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Decision

Matter of: Tyonek Engineering and Agile Manufacturing, LLC

File: B-419775; B-419775.2; B-419775.3

Date: August 2, 2021

Jeffery M. Chiow, Esq., Lucas T. Hanback, Esq., Stephen L. Bacon, Esq., and Eleanor Ross, Esq., Rogers Joseph O'Donnell, PC, for the protester. Scott M. McCaleb, Esq., Tracye Winfrey Howard, Esq., J. Ryan Frazee, Esq., and Adam Briscoe, Esq., Wiley Rein LLP; and Jade C. Totman, Esq., The Boeing Company, all for The Boeing Company, an intervenor. Wade L. Brown, Esq., and Adam Fontana, Esq., Department of the Army, for the agency. Louis A. Chiarella, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of proposed sole-source contract to the incumbent contractor for the production of automated testing equipment is dismissed as untimely where the protest was filed more than 10 days after the agency posted a notice, which did not request responses from other potential sources, stating its intention to enter into the sole-source contract on the basis that the incumbent was the only source able to meet the agency's requirements without unacceptable delays.
2. Supplemental protests challenging the justification and approval in support of the agency's notice of intent to issue a sole-source contract to the incumbent contractor based on only one responsible source capable of meeting agency's requirements for highly specialized equipment without unacceptable delays are found to be without merit.

DECISION

Tyonek Engineering and Agile Manufacturing, LLC, of Madison, Alabama, protests the intended sole-source award of a contract to The Boeing Company, of St. Louis, Missouri, under sole-source award notice No. W15QKN21R0083, issued by the Department of the Army, Army Materiel Command, for the supply of Next Generation Automated Test Systems (NGATS). Tyonek contends that the intended sole-source contract award to Boeing is improper and, among other things, is the result of a lack of advance planning on the part of the contracting agency.

We deny the protest.

BACKGROUND

The NGATS is the latest addition to the Army's approved family of automated test equipment (ATE). It is a highly mobile, rapidly deployable, and reconfigurable automatic test system used to support testing digital and analog electronic hardware and software for a variety of Army weapon systems. Contracting Officer's Statement and Memorandum of LAW (COS/MOL) at 2; Protest at 3. The NGATS is capable of performing field-level diagnostics at the brigade level for a variety of Army platforms, and replaces three older Army ATE systems. COS/MOL at 2, Agency Report (AR), Tab 4, NGATS Acquisition Plan/Acquisition Strategy Report at 7. The NGATS enhances the ability of Army maintenance personnel to "fix forward," *i.e.*, repair weapon systems at the tactical unit level.

On September 24, 2014, the Army competitively awarded contract No. W15QKN-14-D-0106 to Boeing for NGATS full-rate production.¹ COS/MOL at 2; AR, Tab 16, Boeing Contract Award Synopsis at 1-4. The Boeing contract was a 5-year, indefinite delivery, indefinite quantity (IDIQ) contract with a maximum order amount of \$102 million. Under this contract, Boeing provided the Army with NGATS consoles, self-test adapters, and shelter integration services. The Boeing contract also included the delivery of a first article unit; this was because although the NGATS unit had previously been qualified, the source here (*i.e.*, Boeing) had not. Boeing completed first article qualification in 2015 and began the manufacture and delivery of NGATS production units in 2016. AR, Tab 4, NGATS Acquisition Plan/Acquisition Strategy Report at 8.

While there is some dispute about exact numbers, the record reflects that from 2016 until late 2020, the Army planned to procure a total of approximately 160 NGATS units. COS/MOL at 3; AR, Tab 60, Declaration of NGATS Product Director at 2; Hearing Transcript (Tr.) at 23, 32.² The record also reflects that the Army's total planned procurement of 160 NGATS units exceeded what could be ordered under the Boeing contract. Supp. COS/MOL at 11; tr. at 62.

On May 8, 2019, the Army executed a J&A to extend the 2014 Boeing contract for an additional 2 years from September 25, 2019, to September 24, 2021. AR, Tab 24, 2019 J&A at 1-11. The purpose of the contract extension was to meet the "current Army Fielding plan for [fiscal year] FY20 and FY21" of 19 NGAT units and 20 NGATS

¹ The Army previously awarded a contract in 2009 to the Northrup Grumman Corporation for NGATS low-rate initial production. As part of the Northrop contract, the Army obtained government purpose right to the NGATS technical data package (TDP). AR, Tab 24, 2019 Justification and Approval (J&A) at 8.

