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Decision

Matter of: Alliance Technology Group, LLC

File: B-418558

Date: June 16, 2020

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DIGEST

1. GAO has jurisdiction to review a protest challenging an agency's cancellation of a solicitation for a task order valued above the statutory dollar threshold for resolving bid protests, even where the subsequently-issued solicitation falls below the threshold for GAO's task order jurisdiction.
 2. Protest challenging an agency's cancellation of a solicitation as a pretext to avoid resolving a prior protest is denied where the agency demonstrates a reasonable basis for its decision to cancel.
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DECISION

Alliance Technology Group, LLC (Alliance) of Hanover, Maryland, protests the cancellation of request for quotations (RFQ) No. HC108594841 (original RFQ) by the Defense Information System Agency (DISA) for brand name or equal Endace equipment and support necessary to meet the solicitation's Full Packet Capture requirements. The protester challenges the agency's failure to implement the corrective action proposed in a prior protest and argues that the cancellation of the original RFQ and subsequent issuance of a new RFQ is a pretext to avoid resolving its prior protest.

We deny the protest.

BACKGROUND

The original RFQ was issued on April 30, 2019, as a small business set-aside under the National Aeronautics and Space Administration's (NASA) Solutions for Enterprise-Wide Procurement (SEWP) governmentwide acquisition contract (GWAC). Protest at 4; Agency Report (AR), Tab 1, Original RFQ at 1. The original RFQ contemplated the issuance of a fixed-price task order to the vendor submitting the lowest-priced, technically acceptable quotation prepared in accordance with the vendor's NASA SEWP contract. Original RFQ at 2-3. The original RFQ sought quotations for the procurement of brand name or equal Endace equipment and support necessary to meet the agency's Full Packet Capture (FPCAP) requirements.¹ *Id.* at 1; see *also* AR, Tab 1C, attach. 3, Salient Characteristics at 1-5. Quotations were due on June 19, 2019. Original RFQ at 1.

Alliance submitted a timely quotation in response to the original RFQ. Protest at 5. On July 17, DISA issued a \$40.8 million task order to a vendor other than Alliance. COS/MOL at 3; Protester Resp., Apr. 21, 2020, at 2. On July 18, DISA notified Alliance that it was not selected for award because Alliance's proposal failed to meet two of the salient characteristics. Protest at 5. In response, the protester requested a comprehensive debriefing, and on August 5, Alliance filed a protest with our Office, challenging the agency's evaluation of its quotation. *Id.*

On August 16, DISA filed a notice of corrective action proposing to reevaluate quotations and make a new award decision. AR, Tab 2, Notice of Corrective Action, Aug. 16, 2019, at 1. Alternatively, the agency stated that if it was determined to be in the best interest of the government, the agency would open discussions with vendors remaining in the competitive range and request final revised quotations. *Id.* Given the proposed corrective action, the agency requested that the protest be dismissed.² *Id.*

¹ FPCAP is a system for listening to and copying electronic network traffic, and storing the copied data for later analysis. AR, Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 2. Since FPCAP hardware makes a copy of network traffic for later analysis, there are various requirements as to how long the hardware stores the copied data. *Id.* The original RFQ contained a base capacity requirement of 14 days of data storage and several optional contract line item numbers (CLINs) which could be exercised to increase the duration of data storage up to 180 days total during the base contract period of performance. *Id.* at 2-3.

² Alliance filed an objection to the agency's proposed corrective action, arguing that setting a competitive range and opening discussions would be inconsistent with the RFQ's evaluation criteria. *Alliance Tech. Grp., LLC*, B-417815, Aug. 22, 2019, at 2 n.2 (unpublished decision). In dismissing Alliance's protest, we noted that the protester's objection did not address the matter at hand--whether the protester's challenge had been rendered academic by the agency's proposed reevaluation and new award decision--and thus did not provide a basis for our Office to deny the agency's request for dismissal. *Id.*

at 1-2. On August 22, our Office dismissed the protest as academic. *Alliance Tech. Grp., LLC, supra* at 1-2.

