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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Protect the Force, Inc.--Reconsideration

File: B-411897.3

Date: September 30, 2015

David S. Black, Esq., Holland & Knight LLP, for the protester.
Wade L. Brown, Esq., Department of the Army, for the agency.
Gary R. Allen, Esq., and Christina Sklarew, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where the requester has shown no error in our determination that a protest based on a change in requirements to be incorporated in resulting contracts, issued after the submission of final proposal revisions, is untimely when not filed within 10 days of the issuance of the change.

DECISION

Protect the Force, Inc., of Alpharetta, Georgia (hereinafter, PTF), asks that we reconsider our decision of September 4, 2015, which dismissed as untimely its protest of alleged improprieties in the ground rules for solicitation No. W91CRB-15-R-0027, issued by the Department of the Army for the manufacture and delivery of ballistic combat shirts with torso extremity protection. PTF's earlier protest complained that the agency changed the method for determining the maximum amount that could be ordered under the contract after the offerors had submitted final proposal revisions (FPRs). We dismissed the underlying protest as untimely because it was filed more than 10 days after the alleged solicitation impropriety arose. PTF argues that our dismissal as untimely of its prior protest should be reconsidered, and the protest should be reinstated.

We deny the request for reconsideration.

BACKGROUND

On July 27, 2015, after FPRs had been submitted, the agency notified offerors by e-mail that it had decided to replace the maximum quantity of shirts to be procured under solicitation contract line item number 0004 (CLIN 4) with a maximum dollar

amount. In its notice, the agency stated that it intended to make the revisions in the resulting contracts. The notice also requested that offerors confirm within 5 hours whether their previous prices were still valid. The protester acknowledged the change and confirmed its pricing for CLIN 4 as requested.

On July 29, two days after the agency notified offerors about its change in measuring the contract maximum for these ballistic combat shirts, the agency notified the protester that its proposal had not been selected. PTF requested a debriefing, which the agency provided on August 5, 2015. Id. at 6. PTF filed its protest on August 10, 2015.

The agency sought dismissal as untimely of the protester's challenge to the changed solicitation terms on the basis that the challenge was filed more than 10 days after PTF had learned of the alleged solicitation impropriety. In response, PTF argued that its protest was timely because it was filed within 5 days after the debriefing. The agency cited 4 C.F.R. § 21.2(a)(1) in support of its request, and the requester cited 4 C.F.R. § 21.2(a)(2) in support of its opposition. These subsections of our Bid Protest Regulations provide as follows:

Subsection (a)(1): Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation.

Subsection (a)(2): Protests other than those covered by paragraph (a)(1) of this section shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held.

We agreed with the agency, and dismissed the protest on September 4. Our dismissal decision noted that 4 C.F.R. § 21.2(a)(1) does not address the situation where, as here, an agency does not provide an opportunity to submit revised proposals after the alleged solicitation defect occurs. The dismissal decision also noted that, in circumstances like those presented here, we have held that an offeror

is obligated to protest the issue, which concerns the fundamental ground rules of the procurement, within 10 days after knowing of the reason for protest. Armorworks Enters., LLC, B-400394, B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 6.

PTF has asked that we reconsider the decision to dismiss its protest.

DISCUSSION

In its request for reconsideration, PTF argues that we erred in finding that the debriefing exception in 4 C.F.R. § 21.2(a)(2) did not toll the requirement for PTF to file its protest within 10 days of when the alleged impropriety was incorporated into the solicitation.

In this regard, PTF acknowledges that the normally applicable time within which it was required to protest this issue was 10 days after it knew or should have known of its existence--that is, 10 days from the July 27, 2015 notice by the agency. Request for Reconsideration at 4. Nonetheless, the protester contends that because its debriefing was requested and held within 10 days of the time that the alleged impropriety was incorporated into the solicitation, the debriefing exception set out in our regulations at 4 C.F.R. § 21.2(a)(2) tolled the 10-day requirement because this subsection provides that the debriefing exception applies to "any protest basis." Id. at 5. Accordingly, PTF argues that its protest--filed on the 5th day after its debriefing, but 14 days after the alleged impropriety was incorporated into the solicitation--was timely. Id.

Our Office will reverse a decision upon reconsideration only where the requesting party demonstrates that the decision contained a material error of law or fact, or identifies material information that was not previously considered. Person System Integration, Ltd.--Recon., B-236790.2, May 29, 1990, 90-1 CPD ¶ 505 at 1. In our view, PTF has not met the standard for reversing the prior decision.

