



Decision

Matter of: KeyLogic Associates, Inc.; KSD Technologies, LLC

File: B-421346; B-421347; B-421348; B-421377; B-421378

Date: March 8, 2023

John J. O'Brien, Esq., and Jason W. Moy, Esq., Cordatis LLP, for the protesters.
David S. Black, Esq., Gregory R. Hallmark, Esq., and Amy L. Fuentes, Esq., Holland & Knight LLP, for Blackwatch International Corporation, the intervenor.
Joe D. Baker II, Esq., and Susan E. Sharp, Esq., Department of Commerce, for the agency.
Nathaniel S. Canfield, Esq., and Evan D. Wesser, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protests alleging the U.S. Patent and Trademark Office, when conducting procurements in accordance with its statutorily authorized alternative competition method pursuant to 35 U.S.C. § 2(b)(4)(A), failed to reasonably justify its use of other than competitive procedures under 41 U.S.C. § 1708(c)(5) are denied where that statutory provision does not require such a justification.
2. Protests alleging agency failed to comply with internal agency guidance are denied because alleged violations of internal agency policy or guidance, rather than statute or regulation, do not establish a valid basis for protest.
3. Protests alleging that agency failed to comply with requirements regarding time for issuing solicitations following publication of procurement notices, provision of solicitations to requesting parties, and small business set-asides are denied for lack of competitive prejudice because the agency was permitted to select a single firm to receive the challenged solicitations.

DECISION

KeyLogic Associates, Inc. (KeyLogic), of McLean, Virginia, and KSD Technologies, LLC (KSD), a small business of Rockville, Maryland, protest the Department of Commerce, U.S. Patent and Trademark Office's (PTO) issuance of several requests for proposals (RFP) for various information technology (IT) services on a noncompetitive basis. The protesters contend that the agency: (1) has not justified its reasons for using

noncompetitive procedures as required by 41 U.S.C. § 1708(c)(5) and the Patent and Trademark Office Acquisition Guidelines (PTAG); (2) has failed to provide the protesters with copies of the RFPs as required by 41 U.S.C. § 1708(g); and (3) has not complied with the time limitations of 41 U.S.C. § 1708(e) in issuing the RFPs. Additionally, KSD contends that the agency has violated 13 C.F.R. § 125.2 in setting aside certain of the RFPs for small businesses and issuing those RFPs to a single small business each.

We deny the protests.

BACKGROUND

The agency issued the RFPs at issue as part of its Enterprise Infrastructure Product Line (EIPL) Rapid Phase Production (RPP) procurement effort, with each RFP concerning a separate IT functional area. Contracting Officer's Statement (COS) at 1. As discussed further below, for each RFP, the agency selected a single firm that the agency decided was most likely to successfully meet the agency's requirements for the RFP's particular functional area, and issued the corresponding RFP to that firm. *Id.* at 4-7. RFP No. 1333BJ23R00280001 (RFP 0001), which KeyLogic challenges in the protest docketed as B-421346, encompasses platform services. *Id.* at 1-2. RFP No. 1333BJ23R00280003 (RFP 0003), which KSD challenges in the protest docketed as B-421347, encompasses compute services.¹ *Id.* at 2. RFP No. 1333BJ23R00280005 (RFP 0005), which KSD challenges in the protest docketed as B-421348, encompasses integration services. *Id.* RFP No. 1333BJ23R00280004 (RFP 0004), which KSD challenges in the protest docketed as B-421377, encompasses identity, credential, and access management services. *Id.* at 3. RFP No. 1333BJ23R00280007 (RFP 0007), which KeyLogic challenges in the protest docketed as B-421378, encompasses end user services.² *Id.* at 2.

¹ The intervenor, Blackwatch International Corporation (Blackwatch), is the firm selected for receipt of RFP 0003. COS at 6.

² The agency has selected a firm for receipt of RFP 0007 but has not yet issued the RFP, which the agency is currently drafting. COS at 9, 14-15. We do not, however, dismiss the challenge to RFP 0007 as prematurely filed. As discussed more fully below, the PTO is conducting these procurements under its alternative competition method, pursuant to which the PTO may select a single firm for receipt of a solicitation. The PTO published synopses describing the requirements, stating the authority under which the PTO was proceeding, and identified the selected firms.

