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## Decision

**Matter of:** West Electronics, Inc.

**File:** B-421816

**Date:** September 27, 2023

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William E. Hughes, Esq., Husch Blackwell LLP, for the protester.  
Scott E. Pickens, Esq., Barnes & Thornburg, LLP, for GTA Containers, LLC, the intervenor.  
Debra J. Talley, Esq., Department of the Army, for the agency.  
Michael P. Price, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest challenging the reasonableness of an agency's alleged solicitation modifications and acceptance of late delivery orders under a two-phase procurement is dismissed where the protest issues raised are matters of contract administration.

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### DECISION

West Electronics, Inc., of Poplar, Montana, protests the agency's actions in connection with the award of an indefinite-delivery, indefinite-quantity (IDIQ) contract to GTA Containers, LLC, of South Bend, Indiana, pursuant to request for proposals (RFP) No. W56HZV-21-R-0011, issued by the Department of the Army, U.S. Army Materiel Command, for a water storage distribution system program. The protester contends that the agency unreasonably failed to give offerors sufficient time to respond to material changes to the solicitation, and further alleges it was the only offeror that should have been found eligible for award of the IDIQ contract.

We dismiss the protest.

## BACKGROUND

The RFP stated that the procurement would take place in two phases; phase 1 anticipated the award of up to five fixed-price IDIQ contracts for five base years with two 1-year options, while phase 2 anticipated the issuance of a single-award task order to one of the phase 1 contract holders.<sup>1</sup> Req. for Dismissal, exh. C, RFP at 2.<sup>2</sup> The Army issued the initial RFP for phase 1 on May 12, 2021, pursuant to Federal Acquisition Regulation (FAR) part 15. *Id.* at 1, 96. The RFP was set aside for small businesses and sought proposals for a water storage distribution system (WSDS) program and associated field support that included, among other things, water pumps rated at 125 gallons per minute (GPM) and 350 GPM. *Id.* at 2, 61. The initial RFP stated that phase 1 contract holders would be notified if they were eligible to compete in phase 2 and if so, would be given a fair opportunity to compete for the phase 2 effort in accordance with FAR section 16.505.<sup>3</sup> *Id.* at 96. In accordance with the initial RFP, the agency issued a letter RFP for phase 2 of the procurement on November 18, 2022. Req. for Dismissal, exh. A, Phase 2 RFP at 1.

Phase 1 consisted of: (1) the solicitation, receipt, and evaluation of phase 1 proposals; (2) the award of IDIQ contracts to successful offerors; (3) the fulfillment of a single delivery order, which included the design and delivery of two 125 GPM pumps and two 350 GPM pumps; and (4) product qualification testing (PQT) of the delivered pumps. *Id.* at 61-62, 96. The PQT consisted of a variety of functional tests as specified by the solicitation and detailed in the solicitation's attachments. *Id.* at 61-62. The evaluation factors under phase 1 included experience and price, however, offerors were required to submit with their phase 1 proposals pricing for both phases of the procurement, including all option periods.<sup>4</sup> *Id.* at 4-46. The solicitation further stated that the procurement would be governed by the WSDS purchase description under the Automotive Tank Purchase Description (ATPD) in effect at the time of the solicitation's release. *Id.* at 47. The relevant ATPD advised that the water pumps had to meet a specific military performance pump specification; for the 350 GPM pump, the parties agree that the specification in effect at the time of the solicitation's release was a

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<sup>1</sup> The value of the task order here exceeds \$25 million. Accordingly, this protest is within our Office's jurisdiction to resolve protests involving task orders issued under IDIQ contracts established pursuant to the authority in title 10 of the United States Code. 10 U.S.C. § 3406(f)(1)(B).

<sup>2</sup> All citations to the record are to the electronic Adobe PDF document page, unless otherwise indicated. All citations to the RFP are to the initial RFP, unless otherwise indicated.

<sup>3</sup> Because the initial solicitation contemplated a phase 2 procurement action pursuant to FAR section 16.505, which governs orders placed under indefinite-delivery contracts, this decision characterizes the agency's phase 2 procurement action as a task order.

<sup>4</sup> The RFP stated that the experience factor was more important than the price factor. RFP at 138.

recently revised version of specification MIL-PRF-53051 revision C (REV C). *See id*; Protest, exh. 1, West Electronics Debriefing at 5.

