



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Erimax Inc.

File: B-421141; B-421141.2; B-421141.3

Date: December 21, 2022

Jerry A. Miles, Esq., Deale Services, LLC, for the protester.
Devon Hewitt, Esq., for Seventh Sense Consulting, LLC, the intervenor..
Wilmory Bernal, Esq., Department of Commerce, for the agency.
Mary G. Curcio, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest filed via email to GAO protest inbox is dismissed as untimely where protester failed to timely file the protest using GAO's electronic protest docketing system which was functioning and available during normal business hours.
 2. Protest may be filed via email to GAO protest inbox when GAO's electronic protest docketing system is universally unavailable during normal business hours, not when a protester is experiencing difficulties with its individual account.
-

DECISION

ERIMAX, Inc., of Hyattsville, Maryland, protests the issuance of a task order to Seventh Sense Consulting, LLC, of Woodbridge, Virginia, under request for quotations (RFQ) No. CFO-22-0010, issued by the Department of Commerce for acquisition support services for the Census Bureau. ERIMAX asserts that the agency unreasonably evaluated the quotations of ERIMAX and Seventh Sense.

We dismiss the protest.

BACKGROUND

The solicitation was issued on June 16, 2022, as a total set-aside for small disadvantaged business concerns with a current General Services Administration (GSA) multiple award schedule, professional service category contract. The task order was issued under the GSA schedule using Federal Acquisition Regulation section 8.405 procedures. Request for Dismissal (RFD) at 2, 4. On September 22, ERIMAX received

notice that the agency had issued the task order to Seventh Sense. *Id.* at 4; Protest at 2.

On October 3, counsel for ERIMAX attempted to file a protest challenging the issuance of the task order to Seventh Sense using GAO's electronic protest docketing system (EPDS), and his existing EPDS account. Upon attempting to log into his account, he received a message that his username did not exist. Protester Briefing on Timeliness at 1. After trying several times to access his account, and attempting to change his password, the attorney called GAO's general phone number (202-512-3000) and was connected with a member of GAO's Information Systems and Technology Services (ISTS) team.¹ Protester Briefing on Timeliness at 1, 2; Protester Phone Records for October 3. Counsel spoke to ISTS several times, and made several additional calls to GAO's general phone number, but still was unable to access his account. Protester Briefing on Timeliness at 2; Protester Phone Records for October 3.

At 5:25 p.m., after being unable to access his EPDS account, counsel for ERIMAX sent the protest via email to the GAO protest inbox. Protester Briefing on Timeliness at 2. At 5:27 p.m., he sent exhibits for the protest by email to the protest inbox. *Id.* On October 4, the attorney called the number identified in the EPDS instructions as the number to contact for technical issues with EPDS during normal business hours (202-512-5436).² The attorney was instructed to register for a new EPDS account, and after doing so, he was able to access his account and file the protest in EPDS. Protester Briefing on Timeliness at 2; Protester Phone Records for October 4.

The protester stated that the protest was timely filed within 10 days of the notice of award issued by the agency on September 22, 2022, which required the protest to be filed by October 3. Because the protest was filed in EPDS on October 4, we requested the parties to submit briefings addressing the timeliness of the protest.

DISCUSSION

The agency requests that we dismiss ERIMAX's protest as untimely because it was not filed in EPDS within 10 days after the protester knew the basis of protest. Protester's counsel maintains that he timely filed the protest on October 3 via email in the GAO

¹ ISTS provides internal technology support for GAO employees and contract staff.

² See EPDS Protester/Intervenor User Guide, section 11.0; Bid Protest Instructions Cover Page. ("If you require technical assistance with respect to a specific case, please contact protests@gao.gov or 202-512-5436"). The EPDS Protester/Intervenor User Manual and the Bid Protest Instructions are located on GAO's website at <https://www.gao.gov/legal>, and in the "Help" drop down menu at the top of the EPDS website. The Help drop down menu also includes a "Contact Us" option that directs that "[i]f you have questions or Section 508 needs, please contact GAO at 202-512-5436 or protests@gao.gov."

protest inbox after experiencing technical difficulties accessing his EPDS account. As discussed below, we agree with the agency that the protest is untimely.

