



# Decision

**Matter of:** Pacific Shipyards International, LLC

**File:** B-422956; B-422956.2

**Date:** October 22, 2024

## DOCUMENT FOR PUBLIC RELEASE

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

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## DIGEST

Protest challenging terms of solicitation for award of multiple indefinite-delivery, indefinite-quantity contracts brought after award is dismissed where the protester is an awardee and the protest is untimely.

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## DECISION

Pacific Shipyards International, LLC (PSI), a small business of Honolulu, Hawaii, protests the terms of request for proposals (RFP) No. N00024-24-R-4437, issued by the Department of the Navy for ship repair services. The protester challenges several of the RFP's terms as latently ambiguous.

We dismiss the protest.

## BACKGROUND

On November 1, 2023, using the procedures of Federal Acquisition Regulation (FAR) part 15, the Navy issued the solicitation seeking proposals “for the repair, maintenance and modernization requirements of non-nuclear U.S. NAVY surface ships homeported and visiting the Pearl Harbor, HI homeport.” Req. for Dismissal encl. C, RFP at 1, 29, 125.<sup>1</sup> The solicitation included two “lots”--lot 1 for critical ship repair and lot 2 for non-critical ship repair. *Id.* at 125. Offerors were permitted to submit proposals for only

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<sup>1</sup> Unless otherwise noted, our citations use the Adobe PDF pagination of documents in the record.

lot 1, only lot 2, or for both lots, subject to size limitations, as lot 1 was solicited on an unrestricted basis but lot 2 was set aside for small businesses. *Id.*

The solicitation contemplated award of “a minimum of” four fixed-price, indefinite-delivery, indefinite-quantity (IDIQ) multiple award contracts (MACs)--a minimum of two for lot 1 and a minimum of two for lot 2. RFP at 134, 142. Each IDIQ contract would have a 5-year ordering period. *Id.* at 126. The solicitation stated that award would be made on a lowest-priced, technically acceptable (LPTA) basis. *Id.* at 142. With respect to price, the solicitation provided for assessment of proposed prices for reasonableness, as well as evaluation of subcontracting plans submitted by large business offerors on an acceptable/unacceptable basis. *Id.* The solicitation set forth one non-price factor--technical and management capabilities--that would be evaluated on an acceptable/unacceptable basis. *Id.* at 143.

Initial proposals were due on December 22, and PSI submitted timely proposals for both lots 1 and 2. Req. for Dismissal at 4; Protest at 12. After receipt of initial proposals, the agency conducted discussions with PSI and other offerors. *Id.*; Protest exh. B, Pacific Shipyards Discussions Letter at 1. Relevant here, the Navy did not issue any additional solicitation amendments after the receipt of initial proposals. Req. for Dismissal at 4. Following discussions, the agency set a due date of August 12, 2024, for final proposal revisions. *Id.*; Protest at 12. On August 12, PSI submitted both its final proposal revisions and an agency-level protest. Req. for Dismissal at 4; Protest at 13; Protest exh. E, Agency-Level Protest at 1.

On September 11, the agency dismissed in part and denied in part PSI’s agency-level protest. Protest exh. A, Agency-Level Protest Decision at 1. First, the Navy dismissed PSI’s argument that the solicitation’s price evaluation criteria were “vague and ambiguous” because they did not “level the playing field among this diverse group of offerors.” Protest exh. A, Agency-Level Protest Decision at 2. The agency explained that the concerns raised about PSI’s pricing during discussions that underpinned this protest argument were adequately addressed in the protester’s final proposal revisions, and that because there was “no longer a concern to the Navy,” the protest ground was dismissed. *Id.* For the same reason, the agency also dismissed PSI’s related argument that the solicitation’s requirement for “ceiling rates” created an “ambiguity that exacerbate[d] the unequal playing field.” *Id.* at 3.

