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## Decision

**Matter of:** East West, Inc.

**File:** B-412719.2; B-412719.3; B-412719.4

**Date:** June 21, 2016

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### DIGEST

1. Protester that does not have a Federal Supply Schedule (FSS) contract is not an interested party to challenge the agency's decision to cancel a solicitation that limited competition to FSS vendors.
  2. Protest of an agency's corrective action is denied where the record shows the agency acted promptly to implement its proposed corrective action.
  3. Protest of an agency's decision to resolicit its requirement is dismissed as premature where the record shows the agency has not made a final decision regarding its needs and has not yet issued a new solicitation.
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### DECISION

East West, Inc., of Falls Church, Virginia, a small business, protests the cancellation of request for quotations (RFQ) No. 1062534, issued by the Department of Health and Human Services, National Institutes of Health (NIH), through the General Services Administration's (GSA) e-Buy system for janitorial services. The protester alleges that the agency has acted in bad faith in cancelling the RFQ and in implementing the corrective action it proposed in connection with the RFQ. East West also alleges that the agency continues to wrongfully procure the requirement through the GSA e-Buy system.

We deny the protest in part and dismiss it in part.

## BACKGROUND

On January 30, 2016, the NIH issued RFQ No. 1062534 on an unrestricted basis through the GSA e-Buy system. Agency Counsel Email, June 7, 2016. The RFQ was limited to holders of GSA Federal Supply Schedule (FSS) contracts pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 8.4. The RFQ sought janitorial services to be performed at multiple NIH facility locations for a period of performance of one base year and one option year. RFQ at 20-21, 23, 50.

### Initial Protest and Corrective Action

On February 9, prior to the date for receipt of quotations, East West filed a protest challenging the terms of the RFQ.<sup>1</sup> East West's protest was docketed as B-412719. In this initial protest, East West alleged that the NIH's decision to procure the services under the FSS on an unrestricted basis was erroneous. Protest (B-412719) at 1-2, 4, 5-6. Specifically, East West contended that the agency was prohibited from acquiring the subject requirement on an unrestricted basis because the agency had previously awarded the requirement under the Small Business Administration's (SBA) Section 8(a) Business Development Program (hereinafter "8(a) program").<sup>2</sup> *Id.* at 2, 4. Citing 13 C.F.R. § 124.504(d)(3), the protester alleged that the agency was required to set aside the procurement for small businesses, after seeking the approval of the SBA to release the requirement from the SBA's 8(a) program. *Id.* at 4. The protester further contended that, even if the agency were to obtain the SBA's approval to release the requirement from the SBA's 8(a) program, the agency would still be prohibited from issuing the solicitation under the FSS because "[t]he regulations implementing the Small Business Act and GSA's FSS Program expressly anticipate and exclude FSS buys from set-aside requirements." *Id.* at 5 (citing FAR §§ 8.404(a), 19.502-1, 38.101(e)) (emphasis in original).

On February 25, subsequent to the filing of the earlier protest, the agency notified our Office of its intent to take corrective action. Agency's Notice of Corrective Action, Feb. 25, 2016. The NIH represented that it intended to "[c]ontact the [SBA] pursuant to 13 C.F.R. § 124.504(d)(3)" and "[s]tay contract award . . . pending SBA's response." *Id.* As a result, we dismissed the protest as academic on March 9. East West, Inc., B-412719, Mar. 9, 2016 (unpublished decision).

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<sup>1</sup> The RFQ closed on February 23. Contracting Officer (CO) Email, Apr. 27, 2016; GSA e-Buy Email, Feb. 23, 2016.

<sup>2</sup> East West is the incumbent 8(a) contractor and continues to perform the janitorial services during the pendency of the protest. Protest (B-412719.2) at 2; CO's Email, Apr. 27, 2016. East West, however, has graduated from the 8(a) program. Protest (B-412719) at 2.

