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July 29, 2021

VIA EPDS

IMMEDIATE SUSPENSION REQUIRED

[redacted]

Procurement Law Control Group
Office of the General Counsel
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Re: Pre-Award Protest of Mission Driven Ventures, LLC
Request for Proposal ("RFP") No. 75N98121R00001

National Institutes of Health Acquisition and Assessment Center ("NITAAC")

Chief Information Officer – Solutions and Partners ("CIO-SP4")

Dear Sir or Madam:

Mission Driven Ventures, LLC ("MDV"), a Small Business Administration ("SBA") approved mentor-protégé joint venture ("JV"), formed between Protégé Blue Water Thinking, LLC ("Blue Water") and Mentor Grant Thornton Public Sector, LLC ("Grant Thornton"), with offices located at 3939 Bayside Drive, Edgewater, Maryland 21037, telephone no. (703) 472-2152, by counsel, submits this pre-award protest against the terms of the above referenced request for proposal ("RFP" or "Solicitation") issued by the U.S. Department of Health and Human Services ("HHS"), National Institutes of Health Acquisition and Assessment Center ("NIH" or the "Agency") for the CIO-SP4 Government Wide Acquisition Contract ("GWAC"), an indefinite quantity contract for information technology ("IT") services. All correspondence regarding this protest should be directed to the undersigned counsel.

MDV has been forced to file this protest before proposals are due (August 3, 2021) because despite the Agency having issued an amendment as late as July 23, 2021 (Amendment 8), the Solicitation still includes instructions that single out and disparately treat large business mentors who are participating in an SBA approved mentor-protégé JV. This harms both the protégé and mentor participating in a qualified SBA mentor-protégé JV. In addition, the RFP contains several ambiguities that must be resolved so that the Agency treats offerors in a fair and consistent manner against the RFP requirements and evaluation criteria.

[redacted]

The RFP violates material terms of the Federal Acquisition Regulation ("FAR") and the Competition in Contracting Act ("CICA") because it is unduly restrictive, includes restrictions that are not reasonably related to the Agency's needs, and precludes offerors in a free and open competition. 41 U.S.C. §§ 3301-3304, 3306; FAR 11.002; FAR Subpart 6.1; FAR Subpart 16.5; FAR 1.102-2(c).

MDV's protest is based upon the following grounds:

The RFP's instructions impose a restriction on mentors of an SBA approved mentor-protégé JV, by limiting their past performance to just "two examples [of experience] for each task area." *See* Attachment 1 at 155 (Section L.5.2.1); *id.* at 157, 159, 160 (Sections L.5.2.2, L.5.2.3, and L.5.2.4, respectively, providing similar language). This restriction violates CICA and the FAR because it:

A. Unduly restricts competition by improperly imposing arbitrary limits on the information that can be submitted in support of a mentor-protégé JV, thus limiting competition,

B. Violates the SBA Act and implementing regulations by imposing a restriction on a mentor-protégé JV that is contrary to the purpose of the SBA Act and its regulations, and

C. Disparately treats SBA approved mentor-protégé JVs when compared to similarly situated large businesses participating with a small business under a contractor team arrangement ("CTA") established under FAR 9.601.

The RFP also contains several ambiguities. First, the RFP instructions state the dollar value of corporate experience, leading edge technology, and federal multiple award experience is calculated as "the total value of the contract including options." Attachment 1 at 155 (Section L.5.2.1). However, during questions and answers ("Q&As"), the Agency stated the dollar value of experience associated with multiple award and leading edge technology experiences is based upon obligated dollar amounts. *See generally* Attachment 2 at 18, 23 (Amendment 3, Q&A Nos. 55, 56, and 86). The difference between the two approaches to calculating multiple award and leading edge technology experiences can be significant given the points awarded based on the size of the prior experience.

Second, Amendment 8 at Section L.3.7.3 adds a certification requirement to the instructions for FAR 9.601(2) CTAs. Attachment 1 at 147. Under the added language, a certification requirement is imposed upon "each ***member*** of the CTA." This new certification requirement creates an ambiguity for mentor-protégé joint ventures participating as either a prime or subcontractor in a CTA as defined in FAR 9.601(2). It is unclear whether the mentor-protégé joint venture itself should certify under Section K or whether each of the members of the mentor-protégé joint venture should certify under Section K. If the later, it is impossible for the mentor to certify that it is small.

