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# Decision

**Matter of:** Bear Mountainside Realty, LLC

**File:** B-419989.6; B-419989.7

**Date:** February 28, 2023

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## DIGEST

Protest that agency improperly canceled a solicitation is denied where the agency reasonably determined that the solicitation no longer reflected its requirements.

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## DECISION

Bear Mountainside Realty LLC, a small business of Mountainside, New Jersey, protests the cancellation of General Services Administration (GSA) solicitation No. 7NJ2243, for commercial office space for the Internal Revenue Service (IRS) in the area of Mountainside and Springfield, New Jersey. The protester contends that the agency's decision to cancel the solicitation lacks a reasonable basis and was a pretext to avoid awarding a lease to Bear Mountainside.

We deny the protest.

## BACKGROUND

For more than a decade, the IRS has occupied two leased office spaces in the area of Mountainside and Springfield, New Jersey;<sup>1</sup> the leases--referred to as "Mountainside" and "Springfield"--are currently held by GSA and expire this year. Contracting Officer's

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<sup>1</sup> Mountainside and Springfield are neighboring areas in Union County, New Jersey. See National Geospatial Program, National Map Viewer, <https://apps.nationalmap.gov/viewer/>.

Statement (COS) at 1; Agency Report (AR), Exh. B, Mountainside Lease at 1; AR, Exh. C, Springfield Lease at 8; AR, Exh. C-1, Springfield Lease Amendment (transferring lease from the IRS to GSA).<sup>2</sup> The protester is the lessor for the Mountainside lease, but not for the Springfield lease. Protest at 2.

In March 2019, the IRS submitted a request for leased office space to GSA. AR, Exh. A, Request for Space. The IRS identified a long-term requirement for a single property with 38,642 American National Standards Institute/Building Owners and Managers Association Office Area square feet (ABOA SF)<sup>3</sup> of office space and 34 parking spaces. *Id.*; COS at 1. With this requirement, the IRS “sought to combine and consolidate its Mountainside and Springfield offices into one lease location in” the area. COS at 1. GSA issued the first request for lease proposals (RLP) No. 7NJ2243 in May 2021. Protest at 6.

Bear Mountainside protested the terms and conditions of the RLP with our Office, contending that the price requirements and evaluation criteria were unreasonable and unduly restrictive of competition. *Bear Mountainside Realty LLC*, B-419989, Aug. 5, 2021 (unpublished decision). In response, the agency canceled the solicitation, notifying our Office that “options not available to the [a]gency at the beginning of the procurement process have become available and warrant consideration,” and that the agency determined that “it is in the best interest of the Government to cancel the Request for Lease Proposals and consider additional options.” Req. for Dismissal, B-4199891, Aug. 2, 2021. We dismissed the protest as academic. Bear Mountainside then protested the cancellation of the RLP. *Bear Mountainside Realty LLC*, B-419989.2, B-419989.3, Oct. 6, 2021 (unpublished decision) at 1. The agency again notified our Office that it intended to take corrective action by and issuing an RLP “related to the subject procurement.” *Id.* Accordingly, we dismissed the second protest.

On June 16, 2022, GSA issued the present RLP at issue here. The RLP--again identified as RLP No. 7NJ2243--described the same long-term requirement that the IRS had submitted in 2019. COS at 1. As with the previous version of the solicitation, the RLP provided for a lease term of “15 Years, 5 Years Firm,” with an option for an additional 5-year term, with award made to the lowest-priced, technically acceptable offeror. AR, Exh. D, RLP at 4, 21; Protest, exh. 1, May 2021 RLP at 7, B-419989.1, July 15, 2021. Bear Mountainside submitted a timely proposal. Protest at 7-8.

On September 30, GSA, which was continuing to evaluate proposals, emailed Bear Mountainside. Protest, exh. B at 2. GSA explained that “[b]efore we call for final proposals we are taking another look at offers and we noticed that your offered shell and operating rent is very low, well below the market range.” *Id.* The agency asked

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<sup>2</sup> All citations to the record refer to the documents’ Adobe PDF pagination.

