



United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** SCB Solutions, Inc.--Reconsideration

**File:** B-410450.2

**Date:** August 12, 2015

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Ronan Lapie, SCB Solutions, Inc., for the protester.  
Mary G. Courtney, Esq., Department of Veterans Affairs, for the agency.  
Paula J. Haurilesko, Esq., Cherie J. Owen, Esq., and David A. Ashen, Esq., Office  
of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protester's request for reconsideration is granted where, in response to the original protest, the agency explained that it was terminating the awardee's delivery order for the convenience of the government, and our Office concluded that the termination rendered academic the protester's challenges. Instead, the record shows that by the time of the termination decision the awardee had fully performed the order, and the agency ultimately took delivery of, and paid for, the entire order, such that the agency has no further requirement for the goods; under these circumstances, we conclude that the agency's decision to terminate the order did not render academic the protester's concerns, and we conclude that the prior protest should not have been dismissed.

2. Protest that the agency failed to provide necessary information for vendors to meet testing requirements is sustained, where the agency admits that the information was not provided.

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### DECISION

SCB Solutions, Inc. (SCB), of Arlington, Virginia, requests reconsideration of our November 5, 2014, dismissal of its protest of the issuance of a delivery order to XTec, Inc., of Miami, Florida, under request for quotations No. VA119-14-Q-0240 (RFQ91505), issued by the Department of Veterans Affairs (VA) for personal identity verification (PIV) cards. SCB contends that the VA's corrective action did not address the concerns raised in SCB's protest, and argues that its contentions about the procurement were accurate.

We grant the request for reconsideration and sustain the protest.

## BACKGROUND

The VA issued the RFQ via the General Service Administration's eBuy system to holders of Federal Supply Schedule (FSS) 70 contracts, pursuant to the procedures set forth in Federal Acquisition Regulation (FAR) subpart 8.4. The solicitation contemplated the issuance of a single, fixed-price delivery order for a total of 400,000 PIV cards on a brand name or equal basis, comprising five production runs of 80,000 cards, each including a preliminary test run of 100 cards. Within 30 days of award, the awardee was to deliver 100 test cards, then to deliver the remainder of the first production run within 30 days of notification that the agency accepted the test cards. RFQ at 4.

The RFQ also stated that the delivery order would be issued to the vendor providing the lowest-priced, technically acceptable quotation. In this regard, the RFQ advised that the contents of the quotations, to include 10 product test samples and 6 sets of technical product literature, would be evaluated to determine if the quoted products satisfied all of the minimum technical requirements in the product description. Id. at 20. As relevant here, the product description required the PIV cards to meet various requirements, including that the cards: support the intent, regulations, and directives of Homeland Security Presidential Directive 12 (HSPD-12); conform to VA PIV card reader standards; and be able to function in the current VA PIV System. Id. at 9-10.

The VA received seven quotations, including those submitted by SCB and XTec. SCB offered brand name equivalent cards for \$2,292,000, while XTec offered brand name cards for \$2,332,000.<sup>1</sup> The VA evaluated SCB's sample PIV cards and concluded that the cards were technically unacceptable because they did not meet the requirement that the cards support the intent, regulations, and directives of HSPD-12. Agency Report (AR), Exh. 2, Basis for Award Decision, at 4. In this regard, the evaluation noted that the cards would not function within the PIV card management system without programming changes and card profiles being created, which would take 18 months.<sup>2</sup> Id. On September 10, 2014, the VA issued the delivery order to XTec, as the vendor offering the lowest-priced, technically acceptable quotation. VA Response to Recon. Request at 2.

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<sup>1</sup> Another vendor quoted a lower price than SCB but was eliminated from the competition for failing to provide samples.

<sup>2</sup> The evaluation also noted that SCB did not provide 6 sets of technical product literature as required by the RFQ. Id. The protester stated that the product literature was both personally delivered and e-mailed, and provided receipts to demonstrate that both the hard copy and the e-mail were received by the appropriate VA officials. See Comments at 2, Attachs. 1 & 2.

On September 22, the VA notified SCB of its selection decision, and on the same day, SCB, a small business, protested to our Office, arguing that its lower-priced product met the requirements of the RFQ. Protest at 2.

On October 21, the VA submitted its report, in which it explained its testing process and maintained SCB's proposal was technically unacceptable. In SCB's comments on the agency's report, SCB argued that the PIV cards it proposed were approved by GSA as compliant with HSPD-12. SCB also argued that the VA failed to provide the appropriate information for vendors to pre-load on the PIV cards to enable the test cards to pass the agency testing process described in its report. Comments at 4.

We granted the agency's request to respond to SCB's comments, and on November 4, the VA advised our Office that it decided to terminate XTec's contract for the convenience of the government. The VA also stated that at the time the stay of performance was executed XTec had produced all of the cards, but had not delivered them to the VA. VA E-mail, Nov. 4, 2014. On November 5, we dismissed SCB's protest as academic.

