



## Decision

**Matter of:** UXB-KEMRON Remediation Services, LLC

**File:** B-401017.4

**Date:** October 25, 2010

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Thomas A. Coulter, Esq., and Nicole Hardin Brakstad, Esq., LeClairRyan, for the protester.

Ryan A. Black, Esq., and Margaret Simmons, Esq., Department of the Army, for the agency.

Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest contesting the agency's decision to issue a delivery order request for proposals to the "unrestricted" pool of contractors under an indefinite-delivery/indefinite-quantity contract rather to the "small business" pool is dismissed as untimely where it was filed after the due date for receipt of proposals; protester's previous appeal of this matter to the agency Task Order Ombudsman did not constitute an agency-level protest and did not toll GAO's timeliness requirements.

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### DECISION

UXB-KEMRON Remediation Services, LLC, of Blacksburg, Virginia, protests the terms of delivery order proposal request (DOPR) No. W912DY-08-R-0016, issued by the United States Army Corps of Engineers (USACE) under the Worldwide Environmental Remediation Services (WERS) multiple-award, indefinite-delivery/indefinite-quantity (ID/IQ) contracts, for demining work in and around Bagram Air Field in Afghanistan. UXB-KEMRON contends that the agency should have restricted the solicitation to the small business pool of the ID/IQ contracts.

We dismiss the protest as untimely.

On January 7, 2009, the Army awarded multiple WERS ID/IQ contracts to various contractors, including UXB-KEMRON, to acquire the Military Munitions Response Program responses involving conventional munitions and chemical warfare material,

environmental compliance and remediation services, and other munitions-related services. The work could occur at worldwide locations, including international operations supporting Army missions in Iraq, Afghanistan, and other locations. The WERS contract provides that “[t]he Government will consider the Small Business MATOC [multiple award task order contract] pool for task order competition before consideration of the Unrestricted MATOC Pool.” WERS Contract at 2. The contract also included a section entitled “Task Order Ombudsman,” which provides:

If the contractor believes it was not fairly considered for a particular task order, the contractor may present the matter to the contracting officer. The contractor may appeal the explanation or decision of the contracting officer to the USACE Ombudsman.<sup>1</sup>

Id. at 62. UXB-KEMRON was awarded a WERS ID/IQ contract in February 2010 as part of the Small Business Pool.

The DOPR, issued on September 3, 2010, contemplated the issuance of a delivery order for demining work in and around Bagram Air Field in Afghanistan. The DOPR was issued to the “unrestricted MATOC pool” of the WERS ID/IQ contract rather than the small business MATOC pool. Proposals responding to the DOPR were required to be submitted by September 22.

On September 10, UXB-KEMRON contacted the contracting officer and requested that she change her decision to solicit the unrestricted pool for this DOPR and to instead solicit only the small business pool. The contracting officer declined. On September 13, UXB-KEMRON appealed the contracting officer decision to the Ombudsman, arguing that it was not afforded a fair opportunity to be considered for this delivery order given that it was not restricted to the small business pool. On September 21, the Ombudsman determined that UXB-KEMRON had been afforded a fair opportunity to be considered, given that the contracting officer considered the small business MATOC pool for the task order competition before issuing it to the unrestricted MATOC pool. Proposals were received on September 22 as scheduled. On September 29, UXB-KEMRON filed this protest.

UXB-KEMRON has not timely challenged the decision of the agency to issue the DOPR on an unrestricted basis because its protest was not filed before the closing date for receipt of proposals in response to the DOPR. Our Bid Protest Regulations, which are applicable to protests of ID/IQ contract task order competitions, contain strict rules for the timely submission of protests. See Triple Canopy, Inc., B-310566.4, Oct. 30, 2008, 2008 CPD ¶ 207 at 7. Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation that are apparent prior to

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<sup>1</sup> The provision then went on to give specific contact information for the USACE Ombudsman.

the closing time for receipt of initial proposals are required to be filed before that time. 4 C.F.R. § 21.2(a)(1) (2010); A&T Sys., Inc., B-401701, B-401701.2, Nov. 12, 2009, 2010 CPD ¶ 62 at 5. We have considered a protest that a solicitation should be set aside for small business concerns to be a challenge of an alleged solicitation impropriety that must be protested prior to the closing date for receipt of task order proposals in order to be timely.<sup>2</sup> Masai Techs. Corp., B-400106, May 27, 2008, 2008 CPD ¶ 100 at 2.

