

Decision

Matter of: SMF Systems Technology Corporation

File: B-292419.3

Date: November 26, 2003

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DIGEST

Agency determination, in the face of protester's challenge to selection decision, to cancel request for quotations for services under the Federal Supply Schedule (FSS) and to issue an order for services on a noncompetitive basis because the initial competition allegedly was contrary to regulations governing FSS acquisitions and inconsistent with an urgent need to conduct the procurement with minimum delay was not reasonable where the competition conducted was not contrary to applicable regulations and the urgency was primarily the result of the agency's missteps in the acquisition process.

DECISION

SMF Systems Technology Corporation (SMF) protests the decision of the Department of Veterans Affairs (VA) to cancel request for quotations (RFQ) No. RFQ15198 for video teleconferencing support services for the Air Force Surgeon General (AFSG) and to acquire these services on a noncompetitive basis.¹

¹ The AFSG reports that the office oversees the efforts of nearly 40,000 personnel providing direct medical care to more that 2.7 million beneficiaries worldwide. The AFSG uses full video teleconferencing support on a daily basis as a means to conduct business with staff located throughout the world. The AFSG staff conducts approximately 30 to 40 video teleconferences each week. The topics discussed range from routine organizational issues to reviews of medical operation issues that "are literally life and death decisions." Office of the Air Force Surgeon Memorandum at 1. According to the AFSG, the video teleconferencing capability "has become

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We sustain the protest.

On May 21, 2003, the VA issued the RFQ to three FSS contractors, including SMF and Electronic Data Systems, Inc. (EDS). SMF timely submitted its quotation prior to the May 28 closing time. On June 5, the VA advised SMF that its quotation was not selected. At its debriefing, SMF was advised that its quotation, even though significantly less expensive than the EDS quotation, which was selected, was not considered because SMF had not included required resumes. On June 10, SMF protested that the VA had simply overlooked the resumes, and that the VA should take corrective action and consider SMF's quotation. Protest, June 10, 2003. On June 24, the VA advised that it would reevaluate the quotations because SMF's resumes had been "inadvertently overlooked." E-Mail from VA to Protester's Counsel, June 24, 2003. On the next day, SMF agreed to withdraw its protest and, on June 26, our Office closed our file without further action.

The agency conducted a reevaluation and, on July 10, again selected the EDS quotation for the order. On July 16, SMF received a debriefing and on July 17, SMF filed a second protest, asserting that the VA had misevaluated quotations and had made an unreasonable cost/technical tradeoff. On August 18, 2003, the VA advised our Office that the contracting officer had reviewed the procurement and

determined that since a General Services Administration (GSA) schedule contract was the source [of the RFQ], she had used procedures for conducting this procurement that were contrary to the . . . Federal Acquisition Regulation (FAR) 8.402 and inconsistent with the urgent need to conduct this procurement with minimum delay.

Letter from VA to GAO (Aug. 18, 2003).

The VA reported that "[s]ince the need for this contract to be established and functional is critical to the success of AFSG's operations worldwide, the slow process of the current solicitation through FAR Part 15-type procedures is contrary to the interests of the agency." *Id.* The VA stated that the Defense Federal Acquisition Regulation Supplement (DFARS) § 208.404-70, entitled "Additional ordering procedures for services," applied to this FSS order. This provision implements Section 803 of the National Defense Authorization Act for Fiscal Year

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central to the Air Force's ability to adapt its medical care to a highly variable environment," and the support staff are the "lynchpin" to maintaining this capability. *Id.*

2002 (Pub. L. 107-107) and applies to orders placed by non-Department of Defense (DOD) agencies on behalf of DOD.

As relevant here, this provision states that:

(b) Each order for services exceeding \$100,000 shall be placed on a competitive basis in accordance with paragraph (c) of this subsection, unless the contracting officer waives this requirement on the basis of a written determination that--

(1) One of the circumstances described at FAR 16.505(b)(2)(i) through (iii) applies to the order; or

(2) A statute expressly authorizes or requires that the purchase be made from a specified source.

