[redacted]

August 11, 2021

By EPDS

General Counsel
U.S. Government Accountability Office
441 G Street, NW
Washington, D.C. 20548
Attn: Procurement Law Control Group

Re: Protest of Ellumen, Inc.
Solicitation No. 75N981-21-R-00001, Award Suspension Required

Dear Sir or Madam:

Ellumen, Inc.[1] ("Ellumen") protests the unduly restrictive and vague terms of Solicitation No. 75N981-21-R-00001, the "Chief Information Officer-Solutions and Partners 4" ("CIO-SP4") solicitation (the "Solicitation"), issued by the National Institutes of Health ("NIH") of the Department of Health and Human Services ("DHHS").

I. Summary.

The Solicitation does not provide sufficient information for offerors to intelligently bid on supplying IT solutions and services. To the detriment of the U.S. government and the U.S. taxpayer, the restrictions and vagaries in the Solicitation will unnecessarily impede competition for the contracts under it. Although NIH has provided some responses to some questions, still others have not received any clarification, necessitating this protest to properly define just what the agency seeks in bids and to ensure that offerors can actually meet the timing requirements of the Solicitation. The terms include certain time requirements for drafting and getting approval for Mentor/Protégé Agreements ("MPAs") that render achieving such in a timely manner impossible. Furthermore, there are numerous examples of vague terms that make bidding intelligently extremely difficult at best.

Separately, each piece of missing information or overly restrictive term means the Solicitation should be revised. Taken together, GAO should recommend that NIH go back to the

[1] All correspondence relating to this protest should be sent to us. But, as required by 4 C.F.R. § 21.1(c), Ellumen provides the following information:

Ellumen, Inc.
8403 Colesville Road, Suite 340
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702-253-6003

drawing board to correct these errors. For these reasons, and those discussed below, GAO should sustain this protest.

II. Ellumen is an interested party.

Ellumen is an interested party for purposes of filing and pursuing this protest because it is a prospective bidder under the Solicitation, but whose ability to compete for the award is hindered by the unnecessarily restrictive terms. See 4 C.F.R. § 21.0(a)(1).

III. This protest is timely.

Because proposals were due under the Solicitation no later than 12:00 p.m. Eastern on August 20, 2021, this protest is timely. See 4 C.F.R. § 21.2(a)(1).

IV. Request for protective order.

Although this is a pre-award protest, Ellumen believes that its resolution may involve discussions of its capabilities and intended response to the Solicitation. To protect this sensitive information, Ellumen therefore asks that a protective order be issued. See 4 C.F.R. § 21.4.

V. Background.

NIH issued the most recent iteration of the Solicitation on August 2, 2021. See Amendment 9. The Solicitation is under NAICS code 541512. Id. at 128. It is generally unrestricted, although task orders by certain agencies or regarding certain work may be limited to small businesses and may further be restricted to certain certification classes under SBA, such as 8(a) and HUBZone, among others.

The Solicitation seeks IT solutions and services related to health, biomedical, scientific, administrative, operational, managerial, and information systems requirements, in addition to general IT services requiring sound infrastructure systems. Id. at 1. It is a Government Wide Acquisition Contract ("GWAC"), under which any federal government agency may award task orders to acquire IT services. Task orders may be multi-year, multiple year, or include options. Id. at 2.

Since the initial issuance of the Solicitation, it has been amended eight times. With the first amendment, NIH also provided a form for questions from potential offerors regarding provisions of the solicitation. See Amendment 1 J.4 Industry Question Table. In response, NIH received numerous questions, which it responded to as part of the third amendment to the Solicitation. See Amendment 3, Response to Questions and Comments. The questions relevant to this protest are as follows:

Question 54 for Section L asked, "Are task orders awarded under multiple award vehicles (i.e., NITACC CIO-SP3, GSA IT Schedule 70, CMS SPARC etc.) acceptable as federal multiple award experience under L.5.2.3?" Id. at 17. NIH responded, "Yes. See section L 5.2.3." Id. However, Question 55 asked "Section L.5.2.3 how are dollar values to be calculated for federal multiple award experiences?" Id. at 18. NIH's reply: "Dollar values are calculated for federal multiple award experiences, by combining all the awarded Task Orders' obligated dollar amounts

under a single multiple award contract. These task orders cannot have terminated more than 3-years prior to the CIO-SP4 proposal close date." Id. Question 56 similarly asked how to calculate dollar values for multiple award experiences, to which the agency answered, "Dollar values are calculated for Leading Edge Technology experiences, by calculating the obligated up to the date of submission - obligated not contract ceiling, options, NTE, etc. - dollar amounts for each experience. These experiences cannot have terminated more than 3-years prior to the CIO-SP4 proposal close date." Id.

