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Decision

Matter of: International Business Machines Corporation

File: B-417596.10

Date: March 17, 2021

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DIGEST

Protest challenging terms of solicitation in connection with corrective action taken in response to a previous post-award protest is dismissed because the protest challenges patent ambiguities in the terms of the solicitation that the protester previously knew or reasonably should have known of and challenged.

DECISION

International Business Machines Corporation (IBM), of Bethesda, Maryland, protests the terms of request for task order proposals (RFTOP) No. UNAWRD-19-R-UNIF, which was issued by the Department of the Army, U.S. Army Contracting Command – Rock Island, for Unified Enterprise Resource Planning (ERP) Capability Support Services. IBM alleges that the Army’s response to its prior post-award protest and subsequent clarifications to the RFTOP issued as part of the agency’s corrective action are ambiguous and do not allow offerors to intelligently prepare their proposals, or for the agency to evaluate them, on a common basis.

We dismiss the protest.

BACKGROUND

The RFTOP, which was issued on June 10, 2019, and subsequently amended 10 times, seeks proposals from holders of the National Institutes of Health Chief Information Officer – Solutions and Partners 3 (CIO-SP3) multiple-award, indefinite-delivery,

indefinite-quantity contract for the provision of Unified ERP Capability Support Services.¹ Specifically, the Army seeks to procure capability support services for six Army ERP systems, including: contract and program management; administration of help desk services; hardware and software maintenance; application development; training and knowledge management; transition services; compliance; cybersecurity management; organizational change management; and Agile software development implementation.² Agency Report (AR) (B-417596.8), Tab 3, RFTOP (conformed through amend. 8), at 4. The RFTOP contemplates the award of a single task order with cost-plus-fixed-fee, fixed-price, and cost-no-fee contract line items, and a 12-month base period, four 12-month option periods, and a 12-month award term. *Id.* at 3-4.

The procurement was to be conducted in three phases. Relevant here, IBM and Accenture Federal Services, LLC, of Arlington, Virginia, were the only firms invited to participate in Phase III. Based on its evaluation of Phase III proposals, the agency is to make award on a best-suited tradeoff basis, considering three evaluation factors: (1) technical; (2) cost/price; and (3) small business participation. The technical factor is significantly more important than cost/price, the cost/price factor is more important than the small business participation factor, and the non-price factors, when combined, are significantly more important than cost/price. *Id.* at 23, 27.

Critical to the issues presented in this protest is the Army's envisioned transition to the "future state," when the contractor and the Army will share greater responsibility for managing the unified ERP systems. To reach the "future state," the Army envisions multiple transitions. First, the contractor and Army will work together to transition all of the many existing support contracts to this unified support contract. Next, the parties

¹ This procurement has been the subject of numerous protests and related proceedings before our Office. See, e.g., *InSap Servs., Inc.*, B-417596.2, B-417596.3, Sept. 23, 2019, 2019 CPD ¶ 343 (denying protest alleging that the Army was improperly bundling its requirements); *International Bus. Machines Corp.*, B-417596.4 *et al.*, Mar. 30, 2020 (unpublished decision) (*IBM I*) (dismissing protest challenging first award decision as academic based on the Army's proposed corrective action); *International Bus. Machines Corp.*, B-417596.8, B-417596.9, Nov. 13, 2020 (unpublished decision) (*IBM II*) (dismissing protest challenging second award decision as academic based on the Army's proposed corrective action). Our discussion of the background here is limited to matters relevant to the resolution of this current protest.

² The RFTOP originally anticipated that the contractor would support five Army ERP systems under the task order: Logistics Modernization Program; Army Enterprise System Integration Program Hub; Global Combat Support System-Army; General Fund Enterprise Business System (GFEBs); and GFEBs-Sensitive Activities. A sixth system, the Headquarters Army Environmental System (HQAES), was subsequently added to the task order's scope. See Agency Report (B-417596.8), Tab 4, RFTOP, amend. No. 8, attach. No. 1, Unified ERP Capability Support Service Performance Work Statement/Statement of Objectives at 4.

will work together to transition to a set of common processes and tools. Finally, the parties will transition to an enterprise agile development framework for future development. See, e.g., AR (B-417596.4), Tab 4, RFTOP, Performance Work Statement/Statement of Objectives (PWS/SOO) at 24-25; Tab 137, Unified Contract Industry Day Presentation at 32.

Concurrent with these broader programmatic transitions, the agency anticipates that the number of government personnel supporting the shared services center (SSC) activities will increase. In this regard, prior to publishing the RFTOP, the agency developed a notional staffing plan estimating the total number of personnel that will be needed to support the government's requirements over the first five years of performance. The Army anticipated the following total staffing (both government and contractor personnel): 159 (fiscal year (FY) 2018); 284 (FY2019); 467 (FY2020); 550 (FY2021); and 568 (FY2022). While the agency recognizes that the optimal mix of government versus contractor personnel will be determined, the Army explained that its current planning is for the government staff to "be at least 50% of the total Army SSC workforce" by FY2022. See AR (B-417596.4), Tab 138, Unified Enterprise Resource Programs Req. for Info. at 5.

The RFTOP contemplates that offerors are to address their respective approaches to helping the Army achieve its anticipated future state for the Army SSC, including how the contractor will leverage the government's current and proposed Army SSC personnel. See, e.g., AR (B-417596.4), Tab 4, RFTOP, PWS/SOO at 4 ("The mission of the Army SSC is to build a workforce with the skills necessary to recognize the Army's long-term vision of a single Government organization, led by Government Managers and Service Area Leads, to sustain all Army [Enterprise Resource Programs]."); Tab 6, Unified ERP Capability Support Agile Services Proposal Instructions at 6 (requiring offerors to "[c]learly describe how the Contractor's [Strategic Agile Framework (SAFe)] for Government Implementation Plan/Roadmap will leverage existing and planned Army SSC government personnel in the future state model"); Tab 7, Unified ERP Capability Support Agile Services Statement of Work at 8 (providing as one of the required agile services tasks to "[r]eview/evaluate Army SSC's existing civilian resources for appropriate incorporation into the Full SAFe plan/roadmap and include the staffing model to support").