Next, the Navy denied PSI’s argument that the solicitation was “not clear on a fundamental point that would make a non-MSRA [master ship repair agreement] holder equivalent to a MSRA holder,” thus further exacerbating the RFP’s “unlevel playing field” problem. Protest exh. A, Agency-Level Protest Decision at 2. In denying this protest argument, the agency explained that because most of the work under the RFP would be performed at Navy facilities, “it would be overly restrictive of competition for the Navy to restrict competition to offerors holding an MSRA specific to the Hawaii homeport.” *Id.* at 2-3. For the same reason, the agency also denied PSI’s related argument that an “ambiguity in the RFP’s description of requirements for ‘MSRA

Equivalency” appeared to create an “allowance of ‘remote site’ MSRAs” in violation of Navy regulations. *Id.* at 3.

Additionally, the agency dismissed PSI’s argument that the solicitation was ambiguous as to the basis of award. Protest exh. A, Agency-Level Protest Decision at 4. Specifically, the protester argued “[t]he RFP suggests that proposals will be evaluated using the LPTA source selection process,” but fails “to specify that award will be made on the basis of lowest evaluated prices,” and “compounds this latent ambiguity by stating not that award will be made on the basis of lowest evaluated prices but instead on a ‘best value’ basis.” *Id.* at 3-4. In dismissing this protest argument, the Navy explained that the FAR provides for a “best value continuum” that includes LPTA, and the solicitation clearly stated evaluation and award “will be conducted utilizing the Lowest Price Technically Acceptable (LPTA) Source Selection Procedures;” thus, the Navy found PSI’s argument “untimely, as well as lacking in merit,” and dismissed it. *Id.* at 4 (citing RFP at 142).

Finally, the agency found that PSI had not suffered any competitive prejudice. In PSI’s agency-level protest, the protester framed its prejudice argument thusly:

There is a risk that PSI’s proposed prices will not be found to be fair and reasonable solely as a result of the RFP’s failure to provide a level playing field where PSI can have a fair opportunity to compete for award. In addition, the RFP’s improprieties have prejudiced PSI by forcing PSI to compete against other offerors that do not have the capability to perform the work the Navy is soliciting.

Protest exh. E, Agency-Level Protest at 16. In responding to this contention, the agency stated: “The Navy intends to award PSI an IDIQ-MAC under the solicitation. Therefore, PSI is not prejudiced by any of the allegations addressed above.” Protest exh. A, Agency-Level Protest Decision at 4.

On September 11, the same day the agency denied PSI’s agency-level protest, the Navy also awarded PSI an IDIQ contract in the amount of \$669,905,295 for both the critical ship repair work of lot 1 and the non-critical ship repair work of lot 2. Req. for Dismissal at 4-5, 5 n.2; Req. for Dismissal encl. A, Pacific Shipyards IDIQ Contract Award at 1; Protest at 13. On September 18, the protester filed this post-award challenge to the solicitation’s terms with our Office.<sup>2</sup>

## DISCUSSION

The protester argues “[t]he Solicitation is fatally flawed in multiple ways.” Protest at 2. PSI contends the solicitation is ambiguous because it “states that proposals will be evaluated using both: a ‘Best Value source selection process;’ and ‘Lowest Price

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<sup>2</sup> Subsequent to the filing of this protest with our Office, the agency provided the protester with a post-award debriefing on October 2.

Technically Acceptable source selection procedures.” *Id.* Further, the protester maintains a number of additional ambiguities in the solicitation resulted in the RFP failing to “create a level playing field to allow offerors to prepare proposals and compete on an equal basis,” and failing “to specify how prices of different offerors would be compared to make a determination of lowest evaluated price.” *Id.* at 2-3.

The protester acknowledges that it was awarded an IDIQ contract under the solicitation. Protest at 3 n.1. The protester states:

While this protest does not challenge the awards made by the Navy under the RFP, all the awards are defective because the RFP was defective. With regard to PSI, the defects in the RFP improperly led PSI to propose pricing that was lower than PSI would have proposed if the defects in the RFP had been corrected. Thus, as addressed below, PSI has suffered or will suffer economic harm in the form of reduced revenues for services provided under the contracts.

