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Decision

Matter of: Red Heritage Medical, Inc.

File: B-418934

Date: October 19, 2020

Jonathan Perrone, Esq., Whitcomb Selinsky, P.C., for the protester.
Seeta Rebbapragada, Esq., Department of Health and Human Services, for the agency.
Stephanie B. Magnell, Esq., and Evan C. Williams, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest is dismissed where the challenge to the solicitation's terms is untimely and the remainder of the protest lacks a sufficient factual basis for its argument.

DECISION

Red Heritage Medical, Inc., a small business of Knoxville, Tennessee, protests the terms of request for quotations (RFQ) No. IHS1407616, which was issued by the Department of Health and Human Services, Indian Health Service, for brand name or equal ankle fracture podiatry surgical instruments for the Northern Navajo Medical Center. The protester also challenges the agency's award to Arthrex, Inc., a small business of Naples, Florida, on the basis that the agency may have conducted unequal discussions.

We dismiss the protest.

BACKGROUND

On June 22, 2020, the agency issued the RFQ as a combined synopsis/solicitation for brand name or equal ankle fracture podiatry surgical instruments. RFQ at 2.¹ The solicitation was issued as a request for quotations pursuant to Federal Acquisition Regulation parts 12 and 13. *Id.* at 3. Attached to the RFQ was a fee schedule, which listed item serial numbers and descriptions of the products to be purchased by the agency, including an item identified as AR-89435. AR, Tab 2, RFQ attach. 1, fee

¹ Citations to the RFQ are to the document at tab 1 of the agency report (AR).

schedule. Also attached to the RFQ were the product specifications for AR-89435, an ankle fracture management system. AR, Tab 3, RFQ attach. 2, Product Specifications.

Quotations were due by 5:00 p.m. mountain time on June 25. RFQ at 2. The agency received three quotations prior to the submission deadline, including those of Red Heritage and Arthrex. Contracting Officer's Statement at 1. The agency made award to Arthrex on July 6, without holding discussions. *Id.* at 1. Red Heritage filed its protest on July 16.

DISCUSSION

Red Heritage asserts that the solicitation's brand name or equal requirement is unduly restrictive and that the agency held unequal discussions with the awardee. For the reasons below, the protest is dismissed.²

Restrictive Requirements

Red Heritage contends that the RFQ's brand-name-or-equal requirement was overly restrictive. Protest at 4-5. In response, the agency argues that this protest ground is an untimely challenge to the terms of the solicitation. Memorandum of Law (MOL) at 1.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Our timeliness rules require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); see *American Sys. Grp.*, B-418535, June 9, 2020, 2020 CPD ¶ 190 at 3. Where, as here, a protester challenges the terms of the solicitation as overly restrictive, and raises those challenges after the deadline for receipt of quotations, we dismiss that protest ground as untimely. *Id.*

The protester also asserts that it was unable to discern the meaning of the restriction until award was made to Arthrex. Protest at 5. On this basis, the protester contends that this rendered the solicitation defective, and that this defect was latent. *Id.*; see also Comments at 4.

Our decisions provide that an ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. *Colt Def., LLC*, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. *Id.* Under our Bid Protest Regulations, a patent ambiguity must be protested prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1); *Raytheon Co.*, B-417524.2, B-417524.3, 2020 CPD ¶ 50 at 10. Where a patent

² We do not address all of the protester's allegations; however, we have considered each and find no basis to sustain the protest.

ambiguity in a solicitation is not challenged prior to the submission of proposals, we will dismiss as untimely any subsequent challenge to the meaning of the solicitation term. *Id.*

Here, Red Heritage does not assert that there were two or more reasonable interpretations of the product specifications. See *Colt Def., supra* at 8. Rather, the protester contends that it did not know until after award that the “AR” reference in the RFQ’s product specification referred to an Arthrex product.³ Protest at 5. Thus, the protester does not demonstrate that the terms were ambiguous, *i.e.*, capable of two or more reasonable interpretations, only that the meaning of the term was unclear to the protester. We find that to the extent that the term was unclear, such a defect in the solicitation would, at best, constitute a patent ambiguity. Accordingly, Red Heritage’s allegation is dismissed as untimely. 4 C.F.R. § 21.2(a)(1); *Raytheon Co., supra* at 10.

Unequal Discussions

The protester also contends that the agency “likely” engaged in unequal discussions with offerors. Protest at 5-6. The protester bases this assertion on the fact that the agency described the brand-name-or-equal item using the product’s internal serial number. *Id.* The agency requests that our Office dismiss this protest ground as factually insufficient on the basis that it did not engage in discussions with any offeror. MOL at 4-5.

Here, not only does the protester fail to allege a sufficient factual predicate for its protest ground, but the record shows that the agency did not conduct discussions. Our Bid Protest regulations provide for dismissal of protest grounds that lack factual support. 4 C.F.R. §§ 21.1(c)(4), 21.5(f); see also *DocMagic, Inc.*, B-415702, B-415702.2, 2018 CPD ¶ 96 at 3 n.2. As a result, this protest ground is dismissed. *Id.*

The protest is dismissed.

Thomas H. Armstrong
General Counsel

³ In order to avoid dismissal of its protest under 4 C.F.R. § 21.2(a)(1) on the grounds that its protest is an untimely challenge to the terms of the solicitation, Red Heritage contends that there was a latent ambiguity in the RFQ. Comments at 4. The protester also asserts that “some leniency is deserved” with our timeliness rules because, due to telework during the pandemic, “government employees” are not sufficiently responsive and thus the protester did not have adequate time during the period the solicitation was open to inquire with the contracting office or file a protest. *Id.* The protester thus suggests, but does not directly request, that we review the protest under 4 C.F.R. § 21.2(c), which as relevant to this argument provides that GAO may consider an untimely protest for good cause shown. We decline to waive the timeliness rules for the protest here.