Protests filed at GAO are required to be filed using EPDS. 4 C.F.R. § 21.1(b). GAO allows for an alternative filing method in the event EPDS is unavailable. Specifically, when EPDS is unavailable during normal business hours protesters are instructed to contact GAO to ascertain EPDS's operating status, and then file a submission to protests@gao.gov, with courtesy copies to the other parties, and file the protest in EPDS when it is operational. EPDS Instructions, Section VII.22(b). To be timely, a protest must be filed not later than 10 days after the protester knows or should know the basis of protest.³ 4 C.F.R. § 21.2(a)(2).

ERIMAX acknowledges that it learned the basis of its protest on September 22, and that to be timely its protest was required to be filed no later than 5:30 p.m. on October 3. ERIMAX asserts that its protest was timely because it attempted to timely file its protest in EPDS, but that EPDS was unavailable due to technical issues. According to ERIMAX, it therefore timely submitted the protest to protests@gao.gov, on October 3, at 5:25 p.m., as permitted in cases where EPDS is unavailable due to technical issues. It then filed the protest in EPDS the following day, as required by the EPDS instructions. We disagree that ERIMAX timely filed its protest.

The EPDS instructions provide that:

(a) In General. GAO will endeavor to maintain the availability of EPDS Monday through Friday from 8:00 a.m. to 5:30 p.m. eastern time, excluding Federal holidays or when GAO's Headquarters are otherwise closed (hereinafter, normal system operating hours). In the event that a Filer is unable to file a document in EPDS due to a technical failure of EPDS during normal system operating hours, the following procedures in paragraph (b) shall apply. . . .

(b) Submissions to GAO When EPDS is Unavailable. If EPDS is unavailable during normal system operating hours, a Filer should:

- i. Contact GAO to ascertain EPDS's operating status.
- ii. Make its submission to protests@gao.gov, with courtesy copies to the other parties. . . .

* * *

EPDS Instructions, Section VII, 22(a), (b).

³ Different timeliness rules not at issue here apply to protests that concern improprieties apparent from the face of a solicitation, and protests that follow a requested and required debriefing. See 4. C.F.R. § 21.2(a)(1) and § 21.2 (a)(2).

ERIMAX has not established that EPDS experienced a technical failure, or was otherwise not available, during normal system operating hours when ERIMAX attempted to file its protest. Instead, ERIMAX's counsel describes the difficulties he encountered in filing the protest as those associated with only his EPDS account. Specifically, he states that he could not access his account with his password, and he attempted to change his password several times to gain such access.

GAO has confirmed that EPDS was available and not experiencing any technical failures or difficulties on October 3 at the time protester's counsel was attempting to file the protest. Since EPDS was operating normally on October 3, the alternative option to file a protest via email to the protest inbox was not available to the protester and therefore the emails counsel sent to that inbox do not constitute a proper filing. In other words, a protester may file a protest via email to the protest inbox only when EPDS is unavailable, not when the filer is experiencing difficulties with its individual account. Because ERIMAX did not file the protest in EPDS until October 4, the protest is untimely.

ERIMAX asserts that if its protest is untimely, GAO should consider it under the good cause exception to our timeliness rules. We disagree. Pursuant to our regulations, our Office may consider the merits of an untimely protest when good cause is shown. 4 C.F.R. § 21.2(c). In order to prevent our timeliness rules from becoming meaningless, exceptions are strictly construed and rarely used. *Vetterra, LLC, B-417991 et al.*, Dec. 29, 2019, 2020 CPD ¶ 15 at 3. The "good cause" exception is limited to circumstances where some compelling reason beyond the protester's control prevents the protester from filing a timely protest. *Id.* at 2.