*Id.* In this statement lies the crux of the protester’s complaint. During discussions, the Navy advised PSI its prices were considered high, and, as a result, the firm lowered its pricing in its final proposal revisions. Protest at 12 n.3, 13. Having subsequently received award of a contract at the firm’s revised lower prices, the protester now alleges that the solicitation is latently ambiguous in a manner which, in its own words, would require PSI to perform for “reduced revenues.” *Id.* at 3 n.1.

The agency asks that we dismiss PSI’s protest. Req. for Dismissal at 1. First, the Navy argues that “PSI is not an interested party to protest, because it is an awardee and has no direct economic interest.” *Id.* at 2. Additionally, the agency asserts that “although PSI attempts to frame its alleged prejudice around defects in the solicitation leading it to propose pricing that was lower than it would have otherwise proposed without the defects, at the heart of its alleged direct economic interest argument is nothing more than an allegation that it has been prejudiced by being forced to submit competitive rates.” *Id.* at 3. According to the Navy, PSI’s protest, in essence, is an attempt to obtain “more restrictive RFP terms and less competition.” *Id.* at 3-4. Finally, the agency represents that “[w]hile PSI alleges the RFP was ambiguous, each of the alleged ‘flaws’ was evident from the face of the RFP prior to the submission of initial proposals.” *Id.* at 4. As such, the Navy maintains, “the entire agency-level protest” and this follow-on protest to our Office are both untimely. *Id.* at 5. For the reasons discussed below, we dismiss the protest.

### Interested Party Status

Under the Competition in Contracting Act of 1984 (CICA), which governs the bid protest jurisdiction of our Office, only an “interested party” may protest a federal procurement. 31 U.S.C. § 3551(1). CICA defines an interested party as “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.” 31 U.S.C. § 3551(2)(A). Our Bid Protest

Regulations use the same definition. 4 C.F.R. § 21.0(a)(1). Accordingly, to meet the interested party standard under CICA and our regulations, a protester must (a) be an actual or prospective bidder or offeror, and (b) demonstrate that it possesses a direct economic interest in the contract award. *AAR Airlift Group, Inc.*, B-414690 *et al.*, Aug. 22, 2017, 2017 CPD ¶ 273 at 5.

As decisions of our Office have explained, an awardee of a multiple-award IDIQ contract, by definition, is not an actual or prospective offeror. *AAR Airlift Group, Inc.*, *supra* at 5; *Aegis Defense Servs., LLC*, B-412755, Mar. 25, 2016, 2016 CPD ¶ 98 at 3. Further, a protester's status as an awardee precludes its interested party status irrespective of any alleged economic interest. *Aegis Defense Servs., LLC*, *supra*. Thus, the statutory definition of an interested party expressly bars protests where the protester is the awardee of the challenged contract. *Id.* at 4.

The protester maintains that our decisions applying the statutory bar preventing awardees from establishing interested party status "are inapposite," because "PSI challenges the terms of the Solicitation here," and "therefore is an interested party." Resp. to Req. for Dismissal at 2. PSI's argument fails, however, because, as explained below, the protester's challenges to the terms of the solicitation are untimely. When an awardee of a contract raises untimely challenges to the terms of the solicitation under which it received award, our decisions have continued to find that the awardee is not an interested party, because it is no longer an actual or prospective offeror for the purpose of challenging the terms of its own award. See *AeroSage, LLC*, B-416429 *et al.*, July 25, 2018, 2018 CPD ¶ 252 at 3. Accordingly, PSI cannot revive its interested party status by asserting untimely challenges to the terms of a solicitation.

