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# Decision

**Matter of:** Infotrend Inc.

**File:** B-419956.301

**Date:** May 11, 2023

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Lewis P. Rhodes, Esq., and Orest Jowyk, Esq., Reston Law Group, LLP, for the protester.

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Jonathan L. Kang, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest is dismissed as untimely because it was filed more than 10 days after the protester knew or should have known of the grounds for protest. Although the protester received an email containing a pre-award debriefing that disclosed the basis for the protest outside of normal business hours, the protester opened the email, and therefore had notice of its contents.

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## DECISION

Infotrend Inc., an 8(a)<sup>1</sup> small business, of College Park, Maryland, protests the exclusion of its proposal from the competition conducted by the Department of Health and Human Services, National Institutes of Health (NIH), under request for proposals (RFP) No. 75N98121R00001, which was issued for the award of multiple indefinite-delivery, indefinite-quantity governmentwide acquisition contracts for information technology (IT) services, known as Chief Information Officer-Solutions and Partners (CIO-SP4). The protester argues that the agency improperly failed to advance its proposal from phase 1 to phase 2 of the competition under the 8(a) small business category.

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<sup>1</sup> Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small businesses. Federal Acquisition Regulation (FAR) subpart 19.8. This program is commonly referred to as the “8(a) program.”

We dismiss the protest.

## BACKGROUND

NIH issued the solicitation on May 25, 2021, seeking proposals to provide IT solutions and services in the areas of health, biomedical, scientific, administrative, operational, managerial, and information systems requirements. Req. for Dismissal (RFD) at 2; RFD, exh. 1, RFP at 7.<sup>2</sup> The purpose of the CIO-SP4 contracts is to “provide government agencies a mechanism for quick ordering of IT solutions and services at fair and reasonable prices, to give qualified small businesses a greater opportunity to participate in these requirements, and give government agencies a mechanism to help meet their socio-economic contracting goals.” *Id.* at 7.

The RFP anticipates the award of multiple contracts, each of which will have a base period of performance of 5 years and one 5-year option. RFP at 38. The solicitation states that the agency will award approximately 305 to 510 IDIQ contracts, including as relevant here, 20 to 40 contracts to 8(a) small businesses. *Id.* at 143. Each awarded contract will have a maximum ordering value of \$50 billion. *Id.* at 50.

The RFP provides for a 3-phase evaluation of proposals. *Id.* at 173. The phase 1 competition requires offerors to submit a self-scoring sheet that assigns points based on offerors’ representations concerning experience and other capabilities. *Id.* at 157. The solicitation advises that “[o]nly the highest rated offerors will advance to phase 2 of the evaluation.”<sup>3</sup> *Id.* at 174.

NIH advised Infotrend on March 20, 2023, that the agency had validated its self-scoring sheet, that its proposal was not amongst the most highly rated, and that its proposal would not advance to phase 2 of the competition. RFD, exh. 3, Mar. 20, 2023, Notification of Unsuccessful Offer, at 1. That same day, Infotrend requested that the agency provide a pre-award debriefing. RFD, exh. 4, Req. for Debriefing, Mar. 20, 2023, at 1. The agency emailed the debriefing to the protester’s designated representative, its chief executive officer (CEO), on Tuesday, March 28, at 5:22pm ET.

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<sup>2</sup> Citations to the solicitation are to RFP amendment 16. Citations to the record and the parties’ briefings are to the Adobe PDF pages for those documents.

<sup>3</sup> In phase 2 of the evaluation, the agency will validate whether offerors’ proposals comply with “go/no-go” criteria and other mandatory certification requirements. RFP at 174. Proposals that satisfy the phase 2 evaluation criteria will advance to phase 3 of the evaluation. *Id.* In phase 3 of the evaluation, the agency will evaluate proposals under the following four evaluation factors: (1) health IT capability; (2) management approach; (3) past performance; and (4) price. *Id.* at 176. For purposes of award, the solicitation states that “the government will use a selection methodology that awards contracts to offerors whose proposals represent the best value to the government at fair and reasonable prices.” *Id.* at 173.