<sup>3</sup> ABOA SF refers to the area available for use by a tenant for personnel, furnishings, and equipment. See *The Metropolitan Square Assocs., LLC*, B-409904, Sept. 10, 2014, 2014 CPD ¶ 272 at 2 n.2.

Bear Mountainside to confirm its proposed rent; Bear Mountainside did so on October 3. *Id.*

On October 20, the IRS emailed the contracting officer, requesting that GSA cancel the solicitation, explaining that the IRS was reviewing its business needs and would soon submit “revalidated requirements.” AR, Exh. F, Email from IRS to GSA, Oct. 20, 2022. After requesting and receiving more information from the IRS, on November 16, the contracting officer canceled the RLP “due to a change in circumstances.” COS at 2; AR, Exh. I, Cancellation Notice. This protest followed.

## DISCUSSION

The protester alleges that GSA’s cancellation of the solicitation was unreasonable, inadequately documented, and unsupported by the record. Protest at 9-12; Comments & Supp. Protest at 25-26, 28-31; Supp. Comments at 8-16. Fundamentally, the protester alleges that the agency’s cancellation of the RLP is a pretext to avoid awarding Bear Mountainside a new lease, and instead satisfy the IRS’s long-term office space needs improperly and without competition through the Springfield lease. Protest at 12; Comments & Supp. Protest at 9-25. We have considered all of the protester’s arguments, including those that are in addition to or variations of those specifically discussed below, and find no basis to sustain the protest.

In a negotiated procurement, such as this one, an agency has broad authority to decide whether to cancel a solicitation, and to do so, need only establish a reasonable basis. *VSE Corp.*, B-290452.2, Apr. 11, 2005, 2005 CPD ¶ 111 at 6. A reasonable basis to cancel exists when an agency determines that a solicitation does not accurately reflect its needs. *RCR Props., G.P.*, B-414590, July 21, 2017, 2017 CPD ¶ 231 at 3. For example, cancellation of a procurement is reasonable when the agency determines that it no longer has a requirement for the item solicited, or when the agency discovers an existing contract for its requirement would be more advantageous to the government than continuing with the procurement. *Lasmer Indus., Inc.*, B-400866.2 *et al.*, Mar. 30, 2009, 2009 CPD ¶ 77 at 4-5. Moreover, an agency may properly cancel a solicitation regardless of when the information precipitating the cancellation first surfaces or should have been known. *Henry’s Aerial Serv., Inc.; Evergreen Flying Servs., Inc.*, B-414238.7; B-414238.9, Aug. 10, 2017, 2017 CPD ¶ 257 at 5. This is so even when the cancellation occurs during the pendency of a protest. *Tien Walker*, B-414623.2, B-414623.3, July 10, 2017, 2017 CPD ¶ 218 at 3.

### Cancellation of the Current Solicitation

The record here shows that the contracting officer canceled the current RLP based on the determination that the IRS’s requirements had changed. AR, Exh. I, Cancellation Notice. The RLP, as issued, reflected the requirements the IRS had for office space in March of 2019--*i.e.*, a single property with 38,642 ABOA SF and 34 parking spaces in the Mountainside and Springfield area--and provided for a potential lease term of up to 20 years. AR, Exh. A, Request for Space; COS at 1; AR, Exh. D, RLP at 4. In October

2022, while GSA was still evaluating proposals submitted under the RLP, the Chief, Portfolio Management in the Real Property Division of the IRS's Facility Management and Security Services (FMSS) notified GSA that the IRS was reviewing its business needs and would "submit revalidated requirements in the near future," and asked that GSA "cease the current acquisition process." AR, Exh. F, Email from IRS to GSA, Oct. 20, 2022; Agency Resp. re IRS roles at 2.

