

**DECISION**

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

**FILE:** B-220570.2                      **DATE:** April 15, 1986  
**MATTER OF:** NDT-1, Inc.--Request for Reconsideration

**DIGEST:**

Prior decision is affirmed where the arguments raised in the request for reconsideration do not show that the prior decision was erroneous.

NDT-1, Inc. (NDT), requests that we reconsider our decision in NDT-1, Inc., B-220570, Nov. 20, 1985, 85-2 C.P.D. ¶ 576, in which we held that the National Aeronautics and Space Administration (NASA) properly canceled a solicitation for sealed bids for the nondestructive testing of pressure vessels at the Lewis Research Center (Center), Cleveland, Ohio, as a result of its determination that sufficient funds were not available to make an award. NDT had submitted the low bid under invitation for bids (IFB) No. 3-157670, which was canceled.

As set forth in our November 20, 1985, decision, the agency advised that the decision to cancel the solicitation was based on the withdrawal of funds for the procurement as the result of the need to fund an emergency investigation of an explosion at the Center. NASA also pointed out that the services required under the canceled solicitation were also included as part of contract No. NAS3-24754 awarded on August 28, 1985, for engineering, technical and support services necessary for recertification of systems, including pressure vessels.

In its request for reconsideration, NDT in part alleges that the November 20, 1985, decision failed to indicate that bids had been opened prior to the agency's cancellation of the solicitation. Notwithstanding NDT's assertions, the November 20, 1985, decision expressly advised that the sealed bids "were opened by the agency on August 23." Accordingly, we applied the rule that cancellation of a solicitation after bids have been opened and prices have been exposed is not permitted unless a cogent and compelling reason for cancellation exists. International Alliance of Sports Officials, B-211049; B-211049.2, May 24, 1983, 83-1 C.P.D. ¶ 562. We also stated that an agency's determination

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that funds are not available for contract obligation is a sufficient reason to cancel a solicitation and it is not our role to question the unavailability of funds. Id. and Genco Tool and Engineering Co., 61 Comp. Gen. 281 (1982), 82-1 C.P.D. ¶ 175.

NDT asserts that the unavailability of funds is not one of the nine compelling reasons for the cancellation of a request for sealed bids which are set forth in Federal Acquisition Regulation (FAR), § 14.404-1(c) (Federal Acquisition Circular (FAC) No. 84-5, Apr. 1, 1985). However, the FAR expressly provides that an agency may cancel a solicitation after bid opening when "cancellation is clearly in the public's interest." FAR, § 14.404-1(c)(9)(FAC No. 84-5, Apr. 1, 1985). This language is sufficiently broad to encompass the present situation where funds are not available.

NDT contends that even if FAR, § 14.404-1(c)(9), permits cancellation of a solicitation due to lack of sufficient funds, such provision is inapplicable here because "funds were available." As set forth in our November 20 decision, NASA reported that funds which would have been available for award under the IFB were used to fund the emergency investigation of an explosion at the Center.<sup>1/</sup>

NASA did award a negotiated contract for engineering and related services for the recertification of systems at the Center, including nondestructive testing of pressure vessels, under a different solicitation after bids were opened under this protested IFB. As we pointed out in the November 20 decision, however, the management of an agency's funds generally depends on the agency's judgment concerning which projects and activities shall receive increased or reduced funding and a contracting agency has an unquestionable legal right to cancel a solicitation when sufficient funds are not available. Somers Construction Company, Inc.--Reconsideration, B-193929, July 24, 1979, 79-2 C.P.D.¶ 54.

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<sup>1/</sup> We note that NDT now questions the agency's statement that an explosion occurred at the Center since the Center has not presented documentation concerning the explosion. This issue has been untimely raised by NDT, since it is raised more than 3 months after NDT received the agency's October 23 report which cited the explosion. See 4 C.F.R. § 21.2(a)(2) (1985).

NDT asserts the services required under this IFB were not originally included under negotiated contract NAS3-24754 and that, upon cancellation of the IFB, such services were added to the negotiated procurement. Accordingly, NDT asserts that even if the agency could properly cancel the IFB due to lack of funds, the "transfer of services" from the IFB to the negotiated contract violated section 14.404-1(e) of the FAR (FAC No. 84-5, Apr. 1, 1985), which sets forth the circumstances under which an acquisition may be completed through negotiations following the cancellation of an IFB. However, in our opinion, this provision of the FAR is not applicable here since the services in question were not transferred to the negotiated procurement as a result of the cancellation of the IFB. The record before us, which includes a copy of the request for proposals (RFP) upon which contract NAS3-24754 is based--RFP No. 3-563787-- shows that upon its issuance on April 15, 1985, about 2 months prior to the issuance of the IFB, the RFP clearly included the "nondestructive testing" of pressure vessels in addition to the other requested engineering and related services.

The agency reports that, even if funds had not been directed for the emergency investigation of the explosion, the Center would not have awarded a contract under the IFB since the scope of work under the negotiated procurement included the same nondestructive testing services which were being procured under the IFB. The agency states that the internal purchase request which formed the basis of the IFB was initiated to obtain the nondestructive testing services on an interim basis until a contract under the RFP was awarded. NASA advises that due to inadvertent delays, the IFB was not issued until June and, as a result of two amendments to the solicitation, the bid opening date was extended to August 23, 1985. The agency states that it was not until the August bid opening that the two different procurement sections carrying out each procurement action realized that the delays encountered on the IFB moved it into the time-frame of the award under the negotiated procurement. The agency advises that once it became known that the Center would have two contracts under which the nondestructive testing could be performed it decided that it would be appropriate to cancel one of the procurement actions. The agency indicates that since the IFB was only for the nondestructive testing of pressure vessels for a limited period of time, whereas the negotiated procurement was for the entire recertification program (including nondestructive testing of pressure vessels) for an extended period (up to 3

years with the exercise of options) it elected to proceed with award under the negotiated procurement. Under the circumstances, we cannot conclude that the agency would have acted improperly if it had canceled the IFB even if adequate funds therefor had been available, since the agency reasonably determined that its minimum needs would be better met by making an award under the negotiated procurement. See generally Baucom Janitorial Services, Inc., B-210216, May 31, 1983, 83-1 C.P.D. ¶ 584 and Security Management Associates, B-214186, July 23, 1984, 84-2 C.P.D. ¶ 83. We note that the agency points out that the nondestructive testing under the negotiated contract will be performed at a slightly lower cost.

Finally, NDT contends that the IFB should not have been canceled since the agency failed to comply with the provisions of FAR, § 14.404-1(a)(2) (FAC No. 84-5, April 1, 1985), in not anticipating cancellation prior to bid opening. The provision cited states that every effort should be made to anticipate changes in a procurement prior to bid opening. In his report on the request for reconsideration, the contracting officer advises that it was not until after the bid opening that the NASA contract specialist involved learned that funds were not available for award under the IFB due to the explosion at the Center. In any event, an agency may cancel a solicitation no matter when the information providing the basis for cancellation first arises. Marmac Industries, Inc., B-203377.5, Jan. 8, 1982, 82-1 C.P.D. ¶ 22.

Accordingly, the November 20, 1985, decision is affirmed.

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 General Counsel