

## Decision

**Matter of:** Done By Native, LLC

**File:** B-419844

**Date:** August 19, 2021

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Louay Azar for the protester.

Dennis J. Gallagher, Esq., Department of State, for the agency.

Alexander O. Levine, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest challenging rejection of protester's quotation is denied in part where the rejection was based on the agency's reasonable interpretation of the solicitation's pricing terms and dismissed in part because any ambiguity with respect to those terms was patent not latent, and as a result, any challenge to those terms at this juncture is untimely.

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### DECISION

Done by Native, LLC (DBN), a small business located in Clovis, New Mexico, protests the award of a contract to Al-Baher Arabic Language Center, located in Amman, Jordan, under request for quotations (RFQ) No. 19J01021Q0032, issued by the Department of State for Arabic language training for the U.S. Embassy in Amman, Jordan. The protester argues that its quotation was improperly rejected for noncompliance with the solicitation's pricing terms.

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

### BACKGROUND

On March 9, 2021, the agency issued the solicitation, which anticipates the award of an indefinite-delivery, indefinite-quantity contract for Arabic language training for staff and qualifying family members at the U.S. Embassy in Amman, Jordan. The RFQ stated that "[c]lasses [were] to be given at a firm fixed price per session," and included the following table to be completed by the vendor:

Description	Quantity	Unit price (JOD) <sup>1</sup>	Total (JOD)
Arabic Language session	6000		
Grand Total			

Agency Report (AR), Tab 2, RFQ at 3. A similar table was included on the first page of the solicitation, which listed the following single item to be priced: “Arabic Language Training to the Employees of the U.S. Embassy in Amman as per attached scope of work.” *Id.* at 1. Page 1 of the RFQ identified the quantity as “6000,” and requested that vendors provide a unit price and an amount for that item. *Id.*

The solicitation stated that the minimum number of hours the agency would order was 500, and the maximum number of hours was 6,000. *Id.* at 9. Award would be made to “the lowest priced, acceptable, responsible offeror.” *Id.* at 29. The lowest price would be determined by “multiplying the offered prices times the estimated quantities . . . and arriving at a grand total, including all options.” *Id.*<sup>2</sup>

On March 23, DBN timely submitted a quotation in response to the RFQ. The quotation included tiered unit pricing; *i.e.*, the first 3,000 hours were priced at an hourly rate of JOD 20, the next 1,500 hours at JOD 19, and the last 1,500 hours at JOD 14, for a total price of JOD 109,500. AR, Tab 3, DBN Quotation at 3.

On April 29, the agency awarded the contract to Al-Baher at a unit price of JOD 19 (for a total contract price of JOD 114,000). While DBN’s total quoted price (JOD 109,500) was lower than Al-Baher’s, the agency rejected DBN’s quotation due to its tiered pricing structure. The State Department determined that the tiered pricing did not comply with the terms of the solicitation, specifically section 1.1.2., which required “[c]lasses to be given at a firm fixed price per session.” AR, Tab 7, Debriefing at 2.

This protest followed.

## DISCUSSION

The protester argues that the solicitation permitted DBN to quote tiered pricing and that the agency therefore erred in rejecting DBN’s quotation on that basis. The protester also contends that the agency could have had a “clarifying discussion” with DBN to remedy the “differing interpretations between the parties.” Comments at 4. The protester further argues that, even if DBN’s pricing was not the “lowest price under every contract scenario,” the agency could nonetheless have accepted such pricing, or negotiated further with DBN, because the solicitation contemplated award on a best-value basis. Comments at 6.

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<sup>1</sup> JOD is an abbreviation for Jordanian dinar (the unit of currency used in Jordan).

<sup>2</sup> Despite the reference to “options” in the foregoing quotation, the RFQ did not require vendors to price option years; rather the solicitation provided for a period of performance of one year from the date of contract award. *Id.* at 5.

While we do not address every argument raised by the protester, we have reviewed each argument and find no basis to sustain the protest.

### Timeliness

As an initial matter, the agency contends that DBN's protest is untimely because it was filed more than 10 days after the agency first notified DBN, via an April 29 letter, of the award to the higher-priced Al-Baher.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. The 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. *The MIL Corp.*, B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 5. Under these rules, a protest such as DBN's, based on other than alleged improprieties in a solicitation, must be filed not later than 10 days after the protester knew or should have known of the basis for its protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). An exception to this general rule is a protest that challenges "a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required." *Id.* In such cases, with respect to any protest basis that is known or should have been known either before or as a result of the debriefing, the protest must be filed no later than 10 days after the date on which the debriefing is held. *Id.*

The agency argues that although DBN's protest was filed within 10 days after the vendor received a debriefing, the protest is untimely. In this regard, the agency asserts that, since the debriefing was conducted under a commercial items solicitation, it was not a required debriefing and therefore did not extend the applicable protest deadline. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 8 (*citing Gorod Shtor*, B-411284, May 22, 2015, 2015 CPD ¶ 162 at 3).

We find the protest to be timely notwithstanding the fact that the debriefing was not a required debriefing because DBN filed it within 10 days after the protester first learned of its basis of protest.<sup>3</sup> In this respect, nothing in the April 29 award letter placed DBN on notice that its quotation was rejected based on DBN's use of tiered pricing. Instead, the letter simply stated that DBN was not the "lowest priced, technically acceptable, responsible offer to the [g]overnment." AR, Tab 5, Award Notice at 1. This statement did not provide DBN with notice that it was the tiered pricing in its quotation that the agency found to be objectionable; the protester first learned that information in its debriefing. Because the protester filed its protest within 10 days after learning that the basis for rejection of the quotation was the tiered pricing, the protest is timely.

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<sup>3</sup> As discussed below, however, to the extent that DBN challenges the terms of the solicitation, *e.g.*, the lowest-priced technically acceptable procurement methodology, such challenges are not timely.

## Solicitation Pricing Requirements

The protester contends that the solicitation permitted vendors to submit tiered pricing. In this respect, the protester notes that the RFQ referred to prices, in the plural, in several places, for example, in discussing how the agency would calculate each quotation's total price. Comments at 3 (*citing* RFQ at 29 (providing that the lowest price would be determined by “multiplying the offered prices times the estimated quantities . . . and arriving at a grand total, including all options.”). The protester argues that the RFQ's references to prices, in the plural, indicate the submission of more than one price, and therefore a tiered-pricing solution, was permitted. DBN further argues that the solicitation's request for classes “to be given at a firm fixed price per session” is not fatal to its interpretation because the term simply means that prices will not be “subject to any adjustment on the basis of the contractor's cost experience in performing the contract.” Comments at 3-4 (citing Federal Acquisition Regulation (FAR) 16.202-1).<sup>4</sup>

A quotation that fails to conform to material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. *CAMS Inc.*, B-292546, Oct. 14, 2003, 2003 CPD ¶ 191 at 3. Material terms of a solicitation are those that affect the price, quantity, quality, or delivery of the goods or services offered. *Seaboard Elecs. Co.*, B-237352, Jan. 26, 1990, 90-1 CPD ¶ 115 at 4. Where a protester challenges an agency's evaluation resulting in the rejection of its quotation as unacceptable, our review is limited to considering whether the evaluation was reasonable and consistent with the terms of the solicitation and applicable procurement statutes and regulations. *Savvee Consulting, Inc.*, B-408623, B-408623.2, Nov. 8, 2013, 2013 CPD ¶ 265 at 4.

Here, we find that the agency reasonably rejected DBN's quotation based on its noncompliance with the terms of the solicitation. In this respect, the RFQ stated that “[c]lasses [were] to be given at a firm fixed price per session” and provided a table with only one row for vendors to price the entirety (6000 hours) of the instruction requirement. RFQ at 1, 3. The row listed the 6000 hours and sought both a unit price for those hours and a total price. *Id.* at 3. We think that the reference to a fixed price

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<sup>4</sup> DBN also relies on our Office's decision in *SOS Int'l, Ltd.*, B-295533.2, B-295533.3, July 1, 2005, 2005 CPD ¶ 128 to argue that a quotation that provides tiered pricing is nonetheless compliant with a solicitation requirement for fixed pricing. We find this decision to be inapposite. In this respect, in *SOS Int'l, Ltd.*, our Office addressed a question of whether a bid that provided tiered pricing was responsive to an invitation for bids (IFB) requirement for fixed pricing. We concluded that the pricing in question was responsive because, although the tiered pricing deviated from the fixed pricing scheme, the deviation was immaterial. We noted that, for example, the bid was low under all possible calculations, including the scenario where only the firm's highest hourly rates were applied. Here, by contrast, the procurement involves an RFQ (not an IFB) and DBN's deviation from the RFQ requirements was material with DBN's pricing being higher than the awardee's under certain scenarios.

