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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Kenco Associates, Inc.; Air Product and Chemicals, Inc.

File: B-297503; B-297503.2

Date: January 25, 2006

Gregory L. Monge, Esq., VanAntwerp, Monge, Jones & Edwards, LLP, for Kenco Associates, Inc., and Robert J. Symon, Esq., Bradley Arant Rose & White LLP, for Air Products and Chemicals, Inc., the protesters.
Vincent A. Salgado, Esq., National Aeronautics & Space Administration, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Cancellation of solicitation minutes prior to the scheduled time for receipt of proposals was reasonable where the agency, as a result of inquiries from members of Congress, reasonably determined that it needed to further review its mission requirements before proceeding with the procurement.

DECISION

Kenco Associates, Inc. and Air Products and Chemicals, Inc. protest the cancellation of request for proposals (RFP) No. NNL05111032R, issued by the National Aeronautics and Space Administration (NASA), Langley Research Center (LaRC), Hampton, Virginia, for building a government-owned, contractor-operated liquid nitrogen (LN_2) plant.

We deny the protests.

NASA issued this RFP on September 2, 2005 to solicit proposals to build a government-owned, contractor-operated facility to produce an independent source of LN_2 for the National Transonic Facility (NTF) operated by LaRC. The NTF is a closed circuit, fan driven, pressurized wind tunnel operated by LaRC that utilizes LN_2 to test transonic aerodynamic flow. It is the only cryogenic wind tunnel in the United States and is utilized by the Department of Defense and the aeronautics industry to conduct aerodynamic research on scale model aircraft designs. See RFP, Statement of Work ¶ 1.1.

Since 1984, to support the NTF's mission, NASA has acquired LN_2 via a pipeline from Praxair, Inc., a private supplier that operates an LN_2 plant near LaRC, under a sole-source requirements contract. The NTF requires large quantities of LN_2 over short periods, but there are long stretches where no LN_2 is needed, because the actual tests using large quantities of LN_2 at the NTF are intermittent. Because of this, NASA has paid a premium to Praxair for LN_2 to support the NTF. Specifically, the current contract with Praxair costs NASA a weighted average price of $81 per ton (down from the previous contract price of $112 per ton).[1] After undertaking various studies to determine the feasibility of creating its own source of LN_2, NASA determined that it could potentially reduce its cost for LN_2 to $40 per ton, and make its testing more affordable and available to a wider range of customers, if it built and operated its own source of LN_2. This RFP resulted from those studies culminating in an acquisition strategy meeting in May 2005. <u>See</u> Agency Memorandum of Law at 2-3.

The RFP required the contractor to build and operate an LN_2 plant at LaRC under a fixed-price contract that was divided between a base period and an option period. The base period work consisted of engineering, design, manufacturing, testing and delivery of equipment, and the option period consisted of site work, training, commissioning, and demonstration of the LN_2 plant's performance. RFP, Statement of Work ¶ 1.2.2. After various amendments to the RFP, the closing time for receipt of proposals was set for 4 p.m. on October 14.

Immediately after issuing the RFP, NASA began receiving inquiries from various Congressional members from Virginia questioning the propriety and feasibility of NASA devoting resources to build a government-owned LN_2 facility.[2] The concerns expressed included that NASA "may be . . .wast[ing] taxpayers' dollars" for an unnecessary facility and that NASA may be violating the policy of the President and of Office of Management Budget Circular No. A-76 "to rely on the private sector for commercially available products." <u>See</u> Agency Report, Tab 22.

In view of these concerns, NASA had numerous internal communications as well discussions with Congressional representatives, which ultimately led the agency to cancel the RFP on October 14. The following excerpt from the internal e-mail of that date sets out the context for canceling the RFP:

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[1] Historically, the prices have exceeded $100 per ton.

[2] The record indicates that Praxair's complaints were the reason that these inquiries were initiated. <u>See</u>, <u>e.g.</u>, Agency Report, Tab 15, E-mail from American Continental Group to NASA Legislative Affairs Office (Sept. 6, 2005), at 1.

> We are reshaping the Aeronautics program and the NTF will be part of a national assets program, which will place a new emphasis on operating and maintaining these high-value/unique facilities. As a result of this activity, this is an opportunity for LaRC technical staff . . . to revisit their technical needs and assess the options given the new direction of the program. A well scrubbed technical plan will be the product of this exercise. After we are convinced that we fully understand our requirements, the expectation is that there would be a Request for Information . . . and Industry Day to help us better scope our requirements and understand what options the commercial market may offer to help us meet not only our primary requirements, but any peak/surge demand that may arise. Ultimately, a competitive solicitation would be issued, reflecting the most optimal situation for the Government and industry. Specifically, the following actions by the Langley staff will be executed:
>
> • Cancel current procurement of the LN_2 plant for Langley Research Center
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> • Reassess/update the technical requirements for LN_2 for the [NTF]. Included in this assessment should be: estimated LN_2 needs for the long term, 15 years; the impact of a new third LN_2 storage tank; the possibility of trucking LN_2; the possibility of offering a si[te] near the NTF on LaRC property for the construction and commercial operation of a new LN_2 plant; and the impacts of all the scenarios on the LN_2 and facility operations costs and the NTF capacity.