The contracting officer responded that GSA would "need more information," and asked if the delineated area (*i.e.*, the physical boundaries for the location of the property) or square footage requirements would change. AR, Exh. G, Email from GSA to IRS, Oct. 31, 2022. The IRS responded as follows:

We will be terminating the Mountainside lease and looking to consolidate IRS operations there and in Springfield to the [DELETED] area<sup>4</sup> due to changing IRS business needs. The [DELETED] area is walking distance to the Northeastern Corridor Train Rail and [is an] [i]deal location for IRS employees and customer commuting. Our [usable square footage] will increase due to planned new hires and need for additional storage space. We are still discussing location need for our Taxpayer Assistance Center in Springfield. Once that decision has been made, a new [delineated area, request for office space], and full requirements package will be provided [to] GSA.

AR, Exh. H, Email from IRS to GSA, Nov. 3, 2022. The contracting officer then canceled the RLP, advising offerors that the agency "hereby cancels the RLP due to a change in circumstances," and that the government "is reevaluating requirements." AR, Exh. I, Cancellation Notice.

In response to the protest, the IRS FMSS Associate Director Operations East further explains:

In the time since the IRS transmitted its needs to the [GSA] for office space in the Springfield and Mountainside areas, there have been a number of changes to the needs of the IRS. This has resulted in a need to cancel the [s]olicitation . . . as that [s]olicitation may not reflect the current needs of the Agency.

The IRS has not yet determined what its final needs for office space in this region of New Jersey are at this time. However, since the initial requirements were transmitted to GSA [in March 2019] the IRS has been engaged in return to office activities as the COVID-19 crisis has subsided.

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<sup>4</sup> [DELETED] is in [DELETED] County, New Jersey, which borders Union County (where Mountainside and Springfield are located) to the [DELETED]. See National Geospatial Program, National Map Viewer, <https://apps.nationalmap.gov/viewer/>.

As return to the office activities have progressed the [a]gency has found that the way its workforce performs [its] duties has drastically changed. As a result of this change the IRS believes that consolidation of offices may better meet the [agency's] need. The [IRS] is continuing to evaluate its needs and has not reached a final decision with regards to how much space will be required, what the specific requirements of that space will be, and where that space would best be located.

Among the issues still being discussed is the potential need for the Taxpayer Assistance Center office to remain within the Congressional District where that office is currently located.

The IRS hopes to finalize its decisions regarding its needs for office space soon. At this time however the IRS cannot identify a specific date by which this decision will be made.

Decl. of FMSS Associate Director at 1-2. Based on the record, we find the agency's rationale for canceling the solicitation to be reasonable and supported by the record. As noted above, the RLP was written to meet an office space requirement that the IRS identified in 2019. Since that time, however, circumstances have changed, and the IRS is no longer certain about its long-term needs; in short, the IRS no longer has a current need for the solicited lease. The contracting officer's determination that the solicitation no longer reflects the agency's needs provides a reasonable basis to cancel. *VIRE Consulting, Inc.*, B-408148.2, Nov. 26, 2013, 2013 CPD ¶ 272 at 3 (cancellation of solicitation following corrective action is reasonable where the solicitation no longer reflected the agency's needs).

In response to the agency's explanation for the cancellation, Bear Mountainside first argues that the agency's statements about its requirements are "[v]ague and contradictory" and therefore "do not provide a valid basis for the cancellation of a solicitation[.]" Resp. to Agency Statement at 1. The protester alleges that the agency's explanation in the contemporaneous record and the further explanation offered during the protest are inconsistent, and cites our decision in *Walker Development and Trading Group, Inc.*, B-413924, Jan. 12, 2017, 2017 CPD ¶ 21, in support thereof. Resp. to Agency Statement at 1-4.

