



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Gonzales-McCaulley Investment Group, Inc.

File: B-299936.2

Date: November 5, 2007

Ollie M. McCaulley for the protester.
Steven Simpson, Esq., for Management Concepts, an intervenor.
Jonathan A. Baker, Esq., Department of Health and Human Services, for the agency.
Nora K. Adkins, Esq., and James Spangenberg, Esq., Office of General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Agency's decision to cancel a solicitation, after a protest was filed, due to a lack of valid delegated procurement authority, was essentially pretextual when no other solicitations issued under the invalid delegation were cancelled.
 2. Agency did not have a reasonable basis to rescind the selection of a vendor for providing training classes under the Government Employees Training Act based on its belief that the vendor plagiarized certain material from another vendor and included this material in its quotation, which the agency found indicated a lack of independent knowledge of the course material that rendered the quotation unacceptable, where the agency did not reasonably investigate its concerns, the record contains evidence that the vendor properly obtained this material from the agency and reasonably used it in its quotation, and the vendor's quotation contained information that was not plagiarized that was relevant to its knowledge of the course material.
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DECISION

Gonzales-McCaulley Investment Group, Inc. (GMIG) protests the decision of the Department of Health and Human Services (HHS) to cancel a solicitation for quotations for grants management courses to be taught at the Health and Human

Services University (HHS-U), as authorized by the Government Employees Training Act (GETA), 41 U.S.C. §§ 4101-4121 (2000).¹

HHS-U was established on February 19, 2003, as an organizational unit of the Human Resources Service within the HHS Program Support Center (PSC) to develop and manage the Department's training and workforce development. 68 Fed. Reg. 8040 (Feb. 19, 2003). On April 14, 2003, the Deputy Assistant Secretary for Program Support in charge of PSC delegated to the Director of the Human Resources Service the authority to approve and acquire training through HHS-U under the GETA acquisition authority. Agency Report (AR), Sept. 10, 2007, Tab 3, Memorandum, Deputy Assistant Secretary for Program Support.² HHS-U's training acquisition is administered by a Center Manager who, among other things, oversees vendor selection.

On May 11, 2007, the protester received from HHS-U the solicitation for quotations for providing grants management classes for HHS-U's 2008 schedule. In the solicitation, vendors were requested to provide statements of technical capability/subject matter expertise; a statement showing the vendor's understanding of the requirements; assurance of sufficient staff, resources, and instructor knowledge; a list of the grants management courses for which the vendor presents training, including a course agenda/content outline and a list of objectives; itemized costs; and references. This solicitation also listed and described eight grants management training courses for the 2008 fiscal year. Initial Protest, July 2, 2007, Tab 1, HHS-U E-mail to GMIG Requesting Quotation.

GMIG and other vendors submitted quotations prior to the May 31 closing date. Upon review of the vendors' technical capabilities and prices, HHS-U selected GMIG, as well as Management Concepts (the incumbent) and one other vendor, to provide grants management training courses at HHS-U. AR, July 27, 2007, Tab 1, Center Manager's Statement, at 1. On June 19, GMIG received from the Center Manager a confirmation of selection to provide the eight grants management courses at HHS-U. Initial Protest, Tab 6, HHS-U E-mail to GMIG Confirming Selection.

¹ Originally enacted in 1957, GETA provides federal agencies with general authority for employee training and authorizes the use of non-governmental training resources to meet identified training needs. 41 U.S.C. § 4105.

² On March 30, 1995, the HHS Assistant Secretary for Personnel Administration delegated authority to approve and acquire training, including the authority to acquire training under GETA, to the heads of operating divisions (OPDIV), with redelegations permitted. AR, Sept. 10, 2007, Tab 1, HHS Transmittal 95.5. On October 2, 1995, PSC was established as an OPDIV within HHS, thereby giving PSC the authority to approve, acquire, and redelegate the authority to acquire training through GETA. 60 Fed. Reg. 51,480 (Oct. 2, 1995).

Prior to the start of classes, the Center Manager states that she was reviewing the Management Concepts website and noticed “a striking similarity with the course descriptions, objectives, and topics” in comparison to GMIG’s quotation. AR, July 27, 2007, Tab 1, Center Manager’s Statement, at 1. She thus determined that GMIG had submitted “plagiarized” material from the Management Concepts website. Id. The record does not evidence that HHS-U then sought an explanation or response from GMIG in regard to this issue or that HHS-U delved any further into the similarity between the two vendors’ submissions. On June 27, HHS-U notified GMIG via e-mail as follows:

It came to our attention today that the grants course information you included in your proposal is not your own. Therefore, I am withdrawing the offer letter from HHS University. We will not be contracting with you for grants management training in FY08.

Initial Protest, Tab 9, Center Manager’s E-mail to GMIG, at 1.