In addition to the above, Question 87 asked, "For Self-Scoring rows 8-11 the RFP states, 'For SB, 8a, WOSB, VOSB, SDVOSB, HUBZone, IEE, and ISBEE offerors, the following point values may be assigned per example.' Is an example defined as an individual task order or the entire multiple awards or IDIQ effort accumulated together (such as all task orders performed)?" Id., p. 23. NIH's response: "For Self-Scoring rows 8-11 point values are assigned per example; examples are defined as all eligible awards (terminating within 3-years of the proposal close date) for the entire multiple award or IDIQ effort accumulated together (all task orders performed). Award amounts are calculated as all obligated dollars, not awarded amounts." Id. Additionally, with Amendment 3, a Self-Scoring Sheet was attached. See J.5 Self Scoring Sheet.

After a fourth amendment, NIH released a fifth amendment of the Solicitation on July 2, 2021. See Amendment 5. A cover letter for the amendment noted that "Amendment 0005 takes precedence over any inconsistency or conflicting information that was provided in the Questions & Answers that were posted for amendment 0003." Amendment 5 Cover Letter. In this amendment, it stated, regarding the self-scoring sheet: "The dollar value of the corporate experience example is the total value of the contract including options." Amendment 5, p. 153. A table in this section, Section L.5.2.1, notes that small businesses are required to propose on task areas 1 and a minimum of seven additional task areas. Id. This section is followed by Section L.5.2.2, "Row 9 Leading Edge Technology Experience" and Section L.5.2.3, "Row 10 Federal Multiple Award Experience." See id. at 155, 157.

On July 23, 2021, after 2 subsequent amendments following the fifth amendment, NIH released an eighth amended version of the Solicitation. See Amendment 8. In this amendment, language for Section L.3.7.3, "Instructions regarding FAR 9.601(2) CTAs," states as follows:

> Offerors forming CTAs as defined under FAR 9.601(2) are not required to submit any additional documentation regarding the proposed prime / subcontractor contractual relationship or the qualifications of the proposed subcontractors unless the offeror is seeking a small business award.
>
> Offerors that are seeking a small business award must establish a Small Business Teaming Arrangement as defined in 52.207-6(a) and submit a copy of the written agreement required per FAR provision 52.207-6(a)(1)(ii).

Id. at 147.

On August 2, 2021, a ninth amendment was released by NIH for the Solicitation. See Amendment 9. This amendment stated that:

> Note: The dollar value utilized for experience in sections L.5.2.1, L.5.2.2, and L.5.2.3 is determined by the total dollars that were obligated.
>
> Experience examples can be either a collection of orders or one single order. If an experience example 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 for experience in L.5.2.1, L.5.2.2, and L.5.2.3).
>
> Subcontracts performed in support of federal prime contracts will be considered federal experience.

Id. at 156. The amendment also added the term "obligated" to the specification for calculating the corporate experience example: "the total obligated value of the contract including options." Id. Proposal submissions are due on August 20, 2021. See id. at 143.

This protest follows.

VI. Discussion.

Though the Government is required to seek out a broad pool of contractors to determine which can offer the most beneficial services or goods, the Solicitation is needlessly restrictive. It limits teaming agreements between small businesses and large businesses to those with MPAs, which can take months to receive approval, but only gives offerors a couple of weeks to submit their proposal. In addition, many of the Solicitation's provisions are vague or otherwise ambiguous with regards to providing information on past work. It is extremely difficult, if not impossible, for offerors to properly calculate the value of past work they have done considering no guidance is given for what NIH wants to see in terms of such calculations, and there are additional vague terms that raise questions as to just how proposals will be evaluated. The Solicitation needs to be retracted and rewritten.

A. CIO-SP4 is unreasonably restrictive of competition.

Typically, the Competition in Contracting Act requires federal agencies to "obtain full and open competition through the use of competitive procedures" when soliciting goods and services. 41 U.S.C. § 3301(a). To best facilitate competition, GAO has long held that the terms of a solicitation may include restrictive requirements only to the extent necessary to satisfy an agency's legitimate needs. See Total Health Res., B-403209, 2010 CPD ¶ 226 (Comp. Gen. Oct. 4, 2010). Generally, the determination of the government's needs and the best method of accommodating them is primarily the responsibility of the procuring agency, since its contracting officials are most familiar with the conditions under which supplies, equipment, and services have been employed in the past and will be utilized in the future. Pitney Bowes, Inc., B-413876.2, 2017 CPD ¶ 56 (Comp. Gen. Feb. 13, 2017) (citing Columbia Imaging, Inc., B-286772.2 et al., 2001 CPD ¶ 78 (Comp. Gen. Apr. 13, 2001)).