[redacted]

In addition, the RFP contains ambiguities due to the failure to explain the weight attributable to Federal versus commercial experience, the methodology used to define a "project," whether subcontracts under a prime Federal contract will be evaluated as Federal or commercial, the qualifications for a Service-Disabled Veteran-Owned Small Business ("SDVO SB"), and validation of corporate experience (RFP Attachment J-7 submissions based upon Federal Procurement Data System ("FPDS") records).

There is no reasonable or rational justification for limiting a mentor's past performance to just two experience for each task area. Similarly, the RFP contains ambiguities based on inconsistencies and failure to provide adequate explanations. The ambiguities mean that the Agency will not be evaluating offerors on common requirements and evenhandedly against the RFP requirements and evaluation criteria. Pursuant to CICA and the FAR, GAO should recommend that the Agency amend the RFP to remove the improper restrictions and clarify the ambiguities.

SUSPENSION OR STAY OF AWARD REQUIRED

Pursuant to CICA and the FAR, NIH is prohibited from awarding a contract under the referenced RFP pending this protest. FAR 33.104(b); 31 U.S.C. § 3553(c). This pre-award protest has been timely filed before the due date and time for submission of proposals at 2:00 p.m., EDT, on August 3, 2021, and before award. 4 C.F.R. § 21.6.

TIMELINESS

This protest is timely filed under 4 C.F.R. § 21.1(a)(1) because it is filed before the time and due date for submission of proposals at 2:00 p.m., EDT, on August 3, 2021.

STANDING

MDV is an interested party to protest. MDV has a substantial chance of receiving award if this protest is sustained and MDV's proposal is properly considered for award under mandatory competitive procedures. MDV's direct economic interest is therefore affected.

JURISDICTION

GAO has jurisdiction over this protest challenging the award of an order or the proposed issuance of an order under a multiple award IDIQ contract that exceeds $10 million. 41 U.S.C. § 4106(f). The RFP states the maximum value of orders under this contract is $250,000,000,000.00. The procurement here has an estimated value that substantially exceeds $10 million.

[redacted]

PROCUREMENT BACKGROUND AND FACTS

A. The RFP[1]

On or about May 25, 2021, the Agency issued the above referenced RFP for the CIO-SP4 GWAC to provide IT solutions and services related to health, biomedical, scientific, administrative, operational, managerial, and information systems requirements. Attachment 1 at 1 (Section A.1). RFP Section A.1 states the "goals of this contract 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.*

RFP Section L.2 states the Agency contemplates awarding indefinite quantity/indefinite delivery contracts, with individual task orders issued as firm fixed price, time and materials, cost reimbursement, or a hybrid of those contract types. *See* Attachment 1 at 141 (RFP Section L.2). RFP Section L.2 further provides an estimate for the number of awards, based on categorization of business type (*i.e.*, Other than Small Business, Emerging Large Business, Small Business, Women Owned Small Business, etc.). *Id.*

The Agency has issued eight amendments to the RFP.

B. Evaluation Criteria and Basis for Award

RFP Section M.1 stated proposals would be evaluated in the following three phases:

- Phase 1: The government will validate the offerors' self-scoring sheet
- Phase 2: The government will verify the remaining offerors' go/no-go requirements
- Phase 3: The government will evaluate the remaining offerors' written proposals

See Attachment 1 at 168-76 (Section M).

For offerors included in Phase 3, the RFP states the Agency will make award to the proposals representing the best value to the government at fair and reasonable prices. The Phase 3 evaluation factors and subfactors include:

Factor 1 – Health IT Capability

Factor 2 – Management Approach
Subfactor 1 – Program Management
Subfactor 2 – Resources

[1] The RFP and Amendments 1-8 are available at: https://sam.gov/opp/e0c673a0033c4630a7bab3df75ba2eb0/view.

[redacted]

Subfactor 3 – Corporate Commitment

Factor 3 – Past Performance

Factor 4 - Price

Id. at 171 (RFP Section M.4, Table 12). The RFP provided the following order of importance: Health IT Capability is more important than Management Approach, Management Approach is more important than Price, and Price is more important than Past Performance.