Additionally, the RFTOP incorporated a supplemental document list as RFTOP attachment No. 8. The attachment included a purpose statement, which directed that: "This document lists the Unified Supplemental Documents that Contractors may find useful in developing their oral presentations and written proposals. These documents are intended for information purposes only and the Government will not be accepting any questions pertaining to the content of the documents listed below." AR (B-417596.4), Tab 11, RFTOP, attach. No. 8, Supplemental Document List. Relevant here, the RFTOP's supplemental document list included an attachment entitled "Army Shared Services Organic Lay Down." The Organic Lay Down identified approximately 330 government positions and provided certain additional details for each position including, for example, location, division, branch, team, customer (in terms of the

5 supported ERP systems), and the Army SSC role title.³ AR (B-417596.4), Tab 138, Army Shared Services Organic Lay Down.

On December 16, 2019, the task order deciding official found that Accenture’s proposal was the best-suited, and selected it for award. The Army evaluated the final proposals of IBM and Accenture as follows:

	IBM	Accenture
Technical	Green/Acceptable	Blue/Outstanding
Total Evaluated Price	\$735,953,595	\$786,678,433
Small Business Participation	Good	Good

AR (B-417596.4), Tab 128, Task Order Decision at 8.

On December 26, IBM filed its first protest challenging the Army’s initial award to Accenture, which our Office docketed as B-417596.4. During the development of the protest, IBM subsequently amended its protest twice, and we docketed the supplemental protests as B-417596.5 and B-417596.6, respectively. Among its many protest allegations, IBM alleged that the Army unreasonably assessed a weakness in IBM’s technical approach for failing to adequately integrate Army personnel in its agile approach, while simultaneously erring by allowing Accenture to reduce its staffing in the option years due to the anticipated incorporation of the government personnel identified in the Organic Lay Down. Our Office subsequently provided the parties with outcome prediction alternative dispute resolution (ADR). The GAO attorney assigned to the protest indicated that our Office would likely deny IBM’s protest allegations involving the agency’s evaluation of offerors’ respective proposed approaches to incorporating government personnel.

The GAO attorney, however, indicated that it was likely that our Office would sustain certain other discrete, unrelated protest allegations raised by IBM. Based on the ADR, the Army notified our Office of its intent to take corrective action, including, at a minimum, to reevaluate proposals and issue a new award decision. See Req. for Dismissal & Notice of Corrective Action (B-417596.4). We subsequently dismissed the protest as academic based on the agency’s proposed corrective action. See *IBM I, supra*.

³ On June 2, 2020, the Army issued Revision A to the Organic Lay Down document. The principal changes were to: (1) reduce the total government personnel from approximately 330 to 283; (2) provide missing experience level information that was omitted in the initial version for several positions; and (3) identify personnel related to the subsequently added HQAES system. See AR (B-417596.8), Tab 138, RFTOP amend. No. 7, attach. No. 18, Army Shared Services Organic Lay Down, rev. A.

The Army's subsequent corrective action included a number of RFTOP amendments and discussions with offerors. Relevant here, on June 2, 2020, the agency issued RFTOP amendment No. 7, which included offerors' questions about the RFTOP and the agency's responses. See AR (B-417596.8), Tab 22, RFTOP amend. No. 7, attach. No. 19, Questions & Answers. As reflected in that document, the offerors asked many questions seeking further clarification about using and mapping the government resources in the Organic Lay Down, and specific information about the government resources and their correlation to the positions that offerors were asked to use in the preparation of their respective labor staffing approaches. As the following representative examples reflect, the Army declined to provide any further substantive clarification in response to these inquiries:

4. [Question] Please provide a mapping of the resources the Army intends to fill in the Organic Lay Down in the Resource List.

[Response] The Organic Lay Down was provided to assist in the development of your approach. The document is a list of resources available to the Contractor to utilize in its approach.

* * * * *

10. [Question] Attachment 18 does not provide instructions explaining how offerors should incorporate the Organic Lay Down into their proposals. Can the government please provide instructions explaining how the offerors should utilize the attachment in its proposal?

[Response] Please see the answer for question 4.

11. [Question] Please provide further instructions to Attachment 18. Specifically, to what extent and how should offerors utilize these government positions in its proposal to the government.

[Response] Please see the answer for question 4.

* * * * *

73. [Question] Please provide the Labor Category for each organic resource to allow offerors to properly map to the [RFTOP's Unified Resource List, which offerors were to use for their staffing approaches].

[Response] Please see the answer for question 4.

74. [Question] Please identify which positions in [the Unified Resource List] are intended to be filled by the following skill sets identified in [the Organic Lay Down]: Director, Deputy Director, Division Chief, Branch Chief, Team Lead, and Project Lead.

[Response] Please see the answer for question 4.

75. [Question 75] Please identify how resources in [the Organic Lay Down] that do not map to skill set or location in [the Unified Resource List] are to be utilized.

[Response] Please see the answer for question 4.

Id.

