Corp. v. U.S., 86 Fed. Cl. 325, 346-47 (2009) (purpose of CICA's automatic stay provision to preserve the status quo during the pendency of the protest). Where urgent and compelling circumstances will not permit waiting for a decision from our Office, the contract may be awarded notwithstanding a pending protest if the head of the procuring activity makes such a written finding. 31 U.S.C. § 3553(c)(2)(A); see also Federal Acquisition Regulation (FAR) § 33.104(b)(1).

On its face, however, section 3553(c)(1) only prohibits the agency from awarding a contract resulting from the protested procurement. It does not prohibit the agency from satisfying requirements underlying the procurement through other means, nor does it prohibit the agency from satisfying related, but distinct requirements through other means, as is the case here. In this regard, the record shows that the agency did not seek to award a contract under the protested procurement, but instead awarded an emergency order for fuel oil--representing only part of the original requirement--utilizing other than competitive procedures in accordance with FAR § 13.106-1(b). AR, exh. E, Justification for Emergency Procurement, at 1. It was based, in part, on this emergency order that the agency later determined it no longer had a need for the fuel oil that was to be procured under the original solicitation. See AeroSage LLC, supra. Consequently, the record does not support the protester's position that the award was improper because the head of the procuring activity did not determine to override the CICA stay.

Instead, the relevant issues here are whether the agency's decision to procure fuel oil on a sole-source basis was reasonable, and whether that purchase provided a reasonable basis for the agency to cancel the original solicitation. With respect to the latter issue--that of the reasonableness of the agency's decision to cancel the solicitation--we have consistently held that an agency need only establish a reasonable basis to support a decision to cancel a solicitation. See e.g., Computers Universal, Inc., B-410790.2, Feb. 25, 2015, 2015 CPD ¶ 83 at 2; SMF Sys. Tech. Corp., B-292419.3, Nov. 26, 2003, 2003 CPD ¶ 203 at 3; Miller, Davis, Marter & Opper, P.C., B-242933.2, Aug. 8, 1991, 91-2 CPD ¶ 176 at 3. A reasonable basis to cancel exists when, for example, an agency concludes that a solicitation does not accurately reflect its needs. WKF Friedman Enters., B-409892.2, Sept. 25, 2014, 2014 CPD ¶ 282 at 2. Moreover, an agency may cancel a solicitation no matter when the information precipitating the cancellation first arises. SMF Sys. Tech. Corp., supra, at 3. This is so, even when the cancellation occurs during the pendency of a protest. See e.g., Lasmer Indus., Inc., B-400866.2 et al., Mar. 30, 2009, 2009 CPD ¶ 77 at 3.

The VA states that it cancelled the original solicitation after the contracting officer determined that there was no longer a need for 30,000 gallons of fuel oil due to the delivery made under the emergency procurement. Testimony of Contract

Specialist, Hearing Transcript (Tr.) at 130:20-131:17. Further, the agency states that it will meet future fuel oil requirements by ordering off of an established Defense Logistics Agency (DLA) contract. Id. at 133:1-11. While the protester argues that the agency has not shown that it no longer has a need for fuel oil, we have no basis to question the agency's determination.

The record shows that the agency historically met its fuel oil needs by ordering from DLA, as a required source under FAR § 8.002(a)(1)(v). Id. at 23:6-25:18. However, at some point, the agency was required to switch to temporary fuel storage tanks, which were not within the scope of the DLA contract servicing the WHMC. Since the DLA vendor would not deliver fuel to the temporary fuel storage tanks, the VA was required to issue the original solicitation to meet its immediate fuel oil needs, pending modification of the DLA contract to permit fuel delivery to the temporary tanks. Id. at 26:19-28:3. The record also shows that the DLA contract has since been modified to permit the VA to make future purchases off of that contract. Id. at 83:10-84:21.

We have held that an agency may reasonably cancel a solicitation where it determines that an existing contract for its requirement would be more advantageous to the government than continuing with the procurement. See Brian X. Scott, B-310970, B-310970.2, Mar. 26, 2008, 2008 CPD ¶ 59 at 3. Here, the agency determined that ordering off of the DLA contract in the future would best meet its needs. Testimony of Contract Specialist, Tr. at 106:13-15. The record here provides us no basis to question the agency's position that it is required to place future fuel oil orders with the DLA, in accordance with FAR § 8.002. Motion to Dismiss at 2; Tr. at 80:11-81:3. Consequently, to the extent that the original solicitation contemplated any future need for fuel oil, on this record the protester has given us no basis to question the agency's decision to meet such requirements through the DLA contract.²

The record also shows that the agency did not place the emergency order with the DLA vendor, as the contract was not yet modified to permit ordering of fuel for the temporary tanks from the DLA contract. Thus, in deciding whether the agency reasonably cancelled the original solicitation, the issue remains whether the agency's decision to award the emergency order was reasonable.

