



Decision

Matter of: FD Inc.
File: B-422920; B-422920.2
Date: October 4, 2024

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This version has been approved for public release.

Song Yong Eui, Esq., Central IP & Law, for the protester.
Captain Sana H. Daniell, Department of the Army, for the agency.
Heather Self, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest filed subsequent to a post-award brief explanation but more than 10 days after the basis of protest was or should have been known is untimely where a procurement for commercial items using the simplified acquisition procedures of Federal Acquisition Regulation part 13 is not a procurement involving a required debriefing, and, thus, the debriefing exception to our timeliness rules does not apply.

DECISION

FD Inc., a small business of Pyeongtaek Gyeonggo-do, South Korea, protests the award of a purchase order to LK Tech Co., Ltd., under request for proposals (RFP) No. W90VN7-24-R-A005, issued by the Department of the Army for fuel tank servicing. The protester argues that the awardee's proposal should have been evaluated as technically unacceptable.

We dismiss the protest.

BACKGROUND

On July 25, 2024, the agency issued the solicitation seeking proposals for fuel tank inspection, testing, maintenance and repair services to be performed at Kunsan Air Base in South Korea. Req. for Dismissal ex. 1, RFP at 1, 8, 56.¹ The agency issued the solicitation using the procedures of "Federal Acquisition Regulation (FAR) Part 12 Acquisition of Commercial Items and FAR [subpart] 13.5 Simplified Acquisition Procedures for Certain Commercial Items." *Id.* at 56. Additionally, the solicitation specified that the System for Award Management (SAM.gov) would be the "Official Means of Disseminating information after solicitation issuance." *Id.* at 57.

¹ Citations use the Adobe PDF pagination of documents in the record.

The solicitation established that award would be made on a lowest-priced, technically acceptable (LPTA) basis, and set forth two non-price evaluation factors that would be rated on an acceptable/unacceptable basis: (1) technical capability² and (2) past performance. RFP at 61-62. The solicitation explained that a proposal's receipt of "a rating of 'unacceptable' for any factor or subfactor will result in the entire offer being rated 'unacceptable'." *Id.* at 61. Relevant here, technical capability subfactor 2 (prime contractor's prior experience) required the following: "The Contractor shall have at least two (2) years' experience within the last five (5) years in the Inspection, Testing, Maintenance and Repair of fuel tank systems and the Inspection, Testing, and Maintenance of any machines-equipment systems with the U.S. Government or commercial industry." *Id.*

On August 28, the agency posted an award notice on SAM.gov indicating that the date of contract award would be August 29, the selected awardee was LK Tech, and the total award price was \$850,379.58. Req. for Dismissal exh. 2, SAM.gov Award Notice at 2. On an unspecified date, FD "became aware" of the contract award decision "when the Protester accessed Award Notice at SAM.GOV." Protest at 1. On September 3, FD requested a "debriefing," and on September 4 the agency provided FD with a post-award letter the Army referred to as a "debriefing." Req. for Dismissal exh. 3, Post-Award Letter at 1. The agency's post-award letter notified FD that its "proposal was **Technically Acceptable, Not the lowest priced proposal.**" *Id.* at 1. The letter also indicated that the award had been made on an LPTA basis, and noted the award price in "KRWI" (South Korean Won). *Id.* The letter did not provide the identity of the awardee or provide any other information about the evaluation or award decision, instead stating: "For more details, please refer to Award Notice at SAM.GOV." *Id.*

At 2:17 a.m. Eastern Time on September 10, FD filed this protest with our Office. Electronic Protest Docketing System (EPDS) at Docket No. 1.³ On September 13, the Army submitted a request for dismissal.

DISCUSSION

The entirety of FD's protest is encompassed in the allegation that "LK Tech's proposal should not have been deemed technically acceptable." Protest at 1. To support this

² The technical capability factor contained seven subfactors, of which only subfactor 2 is relevant to the discussion. RFP at 61-62.