² Our Office conducted a hearing in this protest at which the Army contracting officer, the NGATS product director, and NGATS project officer testified regarding the agency's procurement action.

units, respectively. *Id.* at 3. The J&A presented the agency's conclusion that there was only one responsible source and no other supplies or services would satisfy the agency's requirements. *Id.*, citing 10 U.S.C. § 2304(c)(1); Federal Acquisition Regulation (FAR) 6.302-1(a)(2)(ii)(B). The J&A stated that although there may be other companies with potential NGATS production capability, "[i]n order to meet the fielding requirements, a company would have to build the First Article, conduct First Article Testing (FAT) and Qualification Testing, produce, and deliver"--events which would take approximately 29 months to compete. *Id.* at 4. The J&A concluded that "this delay is unacceptable as the Army fielding plan which requires deliveries in FY20 and [FY]21 would not be met." *Id.* at 5. The Army subsequently modified the 2014 Boeing contract, extending the period of performance by 2 years and increasing the maximum order amount from \$102 million to approximately \$145 million. Supp. COS/MOL at 12; AR, Tab 3, 2021 J&A at 18.

In the fourth quarter of FY20 (July–September 2020), the Army made a decision to reduce the NGATS requirement to 50 additional units beyond those already being procured under the Boeing contract.³ AR, Tab 4, Acquisition Plan/Acquisition Strategy Report at 8; tr. at 32. These 50 units were to be fielded in FY22-24. AR, Tab 3, 2021 J&A at 5-6; Tab 4, Acquisition Plan/Acquisition Strategy Report at 8. The record reflects that the Army decision to reduce its NGATS requirement was largely a matter of funding prioritization. Tr. at 30-56. The record also reflects that although the Army decreased the total quantity of NGATS to be procured, and shortened the total delivery period, there was never an intent to have a break in production or fielding of the units. *Id.* at 58. Simply put, there was always an intent to field NGATS units in FY22-24, both before and after the reduction in the total quantity requirement. *Id.*

On October 6, 2020, the Army issued request for information (RFI) No. W15QKN-21-X-0DZF (RFI No. -0DZF) regarding NGATS full-rate production. The RFI stated that the agency was seeking to identify vendors that could provide automated test equipment console services in the following area: (1) production; (2) production life cycle; (3) integration; (4) interfaces and systems software; and (5) management. AR, Tab 31a, RFI No. -0DZF, at 4-5. Unlike prior NGATS RFIs, Tyonek did not respond to the RFI here.

The Army subsequently completed a market research report regarding RFI No. -0DZF, and found four vendors to be fully or partially capable in all assessed areas. AR, Tab 13, Market Research Evaluation Report No. -0DZF at 15 ("Based on the evaluation of the responses to the sources sought notice there are sufficient sources in the marketplace that have the capabilities to produce and integrate NGATS ATE systems."). The report concluded, however, that although multiple vendors were potentially capable

³ This represented a reduction in the total NGATS requirements from approximately 160 units to 105 units, insofar as approximately 55 units had already been procured under the Boeing contract. Supp. COS/MOL at 11; tr. at 103. For the Army field units that would no longer be getting the NGATS as once planned, they would continue to use the older Army ATE systems. Tr. at 50.

of producing NGATS consoles, “if this acquisition were to be competed under Full and Open Competition, it would take an additional 15 months to qualify a new vendor capable of producing NGATS consoles and an additional 14 months to build and start delivery for a total of 29 months.” *Id.*

On April 7, 2021, the Army executed the subject J&A for a sole-source contract award to Boeing for 50 NGATS consoles and 28 shelter integrations, at a total value of \$93 million. AR, Tab 3, 2021 J&A at 1-21. The J&A’s cited authority for the action was 10 U.S.C. § 2304(c)(1) and FAR section 6.302-1(a)(2)(ii)(B)), Only one responsible source and no other supplies or services will satisfy the agency’s requirements. *Id.* at 6. The J&A included the Army’s rationale as to why Boeing was the only source that could meet the agency’s requirements without unacceptable delays:

