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## Decision

**Matter of:** Zegler, LLC

**File:** B-410877; B-410983

**Date:** March 4, 2015

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Joseph A. Whitcomb, Esq., and Daniel C. McAuliffe, Esq., Whitcomb Law, PC, for the protester.

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Paula A. Williams, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest of corrective action taken in response to a post-award, agency-level protest is denied where agency reasonably determined that the integrity of the procurement process had been undermined by errors made by the agency in its evaluation of proposals.

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### DECISION

Zegler, LLC, of Cottdale, Alabama, protests the corrective action taken by the Department of Veterans Affairs (VA) in response to an agency-level protest filed by Coburn Contractors, LLC, of Montgomery, Alabama, against VA's award of a contract to Zegler under request for proposals (RFP) No. VA101V-14-R-1063.

Zegler alleges that the agency's corrective action, which consisted of terminating its contract, canceling the RFP, and resoliciting the agency requirements using sealed bid procedures, is unreasonable and an abuse of agency discretion. Zegler also protests the agency's issuance of invitation for bids (IFB) No. VA101V-15-B-0139 for the same requirements.

We deny the protest.

The RFP, issued on August 22, 2014 as a set-aside for service-disabled veteran-owned small businesses (SDVOSB), sought proposals for a contractor to perform various repairs and renovation services at the VA's Regional Office in Montgomery, Alabama. The RFP provided for award of a fixed-price contract to the offeror with the proposal that represented the best value to the government based on

consideration of the following evaluation factors: (1) corporate project experience; (2) key personnel experience; (3) past performance; and (4) price. The solicitation also established that when combined, the non-price factors would be given equal weight to price in the best-value tradeoff process. RFP at 58.

As it relates to the protest, the RFP indicated the magnitude of the work required under the solicitation to be between \$500,000 and \$1 million. Id. at 1. Under the corporate project experience evaluation factor, however, offerors were to demonstrate relevant corporate experience on projects “within the same magnitude of construction (between \$25,000 and \$100,000).” Id. Similarly, under the key personnel experience evaluation factor, the RFP required offerors to demonstrate that their proposed key personnel had experience with projects that were “the same magnitude of construction (between \$25,000 and \$100,000).” Id. at 59.

The VA received proposals from four offerors by the September 22, 2014 closing date. After evaluating proposals, the agency selected Zegler’s proposal for award at a price of \$738,065. Award was made to Zegler on October 27 and the agency notified the unsuccessful offerors of the award decision. After receiving a debriefing, Coburn filed an agency-level protest on November 4 challenging the award to Zegler on the basis that the agency had miscalculated Coburn’s corporate experience and the experience of its key personnel.

In reviewing the procurement, the VA found that the agency had not evaluated proposals under the evaluation criteria set forth in the solicitation. Specifically, the contracting officer recognized that there was a disconnect between the value of the work actually required by the solicitation (between \$500,000 and \$1 million), which the agency used as the basis for evaluating offerors’ corporate experience, and the experience of their key personnel, and the actual terms of the solicitation, which established relevant experience as projects with a magnitude ranging between \$25,000 and \$100,000. Contracting Officer’s Statement of Fact (Dec. 3, 2014); Initial Agency Report (AR) exh. 4, Source Evaluation Technical Evaluation Sheet, at 1-2.

In order to remedy the apparent disconnect between the solicitation’s evaluation terms and the agency’s actual requirements, the contracting officer decided to take corrective action. Specifically, the VA terminated Zegler’s contract, and issued an amendment canceling the RFP, which advised potential offerors that the agency would resolicit its requirements using sealed bidding procedures. The agency issued the new solicitation on November 24, with bid opening scheduled for December 29, 2014. Initial AR exh. 5, amend. 1 (Nov. 21, 2014). The new solicitation simply indicates that the magnitude of the required work is between \$500,000 and \$1 million. See IFB at 1.

Zegler argues that the agency’s corrective action was unreasonable and prejudicial to Zegler where its initial price had been disclosed to the other offerors. According

to the protester, the agency “failed to document its deliberation process or explain why its action was necessary to ensure fair and impartial competition.” Protester’s Comments at 3 (Jan. 5, 2015). In its view, the agency has made no showing that the alleged evaluation errors were prejudicial to the other competing offerors; therefore, the agency unreasonably terminated the award to Zegler.

