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**Comptroller General
of the United States**

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

Decision

Matter of: Ystueta Inc.

File: B-296628.4

Date: February 27, 2006

R. Brent Blackburn, Esq., and Edward J. Kinberg, Esq., Kinberg & Associates, LLC, for the protester.

Samar A. Shams, Esq., Department of Agriculture, for the agency.

Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a negotiated procurement, agency need only establish a reasonable basis for the cancellation of a solicitation; lack of funding for the procurement clearly provides a reasonable basis for cancellation as agency cannot award contract which exceeds available funds.

DECISION

Ystueta, Inc. protests the withdrawal of the small business set-aside restriction under, and the subsequent cancellation of, request for proposals (RFP) No. 04-3K15-05, issued by the Department of Agriculture for construction services for the renovation of the James Whitten Delta States Research Center in Stoneville, Mississippi. Ystueta contends principally that the agency's actions were undertaken to avoid having to award a contract under the RFP to the protester.¹

¹ In its initial protest, Ystueta challenged the agency's rejection of its proposal for failure to submit an adequate bid guarantee; that protest was dismissed after the agency advised that it was taking corrective action, including conducting discussions and evaluating final revised proposals. Ystueta's second protest challenged solicitation terms concerning the bid guarantee to be submitted with the revised proposals; that protest was dismissed for lack of standing after the agency reported the firm was not in line for award. In its third protest, Ystueta, reasserting its solicitation challenge, argued that the offeror next in line for award had been found to be other than a small business; Ystueta argued that the agency should accept its bid guarantee and make an award to the firm as the sole remaining offeror. That

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We deny the protest.

The agency reports that while it had substantial concerns about the sufficiency of the protester's bid guarantee and had determined that the firm's proposal (the sole small business proposal received) was unacceptable on that basis, the set-aside withdrawal determination and the subsequent cancellation of the RFP were based on additional grounds, including the fact that Ystuenta's proposed price substantially exceeded both the agency's cost estimate for the work and the funding available for the project.

Regarding the firm's challenge to the agency's cancellation of the procurement, in a negotiated procurement, such as here, a contracting agency need only establish a reasonable basis to support a decision to cancel an RFP. PBSI Corp., B-227897, Oct. 5, 1987, 87-2 CPD ¶ 333 at 2. It is well established that an agency's lack of funding for the procurement provides a reasonable basis for its cancellation, as agencies cannot award contracts which exceed available funds. Quality Support, Inc., B-296716, Sept. 13, 2005, 2005 CPD ¶ 172 at 2. Here, the agency explains that the protester's proposed price substantially exceeds the agency's funding for the project.² Accordingly, the cancellation clearly was reasonable, since an award was not possible within available agency funds. See First Enter., B-292967, Jan. 7, 2004, 2004 CPD ¶ 11 at 3.

As to the protester's challenge to the agency's earlier determination to withdraw the set-aside restriction in the RFP, the cancellation renders academic the challenge to the terms of the cancelled procurement. See Morey Machinery, Inc.--Recon., B-233793.2, Aug. 3, 1989, 89-2 CPD ¶ 102 at 1-2. To the extent the protester contends that any follow-on procurement for the same renovation work must be set aside for small business concerns, we see the challenge as premature at this juncture. While the protester speculates that the agency will solicit proposals for this work in the future on an unrestricted basis, and that such determination will be improper, it merely anticipates improper agency action and is premature to challenge the matter at this time; moreover, adding to the premature nature of the allegation, we note that

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protest was dismissed as academic after the agency reported that it planned to withdraw the set-aside restriction in the RFP and cancel the procurement. This protest followed.

² In this regard, the agency also notes that it is not feasible to delete any RFP requirements to allow for award of a contract with a smaller scope of work, since it previously had already deleted certain work requirements from the RFP in an effort to reduce offerors' proposed prices in the hope of allowing an award within the agency's set budget.

the agency continues to report a lack of current funding for a follow-on procurement.³ See General Elec. Canada, Inc., B-230584, June 1, 1988, 88-1 CPD ¶ 512 at 6.

Lastly, the protester argues that the challenged withdrawal determination and subsequent cancellation of the RFP were undertaken in bad faith by the agency to avoid awarding a contract to Ystueta, or in retaliation for the firm's previous protests of the procurement. Procurement authorities are presumed to act in good faith and in order for our Office to conclude otherwise, the record must show that procuring officials intended to injure the protester. See Cycad Corp., B-255870, Apr. 12, 1994, 94-1 CPD ¶ 253 at 5. As there is no evidence of intent here by the agency to injure the protester, the protester's inference of bad faith is insufficient to question the agency's decisions.⁴ Quality Support, Inc., *supra*.

The protest is denied.

Anthony H. Gamboa
General Counsel

³ The record shows that the agency eventually (approximately 2 months after the agency reported it was withdrawing the set-aside) notified the Small Business Administration (SBA) Procurement Center Representative (PCR) of its desire to withdraw the set-aside restriction in the subsequently-cancelled procurement. The SBA PCR, prior to the cancellation of the RFP, reported to the agency that he would not comment on the matter until after the current protest was resolved.

⁴ The protester also requests reimbursement of its costs of filing and pursuing the protest. In this regard, the protester generally contends that the agency delayed reporting the basis of the cancellation, and suggests that had the firm been notified earlier of the cancellation due to inadequate funding, it might not have undertaken the costs of pursuing its protest. Since we deny the protest, there is no basis to recommend that the firm be reimbursed its protest costs. See Bid Protest Regulations, 4 C.F.R. § 21.8(d) (2005). We note, however, that despite the firm's suggestion that it was not timely notified of the basis of cancellation, our review of the record confirms that the agency's lack of funding for the procurement was discussed in its initial agency report filed shortly after the protest was filed; thus, the record suggests that, contrary to its current position, the protester chose to pursue the protest in the face of the agency's prompt report that cancellation was due, at least in part, to a lack of available funding.