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## Decision

**Matter of:** Eagle Technologies, Inc.

**File:** B-420135.2; B-420135.3; B-420135.4

**Date:** June 22, 2022

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Christopher R. Yukins, Esq., Kristen E. Ittig, Esq., and Aime JH Joo, Esq., Arnold & Porter Kaye Scholer LLP, for the protester.

Richard B. O’Keeffe Jr., Esq., and Cara L. Lasley, Esq., Wiley Rein LLP, for Dynanet Corporation, the intervenor.

William B. Blake, Esq., Department of the Interior, for the agency.

Kasia Dourney, Esq., and Alexander O. Levine, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest asserting that awardee possessed an organizational conflict of interest is dismissed where protester’s allegations are based on speculation and do not meet the requirements of our Bid Protest Regulations.
  2. Protest challenging the agency’s interpretation of the solicitation’s evaluation criteria is dismissed as untimely where the protester was advised of the agency’s interpretation but elected to challenge that interpretation more than 10 days later.
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### DECISION

Eagle Technologies, Inc., a small business located in Arlington, Virginia, protests the issuance of a task order to Dynanet Corporation, located in Elkridge, Maryland, under request for quotations (RFQ) No. 140D0421Q0158. The RFQ was issued by the Department of the Interior (DOI) for development and platform support services for the Department of Health and Human Services (HHS) Office of Inspector General (OIG). Eagle argues that the agency failed to adequately consider whether Dynanet has an organizational conflict of interest (OCI). The protester also alleges that DOI misevaluated quotations, conducted a flawed best-value tradeoff analysis, and evaluated vendors disparately.

We deny the protest in part, and dismiss it in part.

## BACKGROUND

The agency issued the RFQ on April 12, 2021, as a small business set-aside, to eleven holders of the General Services Administration's Information Technology-Professional Services multiple award schedule contract, special item number 54151S, using the procedures of Federal Acquisition Regulation subpart 8.4. Agency Report (AR), Tab 1, RFQ at 1; Contracting Officer's Statement (COS) at 2-3. DOI solicited the requirement on behalf of HHS OIG, anticipating the establishment of three blanket purchase agreements (BPAs) and the issuance of an order under one of the resulting BPAs. RFQ at 1. Under the BPA, the agency could issue orders on a fixed-price, labor-hour, or time-and-materials basis, or a combination thereof, for a base year and four 1-year option periods. *Id.* at 2.

The RFQ provided for award of the BPAs on a best-value tradeoff basis, considering the following evaluation factors, in descending order of importance: demonstrated prior experience; technical capability and understanding; management approach; and price. *Id.* at 9. The non-price factors, when combined, were significantly more important than price. *Id.* For award of the first BPA order, the agency was also to conduct a best-value tradeoff analysis, considering technical capability and understanding; management approach; and price. COS at 6.

The RFQ stated that the agency would employ a two-phased evaluation approach. *Id.* at 2-8. In phase 1, the agency would evaluate vendors' demonstrated prior experience. *Id.* at 4-5. Following the agency's evaluation of the phase 1 submissions, the agency would advise vendors as to whether they were likely to be viable competitors and should proceed to phase 2. *Id.* In phase 2, the agency was to evaluate the technical capability and understanding, management approach, and price factors. *Id.* at 6-7.

The solicitation instructed that the agency would evaluate each vendor's demonstrated prior experience to assess "whether it will lead to successful performance of the work required in the BPA PWS [performance work statement]." *Id.* at 9. The RFQ also advised that the evaluation of quotations under the technical capability and understanding, and management approach factors was intended to assess "whether [they] will lead to successful performance of the work required in the BPA PWS and BPA [o]rder 1 SOW [statement of work]." *Id.* at 10-11.