For purposes of timeliness only, we analogize this factual circumstance to the scenario involving the publication of a notice of intent to enter into a sole-source contract. In that context, we previously have concluded that a protest of a proposed sole-source action filed prior to the issuance of a solicitation is not premature where the agency publicizes a notice of intent to enter into a sole-source contract but does not invite responses from potential sources. See *Gichner Sys. Group, Inc.*, B-414392, May 31, 2017, 2017 CPD ¶ 178 at 4 n.4 (citing *VSE Corp.*; *Johnson Controls World Servs., Inc.*, B-290452.3 *et*

The PTO issued the RFPs under its unique alternative competition method procurement authority. Agency Report (AR), Tab F-1, RFP 0001 at 4; Tab G-1, RFP 0003 at 4; Tab I-1, RFP 0005 at 4; Tab H-1, RFP 0004 at 4; Tab J-1, Draft RFP 0007 at 4. The agency's alternative competition method is authorized by The Patent and Trademark Office Efficiency Act (PTOEA), 35 U.S.C. § 2(b)(4)(A), and implemented through section 6.1.1 of the PTAG, 78 Fed. Reg. 61185, 61186-87 (Oct. 3, 2013).³ When using the alternative competition method, PTAG section 6.1.1 specifies that “[a]fter conducting market research, the [contracting officer] and Contracting Officer’s Representative (COR) will use their technical expertise and understanding of the marketplace to determine which vendor(s) is/are the most likely to successfully meet the agency’s needs and are thereby eligible to participate in an alternative competition.” 78 Fed. Reg. 61185, 61186 (Oct. 3, 2013). After conducting this market research, the contracting officer sends the solicitation directly to the selected firm(s). *Id.* at 61187.

Pursuant to the alternative competition method, on January 12, 2022, the agency published a notice on the SAM.gov website seeking responses from firms interested in and capable of meeting the agency’s requirements in nine different IT functional areas, including the five that are the subjects of the RFPs at issue here. COS at 4-5. The agency received 33 responses by the notice’s due date of February 8, and following review by an agency subject matter expert panel, the agency extended invitations to firms to participate in an RPP virtual symposium event. *Id.* at 5. Twenty-three firms participated in the symposium on March 22. *Id.* Agency subject matter experts reviewed information obtained through the symposium, as well as exchanges with firms following the symposium. *Id.* Based on all of the information gathered through market research, the agency invited 15 firms to submit concept papers by May 16. *Id.*

The agency received 47 concept papers from 14 firms. *Id.* A panel of agency subject matter experts reviewed the concept papers and provided its findings--including recommendations as to which firm was most likely to successfully meet the agency’s needs in each of the functional areas--to the contracting officer and two contracting

al., May 23, 2005, 2005 CPD ¶ 103 at 5; *Pancor Corp.*, B-234168, Mar. 29, 1989, 89-1 CPD ¶ 328); *cf. Keco Indus., Inc.*, B-238301, May 21, 1990, 90-1 CPD ¶ 575 at 3 n.1 (recognizing that there may be cases where it is clear that an agency is so firmly committed to a sole-source procurement that it would be futile for a protester to first file an expression of interest with the agency). Here, as detailed more fully below, the synopses for these procurements identified the firms to which the RFPs would be issued and did not invite responses from other interested firms. Accordingly, we conclude that the protest of the use of the alternative competition method culminating in the forthcoming RFP 0007 is not premature.

³ As addressed below, the purpose of the PTAG is to “provide internal operating procedures for how the [PTO] will conduct its acquisitions as a result of [the PTOEA’s] exemptions.” 78 Fed. Reg. 61185, 61186 (Oct. 3, 2013).

officer's representatives. *Id.* The contracting officer reviewed and accepted the panel's recommendations, and on June 13, 2022, notified the six identified firms of the functional areas for which they had been determined most likely to successfully meet the agency's needs.⁴ *Id.* at 5-6. The agency issued the RFPs directly to the selected firms.⁵ *Id.* at 6.

The agency's issuance of RFP 0003 to Blackwatch was the subject of a previous protest before our Office. See *KeyLogic Assocs., Inc.*, B-421294, Dec. 9, 2022 (unpublished decision). KeyLogic challenged the agency's issuance of that RFP to Blackwatch, alleging that the agency: (1) failed to publicize the RFP as required by Federal Acquisition Regulation (FAR) part 5, 41 U.S.C. § 1708, 15 U.S.C. § 637(e), and the PTAG; (2) violated the PTAG by not conducting the procurement on a competitive basis; and (3) had not justified its reasons for using noncompetitive procedures as required by 41 U.S.C. § 1708(c)(5). See *id.* In response, the agency notified our Office of its intention to take corrective action by posting the appropriate procurement notice information as required by 41 U.S.C. § 1708 and FAR part 5. See *id.* We subsequently dismissed that protest as academic. See *id.*

On December 20, 2022, the agency published synopses for the RFPs. COS at 6. Each synopsis stated that the requirement was being procured using the agency's alternative competition method in accordance with the PTAG and 35 U.S.C. § 2(b)(4)(A), identified the selected firm and estimated value of the contract to be awarded, and advised that the RFP would be provided directly to the selected firm. See AR, Tab O, RFP 0001 Synopsis; Tab K, RFP 0003 Synopsis; Tab N, RFP 0005 Synopsis; Tab M, RFP 0004 Synopsis; Tab L, RFP 0007 Synopsis.⁶ The synopses further stated that the agency had determined through market research that the identified firms were the most likely to successfully meet the agency's needs. See *id.* Each synopsis also identified response dates for the RFPs--December 28, 2022, for RFPs 0001, 0003, and 0005; January 13, 2023, for RFP 0004; and January 10, 2023, for RFP 0007--but further indicated that those dates were subject to change. *Id.* Additionally, the synopses for RFPs 0003, 0004, and 0005 stated that the requirements were set aside for small businesses. See AR, Tab K, RFP 0003 Synopsis; Tab M, RFP 0004 Synopsis; Tab N, RFP 0005 Synopsis.

