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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Masai Technologies Corporation

File: B-400106

Date: May 27, 2008

Masai Troutman for the protester.

Capt. Megan E. Stephens, Department of the Army, for the agency.

Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest filed within 10 days of contracting officer's letter resolving a timely agency-level protest, but after the closing time for submission of quotations, is untimely where the issue protested at GAO is different from the issues raised in the timely agency-level protest.
 2. Protester's e-mail to officials in agency small business office, which suggested that a procurement could be set aside for small businesses, was not an agency-level protest, and a subsequent protest at GAO raising that issue, filed after the closing time for submission of quotations, is therefore untimely.
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DECISION

Masai Technologies Corporation, doing business as MTC Integration (MTC), a small business, protests the failure to set aside for Historically Underutilized Business Zone (HUBZone) small businesses a procurement by the Department of the Army, U.S. Army Medical Research Acquisition Activity, under request for quotations (RFQ) No. 269701, issued to Federal Supply Schedule (FSS) vendors, for information technology support services.

We dismiss the protest as untimely because it challenges an alleged impropriety in the RFQ that should have been protested before the initial closing time for submission of quotations.

The Army issued the RFQ on March 21, 2008 by posting it on the General Services Administration e-Buy website. The RFQ sought quotations from vendors holding FSS contracts to provide local area network administration and web support for the Defense Medical Standardization Board at Fort Detrick, Maryland. On April 11, the

Army posted an amendment to the RFQ, which extended the deadline for submission of quotations to “Friday, 25 April 2008, 2:00 PM (EST).” RFQ mod. 2. MTC filed this protest with our Office on April 25 at 3:44 p.m. Eastern Daylight Time (EDT). Thus the protest was filed after the deadline for submission of quotations.¹

Our Bid Protest Regulations contain strict rules for the timely submission of protests. They specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals (or as here, quotations) be filed with our Office before that time. 4 C.F.R. § 21.2(a)(1) (2008). A limited exception to this rule exists when a protester has filed a timely agency-level challenge to a solicitation, receives an unfavorable answer, and raises the same issue to our Office within 10 days after resolution of the agency-level protest, even if the subsequent protest to our Office is filed after the solicitation closing date. 4 C.F.R. § 21.2(a)(3); Rochester Optical Mfg. Co., B-292137.2, Mar. 16, 2004, 2004 CPD ¶ 120 at 4 n.3.

MTC argues that its protest is timely because, in its view, the firm filed two agency-level protests, and then filed this protest within 10 days of the resolution of those agency-level protests. Accordingly, we will consider in turn each of the communications that MTC asserts is an agency-level protest.

MTC’s first agency-level protest was submitted in a letter that was clearly labeled as an agency-level protest, and was filed with the contracting officer (CO) on April 10. The protest raised a number of issues unrelated to the challenge that MTC now raises. It did not argue for a HUBZone or other small business set-aside.

MTC asserts that it filed a second agency-level protest, which did raise the set-aside issue, on April 14. This communication took the form of an e-mail to two agency officials: the associate director of the agency’s Office of Small Business Programs, and the deputy director of that office. The April 14 e-mail was not labeled as an agency-level protest—in contrast to MTC’s April 10 submission—but simply stated, in part, that “[t]his would have been a prime candidate for Small Business/8a/Hubzone/other set-aside I wonder if there was market research conducted?” Protester’s Response, attach. A, at 4. In addition, the April 14 e-mail was not filed with the CO, but with other agency officials; the e-mail was subsequently provided to the CO by at least one of the original recipients.

The CO responded to MTC in a letter dated April 18. The CO’s letter first addressed each of the issues raised in MTC’s April 10 agency-level protest. The CO then acknowledged that MTC had posed additional questions to the Office of Small Business Programs concerning the potential for a small business set-aside and

¹ We note that the RFQ specifies the time as “EST,” which is commonly used to designate Eastern Standard Time. Since daylight-saving time is 1 hour ahead of standard time, the RFQ deadline would equate to 3 p.m. EDT.

market research. However, the CO noted that “these concerns were not expressed as part of the agency protest.” Letter from CO to MTC, Apr. 18, 2008, at 3. The CO’s letter concluded by stating that the Army would not set aside the requirement for small businesses.

MTC filed this protest with our Office on April 25, which is within 10 days of the CO’s letter dated April 18, but after the closing time set in the solicitation. The Army requested dismissal of the protest as untimely.

While, as discussed above, our Bid Protest Regulations provide that a protest to our Office filed within 10 days after resolution of an agency-level protest is timely, even when this is after the closing date, that protest must raise the same issue as the agency-level protest. A protest raising a new issue cannot claim the benefit of the earlier agency-level protest for timeliness purposes. See, e.g., Rochester Optical Mfg. Co., B- 292137.2, Mar. 16, 2004, 2004 CPD ¶ 120 at 4 n.3 (protest filed within 10 days of decision on agency-level protest is untimely where protest is filed after closing date and raises a new issue). Therefore, MTC’s April 10 agency-level protest, which did not raise the set-aside issue, has no bearing on the timeliness of this protest, and cannot provide a vehicle for viewing MTC’s protest here as timely.

We next consider whether MTC’s April 14 e-mail was an agency-level protest. While a letter (or e-mail) does not have to state explicitly that it is intended as a protest for it to be so considered, it must, at least, express dissatisfaction with an agency decision and request corrective action. ST Aerospace Engines Pte. Ltd., B-275725.3, Oct. 17, 1997, 97-2 CPD ¶ 106 at 3-4. Therefore, a letter (or e-mail) that merely expresses a suggestion, hope, or expectation, does not constitute an agency-level protest. ILC Dover, Inc., B-244389, Aug. 22, 1991, 91-2 CPD ¶ 188 at 2 (letter expressing protester’s expectation of full and open competition was not an agency-level protest of a sole-source procurement).

MTC argues that its April 14 e-mail was intended as an agency-level protest, while the Army concluded that it was not. Even if we accept MTC’s argument about its intentions, we note that the April 14 e-mail is distinctly different in tone from the April 10 protest. In addition, the clear language that MTC used in its April 10 letter, expressing that the letter was an agency-level protest, demonstrates that MTC apparently knows how to file a protest when it seeks to do so. In our view, the contrast supports a conclusion that the April 14 e-mail should not be considered a protest—even if it was ultimately forwarded to the CO, and even though the CO responded—albeit while clearly advising that he did not view the set-aside inquiry to be part of the pending protest.²

² In fact, we think the clear distinction drawn by the CO in his April 18 response—that the April 10 letter was a protest, and the April 14 e-mail was not—placed MTC on notice that any subsequent challenge on the set-aside issue likely would not be viewed by our Office as part of the original agency-level protest, and needed to be

(continued...)

We conclude that the April 14 e-mail was not an agency-level protest because it did not go beyond suggesting the idea of a set-aside, and did not request the CO take corrective action. Accordingly, this protest asserting that Army's requirement should be set aside for HUBZone small businesses, which was filed in our Office after the deadline for submitting responses to the RFQ, is untimely.

The protest is dismissed.

Gary L. Kepplinger
General Counsel

(...continued)

filed before the closing time in the solicitation. In addition, we note that this distinction was provided to MTC 7 days before the time set for closing.