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Decision

Matter of: Impact Resources, Inc.

File: B-416093

Date: June 11, 2018

David J. Seidman, Esq., and Paul J. Seidman, Esq., Seidman & Associates, P.C., for the protester.

Dennis Gardner, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., for Tactical Edge, Inc., an intervenor.

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Young H. Cho, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest filed with GAO following an agency-level protest is dismissed as untimely where it was not filed at GAO within 10 days of actual or constructive knowledge of initial adverse agency action.
 2. Protest challenging agency's evaluation of proposals and selection decision is dismissed as abandoned where protester, after receipt of the agency report, fails to provide a substantive response to the agency's detailed explanation of its actions.
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DECISION

Impact Resources, Inc., d/b/a IR Technologies (IR Tech) of Springfield, Virginia, protests the award of a contract to Tactical Edge, Inc., of San Diego, California, under request for proposals (RFP) No. M67854-17-R-7601, issued by the United States Marine Corps, for information technology support services. The protester argues that the agency failed to revise the RFP to reflect its changed requirement, and unreasonably evaluated proposals.

We dismiss the protest.

BACKGROUND

The RFP, issued on January 27, 2017, under Federal Acquisition Regulation (FAR) parts 12 and 15, and set aside for small businesses, sought post-deployment systems support services for the Marine Air-Ground Task Force Logistics Support Systems Program. RFP¹ at 1; id., amend. 6, at 3; Performance Work Statement (PWS) at 1. This program consolidated four systems, among which the following two are relevant here: Storage Retrieval Automated Tracking Integrated System (STRATIS) and Air Fortress.² PWS at 1. The RFP contemplated the award of a single indefinite-delivery, indefinite-quantity (IDIQ) fixed-price contract with a 60-month ordering period. RFP, amend. 4, at 38, 44; id., amend. 6, at 3. The RFP advised award would be made on a best-value tradeoff basis, considering the following factors in descending order of importance: innovation approach, technical approach, management approach, past performance, and price. RFP, amend. 4, at 54, 55. The RFP advised that the non-price factors, when combined, were significantly more important than price. Id. at 55.

The agency received 13 timely proposals by the solicitation closing date of April 28, 2017, including proposals from IR Tech and Tactical Edge. Agency Report (AR), Combined Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 4. A source selection evaluation board reviewed the proposals and documented its findings and results. Id.; see also AR, Tab 12, Source Selection Decision Memorandum (SSDM) at 3.

Between September and November 2017, IR Tech had several exchanges with agency and other personnel, during which IR Tech states that it was informed that the Air Fortress and STRATIS systems were being replaced or retired by the agency. See Protest at 5; Protester's Response to Agency's Request for Dismissal at 1-2; Protester's Comments at 4-5. During this time, in October 2017, IR Tech also asked the agency's program manager responsible for the procurement whether there had been a change in the agency's requirements since the issuance of the solicitation, and was told that there were no changes. See Protester's Response to Agency's Request for Dismissal at 1; Protester's Comments at 4.

On November 28, IR Tech raised to the contracting officer (CO) its concerns about the perceived change of solicitation requirements. See AR, Tab 10, IR Tech Nov. 28 Letter to CO. In its letter, IR Tech stated it was aware that the agency intended to replace STRATIS and Air Fortress based on published program schedules and conversations with program personnel. Id. at 1. IR Tech also stated that the retirement of these systems during the first year of performance would result in a contract materially different than solicited, and that the change in requirements should require a new

¹ The solicitation was amended six times.

² The protester is the incumbent contractor for the other two systems. RFP, amend. 6, at 3.

solicitation. Id. IR Tech requested that the agency amend the solicitation to reflect its changed needs. Id. at 2.

On November 30, in response to IR Tech’s November 28 inquiry, the CO stated “[a]s you know, after receipt of proposals, any exchanges of information must be limited and consistent with procurement integrity. The [g]overnment is therefore not able to discuss the issues addressed in your [letter], since they are related to a solicitation that is currently in the evaluation process.” AR, Tab 11, CO Nov. 30 Response to IR Tech.