Boeing is the current and only producer of NGATS production systems, and the only company that can manufacture and deliver the NGATS consoles, adapters and shelter integration [services] in the time frame necessary to meet the fielding requirements. The current Army fielding plan for the NGATS consoles, self-test adapters and shelter integration supported by this J&A is as follows: 50 NGATS Consoles and self-test adapters and 28 shelter integrations in FY22-FY24. While recent market research indicates that there may be other companies in the market place with the potential to have NGATS production capability, none of these companies currently have the production capability required to meet the aforementioned Army fielding plan. A vendor other than Boeing would have to build the First Article, conduct First Article Testing (FAT), conduct Qualification Testing, produce, and deliver the required quantities, to meet the fielding requirements. All of these events, which need to be accomplished sequentially, would take approximately 31 months to complete, and would potentially result in the delivery of only the first production units. The details of these timelines are depicted in the chart below, and discussed in detail thereunder.

* * * * *

Taking into consideration [procurement acquisition lead time] PALT to competitively award a new contract and the manufacturing timelines above, delivery of the initial NGATS console and self-test adapter would not occur until FY25. Based on the analysis herein, this delay is unacceptable as the Army fielding plan which requires deliveries in FY22, 23 and 24 would not be met. The inability to meet the Army fielding plan results in harm to the Army due to lost capabilities in repairing Army weapon system platforms.

Id. at 6, 8.

The record reflects the Army's 2021 J&A essentially mirrors its 2019 J&A. Specifically, in relation to the point in time at which the sole-source justification was prepared, the J&A again asserts the Army would purportedly incur unacceptable delays of 29-31 months in NGATS fielding associated with procuring from any source other than Boeing. *Id.* at 6; Tab 24, 2019 J&A at 4.

On April 8, 2021, the Army posted a notice on the beta.SAM.gov website which stated:⁴

The US Army . . . intends to solicit, negotiate, and award a new sole source Firm Fixed Price (FFP) IDIQ Contract for the Next Generation Automated Test System (NGATS) to The Boeing Company. . . . The Justification & Approval (J&A) cites unacceptable delays to the Government. Authority for this procurement comes under 10 U.S.C. [§] 2304(c)(1); as implemented by [FAR] 6.302.1(a)(2)(iii)(B), Only one responsible source and no other supplies or services will satisfy agency requirements. This notice of intent is not a request for competitive proposals. Questions may be directed to. . . .

AR, Tab 5, Presolicitation Notice No. W15QKN-21-R-0083 at 4.

The notice also included an "Original Published Date" of April 8, 2021, and an "Original Response Date" of April 23, 2021.⁵ *Id.* at 2.

On April 9, Tyonek emailed the contracting activity and inquired about the Army's sole-source award notice. Specifically, Tyonek asked:

Is there more information as to why this will be sole-sourced to Boeing?
The government seems to have all data rights to the documentation, and has had multiple sources sought over the last 3 years. It seems like there

⁴ Beta.SAM.gov was, at the time, the official government-wide point of entry (GPE) website where government business opportunities valued above \$25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public. See FAR 2.101. Although the FAR currently states the GPE is located at FedBizOpps (www.fbo.gov), beta.SAM.gov was the official government successor website to www.fbo.gov. The beta.SAM.gov website has since merged with SAM.gov, and all content from both sites is now at SAM.gov. See <https://sam.gov/content/home> (last visited July 18, 2021).

⁵ The Army states the "original response date" was automatically generated by the beta.SAM.gov system, and the agency could not disable the function. GAO Conference Call with Parties, May 25, 2021 (Electronic Protest Docket System No. 15). Also, the response date was based upon the notice publicizing time established by FAR section 5.203 ("The notice must be published at least 15 days before . . . a proposed contract action [where] the Government intends to solicit and negotiate with only one source under the authority of FAR 6.302. . . .").

had been plenty of planning on the government side to allow for full and open solicitation. I would like to request the solicitation when it[']s available and an updated Technical Data Package. . . . Tyonek intended to bid on this opportunity. . . .

