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Decision

Matter of: ANAMAR Environmental Consulting, Inc.

File: B-411854.6; B-413286

Date: September 14, 2016

Alan I. Saltman, Esq., Stephen J. Kelleher, Esq., and Kathleen Y. Hsu, Esq., Smith, Currie & Hancock LLP, for the protester.

Susan E. Symanski, Esq., and John F. Kasbar, Esq., Department of the Army, for the agency.

Kenneth Kilgour, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests challenging agency's cancellation of solicitation following corrective action in response to a protest is denied where the record shows that the agency reasonably concluded that the agency could perform the requirement in-house.

DECISION

ANAMAR Environmental Consulting, Inc., of Gainesville, Florida, protests the cancellation of request for proposals (RFP) No. W912EP-15-R-0006 issued by the Department of the Army, U.S. Army Corps of Engineers (Corps), for sampling, testing, and analysis of marine sediments. The protester asserts that the agency has no reasonable basis to cancel the RFP, that the cancellation is a pretext to avoid resolving the protest that preceded the cancellation, and that the agency is precluded by law from performing the work in-house.

We deny the protests.

BACKGROUND

The Corps issued the solicitation on January 27, 2015, for the award of a single fixed-price, indefinite-delivery/indefinite-quantity (ID/IQ) contract, with a 12-month base period and four 12-month options, to the offeror whose proposal represented the best value to the government. RFP at 1, 3-7, 11, 194. The primary objective of the solicitation is the performance of sampling, testing, and analysis in compliance

with the Marine Protection, Research and Sanctuaries Act (MPRSA) sections 102 and 103. RFP at 9.

By way of background, the Corps is responsible for executing dredging projects, which sometimes requires the disposal of dredged material into the ocean. Agency Request for Dismissal at 2. Pursuant to MPRSA, the Corps is required to sample, test, and analyze marine sediments when considering ocean disposal of the dredged material. Id. The Environmental Protection Agency (EPA) regulates the transportation of material for the purpose of ocean disposal, and the material itself, under the provisions of the MPRSA. Agency Report (AR), Second Decl. of Ocean Disposal Coordinator at 1. Section 103 of the MPRSA authorizes the Corps to issue permits in coordination with the EPA, which are required prior to the ocean disposal of dredged material. Contracting Officer's Statement of Facts (COSF) at 2.

The EPA and the Corps have developed a three-tiered approach to evaluate the suitability of dredged material for ocean disposal. Under this three-tiered testing, Tier I evaluations determine whether compliance with EPA regulations can be achieved on the basis of existing information, where site conditions have not changed significantly since the prior evaluation. AR, Second Decl. of Ocean Disposal Coordinator at 1-2. Tier II evaluations provide a reliable, rapid screen for potential impact, and thereby eliminate the need for further testing; further testing would be required if the dredged material were found to be out of compliance with water quality criteria. Id. at 2. Tier III evaluations include a determination of water column toxicity and an assessment of contaminant toxicity and bioaccumulation from the material to be dredged; new dredging projects require a Tier III evaluation. Id. at 2, 3.

Once a Tier III evaluation is complete, the determination that the Corps has complied with various requirements is made in the form of a section 103 evaluation (referring to section 103 of MPRSA).¹ AR, Second Decl. of Ocean Disposal Coordinator at 3. Based upon information gathered from the Tier II and Tier III evaluations, the Corps may issue a permit for the disposal of the dredged material for an initial three-year period. COSF at 2-3. The Corps may obtain three 3-year extensions of the original permit for dredging; the type of evaluation required to receive the extension is dependent on changes to the project or the surrounding environment, and a Tier I evaluation is sometimes sufficient to receive a three-year extension. AR, Second Decl. of Ocean Disposal Coordinator at 3.

¹ In contrast, section 102 evaluations involve work such as designation of ocean disposal sites, expansion of existing disposal sites, and completion of and/or updating and revising site management and monitoring plans. AR, Second Decl. of Ocean Disposal Coordinator at 5.