C. Amendments Relevant to this Protest

For Experience, the RFP's instructions contain separate guidance for Corporate Experience (RFP Section L.5.2.1, Row 8), Leading Edge Technology Experience (RFP Section L.5.2.2, Row 9), Federal Multiple Award Experience (RFP Section L.5.2.2, Row 10), and Executive Order 13779 (RFP Section L.5.2.4, Row 11). *See* Attachment 1 at 155-57, 157-58, 158-60, and 160, respectively. However, all of the experience sections include the same restriction for mentors participating in an SBA approved mentor-protégé JV, as follows:

> 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.***

Id. at 155 (Section L.5.2.1), 157 (Section L.5.2.2), 159 (Section L.5.2.3), and 160 (Section L.5.2.4) (emphasis added).

There is no corresponding limitation imposed upon a large business bidding with a small business in a CTA. *See id.*

As part of the RFP's instructions for self-scoring for experience, the dollar value of prior experience is highly relevant because the higher the dollar value of an offeror's Federal contract experience, the more points are awarded. In the instructions for Corporate Experience include the following statement:

> The dollar value of the corporate experience example is the ***total 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.***

Id. at 155 (Section L.5.2.1) (emphasis added).

[redacted]

In other words, the dollar value of an offeror's corporate experience – calculated as the "total value of the contract including options" – may be used for leading edge technology and federal multiple award experiences.

The instructions at RFP Section L.5.2 elicited the following relevant questions, with the Agency's answers that were provide to all offerors in Amendment 3:

No.	Question/Comment		Response
55	L.5.2 Volume I Section 2 – Self-scoring Sheet	Section L.5.2.3 how are dollar values to be calculated for federal multiple award experiences?	***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.
56	L.5.2 Volume I Section 2 – Self-scoring Sheet	Row 9 self-scoring sheet - how to calculate dollar values for multiple award experiences?	***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 [not to exceed], etc. - dollar amounts for each experience.*** These experiences cannot have terminated more than 3-years prior to the CIO-SP4 proposal close date.
87	L.5.7 Volume V – Past Performance	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)?	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***.

Attachment 2 at 18 and 23 (RFP Amendment 3, Q&As at Nos. 55-56 and 87) (emphasis added). With regard to leading edge technology and multiple award experiences, the Q&A Nos. 55-56 state that the dollar values are calculated based on "obligated dollar" amounts. Q&A No. 87 simply speaks in terms of past performance based on "obligated dollars."

[redacted]

Amendment 8 added the following to the instructions regarding FAR 9.601(2) CTAs: "Offerors that are seeking a small business award must also submit separate representations and certifications as required under Section K for each member of the CTA." Attachment 1 at 147 (Section L.3.7.3).

DISCUSSION AND GROUNDS OF PROTEST

Procuring agencies are required to specify their needs in a manner designed to permit full and open competition and may include restrictive requirements only to the extent that they are necessary to satisfy the agency's legitimate needs. *See* 41 U.S.C. §§ 3301(a), 3306(a)(1)-(2); FAR 11.002(a)(ii); *CHE Consulting, Inc.*, B-297534.4, May 17, 2006, 2006 CPD ¶ 84 at 2. The United States Code at Title 41, §§ 3301(a), 3306(a)(1)-(2), and FAR Subpart 16.5 mandate that the agency provide contractors a fair opportunity to compete for this GWAC/IDIQ. This means that procurements must be conducted in such a manner that all responsible contractors are permitted to compete.

The RFP as written does not meet these standards. MDV is materially prejudiced by the Agency's imposition of a restriction on mentors and the ambiguity regarding calculation of the dollar value of past experience. The restriction on a mentor's experience is not necessary to meet the Agency's reasonable needs and will require the Agency to treat similarly situated offerors in a disparate manner. Moreover, the ambiguity creates confusion and will again require the Agency to treat offerors in a disparate manner. Both flaws in the RFP unduly restrict competition and prevent offerors from competing in a full and open competition. As demonstrated below, the restrictive limitations for experience and the ambiguity on dollar value of experience violate both CICA and the FAR.