On June 10, the Army published RFTOP amendment No. 8, which included additional responses to offerors' questions. As with the previous questions and answers, an offeror again expressed frustration regarding the apparent lack of adequate instructions regarding how offerors were to utilize the government resources in the Organic Lay Down. While the Army provided some additional insight by pointing to existing sections of the RFTOP, the agency declined to provide any new or additional guidance. Specifically, the exchange was as follows:

Q1: The RFTOP does not provide adequate instructions regarding [the Organic Lay Down]. In fact, the RFTOP instructions do not even refer to the Organic Lay Down document. In response to Question 4, the Army indicated that the Organic Lay Down constitutes "a list of the resources available for the Contractor to utilize in its approach." *However, the RFTOP does not explain how the contractor may utilize these resources and does not provide any instructions regarding how, where, and in what format offerors should explain or quantify their proposed utilization of the resources in the Organic Lay Down. The lack of instructions regarding utilization of the 280+ resources identified in the Organic Lay Down prevents offerors from competing intelligently and on a relatively equal basis. Please amend the RFTOP to include meaningful instructions regarding how offerors should incorporate the Organic Lay Down into their proposed approach and how offerors should account for the utilization of Government resources in their proposals.*

1. The Government provided the Organic Lay Down for use in the development of the Contractor's Agile approach under Task 2, Assessment of Current Agile Capabilities, which is referenced in both the Agile Statement of Work [RFTOP attachment No. 3] and the Agile Services Instructions to Contractors [RFTOP attachment No. 4] These documents provide information for use in developing the Contractor's approach for this requirement.

AR (B-417596.8), Tab 23, RFTOP amend. No. 8 at 1-2 (emphasis added).

Additionally, offerors raised a number of questions seeking additional guidance from the Army regarding how the Army would permit the contractor to utilize federal employees while not conflicting with the prohibition in Federal Acquisition Regulation (FAR) 7.503 against contractors performing inherently governmental functions, including directing and controlling federal employees. Specifically, the amendment included the following questions and responses:

Q2a: FAR 7.503(a) provides that “[c]ontractors shall not be used for the performance of inherently governmental functions” and identifies the “direction and control of Federal employees” as among the inherently governmental functions a contractor cannot perform. The statement that an offeror may “utilize” Federal employees to “fill the roles necessary to support [its]” approach appears to conflict with the prohibition on inherently governmental functions contained in FAR 7.503. Please explain how the Army will permit the contractor to “utilize” Federal employees to “fill the roles necessary to support [its] approach” without directing the work of Federal employees in violation of applicable law.

2a. In response to the RFTOP, Contractors are to propose an approach to meeting the requirements. This approach could include any or all of the resources identified in [the Organic Lay Down]. The Government provided [the Organic Lay Down] to provide insight to the Contractors as to which Government personnel work in the areas related to the requirements of the Unified ERP PWS/SOO. In creation of its approach, Contractors may utilize the listing to determine placement of its own personnel/how to structure its teams. The Contractor will in no way direct and/or control the employees identified in the attachment as is strictly prohibited by FAR 7.503(c)(7).

* * * * *

Q2c: The entirety of [the Agile Services Statement of Work (SOW)] identifies tasks that the “Contractor” shall perform without any reference to the Federal employees in the Organic Lay Down. The Army’s response to Question 4 indicates that the Contractor can utilize the Federal employees listed in the Organic Lay Dow to support its approach without identifying any restrictions on the utilization of those Federal employees. *Thus, the RFTOP contains a patent ambiguity with respect to the availability of the Federal employees identified in the Organic Lay Down to perform tasks identified in the Agile SOW. Please explain whether contractors may utilize the Federal employees identified in the Organic Lay Down to support the tasks identified in the Agile SOW and amend the RFTOP to include instructions regarding how, specifically, the contractor should account for the utilization of such Federal employees in its proposal.*

2c. As noted above in response to 1, the Government provided the Organic Lay Down for use in development of the Contractor's Agile approach under Task 2. The Government references the review/evaluation of the Army SSC's existing Government resources in the Agile [SOW] and provided the instructions for Contractor's to respond in Agile Services Instructions to Contractors.

As stated above, the Contractor can assume that all of the resources identified in the Organic Lay Down will be available to support the Contractor on a full time basis throughout the period of performance. This means that the government personnel performing the functions identified in the Organic Lay Down will continue to perform those functions on a fulltime basis during contract performance and the Contractor should take this into consideration in structuring its own team.

Id. at 2-4 (emphasis added).

Notwithstanding the noted concerns about a "patent ambiguity" arising from the information in the Organic Lay Down and the request for more specific instructions about the utilization of federal employees identified in the Organic Lay Down, neither Phase III offeror protested the terms of the amended RFTOP. Rather, both offerors proceeded to submit revised proposals by the RFTOP's June 15, 2020, submission deadline. Unlike its prior proposal, IBM this time elected to utilize in its proposed approach the government resources identified in the Organic Lay Down. On July 14, the Army opened discussions with offerors by issuing what the Army referred to as "open interchanges letters." See, e.g., AR (B-417596.8), Tab 81, Open Interchanges Letter to IBM. Relevant to the issues here, the agency identified a weakness in IBM's proposal with respect to its proposed incorporation of government resources in IBM's proposed approach. Specifically, the Army stated that:

(WEAKNESS) The Contractor's Attachment B: Agile Services Staffing Tables (Tasks 6, 7, and 8) lays out by team the proposed Contractor and Government skill sets for each team. Across the different [ERP system] teams for Task 6, the contractor proposed using government skill sets inconsistent with or entirely outside of the Army SSC Organic Laydown. Based on this approach, it would require the Government to reskill their organic technical competencies.

- Please explain how skill sets are matched to teams in the Army SSC Organic Lay Down across [the ERP system] teams and provide support for any proposed assignments of Government personnel that are inconsistent with the skill sets or beyond the team composition set forth in the Army SSC Organic Lay Down.

AR (B-417596.8), Tab 82, Phase III Evaluation Notice to IBM at 1.

IBM did not argue in its discussion response that it objected to the Army’s interpretation of the requirement to map the government resources by team or that the RFTOP included inadequate information to map the resources. Rather, IBM submitted a revised proposal explaining that it “analyzed the Organic Lay Down provided by the Government to determine our mapping of Government personnel based on skill set, business area, and experience level,” and “performed a strategic alignment of resources provided by the Government to the Resource List with a focus on mapping data elements as follows: System to Customer, Capability/Reference to Team, Project Role/Job Title to Army SSC Role Title, Location, and” CIO-SP3 labor category requirements. AR (B-417596.8), Tab 27, IBM Contractor SOW at 22. IBM further elaborated on its approach that it proposed to align government resources based on their core competencies and [DELETED]. *Id.*; Protest (B-417596.8), exh. 13, IBM Agile Staffing Tables, at Tabs X012AB, X013AB, and X014AB.