AR Tab 21, Email Exchange with Tyonek at 1-2.

On April 13, the contracting officer replied as follows:

A Justification and Approval under the authority of [10 U.S.C. § 2304(c)(1)] as implemented by [FAR 6.302-1] - Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements . . . was signed . . . on 07 April 2021. This Justification cited unacceptable delays to the Government if soliciting using full and open competition. Market research has indicated that no other vendor would be able to meet the Army's fielding schedule for this program, which was the basis for the [J&A]. At this time we will not be entertaining proposals from other vendors for this requirement.

We encourage you to continue to monitor beta.SAM for other opportunities related to this program as well as any others and thank you for your interest in the Government acquisition process.

Id. at 1.

Tyonek filed its protest with our Office on April 23.⁶

DISCUSSION

Tyonek raises numerous arguments related to the agency's current sole-source award decision. Specifically, the protester initially contends: (1) the agency failed to comply

⁶ On April 23--the same day that it filed the protest with our Office--Tyonek also submitted a capabilities statement to the Army. Protest at 5; Exh. E, Tyonek Capabilities Statement, Apr. 23, 2021, at 121-126. The Army ultimately reviewed Tyonek's submission and found Tyonek not to be capable in four of the five areas assessed, *i.e.*, production, production life cycle, integration, and interfaces/systems software. AR, Tab 61, Review of Tyonek Capability Statement at 1-4. Specifically, the Army determined that: "[t]he offeror has not demonstrated the ability or capability to produce and integrate complex tactical ATE systems"; the offeror has not supported the claimed ability to meet NGATS production requirements; the offeror's submission indicates it has never performed system integration for ATE items; and "the offeror has not provided information to support [its] ability to support the development, integration and implementation of a fully functional, system level software environment that allows multiple Run Time Systems to coexist." *Id.* at 1-2.

with the statutory and regulatory requirements to justify a sole-source procurement; (2) the intended sole-source award arose from the agency's lack of advanced planning; (3) the agency's notice of noncompetitive contract award violated the requirements of the FAR; and (4) the agency failed to conduct adequate market research to support a sole-source award determination. Protest at 7-10. Tyonek also alleges the J&A turns upon the Army's arbitrary "reduction" in requirements for NGATS.⁷ Supp. Protest, June 7, 2021, at 1-5. Lastly, Tyonek contends the agency's *post-hoc* evaluation of Tyonek's capability statement is inaccurate and should be disregarded. Supp. Protest, July 1, 2021, at 1-4. The gravamen of Tyonek's protest, however, is that the delays which the agency considers to be "unacceptable" associated with qualifying a second source for the production of NGATS units are the result of a lack of advanced planning.

As detailed below, we find no basis on which to sustain the protest. Rather, we find Tyonek's initial protest to be untimely and the remaining protest grounds to be without merit.⁸

⁷ Tyonek states that while it characterizes the agency's actions as "pretextual," "disingenuous," and the product of "gamesmanship," Supp. Protest, June 7, 2021, at 4, 7, it does not allege bias or bad faith. Tyonek Withdrawal of Supp. Protest Ground and Clarification re Bias at 1. Tyonek also protested that the agency improperly failed to set aside the procurement for eligible small business concerns, but subsequently elected to withdraw this basis of protest. Supp. Protest, June 7, 2021, at 5-7; Tyonek Withdrawal of Supp. Protest Ground and Clarification re Bias at 1.

⁸ As an initial matter, we find no merit in Boeing's argument that Tyonek is not an interested party to challenge the Army's sole-source procurement action because the protester failed to timely respond to the preceding RFI. We have previously decided that, in situations where a sole-source award notice is conjoined with a request for expressions of interest, a protester must submit a timely expression of interest in fulfilling the potential sole-source requirement and receive a negative agency response as a prerequisite to filing a protest challenging an agency's sole-source decision. See *Allerion Inc.*, B-256986, Apr. 28, 1994, 94-1 CPD ¶ 281; *Norden Sys., Inc.*, B-245684, Jan. 7, 1992, 92-1 CPD ¶ 32. This procedure gives the agency an opportunity to reconsider its sole-source decision in light of a serious offeror's preliminary proposal while also limiting challenges to the agency's sole-source decision to diligent potential offerors. *Fraser-Volpe Corp.*, B-240499 *et al.*, Nov. 14, 1990, 90-2 CPD ¶ 397.

