

SUSPENSION OF AWARD REQUIRED

August 19, 2021

General Counsel
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

BY EPDS

Re: Pre-Award Protest of CWS FMTI JV LLC under Solicitation No.
75N98121R00001¹

Dear Sir or Madam:

CWS FMTI JV LLC (“CWS FMTI”), through counsel, hereby protests the terms of Solicitation No. 75N98121R00001 (the “Solicitation”), issued by the Department of Health and Human Services, National Institutes of Health (“Agency” or “NIH”).

For government contractors, the value of obtaining a high profile, high value government-wide acquisition contract (“GWAC”) like the contract contemplated under the Solicitation cannot be overstated. In recent years, federal agencies have moved more and more of their acquisitions to GWACs. Winning a coveted GWAC can affect the viability of a business going forward. For this reason, it is essential that the solicitation terms for a GWAC not unduly restrict competition. The Solicitation fails this critical test.

The Solicitation emphasizes an offeror’s experience. No fewer than 78 percent of the points available in Phase I of the evaluation are based on experience. The Solicitation includes two requirements that unduly restrict competition for this important aspect of the evaluation. For one, the Solicitation improperly limits the number of experience examples a large business mentor may submit on behalf of a U.S. Small Business Administration (“SBA”)-approved mentor-protégé joint venture. Not only is the limit unduly restrictive of competition, it is also inconsistent with SBA’s joint venture regulations.

Secondarily, and of equal import, the Solicitation unduly restricts competition by assigning points based on the obligated dollar value of an experience example—as opposed to the awarded dollar value. Before the issuance of Amendment 9, the Solicitation stated that offerors would earn evaluation points based on the dollar value of the federal contract used for

¹ Prior protests filed under the Solicitation have been docketed under file number B-419956 *et seq.*

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evaluation of these factors. Amendment 9 revised the Solicitation so that points will be awarded based on the obligated dollar value of the federal contract. The amended Solicitation is unduly restrictive of competition because awarding points based on the obligated dollar value of a federal contract is irrational and not necessary to meet NIH's requirements.

The same reasoning applies to using a contract's obligated dollar value to assess relevance under the Past Performance factor; the awarded dollar value of a contract is a less arbitrary and more accurate indicator of the size of a past performance reference than the obligated dollar value.

For the reasons set for below, the U.S. Government Accountability Office ("GAO") should sustain CWS FMTI's protest.

1. PARTIES TO THIS PROTEST

CWS FMTI is a mentor-protégé joint venture between [REDACTED], a small business and a participant in SBA's Historically Underutilized Business Zone program, and its SBA-approved mentor, [REDACTED]. CWS FMTI is headquartered at [REDACTED]. CWS FMTI's telephone number is [REDACTED]. The Morris, Manning & Martin, LLP attorneys on this pleading are Michelle Litteken (mlitteken@mmmlaw.com), Andrew Mohr (amohr@mmmlaw.com) and C. Kelly Kroll (kkroll@mmmlaw.com). The contact information for Morris, Manning & Martin, LLP is set forth below.

The contracting agency is the Department of Health and Human Services, National Institutes of Health. The contracting officer for the procurement is Rose Schultz. Ms. Shultz's phone number is 888-773-6542, and the email address provided in the Solicitation for service of protest is CIOSP4.NITAAC@nih.gov. Ms. Shultz's address is:

National Institutes of Health
Information Technology Acquisition and Assessment Center (NITAAC)
6011 Executive Boulevard, Suite 503
Rockville, MD 20852

2. INTERESTED PARTY STATUS

CWS FMTI is an interested party because CWS FMTI is a prospective offeror under the Solicitation whose direct economic interest would be affected by the award of a contract or by the failure to receive an award. See 4 C.F.R. 21.0(a)(1). CWS FMTI's direct economic interest is affected by the unduly restrictive terms in the Solicitation.

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3. TIMELINESS

This protest is timely filed prior to the time set for receipt of initial proposals, 12 pm ET on August 20, 2021. 4 C.F.R. § 21.2(a)(1).