⁴ The contracting officer later memorialized his determination of which firm was most likely to successfully meet the agency's needs in each functional area in a December 21 memorandum. AR, Tab D, Memo to Contract File.

⁵ As part of the EIPL RPP procurement effort, KeyLogic was selected for receipt of RFP No. 133BJ23R00280008 for the production data maintenance services functional area. COS at 6. That RFP is not a subject of these protests.

⁶ With the exception of the synopsis for RFP 0003, which is dated December 20, 2022, the copies of the synopses provided by the agency are dated January 25, 2023, which appears to be a clerical error due to an automatically updating date field.

On December 27, 2022, the protesters filed protests collectively challenging the issuance of RFPs 0001, 0003, and 0005. Thereafter, on January 9, 2023, the protesters filed protests collectively challenging the issuance of RFPs 0004 and 0007. We denied the agency's subsequent requests for dismissal arguing that the protesters are not interested parties, and due to the commonality of issues raised, consolidated the protests. See Notice of Resolution of Req. for Dismissal, Consolidation, and Scheduling, Jan. 18, 2023.

DISCUSSION

The protesters challenge the agency's issuance of the RFPs on several grounds. First, they contend that the agency failed to justify its reasons for using noncompetitive procedures, which the protesters argue is required by 41 U.S.C. § 1708(c)(5) and PTAG part 5. The protesters also allege that the agency violated 41 U.S.C. § 1708(g) by not providing the protesters with copies of the RFPs, and both issued the RFPs and established proposal submission times in violation of the time requirements of 41 U.S.C. § 1708(e). Lastly, KSD contends that the agency improperly set aside RFPs 0003, 0004, and 0005 for small businesses. For the reasons that follow, we find no basis on which to sustain the protests.⁷

Jurisdiction

As an initial matter, the intervenor argues that our Office lacks jurisdiction to consider these protests, citing our decision in *CGI Federal, Inc.; Ascendant Services, LLC*, B-418807, B-418807.2, Aug. 18, 2020, 2020 CPD ¶ 276. Intervenor Comments at 3-5. As discussed more fully below, we conclude that the facts here are distinguishable from those in *CGI Federal*, and that these protests properly fall within our statutory grant of jurisdiction.

As noted above, the PTO issued the RFPs under its unique alternative competition method procurement authority, which is authorized by the PTOEA, 35 U.S.C. § 2(b)(4)(A), and implemented through section 6.1.1 of the PTAG, 78 Fed. Reg. 61185, 61186-87 (Oct. 3, 2013). We previously have concluded that, while the PTOEA exempts a PTO procurement from the substantive requirements of the federal procurement statutes set forth in title 41 of the United States Code and their implementing provisions in the FAR, it does not exempt the PTO from the portions of the Competition in Contracting Act of 1984 (CICA), codified under 31 U.S.C. §§ 3551-3557, regarding our Office's bid protest jurisdiction. *CGI Fed.*, *supra* at 5. Thus, our Office's bid protest jurisdiction generally extends to PTO procurements conducted pursuant to the PTOEA. *Id.* Indeed, in this regard, the PTAG expressly acknowledges that "[t]he [PTO] continues to be subject to the bid protest jurisdiction of the Government Accountability Office[.]" 78 Fed. Reg. 61185, 61188 (Oct. 3, 2013).

⁷ The protesters raise a number of collateral arguments. While our decision does not specifically address each of the arguments, we have reviewed all of the arguments and find that none provides a basis on which to sustain the protests.

In *CGI Federal*, we concluded that our Office did not have jurisdiction over challenges to the manner in which the PTO reviewed the protesters' responses to a request for information (RFI), issued by the PTO to determine which firms the PTO would invite to compete for a requirement under its alternative competition method. *CGI Fed.*, *supra* at 3-4. We noted that, under CICA, protests are defined to include challenges involving solicitations, and awards made or proposed under those solicitations. *Id.* at 5 (citing 31 U.S.C. § 3551(1)(A); *Fred Schreiber et al.*, B-272181 *et al.*, Aug. 16, 1996, 96-2 CPD ¶ 71 at 3; *Onix Networking Corp.*, B-411841, Nov. 9, 2015, 2015 CPD ¶ 330 at 7).