The agency received eight quotations, including quotations from Eagle and Dynanet, by the April 23, 2021 closing date for receipt of quotations. COS at 2. After the phase 1 evaluation, four vendors, including Dynanet and Eagle, were invited to proceed to phase 2. *Id.* at 3. After evaluating these vendors' quotations in phase 2, the agency found that Eagle, Dynanet and vendor A represented the best value for the BPA awards. *Id.*

With respect to the first BPA order at issue in this protest, the agency found Dynanet's technical quotation--considering the technical capability and understanding, and management approach factors--superior to those submitted by Eagle and vendor A. *Id.*

at 4. Dynanet's proposed price of \$74,117,956, however, was higher than Eagle's proposed price of \$70,649,771; at the same time, vendor A's quotation was the highest-priced among the three vendors, amounting to \$77,179,871. *Id.*

Noting that Dynanet's technical quotation was superior to Eagle's, yet it was also higher-priced, the contracting officer conducted a tradeoff analysis between these two vendors' quotations. *Id.* As a result, the contracting officer concluded that Dynanet represented the best value to the government for the award of the first BPA order. *Id.* On August 26, the agency awarded three BPAs, to Eagle, vendor A, and Dynanet, respectively, and issued a task order to Dynanet. *Id.* at 2, 4.

On September 7, 2021, Eagle filed a protest with our Office, challenging the award of the first BPA order to Dynanet. *See, generally*, Protest (B-420135). Eagle argued that the agency failed to identify a potential or actual OCI possessed by Dynanet, failed to disqualify Dynanet based on that OCI, unreasonably evaluated the Dynanet and Eagle quotations, and conducted a flawed best-value tradeoff. *Id.* at 10-15. On September 17, the intervenor requested partial dismissal of the protest grounds challenging the evaluation of the Dynanet and Eagle quotations, and the best-value tradeoff, maintaining that the allegations failed to state a valid basis of protest. Req. for Dismissal at 1-2. We agreed, in part, and on September 22, our Office dismissed the protester's challenges to the evaluation of these two vendors' quotations. Notice of Partial Dismissal (B-420135) at 1.

On October 4, the agency advised our Office that it intended to take corrective action in response to Eagle's OCI challenge. Notice of Corrective Action & Req. for Dismissal (B-420135) at 1. Specifically, the agency indicated that it would conduct a further OCI analysis and make a new best-value tradeoff decision using the existing evaluation record.<sup>1</sup> *Id.* at 2. On the basis of the proposed corrective action, our Office dismissed the protest as academic. *Eagle Tech., Inc.*, B-420135, Oct. 8, 2021 (unpublished decision).

During the reevaluation, the contracting officer conducted an OCI investigation based on the allegations raised by Eagle, and concluded that Dynanet did not have an OCI. COS at 5. Subsequently, the contracting officer, acting as the source selection authority (SSA), performed a new best-value determination using the existing evaluation record. *Id.* The SSA noted that Dynanet submitted the best technical quotation, and that it presented the lowest assessed risk to the agency. AR, Tab 4, Post Corrective Action Award Summary at 4. Although Dynanet's proposed price was 5 percent higher than Eagle's proposed price, the SSA concluded that potential advantages associated with Dynanet's technical quotation and its low assessed risk warranted paying the 5 percent

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<sup>1</sup> The protester partially objected to the corrective action, requesting that HHS OIG take part in the OCI review. *Eagle Tech., Inc.*, *supra*. However, because the agency's new OCI consideration and new source selection determination could result in an award to Eagle, our Office concluded that the agency's corrective action rendered the protest academic, and we dismissed the protest. *Id.*

price premium. *Id.* at 4-5. Accordingly, on March 7, 2022, the agency again issued the first BPA order to Dynanet. AR, Tab 5, Notice of Award at 1. This protest followed.

## DISCUSSION

Eagle challenges various aspects of the agency's decision to issue the first BPA order to Dynanet. First, the protester asserts that the agency improperly found that Dynanet did not have a disqualifying OCI. Protest at 13-20. Second, the protester alleges that the agency miscalculated Dynanet's and Eagle's quotations, treated vendors disparately, and issued an improper best-value decision.<sup>2</sup> *Id.* at 20-22; Comments & 2nd Supp. Protest at 15-18.