4. SUSPENSION

This protest is filed before the deadline for the receipt of proposals, 12 pm ET on August 20, 2021. Therefore, award of any contract contemplated by the Solicitation must be suspended during the pendency of this protest pursuant to 31 U.S.C. § 3353(c)(1) and 48 C.F.R. § 33.104(b)(1). Because this protest is filed before the deadline for the receipt of proposals, the Agency must suspend contract award during the pendency of the protest.

5. JURISDICTION

GAO has jurisdiction over this protest, which alleges a violation of a procurement statute or regulation by a federal agency. See 31 U.S.C. §§ 3551-3556; see also 48 C.F.R. § 33.104. GAO's regulations require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. §§ 21.1(c)(4), (f). These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. CACI Techs., Inc., B-408858.2, at 4 (Dec. 5, 2013). This protest meets those standards.

6. FACTUAL SUMMARY

A. The Solicitation

The Agency issued the Solicitation for the Chief Information Officer – Solutions and Partners (“CIO-SP4”) program on May 25, 2021. NIH has since issued ten amendments to the Solicitation, with the most recent amendment, Amendment 10, issued on August 16, 2021.

The Solicitation contemplates the award of multiple GWACs under which successful offerors will provide information technology (“IT”) solutions and services to the federal government. Solicitation at 1 (§ A.1).² The CIO-SP4 program is valued at more than \$40

² Unless otherwise stated herein, citations of the Solicitation refer to the version of the Solicitation issued with Amendment 10 on August 16, 2021.

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billion, and the Agency expects to receive more than 1,000 proposals.³

IT services provided under awarded contracts will fall under the following ten task areas:

- Task Area 1: IT Services for Biomedical Research, Health Sciences, and Healthcare
- Task Area 2: CIO Support
- Task Area 3: Digital Media
- Task Area 4: Outsourcing
- Task Area 5: IT Operations and Maintenance
- Task Area 6: Integration Services
- Task Area 7: Cyber Security
- Task Area 8: Digital Government and Cloud Services
- Task Area 9: Enterprise Resource Planning
- Task Area 10: Software Development

Solicitation at 18-19 (§ C.2). The Agency intends to award contracts to other than small businesses, emerging large businesses, and small businesses that participate in certain socioeconomic programs (i.e., Woman-Owned Small Business, Veteran-Owned Small Business, etc.). Solicitation at 137 (§ L.2). The Solicitation permits offerors to form a mentor-protégé arrangement that has been approved by SBA.⁴ Solicitation at 140 (§ L.3.7).

The Solicitation contemplates a three phased approach to the evaluation, using the three phases described below:

Phase I: The government will review the self-scoring sheets of all offerors and notify the offerors with the highest scores that will proceed to phase II of the evaluation.

Phase II: The government will review the offerors' documentation and compare it against the go / no-go requirements found in L.5.3 and M.3. Offerors that receive a go for all go / no-go requirements will proceed to phase III of the evaluation.

³ Miller, Jason, NITAAC details timing, evaluation plans for \$40B IT services contract, Federal News Network (Feb. 22, 2021), <https://nitaac.nih.gov/resources/news/nitaac-details-timing-evaluation-plans-40b-it-services-contract>.

⁴ The Solicitation requires joint venture offerors (or "FAR 9.601(1) CTAs") to provide certain information as part of the proposal. Solicitation at 141-43 (§ L.3.7.2). Additionally, a mentor-protégé offeror must submit a copy of its SBA-approved mentor-protégé agreement. Id. at 143 (§ L.3.7.4).

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Phase III: The government will evaluate the offerors’ Health IT capability management, past performance, and price proposals. An adjectival rating will be assigned to each offeror, and the most highly rated offerors will receive awards.

Id. at 143-44 (§ L.4). For Phase 1, the Solicitation requires offerors to complete the self-scoring sheet, with points awarded for experience, capabilities, business systems, and certifications. Solicitation at 150 (§ L.5.2). The self-scoring sheet will determine whether an offeror moves from Phase I to Phase II, and points awarded for experience will likely be determinative in that phase of the evaluation. An offeror may receive up to 10,000 points on the self-scoring sheet, and 7,800 of the 10,000 points are allocated to Corporate Experience (4,500 points); Leading Edge Technology Experience 1,800 points); Federal Multiple Award Experience (1,200 points); and Executive Order 13779 (300 points). See Attach. J.5, Self-Scoring Sheet.

