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Decision

Matter of: WorldLink Aviation, LLC

File: B-403289.2

Date: October 27, 2010

S. Lane Tucker, Esq., Stoel Rives LLP, for the protester.
Robert W. Schlattman, Esq., General Services Administration, for the agency.
Cherie Owen, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protest that agency improperly canceled a solicitation for the lease of space to house an Animal and Plant Health Inspection Services training center is denied where the decision to cancel was reasonably based on agency concerns that the integrity of the procurement process had been undermined by mistakes made by agency procurement officials during the procurement process.

DECISION

WorldLink Aviation, LLC, of Cedar City, Utah, protests the cancellation of solicitation for offers (SFO) No. 7UT2170 by the U.S. General Services Administration (GSA), Public Buildings Service, for the lease of space to house the Animal and Plant Health Inspection Services (APHIS) training center at the airport in Cedar City, Utah. WorldLink contends that the agency lacked a reasonable basis to cancel the solicitation.

We deny the protest.

BACKGROUND

GSA issued SFO No. 7UT2170 on December 5, 2008, seeking proposals for the lease of approximately 12,972 square feet of space at the airport in Cedar City, Utah to house the APHIS training center.

The agency received two offers (from firms other than WorldLink) for new construction by the January 12, 2009 due date. Contracting Officer's Statement at 2. On March 31, 2009, the agency issued amendment 1 to the solicitation to provide an

approximate space configuration and additional information. The agency states that it issued this amendment in hopes that more information would facilitate offers for lower rents. Id. at 2.

Final proposal revisions were submitted on July 7, 2009. Id. Both final proposal revisions contained rental rates that were above market rates, which the agency states would have resulted in a capital lease.¹ Id. The agency did not have authority to enter into a capital lease, so award could not be made at that time. Id. The agency issued amendment 2 to the solicitation on September 11, 2009, decreasing the square footage of the space from the original 12,972 square feet to 12,378, and reopened discussions with the offerors. Id. at 2-3. The agency also contacted WorldLink and encouraged it to submit an offer. Id. at 3.

In September 2009, the agency sent an e-mail to the protester that contained some of the basic requirements under the solicitation, but not the entire bid package. WorldLink Protest at 3. Later the same day, the agency sent another e-mail to the protester containing the SFO and several attachments. Id. WorldLink subsequently submitted an offer.² Id.

The agency initially accepted WorldLink's submission. On December 2, 2009, the agency issued amendment 3 to the solicitation, again decreasing the amount of required square feet from 12,378 to 11,388, and reducing the required number of onsite parking spaces from 20 to 15, in an attempt to reduce project costs. Contracting Officer's Statement at 3; RFP amend. 3. The agency then conducted negotiations with WorldLink and the two initial offerors. Final proposal revisions were due on February 26, 2010. Contracting Officer's Statement at 3.

The agency found the offers submitted by the initial two offerors to be unacceptable. On June 16, 2010, the agency informed the other offerors that WorldLink had been selected as the potential awardee. Id. at 4. The agency also sent an e-mail to

¹ The Financial Accounting Standards Board defines a capital lease as a lease that meets one of the following four criteria: (1) the lease automatically transfers ownership of the property to the lessee by the end of the lease; (2) the lease contains a bargain purchase option; (3) the lease term equals 75 percent or more of the estimated economic life of the property; or (4) the present value of the minimum lease payments at the beginning of the lease term equals or exceeds 90 percent of the fair market value of the property. Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 13, at 8. Capital leases are handled differently for accounting purposes and result in certain financial consequences.

² In its protest, Worldlink contends that it submitted its offer by October 22, 2009. Protest at 3. The agency contends that Worldlink submitted its offer on November 6, 2009. Contracting Officer's Statement at 3.

WorldLink informing it that its offer had been selected and stating that a copy of the unexecuted lease would be forwarded to the protester for review and signature. Id. The same day, the agency sent WorldLink another e-mail clarifying that the contract would not be officially awarded until the lease was signed by the government. Id.; Agency Report (AR), Tab 21, E-mail from GSA to WorldLink, June 16, 2010, at 1.

Subsequently, one of the other offerors filed an agency-level protest challenging the putative award to WorldLink, and alleging that GSA acted improperly when it allowed WorldLink to join the competition several months after the initial January 12, 2009 due date for receipt of offers. Contracting Officer's Statement at 4-5. After a review, the agency determined that it had improperly allowed WorldLink to submit a late offer and notified WorldLink that it would not be awarded the contract. AR, Tab 27, E-mail from GSA to WorldLink, June 29, 2010, at 1. The agency then took corrective action by conducting another round of discussions with the initial two offerors and allowing them to submit additional revised proposals by July 14, 2010. Contracting Officer's Statement at 6.

WorldLink disagreed with the agency's conclusion that its offer was late and filed a protest with our Office on July 9, 2010, contending that it had an enforceable lease with GSA, and challenging the agency's determination that its offer was late.

On July 22, 2010, GSA notified our Office that it had decided to take corrective action by canceling the underlying solicitation. The agency explained its decision in a determination and findings (D&F) document. AR, Tab 33, D&F. In its D&F, the agency provided several reasons for its decision to cancel the solicitation. The agency also noted in its D&F that it had not yet reviewed the final proposal revisions submitted by the two initial offerors on July 14. Id. at 5.

On July 26, 2010, GAO dismissed the WorldLink protest. WorldLink Aviation, LLC, B-403289. This protest followed.

