



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

Comptroller General
of the United States

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Decision

Matter of: CGI Federal, Inc.; Ascendant Services, LLC

File: B-418807; B-418807.2

Date: August 18, 2020

Neil H. O'Donnell, Esq., Stephen L. Bacon, Esq., and Eleanor M. Ross, Esq., Rogers Joseph O'Donnell, PC, for CGI Federal, Inc.; and Daniel J. Strouse, Esq., David Cohen, Esq., and John J. O'Brien, Esq., Cordatis LLP, for Ascendant Services, LLC, the protesters.

Andrew Squire, Esq., Department of Commerce, for the agency.

Heather Self, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests challenging vendors' exclusion from a future competition following agency's review of the vendor responses to a request for information are dismissed for lack of jurisdiction.

DECISION

CGI Federal, Inc., of Fairfax, Virginia, and Ascendant Services, LLC, a small business of Leesburg, Virginia, protest the firms' exclusion from the Department of Commerce, U.S. Patent and Trademark Office's (PTO) business oriented software solutions (BOSS) procurement under request for information¹ (RFI) No. ACQ-19-1870. Both protesters contend that the agency's review of the firms' responses to the RFI was unreasonable and an abuse of discretion. CGI argues that the agency's review of its response violated the terms of the RFI and the PTO's acquisition guidelines because it failed to

¹ The PTO submitted requests for dismissal in both protests, and included the RFI as Enclosure 1 with both of its requests for dismissal. See CGI Req. for Dismissal (B-418807); Ascendant Req. for Dismissal (B-418807.2). Citations in this decision to the RFI, refer to Enclosure 1 of the agency's requests for dismissal. Both requests for dismissal also included the same Enclosures 2 and 3. *Id.* We cite to these identical enclosures as RFI--Vendor Response Template and RFI--Questions & Answers (Q&A), respectively.

consider past performance information of which it should have been aware. Ascendant argues that the agency's review of its response violated the PTO's acquisition guidelines generally, and further challenges the agency's failure to provide an explanation of its review process.

We dismiss the protests.

BACKGROUND

On August 19, 2019, the PTO issued the RFI under its unique Alternative Competition Method procurement authority. RFI at 2. The PTO's Alternative Competition Method is authorized by The Patent and Trademark Office Efficiency Act, 35 U.S.C. § 2(b)(4)(A), and implemented through section 6.1.1 of the Patent and Trademark Office Acquisition Guidelines (PTAG), 78 Fed. Reg. 61185, 61186-61187 (Oct. 3, 2013). The RFI provided that BOSS is the PTO's "requirement for software development and integration services for commercial off the shelf (COTS) products with customized software applications, database applications, and other solutions," and attached a draft solicitation for the BOSS requirement. RFI at 2-3. Under the forthcoming BOSS solicitation, the PTO intends to award multiple indefinite-delivery, indefinite-quantity (IDIQ) contracts of ten years in length with a combined estimated value of over \$2 billion during the ten year performance period. CGI Req. for Dismissal at 2; Ascendant Req. for Dismissal at 2. Further, the PTO anticipates an award ratio of 3:2 for small to large businesses, representing a 60 percent small business set-aside for prime IDIQ awards. *Id.*; RFI at 3.

The RFI required interested vendors to submit a corporate profile and limited² responses to 11 questions. RFI at 2; RFI--Vendor Response Template. The RFI did not ask for vendors to submit any pricing information. *Id.* The RFI informed vendors that "[b]ased on market research, including the responses to this RFI, the [PTO] will determine a pool of vendors that are deemed most likely to successfully meet the agency's needs, and will invite those companies to participate in a PTAG Alternative Competition." RFI at 2. The RFI included answers to several frequently asked questions. *Id.* at 3-5. Two of the answers reiterated that the PTO would "review vendor's RFI responses, and if applicable, additional market research" to select a pool of vendors "most likely to successfully meet the agency's requirements," and that this "selected pool of vendors [would] be invited to compete for the final solicitation." *Id.* at 3, 5. The answers also provided that "[s]ubmission of an RFI response [did] not guarantee a vendor's eligibility to compete for [the] BOSS" requirement. *Id.* at 5. In addition to the frequently asked questions answered directly in the RFI, the PTO

² The RFI established character limits for vendor responses to the 11 questions. RFI--Vendor Response Template. The character limits ranged in length from 2,100 to 5,000 characters, and the character limits included non-printing characters like spaces. *Id.*; RFI--Q&A at Question No. 78.

allowed vendors to submit questions, the answers to which the agency incorporated into the RFI. See RFI--Q&A.