The Solicitation identifies four experience areas to be scored in Phase 1: Corporate Experience (§ L.5.2.1); Leading Edge Technology Experience (§ L.5.2.2); Federal Multiple Award Experience (§ L.5.2.3); and Executive Order 13779. Id. at 151-57. For each experience area, offerors are instructed to provide experience examples, which can be a contract, a single task order, or a collection of task orders placed under an indefinite-delivery, indefinite quantity contract or a blanket purchase agreement.⁵ Id. at 151 (§ L.5.2). Each example provided must be from the three years preceding the date the Solicitation was issued (May 25, 2021). Id. at 151 (§ L.5.2.1), 153 (§ L.5.2.2), 155 (§ L.5.2.3), 156 (§ L.5.2.4). An offeror will earn points for each example submitted, with higher dollar value examples earning more points. For example, for small business offerors, Leading Edge Technology Experience points will be awarded under the following parameters:

Obligated (Funded) Dollar Value of Federal Contract / Agreement	Points Per Example
\$500,000 – \$1,000,000	120 points
\$1,000,001 – \$2,000,000	240 points
\$2,000,001 – \$4,000,000	320 points
\$4,000,001 – \$7,000,000	480 points
Over \$7,000,000	600 points

Id. at 154 (§ L.5.2.2).

⁵ For Corporate Experience, the Solicitation states: “Offerors must provide a minimum of three corporate experience examples. Up to 30 examples may be provided, with no more than three examples per task area.” Solicitation at 151 (§ L.5.2.1). For Leading Edge Technology Experience, Federal Multiple Award Experience, and Executive Order 13779, offerors may provide up to three examples. Id. at 153 (§ L.5.2.2), 155 (§ L.5.2.3), 156 (§ L.5.2.4).

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B. Prior Protests and Subsequent Amendments to the Solicitation

1. Experience Examples Provided by Large Business Mentors

When the Agency issued the Solicitation, the Solicitation did not limit the number of experience examples that the mentor in a mentor-protégé joint venture could provide. Original Solicitation at 156 (§ L.5.2.1). Instead, the Solicitation provided:

All corporate experience examples must be from the last three years from the date the proposals are due for this solicitation. The examples may come from affiliates or members of an offeror's CTA / JV, provided the examples establish a clear relationship between the offeror, their affiliates / CTA / JV members, the project, and the resources that were expended by each in accomplishing the project.

Id.; see also id. at 158 (§ L.5.2.2), 159 (§ L.5.2.3).

On June 22, 2021, the Agency issued Amendment 3, which imposed new limits on the source of experience examples. Specifically, the version of Section L.5.2.1 in Amendment 3 stated, in relevant part:

All corporate experience examples must be from the last three years prior to the date the proposals are due for this solicitation. The examples may come from members of an offeror's CTA / JV, and/or Mentor-Protégé as identified in section L.3.7. If provided, work done by each partner or member of the contractor teaming arrangement will be considered. *However, for mentor-protégé arrangements, large business is limited to one example for each task area.*

Amdt. 3 at 157 (§ L.5.2.1) (emphasis added). Amendment 3 limited a mentor to one example each for Leading Edge Technology Experience, Federal Multiple Award Contract Experience, and Executive Order 13779. Id. at 159 (§ L.5.2.2), 161 (§ L.5.2.3), 163 (§ L.5.2.4).

Amendment 3 was met with multiple pre-award protests, several of which challenged the Solicitation's newly imposed limit on the number of experience examples a large business mentor may submit.⁶ Subsequently, on July 9, 2021, NIH issued Amendment 6, which increased the number of examples a mentor may provide to two per task area for Corporate Experience,

⁶ CIO-SP4 Update 7/13/2021, <https://nitaac.nih.gov/resources/announcements/cio-sp4-update-7132021> (last visited Aug. 16, 2021). Additional protests were filed after the issuance of Amendment 8 on July 23, 2021, some of which also challenged the limit on the number of experience examples a large business mentor may provide. See CIO-SP4 Update 8/5/2021, <https://nitaac.nih.gov/resources/announcements/cio-sp4-update-852021> (last visited Aug. 16, 2021).