DISCUSSION

The agency contends that it canceled the solicitation for several reasons. First, the agency found that several mistakes were made in its process, such as allowing WorldLink to participate even though its proposal was received after the due date for initial offers. The agency also noted that it improperly provided post-award notifications to the unsuccessful offerors disclosing the amount of the annual rent and stating that WorldLink has been selected for award. The agency also states that it failed to notify one of the incumbent lessors of the solicitation. AR, Tab 33, D&F, at 6. This lessor subsequently expressed interest in competing under the solicitation. Contracting Officer's Statement at 6. Finally, the agency stated that, in response to the agency-level protest filed by one of the unsuccessful offerors, the agency should have cancelled the solicitation and issued a new one, eliminating all of the prior improprieties and allowing WorldLink to compete for award, rather than excluding

WorldLink from further competing and considering revised offers from the two offerors who complied with the solicitation due date. AR, Tab 33, D&F, at 6.

The agency also provided several other reasons for cancellation. It states that, based on new information from the United States Fish and Wildlife Service, there has been a relaxation of the excavation restrictions designed to protect endangered prairie dogs. The agency explains that relaxing these restrictions on excavation will likely encourage a larger pool of potential offerors and allow the government to obtain a better price. *Id.* at 7. The agency also stated that it believes that if a new solicitation is issued, it is more likely to receive offers of existing buildings, which would reduce the risks and costs associated with delay and holdover that are likely to result from selecting an offer of new construction. *Id.* (The two unsuccessful offerors offered new construction; however, the agency has received inquiries from owners of existing buildings interested in submitting offers. Contracting Officer's Statement at 5-6.) Further, the agency determined that there was a potential for cost savings if GSA cancels and resolicits. AR, Tab 33, D&F, at 7-8.

The protester challenges each of the agency's justifications and contends that there was no reasonable basis to cancel the solicitation. With regard to procurement irregularities, the protester contends that the agency's inclusion of WorldLink in the procurement was proper, and that WorldLink's offer was not late. Comments at 8. The protester also states that, without WorldLink's offer, there would be no competition because the other two offers were found to be unacceptable. Comments at 9. WorldLink also challenges the agency's statement that it improperly disclosed WorldLink's price to other offerors before the award had been made. Comments at 11. The protester states that GSA cannot establish that disclosure of WorldLink's prices caused any competitive prejudice because the agency has not reviewed the third round of proposal revisions submitted after GSA took corrective action by allowing the original two offerors to submit another round of revised proposals. Comments at 11. Therefore, the protester concludes that GSA lacked a reasonable basis to cancel the solicitation.

In a negotiated procurement, such as the one here, a contracting agency has broad discretion in deciding whether to cancel a solicitation and need only establish a reasonable basis for doing so. *All Seasons Apparel, Inc.*, B-401805, B-401805.2, Nov. 4, 2009, 2009 CPD ¶ 221 at 3; *ESM Group, Inc.*, B-400298.2, Oct. 14, 2008, 2008 CPD ¶ 190 at 2. An agency may properly cancel a procurement based on its concerns that the integrity of the procurement process appears to have been compromised by the improper actions of the selection committee. *Winzler & Kelly*, B-260449, June 19, 1995, 95-1 CPD ¶ 279 at 3. As discussed below, we find that the agency has stated a reasonable basis for canceling the solicitation.

As noted above, one of the reasons the agency canceled the solicitation was because Worldlink submitted an offer after the due date for submitting initial offers, which could not be accepted under the solicitation and applicable GSA regulations. As is relevant here, the solicitation included GSA Form 3516, which incorporated GSA

Regulation (GSAR) § 552.270-3, titled “Late Submissions, Modification, and Withdrawals of Offers (Aug. 1995).” RFP at 7; AR, Tab 1, GSA Form 3516. The language of GSA Form 3516, included in the solicitation, states:

Any offer received at the office designated in the solicitation after the exact time specified for receipt of initial offers will not be considered unless it is received before award is made . . .

AR, Tab 1, GSA Form 3516 (emphasis added). Beginning in March 1998, GSA was permitted to substitute the language of § 552.270-1(c)(2)(i) with alternate language in solicitations if it so chose. Alternate I provides:

(i) Any offer received at the office designated in the solicitation after the exact time specified for receipt of final proposal revisions will not be considered unless it is received before award is made . . .

GSAR § 552.270-1, Alternate 1 (Mar. 1998) (emphasis added).

Here, none of the materials referenced by the solicitation or sent to the initial two offerors invoked the optional Alternate I language. Contracting Officer’s Statement at 10. In contrast, WorldLink alleges that the materials it received contained a different GSA Form 3516, which contained the language of Alternate I. Protest at 6. Thus, the record shows that offerors were provided different information about late proposal submissions.

The fact that different offerors were provided conflicting information regarding when offers would be considered late, and the fact that one offeror (WorldLink) received information contradicting the information set forth in the solicitation, has created confusion among the offerors regarding the cut-off time for accepting offers and caused the agency to be concerned about the integrity of the procurement process. Indeed, as pointed out in the protest, even officials at GSA appear to be confused as to when offers could be accepted. Protest at 5-6. Given the confusion regarding when offers would be considered late and the agency’s reasonable concern about the integrity of the procurement, we find nothing improper in the agency’s decision to cancel the solicitation here. Because we find that this procurement irregularity provided a reasonable basis for canceling the solicitation, we need not address the other bases for cancellation provided by the agency.

The protest is denied.

Lynn H. Gibson
Acting General Counsel