ERIMAX asserts that the good cause exception applies in this case because its attorney's account was deactivated, the attorney was not provided support to reactivate the account, and the attorney was not notified that the account had been deactivated. While ERIMAX is correct that its attorney's EPDS account had been deactivated, counsel for ERIMAX failed to follow the instructions provided to parties that are experiencing technical difficulties with their account. Specifically, parties are advised, "If you require technical assistance or assistance with respect to a specific case, please contact protests@gao.gov or 202-512-5436." Protester/Intervenor User Guide, Section 11.0; Bid Protest Filing Instructions, Cover Page.

The EPDS instructions also instruct users to contact GAO to ascertain EPDS's operating status if EPDS is unavailable during normal operating hours. EPDS Instructions, Section VII, 22 (b). The instructions define contacting GAO as follows:

(j) "GAO" means the GAO attorney(s) assigned to handle a case or other GAO personnel. References herein to contacting GAO mean e-mailing protests@gao.gov, calling GAO's Procurement Law Control Group at (202) 512-4788, or calling or e-mailing the GAO attorney assigned to handle a specific case.

EPDS Instructions, Section I, 2(j).⁴

Instead of calling the phone numbers identified in the user guide, EPDS help menu, or instructions, counsel initially called GAO's general number, which is not one of the contact numbers identified in any of the available EPDS guidance. As noted above, when counsel called one of the designated EPDS contact numbers on October 4, he was provided with the instructions that allowed him to restore his account and file the protest in EPDS. It is therefore counsel's failure to follow the EPDS instructions that resulted in his inability to timely restore his account, and timely file the protest. ERIMAX has not demonstrated that a compelling reason beyond the protester's control prevented the protester from filing a timely protest, and therefore there is no basis to invoke the "good cause" exception.⁵

ERIMAX also filed a separate supplemental protest on October 24. In that protest ERIMAX argues that the agency failed to obtain legal and management review of the agency's evaluation and source selection decision prior to finalizing the issuance of the task order to Seventh Sense in violation of both a memorandum for Census Bureau Acquisition Staff entitled Acquisition Strategy Review Board and Contract Review Board, and Commerce Acquisition Manual paragraph 1307.1.

ERIMAX asserts that the memorandum and Commerce Acquisition Manual requirements were incorporated into the solicitation, and thus the agency was required to follow them in conducting its evaluation. For support, ERIMAX cites to RFQ section C.3 which states that "[t]he Contractor shall furnish the necessary, qualified personnel to provide timely, efficient, effective acquisition support services . . . in compliance with the Federal Acquisition and Commerce Acquisition Regulations . . . the Commerce Acquisition Manual, and [internal] Bureau policies and [Acquisition Division] guidance and that promote the highest probability of contractor performance success." Supp. Protest at 32 (quoting RFQ § C.3). This RFQ section is part of the performance work statement and describes the expectations of the contractor during performance of the contract; it does not apply to the agency's actions during review and evaluation of the quotations.⁶

⁴ GAO's procurement law control group maintains two contact numbers, 202-512-5436 and 202-512-4788. As of the time of this decision, both numbers are monitored by, and used to obtain assistance from, the procurement law control group.

⁵ ERIMAX also argues that we should consider its untimely protest pursuant to the significant issue exception established by 4 C.F.R. § 21.2(c). We regard a significant issue as one of widespread interest to the procurement community that has not been considered on the merits in a prior decision. *Vetterra, LLC, supra*. ERIMAX has failed to demonstrate that its protest raises an issue of widespread interest to the procurement community that would warrant resolution in the context of an otherwise untimely protest.

⁶ ERIMAX also cites to RFQ section H.4 which makes clear that it also applies to contractor performance, not the agency's evaluation: "The contractor shall comply with

Because these provisions relate to contract performance, there is no basis for ERIMAX's assertion that the legal review requirements of the memorandum and Commercial Acquisition Manual were elements of the agency's evaluation of quotations and source selection. ERIMAX has therefore not identified any law, regulation, or solicitation provision that would otherwise require prior to or as part of the agency's selection decision, the legal review contemplated only by the two agency internal documents.