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and two each for Leading Edge Technology Experience, Federal Multiple Award Contract Experience, and Executive Order 13779. Amdt. 6 at 161 (§ L.5.2.1), 163 (§ L.5.2.2), 165 (§ L.5.2.3), 166 (§ L.5.2.4).

For Corporate Experience, the current version of the Solicitation (issued with Amendment 10) provides the following instruction with respect to the source of the experience examples:

The examples may come from members of an offeror's CTA / JV, and/or Mentor-Protégé as identified in section L.3.7. and L.5.2. If provided, work done by each partner or member of the contractor teaming arrangement will be considered. *However, for mentor-protégé arrangements, large business is limited to two examples for each task area.*

Solicitation at 151-52 (§ L.5.2.1) (emphasis added). Large business mentors may provide two examples for Leading Edge Technology Experience, Federal Multiple Award Contract Experience, and Executive Order 13779. Solicitation at 153 (§ L.5.2.2), 155 (§ L.5.2.3), 156 (§ L.5.2.4).

2. Dollar Value of Experience Examples and Past Performance References

When the Agency issued Amendment 9, NIH changed a different aspect of the evaluation of experience areas. Prior to the issuance of Amendment 9, the Solicitation did not use the term "obligated dollar value." Instead, the Solicitation used the term "dollar value" when explaining how points would be assigned for Corporate Experience (§ L.5.2.1); Leading Edge Technology Experience (§ L.5.2.2); and Federal Multiple Award Experience (§ L.5.2.3). Amdt. 8 at 155-59.

Amendment 9 also altered the criteria for the Past Performance factor. Prior to the issuance of Amendment 9, the Past Performance sections of the Solicitation (§ L.5.7; § M.4, Table 13; and § M.4.3) did not use either "dollar value" or "obligated dollar value." Amdt. 8 at 166-67, 171-72, and 174. Amendment 9 added the following language to Section L.5.7:

The dollar value utilized for past performance references [sic] is determined by the total dollars that were obligated.

Projects can be either a collection of orders or one single order. If a project is a "collection of orders" placed under an IDIQ contract or BPA, the dollar value will be the sum of all orders based on the methods above being applied to each individual order. (If the maximum dollar value is achieved without submitting all the orders that have been awarded, then only submit those orders that achieve the maximum results).

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Amdt. 9 at 167-68.

The cover letter to Amendment 9 explained the change as follows:

This amendment addresses a potential ambiguity regarding the use of obligated versus awarded value for Phase I and Phase III. The Questions and Answers posted for amendment 0003 stated the values for experience and past performance must be obligated values. However, the term obligated value was not incorporated into any amendments. Therefore, this amendment addresses this potential ambiguity by adding the term obligated value to sections L.5.2 and L.5.7.

Amdt. 9 Cover Letter.

Amendment 9 extended the deadline for proposal submission from August 3 to August 20, 2021—an extension of less than three weeks. Amdt. 9 at 143 (§ L.3.1). Amendment 10 did not change the proposal deadline. Solicitation at 138 (§ L.3.1).

7. **GROUNDS OF PROTEST**

The following discusses CWS FMTI's protest grounds against the terms of the Solicitation.

A. The Solicitation's Limitation on the Number of Experience Examples a Large Business Mentor May Submit Is Contrary to SBA's Regulations and Unduly Restrictive of Competition

The Solicitation's limit on the number of experience examples that a large business mentor may submit on behalf of a mentor-protégé joint venture is contrary to SBA's regulations, unduly restrictive of competition, and unreasonable.

As an initial matter, the limit on the number of experience examples that a large business mentor may provide is contrary to SBA's regulations. SBA's joint venture regulations specifically address the evaluation of a mentor-protégé joint venture:

(e) Capabilities, past performance and experience. When evaluating the capabilities, past performance, experience, business systems and certifications of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. *A procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The*

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partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.

