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## Decision

**Matter of:** TaxSlayer LLC

**File:** B-411101

**Date:** May 8, 2015

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### DIGEST

Protest that the agency improperly cancelled the solicitation is denied where the record demonstrates that the agency reasonably cancelled the solicitation based on concerns regarding whether the solicitation's requirements and evaluation criteria were adequately structured to reflect the agency's needs.

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### DECISION

TaxSlayer LLC, of Evans, Georgia, protests the cancellation of request for proposals (RFP) No. TIRNO-14-R-00028, issued by the Department of the Treasury, Internal Revenue Service (IRS), for electronic tax return preparation and transmission software and support. TaxSlayer argues that the cancellation was improper because the agency failed to reasonably identify errors or defects in the solicitation.

We deny the protest.

### BACKGROUND

On June 5, 2014, the IRS issued the solicitation for electronic tax return preparation and transmission software and support services for the Customer Assistance, Relationships and Education (CARE) organization within the IRS Wage and Investment Division. RFP at 5-6. CARE uses the tax software in support of IRS tax assistance programs, such as the Stakeholder Partnerships, Education and Communication (SPEC) organization. RFP at 5. SPEC partners with

community-based coalitions, non-profit organizations, and local city and state government agencies to provide free electronic tax preparation, through the Volunteer Income Tax Assistance (VITA) program and the Tax Counseling for the Elderly (TCE) program, for taxpayers who are generally low-income, elderly, or disabled. Id. at 6. SPEC also partners with the Armed Forces Tax Council to provide free tax return preparation for active duty and retired military personnel. Id.

For performance of these services, the solicitation stated that “CARE requires Desktop, Web-based Commercial Off-the-shelf (COTS) and Self-Preparer electronic tax preparation and transmission software and support, compliant with IRS electronic e-file and security requirements.” Id. at 6-7. The RFP anticipated a fixed-price contract with a 1-year base period and four 1-year options. Id. at 4.

The solicitation provided for award on a best-value basis, considering six factors, in descending order of importance: (1) technical approach, (2) management approach, (3) corporate experience, (4) past performance, (5) software testing and evaluation, and (6) price. Id. at 80. As relevant here, under the software testing and evaluation factor, the solicitation required that offerors provide web-based and desktop software samples of their professional software and self-preparer software. Id. at 7, 85. The RFP stated that “[t]he Government will evaluate the software to identify that the functionality and ease of use are in accordance with software, operational, regulatory and security requirements, as per the [Performance Work Statement (PWS)],” and that, based on this evaluation, the vendor’s software would be rated as: fully meets, mostly meets, partially meets, or does not meet. Id. at 85. In addition, the solicitation stated that “[t]esting is part of the technical evaluation process and will be utilized to make determinations of whether or not the software allows use of the various forms required [ ] by end-users,” and “will include, but is not limited to, electronic filing, data submissions and other scenarios.” Id.

The IRS received proposals from five offerors, including TaxSlayer and TaxWise, by the June 30 closing date. Contracting Officer (CO) Statement at 3. Following an initial evaluation of proposals, the contracting officer<sup>1</sup> established a competitive range of two offerors--TaxSlayer and TaxWise. Id.

#### Initial Software Testing and Evaluation

As relevant here, under the RFP’s software testing and evaluation factor, the agency evaluated both the functionality and the ease of use of the offerors’ software. RFP at 85. Specifically, the initial evaluation of the functionality of the software was conducted by the technical evaluation panel (TEP) using a technical evaluation tool that was included in an appendix to the agency’s technical

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<sup>1</sup> The contracting officer was also the source selection authority (SSA). CO Statement at 3.

evaluation plan (TEP), Agency Report (AR), Tab D-1b, TEP, at 4, app. G. The agency's initial evaluation of the software's ease of use was administered by SPEC's Usability Lab Office, and conducted by three SPEC employees and five program volunteers. AR, Tab D-1w, Electronic Tax Software Acquisition Usability Test Report (Aug. 18, 2014), at 1.