As relevant to this protest, the RFP stated that the sampling, testing, and analysis “services required by this contract will be primarily provided for the customers of the [Corps], South Atlantic Division,” and that “work can be awarded for projects located outside the geographical boundary at the specific request of a customer.” RFP at 9. The South Atlantic Division consists of five Districts: Charleston, Jacksonville, Mobile, Savannah, and Wilmington. AR at 4 n.2. The Jacksonville District’s area of responsibility covers parts of Florida, Georgia, Puerto Rico, and the U.S. Virgin Islands. Id. at n.3. The contract line items described the geographic area to be served as Florida, Georgia, and Puerto Rico. See RFP at 3-7. The RFP’s pricing schedule required pricing for Florida, Georgia, Puerto Rico, and the U.S. Virgin Islands. Id. at 29, 36. The total value of the task orders issued under the contract was not to exceed \$10 million. Id. at 8.

This procurement has been the subject of multiple protests. On April 18, 2016, ANAMAR protested the agency’s award of a contract to Water & Air Research, Inc., of Gainesville, Florida. We dismissed that protest when the agency indicated that it was cancelling the underlying solicitation and contract award, and re-soliciting the requirement due to a change in the agency’s needs. ANAMAR Envtl. Consulting, Inc., B-411854.5, June 9, 2016 (unpublished decision). This protest followed.

DISCUSSION

ANAMAR argues that the agency has no reasonable basis to cancel the RFP and that the cancellation is a pretext to avoid resolving the protest that preceded the cancellation. Protest at 2-3; Comments at 1. The agency argues that it reasonably canceled the solicitation because its requirements for these services are so diminished that the requirement can now be performed by the Corps’ Engineer Research and Development Center (ERDC). AR at 1-2. As discussed below, based on our review of the record, we find that the agency’s cancellation was reasonable.

As a general rule, our Office does not review agency decisions to cancel procurements and instead perform the work in-house, because such decisions are a matter of executive branch policy. Inalab Consulting, Inc.; Solutions by Design II, LLC, B-413044 et al., Aug. 4, 2016, 2016 CPD ¶ 195 at 7; Mastery Learning Sys., B-258277.2, Jan. 27, 1995, 95-1 CPD ¶ 54 at 2. However, where, as here, 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 or to avoid resolving a protest--we will closely examine the reasonableness of the agency’s actions in cancelling the procurement. Inalab Consulting, Inc.; Solutions by Design II, LLC, supra; Griffin Servs. Inc., B-237268.2 et al., June 14, 1990, 90-1 CPD ¶ 558 at 3, recon. denied, General Servs. Admin.--Recon., B-237268.3 et al., Nov. 7, 1990, 90-2 CPD ¶ 369 at 2. Notwithstanding such scrutiny, the reasonableness standard applicable to cancellation of a solicitation remains

unchanged. Computers Universal, Inc., B-410790.2, Feb. 25, 2015, 2015 CPD ¶ 83 at 2-3.

The Corps explains that it has concluded there is a reduced need for sampling, testing and analysis due to an overall transition from the planning and testing phase to the actual dredging work itself, and that only four section 103 MPRSA evaluations of dredged material will be required. Request for Dismissal at 3, citing Decl. of Ocean Disposal Coordinator at ERDC at 2-3. Further, although the Jacksonville District has generally used contracts for the sampling, testing, and analysis of marine sediments, since 2012 it has also utilized ERDC civilian employees to supplement the work. Id. at 3; citing Decl. of Research Biologist at ERDC at 2. As a result, the agency determined that ERDC could perform the work for the Jacksonville District over the next five years with its current staffing levels. Id.

The protester argues that the agency's cancellation is improper because there has been no change in the agency's needs, and because the agency's rationale for cancellation is based on an unreasonable estimate of the volume of work. Protest at 2-3, 5-9. Specifically, the protester challenges the agency's determinations regarding: the geographic scope of the RFP; whether the agency will have a requirement for section 102 evaluations; and the number of Tier III section 103 evaluations that will be required. We address each of these disputes in turn and find, based on our review of the record, that the agency's cancellation was reasonable.