I. The Limitation on Mentors Experience Restricts Competition, Violates SBA Regulations, and Amounts to Disparate Treatment

Where a protester makes a *prima facia* case that challenges a solicitation requirement as unduly restrictive, the burden shifts and the agency must show that the requirement is reasonably necessary to meet its needs. *See, e.g.*, *Tennant Co*., B-205914.2, Dec. 20, 1982, 82-2 CPD ¶ 546 at 3. GAO will examine the agency's position to ensure that it is rational and can withstand "logical scrutiny." *NCS Technologies, Inc.*, B-403435, Nov. 8, 2010, 2010 CPD ¶ 281 at 3 (citing *Chadwich-Helmuth Co. Inc.*, B-279621.2, Aug. 17, 1998, 98-2 CPD ¶ 44 at 3); *SMARTnet, Inc.*, B-400651.2, Jan. 27, 2009, 2009 CPD ¶ 34 at 7 (sustaining protest where the agency's concerns did not support the restrictive provisions in the solicitation). GAO will sustain a protest where the agency cannot provide a reasonable basis for the inclusion of the restrictions in the solicitation. *MadahCom, Inc.*, B-298277, Aug. 7, 2006, 2006 CPD ¶ 119 at 2. The Agency cannot meet its burden to show that the restriction is reasonably necessary to meet its needs.

[redacted]

Here, MDV has made a *prima facia* case that the restriction in the RFP that limits an SBA approved JV mentor to just two past performance experience reference is unduly restrictive, and violates fundamental SBA principles allowing for mentor-protégé relationships. Therefore, the burden shifts to the Agency to justify this restriction imposed on large business mentors.

A. RFP Sections L.5.2.1, L.5.2.2, L.5.2.3, and L.5.2.4 Unduly Restrict Competition by Improperly Imposing Arbitrary Limits on the Information that Can Be Submitted by a Mentor in an Approved SBA Mentor-Protégé Relationship in Support of an Offeror's Past Performance, Thus Improperly Precluding Full and Open Competition

Agencies, like NIH, are required to specify their needs in a manner designed to permit full and open competition and may include restrictive requirements only to the extent that they are necessary to satisfy the agency's legitimate needs. *See* 41 U.S.C. §§ 3301(a), 3306(a)(1)-(2); FAR 11.002(a)(ii); *CHE Consulting*, *supra*, at 2.

This means an agency must provide contractors a fair opportunity to compete for a procurement like this one and must also establish that the provisions in question are reasonably necessary to meet the agency's needs. *See Total Health Res.*, B-403209, Oct. 4, 2010, 2010 CPD ¶ 226 at 3 (finding that solicitation requirements for specific experience on the part of the prime contractor was unduly restrictive of competition because the agency did not show that its needs could not be satisfied by a subcontractor with relevant experience); *Iyabak Constr., LLC*, B-409196, Feb. 6, 2014, 2014 CPD ¶ 62 (holding that the past performance and experience requirements were unduly restrictive of competition where the agency could not explain why its needs could not be satisfied by a less restrictive method of evaluating offerors' past performance and experience). GAO has held that all responsible contractors must be permitted to compete.

Under well-established GAO precedence, the burden is on the Agency to demonstrate that its restrictive requirements are necessary to satisfy the Agency's legitimate needs. The Agency's unduly restrictive limitation on SBA JV mentors violates these principles.

The restriction in RFP Sections L.5.2.1, L.5.2.2, L.5.2.3, and L.5.2.4 states that offerors submitting proposals under an approved SBA mentor-protégé arrangement may only submit two past performance/experience reference on behalf of the mentor. *See* Attachment 1 at 155, 157, 159, 160. Here, that means MDV can only submit two references on behalf of Grant Thornton, the mentor to protégé Blue Water Thinking. This defeats the purpose of SBA mentor-protégé relationships – namely to help the protégé develop its capabilities. As SBA explains:

> The small business mentor-protégé program is designed to enhance the capabilities of protégé firms by requiring approved mentors to ***provide business development assistance to protégé firms and to improve the protégé firms' ability to successfully compete for federal contracts***. This assistance may include technical and/or management assistance; financial assistance in the form of equity

[redacted]

> investments and/or loans; subcontracts (either from the mentor to the protégé or from the protégé to the mentor); trade education; and/or assistance in performing prime contracts with the Government through joint venture arrangements. Mentors are encouraged to provide assistance relating to the performance of contracts set aside or reserved for small business ***so that protégé firms may more fully develop their capabilities***.