Almost six months later, on February 11, 2020, the SEWP contract holders were notified that the original RFQ was canceled. AR, Tab 3, RFQ Cancellation Notice at 3. On February 27, 2020, the agency issued RFQ No. HC1085012882 (new RFQ) also as a small business set-aside under the NASA SEWP GWAC. AR, Tab 4, New RFQ at 1. The new RFQ contemplated the issuance of a fixed-price task order to the vendor submitting the lowest-priced, technically acceptable quotation in accordance with the vendor's NASA SEWP contract. *Id.* at 1, 3. The new RFQ sought quotations for brand name or equal Endace equipment and support necessary to meet the agency's FPCAP requirements. *Id.*

The agency titled the new RFQ, "amendment 3" and highlighted and explained all of the changes between the new RFQ and the original RFQ. See *id.* at 1-6. For example, in an attachment to the new RFQ, the agency stated that the total system storage timeframe of up to 180 days was no longer required and the new base requirement for storage was 15 days with one option of 15 additional days of storage. AR, Tab 4E, Questions and Answers at 1. The agency also highlighted that the new RFQ clarified: (1) that the agency would install the equipment; (2) the agency's right to verify that the hardware meets all salient characteristics during performance; and (3) the actions the agency will take in the event of equipment failure during performance. New RFQ at 2; AR, Tab 4E, Questions and Answers at 1.

Quotations in response to the new RFQ were due on March 12.³ New RFQ at 1. On March 9, Alliance filed this protest with our Office.

DISCUSSION

Alliance argues that the agency has failed to implement the proposed corrective action announced in response to Alliance's prior protest. Protest at 11-12; Comments at 4. The protester states that "instead of simply re-evaluating the comprehensive proposals the Agency had received in response to the [original RFQ], the Agency has attempted to expand its corrective action in a pretextual manner that prejudices Alliance and allows other offerors a 'second bite at the apple.'" Comments at 4; Protest at 9. Alliance argues that DISA's cancellation of the original RFQ and issuance of the new RFQ are "without due cause or reasonable justification." Protest at 10.

³ We note that the new RFQ was amended on March 19 to update the list of salient characteristics and to answer questions submitted by vendors. See AR, Tab 7A, Updated Salient Characteristics at 1-5; see also *id.*, Tab 7B, Questions & Answers at 1-5. The March 19 amendment did not provide an updated due date for the submission of quotations. See generally *id.*, Tab 7, RFQ Amend., Mar. 19, 2020.

The agency states that the RFQ was canceled because of changed agency needs. AR, Tab 5, Memorandum for Record, Mar. 9, 2020, at 1. In addition, and in response to a request for briefing by our Office, the agency requests dismissal of the protest, arguing that: (1) the protest is untimely; and (2) GAO does not have jurisdiction to decide the matter because the value of the new RFQ is below GAO's statutory dollar threshold to resolve a task order protest under a multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contract. Agency Briefing, Apr. 17, 2020, at 1; Agency Briefing, May 6, 2020, at 1. For the reasons discussed below, we deny the protest.

As discussed above, this protest stems from Alliance's prior protest of the agency's award under the original RFQ, which our Office dismissed on August 22, 2019, after DISA proposed a corrective action rendering that protest academic. On February 11, 2020, all SEWP contract holders, including Alliance, were notified that the original RFQ had been canceled. On March 9, Alliance filed the instant protest challenging the agency's decision to cancel the original RFQ rather than implement the proposed corrective action of reevaluating proposals announced in response to the prior protest. Protest at 4-12. Accordingly, Alliance requests that our Office recommend that the agency reevaluate proposals received in response to the original RFQ, as the agency indicated when it took corrective action in August 2019. *Id.* at 14.