The software ease of use testing resulted in "Usability Findings," made up of "[u]sability data collected during . . . usability test sessions[, which] consisted primarily of observations (made by the usability test facilitator, data logger, and usability team observers) and comments made by the participants." Id. at 2. Post-test questionnaire responses also served as supplementary usability data. Id. Based on the usability evaluation, the initial TEP report provided to the contracting officer summarized the usability findings as follows:

All of the participants indicated that training with the new software would be quite a challenge and large task due to the volume of volunteers. TaxSlayer Online is very close to TaxWise Online. They both have their pros and cons. However, most of the testers did not prefer the TaxSlayer versions of the desktop and self-preparer platforms. Overall, most said they would rather stay with TaxWise because TaxSlayer was not so outstanding that it would be worth the expense and workload of changing.

AR, Tab D-1z, TEP Report, at 1.

After reviewing the results of the usability testing, the contracting officer expressed concern that the testing method used by the Usability Lab Office did not comply with the RFP, which stated that software ease of use would be evaluated based on compliance with the PWS requirements, and rated as: fully meets, mostly meets, partially meets, or does not meet. AR, Tab E.5, Email from CO to TEP Chair (Sept. 29, 2014), at 3. Accordingly, the contracting officer requested that the technical evaluators conduct another evaluation of the usability of the offerors' software using the same Technical Evaluation Tool that the TEP used to evaluate the functionality of the software. Id. The TEP Chair responded that the evaluators would update the usability testing results for the offerors' software using the tool, and as required by the RFP. See AR, Tab E.5., Email from CO to TEP Chair (Sept. 30, 2014), at 2, 3.

After conducting discussions with the offerors, the IRS received timely final proposal revisions (FPR) from TaxSlayer and TaxWise. AR, Tab D-2a, 2nd FPR, TaxSlayer; Tab D-2b, 2nd FPR, TaxWise. After evaluating the offerors' FPRs, the contracting officer advised the TEP that TaxWise did not provide a sample of its self-preparer software with its FPR, as required by the solicitation, and that TaxWise would be

disqualified from the competition.<sup>2</sup> AR, Tab E.2, IRS Email to TEP Chair (Sept. 17, 2014), at 1. The contracting officer testified that, during the initial software testing, the agency evaluated the offerors' professional software, but not their self-preparer software. Hearing Transcript (Tr.) at 77:21-22; 78:1-3. The agency subsequently concluded, however, that TaxSlayer also did not provide a sample of its self-preparer software, as required by the RFP. CO Statement at 4. Accordingly, the agency conducted another round of discussions, in which both offerors were asked to provide the missing software. AR, Tab D-2a.1, TaxSlayer Request for 2nd FPR (Sept. 29, 2014), at 1; Tab D-2b, TaxWise Request for 2nd FPR (Sept. 29, 2014), at 1. Both offerors submitted timely final FPRs, which included the previously missing software. CO Statement at 5.

### Second Software Testing and Evaluation

As requested by the contracting officer, the TEP conducted another evaluation, under the software testing and evaluation factor, of both the functional and ease of use of the offerors' software, using the technical evaluation tool. The solicitation did not identify this tool, or state that the agency would use the tool to evaluate proposals. The tool consisted of a list of the software, operational, and security requirements in the PWS, and instructed the evaluators that, "[f]or each requirement . . . indicate how well the vendor satisfies the requirement." AR, Tab D.2f, Technical Evaluation Tool Final, at 1. In addition, for each requirement listed in the tool, the evaluators were to assign one of the following ratings: fully meets, mostly meets, partially meets, or does not meet. Id. Based on the rating given, the tool assigned a numerical point score, based on the total maximum possible points in each requirement category. Id.

The overall point scores assigned to TaxSlayer's and TaxWise's proposals during the initial and final evaluations were as follows:

	Initial Evaluation		Final Evaluation	
	TaxSlayer	TaxWise	TaxSlayer	TaxWise
Software (50 pts)	46.6	42.0	37.6	46.3
Operational (30 pts)	29.3	26.7	29.3	29.5
Regulatory & Security (20 pts)	20.0	20.0	9.3	19.6
Total (100 pts)	95.9	88.7	76.2	95.5

AR, Tab D-2j.2, TaxSlayer Final Software Tool Evaluation, at 2; Tab D-2j.3, TaxWise Final Software Tool Evaluation, at 2.

<sup>2</sup> On March 26, 2015, our Office conducted a hearing to receive the testimony of several agency officials involved in the procurement.

After the contracting officer received the software evaluation results, he expressed concern regarding the change in scores between the initial and final evaluation. AR, Tab D-2i, Email from CO (Nov. 21, 2014), at 1. In response to the contracting officer's inquiries, the evaluators advised that they were provided with one set of instructions for using the tool during the initial evaluation, where they were told to evaluate based on written proposals only, and a different set of instructions for using the tool during the final evaluation, where they were told to evaluate based on written proposals and software testing. AR, Tab D-2k.1, Response Regarding Tool Scoring, at 1.

