



**DOCUMENT FOR PUBLIC RELEASE**

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

# Decision

**Matter of:** MLS-Multinational Logistic Services, Ltd.

**File:** B-415782; B-415708.2

**Date:** March 7, 2018

---

Walter A.I. Wilson, Esq., Daniel J. Donohue, Esq., and Claude P. Goddard Jr., Esq., Polsinelli PC, for the protester.

Mark W. Golden, Esq., and Laura Whitten, Esq., Department of the Navy, for the agency.

Pedro E. Briones, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

---

## DIGEST

Protests challenging the terms of solicitations are dismissed as untimely where they were not filed at GAO within 10 days of the solicitations' respective closing dates for receipt of proposals, which constituted initial adverse agency action on the protester's agency-level protests, and the agency's independent review of those protests at a level above the contracting officer as requested by the protester pursuant to Federal Acquisition Regulation section 31.103(d)(4) did not toll GAO's filing deadline.

---

## DECISION

MLS-Multinational Logistic Services, Ltd. (MLS), of Gzira, Malta, protests the terms of request for proposals (RFP) No. N40345-17-R-0121 and RFP No. N62649-17-R-0030, issued by the Department of the Navy, Naval Supply Systems Command, to award multiple indefinite-delivery, indefinite-quantity (IDIQ) contracts for ship husbanding services at various ports throughout Southeast Asia and the Western Pacific region. MLS contends that the solicitations are inconsistent with local port laws and regulations, making it impossible to properly perform the required services.

We dismiss the protests as untimely.

## BACKGROUND

The two protests come to GAO with the same procedural posture: (1) MLS filed a timely agency-level protest challenging the terms of the RFP and requesting that the protest be reviewed at a level above the contracting officer pursuant to

section 31.103(d)(4) of the Federal Acquisition Regulation (FAR); (2) the RFP closed and the Navy received proposals--including from MLS--without granting the relief requested by MLS that the solicitation be amended and its proposal deadline be extended; (3) the contracting officer subsequently issued a decision denying the agency-level protest and advising MLS that the protest and the decision were both reviewed by the chief of the contracting office; (4) the Navy has awarded [DELETED] a contract to MLS; and (5) MLS filed its protest with GAO after receiving the decision denying the agency-level protest.<sup>1</sup> See Requests for Dismissal (Reqs). at 1-5.<sup>2</sup>

The gravamen of MLS's protests is that the RFPs' requirement for so-called "port tariff" items or services (such as trash removal services, ship movement services, potable water supply services, and force protection services) that are typically provided by ports--conflict with the RFPs' stipulation that the husbanding service provider (HSP) is not an agent of the Navy and does not have the authority to bind the agency. See, e.g., Protest B-415782 at 5-13, citing RFP No. N40345-17-R-0121, Performance Work Statement, at 27, 33-34, 40, 45, 52 (port tariff services). MLS asserts, based on its experience as an HSP, that ports require the vessel owner or its authorized agent to contract directly with the port authority for such services. See, e.g., Protest B-415782 at 13-15. Thus, according to MLS, the solicitations "create an irreconcilable dilemma" for offerors: either represent to the Navy that the HSP will obtain port tariff services directly, knowing that the HSP is unable to do so under local port laws and regulations, or improperly represent to port authorities that the HSP is an authorized agent of the Navy.<sup>3</sup> See Protests at 2.

The Navy requests that we dismiss the protests on the bases that MLS is not an interested party and that the protests are untimely. As discussed below, we find that MLS is an interested party, but we agree that the protests are untimely.

---

<sup>1</sup> Specifically, with respect to protest B-415782, the RFP was issued on September 25, 2017; MLS filed its agency-level protest on October 19; the RFP closed on October 20; the protest was denied on November 30; and contracts were awarded on December 1. With respect to protest B-415708.2, the RFP was issued on September 18; MLS filed its agency-level protest on November 2; the RFP closed on November 6; the protest was denied on November 29; and [DELETED]. Both protests were filed with our Office on December 11.

