



Decision

Matter of: Quanterion Solutions, Inc.

File: B-419438

Date: December 28, 2020

Bret S. Wacker, Esq., Clark Hill PLC, and Evan A. Rossi, Rossi & Rossi, PLLC, for the protester.

Damien C. Specht, Esq., James A. Tucker, Esq., and Alissandra D. Young, Esq., Morrison & Foerster LLP, for Kapili Services, LLC, the intervenor.

Judith L. Richardson, Esq., Defense Threat Reduction Agency, for the agency.

Michael P. Grogan, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that Small Business Administration improperly accepted a requirement into the 8(a) program without performing an adverse impact analysis on existing small business concerns is dismissed as untimely where the record shows that the protester knew or should have known of the factual basis for its allegation more than 10 days prior to raising it.

DECISION

Quanterion Solutions, Inc. (QSI), a small business of Utica, New York, protests the decision of the Defense Threat Reduction Agency (DTRA), and the Small Business Administration (SBA) to place a requirement for support services to the Defense Threat Reduction Information Analysis Center (DTRIAC) under SBA's section 8(a) business development program. QSI argues SBA improperly accepted this requirement into the 8(a) program without first determining whether acceptance would adversely impact small businesses.

We dismiss the protest.

BACKGROUND

On July 8, 2020, the agency posted a notice on beta.SAM.gov, stating that DTRA planned to set aside its DTRIAC requirement for fiscal years 2021-2026 as a direct award to an 8(a) small business concern that would be named on a later date. Req. for

Dismissal, exh. 7. Following an inquiry from QSI, the agency informed the protester, on July 22, that DTRA provided SBA with an 8(a) offering letter for its DTRIAC requirement on June 25, and that in the absence of a response from SBA, there was “de facto acceptance” of the agency’s requirement into the 8(a) program.¹ Protest, exh. C. During the months of July and August, the protester contacted both SBA and DTRA seeking information about the circumstances of DTRA’s submission of its offering letter to SBA. See Protest, exhs. D-G. On August 14, in response to QSI’s inquiries, SBA notified the protester that an adverse impact determination was not required, in this instance, because the DTRIAC work was considered a “new requirement” under the governing regulations.² Protest, exh. I. SBA explained that to reach this conclusion, it analyzed the performance work statement for the new DTRIAC requirement supplied by DTRA, and the DTRA contracting officer’s justification for determining that the agency’s needs represented a new requirement from the currently-performed DTRIAC work. *Id.*

That same day, the protester responded to SBA, disputing the conclusion that an adverse impact determination was not required. Protest, exh. J. SBA reaffirmed its analysis by email to the protester on August 19. Protest, exh. K. DTRA then posted a notice on beta.SAM.gov on August 20, stating that it planned to set aside its DTRIAC requirement for direct award to Kapili. Req. for Dismissal, exh. 12. On August 26, DTRA informed the protester that the solicitation for the DTRIAC requirement for fiscal years 2021-2026 had not been issued, and that the solicitation would not be made publically available. Protest, exh. N. That same day, the agency advised the protester that following further discussions with SBA, “SBA did accept the DTRIAC [fiscal year 2021-2026] requirement into the 8(a) program.” *Id.*

Three months later, on November 25, QSI filed the instant protest.³

¹ The agency explained that this de facto acceptance by SBA was consistent with a memorandum of understanding between the Department of Defense and SBA. Protest, exh. C.

² Under the Small Business Act’s implementing regulations, SBA may not accept any procurement for award as an 8(a) contract if doing so would have an adverse impact on an individual small business, a group of small businesses in a specific geographical location, or other small business programs. 13 C.F.R. § 124.504(c); see also *Alpa Techs. and Servs., Inc.*, B-408762.2, Feb. 12, 2014, 2014 CPD ¶ 66 at 6. The adverse impact review process is designed to protect small business concerns that are performing government contracts awarded outside the 8(a) program. *Id.* The requirement for SBA to conduct an adverse impact analysis does not apply to new requirements, except where a new requirement is created through a consolidation of existing requirements being performed by two or more small business concerns. 13 C.F.R. §§ 124.504(c)(1)(ii), (2).

³ QSI uploaded its protest to our Electronic Protest Docketing System (EPDS) at 10:09 p.m. EST on November 24. Consistent with our Bid Protest Regulations, a document is deemed filed when it is received by our Office by 5:30 p.m. EST. 4 C.F.R. § 21.0(g).

DISCUSSION

The protester challenges the agency's intended award to Kapili under the 8(a) program, arguing that the SBA was required to first perform a small business adverse impact analysis because DTRA's work does not constitute a new requirement.⁴ Protest at 8-21. DTRA responds that QSI's protest is untimely, arguing, among other things, that the firm filed its protest more than 10 days after it knew or should have known the basis for its protest. Req. for Dismissal at 7-9. The agency argues QSI was required to raise its protest, at the latest, within 10 days of August 25, when QSI learned that SBA had accepted the DTRIAC fiscal year 2021-2026 requirement into the 8(a) program. *Id.* at 8.

