



**DOCUMENT FOR PUBLIC RELEASE**

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

# Decision

**Matter of:** U.S. Marine Management, Inc.

**File:** B-417353.3; B-417353.4

**Date:** September 23, 2019

---

Jason A. Carey, Esq., J. Hunter Bennett, Esq., Evan R. Sherwood, Esq., and Peter B. Terenzio III, Esq., Covington & Burling, LLP, for the protester.  
Jeffrey N. Davenport, Esq., Department of the Navy, for the agency.  
Louis A. Chiarella, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

---

## DIGEST

Cancellation of request for proposals for the charter of a maritime support vessel was reasonable where proposals received were substantially higher than agency's available funding.

---

## DECISION

U.S. Marine Management, Inc. (USMMI), of Norfolk, Virginia, protests the cancellation of request for proposals (RFP) No. N32205-19-R-3510, issued by the Department of the Navy, Military Sealift Command (MSC), for the charter of a maritime support vessel (MSV). USMMI contends the agency lacked a reasonable basis to cancel the solicitation.

We deny the protest.

## BACKGROUND

The RFP was issued on December 28, 2018, to acquire, on behalf of the U.S. Special Operations Command (USSOCOM), the chartering of the MSV-3 vessel for classified maritime security missions worldwide.<sup>1</sup> Contracting Officer's Statement (COS)/

---

<sup>1</sup> The record in this case, which the agency provided to GAO and the protester, included certain classified documents. Although we considered the classified information, it is not discussed in this decision.

Memorandum of Law (MOL) at 1; Agency Report (AR), Tab 14, RFP at 2. The solicitation included a lengthy performance work statement (PWS) which set forth the vessel's specifications and performance requirements. AR, Tab 30, PWS at 3-69. The RFP, as issued, contained no "country-of-origin" restriction pertaining to the vessels that offerors proposed. AR, Tab 32, RFP Questions and Answers; Tab 33, RFP amend. 002 at 1.

Prior to the RFP's issuance, MSC conducted two market surveys. COS/MOL at 2. These surveys resulted in the development of an independent government estimate (IGE) as well as USSOCOM's budget for the MSV-3 procurement (approximately \$223 million for all performance periods). Id.; AR, Tab 12, MSV-3 Acquisition Plan at 5. USSOCOM thereafter provided MSC with a military interdepartmental purchase request (MIPR) for the MSV-3 procurement, certifying fiscal year 2019 (FY19) funds as available in the amount of \$120 million. AR, Tab 36, MSV-3 MIPR at 1-2; Tab 63, USSOCOM Comptroller Declaration.

Two offerors, including USMMI, submitted proposals by the April 18, 2019, closing date. As initially proposed, USMMI's total price was \$[DELETED] while the second offeror's total price was \$[DELETED]. AR, Tab 45, Summary of Offerors' Proposed Prices.

Several events relevant to the protest here then transpired. First, MSC determined that offerors' prices "far exceed[ed] the available budget authority" for any fiscal year, and that the command had only received \$120 million "from the sponsor for the award obligation."<sup>2</sup> AR, Tab 38, MSC E-mail, May 10, 2019, at 2. Consequently, MSC decided to engage in preliminary discussions and provided offerors with two scenario-based questions to determine the impact on proposed pricing. AR, Tab 39, MSC Preliminary Discussions Letters at 1-4. With regard to the second scenario (which represented the more significant change to the MSV-3 requirements), USMMI's reduced proposed price was \$[DELETED], while the second offeror's reduced price was \$[DELETED]. AR, Tab 59, Contracting Officer's Declaration, Aug. 8, 2019. On May 24, because offerors' prices—even as reduced—greatly exceeded the available FY19 funds and total budget, USSOCOM decided to withdraw its funding for the MSV-3 procurement. AR, Tab 40, USSOCOM E-mail to MSC, May 24, 2019, at 3; Tab 63, USSOCOM Comptroller Declaration ("Because my headquarters did not have sufficient funds to cover the significant gap between proposed prices and available funding . . . my headquarters withdrew funding for the MSV-3 procurement").

