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SUSPENSION OF AWARD REQUIRED

July 29, 2021

Office of General Counsel
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

VIA EPDS

Attention: Procurement Law Control Group

Re: Protest of HumanTouch, LLC Under RFP No. 75N98121R00001

Dear Sir or Madam:

Protester, Team HumanTouch (“Protester”) hereby files this protest challenging the terms of Solicitation No. 75N98121R00001 (Solicitation) issued by the National Institutes of Health Acquisition and Assessment Center (NITAAC or agency). The terms of the Solicitation are ambiguous and unduly restrict competition. As discussed below, protester is prejudiced by the unduly restrictive and ambiguous terms; therefore, this protest should be sustained.

I. THE PARTIES TO THIS PROTEST

The protester has an office at 7918 Jones Branch Drive, Suite 800 McLean VA 22102. Its telephone number is (703)-910-5090. The e-mail address is [REDACTED]. The Cordatis attorneys on this pleading are Daniel Strouse (dstrouse@cordatislaw.com), Norah Molnar (nmolnar@cordatislaw.com) and John O'Brien (jobrien@cordatislaw.com). The contact information for Cordatis is set forth above.

The contracting agency is the United States National Institutes of Health Acquisition and Assessment Center. The Contracting Officer is Ms. Rose Schultz, whose contact information is as follows:

Rose Schultz
Procuring Contracting Officer

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National Institutes of Health
Information Technology Acquisition and Assessment Center
6011 Executive Blvd, Suite 503
Rockville, MD 20852
Email: CIOSP4.NITAAC@nih.gov

II. INTERESTED PARTY STATUS

Protester is an interested party because it intends to participate in this procurement [REDACTED] as defined by the Solicitation. However, the ambiguous and unduly restrictive provisions hinder its chances of receiving award. But for the violations alleged in this protest, Protester would have a better opportunity to compete on a common basis for this award.

III. TIMELINESS

Protester files this protest prior to the due date for initial proposals, currently set for August 3, 2021. Because this protest is filed prior to the time for proposal submission the protest is timely filed in accordance with 4 C.F.R. § 21.2(a)(1). Further, the agency has not yet made an award under this procurement. Therefore, pursuant to 31 U.S.C. § 3553, the agency may not make an award decision while this protest is pending.

IV. FACTUAL SUMMARY

A. The Solicitation

In March of 2020 the agency issued a draft solicitation for an indefinite delivery indefinite quantity (IDIQ) contract known as CIO-SP4, the follow on procurement to the agency's current IDIQ contract vehicle, CIO-SP3. This gave government contractors significant time to prepare for the upcoming procurement of this IDIQ contract vehicle, even though the Solicitation would not be issued until March of 2021.

As described in the Solicitation—now amended 8 times—the CIO-SP4 contract vehicle will be used by the government to procure information technology solutions and services including those related to health, biomedical, scientific, administrative, operational, managerial, and information systems. Solicitation at 1.¹ The vehicle would also cover more general information technology services. *Id.* Under this vehicle, warranted government agencies would be authorized to award task orders under the IDIQ contract. *Id.* at 1-2.

This procurement is significant in value, scope and length of time, with a base period to run from May of 2022 to May of 2027, followed by a five year option period, spanning until May of 2032. Solicitation at 32. And, the government, recognizing the significance of this

¹ Unless otherwise stated, the citation to the Solicitation refers to the tracked changes version of Amendment 8.

[REDACTED]

procurement, indicated that it would make awards across the spectrum of contractor designations as follows:

Other Than Small Business	About 75 to 125 awards
Emerging Large Business	About 20 to 40 awards
Small Business	About 100 to 125 awards
Woman Owned Small Business	About 20 to 40 awards
Veteran Owned Small Business	About 20 to 40 awards
Service Disabled Veteran Owned Small Business	About 20 to 40 awards
HUBZone	About 20 to 40 awards
8A	About 20 to 40 awards
Indian Economic Enterprise	About 5 to 10 awards
Indian Small Business Economic Enterprise	About 5 to 10 awards

Solicitation at 141.

In addition to accepting offers from individual prime contractors, the Solicitation contemplated that offerors would utilize Contractor Team Arrangements which could come in two forms:

9.601(1): Two or more companies form a partnership or joint venture to act as a potential prime contractor. This type of CTA will receive one contract award (for all members of the CTA).

9.601(2): A potential prime contractor agrees with one or more other companies to have them act as its first-tier subcontractors under a specified government contract or acquisition

Id. at 144. 9.601(1) CTAs effectively amount to joint venture agreements, whereas 9.601(2) CTAs constitute prime contractor/subcontractor relationships.

The Solicitation explained that offerors were to submit proposals consisting of six volumes. Volume 1 was to include administrative information as well as a self-scoring



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worksheet; Volume 2 was to address numerous Go/No-Go Requirements; Volume 3 related to Health IT Capability; Volume 4 was for offerors to identify their management approach; Volume 5 was Past Performance; and Volume 6 was Price. Solicitation at 151-152. As relevant to this protest, Section L.5.2 listed the requirements for the self-scoring worksheet to accompany Volume 1. The self-scoring worksheet listed 12 different areas under which offerors would be scored:

- L.5.2.1 Row 8 Corporate Experience
- L.5.2.2 Row 9 Leading Edge Technology Experience
- L.5.2.3 Row 10 Federal Multiple Award Experience
- L.5.2.4 Row 11 Executive Order 13779
- L.5.2.5 Row 12 CMMI Certification Level 2
- L.5.2.6 Row 13 Earned Value Management System
- L.5.2.7 Row 14 Acceptable Estimating System
- L.5.2.8 Row 15 ISO 9001 Certification
- L.5.2.9 Row 16 ISO 20000 Certification
- L.5.2.10 Row 17 ISO 27001 Certification
- L.5.2.11 Row 18 Approved Purchasing System
- L.5.2.12 Row 19 Facility Clearance Level

Solicitation at 154-55. Each row on the scoring sheet would be accompanied by a certain number of points, depending on the amount of experience the offeror had with that specific section of Section L. For instance, under Section L.5.2.1, offerors were to provide up to 30 examples of experience, with up to three for each of the task areas identified under the performance work statement. *Id.* at 155. Points would be assigned depending on the dollar values associated with those experiences.

The evaluation of proposals would come in three phases. First, the government would validate the offerors' self-scoring sheet. "Only the highest rated offerors will advance to phase 2 of the evaluation." Solicitation at 169. Within this Phase 1, the agency would assign offerors points for their Corporate Experience, extending across all task areas, including Health IT—the first evaluation factor.

Based exclusively on scores validated from the self-scoring worksheet, the government would assess which offerors moved on to Phases 2 and 3. In Phase 2, the government would verify the go/no-go requirements. For Phase 3, the government would evaluate the written proposals. *Id.* at 168.

B. The Protester

The Protester is a potential offeror for this procurement intending to submit an offer [REDACTED]. And, it intends to enter [REDACTED].

[REDACTED]

[REDACTED]

As explained in more detail below, the agency's most recent amendment resulted in material ambiguities that prevent offerors such as Protester from competing on a common basis. These changes, if read one way, unduly restrict competition. Absent an understanding of the inconsistency in the Solicitation, Protester cannot reasonably compete.

V. GROUNDS OF PROTEST

A. The Solicitation Contains a Patent Ambiguity Preventing Offerors from Submitting Proposals on a Common Basis.

It is a fundamental principle of procurement law that solicitation provisions must be free from ambiguity to ensure all offerors can compete on a common basis. *Innovate Now, LLC*, B-419546, Apr. 26, 2021, 2021 CPD ¶ 178. Here, the Solicitation, as amended, prevents offerors competing as an Emerging Large Business from competing on a common basis.

More specifically, the Solicitation contains ambiguities as to how the agency intends to evaluate the teaming members proposed by an ELB under a 9.601(2) CTA, and whether the corporate experience of the CTA members will be considered for certain factors identified in the Solicitation. The agency explained that the teaming members would be included in a Phase 1 evaluation:

Other Than Small Business and Emerging Large Business Awards
– Consideration of all member information for CTAs under 9.601(1) as described in L.3.7.1 and L.3.7.2 will occur for L.5.2.1 through L.5.2.12. However, for CTAs under 9.601(2) as described in L.3.7.1 and L.3.7.3, the use of member information will only be considered for L.5.2.1 through L.5.2.4 and L.5.2.12. Only the prime contractor's information will be considered for L.5.2.5 through L.5.2.11.

Solicitation, Amendment 8 at 168. However, the consideration of a subcontractor for an ELB under a 9.601(2) CTA would be rendered effectively meaningless because the agency removed consideration of those teaming members when evaluating Factor 1, Health IT, under Phase 3:

Other Than Small Business and Emerging Large Business Awards
– Consideration of member information for CTAs under 9.601(1) as described in L.3.7.1 and L.3.7.2 will occur for all members. This applies to all Factors and Subfactors listed in M.4. However, for CTAs under 9.601(2) as described in L.3.7.3, the use of member

[REDACTED]

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information will only be considered for Factor 2, Subfactor 2 - Resources, Factor 3 – Past Performance, and Factor 4 - Pricing. Only the prime contractor's information will be considered for Factor 1 – Health IT; Factor 2 – Management Approach, Subfactor 1 – Program Management, and Subfactor 3 – Corporate Commitment

While the evaluation of Phase 1 does not necessarily mandate that the agency must use the same information in Phase 3, removing the consideration of teaming members effectively renders the use of those team members useless. By stating, on the one hand, that the agency intends to evaluate teaming partners while, on the other hand, stating that they will not, the agency has created ambiguity surrounding the proposed use of teaming members.

Absent an ability to bid with an understanding of the impact of using a teaming member, offerors cannot reasonably bid on a common basis. Therefore, this protest must be sustained.

B. The Solicitation Unduly Restricts Competition if it Excludes Consideration of Health IT Experience for CTA members

For offerors that pass through Phases 1 (self-scoring worksheet) and Phase 2 (go/no-go requirements), the agency announced that it would assess proposals under four evaluation factors: 1) Health IT Capability; 2) Management Approach to include three subfactors, program management, resources, and corporate commitment); 3) Past Performance); and 4) Price. Solicitation at 171. The agency made clear, however, that it would **not** consider the work of 9.601(2) CTA members for Health IT Capability, the program management subfactor, and the corporate commitment subfactor. *Id.* By preventing offerors from using subcontractors to obtain experience, the agency has unduly restricted competition to emerging businesses with their own experience. This is unreasonable.

More specifically, under the Health IT factor, the agency explained it would “evaluate the offeror’s experience with designing, developing, creating, using, and maintaining information systems for organizations that operate within the healthcare industry.” *Id.* at 173. Notably, this traces directly to Task Area 1 identified in the Statement of Work under which the agency would assess Corporate Experience in the self-scoring worksheet. *Id.* at 19. However, when evaluating offerors under Phase 3, the agency concluded that it would take away the experience of an Emerging Large Business team member for evaluation. The agency provided no rationale for the inclusion of CTA members under Phase 1, and exclusion during Phase 3. And, excluding consideration of team members is unduly restrictive.

GAO has explained that an agency may only restrict competition when doing so is necessary to satisfy its legitimate needs. *See, e.g. Total Health Resources*, B-403209, Oct.4, 2010, 2010 CPD ¶ 226. In *Total Health Resources*, GAO held that absent a showing as to why the government needed experience directly from the prime contractor, the government acted



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unreasonably by mandating prime contractor experience. Because the restriction did not satisfy the government's legitimate needs, GAO found that the government's restriction of only prime contractor experience unduly restricted competition.

A similar result should hold in this case. Here, the government, after months of permitting Emerging Large Business contractors to work with and gain credit for the experience of its subcontract teaming members, the agency reversed course at the last minute. In doing so, it prevents Emerging Large Business from using the team it intended to compete with—and with very little time to adjust its approach.

There is no legitimate need for the agency to remove experience from subcontractors when evaluating offers for this large IDIQ contract under which ELBs may work with other subcontractors. By removing this ability, the agency is not only restricting competition, but acting in a manner that will prevent it from obtaining the best value services. Therefore, this protest should be sustained because it prevents Protester from bidding without undue restriction.

VI. REQUEST FOR DOCUMENTS

Pursuant to 4 C.F.R. § 21.3(d), Protester requests that the agency file with its agency report the documents required by 4 C.F.R. § 21.3(d), and also produce the following relevant documents, including but not limited to e-mails and e-mail attachments. Protester requests that it be provided with native electronic versions of the documents in the form received by the agency (*e.g.*, Word or Excel).

1. All documents related to the agency's decision to remove subcontractor experience from consideration under Phase 3. These documents are relevant to all protest grounds.
2. All source selection plan documents. These documents are relevant to all protest grounds.
3. All communications between agency personnel involved in recommending requirements or in preparing the Solicitation and all amendments. These documents are relevant to all protest grounds.
4. All communications related to the agency's decision to change the requirement for CTAs to preclude using the experience of subcontractors.

Protester further requests GAO issue a protective order pursuant to 4 C.F.R. § 21.4. Protester and its attorneys will comply with the terms of the GAO's standard protective order.

VII. RESERVATION OF RIGHT TO REQUEST A HEARING

Protester 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.



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VIII. RELIEF REQUESTED

Protester requests that the agency sustain this protest and amend the Solicitation to consider the experience of subcontractors during this procurement for each evaluation phase and factor. Further, Protester requests that the agency to provide sufficient time to submit its proposal. In the event GAO sustains the protest or the agency takes corrective action, Protester requests that the agency reimburse its costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1)-(e).

Respectfully submitted,



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