Based on the record, which demonstrated that the RFI was not a solicitation, but rather a market research tool, we concluded that the RFI process in *CGI Federal* did not constitute "[a] solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services." *Id.* at 6 (citing 31 U.S.C. § 3551(1)(A)). Because we found that the agency's challenged actions--*i.e.*, the review of the protesters' RFI responses--did not involve the solicitation for, or the award or proposed award of, a contract, we concluded that the protesters' challenges to the agency's RFI process were not subject to our bid protest jurisdiction. *Id.* at 7. Thus, our decision in *CGI Federal* turned on our conclusion that the protesters had challenged the PTO's conduct of market research.

Unlike the protesters in *CGI Federal*, the protesters here do not challenge the manner in which the agency conducted its review and evaluation of information gathered as part of the agency's EIPL RPP market research. Rather, the protesters allege that the PTO has not appropriately justified its decision to use other than competitive procedures, *i.e.*, the alternative competition method authorized under the PTOEA as implemented by the PTAG. In the absence of that justification, the protesters argue, the agency's issuance of the RFPs was improper. Thus, the protesters here challenge the propriety of the agency's determination to utilize its alternative competition method and, pursuant to that method, the agency's issuance of the RFPs solely to the selected firms. Because these protests are challenging the propriety of the various solicitations issued by the agency, we find that we have jurisdiction over the protests.

Challenges Under 41 U.S.C. § 1708(c)(5)

The protesters' primary contentions are that: (1) the agency's issuance of the RFPs violates 41 U.S.C. § 1708(c)(5) because the agency has failed to publish a reasonable statement of the reasons justifying the use of other than competitive procedures to procure the EIPL RPP requirements; and (2) the agency has not reasonably justified the use of such procedures. Protest at 9-13.⁸ The intervenor argues that the agency satisfied the requirements of 41 U.S.C. § 1708(c)(5) that a procurement notice include a

⁸ Citations to the protest are to that filed by KSD in the protest docketed as B-421347. The issues raised in each protest are identical except for the contention that the agency improperly set aside RFPs 0003, 0004, 0005 for small businesses, which only KSD raises in its protests.

statement of the reasons justifying the use of other than competitive procedures because the synopses here stated that the agency was conducting these procurements pursuant to the PTOEA. Intervenor Comments at 7. The agency also responds that 41 U.S.C. § 1708(c)(5), which generally establishes requirements for notices of proposed procurement actions, does not create a separate legal requirement for the agency to justify its use of other than competitive procedures. Memorandum of Law (MOL) at 5-7. For the reasons discussed below, we agree with the agency and the intervenor.

The PTOEA exempts PTO procurements from, *inter alia*, the majority of the public contracting requirements of division C of subtitle I of title 41 of the United States Code.⁹ 35 U.S.C. § 2(b)(4)(A). As we have noted, this includes the requirement for agencies generally to obtain full and open competition. See *CGI Fed.*, *supra* at 5 (citing 41 U.S.C. § 3301(a)). Also among the exempted requirements are those of 41 U.S.C. § 3304, which sets forth the conditions that must be met for a civilian executive agency to use “other than competitive procedures,” (as explained below, this means other than full and open competition), how an agency must justify its use of other than full and open competition, and the requirements for publicizing the justification. 41 U.S.C. § 3304(a).

While the competition requirements of division C of subtitle I of title 41 do not apply when the PTO is using its PTOEA authority, the PTO does not contest that the notice requirements of 41 U.S.C. § 1708--found in division B--are applicable to PTO procurements.¹⁰ As relevant here, paragraph (c)(5) of this section states that “in the case of a procurement using procedures other than competitive procedures, [a required notice shall include] a statement of the reason justifying the use of those procedures and the identity of the intended source.” Also relevant here is 41 U.S.C. § 132, which provides that, “[i]n division B, the term ‘competitive procedures’ means procedures under which an agency enters into a contract pursuant to full and open competition.”

When read in conjunction with 41 U.S.C. § 132, 41 U.S.C. § 1708(c)(5) requires only that a notice for a procurement using procedures other than full and open competition include: (1) a statement of the reason justifying the use of other than full and open competition; and (2) the identity of the intended source. Here, the reason justifying the use of other than full and open competition is that Congress has exempted the PTO from the requirement to use full and open competition through the PTOEA, 35 U.S.C. § 2(b)(4)(A). Thus, because the synopses published by the agency expressly stated

⁹ PTO procurements remain subject to the requirements of sections 3302, 3501(b), 3509, 3906, 4710, and 4711 of division C of subtitle I of title 41. See 35 U.S.C. § 2(b)(4)(A).

