



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Delaware Resource Group of Oklahoma, LLC

File: B-299165

Date: February 26, 2007

Jared B. Cawley, Delaware Resource Group of Oklahoma, LLC, for the protester.
Alton E. Woods, Esq., and Sherry K. Kaswell, Esq., Department of the Interior, for the agency.

Linda C. Glass, Esq., and Glenn Wolcott, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Agency properly canceled invitation for bids and terminated protester's contract awarded thereunder where the agency reasonably determined that there were material flaws in the procurement process on which award to the protester was based.

DECISION

Delaware Resource Group of Oklahoma, LLC (DRG) protests corrective action taken by the Department of Interior in canceling invitation for bids (IFB) No. RMG00060009, for support services related to distribution of Delaware Indian judgment funds, and terminating a contract awarded to DRG under that solicitation. DRG maintains that the agency's initial source selection decision and award to DRG was proper and that the corrective actions are arbitrary and capricious.

We deny the protest.

In June 2006, the Department of the Interior, Bureau of Indian Affairs, published the IFB at issue here as a 100 percent Service-Disabled Veteran-Owned Small Business (SDVOSB) set-aside, seeking support services associated with the development of a per capita payment roll for the distribution of Delaware Indian judgment funds. Consistent with the sealed bidding provisions of Federal Acquisition Regulation (FAR) Part 14, the IFB stated: "[c]ontract award will be made to the lowest responsive and responsible bidder." IFB at 2. Directly conflicting with that IFB provision, as well as with the FAR Part 14 requirements regarding sealed bids, the IFB also stated: "The contract will be awarded on the basis of the lowest and best

responsive bid.” IFB, attach. A, ¶ 4.0. Nothing in the solicitation identified any factors on which a determination regarding the “best” responsive bid would be based.

On or before the July 26 bid opening date, the agency received the following three bids:

Upper Mohawk, Inc.	\$632,680
DRG	\$670,820
Central Research	\$974,850

Agency Report (AR), Tab 9, Contracting Officer’s Memo to File (Aug. 21, 2006).

Although DRG did not submit the lowest bid, the contracting officer selected DRG for contract award on the basis that it had submitted the “best responsive bid” and that DRG’s price was “fair and reasonable.” Id. The contracting officer explained that her decision that DRG had submitted the “best” bid reflected her assessment of “the general quality of [DRG’s] submitted written materials pertaining to [the] solicitation, accomplishing the scope of work, qualifications, [and] experience,” along with the fact that DRG’s bid included a cost breakout identifying the “cost of staff, equipment, supplies and other needs for this project.” Id. The contracting officer further noted that the bid submitted by Upper Mohawk, the lowest priced bidder, “did not contain information about judgment fund expertise or the staff’s qualifications or experience and no cost[] break out was submitted.” Id. A contract was awarded to DRG on August 31.

In October, Upper Mohawk filed an agency-level protest complaining that award to DRG was improper for various reasons, including the fact that DRG had not submitted the lowest bid and was not an SDVOSB. AR, Tab 14, Upper Mohawk Agency-level Protest. Thereafter, the agency concluded that award to DRG had been improper and, on November 6, terminated DRG’s contract for the convenience of the government. The agency plans on resoliciting the requirement after correcting material errors in the solicitation. On November 9, DRG filed an agency-level protest; prior to receipt of the agency’s response to that protest, DRG filed this protest with our Office on November 22.

DRG complains that termination of its contract was improper for various reasons, including that the agency’s inclusion of the solicitation clause establishing the procurement as an SDVOSB set-aside was “inadvertent” and—while not disputing the fact that it failed to submit the lowest bid—maintains that termination of its contract 2 months after award was “arbitrary and capricious.”¹

¹ The contracting officer expressly states: “We recognize our obligation to pay start-up costs or other costs [DRG] incurred as a result of receiving the award, consistent (continued...)”

Contracting agencies have broad discretion to take corrective action where they determine that such action is necessary to ensure a fair and impartial competition. Where the agency has a reasonable concern that there were material errors in a procurement, it is well within the agency's discretion to correct those errors. Alfa Consult S.A., B-298288, B-298164.2, Aug. 3, 2006, 2006 CPD ¶ 127 at 2; Patriot Contract Servs., LLC, B-278276.11 et al., Sept. 22, 1998, 98-2 CPD ¶ 77 at 4. Specifically, an agency may resolicit previously competed requirements where the record shows the agency's decision to take this action is made in good faith. Federal Sec. Sys. Inc., B-281745, Apr. 29, 1999, 99-1 CPD ¶ 86 at 5.

Here, nothing in the record suggests that the agency's corrective action was unreasonable, or that the agency acted other than in good faith. Specifically, the contracting officer acknowledges that the solicitation "should not have contained the language" regarding award to the "best" bid or, alternatively, that the solicitation should have been issued as a request for proposals pursuant to the negotiated procurement procedures of FAR Part 15. Further, there can be no dispute that the contracting officer's selection of DRG's bid was improperly made on the basis of unstated evaluation factors. Finally, there is no dispute that DRG is not an SDVOSB and therefore is not eligible for award under the SDVOSB set-aside.² On this record, we have no basis to question the reasonableness of the agency's corrective action to revise the solicitation to correct errors which led to the improper award to DRG and to allow all interested parties to compete.

The protest is denied.

Gary L. Kepplinger
General Counsel

(...continued)

with the Termination for Convenience clause, FAR 52.249-02." Contracting Officer's Statement at 3.

² Apparently, none of the bidders qualified as SDVOSB vendors. The agency intends to issue the new solicitation on an unrestricted basis.