U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States



# Decision

**Matter of:** ITility, L.L.C.

**File:** B-415274.3

**Date:** April 2, 2018

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Sarah L. Carroll, Esq., Defense Information Systems Agency, for the agency.
Heather Weiner, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Protest raised subsequent to post-award debriefing for procurement to establish blanket purchase agreements against Federal Supply Schedule contracts is untimely where it was filed more than 10 days after the basis of protest was known; since the procurement was not conducted on the basis of competitive proposals, GAO's timeliness rules at 4 C.F.R. § 21.2(a)(2), which apply to protests that challenge a procurement conducted on the basis of competitive proposals under which a debriefing is requested and required, are not applicable.

## DECISION

ITility, L.L.C., a small business located in Herndon, Virginia, protests the establishment of blanket purchase agreements (BPA) with five Federal Supply Schedule (FSS) contract holders[1] under solicitation No. HC1047-17-R-0018, issued by the Department of Defense, Defense Information Systems Agency (DISA), for agency program support.[2] The protester challenges the agency's technical and price evaluations.

[1] The selected firms are: (1) Defense Acquisition Support CTA, of Washington, D.C.; (2) Barbaricum, also of Washington, D.C.; (3) Integrity Management Consulting, Inc., of Tysons, Virginia; (4) Mission Services Inc., of McLean, Virginia; and (5) Zentek Consulting, of Tysons, Virginia. Unsuccessful Offeror Letter (Dec. 20, 2017), at 1.

[2] Although the solicitation was termed a "request for proposals" (RFP) in block 14 of Standard Form 1449, it elsewhere referred to quotes, and the agency viewed it as a request for quotations (RFQ). Sol. at 1, 57; Agency Dismissal Request at 2. For ease

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We dismiss the protest.

BACKGROUND

The solicitation was issued on August 15, 2017, as a small business set-aside, and was limited to vendors holding General Services Administration (GSA) FSS contracts under either Information Technology Schedule 70 or the Professional Services Schedule. The solicitation contemplated the establishment of five BPAs, each with a five-year ordering period, and envisioned that call orders issued under the BPAs would be fixed-price, with cost-reimbursable line items for other direct costs and/or travel. Sol. at 7, 19.

The solicitation provided for award based on a three-step price/performance trade-off evaluation method, considering three evaluation factors: price, technical/management plan, and past performance. Sol. at 67. The solicitation provided that step one of the evaluation would be the price evaluation. Id. Proposed prices would be evaluated for reasonableness, completeness, and unbalanced pricing, and the agency would then rank the offerors by total proposed price. Id. at 67-68. The solicitation provided that the agency would then "take [the] five Offerors with the lowest total proposed price[s] to move forward to Step 2 in the evaluation process." Id. at 68. For step two, the solicitation explained that the agency would evaluate the offerors' proposed technical/management plans for acceptability. Id. Those offerors found acceptable under this factor, would move to step three, to be evaluated under the past performance factor. Id. at 69. Ultimately, the agency would select for award "[t]he five lowest priced, technically acceptable [o]fferors with a Substantial Confidence past performance rating[.]" Id. at 71. If, however, there were not at least five proposals which were both technically acceptable and rated with substantial confidence for past performance, the agency would conduct a best-value tradeoff analysis between past performance and price among those proposals rated technically acceptable. Id.

On December 20, DISA notified ITility that its proposal had not been selected. Unsuccessful Offeror Letter (Dec. 20, 2017), at 1. Specifically, the agency advised ITility that "[its] 'Total Evaluated Price' was ranked 13 [out] of 35 offers." Id. The letter explained that, "[i]n accordance with the methodology provided in the solicitation, five lower priced offerors that were rated as 'Acceptable' for the Technical Factor and as having 'Substantial Confidence' for their Past Performance Rating were identified before reaching your proposal as ranked by 'Total Evaluated Price.'" Id. Accordingly, the letter stated that ITility's proposal "was not evaluated." The agency's letter also provided

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of reference, we refer to it herein as the solicitation (Sol.). To the extent the proper designation is relevant to our discussion, it is addressed below.