The evaluators also expressed the following concern regarding the results of the usability testing:

When [we were] instructed to place the results of the usability testing in the ETSA Technical Evaluation Tool, we expressed concern that this was not the intent of the tool or an acceptable manner to report the testing results. We knew that software customization would be needed to answer many of the questions in the tool. Some of the fields required were specific to [the] VITA/TCE program that a commercial software package would not have until the contract was awarded. The incumbent TaxWise had this customization in its software as evident during testing, but we could not find many of the requirements in TaxSlayer's software.

Id. The evaluators further explained that although, "[i]n a number of instances, TaxSlayer indicated they could meet the requirements in the RFP," the evaluators lowered TaxSlayer's ratings from "fully meets" to "mostly meets" where customization of the software would be required. Id. The evaluators also stated that they assigned TaxSlayer a rating of "does not meet" if they did not see where TaxSlayer's software met a requirement. Id.

#### Contracting Officer's Decision to Cancel the Solicitation

On February 3, 2015, the IRS cancelled the solicitation, stating: "The Government was unable to reach a proper source selection decision based on the solicitation provisions addressing software evaluation. These issues prevented the Government from reaching a fair and proper evaluation decision." AR, Tab E.19, Agency Cancellation Notice, at 1. This protest followed.

#### DISCUSSION

TaxSlayer argues that the IRS's stated rationale for canceling the RFP--that the agency "was unable to reach a proper source selection decision based on the solicitation provisions addressing software evaluation"--was unreasonable because it fails to explain how the RFP prevented the IRS from making a proper award

decision, or how the RFP was otherwise flawed.<sup>3</sup> Specifically, the protester contends that the cancellation decision was based solely on the agency's inability to reach a proper source selection, which the protester asserts, did not stem from any RFP defect, and therefore, should have been resolved by a new evaluation. For the reasons discussed below, we conclude that the agency's decision to cancel the solicitation was reasonable.

In a negotiated procurement such as this one, the contracting agency has broad discretion in deciding whether to cancel a solicitation and need only have a reasonable basis for doing so. A-Tek, Inc., B-286967, Mar. 22, 2001, 2001 CPD ¶ 57 at 2. A reasonable basis to cancel exists when, for example, an agency determines that a solicitation does not accurately reflect its needs. MedVet Dev. LLC, B-406530, June 18, 2012, 2012 CPD ¶ 196 at 2-3. A reasonable basis also exists when an agency determines it needs to revise evaluation standards in order to ensure a fair and equal competition. Progressive Servs. Corp., B-404183, B-404251.2, Jan. 11, 2011, 2011 CPD ¶ 18 at 2. In addition, the prospect of increased competition (and the lower prices which often result) generally provides a reasonable basis for an agency to cancel a solicitation. Id. So long as there is a reasonable basis for doing so, an agency may cancel a solicitation no matter when the information precipitating the cancellation first arises, even if it is not until offers have been submitted and evaluated. A-Tek, Inc., supra at 2-3. Where the record reflects that there was a reasonable basis to cancel the solicitation, we will not find that the agency abused its discretion, even though it could have taken a different course by amending the solicitation. See Skyline ULTD, Inc., B-408961, Dec. 27, 2013, 2013 CPD ¶ 298 at 2.

TaxSlayer argues that the testimony provided by the contracting officer and TEP chair support the protester's position that the agency's asserted basis for canceling the RFP concerned evaluation issues, rather than a defect with the RFP. While the protester is correct that the contracting officer and TEP chair testified regarding the agency's evaluation problems, the contracting officer and TEP chair, however, also testified that the RFP's requirements and software evaluation criteria did not reflect the agency's needs. Tr. at 60:1-6; 109:8-12; 157:3-20; 158:8-12.