The RFI did not set forth any criteria the PTO would use to review vendor responses or to choose the vendors the PTO would invite to compete for the BOSS requirement. During the Q&A period, the PTO received multiple questions asking about the review process. RFI--Q&A at Questions Nos. 3, 7, 26, 34, 38. For example, one vendor submitted the following question: “The RFI does not provide the Evaluation Criteria the Government will use to evaluate vendors’ RFI responses. Because the RFI response will determine whether a vendor is eligible to continue to pursue this very important opportunity, will the Government provide clear criteria for how it will differentiate between vendor responses?” RFI--Q&A at Question No. 3. The PTO responded that “[t]he Government will not utilize formal evaluation criteria for market research associated with PTAG 6.1.1. The Government will review RFI responses to determine which vendors are most likely to successfully meet the agency’s requirements for BOSS.” *Id.* The PTO instructed vendors to “[p]lease see response to question #3” in response to additional questions asking about the review process. *Id.* at Questions Nos. 7, 26, 34, 38.

The PTO received 229 vendor responses by the September 19, 2019 RFI submission deadline. CGI Req. for Dismissal at 5; Ascendant Req. for Dismissal at 6. The PTO represents that, as part of an “RFI Assessment Team,” the contracting officer and contracting officer’s representative “used their technical expertise to determine which vendors are the most likely to successfully meet the agency’s needs,” and that the contracting officer “determined that no additional market research was necessary other than the review of the RFI responses.” *Id.* On May 29, 2020, the PTO published a “Competitive Synopsis” that listed 24 vendors to which the PTO will directly issue the forthcoming solicitation for the BOSS requirement.³ CGI Req. for Dismissal at 5-6; Ascendant Req. for Dismissal at 6-7; see CGI Protest, exh. 2, Competitive Synopsis. The protesters were not identified on the list, and, thus, will not receive a copy of the forthcoming BOSS solicitation. *Id.* Following publication of the competitive synopsis, CGI and Ascendant each filed a protest with our Office.

DISCUSSION

CGI contends that the agency’s review of its response to the RFI violated the terms of the RFI and the PTAG,⁴ was unreasonable, and was an abuse of the PTO’s discretion

³ The PTO published the competitive synopsis on the government-wide point of entry, beta.sam.gov.

⁴ In publishing the PTAG, the PTO provided that it was setting forth its “internal operating procedures for how [it] will conduct its acquisitions” performed under the authority of The Patent and Trademark Office Efficiency Act. 78 Fed. Reg. 61185, 61186 (Oct. 3, 2013). Generally, a protester’s assertion that an agency did not adhere
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because it failed to consider information about which it should have been aware regarding CGI's performance as one of the incumbent contractors. CGI Protest at 7-17. While presented as separate arguments, the crux of each of CGI's challenges is the same. CGI argues that, in reviewing its response to the RFI, the PTO was required to consider CGI's history of successfully performing "nearly \$100 million of work" providing the PTO with "the same sort of technology and services" as what will be acquired through the forthcoming BOSS procurement. See CGI Protest at 1.

Ascendant also argues that the PTO acted arbitrarily and abused its discretion. Ascendant Protest at 3. Ascendant contends that the PTO was obligated to "reasonably comply with its own regulations,"⁵ and that it failed to do so by disregarding "reasonable responses to market research when down-selecting its field of competitors." *Id.* Ascendant further contends that the PTO abused its discretion when it removed "more than 90% of the entities that submitted a response to the RFI from even competing" for the forthcoming procurement "without ever identifying a process by which it would down-select entities." *Id.* For the reasons discussed below we dismiss the protests for lack of jurisdiction.

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to internal policy guidance is not a basis for challenging the agency's actions in our bid protest forum. *Triad Logistics Servs. Corp.*, B-403726, Nov. 24, 2010, 2010 CPD ¶ 279 at 2-3. Because, as discussed below, we do not have jurisdiction over the matter, we need not decide whether the PTAG, which was published in the federal register, constitutes something other than internal agency policy guidance.

