

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

Eaton

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FILE: B-211105

DATE: December 7, 1983

MATTER OF: J.C. Yamas Company

DIGEST:

1. When protester is aware that solicitation for subcontract has been canceled, but does not know why until it receives copies of correspondence between agency and prime operating contractor under Freedom of Information Act request, protest alleging that cancellation was unreasonable, filed within 10 working days of receipt of correspondence, is timely.
2. When record does not support agency's statement that evaluation criteria and procedures were deficient, GAO will sustain protest against prime operating contractor's cancellation of solicitation for subcontract upon agency's recommendation.
3. In direct federal procurement, only a reasonable basis (as opposed to a compelling reason) is required for cancellation of a negotiated solicitation. In GAO's opinion, however, the same reasonable basis should exist before agency recommends that a prime operating contractor cancel a negotiated solicitation for a subcontract.
4. When specific government recommendation has caused prime operating contractor to breach duty to evaluate subcontractor's proposal fairly, GAO will recommend that agency instruct prime to award offeror proposal preparation costs; agency ultimately will bear this expense under prime's cost-reimbursement type contract.

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The J.C. Yamas Company protests the cancellation of request for proposals SS-10329, for construction of oil field facilities at the Department of Energy's (DOE's) Naval Petroleum Reserve No. 1 (Elk Hills) in California. Williams Brothers Engineering Company, DOE's unit operator, canceled the solicitation upon DOE's recommendation following the agency's refusal to approve a proposed subcontract award to Yamas. We sustain the protest.

The facts are not in dispute. The solicitation, issued November 3, 1982, covered labor, equipment, and incidental materials for installation, repair, and modification of natural gas handling and processing facilities at the installation. By amendment, Williams extended the due date for proposals to December 7, 1982, and amplified the evaluation criteria contained in the original solicitation.

Of six offers received and evaluated under the amended criteria, Yamas earned the highest number of technical points, 55.7 of a possible 60. The record indicates that following a favorable pre-award survey, Yamas met with Williams and executed a subcontract on December 30, 1982; the firm apparently was advised that DOE approval was required and that following this, it could expect to receive a notice to proceed in early January.

On January 23, 1983, however, the director of the Naval Petroleum Reserves in California informed Williams that DOE disapproved the proposed subcontract. DOE advised Williams that it had "significant doubts" as to the objectivity of the technical evaluation process, and that it found the transition from the amended criteria to the evaluation of proposals too generalized to support their ranking. DOE also objected to the fact that Yamas had been advised that it was the highest-ranked offeror before the agency had approved the award, and to the fact that Williams' field personnel had participated in the evaluation.

DOE therefore recommended that Williams either cancel the solicitation and "objectively rewrite the award and evaluation criteria" or "evaluate the proposals based

solely on the submission or nonsubmission of the data requested in the addendum." On February 4, 1983, Williams advised all offerors that the solicitation had been canceled due to changed requirements in the scope of work.

After numerous discussions with Williams, Yamas protested the cancellation to the director of the Naval Petroleum Reserves in California on February 24 and to our Office on March 14, 1983. DOE asserts that the protest is untimely under our Bid Protest Procedures, 4 C.F.R. § 21.2 (1983), which require filing within 10 days after the basis for a protest is known or should have been known, whichever is earlier. In this case, DOE argues, the 10 days began to run with the February 4 cancellation or, at the latest, on February 18, when Williams advised Yamas--which had been arguing, among other things, that it actually had been awarded a subcontract--that in Williams' opinion, no subcontract existed.

As Yamas points out, however, the primary basis for its protest to our office is the allegedly improper cancellation. Yamas states that it did not learn that DOE lacked a valid reason for its disapproval of the subcontract--the event that led to the cancellation--until February 22, 1983, when it received information in response to a Freedom of Information Act (FOIA) request. Yamas therefore believes its protest is timely.

We agree. Under our procedures, if a protest initially is filed with a contracting agency, any subsequent protest to our Office must be filed within 10 working days after initial adverse agency action. 4 C.F.R. § 21.2(a). We have held, however, that if a protest based entirely on FOIA materials is filed within 10 working days of receipt of those materials, it is timely. See Drinkwater Engineering, Inc., B-209386, March 14, 1983, 83-1 CPD 248. In this case, Yamas did not know the basis of its protest, i.e., DOE's reasons for refusing to approve the subcontract and recommending cancellation, until it received copies of the correspondence between DOE and Williams. Since Yamas protested to the director of the Naval Petroleum Reserves within 10 days after receipt of that information, and to our Office within 10 days after the director advised it, by letter of March 4, 1983, that he would not intervene in what he characterized as a matter between Yamas and

Williams--which constituted initial adverse agency action--we will consider the protest.