Notwithstanding IBM’s additional explanations, the agency ultimately decided that the evaluated weakness had not been resolved. Specifically, the Army explained that:

[The] additional information did not resolve the concerns with the government skill sets that are inconsistent with or entirely outside of the resources available in the Army SSC Organic Lay Down. The revisions in Attachment B, Agile Staffing Tables, did not describe a sufficient approach to how the Agile teams would be constructed with the Government roles that were provided.

AR (B-417596.8), Tab 87, Unified ERP Phase III Evaluation Report for IBM at 10; see *also id.* at 9 (explaining that IBM’s approach would require the agency “to reskill its organic technical competencies,” and that “the Government did not present this as an option to contractors as it is not feasible for the Government to do”).⁴

On September 9, the task order deciding official again found that Accenture’s proposal was the best-suited, and selected it for award. The Army evaluated the final proposals of IBM and Accenture as follows:

	IBM	Accenture
Technical	Green/Acceptable	Blue/Outstanding
Total Evaluated Price	\$685,353,384	\$729,723,148
Small Business Participation	Good	Good

AR (B-417596.8), Tab 100, Task Order Decision at 8 (prices rounded to nearest whole dollar).

⁴ IBM was provided with a copy of the technical evaluation report as part of its post-award debriefing. See AR (B-417596.8), Tab 98, IBM Debrief, attach. No. 1, Unified ERP Phase III Evaluation Report for IBM.

On September 23, IBM filed a post-award protest challenging the second proposed award to Accenture, which our Office docketed as B-417596.8. Among its many protest allegations, IBM challenged the weakness awarded to its proposal based on its proposed incorporation of government resources, arguing that the agency's evaluation was flawed in a number of respects. Relevant here, IBM alleged that the Army unreasonably relied on "[a]n unstated rule that offerors could not map Role Titles across Business Areas (e.g., that [a] software developer in the Acquisition Business Area could not be utilized as a software developer in the Finance Business Area)." Protest (B-417596.8) at 13.

In support of this specific protest allegation, IBM argued that "[t]he RFTOP did not include any explanation or instructions for the Organic Lay Down," and that the Army, "in response to numerous questions, declined to provide any details regarding the education, experience, job description, labor mapping, or skill sets of these government resources." *Id.* at 17. IBM further argued that the agency's responses to questions included in RFTOP attachment No. 19 "afforded offerors broad discretion to utilize the government resources in the Organic Lay Down to support their approaches," and "[n]othing in the RFTOP prohibited offerors from using government resources with the same Role Title across different Business Areas." *Id.*

The Army responded to the protest with a report, rebutting, in detail, IBM's interpretation of the RFTOP. The agency asserted that the RFTOP did not permit offerors to repurpose or reskill Army resources for new roles and that IBM's contrary interpretation of the RFTOP was unreasonable. According to the Army, IBM's interpretation precluded offerors from competing on a common basis and allowed a contractor to direct government personnel, which was in contravention of FAR 7.503, and rendered the RFTOP patently ambiguous. See Contracting Officer Statement/ Memorandum of Law (B-417596.8) at 9-12. The Army also argued that IBM's complaints--i.e., that the RFTOP contained insufficient information, that the Army failed to provide reasonable responses to offerors' questions on the RFTOP, and that the Army's evaluation notice requiring the mapping of Organic Lay Down resources by team composition was unreasonable--were otherwise untimely challenges to the terms of the solicitation. *Id.* at 12-13.

IBM's comments responding to the agency's report did not address the Army's arguments about the correct interpretation of the RFTOP or rebut the Army's arguments about the untimeliness of IBM's allegations. Rather, IBM abandoned its initial challenge of the weakness awarded to its proposal based on its proposed incorporation of government resources and instead raised an entirely new set of supplemental protest allegations. Specifically, IBM asserted that the agency had engaged in a disparate evaluation of proposals by not similarly penalizing Accenture for its proposed reskilling or repurposing of government personnel beyond the team composition set forth in the

Organic Lay Down.⁵ See IBM Comments & Supp. Protest (B-417596.8, B-417596.9) at 11-25.

Prior to the deadline established by our Office for the submission of the supplemental agency report, the Army notified us of its intent to take corrective action. As addressed above, at the time the agency proposed to take corrective action, there was only one relevant pending protest ground involving the mapping/proposed use of government resources--IBM's supplemental protest allegation that the Army had engaged in a disparate evaluation of the proposals. The Army sought dismissal of the post-award protest as academic based on the agency's proposal to: (1) reevaluate proposals; (2) reopen discussions if necessary; and (3) issue a new award decision based on the reevaluation. See Req. for Dismissal & Notice of Corrective Action (B-417596.8) at 1.

IBM submitted a nine-page "Response to Notice of Corrective Action and Request for Dismissal" setting forth various concerns about how the agency had conducted the procurement to date, and proposed solicitation amendments or other actions that IBM wanted the Army to take. IBM, however, expressly stated that "IBM does not object to the dismissal of its protest as academic under the legal standards applied by the Government Accountability Office," while noting IBM's belief that "those standards do not address whether the proposed corrective action will correct the serious procurement errors identified by IBM, which they will not." See Resp. to Notice of Corrective Action & Req. for Dismissal (B-417596.8) at 1 n.1. Based on the agency's proposed corrective action and IBM's representation that it did not object to dismissal of its protest as academic, we dismissed the protest on November 13, 2020. *IBM II, supra*. We note that IBM did not file a protest of the scope of the agency's corrective action or otherwise challenge the terms of the solicitation.