<sup>2</sup> MLS's protest pleading, the Navy's request for dismissal, and MLS's response to the request for dismissal (hereinafter, Response) in the instant protests, are largely identical. We cite to the respective pleadings jointly, unless otherwise noted.

<sup>3</sup> In light of our decision dismissing MLS's protests, nothing in this decision should be construed as expressing or reflecting this Office's opinion regarding the propriety of the solicitations at issue.

## DISCUSSION

### Interested Party

The Navy contends that MLS is not an interested party to pursue the protests, because it submitted proposals that did not take exception to the disputed RFP terms and MLS has received an award under one solicitation [DELETED]. See Reqs. at 5-6. MLS argues that it is an interested party, despite any awards, because the RFPs' port tariff requirements are impossible to perform properly and will preclude MLS from receiving task orders under the resulting IDIQ contracts. See Responses at 2; Protests at 17. The protester asserts that the Navy's answers to MLS's questions during the RFPs' question and answer phases did not resolve MLS's concerns, leaving MLS "in the position of having to submit a proposal in response to a Solicitation that contained important provisions that are contrary to applicable Port regulations." Protest B-415782 at 11; Protest B-415782.2 at 10-11.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556, only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. RELM Wireless Corp., B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2. Where a protester challenges the terms of a solicitation and the remedy sought is the opportunity to compete under a revised solicitation, it is an interested party to pursue the protest regardless of whether or not it submitted--or could have submitted--a bid or offer under the challenged solicitation, so long as the challenged requirement has compromised its competitive position. Johnson Controls, Inc., B-243605, Aug. 1, 1991, 91-2 CPD ¶ 112 at 4; see Quantico Arms & Tactical Supply, Inc., B-400391, Sept. 19, 2008, 2008 CPD ¶ 173 at 3 n.4.

In our view, MLS is an interested party under the circumstances presented here since the protester's argument is that the solicitations must be amended in a way that reasonably could materially affect the resulting competitions, both at the contract and task order levels. In this respect, MLS contends that the ambiguity arising from the RFPs' (allegedly) conflicting provisions prevented MLS from offering its best prices during the IDIQ competition. Protests at 17. Moreover, the protester requests, as relief, that the Navy amend the RFPs and permit offerors to submit revised proposals. Id. at 21. Given the economic harm articulated by MLS and the relief sought, we decline to dismiss the protests on the basis that MLS is not an interested party. See Quantico Arms & Tactical Supply, Inc., supra (finding that the protester, who submitted a quotation, "is an interested party to challenge the terms of the RFQ [request for quotations] since [the protester's] argument is that the RFQ must be amended in a way that reasonably could materially affect the resulting competition."); Johnson Controls, Inc., supra.

## Untimeliness

The Navy also requests that we dismiss the protests as untimely because they were not filed with GAO within 10 days of the solicitations' respective closing dates, that is, when MLS was on notice that the Navy was proceeding with the receipt of proposals despite MLS's agency-level protests. See Reqs. at 1-5. Here, we do agree with the agency.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Where a protest first has been filed with a contracting activity, any subsequent protest to our Office, to be considered timely, must be filed within 10 calendar days of "actual or constructive knowledge of initial adverse agency action." 4 C.F.R. § 21.2(a)(3). The term "adverse agency action" means any action or inaction on the part of a contracting agency that is prejudicial to the position taken in a protest filed with the agency, including the "opening of bids or receipt of proposals." 4 C.F.R. § 21.0(e). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. DAI, Inc., B-408625, B-408625.2, Nov. 6, 2013, 2013 CPD ¶ 259 at 3 (dismissing protest as untimely because it was not filed at GAO within 10 days of closing date for proposal receipt, which constituted initial adverse action on the protester's agency-level protest); Lifecare Mgmt. Partners, B-297078, B-297078.2, Nov. 21, 2005, 2006 CPD ¶ 8 at 10-11.

MLS concedes that it filed its protests with GAO more than 10 days after the due date for receipt of proposals; however, MLS argues that timeliness in this case should be measured from the respective dates on which MLS learned that its agency-level protests had been denied and independently reviewed pursuant to FAR section 31.103(d)(4). See Responses at 3-4. MLS maintains that there was no initial adverse agency action until the chief of the contracting office (CCO) had independently reviewed and upheld the contracting officers' determinations to accept proposals without revising the RFPs.<sup>4</sup> See id.

