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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Saturn Landscape Plus, Inc.

File: B-297450.3

Date: April 18, 2006

John T. Bray, Esq., for the protester.

Maj. Lawrence M. Anderson, Department of the Air Force, for the agency.

Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging certain agency decisions as improper because they allegedly were made in bad faith is denied where the record shows that there is no basis to question the propriety of the challenged decisions; specifically, the record shows that the agency reasonably decided to cancel the initial solicitation and issue a revised solicitation to reflect reduced option periods and changed evaluation factors, and the agency properly decided to set the procurement aside for Historically Underutilized Business Zone (HUBZone) firms based on the reasonable expectation of receiving two or more offers from HUBZone firms and making award at a fair market price.

DECISION

Saturn Landscape Plus, Inc. protests certain decisions by the Department of the Air Force regarding request for proposals (RFP) Nos. FA5004-05-R-C004 and FA5004-06-R-C007, for landscape services at Eielson Air Force Base (AFB), Alaska. Saturn asserts that the Air Force acted in bad faith toward Saturn by: canceling the initial RFP instead of reevaluating offers and making a new award decision; issuing the revised RFP as a set-aside for Historically Underutilized Business Zone (HUBZone) firms; and posting to the Federal Business Opportunities (FedBizOpps) website allegedly “duplicitous” answers to questions submitted by potential offerors. Saturn also protests the agency’s alleged failure to take timely corrective action in response to Saturn’s initial protest of the award decision under the original RFP.

We deny the protest.

On March 1, 2005, the Air Force issued RFP No. FA5004-05-C004 for landscape services at Eielson AFB. The contract, a total small business set-aside, was to be awarded to the firm whose proposal offered the best value to the government. The base performance period was April 15, 2006 to September 30, 2006, with nine 1-year options. Offerors were required to submit their proposals by May 2; nine offerors, including Saturn and Hawks Enterprises, submitted proposals. The contract was awarded to Hawks on September 30. Saturn, the incumbent contractor, protested the award to our Office on October 17, asserting, among other challenges, flaws in the agency's past performance evaluation of the awardee. On December 2, the agency advised that it intended to take corrective action, either by terminating the award to Hawks, reevaluating all proposals, and making a new award decision, or by canceling the solicitation and issuing a new solicitation with a call for new proposals. On December 2, we dismissed the protest as academic.¹ According to the Air Force, it received notification of our decision to dismiss the protest on December 5. By letter of December 6, the Air Force informed Hawks of the government's intent to terminate the contract, effective that day.

The agency decided to issue a revised RFP to reflect the following changes. After the initial solicitation was issued in March 2005, Eielson AFB was included on the Base Realignment and Closure (BRAC) list. Although Eielson AFB was ultimately removed from that list, the Air Force reports that concern over future BRAC decisions regarding the base and a desire for greater flexibility in planning prompted the agency to reduce the number of option periods from nine to six. Technical evaluation factors also were added to the two existing factors--past performance and price--and the revised past performance information provided new definitions of "relevant" past performance and "similar size." Agency Report (AR), Tab 7, RFP at 8-9. The agency also made the determination to set aside the procurement for HUBZone firms. In September 2005, the contracting squadron at Eielson AFB received a protest regarding another procurement, alleging that it should have been set aside for HUBZone firms.² The contracting squadron canceled that solicitation and determined that, for all future solicitations, it would conduct appropriate market research for all potential set-asides. Consistent with that determination, the agency

¹ The protester filed a request that we recommend that it be reimbursed its protest costs on February 1, 2006. The request was untimely filed; our Bid Protest Regulations require that such a filing be made within 15 days of when the protester learns that our Office has closed the protest based on the agency's decision to take corrective action. See 4 C.F.R. § 21.8(e) (2005).

² The Federal Acquisition Regulation (FAR) requires agencies to set aside for HUBZone firms any acquisition exceeding the simplified acquisition threshold, whenever the contracting officer has a reasonable expectation that the agency will receive two or more offers from HUBZone firms and that award will be made at fair market price. FAR § 19.1305(b).

here conducted market research, including a search of the central contractor's registration website and the Small Business Administration website and direct contact of several possible offerors, to assess the appropriateness of the grounds maintenance requirement for a HUBZone set-aside. The contracting officer concluded that the solicitation was, in fact, suitable for a HUBZone set-aside. Taken together, the contracting officer considered these changes significant enough to warrant issuance of a new solicitation by the agency.³ AR, Tab 2, Contracting Officer's Statement of Facts, at 9.

The agency then published a presolicitation notice on January 23, 2006. Interested parties submitted questions to the agency, which published, without attribution, the questions and the agency's responses on February 1. On February 8, the agency issued the new solicitation, with a proposal due date, as extended by amendment 3, of March 3. The protester then filed this protest on February 10.

The protester contends that the agency's decision to resolicit under a revised RFP, rather than reevaluate proposals and make a new award decision under the original RFP, was made in bad faith. Contracting officers are presumed to act in good faith; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Pride Mobility Prods. Corp., B-292822.5, Dec. 6, 2004, 2005 CPD ¶ 72 at 5. In order to show bad faith, a protester must present virtually irrefutable evidence that the contracting agency directed its actions with the specific and malicious intent to injure the protester. Information Res., Inc., B-271767 et al., July 24, 1996, 96-2 CPD ¶ 38 at 2.

