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**Comptroller General
of the United States**

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

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Decision

Matter of: Optimum Services, Inc.

File: B-401051

Date: April 15, 2009

Edward Kinberg, Esq., Tracey L. Vore, Esq., and R. Brent Blackburn, Esq., Kinberg & Associates, LLC, for the protester.
Steven Reed, Esq., and Douglas Hibshman, Esq., Smith, Currie & Hancock LLP, for Westwind Contracting, Inc., an intervenor.
Emily E. Parkhurst, Esq., National Park Service, for the agency.
Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency acted reasonably when it terminated protester's contract for convenience and cancelled the underlying solicitation where the solicitation's maximum estimated quantities and maximum ordering values did not reflect the agency's requirements due to a reduction in program funding.

DECISION

Optimum Services, Inc. of Okeechobee, Florida protests the decision by the Department of the Interior, National Park Service (NPS), to cancel request for proposals (RFP) No. N5297080232 for land restoration and clearing services in Everglades National Park, Florida. Optimum alleges that the agency did not have a reasonable basis to cancel the solicitation.

We deny the protest.

The RFP, issued on June 16, 2008, contemplated the award of an indefinite-delivery/indefinite-quantity contract with a 1-year base period plus four 1-year options for ecological restoration services within Everglades National Park. For each year, the RFP included a contract pricing schedule, which set forth contract line item numbers (CLIN) for specific tasks. For each CLIN, offerors were required to propose fixed prices for identified minimum and maximum estimated order quantities. The RFP provided that the government would order, at a minimum, \$2 million worth of services under the contract; the total dollar value per order would not exceed \$24 million; the total dollar value of all orders for the base year

would not exceed \$24 million; and the total dollar value of orders for each option year would not exceed \$26 million. RFP at 5.

In response to the RFP, the agency received proposals from several offerors, including Optimum and Westwind Contracting, Inc. The agency made award to Westwind and, after receiving a debriefing on September 23, 2008, Optimum filed a protest with our Office. We dismissed the protest as academic after the agency informed our Office that it intended to take corrective action, which would include conducting discussions with offerors, obtaining revised proposals, reevaluating proposals, and making a new source selection decision. Optimum Servs., Inc., B-400677, Nov. 17, 2008. On the same day that our Office dismissed Optimum's protest, Westwind filed an agency-level protest, which was denied on November 21.

After implementing its corrective action, NPS made award to Optimum. Westwind protested this award at the U.S. Court of Federal Claims, alleging that the agency failed to mitigate any unfair competitive advantage Optimum may have received as a result of the disclosure of Westwind's price during Optimum's September 23 debriefing. Westwind also alleged that the agency's evaluation of offerors' past performance and experience was flawed. The agency informed the Department of Justice that it intended to cancel the current solicitation and terminate the award to Optimum. Agency Report (AR), Tab 27, NPS Letter, Jan. 15, 2009. NPS further indicated that it intended to "solicit a new contract to better reflect its needs." Id. After the Department of Justice informed the Court of the agency's intention to cancel the solicitation, Westwind moved for dismissal of its complaint as moot. Optimum, as an intervenor, opposed the motion, arguing that there was no reasonable basis for the agency to cancel the solicitation. The Court dismissed Westwind's protest over Optimum's objection, noting that the agency's "cancellation decision is not at issue in this protest." AR, Tab 32, Westwind Contracting, Inc. v. United States, No. 09-25C (Fed. Cl.), Order of Dismissal, Jan. 22, 2009.

On January 23, 2009, Optimum filed its protest with our Office, arguing that the agency did not have a reasonable basis to cancel the solicitation.