In the same timeframe, on May 23, the Assistant Secretary of the Navy for Research Development and Acquisition (ASN(RD&A)) issued a memorandum making a country-of-origin requirement applicable to MSV ships, including the procurement here. AR, Tab 51, ASN(RD&A) Memorandum, National Security Policy Determination to Limit Competition, May 23, 2019 (Classified). On June 5, the MSC contracting officer

---

<sup>2</sup> As used by the contracting agency here, the term "sponsor" refers to the requiring and funding activity, USSOCOM.

decided to cancel the MSV-3 procurement, finding that the restriction dictated by the ASN(RD&A) memorandum substantially changed the subject RFP requirement. AR, Tab 41, MSC Memorandum for Record, at 1-2. This protest followed.

## DISCUSSION

USMMI alleges that the Navy's decision to cancel the solicitation was irrational and not adequately supported. Specifically, USMMI argues the ASN(RD&A) memorandum did not require cancellation and that the Navy should have instead amended the solicitation to include the new requirement.<sup>3</sup> Protest at 9-11.

The Navy, in its report to our Office, contends the decision to cancel the solicitation was reasonable because the contracting activity lacked sufficient funding to make award.<sup>4</sup> COS/MOL at 3. The Navy points to the fact that the IGE and budget for the MSV-3 procurement totaled approximately \$223 million, while offerors' proposed prices were more than double that amount. Id. Therefore, the Navy argues, the agency had a compelling reason to cancel the solicitation. Id.

In a negotiated procurement, such as the one here, a contracting agency has broad discretion in deciding whether to cancel a solicitation, and need only establish a reasonable basis for doing so. T.W. Recycling, B-413256, Sept. 16, 2016, 2016 CPD ¶ 261 at 4; SupplyCore Inc., B-411015.8, May 27, 2016, 2016 CPD ¶ 153 at 3. So long as there is a reasonable basis for doing so, an agency may cancel a solicitation regardless of when the information precipitating the cancellation first arises, even if it is after proposals have been submitted and evaluated, or even if it is discovered during the course of a protest. T.W. Recycling, supra; Glen/Mar Constr., Inc., B-298355, Aug. 3, 2006, 2006 CPD ¶ 117 at 2.

It is also well established that an agency's lack of funding for a procurement provides a reasonable basis for cancellation, as agencies may not award contracts that exceed available funds. Welch Constr., Inc., B-411879, Nov. 9, 2015, 2015 CPD ¶ 351 at 2; VetPride Servs., Inc., B-401435, July 28, 2009, 2009 CPD ¶ 156 at 2. Moreover, it is not our role to question the unavailability of funds. Welch Constr., Inc., supra; VetPride Servs., Inc., supra, at 3. Rather, the management of an agency's funds generally depends on the agency's judgment concerning which projects and activities should receive increased or reduced funding. T.W. Recycling, supra; Vinculum Solutions, Inc.--Recon., B-408337.3, Dec. 3, 2013, 2013 CPD ¶ 274 at 4.

---

<sup>3</sup> USMMI also asserts the Navy's country-of-origin restriction lacks a rational basis, and is unduly restrictive and unnecessary to meet the agency's needs. Comments & Supp. Protest at 3.

<sup>4</sup> The Navy does not, however, now assert that the country-of-origin requirement constituted a reasonable basis to cancel the solicitation. See COS/MOL at 3-5.

Here, the record demonstrates that both proposals received by the agency substantially exceeded the available funding for this procurement, and the agency has submitted documentation showing that additional funds were not available. AR, Tab 38, MSC E-mail, May 10, 2019, at 2; Tab 63, USSOCOM Comptroller Declaration. The record also demonstrates the Navy made efforts to provide offerors with alternative delivery and payment scenarios, in an unsuccessful attempt to reduce pricing to an amount that would permit contract award. AR, Tab 59, Contracting Officer's Declaration, Aug. 8, 2019. Under these circumstances, we have no basis to object to the cancellation of the solicitation.

USMMI does not dispute that lack of funding for a procurement provides a valid basis for the cancellation of a solicitation. Rather, USMMI argues that cancellation for lack of funding was not reasonable here, because it was not contemporaneously stated as the reason for cancellation. The protester further contends that insofar as "substantial price flexibility" existed both on the part of itself and USSOCOM, it would have been irrational for the contracting officer to cancel based on a lack of funding. Comments & Supp. Protest at 9. We disagree.