We have reviewed all of the protester's allegations, and although we do not address all of the protester's arguments below, we conclude that none provides us with a basis to sustain the protest. Prior to discussing Eagle's principal contentions below, we dismiss several challenges for failing to state valid bases of protest.

### Dismissed Protest Grounds

Eagle contends that the agency's OCI determination was unreasonable because Dynanet's performance of another contract for HHS OIG, which HHS awarded Dynanet in March 2020, triggered a disqualifying OCI under the specific terms of the RFQ here. Protest at 13-17. Eagle also alleges that DOI improperly failed to coordinate with HHS OIG before concluding that Dynanet did not have an OCI. *Id.* In addition, Eagle argues that because of this actual or apparent OCI, Dynanet was non-responsible and non-responsive. *Id.* at 19-20. Further, the protester challenges the agency's evaluation of Dynanet's and Eagle's quotations. *Id.* at 20-22. The agency requests dismissal of these allegations, arguing that they lack sufficient factual or legal support and are speculative. Req. for Dismissal at 1-10.

On this record, we agree, and dismiss the allegations as failing to state a valid basis of protest. Our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. §§ 21.1(c)(4) and (f). Where a protester relies on bare assertion, without further supporting details or evidence, our Office will find that the protest ground essentially amounts to no more than speculation and does not meet the standard contemplated by our regulations for a legally sufficient protest. *enrGies, Inc.*,

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<sup>2</sup> The protester also alleged that the agency failed to reevaluate quotations according to the terms of DOI's corrective action. Response to Req. for Dismissal & Supp. Protest at 19-20. In its comments responding to the agency's report, in which the agency provided a specific rebuttal to this assertion, Eagle failed to address this argument. See, *generally*, Comments & 2nd Supp. Protest. Accordingly, we consider this argument abandoned. See, *e. g.*, *Israel Aircraft Indus., Ltd.--TAMAM Div.*, B-297691, Mar. 13, 2006, 2006 CPD ¶ 62 at 6-7.

B-408609.9, May 21, 2014, 2014 CPD ¶ 158 at 6. Additionally, the identification of conflicts of interest is a fact-specific inquiry where a protester must provide “hard facts” that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough.<sup>3</sup> *TeleCommunication Sys. Inc.*, B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3.

Here, we find the above protest grounds legally insufficient because they are either unsupported by the terms of the RFQ, fail to sufficiently allege improper agency action, are based on speculation, or do not allege “hard facts” that indicate the existence or potential existence of an OCI.

First, with respect to the alleged OCI, the protester contends that the agency unreasonably failed to conclude that Dynanet’s preexisting contract with HHS OIG, for similar services as those sought in this procurement, creates an OCI under the terms of the instant solicitation. Protest at 13-17. Specifically, Eagle alleges that Dynanet’s March 2020 HHS OIG contract for information technology system planning, design and implementation services establishes a conflict of interest as contemplated by the RFQ’s OCI clause. *Id.* That clause provides that a vendor is “prohibited from participating . . .

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<sup>3</sup> The situations in which OCIs arise, as described in FAR subpart 9.5 and the decisions of our Office, can be categorized into three groups: biased ground rules, unequal access to information, and impaired objectivity. See, e.g., *McConnell Jones Lanier & Murphy, LLP*, B-409681.3, B-409681.4, Oct. 21, 2015, 2015 CPD ¶ 341 at 13. The first group consists of situations where in part of its performance of a government contract, a contractor has in some sense set the ground rules for another government contract by, for example, writing the statement of work or the specifications. In these “biased ground rules” cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself.

The second group concerns situations which a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract. In these “unequal access to information” cases, the concern is the firm could gain a competitive advantage. These situations may also involve a concern that the firm, by virtue of its special knowledge of the agency’s future requirements, would have an unfair advantage in the competition for those requirements.

Finally, the third OCI group comprises cases where a firm’s work under one government contract could entail its evaluating itself, either through an assessment of performance under another contract or an evaluation of proposals. In these “impaired objectivity” cases, the concern is that the firm’s ability to render impartial advice to the government could appear to be undermined by its relationship with the entity whose work product is being evaluated. *International Business Machines Corp.*, B-410639; B-410639.2, Jan. 15, 2015, 2015 CPD ¶ 41 at 5-6.

in the development, production, or delivery of products for any other HHS/OIG/OIT supply or service contracts.” RFQ at 44.