For phase 2 of the procurement, the firms that had received IDIQ contracts, completed delivery orders, and undergone successful functional PQT in phase 1, would be given a fair opportunity to compete for the phase 2 task order in accordance with FAR section 16.505. RFP at 96. The evaluation factors under phase 2 included technical performance and price.<sup>5</sup> *Id.* The technical performance factor was to be evaluated based solely on the results of offerors' phase 1 PQT. *Id.* at 96-97. For the price factor, offerors would be given the opportunity to update their proposed pricing from phase 1, but were permitted to only lower their proposed pricing, if they chose to do so. *Id.* at 97. The RFP stated that the government reserved the right to issue a unilateral contract modification for the no-cost cancellation of the IDIQ contracts awarded to firms under phase 1 that were subsequently not selected for award of the phase 2 task order. *Id.*

On December 17, 2021, the Army awarded phase 1 contracts and corresponding delivery orders to three firms, including West Electronics and GTA Containers. Req. for Dismissal, exh. A, Phase 2 RFP at 1; Req. for Dismissal, exh. B, West Electronics Contract at 1. Under the protester's phase 1 contract and pursuant to the terms of the original solicitation, the phase 1 pumps were to be delivered within 90 days of contract award in order to undergo PQT. Req. for Dismissal, exh. B, West Electronics Contract at 82. This established a delivery date of no later than March 17, 2022. *See id.*

On March 14, three days before the due date for delivery of the pumps, the Army sent the phase 1 contract holders a notice containing an approved "list of permanent deviations relative to the WSDS program." Protest, exh. 2, WSDS Permanent Deviations at 1. The list included various technical changes to the pump specifications. *Id.* at 1-2. The protester explains, and the agency does not contest, that the changes to the specifications relaxed the requirements for the 350 GPM pumps. With the changes, phase 1 contractors could deliver 350 GPM pumps that met a previous, less stringent, military performance pump specification (MIL-PRF-53051 REV B) instead of having to deliver pumps that met the more recent REV C in effect at the time the agency issued the solicitation. Protest, exh. 1, West Electronics Debriefing at 2-5. The notice also stated that "[a] formal contract modification to incorporate the . . . permanent deviations . . . will be forthcoming." Protest, exh. 2, WSDS Permanent Deviations at 2. West Electronics delivered the pumps it had developed, which were REV C compliant, by the March 17 delivery date.

On November 18, 2022, after having completed phase 1 PQT, the Army sent a "request for proposals [] for Phase II of the WSDS program" to the successful phase 1 firms, including West Electronics and GTA Containers. Req. for Dismissal, exh. A, Phase 2 RFP at 1. In accordance with the phase 1 RFP, the phase 2 RFP advised that each firm could update the pricing it proposed under phase 1 of the procurement, but that the

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<sup>5</sup> Similar to phase 1, the RFP stated that the technical performance factor was more important than the price factor. RFP at 96.

firms were only authorized to propose downward adjustments, or make no changes, to their pricing. *Id.* West Electronics elected to make no pricing change (other than removing pricing from year 1 of the previously-awarded contract, as the first year of performance was set to end in December 2022). Protest at 8.

On June 28, 2023, the Army notified West Electronics that GTA Containers had been selected for the phase 2 task order, and West Electronics requested a debriefing. Protest at 7. The agency provided West Electronics a written debriefing on July 10. Protest, exh. 1, West Electronics Debriefing at 1. In the debriefing, the agency explained that it relaxed its pump specifications on March 14 at the request of multiple offerors for two primary reasons. First, the agency determined that the initial specifications were not needed for the specific WSDS system being procured, and that a change in the technical specifications would not negatively affect WSDS performance. *Id.* at 5. Second, the agency determined that the change in specifications would maximize competition. *Id.*

On July 17, West Electronics filed the instant protest with our Office.

#### ADMISSION TO THE PROTECTIVE ORDER

As a preliminary matter, on July 20, our Office issued a protective order pursuant to our Bid Protest Regulations at 4 C.F.R. § 21.4(a). Electronic Protest Docketing System (Dkt.) No. 5. After counsel for West Electronics submitted protective order applications on July 21, GTA Containers timely objected to admission to the protective order of protester's counsel, an objection to which the agency joined. Intervenor Objection to West Electronics Protective Order Application; Dkt. No. 14.

The protective order applications initially submitted by protester's counsel indicated that counsel were representing a firm called W.S. Darley & Co, and not West Electronics. West Electronics Initial Protective Order Applications at 1. According to GTA Containers' objection, W.S. Darley Co. is a large business pump supplier to West Electronics. Intervenor Objection to West Electronics Protective Order Application at 1. Because the protective order applications stated that counsel was representing a large business supplier of West Electronics that was not a party to the protest, the intervenor argued that the protester's counsel should be denied admission to the protective order, and that "GAO should consider whether the protest should be dismissed," as the supplier was ineligible for award of either the phase 1 or phase 2 task order. *Id.* at 2.

In response to the objection, protester's counsel asserted that their initial applications contained a "clerical error," and that in any event, the protest document itself identified West Electronics as both the protester and an interested party to the protest. Protester Resp. to Intervenor Objection to Protective Order Applications at 1-2. Protester's counsel also filed corrected protective order applications naming West Electronics as their client and the party to the protest. West Electronics Corrected Protective Order Applications at 1. Following the filing of protester's counsel's response to the intervenor's objection, GAO notified the parties that it intended to admit protester's

counsel to the protective order over the objections and asked if the agency and intervenor wanted to withdraw their objections. In response, the agency stated it had no objections to the protester's admittance to the protective order. Dkt. No. 25. The intervenor did not affirmatively state whether it had continued objections to the admission of the attorneys.<sup>6</sup> See *generally* Dkt.

Given the representations and explanations provided by protester's counsel, as well as the agency's statement of no objection, our Office found no basis to deny the attorneys' admission to the protective order as counsel for West Electronics. Dkt. No. 26.

## DISCUSSION

West Electronics argues that the Army unreasonably failed to give the protester a fair opportunity to respond to what the protester asserts were modifications to the solicitation. Protest at 9. In this regard, the protester contends that it should have been given the opportunity to submit a less costly pump that met the changed, and less stringent specifications that were announced only three days prior to the delivery due date for the pumps under phase 1. *Id.* at 9-10. The protester also argues that because it was the only firm to meet the delivery deadline under the phase 1 delivery order, it should have been the only firm eligible to compete in phase 2 of the procurement. *Id.* at 9.

The Army requests dismissal of the protest on multiple grounds. First, the agency argues that West's first protest ground is factually erroneous. Req. for Dismissal at 2. While the protester argues that the agency failed to give a reasonable amount of time to respond to solicitation modifications, the agency explains that there was no active solicitation at the time the agency made the modifications--the phase 1 solicitation was no longer active, as the IDIQ contracts had already been awarded, and the phase 2 solicitation was not issued until November 2022. See *id.* In this regard, the agency asserts that the change in pump specifications was a modification to the base IDIQ contract, not the phase 1 or phase 2 solicitation. *Id.*

In the alternative, the agency argues that the protester's first basis of protest is at best a challenge to the terms of the phase 2 solicitation. Accordingly, the agency maintains that the protest was untimely filed, as the protester was required by regulation to file its protest prior to the time set for receipt of proposals. *Id.* at 2-3; see 4 C.F.R. § 21.2(a). Finally, the agency argues that the protester's argument that it was the only eligible firm to compete in phase 2 because it was the only firm to meet the phase 1 delivery deadline is a matter of contract administration, and thus not subject to our Office's review. *Id.* at 4.

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<sup>6</sup> The intervenor alerted GAO that it had not been receiving automated notices from EPDS indicating that there had been updates to the docket. Intervenor Notice to GAO at 1. This administrative issue was ultimately resolved.

Our regulations provide that “[t]he administration of an existing contract is within the discretion of the agency. Disputes between a contractor and the agency are resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978.” 4 C.F.R. 21.5(a). Accordingly, once a contract is awarded, our Office will generally not review protests of modifications or delivery orders under contracts because such matters are related to contract administration and are beyond the scope of our bid protest function. *Lasmer Industries, Inc.*, B-400866.2 *et al.*, Mar. 30, 2009, 2009 CPD ¶ 77 at 6; *Cornische Aviation & Maintenance, LTD*, B-405013.4, Jan. 25, 2013, 2013, CPD ¶ 42 at 3.

Here, we find both issues raised in this protest to be matters of contract administration, and thus not subject to review by our Office. The Army’s March 14 list of permanent deviations for the WSDS program were modifications to the existing IDIQ contracts awarded on December 17, 2021, not modifications to a solicitation. These modifications changed the requirements established by the phase 1 solicitation and subsequently awarded contracts, relaxing some of the REV C military performance pump specifications. The announcement of the modifications in such close proximity to the March 17 due date for the first delivery order further implicated matters of contract performance. Indeed, the March 14 notice to contract holders implementing these changes explicitly stated that a contract modification would be forthcoming. Thus, to the extent the protester now complains that it did not have sufficient time to respond to the modified contract requirements, the challenge presents a matter concerning the administration of West Electronics’s contract. In accordance with our regulations, any dispute regarding the modifications is an issue of contract administration and not an issue involving the solicitation.

West Electronics argues that it did not have a basis for believing it would be prejudiced by the March 14 specification change, because it “reasonably believed that all offerors would be proposing pumps that met [the REV C specifications].” Resp. to Req. for Dismissal at 2. Regardless of whether it was reasonable for the protester to make assumptions concerning what “all offerors would be proposing,” the fundamental nature of this dispute remains the administration of the IDIQ contracts awarded in December 2021. Accordingly, this protest ground is dismissed.<sup>7</sup>

Similarly, West Electronics’s second basis of protest, that it was the only firm that should have been found eligible to compete for the task order under phase 2, involves matters of contract administration. The initial RFP established a single, permissive eligibility criterion for participation in phase 2 of the competition, advising that “[t]he

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<sup>7</sup> We note that, in limited circumstances and as an exception to our general rule, our Office may consider challenges to contract modifications that are outside the scope of the underlying contract, including challenges to the relaxation of contract requirements. See *A. Prentice Ray & Associates, LLC*, B-421470 *et al.*, May 24, 2023, 2023 CPD ¶ 129 at 8; *Epsilon Systems Solutions, Inc.*, B-414410.4, Nov. 6, 2017, 2017 CPD ¶ 344 at 3-4. However, the protester has not expressly raised such an argument, and in any event, in order to be timely, a challenge of this nature needed to have been made within 10 days of the March 14, 2022 contract modification.

government may reject offers for the Phase II effort from those contractors that did not successfully demonstrate all requirements in the phase I [t]est . . .” RFP at 96. In issuing the phase 2 RFP, the Army informed three firms, including the protester and awardee, that they were eligible for consideration of the phase 2 task order, as they had met the testing requirements of the phase 1 PQT. Req. for Dismissal at 4; Req. for Dismissal, exh. A, Phase 2 RFP at 1.

West Electronics maintains, and the Army does not dispute, that the protester timely delivered pumps for PQT under phase 1 of the procurement, and that the agency accepted deliveries from other firms that were late--they were received after the delivery date established in the phase 1 IDIQ contracts. However, disputes concerning the timeliness of a delivery order or the agency’s decision to accept a late delivery (as opposed to, for example, the decision to accept a late proposal) are matters of contract administration that our Office does not review. *Compare O’Gara-Hess & Eisenhardt Armoring Co., LLC*, B-415178.2, B-415178.3, Apr. 18, 2018, 2018 CPD ¶ 160 at 9 (protest ground challenging awardee’s ability to meet delivery schedule is dismissed, as it involves a matter of contract administration); *Securiguard, Inc. et al.*, B-254392.8 *et al.*, Feb. 9, 1994, 94-1 CPD ¶ 92 at 6 (protest ground challenging agency’s decision to relax start date for contract performance is a matter of contract administration not for consideration by our Office) *with Richen Management, LLC*, B-419253, Jan. 12, 2021, 2021 CPD ¶ 24 (protest challenging agency’s acceptance of late proposal considered by our Office); *see King Nutronics Corp.*, B-259846, May 3, 1995, 95-2 CPD ¶ 112 at 3 n.4 (explaining that a dispute concerning the acceptability of a delivery order for testing under a prior contract is a matter for the appropriate board of contract appeals, and not our Office). Moreover, timely delivery of the phase 1 pumps was not an eligibility requirement to participate in the phase 2 competition. Rather, as noted above, to compete in phase 2, a phase 1 contractor’s pumps had to pass functional product quality testing and timely delivery of the pumps for testing was not an element of the agency’s functional testing requirements.

Because three firms were reasonably found to have met the single eligibility criterion for participation in phase 2 of the procurement, and disputes concerning the timeliness of phase 1 deliveries involve matters of contract administration, this protest ground is also dismissed.

The protest is dismissed.

Edda Emmanuelli Perez  
General Counsel