But when a protester challenges a specification as unduly restrictive, the procuring agency has the responsibility of establishing that the specification is reasonably necessary to meet its needs. Id. (citing Smith and Nephew, Inc., B-410453, 2015 CPD ¶ 90 (Comp. Gen. Jan. 2, 2015)). When it comes to solicitation notices, "the fundamental purpose of these notices…is to enhance the possibility of competition." Info. Ventures, Inc., B-293541 (Apr. 9, 2004). GAO will determine adequacy of the agency's justification through examining whether the agency's explanation is reasonable, that is, whether it can withstand logical scrutiny. Pitney Bowes, *supra*. And though an agency enjoys some discretion in determining how to accommodate its needs, it must do so "in a manner designed to achieve full and open competition and may include restrictive requirements only to the extent they are necessary to satisfy its legitimate needs." Global SuperTanker Servs., LLC, B-414987 et al., 2017 CPD ¶ 345 (Comp. Gen. Nov. 6, 2017) (citation omitted). Thus, GAO requires solicitations to be written in the most nonrestrictive way possible and will require an agency to demonstrate, when challenged, why the restriction is necessary to meet its needs. Id.

Agencies are required to afford offerors an adequate amount of time in which to prepare proposals. Tennier Indus., Inc., B-299624, 2007 CPD ¶ 129 (Comp. Gen. July 12, 2007). The latest iteration of CIO-SP4 was issued on August 2, 2021, with proposals due August 20, 2021. See Amendment 9, p. i, 143. On July 19, 2021, NIH, through the seventh amendment to the Solicitation introduced a specification, L.3.7.3, that, in effect, disallows small businesses seeking a small business award from using large businesses as first-tier subcontractors unless they have an MPA together. Amendment 7, p. 147. The specification requires that offerors seeking a small business award "must establish a Small Business Teaming Arrangement as defined in (FAR) 52.207-6(a)" if they want to use any subcontractors. Id. Naturally, such a Small Business Teaming Arrangement can only be made between small business concerns. See FAR 52.207-6(a) (defining Small Business Teaming Arrangement as "[t]wo or more small business concerns have formed a joint venture" or a "small business offeror agrees with one or more other small business concerns to have them act as its subcontractors"). There is one exception in that regulation: where the businesses are in a mentor/protégé relationship and they have received an exception to affiliation pursuant to 13 C.F.R. § 121.103(h)(3). Id. Prior to Amendment 7, there was no specification prohibiting the use of large businesses as subcontractors in any way.

As a result of this amendment, any small business offerors that had plans to utilize large business subcontractors for small business task orders now were left with two options: find a small business subcontractor or enter an MPA with the large business. [redacted] This would leave the [redacted] option. However, proposals are due on August 20, 2021, and the Solicitation requires that the MPA be approved by SBA at the time of proposal submission. See id. But, as SBA's official website notes, the MPA approval process takes "105 days." See U.S. Small Business Administration Website, "SBA Mentor-Protégé Program" (July 29, 2021).[2] This is a problem for multiple reasons.

The FAR requires agencies to allow at least 30 days for response to a solicitation for services if the proposed contract is expected to exceed the simplified acquisition threshold. FAR § 5.203(c). The simplified acquisition threshold at the time the Solicitation was issued was and is $250,000. FAR 2.101. Each awarded contract alone has a ceiling value of $50 billion. Amendment

[2] *https://www.sba.gov/federal-contracting/contracting-assistance-programs/sba-mentor-protege-program*.

8, p. 44. The current deadline of August 20, 2021 is a less than 30 days from the date Amendment 8 was issued, July 23, 2021. This is in violation of FAR § 5.203(c). Therefore, the Solicitation needs to be retracted and revised.