As an initial matter, the intervenor, Westwind, requested summary dismissal of Optimum's protest. Westwind argued, in essence, that award of the contract to Optimum extinguished the underlying solicitation, so that there was no solicitation remaining for the agency to cancel; thus, according to Westwind, Optimum's challenge in fact concerns the propriety of the agency's decision to terminate its contract, a matter we generally do not review. While, as Westwind contends, we generally decline to review the termination of contracts because such actions are matters of contract administration which are appropriate for resolution by the contracting agencies and the contract appeals boards under the disputes procedure, see Bid Protest Regulations, 4 C.F. R. § 21.5(a) (2008), we will review the propriety of a termination where it flows from a defect the contracting agency perceived in the award process. In such cases, we examine the award procedures that underlie the

termination action for the limited purpose of determining whether the initial award was improper and, if so, whether the corrective action taken is proper. See Phenix Research Prods., B-292184.2, Aug. 8, 2003, 2003 CPD ¶ 151 at 3. Here, as discussed below, the agency's termination of Optimum's award flowed directly from the agency's concern that the solicitation did not accurately reflect the agency's requirements. Under these circumstances, we will review the protest which, ultimately, turns on the propriety of the agency's decision to cancel the solicitation.

NPS has identified three reasons why the solicitation should be cancelled. First, cancellation is proper because NPS failed to mitigate the unfair competitive advantage Optimum derived as a consequence of learning Westwind's price information during its debriefing. Second, NPS claims that the solicitation needs to be revised to address "unclear and/or confusing" language regarding the agency's evaluation of offerors' past performance and experience. AR at 5. Third, the agency maintains that as a consequence of a significant reduction in funding (approximately 50 percent), it needs to lower the estimated maximum order quantities for the CLINs as well as reduce the maximum order dollar values stated in the solicitation for the base period and each option period to \$10 million, from \$24 million and \$26 million, respectively. Contracting Officer's Statement at 4.

Optimum asserts that it did not in fact receive Westwind's price information during its debriefing, that there is nothing unclear or confusing about the solicitation, and that the agency's third justification does not provide a reasonable basis to cancel the solicitation because the minimum quantities will not be affected by the reduced funding.¹

In a negotiated procurement, contracting agencies enjoy broad discretion in determining whether to cancel a solicitation, and need only have a reasonable basis for doing so. ESM Group, Inc., B-400298.2, Oct. 14, 2008, 2008 CPD ¶ 190 at 2. Here, we need not review the agency's first two justifications for cancellation since the agency's third justification establishes a reasonable basis for its decision to cancel the RFP. We have held that a reasonable basis for cancellation exists where the solicitation does not accurately reflect the agency's requirements. Blue Rock Structures, Inc., B-400811, Jan. 23, 2009, 2009 CPD ¶ 26 at 2. Due to reduced funding

¹ Optimum also argues that the agency's articulated reasons for canceling the solicitation are essentially a pretext and that its decision was motivated by the agency's desire to avoid resolving Westwind's protest in court. In this regard, Optimum contends that the agency is allowing itself to be "intimidated" by Westwind and that the agency should have defended its award decision in court since Westwind's protest allegations were procedurally defective and without merit. In our view, Optimum's argument reflects mere inference and supposition, which provides no basis to question the reasonableness of the agency's actions.

levels, the agency here recognized that the solicitation did not accurately reflect its requirements given that the maximum estimated order quantities for the CLINs were overstated, as were the maximum order dollar values for the base and option periods.

The protester contends that changes to the solicitation's maximum values are immaterial because the government is only obligated under the solicitation to order the stated minimum order value (\$2 million), which remain unchanged. We disagree. Both the maximum estimated quantities for the CLINs and the maximum order values during each ordering period are provided to help offerors make informed judgments when proposing their unit prices; they could directly affect offerors' pricing strategy. Moreover, we have recognized that reducing maximum quantities can allow further competition from firms unable to perform at the originally stated quantities, but with the ability to perform at lower quantities. See, e.g., Cadre Tech., Inc.; Hubbard Assoc. of Florida, Inc., B-221430, B-221430.2, 86-1 CPD ¶ 256 at 2. Given the magnitude of the changes to these material aspects of the solicitation, the agency acted reasonably in concluding that the solicitation did not accurately state the agency's requirements and deciding to cancel the solicitation so that it could issue a new solicitation based on the revised estimates.

The protest is denied.

Gary L. Kepplinger
General Counsel