



# Decision

## DOCUMENT FOR PUBLIC RELEASE

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**Matter of:** C3.ai

**File:** B-421337; B-421337.2

**Date:** February 16, 2023

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## DIGEST

Protest that solicitation improperly required offerors to propose a brand-name product is dismissed where the protester is not an interested party to bring the allegation. The contracting officer exercised reasonable discretion in selecting an indefinite-delivery, indefinite-quantity (IDIQ) contract vehicle, and the protester--which does not hold the requisite IDIQ contract--was ineligible for contract award.

## DECISION

C3.ai, of Redwood City, California, protests the issuance of a task order to i3 Federal LLC, of Clifton, Virginia, by the Department of Health and Human Services, Centers for Disease Control and Prevention (CDC), under request for task order proposals (RFTOP) No. 75D301-22-R-72452, to support the CDC Common Operating Picture SaaS (software as a service) Solution (COPSS). The protester argues that the RFTOP improperly required the contractor to provide the Palantir Gotham Platform<sup>1</sup> that is proprietary to Palantir Technologies Incorporated.

<sup>1</sup> The agency explains that Palantir Foundry is a configuration of the Palantir Gotham platform, and that for the CDC's purposes in this procurement, Foundry is a common feature set of the Gotham platform. Email from Agency to GAO, Feb. 9, 2023.

We dismiss the protest.

The CDC issued the RFTOP as a service-disabled veteran-owned small business (SDVOSB) set-aside under the National Aeronautics and Space Administration's (NASA) Solutions for Enterprise-Wide Procurement (SEWP) governmentwide acquisition contract (GWAC).<sup>2</sup> Request for Dismissal, exh. 5, RFTOP at 3. The solicitation contemplated the issuance of a single fixed-price task order to the offeror whose proposal represented the best value to the government, considering price and the following three technical factors: technical approach--product capability (40 points); response to performance work statement (40 points); and similar experience (20 points). *Id.* at 76, 80-81. The RFTOP advised offerors that "all evaluation factors other than cost or price are significantly more important than cost or price." *Id.* at 81.

The solicitation required the contractor to "provide CDC with commercial term software licenses for access to Palantir Foundry in [Palantir Foundry Cloud Service (PFCS)], Palantir's [Federal Risk and Authorization Management Program (FedRAMP)-approved [Software as a Service (SaaS)] offering," as well as upgrades, services, and maintenance to support users of the platform. *Id.* at 32-33. The CDC contends that the "Palantir Foundry SaaS Cloud product is critical to CDC COPSS and must continue to be used as the core platform." Request for Dismissal, exh. 6, Brand-Name Justification at 2.

C3.ai asserts that CDC's brand-name justification in support of its decision to limit the SaaS solution license to Palantir Foundry products is improper. The protester argues that, "[u]nder the [Federal Acquisition Regulation (FAR)], '[b]rand-name specifications shall not be used unless . . . market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs." Protest at 9-10, quoting FAR 16.505(a)(4)(i). C3.ai contends that if the CDC had conducted the required market research, the agency would have found that the protester--and not Palantir alone--can provide a full solution for the agency's requirements. Protest at 12. C3.ai does not identify itself as a holder of the NASA SEWP contract, however; rather, the protester states that a supplier of C3.ai products, Carahsoft, is a NASA SEWP contract holder. *Id.* at 10. The protester does not assert that either it or Carahsoft is a small business. See *id.*

#### Timeliness of Protest

As a threshold issue, the agency requests dismissal--as untimely--of the protester's challenge to the brand-name requirement. First, the agency contends that the protester was on notice of the content of the draft RFTOP on September 7, 2022, and the agency posted notice of award on the Federal Procurement Data System (FPDS) on September 29. See Request at 4. The agency argues because C3.ai did not file its protest within 10 days of either of these dates, its protest is untimely. *Id.* The CDC

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<sup>2</sup> Because the task order is valued at over \$25 million, GAO has jurisdiction to hear the protest. See 10 U.S.C. § 3406(f)(B).

further contends that the issuance of the determinations and finding (D&F) on the publicly-available SAM.gov website on September 2 put the protester on notice that the procurement would be open to SDVOSB concerns holding the NASA SEWP contract and offering Palantir products. *Id.* at 5. Because C3.ai failed to protest within 10 days of the issuance of the D&F, the agency argues that the allegation is untimely.

A protest of the terms of a solicitation is ordinarily untimely when filed after the closing time for proposal submission. See 4 C.F.R. § 21.2(a)(1) (Protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals). Here, as explained below, the record does not establish that the alleged impropriety was apparent to the protester until after contract award.

The protester provided a substantive defense of the protest's timeliness. C3.ai asserts that, because the protester did not hold the IDIQ contract under which the solicitation was issued, it did not receive a copy of the draft RFTOP. See Response at 7, 11. In any event, C3.ai argues that, because a draft solicitation is not a solicitation, any protest of the brand-name requirement would have been premature. See *id.* at 6, *citing InSap Servs., Inc.*, B-417596.2, B-417596.3, Sept. 23, 2019, 2019 CPD ¶ 343 at 4 n.3. With regard to the agency's posting of the notice of award, the C3.ai asserts that "GAO has repeatedly held that posting on FPDS [is] not sufficient to give a protester constructive notice" because FPDS is not a government point of entry. Response at 9, *citing Scaletta Armoring*, B-412302, Jan. 14, 2016, 2016 CPD ¶ 22 at 4 n.4. Finally, the protester argues that it was not aware of the D&F prior to December 7, but that, in any event, the D&F was not a solicitation, and the D&F expressly states that the contemplated procurement required a non-manufacturer rule waiver from the Small Business Administration, which had yet to be obtained. Response at 6; see *InSap Servs., Inc., supra* (noting that GAO dismissed as premature a challenge to the agency's intent to bundle certain requirements because the contemplated solicitation had not yet been issued). In CDC's reply to the protester's response to the dismissal, the agency does not rebut the protester's assertion that its challenge to the brand-name requirement was timely filed, although CDC argues that certain other allegations are untimely. See Reply to Response to Request at 1, 3.