The source selection authority (SSA) performed a comparative assessment of IR Tech’s and Tactical Edge’s proposals, which were evaluated as follows:

	IR Tech	Tactical Edge
Innovation Approach	Good	Outstanding
Technical Approach	Outstanding	Outstanding
Management Approach	Acceptable	Good
Past Performance	Relevant Satisfactory Confidence	Very Relevant Substantial Confidence
Total Evaluated Price	\$40,043,523	\$32,828,605

AR, Tab 12, SSDM at 3; AR, Tab 9, Business Clearance Memorandum (BCM) at 17. In determining that Tactical Edge’s proposal offered the best value, the SSA noted that Tactical Edge had both a superior technical proposal and lower total evaluated price when compared to IR Tech (the only other proposal eligible for award), and determined that no tradeoff analysis was necessary. On January 10, 2018, the SSA selected Tactical Edge for award. AR, Tab 12, SSDM at 16-17.

On February 14, IR Tech received a preaward notice pursuant to FAR § 15.503(a)(2), identifying Tactical Edge as the apparent successful offeror. AR, Tab 13, Intended Awardee Letter. On February 16, IR Tech was informed that award was made to Tactical Edge and was provided a written debriefing. See generally AR, Tab 15, Postaward Notice and Debrief.

On February 19, IR Tech requested a new debriefing be given and that the debriefing comply with section 818 of the fiscal year (FY) 2018 National Defense Authorization Act (NDAA), Pub .L. No. 115-91, 131 Stat. 1283, 1483.³ See AR, Tab 16, IR Tech Feb. 19 Letter to CO. On February 20, the agency informed IR Tech that additional questions

³ Section 818 of FY 2018 NDAA includes provisions for enhanced post-award debriefings for disappointed offerors by providing an opportunity to submit additional questions within two business days after receiving a post-award debriefing, requiring an agency to respond to those questions in writing within five business days after receiving those questions, and directing the agencies not to consider the debriefing to be concluded until the agency delivers its written responses to the disappointed offeror.

related to the debriefing could be submitted by February 21. AR, Tab 17, CO Feb. 20 Emails to IR Tech.

On February 28, the agency provided written responses to the questions submitted by IR Tech on February 21. AR, Tab 18, Feb. 28 Letter and Rewritten Responses to Debriefing Questions. IR Tech filed its protest with our Office on March 4.

DISCUSSION

IR Tech argues that the agency failed to revise the RFP to reflect its changed requirement and that the agency unreasonably evaluated proposals. As explained below, we find that the first argument, challenging the terms of the solicitation, are untimely, and that the latter arguments, challenging the agency's evaluation of proposals, have either been abandoned or concern the adequacy and conduct of debriefing that do not involve the validity of the contract award.

Asserting that the agency's requirements for STRATIS and Air Fortress have changed, the protester primarily argues that the agency was required to amend the solicitation to reflect this change. In this regard, the protester contends that exchanges with agency personnel and agency documents⁴ indicate that the agency intends to retire STRATIS and Air Fortress during the first year of performance. See Protest at 5. The protester further argues that the retirement of STRATIS and Air Fortress less than one year into a five year program results in a contract materially different from this solicitation's terms; and that, instead of amending the RFP to reflect its changed needs, the agency made an award with the apparent intention of issuing changes later. Protest at 11-12.

While maintaining that STRATIS and Air Fortress remain valid requirements, the agency requests that our Office dismiss this protest ground as untimely. See AR, COS/MOL at 6-11; see also Agency Request for Dismissal at 2-5. In this regard, the agency argues that the protester effectively submitted an agency-level protest on November 28, 2017, expressing its belief that the agency's requirements had changed and requesting that the agency amend the solicitation. See AR, COS/MOL at 10-11. The agency further asserts that at the very latest, the protester knew by the date of award, February 16, 2018, of the agency's adverse decision, i.e., its decision not to amend the solicitation. Id. at 11. As a result, the agency argues that the protester's March 4 protest, which was filed more than 10 days after the protester knew or should have known of the basis of protest, is untimely. Id.