Subsequent to our dismissal of the protest, the Army initiated its reevaluation of proposals and elected to reopen discussions with offerors. See, e.g., Protest (B-417596.10), exh. 10, Open Interchanges Letter to IBM. In a letter dated December 21, the Army notified IBM of an assessed weakness with respect to IBM's proposed mapping of the government personnel listed in the Organic Lay Down. The assessed weakness was materially similar to the weakness previously assessed against IBM's proposal and disclosed to IBM during the prior round of discussions and

⁵ Where an agency provides a detailed response to a protester's assertions and the protester fails to rebut or otherwise substantively address the agency's arguments in its comments, the protester provides us with no basis to conclude that the agency's position with respect to the issue in question is unreasonable or improper. *IntegriGuard, LLC d/b/a HMS Fed.--Protest & Recon.*, B-407691.3, B-407691.4, Sept. 30, 2013, 2013 CPD ¶ 241 at 5. In this regard, a protester abandons its initial protest allegations where, like IBM did in its prior protest, it fails to substantively respond to the government's response to the initial allegations, but, instead, asserts similar, but materially-different, supplemental protest allegations. *Arktis Detection Sys., Inc.*, B-416339, B-416339.2, Aug. 10, 2018, 2018 CPD ¶ 303 at 6-7.

evaluation. Specifically, the Army notified IBM of the following weakness assessed during the reevaluation:

(Weakness) The Contractor's Attachment B: Agile Services Staffing Tables (Tasks 6, 7, and 8) lays out the proposed Contractor and Government skill sets for each team. Across the different teams for Tasks 6 and 8, the contractor proposed using government skill sets inconsistent with or entirely outside of the Army SSC Organic Lay-Down when viewed according to customer/branch/team.

The Contractor's revision in its [July 20 final proposal revision] did provide some rationale for the skill sets proposed; however, this additional information did not resolve the concerns with the government skill sets that are inconsistent with or entirely outside of the resources available in the Army SSC Organic Lay Down. The revisions in Attachment B, Agile Staffing Tables, did not describe a sufficient approach to how the Agile teams would be constructed with the Government roles that were provided. This could result in a disruption of the Army SSC mission, which increases performance risk.

* * * * *

Please either revise the proposal or explain how the proposed skill sets align to customer/branch/team in the Army SSC Organic Lay Down across Tasks 6 and 8 and provide support for any proposed assignments of Government personnel that are inconsistent with the skill sets or beyond the team composition set forth in the Army SSC Organic Lay Down.

Id. at 1-3.

Additionally, the Army responded to additional offeror questions on the RFTOP through an amendment to the RFTOP dated December 21. As with the prior exchanges, many of the offerors' questions and requests for clarification related to the Organic Lay Down and how offerors were to propose to use and direct the government personnel addressed therein. Regarding the Organic Lay Down, as the following representative examples demonstrate, the agency confirmed its prior positions that offerors should generally strictly map government resources by their designated team assignments in the Organic Lay Down, and again declined to provide further amplification of the information contained in the Organic Lay Down:

8. [Question] Question 14 asked the Army to "provide the qualifications and position descriptions for each organic resource to allow offerors to properly map to the Resource List." The Army responded, "[Revision A to the Organic Lay Dow] has been provided. However, please also note the answer for question 4." The answer to Question 4, in turn, stated: "The Organic Lay Down was provided to assist in the development of your

approach. The document is a list of resources available to the Contractor to utilize in its approach.”

a. Why has the Army declined to provide the information requested in Question 14? Does the Army not have the information? Does the Army believe offerors already have the information? Does the Army believe the information is irrelevant? Does the Army believe the question is unreasonable? Does the Army believe offerors can map resources without qualifications and position descriptions? Please explain.

b. Please provide the information requested in Question 14.

[Response] The Organic Lay Down provides the Branch, Team, Army SSC Role Title, and Experience Level; these pieces of information indicate how Contractors may utilize Government Resources in their approach. Contractors shall note that there is no obligation to utilize Government Resources.

* * * * *

10. [Question] May a resource identified with a particular Customer in the Organic Laydown be mapped to a position on a different ERP System? Are there any circumstances under which such mapping would be appropriate?

[Response] Resources under a particular Customer in the Organic Lay Down should not be mapped to another Customer without supporting rationale. The Government will evaluate the approach and rationale, if any, to determine its feasibility.

11. [Question] Please explain how the resources identified in the Organic Lay Down map to the Business Areas for the Agile Services Tasks.

[Response] Mapping the Business Areas for Agile Services Tasks to the Organic Laydown varies by Customer because each Customer has its own structure; for example, some Customers map up “Branch” while others map by “Team.”

12. [Question] Which Teams in the Organic Laydown map to which Business Areas in the Agile Services Tasks?

[Response] As stated above, the Business Areas vary by Customers because each Customer has its own structure. Not all Business Areas have Government Resources available; those that are identified are those that are available.

Protest (B-417596.10), exh. 11, RFTOP, attach. No. 19, Questions & Answers.

With respect to the incorporation of government personnel into offerors' approaches, the Army again confirmed that it would make government personnel available to support the contractor's proposed approach, but the contractor will not be authorized to direct or control the government personnel as prohibited by FAR 7.503.

32. [Question] Please confirm that the Army is committing that the government resources identified in the Organic Laydown will follow the contractor's reasonable instructions in performing the work contemplated by the contractor's proposed approach.

[Response] Contractors are not allowed to direct Government employees in any way per FAR 7.503; however, the Government Resources identified in the Organic Lay Down are made available for Contractors to utilize in supporting their approach. Contractors shall note that there is no obligation to utilize Government resources.

* * * * *

34. [Question] Please confirm that the Army is committing to assume responsibility for delays and cost increases caused by the government resources who are supporting the contractor's proposed approach.

[Response] Performance of the contract remains the responsibility of the Contractor. Contractors shall note that there is no obligation to utilize Government resources.

Id.