As discussed above, the RFP stated that the agency would evaluate a vendor's software to identify that the functionality and ease of use of the software are in

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<sup>3</sup> TaxSlayer initially asserted that the agency's cancellation of the RFP was a pretext to avoid awarding a contract to the protester on a competitive basis, or to avoid resolution of a protest by our Office. The protester, however, did not further discuss this contention in its comments responding to the agency report. Accordingly, we conclude that the protester abandoned this protest ground and will not consider it further. See Lynxnet, LLC, B-409791, B-409791.2, Aug. 4, 2014, 2014 CPD ¶ 233 at 4 n.3.

accordance with the PWS's software, operation, regulatory and security requirements, and that, based on this evaluation, the vendor's software would be rated as: fully meets, mostly meets, partially meets, or does not meet. RFP at 85. As also discussed above, the contracting officer found that the agency's initial usability testing failed to comply with the RFP's requirements because it did not include consideration of whether the ease of use of the offerors' software was in accordance with the PWS's software, operation, regulatory and security requirements, and it did not rate the offerors' software using the adjectival ratings contained in the RFP. See AR, Tab E.5, Email from CO to TEP Chair (Sept. 29, 2014), at 3.

The record also reflects that the contracting officer also expressed concerns regarding the validity of the agency's subsequent evaluation of the ease of use of the offerors' software, using the technical evaluation tool, even though the contracting officer believed that the evaluation tool complied with the evaluation requirements in the RFP. AR, Tab D-2i, Email from CO (Nov. 21, 2014), at 1. Specifically, in a statement submitted in response to the protest, the contracting officer explains, as relevant here, that after receiving the revised software evaluation results from the TEP, he remained concerned about "inconsistencies in the ratings of evaluations, and potential solutions for obtaining the requisite usability testing that complied with the terms of the solicitation."<sup>4</sup> CO Statement at 6.

In this regard, as explained during testimony provided by the contracting officer, the RFP failed to provide for a meaningful evaluation of usability. See Tr. at 166:19-167:3; 173:19-174:5; 158:8-12. Specifically, the contracting officer and TEP chair testified that, while the RFP required the agency to evaluate whether the functionality and ease of use of the software are in accordance with the PWS's software, operation, regulatory, and security requirements, the PWS requirements focused only on the functional capabilities of the software, and failed to capture the agency's needs regarding ease of use. Tr. at 60:1-6; 109:8-12; 157:3-20; 158:8-12. In this regard, the contracting officer and TEP chair explained that the agency's ease of use needs with regard to the VITA program include, for example, whether a particular vendor's software is easy to navigate or permits testers to transition between screens. Tr. at 109:8-12; 156:16-21. They also testified regarding the importance of the software's ease of use to the VITA program in light of the program's reliance on volunteers. Tr. at 109:8-16; 159:21-160:4.

In addition, the agency's deputy director, Office of Information Technology Acquisitions, who supervised the contracting officer for this procurement, testified during the hearing regarding the agency's decision to cancel the solicitation.

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<sup>4</sup> The contracting officer also stated that he remained concerned about the testing methodology and the individuals who could participate in the evaluation process. CO Statement at 6.

Specifically, the deputy director discussed the agency's concerns regarding its inability to evaluate the usability of the software, stating that "[u]sability . . . is a matter of time and quality for completion of tax returns,"<sup>5</sup> Tr. at 304:16-20, and "was not addressed by our solicitation or evaluation factors." Id. He explained that, "as written, we did not know that the solicitation and resulting contract would meet the IRS's needs," Tr. at 276:8-10, and that the agency considered this to be a "material flaw in [the] solicitation." Tr. at 306:5-12. To the extent the protester disagrees with the agency's judgment concerning its needs and how best to accommodate them, such disagreement does not demonstrate that the agency's judgment was unreasonable. See URS Fed. Support Servs., Inc., B-407573, Jan. 14, 2013, 2013 CPD ¶ 31 at 4 (contracting agencies have broad discretion to determine their needs and the best way to meet them). Accordingly, based on this record, we find the protester's argument is not supported by the record.

TaxSlayer also argues that we should afford little or no weight to the deputy director's testimony regarding the agency's plans for the new solicitation because it constitutes a new stated basis for the cancellation of the RFP that is not related to the contracting officer's contemporaneous decision to cancel the RFP.