The record reflects that the NIH contacted the SBA two days later on March 11. Agency Req. for Dismissal, Apr. 15, 2016, Attach. 3, SBA Email to Agency Counsel, Apr. 6, 2016. As the contracting officer explains, the SBA recommended to the agency that, in lieu of removing the requirement from the 8(a) program, the agency should resolicit the requirement through the GSA e-Buy system as a set-aside for 8(a) participants. CO Statement, May 18, 2016. Accordingly, on March 22, pursuant to FAR § 19.804-2, the agency offered the requirement to the SBA for acceptance into the 8(a) program. Agency Req. for Dismissal, Apr. 15, 2016, Attach. 2, Agency Offer Letter, Mar. 22, 2016. In an undated letter, the SBA accepted the requirement into its 8(a) program. Id., Attach. 1, SBA Acceptance Letter, undated. At this time, the NIH has not yet issued a new solicitation. Agency 2d Req. for Dismissal, May 5, 2016, at 1. Instead, the contracting officer represents that the agency has “not made a final decision on what action to take but [is] considering multiple options.” CO Statement, May 18, 2016.

During this time, although the agency received quotations in response to RFQ No. 1062534, in accordance with its proposed corrective action, the agency suspended action on the RFQ and did not make an award. CO’s Email, May 6, 2016; GSA e-Buy Email. Over the next few months, the contracting officer made several unsuccessful attempts to have GSA list the status of the RFQ as “canceled,” instead of “closed,” in the e-Buy system. CO’s Email, May 6, 2016. Eventually, GSA informed the agency that, once a solicitation has closed and quotations have been received, the solicitation may not be further modified, to include changing the status of the RFQ to “canceled.” CO’s Email, May 17, 2016. Regardless of the status listed in the GSA e-Buy system, the contracting officer represents that the RFQ is “essentially dead.” Id.

#### Current Protest

On March 24, two weeks after our Office dismissed East West’s initial protest, East West filed the subject protest, docketed as B-412719.2, alleging that the agency acted in bad faith by “deliberately” refusing to implement its corrective action. Protest (B-412719.2) at 4. In support of its bad faith allegations, East West describes a conversation that it alleges occurred between a representative of East West and a representative of the SBA, in which the SBA representative informed East West that no one from the agency had participated in a telephone conference scheduled for March 16 to discuss the requirement.<sup>3</sup> Id. at 2-3, 6. East West

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<sup>3</sup> East West also submitted an email dated March 15 in which an SBA representative confirmed that a meeting with the agency would occur on March 16, Protest (B-412719.2), Exh. 1, SBA Email, Mar. 15, 2016, and an email dated March 17 from the same SBA representative stating that “we were not able to speak with the [contracting officer.]” Id., Exh. 4, SBA Email, Mar. 17, 2016.

claims that the agency's alleged refusal to participate in the conference rises to the level of "a deliberat[e] act . . . to avoid complying with its promised corrective action[.]" Id. at 6. East West further alleges that the NIH's representation to our Office that it would take corrective action was a "sham" and that "NIH continues to wrongfully compete the requirement in the FSS Program and evaluate offers[.]" Id. at 4 n.2.

On April 15, the agency submitted a request for dismissal of the protest, arguing that the protester had not satisfied its burden to demonstrate, by convincing proof, that the agency acted in bad faith in implementing its corrective action. Agency Req. for Dismissal at 1-2. After submitting its correspondence with the SBA, the agency requested dismissal of the protest based on its assertion that the corrective action had been implemented. Id. at 2.

In response, the protester filed a supplemental protest, docketed as B-412719.3, alleging that the agency's correspondence with the SBA further supports the protester's bad faith allegations. Supp. Protest (B-412719.3) at 2. Specifically, East West alleges that NIH acted in bad faith by promising our Office that it would seek to obtain approval from the SBA to remove the requirement from the 8(a) program and then "deliberately disregard[ing]" its notice of corrective action. Id. at 2. In its supplemental protest, East West also challenges the propriety of the agency's offer letter, the SBA's acceptance letter, and the agency's alleged decision to solicit its requirement under the FSS as a set-aside under the 8(a) program. Id. at 2-3, 9-18.

The agency responded by filing a second request for dismissal. Agency 2d Req. for Dismissal, May 5, 2016. The agency argued that the entire protest should be dismissed because RFQ No. 1062534 was "officially closed," no award was made pursuant to the RFQ, and no new solicitation for the janitorial services has been issued. CO Email, Apr. 27, 2016.

On May 16, the protester filed another supplemental protest, which was docketed as B-412719.4. In this supplemental protest, East West challenges the NIH's decision to cancel RFQ No. 1062534,<sup>4</sup> which the agency announced during a conference call with our Office on May 6. East West contends that the agency's motivation in cancelling the RFQ "is to avoid GAO's scrutiny and review" of its protest. Supp. Protest (B-412719.4) at 2. East West requests that we recommend that the agency reissue the solicitation. Id. at 17.