The deadline for final proposal revisions was January 7. *Id.*, ¶ 41. This protest followed.⁶

DISCUSSION

IBM raises three primary challenges to the RFTOP's terms. First, IBM alleges that the RFTOP does not provide adequate information for offerors to comply with the Army's undisclosed rules for the mapping of government resources from the Organic Lay Down

⁶ The values of the previously awarded task orders exceeded \$700 million. Accordingly, this protest falls within our statutory grant of jurisdiction to hear protests in connection with task and delivery orders valued in excess of \$10 million issued under civilian agency multiple-award indefinite-delivery, indefinite-quantity contracts. 41 U.S.C. § 4106(f).

to the roles on the contractor's agile software development teams. The protester alleges that the "Technical Evaluation provided to IBM as part of its debriefing following the first corrective action and the Interchange Notices provided to IBM as part of the second corrective action demonstrate that the Army has decided to apply rigid but undisclosed mapping rules," and the Army unreasonably refused to address IBM's requests for additional information during the current corrective action. Protest (B-417596.10) at 2.

Second, IBM alleges that the RFTOP is patently ambiguous with respect to the extent and manner in which contractors will be permitted to utilize the government resources identified in the Organic Lay Down. The protester specifically points to the agency's response that the contractor will not be permitted to direct government personnel to IBM's question regarding whether the government personnel will be required to comply with the contractor's reasonable instructions. Third, and relatedly, IBM contends that the agency's refusal to confirm that it will be responsible for delays and cost increases caused by government personnel utilized by the contractor creates patent ambiguities with respect to application of several flow-down clauses from the CIO-SP3 contract.

The Army requests dismissal of the protest, primarily arguing that IBM's protest presents untimely challenges to the RFTOP's terms. In this regard, the agency argues that the alleged ambiguities were patent, and were--or reasonably should have been--raised by IBM in its prior protests. The agency contests IBM's arguments that the Army's clarifications issued during the current period of corrective action introduced new ambiguities, arguing that the Army's confirmation of its prior positions does not excuse IBM's failure to diligently pursue its challenges earlier. IBM opposes dismissal, primarily arguing that it timely challenged the agency's introduction of new ambiguities in the evaluation notice and RFTOP clarifications issued during the current corrective action.

Our Bid Protest regulations contain strict rules for the timely submission of protests. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); *Sikorsky Aircraft Corp.*, B-416027, B-416027.2, May 22, 2018, 2018 CPD ¶ 177 at 6. A patent solicitation ambiguity exists where the solicitation contains an obvious, gross, or glaring error. *Sheritech Pharmacy Piedmont, LLC*, B-413945, Nov. 7, 2016, 2016 CPD ¶ 325 at 4 n.2. An offeror has an affirmative obligation to seek clarification of a patent ambiguity prior to the first due date for submissions responding to a solicitation following introduction of the ambiguity into the solicitation. 4 C.F.R. § 21.2(a)(1); *Pitney Bowes, Inc.*, B-294868, B-294868.2, Jan. 4, 2005, 2005 CPD ¶ 10 at 5. Where a patent ambiguity exists but is not challenged prior to the submission of solicitation responses, we will not consider subsequent untimely arguments asserting the protester's own interpretation of the ambiguous provisions. *FFLPro, LLC*, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 10.

For the reasons that follow, we agree with the Army that IBM's protest presents untimely challenges to the terms of the RFTOP that were or reasonably should have previously been known to IBM. Therefore, we dismiss the protest.

Organic Lay Down Mapping Requirements

As an initial matter, we do not find a basis to materially disagree with IBM's assertions that the RFTOP is patently ambiguous and/or fails to include meaningful information with respect to how the agency expected offerors to map the proposed use of the government resources in the Organic Lay Down to the offeror's unique proposed approaches, and the mapping of the government resources to the labor staffing model that offerors were required to use. In this respect, both parties have consistently argued as such, including in (i) the offerors' questions on the RFTOP, (ii) IBM's previous protest, and (iii) the Army's response in opposition to IBM's prior protest. See, e.g., AR (B-417596.8), Tab 23, RFTOP Amend. 8 at 1-2 (including an offeror's concerns that "[t]he RFTOP does not provide adequate instructions regarding" the Organic Lay Down, "the RFTOP does not explain how the contractor may utilize these resources and does not provide any instructions regarding how, where, and in what format offerors should explain or quantify their proposed utilization of the resources in the Organic Lay Down," and the lack of instruction regarding utilization "prevents offerors from competing intelligently and on a relatively equal basis," and requesting the Army to amend the RFTOP to "include meaningful instructions regarding how offerors" were to utilize the Organic Lay Down resources); *id.* at 2 (including a vendor's position that the Army's prior response "indicates that the Contractor can utilize the Federal employees listed in the Organic Lay Down to support its approach without identifying any restrictions on the utilization of those Federal employees," and, therefore, arguing that "the RFTOP contains a patent ambiguity with respect to the availability of the Federal employees identified in the Organic Lay Down"); Protest (B-417596.8) at 17 ("The RFTOP did not include any explanation or instructions for the Organic Lay Down," and "[t]he Army, in response to numerous questions, declined to provide any details regarding the education, experience, job description, labor mapping, or skill sets of these government resources."); Contracting Officer's Statement/Legal Memorandum (B-417596.8) at 12-13 (arguing that IBM's protest allegations presented a patent ambiguity in the RFTOP's terms). Indeed, IBM's concerns with the RFTOP's apparent lack of adequate explanation for the Organic Lay Down document goes all the way back to at least IBM's first protest. See, e.g., Protest (B-417596.4) at 19 (arguing that the Organic Lay Down document "is a spreadsheet of 330 positions with no instructions or requirements," and the PWS/SOO's reference to the Army's "long-term vision [of] a Government organization, led by Government Managers and Service Area Leads . . . does not define how the government and contractor staff should be allocated and it does not require offerors to describe their allocation").