In a negotiated procurement, such as the one here, a contracting agency has broad discretion in deciding whether to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. Major Contracting Servs., Inc., B-400737.2, Dec. 17, 2008, 2008 CPD ¶ 230 at 2. A reasonable basis to cancel exists when, for example, an agency determines that a solicitation does not accurately reflect its needs. Logistics Solutions Group, Inc., B-294604.7, B-294604.8, July 28, 2005, 2005 CPD ¶ 141 at 3. It is the responsibility of the contracting agency to determine its requirements, and our Office will defer to the activity’s judgment. Id. Moreover, an agency may properly cancel a solicitation no matter when the information precipitating the cancellation first surfaces or should have been known, even if the solicitation is not canceled until after offers have been submitted and evaluated, after a contract has been awarded or, as here, after the filing of a protest against the award. See Global Solutions Network, Inc., B-289342.4, Mar. 26, 2002, 2002 CPD ¶ 64 at 3.

In our view, the corrective action here is well within the broad discretion afforded to contracting agencies. As noted previously, due to the agency-level protest, the VA identified a fundamental disconnect between the RFP’s stated basis for evaluating offeror’s experience and the agency’s actual requirements. Accordingly, it was within the agency’s discretion to cancel the procurement based on its concern that the procurement process was compromised by errors inherent in the solicitation. Since nothing in Zegler’s protest demonstrates that the agency’s corrective action was unreasonable or reflected an abuse of discretion, we deny Zegler’s protest regarding the agency’s decision to terminate the award, to cancel the RFP, and to conduct a new competition.

To the extent Zegler argues that because its contract prices had been disclosed, reopening the competition would foster an impermissible auction and put Zegler at a competitive disadvantage, we find no merit to this allegation. We have previously noted that the Federal Acquisition Regulation (FAR) does not prohibit auctions, and agencies are not otherwise prohibited from taking corrective action in the form of a new competition where the original awardee’s prices have been disclosed. Jackson Constructor Group, B-402348.2, May 10, 2010, 2010 CPD ¶ 154 at 3; see also, FAR § 15.306(e)(3). The possibility that the contract may not have been awarded based on a fair determination of the most advantageous proposal has a more harmful effect on the integrity of the competitive procurement system than does the possibility that the original awardee will be at a disadvantage in the reopened competition. PCA Aerospace, Inc., B-293042.3, Feb. 17, 2004, 2004 CPD ¶ 65 at 4; Strand Hunt Constr., Inc., B-292415, Sept. 9, 2003, 2003 CPD ¶ 167 at 6.

Although the protester insists that the VA should take steps to mitigate the harm done to the firm, caused by the disclosure of its contract prices, before moving forward with the IFB, the protester is incorrect. We have repeatedly held that as a general matter, an agency is not required to equalize the possible competitive advantage flowing to other offerors as a result of the release of information in a post-award setting where the release was not the result of preferential treatment or other improper action on the part of the agency. Nova Techs., B-403461.3, B-403461.4, Feb. 28, 2011, 2011 CPD ¶ 51 at 4. Here, because the protester's price was properly released to its competitors in the context of a post-award debriefing as contemplated by FAR § 15.506(d)(2), and not as a result of preferential treatment or other improper action on the part of the agency, the agency was not required to equalize any competitive advantage that may have been afforded to Zegler's competitors as a result of the release of the protester's price.<sup>1</sup> Id.

The protest is denied.

Susan A. Poling  
General Counsel

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<sup>1</sup> Zegler also alleges that the VA conducted post-award discussions with Coburn in its evaluation of Coburn's proposal. We dismiss this allegation as academic where, as noted above, the agency cancelled the underlying solicitation based on the defective evaluation criteria and the agency is re-procuring the requirement under a new solicitation. We do not consider academic protests because to do so would serve no useful public policy purpose. Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132. We only consider protests against specific procurement actions and will not render to a protester what would be, in effect, an advisory decision. Id.

Moreover, to the extent Zegler has complained that the newly issued IFB is defective because bidders did not have 10 days to obtain bid bonds as required by FAR § 28.101-2, the protester is mistaken because the cited FAR provision concerns a post-award requirement and is therefore inapposite. In this regard, FAR § 28.101-2, requires agencies to insert FAR § 52.228-1, Bid Guarantee, in solicitations requiring a bid guarantee, such as the one here. FAR § 52.228-1 requires bidders to submit their bid guarantee when bids are due. The clause also establishes a 10-day period within which an awardee must execute all contractual documents and provide the government with executed performance and payment bonds, as required. Simply put, the FAR provision cited by Zegler does not establish a minimum 10-day period, pre-bid submission, for contractors to obtain a bid bond.