Here, by contrast, the Army's sole-source award notice was not accompanied by a request for expressions of interest. AR, Tab 5, Presolicitation Notice No. W15QKN-21-R-0083 at 1-4. Additionally, the RFI in question included language stating that "[n]ot responding to this notice does not preclude participation in any future [request for proposals] RFP, if any is issued." AR, Tab 31a, RFI No. -0DZF at 3. Under such circumstances, we do not find that Tyonek's decision not to respond to the preceding RFI deprives it of standing to challenge the subsequent sole-source award determination.

Timeliness of Initial Protest

The Army, as well as Boeing, argues that Tyonek's initial protest challenging the intended sole-source award should be dismissed as untimely. Specifically, the Army argues that the April 8 intent to sole-source notice, posted on the beta.SAM.gov website, provided Tyonek with the information that formed the basis of protest, and that Tyonek failed to file its protest with our Office within 10 days thereof. Agency Dismissal Request at 6-7; *see also* Boeing Supp. Comments at 5-7.

Tyonek initially asserts that its protest was timely because it was filed prior to the sole-source notice's response date. Protest at 2, *citing* 4 C.F.R. § 21.2(a)(1). Subsequently, the protester also argues that its protest is timely because it was filed within 10 days of when it learned (on April 13) that the agency would not consider responses from vendors and had already decided to proceed with a sole-source award. Tyonek Response to Agency Dismissal Request at 2, *citing* 4 C.F.R. 21.2(a)(2). Tyonek contends that prior to the contracting officer's "definitive statement" in the April 13 email, the firm did not possess any basis to protest and that its protest would have been premature. *Id.*, *citing Forensic Quality Servs.-Int'l*, B-299723, May 23, 2007, 2007 CPD ¶ 97 at 2. We disagree.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. *Logistics Mgmt. Inst.*, B-417601 *et al.*, Aug. 30, 2019, 2019 CPD ¶ 311 at 14. These rules require that a protest based on other than alleged improprieties in a solicitation be filed no later than 10 days after the protester knew or should have known its basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2).

We have previously recognized that publication on the GPE website--be it FedBizOpps or beta.SAM.gov--of an agency's intent to enter into a sole-source contract constitutes constructive notice of that proposed contract action. *Prudential Protective Servs., LLC*, B-418869, Aug. 13, 2020, 2020 CPD ¶ 272 at 3; *CBMC, Inc.*, B-295586, Jan. 6, 2005, 2005 CPD ¶ 2 at 2. In those instances where the sole-source notice also requested that potential alternate sources submit an expression of interest and demonstration of capabilities, we have found that the protester's timely filing of the requested submission to the agency was a prerequisite to timely protesting to our Office. *Allerion Inc.*, *supra* at 2; *Fraser-Volpe Corp.*, *supra* at 3. However, in those situations where the sole-source notice does not invite or request responses from potential sources, we have found that a protest of the proposed sole-source award must be filed within 10 days of the announcement that the agency will use a sole-source procurement. *See, e.g.*, *AGMA Sec. Serv., Inc.*, B-418647, June 24, 2020, 2020 CPD ¶ 223 at 3-4; *VSE Corp.*; *Johnson Controls World Servs., Inc.*, B-290452.3 *et al.*, May 23, 2005, 2005 CPD ¶ 103 at 5-6; *S.T. Research Corp.*, B-232751, Oct. 11, 1988, 88-2 CPD ¶ 342 at 1.

Here, we find the Army's April 8 intent to sole-source announcement--which invited no responses from potential sources--provided adequate notice of the Army's proposed

sole-source contract award to Boeing, such that Tyonek was required to protest this proposed action within 10 days of publication of the announcement. *VSE Corp.; Johnson Controls World Servs., Inc., supra* at 6.

