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## Decision

**Matter of:** AE Works, Ltd.

**File:** B-419528.2

**Date:** May 5, 2021

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### DIGEST

Protest that agency improperly cancelled a requirement for architect-engineer services is denied where the decision to cancel was reasonably based on agency concerns that insufficient funds were available.

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### DECISION

AE Works, Ltd. (AE Works), a service-disabled veteran-owned small business (SDVOSB) of Sewickley, Pennsylvania, protests the cancellation of request for proposals (RFP) No. 36C24620R0134, issued by the Department of Veterans Affairs (VA) for architect-engineer (A/E) services. The protester contends that the VA's decision to cancel the procurement was unreasonable and not made in good faith.

We deny the protest.

### BACKGROUND

Generally, in acquiring A/E services, a contracting agency must publicly announce its requirements, evaluate the A/E performance data and qualifications statements on file as well as those submitted in response to the announcement, and select at least three firms for discussions without considering price. Negotiations concerning price are then conducted with the highest-ranked firms. See *OLBN Architectural Serv., Inc.*, B-402444.4, B-402444.5, Oct. 4, 2010, 2011 CPD ¶ 55. On June 10, 2020, the VA posted a request on the beta.SAM.gov website for Standard Form (SF) 330 A/E Qualifications statements with a due date of July 13, 2020. Agency Report (AR), Tab 3, Request for SF-330 at 2, 7. The agency sought to award a fixed-price contract for A/E

services on a project to develop a facility master plan for certain medical centers within the VA Mid-Atlantic Health Care Network. *Id.* at 9.

The solicitation, issued as an SDVOSB set-aside, specified that the procurement was to be conducted in accordance with the Selection of Architects and Engineers Statute, formerly known as the Brooks Act, as implemented in Federal Acquisition Regulation (FAR) subpart 36.6. AR, Tab 1, RFP at 1. Under this Act, contractors are selected for A/E work on the basis of demonstrated technical competence and qualifications. *Fire Risk Mgmt., Inc.*, B-411552, Aug. 20, 2015, 2015 CPD ¶ 259 at 2. The procedures do not include price competition; rather, the agency must identify the most highly qualified firm and attempt to negotiate a contract with that firm at a fair and reasonable level of compensation. *Id.*

The request for SF-330 submissions provided for selection based on the following evaluation criteria: (1) professional qualifications; (2) specialized experience and technical competence; (3) past performance; (4) personnel experience and qualifications; (5) capacity to accomplish the work in the required time; (6) reputation and standing of the firm; and (7) record of significant claims against the firm. AR, Tab 3, Request for SF-330 at 3-4. This notice explained that an evaluation board would assess SF-330 submissions to identify the most highly qualified firms. *Id.* at 3. The agency would then hold discussions with “at least three” of the identified firms. *Id.*

On September 1, the VA identified the most highly qualified firm, provided that firm with the RFP, and began negotiations with that firm. Memorandum of Law (MOL) at 2. The agency terminated those negotiations on November 16 after determining that the firm’s best and final offer exceeded the agency’s allotted funds, and on November 19, the VA sent the RFP to the protester, the next most highly qualified firm. *Id.*; Contracting Officer’s Statement (COS) at 1. The agency received AE Works’s proposal on January 8, 2021, and terminated negotiations with the protester via email on January 12 because the protester’s proposed price also exceeded the agency’s allotted funding. COS at 2. The VA notified the protester that the agency did “not believe that we can come to an agreement on cost for the project that will be satisfactory for both parties,” and as a result, decided to “terminat[e] any future negotiation.” Protest, Exh. D, Proposal Rejection Email at 1.

On January 19, the protester filed its initial protest with our Office. MOL at 2. On January 29, the VA advised our Office that it intended to take corrective action by cancelling the solicitation, evaluating the agency’s actual requirements, and issuing a new solicitation that adequately reflected those requirements; as a result, we dismissed the protest as academic. *AE Works, Ltd.*, B-419528, Feb. 2, 2021 (unpublished decision).

This protest followed.

## DISCUSSION

AE Works raises various complaints about the agency's corrective action. The protester contends that the agency's decision to cancel the RFP is "erroneous insofar as [the cancellation] is unsupported by factual evidence or reasoned analysis." Protest at 2; see *also* Comments at 1 (claiming that the agency "lacks a reasonable basis" for cancellation). AE Works also alleges that the agency did not act in good faith when it cancelled the solicitation. See Protest at 7-8; Comments at 1. The protester argues that the agency should be required to refrain from cancelling the RFP and should engage in negotiations with AE Works in accordance with FAR subpart 36.6. Protest at 8.

A contracting agency has broad discretion to determine when it is appropriate to cancel a procurement conducted under the Selection of Architects and Engineers Statute and may do so by establishing a reasonable basis for the cancellation. See *Digital Forensic Servs., LLC*, B-419305.3, Feb. 25, 2021, 2021 CPD ¶ 106 at 3; *Winzler & Kelly*, B-260449, June 19, 1995, 95-1 CPD ¶ 279 at 2. In this regard, agencies are afforded the same discretion to cancel as in other types of procurements. *Parkey & Partners Architects*, B-217319, Mar. 22, 1985, 85-1 CPD ¶ 336.

We have fully considered the record and the parties' arguments and find no basis to sustain AE Works's protest.<sup>1</sup>

Here, the agency asserts that its decision to cancel the RFP was reasonable because it lacked sufficient funding. The agency specifically explains that it began negotiations with the most highly qualified firm, and that the agency received a best and final offer from that firm, \$4.1 million, that was higher than the Independent Government Cost Estimate (IGCE) for the project, which was \$1.3 million. COS at 2-3; MOL at 2. After terminating negotiations with that firm and sending the RFP to AE Works, the next most highly qualified firm, the agency states that it "decided to terminate negotiations with AE Works because of the disparity between the [IGCE] . . . and the proposal submitted by AE Works."<sup>2</sup> MOL at 2. The agency adds that "because of the disparity between the

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<sup>1</sup> In addition to the argument specifically discussed below, we have considered all other arguments and variations thereof. For example, to the extent the protester argues that the agency was acting in bad faith by cancelling the solicitation, government officials are presumed to act in good faith. See *Data Matrix Sols., Inc.*, B-412520, Mar. 14, 2016, 2016 CPD ¶ 87 at 6-7. A protester's assertion of bad faith must be supported by convincing proof, and not mere inference, supposition, or unsupported speculation. *Id.* Apart from its complaint that the agency did not negotiate with the protester prior to cancelling the solicitation, the protester offers no evidence that the agency acted in bad faith. AE Works's arguments do not meet this standard; accordingly, this ground is dismissed.

<sup>2</sup> The agency points out that AE Works's proposed price was \$9.3 million, an amount approximately seven times the ICGE amount of \$1.3 million. MOL at 2, 4.

IGCE and all offers, the [contracting officer] decided to cancel the solicitation.” *Id.* The agency asserts that the disparity between the protester’s proposed price and the IGCE led it to conclude that negotiations would not be successful with AE Works. MOL at 3-4. The agency states its intention to better define the project so that the solicitation can adequately reflect the agency’s requirements. COS at 2.

In its comments, the protester continues to argue that the agency’s cancellation was unreasonable. The protester complains that the agency negotiated with the most highly qualified firm, yet terminated negotiations and cancelled the solicitation without holding discussions with the protester about price and without allowing the protester to submit a best and final offer. Comments at 3.

So long as there is a reasonable basis for doing so, an agency may cancel a solicitation no matter when the information precipitating the cancellation first arises. See *Draeger, Inc.*, B-418089.2, B-418089.3, Dec. 10, 2020, 2021 CPD ¶ 4 at 3. An agency’s determination that funds are not available is sufficient reason to cancel a solicitation; moreover, it is not our role to question the unavailability of funds. *T.W. Recycling*, B-413256, Sep. 16, 2016, 2016 CPD ¶ 261 at 4.

Under these circumstances, we find no basis to object to the agency’s decision to cancel the solicitation. The record shows that after beginning negotiations with the first firm, the agency recognized that it was unable to come to an agreement regarding price. In its discretion, the agency determined that its available funds were insufficient, such that it could not come to an agreement with either the first firm or with any subsequent firms. In support of its rationale, we note the agency’s argument that there was a significant disparity between the agency’s IGCE and the protester’s offered price, as well as other offerors’ prices. The protester’s argument that the agency was required to negotiate with AE Works prior to cancelling the solicitation skirts the real issue, which is whether the agency’s decision to cancel the solicitation was reasonable. The record shows that the agency determined it lacked sufficient funds for the procurement at issue; in such circumstances, an agency may reasonably cancel the solicitation. See *T.W. Recycling, supra*. The fact that the agency cancelled the solicitation prior to negotiating with the protester does not negate the reasonableness of that decision. See *Draeger, Inc., supra*. Furthermore, the agency’s stated intention to reevaluate its requirements and update the procurement accordingly provides a reasonable basis for its decision to cancel the solicitation.

The protest is denied.

Thomas H. Armstrong  
General Counsel