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**Comptroller General
of the United States**

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

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Decision

Matter of: VSE Corporation

File: B-290452.2

Date: April 11, 2005

William W. Goodrich, Jr., Esq., Lisa K. Miller, Esq., and Melissa D. Droller, Esq., Arent Fox, for the protester.

Carmody A. Gaba, Esq., Department of Homeland Security, for the agency.

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DIGEST

Protest against the cancellation of a solicitation for storage, maintenance, and disposition services to handle personal property seized by various federal agencies is denied, where the record evidences that the solicitation no longer accurately reflected the agency requirements and there are uncertainties as to how the solicitation will be funded that have not been resolved, and the agency believes that additional sources may submit proposals, given the almost 5-year period since initial proposals were submitted on this solicitation.

DECISION

VSE Corporation protests the Department of Homeland Security (DHS), Bureau of Customs and Border Protection's (CBP) cancellation of request for proposals (RFP) No. CS-00-007 for storage, maintenance, and disposition services to handle personal property seized by various federal agencies.

We deny the protest.

A significant resource of the federal government in its effort to prevent criminal activity has been the moneys derived from the sale of seized and forfeited property belonging to individuals who violated United States laws. To ensure that the moneys derived from the sale of forfeited and seized property involving criminal activity were specifically applied to the expenses of law enforcement programs, the government established several funds, one of which is the Treasury Forfeiture Fund, which is administered by the Treasury Executive Office for Asset Forfeiture

(TEOAF) in the Department of Treasury.¹ As agent for the TEOAF, the U.S. Customs Service managed the contracts administering the seized property that support the fund. Since 1985, based on a GAO report and an Office of Management and Budget Circular A-76 study, the Customs Service has utilized the services of one nationwide prime contractor to manage the program. In 1999, the Customs Service split the requirement into two nationwide contracts separating the real property requirements from the personal property requirements.

In March 2000, the Customs Service (then part of the Department of Treasury) issued this RFP seeking proposals for a follow-on contract for nationwide services for the receipt, custody, management and disposition of seized and forfeited personal property. These services were to cover the inventory of seized property, such as vehicles, vessels, aircraft, and general property, which are covered by the TEOAF as well as property seized by certain other agencies.

The RFP contemplated the award of a cost-plus-award-fee contract for a 4-month transition period (from September 19, 2000 to January 18, 2001), a base period (from January 19 to September 30), and nine 1-year options. The RFP provided for award to the offeror representing the best value, considering the merits and capability of the proposals, determined based on evaluating the acceptability and cost/price of the proposals as well as past performance, experience, understanding the requirements, and small business utilization.

Prior to the receipt of initial proposals, the Customs Service issued amendment Nos. 0001-0009 to the RFP. In addition to responding to the offerors' questions, these amendments made extensive revisions to the RFP involving such matters as the statement of work, the simulated inventory of seized property, and the estimated workload projections.

Four offerors--VSE; Day and Zimmerman Services, Inc.; Johnson Controls World Services, Inc.; and EG&G Technical Services, Inc. (the incumbent contractor)--responded to the RFP by the June 30, 2000 due date for receipt of proposals. After conducting oral interviews with each offeror, the Customs Service issued amendment No. 0010 on March 27, 2001, announcing that discussions would be held and that final technical proposal revisions were due to be submitted by April 30. Prior to the receipt of these technical proposal revisions, the Customs Service issued amendment Nos. 0011 and 0012, which made additional changes to the RFP and answered more questions related to the procurement.

Discussions were then conducted and amendment Nos. 0013-0018, which made more changes to the RFP and answered more questions, were issued. Final proposal

¹ The fund also covers seizures by the U.S. Secret Service, Bureau of Alcohol, Tobacco and Firearms, and the Internal Revenue Service.

revisions (FPR) (including price) were submitted by the offerors by October 30, 2001. Following the receipt of FPRs, the Customs Service issued amendment No. 0019 announcing face-to-face discussions to be held in December. After these discussions, the Customs Service issued amendment Nos. 0020-0028, which made further changes to the RFP and answered more questions. The Customs Service received the revised FPRs from the offerors on February 11, 2002 and proceeded with its final evaluation. Award was made to Day and Zimmerman on April 23, which led to a protest to our Office by EG&G.

In response to the protest, the Customs Service decided to take corrective action because “the cost realism evaluation of EG&G’s proposal resulting in EG&G’s projected Most Probable Cost (MPC), was based on some incorrect assumptions by Customs.” Among other things, the Customs Service stated that it would terminate the award to Day and Zimmerman, revise the statement of work, and reopen the competition. Agency Report, Tab 3, Corrective Action Letter.

Meanwhile, effective May, 17, 2001, the agency entered into a sole-source contract extension with EG&G to cover the services while this competition was being conducted. This sole-source contract expired on December 16, 2002. The agency then executed another sole-source contract extension of EG&G’s contract, which extended the services through October 1, 2003 with options that have allowed the contract to extend to April 1, 2005. DHS’s latest proposal to further extend EG&G’s contract beyond April 1 on a sole-source basis is the subject of protests by VSE and Johnson Controls, which we intend to address in a separate decision.