The protester next argues that its complaint to the Ombudsman constituted an agency-level protest, and that its protest to our Office was therefore timely because it was filed within 10 days of learning of the decision of the Ombudsman.<sup>3</sup> However, the Ombudsman procedure does not constitute an agency-level protest. Agency-level protests are provided for and described in Federal Acquisition Regulation § 33.103, which does not mention or contemplate Ombudsman complaints. Complaints to the Ombudsman are separately provided for in FAR § 16.505(b)(6), which states:

Task-order and delivery-order ombudsman. The head of the agency shall designate a task-order and delivery-order ombudsman. The ombudsman must review complaints from contractors and ensure they are afforded a fair opportunity to be considered, consistent with the procedures in the contract. The ombudsman must be a senior agency official who is independent of the contracting officer and may be the agency's competition advocate.

Because UXB-KEMRON's complaint to the Ombudsman was not an agency-level protest, it did not satisfy the timeliness requirement that alleged solicitation

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<sup>2</sup> UXB-KEMRON contends that it was not challenging the impropriety in the task order solicitation itself, but was challenging the "administrative decision to issue the Task Order RFP to the Unrestricted Pool." UXB-KEMRON Submission (Oct. 13, 2010) at 4. However, where, as here, the agency's decision is implemented in the terms of the DOPR, any cognizable protest of this decision necessarily concerns an alleged solicitation impropriety that must be protested prior to the closing date for receipt of proposals. See A&T Sys., Inc., *supra*.

<sup>3</sup> Our Bid Protest Regulations provide that where a protest is initially filed with the contracting agency, to be considered timely, the protest to GAO must be filed not later than 10 days after the protester had actual or constructive knowledge of the "initial adverse agency action" on the agency-level protest. 4 C.F.R. § 21.2(a)(3).

improprieties be protested, either to the agency or our Office, prior to the closing date for receipt of proposals.<sup>4</sup>

UXB-KEMRON also argues that the “Task Order Ombudsman” section in the WERS Contract gave it “a specific contract right to appeal the Contracting Officer’s decision to the Ombudsman,” UXB-KEMRON Submission (Oct. 13, 2010). However, the Ombudsman appeal process provided for under the contract and FAR § 16.505(b)(6) is clearly permissive and is not a prerequisite to protesting to our Office.

Alternatively, the protester requests that we consider its protest as a “significant issue” exception to the timeliness requirements under our Bid Protest Regulations, 4 C.F.R. § 21.2(c). Under this exception, our Office may consider an untimely protest that raises issues significant to the procurement system that have not been considered previously; however, in order to prevent the timeliness rules from becoming meaningless, this exception is rarely implemented. DePaul Hosp. and The Catholic Health Assoc. of the U.S., B-227160, Aug. 18, 1987, 87-2 CPD ¶ 173 at 5. As noted by the protester, we considered a similar issue in Delex Sys., Inc., *supra*, and we decline to find a significant issue is present here.

The protest is dismissed.

Lynn H. Gibson  
Acting General Counsel

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<sup>4</sup> UXB-KEMRON also contends that in Delex Sys., Inc. B-400403, Oct. 8, 2008, 2008 CPD ¶ 181 at 6, our Office indicated that it was appropriate to appeal and obtain a decision from an Ombudsman before protesting to our Office. However, we did not address the timeliness of Delex’s protest in that decision because it was not at issue. In this regard, while not specifically stated in that decision, the protest in Delex was filed in our Office prior to the closing date for receipt of task order proposals.