DISA argues that Alliance's protest challenges the agency's cancellation of the original RFQ and failure to follow the corrective action set forth in the prior protest, and therefore Alliance had 10 days, starting from the date the RFQ was canceled--February 11--to protest the cancellation. Agency Briefing, May 6, 2020, at 1. The agency contends that because Alliance did not file its protest with our Office until March 9, the protest is untimely and must be dismissed. *Id.*

The protester claims that it could not have known the basis for its protest until the issuance of the new RFQ on February 27. Protester Response, May 8, 2020, at 2. Specifically, the protester states that the agency did not share the rationale for canceling the RFQ at the time of cancellation, and therefore any protest issued in response to the February 11 notice of cancellation would have been based on conjecture and speculation. *Id.* Alliance maintains that the terms of the new RFQ disclosed, for the first time, that the agency's needs and material requirements had not truly changed as compared to the original RFQ, and that the new RFQ was issued in a pretextual manner to avoid resolving Alliance's earlier protest. *Id.* at 4. Alliance therefore insists that its protest is timely because it was filed within 10 days of the issuance of the new RFQ.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest, other than one alleging improprieties in a solicitation, must be filed no later than 10 days after the protester knew, or should have known, of the basis of protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Our Office has explained that a challenge to the cancellation of a solicitation is subject to the 10-day timeliness rule. *The Jonathan Corp.*, B-247053, B-247053.7, May 15, 1992, 92-1 CPD ¶ 446 at 4 (protest of the cancellation of a solicitation filed more than 10 days after the protester

received the amendment notifying it of the cancellation is clearly untimely and will not be considered); see also *Delta Risk, LLC*, B-416420, Aug. 24, 2018, 2018 CPD ¶ 305 at 14 (protest allegation challenging ground rules that the agency announced for performing corrective action and recompetition, where no further submissions are anticipated, must be raised within 10 days of when the scope of the agency's corrective action was known or should have been known).

We find timely Alliance's argument that the agency improperly canceled the original RFQ as a pretext to avoid resolving Alliance's prior protest and to reopen the competition. Protest at 7, 9; Comments at 3. Although the agency issued a cancellation notice through the NASA SEWP website on February 11, the notice did not set forth the agency's basis for cancellation. We agree with the protester that this basis of protest--that the cancellation was a pretext--was established on February 27, when DISA issued the new RFQ, which allowed the protester to compare the terms of the old and new solicitations. *Boswell & Dunlap, LLP*, B-416623, Oct. 10, 2018, 2018 CPD ¶ 351 at 4 (protester required to file a protest alleging that the cancellation of the solicitation was otherwise improper within 10 days of receiving the notice setting forth the basis of cancellation).

DISA alternatively argues that this protest allegation must be dismissed because GAO does not have jurisdiction to decide a protest in connection with the new RFQ. Agency Briefing, Apr. 17, 2020, at 1-2. According to the agency, GAO lacks jurisdiction over the protest because the new RFQ contemplates the issuance of a task order valued at less than \$25 million under the NASA SEWP GWAC, and because Alliance does not argue that the contemplated task order increases the scope, period, or maximum value of the contract.⁴ *Id.* at 2-3; COS/MOL at 5-6 (estimating the value of the contemplated task order at approximately \$7 million).

Alliance asserts that while its basis of protest was established by the terms of the new RFQ, its challenge is actually in connection with the \$40.8 million task order awarded on July 17, 2019. Protester Resp., Apr. 21, 2020, at 4-5, 7; Protest at 7. Alliance insists that its protest allegation "looks to remedy errors found in the implementation of a corrective action related to a procurement that resulted in a \$40.8 [million] award." Protester Resp., Apr. 21, 2020, at 9. Based on the connection with the \$40.8 million task order, Alliance argues that GAO has jurisdiction over the instant matter. *Id.* at 7.

