



Decision

Matter of: NikSoft Systems Corporation

File: B-421801

Date: August 16, 2023

Manesh Gupta, for the protester.

Emily Vartanian, Esq., Library of Congress, for the agency.

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DIGEST

Protest to GAO of the exclusion of the protester's proposal from the competitive range is untimely filed where the matter was initially protested to the contracting agency but was not filed with the agency within 10 days of the date that the protester learned the basis of its protest; the timeliness exception in GAO's Bid Protest Regulations for filing a protest with GAO after receipt of a required debriefing does not apply to agency-level protests.

DECISION

NikSoft Systems Corporation, of Reston, Virginia, protests the exclusion of its proposal from the competitive range under solicitation No. 030ADV22R0079, which was issued by the Library of Congress (LOC) to establish multiple indefinite-delivery, indefinite-quantity contracts for Agile system development and support services. The protester argues that the agency unreasonably evaluated its proposal, resulting in the improper exclusion of its proposal from the competitive range.

NikSoft submitted its protest to our Office after having received a decision from LOC that its pre-award debriefing response constituted an agency-level protest, which the agency denied as untimely filed because it was filed more than 10 days after the protester was notified of its exclusion from the competitive range.

We dismiss the protest.

Under our Bid Protest Regulations, a matter initially filed with a contracting activity will be considered timely by our Office only if the agency protest was filed within the time limits provided by our regulations, unless the contracting agency imposes a more

stringent time for filing, in which case the agency's time for filing will control. 4 C.F.R. § 21.2(a)(3). Where, as here, the protester is challenging its exclusion from the competitive range, the protester was required to file its agency-level protest within 10 days of when it knew or should have known it was excluded from the competition. See 4 C.F.R. § 21.2(a)(2).

Here, the record indicates that on June 15, 2023, the agency notified NikSoft that its proposal was not among the most highly rated proposals and was excluded from the competitive range. The notification provided a summary of the agency's evaluation of the protester's proposal, including strengths and two weaknesses in its technical approach. Req. for Dismissal ex. A, Notification of Exclusion at 13-14.¹ On June 16, the protester requested that the agency provide a pre-award debriefing. *Id.*, ex. B, Request for Debrief at 16. The agency emailed the debriefing to the protester on June 30.² *Id.*, ex. B, Pre-Award Debrief Letter at 18-21. The debriefing letter included nearly verbatim information from the notification of exclusion from the competitive range explaining the basis for the two technical weaknesses in NikSoft's proposal. *Id.* at 20. The debriefing letter also stated that the protester could submit questions to the agency no later than July 5. *Id.* at 21.

On July 6, LOC received an email response from NikSoft.³ *Id.*, ex. C, Resp. to Pre-Award Debrief at 23-24. In the response, NikSoft stated that it "disagree[d] with the two weaknesses specified in page 3 of [LOC's] Preaward Debriefing Letter" and provided a rebuttal to each identified evaluation weakness. *Id.* In addition to its disagreement with the assigned weaknesses, NikSoft requested that the agency "take a closer look to reevaluate and reconsider its current . . . determination" to exclude its proposal from the competitive range. *Id.* at 24. The agency concluded that the protester's July 6 response constituted an agency-level protest, which the agency denied as untimely because it was filed more than 10 days after the protester was notified of its exclusion from the competitive range. Req. for Dismissal at 4; Protest ex. 1, Contracting Officer's Decision on Pre-Award Agency-Level Protest at 1-3.

On July 7, the protester sent an email to the agency, the subject of the email was "NikSoft Preaward, Agency-Level Protest in Response to Library of Congress Contracting Officer's Decision letter dated July 6, 2023 to NikSoft" and its formal agency-level protest was set forth in the body of the email. Req. for Dismissal ex. D, Agency-Level Protest at 33-35. In this July 7 submission the protester asserted, among other things, that its July 5 response to the pre-award debriefing, filed on July 6, was not

¹ Citations to the record and the parties' briefings are to the Adobe PDF pages for those documents.

² The debriefing letter was dated June 29 but was emailed to the protester on Friday, June 30, at 4:18 p.m. Eastern Time. Req. for Dismissal at 16.

³ The response was emailed to the agency on Wednesday, July 5, at 10:01 p.m. Eastern Time after normal business hours and was deemed received on July 6. *Id.* at 23.

“intended to be a Protest by NikSoft.” *Id.* at 35. The agency considered the protester’s July 7 submission to be an appeal of the contracting officer’s denial of its agency-level protest which was denied by the agency’s senior procurement officer. Req. for Dismissal at 4.

NikSoft filed this protest with our Office on July 10, arguing essentially that the agency did not reasonably evaluate its proposal and that the subsequent exclusion of its proposal was improper. See *generally*, Protest at 2-4.

LOC argues that the protest to our Office is untimely because the protester’s agency-level protest was untimely filed. Req. for Dismissal at 4. In this regard, the agency states that the protester was required to file its agency-level protest within 10 days of when NikSoft knew or should have known it was excluded from the competitive range *i.e.*, the notification of exclusion provided on June 15, which NikSoft failed to do. Req. for Dismissal at 4 (*citing* 4 C.F.R. § 21.2(a)(2)). The agency also contends that the debriefing exception to our timeliness rules do not apply here because NikSoft elected to file an agency-level protest and that the agency-level protest was not filed within the timeframe established by the agency.⁴ *Id.* at 4-5 (*citing* 4 C.F.R. § 21.2(a)(3)).