⁵ Generally, when the Competition in Contracting Act (CICA) and its implementing Federal Acquisition Regulation (FAR) procedures do not apply to procurements that are within our bid protest jurisdiction, we will review the record to determine if the agency's actions were reasonable and consistent with any statutes or regulations that do apply. *DNC Parks & Resorts at Yosemite, Inc.*, B-410998, Apr. 14, 2015, 2015 CPD ¶ 127 at 10; *Recreation Resource Mgmt. of America, Inc.*, B-406072, Feb. 1, 2012, 2012 CPD ¶ 60 at 5.

Even if we were to conclude that the PTAG constitutes something other than internal agency guidance, we need not decide whether the PTO's actions were consistent with the PTAG. As discussed below, the RFI at issue here constituted market research, not a solicitation or other request for award of a contract. Consequently, our Office lacks bid protest jurisdiction to consider the protester's allegations that the PTO failed to adhere to the PTAG or abused its discretion in conducting its market research.

As noted above, the PTO issued the RFI under its unique Alternative Competition Method procurement authority, which is authorized by The Patent and Trademark Office Efficiency Act, 35 U.S.C. § 2(b)(4)(A), and implemented through section 6.1.1 of the Patent and Trademark Office Acquisition Guidelines (PTAG), 78 Fed. Reg. 61185, 61186-61187 (Oct. 3, 2013). In relevant part, this statute provides that the PTO “may make such purchases, contracts for the construction, maintenance, or management and operation of facilities, and contracts for supplies or services, without regard to the provisions of . . . subtitle I of title 41[.]” *Id.* Thus, when used by the PTO, this authority exempts a PTO procurement from the federal procurement statutes set forth in title 41 of the United States Code and their implementing provisions in the FAR, including the requirement for agencies generally to obtain full and open competition. See 41 U.S.C. § 3301(a).

The PTO’s use of its special procurement authority under the Patent and Trademark Office Efficiency Act, however, does not exempt PTO procurements conducted under this authority from our bid protest jurisdiction, and the PTO does not dispute this fact. The authority of our Office to hear protests of federal agency procurements is established by CICA and codified under 31 U.S.C. §§ 3551-3557. While the Patent and Trademark Office Efficiency Act, 35 U.S.C. § 2(b)(4)(A) exempts certain PTO procurements from the substantive procurement requirements of title 41, it does not exempt the PTO from the portions of CICA in title 31 of the United States Code regarding our Office’s bid protest jurisdiction. In this regard, the PTO’s acquisition guidelines expressly acknowledge 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).

Having established that our Office’s bid protest jurisdiction generally extends to PTO procurements conducted pursuant to the authority of The Patent and Trademark Office Efficiency Act, we next must consider whether the challenges raised here fall within the definition of a “protest” as set forth in CICA. The short answer is that they do not because they do not object to the terms of a solicitation and do not otherwise concern the award of a contract.

Under CICA, protests are defined to include challenges involving solicitations, and awards made or proposed under those solicitations. 31 U.S.C. § 3551(1)(A); *Fred Schreiber, et al.*, B-272181 *et al.*, Aug. 16, 1996, 96-2 CPD ¶ 71 at 3 (dismissing protest challenging agency’s non-selection of protester for a prequalification certification because the procedure did “not involve the solicitation for, or the award or proposed award of, a contract and therefore” was not subject to our bid protest jurisdiction); see also *Onix Networking Corp.*, B-411841, Nov. 9, 2015, 2015 CPD ¶ 330 at 7 (noting, in a protest challenging an out-of-scope modification to a previously awarded delivery order, that had the protester filed a protest challenging the terms of the RFI preceding the modification at issue, the protest would have been premature because no solicitation had been issued).

As set forth above, the PTO issued the RFI under its Alternative Competition Method procurement authority, the procedures for which are established in section 6.1.1 of the PTAG. 78 Fed. Reg. 61185, 61186-61187 (Oct. 3, 2013). The PTAG provides that “[a]fter conducting market research, the [contracting officer] CO 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.” *Id.* After conducting this market research, the contracting officer sends the solicitation directly to the selected vendor(s). *Id.*

