



## Decision

**Matter of:** Trujillo/AHW, JV

**File:** B-403958.4

**Date:** October 13, 2011

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Richard F. Busch II, Esq., Busch Law Firm, L.L.C., for the protester.  
Lt. Col. Heidi L. Osterhout, and Col. Mark S. Teskey, Department of the Air Force, for the agency.  
Jacqueline Maeder, Esq., and Scott H. Riback, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest that agency unduly delayed taking the corrective action promised in response to earlier protests is dismissed as academic where agency subsequently cancels the underlying solicitation.
  2. Protest challenging agency's decision to cancel a solicitation is denied where the record shows that the agency had a reasonable basis for its cancellation decision.
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### DECISION

Trujillo/AHW JV, of Lakewood, Colorado, requests that our Office reinstate and sustain an earlier protest it filed against the award of a contract to Alpine Design Interiors, Inc. d/b/a ADI Construction (ADI) of Denver, Colorado, under request for proposals (RFP) No. FA4613-09-R-0001A, for interior and exterior painting at F.E. Warren Air Force Base (Warren AFB), Wyoming. Trujillo also protests the agency's subsequent cancellation of the underlying solicitation and requests that we recommend that it be reimbursed the costs of filing and pursuing both its current and earlier protest.

We dismiss in part and deny in part Trujillo's protest and request for reimbursement of its costs.

## BACKGROUND

The RFP was issued on July 29, 2009 and provided that the agency would perform a price/past performance tradeoff to make a best value award decision; past performance and price were deemed approximately equal in weight for evaluation purposes. RFP at 96. The RFP provided that if the proposal from the lowest-priced offeror received a “substantial confidence” performance confidence rating, it would constitute the “best value.” Id. The RFP further provided that award could be made to the firm submitting other than the lowest-price if the lowest-priced offeror’s proposal received other than a “substantial confidence” rating. Id.

The agency received several proposals, including those of Trujillo and ADI, by the August 28, 2009 due date. After evaluating the proposals, the agency assigned both ADI’s and Trujillo’s proposals “substantial confidence” performance confidence ratings.

On August 16, 2010, almost a year after proposals were submitted, the agency made award to ADI based on its “substantial confidence” rating and its lowest price.<sup>1</sup>

After being advised of the award decision, and receiving a debriefing, Trujillo protested to our Office by letter dated September 19. By letter of October 6, Trujillo supplemented its protest. Trujillo principally argued that the agency’s past performance evaluation of the awardee was improper.

On October 12, prior to the deadline for submitting its report, the agency advised our Office that it would take corrective action. Specifically, the agency advised that it would reevaluate past performance and make a new performance/price tradeoff. Notice of Corrective Action, Oct. 12, 2010, at 1. As a result, we dismissed Trujillo’s protest as academic on October 14. (B-403958, B-403958.2, Oct. 14, 2010.) Shortly after our dismissal, Trujillo filed a request that we recommend that it be reimbursed the costs associated with its earlier protest. On February 17, we dismissed Trujillo’s request because the agency promptly took corrective action in response to the protest. (B-403958.3, Feb. 17, 2011.)

On July 5, 2011, Trujillo filed the current protest, arguing that the Air Force improperly delayed taking the corrective action it promised in response to its initial protest. Trujillo seeks reinstatement of its earlier protest and reimbursement of the costs associated with all of its protests. In addition, during the pendency of the current protest, the agency advised our Office, by letter dated August 1, that it was

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<sup>1</sup> The record shows that, between the time when proposals were submitted and when the agency made its award, the firms extended the acceptance period for their proposals several times. Contracting Officer’s Statement at 9-11.

canceling the underlying solicitation and resoliciting its requirements; Trujillo also protests that decision.

## ANALYSIS

As a preliminary matter, the agency's cancellation of the underlying solicitation renders academic Trujillo's protest that the agency unduly delayed implementing its earlier-proposed corrective action (as well as its claim for protest costs associated with its earlier protest). We do not consider academic protests because to do so would serve no useful public policy purpose. Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132. Accordingly, we dismiss this aspect of Trujillo's protest and its request for protest costs.<sup>2</sup>

The only remaining question relates to the propriety of the agency's cancellation decision. In this connection, the agency's notice to our Office represents that the underlying reason for the cancellation relates principally to the amount of time that has elapsed since the requirement was originally developed and solicited; the agency also notes that the evaluation criteria under the original solicitation were confusing. Trujillo asserts that there is nothing confusing about the evaluation criteria, and that it will suffer competitive prejudice if the agency is permitted to resolicit the requirement.

In a negotiated procurement, a contracting agency has broad discretion in deciding whether to cancel a solicitation, and need only establish a reasonable basis for doing so. USA Elecs., B-283269.2, Oct. 5, 1999, 99-2 CPD ¶ 67 at 3. A reasonable basis to cancel exists when, for example, an agency determines that a solicitation does not accurately reflect its needs. Logistics Solutions Group, Inc., B-294604.7, B-294604.8, July 28, 2005, 2005 CPD ¶ 141 at 3. Additionally, we have recognized that the potential for cost savings provides a reasonable basis for cancellation. RN Expertise, Inc., B-401020, Mar. 27, 2009, 2009 CPD ¶ 63 at 2.

On the record before us, we find the agency's cancellation decision reasonable. As noted by the agency, this requirement originally was developed in December of 2008 and solicited in July 2009. More than two years have elapsed since the submission of the original proposals, and the agency anticipates that, because of the current uncertain economic conditions, it will receive pricing that is more competitive than

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<sup>2</sup> To the extent that Trujillo requests that we "reinstate" its earlier protest, we decline to do so since the underlying basis for the original protest—in this case Trujillo's challenge to the agency's original evaluation of proposals—was rendered academic by the agency's originally-proposed corrective action and is not "revived" by subsequent agency action. Pemco Aeroplex, Inc.-Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 4-5. Rather, the subsequent action gives rise to a new basis for protest. Id.

the pricing that was submitted over two years ago. The agency concludes, and we have no basis to question its conclusion, that it will achieve cost savings under the circumstances. As noted, anticipated cost savings can provide a reasonable basis for an agency's decision to cancel and resolicit its requirements. RN Expertise, Inc., supra. We therefore have no basis to object to the agency's cancellation for this reason alone.

With regard to Trujillo's argument that there is nothing confusing about the evaluation criteria, the fact remains that the agency's anticipated cost savings provides an independent, sufficient, basis to support the agency's cancellation decision.

Alternatively, Trujillo asserts that the cancellation and resolicitation is a pretext to avoid having to make award to it. This assertion essentially amounts to a contention that the agency's cancellation is evidence of bias against the protester.

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 or supposition. TPL, Inc., B-297136.10, B-297136.11, June 29, 2006, 2006 CPD ¶ 104 at 20-21. Where a protester alleges bad faith or bias, it must not only provide credible evidence clearly demonstrating bias against the protester or in favor of the awardee, but also must show that this bias translated into action that unfairly affected the protester's competitive position. Id.

Trujillo's protest does not meet this standard. Contrary to Trujillo's position, there is nothing in the record to show that Trujillo was in line for award of a contract in the absence of the agency's decision to cancel the solicitation. In fact, the record shows that, to the extent that the agency performed a reevaluation prior to deciding to cancel the RFP, another concern, rather than Trujillo, was the apparent successful offeror. Contracting Officer's Statement at 16. Thus, the record shows that Trujillo was not in line for award under either evaluation performed by two independent evaluation panels. Given these circumstances, we see no basis to conclude that the agency was biased against Trujillo.

The protest and request for costs are dismissed in part and denied in part.

Lynn H. Gibson  
General Counsel