³ To the extent that 2:17 a.m. colloquially could be considered "the middle of the night" on September 9, we note that it is not; rather, it is the early morning on September 10. Moreover, our Bid Protest Regulations provide that "[a] document is filed on a particular day when it is received in EPDS by 5:30 p.m., Eastern Time." 4 C.F.R. § 21.0(g). Thus, even if 2:17 a.m. were "the middle of the night" on September 9 (which it is not) because FD's protest would have been filed after 5:30 p.m. on September 9, the protest would be considered to have been filed on September 10.

allegation, FD states only that LK Tech “does not appear to have met the Prime Contractor’s Prior Experience” requirement under technical capability subfactor 2. *Id.* at 3. The agency requests that we dismiss FD’s protest for two reasons, arguing that: (1) “FD Inc.’s protest is untimely”; and (2) FD’s protest “failed to state sufficient factual and legal protest grounds.” Req. for Dismissal at 1. For the reasons set forth below, we dismiss the protest as untimely.

Our 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. *Desert Springs Trout Farm*, B-420338, B-420338.2, Dec. 9, 2021, 2021 CPD ¶ 7 at 2. As relevant here, our regulations require that protests not based upon alleged improprieties in a solicitation “shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required.” 4 C.F.R. § 21.2(a)(2).

Debriefing Exception Inapplicable

The Army argues that FD “cannot rely on GAO’s debriefing exception to delay filing its protest because GAO has made it clear that there is no mandatory debrief requirement in a FAR 12/13 procurement.” Req. for Dismissal at 4. The agency notes that while FD “requested a debriefing, and the contracting officer provided a ‘debriefing letter,’ this letter did not qualify as a mandatory debrief,” but was instead “a ‘brief explanation of the basis for the agency’s contract award decision,’ pursuant to FAR Section 13.106-3(d).” *Id.* at 6. Thus, the agency maintains, “the debriefing exception does not apply to this procurement.”

The protester responds that the agency’s post-award letter states it was provided “[i]n accordance with (IAW) FAR 15.506, Post award debriefing of offerors,” thus “contradicting the Army’s assertion that the Debriefing Letter was issued pursuant to FAR Section 13.106-3(d).” Resp. to Req. for Dismissal at 2. Additionally, FD maintains that “[w]hen the Army provided a debriefing under FAR part 15, whether by intention or by mistake, an offeror should be given ten (10) days from the debriefing date to protest to the GAO, regardless of the award notification date in SAM.” *Id.* at 6. The protester also notes that the RFP included FAR provision 52.212-1; paragraph (l) of which provides: “Debriefing. If a post-award debriefing is given to requesting offerors, the Government shall disclose the following information, if applicable.” *Id.* at 2 (quoting RFP at 56).

In responding to the request for dismissal, FD acknowledges that the RFP provided for award to be made in accordance with FAR parts 12 and 13. Resp. to Req. for Dismissal at 2 (citing RFP at 56). The protester argues, however, that because the solicitation included “[a] detailed description of information to be contained in a debriefing,” and “there was no mention in the Solicitation that a debriefing was not

mandatory under FAR part 13,” then a “reasonable offeror would have determined that the government would give a debriefing upon request.” Resp. to Req. for Dismissal at 4. Further, the protester maintains that an offeror would “first [have] to research the difference between FAR part 13 and FAR part 15 and review FAR part 13 provisions to understand that a debriefing is not mandatory under FAR part 13.” *Id.* In addition, FD asserts that the RFP “was poorly drafted,” “left out essential information,” and that “[t]he government mistakenly assumed that offerors would fully understand the details of FAR part 13.”⁴ *Id.* at 4-5.