13 C.F.R. § 125.8(e) (emphasis added). The Solicitation does not comply with SBA's joint venture regulations because the Solicitation requires a protégé to satisfy the evaluation criteria and it does not allow the members of a joint venture to demonstrate the required experience in the aggregate.⁷

GAO's decision in Innovate Now, LLC, B-419546, Apr. 26, 2021, 2021 CPD ¶ 178, is instructive here. In that case, the solicitation required each member of a joint venture to submit work samples that satisfied a number of requirements, and the protester argued the requirement violated SBA's joint venture regulations. GAO cited 13 C.F.R. § 125.8(e) and sustained the protest, stating: "The plain language of the regulation is clear; a procuring agency may not require a protégé firm to individually meet the same evaluation requirements as those imposed on other offerors. Here, the RFP violates this express prohibition." Id.

The same reasoning applies here. For one, NIH is not considering the experience of the joint venture in aggregate. "Aggregate" means "Formed by combining into a single whole or total." AGGREGATE, Black's Law Dictionary (11th ed. 2019). The Solicitation does not permit the members of a mentor-protégé joint venture to demonstrate the experience needed to perform the contract as a single whole—the Solicitation limits the experience a large business mentor may contribute. And, the Solicitation effectively requires a protégé to independently satisfy the evaluation criteria. As noted above, only the offerors with the highest scores in Phase I will proceed to the subsequent phases of the evaluation. Solicitation at 143-44 (§ L.4). No fewer than 78 percent of the points available in Phase I are allocated to the four experience areas in which the number of experience examples a mentor may submit are limited. A joint venture would be unlikely to advance to Phase II absent experience examples from the mentor *and* the protégé. As such, a protégé will need to submit 10 experience examples for Corporate

⁷ We recognize that in Ekagra Partners, LLC, B-408685.18, Feb. 15, 2019, 2019 CPD ¶ 83, GAO denied a protest challenging the a provision limiting number of experience projects that a large business mentor may submit on behalf of a mentor-protégé joint venture. However, Ekagra Partners is distinguishable because the decision pre-dates SBA's October 2021 amendments to the joint venture regulations. The prior version of 13 C.F.R. 125.8(e) stated: "Past performance and experience. When evaluating the past performance and experience of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously." As amended, SBA's regulations require procuring agencies to consider the experience of joint venture members in the aggregate, and a procuring agency cannot require a protégé to individually satisfy evaluation criteria.

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Experience and at least one example each for Leading Edge Technology Experience, Federal Multiple Award Experience, and Executive Order 13779 for the joint venture to obtain the maximum amount of points available and be competitively positioned for award.

The limitation on large business mentor experience is also unduly restrictive of competition. When drafting a solicitation, an agency may include restrictive provisions only to the extent necessary to satisfy the agency's actual needs. 10 U.S.C. § 2305(a)(1)(B)(ii). As GAO has explained, "Where a protester challenges a solicitation provision as unduly restrictive of competition, the procuring agency is required to establish that the challenged provision is reasonably necessary to meet the agency's requirements." AES UXO, LLC, B-419150, Dec. 7, 2020, 2020 CPD ¶ 395. If a pre-award protest is filed, GAO "examine[s] the adequacy of the agency's justification for a restrictive solicitation term to ensure that it is rational and can withstand logical scrutiny." Ekagra Partners, LLC, B-408685.18, Feb. 15, 2019, 2019 CPD ¶ 83.

The restriction on the number of experience examples a large business may provide on behalf of a mentor-protégé joint venture is unduly restrictive of competition because it is unnecessary to meet the Agency's needs. In protests involving limitations on the consideration of a subcontractor's experience, GAO has stated: "an agency may consider only the offeror's experience, and not that of its proposed subcontractors, if the agency has legitimate reasons for concluding that the successful offeror itself must possess the relevant experience in order to ensure successful performance of the contract." Total Health Resources, B-403209, Oct. 4, 2010, 2010 CPD ¶ 226. Although Total Health Resources involved the consideration of a subcontractor's experience, it is equally instructive for mentor-protégé joint ventures. With a mentor-protégé joint venture, there is no legitimate reason to require the joint venture offeror—or the individual members—to separately possess relevant experience because the joint venture agreement must "obligat[e] all parties to the joint venture to ensure perchance of a contract set aside or reserved for small businesses." 13 C.F.R. § 125.8(b)(2)(viii). Stated differently, the Agency does not have a legitimate basis for concluding a protégé must have a minimum level of experience to ensure successful performance because each member of the joint venture is obligated to ensure successful performance. The limit on the number of experience examples a large business mentor may submit is unnecessary to meet the Agency's needs and is therefore unduly restrictive of competition.