Under the Federal Acquisition Streamlining Act (FASA) of 1994, as modified by the National Defense Authorization Act of 2017, our Office is not authorized to hear a protest "in connection with the issuance or proposed issuance of a task or delivery order

⁴ In a pre-award setting, the estimated value of the contemplated task order is controlling for the purpose of establishing GAO's bid protest jurisdiction under Title 10, section 2304c(e)(1)(B). See *Global Dynamics, LLC*, B-417776, Oct. 23, 2019, 2019 CPD ¶ 366 at 4 (establishing jurisdiction based on an independent government cost estimate).

except” in expressly authorized situations. 10 U.S.C. § 2304c(e). That authority allows GAO to hear protests in connection with the issuance or proposed issuance of task orders in two limited scenarios: (1) where the protester asserts that the task order increases the scope, period, or maximum value of the contract under which the order is, or will be, issued; or (2) where the task order is valued in excess of \$25 million.⁵ *Id.*; *id.* § 2304a(a) (authorizing the “head of an agency” to enter into a task or delivery order contract); *id.* § 2302(1) (including the administrator of NASA as a “head of an agency”); FAR 16.505(a)(10)(i).

Here, we find that the cancellation of the solicitation is a discrete procurement action involving a preliminary procurement decision--the decision to cancel the original RFQ--which should have occurred before any new contract vehicle was selected. See *BayFirst Solutions, LLC v. United States*, 104 Fed. Cl. 493, 507-508 (2012) (FASA jurisdictional bar did not apply to the agency’s decision to cancel a solicitation because cancellation of the solicitation can be viewed as “a discrete procurement decision and thus could have been the subject of a separate protest”). Because the agency did not set forth its basis for cancellation of the original RFQ until it issued the new RFQ, the protester is only using the new RFQ as evidence to support its protest allegation that cancellation of the original RFQ is a pretext.

This conclusion is consistent with our decision in *e-Management*, where our Office maintained jurisdiction to hear a challenge to the cancellation of a solicitation as a pretext, even though our Office found that the challenge to the task order was barred by FASA. *e-Management Consultants, Inc.; Centech Grp., Inc.*, B-400585.2, B-400585.3, Feb. 3, 2009, 2009 CPD ¶ 39, at 5-6; see also *EA Eng’g, Sci., and Tech., Inc.*, B-411967.2, *et al.*, Apr. 5, 2016, 2016 CPD ¶ 106 at 4 (concluding that our Office had jurisdiction to review the reasonableness of the issuance of a task order valued below the threshold to a vendor as part of the review of the reasonableness of the agency’s decision after corrective action to terminate the protester’s task order, which was valued above the threshold). Therefore, we will address this protest issue on the merits.⁶

⁵ Our statutory authority to consider protests of task or delivery orders issued under IDIQ contracts is based on the agency that established the IDIQ contract, not the agency that places the order under that contract. See *Analytic Strategies LLC; Gemini Indus., Inc.*, B-413758.2, B-413758.3, Nov. 28, 2016, 2016 CPD ¶ 340 at 4-5 (finding jurisdiction under Title 41 because the underlying multiple-award contract was issued by a civilian agency). Therefore, orders issued under multiple-award contracts established by NASA are governed by the procedures of Title 10. 10 U.S.C. § 2304c(e); *id.* § 2304a(a); *id.* § 2302(1); Federal Acquisition Regulation (FAR) 16.505(a)(10)(i)(B)(2).

⁶ We do lack jurisdiction, however, with respect to any of Alliance’s allegations that are based solely on the issuance of the new RFQ and its terms. In this regard, Alliance has not alleged that the new RFQ increases the scope, period, or maximum value of the contract against which it was issued.

In a negotiated procurement, a contracting agency has broad discretion in deciding whether to cancel a solicitation. *Tien Walker*, B-414623.2, B-414623.3, July 10, 2017, 2017 CPD ¶ 218 at 2; *SupplyCore Inc.*, B-411015.8, May 27, 2016, 2016 CPD ¶ 153 at 3. Thus, an agency need only establish a reasonable basis to support a decision to cancel a solicitation. See, e.g., *Tien Walker*, *supra*. A reasonable basis to cancel exists, for example, when an agency concludes that a solicitation does not accurately reflect its needs. *Id.* An agency may cancel a solicitation regardless of when the information prompting the cancellation first arises. *Firetech Automatic Sprinkler*, B-295882, May 4, 2005, 2005 CPD ¶ 146 at 2.