The protester disagrees, arguing that its protest was timely filed under our Bid Protest Regulations. QSI contends that its protest concerns an alleged impropriety in a solicitation issued by the agency for the DTRIAC requirement. Resp. to Req. for Dismissal at 7. In support of its position, the protester seems to point to a posting by the agency on beta.SAM.gov, which, QSI suggests, set a November 30 deadline for the receipt of proposals for the DTRIAC requirement. *Id.* at 5, 7. Because its protest was filed on November 25, ahead of the November 30 deadline, QSI argues its protest is timely. Resp. to Req. for Dismissal at 7; see 4 C.F.R. § 21.2(a)(1). For the reasons that follow, we conclude that the protest was not timely filed with our Office.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. See 4 C.F.R. § 21.2. 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 or quotations be filed before that time. 4 C.F.R. § 21.2(a)(1); see *AmaTerra Env'tl. Inc.*, B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3. However, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2).

Accordingly, QSI's protest is deemed filed the next day our Office was open, which was November 25. 4 C.F.R. § 21.0(d).

⁴ Section 8(a) of the Small Business Act authorizes SBA to enter into contracts with government agencies and to arrange for performance of such contracts by awarding subcontracts to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a). The Act affords SBA and contracting agencies broad discretion when selecting procurements for the 8(a) program; we will not consider a protest challenging a decision to procure under the 8(a) program absent a showing of possible bad faith on the part of government officials or that regulations may have been violated. 4 C.F.R. § 21.5(b)(3); *Performance Value Management, LLC*, B-416226, B-416226.2, July 12, 2018, 2018 CPD ¶ 372 at 4.

Here, the record does not support QSI's contention that its challenge represents a challenge to the terms of a solicitation because, in fact, there is no evidence of any solicitation. Although the protester asserts that the agency has set a date for the receipt of proposals of November 30, through a publication on beta.SAM.gov, the underlying record and published material on beta.SAM.gov do not provide evidence of any solicitation or a closing date for the receipt of proposals. Protest at 3; Resp. to Req. for Dismissal at 7. The record does reflect that the beta.SAM.gov website posting for this requirement set an "Updated Response Date" of November 30, in the general information section of the posting. See <https://beta.sam.gov/opp/3bacb31dabb2418598d1643abbb4ce90/view>. However, because the beta.SAM.gov posting does not contain a request for proposals--or any other active document seeking a response from firms--the November 30 date appears to, instead, concern when the beta.SAM.gov posting for this requirement reverts to inactive status, and not, as the protester contends, as establishing a submission date for proposals. See *id.*

The protester implicitly acknowledges that its challenge does not concern a specific solicitation, when QSI characterizes its challenge as one regarding the issuance of "at least an expected solicitation." Resp. to Req. for Dismissal at 5. Indeed, the protester concedes, "To QSI's knowledge, no solicitation has been released. . . ." *Id.* Accordingly, QSI's protest can hardly be construed as challenging an impropriety in a solicitation that it has never seen. Instead, given that the central focus of this protest concerns SBA's and DTRA's determination that the DTRIAC requirement constituted a new requirement (and that an adverse impact analysis was not required), QSI's challenge is governed by section 21.2(a)(2) of our regulations, which requires that a protest that is not a solicitation challenge be filed within 10 days after the basis of protest is known or should have been known. See *Suntek Sys., Inc.*, B-412265, Dec. 22, 2015, 2016 CPD ¶ 6 at 4.

Analyzing the protest under section 21.2(a)(2), we conclude that QSI failed to timely file with our Office. First, the protester learned, no later than August 19, that SBA was not going to perform an adverse impact assessment because it considered the DTRIAC requirement to be a new requirement under its regulations. See Protest, exh. I (SBA email to the protester on August 14, notifying QSI that that SBA was not required to perform an adverse impact determination because the DTRIAC work was determined to be a "new requirement"); Protest, exh. K (SBA email to protester on August 19 reaffirming its analysis). Second, the record shows DTRA provided public notice, on August 20, that it intended to direct an award to Kapili, an 8(a) firm. Req. for Dismissal, exh. 12. Finally, the record illustrates the agency notified the protester, on August 26, that SBA had accepted the DTRIAC requirement into the 8(a) program. Protest, exh. N.

Accordingly, no later than August 26, the basis of QSI's protest was known: the protester was aware of SBA's determination that no adverse impact determination was required, that SBA had accepted the requirement into the 8(a) program, and that the agency intended to make a directed award to Kapili under the 8(a) program. Any

protest challenging the acceptance of this requirement into the 8(a) program, or more specifically, SBA's determination that the requirement was exempt from an adverse impact analysis because it is a "new" requirement, was required to be filed within 10 days of August 26. 4 C.F.R. § 21.2(a)(2). Because QSI did not file its protest until November 25, three months after this date, the protest is untimely. See *Suntek Sys., Inc., supra*, at 5 (protest dismissed as untimely where protest was filed more than 10 days after the protester knew the SBA had accepted requirement into the 8(a) program, and knew that SBA determined the requirement was exempt from an adverse impact analysis because it was a "new" requirement).

The protest is dismissed.

Thomas H. Armstrong
General Counsel