RFD, exh. 5, Pre-Award Debriefing at 1. The email was sent from an account named “CIO-SP4 Proposals,” the subject of the email was “Pre-Award Debrief Request Notification,” and the debriefing was set forth in the body of the email. *Id.* Infotrend filed this protest on April 10.

## DISCUSSION

Infotrend argues that the agency did not reasonably evaluate its proposal in accordance with the terms of the solicitation. Protest at 4. NIH requests that we dismiss the protest because it was filed more than 10 days after the protester received its pre-award debriefing on March 28. The protester contends that the protest was timely filed because the debriefing was not received until March 29, and that the protest was filed within 10 days of that date. Resp. to Req. for Dismissal at 1-2. For the reasons discussed below, we agree with the agency that the protest is untimely and therefore dismiss it.

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. Under these rules, 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). An exception to this general rule is a protest that challenges a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required--such protests must be filed within 10 days after the debriefing is held. *Id.*

Infotrend filed its protest on April 10. The protest addressed timeliness as follows: “This protest is timely as it is filed within ten (10) days of Infotrend receiving the Agency’s required debriefing on March 28, 2022 (‘Debriefing’). 4 C.F.R. 21.2(a)(2).” Protest at 3. As the agency notes, 10 days after Tuesday, March 28 was Friday, April 7. Notwithstanding Infotrend’s initial statement that the debriefing was received on March 28, the protester now contends in response to the agency’s request for dismissal that the debriefing should be deemed received on March 29 because the email containing the debriefing was received after normal business hours. Resp. to Req. for Dismissal at 1-2. The protester’s vice president (VP) contends that the company normally closes for business at 5:00pm Eastern Time. First Decl. of Infotrend VP ¶ 3. For this reason, the protester contends that the protest was timely filed on April 10 because the 10th day following March 29 was Saturday April 8, and Monday April 10 was the next day our Office was open. *Id.*; see 4 C.F.R. 21.0(d) (when a deadline for filing a protest falls on a weekend or other day when our Office is closed, the deadline extends to the next day our Office is open).

We find that the protest is untimely because the initial protest filing stated that the debriefing was received on March 28. A protester must provide all information

establishing the timeliness of its protest in the original protest pleading. 4 C.F.R. § 21.1(c)(6). A protester will generally not be permitted to later introduce, for the first time, additional facts or legal theories establishing timeliness where such information was in the protester's possession and could have been provided to our Office as part of the initial protest submission. *Microgenics Corp.*, B-419470, Feb. 2, 2021, 2021 CPD ¶ 72 at 6. Further, if a protester, in its initial protest, fails to establish the timeliness of its challenge, the protest will be dismissed and the protester will not be permitted another opportunity to present its case. See *Consolidated Mgmt. Servs., Inc.--Recon.*, B-270696.2, B-270696.3, Feb. 13, 1996, 96-1 CPD ¶ 76 at 2 (finding protester's attempt to introduce new information altering when the basis of protest was first known to it provided no basis for reconsideration of underlying dismissal decision). Here, because the initial protest filing could have presented Infotrend's argument regarding why the debriefing should have been deemed received on March 29, but did not do so, we conclude that the protester has failed to establish the timeliness of the protest filed on April 10. We therefore dismiss the protest.

Additionally, we find no merit to the protester's argument that the debriefing should be deemed received on March 29. In support of its argument, and as noted above, Infotrend's vice president (VP) states that the company's business hours close at 5:00pm Eastern Time. First Decl. of Infotrend VP ¶ 3. The CEO states that he received the email in the evening of March 28, and that he saw both the subject of the email, "Pre-Award Debrief Request Notification" and the name of the account from which it was sent, "CIO-SP4 Proposals." Second Decl. of Infotrend CEO ¶ 4. The CEO then "forwarded [the email], without reading, to my colleagues." First Decl. of Infotrend CEO ¶ 4. The CEO acknowledges that the act of forwarding the email involved opening the message on his phone, but states that "[w]hile the process of forwarding an email could allow you to scroll through and read the content, I did not scroll and read the email." Second Decl. of Infotrend CEO ¶ 5. The CEO and VP state that neither they, nor the other two individuals who received the email on March 28, reviewed the body of the email that day. First Decl. of Infotrend CEO ¶ 5; Second Decl. of Infotrend VP ¶ 3. Instead, the CEO and VP state that the email was first reviewed by individuals on March 29. *Id.*

