



## Decision

**Matter of:** Orange Personnel Services, Inc.--  
Reconsideration; Eastex Maritime, Inc.--  
Modification

**File:** B-256164.2; B-256164.3

**Date:** January 18, 1995

J. Scott Hommer III, Esq., and Wm. Craig Dubishar, Esq., Venable, Baetjer and Howard, for the protester. Robert L. Bunner, Esq., Shapiro Fussell Wedge Smotherman & Martin, for Orange Personnel Services, Inc., the interested party seeking reconsideration. Christopher A. Muessel, Esq., Maritime Administration, for the agency. Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Cancellation of solicitation is unobjectionable where the record supports the agency's determination that its needs have changed, so that the solicited services are no longer needed.
2. Protester is not entitled to recover its bid preparation costs where it was in line for award but the solicitation was canceled before award was made, and the determination to cancel was unobjectionable.
3. Initial proposed awardee's request for reconsideration is dismissed as academic where agency cancels solicitation.

### DECISION

Orange Personnel Services, Inc. requests reconsideration of our decision in Eastex Maritime, Inc., B-256164, May 19, 1994, 94-1 CPD ¶ 340. In that decision, we sustained Eastex's protest against the Maritime Administration, Department of Transportation's (MarAd) proposed award of a contract for layberthing services for two Ready Reserve Force ships to Orange because we concluded that Orange's bid was materially and mathematically unbalanced and therefore nonresponsive. Subsequent to our decision, the agency

canceled the procurement because it was advised by the Department of Defense (DOD) that the services at issue are no longer needed. MarAd requests that we change our recommendation of award to Eastex; Eastex objects to the cancellation and requests either that we uphold our original award recommendation or modify our remedy to substitute entitlement to the costs of preparing its bid.

Under the Merchant Marine Act of 1936, 46 U.S.C. App. § 1101 et seq. (1988), and the Merchant Ship Sales Act of 1946, 50 U.S.C. App. § 1735 et seq., (1988) MarAd is charged with creating and maintaining a merchant fleet that can be converted to military use in times of national emergency. As part of this responsibility, MarAd owns and maintains a number of inactive vessels that can be activated in the event of an emergency; these vessels make up the Ready Reserve Force.

MarAd states that it was informed by the DOD, Transportation Command (Transcom) that it was planning to reposition a number of ships from the Beaumont, Houston, and Galveston, Texas area, including the two ships for which the layberthing services had been solicited under this procurement, and that the requirement to layberth these ships in this location therefore no longer exists. Accordingly, the Maritime Administrator determined to cancel the solicitation.

Eastex points out that MarAd insisted during the process of its protest (which included a hearing), that the agency had a firm expectation that its requirement for layberthing services for two ships would continue for the full 5-year potential term of the contract, and contends that this position is fundamentally inconsistent with MarAd's current assertion that the agency's needs have changed.

The Federal Acquisition Regulation (FAR) provides that invitations for bids may be canceled and all bids rejected before award but after opening when, consistent with FAR § 14.404-1(a)(1), the agency head determines in writing that the supplies or services being contracted for are no longer required. FAR § 14.404-1(c)(3). That determination was made in this case, once Transcom advised MarAd that the vessels were being moved. Notwithstanding Eastex's skepticism regarding the change in MarAd's position, the record before us does not provide a basis for concluding that the agency's cancellation of this procurement was for reasons other than those described by MarAd. The apparent change in Transcom's needs justified MarAd's determination to cancel the solicitation.

Eastex also questions MarAd's motives throughout the procurement process, suggesting that MarAd was only willing to award the contract to a vendor who would place the ships in a specific port, and implying that MarAd improperly influenced Transcom's decision to avoid awarding this contract for layberths. This conclusion, however, requires the presumption of bad faith on the part of MarAd's contracting officials. Procurement authorities are presumed to act in good faith and, in order for our Office to conclude otherwise, the record must show that procuring official acted with intent to injure the protester. Cycad Corp., B-255870, Apr. 12, 1994, 94-1 CPD ¶ 253. We do not think the record supports this conclusion, nor do we think Eastex's inference of bad faith is sufficient to prove its claim. Accordingly, the cancellation is unobjectionable.

Eastex also requests a modification of the remedy, arguing that since the cancellation of the procurement deprived Eastex of the remedy which was recommended in our decision--the award of the contract--and no other corrective action is available in the current circumstance, it is entitled to recover the cost of preparing its bid. However, since we have concluded that the cancellation was proper, we have no basis to modify Eastex's remedy to include bid preparation costs. We have allowed such costs when a bidder has been deprived of a contract it should have received, as the protester observes; however, where the solicitation is properly canceled, we cannot conclude that the bidder in line for award was improperly denied a contract to which it was entitled. See Fischer and Porter Co., 67 Comp. Gen. 371 (1988), 88-1 CPD ¶ 327. While we recognize Eastex's frustration at being denied the award at this point, its loss in this regard is no different than that of any contractor that was selected for award but then lost the contract when the procurement was canceled. Accordingly, we deny the request for remedy modification.

We dismiss Orange's reconsideration request. Since we have concluded that there is no legal basis to object to MarAd's cancellation of the procurement, no award will be made under the invitation. The cancellation of the solicitation therefore renders Orange's request for reconsideration academic, and we will not consider it. See Introl Corp.--Recon., B-206012.2, Apr. 22, 1982, 82-1 CPD ¶ 370. Orange argues that we should consider its request notwithstanding the cancellation, contending that it would be entitled to reimbursement for costs it incurred for its participation in the original protest if, on reconsideration, we overturned our decision. We disagree. Our authority to declare entitlement to protest costs extends to parties whose protests to our Office support a finding that a procurement statute or regulation was violated. 31 U.S.C. § 3554(c)(1) (1988). Thus, even if Orange were to prevail on

reconsideration, it would not be entitled to recover its costs since it was not a party as contemplated under 31 U.S.C. § 3554(c)(1).

Eastex's request to modify its claim for costs is denied; Orange's request for reconsideration is dismissed.

\s\ Paul Lieberman  
for Robert P. Murphy  
General Counsel