



GAO

Accountability \* Integrity \* Reliability

Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

# Decision

**Matter of:** Shertech Pharmacy Piedmont, LLC

**File:** B-413945

**Date:** November 7, 2016

---

Timothy A. Sheriff, Esq., Sheriff & White, PLLC, for the protester.

Evan C. Williams, Esq., and Scott N. Flesch, Esq., Department of the Army, for the agency.

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

---

## DIGEST

1. Protester's interpretation of solicitation provision requiring a 30 minute response time for certain materials as requiring only an acknowledgment by the contractor, as opposed to actual delivery, is unreasonable when the solicitation is read as a whole and in a manner giving effect to all of its provisions; the only reasonable interpretation is that the contractor will be required to deliver the materials within the specified time period.

2. Protest challenging the terms of the solicitation as being unduly restrictive of competition is dismissed as untimely where the challenge is raised after award.

---

## DECISION

Shertech Pharmacy Piedmont, LLC, a small business, of Kernersville, North Carolina, protests the award of a contract to Cardinal Health 414, LLC, of Dublin, Ohio, under request for proposals (RFP) No. W91YTZ-16-R-0068, which was issued by the Department of the Army, for the provision of radiopharmaceuticals for the Womack Army Medical Center at Fort Bragg, North Carolina. Shertech alleges that the agency unreasonably found its proposal technically unacceptable as a consequence of a latent ambiguity regarding the solicitation's requirements, and the solicitation, as interpreted by the agency, was unduly restrictive of competition.

We deny the protest in part and dismiss it in part.

## BACKGROUND

On June 8, 2016, the Army issued the RFP for the provision of radiopharmaceuticals at the Womack Army Medical Center. The RFP contemplated the award of a fixed-price contract with a base year and 4 one-year options. RFP at 129, 132. Award was to be made on a lowest-priced, technically acceptable basis. Id. at 132. On July 6, the agency amended the RFP to extend the closing time for the receipt of proposals from July 11 to July 18. RFP, amend. No. 1, at 2. On July 14, the Army issued amendment No. 2 to the RFP, incorporating agency responses to offerors' questions. RFP, amend. No. 2, at 4-5.

On September 27, the agency notified Shertech that its lower-priced proposal was not selected for award because it was rated as technically unacceptable. See Request for Dismissal, exh. No. 6, Unsuccessful Offeror Notice (Sept. 27, 2016), at 2. Specifically, the Army explained that: “[y]our company couldn’t meet the STAT Delivery (CLIN [contract line item numbers] 0033, 1033, 2033, 3033, 4033) requirement of paragraph 11.d of the SOW [statement of work].” Id. As relevant, the RFP required that “Stat delivery time shall be no more than 30 minutes.” RFP at 19. Paragraph 11.d of the SOW further defined Stat deliveries to mean those deliveries that “can be called in at any time and must have an immediate response time of no more than 30 minutes after placing the order.” Id. at 129. On October 7, Shertech filed this protest.

## DISCUSSION

Shertech challenges the agency’s conclusion that its proposal was unacceptable with respect to the Stat deliveries requirement. According to Shertech, it reasonably understood the requirement for a 30 minute “response time” to mean that the contractor need only reply to the request, as opposed to actually deliver the material, within 30 minutes. In response, the agency argues that the solicitation established a clear requirement for delivery of required items within 30 minutes of when the Army placed an order for a Stat delivery.

Shertech does not contend that its proposal demonstrated that it would make Stat deliveries within 30 minutes. Rather, the protester argues that its proffered interpretation--that “response time” refers only to the contractor’s need to acknowledge the request for a Stat delivery, not to actually make the delivery--is a reasonable alternative interpretation, thus evidencing a latent ambiguity. Further, Shertech asserts that requiring Stat deliveries within 30 minutes exceeds the government’s minimum requirements, and is unduly restrictive of competition.<sup>1</sup>

---

<sup>1</sup> To the extent Shertech also challenges the agency’s evaluation of a separate weakness in its proposal, we need not address this issue as we conclude that the  
(continued...)

