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# Decision

**Matter of:** SAGAM Securite Senegal

**File:** B-418583.2

**Date:** March 22, 2021

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Thomas A. Coulter, Esq., and Ryan J. Starks, Esq., Whiteford Taylor & Preston LLP, for the protester.

John W. Cox, Esq., Department of State, for the agency.

Lois Hanshaw, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest challenging the agency's cancellation of solicitation is untimely where notice of the basis of protest was received during protester's normal business hours, but protest was filed more than 10 calendar days after receipt of the agency's email notification; for purposes of our timeliness rules, the filing deadline imposed by our regulations is not tolled where the recipient's email system generated an automatic response indicating that the recipient was on leave.

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## DECISION

SAGAM Securite Senegal (SAGAM) of Dakar, Senegal, protests the cancellation of solicitation No. 19AQMM18R0332, issued by the Department of State for local guard services for the U.S. Embassy in Dakar. The protester contends that the agency erred in deciding to cancel the solicitation in response to discovering a violation of the Procurement Integrity Act (PIA).

We dismiss the protest as untimely because it was filed more than 10 calendar days after the protester knew, or should have known, the basis for its protest.

## BACKGROUND

The undisputed facts are as follows. On December 2, 2020, the contracting officer emailed the director of operations (director) for SAGAM to provide notice that the

agency was cancelling the solicitation.<sup>1</sup> Req. for Dismissal, Exh. 1, Emails between Agency and Protester (Dec. 2, 7, 10, 2020). Because the contracting officer did not receive acknowledgement of receipt of her email, she again emailed the director on December 7 and December 10, respectively. *Id.* Also on December 10, the agency's assistant regional security officer (security officer) emailed the protester's project manager (PM) to inquire as to whether the director had received the contracting officer's email. Resp. to Req. for Dismissal, Exh. 5, Emails between Agency and Protester (Dec. 10, 2020). SAGAM's PM responded to the agency's security officer by email and contacted the director to relay the security officer's message. Resp. to Dismissal Req. at 4. On the evening of December 10, the director responded to the contracting officer's previous emails. Resp. to Req. for Dismissal, Exh. 6, Email from Protester to Agency.<sup>2</sup>

On December 21, SAGAM protested to our Office, alleging that because the agency found a PIA violation, it was improper to cancel the solicitation, rather than disqualifying the competing offeror that improperly obtained information from SAGAM's proposal. Protest at 3.

## DISCUSSION

The agency subsequently requested dismissal, asserting that the protest is untimely because it was filed more than 10 days after December 2, the date on which the agency notified the protester of cancellation of the solicitation. The agency contends that the protester neither alleges that it failed to receive the agency's earlier emails, nor explains how such a failure would mitigate timeliness. *Id.*

In response, the protester contends that its protest is timely because it did not have actual or constructive notice of the agency's cancellation until December 10. Resp. to Req. for Dismissal at 2. In this regard, the protester explains that between November 23 and December 23, SAGAM's director was on leave and could not access emails without physically going into a SAGAM office. *Id.* at 3, 5. In support of this assertion, the protester states that "[i]n accordance with standard business practices," the director enabled an automatic email response providing notice that the director was on leave with irregular access to email and that urgent matters should be addressed to SAGAM's PM. *Id.* at 3. Thus, the protester asserts that although the agency sent an email providing notice on December 2, the protester did not have constructive or actual knowledge of the notice of cancellation until the director accessed his email account on December 10. *Id.* at 2. In addition, the protester contends that the agency's failure to

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<sup>1</sup> The attachment to the email explained that the solicitation was being cancelled because the agency determined that it had violated the PIA and that the violation impacted the procurement. Protest, Exh. B, Notice of Cancellation at 1.

<sup>2</sup> The email chain includes messages from the contracting officer dated December 2, 7, and 10. Resp. to Req. for Dismissal, Exh. 6, Emails between Agency and Protester.

contact the PM, as expressly instructed by director's automatic reply,<sup>3</sup> was the only reason that SAGAM did not have notice of the agency's decision to cancel the solicitation until December 10. *Id.* at 5.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These 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. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2).