ITility with the following information regarding the firms selected:

| Awardees | Total Proposed Price | Technical Rating | Past Performance Rating |
|---|---|---|---|
| Defense Acq. Support | $123,853,008 | Acceptable | Sub. Confidence |
| Barbaricum | $132,477,552 | Acceptable | Sub. Confidence |
| Integrity | $138,183,671 | Acceptable | Sub. Confidence |
| Mission Servs. LLC | $141,113,280 | Acceptable | Sub. Confidence |
| Zentek Consulting | $164,809,485 | Acceptable | Sub. Confidence |

Id. In addition, the letter stated that ITility could request a debriefing. Id.

ITility requested a debriefing, which was held in person on January 4, 2018. Prior to the debriefing, on January 2, the agency provided ITility with debriefing slides. Response to Dismissal Request at 4. The debriefing slides included information similar to the information provided in ITility's Unsuccessful Offeror letter. See Debriefing Slides at 1-13. This protest was filed on January 12, 2018.

DISCUSSION

ITility asserts that the agency's evaluation failed to consider the impact of the selected firms' low proposed prices on the technical acceptability of their proposals. The protester also challenges the agency's price evaluation, arguing that the agency should have realized, based on the selected firms' low proposed prices, that these firms "based [their pricing] on differing assumptions" than ITility, which resulted in an unequal evaluation. Protest at 8. DISA responds that the protest is untimely because ITility filed its protest more than 10 days after it should have known the basis of protest. In this regard, DISA asserts that ITility knew, or should have known its basis of protest when it received its unsuccessful offeror letter. The protester disagrees, arguing that the debriefing exception applies, and therefore, that ITility was not required to file its protest until 10 days after it received its debriefing slides. Alternatively, ITility asserts that it could not have known its basis of protest until receiving the debriefing, and that it properly filed its protest within 10 calendar days of that time. For the reasons discussed below, we conclude that the protest was untimely filed with our Office, and dismiss it on that basis.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. The timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 5. Under these rules, a protest such as ITility's, based on other than alleged improprieties in a solicitation, must be filed not later than 10 days after the protester knew or should have known of the basis for its protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). An exception to this general rule is a protest that challenges "a procurement conducted on the basis of competitive proposals under

which a debriefing is requested and, when requested, is required." Id. In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the protest must be filed no later than 10 days after the date on which the debriefing is held. Id. Here, we find that this procurement to establish BPAs with FSS contract holders was not conducted on the basis of "competitive proposals" as contemplated by 4 C.F.R. § 21.2(a)(2).

In evaluating whether a procurement was conducted on the basis of "competitive proposals" for the purpose of the debriefing exception to our timeliness rules, we have noted that the use of negotiated procedures in accordance with Federal Acquisition Regulation (FAR) part 15--as evidenced by the issuance of a RFP--is the hallmark. See Millennium Space Sys., Inc., B-406771, Aug. 17, 2012, 2012 CPD ¶ 237 at 4. We have, however, recognized that the FAR identifies "other competitive procedures" that are distinct from competitive proposals.[3] As relevant here, our Office has previously determined that procurements utilizing other competitive procedures are not procurements conducted on the basis of competitive proposals, and that the debriefing exception to our timeliness rules does not apply to such procurements. The MIL Corp., supra, at 6 (FSS procurement); IR Techs., B-414430 et al., June 6, 2017, 2017 CPD ¶ 162 at 6 (same); Millennium Space Sys., Inc., supra (BAA procurement) ; McKissack-URS Partners, JV, B-406489.2 et al., May 22, 2012, 2012 CPD ¶ 162 (Brooks Act procurement).

Here, although ITility acknowledges that the solicitation sought to establish BPAs against FSS contracts pursuant to FAR subpart 8.4, the protester disagrees that the instant procurement is an "other competitive procedure" as defined by FAR § 6.102(d). In this regard, the protester notes that the solicitation indicated in block 14 of the standard form (SF) 1449 that it was being issued as an RFP, and asserts that the solicitation "contemplate[d] the use of FAR [p]art 15 competitive procedures in numerous instances." Protester's Response at 4. As such, the protester argues that the procurement incorporated sufficient characteristics of a negotiated procurement under FAR part 15 to be considered a "procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required." 4 C.F.R. § 21.2(a)(2). We disagree.

