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**Comptroller General  
of the United States**

Washington, D.C. 20548

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## **Decision**

**Matter of:** Robertson Leasing Corporation

**File:** B-275152

**Date:** January 27, 1997

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Donald O. Ferguson, Esq., and Carl Payne Tobey, Jr., Esq., Gardner & Ferguson, Inc., for the protester.

Robert L. Kenny, Esq., Duckor Spradling & Metzger, for Abre Enterprises, an intervenor.

Joni M. Gibson, Esq., Department of Justice, for the agency.

Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

Cancellation of solicitation is unobjectionable where the contracting officer reasonably determined that the requirement should be recompeteted under relaxed specifications in order to increase competition and reduce costs to government, and the record does not support allegation of bad faith.

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### **DECISION**

Robertson Leasing Corporation protests the cancellation of request for proposals (RFP) No. MS-95-R-0034, issued by the United States Marshals Service (USMS), Department of Justice, for towing, storage, and disposal services for seized and forfeited vehicles in San Diego County, California. Robertson challenges the cancellation as unreasonable and argues that the agency acted in bad faith in order to avoid awarding to Robertson or its only competitor, Abre Enterprises.

We deny the protest.

The RFP was issued August 1, 1995, and contemplated the award of two indefinite delivery contracts for a base year with four 1-year options.<sup>1</sup> The RFP required the successful offeror to tow vehicles from the locations where they had been seized by

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<sup>1</sup>The RFP divided the San Diego service area into a north and a south zone, contemplating an award to an offeror that could perform the contract in each zone. The RFP was unrestricted for the south zone but set aside for small business competition in the north zone.

the government<sup>2</sup> to a facility operated by the contractor for storage until disposed of by auction or salvage. Vehicles were to be stored in an indoor or outdoor facility, depending upon value.<sup>3</sup> The RFP required offerors to submit with a technical proposal either: (1) proof of ownership of a facility, (2) a copy of a current lease to such a facility, (3) a copy of an "intent to lease" agreement, or (4) a copy of a contract to purchase a facility that would eventually meet the agency's requirements.

Six proposals were received by the extended September 18 closing date.<sup>4</sup> The technical evaluation board reviewed the proposals, discussions were held on January 22, 1996,<sup>5</sup> and best and final offers (BAFO) were submitted by March 6. Four BAFOs were determined to be technically acceptable or capable of becoming technically acceptable.

USMS had been concerned about limited competition under this solicitation because, historically, only two vendors, Robertson and Abre, have had facilities with sufficient capacity to handle the volume of vehicles in USMS custody.<sup>6</sup> USMS hoped to increase the usual level of competition by dividing the area to be serviced into two zones and allowing contractors to propose for only one zone. Then in March 1996, USMS began a review of this program and determined that if it could acquire its own land on which to operate the seizure and forfeiture services on a government-owned/contractor operated (GO/CO) basis, it could increase competition and have more options if one contractor should prove unsatisfactory. The agency started looking for possible sites to acquire or lease and, by letter dated April 17, requested that offerors extend their offers through September 30. All four offerors extended their offers. No decision was made on a course of action by September 27 and offerors were requested to extend their offers to December 31.

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<sup>2</sup>The vehicles are generally seized by the Immigration and Naturalization Service (INS), the U.S. Border Patrol, the Drug Enforcement Administration, and the Federal Bureau of Investigation.

<sup>3</sup>Vehicles with a National Automobile Dealers Association value of \$5,001 or more were to be stored indoors.

<sup>4</sup>Four proposals were for the north zone; three were for the south zone. One offeror proposed for both zones. Robertson's proposal was for the south zone. The original September 11 closing date was extended 1 week to September 18.

<sup>5</sup>Work on this procurement was temporarily halted in December 1995 and January 1996 due to the government shut-down and adverse weather conditions.

<sup>6</sup>Approximately 40 acres of land and 60,000 square feet of warehouse are needed to store the vehicles.

Three offerors extended their offers through December, while Robertson extended its offer through October 31.

In September, USMS learned that because of enforcement policy changes at INS, the number of vehicles being seized in the north zone had significantly decreased. In response, USMS issued an amendment on October 9 to revise the statement of work (SOW), incorporate updated wage determinations, revise the evaluation criteria, and request a second round of BAFOs. The revised SOW made the north zone contract for towing only and transferred all storage and disposal services to the south zone.

