



Decision

Matter of: Waterfront Technologies, Inc.

File: B-403638.3

Date: February 22, 2011

Janice H. Kaufmann for the protester.

Peter J. Dickson, Esq., Department of Labor, for the agency.

Paul E. Jordan, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where initial protest at GAO is dismissed because third party files protest at U.S. Court of Federal Claims (COFC), re-filing of protest at GAO 37 days after conclusion of COFC litigation is untimely; monitoring proceedings at COFC through a commercial website that was not regularly updated instead of using the official COFC website (PACER), which provides real-time updates for all filings, does not satisfy the requirement for protesters to utilize the most expeditious information-gathering approach under the circumstances.

DECISION

Waterfront Technologies, Inc. (WTI), of Baltimore, Maryland, protests the Department of Labor's (DOL) award of a contract to Astor & Sanders Corporation (ASC), of Rockville, Maryland, under request for proposals (RFP) No. DOL110RP20850, for information technology (IT) services. WTI challenges the evaluation of proposals.

The RFP contemplated the award on a "best value" basis of an indefinite-delivery, indefinite-quantity contract, for a base year with 4 option years, to integrate IT services in support of DOL's Office of Performance and Technology (PROTECH). Twenty offerors (including ASC and WTI) submitted proposals. Because WTI's proposal was rated unacceptable overall, it was not considered for award. Based on ASC's low price and good technical rating, the contracting officer awarded it a contract. After a debriefing, WTI filed a protest with our Office challenging the evaluation.

On September 16, 2010, prior to DOL's submission of its agency report on WTI's protest, another unsuccessful offeror (Enterprise Solutions Realized, Inc. (ESR)) filed a protest with the United States Court of Federal Claims (COFC), challenging the award to ASC and seeking a temporary restraining order and injunctive relief. Docket No. 1:10CV-00628-FMA. Because the protested procurement was then pending before a court of competent jurisdiction, we dismissed WTI's protest in accordance with our Bid Protest Regulations, 4 C.F.R. § 21.11(b) (2010).

On September 27, DOL filed the administrative record with COFC. After reviewing the record, ESR moved on October 7 to dismiss its protest. The Court dismissed ESR's complaint on October 12.

WTI did not intervene in the COFC litigation. Instead, according to WTI, it monitored the COFC proceedings on a weekly basis using the commercial website FreeCourtDockets.com (at <http://www.freecourtdockets.com>). WTI Final Comments at 19. Based on the commercial website's report of the official COFC Docket Entry No. 1 (dated Sept. 16, 2010), which refers to an "Answer due by 11/15/2010," WTI believed an answer was due from the COFC judge on that date. Protest at 3. Interpreting the anticipated answer as a "resolution" of the matter at COFC, WTI re-filed its protest with our Office on November 18, 37 days after the Court's dismissal of ESR's complaint. WTI Response to Motion to Dismiss at 6.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. 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). A protester may not passively await information providing a basis for protest. Rather, a protester has an affirmative obligation to diligently pursue such information, Automated Med. Prods. Corp., B-275835, Feb. 3, 1997, 97-1 CPD ¶ 52 at 2-3, and a protester's failure to utilize the most expeditious information-gathering approach under the circumstances may constitute a failure to meet its obligation in this regard. See, e.g., Thomas May Constr. Co., B-255683, Mar. 23, 1994, 94-1 CPD ¶ 210 (no diligent pursuit where protester waited until after notice of award to file Freedom of Information Act requests seeking information publicly available at bid opening). Here, WTI did not meet its obligation to utilize the most expeditious information-gathering approach under the circumstances.

WTI asserts that it acted promptly in re-filing its protest at our Office, since it acted within 3 days of the November 15 date for filing an answer as specified in the official COFC Docket Entry No. 1 included on the FreeCourtDockets.com website. However, while that entry may have included the most recent information concerning the schedule for the COFC litigation available on the FreeCourtDockets.com website, the record indicates that more up-to-date

information was available to the public through the official website for litigation at COFC (and other federal courts).¹

In this regard, the official electronic case docket for federal courts, including COFC, is maintained online in the PACER database. According to the PACER website, it is a service of the U.S. Judiciary, operated by the Administrative Office of the U.S. Courts, which provides electronic public access to case and docket information available immediately after electronic filings are made. PACER, Frequently Asked Questions (FAQ), <http://www.pacer.gov/psc/faq.html> (Jan. 25, 2011). Here, the publicly-available PACER docket for ESR's protest indicates that the order granting ESR's motion to dismiss was filed and judgment entered on October 12; this information was reflected in PACER that same day. PACER Docket, Docket No. 1:10CV-00628-FMA, Entry Nos. 21-22. Had WTI been diligently monitoring the PACER website, instead of the commercial FreeCourtDockets.com website, it would have promptly known on or about October 12 that the ESR litigation was resolved by dismissal of ESR's complaint on October 12. We conclude that in relying on a commercial website (freecourtdockets.com) rather than the up-to-date, official government online docket, WTI was not using the most expeditious information-gathering approach to follow the COFC litigation.

Our conclusion is not changed by the fact that, as noted by WTI, PACER usage requires registration and involves fees. PACER is available to anyone who registers for an account and there is no charge for registration.² PACER, Home Page, at <http://www.pacer.gov> (Jan. 25, 2011). While there is a charge for access to PACER documents, the charges are nominal (\$.08 per page, up to \$2.40 per document), and are waived when usage is less than \$10 in any given quarter. PACER FAQ at <http://www.pacer.gov/psc/faq.html>, (Jan. 25, 2011). Protesters pursuing litigation

¹ While FreeCourtDockets.com apparently obtains its information from the official website (Public Access to Court Electronic Records at <http://www.PACER.gov>), it is not clear how often FreeCourtDockets.com updates that information. In this regard, a printout from the site submitted by WTI in connection with its protest displays entries only up through an entry for September 21, 2010, recording ESR's counsel's application for access to protected material under the Court's protective order. WTI Printout, Entry No. 18, Dec. 3, 2010. However, the FreeCourtDockets.com web page for this litigation contains a link entitled "Refresh/Update This Docket Now." WTI has not explained whether it ever availed itself of this update service.

² In registering for an account, one may provide a credit card number and obtain same day access via e-mailed instructions on how to obtain a login and password. Those who do not provide a credit card will receive their login and password via U.S. mail within 7-10 days. PACER, Registration, at http://www.pacer.gov/reg_pacer.html (Jan. 11, 2011).

at our Office are expected to bear such costs, and the nominal cost for reasonably monitoring the COFC litigation provides no excuse for not doing so.

Since WTI could and should have known on or about October 12 that ESR's protest at COFC had been resolved, which furnished the basis for its re-filing at our Office, its November 18 re-filing of its protest, some 37 days later, is untimely.

The protest is dismissed.

Lynn H. Gibson
General Counsel