Even if FAR 5.203 was not violated by NIH, this solicitation is still overly restrictive as it makes it practically impossible for an offeror to utilize a [redacted] The only means by which a small business offeror can utilize a large business subcontractor for small business awards, under the terms of the solicitation, is to [redacted]. But the deadline for proposals isn't even 30 days from the date the amendment was issued, let alone the 105 days needed to get an MPA approved by SBA, as also required by the solicitation. [redacted] are now stuck between attempting to find a suitable small business subcontractor by August 20, 2021, or simply having to give up submitting an offer at all. This goes against the very point of government contract solicitations: "the fundamental purpose of these notices…is to enhance the possibility of competition." Info. Ventures, *supra*.

In addition, the Solicitation has now received nine separate amendments since its initial issuance on May 25, 2021, up until the most recent amendment on August 2. See generally Solicitation; Amendments 1-9. That is roughly one amendment per week. This constant changing of requirements and specifications is costly for offerors. Each proposal requires time, effort, and resources that cannot go towards other work. Each time an amendment is made, offerors must review and modify their proposals to align with the new requirements. While a few amendments are anticipated by offerors, the constant amending of the Solicitation is imposing serious difficulties on offerors. Nothing indicates the amendments are done, either. At this point, offerors are seriously considering foregoing submission of any proposals under the Solicitation as the constant amendments make it a waste of time and resources. As a result, competition is harmed by the constant amendments, resulting in an effect akin to an overly restrictive specification.

As such, NIH needs to retract and reissue the Solicitation after making all needed changes to allow small business offerors a reasonable amount of time to adjust to the recently added specifications.

B. The Solicitation cannot be intelligently bid upon as it contains terms that are crucial to understanding for submitting an acceptable proposal, but said terms are ill-defined and vague.

GAO has consistently held that solicitations "must contain sufficient information to allow offerors to compete intelligently and on an equal basis." See Gov't & Military Certification Sys., Inc., B-411261, 2015 CPD ¶ 192 (Comp. Gen. Jun. 26, 2015); Tennier Indus., Inc., B-299624, 2007 CPD ¶ 129 (Comp. Gen. Jul. 12, 2007). "Specifications should be free from ambiguity and should describe the agency's minimum needs accurately." Newport News Shipbuilding & Dry Dock Co., B-221888, 86-2 CPD ¶ 23 (Comp. Gen. July 2, 1986) (citing Klein-Seib Advertising and Public Regulations, Inc., B-200399, 81-2 C.P.D. ¶ 251 (Comp. Gen. Sept. 28, 1981)).

The uncertainties described below means the Solicitation lacks the minimum information needed for offerors to bid intelligently.

1. Definition of Total Obligated Value.

Amendment 9 of the Solicitation includes a specification that states: "The dollar value of the corporate experience example is the total obligated value of the contract including options. The same examples may be used for corporate experience, leading edge technology relevant experience, and federal multiple award experience." Amendment 9, p. 156. However, the phrase "total obligated value" has received no definition in the Amendment.

The aforementioned answer to Question 55 stated that "[d]ollar values are calculated for federal multiple award experiences, by combining all the awarded Task Orders' obligated dollar amounts under a single multiple award contract." However, in response to Question 56, which is basically the same as Question 55, NIH replied, "[d]ollar values are calculated for Leading Edge Technology experiences, by calculating the obligated up to the date of submission - obligated not contract ceiling, options, NTE, etc. - dollar amounts for each experience." Amendment 3, Response to Questions and Comments, p. 17. This creates confusion: the Solicitation as amended states "[t]he dollar value utilized for experience in sections L.5.2.1, L.5.2.2, and L.5.2.3 is determined by the total dollars that were obligated." Amendment 9, p. 156. Nothing is said regarding options. But the answer to Question 56 states options are not to be included. It is not clear whether the answer to Question 56 still applies. The calculation requirements are unclear.

The matter only becomes more discombobulated when considering the answer to Question 87. That question asked, for point values, "[i]s an example defined as an individual task order or the entire multiple awards or IDIQ effort accumulated together (such as all task orders performed)?" Id. at 23. NIH responded: For Self-Scoring rows 8-11 point values are assigned per example; examples are defined as all eligible awards (terminating within 3-years of the proposal close date) for the entire multiple award or IDIQ effort accumulated together (all task orders performed). Award amounts are calculated as all obligated dollars, not awarded amounts." Id. The same questions as to how to calculate award amounts arise. Determining which contracts are proper to submit and how to calculate them is a guessing game.