Section 33.103 of the FAR specifies procedures for filing and resolving agency-level protests and provides that interested parties may request an independent review of their agency-level protest at a level above the contracting officer. FAR § 31.103(d)(4). Section 33.103(d)(4) provides that the independent review may be available as an alternative to consideration of the protest by the contracting officer, or as an appeal of the contracting officer's decision. Id. The Navy Marine Corps Acquisition Regulation

---

<sup>4</sup> We note that MLS states that because the defects in the IDIQ solicitations are known at this time, now is the proper time (rather than during task order competitions) to bring these protests under GAO's timeliness rules and our decision Draeger, Inc., B-414938, Sept. 21, 2017, 2017 CPD ¶ 308 (dismissing as untimely a protest that a purchase order exceeded the scope of the awardee's IDIQ contract where the record showed that the protester knew, prior to submitting its proposal, that the agency considered the equipment at issue to be within scope). Protests at 5.

Supplement (NMCAR) states that for purposes of FAR section 33.103(d)(4), a level above the contracting officer means the CCO. NMCAR § 5233.103.

Notably, MLS fails to address the entirety of section 33.103(d)(4), which also states, expressly, that “an agency appellate review of the contracting officer’s decision on the [agency-level] protest . . . will not extend GAO’s timeliness requirements. Therefore any subsequent protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action (4 CFR [§] 21.2(a)(3)).”<sup>5</sup> FAR § 31.103(d)(4); see generally Protests; Responses. Based on our review of this provision, we find unpersuasive MLS’s argument that the timeliness of its GAO protests should be measured from the date on which MLS learned that the decisions denying its agency-level protests had been independently reviewed.<sup>6</sup>

Therefore, contrary to MLS’s belief, the CCO’s independent review of MLS’s agency-level protests did not toll the time for filing at GAO. This is consistent with our long line of decisions reasoning that once the contracting activity proceeds with receipt of proposals, the protester is on notice that the contracting activity will not undertake the requested corrective action; consequently, timeliness is measured from this point rather than from the receipt of a subsequent formal denial of the agency-level protest. DAI, Inc., supra, at 3; Lifecare Mgmt. Partners, supra, at 10; Ann Riley & Assocs., Ltd., B-237365, Nov. 15, 1989, 89-2 CPD ¶ 463 at 2; Consolidated Indus. Skills Corp., B-231669.2, July 15, 1988, 88-2 CPD ¶ 58 at 1-2.

The Navy’s actions here in allowing the proposal deadlines to lapse, without revising the RFPs, was undeniably prejudicial to MLS’s position. Southwest Marine of San Francisco, Inc.--Recon., B-229654.2, Jan. 19, 1988, 88-1 CPD ¶ 49 at 2 (“Whether [the agency] intended adverse action on the protest is irrelevant. . . . If the agency proceeds with the procurement under such circumstances, without corrective action, it clearly constitutes adverse initial agency action.”). The fact that the contracting officers’ decisions to deny the agency-level protests were independently reviewed, does not change the fact that the initial prejudicial action occurred when the agency permitted the solicitations to close without granting the relief requested by MLS. Id. In short, MLS’s decision to pursue its protests first at the agency level did not alter its responsibility to conform to our filing requirements, regardless of whether the agency-level protests were

---

<sup>5</sup> The record here indicates that the CCO’s independent reviews were in the nature of appellate reviews of the contracting officers’ decisions on the agency-level protests. See Agency-level Protest Decs. at 3. In any event, regardless of whether an independent review under FAR section 33.103(d)(4) is an alternative to, or an appeal of, a contracting officer’s decision on an agency-level protest, neither review tolls GAO’s filing deadlines for the reasons discussed below.