When conducting a procurement utilizing simplified acquisition procedures, contracting officers must promote competition to the maximum extent practicable to obtain supplies and services from the source whose offer is the most advantageous to the government. 41 U.S.C. § 3305(d); FAR § 13.104; Info. Ventures, Inc., B-293541, Apr. 9, 2004, 2004 CPD ¶ 81 at 3. As an exception to the general

² On March 16, 2015, AeroSage filed a protest challenging the agency's future use of the DLA contract. Our Office will address this protest in a future decision.

competition requirement, a contracting officer may solicit from one source if the contracting officer determines that the circumstances of the contract action deem only one source was reasonably available, such as under urgent circumstances. FAR § 13.106-1(b)(1)(i). We review an agency's decision to limit competition under such circumstances for reasonableness. Critical Process Filtration, Inc., B-400746 et al., Jan. 22, 2009, 2009 CPD ¶ 25 at 3.

Here, the agency articulated the need for sufficient fuel oil in the emergency tanks to provide for three days of emergency use over the Thanksgiving holiday weekend. See Declaration of Director, Network Contracting Office, Veteran's Health Administration, at 1. As the Director explains, "the West Haven Medical Center did not have sufficient oil on hand for a three-day burn, which would have been required to cover the Thanksgiving holiday weekend if there were an interruption in service of the primary heating system. Without sufficient back-up, the situation posed a life and safety risk to the Veteran patients being cared for. . ." Id. The record shows that in the week prior to the Thanksgiving holiday, the agency identified various risks leading to the decision to undertake the emergency procurement. First, the agency determined that the level of fuel was low; insufficient to permit a three-day supply of heat, should the primary fuel source be interrupted. See id.; see also AR, exh. C, Declaration of Chief, Maintenance and Operations, at 1. Next, the agency was concerned that cooler temperatures would cause more of a demand on the boilers than in warmer months, increasing the need for fuel on-hand, and that an impending storm might impact the delivery of fuel should an emergency occur. Finally, the agency identified a risk that given the Thanksgiving weekend, personnel on-hand would be insufficient to evacuate the medical center, should the heating sources fail. Testimony of Assistant Director, Hearing Tr. 222:20-225:10.

Given the agency's explanation of the circumstances surrounding its decision, we have no reason to question the agency's determination to purchase fuel oil on an emergency basis. In this regard, the record shows that the confluence of circumstances, described above, sufficiently support the agency's decision. Further, while the protester argues that the agency improperly satisfied the requirements of the original solicitation with this emergency order, we do not believe that the record supports this conclusion. The original solicitation, on its face, contemplated the award of a contract for the delivery of an estimated quantity of 30,000 gallons of fuel oil over a one-year performance period. See generally Original Solicitation. In contrast, the emergency order was for a one-time delivery of 20,000 gallons of fuel; in essence a bridge contract to meet the agency's immediate needs. Thus, the emergency order appears to articulate a different requirement from the original solicitation.

Further, to the extent that the protester challenges the propriety of the agency's decision to issue an emergency order in light of the then-pending protest, it has provided no basis for us to question the agency's actions. Protest at 5. In this regard, under different factual circumstances, we have questioned an agency's

decision to cancel a solicitation after awarding a contract for the same requirements during the pendency of a protest. See generally SMF Sys. Tech. Corp., supra. In SMF Systems our Office sustained a protest challenging the cancellation of a solicitation after finding that the urgency underlying the contract award was caused by missteps in the acquisition process. SMF Sys. Tech. Corp., supra, at 4-5. There, we also expressed concern that it appeared the cancellation was essentially an attempt to avoid further scrutiny and review. Id. at 5.

Here, as discussed above, the emergency order was for a different requirement from the original solicitation. Moreover, the record shows that it was not until later, when the contracting officer discussed the ongoing need for fuel oil in light of the emergency procurement, and with an expectation of the impending modification to the DLA contract, that the agency determined that it was appropriate to cancel the original solicitation. Testimony of Contract Specialist, Hearing Tr. 95:14-96:21; 132:16-133:11. Thus, the situation presented here is not one where the agency simply awarded a separate contract in order to avoid addressing the issues raised in the original protest. Instead, the agency met its urgent needs through a limited order, and contemplated its future requirements being met by the now-modified DLA contract. The record affords us no basis to question the reasonableness of the agency's decision in this regard.

The protest is denied.³

Susan A. Poling
General Counsel

³ AeroSage points to various "contracting failures" as bases for sustaining this protest. See generally Post-Hearing Comments. We have reviewed each of the protester's allegations and find no basis to sustain the protest.