While the agency was revising the solicitation as part of its corrective action, Congress passed the Homeland Security Act of 2002, 6 U.S.C. § 101 et seq. (Supp. II 2002), in November 2002, which among other things transferred the Customs Service from the Department of Treasury to DHS and established the CBP. The CBP, which was created by the Act, became the contracting office for this procurement. The CBP also took over various functions transferred to DHS by the Act from the Department of Agriculture and the Immigration and Naturalization Service (INS) of the Department of Justice, including the inspection and border protection activities of the Animal and Plant Health Inspection Service and the Border Patrol. The added functions resulted in increased workload projections related to the property covered by the contract.²

² At the time of the award to Day and Zimmerman, the estimated workload for the base period was 3,931 vehicles, 79 vessels, 8 aircraft, and 8,324 line items of general property. After gathering additional information regarding its added functions, the CBP estimated the workload for the recompetition at 9,240 vehicles, 114 vessels, 8 aircraft, and 8,060 line items of general property. See Agency Report at 6.

On March 12, 2003, the CBP issued amendment No. 0029, which replaced the initial RFP in its entirety and included revised workload estimates. The CBP subsequently issued amendment Nos. 0030-0043, in which the CBP again made changes to the RFP and answered questions. On August 6, 2003, the CBP received FPRs from the offerors. The CBP subsequently decided, based on an agreement with the TEOAF, the Department of Justice and the U.S. Marshals Service, to use a government-owned, contractor-operated (GOCO) facility to store, maintain, and sell property in the San Diego area that had been used by the Border Patrol.³ The agency issued amendment No. 0044 on November 14 to notify offerors of this potential change and to advise that a subsequent amendment incorporating the requirement would be forthcoming.

Meanwhile, the CBP met with the DHS Office of Small and Disadvantaged Business Utilization regarding the concern that the inclusion of the additional requirements from the INS and the Border Patrol, which had previously been performed by small businesses, into the nationwide contract constituted improper bundling.⁴ In response to this concern, the CBP began trying to develop a plan to address the question of bundling by breaking out certain of the requirements that had previously been set aside for small businesses, such as towing, and separately conducting small business set-aside procurements for these requirements. While contemplating this change, the CBP discovered that the TEOAF was reluctant to fund a contract that was split into various pieces to address this bundling issue, without the benefit of a study, and that the TEOAF might consider withdrawing the CBP's authority to contract on its behalf. At the same time, the CBP experienced increased costs associated with seized vehicles--whose inventory had risen from around 3,000 to 5,000 to over 20,000--under the extended EG&G contract, which caused funding problems; this, too, was of concern to the TEOAF and highlighted the need to revise the statement of work to address the problem.⁵ See Agency Report at 10-12.

³ Some of the seizure functions assumed by the CBP included functions being performed by the Border Patrol and the INS that were being managed by the U.S. Marshals Service under various small business contracts that included using a GOCO to handle storage, maintenance, and conveyances. Approximately 500 small business contracts associated with this work were transferred to the CBP after its reorganization. The CBP modified EG&G's nationwide contract to include the services that had been performed by these small businesses.

⁴ Bundling of contract requirements can be found to arise where two or more procurement requirements for goods or services previously provided or performed under separate smaller contracts are consolidated into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern. See 15 U.S.C. § 632(o) (2000).

⁵ The CBP reports that that these costs primarily were caused by DHS's adoption of the Border Patrol's practice of advertising for the sale of seized vehicles valued

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After considering and attempting to resolve these issues, on December 20, 2004, the CBP eventually issued amendment No. 0045 canceling the solicitation. The CBP explained in the letter to the offerors enclosing the amendment that:

After careful consideration and a lengthy review process, the government has determined that the requirement has changed substantially from the initial issuance of the solicitation in March 2000 and the [corrective action] taken in June 2002.

The determination has been made that the subject solicitation no longer meets the government's requirement. The government anticipates re-evaluating the acquisition strategy and resoliciting the requirement possibly utilizing multiple procurement methods.

This protest from VSE followed.

VSE contends that the CBP's action of canceling the RFP to address changes in the requirements was arbitrary, capricious, and unreasonable because during the course of the procurement the agency had previously addressed significant changes to the RFP, including replacing the RFP in its entirety, by issuing amendments. VSE argues that the agency's action was a pretext to rid itself of a burdensome procurement process and to preserve the sole-source arrangement with EG&G.

In response, the CBP explains that the decision to cancel the solicitation was made because the solicitation, as amended, no longer accurately reflected its requirements. The agency explains that it decided to cancel the RFP due to unresolved questions related to the scope of the contract involving the requirements to be severed for small businesses, funding, and significant increases in the estimated workload, as well as a belief that if the requirement were resolicited there would be increased competition because of the almost 5-year period from when initial proposals were received and the extensive changes that have already been made to the solicitation.