Geographic Scope

The protester first asserts that the scope of the cancelled solicitation includes requirements for all of the South Atlantic Division, not just the Jacksonville District, and therefore the agency's forecast of the need to perform only four evaluations in-house is unreasonable. Comments at 12-14. ANAMAR cites as support for its assertion language in the RFP that "services required by this contract will be primarily provided for the customers of the [Corps], South Atlantic Division." Comments at 12, quoting RFP at 9.

The Corps contends this procurement was not structured to include all of the work in the South Atlantic Division under one contract. AR at 4. The agency argues that, while the solicitation contained an "errant" statement that the services provided would be for the South Atlantic Division, see RFP at 9, all of the actual contract line items identified refer to the Jacksonville District, which includes service areas in Florida, Georgia, and Puerto Rico. AR at 4-5, citing RFP at 3-7. Further, as noted above, the RFP's pricing schedule required pricing for Florida, Georgia, Puerto Rico, and the U.S. Virgin Islands, all of which are part of the Jacksonville District. RFP at 29, 36.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. Pate Constr. Co., B-410211, Nov. 17, 2014, 2014 CPD ¶ 341 at 3. Here, the solicitation addresses pricing in the contract line items and in the more detailed pricing schedule. As noted above, both the contract line items and the pricing schedule request pricing only for areas within the Jacksonville District service area. Nowhere in the solicitation are offerors requested to provide pricing for requirements in any district other than Jacksonville. Where the agency restricts pricing to locations in the Jacksonville District and the agency attests that its intent was to limit the solicitation to requirements in that district, we see no merit in ANAMAR's assertion that the requirement included all of the South Atlantic Division. Therefore, this argument fails to provide a basis to find the agency's estimate of the work, and the rationale for cancellation of the solicitation, unreasonable.

Section 102 Evaluations

The protester also challenges the Corps' projection that the agency will only need section 103 evaluations over the next five years, and will not have a need for section 102 evaluations. Comments at 15. The agency asserts that, although the solicitation's scope of work included section 102 requirements, some categories of section 102 work, such as site management and monitoring work, have and will continue to be performed by the Jacksonville District. AR, Second Decl. of Ocean Disposal Coordinator at ¶ 9. For that reason, the Corps claims that it has reasonably projected that the Jacksonville District will not have the need, over the next 5 years, to contract out any work required by section 102. Id.

While ANAMAR concedes that the Corps has traditionally performed site management and monitoring work in-house, the protester argues that on the last ID/IQ contract, it performed a total of three task orders for the Jacksonville District for section 102 work involving designation and monitoring of Ocean Dredged Material Disposal Sites (ODMDS). Comments at 16, citing Attach. B. The value of those three task orders was \$333,729. See Comments, Attach. B. The protester argues that, while the Corps' contracting officer and the Ocean Disposal Coordinator state that similar work is not projected for the Jacksonville District, "the Corps has not proven that similar orders would not be placed at any time during the next five years." Comments at 16-17.

Even under ANAMAR's analysis of the Corps' historical requirements, less than \$350,000 in ODMDS task orders for the Jacksonville District were issued over the course of the last 5-year ID/IQ contract. Comments, Attach. B. In three of those 5 years, no ODMDS task orders were issued. Id. On this record, we have no basis to find unreasonable the Corps' assertion that it does not anticipate the award of any ODMDS task orders in the Jacksonville District over the next 5 years.

Tier III Evaluations

The remaining area of dispute is the projected agency requirement for only four Tier III, section 103 MPRSA evaluations. ANAMAR identifies “between 20 and 24” dredging permit renewals for Tier III evaluations that it asserts will be required within the next 5 years within the Jacksonville, Charleston, and Savannah Districts. Comments at 11, citing Attach. D. However, the Corps anticipates only four such projects in the Jacksonville District: Port Everglades, Mayport Naval Station, Port Canaveral, and Tampa/Manatee Harbor. COSF at 3, citing Second Decl. of Ocean Disposal Coordinator.