4. C.F.R. § 125.9(a) (emphasis added).

Without being able to rely on the past performance information of its mentor, MDV will be at a significant disadvantage and will not be afforded a fair opportunity to compete for the CIO-SP4 contract. Significantly, the restriction is not reasonably necessary to the extent the Agency's concern is about the size, price, or complexity of the procurement such that the provisions would be necessary to lessen the agency's risk of inadequate performance. *See, e.g.*, *Valor Constr. Mgmt., LLC*, B-405365, Oct. 24, 2011, 2011 CPD ¶ 226 at 4 (restricting consideration of an offeror's experience and past performance to only those firms with which it has contractual privity for purposes of performing the contract was a reasonable justification, given the high visibility of performance). Here, RFP Sections L.5.2.1, L.5.2.2, L.5.2.3, and L.5.2.4 have the opposite effect and precludes MDV from relying upon the experience of its mentor.

The unduly narrow restrictions imposed on large business mentors participating in an SBA approved mentor-protégé JV improperly restrict full and open competition and will arbitrarily require the Agency to significantly downgrade offerors like MDV who have a mentor that can only submit two examples of its experience. GAO should direct the Agency to amend the RFP to remove the improper restriction on mentors and otherwise ensure full and open competition.

B. The Solicitation Violates the SBA Act and Implementing Regulations by Imposing a Restriction on Mentors that is Not Reasonably Related to the Agency's Minimum or Actual Needs

The SBA Act, 15 U.S.C. § 644(q)(1)(c), requires:

> When evaluating an offer of a joint venture of small business concerns for any multiple award contract above the substantial bundling threshold of the Federal agency, if the joint venture does not demonstrate sufficient capabilities or past performance to be considered for award of a contract opportunity, the head of the agency shall consider the capabilities and past performance of each member of the joint venture as the capabilities and past performance of the joint venture.

[redacted]

The SBA's implementing regulations at 13 C.F.R. § 125.8(e) states:

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

As both the SBA Act and the implementing regulations make clear, an agency must consider the past performance and experience of each member of the joint venture "as the capabilities and past performance of the JV." Limiting the mentor's past performance and experience is contrary to the SBA Act and SBA's regulations.

GAO has held that when an agency imposes a restrictive specification, it cannot exceed the Agency's minimum needs. *See, e.g., Biddle Instruments; Tektronix, Inc. -- Recon.*, B-225769.9, B-225769.3, Sept. 15, 1987, 87-2 CPD ¶ 251 ("A contracting agency may impose restriction on the competition only if it can be shown that after consideration of all relevant factors, the restriction is deemed necessary to meet the agency's actual minimum needs, since the benefit of competition, both to the government and the public in terms of price and other factors, is directly proportional to the extent of the competition."); *Tennant Co.*, *supra*, at 3 ("a contracting agency may impose a restriction on the competition only if it can be shown that after careful consideration of all relevant factors, the restriction is deemed necessary to meet the agency's actual minimum needs, since the benefit of competition, both to the Government and to the public in terms of price and other factors, is directly proportional to the extent of the competition").

The Agency violated this basic tenant of full and open competition – that the requirements of the solicitation be based on the agency's actual minimum needs – because the restrictions placed on past performance of a mentor violates the SBA Act and implementing regulations, and is not necessary for the Agency to meet its actual or minimum needs. The restriction on the ability of a mentor to submit past performance/experience information is not reasonably related to any stated Agency need. Instead, allowing MDV's mentor to demonstrate its past performance/experience will demonstrate the relevant information the Agency needs to assess MDV's capabilities for corporate experience, leading edge technology, and federal multiple award experience. These are the capabilities that the SBA Act and implementing regulations purposefully require an agency to consider as part of the evaluation process.

[redacted]

Here, the restriction imposed upon large business mentors participating in an SBA approved mentor-protégé JV is a restriction that violates the SBA Act, the SBA's regulations, exceeds the Agency's minimum needs, and does not benefit competition. Offerors like MDV in a mentor-protégé relationship are being singled out and will be unfairly impacted by the competition limiting restriction included in RFP Sections L.5.2.1, L.5.2.2, L.5.2.3, and L.5.2.4.

