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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

# Decision

**Matter of:** Medfinity LLC

**File:** B-413450

**Date:** September 9, 2016

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Peter Pham for the protester.

Douglas Kornreich, Esq., Department of Health and Human Services, for the agency.

Alexander O. Levine, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Agency's cancellation of a brand-name-or-equal solicitation was reasonable and was not made on the basis of pretext where the salient characteristics included in the solicitation did not adequately reflect the agency's needs.

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## DECISION

Medfinity LLC, a small business located in Fountain Valley, California, protests the decision by the Department of Health and Human Services (HHS) to cancel request for quotations (RFQ)<sup>1</sup> No. IHSWRSUOptometry for optometry equipment and installation services at Whiteriver Hospital campus in Whiteriver, Arizona. Medfinity alleges that the agency's rationale for cancellation was a pretext.

We deny the protest.

## BACKGROUND

The RFQ, which was issued on March 3, 2016, sought four optometry equipment items, and installation services, for the Whiteriver Hospital campus. The RFQ

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<sup>1</sup> The solicitation synopsis refers to the solicitation as both a "request for proposal" and a "request for quote." RFQ Synopsis at 1. Because the appropriate characterization of the solicitation as an RFQ or a request for proposals does not affect the outcome of this protest, we refer to the solicitation in this decision as an RFQ and the vendors' submissions as quotations for the sake of consistency.

provided for award to be made on a lowest-price, technically-acceptable basis. RFQ Synopsis at 2. For the equipment, the RFQ specified a particular brand and model of equipment (in each case, a ZEISS brand name) and indicated that the procurement was being conducted on a brand-name-or-equal basis. For three of the four pieces of equipment, the solicitation did not include any information beyond the brand and model of the ZEISS equipment. For the fourth item, a ZEISS Cirrus high-definition optical coherence tomography (OCT) Model 5000, the RFQ provided a one-page listing of characteristics of the machine.

On March 28, Medfinity timely provided a quotation in response to the RFQ. Medfinity's quotation did not propose ZEISS-brand equipment, and instead proposed different brands of equipment, which Medfinity asserted were equivalent or better than the specified ZEISS equipment. Agency Report (AR), Tab 7, Medfinity Quotation. On April 27, HHS issued an award to Medfinity. Contracting Officer Statement at 1.

On May 2, a disappointed vendor, PROAIM Americas, LLC, filed an agency-level protest with HHS. AR, Tab 13, PROAIM Protest. In its protest, PROAIM asserted that Medfinity's proposed OCT equipment failed to meet at least nine of the salient characteristics listed in the RFQ and therefore should have been determined technically unacceptable. Id. at 2. On May 11, the contracting officer (CO) sustained PROAIM's protest, determining that the issues raised were valid. AR, Tab 18, Agency Protest Decision Letter at 3.<sup>2</sup> In setting forth HHS's planned corrective action, the agency stated:

The contract will be resolicited (if it is still required). The technical team will need to revisit their criteria to determine the exact salient characteristics they need. At that time, the solicitation will have clear standards that need to be met and the technical team will understand their responsibilities during the selection process.

Id. That same day, the contract specialist emailed Medfinity's manager, and relayed the CO's rationale for sustaining PROAIM's protest. AR, Tab 17, Medfinity Email Chain, at 5-7. The contract specialist's email also stated that because the protest had been sustained, the agency would be terminating Medfinity's contract for convenience. Id. at 5.

On May 13, Medfinity sent an email to the CO challenging the assertions underlying HHS's decision to sustain PROAIM's protest, and requesting an independent third

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<sup>2</sup> The agency's protest decision letter did not contain page numbers. Our Office assigned consecutively numbered pages to the unnumbered pages in the decision. The citations to the letter in this decision are to the page numbers assigned by our Office.

party review, which Medfinity contended would show that its products met or exceeded the solicitation requirements. Id. at 2-5.<sup>3</sup> On July 18, Medfinity's manager emailed the contract specialist to inquire whether PROAIM's protest had been "resolved so we can ship the equipment?" AR, Tab 17, Medfinity Email Chain, at 2. The contract specialist replied that same day, stating that:

We have decided to cancel all solicitations and the units are redefining their requirements. We will be using ECAT<sup>[4]</sup> until final decision(s) is/are made in the requirement/sources end-user needs.

Id. at 2.

This protest follows.

## DISCUSSION

Medfinity primarily challenges the cancellation of the RFQ, asserting that the agency's decision to cancel the solicitation was a "smokescreen" to allow the agency to purchase the requirement using PROAIM's ECAT contract.<sup>5</sup>

As a preliminary matter, however, the agency challenges the timeliness of Medfinity's protest since the protest was filed more than two months after the agency announced its intention to cancel the solicitation. We decline to dismiss the protest on these grounds. In this regard, the record evidences that on May 13, Medfinity sent an email to the CO disagreeing with the agency's cancellation decision and requesting an independent third party review. See AR, Tab 17, Medfinity Email Chain, at 2-5. Our Office has long held that, to be regarded as an agency-level protest, a written statement need not state explicitly that it is, or is intended to be, a protest, but rather must convey the intent to protest by a specific expression of dissatisfaction with the agency's actions and a request for relief. Coulson Aviation (USA), Inc., B-411525, B-411525.2, Aug. 14, 2015, 2015 CPD ¶ 272 at 5. Because Medfinity's May 13 email included both a specific expression of dissatisfaction and a request for corrective action, we find that it constituted an

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<sup>3</sup> On May 18, the agency issued a modification terminating the contract awarded to Medfinity for convenience in accordance with Federal Acquisition Regulation (FAR) § 52.212-4; however, this modification was not transmitted to Medfinity. AR, Tab 20, Declaration of Contract Specialist.