Additionally, the limitation on the number of experience examples a mentor may submit results in disparate treatment. Although the Solicitation limits the number of experience examples a large business mentor may submit, the Solicitation does not contain similar limits for other small business teaming arrangements. The Solicitation states:

Phase I- Evaluation of Self-scoring sheet

Small Business awards – Consideration of member information for CTAs under 9.601(1) or 9.601(2) as described in L.3.7.1, L.3.7.2 and L.3.7.3 will occur *if the*

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member is a small business. There is an exception for SBA approved mentor protégés arrangements between a small protégé and other than small business mentor. This applies to all areas of the self-scoring (L.5.2.1 through L.5.2.12)

Solicitation at 165 (§ M.1.1) (emphasis added). Accordingly, if an offeror submits a proposal as a FAR 9.601(1) joint venture or SBA-approved mentor-protégé joint venture in which all members are small businesses, there are no limits imposed on the number of experience examples each member may submit. Indeed, in such a scenario, the managing member would not be required to submit *any* experience examples, and it could rely on the experience of the other member. Likewise, if an offeror submits a proposal as a FAR 9.601(2) contract team arrangement in which the small business prime offeror subcontracts with other small businesses, the Solicitation does not limit the number of experience examples the small business subcontractor(s) may submit. Again, the prime contractor could submit *no* experience examples and rely entirely on the experience of its subcontractor(s). Under the terms of the Solicitation, such an offeror could submit *no experience examples* and be eligible for award. At the same time, a protégé in a joint venture with a large business mentor is required to submit experience examples to obtain the maximum number of points available. The disparate treatment is clear, and prejudices mentor-protégé joint ventures with large business mentors, like CWF FMTI.

For the reasons set forth above, the limit on the number of experience examples a large business mentor may submit is contrary to SBA's regulations and unduly restrictive of competition.

B. The Agency's Use of Obligated Dollar Value to Assign Points for the Three Experience Areas Is Unduly Restrictive of Competition and Otherwise Unreasonable

The Solicitation's use of the obligated dollar value of a contract to award points for Corporate Experience, Leading Edge Technology Experience, and Federal Multiple Award Experience is unduly restrictive of competition because the requirement is not necessary to meet the Agency's needs. Using the obligated dollar value of a contract—as opposed to the awarded dollar value—is also unreasonable because the obligated dollar value provides an incomplete and often misleading representation of a contract's actual value.

As discussed above, when preparing a solicitation, an agency may include restrictive provisions only to the extent necessary to satisfy the agency's actual needs. 10 U.S.C. § 2305(a)(1)(B)(ii); AES UXO, LLC, B-419150, Dec. 7, 2020, 2020 CPD ¶ 395. Assigning points based on the obligated dollar value of a contract is unduly restrictive because the approach is not based on NIH's actual needs. Presumably, the Agency chose to award more points to higher-valued contracts because such contracts indicate an offeror has experience performing larger and more complex contracts. The dollar value of a contract is a recognized indicator of the magnitude or size of the contract. See WingGate Travel, Inc., B-412921, July 1, 2016, 2016

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CPD ¶ 179, at n.11 (“We think it is self-evident that the size of an offeror’s prior efforts . . . logically relates to the relevance of those contracts to the anticipated requirement.”). However, assigning points based on the *obligated dollar value* is not necessary to meet the Agency’s objective, i.e., identifying the offerors with the most experience performing large and complex contracts. The awarded dollar value of a contract accomplishes the same objective and is less restrictive because (i) the awarded dollar value also represents the size and complexity of a contract and (ii) small business contracts with awarded dollar values in excess of \$4 million and \$7 million are significantly more common than small business contracts with obligated dollar values in excess of those amounts because of how contracts are awarded and funded, as well as the nature of small business contracts.