In response, the agency filed a third request for dismissal, arguing that East West is not an interested party to challenge the cancellation of the RFQ because East West

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<sup>4</sup> We note that this is the relief East West requested in its initial protest. Protest (B-412719) at 5-7.

is not an FSS contract holder, and thus, East West would be ineligible for award under the RFQ.<sup>5</sup> Agency 3d Req. for Dismissal, May 18, 2016, at 1. For its part, the protester does not contend that, if the RFQ were reissued, it would be eligible to submit a quotation. Rather, East West explains that, once the RFQ is reissued, our Office could consider and sustain the merits of a challenge to the terms of the RFQ and recommend that the agency cancel or amend the solicitation to solicit its requirement outside of the FSS. Protester's Interested Party Briefing, May 18, 2016, at 3-4. Once the requirement is solicited outside of the FSS, East West would be eligible to submit a quotation. Id.

## DECISION

East West's allegations generally fall into three categories. First, East West challenges the agency's cancellation of the original RFQ, arguing that the cancellation was a pretext to avoid our Office's review of the RFQ. Second, East West challenges the agency's implementation of its corrective action, alleging that the agency has not made a good faith effort to implement the corrective action it proposed in connection with East West's initial protest. Finally, East West challenges the agency's alleged decision to issue a solicitation to procure the janitorial services through the FSS as an 8(a) set-aside. We find no basis to sustain the protest.<sup>6</sup>

### Cancellation of the RFQ

East West's challenge to the agency's decision to cancel the RFQ is dismissed because East West is not an interested party to challenge the agency's cancellation. Under the bid protest provisions of the Competition in Contracting Act of 1984, only an "interested party" may protest a federal procurement. 31 U.S.C. § 3551; National Air Cargo Grp., Inc., B- 411830.2, Mar. 9, 2016, 2016 CPD ¶ 85 at 4. That is, a protester must have a direct economic interest that would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. 21.0(a)(1). Determining whether a protester is interested

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<sup>5</sup> The agency also asserted a second basis to dismiss the protest, arguing that the protest was premature because the solicitation "cannot be canceled" and therefore "is not currently canceled." Agency 3d Req. for Dismissal at 1. Despite counsel's assertions, the contracting officer represents that, for all intents and purposes, the RFQ is "essentially dead" and that the agency has exhausted all efforts to list the RFQ as "canceled" in the GSA e-Buy system. CO's Email, May 17, 2016. Accordingly, we do not find the protester's challenge to be premature.

<sup>6</sup> Although we do not specifically address all of East West's arguments, we have fully considered all of them and find that they afford no basis on which to sustain the protest.

involves consideration of a variety of factors, including the nature of the issues raised, the benefit of relief sought by the protester, and the party's status in relation to the procurement. National Air Cargo Grp., Inc., supra.

Here, East West does not have the requisite interest to challenge the agency's cancellation of RFQ No. 1062534. East West represents that it "does not hold a [FSS] contract[.]" Protest (B-412719) at 3 n.2. Therefore, even assuming that its protest challenging the cancellation were sustained and our Office recommended that the agency reissue the RFQ, East West would not be eligible to submit a quotation in response to the reissued RFQ. See Sales Res. Consultants, Inc., B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102 at 5 (a protester that does not have an FSS contract is ineligible to compete for orders under the FSS). Accordingly, East West does not possess the requisite interest to challenge the NIH's decision to cancel the RFQ.

#### Implementation of Corrective Action

East West alleges that the agency acted in bad faith in implementing its corrective action. As a general matter, government officials are presumed to act in good faith, and a protester's contention that procurement officials were motivated by bad faith must be supported by clear and convincing evidence; our Office will not consider allegations based on mere inference, supposition, or unsupported speculation. Data Matrix Solutions, Inc., B-412520, Mar. 14, 2016, 2016 CPD ¶ 87 at 6-7. Here, East West fails to support its allegations of bad faith with convincing proof.