As the agency correctly points out, the RFQ clause at issue specifically refers to the provision of products, while Dynanet’s ongoing contract from 2020 is for the provision of services. Req. for Dismissal at 1-2. In this regard, the factual predicate for the protester’s contention is incorrect; the RFQ’s OCI clause does not prohibit Dynanet from providing services. As such, Eagle’s allegation is legally insufficient because the allegation facially does not demonstrate improper agency action, *i.e.*, that the agency’s OCI determination disregarded the terms of the solicitation. *See, e.g., American Electronics, Inc.*, B-419659, B-419659.2, May 25, 2021, 2021 CPD ¶ 218 at 6 (dismissing challenge to the agency’s evaluation as legally insufficient when the allegation did not demonstrate that the evaluation violated the terms of the solicitation). Accordingly, we dismiss this aspect of the protest.

Additionally, Eagle alleges that Dynanet’s “established corporate strategy” and its work for the HHS OIG under the 2020 contract triggered three types of OCI: biased ground rules, unequal access to information, and impaired objectivity. Protest at 15-17. Without providing specific evidence or allegations supporting these assertions, the protester speculates that Dynanet’s use of its program and project management model in performance of the 2020 contract “helped shape the current procurement,” and as such, created a biased ground rules type of OCI. *Id.* at 15. Similarly without any support, Eagle alleges that under the 2020 contract, Dynanet had “access to the HHS OIG source selection information,” thus creating an unequal access to information OCI.<sup>4</sup> *Id.* at 16. Moreover, the protester questions Dynanet’s ability to provide impartial services under the current task order--speculating that Dynanet has an impaired objectivity OCI--because Dynanet’s “systems recommendations . . . *would have been distorted*” by the awardee’s “hope to capitalize . . . on its prior work for HHS OIG.” *Id.* (emphasis added). We find that these allegations are speculative and fail to allege “hard facts” identifying a potential or actual OCI. In essence, because the protester’s allegations are unsupported by any specific allegations or evidence, we conclude that the allegations fail to state a valid basis for protest.

Further, Eagle complains that HHS OIG “played no direct role” in the agency’s OCI review. Protest at 18-19. Specifically, Eagle contends that although the March 7, 2022, notice of award advised that “the requiring activity (HHS OIG) participated in [an OCI] analysis and all conflict types were considered,” there is no evidence that HHS OIG was ever involved in the OCI review. *Id.* at 17-19 (*quoting* AR, Tab 5, Notice of Award at 1). In support of this allegation, Eagle relies on a Freedom of Information Act (FOIA) response from HHS OIG, stating that HHS OIG did not find any documents related to

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<sup>4</sup> We note that also the protester’s teaming partner on this procurement, Digital Management, LLC, has been supporting HHS OIG for the past nine years. Protest at 8.

the August 2021 task order award to Dynanet.<sup>5</sup> *Id.* at 11. According to Eagle, that response “confirmed” that HHS OIG had no direct involvement in the OCI analysis. *Id.*

We again conclude that the protester has failed to allege a cognizable basis of protest. As an initial matter, Eagle fails to identify any procurement law or regulation mandating that the requiring agency be directly involved in an OCI investigation conducted by the procuring agency. In addition, the protester’s allegations are based on speculation because HHS OIG’s FOIA response was received by Eagle more than two months before DOI concluded its corrective action and therefore does not establish that HHS OIG was uninvolved in the OCI analysis. Any protest allegation which relies on speculation is legally insufficient because our Office will not find improper agency action based on conjecture or inference. *Raytheon Blackbird Techs., Inc.*, B-417522, B-417522.2, July 11, 2019, 2019 CPD ¶ 254 at 3. As such, because Eagle’s OCI’s allegations are both speculative and fail to sufficiently allege improper agency action, they do not warrant further consideration, and we dismiss them.<sup>6</sup> 4 C.F.R. §§ 21.1(c)(4), (f).