The record reflects that the agency’s post-award letter references FAR section 15.506--which specifies the information required to be included in debriefings for procurements conducted using the procedures of FAR part 15--rather than referencing FAR section 15.503(b), which specifies the information required to be included in brief explanations of award for procurements conducted using the procedures of FAR part 13, such as the procurement at issue here. Req. for Dismissal exh. 3, Post-Award Letter at 1; see also FAR 13.106-3(d); 15.503(b)(1)-(2); 15.506(a)(1), (d). The controlling language for determining the type of procurement conducted is the language of the solicitation, however, not the agency’s post-award letter to FD. See *Beckman Coulter, Inc.*, B-421748, July 28, 2023, 2023 CPD ¶ 180 at 3 n.3 (“Notwithstanding the references to FAR part 15 debriefings in the unsuccessful offeror notification, this procurement for commercial products and services was conducted under FAR part 13, and a debriefing was not required”). Here, as acknowledged by FD, the solicitation provided for award to be made in accordance with the simplified acquisition procedures of FAR part 13. RFP at 56. Despite the protester’s insistence, the Army’s erroneous citation, in its post-award letter, to FAR section 15.506 did not convert the procurement into one using the competitive negotiation procedures of FAR part 15. *Beckman Coulter, Inc.*, *supra*.

As our Office has stated, the award of an order under FAR part 13 does not require a debriefing, but may require a brief explanation of the basis for the agency’s award decision. *Desert Springs Trout Farm*, *supra* at 3. To that end, section 13.106-3 of the FAR provides, “[i]f a supplier requests information on an award that was based on factors other than price alone, a brief explanation of the basis for the contract award decision shall be provided (see [FAR] 15.503(b)(2)).” FAR 13.106-3(d). Moreover, while FAR provision 52.212-1(l)--the text of which was included in this RFP--provides a list of required information the agency must furnish an unsuccessful offeror “if a post-award debriefing is given,” the FAR provision does not mandate that an agency actually

⁴ To the extent FD’s argument can be considered a challenge to the terms of the solicitation, such argument is clearly untimely. Our regulations generally require protests based on alleged improprieties in a solicitation to be filed prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1).

provide a debriefing.⁵ *Id.*; RFP at 56 (emphasis added); see also *Gorod Shtor*, B-411284, May 22, 2015, 2015 CPD ¶ 162 at 3.

Accordingly, we find that despite being labeled as a “debriefing,” the September 4 letter provided by the agency to FD was a brief explanation of the basis for award, which did not trigger the exception to our timeliness rules for required debriefings. See *Desert Springs Trout Farm*, *supra* at 3 (finding where agency “conducted the competition as a commercial item acquisition under FAR part 13, the debriefing it provided to the protester was not required,” and therefore not excepted from our timeliness rules).

Further, we find unpersuasive the protester’s argument that FD could not have known that a debriefing was not required under the solicitation without first researching the difference between FAR part 13 and FAR part 15 procurements. As our Office has repeatedly explained, the FAR is published in the Federal Register and the Code of Federal Regulations, thus putting all parties, including the protester, on constructive notice of its contents. See *The Povolny Group*, B-414532.3, Sept. 21, 2017, 2017 CPD ¶ 293 at 5; *Emmert Int’l*, B-280478, B-280478.2, Oct. 7, 1998, 98-2 CPD ¶ 112 at 9 n.8; *Gurley’s Inc.*, B-253852, Aug. 25, 1993, 93-2 CPD ¶ 123 at 3.

Date of Notice of Award

Having established that the debriefing exception to our timeliness rules does not apply, we turn now to determining the date on which FD knew or should have known the basis of its protest--*i.e.*, the date from which FD had 10 days to file its protest with our Office. See 4 C.F.R. § 21.2(a)(2). In this regard, the agency maintains that the award notice posted on SAM.gov on August 28 provided “sufficient information to form the ‘basis for protest’,” because it specified the awardee’s name, award date (August 29), and total contract award value. Req. for Dismissal at 6. Further, the agency represents that “the contracting officer’s ‘debriefing letter’ simply reaffirmed information that was already contained in the award notice,” and “did not add any new information.” *Id.* The Army argues that because the posting of the award notice on SAM.gov, which is the governmentwide point of entry (GPE), provided FD with constructive notice of the basis of its protest, FD’s protest is untimely because it was filed more than 10 days after August 28.⁶ *Id.* at 5-7.