¹⁰ 41 U.S.C. § 1708 generally prescribes requirements for procurement notices, such as the circumstances in which such notices must be published, the amount of time for which such notices must be published prior to solicitation issuance, and the content of such notices.

that the requirements were being procured using the agency's alternative competition method in accordance with the PTAG and 35 U.S.C. § 2(b)(4)(A), the agency satisfied the notice requirement of 41 U.S.C. § 1708(c)(5) to include a statement of the reason justifying the use of other than competitive procedures. Additionally, as noted above, each synopsis identified the intended source, thereby satisfying the second requirement contained in 41 U.S.C. § 1708(c)(5). The synopses therefore fulfilled the notice requirements of 41 U.S.C. § 1708(c)(5).

Notwithstanding that the synopses provided a statement of the reason justifying the use of other than full and open competition as required by 41 U.S.C. § 1708(c)(5), the protesters nonetheless argue that section 1708(c)(5) required the PTO to do more. Specifically, they contend that section 1708(c)(5)--independent of the justification requirements imposed by 41 U.S.C. § 3304(e)--requires the agency to reasonably justify the use of its alternative competition method for these procurements.¹¹ See Protest at 10-12; Protesters' Comments at 1-5, 14-16. We find no merit to the protesters' contentions.

The starting point for our analysis is the statutory language used by Congress. See *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself."). In construing the statute, "we look first to its language, giving the words used their ordinary meaning." *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs*, 519 U.S. 248, 255, 117 S. Ct. 796, 136 L. Ed. 2d 736 (1997) (quoting *Moskal v. United States*, 498 U.S. 103, 108, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990)). Generally, we must give effect to all words in the statute, as Congress does not enact unnecessary language. *Life Techs. Corp. v. Promega Corp.*, 580 U.S. 140, 147, 137 S. Ct. 734, 197 L. Ed. 2d 33 (2017) (citing *Hibbs v. Winn*, 542 U.S. 88, 89, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004)). It is a cardinal principle of statutory construction that a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) (citing *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001)). If the statutory language is clear and

¹¹ Ordinarily, CICA provides that an executive agency may use procedures other than competitive procedures only under certain circumstances. 41 U.S.C. § 3304(a). Additionally, the agency must justify the use of those procedures in writing. 41 U.S.C. § 3304(e). If the agency is required to publish a notice of solicitation for the procurement, that notice must include a statement of the reasons justifying the use of other than competitive procedures. 41 U.S.C. § 1708(c)(5). As discussed above, the PTOEA exempts PTO procurements from the requirements of 41 U.S.C. § 3304, but not those of 41 U.S.C. § 1708. Thus, the PTO is not required to justify its use of other than competitive procedures in accordance with 41 U.S.C. § 3304, but it remains subject to the procurement notice requirements of 41 U.S.C. § 1708.

unambiguous, the inquiry ends with the plain meaning. *Myore v. Nicholson*, 489 F.3d 1207, 1211 (Fed. Cir. 2007) (internal citations omitted). GAO likewise applies the “plain meaning” rule of statutory interpretation. See, e.g., *Oracle Am., Inc.*, B-416061, May 31, 2018, 2018 CPD ¶ 180 at 16.

Looking first to the plain language of the statutory provisions, it is clear that 41 U.S.C. § 1708(c) is procedural in nature and governs what an agency needs to include in a required procurement notice. It does not address when an agency may use other than competitive procedures, or how it must justify the use of those procedures. To the contrary, paragraph (c) is entitled “Contents of Notice,” and its imperative language contemplates only the contents of a required solicitation notice, stating that “[e]ach notice of solicitation . . . shall include” the items listed in the following subparagraphs. There is no indication that paragraph (c) contemplates the execution or publication of a justification in order for an agency to use other than competitive procedures.¹²

Moreover, it is clear that CICA contemplates a justification to use other than competitive procedures and a notice stating that an agency intends to use such procedures as separate requirements. For example, 41 U.S.C. § 3304(e)(1)(C) provides that, in addition to the completion of a justification and approval (J&A) to use other than competitive procedures, an agency must have published any notice required by 41 U.S.C. § 1708. Similarly, 41 U.S.C. § 3304(f) requires an agency to make the justification available to the public; this requirement is distinct from the notice content requirements of 41 U.S.C. § 1708(c)(5). Indeed, as the agency points out, our decisions have recognized that the substantive justification required by 41 U.S.C. § 3304 and the solicitation notice required by 41 U.S.C. § 1708 are separate, though related, requirements.¹³ See MOL at 7 (citing *Midwest Dynamometer & Eng’g Co.*, B-257323, Sept. 2, 1994, 94-2 CPD ¶ 91, *WSI Corp.*, B-220025, Dec. 4, 1985, 85-2 CPD ¶ 626); see also *World-Wide Sec. Serv., Inc.*; *Philips Elec. Instruments, Inc.*, B-224277, B-224277.2, Jan. 8, 1987, 87-1 CPD ¶ 35 at 3-4 (sustaining protest of sole-source award where agency completed written justification but failed to publish notice as required by statute). Thus, the notice requirements of 41 U.S.C. § 1708 are

¹² As noted above, CICA’s substantive provisions regarding an agency’s use of noncompetitive procedures are found at 41 U.S.C. § 3304.

