



G A O

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: T. W. Recycling

File: B-413256

Date: September 16, 2016

Anthony E. Hoover for the protester.
James J. Diliberti, Esq., and Leslie Chen, Esq., Defense Logistics Agency,
for the agency.
Elizabeth Witwer, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the
General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of an agency's cancellation of a solicitation is denied where the record demonstrates that any contract based upon the prices proposed would exceed the amount budgeted for the acquisition.

DECISION

T.W. Recycling, of Las Vegas, Nevada, protests the cancellation of request for proposals (RFP) No. SP4530-16-R-0003, issued by the Defense Logistics Agency (DLA) on behalf of the U.S. Army Garrison Kwajalein Atoll for management and scrap metal removal services. The protester contends that the cancellation was improper.

We deny the protest.

BACKGROUND

On April 22, 2016, DLA's Disposition Services Pacific Branch (DLA-DSP) issued the solicitation seeking proposals for scrap removal and disposal services at the U.S. Army Garrison Kwajalein Atoll, which is located in the Republic of the Marshall Islands.¹ RFP at 1; Performance Work Statement (PWS) ¶ 1.0; Combined

¹ The agency explains that DLA-DSP is a DLA field activity that provides worldwide disposal support for the military services and civilian defense agencies receiving
(continued...)

Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 2. The agency explains that it issued the solicitation at the request of the Department of the Army, specifically the U.S. Army Garrison Kwajalein Atoll. COS/MOL at 1. Funding for the acquisition was provided by the U.S. Army Installation Management Command (IMCOM) via a Military Interdepartmental Purchase Request (MIPR) and the funding amount was based upon an independent government costs estimate developed by DLA in conjunction with the U.S. Army Garrison Kwajalein Atoll. Id.; Agency Report (AR), Tab 3, Declaration of Operations Chief, DLA-DSP, ¶ 3; Tab 4, MIPR.

The solicitation provided for the award of a fixed-price contract on a best-value basis consisting of two evaluation factors of equal importance: (1) past performance and (2) price. RFP, Addendum, at 4; COS/MOL at 2. Proposals were due on May 27. In response to the solicitation, DLA received proposals from three offerors, including T.W. Recycling. COS/MOL at 2.

The contracting officer represents that he conducted an "initial screening" of the proposals and excluded one of the offerors because its proposal was deemed to be materially deficient. Id. With respect to the two remaining proposals, including the proposal submitted by T.W. Recycling, the contracting officer explains that the offerors' proposed prices were significantly higher than the funding provided by the Army for the acquisition and the independent government cost estimate. Id. The record reflects that T.W. Recycling's proposed price was more than five times higher than the available funding. Id. at 2 n.2; AR, Tab 2, T.W. Recycling's Proposal, Attach. 19; Tab 4, MIPR. The other remaining offeror's proposed price was also several times higher than the available funding.² AR, Tab 11, Offeror A's Proposal, at 4; Tab 4, MIPR.

DLA consulted the U.S. Garrison Kwajalein Atoll and IMCOM and was informed that additional funds were not available for this requirement. AR, Tab 3, Declaration of Operations Chief, DLA-DSP. Accordingly, the agency cancelled the solicitation on June 3 and returned the funds to the Army. COS/MOL at 2-3; AR, Tab 12, Declaration of Chief, Acquisition Hazardous Pacific Branch, DLA-DSP.

(...continued)

excess personal property, scrap materials, and hazardous materials and waste. Contracting Officer's Statement and Memorandum of Law at 1.

² Because T.W. Recycling proceeded without counsel in this protest, and therefore no protective order was issued, protected information cannot be included in this decision. Accordingly, our discussion of some aspects of the evaluation is necessary general in nature in order to avoid reference to non-public information. Our conclusions, however, are based upon our review of the entire record, including non-public information.

The contemporaneously prepared documentation indicates that the funds were returned by DLA because the submitted proposals “far exceed[ed] cost projections.” AR, Tab 4, MIPR, at 2.

The agency posted its notice of cancellation on the Federal Business Opportunities (FedBiz Opps) website, the governmentwide point of entry, on June 3. COS/MOL at 3. On June 6, T.W. Recycling requested a debriefing. AR, Tab 13, Correspondence with T.W. Recycling, at 5-7. Although the agency explained that a debriefing following a cancelled solicitation was not required under part 15 of the Federal Acquisition Regulation (FAR), it nevertheless provided T.W. Recycling with a detailed explanation of the basis for the cancellation and provided answers to many of the protester’s questions. Id. T.W. Recycling filed this protest on June 13.