Where a protester has alleged an agency's rationale for canceling a solicitation is but a pretext--that is, 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. *Abacus Tech. Corp.*, B-416390.5, May 7, 2019, 2019 CPD ¶ 172 at 8; *Tien Walker*, *supra*. Nevertheless, the reasonableness standard applicable to cancellation of a solicitation remains unchanged. E.g., *Tien Walker*, *supra*.

With respect to the changes in the new RFQ, the agency states that: (1) the optional CLINS, CLINs 11 through 55, were eliminated due to budgetary constraints; (2) because the optional CLINS were deleted, the total system data storage time requirement was reduced from 180 days to 14 days of storage with one option providing for a total of 30 days; (3) additional language was needed to clarify that the government would install the equipment; and (4) language was needed to clarify that the agency would have 180 days of contract performance to verify that the equipment met the salient characteristics and that if the contract is terminated, all equipment would be returned to the vendor. AR, Tab 5, Memorandum for Record, Mar. 9, 2020, at 1; see also New RFQ at 2; AR, Tab 4A, Pricing Worksheet; AR, Tab 4E, Questions and Answers at 1. According to the contracting officer, these changes resulted in an estimated reduction of total lifecycle cost from \$38 million to approximately \$7 million. AR, Tab 5, Memorandum for Record, Mar. 9, 2020, at 1.

The contracting officer determined that "the changes to the solicitation were so substantial that they exceeded what prospective [vendors] could reasonably anticipate." COS/MOL at 5. Further, since the original RFQ was a small business set-aside, the contracting officer concluded that due to the changes, cancellation of the original RFQ was necessary to provide a fair opportunity to all small business vendors--those small businesses that responded to the original RFQ, and those that may not have submitted quotations because the prior scope of work exceeded their capabilities. *Id.* at 5-6.

The protester contends that the terms of the new RFQ prove the agency's needs have not actually changed, and thus the new RFQ was issued as a pretext. Comments at 1-3. Specifically, the protester argues: (1) the original RFQ and new RFQ have the same base period of performance and funding level; (2) the original RFQ and new RFQ list the same product and salient characteristics; (3) the new RFQ states that training

and installation services are not required, however, the protester never considered those services as being required under the original RFQ so the clarification was unnecessary; and (4) language in the new RFQ detailing “post-award administrative matters” are matters of contract administration not for GAO’s review. Protest at 2, 6 n.3, 7; Comments at 2-3.

We conclude that the agency has demonstrated a reasonable basis for canceling the original RFQ and resoliciting its updated requirements via the new RFQ. Any one of the agency’s proffered justifications for canceling the original RFQ, standing alone, would have satisfied our Office’s reasonableness standard applicable to cancellation of a solicitation. *Tien Walker, supra* (reasonable basis to cancel a solicitation exists when the solicitation does not accurately reflect agency needs); *KNAPP Logistics Automation, Inc.--Protest & Costs*, B-404887.2, B-404887.3, July 27, 2011, 2011 CPD ¶ 141 at 3.

Specifically, the agency has identified several instances where it believes the new RFQ has been revised to more accurately reflect its needs and argues that these changes may broaden competition. For example, the new RFQ clarified the government will perform integration services and includes updated termination provisions so that it is consistent with the termination clauses of the FAR. New RFQ at 2; AR, Tab 4E, Questions and Answers at 1.

In contrast, none of the protester’s arguments show that the changes to the new RFQ were unrelated to the agency’s requirements. For example, we find unpersuasive Alliance’s argument that it never believed integration services were required, even in the original RFQ, and its argument that changes in termination provisions are irrelevant to the agency’s evaluation of proposals. In our view, clarification of an agency’s requirements provides a reasonable basis to cancel a solicitation and resolicit the requirements. See *Noelke GmbH*, B-278324.2, Feb. 9, 1998, 98-1 CPD ¶ 46 at 3.

The protest is denied.

Thomas H. Armstrong
General Counsel