¹³ Although the FAR generally does not apply to the procurements at issue, we have noted that when agencies procure their requirements on the basis of only one responsible source available, the corresponding FAR provisions do not require that an agency include a final J&A with its synopsis of a contemplated procurement. In this context, responses to the notice may inform the agency of other sources capable of fulfilling the agency’s requirement. See *Barnes Aerospace Group*, B-298864, B-298864.2, Dec. 26, 2006, 2006 CPD ¶ 204 at 7 (noting that agencies undercut their credibility when they issue J&As on the basis of one available source before receiving responses to a presolicitation notice); *Unitron LP*, B-406770, Aug. 14, 2012, 2012 CPD ¶ 247 at 3 n.1 (citing *Barnes Aerospace*, *supra*; FAR 5.207; 6.305(a)).

separate and distinct from 41 U.S.C. § 3304's requirements to execute a J&A and make it publicly available when using other than competitive procedures.

To read, as the protesters urge here, that 41 U.S.C. § 1708(c)(5) imposes a separate and independent substantive requirement that an agency justify its use of other than competitive procedures and include that rationale in a published procurement notice would render the justification requirements of 41 U.S.C. § 3304(e) and public availability requirements of 41 U.S.C. § 3304(f) at least partially, if not largely, superfluous. This runs counter to the cardinal principle of statutory construction that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. In addition, such a reading would completely nullify the PTOEA's exemption of PTO procurements from the justification requirements of 41 U.S.C. § 3304, as the protesters' interpretation would, in essence, subject the PTO to section 3304's justification requirements, from which it is explicitly exempt under the PTOEA. Accordingly, the protesters' proffered reading of 41 U.S.C. § 1708(c)(5) provides no legal basis for their challenges.

Challenges Under the PTAG

The protesters also contend that the agency's use of its alternative competition method violates part 5 of the PTAG because the agency did not rationally justify its decision not to use competitive procedures for these procurements. Protest at 12. In this regard, the protesters effectively contend that the PTAG is a separate, binding authority that imposes a requirement to justify the use of other than full and open competition similar to the requirement that the protesters argue is imposed by 41 U.S.C. § 1708(c)(5). The PTO responds that the PTAG is internal agency guidance and therefore not binding, and that in any event, the agency complied with PTAG part 5 by documenting the basis for using its alternative competition method. MOL at 16-17. The agency argues that the PTAG does not require detailed justification for the use of other than full and open competition as argued by the protesters. *Id.* at 17. We agree with the agency that the PTAG is internal agency guidance, an alleged violation of which does not state a valid basis of protest, or, in the alternative, that the protesters' interpretation of the PTAG's requirements is not reasonable.

Under CICA, our Office is authorized to resolve bid protests "concerning an alleged violation of a procurement statute or regulation." 31 U.S.C. §§ 3552, 3553(a). We consistently have concluded, therefore, that protests that assert a violation of internal agency policy or guidance, rather than procurement statute or regulation, do not establish a valid basis for protest. *See, e.g., Triad Logistics Servs. Corp.*, B-403726, Nov. 24, 2010, 2010 CPD ¶ 279 at 2-3. In determining whether a provision constitutes internal agency policy or guidance or a regulation with the force and effect of law that is binding on the agency, we have stated that the controlling question is whether the provision creates any rights in offerors or is merely for the protection of the

government.¹⁴ *Bank St. Coll. of Educ.--Recon.*, B-213209.2, Oct. 23, 1984, 84-2 CPD ¶ 445 at 3. If the latter, an offeror cannot be heard to complain that the internal policy or guidance was not followed. *Id.*

Here, it is clear that the PTAG does not create any rights in offerors, and was promulgated to provide internal agency procedures and guidance. The summary of the Federal Register notice in which the PTAG was published states that the PTAG is “the agency’s internal operating procedures for procurement.” 78 Fed. Reg. 61185, 61185 (Oct. 3, 2013). Similarly, part 1 of the PTAG states that “[t]he purpose of the [PTAG] is to provide internal operating procedures for how the [PTO] will conduct its acquisitions as a result of [the exemptions provided by the PTOEA].” *Id.* at 61186. In a prefatory section headed “Nature of Guidelines,” the PTAG expressly states that “the alternate guidance provided in this notice is [not] binding on [PTO] vendors or any other member of the public[.]” *Id.* Thus, there is no indication in the PTAG that it is anything other than an internal guidance document, or that it creates any rights in offerors.¹⁵ Accordingly, we conclude that the PTAG is internal agency policy or guidance, the alleged violation of which does not establish a valid basis for protest.¹⁶