DECISION

T.W. Recycling argues that the DLA’s decision to cancel the solicitation was unreasonable. In this regard, T.W. Recycling contends that the agency failed to properly budget for the requirement and, thus, improperly induced T. W. Recycling to submit a proposal in response to the solicitation. T.W. Recycling also alleges that the agency’s cancellation was pretextual. We find no basis on which to sustain the protest.³

As an initial matter, in its protest, T.W. Recycling also challenged the Army’s alleged modification of contract No. DASG60-02-C-0074, awarded to Kwajalein Range Services, LLC (KRS), for contractor support services in support of installation operations and missile test range operations on Kwajalein Atoll. The protester contends that the alleged modification represents an out-of-scope change to the awarded contract. T.W. Recycling also alleges that the Army improperly refused to consider an unsolicited proposal that it purportedly submitted in March 2011. We docketed T.W. Recycling’s challenge to the Army’s actions as B-413279. In our

³ Although our decision does not address all of T.W. Recycling’s arguments in detail, we have fully considered each of them and find no basis upon which to sustain the protest. For instance, in its comments, T.W. Recycling appears to allege potential violations of the Procurement Integrity Act, codified at 41 U.S.C. §§ 2101-2107. Comments, July 12, 2016, 7:44 a.m.; Supp. Comments, July 21, 2016, at 2-3, 4. Both our Bid Protest Regulations and the statute require, as a condition precedent to our consideration of an alleged procurement integrity violation, that a protester have reported the matter to the contracting agency within 14 days of becoming aware of the information or facts giving rise to the alleged violation. 41 U.S.C. § 2106; 4 C.F.R. § 21.5(d); Tennier Indus., Inc., B-403336.2, B-403336.3, Oct. 26, 2010, 2011 CPD ¶ 5 at 6. Here, there is nothing in the record to suggest, nor has the protester asserted, that T.W. Recycling referred this matter to the agency. Thus, we dismiss this ground.

decision here, we address only those matters pertaining to DLA's actions in connection with the cancellation of the solicitation.

In a negotiated procurement, such as this one, a contracting agency has broad discretion in deciding whether to cancel a solicitation, and need only establish a reasonable basis for doing so. SupplyCore Inc., B-411015.8, May 27, 2016, 2016 CPD ¶ 153 at 3. Moreover, an agency may cancel a solicitation regardless of when the information precipitating the cancellation first arises, even if it is after proposals have been submitted and evaluated, or even if it is discovered during the course of a protest. Id. Where a protester argues that the agency's rationale for cancellation is but a pretext--that the agency's actual motivation is to avoid awarding a contract on a competitive basis--we will closely examine the reasonableness of the agency's actions in canceling the procurement. Bluehorse, B-412494, B-412494.2, Feb. 26, 2016, 2016 CPD ¶ 64 at 4-5. Notwithstanding such closer scrutiny, a contracting agency need only establish a reasonable basis to support a decision to cancel a solicitation. Id.

DLA explains that it cancelled the RFP because the offerors' proposed prices were significantly above both the amount budgeted for the contract award and the independent government cost estimate. COS/MOL at 3. Our review of the record confirms the agency's position. An agency's determination that funds are not available is sufficient reason to cancel a solicitation, as agencies may not award contracts that exceed available funds. Welch Constr., Inc., B-411879, Nov. 9, 2015, 2015 CPD ¶ 351 at 2. Moreover, it is not our role to question the unavailability of funds. Id.; VetPride Servs., Inc., B-401435, July 28, 2009, 2009 CPD ¶ 156 at 3. Rather, the management of an agency's funds generally depends on the agency's judgment concerning which projects and activities should receive increased or reduced funding. Welch Constr., Inc., supra; Vinculum Solutions, Inc.--Recon., B-408337.3, Dec. 3, 2013, 2013 CPD ¶ 274 at 4. Thus, under the circumstances presented here, we find that DLA properly cancelled the solicitation.

T.W. Recycling contends that the agency violated FAR §§ 1.602-1 and 1.602-2 by failing to properly budget for the requirement.⁴ Protest at 6. Here, the record shows that the government estimate was prepared in good faith and that the agency issued the solicitation with the intent to award a contract. Even assuming for the sake of argument, however, that the agency prepared its government estimate negligently or improperly proceeded with the procurement knowing that it lacked adequate funding, such negligence or lack of diligence does not establish bad faith and, by itself, provides no basis on which to sustain the protest. D.H. Kim Enters.,

⁴ These provisions pertain generally to the authority and responsibilities of contracting officers. As relevant here, FAR § 1.602-2(a) provides that, in preparing for a procurement, "[c]ontracting officers shall [e]nsure . . . that sufficient funds are available for obligation."