(c) An order for services exceeding \$100,000 is placed on a competitive basis only if the contracting officer provides a fair notice of the intent to make the purchase, including a description of the work the contractor shall perform and the basis upon which the contracting officer will make the selection, to--

(1) As many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that offers will be received from at least three contractors that can fulfill the work requirements, and the contracting officer--

(i)(A) Receives offers from at least three contractors that can fulfill the work requirements; or

(B) Determines in writing that no additional contractors that can fulfill the work requirements could be identified despite reasonable efforts to do so (documentation should clearly explain efforts made to obtain offers from at least three contractors); and

(ii) Ensures all offers received are fairly considered

The VA subsequently determined on September 26 that this schedule order should be placed without competition pursuant to FAR § 16.505(b)(2)(i) because AFSG's need for these services were "so urgent that [competition] would result in unacceptable delay." Contracting Officer's Determination and Findings, Sept. 26, 2003. The basis for the decision was that the services were necessary to "the execution of [Air Force]

Medical Service programs that is paramount to the medical community. Interruption of this service would disrupt high-level fast paced business communication during this time of war.” Id. at 2. The agency also reports that resoliciting the requirement “would put the [AFSG] at risk [in performing] adequate technical oversight that he provides the medical community in regards to direct patient care for the Air Force warfighter and families worldwide.” Id. at 2. On August 21, our Office dismissed SMF’s second protest because the RFQ had been canceled.

On August 19, SMF protested the agency’s determination to cancel the RFQ, which is the issue we address in this decision. SMF argued that the cancellation could not be supported on an urgency basis, that there was no basis to forgo the competition already conducted, and that the VA’s real reason for canceling was the VA’s “inability to get it right in a competitive setting” and the agency’s desire to avoid scrutiny. Protest at 9. SMF also argued that GAO should resolve the firm’s earlier protest challenging the evaluation of quotations and the agency’s tradeoff analysis and selection decision.

On September 29, the VA responded to SMF’s protest, pointing out that in the context of a negotiated procurement, an agency has broad discretion in deciding whether to cancel a solicitation and arguing that the VA had a reasonable basis for canceling this solicitation. The VA cited its earlier letter to our Office explaining the basis for its decision to cancel the solicitation and provided further information from AFSG’s office elaborating on the urgent need for these services in order to avoid any further potential disruption to its mission. The VA submitted the contracting officer’s determination and findings, as referenced above, that the requirement was urgent and that this urgency supported the issuance, without additional competition, of an order to EDS, the firm that had received the order under the protested competition and that was currently performing the work. In its comments, the protester continues to maintain that the agency’s actions are improper and that the original competition should have been completed.

A contracting agency need only establish a reasonable basis to support a decision to cancel an RFQ. Surgi-Textile, B-289370, Feb. 7, 2002, 2002 CPD ¶ 38 at 2. 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, even if it is not until offers (or, as here, quotations) have been submitted and evaluated. A-Tek, Inc., B-286967, Mar. 22, 2001, 2001 CPD ¶ 57 at 2-3. However, where, as here, a protester has alleged 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. Miller, Davis, Marter & Oppen, P.C., B-242933.2, Aug. 8, 1991, 91-2 CPD ¶ 176 at 4.

Here, the VA has not offered a reasonable basis for canceling the competition. The VA states that its initial decision to conduct a competition using FAR “Part 15-type” procedures was “contrary to the requirements of the FAR 8.402 and inconsistent with

the urgent need to conduct this procurement with minimum delay.” Letter from VA to GAO (Aug. 18, 2003). However, this post-protest conclusion that the VA should not have conducted the procurement as it did is flawed in a number of respects.

First, contrary to the position VA takes in its justification for canceling the competitive acquisition, the VA’s decision to conduct a competition under rules similar to those used in negotiated procurements did not violate FAR § 8.402. It is not clear from the record what aspect of the process followed—which took approximately 2 weeks, from issuance of the RFQ to the announcement of the results—the VA thought was improper. FAR Subpart 8.4 (which governs the use of the FSS) does not prohibit the use of negotiated procurement-type procedures for an FSS buy (although it also does not require use of those procedures). Similarly, under the DFARS provision quoted above, which the VA now relies on for its subsequent actions, an agency is not prohibited from conducting an FSS buy using negotiated procurement-type procedures (although, again, an agency is also not required to use those procedures). The ordering procedures found at DFARS § 208.404-70(c), quoted above, set a minimum competition requirement which, it is true, is simpler than the process in FAR Part 15. The VA’s competition among three vendors certainly appears to have complied with the DFARS requirement (assuming that three vendors who could fulfill the requirements responded). Thus, the VA’s position that its initial competition violated FAR Subpart 8.4 is misplaced.

Second, as the protester correctly points out, at the time the VA decided to take its “corrective action,” the VA had already, on two occasions, effectively completed this competitive procurement. Taking under 16 days each time, the VA twice evaluated the quotations and made a selection decision (as noted above, in response to SMF’s first protest, the VA admitted that it had overlooked the protester’s resumes, so that the agency took corrective action and conducted a reevaluation of the quotations and made a new selection decision based on the reevaluation). During the 3-month period from the VA’s issuance of the RFQ on May 21 until its letter of August 18 stating its intent to cancel based on urgency grounds, the VA never asserted any urgency concerns or any concerns regarding the acquisition approach it used to conduct the acquisition. It is difficult to find reasonable an agency’s claim that urgency prevents it from using competitive procedures when the urgency is not identified or asserted until after the competitive procedures have been completed.

Third, as the protester also points out, the VA fails to explain why it could not have allowed our Office to resolve SMF’s protest of the selection decision. The record shows that the protester filed its second protest on July 17, and the VA took approximately 1 month (until August 18) to decide that it would cancel the acquisition and award to EDS without further competition. The reason for this delay is not explained in the record. However, in our view, the urgency that exists today was primarily the result of missteps in the agency’s acquisition process, and it is troubling that the resulting urgency is now the basis proffered for the cancellation of the solicitation.

The Competition in Contracting Act of 1984 (CICA), as amended, requires our Office to complete its review of bid protests within 100 calendar days—a deadline consistently met—to minimize the disruption that protests necessarily engender. 31 U.S.C. § 3554(a)(1) (2000). Congress decided that, in the event that a protest qualifies for a stay of performance under the terms of the Act, the 100-day timeframe strikes an appropriate balance between agency needs and the need to preserve the possibility of meaningful relief for contractors whose protests are vindicated upon review. Where an agency’s procurement needs cannot wait for our resolution of a protest, CICA identifies the steps the agency may take to override the stay, and begin performance of the contract notwithstanding the protest. 31 U.S.C. § 3553(d)(3)(C). The protest process, which plays an important role in ensuring transparency and accountability in our federal procurement system, is thus structured to allow agencies with urgent needs to proceed with contract performance unhindered by protests.

Here, the VA baldly acknowledges that one of its bases for canceling the solicitation is “the fact that the SMF protests have come post award, in the first case necessitating corrective action and re-evaluation of proposals....” Letter from VA to GAO, Sept. 29, 2003, at 1. The VA thus indicates that, in its view, one of the problems with these protests was their merit—that is, the protester was right when it pointed out that the agency had overlooked its resumes in rejecting its lowest-priced offer. While this situation may be inconvenient for the VA, the decision to cancel appears to be, as the protester contends, essentially an attempt to avoid further scrutiny and review, when, if it needed to, the agency could have proceeded with contract performance during the pendency of the protest.

In reaching our conclusion about the merits of the VA’s decision to cancel, we do not mean to suggest that the ultimate user of these services, the Air Force Surgeon General’s Office, does not urgently need them. At this point, the AFSG has documented the need to avoid further disruption to its mission to provide medical services. On the other hand, this record suggests that the urgency here may spring more from the VA’s inability to properly complete this procurement, than from any other source. We conclude that the VA has unreasonably canceled a competitive acquisition, after receiving and evaluating quotations and selecting one for award, without a reasonable basis.

The protest is sustained.

As noted above, we are mindful of AFSG’s concern for the need to avoid potential further disruption to AFSG’s medical services mission, a concern that the protester has not meaningfully challenged. In our decisions, our Office takes into account concerns such as these. See, e.g., J & J/BMAR Joint Venture, LLP--Costs, B-290316.7, July 22, 2003, 2003 CPD ¶ 129 at 2 (recognizing that wartime exigencies created by the recent Iraq conflict provided a reasonable basis for an agency to delay the implementation of its promised corrective action). We therefore conclude that disturbing the award to EDS and reinstatement of the solicitation are not appropriate

in the circumstances. We do, however, recommend that the agency not exercise any options under this task order. Because of the absence of other relief at this point, we also recommend that SMF be reimbursed the reasonable costs incurred in preparing its quotation. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(2) (2003). We further recommend that SMF be reimbursed its cost of filing and pursuing all three protests, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel