



888 17th Street NW, 11th Floor
Washington, DC 20006
www.pilieromazza.com
Telephone: (202) 857-1000
Secure Fax: (202) 857-7836

September 10, 2021

VIA EPDS

Office of the General Counsel
U.S. Government Accountability Office (“GAO”)
441 G Street, NW
Washington, DC 20548
Attn: Procurement Law Group

**Re: Protest of Ardent Management Consulting, Inc.
Department of Health and Human Services
National Institutes of Health Acquisition and Assessment Center
Request for Proposal No. 75N98121R00001**

Dear Sir or Madam:

Ardent Management Consulting, Inc. (“Ardent”), by and through its undersigned counsel, protests the terms and improprieties related to Request for Proposal No. 75N98121R00001 (the “RFP”), issued by the National Institutes of Health Acquisition and Assessment Center (“NITAAC” or “Agency”). Pursuant to **4 C.F.R. § 21.2(a)(1) and (a)(3)**, this pre-award protest is timely filed within 10 days of NITAAC’s August 31, 2021 denial of Ardent’s agency-level protest, which was timely filed on July 29, 2021, prior to the deadline for submission of initial proposals. **Therefore, the Agency must withhold all contract awards until resolution of this protest.** FAR 33.104(b)(1).

As discussed thoroughly below, the RFP is contrary to U.S. Small Business Administration (“SBA”) regulations, ambiguous, and unduly restricts competition in a manner that does not serve a legitimate Government need, [REDACTED]

Following release of the February 27, 2021 pre-solicitation notice and March 2021 draft RFP, on May 25, 2021, NITAAC issued formally the RFP. Since issuing the official RFP, NITAAC has amended it eleven times: Amendment 1 was issued on May 26, 2021; Amendment 2 was issued on June 4, 2021; Amendment 3 was issued on June 22, 2021; Amendment 4 was issued on June 24, 2021; Amendment 5 was issued on July 2, 2021; Amendment 6 was issued on July 9, 2021; Amendment 7 was issued on July 19, 2021; Amendment 8 was issued on July 23,

[REDACTED]

2021; Amendment 9 was issued on August 2; Amendment 10 was issued on August 16; and, most recently, Amendment 11 was released on August 20, 2021.¹

Critically, the RFP incorporates [REDACTED] but this provision is ambiguous, contrary to SBA's regulations, and unduly restrictive of competition because it

[REDACTED]
[REDACTED]
[REDACTED]

Given this conflict, NITAAC should amend the RFP to clarify that SBA's regulations control over the conflicting FAR provision.

REQUIRED INFORMATION

PROTESTER: Ardent is a [REDACTED] [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]

AGENCY AND SOLICITATION: The contracting agency is NITAAC. On May 25, 2021, NITAAC issued the RFP, seeking to award information technology ("IT") solutions and services indefinite-delivery/indefinite-quantity ("IDIQ") contracts under the Chief Information Officer – Solutions and Partners ("CIO-SP4") Government Wide Acquisition Contract ("GWAC").

TIMELINESS: Pursuant to 4 C.F.R. § 21.2(a)(1), (3), this protest is timely is filed within 10 days of NITAAC's August 31, 2021 denial of Ardent's agency-level protest, which was timely filed on July 29, 2021, prior to the deadline for submission of initial proposals and prior to contract award. Prior to the NITAAC's August 31, 2021 denial, Ardent had no actual or constructive knowledge of any adverse agency action. **Therefore, the Agency must withhold all contract awards until this protest is resolved.** FAR 33.104(b)(1).

INTERESTED PARTY: Ardent is an interested party because it is an actual offeror under the RFP, having timely submitted a proposal; as such, it is an actual offeror whose direct economic interest is affected by the Agency's unlawful and unduly restrictive terms in the RFP and, but for the Agency's errors, there is a substantial chance Ardent will be eligible for and receive award.

¹ Unless otherwise noted, all RFP references herein are to Amendment 11, the most recent version of the RFP, issued on August 20, 2021.

² [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

RULING SOUGHT: Ardent requests a ruling by GAO that that the Agency’s requirement that a prospective [REDACTED]

RELIEF SOUGHT: Ardent requests that GAO recommend that the Agency amend the RFP to remove the requirement that a [REDACTED]

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., B408858.2, at 4 (Dec. 5, 2013). This protest meets those standards.

COPY OF PROTEST TO CONTRACTING OFFICER: In accordance with 4 C.F.R. § 21.1(e) and the RFP, Ardent will serve a complete copy of this Protest, including all attachments, within one (1) day of its filing at GAO on the following Contracting Officer via email:

[REDACTED], Procuring Contracting Officer
National Institutes of Health
Information Technology Acquisition and Assessment Center (NITAAC)
6011 Executive Boulevard, Suite 503
Rockville, MD 20852

[REDACTED]

**LEGAL AND FACTUAL GROUNDS FOR PROTEST,
INCLUDING PREJUDICE TO PROTESTER**

I. FACTS

A. The RFP

On February 27, 2021, the Agency issued a pre-solicitation notice advising contractors that it intended to issue the solicitation for the CIO-SP4 successor contract on or about March 16, 2021. After several extensions of the initial anticipated release date, on May 25, 2021, the Agency issued the long-awaited RFP, seeking to award IDIQ contracts for IT solutions and services. Awardees would provide a range of services, including, among other things, IT solutions and services “related to health, biomedical, scientific, administrative, operational, managerial, and information systems requirements[,]” and “general IT services because medical systems are increasingly integrated within a broader IT architecture[,]” which may “require sound infrastructure systems approaches to their implementation and operation.” RFP § A.1. NITAAC issued this negotiated RFP contemplating awards amongst multiple designations, such as small business, 8(a), women-owned small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, Indian economic enterprise, Indian small business economic enterprise, emerging large business, and other than small business. Id. § L.2.

The Agency’s goals under the contracts contemplated by the RFP are “to provide government agencies a mechanism for quick ordering of IT solutions and services at fair and reasonable prices, to give qualified small businesses a greater opportunity to participate in these requirements, and give government agencies a mechanism to help meet their socio-economic contracting goals.” Id. § A.1.

The period of performance under the RFP is a five-year base period (May 2022 to May 2027) with a five-year optional period of performance (May 2027 to May 2032). Id. § F.2.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

II. PROCEDURAL BACKGROUND

On July 31, 2021, Ardent submitted an agency-level protest with NITAAC, challenging the RFP on the basis that [REDACTED]

[REDACTED]

On August 31, 2021, NITAAC denied Ardent’s agency-level protest. (A true and correct copy of the Agency’s denial letter (“Denial Letter”) is attached hereto as Ex. A. A true and correct copy of Ardent’s agency level protest is attached hereto as Ex. B.)⁴ In support of its denial, NITAAC maintains that [REDACTED]

[REDACTED]

[REDACTED] Ex. A at 2 (emphasis in original).

In an effort to explain its meritless position, NITAAC goes on to state that, [REDACTED]

[REDACTED]

3 [REDACTED]

⁴ The Agency’s letter denying the agency-level protest is dated August 20, 2021, however it was not provided by the Agency to Ardent until August 31st.

[REDACTED]

[REDACTED]

Id. at 4.

In essence, NITAAC is arguing that agencies [REDACTED]
[REDACTED]
[REDACTED] However, as discussed below, the rules are clear that a [REDACTED]
[REDACTED] And agencies do not have
authority to make a [REDACTED]
[REDACTED]
[REDACTED]

Further, in an effort to combat the fact that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Id. at 5.

This protest follows.

[REDACTED]

III. GROUNDS FOR PROTEST

A. The RFP's Terms Conflict with SBA's [REDACTED]
[REDACTED]

1. The RFP's inclusion of [REDACTED]
[REDACTED]

As stated above, the RFP includes [REDACTED]

[REDACTED]

This requirement, however, conflicts with SBA's [REDACTED]. While true that SBA's [REDACTED]
[REDACTED]. SBA's current regulations
[REDACTED]:

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Court of Federal Claims' decision in Hawpe Const., Inc. v. United States, 46 Fed. Cl. 571, 581–82 (2000), aff'd, 10 F. App'x 957 (Fed. Cir. 2001), is particularly instructive concerning the interplay between SBA regulations that conflict with FAR provisions. The following passage explains why SBA's regulations, particularly as they concern small business size status, control when in conflict with the FAR:

Second, plaintiff argues that defendant violated FAR § 52.219–18(a)(1), which specifically requires that SIC Code 1761 be among the approved codes for a bidder to qualify as a section 8(a) small business under SBA regulations. See 48 C.F.R. § 52.219–18(a)(1). This regulation was in effect at the time of the RFP's issuance. As has been discussed, however, a sweeping change in requirements for section 8(a) small businesses had been made in 1998, stating that bidders did not have to attain certification under certain SIC Codes, but that they merely had to meet with the requirements of such codes. 13 C.F.R. §§ 124.402 and 124.507. **Conflicts between FAR and SBA regulations should be resolved by looking to the SBA's latest intent on the issue and by relying on the SBA to determine which provision best implements the policies of the agency itself.** C & G Excavating, Inc. v. United States, 32 Fed. Cl. 231, 239–40 (1994); cf. Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696, 704 (5th Cir.1973). Here, although FAR § 52.219–18 was still in effect, it is clear that 13 C.F.R. §§ 124.402 and 124.507 were meant to remove such requirements. See 13 C.F.R. § 124.507(b)(2)(i); 65 Fed. Reg. 35,726, 35,734 (1998) (“SBA believes that the burden on an 8(a) Participant to obtain SBA approval for every SIC code . . . hinders more than helps the Participant's business development.”) **As defendant has shown, the SBA's opinion on the matter is that the new provisions in the CFR override the old FAR provision. The court finds that the SBA's interpretation is correct, not only due to deference to the agency, but also due to its obvious earlier intent to rid small businesses of the burden of SIC Code pre-certification.** See C & G, 32 Fed. Cl. at 240.¹¹ Defendant's actions with regard to the SIC Code 1761 requirement were in accord with applicable regulations in effect.