The looming question for the entire solicitation is "What does 'obligated' mean?" Not only for "total obligated value" but every other instance of the use of "obligated" with regards to contract values or awards. There is no definition for "obligated" in FAR 2.101. In light of how contract values can change over the course of a project, the phrase "obligated value" is amorphous. Is it the value that the government is obligated to pay at the time of award? Is it the value that the government is obligated to pay at the end of the entire project, after all the equitable adjustments and various other changes are made that are common to this type of project? The lack of definition or explanation for the term "obligated" results in another guessing game for offerors. Some offerors might submit contracts based on the original value at award; others might use the final amount they were actually paid for their contracts.

2. Amendment 5.

Possibly considering some of the above concerns, NIH issued Amendment 5 on July 2, 2021. See Amendment 5. A cover letter for the amendment noted that "Amendment 0005 takes precedence over any inconsistency or conflicting information that was provided in the Questions & Answers that were posted for Amendment 0003." Amendment 5 Cover Letter. Turning to

Amendment 5, the amendment addresses Section L.5.2.1, "Corporate Experience." Amendment 5, p. 153. Again, in this section, it states, "[t]he dollar value of the corporate experience example is the total value of the contract including options." Id. Of course, as mentioned above, now Amendment 9 has made that "the total obligated value of the contract including options." Amendment 9, p. 156. But, despite Amendment 9, no similar explanation is given for Leading Edge Technology experiences or federal multiple award experiences. See generally id. at 158-61 On page 156, it does state "[t]he dollar value utilized for experience in sections L.5.2.1, L.5.2.2, and L.5.2.3 is determined by the total dollars that were obligated." Id. at 156. But it is still unclear what is meant here.

Offerors are left with a myriad of questions regarding Leading Edge Technology experiences and federal multiple award experiences. Apparently for federal multiple award experiences—per the responses to Questions 55 and 87—dollar values are calculated by combining all the awarded task orders' obligated dollar amounts under a single multiple award contract, but also by combining all eligible awards for the entire multiple award accumulated together (all task orders performed) in terms of obligated dollars. It is difficult to discern what is meant in any event. Three calculation procedures might be the one required by the solicitation: A) Total obligated value of the multiple award task order, B) Total obligated value of all task orders awarded on the vehicle, or C) Total obligated value of task orders awarded to date? Or is the meaning something else entirely?

Likewise, for Leading Edge Technology experiences, Question 56 states dollar values are calculated by using the "obliged up to the date of submission…dollar amounts." This does not speak to such experiences with task orders. Therefore, the question is whether the value is the total value of all task orders, the obliged value of task orders awarded to date, or something else. In any event, it is difficult to tell, and offerors cannot reasonably be expected to discern the distinctions, or the intended meaning as it stands.

3. Self-Scoring.

NIH provided a self-scoring sheet experience template with Amendment 3. See Amendment 3, Attachment J.7 (listed on SAM.gov as J.6). While the template in and of itself is straightforward enough, no instructions are given as to whether the same experience template will cover the experience if it is submitted under multiple categories (for example, corporate experience and Leading Edge Technology experience) or if each reference to experience requires a unique, dedicated self-scoring sheet. As such, offerors are left playing a guessing game as to what NIH wants.

4. Evaluation of Proposals.

Finally, Section L.5.2.1, regarding the corporate experience section of the Self-Scoring Sheet, provides that small businesses must provide examples for at least eight of the ten task areas the Solicitation will award under. Amendment 9, p. 157. The same section also provides that businesses that fall under certain socio-disadvantaged categories (8(a), WOSB, HUBZone, etc.) must only provide examples for at least five task areas. Id. at 156. However, nothing in the amendment or any other documentation provides for how the score of a small business proposing against eight task areas is normalized against another small business that proposes against all ten

task areas, or how the score of a socio-disadvantage business is normalized against another business that proposes all ten. It is not clear if this presents an intended disadvantage for small businesses that don't have experience in all ten task areas, or if such differences will receive adjustments to account for the fact that even qualified offerors may not have experience in all task areas, yet still present a good opportunity for the government.

VII. Document requests.

NIH's production of "all relevant documents," see 4 C.F.R. § 21.3(d), should include but not necessarily be limited to:

1) All documents relating to the NIH's acquisition planning related to the Solicitation; and

2) All documents and information responsive to Solicitation concerns raised in this Protest.

VIII. Conclusion and relief requested.

The Solicitation is missing information necessary for bidding and contains other terms overly restrictive to offerors. GAO should sustain this protest and recommend NIH amend the Solicitation to correct the errors and missing information. GAO should also grant Ellumen its attorneys' fees and costs and any other relief it deems appropriate.

Respectfully submitted,

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