Thus, we begin our analysis with the understanding that IBM elected to compete under a patently ambiguous solicitation--a solicitation the protester itself has consistently asserted lacks critical information necessary for offerors to intelligently develop their respective proposals on a common basis. An offeror that chooses to compete under a

patently ambiguous solicitation does so at its own peril and cannot later complain when the agency proceeds in a way inconsistent with its interpretation. *Yulista Tactical Servs., LLC*, B-417317.3 *et al.*, Jan. 15, 2020, 2020 CPD ¶ 29 at 11-12. We also find IBM's complaints--that the Army unreasonably declined to provide clarification in response to offerors' questions on the RFTOP--equally problematic and untimely. When an agency fails to clarify a patently-ambiguous term or solicitation provision, or otherwise satisfactorily resolve a firm's questions, a firm is required to raise its concerns prior to the next closing date. *Strategic Mgmt. Solutions, LLC*, B-416598.3, B-416598.4, Dec. 17, 2019, 2019 CPD ¶ 426 at 15-16; *Pathology Assocs., Inc.*, B-237208.2, Feb. 20, 1990, 90-1 CPD ¶ 292 at 6; *Manatts, Inc.*, B-237532, Feb. 16, 1990, 90-1 CPD ¶ 287 at 3. Here again, IBM elected not to challenge the Army's allegedly deficient responses, but, rather, elected to compete notwithstanding.⁷ Thus, IBM's complaints as to the adequacy of instructions and the level of information provided in the RFTOP regarding the Organic Lay Down, or the Army's refusal to provide further clarification on the subject are facially untimely at this juncture.

IBM, however, argues that its protest of the lack of adequate information in the RFTOP is now timely because the agency's December 21 question and answer responses confirmed the agency's understanding of the RFTOP as requiring a strict mapping of the Organic Lay Down resources by team composition. IBM argues that it could only reasonably challenge the limitations of the RFTOP's instructions and information about the Organic Lay Down once the agency confirmed that it would insist on mapping government resources by team composition in the Organic Lay Down to the business areas in the Unified Resource List that offerors were to use for their proposed staffing. Because IBM filed its protest before the next due date for receipts of proposals, IBM contends its protest of the solicitation defect is timely under our rules. We disagree.

Even assuming for the sake of argument that the particular concerns about the solicitation IBM now raises were not apparent at the time of the initial closing date for proposals,⁸ it is clear that they share the same legal and factual predicates with

⁷ We further note that the Army has been remarkably consistent in refusing to provide further clarification of the information contained in the Organic Lay Down as requested by offerors. Indeed, as discussed above, the initial RFTOP instructions for the supplemental RFTOP exhibits, which included the Organic Lay Down, stated that "the Government will not be accepting any questions pertaining to the content of the documents listed below." AR (B-417596.4), Tab 11, RFTOP, attach. No. 8, Supplemental Document List. As recounted above, the Army largely declined to provide any further information regarding the contents of, or how offerors were to address, the Organic Lay Down over several subsequent rounds of exchanges on the RFTOP. IBM's complaints are patently untimely when--after multiple amendments and proposal submissions--IBM now complains that the Army is continuing to act in a manner consistent with the position the Army set forth in the original RFTOP.

⁸ To be clear, we view the solicitation defects at issue in this protest to stem from patent ambiguities that existed in the solicitation when IBM submitted its first proposal. As
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arguments that should have been – and in fact were – raised previously in connection with IBM’s prior post-award protest. Indeed, the crux of IBM’s arguments in its prior protest was that the RFTOP did not require offerors to strictly map the government resources from the Organic Lay Down to their proposed staffing approaches, while also arguing that the RFTOP contained inadequate information and instructions about the Organic Lay Down. In support of its interpretation of the RFTOP, IBM argued that there was no prohibition on the repurposing or reskilling of government personnel, arguing that the RFTOP generally permitted the use of such resources to support the offeror’s approach, and noting that the RFTOP did not provide--and the Army declined requests for further--instructions on the use of the Organic Lay Down.

The Army, however, provided a detailed rebuttal of these protest allegations in its Memorandum of Law responding to the protest. As set forth above, the Army argued that the RFTOP did not authorize offerors to repurpose or reskill government resources beyond the team composition for those resources included in the Organic Lay Down. Alternatively, the Army alleged that IBM’s interpretation presented patent ambiguities in the terms of the RFTOP, or otherwise presented untimely challenges to the RFTOP’s terms. Rather than responding to the agency’s arguments, IBM substituted its initial protest allegations for new supplemental protest allegations of disparate treatment, and, thus, abandoned its initial protest allegations. *Arktis Detection Sys., Inc., supra*; *IntegriGuard, LLC d/b/a HMS Fed.--Protest & Recon., supra*.

By abandoning its challenge to the agency’s understanding of the mapping requirements, IBM effectively conceded any argument about the terms of the solicitation in this respect. Under these circumstances, IBM must be charged with having adopted, or at a minimum having understood, the agency’s interpretation of the RFTOP as requiring strict mapping when the agency undertook corrective action in response to IBM’s protest. Nonetheless, IBM did not file a protest at that time to complain about the strict mapping concerns it now raises months later for the first time in this protest.

In this regard, IBM’s allegations present the improper piecemeal presentation of issues. Our Office will dismiss a protester’s piecemeal presentation of arguments that could have been (or, in this case, were already) raised earlier in the protest process. *Leader Comm’ns, Inc.*, B-417152.2, B-417152.3, June 26, 2019, 2019 CPD ¶ 241 at 6; *Gaver Techs., Inc.*, B-409535.3, Apr. 2, 2015, 2015 CPD ¶ 115 at 12 n.5. As we have further explained, our regulations obligate a protester to set forth all of the known legal or factual grounds supporting its allegations because piecemeal presentation of evidence or arguments unnecessarily delays the procurement process and our ability to resolve

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detailed above, the problems with the solicitation were then specifically identified in the series of questions and answers to the agency following IBM’s first protest, yet, IBM decided to submit a revised proposal without seeking resolution of these concerns. Also, as explained above, any subsequent protest concerning these patent ambiguities is now untimely.

protests within the requisite 100-day period. *Battelle Memorial Inst.*, B-418047.5, B-418047.6, Nov. 18, 2020, 2020 CPD ¶ 369 at 9 ; *XTec, Inc.*, B-418619 *et al.*, July 2, 2020, 2020 CPD ¶ 253 at 25.