Inc., B-261103, July 7, 1995, 95-2 CPD ¶ 5 at 2-3; Hac Corp., B-235136, July 20, 1989, 89-2 CPD ¶ 68 at 3.

T.W. Recycling also alleges that the agency's rationale for canceling the RFP is a pretext to avoid awarding a contract to T.W. Recycling. Protest at 5; Protest, Addendum, June 13, 2016, 4:58 p.m., at 2. In particular, T.W. Recycling argues that the agency never intended to award a contract pursuant to the solicitation. Protest at 5. Instead, T.W. Recycling contends that the solicitation, and others issued in previous years, were simply a ruse to "garner updated expert information and consultation services without compensation." Id. The protester argues that, in employing this "bait and switch" tactic, the agency has breached its duty of good faith and fair dealing. Id.

In response, the agency argues that, when it issued the solicitation, it fully intended to award a contract. COS/MOL at 6. The agency points out that the Army committed funds for the effort on February 23, 2016, when it issued a MIPR to DLA. Id.; AR, Tab 4, MIPR. The agency argues, therefore, that "[h]ad this not been a serious effort, obtaining the funds would not have been necessary at all."⁵ COS/MOL at 6. Regarding prior efforts to remove scrap metal from Kwajalein Atoll, the agency explains that, in 2013 and 2016, DLA attempted to use sales contracts to dispose of the excess property, but was unsuccessful because it received "negative bids."⁶ Id. at 2 n.1, 6; AR, Tab 6, Memo. for Record, at 2. DLA argues that, contrary to T.W. Recycling's contentions, these two prior efforts demonstrate the agency's continued and "serious effort[s]" to assist the Army to meet its requirement for scrap metal removal. COS/MOL at 6.

The record does not show that the agency was motivated by a desire to avoid awarding the contract. Government officials are presumed to act in good faith and, a protester's contention that procurement officials were motivated by bad faith must be supported by clear and convincing evidence; our Office will not attribute unfair or

⁵ The record also reflects that in March 2016, the agency prepared a detailed memorandum for record justifying its decision to procure the services on an unrestricted basis. AR, Tab 6, Memo. for Record. Had the agency intended to cancel the solicitation, it is unlikely that DLA would have prepared such a lengthy description of the procedural history of this requirement and DLA's prior efforts to satisfy the Army's needs through various contracting vehicles.

⁶ DLA explains that it uses sales contracts to dispose of excess property when the government anticipates that a contractor would be willing to pay for the property because the value of the property exceeds the contractor's costs in removing it. COS/MOL at 2 n.1. In the two prior efforts here, DLA received "negative bids," meaning that DLA would be required to pay the contractor for the removal. Id. Accordingly, the decision was made to issue the solicitation here. Id. at 6.

prejudicial motives to procurement officials on the basis of inference, supposition, or unsupported speculation. East West, Inc., B-412719.2 et al., June 21, 2016, 2016 CPD ¶ 170 at 6. Even if it could be shown that personal animus or 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. VIRE Consulting, Inc., B-408148.2, Nov. 26, 2013, 2013 CPD ¶ 272 at 3-4. As described above, based upon the documents submitted here, we conclude that the agency's decision to cancel the solicitation due to a lack of available funding was reasonable.

Finally, T.W. Recycling argues that, even if, as the agency contends, the submitted proposals exceeded the amount available for the requirement, the government should "seriously consider" an unsolicited offer T.W. Recycling submitted in March 2011.⁷ Protest at 7. It does not appear that T.W. Recycling submitted its proposal to DLA in March 2011, but rather to the Army. See Protest, ex., "20110314 Recycling Proposal to [] USAKA CAMO Office." For this reason, we discussed this protest ground, at length, in our decision in B-413279. T.W. Recycling, B-413256, Sept. 16, 2016 (unpublished decision). However, to the extent it is relevant to the reasonableness of DLA's actions here, we conclude that the government is not required to make an award based upon T.W. Recycling's unsolicited proposal.

The decision to make an award based upon an unsolicited proposal is in the agency's discretion, and then only where the requirements of FAR § 15.607 are met. InGenesis, Inc., B-412101.2, Mar. 28, 2016, 2016 CPD ¶ 102 at 5 n.9; Rante Corp., B-411188, June 1, 2015, 2015 CPD ¶ 166 at 2. As we have previously held, FAR § 15.607(a) sets forth those circumstances where any agency is required to reject an unsolicited proposal; it does not follow that, in all other circumstances, the agency must accept an unsolicited proposal. InGenesis, Inc., supra. Thus, we dismiss this ground.

The protest is denied.

Susan A. Poling
General Counsel

⁷ T.W. Recycling contends that its proposal is "still valid on the condition that pricing may be updated to 2016 prices, and for future year prices." Protest at 7.