



## Decision

**Matter of:** Beckman Coulter, Inc.

**File:** B-421748

**Date:** July 28, 2023

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Thomas M. Holl, Beckman Coulter, Inc., for the protester.  
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Cree W. Townsend, Emily R. O'Hara, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest challenging the awardee's technical acceptability is dismissed as untimely where the protest was filed more than 10 days after the protester received the information that formed the basis of protest.

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### DECISION

Beckman Coulter, Inc., of Indianapolis, Indiana, protests the award of a contract to Sysmex America, Inc., of Lincolnshire, Illinois, under request for quotations (RFQ) No. W81K00-22-Q-0109, issued by the Department of the Army, Army Medical Command, for laboratory equipment and maintenance services for flow cytometry testing. The protester alleges the award was improper because the awardee should have been found to be technically unacceptable.

We dismiss the protest as untimely.

### BACKGROUND

The Army issued the RFQ on July, 14, 2022, using the simplified acquisition procedures for the purchase of commercial items prescribed in subpart 13.5 of the Federal Acquisition Regulation (FAR), for laboratory equipment and flow cytometry testing at the San Antonio Military Medical Center, Fort Sam Houston, Texas. Req. for Dismissal (RFD) at 1; RFD, exh. 1, RFQ at 60. The RFQ anticipated that award would be made on a lowest-priced, technically acceptable (LPTA) basis. RFQ at 95. As relevant here, the solicitation required all testing materials to be Food and Drug Administration (FDA) approved platforms. RFQ at 52.

On May 3, 2023, the Army notified Beckman Coulter that Sysmex had been selected for award. RFD, exh. 2, Unsuccessful Offeror Notification at 1. Eight days later on May 11, the protester emailed the contract specialist, inquiring, among other things, whether the awardee's testing equipment "offer[ed] the required FDA-cleared . . . testing solutions" as specified in the solicitation. RFD, exh. 3, Email from Protester to Agency at 2. The contract specialist replied to the protester's email the same day, confirming that the awardee "complied with all the terms and conditions of Solicitation W81K00-22-Q-0109 for the Flow Cytometry Testing Requirement." *Id.* at 2. The protester then requested a phone call with the contract specialist to discuss the award, stating its belief that the awardee did not hold any FDA approvals for flow cytometry testing and that the awardee's offer, therefore, should not have been considered technically acceptable. *Id.* at 1-2.

On May 15, the agency conducted a teleconference with the protester.<sup>1</sup> During that call, the protester communicated the same questions and claims about the awardee's offer that the firm had previously made in its emails. RFD at 3. The contracting officer informed the protester that the Procurement Integrity Act precluded the agency from providing any additional information about the content of the awardee's quotation. *Id.*

After this discussion, on May 19, the protester filed an agency-level protest with the Army. RFD, exh. 5, Agency-Level Protest at 1. On June 6, the agency dismissed the protest as untimely because the protest had been filed more than 10 days after the protester knew or should have known the basis of its protest. RFD, exh. 4, Agency-Level Protest Decision at 2.

On June 13, the protester filed this protest with our Office.

## DISCUSSION

Prior to the agency report due date, the agency requested that our Office dismiss Beckman Coulter's protest as untimely because Beckman was notified on May 3 that award had been made to Sysmex America. RFD at 2. According to the agency, the protester knew or should have known of the basis for protest at that time, and the protest should have been filed no later than 10 days from receipt of the notice of award, which, in this instance, would have been May 15.<sup>2</sup> *Id.*

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<sup>1</sup> The protester and the agency disagree on the date of this telephone call. See Protest at 2 (claiming that the call occurred on May 13); Req. for Dismissal at 3 (claiming that the call occurred on May 15); Resp. to Req. for Dismissal at 1 (claiming at different points that call occurred on May 13 and May 15). We identify May 15 as the one date named by both parties. For the purposes of this analysis, however, the specific date is irrelevant.

<sup>2</sup> When the last day of the 10-day period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday.