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

⁴ The protester asserts that a January 30, 2018, PowerPoint slide documented the agency's intent to retire STRATIS. Protest at 5.

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 there. 4 C.F.R. § 21.0(e). Timeliness is thus measured from when the protester is on notice that the contracting activity will not undertake the requested corrective action rather than from the receipt of a subsequent formal denial of the agency-level protest. See Scopus Optical Indus., B-238541, Feb. 23, 1990, 90-1 CPD ¶ 221. In this respect, 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. Dominion Aviation, Inc.--Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3.

In its comments, the protester argues that its November 28, 2017 letter was not an agency-level protest. See Protester’s Comments at 17. In this regard, the protester argues that its letter did not express dissatisfaction with a prior agency action nor did it request a ruling by the agency. Id. The protester further argues that the debriefing exception should apply because the agency withheld information critical to raising IR Tech’s protest ground, and it diligently pursued information about the potential changed requirements. Id. at 17-18.

Our Office has consistently explained that, to be regarded as a protest, a written statement need not state explicitly that it is, or is intended to be, a protest, but must convey the intent to protest by a specific expression of dissatisfaction with the agency’s actions and a request for relief. See, e.g., Western Star Hosp. Auth., Inc., B-414198.2, B-414198.3, June 7, 2017, 2017 CPD ¶183 at 6; Masai Techs. Corp., B-400106, May 27, 2008, 2008 CPD ¶ 100 at 3; ILC Dover, Inc., B-244389, Aug. 22, 1991, 91-2 CPD ¶ 188 at 2. In contrast, we have explained that a letter that merely expresses a suggestion, hope, or expectation, does not constitute an agency-level protest. Id.

On this record, we agree with the agency that the protester’s November 28 letter to the contracting officer was an agency-level protest. Here, the protester expressed its dissatisfaction with the solicitation’s inclusion of the STRATIS and Air Fortress requirements in the solicitation, in light of its discovery that those requirements would be retired during the first year of the contract. See AR, Tab 10, IR Tech Nov. 28 Letter to CO at 1 (“It makes no sense for a contractor to expend money to reduce STRATIS and Air Fortress operating costs if they are to be discontinued. The retirement of [these systems] one year into a five year program results in a contract materially different than that solicited.”). The protester also specifically “request[ed] that the Marine Corps amend the solicitation to reflect its changed needs.” Id. at 2. While the November 28 letter did not explicitly state that it was a protest, it clearly conveyed the intent to protest by a specific expression of dissatisfaction with the agency’s action and a request for relief.

We therefore agree with the agency that the protester’s March 4, 2018 protest to our Office was untimely. In this regard, on November 30, 2017, the agency responded to IR Tech’s November 28 letter, informing the protester that the agency would not be able to discuss the issues raised in its letter because it was related to a solicitation that is

currently in the evaluation process. AR, Tab 11, CO Nov. 30 Response to IR Tech. On February 14, 2018, the protester was notified that Tactical Edge was the apparent successful offeror and that an award would be forthcoming. See AR, Tab 13, Intended Awardee Letter. This letter placed the protester on notice that the agency would not undertake the requested corrective action, i.e., amend the solicitation. Accordingly, the protester's March 4 protest, which was filed more than 10 days after the protester knew or should have known of the basis of protest, is untimely. Id.

The protester argues, however, that the debriefing exception to our timeliness rules should apply here.⁵ We disagree. The basis for the protester's complaint that the solicitation did not accurately reflect the agency's changed requirements is the allegation of an impropriety in the solicitation.⁶ The debriefing exception as set forth in our Bid Protest Regulations specifically states that it does not apply to any protest basis that "involve[s] an alleged solicitation impropriety covered by [4 C.F.R. § 21.2(a)(1)]." 4 C.F.R. § 21.2(a)(2). Accordingly, this exception is not applicable here.⁷

The protester also argues that the award was improper because the ratings assigned to the proposals were flawed. See Protest at 14-22. In this regard, the protester challenges the evaluation of its own proposal under the innovation approach, management approach, and past performance factors, arguing that it should have been assigned higher ratings. See id. The agency provided a detailed agency report responding to IR Tech's protest, in which it addressed each of the protester's arguments.

