

### Cancellation

#### HHS Couldn't Justify IT Competition Cancellation, COFC Says



By Daniel Seiden

July 27 — The Department of Health and Human Services couldn't justify its cancellation of an IT competition that a protester claimed was tainted by bias, the U.S. Court of Federal Claims said (*Starry Assocs. Inc. v. United States*, 2016 BL 241279, Fed. Cl., No. 16-44C, 7/27/16).

Judge Eric G. Bruggink set aside the cancellation because there was no evidence the agency meaningfully reviewed its IT needs before making that decision. The court also barred several agency employees from participating in any subsequent competition actions.

The case "shows the recent trend that courts will hold federal agencies accountable for arbitrarily canceling solicitations or failing to take meaningful corrective actions. In this case, we have both," Wojciech Z. Kornacki of Centre Law & Consulting LLC told Bloomberg BNA.

It was noteworthy that the court granted injunctive relief, Kornacki said. "The court felt that the public interest favored the injunction because the public had an interest in the integrity of the federal procurement," he said. "The court found that the agency actions reflected 'a lack of fidelity to the procurement process.'"

This action was necessary for Starry to get access to discovery tools, like depositions, that aren't available at the Government Accountability Office, said Sandy Hoe, senior of counsel at Covington & Burling LLP. "But that discovery tool in a bid protest is limited to extraordinary situations such as here," he said. "I would expect to see that tool being used in very few other circumstances."

Prohibiting the government from canceling a solicitation is unusual, he added.

"The reasoning makes sense given the bias here, but that relief is only a few steps short of the court directing an award to a party, which is virtually never done," he said. "Another option the court might have exercised was to order the agency to pay Starry's bid and proposal costs and allow the solicitation to be canceled.

"Apparently, the court was not willing to let the agency off the hook so easily given the agency's bad conduct," Hoe said.

#### Award Affirmed

Incumbent protester Starry Assocs. Inc. filed a protest with the Government Accountability Office (GAO) after the agency awarded a task order to Intellizant LLC. The agency took corrective action by re-evaluating quotations, but then affirmed the award.

Starry filed a second protest that the GAO partially sustained, recommending that the agency re-evaluate Intellizant's quotation. Shortly thereafter, the agency canceled the solicitation.

Starry protested the cancellation as pretextual and biased because it argued the agency was trying to steer the award toward Intellizant. The GAO rejected the protest, so Starry pursued the matter with the court (105 FCR 22, 1/12/16).

In April, the court granted Starry's request to depose agency officials because Starry made a strong bias case against an agency official who previously worked for Intellizant (105 FCR 306, 4/12/16).

#### Reevaluation Not Serious

The court concluded that it didn't have to reach a decision on the bias claim because the cancellation was clearly arbitrary.

Once agency officials selected Intellizant, any other result was unwelcome and not seriously considered, the court said. Officials told the GAO and Starry they would undertake a serious re-evaluation of Intellizant's proposal, but the record didn't reflect such an effort, the court found.

The agency official charged with the cancellation decision said the cancellation was reasonable because other contract vehicles could meet the agency's needs. However, the record didn't show that he compared those vehicles, and his supervisor and colleagues didn't double-check his assertion.

Agency officials also said Starry would have received the award had the GAO's recommendation been followed. Therefore, the court set aside the cancellation decision, and said the agency should again re-evaluate Intellizant's proposal, as the GAO said in its second decision.

In addition, the court enjoined certain officials from participating in any subsequent agency actions in this competition.

Depositions with those officials "provide an illuminating, if depressing, window" into how they misrepresented the quality of their evaluation, the court said.

Specifically, one official rated Intellizant as technically acceptable despite having insufficient knowledge of the agency's software, the court said.

Lars E. Anderson of Odin, Feldman & Pittleman PC, Reston, Va., represented the plaintiff. Jennifer A. Semko of Baker & McKenzie LLP, Washington, represented the intervenor. Alexis J. Echols and others from the Justice Department; and Christian Maimone of the Department of Health and Human Services represented the government.

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#### Snapshot

- COFC issues opinion setting aside IT competition cancellation, and blocks officials from participating in subsequent competition actions
- Opinion says HHS couldn't articulate rationale for canceling IT competition but doesn't reach bias claim

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