The RFI advised vendors that “[t]his RFI is not a solicitation and does not constitute a request for quotation or proposal,” and that the PTO was “not seeking or accepting unsolicited proposals.” RFI Cover Page. The RFI further advised vendors that “no [PTO] commitment or implied agreement or understanding” would arise as a result of the RFI. *Id.* In the section of the RFI setting forth the PTO’s intended “notational milestones” for the BOSS requirement, the RFI was listed as the first step and referred to as a “Market Research Request for Information.” *Id.* at 5. The RFI indicated that this market research step, which included providing vendors a draft solicitation for the BOSS requirement “for reference,” would be followed by the issuance of a solicitation to “the vendor(s) deemed most likely to successfully meet the agency’s requirements.” *Id.* In keeping with the PTO’s use of the RFI as a market research tool, the RFI did not contain evaluation criteria for the review of vendor responses, whereas it did reference a “Phased Evaluation” it intended to use “to evaluate proposals” submitted in response to the final solicitation.⁶ *Id.*

Based on this record, we conclude that the RFI process at issue here does not constitute “[a] solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.” See 31 U.S.C. § 3551(1)(A). In this regard, the vendors selected by the PTO through the RFI process are not guaranteed an opportunity to participate in or obligated to perform the BOSS requirement. In addition, the PTO is not obligated to pay the vendors for any services. Rather, the 24 vendors chosen through the RFI process are merely afforded an opportunity to receive the final solicitation and submit a proposal to compete for the BOSS requirement. Moreover, as explained above, the RFI did not include any evaluation criteria or solicit pricing for a specific requirement. Rather, it is apparent that pursuant to its unique statutory authority, the PTO used the RFI process to conduct market research based

⁶ One of the questions submitted by vendors, the answer to which the PTO incorporated into the RFI, asked if the “phased evaluation” approach discussed in the RFI’s summary of next steps, referred to the evaluation of proposals that would be submitted in response to the forthcoming solicitation, or if it referred to the review of vendor responses to the RFI. RFI--Q&A at Question No. 71, *referencing* RFI at 6. The PTO responded that the phased evaluation discussed in the RFI referred to the methodology the agency intended to utilize in evaluating proposals submitted in response to the forthcoming BOSS solicitation. *Id.*

preliminary screening that it would use to conduct a future procurement. We therefore find that the agency's actions did not involve the solicitation for, or the award or proposed award of, a contract. Accordingly, the RFI process at issue here is not subject to our bid protest jurisdiction. *Fred Schreiber, supra* at 3.

Both CGI and Ascendant refer to the RFI process here as a "down-select,"⁷ and suggest that because the process resulted in their elimination from the future competition, our Office should conclude that the RFI essentially constitutes an initial phase of the PTO's selection process. See e.g., CGI Protest at 7 ("[T]he PTAG's Alternative Competition Method authorizes a vendor down-select process before receipt of proposals[.]"); Ascendant Protest at 3 (The PTO must "reasonably comply with its own regulations and may not disregard reasonable responses to market research when down-selecting its field of competitors."). While we acknowledge the impact of the review here, we disagree with the assertion that this process falls within the reach of our bid protest jurisdiction.

As an initial matter, the PTO has received an exemption from the general requirements for obtaining full and open competition. The PTAG provides that the PTO "will endeavor to conduct its procurements on a competitive basis under the FAR when it is reasonable to do so," but authorizes PTO contracting officers to use the PTAG's CICA and FAR-exempt "agency-specific acquisition procedures . . . when the particular circumstances warrant it and it is in the best interest of the agency to do so." 78 Fed. Reg. 61185, 61186 (Oct. 3, 2013). Thus, 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. *Id.* (providing that the contracting officer will "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").

To the extent the PTO uses a process of information gathering to select the field of potential offerors for a future solicitation, such as the RFI process used here, that process cannot properly be considered an extension of the final solicitation for offers. As set forth above, there is no mandate for the PTO to seek competition among the full field of potential offerors. Our conclusions and understanding in this regard are consistent with the nature of the RFI itself, which did not seek proposals, pricing, or

⁷ A down-select process is one in which an agency selects offerors to proceed to the next phase of a competition. See *Computer & Hi-Tech Mgmt., Inc.*, B-293235.4, Mar. 2, 2004, 2004 CPD ¶ 45 at 2.

identify evaluation criteria. Accordingly, the protesters' arguments in support of our jurisdiction of the PTO's market research as a competitive down-select procedure are without merit.

The protests are dismissed.

Thomas H. Armstrong
General Counsel