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**Comptroller General
of the United States**

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

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Decision

Matter of: e-Management Consultants, Inc.; Centech Group, Inc.

File: B-400585.2; B-400585.3

Date: February 3, 2009

Jason P. Matechak, Esq., Lawrence S. Sher, Esq., Keith D. Coleman, Esq., and Steven D. Tibbets, Esq., Reed Smith LLP, for e-Management Consultants, Inc., a protester.

Kenneth A. Martin, Esq., Martin Law Firm, for Centech Group, Inc., a protester.

John Donaldson, Esq., National Highway Traffic Safety Administration, Department of Transportation, for the agency.

Glenn G. Wolcott, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably cancelled solicitation based on concerns, supported by the record, that the primary author of the solicitation's statement of work and evaluation factors had a conflict of interest with regard to one offeror.
 2. GAO is not authorized to consider a protest challenging the award of a task order valued at less than \$10 million where the protest does not assert that the order increases the scope, period, or maximum value of the contract under which the order was issued.
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DECISION

e-Management Consultants, Inc., of Silver Spring, Maryland, and Centech Group, Inc. of Arlington, Virginia, protest the decision of the National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT), to cancel request for proposals (RFP) No. DTNH22-08-R-00179 to provide systems engineering and information technology (IT) support for various NHTSA programs.¹ Centech also

¹ Section C of the solicitation stated that the procurement sought services "for the planning and implementation of NHTSA's e-Government program (e-Gov) and other initiatives, including IT capital planning and investment control support; enterprise architecture and IT strategic planning; support for NHTSA input to Departmental and Federal e-Gov initiatives; implementation of risk management and other processes

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protests NHTSA's issuance of an interim task order to meet the agency's ongoing requirements for IT support while the agency prepares to conduct a new procurement.

We deny the protests challenging cancellation of the solicitation and dismiss the protest challenging the issuance of an interim task order.

BACKGROUND

The solicitation at issue was published on July 2, 2008 pursuant to the General Services Administration's (GSA) Commerce Information Technology Solutions -- Next Generation (COMMITTS) government-wide acquisition contract (GWAC).² e-Management was the incumbent contractor for the competed requirements. The agency states that NHTSA's chief information officer (CIO), who served as the contracting officer's technical representative (COTR) under the predecessor e-Management contract, was the primary author of the solicitation's statement of work and evaluation factors. Agency Report, Nov. 24, 2008, at 2.

On or before the July 31, 2008 closing date, proposals were submitted by e-Management, Centech, and a third offeror;³ the proposals were subsequently evaluated by the agency's evaluation panel. On September 11, NHSTA announced that Centech's proposal had been selected for contract award.

On September 16, 2008, e-Management filed its first protest with this Office, challenging the bases for the agency's decision to award to Centech. As an attachment to that protest, e-Management submitted what it acknowledged was "[i]nternal NHTSA correspondence relating to this procurement." e-Management Protest, Sept. 16, 2008, at 8. Specifically, the internal NHTSA correspondence consisted of e-mails by and between NHTSA's CIO and

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and systems to promote a robust security and privacy posture; support for network and infrastructure operation, maintenance, and consolidation; and ongoing mission systems management and operation." RFP at 13-14.

² COMMITTS is a task order contract designed to offer information technology solutions to federal government customers, and was previously managed by the U.S. Department of Commerce; GSA assumed responsibility for managing COMMITTS in March 2008.

³ A proposal was also submitted by a fourth offeror, but that proposal was subsequently eliminated from the competition for reasons unrelated to this protest.

various agency procurement personnel that were dated September 4 and 5, 2008—just days before the agency’s award decision. Among other things, the e-mails included what e-Management describes as “[the CIO’s] revised ‘risk assessment’ portion of NHTSA’s technical evaluation.”⁴ Id. at 9. In this regard, one of the e-mails included a table containing various risk ratings for each offeror, along with the following CIO statement: “The risk table would then look like the attached, which would make e-Management the best value with the lowest risk and still the lowest cost.” Id. at 10.