per session, together with the format of the table, was sufficient to place vendors on notice that they were to complete the table by providing one fixed unit price for the entirety of the requirement.<sup>5</sup> While, as pointed out by the protester, the solicitation also contains a few references to prices in the plural, we do not agree with the protester that these references are reasonably interpreted as contemplating division of the requirement into separately priced portions.

We further note that even if the protester's interpretation were reasonable, this would give rise to a patent ambiguity, *i.e.*, an obvious, gross, or glaring error. See *Odyssey Sys. Consulting Grp., Ltd.*, B-412519, B-412519.2, Mar. 11, 2016, 2016 CPD ¶ 86 at 5. In this respect, the agency's interpretation of the solicitation as requiring vendors to provide a fixed unit price for the 6000-hour requirement is both reasonable and readily apparent. As noted above, the solicitation provided a table with one row to be completed for the entire 6000-hour requirement with one box to be completed for the unit price for the 6000 hours.

Where a solicitation contains a patent ambiguity, our timeliness rules require a vendor to file any challenge to the alleged ambiguity prior to the time set for receipt of proposals. *Id.* Where a patent ambiguity is not challenged prior to the submission of solicitation responses, we will not consider subsequent arguments asserting the protester's own interpretation of the ambiguous provisions. *FFLPro, LLC*, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 10. Since DBN did not challenge the RFQ pricing terms prior to the deadline for quotation submissions, we find that---even if its interpretation of the RFQ is considered reasonable--DBN has not timely raised this challenge.

#### Discussions and Best-Value Methodology

The protester argues that the agency could have conducted a "clarifying discussion" with DBN, pursuant to FAR provision 52.212-1(g) to ask that the vendor "submit one hourly price that was the same for all 6,000 hours of classes." Comments at 4-5.

We have consistently stated that we generally will not review an agency's decision whether or not to engage in discussions because there are no statutory or regulatory criteria specifying when an agency should or should not initiate discussions, nor is there any requirement for an agency to, for example, document its decision not to engage in discussions. *Aviation Training Consulting, LLC*, B-417151 *et al.*, Mar. 11, 2019, 2019 CPD ¶ 103 at 6. In addition, the cover letter to the solicitation expressly advised vendors that the agency contemplated making an award without discussions. AR, Tab 1, RFQ Cover Letter at 1. While DBN argues that the agency should have nonetheless provided an opportunity for discussions, an agency is not required to do so

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<sup>5</sup> We note that vendors were provided an opportunity to ask questions prior to the quotation submission deadline, but no one asked if multiple or tiered pricing would be acceptable. COS/MOL at 4.

where it states that award will be made without discussions. See *Kiewit Louisiana Co.*, B-403736, Oct. 14, 2010, 2010 CPD ¶ 243 at 3-4.

Relatedly, the protester argues that the agency should have considered DBN's quotation to be in the "competitive range" because its services are highly regarded within the embassy community and because its tiered pricing was "highly competitive or more competitive in every contract scenario." Comments at 7-8. The protester asserts that, based on these considerations, the agency should have further negotiated with DBN and further evaluated DBN's quotation.

We conclude, however, that this argument amounts to an untimely challenge to the terms of the solicitation. The protester is essentially asserting that the agency should have considered factors other than price and technical acceptability in its award determination. In this regard, the solicitation did not provide for the consideration of such additional factors, and instead provided that award would be made to "the lowest priced, acceptable, responsible offeror." RFQ at 29. To be timely, a protest objecting to the absence of such RFQ terms would have needed to be filed prior to the quotation submission deadline. See 4 C.F.R. § 21.2(a)(1). Since no such protest was filed, we dismiss this argument as untimely.

The protest is denied in part and dismissed in part.

Edda Emmanuelli Perez,  
General Counsel