Turning to the evaluation challenges, Eagle argues that the agency’s evaluation of Dynanet’s and its own quotations was “incorrect.” Protest at 21. Eagle’s protest, however, lacks any clear statement or details as to what exactly the agency did wrong. For example, Eagle makes only general allegations that there was no reasonable basis for the agency to conclude that Dynanet’s quotation “presented less risk” than Eagle’s quotation. *Id.* Similarly, the protester only generally contends that its quotation was improperly assessed a “higher risk” than the awardee’s quotation, despite the Eagle team’s “many years of experience” with HHS OIG. *Id.* However, the protester does not provide further support for what amounts to a naked conclusion that its overall risk assessment rating should have been lower. *Id.* at 21-22.

We conclude that both of these protest grounds, challenging the evaluations of the Dynanet and Eagle quotations, are based on speculation. Accordingly, we likewise dismiss these allegations as failing to state a valid basis of protest. 4 C.F.R. §§ 21.1(c)(4), (f).

#### Disparate Treatment

The protester also alleges that the agency evaluated vendors in an unequal manner. Comments & 2nd Supp. Protest at 15-18. Specifically, Eagle contends that while DOI disregarded its demonstrated prior experience, it failed to do the same when evaluating Dynanet’s quotation, and, in fact, found that Dynanet’s prior experience mitigated a risk

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<sup>5</sup> Eagle filed a FOIA request with HHS OIG on September 27, 2021. Protest at 11, exh. 8, Jan. 4, 2022 FOIA Response Letter at 1.

<sup>6</sup> Having dismissed the allegations regarding the agency’s OCI determination, we need not consider Eagle’s related allegations asserting that Dynanet was non-responsible and non-responsive based on an actual and apparent OCI.

identified in its quotation. *Id.* (citing AR, Tab 4, Post Corrective Action Award Summary at 4 (stating that “some risk” assessed for Dynanet’s “lack of diverse experience” in the resumes of its proposed key personnel was mitigated “because Dynanet was able to demonstrate through other areas of their quot[ation] that they have done this type of work before.”))).

The agency contends that the protester’s argument is without merit because it is based on an “incorrect interpretation” of the agency’s award decision. Supp. MOL at 8-9. DOI explains that while the protester interprets the phrase “they have done this type of work before” in the context of the demonstrated prior experience factor, where “they” refers to Dynanet as an organization, the contracting officer was actually referring to the prior work performed by Dynanet’s key personnel, as discussed in Dynanet’s management approach. *Id.* at 9. The agency further provides a declaration from a Technical Evaluation Committee (TEC) chairperson to explain the meaning of the phrase at issue, as it was used in the TEC’s evaluation, and relied on by the contracting officer in her award decision. AR, Tab 6, Decl. of TEC Chairperson at 1. The chairperson clarifies that when stating “they have done this type of work before,” the TEC was not referring to Dynanet’s organizational experience performing similar work, but rather to the experience of the individuals proposed as key personnel. *Id.*

It is a fundamental principle of federal procurement law that a contracting agency must treat all vendors equally and evaluate their quotations evenhandedly against the solicitation’s requirements and evaluation criteria. *22nd Century Techs., Inc.*, B-417336, B-417336.2, May 24, 2019, 2019 CPD ¶ 198 at 6. Here, based on our review of the record, we find the agency’s clarification reasonable. In this regard, we are satisfied with the agency’s explanation of the terms used in the post-corrective award summary decision, and conclude that DOI did not credit Dynanet for its demonstrated prior experience, as asserted by Eagle. Because the protester fails to establish that the agency treated vendors disparately, we find no basis to sustain this protest ground.