In *Walker Development*, we found the agency failed to produce a report that coherently addressed the agency's rationale for the cancellation of the solicitation, and therefore concluded that the record did not establish that the agency had a reasonable basis for its solicitation cancellation. *Walker Development, supra* at 6. We find Bear Mountainside's reliance on our *Walker Development* decision to be misplaced, as the facts in the current protest are not analogous to those in the cited decision. Here, the agency's rationale for canceling the solicitation has remained consistent. As detailed above, GSA reasonably determined that the IRS was reevaluating its office space needs, and therefore the IRS does not have a current need for the solicited lease--i.e., a 20-year lease that would have obligated the agency for a minimum of five years. The

protester is correct that, in the contemporaneous record, the IRS identified a potential new location and increased square footage, while in response to the protest, the IRS invoked potential changes triggered by the suspension and return of in-person activities associated with the COVID-19 pandemic. Resp. to Agency Statement at 1-4. These details, however, are consistent with the position the IRS has maintained since its first communication about canceling this solicitation--that the IRS is reevaluating its long-term office space needs for the region and has not reached a final decision about the location, square footage, and other key parameters. AR, Exh. F, Email from IRS to GSA, Oct. 20, 2022; AR, Exh. H, Email from IRS to GSA, Nov. 3, 2022; Decl. of FMSS Associate Director at 1. And it was this rationale that provided the basis for the GSA cancellation of the solicitation. See AR, Exh. I, Cancellation Notice; COS at 2.

Indeed, arguing in the alternative, Bear Mountainside recognizes the same--that the agency canceled the solicitation because the IRS is reevaluating its requirements--when the protester contends the cancellation was premature and unjustified. See Protest at 9-12; Comments & Supp. Protest at 26, 28-31; Supp. Comments at 10-16. In this instance, the protester argues that the agency cannot cancel the solicitation because the IRS has not yet finalized its new requirements, and therefore “does not at this time know if its requirements have changed or whether the current [s]olicitation accurately reflects its needs.” Protest at 9. More specifically, Bear Mountainside argues that GSA is uniquely constrained under the applicable regulatory authority, and may not cancel an RLP based on a change in requirements before (1) finalizing new requirements; and (2) analyzing and documenting whether the RLP could be amended to accommodate the new requirements. See Protest at 9-12; Comments & Supp. Protest at 26, 28-31; Supp. Comments at 10-16.

Because this is a GSA lease of real property, the Federal Acquisition Regulation (FAR) does not govern; instead, part 570 of the General Services Acquisition Regulation (GSAR) controls. 48 C.F.R. § 570.101. Part 570 of the GSAR includes a provision for changes to RLPs, also referred to as solicitation for offers (SFOs), which sets forth, in relevant part:

(a) If the Government’s requirements change, either before or after receipt of proposals, issue an amendment. Document the amendment using the same method as for the SFO, written or electronic.

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(d) If an amendment is so substantial that it requires a complete revision of the SFO, cancel the SFO, readvertise if required by 570.106,<sup>5</sup> and issue a new SFO.

(e) If there are changes to the Government’s requirements for amount of space, delineated area, occupancy date, and/or other major aspects of the

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<sup>5</sup> Section 570.106 sets forth the requirements for advertising leasehold acquisitions.

requirements, the contracting officer shall consider whether there is a need to readvertise, and to document the file accordingly.

48 C.F.R. § 570.303-4. We do not find--as the protester suggests--that this provision somehow prohibits the agency from canceling a lease solicitation where the agency has articulated reasons why its needs have changed and is in the process of defining its new requirements.

As a result, because the IRS can no longer attest that it has a need for the lease solicited in the RLP, the reasonableness standard applicable in any negotiated procurement remains. In other words, it was proper for the GSA to cancel the RLP even while the IRS and GSA work to finalize the IRS's future requirements. See *Tien Walker, supra* at 3-4. In addition, although the protester argues that it was improper for the agency to cancel and resolicit instead of amend the existing solicitation, we have found that an agency may properly cancel an RLP when it has a reasonable basis for doing so. See, e.g., *AeroSage LLC*, B-410648.2, B-410648.3, Mar. 20, 2015, 2015 CPD ¶ 111 at 3 (“[W]e have consistently stated that an agency need only establish a reasonable basis to support a decision to cancel a solicitation.”).

