



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

April 11, 2017

Via ELECTRONIC MAIL ([protests@gao.gov](mailto:protests@gao.gov))

Office of the General Counsel  
U.S. Government Accountability Office ("GAO")  
441 G Street, NW, Washington, DC 20548



Attn: Ms. Stephanie B. Magnell, Senior Attorney  
Procurement Law Control Group

Re: Protest of the Pennsylvania Higher Education Assistance Agency (B-414262)  
Notice of Amendment of Solicitation and Request for Partial Dismissal of Protest

Dear Ms. Magnell:

In accordance with 4 C.F.R. § 21.3(j), the United States Department of Education ("Department"), through undersigned counsel, hereby requests leave to file the following statement, requesting the partial dismissal of the protest of Pennsylvania Higher Education Assistance Agency ("Protester" or "PHEAA"). GAO Bid Protest File No. B-414262. The basis for this request is the Department's recent decision to amend Solicitation No. ED-FSA-17-R-0001 ("Phase II Solicitation"). The intended revisions to the Phase II Solicitation will address all but one of the grounds of protest put forth by the Protester, making those protest grounds academic.

**NOTICE OF AMENDMENT OF SOLICITATION  
AND REQUEST FOR PARTIAL DISMISSAL OF PROTEST**

The Comptroller General will dismiss a protester's allegation where the agency's actions in the course of the protest address that allegation and render the protest academic. *Fisher Scientific Company*, B-252418, June 15, 1994, 94-1 CPD ¶ 368 (agency voluntarily revised solicitation to address protester's concerns); *Harding Lawson Assocs.* B-239231, Dec. 4, 1990, 90-2 CPD P 450.

The Department has decided to amend the Phase II Solicitation. That amendment will be issued in the next few weeks. All three eligible offerors will be given an opportunity to revise and resubmit their proposals. The revised proposals will be evaluated under a new and substantially revised evaluation scheme. The revised Phase II Solicitation will provide as follows:

1. As part of the past performance evaluation, the Department will consider the experience of an offeror's team in developing and operating a loan servicing electronic platform, including loan servicing platforms that were not used to service student loans. In determining the relevance of such experience, and how much weight to assign such experience, the evaluators will consider how similar it is in size, scope, and complexity to the Solicitation requirements;
2. The requirement to submit certain "negative" past performance information (at Sections L-2.4(1)(e) to (g)) will be substantially revised. To the extent the revised solicitation instructs offerors to provide "negative" past performance information, the scope of that request will be the same as the request for other past performance information;
3. The relative weight assigned to past performance will be revised, with past performance no longer identified as the most important evaluation criterion;
4. The evaluation of the past performance of teaming partners and subcontractors will be based on the experiences of each firm relevant to the specific tasks for which it is proposed. There will be no "double credit."



5. Numerous Phase II requirements will be significantly revised or deleted outright. In addition, customer service requirements regarding subcontracting will be revised and will be significantly simplified. As a result, the cost of performance (and any financial risk to the contractor) should be significantly reduced; and
6. The revised Solicitation will clarify the meaning of the term "loan servicing system" in Sections L and M, consistent with the Department's answers to questions submitted by the Phase II offerors. The instructions for submission of past performance information will be substantially revised. To the extent that the revised solicitation retains the term "Past Performance Failures," its meaning will be made clear.

It is the Department's position that the only protest ground not rendered moot by the anticipated Phase II Solicitation amendment is the alleged failure to report a suspected antitrust violation, at Section IV of the Protest (pages 38-40).

The Department has elected to make substantial revisions to the Phase II Solicitation solely because its requirements and policy priorities have recently changed. The Department does not concede that the Protester's arguments are at all meritorious and is not making changes to the Phase II Solicitation because it agrees with the arguments raised by the Protester. Previous decisions by GAO recognize that the mere fact that an agency decides to take corrective action does not establish that a statute or regulation has been violated. *Information Ventures, Inc.-Costs*, B-407478.3, April 5, 2013, 2013 CPD ¶ 95.

While we recognize that this notice and request comes at a late stage in this Protest, the Department's analysis took time to complete and it was only today that certain decisions were finalized. The Department has been working diligently to complete its analysis and is notifying GAO of these developments as soon as could be. We note that the process was protracted, in part due to administration and leadership transitions. The memoranda issued by Secretary King and Under Secretary Mitchell, referenced by Protester in its protest letter and included at Tabs N and O of the Agency Report, are



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being withdrawn, effective today. That action, and related changes in the Department's requirements for Phase II, should resolve all but one of the protester's grounds of protest.

Under these circumstances, the Department respectfully submits that reimbursement of protest costs is not appropriate. *Advanced Env't'l Solutions, Inc.*, B-296136.2, June 20, 2005, 2005 CPD ¶ 121 (holding that where the agency action that rendered a protest academic does not constitute corrective action in response to the protest, our Office will not recommend reimbursement of protest costs).

Based on the above, the Department respectfully requests that the Comptroller General partially dismiss PHEAA's protest.

Respectfully Submitted,



Justin V. Briones  
Jose Otero

*Counsel for Department of Education*

Cc: (Via Electronic Mail)

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