

## GAO Sustains Bid Protest Alleging that Cancellation of Solicitation was Pretextual and Unreasonable

**Introduction:** A recent decision of the Government Accountability Office (“GAO”) sustained a bid protest concluding that the government cancelled a solicitation on pretextual grounds after a protest had been initiated. While agencies enjoy considerable discretion to cancel requests for quotations, even after the quotations have been submitted and evaluated, they must have a reasonable basis for doing so. The government may not do so simply to avoid a bid protest and the attendant scrutiny of the procurement.

**Summary:** In *Gonzales-McCaulley Investment Group, Inc.*, B-29936.2, Nov. 5, 2007, the GAO ruled that a cancellation of a solicitation, even where acquisition authority had been improperly delegated, was pretextual and therefore unreasonable, and recommended that the protester receive its protest costs and fees.

- The Department of Health and Human Services (“HHS”) issued a solicitation for quotations for grants management courses to be taught at the HHS University (“HHS-U”), pursuant to the Government Employees Training Act (“GETA”). HHS-U selected three vendors to provide grants management training courses, one of which was Gonzales-McCaulley Investment Group (“GMIG”).
- Prior to the start of classes, HHS-U’s acquisition official noticed a similarity between materials in GMIG’s proposal and the content of another vendor’s website. This official did not make further inquiries or ask for an explanation, but sent an e-mail to GMIG stating that HHS-U was withdrawing its offer letter because of a concern that GMIG had plagiarized its materials. In response to this action, GMIG filed its first protest.
- HHS argued that the rescission of the selection of GMIG (because of the similarity between GMIG’s course descriptions and learning objectives and those of another vendor) was reasonable. GMIG filed comments that denied the plagiarism and countered by providing identical language (relating to the goals of the program) found in numerous government training catalogues. In addition, GMIG argued that other materials submitted to HHS-U demonstrated that GMIG had the requisite command of the subject matter and the ability to conduct the classes.
- After reviewing GMIG’s comments, HHS requested a dismissal of the protest on a different ground – that “the acquisition had been conducted under a delegation of GETA authority that was not effective as to HHS-U” because of a reorganization within HHS that rendered a prior delegation of authority ineffective. HHS then rescinded the selections and cancelled the solicitation. GMIG’s first protest was subsequently dismissed by the GAO as academic.
- GMIG then filed a second protest that argued that HHS had GETA authority at the time of GMIG’s selection and, alternatively, that the cancellation of the solicitation was only done in order to obtain dismissal of its first protest.

- In its decision, the GAO noted that an agency “need only establish a reasonable basis to support a decision to cancel a request for quotations.” The GAO, however, will recommend corrective action in cases where the rationale for the cancellation was merely a pretext. Here, despite the fact that HHS apparently lacked acquisition authority (a reasonable basis for cancelling the solicitation), it was clear that this cancellation was pretextual – hundreds of other solicitations had been conducted without appropriate acquisition authority, but this was the only solicitation cancelled.
- Even if it can be shown that a solicitation was cancelled as a pretext to avoid scrutiny of a procurement, however, the GAO held that the protester still has to be able to demonstrate that it was prejudiced. Here, GMIG satisfied this requirement by showing that its initial protest would have been sustained but for the cancellation. The GAO, noting that acquisition authority had recently been properly delegated, recommended that HHS-U reinstate the solicitation, reevaluate the quotations, and reimburse GMIG for its protest costs.

**Practitioner Tips:** While a victory for the protester, *Gonzales-McCaulley Investment Group, Inc.* is representative of a fairly rare factual scenario.

- While the government is not allowed to use pretext to cancel a solicitation, it can often point to an alternative reasonable basis for the cancellation.
- In addition, proving that an action was pretextual is normally quite difficult. Few protesters will be as lucky as GMIG in developing facts as clearly demonstrative of a pretextual action taken solely to terminate a likely successful bid protest.
- Any protester that is faced with an agency decision to cancel a solicitation on a basis that is unrelated to the basis for its protest should closely examine the agency’s preferred basis for cancellation to determine whether the facts suggest that the agency is cancelling the acquisition on a pretext or whether the agency has a reasonable basis for the cancellation.

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