U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Freedom Contracting Group

File: B-417772.2

Date: July 31, 2020

John M. Manfredonia, Esq., Manfredonia Law Offices, LLC, for the protester.
Susan M. Chagrin, Esq., Department of Veterans Affairs, for the agency.
Paula A. Williams, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's decision to resolicit its requirements, taken in response to a size determination by the Small Business Administration--rather than amending the solicitation and requesting revised proposals--is denied where the agency's decision was reasonably based on its determination that the solicitation no longer reflected the agency's needs.

DECISION

Freedom Contracting Group (Freedom Contracting), located in New Hudson, Michigan, protests the actions taken by the Department of Veterans Affairs (VA) in response to a size determination by the Small Business Administration (SBA) that MGC Services a Joint Venture, LLC (MGC), located in Lutz, Florida, was other than small under request for proposal (RFP) No. 36C10F-19-R-0010, for design bid build construction and maintenance services. Freedom Contracting contends that the VA's announced intention to resolicit the requirement, rather than to amend the solicitation and request revised proposals, was an unreasonable response to the SBA's size determination. The protester also contends that the agency violated Federal Acquisition Regulation (FAR) 15.503(a)(2) by failing to provide the protester a pre-award notice of the agency's intent to make award to MGC.

We deny the protest.

BACKGROUND

The RFP, which the VA issued on May 31, 2019, and subsequently amended five times, sought proposals for phase II of the VA's graveside expansion and cemetery improvements to provide burial services at the VA's Great Lakes National Cemetery in Holly, Michigan. The project will develop approximately 30 acres of undeveloped land at the national cemetery to provide approximately 28,400 gravesites, including both casket and cremation sites. This project also will include renovations and upgrades to the existing administration and maintenance facilities, repairs and sealing of the existing road system, and necessary repairs to the committal shelters. RFP at 10-11; Agency Report (AR) exh. 15, Source Selection Decision Memorandum at 4.

The solicitation, a set-aside for service-disabled veteran-owned small business concerns, provided for award of a fixed-price contract on a best-value tradeoff basis, considering the following evaluation factors: (1) past performance; (2) relevant experience; (3) technical approach; (4) construction/project management; and (5) price. RFP at 11. The four non-price factors, when combined, were significantly more important than price. *Id.* The solicitation incorporated by reference FAR provision 52.215-1, Instructions to Offerors-Competitive Acquisition, which provided that the agency reserved the right to make award without discussions. *Id.* at 27 (*see* FAR 52.215-1(f)(4)).

The VA received three timely proposals in response to the solicitation, which were evaluated as follows:

Technical Factors	**MGC**	**Freedom Contracting**	**Offeror 3**
Past Performance	Very Good	Satisfactory	Neutral
Relevant Experience	Very Good	Marginal	Unsatisfactory
Technical Approach	Satisfactory	Marginal	Satisfactory
Construction/Project Management	Satisfactory	Marginal	Satisfactory
Overall Rating	Satisfactory	Marginal	Marginal
Evaluated Price	$28,758,320	$34,990,000	$40,652,542

AR exh. 13, Consensus Evaluation Report at 10; exh. 15, Source Selection Decision Memorandum at 42.

Based on these results, the contracting officer, who was also the source selection authority for this procurement, concluded that no tradeoff was necessary because MGC's proposal received the highest technical rating and offered the lowest evaluated price. The agency made award to MGC on January 31, 2020. AR exh. 15, Source Selection Decision Memorandum at 42-43; Contracting Officer Statement at 1-2. That same day, the VA posted notice of award on the www.beta.sam.gov website and notified Freedom Contracting that MGC was the awardee. AR exh. 16, Notice to Unsuccessful Offerors.

On February 4, Freedom Contracting filed a size status protest with the SBA, alleging that MGC was other than small for purposes of this procurement. Protest exh. 4, SBA

Size Determination at 1. The SBA agreed, and concluded that MGC was other than small for the applicable size standard assigned to this procurement due to issues with the firm's joint venture agreement. *Id.* at 5-8.