In the September 16 protest, e-Management asserted that the agency’s decision to award to Centech “relied on an unreasonable and unsupported best value determination,” and that “the evidence available to e-Management suggests an element of bias against e-Management among NHTSA source selection personnel.” Id. at 11.

Following submission of e-Management’s protest—and the accompanying internal agency correspondence—the agency reported the matter to DOT’s Office of Inspector General (IG) due to the agency’s concerns regarding potential procurement integrity violations. Thereafter, the IG initiated an investigation, providing an interim briefing to NHTSA officials in October. By letter dated October 22, 2008, the agency advised this Office as follows:

[B]ased on information relayed by the IG, the agency has concluded that a serious conflict of interest and potential bias in favor of e-Management by a senior agency official existed during the course of this procurement, due to a personal relationship between the official and a principal of e-Management, and that this circumstance affected the integrity of the procurement process.⁵

Letter from NHTSA to GAO, Oct. 22, 2008, at 2.

The agency continued that, in the context of e-Management’s possession of internal agency correspondence, along with the CIO’s prior advocacy for e-Management’s proposal and the fact that the CIO had authored the solicitation’s statement of work

⁴ The CIO was not an evaluator on the agency’s technical evaluation panel.

⁵ The record shows that the CIO was the “senior agency official,” and indicates that she had an undisclosed personal relationship with e-Management’s president. Among other things, the record further shows that the CIO and e-Management’s president, along with their respective spouses, traveled together on a transatlantic cruise approximately 3 months prior to the submission of proposals in this procurement, and that the two couples shared a rented vehicle to travel from Washington, D.C. to New York at that time.

and evaluation factors, the information provided by the IG “heightened [the agency’s] concern.” The agency further stated that, “based on the information learned to date, it is appropriate for NHTSA to act to safeguard the public’s confidence in the procurement process,” concluding: “For the forgoing reasons, the agency is canceling the solicitation. As we have a continuing need for the IT services, we intend to issue a new solicitation.” Id. at 3.

Accordingly, the agency terminated Centech’s contract and cancelled the solicitation, advising the parties of those actions on October 22 and 23. Thereafter, NHTSA issued an interim task order to Bowhead Support Services, pursuant to a different, existing task order contract, in order to meet the agency’s ongoing IT requirements while the agency prepared to conduct the new procurement. That task order had an estimated maximum value of \$500,993.⁶ Letter from NHTSA to GAO, Dec. 1, 2008, attach. 3.

On October 28, e-Management submitted a second protest challenging the agency’s cancellation of the solicitation. In this protest, e-Management asserts that the cancellation was unreasonable and “merely a pretext” to avoid resolution of e-Management’s prior protest. e-Management Protest, Oct. 28, 2008, at 7. On November 1, Centech submitted a protest, similarly challenging the agency’s cancellation of the solicitation; additionally, Centech protests the agency’s award of the interim task order to Bowhead.

On November 5, 2008, we dismissed e-Management’s September 16 protest challenging the award to Centech on the basis that the agency’s termination of Centech’s contract rendered the protest academic. e-Management Consultants, Inc., B-400585, Nov. 5, 2008.

DISCUSSION

First, with regard to e-Management’s and Centech’s protests challenging the agency’s decision to cancel the solicitation, we note that the Federal Acquisition Regulation (FAR) provides:

Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general

⁶ The agency has provided documentation establishing that the task order was issued for a projected performance period of 3.5 months pursuant to contract No. DTNH22-01-C07473. Letter from NHTSA to GAO, Dec. 1, 2008, attach. 3.

rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.

FAR § 3.101-1.