⁵ This exception, set out in 4 C.F.R. § 21.2(a)(2), essentially provides that where a requested and required debriefing is provided, an initial protest may not be filed before the offered debriefing date and must be filed no later than 10 days after the date on which the debriefing is held.

⁶ In contrast to the timeliness requirement for a protest based on a solicitation impropriety that is apparent prior to the time set for receipt of initial proposals, where, as here, a change in the agency's requirements is not apparent until after the time set for receipt of proposals and no further submissions are anticipated, any alleged solicitation improprieties must be protested within 10 days of when the alleged impropriety was known or should have been known. 4 C.F.R. § 21.2(a)(1). See Protect the Force, Inc.-- Recon., B-411897.3, Sept. 30, 2015, 2015 CPD ¶ 306 at 4; Armorworks Enters., LLC, B-400394; B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 7.

⁷ Similarly, to the extent the protester argues that the debriefing exception does apply because the agency allegedly withheld information that IR Tech claims it needed for purposes of filing a protest, that allegation does not overcome the express terms of 4 C.F.R. § 21.2(a)(2), as explained above. Further, while the protester maintains that it repeatedly sought information and received contradictory information from the agency, the record shows that when IR Tech specifically asked whether the agency's requirements had changed, the agency maintained that there were no changes in the requirements. See, e.g., Protester's Comments at 18.

In its comments, IR Tech has failed to provide a response to the arguments advanced in the agency report. While the agency responded to the protester's various challenges to the agency's evaluation of its proposal and argued that IR Tech cannot demonstrate competitive prejudice, IR Tech has not provided a substantive or meaningful response.

In responding to an agency report, protesters are required to provide a substantive response to the arguments advanced by the agency. enrGies, Inc., B-408609.9, May 21, 2014, 2014 CPD ¶ 158 at 4. Where a protester merely references earlier arguments advanced in an initial protest without providing a substantive response to the agency's position, our Office will dismiss the referenced allegations as abandoned. Id. Similarly, a protester's statement, without elaboration, that its initial arguments "are maintained" also will result in the dismissal of the arguments as abandoned. Citrus College; KEI Pearson, Inc., B-293543, et al., Apr. 9, 2004, 2004 CPD ¶ 104 at 8 n.4. Accordingly, we conclude that IR Tech has abandoned these protest grounds.

Finally, we dismiss the protester's argument that Tactical Edge's proposal was not evaluated in accordance with the solicitation's evaluation criteria. See Protest at 22. IR Tech states that it was informed in its debriefing that the rating assigned to Tactical Edge was "---," which IR Tech understood to mean an "unknown confidence (neutral)" rating, arguing, further, that a neutral rating is lower than the "satisfactory" rating that was assigned to IR Tech's proposal. Id. The sole basis for the protester's argument in this regard is belied by the record. The contemporaneous documents produced with the agency report in fact indicate that Tactical Edge was assigned a higher rating than IR Tech, which the protester has not challenged. See AR, Tab 9, BCM at 17. On this record, we recognize that the debriefing letter does not reflect the actual evaluation performed by the agency. We therefore dismiss IR Tech's complaints concerning the evaluation as represented in the debriefing. See, e.g., Advance Bus. Sols., B-412937.2, July 7, 2016, 2016 CPD ¶ 181 at 3-4 n.2 (GAO will not consider protest alleging an error in debriefing because the adequacy and conduct of a debriefing is a procedural matter that does not involve the validity of contract award); DGC, Int'l, B-410364.3, Apr. 22, 2015, 2015 CPD ¶ 136 at 5.

The protest is dismissed.

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General Counsel