GAO has, in protests that contain unusual facts, found timely challenges to terms of a solicitation filed after the closing deadline. See *COBRO Corp.*, B-287578.2, Oct. 15, 2001, 2001 CPD ¶ 181 at 4 (finding challenge to solicitation terms timely filed after solicitation closing date where the impropriety was not obvious to protester before then, and noting GAO's long-standing view that doubts over timeliness issues should be resolved in favor of protesters); *N&N Travel & Tours, Inc.*, B-285164.2, B-285164.3, Aug. 31, 2000, 2000 CPD ¶ 146 at 6 (acknowledging GAO's long-standing view that doubts over issues of timeliness should be resolved in favor of protesters, and finding that "unusual circumstances" "negated" the requirement that protesters challenge a set-aside provision prior to the solicitation closing time). The protester contends that it first learned of the basis for its protest from a Palantir press release on December 7, 2022, and that its protest was timely filed on December 16. Response to Request at 9.

Nothing in the record contradicts the protester's claim. This unusual record--which does not demonstrate that the brand-name requirement was either apparent to C3.ai prior to the proposal submission deadline or was known more than 10 days before the protest was filed--provides insufficient basis to find the protest untimely.

#### Interested Party Status of Protester

The CDC also requests dismissal of the protest, arguing that "C3.ai brought no timely challenge to either CDC's use of the SEWP contracting vehicle, or the agency's decision to set the order aside for SDVOSBs." Request at 2. The agency argues that, absent such a challenge, "C3.ai could not have 'offered its product' irrespective of CDC's brand-name justification[,] and, as a result, the protester "was not an 'actual or prospective offeror' in the CDC COPSS procurement." *Id.* The agency maintains that C3.ai therefore "lacks standing to challenge any aspect of CDC's administration of [the procurement]." *Id.*

Under the bid protest provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551–3557, only an "interested party" may protest a federal procurement. Our regulations implementing CICA define an interested party as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). Determining whether a protester is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the protester's status in relation to the procurement. *Castellano Cobra UTE MACC LEY 18-1982*, B-420429.5, Oct. 14, 2022, 2022 CPD ¶ 258 at 5. A protester is not an interested party where it does not possess the IDIQ contract under which the protested order will be or has been issued. *Latvian Connection LLC*, B-413442, Aug. 18, 2016, 2016 CPD ¶ 194 at 5.

C3.ai contends that it is an interested party, notwithstanding that it is a large business that does not hold the NASA SEWP contract.<sup>3</sup> C3.ai argues that, because the agency's

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<sup>3</sup> The protester raises various other arguments in support of its claim that it is an interested party. We have reviewed all of the protester's arguments regarding its interested party status; while we discuss only the most pertinent ones, we found none to have merit. For example, C3.ai argues that, notwithstanding that it does not hold the NASA SEWP contract, it is an interested party because its reseller Carahsoft Technology Corporation is a SEWP contract holder. Opposition to Request at 3. C3.ai relies on *Mythics, Inc.; Oracle America, Inc.*, in which we found Oracle to be an interested party with a direct economic interest, even though Oracle is a cloud service provider and not a reseller, and the solicitation sought proposals from resellers. *Id.*; see *Mythics, Inc.; Oracle Am., Inc.*, B-418785, B-418785.2 Sept. 9, 2020, 2020 CPD ¶ 295 at 3. C3.ai's reliance on *Mythics, Inc.; Oracle America, Inc.* is misplaced. In that case, Oracle was protesting on behalf of itself. Here, Carahsoft is not a party to this protest, and nothing in the record suggests that C3.ai is acting as Carahsoft's agent. *Mythics,*

“market analysis is inadequate,” the “propriety of its choice of a GWAC to satisfy its requirements” is “undermine[d].” Response to GAO Notice at 6. The protester further contends that GAO should not determine “that the Agency’s decision to use [the] NASA SEWP was separate and distinct from its decision to procure [a] Palantir[ ] solution on a brand-name-restricted basis.” *Id.*

Contracting agencies have broad discretion to determine their needs and the best way to meet them. *URS Fed. Support Servs., Inc.*, B-407573, Jan. 14, 2013 CPD ¶ 31 at 4. The selection of a contract type is the responsibility of the contracting agency; our role is not to substitute our judgment for the contracting agency’s, but instead to review whether the agency’s exercise of discretion was reasonable and consistent with applicable statutes and regulations. *Id.*

GAO asked the parties to brief what procurement law or regulation the agency violated in selecting the NASA SEWP as its procurement vehicle. The protester identified none. See Response to Notice. The intervenor argues that “no law or regulation prevented CDC from using the SEWP vehicle to meet its needs in this procurement.” Intervenor’s Response to Notice at 3. We agree with the intervenor. The record provides no basis to find that the contracting officer’s (CO’s) selection of the NASA SEWP was an abuse of discretion, or to find any impropriety in the agency’s choice of contract vehicle.

The agency exercised reasonable discretion in selecting the NASA SEWP as the contract vehicle. Because the protester does not hold a NASA SEWP contract, C3.ai would not be eligible for award even if its challenge to the brand-name justification was sustained. The protester is thus not an interested party to bring that challenge.

The protest is dismissed.

Edda Emmanuelli Perez  
General Counsel

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*Inc.; Oracle America, Inc.*, is thus inapposite here; C3.ai--not Carahsoft--is the protesting party, and C3.ai is not a NASA SEWP contract holder.