In reaching this conclusion, we note that the contemplated changes to the agency's requirements do not appear to be minor in nature. Although the agency has not yet finalized the scope of the necessary changes, it is evident that the agency is contemplating fundamental changes to the agency's requirements based on what the IRS describes as drastic changes to the way its workforce performs its duties in connection with the progression of return to the office activities as compared with 2019 when the requirements were established. With such fundamental questions under consideration, we have no basis to question the reasonableness of the agency's conclusion that cancellation is the proper course, as opposed to keeping the current solicitation in place for future amendment.

#### Alleged Pretextual Cancellation

The protester also argues that the agency truly canceled the solicitation because the IRS wanted to avoid awarding a new lease to Bear Mountainside. See Protest at 10, 12; Comments & Supp. Protest at 17-25, 29, 31-32; Supp. Comments at 6-8, 12-17. The agency responds that the cancellation of the solicitation was reasonable and was not made in bad faith. Supp. MOL at 3-4.

Where, as here, a protester argues that the agency's rationale for cancellation is but a pretext--that the agency's actual motivation is to avoid awarding a contract on a competitive basis or to avoid resolving a protest--we will closely examine the reasonableness of the agency's actions in canceling the acquisition. *Inalab Consulting, Inc.; Solutions by Design II, LLC*, B-413044 *et al.*, Aug. 4, 2016, 2016 CPD ¶ 195 at 7. Even so, the reasonableness standard applicable to cancellation of a solicitation remains unchanged. *Meridian Knowledge Sols., LLC*, B-420150.4 *et al.*, Aug. 25, 2022, 2022 CPD ¶ 215 at 5-6. If an agency's cancellation decision is reasonably supported by

a change in the agency's requirements, the fact that the decision to cancel may also have been motivated by another inappropriate interest provides no basis to sustain a protest of the cancellation. *Id.* at 8; *Lasmer Indus., Inc., supra* at 4; *Dr. Robert J. Telepak*, B-247681, June 29, 1992, 92-2 CPD ¶ 4 at 4.

Bear Mountainside argues, among other things, that this pretext is demonstrated by the history of this procurement, including the protester's contention that the IRS only requested that GSA cancel the solicitation after Bear Mountainside was established as the awardee under the RLP. See Comments & Supp. Protest at 21-22. The protester relies on this contention to analogize its circumstances to those of the protester in *Parcel 49C Ltd. Partnership v. United States*, 31 F.3d 1147 (Fed. Cir. 1994), where the Federal Circuit affirmed the trial court's determination that GSA improperly canceled a solicitation for a lease for the Federal Communications Commission (FCC). See Comments & Supp. Protest at 21-22.

The protester, however, cannot demonstrate that its position was the same as the protester in *Parcel 49C*--where, in that instance, GSA had made award, and the protester offered "testimony of GSA officials who stated that FCC intended to take whatever steps were necessary to avoid" proceeding with that award. *Parcel 49C*, 31 F.3d at 1149. By contrast here, GSA was still continuing to evaluate proposals and intended to call for final proposal revisions.<sup>6</sup> Protest, exh. B at 2. Moreover, despite Bear Mountainside's allegations of animus and an attempt to avoid the competitive process, the IRS continues to occupy the Mountainside lease--the term of which does not expire until September 2023--and GSA has attested that it "anticipates a competitive procurement in the future once the IRS'[s] new requirements are received." COS at 2.

The protester further contends that the IRS's explanation that its needs have changed, in part, due to return-to-work activities should be viewed with skepticism. Resp. to Agency Statement at 3-4. According to the protester, the IRS and its union "completed their negotiation of the return to office plan nearly a year ago, and it was fully implemented by June 25 of last year." *Id.* at 4. The record reflects, however, that the suspension of in-person activities and the return to work activities occurred after the IRS identified its office space requirement in 2019. Decl. of FMSS Associate Director at 1.