⁵ While the information furnished under FAR provision 52.212-1(l) is essentially the same as required under FAR section 15.506(d), providing a debriefing under FAR provision 52.212-1(l) is permissive, not required as it is under FAR section 15.506(d).

⁶ The tenth day after August 28 was Saturday September 7. Pursuant to our regulations, when the last day of the 10-day period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. 4 C.F.R. § 21.0(d). Thus, FD was required to file its protest no later than 5:30 p.m. Eastern Time on Monday September 9. *Id.* Here, as the agency points out, even if the date of actual contract award (August 29), rather than the date of notice of award (August 28), were to be considered the pertinent date for determining timeliness, the

(continued...)

The protester responds that an offeror would “also [have] to research and understand that notification in SAM is construed as constructive knowledge of a contract non-award, from which date an offeror has to make a protest to the GAO within ten (10) days.” Resp. to Req. for Dismissal at 4. Additionally, the protester argues that while the award notice “posted on SAM only provided the contract award date, contractor awarded name, and total contract value,” the agency’s September 4 “Debriefing Letter provided all the information required under FAR 15.506, much more information than those in the award notification in SAM.” *Id.* at 5. Thus, in the protester’s view, FD reasonably “thought it had ten (10) days from September 4, 2024 to protest to the GAO.” *Id.*

The protester’s contentions regarding the post-award “debriefing” letter providing more pertinent information than the award notice are not supported by the record. As noted above, with respect to the awardee, the award notice posted on SAM.gov actually provided *more* information than the agency’s post-award letter, which did not identify LK Tech as the awardee and, instead, referred FD to the award notice on SAM.gov for this information. *Compare* Req. for Dismissal exh. 2, SAM.gov Award Notice *with* Req. for Dismissal exh. 3, Post-Award Letter at 1.

The only additional information provided in the post-award letter that was not in the award notice pertains not to the awardee, but to FD itself. Specifically, the post-award letter informed FD that its proposal was evaluated as technically acceptable, but that it was not the lowest-priced proposal submitted. Req. for Dismissal exh. 3, Post-Award Letter at 1. This information about the evaluation of FD’s own proposal does not form the basis of FD’s protest, however. Rather, the sole basis of FD’s protest is the protester’s contention that LK Tech’s proposal should not have been evaluated as technically acceptable because the awardee purportedly lacks the prior experience as a prime contractor required by the solicitation. Protest at 1, 3.

Accordingly, FD knew or should have known the basis of its sole protest allegation from the August 28 award notice’s identification of the awardee as LK Tech, and nothing in the agency’s September 4 post-award letter added to this basis of protest. *See e.g., Beckman Coulter, Inc., supra* at 3 (finding, in LPTA procurement, agency’s selection of awardee “clearly put the protester on notice that the agency found [the awardee’s] offer to be technically acceptable”).

Further, SAM.gov has been designated as the GPE, “the single point where Government business opportunities greater than \$25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public.” FAR 2.101. Our Office has explained consistently that protesters are charged with constructive notice of procurement actions published on the GPE. *Phoenix Data Sec., Inc. et al., B-419956.200 et al., July 10, 2023, 2023 CPD*

tenth day would have fallen on Sunday September 8, resulting in the same deadline for FD to file its protest--*i.e.*, Monday September 9. Req. for Dismissal at 7 n.3.

¶ 172 at 12 n. 11; *Allosense, Inc.*, B-420201, Dec. 27, 2021, 2021 CPD ¶ 395 at 5; *Prudential Protective Servs., LLC*, B-418869, Aug. 13, 2020, 2020 CPD ¶ 272 at 3-4.