In its report to our Office, DOE points out, in considerable detail, that the lands within the Naval Petroleum Reserve No. 1 are partially owned by Chevron U.S.A., Inc. (formerly Standard Oil of California). This company, with DOE, controls the committee that determines the work to be performed by Williams, pays a proportionate share of the costs of unit operation, and is entitled to a "participating percentage" of production, the agency states.

While this is an implicit challenge to our jurisdiction, we do not believe Chevron's joint ownership and control prevents our review of the protest. Our rationale for reviewing procurements by federal grantees, expressed in our Public Notice at 40 Fed. Reg. 42407 (1975), is that such review is consistent with our statutory obligation to investigate the receipt, disbursement, and application of public funds. Since significant federal funds are involved in the operation of Naval Petroleum Reserve No. 1, we believe the same rationale is applicable here.

Moreover, DOE does not indicate that Chevron in any way participated in the decision to disapprove the proposed subcontract with Yamas or joined in the recommendation to cancel the solicitation. The ownership question is therefore not relevant to the issues raised by the protester.

Addressing the merits of Yamas' contention that DOE's actions were arbitrary and capricious, we find, first, that the record does not support Williams' initial statement to offerors that the cancellation was due to a change in the scope of work. There is absolutely no evidence of a change in requirements in any of the materials submitted to our Office.

Nor does the record support DOE's conclusions that the evaluation criteria and procedures were deficient. DOE asserts that Williams acted improperly by issuing the solicitation at the same time that it submitted it to DOE for approval, since Williams' Policies and Procedures Manual requires prior approval. Nevertheless, although formal approval was not given until early January, after offers had been received and evaluated, DOE did approve the

original evaluation criteria. As amended, the solicitation gave additional specific details as to what would be considered in determining technical competence, as well as a numerical breakdown of the points to be awarded on each sub-criterion. The offeror who ranked highest on these technical factors was to receive the maximum allowable number of points, i.e., 60, with the remaining 40 points allocated to cost. The amendment provided:

"1. Written Narrative (25 Points)

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| "A. <u>2 Points</u>
(Organization) | Should include a proposed table of the organization or its equivalent, plus how it plans to do the work. |
| "B. <u>3 Points</u>
(Experience) | Indicate the approximate dollar value of 'example' work/activities as well as number of people involved. Should include scope of experience of work (technical/field/planning/completion dates, where appropriate.) |
| "C. <u>2 Points</u>
(Experience) | Should also include descriptions of any work activities involving complex processes. |
| "D. <u>6 Points</u>
(Background) | Needs to provide information as to how well established the company is, that is: when established, services offered, forces available and equipment available, and where located. Include location of main shop(s) and code certification. |

- "E. 7 Points
(Field
Capability) This description should
detail the engineering,
B/M preparation and
material takeoff, as well
as indicate ability to
prepare field sketches
and do 'lay-out' work,
and planning.
- "F. 5 Points
(Planning
and Adminis-
trative Con-
trol) Should indicate ability
to operate an office,
properly staffed (cleri-
cal) and controlled.

"2. Detailed Resume (35 Points)

- "A. 20 Points Primary Supervisor
- "B. 15 Points Secondary Supervisor

This person [the primary supervisor] must be an engineer or one who has demonstrated abilities as indicated by previous job experiences. The person must have 10 or more years' progressive experience in the construction and maintenance of gas plants, gas gathering systems, petrochemical plants and refineries. Needs experience in both union and non-union shops. Requires 'hands-on' experience for prime responsibility for a \$5MM/year maintenance operation comprised of 20-30 people plus supporting elements."

Under these criteria, Yamas received 55.7 points when individual evaluators discussed their conclusions and arrived at an average raw score. According to the evaluation formula, the firm therefore was awarded the maximum technical score of 60.

We are puzzled by DOE's statement that the transition from the amended criteria to the evaluation of proposals was too generalized to support their ranking, and by DOE's instructions to Williams to "objectively" rewrite the criteria. In our opinion, the amended evaluation criteria are no more general or subjective than those in many solicitations issued directly by federal agencies. See, for example, Reliability Services, Incorporated, B-205754.2, June 7, 1983, 83-1 CPD 612; Holmes & Narver Services, Inc., B-208652, June 6, 1983, 83-1 CPD 605. We find that the amended criteria were sufficiently detailed and objective to advise offerors of the basis on which their proposals would be evaluated, a basic procurement requirement. See A.T. Kearney, Inc., B-205898.2, February 28, 1983, 83-1 CPD 190. The criteria themselves therefore do not provide a reasonable basis for cancellation of the solicitation.

