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**Comptroller General
of the United States**

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

Decision

Matter of: ESM Group, Inc.

File: B-400298.2

Date: October 14, 2008

Eric J. Marcotte, Esq., and James White, Esq., Winston & Strawn LLP, for the protester.

Walter R. Dukes, Esq., Department of the Army, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's cancellation of a solicitation was reasonable where the agency states that it no longer has a need for the item solicited.

DECISION

ESM Group, Inc. protests the cancellation of request for proposals (RFP) No. W15P1J-08-R-3021, issued by the Department of the Army, for magnesium powder.

We deny the protest.

The RFP, issued on June 11, 2008, provided for the award of a contract for the supply of the magnesium powder for a base period of 1 year, with two 1-year options, to the offeror submitting the low-priced, technically acceptable proposal. ESM filed a protest with our Office (docketed as B-400298) prior to the closing date for the solicitation, arguing that the RFP was unduly restrictive of competition because of the RFP's "implied requirement that the [magnesium powder] particles be produced through an atomizing process." Protest (B-400298) at 9. On July 15, prior to the submission of its agency report in response to the protest, the Army informed our Office and the protester that it was canceling the solicitation, and requested that our Office dismiss the protest. The Army's request included a memorandum from the contracting officer, stating that the solicitation was defective in that it had failed to "restrict the purchase of Magnesium Powder (atomized) to the National Technology Industrial Base," and that as a result, the agency "will cancel [the] solicitation" and "resolicit with the appropriate restriction." Agency Request for Dismissal, encl. 1,

Contracting Officer's Memorandum, at 1. The agency's request included an amendment to the solicitation canceling the RFP in its entirety. Accordingly, our Office dismissed the protest as academic on July 22.

ESM now protests the cancellation of the solicitation, arguing that it was not reasonably based and was a pretext to avoid our consideration of its initial protest challenging the solicitation's terms. The protester contends that "[t]he lack of a valid basis for canceling the Solicitation can be readily discerned simply from the illogical and inconsistent justifications the Army has offered in support of its action." Protester's Comments at 1. In this regard, and as mentioned previously, the agency had previously stated that the solicitation was canceled because it failed to "restrict the purchase of Magnesium Powder (atomized) to the National Technology Industrial Base," and that the requirement would be resolicited with the appropriate restriction. Agency Request for Dismissal, encl. 1, Contracting Officer's Memorandum, at 1. In responding to this protest, the agency explains that since the cancellation, the agency had found that the "requirement for magnesium powder no longer exists," and that "[c]ontrary to the protester's claims, the Agency has no requirements or plans to procure magnesium powder in the near future." Agency Report (AR) at 1-2. The protester questions the veracity of the agency's claim here, noting that according to the cognizant contracting officer, "the customer notified the [procuring activity that] there was no longer an existing requirement for Magnesium Powder" on July 14, which was the day before the agency notified our Office that the solicitation had been canceled because it was defective. Protester's Comments at 11-12. The protester also contends that the agency's explanations regarding the cancellation are inconsistent, and thus unreasonable, given that the agency also states that the cancellation was appropriate because the requiring activity "is obtaining the magnesium powder through an existing DLA [Defense Logistics Agency] contract," which according to the protester expired on September 10, 2008. Protester's Comments at 2; see Contracting Officer's Statement at 2.

In a negotiated procurement such as this one, a contracting agency has broad discretion in deciding whether to cancel a solicitation, and need only establish a reasonable basis for doing so. A-Tek, Inc., B-286967, Mar. 22, 2001, 2001 CPD ¶ 57 at 2. An agency may properly cancel a solicitation no matter when the information precipitating the cancellation first surfaces or should have been known, even if the solicitation is not canceled until after offers have been submitted and evaluated. Daston Corp., B-292583; B-292583.2, Oct. 20, 2003, 2003 CPD ¶ 193 at 3. In this regard, we have found the cancellation of an RFP to be reasonable where the agency determines that it no longer has a requirement for the item solicited, Peterson-Nunez Joint Venture, B-258788, Feb. 13, 1995, 95-1 CPD ¶ 73 at 4, or where the agency discovers an existing contract for its requirement would be more advantageous to the government than continuing with the procurement. Brian X. Scott, B-310970; B-310970.2, Mar. 26, 2008, 2008 CPD ¶ 59 at 3. Where, as here, a protester has alleged that an agency's rationale for cancellation is but a pretext, that is, the agency's actual motivation is to avoid awarding a contract on a competitive basis or to avoid resolving a protest, we will closely examine the reasonableness of the agency's

actions in canceling the solicitation. Gonzales-McCaulley Inv. Group, Inc., B-299936.2, Nov. 5, 2007, 2007 CPD ¶ 192 at 5.

While the record here is not a model of clarity, the agency has affirmatively represented that it no longer has a need for the magnesium powder, specifically stating that “the Agency has no requirement or plans to procure magnesium powder in the near future.” AR at 1-2. With regard to the protester’s challenge to the veracity of this representation, we note that Government officials are presumed to act in good faith and a protester’s claim that contracting officials are motivated by bias or bad faith must be supported by convincing proof. Our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Brian X. Scott, supra, at 4. The protester has not provided such convincing proof. In this regard, we do not view the fact that the customer notified the procuring activity on July 14 that it no longer needed the magnesium powder, and the procuring activity’s cancellation of the solicitation by amendment on July 14 and notification of our Office of the cancellation on July 15 on a different basis, as convincing proof that the agency was not truthful in its statement that it no longer needed the magnesium powder. This is so given that these different reasons were advanced during the same time frame by different elements within the agency. Nor do we view the agency’s statement that the requiring activity “is obtaining the magnesium powder through an existing DLA contract” to be proof of bias or bad faith, given that the discovery of an existing contract to satisfy its needs may in itself provide a reasonable basis for a cancellation, and in the alternative, that according to the protester, the contract has now expired. In sum, we simply cannot find, as asserted by the protester, that the Army’s statement that it no longer has a need for the magnesium powder is “demonstrably false.” See Protester’s Comments at 12. Since an agency has reasonable basis to cancel a solicitation where it determines that it no longer has a requirement, we find based upon our review of the record here that the agency’s cancellation of the solicitation is unobjectionable. See Peterson-Nunez Joint Venture, supra.

The protest is denied.

Gary L. Kepplinger
General Counsel