While the foregoing considerations usually apply during the pendency of the same protest proceeding, the prudential considerations underpinning the prohibition on piecemeal development applies with equal force in the unique circumstances here involving a prior post-award protest and this subsequent corrective action protest. Specifically, as addressed above, the protester previously sought clarification regarding the Organic Lay Down and how it was to use and map the government resources contained therein. Notwithstanding its complaints that the Army failed to adequately address its concerns, the protester competed regardless. IBM's prior post-award protest then challenged the agency's interpretation of the RFTOP's mapping requirements, while also complaining that the RFTOP failed to provide meaningful instructions regarding the Organic Lay Down and the agency unreasonably refused to provide requested clarification. The agency provided a detailed rebuttal to those arguments in its agency report. IBM subsequently abandoned those arguments when it failed to respond in its comments.

The agency then proposed specific corrective action to address IBM's remaining supplemental protest allegations challenging the agency's alleged disparate evaluation of proposals. In responding to the agency's corrective action notice, IBM expressed its concerns about the terms of the solicitation, yet, it did not object to the scope of the agency's proposed corrective action, which did not contemplate any changes to the terms of the solicitation, and IBM did not otherwise timely protest the terms of the solicitation at that time. IBM's current protest, however, effectively argues that the agency is refusing to take actions to address the very protest arguments that IBM abandoned during the prior protest. Had the protester not abandoned these arguments, the Army either could have elected to seek a decision from our Office on those grounds, or otherwise considered whether to address them as part of the agency's corrective action.

Additionally, while the protester relies on the Army's latest question and answer responses, and the new solicitation deadline, to support the timeliness of its protest, this reliance is misplaced. The Army's confirmation of its previous positions in its responses to IBM's current questions and requests for clarification of the RFTOP, which are substantively indistinguishable from the questions and answers previously incorporated into the RFTOP, cannot restart the protest clock for deficiencies that were or should have been apparent to IBM previously.⁹

⁹ Even assuming it was not clear that the RFTOP specifically contemplated strict mapping at the time proposals were originally submitted, the Army unequivocally made its position known (1) during discussions prior to the second award decision, and (2) in its response to IBM's second post-award protest. As discussed above, IBM abandoned its contrary interpretation of the solicitation during its prior protest and never pursued the
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Control of Proposed Government Resources

We dismiss IBM's remaining two protest allegations because they are patently untimely challenges to the terms of the solicitation. In this regard, IBM's protest allegations here all challenge the agency's approach to permit the contractor to utilize government personnel while not providing the contractor with the ability to effectively manage or direct the performance of those government personnel. This concern, however, was known or should have reasonably been known by IBM by no later than the questions and answers incorporated into RFTOP amendment No. 8. In this regard, the Army unequivocally stated in response to an offeror's concerns regarding the contractor's control and supervision of government personnel that "[t]he Contractor will in no way direct and/or control the employees identified in the [Organic Lay Down] attachment as is strictly prohibited by FAR 7.503(c)(7)." AR (B-417596.8), Tab 23, RFTOP Amend. 8, at 3. IBM did not object to agency's clarification that the contractor will not be permitted to control or supervise government personnel, but, rather, elected to proceed with submitting its proposal.

As with its objections to the dismissal of its mapping-related challenges, IBM effectively seeks to avoid the consequences of its failure to diligently pursue this alleged RFTOP deficiency by arguing that the agency's subsequent responses on the RFTOP introduced new ambiguities that it has now timely protested. We, however, find nothing in the Army's confirmation in subsequent questions and answers of its position previously taken in earlier questions and answers on the solicitation that would excuse IBM's failure to diligently pursue its challenges to the same operative factual and legal arguments. Specifically, the Army merely confirmed its prior response that the contractor will not be permitted to control or direct government personnel. Additionally, to the extent that IBM sought additional information from the agency that was consistent with the agency's original clarification, such lack of diligence would not excuse IBM from having failed to timely pursue its protest. In this regard, we have explained that a firm may not delay filing a protest until it is certain that it is in a position to detail all of the possible separate grounds of protest. *Centerra Integrated Facilities Servs., LLC*, B-418628, Apr. 23, 2020, 2020 CPD ¶ 155 at 8; *CDO Techs., Inc.*, B-416989, Nov. 1, 2018, 2018 CPD ¶ 370 at 5; *Litton Sys., Inc., Data Sys. Div.*, B-262099, Nov. 17, 1995, 95-2 CPD ¶ 261 at 5 n.5. As IBM waited until this late date to challenge these apparent solicitation defects, its allegations now are untimely and dismissed on that basis. *DCR Servs. & Constr., Inc.*, B-415565.2, B-415565.3, Feb. 13, 2018, 2018 CPD ¶ 125 at 4 n.6; 4 C.F.R. § 21.2(a)(1).

In conclusion, we are compelled to dismiss IBM's untimely protest allegations. Although our Office will not make a recommendation that the Army fix the RFTOP's apparent

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matter further either during that protest or timely in response to the agency's notice of corrective action.

deficiencies where IBM has failed to exercise reasonable diligence to bring its challenges, we note that this procurement appears to be significant to the Army and, based on its prior history, will likely be the subject of a future post-award protest by whichever party is disappointed by the agency's subsequent evaluation. Thus, the agency may elect to consider whether providing additional clarification to guide offerors in the preparation of their proposals may be warranted.

The protest is dismissed.

Thomas H. Armstrong
General Counsel