In deciding whether to cancel a solicitation, the contracting officer has broad discretion and need only advance a reasonable basis for such a decision. Sunshine Kids Serv. Supply Co., B-292141, June 2, 2003, 2003 CPD ¶ 119 at 2. Here, as discussed above, the record contains evidence that the agency made several material changes to the RFP--reducing the number of option periods, revising the evaluation criteria, and setting the procurement aside for HUBZone firms. Given the changes to the solicitation, we see nothing unreasonable in the contracting officer's decision to cancel the solicitation, see Global Solutions Network, Inc., B-289342.4, Mar. 26, 2002, 2002 CPD ¶ 64 at 3-4; Wilkinson Mfg. Co., B-210642 et al., Mar. 6, 1984, 84-1 CPD ¶ 270 at 3-4, and we likewise find no evidence in the record that the

³ The agency also asserts that the original solicitation contemplated award of a fixed-price contract with economic price adjustment (EPA), and that this contract type was determined to be inappropriate for this effort and was revised in the resolicitation. The protester asserts that the original solicitation did not, in fact, contain an EPA clause. Since, as discussed below, we conclude that the agency's decision to cancel and resolicit was proper on the other grounds asserted by the agency, the issue concerning the contract type is not material to our resolution of the protest.

agency's decision to cancel was in any way motivated by bad faith toward Saturn.

The protester also alleges that the decision to set aside the procurement for HUBZone firms was motivated by bad faith. Generally, our Office regards a determination to set aside a procurement as a matter of business judgment, within the agency's discretion. See York Int'l Corp., B-244748, Sept. 30, 1991, 91-2 CPD ¶ 282 at 6. Here, as discussed above, based on its market research, the agency concluded that there was a reasonable expectation that offers would be received from two HUBZone firms and that award would be made at a fair market price, as contemplated under FAR § 19.305(b). The protester has not alleged that the agency's decision to set aside the procurement was improper, and we see nothing in the record to suggest that it was. To the extent Saturn asserts that the decision was motivated by bad faith, there simply is nothing in the record suggesting that the agency was motivated by a specific intent to harm the protester. Id.

Saturn also alleges that the agency responses in the "Questions and Answers" dated February 1, 2006, and posted to FedBizOpps, were prejudicial to Saturn. Specifically, Saturn objects to responses one, four, and five:

Q1. In February of 2004, the grounds maintenance contract with Saturn was modified to add litter control, what was the additional cost per month to the government?

A1. This is proprietary information, therefore we cannot give out the additional cost.

Q4. Name of last contractor?

A4. Hawk and Company, Inc.

Q5. Bottom dollar value of last contract?

A5. \$5,450,000.00.

AR, Tab 23, Questions and Answers. Saturn is concerned with how the 2004 modification to its contract became known to the firm that submitted the first question, and Saturn asks why the agency did not answer questions four and five by naming Saturn as the last contractor, along with the amount of that contract.

Our Bid Protest Regulations, 4 C.F.R. §§ 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Robert Wall Edge-Recon., B-234469.2, Mar. 30, 1989,

89-1 CPD ¶ 335 at 2. Saturn does not allege, and we see no basis to assume, that any of the agency's responses violated any procurement law or regulation. As a result, Saturn's allegations are insufficient to form a valid basis of protest. In any event, the protester, which is not a HUBZone firm, is ineligible for award under the revised RFP and therefore is not an interested party to raise this ground of protest. Admiral Towing and Barge Co., B-291849, B-291849.2, Mar. 6, 2003, 2003 CPD ¶ 164 at 5 n.5. Moreover, Saturn's assertion that the agency responses were made with the intent to prejudice the protester contains no plausible explanation of what that prejudice is, and some showing of prejudice is a necessary part of any viable protest. Crane & Co., B-297398, Jan. 18, 2006, 2006 CPD ¶ 22 at 9.

Unrelated to its allegations of bad faith, Saturn asserts that the agency violated FAR § 33.104(g)⁴ by failing to complete corrective action in response to the initial protest within 60 days of receiving our "recommendations." That FAR provision is inapplicable here in that we did not issue a recommendation to the agency as part of a decision on the protest; rather, the agency decided to take corrective action in response to the initial protest. In any event, as discussed above, the agency took immediate steps to terminate the contract initially awarded and within a reasonable time reissued the solicitation. We see no basis on which to question the speed with which the agency acted. See J&J/BMAR Joint Venture, LLP--Costs, B-290316.7, July 22, 2003, 2003 CPD ¶ 129 at 3.

Finally, in a supplemental protest, Saturn alleged that the agency improperly received and opened proposals during the pendency of this protest, citing 4 C.F.R. § 21.0(f). That section of our Bid Protest Regulations provides the definition of "adverse agency action," and appears irrelevant to the protest allegation. In any event, an agency is not required to suspend the closing date for receipt of proposals

⁴ FAR 33.104(g) provides as follows:

Notice to GAO. If the agency has not fully implemented the GAO recommendations with respect to a solicitation for a contract or an award or a proposed award of a contract within 60 days of receiving the GAO recommendations, the head of the contracting activity responsible for that contract shall report the failure to the GAO not later than 5 days after the expiration of the 60-day period. The report shall explain the reasons why the GAO's recommendation, exclusive of costs, has not been followed by the agency.

or its evaluation of offerors' proposals while a protest is pending. Lifecare Mgmt. Partners, B-297078, B-297078.2, Nov. 21, 2005, 2006 CPD ¶ 8 at 10 n.16.

The protest is denied.

Anthony H. Gamboa
General Counsel