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## Decision

**Matter of:** Karthik Consulting, LLC

**File:** B-421610.2

**Date:** May 31, 2023

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Beth Sturgess, Esq., and Richard W. Postma, Esq., Department of Homeland Security, for the agency.

Michael Willems, Esq., and Evan D. Wesser, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Post-award protest challenging the protester's exclusion from the competition because it was not currently an 8(a) small business is dismissed where the solicitation was patently ambiguous with respect to whether it was set aside for 8(a) small businesses.

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### DECISION

Karthik Consulting, LLC, a small business of Falls Church, Virginia, protests the issuance of a task order to Zen Strategics, LLC, an 8(a)<sup>1</sup> small business of Vienna, Virginia, under request for quotations (RFQ) 71SBUR23Q00000018 pursuant to the General Services Administration (GSA) highly adaptive cybersecurity services multiple award schedule (HACS MAS) issued by the Department of Homeland Security, United States Citizenship and Immigration Services for cybersecurity services. The protester contends that the agency erred in excluding it from the competition because the RFQ did not require vendors to be active 8(a) program participants at the time of quotation submission.

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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 business concerns. Federal Acquisition Regulation (FAR) 19.800. This program is commonly referred to as the 8(a) program.

The agency requests that we dismiss the protest because the solicitation was clearly set aside for 8(a) small businesses, and the protester concedes that it graduated from the 8(a) program prior to the time of quotation submission. Req. to Dismiss at 1-3. In response, the protester argues that it was an active 8(a) program participant when it received an award under the underlying GSA HACS MAS contract, and that the RFQ contained language that suggested that 8(a) holders of the underlying GSA HACS MAS contract would be eligible to compete for this requirement even if they had since graduated from the program. Resp. to Req. to Dismiss, Apr. 28, 2023 at 2-3.

Where a dispute exists as to a solicitation's actual requirements, we will first examine the plain language of the solicitation. *Intelsat General Corporation*, B-412097, B-412097.2, Dec. 23, 2015, 2016 CPD ¶ 30 at 8. Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *Crew Training Int'l, Inc.*, B-414126, Feb. 7, 2017, 2017 CPD ¶ 53 at 4.

An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible; a patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error. Where a patent ambiguity is not challenged prior to submission of solicitation responses, we will not consider subsequent untimely arguments asserting the protester's own interpretation of the ambiguous provisions. *FFLPro, LLC*, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 10.

In this regard, the protester notes that several portions of the solicitation support its reading that holders of the underlying GSA contract that were 8(a) small businesses at the time of that contract's award would be eligible to compete regardless of their current 8(a) status. Protest at 9-11; Resp. to Req. to Dismiss, Apr. 28, 2023 at 2-3. For example, the solicitation explains that the "government intends to award one (1) task order to one (1) GSA HACS MAS SIN 54151 8(a) Quoter." Req. to Dismiss, exh. 2, RFQ at 69. The protester contends that this language is ambiguous with respect to whether the government is seeking a vendor that is an active 8(a) small business at the time of award, or merely a holder of the underlying contract vehicle that was an 8(a) small business when the underlying schedule contract was awarded. Protest at 9-11.

The protester contends that this ambiguity is heightened by language explaining that, prior to award, the government would perform a pre-award check of the awardee's 8(a) status, but that "[t]he purpose of this pre-award check [is] to validate the presumptive awardee's current 8(a) status as a part of the RFQ compliance review only and not to make HACS MAS schedule holders ineligible for award." *Id.* (citing RFQ at 69). The solicitation does not otherwise explain the purpose of the "pre-award check," if the purpose was not to determine an offeror's eligibility based on its current

8(a) status. In the absence of such an explanation, the protester maintains that this language can be read as suggesting that vendors that were 8(a) small businesses when they received award under the underlying GSA contract would be eligible to compete because the purpose of the check was “not to make HACS MAS schedule holders ineligible for award.” *Id.* Moreover, the protester also notes that the solicitation incorporates FAR clause 52.219-6, “Notice of Total Small Business Set Aside,” but does not include FAR clause 52.219-18, “Notification of Competition Limited to Eligible 8(a) Participants,” which is ordinarily required for an 8(a) set-aside. Protest at 10.

However, the protester’s reading of the solicitation is incompatible with other portions of the solicitation. Significantly, the RFQ provided that “[t]he [q]uoter shall represent its 8(a) size and socioeconomic status at the time of their quote submission” to ensure that the agency “receives the 8(a) credit for this task order.” RFQ at 65. The RFQ also explains that “[t]ask order quotes that **are not** submitted by 8(a) quoters under GSA HACS MAS SIN 541151 8(a) at the time of initial task order quote submission, shall not be considered and will be further removed from the competition.” *Id.* Taken together, this language does not merely require that vendors be eligible holders of the underlying GSA contract. Rather, these provisions require that vendors must certify their 8(a) status at the time of quotation submission, and provide that vendors that are not 8(a) small businesses will be disqualified from the competition.<sup>2</sup>

In short, the provisions relied upon by the protester to support its interpretation are contradicted by other provisions of the solicitation. The protester is correct that the solicitation does not include FAR clause 52.219-18, and also assured vendors that the 8(a) pre-award check was not intended “to make HACS MAS schedule holders ineligible for award.” *See id.* at 69. However, the solicitation also required vendors to certify their 8(a) status at the time of quotation submission and explained that vendors that were not 8(a) vendors would be excluded from the competition. *Id.* at 65.

These solicitation provisions are inconsistent on their face, which is to say that the solicitation is, at best, patently ambiguous. *See A-P-T Research, Inc.*, B-414825, B-414825.2, Sept. 27, 2017, 2017 CPD ¶ 337 at 12-14 (finding solicitation that was inconsistent on its face contained patent ambiguity). A vendor that competes under a patently ambiguous solicitation does so at its own peril, and cannot later complain when the agency proceeds in a manner inconsistent with one of the possible interpretations. *Sheritech Pharmacy Piedmont, LLC*, B-413945, Nov. 7, 2016, 2016 CPD ¶ 325 at 4 n.2. The agency has explained that it intended to set aside this requirement for vendors that were 8(a) small businesses at the time of quotation submission. Accordingly, the

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<sup>2</sup> Additionally, while the text of the solicitation controls over other extrinsic sources, we further note that the GSA e-Buy system used by the agency to issue the RFQ states that the “RFQ is a: SBA Certified 8(a) Firm set-aside.” Req. to Dismiss, exh. 3, e-Buy Screenshot at 2.

protester's argument that it was inappropriately excluded from the competition because it is not a current 8(a) program participant represents an untimely protest of a patent ambiguity.<sup>3</sup>

The protest is dismissed.

Edda Emmanuelli Perez  
General Counsel

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<sup>3</sup> We note that, in addition to challenging its exclusion from the competition, the protester also challenges aspects of the agency's evaluation. However, because the protester is not a current 8(a) program participant it is not an interested party to further challenge the agency's evaluation. 4 C.F.R. § 21.0(a)(1).