As for application of the amended criteria, we have examined the data sheets completed by the evaluators and find that their scoring was both reasonable and consistent with listed criteria. For example, Yamas' high rating for a proposed primary supervisor was based on 14 years of "hands on" experience, including Elk Hills-type work, a degree in mechanical engineering from Cornell, and a professional license from the state of California. With regard to organization, experience, and field capability, evaluators noted that in prior work for the gas operations department at Elk Hills, the firm had met its time/cost commitments, been conscious of safety and made no mistakes in that area, had a "tight and efficient operation," and was "receptive to and cooperative with the client." In addition, Yamas was evaluated as having all necessary equipment readily available.

While Yamas was not the lowest-priced offeror, and therefore received an evaluated score of only 38 (rather than 40) in this area, the lowest offeror received a very poor technical rating. Further, Yamas' two closest competitors in the technical area each had considerably higher

evaluated costs. Although, as noted above, DOE advised Williams that the evaluation was of doubtful objectivity, we therefore find no support for this conclusion in the record.

Nor do we believe that DOE can, at this time, object to the composition of the evaluation panel. The record indicates that DOE was advised in advance of its membership, raised no objection to the inclusion of Williams' field personnel then and in fact ignored a request by Williams that DOE and Chevron send representatives to sit on the panel. This participation apparently would not have been difficult because, according to Yamas, Williams and DOE staff members occupy the same single story office building at Naval Petroleum Reserve No. 1 and have daily contact with each other. In addition, it appears that field personnel would be well qualified to evaluate point E above, field capability.

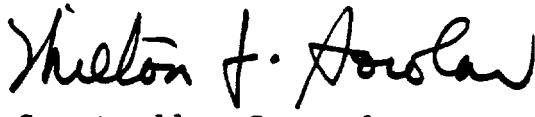
In direct federal procurement, only a reasonable basis (as opposed to a compelling reason) is required for cancellation of a solicitation when negotiation procedures are used. American Indian Health Systems, Inc., B-206218, July 12, 1982, 82-2 CPD 38. We believe that with DOE prime contractors, the same reasonable basis should exist before a solicitation for a subcontract is canceled. Given the record before us, we do not find that DOE had a reasonable basis for recommending such action here. We therefore find the cancellation improper.

In a statement dated October 20, 1983, Williams states that since cancellation of the solicitation, it has been performing gas plant maintenance work in-house, except for short term projects such as welding for which it has used other subcontractors. Further, DOE advises us that Williams does not intend to resolicit. Although remedial action in the form of reinstatement and award under the improperly canceled solicitation therefore does not appear to be practicable, we are recommending that DOE instruct Williams to award the firm its proposal preparation costs. The courts have held that this remedy is available when bidders or offerors can show that the government's conduct was arbitrary or capricious, by proving that it (1) acted in bad faith; (2) violated a statute or regulation that gives the bidder an enforceable right; or (3) had no

reasonable basis for a procurement decision. Keco Industries v. United States, 492 F.2d 1200 (Ct. Cl. 1974), citing Continental Business Enterprises, Inc. v. United States, 452 F.2d 1016 (Ct. Cl. 1971). See also American General Leasing, Inc. v. United States, 587 F.2d 54, 58 (Ct. Cl. 1978); Bayshore Systems Corporation, B-183540, October 9, 1975, 75-2 CPD 217 (finding a reasonable basis for government decisions to cancel solicitations).

While a subsequent award generally is a condition precedent to recovery of bid preparation costs, James W. and Joan Carroll, PSBCA No. 1035, May 6, 1983, 83-1 BCA ¶ 16,514, we think the fact that the services still are being acquired, either in-house or through other subcontracts, is tantamount to such an award. The fact that it was actually Williams who breached an implied contract to consider Yamas' proposal fairly does not prevent recovery, since in this case Williams acted on the express recommendation of the Department of Energy, and the agency ultimately will bear the expense of proposal preparation costs under Williams' cost-reimbursement type contract. Cf. J.F. Small & Co., Inc.--Reconsideration, B-207681.3, July 14, 1983, 83-2 CPD 89 (finding no legal basis for payment of proposal preparation costs where the prime contractor, rather than the government, breached a duty to evaluate proposals fairly).

The protest is sustained.

for 
Comptroller General
of the United States