Our Office generally considers post-protest explanations, such as these, where the explanations merely provide a detailed rationale for contemporaneous conclusions and fill in previously unrecorded details, so long as the explanations are credible and consistent with the contemporaneous record. See Vinculum Solutions, Inc.- Recon., B-408337.3, Dec. 3, 2013, 2013 CPD ¶ 274 at 3 n.2; Lynxnet, LLC, supra. In contrast, our Office accords lesser weight to post-hoc arguments or analyses made in response to protest allegations because we are concerned that new judgments made in the heat of an adversarial process may not represent the fair and considered judgment of the agency. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Based on this record, including testimony from the agency's witnesses, we have no such concerns here.<sup>6</sup>

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<sup>5</sup> He further explained usability as follows: "It's click usage, it's number of characters entered, it's quality, human data error, it's things that would make a difference, because if a normal volunteer takes 45 minutes to process a return, [but it] takes . . . an hour and a half [to process a return] on a new software, that is a workflow problem. . . ." Tr. at 283:8-22; 284:1-4.

<sup>6</sup> For example, the agency's decision to add to the RFP objective standards to allow the agency to test the software's ease of use, such as click usage and number of screens, is consistent with the contemporaneous rationale that the RFP's requirements and software evaluation criteria were not structured to provide the agency with a meaningful basis to evaluate the ease of use of the software.

The cancellation notice issued by the contracting officer states that agency decided to cancel the solicitation “based on the solicitation provisions addressing software evaluation.” AR, Tab E.19, Agency Cancellation Notice, at 1. Additionally, in response to the protest, the contracting officer submitted a statement explaining that he determined that the requirement should be recompeted under a revised solicitation, with a performance work statement which better reflected the government’s software evaluation requirements, and that IRS senior management concurred with his decision to cancel the solicitation. CO Statement at 6. Specifically, the contracting officer states: “The decision was made to assemble a new team, including a new contracting officer, to draft a PWS that would revise the usability testing and evaluation requirements and would allow the Incumbent, the Protester, and other interested vendors (offerors) to compete for award.” Id.

As relevant here, the deputy director testified regarding the IRS’s plans for the new solicitation. Specifically, the deputy director testified that, in preparation for the new solicitation, the agency assembled a new team, including a member from the agency’s information technology division who is familiar with software use and testing across multiple software platforms. Tr. at 282:4-8. The deputy director also testified that the basis for evaluation for the new solicitation will change from best value to low-priced, technically acceptable, and that the PWS requirements in the new solicitation will be simplified to reflect the agency’s intent to acquire commercial off-the-shelf software. Tr. at 282:14-18. In addition, the deputy director stated that the new team is working to address the usability issue identified in the cancelled solicitation by creating pass/fail usability requirements that can be objectively evaluated by the agency. Tr. at 284:5-10. We find that the deputy director’s testimony is reasonably consistent with the record and the agency’s contemporaneous cancellation decision.

In any event, to the extent the protester argues that the deputy director’s testimony constitutes a new basis for cancelling the solicitation that was not identified until after the solicitation had been cancelled, our Office has held that new or additional rationale justifying the cancellation of a solicitation provided by an agency during the development of a protest is acceptable so long as it would have supported cancellation had it been advanced originally. See Peterson-Nunez Joint Venture, B-258788, Feb. 13, 1995, 95-1 CPD ¶ 73 at 5. In this regard, an agency may properly cancel a solicitation no matter when the information supporting the cancellation first surfaces or should have been known, even if the solicitation is not cancelled until after proposals have been submitted and evaluated, or even if discovered during the course of a protest. SEI Group, Inc., B-299108, Feb. 6, 2007, 2007 CPD ¶ 35 at 3. The new solicitation includes additional requirements and a revised evaluation scheme, which provides a reasonable basis for canceling the RFP. See MedVet Dev. LLC, supra.

The record here supports the IRS’s contention that the RFP’s requirements and software evaluation criteria were not adequately structured to provide the agency

with a meaningful basis to evaluate the ease of use of the software as necessary for the VITA program. We therefore conclude that the agency reasonably determined that the solicitation did not reflect the agency's needs. In addition, the record indicates that the agency believed that revising the RFP and PWS may lead to increased competition, which is supported by the fact, as discussed above, that three of the five proposals originally received by the agency were deemed non-responsive and excluded from the competition. CO Statement at 3-4. Under these circumstances, we find that the agency's determination to cancel the solicitation was reasonable. See Global Solutions Network, Inc., B-289342.4, Mar. 26, 2002, 2002 CPD ¶ 64 at 3 (where a solicitation no longer accurately reflects an agency's requirements, and resolicitation could result in increased competition, cancellation of the solicitation is appropriate).

In sum, we find no basis to object to the agency's cancellation of the RFP.

The protest is denied.

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General Counsel