<sup>6</sup> MLS does not contend that the independent reviews were inconsistent with FAR section 33.103. See generally Protests; Responses.

independently reviewed pursuant to FAR section 33.103(d)(4). See The Peddler's Motor Inn--Recon., B-227110.2, B-227111.2, Aug. 17, 1987, 87-2 CPD ¶ 166 at 2. Thus, to be timely under our rules, MLS was required to file its protests with GAO within 10 days of the RFPs' respective closing dates when the protester had notice of initial adverse agency action, that is, when the Navy proceeded with the receipt of proposals without amending the RFPs and extending their deadline for proposals as requested by MLS.<sup>7</sup> 4 C.F.R. § 21.2(a)(3); FAR § 31.103(d)(4).

Finally, we agree with the Navy that MLS raises untimely new protest grounds that were apparent prior to the solicitations' respective closing dates. See Reqs. at 8-10. MLS purports to raise two new protest grounds: that the RFPs' port tariff provisions unduly restrict competition and that those provisions will deprive HSPs of a fair opportunity to compete for task orders, contrary to FAR section 16.505(b)(1). Protests at 4-5, 17-19. According to MLS, these protest grounds first became apparent in the decisions denying MLS's agency-level protests, because the decisions demonstrated that the Navy "expects the Port Tariff item provisions to permit some HSP contract-awardees to compete for a task order while preventing others from doing so, solely because they propose to comply with local laws and regulations."<sup>8</sup> Protests at 17-19.

As the Navy points out, these purportedly new protest grounds simply restate MLS's continuing argument--first raised during the solicitations' question and answer (Q&A) phases--that the RFPs' port tariff provisions will affect offerors differently because some

---

<sup>7</sup> To the extent that MLS contends that our timeliness rule requires a protester to abandon an agency-level protest while it is still under consideration and file the protest with GAO instead, see Responses at 4, we have previously considered such arguments and found them to lack merit. ACRO TECH, Inc.--Recon., B-270506.2, Apr. 18, 1996, 96-1 CPD ¶ 193 at 4 ("[A] contractor's decision to pursue agency resolution does not waive or toll our timeliness requirements."); Sunbelt Indus., Inc.--Recon., B-245780.2, Oct. 29, 1991, 91-2 CPD ¶ 399 at 2; Dock Express Contractors, Inc.--Recon., B-223966.2, Mar. 4, 1987, 87-1 CPD ¶ 243 at 2-3.

<sup>8</sup> In fact, the agency-level protest decisions state, among other things, that: historically the Navy has not obtained port tariff services directly from the ports covered by the RFPs, but has almost universally acquired such services through HSPs; the Navy expects and depends on HSPs to know applicable port rules and regulations and how they are enforced; some ports may simply require the HSP to explain its contractual relationship with the Navy; some ports may require the HSP to contract directly with the port authority or port-designated provider; at other ports, the HSP may find alternatives or "innovative solutions" such as providing a bond; and, in limited instances, one HSP may be able to reach an agreement with a port that does not bind the Navy, "but another HSP is unable to so and, thus, is unable to submit" an offer for a particular task order. See Agency-level Protest Decs. at 1-2. As indicated above however, we express no opinion on the propriety of the solicitations or the parties' arguments in that regard, because the protests are untimely.

HSPs will obtain port tariff services by misrepresenting their relationship with the Navy. See Reqs. at 8-10, citing RFP No. N40345-17-R-0121, amend. 3, Q&A No. 14 at 33 and RFP No. N62649-17-R-0030, Q&A no. 28 at 227 (MLS questioning whether the Navy would issue a task order to a “more truthful” HSP who may offer a more competitive price, but who advises the agency that the port refuses to subcontract with the HSP for the required services).<sup>9</sup> Inserting a cite to FAR section 16.505(b)(1) or suggesting for the first time that the RFP provisions also unduly restrict competition, does not make these arguments timely at this point.

In sum, because MLS filed its protests at GAO more than 10 days after the protester had actual or constructive knowledge of initial adverse agency action, we dismiss the protests as untimely. 4 C.F.R. § 21.5(e).

The protests are dismissed.

Thomas H. Armstrong  
General Counsel

---

<sup>9</sup> Our reference to RFP No. N62649-17-R-0030 is to the conformed version of the solicitation provided by the Navy in its request for dismissal. See Req. B-415708.2, exh. 1, RFP.