### Best-Value Determination

Finally, the protester argues that the agency’s best-value determination was flawed because DOI improperly found that Dynanet’s technical quotation warranted paying a price premium of “millions of dollars,” despite the awardee having much less experience with HHS OIG than Eagle, whose subcontractor was the incumbent contractor for the requirement. Protest at 22. As a related ground, Eagle asserts that the agency did not apply the solicitation’s stated best-value evaluation criteria when it selected Dynanet for the BPA task order because DOI did not consider prior demonstrated experience when it made the task order best-value tradeoff decision. *See, generally*, Req. for Summary Decision Sustaining Protest in Part. Alternatively, Eagle contends that the RFQ contained a latent ambiguity regarding the factors that would be considered as part of the best-value tradeoff for the task order. The protester asserts that this latent ambiguity prevented Eagle from competing intelligently and on an equal basis. Comments & 2nd Supp. Protest at 12-15.



The agency requests that we dismiss the best-value determination challenge on the basis that the protester's HHS OIG experience "has no bearing on the award of BPA [o]rder 1." Req. for Dismissal at 9. DOI asserts that the non-price evaluation factors for the task order were limited to the technical capability and understanding and the management approach factors; prior demonstrated experience was "excluded." *Id.* Additionally, to the extent there was any ambiguity in this respect, the agency argues that Eagle's arguments are now untimely. Supp. MOL at 2-8. In this regard, DOI contends that the allegations were filed more than 10 days after the protester knew or should have known of the basis for these protest grounds. *Id.* (citing 4 C.F.R. § 21.2(a)(2)).

Our regulations contain strict rules for the timely submission of protests that 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. *Applied Sciences & Info. Sys., Inc.*, B-418068, B-418068.2, Dec. 26, 2019, 2020 CPD ¶ 122 at 4. Under these rules, protests other than those alleging improprieties in a solicitation that are apparent prior to closing time for receipt of quotations must be filed within 10 days of when a protester knew or should have known of its protest ground. 4 C.F.R. § 21.2(a)(2).

Based on our review of the record, we find that the solicitation was ambiguous as to the evaluation criteria that DOI would consider for the task order best-value tradeoff. Specifically, while the agency argues that the solicitation clearly "excluded" the prior demonstrated experience factor from consideration, we note that the RFQ does not state so directly. Rather, the solicitation only provides that the agency would evaluate each vendor's demonstrated prior experience, in phase 1, to assess "whether it will lead to successful performance of the work required in the BPA PWS." *Id.* at 9. The RFQ also states that in phase 2, DOI would evaluate the technical capability and understanding factor, and the management approach factor, in order to assess "whether [they] will lead to successful performance of the work required in the BPA PWS and BPA [o]rder 1 SOW [statement of work]." *Id.* at 10-11.

At the same time, in the basis for award section, the RFQ only lists evaluation criteria for the BPA award, without providing a separate section listing the evaluation criteria for the task order award. *Id.* at 9. In addition, the solicitation advises--albeit in a separate section, instructing on the quotation submission requirements--that prior demonstrated experience "will be considered alongside with the evaluation of [p]hase [2] when the [g]overnment makes its source selection decision." RFQ at 5. Here, as discussed above, the source selection decision included both the establishment of the BPAs and the issuance of the first BPA order.

An ambiguity exists when two or more reasonable interpretations of the terms or specifications of the solicitation are possible. See *Ashe Facility Servs. Inc.*, B-292218.3, B-292218.4, Mar. 31, 2004, 2004 CPD ¶ 80 at 10. A party's interpretation need not be the most reasonable to support a finding of ambiguity; rather, a party need only show

that its reading of the solicitation is reasonable and susceptible of the understanding that it reached. *The HP Grp., LLC*, B-415285, Dec. 14, 2017, 2017 CPD ¶ 385 at 5. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. *Colt Def., LLC*, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. An offeror has an affirmative obligation to seek clarification of a patent ambiguity prior to the due date for proposal submission. *Pitney Bowes, Inc.*, B-294868, B-294868.2, Jan. 4, 2005, 2005 CPD ¶ 10 at 5. When a patent ambiguity exists but is not challenged prior to the proposal submission deadline, we will not consider subsequent untimely arguments asserting the protester's own interpretation of the ambiguous provision. *FFLPro, LLC*, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 10. We find that the RFQ here contained a patent ambiguity.