¹⁴ We note that the United States Court of Federal Claims similarly has held that, to be considered a regulation entitled to the force and effect of law in the bid protest context, *inter alia*, an internal agency document must have been promulgated with the intention to establish a binding rule. See *Savantage Fin. Servs., Inc. v. United States*, 123 Fed. Cl. 7, 34 (2015) (citing *Hamlet v. United States*, 63 F.3d 1097, 1105 (Fed. Cir. 1995)). Where there is no indication that the document was written for the benefit of offerors, the court has found that condition is not met. See *id.* at 34-35 (citing *Freightliner Corp. v. Caldera*, 225 F.3d 1361, 1365 (Fed. Cir. 2000); *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1451-52 (Fed. Cir. 1998)).

¹⁵ We further note that the fact that the PTAG was published in the Federal Register does not, by itself, establish that the PTAG is a binding regulation. See *Tricon Timber, Inc.*, B-241065, B-242174, Jan. 15, 1991, 91-1 CPD ¶ 37 at 3 n.1 (concluding that the Forest Service Manual, regardless of its publication in the Federal Register, “remains primarily an internal policy document”); see also *Centerra Integrated Facilities Servs., LLC*, B-418628, Apr. 23, 2020, 2020 CPD ¶ 155 at 2 n.1 (noting that the Bonneville Power Administration’s purchasing instructions, while published in the Federal Register, are not the product of notice and comment rulemaking under the Administrative Procedures Act, 5 U.S.C. § 553).

¹⁶ The protesters also argue that the agency failed to follow the provisions of the PTAG desktop guide. See Protesters’ Comments at 7-8. As stated in that document, its purpose “is to provide detailed guidance about the intent, purpose and application of each portion of the [PTAG], which was released on October 3, 2013.” AR, Tab S, PTAG Desktop Guide at 3. Thus, to an even greater degree than the PTAG, it is plainly internal agency guidance, the violation of which does not establish a valid basis for protest.

The protesters assert that, regardless whether the PTAG is a binding regulation as a general matter, the agency is bound by the PTAG here because the agency expressly incorporated the PTAG into the RFPs and because, in the protesters' view, the agency relies on compliance with the PTAG to establish compliance with 41 U.S.C.

§ 1708(c)(5). In support of their argument, the protesters cite to our decisions in *A. Finkl and Sons, Co. DBA Finkl Steel*, B-416582.4, Dec. 10, 2018, 2018 CPD ¶ 415 and *ACI Technologies, Inc.*, B-417011, Jan. 17, 2019, 2019 CPD ¶ 24. See Protesters' Comments at 6, 16. We conclude that the facts here distinguish these protests from those decisions.

In *A. Finkl*, the agency argued that its compliance with Department of Defense 5220.22-M, National Industrial Security Program Operating Manual (NISPOM) was not for our Office's consideration, as the NISPOM is internal agency guidance. *A. Finkl, supra* at 7 n.8. While we agreed that our Office generally does not review compliance with internal agency guidance, we noted that the solicitation required the agency to analyze foreign ownership, control, or influence (FOCI) matters in accordance with applicable NISPOM provisions. *Id.* Accordingly, because the solicitation established that the agency's evaluation of FOCI matters would be conducted in accordance with the specific terms of the NISPOM, we concluded that it was appropriate for us to review the NISPOM's provisions to the extent they were incorporated into the terms of the solicitation. *Id.*

Here, each of the synopses and RFPs stated that the requirement was being procured using the alternative competition method in accordance with the PTAG and PTOEA. See, e.g., AR, Tab O, RFP 0001 Synopsis; Tab F-1, RFP 0001 at 4. Unlike in *A. Finkl*, these statements do not indicate the manner in which the agency would evaluate proposals, or otherwise set the terms by which the agency would conduct the procurement. Rather, they serve only to provide notice that the agency is using a statutorily authorized procurement method. They do not establish terms that are binding on the agency. Accordingly, *A. Finkl* is inapposite to the facts at hand.

In *ACI Technologies*, the agency argued that the issuance of a solicitation for an "other transaction agreement" (OTA) was consistent with its statutory authority to enter into OTAs based on its assertions that its conduct was consistent with an internal agency guidance document. *ACI Techs., supra* at 5. We concluded that, because the agency relied on consistency with its internal guidance document to establish statutory compliance, it was appropriate to look to that guidance to determine whether the agency's reliance was reasonable. *Id.* Here, the agency has not argued that, because it complied with the PTAG, it satisfied the requirements of 41 U.S.C. § 1708(c)(5). Rather, as discussed above, the agency argues that 41 U.S.C. § 1708(c)(5) does not require the agency to justify the use of its alternative competition method. See MOL at 5-7. Thus, *ACI Technologies* also does not support the protesters' argument.