[REDACTED]

Id. (emphases added). In short, where a FAR provision conflicts with an SBA regulation, GAO and the COFC defer to SBA and provide that the Agency should comply with the SBA regulation.

Notwithstanding the foregoing, in denying the agency-level protest, NITAAC proffers that

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Ex. A at 4. NITAAC's argument is not only without merit, but contrary to the positions taken by the SBA in the [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

SBA was asked to submit comments on the issue of whether the Area Office erred in

[REDACTED]
[REDACTED] In its comments, SBA explained that [REDACTED]
[REDACTED]

⁶ NITAAC asserts that the SBA regulations [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

SBA pointed out in [REDACTED]

[REDACTED] Id. at [REDACTED]

Simply put, the problem with the NITAAC's argument [REDACTED] and NITAAC's argument would disturb that scheme. [REDACTED]

Finally, and tellingly, [REDACTED]

⁷ Similarly, [REDACTED]

[REDACTED]

[REDACTED]

2. [REDACTED] *is unduly restrictive*

Additionally, the RFP's requirement that [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] unduly restricts competition. Fundamentally, as required by CICA, "[i]n preparing a solicitation for supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition, and include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs." Prisoner Transportation Servs., LLC; V1 Aviation, LLC; Aar Aircraft Servs., B-292179 (June 27, 2003) (citing 41 U.S.C. § 253a(a) (currently codified at 41 U.S.C. § 3306(a))). And, pertinently, "[a]s the agency responsible for promulgating the applicable regulations, the SBA's interpretation of its regulations is accorded great weight; [GAO] defer[s] to the SBA's interpretation so long as that interpretation is reasonable." SKC, LLC, B-415151 (Nov. 20, 2017) (citing NANA Servs., LLC, B-297177.3, B-297177.4 (Jan. 3, 2006)); see also BGI-Fiore JV, LLC, B-409520 (deferring to SBA interpretation of SBA regulation apparently in conflict with FAR provision).

For these reasons, Ardent submits that the Agency should amend the RFP accordingly.

B. Enforcement of [REDACTED] Will Prejudice Ardent

The RFP's terms prejudice Ardent because, as currently written, the RFP requires Ardent, [REDACTED] [REDACTED] [REDACTED] This is violative of SBA's regulations. To establish prejudice, a protester is not required to show that, but for the

[REDACTED]

[REDACTED]

alleged error, the protester would have been awarded the contract. Management HealthCare Prods. & Servs., B-251503.2, at 4 (Dec. 15, 1993). Rather, it is enough that the record contain evidence reflecting a reasonable possibility that, but for the agency's actions, the protester would have had a substantial chance of receiving the award. Metro Machine Corp., B-281872 et al., at 5 (Apr. 22, 1999).

Given the scope of time it will take the Agency to conduct evaluations and make awards, which could be months or years, [REDACTED]

[REDACTED]

[REDACTED] As such, the RFP's terms prejudice Ardent and should be amended or clarified to come into conformance with SBA's regulations. Notably, in its Denial Letter, NITAAC does not dispute the competitive prejudice to Ardent.

REQUEST FOR DOCUMENTS

Ardent 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);

[REDACTED]

REQUEST FOR PROTECTIVE ORDER

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

REQUEST FOR HEARING

Ardent reserves the right to request a hearing on all factual issues in dispute that may arise during the protest. See 4 C.F.R. § 21.7.

[REDACTED]

CONCLUSION

[REDACTED]
[REDACTED]
[REDACTED] and, of course, is not necessary to serve any legitimate government need. Indeed, enforcement of this provision will only hinder the Agency's ability to foster competition.

For these reasons, the Agency should sustain Ardent's protest and, pursuant to 4 C.F.R. § 21.8(d), (e) and (f), recommend that the Agency pay Ardent all other applicable costs, including but not limited to its attorneys' fees, and costs of bid and proposal preparation.

Respectfully submitted,

[REDACTED]

Isaias "Cy" Alba, IV
Katherine B. Burrows
Timothy F. Valley
Meghan F. Leemon

Counsel for Ardent Management Consulting, Inc.

[REDACTED]
[REDACTED]
[REDACTED]