The obligated dollar value of a contract is often substantially lower than the awarded dollar value. Indeed, when a contract is awarded, the government often does not obligate any funds for the base period of performance. If contracts were fully funded at award, there would be no need for FAR 52.232-18—Availability of Funds⁸ or FAR 52.232-19—Availability of Funds for the Next Fiscal Year.⁹ Additionally, it is not uncommon for an agency to de-obligate funds over the course of performance—often for reasons unrelated to performance. The obligated dollar value of a contract will change over time, while the awarded dollar value remains relatively constant.

At the same time, the Solicitation requires all experience examples to “be from the last three years prior to the date the date the solicitation was originally released (May 25, 2021).” Solicitation at 151 (§ L.5.2.1); see also at 153 (§ L.5.2.2), 155 (§ L.5.2.3). A contract awarded within the last three years will likely have an obligated dollar value that suggests the contract is smaller than it actually is because the contract has not been fully funded. The Agency’s approach effectively ignores the fact that the obligated dollar value of a contract that is not close to or has not yet reached completion will have a substantially lower obligated dollar value than

⁸ FAR 52.232-18 provides: “Funds are not presently available for this contract. The Government’s obligation under this contract is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise until funds are made available to the Contracting Officer for this contract and until the Contractor receives notice of such availability, to be confirmed in writing by the Contracting Officer.”

⁹ FAR 52.232-19 states: “Funds are not presently available for performance under this contract beyond _____. The Government’s obligation for performance of this contract beyond that date is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise for performance under this contract beyond _____, until funds are made available to the Contracting Officer for performance and until the Contractor receives notice of availability, to be confirmed in writing by the Contracting Officer.”

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the actual value of the contract. This discrepancy has nothing to do with the actual size of the contract, but offerors will not be able to obtain points for the actual size of the example contract. The adverse impacts resulting from this discrepancy will be exacerbated for small businesses that are new to federal contracting.

The Solicitations use of the obligated dollar value is particularly problematic for small businesses. The North American Industry Classification System (“NAICS”) code assigned to the Solicitation is 541512, which means the size standard is \$30 million. Solicitation at 116 (§ K). At the same time, each offeror will be submitting multiple experience examples under the three experience areas, and the more examples an offeror submits, the more points an offeror can earn.¹⁰ To obtain the maximum amount of points available, a small business offeror will need to have multiple recent contracts with obligated dollar values in excess of \$7 million. *Id.* at 152-156. Yet, it would be extremely difficult, if not impossible, for a potential offeror to have multiple contracts performed within the last three years with obligated dollar values in excess of \$7 million *and* have average annual revenues less than \$30 million. Simply said, the Agency is imposing a requirement that many small businesses cannot possibly meet.

In sum, assigning points for Corporate Experience, Leading Edge Technology Experience, and Federal Multiple Award experience based on the obligated dollar value of an example contract is unduly restrictive of competition and otherwise unreasonable. With 75 percent of the 10,000 points available on the self-scoring sheeting coming from these three experience areas, the impact on the evaluation and the potential prejudice to CWS FMTI is clear. The Solicitation’s requirements make it extremely difficult, if not impossible, for many small businesses to obtain high point values under the three experience areas. Assigning points using the awarded value of example contracts would allow more small businesses offerors to obtain more points and enhance competition. Furthermore, assigning points based on the awarded dollar value of examples contracts would accomplish the same objective: identifying offerors with experience performing large contracts.

C. NIH’s Use of Obligated Dollar Value to Evaluate the Past Performance Factor Is Unreasonable and Unduly Restrictive of Competition

With Amendment 9, the Agency clarified that “The dollar value utilized for past performance references [sic] is determined by the total dollars that were obligated.” Amdt. 9 at 167 (§ L.5.7). Like the experience examples, past performance references “must have occurred within the last three years from the date the solicitation was originally released (May 25, 2021).”

¹⁰ The Solicitation prohibits offerors from reusing the experience example provided for Task Area 1 for other task areas. Solicitation at 151 (§ L.5.2.1). Other examples may be reused for other task areas, and examples provided for Corporate Experience may be used for Leading Edge Technology Experience and Federal Multiple Award Experience. *Id.*

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Solicitation at 163 (§ L.5.7). The Solicitation's use of obligated dollar values to evaluate past performance references unreasonable and unduly restrictive of competition.