Further, in a negotiated procurement, an agency has broad authority to cancel a solicitation, and needs only a reasonable basis to do so. See, e.g., A-Tek, Inc., B-286967, Mar. 22, 2001, 2001 CPD ¶ 57 at 2. In this regard, an agency may properly cancel a solicitation no matter when the information precipitating the cancellation first surfaces or should have been known. See, e.g., Daston Corp., B-292583, B-292583.2, Oct. 20, 2003, 2003 CPD ¶ 193 at 3. Where a protester has alleged that an agency's rational for cancellation is pretextual, 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 more closely examine the bases for the agency's actions. See, e.g., Superlative Tech., Inc., B-310489, B-310489.2, Jan. 4, 2008, 2008 CPD ¶ 12 at 7; Gonzales-McCaulley Inv. Group, Inc., B-299936.2, Nov. 5, 2007, 2007 CPD ¶ 192 at 5. Notwithstanding such closer scrutiny, the reasonableness standard applicable to cancellation of a solicitation remains unchanged.

Here, as noted above, the CIO was the COTR under e-Management's prior contract, had an undisclosed personal relationship with e-Management's president, and was the primary author of this solicitation's statement of work and evaluation factors. In response to e-Management's second protest, the agency provided additional documentation regarding the CIO's activities during the source selection process. For example, early in the evaluation process, the agency's evaluation panel had ranked the third offeror's proposal as the most highly rated, but that ranking was changed following criticism by the CIO. Agency Report, Nov. 24, 2008, at 6-7. Finally, the agency has produced a copy of the IG's interim report for this Office's in camera review. We understand the IG has not yet closed its investigation regarding this matter; accordingly, we will not further discuss that report.

Based on our review of the record, we do not question the reasonableness of the agency's determination to cancel the solicitation and to subsequently issue a new solicitation for this procurement. More specifically, here, the agency obtained information following contract award indicating that the terms of the solicitation, including the statement of work and evaluation factors, may not have been written with complete impartiality and objectivity. Further the record provides a reasonable basis for the agency's concern that, as a result of the potential bias, the agency's consideration of all offerors' proposals may have been compromised. In such circumstances, the approach taken by NHTSA appears to be a prudent course of

action. e-Management's and Centech's assertions that cancellation of the solicitation was unreasonable and pretextual are without merit.⁷

Next, with regard to Centech's protest challenging the agency's interim issuance of a task order to Bowhead, this Office is not authorized to consider the matter. Specifically, the Federal Acquisition Streamlining Act of 1994 (FASA) provides that this Office is authorized to consider task order protests only under limited circumstances, stating:

A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued.

41 U.S.C. § 253j(d) (2008).

This Office's authority to consider task order protests was recently expanded by section 843 of the National Defense Authorization Act of Fiscal Year 2008 (NDAA). In this regard, the NDAA authorizes this Office, in addition to the circumstances identified above, to consider protests filed in connection with task orders that are valued in excess of \$10 million. Pub. L. 110-181, 122 Stat. 3, 239 (2008).

Here, Centech's protest does not allege that the task order issued to Bowhead increased the scope, period, or maximum value of the contract against which the order was issued. Further, the record is undisputed that the value of the task order is less than \$10 million. Accordingly, pursuant to the statutory limitations discussed above, this Office is not authorized to consider Centech's protest challenging the agency's issuance of an interim task order to Bowhead.

The protests challenging the agency's cancellation of the solicitation are denied and the protest challenging the award of an interim task order is dismissed.

Gary L. Kepplinger
General Counsel

⁷ As noted above, we understand the IG has not yet closed its investigation in this matter. Accordingly, even if we did not consider the record adequate to support cancellation of the solicitation—which we do—we would dismiss the protests, pending completion of the IG investigation. See, e.g., JWK Int'l Corp., B-296969.3, Jan. 5, 2006, 2006 CPD ¶ 17 at 3 n.4; Oceaneering Int'l, Inc., B-278126, Dec. 31, 1997, 98-1 CPD ¶ 133 at 1 n.1; Complere Inc., B-257946, Nov. 23, 1994, 94-2 CPD ¶ 207 at 6 n.4.