In determining whether the protester should be charged with constructive knowledge of the agency's adverse decision, we consider a protester's regular business hours, rather than an agency's regular business hours as the more persuasive factor in determining constructive knowledge. *See Tribologik Corp.*, B-417532, Aug. 2, 2019, 2019 CPD ¶ 284 at 8. For the purposes of our timeliness rules, the mechanical receipt of the email during a firm's regular business hours constitutes notice to a party. *Golight Inc.*, B-401866, Sept. 10, 2009, 2009 CPD ¶ 184 at 2.

Here, the record shows that on Wednesday, December 2 at 3:44 p.m., the agency emailed SAGAM's director, and the director did not respond until December 10 at 11:17 p.m. because he was on leave. Resp. to Dismissal Req, Exh. 5, Email from Contracting Officer to Director; Exh. 6, Email from Director to Contracting Officer (Dec. 10, 2020). Because the email in question was available to be opened during regular business hours by SAGAM on December 2, we consider the email to have been received by the protester on that date. The fact that SAGAM's director did not access his email because he was on leave does not toll the filing deadline imposed by our regulations. *See e.g., Golight, supra* (concluding that email sent to employee who was out of the office during regular business hours was received on the date the email was sent).

Additionally, the protester has failed to establish a basis to conclude that it did not receive notice of cancellation of the solicitation on December 2. For example, the protester does not represent that the agency sent the December 2 email to the wrong email address or incorrect recipient. Similarly, the protester has not shown that the email was sent outside the protester's regular hours of operation or on a day when the

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<sup>3</sup> The protester represents that between November 23 and December 23, the director's email account generated automatic responses indicating that the director was on leave until December 23, and identifying the PM for SAGAM as an alternate contact for urgent matters. Resp. to Dismissal Req., Exh. 1, Declaration of Director at 1. In response, the agency represents that it did not receive this information. Supp. Req. for Dismissal, Exh. 1, Lost Email Inquiry. Whether the agency received the automatic response is not dispositive here. Accordingly, we need not resolve this dispute.

protester's office was closed. *Cf. Tribologik, supra* (concluding that the protester should not be charged with constructive knowledge of the agency's decision where receipt of the email occurred outside the company's regular business hours).

Although SAGAM contends that the agency should have contacted the PM identified as the alternate contact in the director's automatic response, SAGAM's argument does not demonstrate, and we cannot find, a basis to impose such a duty on the agency. Our timeliness rules do not turn on whether an agency has sent information to a particular designated address; rather, we look to whether the relevant information was in fact received by the offeror. *Hawker Beechcraft Def. Co., LLC*, B-406170, Dec. 22, 2011, 2011 CPD ¶ 285 at 3. While we recognize that the protester's automatic response provided notice that the director was out of the office, we decline to conclude here that the agency was required to respond or otherwise take action in response to receiving this notice.

Based upon the record before us, we conclude that the protester knew or should have known of its basis of protest on December 2--*i.e.*, when the agency first provided email notice that the solicitation was canceled. Accordingly, the protester should have filed its protest by no later than December 14. However, the protest was not filed until December 21. Therefore, the protest is untimely.<sup>4</sup>

The protest is dismissed.

Thomas H. Armstrong  
General Counsel

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<sup>4</sup> SAGAM also argues that its protest should nevertheless be considered under the good cause and significant issue exceptions to our timeliness rules. *Resp. to Dismissal Req.* at 5. The good cause exception to GAO's timeliness rules is limited to circumstances where compelling reasons beyond the protester's control prevent the protester from filing a timely protest, while the significant issue exception is limited to untimely protests that raise issues of widespread interest to the procurement community, and which have not been considered on the merits in a prior decision. *Baldt Inc.*, B-402596.3, June 10, 2010, 2010 CPD ¶ 139 at 2-3. SAGAM has not demonstrated any compelling reason why it could not have timely challenged the cancellation, nor has it demonstrated the presence of a significant issue; for example, our Office has addressed issues similar to those raised here in previous decisions. *See, e.g., Superlative Techs., Inc.*, B-310489.4, June 3, 2008, 2008 CPD ¶ 123 (reviewing the propriety of cancelling a solicitation after a potential procurement integrity violation).