<sup>4</sup> ECAT is an acronym for the Defense Logistics Agency's electronic catalogue, which is a governmentwide acquisition contract.

<sup>5</sup> While we do not address in detail all of the arguments raised by Medfinity in its protest, we have reviewed each, and conclude that none of these other protest grounds provides a basis to sustain the protest.

agency-level protest. Since Medfinity filed the instant protest with our Office within ten days of learning, on July 18, that the agency still intended to cancel the solicitation, its protest is timely under our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(3).

With regard to Medfinity's challenge to the cancellation decision, our Office has held that a contracting agency need only establish a reasonable basis to support a decision to cancel an RFQ. Inalab Consulting, Inc.; Solutions by Design II, LLC, B-413044 et al., Aug. 4, 2016, 2016 CPD ¶ 195 at 9. A reasonable basis to cancel exists when, for example, an agency determines that a solicitation has been drafted without sufficiently detailed evaluation criteria to permit a fair and equal evaluation of all quotations. See Kingdomware Techs., B-407389, Dec. 4, 2012, 2012 CPD ¶ 348 at 3; Progressive Servs. Corp., B-404183, B-404251.2, Jan. 11, 2011, 2011 CPD ¶ 18 at 3.

Where, as here, a protester alleges that the agency's rationale for cancellation is a pretext, that is, that the agency's actual motivation is to avoid awarding a contract on a competitive basis or to avoid deciding a protest on the merits, we will closely examine the reasonableness of the agency's actions in canceling the acquisition. VIRE Consulting, Inc., B-408148.2, Nov. 26, 2013, 2013 CPD ¶ 272 at 3. Notwithstanding such closer scrutiny, however, and even if it can be shown that personal animus or pretext may have supplied at least part of the motivation to cancel the procurement, the reasonableness standard applicable to the cancellation of a solicitation remains unchanged. Lasmer Indus., Inc., B-400866.2 et al., Mar. 30, 2009, 2009 CPD ¶ 77 at 3.<sup>6</sup>

Here, we find that HHS had a reasonable basis to cancel the solicitation in light of the RFQ's failure to include detailed specifications that reflected the agency's needs. Under FAR § 11.104, solicitations that are conducted on a brand-name-or-equal basis must include, in addition to the brand name, a "general description of those salient physical, functional, or performance characteristics of the brand name item that an 'equal' item must meet to be acceptable for award." The RFQ at issue here, however, did not list salient characteristics for three out of the four equipment items being solicited and instead merely provided the brand name. See AR, Tab 4, RFQ Salient Characteristics. Additionally, with respect to the fourth item, the OCT system, the agency explained that the salient characteristics listed had simply been copied from a website without any consideration as to whether such characteristics reflected the agency's needs. Memorandum of Law (MOL) at 7. Mirroring the lack of detail in the solicitation, the agency's technical evaluation included no analysis of

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<sup>6</sup> Government officials are presumed to act in good faith, and we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference and supposition. Logistics Solutions Group, Inc., B-294604.7, B-294604.8, July 28, 2005, 2005 CPD ¶ 141 at 4.

whether Medfinity’s proposed solution met the salient characteristics provided for in the RFQ. See AR, Tab 9, Medfinity Technical Evaluation. In reviewing this record following PROAIM’s protest, HHS determined that it needed to terminate Medfinity’s contract for convenience, “pending the development of salient and essential physical characteristics . . . in order to effectively develop a requirements package that adequately represents the Government’s need while also allowing for adequate competition.” AR, Tab 14, CO Agency-Level Protest Determination; Tab 15, Chief of Contracting Agency-Level Protest Determination.<sup>7</sup>

Notwithstanding this stated rationale, Medfinity contends that the agency’s real reason for canceling the solicitation was to avoid having to award the contract on a competitive basis. In this regard, Medfinity points to an email sent by the contract specialist, which states that HHS would be using ECAT, a governmentwide acquisition contract, while HHS redefines its requirements. Comments at 1. Medfinity asserts that this establishes that the agency has no intention of resoliciting the requirement. Id.<sup>8</sup>

We disagree with the protester’s contention that the contract specialist’s statement establishes that the agency’s real reason for canceling the solicitation was to avoid awarding a contract on a competitive basis. As discussed above, the evaluation record evidences that the salient characteristics for each equipment item were either missing or did not reflect the agency’s needs. In light of this, HHS was not able to use the existing RFQ to evaluate vendors in a fair or equal manner in order to meet its needs.

Accordingly, we cannot conclude that the decision to cancel the solicitation was unreasonable or was made on the basis of pretext.

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<sup>7</sup> In light of these facts, we do not agree with Medfinity’s contention that the salient characteristics included in the RFQ were sufficient to support an award to Medfinity on the basis of its allegedly equivalent solution. In this regard, we note that Medfinity’s solution differs from the listed salient characteristics significantly, and that neither the RFQ nor the evaluation record provides a basis to evaluate whether these differences are material.

<sup>8</sup> The contract specialist’s email states that the agency will be canceling “all solicitations” and then states that it would be using ECAT until final decisions are made regarding its requirements. AR, Tab 17, Medfinity Email Chain, at 2. There is thus no conclusive support for the contention that the agency intends to use ECAT with respect to the specific optical equipment at issue here. Moreover, we note that the agency’s legal memorandum states that “[t]he agency is not reprocurring this requirement until it develops a new statement of work.” MOL at 5.

The protest is denied.

Susan A. Poling  
General Counsel