Our Office has explained that a protester is on constructive notice of information received via email during normal business hours, but is not on constructive notice when an email is received outside of normal business hours. See *Golight Inc.*, B-401866, Sept. 10, 2009, 2009 CPD ¶ 184 at 2. We have also explained, however, that where a protester has actual notice of information received outside of normal business hours, the timeliness clock for filing a protest begins on the day the information was actually received. *Supreme Edgelight Devices, Inc.*, B-295574, Mar. 4, 2005, 2005 CPD ¶ 58 at 3 n.1 (citing *Atkinson Dredging Co.*, B-218030.2, July 3, 1985, 85-2 CPD ¶ 22).

In *Supreme Edgelight Devices, Inc.*, the protester's office clerk received an envelope containing the agency's decision in response to an agency-level protest on a Saturday (a non-business day), but the envelope was not opened until Monday, the next business day. We found that the protester did not have constructive notice of the contents of the

envelope that was received, but not opened, on Saturday, and that the agency-level protest decision was therefore received by the protester on Monday for the purpose of determining whether a subsequent protest to our Office was timely. *Id.* at 2-3. Similarly, in *International Resource Group*, B-286663, Jan. 31, 2001, 2001 CPD ¶ 35, a protester received, but did not open, an email on a Saturday (a non-business day), advising that the protester's proposal was excluded from the competitive range. We also found that the protester did not have constructive notice of the contents of the email on Saturday, and that it was received by the protester on the next business day for the purposes of determining whether a request for a required debriefing was timely. *Id.* at 5.

In *International Marine Products, Inc.*, B-296127, June 13, 2005, 2005 CPD ¶ 119, a company vice president received on a Saturday (a non-business day) an envelope containing an agency's decision in response to an agency-level protest. The vice president did not open the envelope on that Saturday, but called another company official to advise that a letter had been received from the agency. *Id.* at 4. The letter containing the agency's decision was not opened until Monday, the next business day. *Id.* In response to the agency's request to dismiss the protest as untimely, we explained that there is no duty to conduct business outside of ordinary business hours by, for example, opening mail. *Id.* at 4-5. We also explained that the position of the individual who received, but did not open the letter (e.g. a vice president or an office clerk), did not affect this principle. *Id.* We therefore found that the protester did not have constructive notice of the agency's decision on Saturday, and that it was received on Monday, for purposes of determining the timeliness of the protest with our Office. *Id.*

Infotrend argues that the circumstances here are similar to those in *International Marine Products*, because the email containing the debriefing was received by the company's CEO outside of normal business hours, the CEO did not read the email, and that the only actions taken by the CEO were to forward the email to other individuals at the company. Resp. to Req. for Dismissal, May 1, 2023 at 1-2. We conclude that the facts here are distinguishable from those in *International Marine Products*, *Supreme Edgelight Devices*, and *International Resource Group* because Infotrend's CEO did not merely receive the email outside of normal business hours, he opened the message on his phone as part of the process of forwarding it to other individuals at the company. See Second Decl. of Infotrend CEO ¶ 5.

As we explained in *International Marine Products*, there is no duty to conduct business outside of ordinary business hours, for example, by opening an envelope or an email. *International Marine Products, supra*, at 5. Here, we conclude that the opening of the email by the CEO was conducting business outside of normal business hours. Even though the CEO states that he opened the email only for the purpose of forwarding it to other individuals in the company, we think that these actions put the protester on notice of the contents of the email--i.e., the pre-award debriefing set forth in the text of the email--because he could have at that point scrolled through the email. Having elected to open the email, we find that the protester could not reasonably ignore its contents. Even assuming, as the protester represents, that the four individuals who received the

email on March 28 did not read the debriefing contained in the email and therefore had actual notice, we find that the CEO had constructive notice of the debriefing because he opened the email on that date. For these reasons, we conclude that the protester received the pre-award debriefing on March 28, and that the protest was not timely filed on April 10. We therefore also dismiss the protest for this reason.

The protest is dismissed.

Edda Emmanuelli Perez  
General Counsel