We also disagree with Tyonek that the firm lacked the information necessary to file this protest until receipt of the contracting officer's April 13 email. All of Tyonek's arguments challenge the Army's decision to initiate a sole-source procurement with Boeing on the basis that Boeing was viewed as the only firm able to produce NGATS units without unacceptable delays to the Army. The intention to take that action and the associated legal rationale--that there was only one responsible source--were both apparent from the April 8 sole-source notice. Tyonek, thus, knew or should have known on April 8 that the Army believed Boeing was the only responsible source. To the extent that Tyonek wanted to argue that it could also meet the Army's requirements, the firm had a basis to challenge the agency's rationale upon issuance of the sole-source notice.⁹ Accordingly, to be timely, Tyonek had to file any protest challenging the Army's intent to make a sole-source award to Boeing within 10 days of the April 8 notice. *AGMA Sec. Serv., Inc., supra* at 3.

Further, we find Tyonek's assertions that it did not learn until April 13 that the Army did not intend to consider alternate responses, and had already decided to proceed with a sole-source award, are belied by the facts in the record. First, there is scant difference between the language contained in the sole-source notice ("This notice of intent is not a

⁹ We also find Tyonek's reliance on our decision in *Forensic Quality Servs.-Int'l, supra*, to be misplaced. In *Forensic*, we found a protest against a proposed Federal Bureau of Investigation (FBI) sole-source award to be premature where the protester had submitted a timely expression of interest in response to the agency's presolicitation notice of intent to conduct a sole-source procurement, which the agency had not rejected. Specifically, the presolicitation notice announced that "[a]ny firms desiring consideration must fully identify, in writing, their capabilities to perform the mandatory requirements addressed herein, including the government's time frame for accreditation to occur." *Id.* at 1.

In light of the FBI's representation that it was actively reviewing the merits of the protester's expression of interest, we applied a "wait and see" rule, *i.e.*, "the protester can protest the sole-source and related issues within 10 days of when it knows or should have known that its response was rejected and that the sole-source procurement is proceeding." *Id.* at 2. Here, unlike the facts in *Forensic*, (1) the Army's sole-source notice had not invited responses; (2) Tyonek had not submitted a response to the presolicitation notice prior to receipt of the contracting officer's April 13 email; (3) the Army was not then in the process of considering any Tyonek response; and (4) the Army had already made it known in its notice that the agency was proceeding with the sole-source procurement. In sum, as there was no Tyonek response then under consideration by the agency, it would not have been premature for Tyonek to file its protest prior to the contracting officer's April 13 email.

request for competitive proposals”) and the language used in the contracting officer’s subsequent email, re-affirming the fact that the agency was not requesting proposals (“At this time we will not be entertaining proposals from other vendors for this requirement”). AR, Tab 5, Presolicitation Notice No. W15QKN-21-R-0083 at 4; Tab 21, Email Exchange with Tyonek at 2. Thus, we find no merit in the protester’s assertion that only the latter statement, but not the former one, adequately informed vendors that the Army would not consider responses (*e.g.*, capability statements) from alternate sources.¹⁰ See Tyonek Response to Agency Dismissal Request at 2 (“Tyonek did not have any basis to protest until April 13, when the Contracting Officer rejected Tyonek’s request for the solicitation and informed Tyonek that the Agency would ‘not be entertaining proposals from other vendors for this requirement’ because it concluded that no other vendor could meet the Army’s fielding schedule.”).

It is likewise evident from the April 8 notice that a J&A had been executed and the agency had already decided to proceed with a sole-source award. AR, Tab 5, Presolicitation Notice No. W15QKN-21-R-0083 at 3; see *also* Protest at 2 (“the Notice indicates the J&A proceeds from the erroneous premise that there is only one responsible source to meet the Army’s NGATS requirements”). It is clear, we think, that based on the April 8 notice, Tyonek knew or should have known that: (1) the agency had already executed a J&A based on the conclusion that no other source would avoid unacceptable delays; and (2) because the agency had already decided to proceed with a sole-source award, it was not considering or entertaining any responses from other sources. The contracting officer’s April 13 email did no more than reiterate this prior information.