#### Timeliness

Our Bid Protest Regulations contain strict rules for the timely submission of protests. *Science and Tech. Corp.*, B-420216, Jan. 3, 2022, 2022 CPD ¶ 1 at 4. As a general rule, our regulations require that protests based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals are required to be filed before that time. 4 C.F.R. § 21.2(a)(1). A limited exception to this rule exists, however, when a protester has filed a timely agency-level challenge to a solicitation, and receives an unfavorable answer. 4 C.F.R. § 21.2(a)(3); *Science and Tech. Corp.*, *supra*. In such instances, any subsequent protest on the same issue to our Office will be considered timely if it is filed within 10 days of actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a)(3). In order for this exception to apply, however, the initial agency-level protest must have been filed within the time limits provided by our regulations for filing a protest with our Office. *Id.*; *Parcel 49C Ltd. P'Ship*, B-412552 *et al.*, Mar. 23, 2016, 2016 CPD ¶ 95 at 8.

As set forth above, the record here reflects that PSI did not file its agency-level protest prior to the time set for receipt of initial proposals, but instead filed it after both initial proposal submission and discussions. The protester does not dispute this timeline.

Instead, the protester makes two arguments for why its agency-level protest, and subsequent follow-on protest to our Office, should be considered timely.

First, PSI contends the agency cannot now argue that the agency-level protest was untimely when the contracting officer's decision on the agency-level protest "found only one protest ground to be 'untimely' and considered the merits of the other protest grounds." Resp. to Req. for Dismissal at 3. The Navy acknowledges that its decision on PSI's agency-level protest "briefly addressed the merits of some of the allegations," but claims that notwithstanding this fact the entire agency-level protest was untimely because it was filed after the time set for receipt of initial proposals. Req. for Dismissal at 5. Our Office previously has explained that a contracting agency's consideration of the merits of a protest which is untimely under our regulations does not preclude our later dismissal of the same protest filed with us. *King Nutronics Corp.*, B-228596, Nov. 5, 1987, 87-2 CPD ¶ 453 at 2; *aff'd on recon.* B-228596.2, Dec. 1, 1987, 87-2 CPD ¶ 532; *see also Federal Acquisition Mgmt. Training Serv.*, B-220070, Nov. 26, 1985, 85-2 CPD ¶ 604 at 2 (finding the fact that an agency formally denies an agency-level protest "does not alter the protester's responsibility to conform to the filing requirements of our Bid Protest Regulations in protesting to our Office").

Second, the protester maintains that PSI's agency-level protest was timely because the alleged solicitation flaws were not apparent prior to the time set for receipt of initial proposals but were instead latent ambiguities that became known only through the course of discussions. Resp. to Req. for Dismissal at 5. The agency represents that each of the ambiguities alleged by PSI was apparent from the face of the solicitation. Req. for Dismissal at 4. For the reasons explained below, we find that the solicitation terms either were unambiguous or, to the extent there were any ambiguities, they were patent rather than latent.

### Source Selection Methodology

As an initial example, we address the protester's contention that the solicitation is ambiguous because it "states that proposals will be evaluated using both: a 'Best Value source selection process;' and 'Lowest Price Technically Acceptable source selection procedures.'" Protest at 2. The protester claims that "[i]f the Navy truly intends to base its award on best value, then it should advise offerors what tradeoffs will be made so they can prepare proposals that will meet those tradeoffs and satisfy the Navy's needs." *Id.* at 19. The protester attempts to bolster its argument by noting that the agency's post-award debriefing indicates the Navy made awards to all offerors in the competitive range. Supp. Protest at 2. According to PSI, making awards to all offerors "would require the Agency to ignore the" solicitation's LPTA award language. *Id.* at 2, 6.

Where a dispute exists as to a solicitation's actual requirements, we begin by examining the plain language of the solicitation, and we resolve questions of solicitation interpretation by reading the solicitation as a whole and in a manner that gives effect to all provisions. *TriWest Healthcare Alliance Corp.*, B-415222.3 *et al.*, May 2, 2019, 2019 CPD ¶ 152 at 12. If the solicitation language is unambiguous, our inquiry ceases. *Id.*

An ambiguity, however, exists when two or more reasonable interpretations of the solicitation are possible. *Colt Defense, LLC*, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. If the ambiguity is an obvious, gross, or glaring error in the solicitation then it is a patent ambiguity; a latent ambiguity is more subtle. *Id.* When a patent ambiguity in a solicitation is not challenged prior to the submission of proposals, we will dismiss as untimely any subsequent challenge to the meaning of the solicitation term. 4 C.F.R. § 21.2(a)(1); *Metric 8 LLC, et al.*, B-419759.2 *et al.*, July 29, 2021, 2021 CPD ¶ 299 at 19.