There is no dispute that the procurement was restricted to FSS contract holders, and that the procedures set forth in FAR subpart 8.4 apply to "BPAs established against Federal Supply Schedule contracts." FAR § 8.403(a)(2). Likewise, FAR part 15 "do[es] not apply to BPAs . . . placed against Federal Supply Schedule contracts . . . ." FAR

[3] Specifically, FAR § 6.102(d) carves out the following procurement methods: (1) procurements for architect-engineer contracts conducted pursuant to the Brooks Act, 40 U.S.C. §§ 1101-1104; (2) procurements for basic and applied research conducted pursuant to a broad agency announcement (BAA) under FAR subpart 35.016; and (3) procurements under the FSS conducted pursuant to FAR subpart 8.4.

§ 8.404(a). As such, the fact that the solicitation was termed an "RFP" in block 14 of the SF 1449, or that the solicitation included certain FAR part 15 provisions, does not alter that this was an FSS procurement to which the procedures of FAR subpart 8.4 applied. See IR Techs., supra, at 6 (finding that neither a solicitation's inclusion of some FAR part 15 procedures, nor a contracting officer's mischaracterization of whether a debriefing was a "required debriefing," could change the fact that the procurement was an FSS procurement to which the procedures of FAR subpart 8.4, rather than FAR part 15, applied); see also Systems Plus, Inc. v. United States, 68 Fed. Cl. 206, 209-10 (2005) (finding procurement to establish a BPA under the FSS program was not conducted on the basis of competitive proposals, even though it may involve the use of FAR part 15 enhanced procedures). Accordingly, because the solicitation at issue sought to establish BPAs with FSS contract holders, the procurement here was not conducted on the basis of competitive proposals, and the debriefing exception to our timeliness rules allowing protests to be filed within 10 days of a debriefing does not apply.[4]

The protester, however, asserts that its protest was timely filed because it could not have known the basis of its protest allegations until receiving the debriefing slides on January 2, 2018, and properly filed its protest within 10 calendar days of that time. We disagree. As set forth above, both of ITility's protest allegations are based on a comparative assessment of the five selected firms' proposed prices to its own--information that ITility knew from the award notice, which it received on December 20. See Award Notice (Dec. 20, 2017), at 1. The protester has failed to point to any information relied upon in its protest that was not available based on information provided in its unsuccessful offeror letter. In this regard, although the protester asserts that it learned during the debriefing that the agency "analyzed offers to determine whether they were unbalanced with respect to separately priced items," Response to Dismissal Request at 5, this same information was provided in the solicitation. Sol. at 67 ("The Government will analyze offers to determine whether they are unbalanced

[4] In addition, we note that with regard to debriefings, the solicitation provided that "[t]he Contracting Officer will notify all unsuccessful Offerors of the source selection decision in accordance with FAR 8.405-3(b)(3)," and that "[u]pon such notification, unsuccessful Offerors may request and receive a brief explanation of the basis for the award decision." Sol. at 57. Accordingly, to the extent that ITility asserts, based on other provisions in the solicitation, that the agency was required to provide a required debriefing in accordance with FAR part 15, such an interpretation clearly contradicts the solicitation provisions providing that unsuccessful offerors may request and receive a brief explanation, in accordance with FAR subpart 8.4. Accordingly, since any alleged ambiguity regarding these provisions was apparent on the face of the solicitation itself, a protest on this ground was required to be filed prior to the submission of quotations. 4 C.F.R. § 21.2(a)(1); U.S. Facilities, Inc., B-293029, B-293029.2, Jan. 16, 2004, 2004 CPD ¶ 17 at 10. ITility's failure to do so renders the protest untimely on this basis as well.

with respect to separately priced items.”). In sum, ITility’s assertions--that the agency failed to consider the selected firms’ low proposed prices in evaluating technical acceptability and as part of the agency’s price evaluation--were based on information ITility knew prior to its debriefing, and yet, ITility did not file its protest within the required time. 4 C.F.R. § 21.2(a)(2).

The protest is dismissed.

Thomas H. Armstrong
General Counsel