Finally, we recognize the incongruity of including a response date in the Army’s sole-source notice but not including an invitation to submit responses. In fact, the notice here did the opposite: it did not include a solicitation; it announced a final agency decision; and it expressly informed vendors that “[t]his notice . . . is not a request for competitive proposals.” AR, Tab 5, Presolicitation Notice No. W15QKN-21-R-0083 at 4. As noted earlier, the Army asserts--and we are provided with no contradictory information to conclude otherwise--that the response date was automatically generated by the beta.SAM.gov system and the agency could not disable the function. Based on the notice’s language as a whole, we find that Tyonek knew or should have known that the response date was meaningless, and that the incongruous inclusion of a response date did not alter Tyonek’s obligation to file its protest within 10 days of the notice’s publication. As Tyonek did not file within 10 days of the notice, the initial protest is untimely.

¹⁰ Tyonek also argues that the Army’s sole-source notice should have requested responses from offerors, and was defective in this regard. Protest at 8-9. This, however, does not obviate the fact that potential offerors were placed on notice of the agency’s intent to sole-source a contract, and that the Army was not seeking responses from alternate sources.

Remaining Protest Allegations

Tyonek also protests that the Army's sole-source procurement turns upon an arbitrary reduction in NGATS requirements, and that the agency's *post-hoc* evaluation of Tyonek's capability statement is inaccurate and should be disregarded. Supp. Protest, June 7, 2021, at 2; Supp. Protest, July 1, 2021, at 1-4. We deny these allegations for the reasons below.

Tyonek contends the 2021 J&A turns upon the Army's arbitrary "reduction" in NGATS requirements which is allegedly contradicted by the record. Supp. Protest, June 7, 2021, at 2-5. Specifically, among other things, the protester claims that: (1) the Army "moved around" its NGATS requirements between budgetary documents "as a pre-text to justify this sole source procurement"; (2) the Army provided no rational explanation for its stated requirement of 50 additional NGATS consoles; (3) the Army allegedly admits that its total acquisition objective is greater than 50 additional NGATS units; and (4) the Army never explained why a quantitative reduction in the NGATS requirement caused the agency to abandon a competitive acquisition strategy. *Id.* at 1; see Tyonek Supp. Comments at 8-14. We disagree.

First, we find no merit in Tyonek's allegation that the Army merely moved around its NGATS requirements between budgetary documents as a pretext to justify a sole-source procurement. As the agency explains, the document on which Tyonek relies to support its assertion here applies to NGATS common core test program hardware equipment (*i.e.*, accessories, cables), and not NGATS consoles themselves--which is the requirement at issue in this protest. Supp. COS/MOL at 4-5; AR, Tab 7, NGATS Basis of Issue Plan, Apr. 17, 2020, at 2; Tab 60, Declaration of NGATS Product Director at 4. Tyonek provides no information to dispute the agency's explanation. See Tyonek Supp. Comments, *passim*.

Further, the record reflects that the Army, for budgetary reasons, made a decision to reduce its NGATS procurement and fielding requirements. AR, Tab 3, 2021 J&A at 4-5; Tab 60, Declaration of NGATS Product Director at 2 (stating that because of "funding constraints," both the Army's actual operational requirements and funded requirements for NGATS units were reduced); Tr. 30-56. The record also indicates that the Army's decision to reduce its NGATS requirement was made separate from, and in advance of, the agency's acquisition strategy determination. The mere fact that various Army program personnel would prefer to procure additional NGATS units simply does not indicate that the programmatic decision to reduce total NGATS procurement and fielding quantities was either unreasonable or pretextual, as Tyonek claims. Finally, as the protester itself recognizes, it is the Army's FY22-24 fielding schedule--and not the NGATS quantity amount--which provides the basis for the agency's assertion that there is but one responsible source that can meet the agency's requirement for highly specialized equipment without unacceptable delays. See AR, Tab 3, 2021 J&A at 6; Tyonek Post-Hearing Comments at 1.

We also find no merit to Tyonek's assertion that the agency's evaluation of the firm's capabilities statement was unreasonable and should therefore be disregarded. As set forth above, the Army issued several RFIs regarding the NGATS procurement before posting the April 8 notice of its intent to proceed on a sole-source basis. Although Tyonek failed to respond to the last RFI, RFI No. - 0DZF, by the October 21, 2020 response date, the Army elected to review Tyonek's untimely capabilities statement--submitted at the same time Tyonek filed its protest. During this review, the Army concluded that the firm was not capable of meeting the agency's requirements in multiple areas beyond the one that is the subject of protest, *i.e.*, the ability to meet the NGATS delivery schedule without unacceptable delays. AR, Tab 61, Tyonek Capability Statement Review at 1-4.