With respect to the decision to remove certain requirements for small business contracts that are now being performed under the nationwide contract, the CBP explains the agency is still grappling with the question of what services can be legitimately severed from the nationwide contract without affecting the efficiency of the nationwide contract. With respect to funding, the CBP explains that the agency has to resolve its status as executive agent for the TEOAF, which may reclaim

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under \$2,500. The CBP advises that this practice is under review to determine whether it would be more cost effective to destroy or otherwise dispose of these vehicles.

ownership of some aspects of the requirements, such that the CBP would no longer be responsible.

The CBP further advises that because of the various changes that have already been made to the solicitation and which are anticipated to take place, it is likely that more firms will be able to compete. In this regard, the CBP explains that, besides the numerous amendments already made that changed the RFP's requirements, certain elements of the nationwide contract that were solicited may be removed, and that under the new solicitation, as a result of the agency's decision to use the GOCO for storage, offerors no longer will be required to include storage facility costs in their proposals, as under the initial solicitation.

In a negotiated procurement, an agency has broad authority to decide whether to cancel a solicitation, and to do so need only establish a reasonable basis. A reasonable basis for cancellation exists and cancellation is appropriate when a solicitation does not accurately reflect the agency's requirements, particularly where cancellation of the solicitation and the issuance of a revised solicitation would present the potential for increased competition. If a reasonable basis exist to cancel a solicitation, an agency may cancel the solicitation regardless of when the information first surfaces or should have been known, even if the solicitation is not canceled until after proposals have been submitted and evaluated, or even if discovered during the course of a protest. See Rice Servs., Inc.; Watson Servs., Inc., B-293861 et al., June 15, 2004, 2004 CPD ¶ 167 at 4; Global Solutions Network, Inc., B-289342.4, Mar. 26, 2002, 2002 CPD ¶ 64 at 3.

Here, we find that the record demonstrates that the agency reasonably decided to cancel this RFP. The reduced scope of work associated with severing certain requirements to avoid possibly improper bundling and the removal of the requirement to provide a storage facility, due to the GOCO, meant that the current RFP did not reflect the agency's requirements. In addition, because of the time which has elapsed from the initial issuance of the solicitation in March 2000 until the cancellation in December 2004, and the numerous changes made to the RFP during that period, we find that the agency's assumption that additional firms may well be interested in participating in a competition based on a solicitation reflecting the agency's current requirement, with the result that competition may be increased, is reasonable. Where, as here, a solicitation no longer accurately reflects an agency's requirements, and resolicitation could result in increased competition, the cancellation of the solicitation is appropriate. See Global Solutions Network, Inc., supra.

As detailed above, the CBP found that cancellation of the RFP was more feasible than issuing another amendment because it was still trying to resolve its responsibilities, as well as to determine the best method for procuring the requirement, given its reorganization and its failure to resolve with the TEOAF how this evolving requirement should be procured. Although VSE suggests otherwise, the

numerous prior amendments to the RFP do not preclude the CBP from canceling the RFP. The only pertinent inquiry here is whether there existed a reasonable basis to cancel, since an agency may cancel at any time when such a basis is present. Since the record here reflects that there was a reasonable basis to cancel the RFP, we do not find that the agency abused its discretion, even though it may have taken a different course by further amending the RFP. See PBSI Corp., B-227897, Oct. 5, 1987, 87-2 CPD ¶ 333 at 2. In this regard, the CBP advises that it “initially believed the changes could be addressed via amendments . . . since CBP and the offerors had already put so much effort into the solicitation” but “instead of continuing to try to force the agency’s developing needs into the old solicitation with the full knowledge that scope-changing modifications and/or a termination for convenience are inevitable, the agency decided to cancel and re-evaluate the work.” See Agency Report at 24-25.

In any case, Federal Acquisition Regulation (FAR) § 15.206(e) specifically advises that if, in the judgment of the contracting officer, based on market research or otherwise, an amendment proposed for issuance after offers have been received is so substantial as to exceed what prospective offerors reasonably could have anticipated, so that additional sources likely would have submitted offers had the substance of the amendment been known to them, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition. Consistent with this regulation, and in light of the many significant amendments since initial proposals were obtained, the agency’s decision to cancel and resolicit was the appropriate course to take.

We find VSE’s arguments that the cancellation was a pretext for the CBP to rid itself of a burdensome procurement process and to preserve the sole-source arrangement with EG&G are not supported by the record. To the contrary, the record substantiates that the agency canceled the solicitation because the scope of work under the solicitation had changed, and was undergoing further refinement, and that increased competition could reasonably be expected, given that the original solicitation was solicited in March 2000, and many of the changes could not have been anticipated by the initial field of competition. Accordingly, we find that the cancellation decision was proper.

The protest is denied.

Anthony H. Gamboa
General Counsel