As set forth above, an agency may properly cancel a solicitation no matter when the information supporting the cancellation first surfaces or should have been known, even if the solicitation is not cancelled until after proposals have been submitted and evaluated, or even if discovered during the course of a protest. T.W. Recycling, supra; SEI Group, Inc., B-299108, Feb. 6, 2007, 2007 CPD ¶ 35 at 3. Further, while USMMI argues that lack of funding was not identified as a reason for cancellation until after the RFP had been cancelled, our Office has held that a new or additional rationale justifying the cancellation of a solicitation provided by an agency during the development of a protest is acceptable so long as it would have supported cancellation had it been advanced originally. TaxSlayer, LLC, B-411101, May 8, 2015, 2015 CPD ¶ 156 at 9; Peterson-Nunez Joint Venture, B-258788, Feb. 13, 1995, 95-1 CPD ¶ 73 at 5. Here, the lack of funding would have supported cancellation had it been advanced originally; the contemporaneous record clearly reflects that, at the time of cancellation, USSOCOM had determined that offerors' prices far exceeded the available budget and, in light thereof, had withdrawn the funding that would permit any award. In sum, although the lack of funding was not stated as part of the contracting officer's decision, it existed at such time as a valid reason to cancel the solicitation.<sup>5</sup>

---

<sup>5</sup> USMMI also argues that we should afford little or no weight to the Navy's lack-of-funding rationale because it constitutes a new stated basis for the cancellation of the RFP that is not related to the contracting officer's contemporaneous decision to cancel the RFP. Supp. Comments, Sept. 11, 2019, at 1-4. Our Office generally considers post-protest explanations, such as these, where the explanations merely provide a detailed rationale for contemporaneous conclusions and fill in previously unrecorded details, so long as the explanations are credible and consistent with the contemporaneous record. Lynxnet, LLC, B-409791, B-409791.2, Aug. 4, 2014, 2014 CPD ¶ 233 at 6; Vinculum Solutions, Inc.--Recon., B-408337.3, Dec. 3, 2013,

(continued...)

We also find no merit in USMMI's assertion that existing budget constraints could have been resolved. A protester's belief that negotiations might have resulted in reducing the offerors' proposed pricing does not render unreasonable the contracting officer's decision to cancel the solicitation. Glen/Mar Constr., Inc., supra. In any event, a significant difference remained between the offerors' reduced pricing and the available funding, which made it unlikely that negotiations, without a significant reduction in the scope of the contract requirements, would have proved successful. In the absence of a showing of bad faith on an agency's part in connection with a funding decision (which is neither alleged nor otherwise evident here), there is no basis to require an agency to go forward with a procurement given that there is insufficient funding for the project. James M. Carroll--Recon., B-221502.3, Mar. 24, 1986, 86-1 CPD ¶ 290 at 3.

Lastly, as the lack of funding was a valid reason for the solicitation's cancellation here, we need not determine whether the country-of-origin requirement also constituted a proper reason for the agency's action.<sup>6</sup> See Dr. Robert J. Telepak, B-247681, June 29, 1992, 92-2 CPD ¶ 4 at 4-5.

The protest is denied.

Thomas H. Armstrong  
General Counsel

---

(...continued)

2013 CPD ¶ 274 at 3 n.2. In contrast, our Office accords lesser weight to post-hoc arguments or analyses made in response to protest allegations because we are concerned that new judgments made in the heat of an adversarial process may not represent the fair and considered judgment of the agency. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Based on this record, including the declarations of agency personnel and contemporaneous e-mails, we have no such concerns here. Computer World Servs. Corp., B-416042, May 22, 2018, 2018 CPD ¶ 191 at 5 (finding agency's post-protest explanations which provided details explaining agency's rational for its decision to cancel solicitation to be reasonable).

<sup>6</sup> USMMI also argues that cancellation of the solicitation based on a country-of-origin requirement resulted from a lack of advance planning. Protest at 11-13; Comments & Supp. Protest at 12-15. Insofar as the agency's lack of funding was a reasonable basis for cancellation, we also need not determine whether the country-of-origin requirement resulted from a lack of advance planning.