After receiving HHS-U’s notice, GMIG contacted the agency and requested that HHS-U review GMIG’s course book that it had previously provided HHS-U, asserting that it was readily apparent that the two vendors had different curriculums and that it had shown that it can successfully provide the required courses. GMIG also complained that comparing GMIG’s quotation with another vendor’s quotation was improper. Initial Protest, Tab 10, GMIG E-mail to HHS-U (June 27, 2007); Tab 11, GMIG E-mail to HHS-U (June 28, 2007).

On June 29, the Center Manager responded, stating “I did review your binder. However, it wasn’t referenced in your proposal. My decision stands,” although she invited GMIG “to resubmit a proposal with information on courses that GMIG offers. We will be happy to consider it for future classes.” Initial Protest, Tab 12, Center Manager’s E-mail to GMIG, at 1. GMIG then protested to our Office the agency’s decision to rescind the firm’s selection to provide grants management courses at HHS-U.

The agency asserted that the rescission of GMIG’s selection was reasonable because a comparison of the Management Concepts materials (located on its Internet site) and GMIG’s submitted materials confirms that GMIG copied the Management Concepts course descriptions and learning objectives and submitted them as their own.³ As such, HHS-U concluded that there was an insufficient basis on which to evaluate GMIG’s quotation as technically acceptable because GMIG’s plagiarism inspired little confidence in regard to its independent knowledge of the course

³ Our review of the record indicates that the two vendors’ course descriptions and learning objectives were virtually identical.

material and its ability to convey appropriate information through its course instruction. AR, July 18, 2007, at 2; AR, July 27, 2007, at 3.

In its comments in response to the agency report on this protest, GMIG denied the claims of plagiarism with regard to this information (which GMIG states was “very general by its nature”), and countered by providing various examples from publicly provided federal government training catalogs, including that of HHS-U, with course descriptions and learning objectives that were also virtually identical to the course descriptions and learning objectives included in GMIG’s quotation and on the Management Concepts website. Initial Protest, at 2; Protester’s Comments, July 31, 2007, at 5-9, 14. GMIG asserts that a review of the rest of its quotation and the course book that it provided to HHS-U reveals that it had the requisite understanding and ability to provide courses that were significantly different than those offered by Management Concepts, and that the agency’s rescission of its selection was improper. Initial Protest, at 2.

Shortly after receiving GMIG’s comments, HHS requested dismissal of the protest based on a discovery that the acquisition had been conducted under a delegation of GETA authority that was not effective as to HHS-U. As previously stated, on April 14, 2003, the Deputy Assistant Secretary for Program Support in charge of PSC delegated to the Director of the Human Resources Service the authority to approve and acquire training through HHS-U under the GETA acquisition authority. AR, Sept. 10, 2007, Tab 3, Memorandum, Deputy Assistant Secretary for Program Support. However, by notice of November 23, 2001, PSC had ceased to be an OPDIV. 66 Fed. Reg. 58,740 (Nov. 23, 2001). Therefore, according to HHS, because the authority to redelegate GETA acquisition authority was based on PSC’s status as an OPDIV, the Deputy Assistant Secretary for Program Support did not, in 2003, have the authority to redelegate the approval or acquisition of training under GETA to the Director of the Human Resources Service. Thus, the agency asserted that HHS-U lacked the authority to conduct this acquisition.⁴ Because of this, it rescinded the selections and cancelled this solicitation. On August 7, our Office dismissed GMIG’s protest as academic due to the solicitation’s cancellation.

On August 8, GMIG protested that the GETA authority was operational at the time of GMIG’s selection and, alternatively, that the agency’s decision to cancel the solicitation was solely for the purpose of having its protest dismissed. In response,

⁴ On September 4, 2007, the Deputy Assistant Secretary for Acquisition Management and Policy redelegated, under valid authority from a delegation of the Assistant Secretary for Administration and Management dated July 14, 2006, the authority to acquire training under GETA to the Director of the Workforce and Career Development Division for HHS-U, with redelegations allowed. AR, Sept. 10, 2007, Tab 9, Delegation of Training Acquisition Authority, at 1. Accordingly, HHS-U was provided the requisite GETA authority to acquire training.

the agency argued that its decision to cancel was reasonable because the acquisition was unauthorized as it was conducted under an invalid delegation of acquisition authority and that the reason for cancellation was not pretextual.

A contracting agency need only establish a reasonable basis to support a decision to cancel a request for quotations. SMF Sys. Tech. Corp., B-292419.3, Nov. 26, 2003, 2003 CPD ¶ 203 at 4. So long as there is a reasonable basis for doing so, an agency may cancel a solicitation, no matter when the information precipitating the cancellation first arises, even if it is not until quotations have been submitted and evaluated. Id. As here, however, where a protester has alleged that the agency's rationale for cancellation is but a pretext to avoid awarding a "contract" on a competitive basis or to avoid the resolution of a protest, we will closely examine the reasonableness of the agency's actions in canceling the solicitation. Id.; Griffin Servs., Inc., B-237268.2 et al., June 14, 1990, 90-1 CPD ¶ 558 at 3, aff'd, General Servs. Admin.-Recon., B-237268.3 et al., Nov. 7, 1990, 90-2 CPD ¶ 369. In cases where we conclude that the agency's rationale for cancellation is merely a pretext, we will recommend appropriate corrective action. See Griffin Servs., Inc., supra, at 3-4; Miller, Davis, Marter & Opper, P.C., B-242933, B-242933.2, Aug. 8, 1991, 91-2 CPD ¶ 176 at 4.

Here, it appears from the record that HHS is correct in its assertion that the GETA acquisition authority had not been validly delegated to HHS-U. We believe that this lack of authority would ordinarily provide a reasonable basis to cancel a solicitation. However, based on our review of HHS's actions here, we conclude that the cancellation of this solicitation was pretextual. The record shows that this was the only acquisition, out of the hundreds that had been conducted by HHS-U without properly delegated authority, that was cancelled when HHS became aware of the lack of authority, even though a number of the other HHS-U acquisitions were ongoing. See AR, Oct. 12, 2007, Declaration of HHS Director, Division of Acquisition Policy, at 5. We recognize that HHS asserted in its response to our Office's inquiry that it "expect[ed] and intend[ed] that HHS-U would cancel all outstanding requests for quotations for training services," but that it apparently had not "adequately communicated [this] expectation" to HHS-U. Id. However, whether expected or not, this did not occur. Thus, we find on this record that HHS's cancellation appears to be, as the protester contends, essentially a pretext to avoid further scrutiny and review of its protest.

Nevertheless, even where the cancellation of a solicitation was a pretext to avoid further scrutiny and review of a protest, we will not sustain a protest of the cancellation on this basis unless the protester was prejudiced, for example, if its initial protest would have been sustained but for the cancellation. See Miller, Davis, Marter & Opper, P.C., supra, at 5.

As indicated above, HHS rescinded the selection of GMIG because it believed that GMIG had plagiarized from the Management Concepts materials in preparing its quotation and that the agency, therefore, had an insufficient basis on which to

evaluate GMIG's quotation as technically acceptable, because GMIG's plagiarism inspired little confidence in regard to GMIG's independent knowledge of the course material and its ability to convey appropriate information through its course instruction.

In response, GMIG specifically denies plagiarizing this material from the Management Concepts website and provides evidence that the course descriptions and learning objectives that it used were virtually identical to those in HHS-U's catalog and the catalogs of several other federal agencies. HHS does not deny that this is the case. Indeed, the general course descriptions included by GMIG in its quotation were included in HHS-U's solicitation, so it is not surprising that a vendor offering these very courses would copy the solicitation's description and refer to the "learning objectives" already identified by the agency in its catalog for these courses. We also note that it has not been alleged that GMIG plagiarized the course syllabus, also included in its quotation, which contained details regarding GMIG's class instruction, or the course book that GMIG provided to HHS-U. Indeed, as indicated, the Center Manager was aware, after reviewing GMIG's course book, that the "binder of materials appear[ed] to be a viable training option." AR, July 27, 2007, Tab 1, Center Manager's Statement, at 2. While it may be that there was a reason that GMIG should not have been selected to provide these courses, the record here shows that HHS-U's Center Manager did not attempt to reasonably investigate her suspicions of plagiarism prior to rescinding GMIG's selection and, on this record, we find the rescission was not reasonably based.⁵

Given that the agency now has the properly delegated acquisition authority, we recommend that HHS-U reinstate the solicitation and reevaluate the quotations, considering all information presented by the vendors in response to the plagiarism allegations.⁶ We also recommend that GMIG be reimbursed its costs of filing and pursuing the current protest of the cancellation, as well as its earlier protest of the

⁵ The agency in its report asserts that GMIG was "given an opportunity to resubmit its quote." AR, July 27, 2007, at 1-2. This is not true. The record shows that the Center Manager only "invite[d] [GMIG] to resubmit a proposal with information on courses that GMIG offers. We will be happy to consider it for future classes." Initial Protest, Tab 12, Center Manager's E-mail to GMIG, at 1.

⁶ Management Concepts asserts that there are copyright concerns regarding the use of its materials that need to be addressed with regard to this acquisition. The agency should review these concerns to ascertain their validity and take appropriate action. We also recognize that an agency's concerns about plagiarism, if justified, could affect the determination of the prospective contractor's responsibility.

rescission of its selection. Bid Protest Regulations 4 C.F.R. § 21.6(a)(1) (2007).⁷ GMIG should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Gary L. Kepplinger
General Counsel

⁷ We do not recommend that GMIG be reimbursed its claimed quotation preparation costs, since it is being provided an opportunity to compete for courses under the solicitation.