Specifically, the Army found that Tyonek: had not demonstrated the ability or capability to produce complex tactical ATE systems; had not demonstrated that it had ever performed system integration of ATE items; and, with regard to interfaces and system software, did not provide sufficient information to demonstrate its ability to support the development, integration and implementation of a fully functional, system level software environment.¹¹ *Id.* at 1-2. We find reasonable the agency's conclusion that while Tyonek demonstrated the ability to produce parts, kits, and subassemblies, it failed to demonstrate the ability, in multiple regards, to perform full scale ATE production like that required for NGATS. While Tyonek attempts to dispute certain specific agency findings, we find the agency's overall evaluation here to be both unobjectionable and adequately documented.¹²

¹¹ In fact, a review of Tyonek's capabilities statement indicates that it does not directly address integration capability, or mention interfaces and system software. See Protest, Exh. E, Tyonek Capabilities Statement, Apr. 23, 2021, at 121-126.

¹² As Tyonek was reasonably found to be not capable of meeting the agency's requirements in multiple areas beyond the one that is the subject of protest (*i.e.*, the ability to meet the Army's NGATS delivery schedule without unacceptable delays), we also find the protester has failed to demonstrate that it was competitively prejudiced by the agency's procurement action which it disputes. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. *HP Enter. Servs., LLC*, B-411205, B-411205.2, June 16, 2015, 2015 CPD ¶ 202 at 6; see also *Sallyport Global Holdings*, B-417223.2, B-417223.4, Apr. 3, 2019, 2019 CPD ¶ 133 at 5. Here, even if our Office were to determine that the agency's alleged unacceptable delays in the fielding of NGATS units were the result of a lack of advance planning, we would nonetheless have no basis to conclude that Tyonek has any chance of receiving the award. See *SSI Tech., Inc.*, B-417917, Dec. 4, 2019, 2019 CPD ¶ 418 at 6; *McKesson Automation Sys., Inc.*, B-290969.2, B-290969.3, Jan. 14, 2003, 2003 CPD ¶ 24 at 8-9; see also *Amtech Sys. Corp.*, B-252414, June 29, 1993, 93-1 CPD ¶ 500 at 4.

Tyonek argues the Army's *post hoc* evaluation of the protester's capabilities statement should be given little if any weight by our Office, because analyses "prepared in the heat of the adversarial process may not represent the fair and considered judgment of the agency." Tyonek Supp. Comments at 15, *citing Sikorsky Aircraft Co.; Lockheed Martin Sys. Integration-Owego*, B-299145 et al., Feb. 26, 2007, 2007 CPD ¶ 45 at 10. We disagree. First, there are significant portions of the agency's evaluation of the protester's capabilities statement which Tyonek does not in fact dispute. Second, we find the agency's evaluation here to be entirely consistent with earlier evaluations of Tyonek capability statements submitted in response to prior RFIs for NGATS full rate production. See AR, Tab 10, Market Research Evaluation Report No. -0BLU, June 3, 2020, at 6, 8 ("The offeror has not demonstrated any of the ability or capability to produce and integrate a complex tactical ATE systems"); Tab 26, Market Research Evaluation Report No. -040J, Oct. 29, 2018, at 6, 8 ("The offeror has not demonstrated the ability or capability to perform high scale ATE production on a continual basis").

Moreover, we find the timing of the agency's review here to be entirely the result of Tyonek's failure to submit a capabilities statement to the agency in a timely manner. The Army, quite simply, could not have evaluated Tyonek's capabilities statement at any other time than after the filing of the protest, because Tyonek submitted the statement in response to the RFI on the same day as it filed its protest. If Tyonek had wanted its capabilities statement evaluated outside the heat of litigation, it should have submitted the capabilities statement by the applicable RFI closing date (*i.e.*, October 21, 2020) rather than mere hours before filing its protest.

The protest is denied.

Edda Emmanuelli Perez
General Counsel