Relevant here, the solicitation instructed offerors that “the Government anticipates awarding the IDIQ contracts through a Best Value source selection process, utilizing Lowest Price Technically Acceptable source selection procedures as outlined in FAR 15.101-2.” RFP at 125. For the basis of award, the solicitation provided “[t]he evaluation of proposals submitted in response to the solicitation will be conducted utilizing the **Lowest Price Technically Acceptable (LPTA) Source Selection Procedures.**” *Id.* at 142.

The protester’s allegation, here, stems from PSI’s mischaracterization of the term best-value. Under PSI’s characterization, the term only describes a price/technical tradeoff and thus is incompatible with an LPTA source selection methodology. This characterization, however, is neither supported by a plain reading of the RFP--which makes no mention of tradeoffs, and instead clearly states the basis of award as LPTA--nor by the FAR, which defines best value simply as “the expected outcome of an acquisition that, in the Government’s estimation, provides the greatest overall benefit in response to the requirement.” FAR 2.101. In this regard, the FAR specifically identifies the LPTA source selection process as part of the best-value continuum, describing the process to be appropriate when “best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price.” FAR 15.101-2; see *Platinum Servs., Inc.; WIT Assocs., Inc.*, B-409288.3 *et al.*, Aug. 21, 2014, 2014 CPD ¶ 261 at 6-7 (explaining that both a tradeoff and LPTA source selection process are part of a best-value continuum).

Further, we note that the solicitation provided for “a minimum of” four IDIQ contract awards, thus permitting the agency to make more than four awards. RFP at 142. The protester has not pointed to any procurement regulation or statute--nor are we aware of any--that makes the award of multiple contracts under a solicitation incompatible with the use of an LPTA source selection methodology. In this instance, PSI’s interpretation of the solicitation is based on a flawed characterization of (1) the best-value continuum established by the FAR, (2) the mechanics of the LPTA source selection methodology, and (3) the plain language of the solicitation. As such, we find unreasonable the protester’s interpretation and conclude there is no ambiguity with regards to the RFP’s stated basis for award.<sup>3</sup> See *e.g., TriWest Healthcare Alliance Corp.*, B-415222.3 *et al.*,

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<sup>3</sup> Moreover, our Office has explained that where a solicitation provides for award on two different and conflicting bases, the solicitation is patently ambiguous. *Systems Plus*,  
(continued...)

May 2, 2019, 2019 CPD ¶ 152 at 13 (denying protest argument that RFP's price ceiling terms were latently ambiguous where protester's interpretation of the terms was not reasonable).

### Price Evaluation Criteria

As a final example, we address the protester's assertion that the price evaluation criteria are flawed in a way that prevents offerors from competing on an equal basis. Protest at 14. Specifically, PSI argues the solicitation "recognizes that there may be offerors with different qualifications competing for awards under this Solicitation," but in the protester's view, the RFP "fails to level the playing field among this diverse group of offerors despite significant differences between the groups that inevitably lead to material differences in their price proposals." *Id.* (citing RFP at 131-132).

In the protester's view "PSI's position as a current MSRA and HRMC [Hawaii Regional Maintenance Center] Critical and Non-Critical IDIQ-MAC holder illustrates this point," because as a holder of such agreements "PSI has invested heavily in its facilities and infrastructure on Oahu, Hawaii in close proximity to Pearl Harbor." Protest at 14. While having these facilities "lowers or eliminates the risk that PSI lacks capability to perform the work here," this lowered risk "comes at a cost because PSI's investment changes its rate structure." *Id.* Thus, the protester represents, it is "expected that, compared to a non-MSRA holder, or an MSRA holder without facilities in Hawaii, PSI's rate structure would be higher," and a comparison of PSI's rates with a non-MSRA holder's rates "is not an apples-to-apples comparison." *Id.* at 14-15.