On March 24, the VA received the SBA's size determination that MGC was other than an eligible small business concern. After receiving the SBA's decision, there were multiple discussions between the agency's contracting personnel and project staff to determine how to proceed. The VA decided to terminate the award to MGC, modify the project design to address recently identified drainage issues at the site, and competitively resolicit the project. Contracting Officer Statement at 3. On April 24, the VA terminated for convenience MGC's contract. AR exh.19, Notice of Termination. Also on April 24, the contracting officer provided email notification of the agency's decision to Freedom Contracting, explaining its intent to resolicit the project in order to "modify the design slightly to address" changes to the drainage design. Protest exh. 1, Agency Email to Protester. This protest followed.[1]

DISCUSSION

Freedom Contracting contends that the agency's announced intention to issue a new solicitation in response to the protester's successful size protest is unreasonable, arguing that the agency should reopen and amend the original solicitation, and request revised proposals. In support of its position, the protester alleges that the VA's actions are inconsistent with FAR 15.206(e) because any alleged changes in the scope of work are minimal and could have been effectuated through an amendment to the solicitation. The protester also alleges that issuing a new RFP favors MGC because MGC could compete under this RFP in circumvention of the SBA's size determination and would negate Freedom Contracting's competitive position under the original RFP. The agency responds that its actions were reasonable because the challenged solicitation did not reflect the agency's needs. For the reasons set forth below, we find no basis to sustain Freedom Contracting's protest.[2]

When, as here, an agency terminates a contract and resolicits, it is in effect canceling the underlying solicitation, and we will determine the propriety of the agency action applying the rules pertaining to the cancellation of a solicitation.[3] *See Noelke GmbH*,

---

[1] On February 14, the VA provided the protester its requested debriefing which included the ratings assigned to Freedom Contracting's proposal. AR exh. 17, Summary of Post-Award Debriefing; Contracting Officer Statement at 1. In its protest, Freedom Contracting does not challenge the agency's evaluative findings as to the merits of its proposal. *See generally* Protest at 2.

[2] Freedom Contracting raises other collateral arguments. While our decision does not specifically address every argument, we have considered all of the protester's additional assertions and find that none provides a basis on which to sustain the protest.

[3] The VA argues that it did not "formally" cancel the RFP because the agency "deemed this award to supersede the underlying solicitation." Memorandum of Law at 4. Stated

B-278324.2, Feb. 9, 1998, 98-1 CPD ¶ 46 at 3 n.1. In the context of a negotiated procurement, such as this one, a contracting agency has broad discretion in deciding whether to cancel a solicitation, and need only establish a reasonable basis for doing so. *SupplyCore Inc.*, B-411015.8, May 27, 2016, 2016 CPD ¶ 153 at 3. A reasonable basis to cancel exists when, for example, an agency determines that a solicitation does not accurately reflect its needs. *American Sys. Corp.*, B-412501.2, B-412501.3, Mar. 18, 2016, 2016 CPD ¶ 91 at 6. 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. *SupplyCore Inc., supra; American Sys. Corp., supra*.

Here, the VA announced its intention to resolicit this phase II project after terminating MGC's contract in response to the SBA's size determination. According to the VA, the original RFP no longer reflected the government's current needs. Specifically, the VA represents that it is considering several changes to the design of the phase II project, such as:

- Adding a new traditional burial section of approximately 500 burial sites to avoid depleting their current inventory of in-ground burial crypts. High water tables resulting from above average rain and poor drainage have rendered some traditional burial sites unsuitable for interments at this time, which has accelerated the depletion of current traditional burial inventory. This drainage issue was not known at the time of the original design.

- Changing the design for physical security in anticipation of a new [...] standard being developed and nearing final approval.

- Accelerating a portion of the proposed new columbarium construction by creating an early turnover (ETO) phase to avoid depleting their current columbarium inventory[.]

- Modifying the construction sequencing to include roadway access to the columbarium ETO phase described above.

Contracting Officer Statement at 4; *see generally* AR exh. 10, Internal VA Email Communications at 34-37. As a result of these proposed design changes, the agency argues that issuing a new solicitation is reasonable, and within the discretion afforded to the agency. Memorandum of Law at 7-8.

The protester disagrees, arguing that even if these proposed changes "are legitimate," they do not justify cancellation and issuance of a new solicitation. Comments at 8. In support of its position, Freedom Contracting contends that the agency's decision not to amend the original RFP was inconsistent with FAR 15.206(e). According to the

---

differently, the agency asserts that the contract with MGC superseded the solicitation therefore there was no active solicitation to be cancelled. *Id.* at 6. As explained, we view the agency as having effectively canceled the RFP.

protester, this FAR provision precludes the agency from canceling the solicitation because, in the protester's view, the changes in the VA's needs are minimal. Protest at 7; Comments at 8. The protester's reliance on FAR 15.206(e) is misplaced, however.