The protester contends that the basis of its protest was not known until May 11, when it received the response email from the agency, stating that the awardee's testing solution "complied with all the terms and conditions of the solicitation." Protest at 2. The protester also argues, alternatively, that the basis of protest was not known until the teleconference with the agency on May 15. Resp. to RFD at 1.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Relevant here, our regulations require that protests not based upon alleged improprieties in a solicitation "shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required."<sup>3</sup> 4 C.F.R. § 21.2(a)(2).

A matter initially protested to the contracting agency will be considered timely by our Office only if the initial agency protest was filed within the time limits proscribed by our regulations for filing a protest with our Office, unless the contracting agency imposes a more stringent time for filing, in which case, the agency's time for filing will control. 4 C.F.R. § 21.2(a)(3). In this instance, no party suggests that the agency's regulations impose a more stringent time for filing, so the timeliness rules provided by our regulations are appropriately applied to the protester's agency-level protest. *Alamo Strategic Mfg., Inc.*, B-420716, July 27, 2022, 2022 CPD ¶ 192 at 3.

Here, the protester asserts that the awardee's offer was not technically acceptable under the requirements of the solicitation. Protest at 2. We find that the basis of that allegation was known to the protester on May 3, when it received the unsuccessful offeror notice, which identified Sysmex as the awardee. As noted above, the solicitation required all proposed equipment and materials to be FDA compliant, and the RFQ advised that award would be made on an LPTA basis. RFQ at 52, 95. In light of these requirements, the fact that the agency selected Sysmex for award clearly put the protester on notice that the agency found Sysmex's offer to be technically acceptable, *i.e.*, compliant with the requirements of the solicitation. See *Microgenics Corp.*, B-419470, Feb. 2, 2021, 2021 CPD ¶ 72 at 5 (finding that notice of award provided the basis of protest when protester asserted that awardee did not meet solicitation requirements). To the extent that the protester believed the agency's award decision

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4 C.F.R. § 21.0(d). Here, the last day of the period would fall on Saturday, May 13, 2023, and the period would extend to Monday, May 15.

<sup>3</sup> Notwithstanding the references to FAR part 15 debriefings in the unsuccessful offeror notification, this procurement for commercial products and services was conducted under FAR part 13, and a debriefing was not required. See FAR 13.106-3(d).

was in error or that the agency had not adhered to the selection criteria set forth in the solicitation, Beckman Coulter was required to file its protest challenging the award to Sysmex within 10 days of receipt of the notice of award. 4 C.F.R. § 21.2(a)(2); *Microgenics Corp.*, *supra* at 5-7.

Responding to the agency's request for dismissal, the protester argues that it did not have enough information to protest on May 3 because it could not tell "whether the Army decided to relax the requirements" of the solicitation, or whether the alleged violation might be attributed to "an error that [the protester] did not understand based on the facts provided." Resp. to Req. for Dismissal at 1. The protester's questions to the agency, however, did not elicit any new information that was not already apparent from the agency's notice of award. The email correspondence and phone call with the agency thereafter served only to restate the agency's initial determination--implicit in the unsuccessful offeror notice--that the agency had made award to the lowest-priced technically acceptable offeror. See *Desert Springs Trout Farm*, B-420338, Dec. 9, 2021, 2021 CBP ¶ at 3 n.5 (finding "the agency's decision not to answer [protester's] question . . . provides no new information or evidence to support or refute the protester's allegation" and protest was untimely when filed more than 10 days after notice of award).

In conclusion, we find that the facts which provided Beckman Coulter with its basis of protest here were known to the protester on May 3, the date the firm received the award notification. Accordingly, since Beckman Coulter's protest with the agency was not filed until May 19, the protest was untimely because it was not made within 10 days of when the protester knew or should have known of the basis of protest. 4 C.F.R. § 21.2(a)(2); *Microgenics Corp.*, *supra*. Although Beckman Coulter's protest to GAO was filed within 10 days of initial adverse agency action--*i.e.*, the dismissal of the agency-level protest--the firm's initial protest to the agency was untimely. As such, this protest is also untimely in our forum. 4 C.F.R. § 21.2(a)(3); *Alamo Strategic Mfg., Inc.*, *supra*.

The protest is dismissed.

Edda Emmanuelli Perez  
General Counsel