In the Past Performance evaluation, NIH will assess the relevance of an offeror's past performance references, and NIH will likely consider the size, complexity, and magnitude of the past performance references provided using the obligated dollar value.¹¹ However, using the obligated dollar value of a past performance reference to evaluate relevance is unduly restrictive of competition because it exceeds what is necessary to meet the Agency's needs. As explained above with the respect to the experience areas, the obligated dollar value of a contract is often lower than the awarded value of the contract for reasons unrelated to the size, scope, and complexity of the contract. This discrepancy will likely lead the Agency to erroneously deem highly relevant contracts less relevant than the contracts actually are. Stated differently, the terms of the Solicitation are likely to cause NIH to discount a relevant past performance reference simply because the contracting agency has not fully funded the contract.

In a past performance evaluation, the intent is to assess "an offeror's ability to perform the contract successfully." FAR 15.305(a)(2)(i). Using the awarded dollar value of the past performance reference would accomplish the same objective while imposing fewer restrictions on offerors. Additionally, for the reasons discussed above, the awarded dollar value of a past performance references is a more accurate indicator of the size, complexity, or magnitude of a contract. The Solicitation should be amended to evaluate past performance references using the awarded contract value.


8. REQUEST FOR DOCUMENTS¹⁵.

CWS FMTI requests the following specific documents that are relevant to the issues raised in connection with this protest:

- (1) Copies of "all relevant documents," as are required to be produced in accordance with 4 C.F.R. section 21.3(d);
- (2) All documents related to the Agency's basis, if any, for limiting the number of experience examples that can be submitted by large business mentors. These documents are relevant to CWS FMTI's argument that the experience examples requirements for mentor-protégé joint ventures are unduly restrictive of competition

¹¹ The Solicitation states: "To be relevant, the past performance must be similar in scope and complexity to any of the task areas defined in C.2.1 through C.2.10 (e.g., task areas 1 – 10)." See Solicitation at 163 (§ L.5.7).

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- (3) All questions received by NIH from any potential offeror concerning the Corporate Experience, Leading Edge Technology Experience, Federal Multiple Award Experience areas, and Past Performance sections of the Solicitation, which documents are relevant to CWS FMTI's challenges to the experience and past performance evaluation criteria;
 - (4) All Agency-issued responses to questions received from potential offerors concerning the Corporate Experience, Leading Edge Technology Experience, Federal Multiple Award Experience areas, and Past Performance sections of the Solicitation, which documents are relevant to CWS FMTI's challenges to the experience and past performance evaluation criteria;
 - (5) All documents related to the Agency's basis, if any, for using the obligated dollar value of a contract to evaluate experience and past performance. These documents are relevant to CWS's argument that using the obligated dollar value is unduly restrictive of competition;
 - (6) All non-privileged written communications, including email, between or among NIH personnel, including, but not limited to the evaluators and/or the source selection official pertaining to the experience areas and Past Performance evaluation criteria, which documents are relevant to CWS FMTI's challenges to the experience areas and Past Performance evaluation criteria;
 - (7) All source selection plans, selection guidelines, and evaluation criteria pertaining to the Solicitation. These documents are relevant to CWS FMTI's arguments that the Solicitation is unduly restrictive of competition.

9. REQUEST FOR PROTECTIVE ORDER

CWS FMTI requests that a protective order be issued in this case. See 4 C.F.R. § 21.4.

10. RESERVATION OF RIGHT TO REQUEST A HEARING

CWS FMTI does not believe at this time that a hearing will be required, but reserves its right to request a hearing in the future after reviewing the agency report.

11. RELIEF REQUESTED

For the reasons stated above, CWS FMTI respectfully asks GAO to: (i) issue a decision holding that the Solicitation is unduly restrictive of competition and (ii) recommend that the

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Agency amend the Solicitation to address the issues raised in this protest. GAO should also recommend award to CWS FMTI of its costs and expenses, including legal fees, incurred in the preparation and pursuit of this protest, as well as such other recommendations as GAO deems necessary and proper under 4 C.F.R. § 21.8.

Respectfully submitted,

Michelle E. Litteken
Andrew J. Mohr
C. Kelly Kroll

Morris, Manning & Martin, LLP
Attorneys for CWS FMTI JV LLC

cc: Rose Schultz, Contracting Officer