As our Office has explained, the FAR requires an agency to cancel an existing solicitation and begin a procurement anew when its requirements have changed in a manner that is "so substantial as to exceed what prospective offerors reasonably could have anticipated." FAR 15.206(e); s*ee Companion Data Servs., LLC*, B-410022, B-410022.2, Oct. 9, 2014, 2014 CPD ¶ 300 at 11. This does not, however, suggest that the converse is true, *i.e.*, that an agency is prohibited from canceling a solicitation when changes in the agency's requirements do not rise to the level contemplated in FAR 15.206(e). *See Social Impact, Inc.*, B-412655.3, June 29, 2016, 2016 CPD ¶ 176 at 6.

Quite simply, absent some showing that the agency's actions were contrary to procurement law or regulation or otherwise improper, Freedom Contracting's protest amounts to little more than the protester's preference for the original RFP, and its disagreement with the VA's rationale for its announced intention to issue a new RFP with updated requirements that more accurately reflect its needs. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not, however, establish that the agency's judgment is unreasonable. *See Dynamic Access Sys.*, B-295356, Feb. 8, 2005, 2005 CPD ¶ 34 at 4. Accordingly, we have no basis to find the agency's actions improper or otherwise unreasonable.

Next, Freedom Contracting contends that the agency's announced intention to issue a new RFP favors MGC because it permits MGC to continue to compete rather than being disqualified based on the SBA's size determination. Protest at 5-7; Comments at 3, 9-10. As explained above, however, an agency may cancel a RFP and then resolicit its requirements when the record shows that the agency's decision to take this action has a reasonable basis. As also explained above, the agency reasonably decided to issue a new solicitation to reflect its current needs and informed the remaining offerors of its intent to do so. While it is possible that a MGC may be able to address the issues in its joint venture agreement, and become eligible to participate in the new competition, nothing in the record suggests that the agency's decision was made in bad faith, intended to benefit any particular offeror, or otherwise improper. We therefore deny this aspect of the protest.

Finally, the protester alleges that the agency's intent to resolicit its requirements fails to remedy the competitive harm to the protester caused by the agency's failure to provide the pre-award notification required by FAR 15.503(a)(2).[4] According to the protester, it was prejudiced by the agency's failure because the lack of notice prohibited Freedom

---

[4] The purpose for this pre-award notice is to allow unsuccessful offerors the opportunity to have the SBA review the prospective awardee's size status before award. *See Spectrum Sec. Servs., Inc.*, B-297320.2, B-297320.3, Dec. 29, 2005, 2005 CPD ¶ 227 at 3-4.

Contracting from filing a pre-award challenge to MGC's eligibility for award, thereby preventing the contract award to MGC. Protest at 8; Comments at 4-9.

An agency's failure to provide a pre-award notice is procedural in nature and our Office will not sustain a protest of an agency's failure to comply with this pre-award notification requirement absent competitive prejudice to the protester. *See, e.g., K2 Solutions, Inc.,* B-417689, Sept. 24, 2019, 2019 CPD ¶ 330 at 8; *Jensco Marine, Inc.*, B-278929.7, Feb. 11, 1999, 99-1 CPD ¶ 32 at 3. In other words, the protester must establish that but for the agency's actions, the protester would have had a substantial chance of receiving the award. *See e.g., Raytheon Co.*, B-409651, B-409651.2, July 9, 2014, 2014 CPD ¶ 207 at 17; *Arc Aspicio, LLC et al.*, B-412612 *et al.*, Apr. 11, 2016, 2016 CPD ¶ 117 at 7.

Here, the record shows that Freedom Contracting's post-award size protest was successful as the SBA determined that MGC was other than small under the applicable size standard for this procurement. However, even if MGC was eliminated from the competition before award, the record does not establish that Freedom Contracting would have had a substantial chance of receiving the award. As detailed above, the evaluation results show that Freedom Contracting's proposal was assigned an overall rating of marginal under the non-price factors. On this record, we cannot say that the contracting officer would have conducted discussions, requested and evaluated revised proposals, or, if it had, that Freedom's revised proposal would have received an overall rating higher than marginal. Moreover, as explained above, the agency reasonably decided to resolicit its requirements after concluding that the solicitation did not meet the agency's needs. Accordingly, we conclude that Freedom Contracting has not established the requisite competitive prejudice to prevail in its protest.[5] *See Sauer, Inc.*, B-411137, May 22, 2015, 2015 CPD ¶ 171 at 4.

The protest is denied.

Thomas H. Armstrong
General Counsel

---

[5] In any event, the protester will be afforded an opportunity to engage in the continued competition.