In the Armorworks Enterprises decision cited above, our Office considered and resolved the conflict as to which timeliness rule takes precedence where a solicitation impropriety becomes apparent after proposals have been submitted, and where there is no subsequent opportunity to submit revised proposals. PTF does not argue that the Armorworks decision was erroneous, but contends that unique circumstances present here require an exception to the rule we set forth in Armorworks.

In Armorworks, the basis of protest concerned the incorporation of an alleged solicitation impropriety through an amendment issued after proposals were submitted, and the agency did not request the submission of revised proposals. In those circumstances, we acknowledged that there could be a question as to whether the debriefing timeliness rules should apply. Nonetheless, we declined to

apply the debriefing exception, specifically citing the different purposes for our timeliness rules governing solicitation improprieties and debriefings.¹ Armorworks, supra at 7.

We stated in that decision that the principle governing the timeliness rules regarding solicitation improprieties is that challenges going to the heart of the underlying ground rules of a competition should be resolved as early as possible during the solicitation process to promote fundamental fairness and efficiency in the competitive process. Id. In contrast, the timeliness rules identified in the debriefing exception applicable to negotiated procurements allow a delay in filing a protest challenging a selection decision so that unsuccessful offerors may seek, and contracting agencies may provide, more information related to whether the offeror has a basis to file a protest. Debriefings are also meant to preclude strategic or defensive protests before actual knowledge that a basis for protest exists. Id. In summary, the rules governing solicitation challenges encourage filing a protest as early as possible, while the debriefing exception allows a delay in filing a protest until offerors have additional facts about the agency's actions.

It is in this context that we declined to apply the debriefing rules in Armorworks, noting:

Because Armorworks' allegations clearly concern the terms of the solicitation as established by the agency and therefore implicate the fundamental ground rules of the procurement, issues which were apparent to Armorworks before its elimination from the competition, its protest allegation implicates the policy considerations attendant to the solicitation impropriety timeliness rules outlined above, as opposed to those associated with the debriefing rules. We therefore find it appropriate in this case to apply the solicitation impropriety timeliness rules, consistent with our decisions holding that solicitation defects not apparent before the solicitation's closing date must be protested not

¹ PTF also argues that its protest concerning the change in requirements for the resulting contracts was a challenge to the agency's failure to amend the solicitation and seek revised proposals, which, in PTF's view, is a matter that did not become ripe for protest until July 29, when the protester received its unsuccessful offeror notice. Request for Reconsideration at 9-10. We disagree. Here, PTF had all the knowledge it needed to file a protest challenging the alleged solicitation impropriety on July 27—when it acknowledged the change in the solicitation and confirmed its pricing for CLIN 4. As we have previously held, protests challenging the ground rules of a procurement will be treated as challenges to the terms of a solicitation. Caddell Constr. Co., Inc., B-401281, June 123, 2009, 2009 CPD ¶ 130 at 3; Domain Name Alliance Registry, B-310803, Aug. 18, 2008, 2008 CPD ¶ 168 at 7.

later than 10 days after the defect becomes apparent, and we expressly decline to apply the debriefing timeliness rules under these circumstances.

Id.

The fact that PTF became aware of the basis for a protest concerning the ground rules of this solicitation less than 10 days before its debriefing request does not change the nature of its protest--one that we treat as a challenge to the terms of a solicitation. Caddell Constr. Co., Inc., supra; Domain Name Alliance Registry, supra. In addition, the principle we now apply is indistinguishable from the principle applied in our decision in Armorworks Enterprises, LLC. Moreover, our prior decision expressly considered "whether the debriefing timeliness rules should apply [to Armorworks] since they broadly apply to 'any basis of protest,' including those known before the debriefing." Armorworks, supra at 7. The decision concluded that the debriefing rule should not apply. Id. The only difference between the situation here, and the situation in Armorworks, is the unusually brief time between introduction of the alleged impropriety, and the award decision and subsequent debriefing. This difference does not lead us to reach a different conclusion.

In conclusion, we recognize now--and recognized in our 2008 Armorworks decision--that our bid protest regulations might be read to permit timely filing of an issue involving an alleged solicitation impropriety until up to 10 days after a required debriefing. Nonetheless, we find that such a conclusion is inconsistent with the intended meaning of our regulation; inconsistent with our prior decision precisely on point; and inconsistent with the principles enunciated by the Federal Circuit in Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1313-14 (Fed. Cir. 2007), which recognized that requiring the early filing of challenges to alleged solicitation improprieties would promote fundamental fairness in the competitive process by preventing an offeror from taking advantage of an effort to restart the procurement process, potentially armed with increased knowledge of its competitors' position or information. Accordingly, we conclude that the requester has failed to show that our prior decision contains an error of fact or law.

The request for reconsideration is denied.

Susan A. Poling
General Counsel