Throughout its analysis of the Corps’ needs, ANAMAR speculates that it can prepare a more accurate estimate of the Corps’ requirements than can the Corps. For example, ANAMAR asserts that the Corps will require a new permit for Tier III sampling for Manatee Harbor, Florida. Comments, Attach. D, at 1. The Corps argues that there is only a “slight likelihood of a Tier III sampling event in the next 5 years.” AR, Second Decl. of Ocean Disposal Coordinator, Attach. 2, at 1. Rather, the Corps maintains, material is likely to continue to be disposed of upland, and, if Tier III testing is required, it will be combined with testing for Tampa Harbor, one of the four locations that the Corps agrees will require Tier III testing. Id. In response, the protester speculates that if the harbor deepening is funded, then the agency will require Tier III testing, see Comments, Attach. D, at 1, but the Corps explains that there is no certainty that the deepening will, in fact, be funded. ANAMAR also argues that, historically, Tampa and Manatee have not been combined for section 103 testing, but the protester does not dispute that the requirements could be combined. ANAMAR further alleges that a Tier III evaluation will be required for possible new work or maintenance dredging, but recognizes that the new work is an uncertain requirement.

The agency and the protester also disagree on the Corps’ future requirements for Canaveral Harbor. While both ANAMAR and the Corps agree on the need for Tier III testing in fiscal years 2017 or 2018, the agency explains that it plans to conduct Tier I testing of sediment. AR, Second Decl. of Ocean Disposal Coordinator, Attach. 2, at 1. ANAMAR, however, believes that Tier III testing will likely be required due to suspected toxicity. Comments, Attach. D, at 2.

We considered these examples, and the numerous others, in which the protester expresses disagreement with the accuracy of the agency’s assessment of its upcoming requirements. The protester asks GAO to adopt ANAMAR’s estimate of the agency’s future requirement, which is based on what the protester asserts is a more reliable gauge of the Corps’ needs. However, a protester’s disagreement with the agency’s judgment concerning its needs and how to best accommodate them does not demonstrate that the agency’s judgment was unreasonable. See Gallup, Inc., B-410126, Sept. 25, 2014, 2014 CPD ¶ 280 at 5. Our Office has consistently held that an agency may cancel a solicitation when the agency determines that the

solicitation does not accurately reflect its needs. Social Impact, Inc., June 29, 2016, B-412655.3, 2016 CPD ¶ 176 at 3. Moreover, we have also previously recognized that avoiding procuring duplicative services may reasonably support a decision to cancel a solicitation. Id.

Here, the agency has determined that at least some of the effort currently encompassed by the solicitation can be accomplished at no additional cost to the agency; this is sufficient for us to conclude that the agency's cancellation of the solicitation is reasonable. See Inalab Consulting, Inc.; Solutions by Design II, LLC, supra.

Performance of Work by the Corps

ANAMAR also challenges the legality of the agency's decision to perform the work in-house, asserting that the Corps' actions violate the Economy Act, 31 U.S.C. § 1535. Protest, June 17, 2016, at 5-6. Under the Act, a major organizational unit within an agency may place an order with a major organizational unit within the same agency for goods or services, provided certain requirements are met. See 31 U.S.C. § 1535(a)(1)-(4). The agency argued that the Economy Act is inapplicable here because the Jacksonville District and ERDC are offices within the same major organizational unit--the Corps--and that therefore the Corps may place an order for services with ERDC. Request for Dismissal at 2, 4. The protester offered no response to the agency's argument, and we therefore consider this argument abandoned, and we will not further consider it. McKissack-URS Partners, JV, B-406489.7, Jan. 9, 2013, 2013 CPD ¶ 25 at 4 n.2.

The protests are denied.

Susan A. Poling
General Counsel