
From: The LAB @ DOC
Subject: MMCB - Vol. 21 - Do Advisory Down-Selects Improperly Restrict Competition? June 2022



Welcome to MMCB Volume 21! This volume is brief and to the point: does the two-phased advisory down-select process improperly restrict competition? The answer to that should be an emphatic NO – but there is an answer to that below, and MORE!

Matter of: Monbo Group International
File: [B-420765; B-420765.2](#)
Link: <https://www.gao.gov/products/b-420765%2Cb-420765.2#mt=e-report>
Date: June 08, 2022

The Department of Treasury, Internal Revenue Service (IRS) is the agency. The requirement was a FAR 8.405-3 blanket purchase agreement (BPA) for Freedom of Information Act (FOIA) support services. The process is one we are intimately familiar with: a two-phased advisory down-select with only a short experience volume required in Phase I. The argument is simple enough, but the complaint hits at the core of the advisory down-select model.

IRS FOIA RFQ – noteworthy evaluation items, submission timeline requirement, argument, and GAO dismissal!

Noteworthy evaluation item



Prior experience in the first phase of a multi-phase procurement is highly recommend, keeping it brief and to the point is even better. This team took that approach to another level and requested this evaluation factor by only ONE PAGE! That is it! Not sure if that was sufficient or was used purely to get a high volume of submissions down, but just a page one-page summary demonstrating their experience performing work similar in size, scope and complexity to the requirements identified in the Performance Work Statement (PWS).

As always, it is always highly recommended that teams right-size the innovative procurement techniques and vendor's submission for their requirement.

Submission Timeline Requirement

“The solicitation advised vendors that failure to participate in Phase I would preclude them from participating in Phase II, and that Phase II submissions would not be accepted from vendors that did not make Phase I submissions by the due date stated in the solicitation. Id. at 51. The deadline for Phase I submissions was May 10, 2022. The protester filed its protest on May 18, 2022.”

Argument (Protest Ground #1 and #2)

The highlights represent the two grounds for this protest:

“The protester argues that the solicitation improperly restricts competition by barring vendors from participating in Phase II if they do not make Phase I submissions by the May 10 deadline. The protester also argues that the agency is using vendor Phase I responses to the solicitation to assess marketplace interest in the opportunity, which is contrary to the customary government practice of conducting market research by issuing a pre-solicitation notice.”

GAO Decision – Protest Ground #1 of Improperly Restricting Competition

“We dismiss the protester’s first argument as an untimely challenge to the terms of the solicitation. Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation, which are apparent before the time set for receipt of initial proposals, must be filed prior to that time. See 4 C.F.R. § 21.2(a)(1); see Sea Box, Inc., B-401523, B-401523.2, Sept. 25, 2009, 2009 CPD ¶ 190 at 3-4. Where a solicitation uses a phased submission and evaluation process, and a protester objects to a solicitation term pertaining to the Phase I submission, the protest must be filed prior to the due date for the Phase I submission to be timely. See The Charles E. Smith Cos., B-277391, Sept. 25, 1997, 97-2 CPD ¶ 88 at 2-3. Here, the protester’s challenge to the clearly stated solicitation requirement for vendors to make Phase I submissions in order to participate in Phase II is untimely because it was brought after the time set for receipt of Phase I submissions. This protest ground is thus dismissed.

This shouldn’t be a surprise as it follows the logical process of timeliness which the GAO does not deviate from. But at least this affirms, akin to a solicitation based challenge, that the protest must come prior to the deadline set forth in the solicitation of that initial phase or submission date.

GAO Decision – Protest Ground #2 of Not Following Customary Government Practices

The protester next argues that by conducting market research for this procurement, the agency did not follow the customary government practice of issuing a pre-solicitation notice in the form of either a Sources Sought Notice (SSN) or a Request for Information (RFI). Supp. Protest at 1. We dismiss this argument for failing to state a valid basis of protest. Where a protest allegation does not facially demonstrate unreasonable agency action, we will dismiss it for failing to state a valid basis for protest. Elevator Serv., Inc., B-416258.2, B-416258.3, Sept. 13, 2018, 2018 CPD ¶ 319 at 3 (citing 4 C.F.R. § 21.5(f)). First, the agency has provided documentation showing that it did, in fact, post a sources sought notice in the GSA e-Buy system approximately six months before issuing the solicitation. Second, the protester has not provided any support for its allegation that the agency is using responses to the solicitation to assess marketplace interest in this opportunity. Rather, the solicitation by its terms explains that the agency will use the Phase I responses to advise individual firms as to the likelihood that they will be viable competitors under Phase II “to minimize quote development costs for those with little to no chance of receiving an award. Accordingly, this argument does not state a valid basis of protest.

Closing

This was only a 3-page GAO decision and not too complicated, but perhaps it is helpful to those out there wanting to try advisory down-selects or brief proposal submissions. Remember to utilize the tested language on the [Periodic Table of Acquisition Innovations \(PTAI\)](#) when incorporating an advisory down-select into your requirements!

This volume was originally authored in June 2022 and refreshed in March 2025.

*Disclaimer: The information contained in this MMCB is merely an opinion of the author and does not constitute formal legal or policy guidance of any kind.