In addition, notwithstanding the protester's assertion that the policy documents identified above were required to be used by the agency to evaluate quotations, GAO does not review as part of its bid protest function an agency's compliance with internal guidance or policies that are not contained in mandatory procurement regulations. See *Trailboss Enterprises, Inc.*, B-415970, *et al.*, May 7, 2018, 2018 CPD ¶ 171 at 5; *All Points Logistics, Inc.*, B-407273.53, June 10, 2014, 2014 CPD ¶ 174 at 10 n.10. Accordingly, ERIMAX's supplemental protest fails to state a valid legal basis and is dismissed. 4 C.F.R. § 21.1(c)(4).

On December 1, ERIMAX filed a second supplemental protest in which ERIMAX alleges that Seventh Sense proposed to perform the task order with staff that is underqualified, inexperienced, and underpaid.⁷ ERIMAX bases this allegation on an exchange between the ERIMAX program manager on the incumbent task order, and a representative of Seventh Sense who asked the program manager if he was interested in submitting a resume to be considered for a position on the new task order. ERIMAX further asserts that the program manager was told that after the agency issued the task order to Seventh Sense under the solicitation at issue, the agency changed the mix of personnel it was seeking. According to ERIMAX, based on this change, Seventh Sense is engaging in an improper "bait and switch," apparently because ERIMAX believes that Seventh Sense is switching the higher-level personnel it proposed for lower-level personnel.⁸

all applicable laws, rules, and regulations which deal with or relate to performance in accord with the terms of the contract." Supp. Protest at 32 (quoting RFQ § H.4).

⁷ ERIMAX also asserts that Seventh Sense offered an unrealistically low price. Where a solicitation contemplates the award of a fixed-price or time-and-materials contract, price realism is not ordinarily considered, because a fixed-priced contract places the risk and responsibility for costs and resulting profit or loss on the contractor. *HP Enter. Servs., LLC*, B-413888.2 *et al.*, June 21, 2017, 2017 CPD ¶ 239 at 5; see FAR § 15.402(a). Here, the RFP did not provide for a price realism analysis. Accordingly, we dismiss this ground for failure to state a valid basis of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f).

⁸ ERIMAX also complains that the agency did not withhold performance of the task order after ERIMAX filed its protest. When a protest is filed, the agency may be required to withhold award and to suspend contract performance. The requirements for

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. *Cybermedia Tech., Inc.*, B-4055 11.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. To achieve this end, our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), 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. Under our regulations, any protest allegation which relies on speculation is legally insufficient because GAO 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.

ERIMAX's supplemental protest does not include sufficient information to establish the likelihood that the agency in this case violated applicable procurement laws or regulations. To support its supplemental protest, ERIMAX has provided an affidavit from the ERIMAX program manager on the incumbent task order in which he states that he was told by a representative of the awardee that Seventh Sense was seeking to hire mid-level to junior-level contract specialist staff, as opposed to senior-level staff, and was offering salaries of up to \$100,000 for those positions. Protest, exh. 20.2, Affidavit of Program Manager at 1. According to the program manager, the Seventh Sense representative stated that she recognized that the program manager was a senior-level position on the prior task order, but that Seventh Sense wanted to know if he was interested in a lower-level position. *Id.* In addition, the program manager stated that the Seventh Sense representative further explained that Seventh Sense "had no senior level vacancies." *Id.* The program manager also stated that the Seventh Sense representative mentioned that Seventh Sense had been advised by the agency that the agency desired less "senior staff" and wanted Seventh Sense to bring on more junior-level personnel.⁹ *Id.*

the withholding of award and the suspension of contract performance are set forth in 31 U.S.C. § 3553(c) and (d); GAO does not administer the requirements to withhold award or suspend contract performance. 4 C.F.R. § 21.6. An agency shall file a notification in instances where it overrides a requirement to withhold award or suspend contract performance, and it shall file either a copy of any issued determination and finding, or a statement by the individual who approved the determination and finding that explains the statutory basis for the override. *AeroSage, LLC*, B-417289, April 24, 2019, 2019 CPD ¶ 151. To the extent the protester argues that the agency improperly failed to suspend contract performance of the contract, GAO does not administer the requirements to withhold award or suspend contract performance. 4 C.F.R. § 21.6.