Rather, the record shows that officials at the agency and the SBA discussed the requirement as early as March 11, two days after our Office dismissed the initial protest. See Agency Req. for Dismissal, Attach. 3, SBA Email to Agency Counsel, Apr. 6, 2016. Moreover, the record demonstrates that the agency submitted an offer letter to the SBA on March 22--less than two weeks after our dismissal of the protest--seeking the SBA's acceptance of the requirement in the SBA's 8(a) program. Id., Attach. 2, Agency Offer Letter. Based on the documents submitted, we find that the agency acted promptly to implement its corrective action and any allegations regarding the agency's alleged "refusal" to participate in a meeting with the SBA are unfounded and, in any event, do not rise to the level of bad faith.

Regarding East West's allegation that the agency continued to evaluate quotations received in response to the RFQ and failed to stay the award of the contract, we find that the protester submitted no evidence at all to support its allegations. See generally Protest (B-412719.2) at 4 n.2; Supp. Protest (B-412719.3) at 8. Rather, the contracting officer has represented that no contract award was made pursuant to the RFQ and that the agency has made several unsuccessful attempts to list the RFQ as cancelled in the GSA e-Buy system. CO Email, May 6, 2016. Moreover, the agency has not issued a new solicitation for the requirement. Agency

2d Request for Dismissal at 1. Accordingly, we find no evidence of bad faith on the part of the agency in this respect.

Next, East West alleges that the agency acted in bath faith by representing to our Office that it would specifically seek approval from SBA under 13 C.F.R. § 124.504(d)(3) to remove the requirement from the 8(a) program, and then instead submitting an offer letter to the SBA to have the requirement accepted into the 8(a) program.<sup>7</sup> Protest (B-412719.3) at 2. As an initial matter, we do not construe the agency's notice of corrective action to have committed to removing its requirement from the 8(a) program. Rather, the agency's notice simply states that it intends to "contact" the SBA, which it has done. Agency Notice of Corrective Action at 1. In any event, to extent the agency's notice could be construed as a representation that the agency would formally seek to remove its requirement from the 8(a) program, the contracting officer explains that the agency's decision to offer the requirement to the SBA for acceptance into the 8(a) program was based upon the recommendation of the SBA. CO Statement at 1. We find no evidence of bad faith on the part of the agency in this respect.

#### Resolicitation of Requirement

Finally, East West challenges the agency's alleged decision to solicit its requirement under the FSS as a set-aside under the 8(a) program. See e.g., Protest (B-412719.3) at 2-3, 9-18. We dismiss this ground as premature because the contracting officer represents that the agency has not made a final decision regarding its future actions and is "considering multiple options." CO Statement at 1. At this time, no new solicitation has been issued. Accordingly, the protester's challenge to the terms of a future yet-to-be-determined RFQ and/or the agency's final implementation of its corrective action anticipates improper action that has not, and may not, occur. Point Blank Enter., Inc. d/b/a Protective Prods. Enters., B-409940.3, Nov. 26, 2014, 2014 CPD ¶ 357 at 7-8. In the absence of a

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<sup>7</sup> East West's argument in this respect is contradictory. On one hand, East West argues that the NIH represented to our office that it would seek to remove the requirement from the 8(a) program and did not do so. Protest (B-412719.3) at 2 ("NIH did not request approval from SBA under 13 C.F.R. § 124.504(d)(3) as reflected [in] NIH[s] [offer letter to the SBA], which runs contrary to the corrective action letter that GAO relied upon in dismissing the protest."). Elsewhere, however, East West argues that the NIH's offer letter to the SBA "is, in actuality, a request, for removal of the requirement from the 8(a) Program for placement in the GSA e-buy for award of the contract to an FSS Schedule holder that is an 8(a) participant." Id. at 2-3. Accepting East West's latter argument as true would result in the conclusion that the agency has implemented the corrective action East West alleges it represented it would take, i.e., removal of the requirement from the 8(a) program.

solicitation, the agency's offer letter and the SBA's acceptance letter do not constitute procurement actions that our Office may independently review. See 31 U.S.C. § 3551(1); Point Blank Enter., Inc. d/b/a Protective Prods. Enters., supra, at 7-8. Rather, our Office's jurisdiction is limited to considering protests involving solicitations already issued by federal agencies and awards made or proposed to be made under those solicitations. Tri-Ex Tower Corp., B-245877, Jan. 22, 1992, 92-1 CPD ¶ 100 at 2.

The protest is denied in part and dismissed in part.

Susan A. Poling  
General Counsel