

Harrington

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-218182 **DATE:** June 17, 1985

MATTER OF: Mercury Consolidated Inc.

DIGEST:

1. GAO will review protests concerning the cancellation of a solicitation issued for A-76 cost comparison purposes since the competitive procurement system is involved.
2. A protest against an agency's cancellation of a request for proposals issued as part of an Office of Management and Budget Circular A-76 is denied where the agency reasonably determines that the solicitation no longer accurately reflects its minimum needs.
3. To succeed in a claim for proposal preparation costs, the claimant must show that the government's conduct was arbitrary and capricious and that if the government had acted properly, the protester would have had a substantial chance of receiving the contract award.

Mercury Consolidated, Inc. (Mercury) protests the Navy's cancellation of Request for Proposals (RFP) No. N00189-83-R-0088 for the handling of air freight at the Naval Supply Center in Norfolk, Virginia. Mercury alleges that the decision to cancel the solicitation was arbitrary and capricious.

We deny the protest.

The solicitation was issued pursuant to an Office of Management and Budget (OMB) Circular A-76 cost-comparison in April of 1983. Mercury submitted the low proposal, but was found nonresponsible for financial reasons in January of 1984. After the cost comparison was completed but before award, Mercury obtained further financial commitments from its bank. The Navy refused to consider this change in financial circumstances. Mercury protested this finding to our Office, contending that information relating to matters of responsibility could be submitted up until the time of award, and that material changes in the firm's

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financial status warranted review. We sustained the protest (see Mercury Consolidated, Inc., B-212077.2, Aug. 17, 1984, 84-2 CPD ¶ 186) and affirmed that decision when the Navy requested reconsideration in October 1984 (see CFE Services, Inc.; Department of the Navy-Request for Reconsideration, B-212077.3 et al., Oct. 24, 1984, 84-2 CPD ¶ 459). Both in its initial report and in its request for reconsideration, the Navy was of the opinion that the regulations applicable to negotiated cost comparison solicitations for commercial or industrial type activities precluded the determination of an offeror's responsibility after the cost comparison study was completed. Alternatively, the Navy believed that GAO case law left the determination to re-examine an offeror's responsibility to the contracting officer's discretion. ^{1/}

In November of 1984, the Navy reviewed the RFP specifications to determine whether any adjustments were necessary to reflect current circumstances accurately. The reviewers determined that the Navy's needs had changed significantly during the delay period of nearly 2 years since the initial RFP had been issued, and the contracting officer decided to cancel the solicitation. It is this cancellation to which Mercury now objects; the protester argues that any changes in the Navy's requirements could have been accommodated through an amendment to the solicitation.

Generally, our Office does not review agency decisions to perform in-house rather than to contract for certain services because we regard the decision as a matter of

^{1/} The Navy believed that language in our prior decisions to the effect that evidence of a firm's responsibility may be furnished at any time prior to award did not require a contracting officer to consider such evidence, but only permitted him to do so in his discretion. See, e.g., Guardian Security Agency, Inc., B-207309, May 17, 1982, 82-1 CPD ¶ 471. In our decision on the initial request for reconsideration, we concluded that despite the literal language of our decisions, where ample time permits, further consideration of an offeror's responsibility should be made where a material change occurs in a principal factor on which the original determination was based. CFE Services, Inc.; Department of the Navy-Request for Reconsideration, supra.

executive branch policy. Midland Maintenance Inc., B-202977.2, Feb. 22, 1982, 82-1 CPD ¶ 150. However, we review protests concerning the cancellation of solicitation issued for A-76 cost comparison purposes, since the competitive procurement system is involved. D-K Associates, Inc., 62 Comp. Gen. 129 (1983), 83-1 CPD ¶ 55. In such circumstances, we apply the general rules regarding cancellation in evaluating the propriety of the contracting officer's decision. Id.

The Navy asserts that the contracting officer's decision to cancel the solicitation was based on three reasons: (1) substantial changes in the government's needs, (2) the long period of time between the original solicitation and the necessary revisions, and (3) a possible compromise of the original solicitation by unauthorized disclosures of information to the protester.

The changes cited by the Navy include substantial increases in the volume and projected volumes of work to be handled by the air terminal, and a new requirement that all training of contractor personnel be completed prior to beginning performance. The Navy asserts that either of these changes could reasonably be expected to have a significant impact on the cost of performance.—In addition, there have been changes in the equipment which the contractor will be required to provide, such as a special wide-body aircraft loader and boarding ladder necessitated by a change in the type of aircraft to be serviced. The protester contends, however, that most of these changes were already provided for as contingencies in the original RFP, and that the negotiations that might be necessary to effect these changes would be required as an integral part of the A-76 process in any case.

Notwithstanding the requirement that discussions be routinely conducted in negotiated procurements, a government agency may not solicit offers on one basis when it is to make award on another basis. Where there is a serious discrepancy between a solicitation estimate and actual anticipated needs, the government should not make award on the basis of the stated estimate, but rather should revise its solicitation to provide offerors with the most accurate information available. TWI Inc., B-202966.4, Nov. 30, 1982, 82-2 CPD ¶ 487. As to whether the solicitation should have been amended or canceled, the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.606(b)(4) (1984), states that a change in government requirements so

substantial that it warrants complete revision of an RFP requires cancellation and resolicitation, regardless of the stage of the acquisition. Our Office has recognized the discretion vested in contracting officials in determining the government's minimum needs and the best method of accommodating those needs in this context, and has held that the contracting officer need only have a reasonable basis for canceling negotiated solicitations. See Allied Repair Service, Inc., B-207629, Dec. 16, 1982, 82-2 CPD § 541. Hence, the decision to cancel is closely linked to an agency's discretionary authority to determine its minimum needs. Baucom Janitorial Service, Inc., B-210216, May 31, 1983, 83-1 CPD ¶ 584. The protester bears the burden of showing that the cancellation is unreasonable. Surgical Instrument Company of America, B-211368, Nov. 18, 1983, 83-2 CPD ¶ 583.

Applying these standards here, we note that the Navy has estimated that basic workloads would be increased by 30 to 50 percent over the original estimates; that the additional cost to the contractor to complete its personnel training in advance of performance could be approximately \$41,000; that the additional cost of providing the new aircraft loading and boarding equipment would be more than \$65,000; and that key personnel listed by Mercury in its original proposal have changed, requiring that new technical proposals be offered and technical responsibility be reviewed. We are persuaded that these factors represent substantial changes in the government's requirements and therefore provide a reasonable basis for the contracting officer's decision to cancel the solicitation.

Because these changes in the Navy's requirements provide sufficient justification for canceling the solicitation, we need not consider whether the other bases advanced by the agency also justify the cancellation. Furthermore, Mercury has specifically limited its protest to the propriety of the cancellation and any recovery to which it may be entitled on that basis; it has not taken issue with the Navy's reasons for not resoliciting the requirement after canceling the RFP. We therefore need not discuss the propriety of the agency's subsequent actions.

However, there remains for our consideration Mercury's claim for legal fees in connection with its earlier protests and proposal preparation costs.

The Competition in Contracting Act of 1984 (CICA), Pub. Law 98-369, and section 21.6(d) of our Bid Protest Regulations implementing CICA, 4 C.F.R. § 21.1(d) (1985),

authorize our Office to determine whether a protester is entitled to recover such costs, including attorney's fees. The applicable CICA provisions took effect on January 15, 1985. Since Mercury's earlier protests were filed in 1983 and 1984, we have no authority upon which to consider them. Therefore, this portion of Mercury's claim is denied.

Regarding proposal preparation costs, prior to the enactment of CICA, we awarded such costs where the government's conduct was arbitrary and capricious and where, if the government had acted properly, the protester would have had a substantial chance of receiving the contract award. See Northwest Regional Educational Laboratory--Request for Proposal Preparation Costs, B-213464.2, July 24, 1984, 84-2 CPD ¶ 99. Here, although we do not find that the cancellation of the solicitation in 1985 was arbitrary or capricious, we are mindful that the agency's action in 1983 and 1984, in failing to consider information material to the issue of the protester's financial responsibility, caused (or contributed to) the delay which then necessitated the cancellation. At the time we sustained the earlier protest, we did not consider awarding costs because our recommendation was that the protester's proposal be considered for award. In this situation, restitution of proposal preparation costs would have represented a windfall to the protester. Now, however, since the award of the contract is no longer possible, it is appropriate to re-examine the improper agency actions to determine whether the protester is entitled to proposal preparation costs.

In determining whether the government's actions are sufficiently capricious to warrant reimbursement of these costs, we have held that it is not enough that a claimant can establish that the actions complained of appear arbitrary in retrospect. Base Information Systems, Inc., B-186932, Mar. 22, 1979, 79-1 CPD ¶ 196. It must appear that the action was motivated by caprice or constructive bad faith--the evidence showing that those involved knew or should have known that what they were doing was arbitrary. The claimant need not show actual ill will on the part of government officials but must show that in the circumstances procuring officials should be held responsible for at least not having recognized the nature of what they did. Id. The claimant must demonstrate that the action complained of was taken without reason.

We cannot say that the Navy's conduct meets this standard in this situation. While the government actions recounted in our prior decision were found to be improper,

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we do not find that the protester has shown them to be arbitrary and capricious or without a reasonable basis. The Navy relied on its interpretation of the governing regulations and prior GAO decisions when it decided not to re-evaluate Mercury's financial condition.

We do not find that the Navy's actions justify an award of proposal preparation costs here.

The protest is denied; claims for costs are denied.

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General Counsel