## Meaning of “Response Time”

As an initial matter, we must determine whether the Stat delivery requirement was ambiguous, and, if so, whether any ambiguity was patent or latent. When a dispute arises as to the actual meaning of a solicitation provision, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. Alpha Marine Servs., LLC, B-291721, B-291721.3, Mar. 5, 2003, 2003 CPD ¶ 71 at 4. A solicitation is not ambiguous unless it is susceptible to two or more reasonable interpretations. Id. In our view, the only reasonable interpretation of the solicitation is the one advocated by the agency--that the “response time” for Stat deliveries requires delivery within 30 minutes.

Relevant here, CLIN 0033 (as well as optional CLINs 1033, 2033, 3033, and 4033), titled “STAT Delivery,” provides that “STAT delivery time shall be no more than 30 minutes.” RFP at 19 (emphasis added). The protester argues that, notwithstanding the reference to “delivery time,” ¶ 11.d of the SOW suggests that all that was required was a “response” from the offeror within 30 minutes, based on the provision that: “Stat Delivery – Stat deliveries can be called in at any time and must have an immediate response time of no more than 30 minutes after placing the order.” Id. at 129 (emphasis added).

Assuming, for the sake of discussion, that the initial terms of the solicitation were ambiguous, the agency’s clarifications through questions and answers incorporated into the solicitation through amendment No. 2 removed any doubt as to the meaning of the STAT “response time.” In its responses to offerors’ questions, the agency unambiguously confirmed that “response time” meant delivery:

Question: Can you clarify what the words “STAT” and “emergency” mean and what is the difference . . . .

Response: As defined in the solicitation, a STAT is a delivery time that shall be no more than 30 minutes after order is placed. An emergency delivery response time shall be no more than two hours after order is placed.

\* \* \* \* \*

Question: Line Item 0033, STAT Delivery: Are you requesting that the Patient Unit Dose is delivered in 30 minutes starting from when

---

(...continued)

agency properly evaluated Shertech’s proposal as unacceptable for failing to meet the solicitation’s Stat delivery requirement.

the department calls to place the order to the pharmacy during normal business hours?

Response: Yes.

RFP, amend. No. 2, at 4 (emphasis added).

Given the agency's clear and consistent articulation that the STAT "response time" meant delivery, we find the term unambiguous and deny this protest allegation.<sup>2</sup>

#### Unduly Restrictive Requirement

Shertech further contends that, even if we concur that the 30 minute Stat delivery requirement is not ambiguous, we should nevertheless hear its challenge that the provision is unduly restrictive of competition. See Opp. to Request for Dismissal at 4. We disagree, as this is an untimely challenge to the terms of the solicitation.

Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing time for receipt of proposals must be filed prior to the closing time. 4 C.F.R. § 21.2(a)(1). This rule explicitly includes challenges to alleged improprieties which did not exist in the initial solicitation but which are subsequently incorporated into the solicitation. In such cases, the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation. Id.; Cessna Aircraft Co., B-261953.5, Feb. 5, 1996, 96-1 CPD ¶ 132 at 16.

As set forth above, we find that the Stat delivery "response time" provision now challenged by the protester was not ambiguous, or, at worst, presented a patent ambiguity based on the questions and answers incorporated into amendment No. 2 to the RFP. Thus, in order to have been timely, any protest challenging the terms of the solicitation had to be filed, at the latest, on or before the next closing date following the issuance of amendment No. 2 to the RFP, which was the revised

---

<sup>2</sup> Alternatively, the questions and answers put Shertech on notice that the agency interpreted the "response time" requirement for Stat deliveries to mean delivery time, thus creating a patent ambiguity. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error. Where, as here, 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 11. An offeror 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. Id.

closing date of July 18. This challenge, raised here in Shertech's post-award protest, is therefore untimely and is dismissed.

The protest is denied in part and dismissed in part.

Susan A. Poling  
General Counsel