As referenced above, an agency may properly cancel a solicitation regardless of 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, or even after a contract has been awarded. *Deva & Assocs. PC*, B-309972.3, Apr. 29, 2008, 2008 CPD ¶ 89 at 5. Accordingly, we find no merit to the protester's suggestion that the agency's failure to cancel or amend the solicitation more

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<sup>6</sup> Contrary to the protester's insistence, we find no evidence to support the contention that it was the "presumptive awardee" simply because the RLP provided for award to the lowest-priced, technically acceptable offeror, and during discussions, the GSA communicated to Bear Mountainside that the firm's price appeared very low. See Comments & Supp. Protest at 21-22.



quickly renders the agency's determination to cancel the solicitation unreasonable or pretextual. See *Rice Servs., Ltd.*, B-284997.5, Mar. 12, 2002, 2002 CPD ¶ 59 at 8 (finding the tardiness of agency's determination that a solicitation should be canceled does not alter the overriding principle that an agency should not proceed with a procurement when it reasonably believes that the resulting contract will fail to meet the agency's requirements).

Absent anything in the record to support Bear Mountainside's claim, and given that government officials are presumed to act in good faith, we find that the allegation of animus or bias is unsupported and, thus, lacks merit. See *Inalab Consulting, Inc.; Solutions by Design II, LLC*, *supra* at 9. Moreover, if we were to assume that the agency's decision to cancel the solicitation was, in part, pretextual, our decisions have consistently concluded that an agency may nevertheless still cancel a solicitation if it has established a reasonable basis for doing so. *Meridian Knowledge*, *supra* at 8. Accordingly, even reading the evidence in the light most favorable to the protester, we see no basis to sustain the protest where, as here, the cancellation was otherwise reasonably justified. See *Qbase, LLC*, B-417371.4; B-417371.5, June 26, 2020, 2020 CPD ¶ 252 at 6.

#### The Springfield Lease

Finally, Bear Mountainside relies on the Springfield lease--the other GSA lease in the region currently occupied by the IRS--to challenge the propriety of the RLP cancellation. Comments & Supp. Protest at 9-12, 27. The agency acknowledges that it intends to execute a short-term extension of the Springfield lease, which would otherwise end in February 2023, "while the long-term needs of the [IRS] are established and a procurement reflecting those new needs is completed." Decl. of FMSS Associate Director at 1; Resp. to Req. for Statement at 1-2.

According to the protester, the cancellation of the solicitation is improper because (1) the cancellation necessitated the extension of the Springfield lease, and "the regulations only allow for extensions when they are made in support of an agency actively pursuing a long-term solution"; and (2) the effect of the cancellation is disparate treatment in extending only the Springfield lease. Comments & Supp. Protest at 9-12, 27.

First, as the protester concedes, a short-term extension of a lease is appropriate, and not otherwise prohibited, when made in support of an agency actively pursuing a long-term solution. *Id.* at 9; 48 C.F.R. § 570.405 (providing for "extension of the term of a lease to provide for continued occupancy on a short-term basis"). The IRS and GSA have repeatedly represented that they are pursuing a long-term solution for the IRS's requirements. See, e.g., COS at 2. That the protester doubts the agency's intentions provides no basis to find objectionable the agency's rationale to cancel of the solicitation.

Second, the protester's allegations of disparate treatment are based on its unreasonable interpretation of communications between the IRS and GSA regarding the IRS's request to cancel the RLP. When asked for additional information regarding its reevaluation of its requirements, the IRS explained, in part, that it would "be terminating the Mountainside lease and looking to consolidate IRS operations there and in Springfield to the [DELETED] area due to changing IRS business needs." AR, Exh. H, Email from IRS to GSA, Nov. 3, 2022.

Bear Mountainside insists that this statement, and the short lease extension contemplated by GSA, reflect an intention to terminate the Mountainside lease and extend the Springfield lease. Comments & Supp. Protest at 27. Contrary to the protester's assertion, however, a plain reading of the statement reflects another possibility--one where the IRS is considering ending both the Mountainside and Springfield leases, in favor of a lease in a different location. AR, Exh. H, Email from IRS to GSA, Nov. 3, 2022. In addition, the Mountainside lease does not require an immediate extension, because that lease does not expire until September 2023, while the Springfield lease would have lapsed in February 2023. COS at 1. In other words, it appears that GSA will be maintaining both leases for the near future. As such, this argument provides no basis to sustain the protest.

The protest is denied.

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