⁹ ERIMAX also provided affidavits from the ERIMAX director of program operations and the ERIMAX chief executive officer (CEO) in which they relayed their discussions with the program manager regarding his discussions with the Seventh Sense representative. They both also stated that the scope of work had not changed. Supp. Protest, exh. 20.2, affidavit of director of operations at 1-2; Supp. Protest exh. 20.1, affidavit of CEO at 1-2.

From these affidavits, ERIMAX extrapolates its arguments that Seventh Sense must have proposed only inexperienced, underqualified, and underpaid junior staff for the task order that would make it impossible for Seventh Sense to perform the task order as required by the solicitation. 2nd. Supp. Protest at 1-2. ERIMAX also argues that because of this alleged approach of hiring underqualified employees, Seventh Sense could not have met the requirements under the management approach technical factor. *Id.* at 2. Finally, ERIMAX contends that Seventh Sense must have engaged in an improper bait and switch given the agency's apparently stated desire to staff the task order with more junior-level personnel. *Id.* at 4.

The agency requests dismissal of this protest ground, arguing that the supplemental protest fails to state a valid basis for protest because it is based on speculation about Seventh Sense's proposal.¹⁰ We agree with the agency.

The affidavits provided by ERIMAX do not demonstrate that Seventh Sense failed to propose adequately qualified personnel to perform the task order. Specifically, the fact that Seventh Sense offered the current program manager the opportunity to interview for a lower-level position, and indicated that it was seeking to fill mid- and lower-level positions, does not demonstrate that Seventh Sense failed to propose a fully qualified program manager or other staff.¹¹ Indeed, the program manager acknowledged that the Seventh Sense representative stated that Seventh Sense had no senior-level vacancies

¹⁰ ERIMAX argues that the agency's request to dismiss ERIMAX's protest as speculative is a "conjunctural statement[] that all three ERIMAX current/former representatives are lying." ERIMAX Resp. to Req. for Dismissal at 2. ERIMAX's argument is misplaced. Even accepting the ERIMAX employees' affidavits as reflecting a truthful and accurate recollection of the conversation between the ERIMAX program manager and the Seventh Sense representative, the arguments ERIMAX proffers based on those affidavits are speculative regarding what Seventh Sense actually proposed. In other words, as explained below, the affidavits do not support the arguments that ERIMAX has raised in its second supplemental protest.

¹¹ ERIMAX argues that the salary of \$100,000 that Seventh Sense proposed to the program manager is evidence that the agency intends to underpay its employees because the program manager previously had a \$150,000 salary under the prior task order. However, as the program manager explains, on the prior task order, he was acting as the program manager, a higher-level position than the ones Seventh Sense was seeking to fill. Thus, it would be expected that the salary for a lower-level position would be lower than the one the program manager previously received. Indeed, Seventh Sense even acknowledged that the program manager was a senior-level professional but inquired as to whether he would be willing to accept a lower-level (and thus lower-paying) position. Accordingly, the fact that Seventh Sense offered the program manager a salary lower than the one he previously received does not indicate the awardee intends to underpay all of its employees.

which suggests that it had actually proposed and filled the positions requiring higher-level employees.

Nor do the affidavits demonstrate that the agency changed any requirements, or that Seventh Sense engaged in a bait and switch and is substituting out the higher-level employees that it proposed for lower-level employees. According to the ERIMAX program manager, the Seventh Sense representative explained that it was the agency that apparently directed Seventh Sense, after award, to bring on more junior level personnel. This statement does not indicate that Seventh Sense knowingly proposed higher-level personnel with the intention of providing lower-level personnel. Moreover, even if the agency requested that Seventh Sense provide more junior level personnel, this request occurred after award of the contract and would be considered a matter of contract administration, which we would not review. 4 C.F.R. § 21.5(a). Accordingly, we dismiss the protest as legally insufficient. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f).

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel