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441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Microgenics Corporation

File: B-419470

Date: February 2, 2021

Kevin Pinkney, Esq., and Travis L. Mullaney, Esq., Arent Fox, LLP, for the protester.
Jeffery M. Chiow, Esq., Robert S. Metzger, Esq., Stephen L. Bacon, Esq., and Eleanor M. Ross, Esq., Rogers Joseph O'Donnell, PC, for Siemens Healthcare Diagnostics, Inc., the intervenor.
Michael K. Greene, Esq., Administrative Office of the United States Courts, for the agency.
Louis A. Chiarella, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging an award made by the Administrative Office of the United States Courts filed more than 10 days after the protester learned of its basis of protest when the agency provided a non-required debriefing is dismissed as untimely; a debriefing mandated by internal agency policy guidance is not a "required debriefing" for purposes of GAO's timeliness rules.

2. Protest challenging the agency's conduct of discussions and alleged disclosure of protester's propriety information by means of an amended solicitation is dismissed where the protester failed to challenge the apparent solicitation defect in a timely manner.

DECISION

Microgenics Corporation, of Fremont, California, protests the award of a contract to Siemens Healthcare Diagnostics, Inc., of Norwood, Massachusetts, under request for proposals (RFP) No. USCA20R0151, issued by the Administrative Office of the United States Courts (AOUSC) for drug analyzing equipment and supplies. Microgenics contends the agency's evaluation of Siemens's proposal and resulting award decision were improper.

We dismiss the protest as untimely.

BACKGROUND

The AOUSC is "an arm of the judicial branch" of the federal government. Agency Dismissal Request at 2, *citing Superior Reporting Servs., Inc.*, B-230585, June 16, 1988, 88-1 CPD ¶ 576 at 2. The mission of the AOUSC is to provide administrative, financial, legal, legislative, management, technology, and program support services to the federal courts and other judicial branch agencies (*e.g.*, United States Sentencing Commission, Federal Judicial Center, United States Probation and Pretrial Services Offices (USPPSO)). www.uscourts.gov/about-federal-courts/judicial-administration (last visited Jan. 19, 2021). Moreover, unlike most executive branch agencies, the AOUSC's contracting activities are not governed by the competition requirements of the Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (codified in scattered sections of 41 U.S.C.), as amended by the Competition in Contracting Act of 1984 (CICA), and implemented in the Federal Acquisition Regulation (FAR). *Court Copies & Images, Inc.*, B-277268, B-277268.2, Sept. 24, 1997, 97-2 CPD ¶ 85 at 2 n.2 ("Because AOUSC is part of the judicial branch, it is not subject to the procurement statutes and regulations governing executive branch procurements"); *Superior Reporting Servs., Inc.*, *supra* at 2-3. Rather, the AOUSC's procurements are conducted in accordance with the agency's Guide to Judiciary Policy, Volume 14 (Procurement).[1] www.uscourts.gov/sites/default/files/guide-vol14-2016-03-29_0.pdf (last visited Jan. 19, 2021).

The RFP, issued on September 23, 2020, contemplated the award of an indefinite-delivery, indefinite-quantity contract under which fixed-price delivery orders could be placed for 5 years with one 6-month option.[2] RFP at 4, 25. In general terms, the solicitation's statement of work (SOW) required the contractor to provide all the drug testing equipment and reagents (*i.e.*, immunoassays) necessary to perform on-site drug testing at various USPPSO locations. RFP amend. 0002, SOW at 2. The RFP established that contract award would be made on a "lowest priced, technically-acceptable" basis, based on three evaluation factors: technical approach; experience and past performance (hereinafter, past performance); and price.[3] RFP amend. 0002 at 14.

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[1] The Guide to Judiciary Policy, Vol.14 (Procurement), was developed pursuant to the authority of the Director of the AOUSC to "enter into and perform contracts and other transactions upon such terms as the Director may deem appropriate as may be necessary to the conduct of the work of the judicial branch of Government . . . ." 28 U.S.C. § 604(a)(10)(C); *see also* Guide to Judiciary Policy, Vol. 14 (Procurement) at 3-4.

[2] The solicitation was subsequently amended three times. Unless specified otherwise, all citations are to the final version of the solicitation.

[3] Although contract award was to be made on a lowest-priced, technically acceptable basis, in which all non-price factors are evaluated for acceptability (*e.g.*, acceptable or unacceptable), the agency inexplicably defined acceptability for past performance in

Both Siemens and Microgenics submitted proposals by the October 27 closing date. The agency evaluated offerors' proposals, with the final evaluation ratings and prices as follows:

	Siemens	Microgenics
Technically Acceptable	Yes	Yes
Past Performance	Satisfactory Confidence	Substantial Confidence
Price	$9,944,205	$15,195,775

Req. for Dismissal at 3.

The agency's source selection authority thereafter determined that Siemens had submitted the lowest-priced, technically acceptable proposal, and selected Siemens for contract award. Req. for Dismissal, exh. 1, Award Notice.

On December 1, the agency provided Microgenics with notice of award to Siemens. *Id.* On December 2, Microgenics requested a debriefing, which the agency provided on December 9. Microgenics then filed its protest with our Office on December 14.[4]

DISCUSSION

Microgenics contends the agency unreasonably found Siemens's proposal to be technically acceptable, asserting that certain existing Siemens immunoassays do not meet the solicitation's requirements. Protest at 17-22. Microgenics also alleges that Siemens's low price suggests the awardee must have proposed equipment that does not meet the SOW's drug testing through-put requirements. *Id.* at 23. Finally, the protester asserts that the AOUSC conducted improper discussions by disclosing aspects of Microgenics's proprietary solution, as "evidenced by the Agency's . . . issuance of [RFP] Amendment 002 to the Solicitation[] in the midst of discussions. . . ." *Id.* at 28-29.

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terms of varying levels of confidence, such as "substantial confidence," "satisfactory confidence," or "unknown confidence." RFP amend. 0002 at 14. Only a rating of "no confidence" was considered unacceptable. *Id.*

[4] Under CICA, our Office has jurisdiction to resolve bid protests concerning solicitations and contract awards that are issued "by a Federal agency." 31 U.S.C. § 3551(1)(A). CICA provides that the term "Federal agency" has the meaning "given such term by section 102 of title 40." 31 U.S.C. § 3551(3). Section 102 of Title 40 defines the term "Federal agency" as including any "establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol, and any activities under the direction of the Architect of the Capitol)." The AOUSC, as an establishment in the judicial branch, is subject to our bid protest jurisdiction under CICA.

The AOUSC argues that the Microgenics protest is untimely. Specifically, the agency contends the challenges to Siemens's technical acceptability were filed more than 10 days after Microgenics knew or should have known of its basis of protest (*i.e.*, the award notice provided on December 1), and that the debriefing exception to this general rule does not apply here, because the debriefing provided to Microgenics was not a "required" one within the meaning of 4 C.F.R. § 21.2(a)(2). The AOUSC also argues the final protest ground--that RFP amendment 0002 improperly disclosed Microgenics's proprietary information and resulted in unfair discussions--is even more untimely than the challenges to Siemens's technical acceptability, as it "is nothing more than an untimely objection to the terms of the [amended] Solicitation." Req. for Dismissal at 2.

Microgenics opposes dismissal of its protest as untimely. With regard to the challenges to Siemens's technical acceptability, Microgenics argues that the debriefing exception applies in this case and that its protest was timely filed within 10 days of the debriefing provided on December 9. In support thereof, Microgenics contends the debriefing was required, pursuant to the AOUSC's Guide to Judiciary Policy. Resp. to Req. for Dismissal at 4-14. The protester also alternatively contends that the challenges to Siemens's technical acceptability were timely because Microgenics did not learn of its basis of protest until the December 9 debriefing. *Id.* at 16-19. Finally, Microgenics argues that its challenge to the agency's conduct of discussions was timely filed within 10 days of the December 9 debriefing.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. *Centerra Integrated Facilities Servs., LLC*, B-418628, Apr. 23, 2020, 2020 CPD ¶ 155 at 4; *The MIL Corp*., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 5. Under these rules, a protest based upon alleged improprieties in a solicitation that are apparent prior to the time set for receipt of initial proposals must be filed prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1).

In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation (*e.g.*, by an amendment), generally must be protested not later than the next closing time for receipt of proposals following the incorporation. *Id*. When, however, a protester does not have a reasonable opportunity to file such a protest prior to the next closing time, the protester is required to protest the solicitation impropriety no later than 10 days from the time it knew or should have known of its basis for protest. *WareOnEarth Commc'ns, Inc.*, B-298408, July 11, 2006, 2006 CPD ¶ 107 at 3; *Dube Travel Agency & Tours, Inc.; Garber Travel*, B-270438, B-270438.2, Mar. 6, 1996, 96-1 CPD ¶ 141 at 6 n.7; *see* 4 C.F.R. § 21.2(a)(2).

Additionally, a protest based on other than alleged improprieties in a solicitation must be filed not later than 10 days after the protester knew or should have known of the basis

for its protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). An exception to this general rule is a protest that challenges "a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required." *Id.*; *Centerra Integrated Facilities Servs., LLC*, *supra*; *The MIL Corp*., *supra*. In such cases --when a debriefing is required--with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the protest must be filed no later than 10 days after the date on which the debriefing is held. *Id.*

Challenges to Siemens's Technical Acceptability

First, we find Microgenics's challenges to Siemens's technical acceptability to be untimely, because the debriefing provided to Microgenics was not "required" within the meaning of the debriefing exception in our regulations, and because Microgenics knew or should have known of its basis of protest here no later than receipt of the December 1 award notice.[5] The requirement for a post-award debriefing is established by statute, which provides as follows:

> When a contract is awarded by the head of an executive agency on the basis of competitive proposals, an unsuccessful offeror, on written request received by the agency within 3 days after the date on which the unsuccessful offeror receives the notification of the contract award, shall be debriefed and furnished the basis for the selection decision and contract award.

41 U.S.C. § 3704(a).

The plain language of the statute clearly articulates that the provision applies to contracts awarded by "an executive agency." *Id.* The AOUSC, a judicial-branch agency, is not bound by statutory requirements that apply only to executive-branch agencies. Thus, the statutory requirement for a post-award debriefing established by section 3704 of Title 41 is inapplicable to the AOUSC.

Microgenics does not identify any statute or regulation applicable to the AOUSC that required the contracting agency to provide the protester a post-award debriefing. Instead, the sole basis for the protester's argument that the debriefing should be considered "required" rests on the debriefing provisions set forth in the AOUSC Guide to

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[5] In light of our determination that the debriefing here was not a required one, we need not address whether the procurement was one conducted on the basis of competitive proposals, a second predicate under our regulations to the application of the debriefing exception. However, when evaluating whether a procurement was conducted on the basis of "competitive proposals" for the purpose of the debriefing exception to our timeliness rules, we have noted that the use of negotiated procedures consistent with FAR part 15 is the hallmark. *See Millennium Space Sys., Inc.*, B-406771, Aug. 17, 2012, 2012 CPD ¶ 237 at 4; *The MIL Corp*., *supra* at 6.

Judiciary Policy.[6] These provisions, however, reflect AOUSC internal policy guidance versus a procurement statute or regulation, and are therefore insufficient to establish the debriefing at issue as a "required" debriefing within the meaning of our regulations. *Centerra Integrated Facilities Servs., LLC*, supra (finding that a debriefing provided pursuant to agency policy guidance is not a "required" one within the meaning of the debriefing exception in our regulations); *The MIL Corp.*, *supra* ("the [debriefing] exception extends to protests involving procurements where a debriefing is required by law"). Similarly, we have found an agency's compliance, or noncompliance, with internal guidance and policies (that are not contained in mandatory procurement regulations) is not a matter that our Office will review as part of our bid protest function. *See*, *e.g.*, *Trailboss Enters., Inc.*, B-415812.2 *et al.*, May 7, 2018, 2018 CPD ¶ 171 at 5; *LCPP, LL*C, B-413513.2, Mar. 10, 2017, 2017 CPD ¶ 90 at 5; *Triad Logistics Servs. Corp.*, B-403726, Nov. 24, 2010, 2010 CPD ¶ 279 at 3. Absent any applicable statutory or regulatory requirement for the post-award debriefing provided to Microgenics by the AOUSC here, the debriefing exception to our timeliness rules does not apply.

Next, we find that Microgenics knew or should have known of its basis for protest here as of the December 1 award notice. As a preliminary matter, our regulations require that a protester provide all information establishing the timeliness of its protest in the original protest pleading. 4 C.F.R. § 21.1(c)(6). A protester will generally not be permitted to later introduce, for the first time, additional facts or legal theories establishing timeliness where such information was in the protester's possession and could have been provided to our Office at part of the initial protest submission. *See ACRO-TECH, Inc.--Recon.*, B-270506.2, Apr. 18, 1996, 96-1 CPD ¶ 193 at 3. Further, if a protester, in its initial protest, fails to establish the timeliness of its challenge, the protest will be dismissed and the protester will not be permitted another opportunity to present its case. *See Consolidated Mgmt. Servs., Inc.--Recon.*, B-270696.2, B-270696.3, Feb. 13, 1996, 96-1 CPD ¶ 76 at 2 (finding protester's attempt to introduce new information altering when the basis of protest was first known to it provided no basis for reconsideration of underlying dismissal decision).

In its initial protest filing, Microgenics alleged that its protest of Siemens's technical acceptability was timely because it was filed within 10 days of a required debriefing--not because the debriefing first provided the firm with its basis of protest. Protest at 30. In fact, it was only in response to the AOUSC's dismissal request that Microgenics first advanced its alternative legal theory that the information from the debriefing was the basis of its protest. We find that Microgenics's protest fails to establish the timeliness of its challenge to Siemens's technical acceptability, and Microgenics's *post-hoc* attempt to introduce an alternative legal theory as to the protest's timeliness is incongruous with

[6] In this regard, the Guide to Judiciary Policy states that "[a]n unsuccessful offeror must request a debriefing in writing. Unsuccessful offerors, who request a debriefing, must be debriefed and told the basis for selection decision and award. Debriefings must be scheduled promptly." Guide to Judiciary Policy, Vol. 14, (Procurement) at 443 (§ 330.73.10).

our expeditious resolution of protests. *See Eurometalli s.p.a.--Recon.*, B-250522.2, Apr. 15, 1993, 93-1 CPD ¶ 323 at 3-4.

Moreover, the record reflects that Microgenics knew or should have known this basis for protest as of the date it received notice of the award to Siemens on December 1. The gravamen of the Microgenics protest is that certain Siemens's immunoassays and drug-testing equipment fail to meet SOW requirements, and the protester bases such assertions upon publicly-available information about Siemens's products (*e.g.*, U.S. Food and Drug Administration (FDA) medical device reports, Siemens's product literature). Protest at 17-28; Exh. D, FDA Review of ARK Fentanyl II Assay, at 14-26, Exh. E, FDA Review of Emit II Plus Buprenorphine Assay, at 28-44. Here, the December 1 award notice informed Microgenics that the AOUSC had found Siemens to be technically acceptable, notwithstanding the information upon which Microgenics now relies.

By contrast, what Microgenics learned at the December 9 oral debriefing--by its own admission--was essentially that the agency had confined its evaluation to the offerors' proposals and had not reviewed information from outside sources, which it was not required to consider.[7] Protest at 17. Thus, we find that the facts which provided Microgenics with its basis of protest here were known to the protester as of December 1, the date Microgenics received the award notification. Accordingly, since Microgenics's protest was not filed until December 14, we find this allegation to be untimely because Microgenics did not protest the Siemens technical acceptability issue 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).

Conduct of Discussions

We also find Microgenics's final challenge to the conduct of discussions to be an even more untimely protest of an apparent solicitation defect. The AOUSC issued RFP amendment 0002 on November 23 to incorporate allowable alternative methods to meet the SOW's drug detection cutoff requirements. RFP amend. 0002 at 4. As part of the amended solicitation, the agency requested that each offeror submit revised proposals, confirming that it would fully meet the revised SOW requirements, by 12:00 p.m. (noon)

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[7] Specifically, the protester states:

> In the debriefing the Agency indicated, among other things, that the Agency did not review any product literature, publicly available information, FDA clearances, or any other source of information regarding the equipment and reagents proposed by each offeror. Instead, the Agency merely checked whether the offeror's proposal indicated that the offeror would provide products in compliance with the Solicitation.

Protest at 17. Similarly, the AOUSC asserts that the debriefing "did not reveal any information about Siemens's technical proposal or the Judiciary's evaluation of it, except for the information disclosed in the Notice of Award." Req. for Dismissal at 3.

on November 24, which was the following day. *Id.* at 1, 11; Protest at 15. Microgenics alleges the agency engaged in improper discussions when it requested "specific information from Microgenics as to how it intended to meet the Solicitation's prescribed detection cut-off levels *(i.e.*, by using semi-quantitative analysis) and then suggesting to Siemens that it could meet the Solicitation requirements in the same way." Protest at 28. The protester asserts that the unfair discussions were evidenced by the AOUSC's issuance of amendment 0002, which according to the protester, "clearly favored Siemens by allowing for the use of 'custom' calibrators that Siemens (and not Microgenics) would require to perform the type of semi-quantitative analysis described." *Id.* at 29.

Here, the agency conduct to which Microgenics objects--the alleged unfair discussions--occurred by means of a solicitation amendment that applied to all offerors. *See CSRA LLC*, B-417635 *et al.*, Sept. 11, 2019, 2019 CPD ¶ 341 at 7 (finding a protest challenging the conduct of discussions to be untimely where a solicitation amendment established the scope of the discussions that were to occur and the protester failed to challenge the "grounds rules for the competition" by the next closing date). As Microgenics, itself, recognizes, timely challenges to amendments to the solicitation would generally have to be received before proposals are next due. 4 C.F.R. § 21.2(a)(1). The protester, however, argues that the submission of a protest before the next solicitation closing date here--one day after the amended solicitation's issuance--was "virtually impossible." Protest at 28 n.9.

When, as here, reasonable time does not exist to file before the next closing date, a challenge to the propriety of the solicitation is due within 10 days of when the protester knew or should have known of its basis for protest. *Dube Travel Agency & Tours, Inc.; Garber Travel*, *supra* (finding that protester did not have reasonable opportunity to file protest when amendment was not received until one day before proposals were due). Because Microgenics received RFP amendment 0002 on November 23, it was required to file its protest concerning this solicitation amendment within 10 days of receipt of the amendment, *i.e.*, by December 3. As stated above, because Microgenics filed its protest with our Office on December 14, it is untimely.

Microgenics also argues that the debriefing exception applies here, such that the challenge to the solicitation is timely. We disagree. As discussed above, we find the debriefing exception to be inapplicable to this AOUSC procurement. Moreover, the debriefing exception, as set forth in our regulations, specifically states that it does not apply to any protest basis that "involve[s] an alleged solicitation impropriety covered by [4 C.F.R. § 21.2(a)(1)]." 4 C.F.R. § 21.2(a)(2); *Delta Risk, LLC*, B-416420, Aug. 24, 2018, 2018 CPD ¶ 305 at 16; *Impact Res., Inc.*, B-416093, June 11, 2018, 2018 CPD ¶ 207 at 6. Quite simply, the fact that Microgenics may not have had reasonable time to file its protest of RFP amendment 0002 by the November 24 closing date did not then permit the protester, as it argues, to wait until after receiving a post-award debriefing to

file its protest with our Office.[8] Microgenics was instead required here to file its protest concerning RFP amendment 0002 within 10 days of receiving the amendment. *Dube Travel Agency & Tours, Inc.; Garber Travel*, *supra*.

In sum, because the debriefing provided by the AOUSC to Microgenics was not "required" within the meaning of the debriefing exception in our regulations and because Microgenics raised its challenges to the awardee's technical acceptability more than 10 days after it knew or should have known of this basis of protest, those challenges are untimely. Similarly, even if reasonable time did not exist to permit Microgenics to file a protest of an apparent solicitation defect before the next closing date, because Microgenics failed to file its remaining challenge within 10 days after it knew or should have known of the basis of protest, that allegation is also untimely. Consequently, Microgenics's entire protest is untimely.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

[8] We also find no merit in Microgenics assertion that our Office should review this protest under the significant issue exception to our timeliness rules. Pursuant to our regulations, our Office may consider the merits of an untimely protest where good cause is shown or where the protest raises issues significant to the procurement system. 4 C.F.R. § 21.2(c). In order to prevent our timeliness rules from becoming meaningless, exceptions are strictly construed and rarely used. *Vetterra, LLC*, B-417991 *et al.*, Dec. 29, 2019, 2020 CPD ¶ 15 at 3. What constitutes a significant issue is decided on a case-by-case basis. *Cyberdata, Techs., Inc.*, B-406692, Aug. 8, 2012, 2012 CPD ¶ 230 at 3. However, we generally regard a significant issue as one of widespread interest to the procurement community that has not been considered on the merits in a prior decision. *Vetterra, LLC*, *supra*. Moreover, invoking the significant issue exception is a matter entirely within GAO's discretion. *Capital Brand Group, LLC--Recon.*, B-418656.2, July 9, 2020, 2020 CPD ¶ 231 at 4. Here, Microgenics has failed to show both that the issue is one of widespread interest to the procurement community not previously considered on the merits by our Office.