## DISCUSSION

In requesting reconsideration, SCB argues that, in dismissing its protest as academic, we failed to consider the consequences of the VA's termination and that the VA's decision to take corrective action enabled the agency to avoid resolution of the protest. In this regard, SCB contends, citing to Saltwater, Inc.-Recon. & Costs, B-294121.3, B-294121.4, Feb. 8, 2005, 2005 CPD ¶ 33, that the protest is not academic where, as here, the corrective action provides no meaningful remedy. Recon. Request at 3. SCB further contends that, by terminating XTec's contract for the convenience of the government after XTec produced all of the PIV cards, FAR § 12.403(d) permits the VA to receive the PIV cards and pay XTec 100 percent of the contract price, thus circumventing GAO's protest process.<sup>3</sup> Id. at 2.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.14(a). We have held that information not previously considered means information that was not available during the earlier

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<sup>3</sup> FAR § 12.403(d)(1)(i)(A) provides that when the contracting officer terminates a contract for commercial items for the Government's convenience, the contractor shall be paid the percentage of the contract price reflecting the percentage of the work performed prior to the notice of the termination for fixed-price or fixed-price with economic price adjustment contracts.

protest. Norfolk Dredging Co.,--Recon., B-236259.2, Oct. 31, 1989, 89-2 CPD ¶ 405 at 2. SCB's request meets this standard for reconsideration.

Subsequent to the filing of SCB's request for reconsideration, we learned that on September 23--the same day we notified the VA of SCB's protest<sup>4</sup>--the VA modified XTec's contract to require one bulk delivery of the 400,000 PIV cards.<sup>5</sup> We also learned that the VA did not direct XTec to stay performance until two days after receiving notice of the protest. VA E-mail to GAO, Jan. 20, 2015; VA Response to Recon. Request at 2. We further learned that the VA had no need to resolicit the requirement after terminating the contract for the convenience of the government because it had sufficient stock of the cards after accepting delivery of, and paying XTec for, the full quantity of 400,000 cards. VA E-mail to GAO, Jan. 22, 2015.

In light of this new information, together with reconsideration of the conclusions reached by our Office, we agree with SCB that, as in Saltwater, Inc.--Recon. & Costs, *supra*, the VA's corrective action did not remedy the concern raised in the protest. The VA's decision to terminate the contract after modifying the contract to accelerate delivery, and after the awardee substantially performed (and where the agency had no intention of resoliciting for its requirements) is not the commonly-understood meaning of an agency's representation that it is terminating the underlying contract. As a result, we grant SCB's request that we reconsider our decision to dismiss its protest as academic.

We now turn to the merits of SCB's protest. SCB contended, in its earlier protest, that the VA erred in determining that SCB's PIV cards did not meet the requirements of the RFQ. SCB argued that the VA's evaluation methodology was faulty because the solicitation did not contain the information needed for the cards to pass the testing process described in the agency's report.<sup>6</sup> Comments at 4.

As a general rule, a procuring agency must provide sufficient information in a solicitation so that offerors can compete intelligently and on a relatively equal basis. IBM Global Business Servs., B-404498, B-404498.2, Feb. 23, 2011, 2012 CPD ¶ 36 at 8; Meridian Mgmt. Corp., B-285127, July 19, 2000, 2000 CPD ¶ 121 at 6. Based on the record before our Office, we find that the RFQ did not reasonably provide offerors adequate information to compete intelligently. Specifically, the VA acknowledges that the RFQ "did not set forth what is required in order for a smart card to perform in the current VA PIV System." VA E-mail, Jan. 22, 2015. Further,

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<sup>4</sup> Our records indicate that we notified the VA of SCB's protest at 11:00 a.m. on September 23.

<sup>5</sup> The VA had already approved the initial 100 test cards.

<sup>6</sup> SCB raised additional arguments in its comments; however, we need not address these arguments in light of the remainder of this decision.

this solicitation deficiency was latent--that is, the deficiency was not apparent until the VA submitted its agency report showing that the evaluation methodology required offerors to rely on information that the agency never provided. Finally, we find that this latent solicitation deficiency resulted in competitive prejudice to SCB because it resulted in the elimination of SCB's quote, which was otherwise in line for award, from the competition. Accordingly, we sustain SCB's protest.

#### RECOMMENDATION

Because this delivery order has been fully performed and the agency does not plan to resolicit for its requirements, we recommend that SCB be reimbursed the costs of preparing its quotation, as well as the reasonable costs of filing and pursuing its protest and its request for reconsideration. 4 C.F.R. §§ 21.8(b), (d). SCB should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The request for reconsideration is granted; the protest is sustained.

Susan A. Poling  
General Counsel