The protester opposes the agency’s request for dismissal. The protester maintains that its protest to our Office was timely filed within 10 days of the completion of the agency’s pre-award debriefing, which NikSoft claims was July 7. Resp. to Req. for Dismissal at 1-2. In this regard, the protester disputes the agency’s contention that its July 6 response to the pre-award debriefing constituted an agency-level protest since it “did not have adequate information to provide an LOC agency-level protest prior to the LOC completion of the LOC Debriefing.” *Id.* at 1. We disagree.

As the agency points out, our Office has explained that the rules for filing an agency-level protest are generally established by the Federal Acquisition Regulation (FAR) under which protests of other than alleged solicitation improprieties are required to be filed within 10 days after the basis of protest is known or should have been known, and the FAR does not contain a “required debriefing” exception to this 10-day rule. See *M2 Glob. Tech., Ltd.*, B-400946, Jan. 8, 2009, 2009 CPD ¶ 13 at 3 (*citing* FAR 33.103(e)).

⁴ GAO’s Bid Protest Regulations provide an exception to the general 10-day rule for filing a protest at GAO that challenges “a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required.” 4 C.F.R. § 21.2(a)(2). In those cases, where the protest is filed with our Office with respect to any protest basis which is known or should have been known either before or as a result of the requested and required debriefing, the protest cannot be filed before the debriefing date offered, but must be filed not later than 10 days after the date on which the debriefing is held. *Id.* As discussed herein, however, the debriefing exception is not included in the applicable Federal Acquisition Regulation provisions governing the timeliness of agency-level protests, a standard adopted as a matter of policy by LOC.

Indeed, the facts of this case are nearly identical to those addressed by our Office in *M2 Glob. Tech., Ltd.*, *supra*. In that case, the protester received a detailed letter from the agency informing the firm that its proposal was excluded from the competitive range and the reasons for the exclusion. The protester promptly requested and received a pre-award debriefing, and then subsequently filed an agency-level protest within 10 days of the debriefing. *Id.* at 2.

After the agency dismissed the agency-level protest as untimely, the protester filed a protest with our Office. We explained that the initial notice of exclusion from the competitive range included sufficient information to inform the protester of its bases of protest, and therefore the protester was required to file its protest within 10 days of receiving the notice. In response to the protester's arguments that it reasonably waited to file its protest until after the conclusion of its debriefing, we explained that the debriefing exception established in our Bid Protest Regulations governing the timeliness of protests filed with our Office was inapplicable to agency-level protests, which are governed by the timeliness rules in the FAR. *Id.* at 3.

As in *M2 Glob. Tech. Ltd.*, NikSoft received a notice of exclusion from the competitive range that included sufficiently detailed information setting forth the basis for the agency's decision. Indeed, the protester does not credibly point to any new information provided in the debriefing that was not already provided in the notice of exclusion. See *Centerra Integrated Facilities Servs., LLC*, B-418628, Apr. 23, 2020, 2020 CPD ¶ 155 at 8 (dismissing allegations as untimely where the protester waited to file its protest until after the receipt of a non-required debriefing and failed to demonstrate that it had obtained new information during the debriefing that had not already been previously provided by the agency). In this regard, we have explained that a firm may not delay filing a protest until it is certain that it is in a position to detail all of the possible separate grounds of protest. *CDO Techs., Inc.*, B-416989, Nov. 1, 2018, 2018 CPD ¶ 370 at 5.

We do note that our decision in *M2 Glob. Tech. Ltd.* relied on the fact that the procurement at issue in that case, which was conducted by the Department of the Navy--an executive branch agency--was subject to the FAR as a matter of applicable binding federal regulation, whereas here, LOC, a legislative branch agency, is not expressly bound to conduct its procurements in accordance with the FAR. In this regard, we have explained that LOC, as a legislative branch agency, is not subject to the FAR, but conducts its acquisitions in accordance with Library of Congress Regulations (LCR). *Strong Env'tl, Inc.*, B-311005, Mar. 10, 2008, 2008 CPD ¶ 57 at 3. However, LCR 7-210, Procurement – Goods and Services, establishes that “[i]t is the policy of the Library to follow the [FAR] in the procurement of goods and services under this regulation” unless a specific deviation is adopted. LCR 7-210 at § 3.A; see also *Mythics, Inc.; Oracle Am., Inc.*, B-418785, B-418785.2, Sept. 9, 2020, 2020 CPD ¶ 295 at 5 (recognizing that “[t]he agency has not argued that it is not bound by the requirements of the FAR, and in fact, cites its own regulation stating that the agency follows the FAR as a matter of policy,” and concluding, therefore, that “the requirements of the FAR govern[ed]” the acquisition at issue in the protest). As LOC has adopted the agency-level protest timeliness standards of FAR section 33.103(e) without deviation,

see Library of Congress FAR Supplement § LC33.103, we conclude that this standard governs the question of timeliness here. In this context, FAR section 33.103(e) provides that “protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier.”

As the protester had sufficient notice of its bases of protest from the June 16 notice, pursuant to FAR section 33.103(e), any protest to the agency was required to be filed with LOC by no later than the close of business on June 26.⁵ Because the protester did not file its protest with LOC by June 26, its agency-level protest was untimely, and, therefore, its subsequent protest with our Office is also untimely. 4 C.F.R. § 21.2(a)(3).

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel

⁵ Because any agency-level protest had to be filed by no later than the close of business on June 26, see FAR 33.103(e), we need not resolve the protester’s contention that its July 5 email to the agency (received on July 6) was not an agency-level protest, as either the July 5 response or the July 7 agency-level protest would have been untimely, and, thus, the subsequent protest to our Office is untimely.