On the same date, USMS learned that at least one appropriate site would be available within 6 months and that handling the procurement on a GO/CO basis was a viable option. Therefore, by amendment issued October 28, USMS notified offerors that its requirements for towing, storage, and disposal services had substantially changed and the solicitation was canceled. The amendment stated that the agency anticipated issuing a new solicitation for towing, storage, and disposal services to be provided on government-owned/leased property. This protest followed.

Robertson protests that the cancellation of the RFP was improper. Specifically, the protester argues that the agency's determination to perform the work on a GO/CO basis is a pretext to avoid awarding Robertson or Abre a contract. The protester alleges that when the agency issued the solicitation, it had already decided that it "did not want to do business" with Robertson or Abre. The protester also contends that the agency's multiple requests for extensions, during the time the agency intended to cancel the solicitation, exposed Robertson to extensive continuing facilities lease expenses. Robertson argues that the "secretive, conspiratorial manner" in which the agency's determination was made demonstrates bad faith, deception, and a breach of the implied contract to fairly consider its proposal.

In a negotiated procurement, as here, the contracting officer has broad discretion in deciding whether to cancel a solicitation and to do so the contracting officer need only have a reasonable basis. See Federal Acquisition Regulation § 15.608(b) (FAC 90-31); FRC Int'l, Inc., B-260078, Apr. 10, 1995, 95-1 CPD ¶ 189. A reasonable basis to cancel exists when a new solicitation presents the potential for increased competition or cost savings. G.K.S. Inc., 68 Comp. Gen. 589 (1989), 89-2 CPD ¶ 117; Bell Indus., Inc., B-233029, Jan. 25, 1989, 89-1 CPD ¶ 81. Therefore, cancellation of a solicitation is proper where the solicitation materially overstates the agency's requirements and the agency desires to obtain enhanced competition by relaxing the requirements. Xactex Corp., B-247139, May 5, 1992, 92-1 CPD ¶ 423; HBD Indus., Inc., B-242010.2, Apr. 23, 1991, 91-1 CPD ¶ 400.

Here, we find that the agency's decision to cancel the RFP and resolicit based upon relaxed specifications was reasonable. First, the agency was concerned about the level of competition for this procurement. When the agency learned that it could buy or lease an appropriate site for storing vehicles, it could reasonably assume that the field of potential competitors would significantly increase since a major requirement of the solicitation could be eliminated. See Xactex Corp., supra; Research Analysis and Maintenance, Inc., B-236575, Dec. 12, 1989, 89-2 CPD ¶ 543.

Second, USMS reports that it currently pays Abre \$250,000 for the indoor storage for 1 year. The agency estimates that one warehouse identified as meeting its needs will cost \$125,000 to retrofit and approximately \$200 yearly for utilities. Thus, the agency believes that it will save considerable money by utilizing the GO/CO approach.

Accordingly, since greater competition and lower costs to the government are potentially available through the GO/CO approach, the agency clearly had a reasonable basis for canceling the RFP.

While Robertson surmises that the timing of the cancellation, coming after what Robertson perceives as unusual delays and repeated requests for the extension of offers, suggests bad faith on the part of contracting officials, there is no evidence to support this claim. To show bad faith, a protester must show that the contracting agency directed its actions with the specific and malicious intent to injure the protester. Telestar Int'l Corp., B-247557.2, June 18, 1992, 92-1 CPD ¶ 530. Contrary to Robertson's assertion that the agency knew in August 1995 when it issued the solicitation that it would not award a contract, the record shows, as noted above, that USMS only began discussing alternatives in March 1996 and made its determination to conduct the procurement on a GO/CO basis in October. The fact that USMS requested that offerors extend their offers before subsequently canceling the solicitation is not evidence of bad faith. The record shows that the first request for extension occurred before initial offers were submitted; the second and third requests occurred because the agency was investigating alternatives to increase competition and determined that the procurement should be held until additional information became available. The decision to cancel was made as soon as USMS determined that an alternative approach was feasible within an acceptable time frame. In any event, 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 proposals have been

submitted and evaluated and protesters have incurred costs in pursuing the award. Peterson-Nunez Joint Venture, B-258788, Feb. 13, 1995, 95-1 CPD ¶ 73; PAI Corp. et al., B-244287.5 et al., Nov. 29, 1991, 91-2 CPD ¶ 508.

The protest is denied.

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of the United States