The doctrine of constructive notice creates a presumption of notice in law that cannot be rebutted. *Boswell & Dunlap, LLP*, B-416623, Oct. 10, 2018, 2018 CPD ¶ 351 at 3, *citing Townsend v. Little and Others*, 109 U.S. 504, 511, 3 S. Ct. 357, 27 L. Ed. 1012 (1883) (“Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted.”). By definition this doctrine imputes knowledge to a party without regard to the party’s actual knowledge of the matter at issue. *Boswell & Dunlap, supra*. Thus, FD had constructive notice of the basis of its protest on August 28 when the agency posted the award notice on SAM.gov--*i.e.*, the GPE.

Consequently, we find meritless the protester’s contention that FD could not have known that it would be charged with constructive notice of the agency’s award posting on SAM.gov without having researched this matter. The protester’s argument, in this regard, is not only circular but would render meaningless the doctrine of constructive notice. Finally, even if this were not the case, the solicitation here specifically provided that SAM.gov would be the “Official Means of Disseminating information after solicitation issuance.” RFP at 57.

In sum, where, as here, the agency conducted the competition as a commercial item acquisition under FAR part 13, the brief explanation of the basis for award was neither a “debriefing” nor was it required as contemplated under section 15.506 of the FAR. Consequently, under our regulations--where the debriefing exception is inapplicable--FD was required to file its protest no later than 10 days after the basis of its protest was known, which was August 28 when the Army posted the award notice on SAM.gov. 4 C.F.R. § 21.2(a)(2). Accordingly, FD’s September 10 protest is untimely as it was filed more than 10 days after the basis of protest was known.⁷ *See Desert Springs*

⁷ Because we find FD’s protest to be untimely, we need not address the agency’s contention that the protest also “failed to state sufficient factual and legal protest grounds.” Req. for Dismissal at 1. As a result, we also need not address the protester’s attempt, on September 15--responding to the Army’s dismissal request--to submit additional arguments to bolster FD’s initial protest allegation that LK Tech did “not appear to have met the Prime Contractor’s Prior Experience” requirement. Protest at 3; Supp. Protest at 2-3. We note that even if FD’s initial protest had been timely filed, the protester’s additional arguments in support of its initial allegation would not have been considered because the arguments are untimely piecemeal presentation of protest issues.

Our regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. *Gulf Master Gen. Trading, LLC*, B-420682.2, B-420682.3, Sept. 26, 2022, 2022 CPD ¶ 244 at 4. Our decisions explain that the piecemeal presentation of evidence, information, or analysis supporting allegations previously made is prohibited. *Raytheon Blackbird Techs., Inc.*, B-417522, B-417522.2, (continued...)

Trout Farm, supra at 3-4 (dismissing protest as untimely where procurement was conducted under FAR part 13 and protest was filed more than 10 days after notice of award).

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel

July 11, 2019, 2019 CPD ¶ 254 at 4. Rather, protesters are obligated to set forth in their protest filings all of the known legal and factual grounds supporting their allegations because piecemeal presentation of evidence unnecessarily delays the procurement process and our ability to resolve protests within the 100-day period statutorily mandated by the Competition in Contracting Act. *Battelle Memorial Inst.*, B-418047.5, B-418047.6, Nov. 18, 2020, 2020 CPD ¶ 369 at 9; 31 U.S.C. § 3554(a)(1). At the time of its initial protest, FD knew the reasons for its allegation that LK Tech lacks the requisite prime contractor prior experience, yet FD did not provide this information in its initial protest filing; instead waiting to provide it until after the agency requested dismissal of FD's initial protest for failing to set forth a sufficient factual basis of protest. Accordingly, we would not have considered FD's untimely piecemeal presentation of its protest arguments. *XTec, Inc.*, B-418619 *et al.*, July 2, 2020, 2020 CPD ¶ 253 at 24-25.