Additionally, the protester notes that "the RFP limits the price items that the Navy can evaluate to only two items: labor rates and material rates," and does not provide for consideration of travel costs and other direct costs (ODCs), which in PSI's experience are "a substantial component of the price paid by the Navy for ship repair work." Protest at 15. The protester argues, under the solicitation, because "those items are excluded from consideration by the Navy evaluators, the RFP does not represent the prices the Navy will pay for work under the contract and allows mainland contractors (who would reasonably be expected to incur higher travel costs and ODCs than [Hawaii]-based contractors such as PSI) to submit pricing that does not approximate the overall price the Navy will pay for the work." *Id.* Thus, in PSI's view, the solicitation "sets up a 'fictional' price evaluation that bears no rational relationship to the prices [the Navy] can be expected to pay in real life." *Id.*

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*Inc., et al.*, B-419956.184 *et al.*, June 29, 2023, 2023 CPD ¶ 192 at 39. Thus, even if we were to find the RFP's use of an LPTA award methodology, in conjunction with the intent to make multiple awards, created an ambiguity--which we do not--such ambiguity was patent; that is, evident from the plain language of the RFP. Consequently, in order to be timely, PSI was required to challenge such a solicitation ambiguity prior to the time set for receipt of initial proposals. *Id.*; 4 C.F.R. § 21.2(a)(1).



Our review of the record shows--and the protester admits--the solicitation "recognizes that there may be offerors with different qualifications competing for awards under this Solicitation." Protest at 14. In citing to the solicitation to support its argument, the protester also acknowledges that the RFP permitted both MSRA holders and non-MSRA holders to submit proposals. *Id.* (citing RFP at 131-132). Finally, the protester concedes the solicitation clearly set forth that the calculation of total evaluated prices would include only labor rates and material rates. *Id.* at 15 ("[T]he RFP limits the price items that the Navy can evaluate to only two items: labor rates and material rates.").

Relevant here, the solicitation set forth the following formula for calculating total evaluated prices: (i) "multiplying the fully burdened ship repair labor rate by the total number of hours allocated for each ordering period to yield the total price for labor"; (ii) "multiplying the material burden rate for each ordering period by the dollar value of material expected to be purchased in the ordering period to yield the total price for material"; (iii) adding the total labor and total material prices to obtain the total price for each ordering period; and then (iv) adding the prices for each ordering period to obtain the total evaluated price. RFP at 143.

To the extent the solicitation's pricing evaluation methodology fails to create an "apples-to-apples" comparison, as alleged by the protester, this failure is not a latent ambiguity, but was apparent from the face of the solicitation. Accordingly, PSI's agency-level protest and its protest to our Office, both of which were brought after the time set for receipt of initial proposals, are untimely.<sup>4</sup> See *e.g.*, *Parcel 49C Ltd. P'Ship*, *supra* at 9 (dismissing as untimely challenges to the terms of the solicitation raised in an agency-level protest, and follow-on protest to our Office, both of which were submitted after the due date for receipt of initial proposals).

The protest is dismissed.

Edda Emmanuelli Perez  
General Counsel

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<sup>4</sup> PSI raises other challenges to the terms of the solicitation that we do not discuss herein. See *generally* Protest at 16-19; Supp. Protest at 2, 7. We have considered all of PSI's challenges, however, and conclude that each of the flaws or ambiguities alleged by the protester was apparent from the face of the solicitation, *i.e.*, patent. Consequently, PSI was required to raise those challenges in its agency-level protest prior to the time set for receipt of initial proposals in order for its follow-on protest and supplemental protest to our Office to be considered timely. 4 C.F.R. § 21.2(a)(1); *Metric 8 LLC, et al., supra*.