Accordingly, for the reasons discussed herein, we agree with the agency that the PTAG is an internal agency policy or guidance document, the alleged violation of which fails to state a valid basis of protest.

Alternatively, even if we were to consider the PTO's compliance with the PTAG, we agree with the agency that it satisfied part 5 of the PTAG. The protesters point to PTAG section 5.0, which states in relevant part that "the [contracting officer] may use agency-specific acquisition procedures as described herein when the particular circumstances warrant it and it is in the best interest of the agency to do so." See Protest at 10. They further cite PTAG section 5.1.1, which states that "[contracting officers] must document the contract file to explain their decisions regarding the use of competition and to what extent it will be used." See *id.* The protesters argue that, because the agency has not reasonably justified the use of its alternative competition method, it has failed to demonstrate that the circumstances warrant the use of those procedures and that it is in the agency's best interest to use them, as well as to document the contracting officer's decision. See *id.* at 10, 12.

The contracting officer documented his conclusions regarding the use of the alternative competition method in a memorandum. See AR, Tab D, Memo to Contract File at 1. The contracting officer discussed the nature of the requirements and previous procurements, which followed FAR requirements for competitive acquisitions, as well as the acquisition planning process that led him to conclude that using the alternative competition method was in the best interest of the agency. See *id.* The contracting officer further discussed the method by which the agency conducted its market research, and the basis for his determination of which firms were most likely to successfully meet the agency's needs. See *id.* at 1-6. On this record, we conclude that the contracting officer documented the contract file to explain his decision regarding the use of competition and the extent to which it would be used, as well as the basis for his conclusion that the use of the alternative competition method was warranted and in the best interest of the agency. Accordingly, even if the PTAG imposed binding obligations on the part of the PTO, the alleged violation of which could give rise to a viable basis of protest, we agree with the agency that it satisfied the provisions of PTAG part 5.

Alleged Violations of 41 U.S.C. § 1708(e) and (g); 13 C.F.R. § 125.2(f)(2)(i)

Lastly, the protesters raise collateral procedural challenges to the agency's actions here. Specifically, they allege that the agency: (1) both issued the RFPs and established proposal submission times in violation of the requirements of 41 U.S.C. § 1708(e); (2) failed to provide the protesters with complete copies of the RFPs as required by 41 U.S.C. § 1708(g); and (3) improperly set aside RFPs 0003, 0004, and 0005 for small businesses. See Protest at 13-17. We find it unnecessary to decide whether the agency erred in these regards, as the protesters cannot establish a reasonable possibility of competitive prejudice, even if the agency erred as alleged.

Competitive prejudice is an essential element of any viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. *CACI, Inc.-Fed.*, B-420441.3, Nov. 5, 2022, 2022 CPD ¶ 278 at 11.

As discussed above, we conclude that the agency properly exercised its authority, as permitted by the PTOEA, to utilize its alternative competition method. As we previously have noted, when proceeding under this unique authority, the PTO is not required to invite, or even consider, the entire field of competitors for its requirements, and may solicit proposals for its requirements from as many or as few offerors as it chooses, including choosing only a single offeror to solicit. *CGI Fed.*, *supra* at 7. With respect to the challenged RFPs, the agency has selected a single offeror to solicit for each requirement under the PTO's unique authority. Thus, the protesters cannot demonstrate that they would have had a substantial chance of receiving awards under those RFPs but for the agency's alleged erroneous actions.¹⁷

The protests are denied.

Edda Emmanuelli Perez
General Counsel

¹⁷ For example, KSD argues that the agency lacked a proper factual basis to set aside RFPs 0003, 0004, and 0005 for small businesses. See Protest at 14 ("Here, the agency's actions violate the applicable regulation because the agency has absolutely no reasonable expectation that offers will be obtained from at least two small business concerns."). Even if KSD were correct and these RFPs should not have been set aside for small businesses, the agency nevertheless could have issued the RFPs to the single firms it selected as most likely to successfully meet those requirements under the alternative competition method. Moreover, while the agency did select small businesses for receipt of RFPs 0003, 0004, and 0005--and the synopses and RFPs state that the requirements are set aside for small businesses--nothing in the record indicates that the agency restricted its consideration solely to small businesses for receipt of those RFPs, or in any way meaningfully set those requirements aside solely for small businesses. Rather, the record suggests that the agency determined the firms most likely to successfully perform those requirements pursuant to the alternative competition method, and those firms happened to be small businesses. Accordingly, the designation of RFPs 0003, 0004, and 0005 as small business set-asides appears at most to be an administrative error, the correction of which still would not result in KSD's having a substantial chance of receiving award, given the agency's authority to choose only a single offeror to solicit under the alternative competition method.