In our view, the RFQ's language differentiating between the evaluation factors considered for "the BPA PWS" and the evaluation factors considered for "the BPA PWS and BPA [o]rder 1 SOW" does not preclude the possibility that prior experience was to be considered for the task order award. In this regard, the RFQ's language advising that the prior demonstrated experience "will be considered," together with the phase 2 factors, *i.e.*, the technical capability and understanding and the management approach factors, in the agency's source selection decision could reasonably have been interpreted as including prior experience in the evaluation criteria for the task order. Given that the solicitation language was inconsistent in its explanation of the how the agency would consider the various factors for award of the task order, we find that the ambiguity was patent and therefore should have been challenged prior to the solicitation's closing date.

However, even if we were to conclude that the ambiguity here was latent, the protester failed to timely challenge that the agency's best-value determination for the task order improperly excluded prior experience from its evaluation criteria, or, alternatively, that the solicitation was latently ambiguous regarding the evaluation criteria the agency would use for the issuance of the first BPA task order. Specifically, we find that the agency presented its interpretation of the RFQ's evaluation criteria for issuance of the BPA task order in its March 29 request for dismissal. Req. for Dismissal at 9. In our view, even if the ambiguity could be considered latent, it became patent when the agency announced its interpretation in that March 29 filing. See *AAR Airlift Grp., Inc.*, B-414690, *et al.*, Aug. 22, 2017, 2017 CPD ¶ 273 at 7 (solicitation ambiguity was patent, rather than latent, where offeror had express notice of the agency's interpretation).

Specifically, DOI stated that:

HHS OIG experience has no bearing on the award of BPA [o]rder 1. The solicitation listed all the factors and subfactors for the BPA evaluation and then specifically identified the factors to be considered for BPA [o]rder 1. . . . The BPA [o]rder 1 factors fall under Technical Capability and Understanding and Management Approach--Prior Demonstrated Experience is excluded.

*Id.*

The protester, however, first challenged the agency's interpretation of the evaluation criteria used for the BPA task order trade-off, and, specifically, DOI's exclusion of the prior demonstrated experience factor, in an April 18 submission requesting a summary decision sustaining its protest.<sup>7</sup> See, *generally*, Req. for Summary Decision Sustaining Protest in Part. Eagle's allegation that the RFQ contained a latent ambiguity was first filed in its comments on the agency report on May 6. Comments & 2nd Supp. Protest at 12-15.

Eagle contends that the above protest grounds were timely filed, yet fails to assert that it raised these protest grounds within 10 days of the March 29 request for dismissal. Instead, the protester notes that the RFQ's "provisions which called for prior experience to be considered in awarding the task order were addressed in detail in [our] prior comments." Supp. Comments at 8. Eagle's "prior comments" were filed on May 6, *i.e.*, well beyond 10 days after the protester first learned of the agency's interpretation of the BPA order evaluation factors.

The protester's new arguments, raised more than 10 days after Eagle knew or should have known that the agency did not consider the demonstrated prior experience factor for the BPA order award, are therefore untimely. 4 C.F.R. § 21.2(a)(2). As a result, we dismiss these protest grounds.

With respect to the best-value determination argument initially raised in Eagle's protest, we find that the allegations do not provide a basis upon which to sustain the protest. Because we conclude, as discussed above, that Eagle's challenges to the evaluation of vendors' quotations, and the agency's OCI determination were without merit, legally insufficient, or untimely, we similarly find the protester's best-value challenge to be without merit.

The protest is denied in part and dismissed in part.

Edda Emmanuelli Perez  
General Counsel

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<sup>7</sup> Eagle's request for a summary decision sustaining its protest in part appears to have been prompted by our request for additional information from the agency on the evaluation factors used by DOI for award of its first BPA order. See Electronic Protest Docketing System No. 24. Specifically, after receipt of the agency's submission explaining the RFQ's evaluation factors used for the BPA order, on April 15, our Office asked the agency to explain the basis of its statement that, under the BPA order evaluation factors, "prior demonstrated experience is excluded." *Id.*