See Agency Report, Tab 45, E-mail from NASA Director Aeronautics Test Program to NASA Associate Administrator for Aeronautics (and other NASA Officials) (Oct. 14, 2005), at 1. At that time, NASA had already received two proposals, one from Kenco and the other from Air Products, but had not opened the proposals, since the cancellation of the RFP occurred just a few minutes prior to the scheduled closing time on October 14. These protests followed.

The protesters contend that the cancellation was improper because the primary reason that the agency canceled the RFP was political pressure exerted by Congressional members on behalf of Praxair.

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 requirements, particularly where cancellation and the issuance of a revised solicitation would present the potential for increased competition or cost savings. VSE Corp., B-290452.2, Apr. 11, 2005, 2005 CPD ¶ 111 at 6.

Here, although the record confirms that the inquiries and concerns expressed by Congressional representatives caused NASA to review the need for a government-owned, contractor-operated LN_2 plant, the record also establishes that the ultimate decision to cancel was made because NASA was concerned that the RFP may not accurately reflect its requirements in light of the reshaping of the agency's aeronautics program.

In response to the protest, the agency explains that the NTF, in April 2005, was placed in the agency's Shared Capability Asset Program (SCAP), which is a program designed to ensure that key capabilities and assets are available to support NASA's mission. The SCAP involves identifying and prioritizing critical NASA assets and making strategic investment decisions to replace, modify, or dispose of such assets based on NASA and national needs. The SCAT contemplates that funding decisions for acquiring such assets would be made at the NASA headquarters level, not at the field activity level.

NASA advises that, in response to the concerns expressed by the Congressional representatives, the agency initiated an independent review to verify the need for a government-owned LN_2 facility and to ensure that construction of the facility was consistent with the aeronautics research program and the SCAP program objectives. The agency explains that this review revealed that the requirement for LN_2 was not adequately defined and that proceeding with the procurement was "premature and inappropriate" because, for example, it was not clear whether the newly constructed LN_2 plant would fulfill the NTF's entire requirement for LN_2 or only part of the NTF's LN_2 requirements. In addition, NASA reports that, based on the SCAP, the requirement for LN_2 should have been, but was not, determined "based upon technical assessments aligned with [the agency's] reshaped aeronautics program," such as the need to "determine what technical capabilities the NTF facility will need to ensure the agency can address the data collection needs [relating to aerodynamics research] of NASA and other users in the coming 15-plus years." Moreover, NASA found that LaRC used the "Full Cost Recovery model" in justifying this procurement and this model is no longer applicable under the new SCAP program. See Agency Report, Tab 57, Declaration of NASA Associate Administrator for Aeronautics (who was the official responsible for the decision to cancel the RFP).

As noted, a reasonable basis to cancel exists where a solicitation does not accurately reflect the agency's requirements. The fact that NASA found that the RFP may not accurately reflect its requirements, and that it needed to fully consider and resolve questions regarding its LN_2 requirements that were not considered at the time the RFP was issued, constituted a reasonable basis to cancel the RFP. While the protesters attack NASA's motives as merely capitulating to political pressure on behalf of a particular constituent, we find nothing questionable about NASA responding appropriately to the concerns expressed by representatives of Congress, which has oversight authority. Based on our review of the record, NASA has established that it has legitimate reasons for reviewing its requirements before proceeding with this procurement and thus a reasonable basis to cancel the RFP while it does so. See Global Solutions Network, Inc., B-290107, June 11, 2002, 2002 CPD ¶ 98 at 3-5

Nevertheless, Kenco and Air Products question the timing of the agency's decision to cancel, given that it was made after each had expended considerable resources to address the RFP, and because no mention was made to the offerors of the SCAP prior to the cancellation, and because all the agency's prior studies concluded that building a LN_2 plant was in the government's best interest. The protesters argue that they should at least be entitled to recover their proposal preparation costs, given the agency's actions.

However, as long as an agency has a reasonable basis to cancel, it may properly cancel a solicitation no matter when the information precipitating the cancellation first surfaces or should have been known. See The Potomack Partnership, B-252860, Aug. 3, 1993, 93-2 CPD ¶ 75 at 4 (cancellation after receipt but without evaluating proposals); see also Global Solutions Network, Inc., supra (cancellation prior to receipt of proposals). Given that NASA promptly canceled the RFP when it learned that there were reasons for questioning its requirements, we have no reason to question the agency's actions here.

Under the circumstances, we also find no basis to grant the protesters' request to recover their costs simply for competing in this procurement. The Competition in Contracting Act of 1984, 31 U.S.C § 3554 (c)(1) (2000), and our implementing regulations, 4 C.F.R. § 21.6(d) (2005), provide for our Office to recommend reimbursement of proposal preparation costs only where we determine that "a solicitation, proposed award, or award of a contract does not comply with a statue or regulation." Since the cancellation here was proper, and there is no other reason to conclude that the agency has acted contrary to statute or regulation, there is no basis to recommend the recovery of proposal preparation costs. See Bahan Dennis Inc., B-249496.3, Mar. 3, 1994, 94-1 CPD ¶ 184 at 6.

The protests are denied.

Anthony H. Gamboa
General Counsel