* * *

Where a protester challenges a solicitation requirement as unduly restrictive, the agency must be able to show that the requirement is reasonably necessary to meet its needs. GAO will examine the agency's position to ensure that it is rational and can withstand "logical scrutiny." *NCS Technologies, Inc.*, B-403435, Nov. 8, 2010, 2010 CPD ¶ 281 (citing *Chadwich-Helmuth Co. Inc.*, B-279621.2, Aug. 17, 1998, 98-2 CPD ¶ 44 at 3). GAO will sustain a protest where the agency cannot provide a reasonable basis for the inclusion of the restrictions in the solicitation. MadahCom, Inc., B-298277, Aug. 7, 2006, 2006 CPD ¶ 119 at 2. Here, the Agency's position cannot withstand GAO's "logical scrutiny" test. The Agency cannot show the unduly restrictive requirement is reasonably necessary to meet its needs because it is not imposing a similar restriction on similarly situated offerors (*i.e.*, those that are part of a CTA arrangement).

MDV is materially and competitively prejudiced by the unduly restrictive language in RFP Sections L.5.2.1, L.5.2.2, L.5.2.3, and L.5.4.2. These restrictions that unfairly and unreasonably target mentors in an SBA approved mentor-protégé JV are not necessary to meet the Agency's legitimate, reasonable, or minimum needs. The RFP must be amended to be consistent with the terms of CICA and the FAR to ensure a fair opportunity for award and full and open competition.

II. The RFP Contains Ambiguities that Preclude Offerors from Competing on a Level Playing Field

The RFP contains several ambiguities that preclude offerors from competing on a fair and equal playing field. Unless these ambiguities are resolved, the Agency will be forced to evaluate proposals against differing interpretations of the Agency's requirements and evaluation criteria. In circumstances where there is an ambiguity on the face of the proposal, like here, a protester is required to protest before the due date and time for proposal submission. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, (e.g., where the solicitation provisions appear inconsistent on their face), while a latent ambiguity is more subtle. *Coastal Int'l Sec., Inc.*, B-411756, Oct. 19, 2015, 2015 CPD ¶ 340 at 4 ("An obvious, gross, or glaring error in the solicitation is a patent ambiguity; a latent ambiguity is more subtle."); *see also Brickwood Contractors, Inc.*, B-292171, Jun. 3, 2003, 2003 CPD ¶ 120 at 6 (explaining a patent ambiguity as one which is obvious on its face); *Bank of Am.*, B-287608, B-287608.2, Jul. 26, 2001, 2001 CPD ¶ 137 at 10 (finding patent ambiguity where solicitation terms were in direct conflict).

[redacted]

Under CICA and the FAR, the RFP must provide for evaluation and award on a level playing field where the offerors compete against unambiguous requirements. *See, e.g.*, *Continental RPVs*, B-292768.2, B- 292768.3, Dec. 11, 2003, 2004 CPD ¶ 56 at 8 (holding it is a fundamental principle of government procurement that competitions must be conducted on an equal basis; that is, offerors must be treated equally and be provided with a common basis for the preparation of their proposals). The RFP does not meet these full and open or fair opportunity for award obligations because the RFP is unclear and uncertain and precludes any fair comparison of competing proposals.

A. The RFP Contains an Inconsistency Concerning the Calculation of the Dollar Value of Experience

RFP at Section L.5.2.1 states:

> ***The dollar value of the corporate experience example is the total 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.

Attachment 1 at 155 (emphasis added.)

This conflicts with the Agency's answers in response to offeror questions, as included in the Solicitation in Amendment 3:

No.	Question/Comment		Response
55	L.5.2 Volume I Section 2 – Self-scoring Sheet	Section L.5.2.3 how are dollar values to be calculated for federal multiple award experiences?	***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.
56	L.5.2 Volume I Section 2 – Self-scoring Sheet	Row 9 self-scoring sheet - how to calculate dollar values for multiple award experiences?	***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.

[redacted]

No.	Question/Comment		Response
87	L.5.7 Volume V – Past Performance	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)?	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***.

Attachment 2 at 18, 23 (RFP Amendment 3, Q&As at Nos. 55-56 and 87) (emphasis added).

There is a material difference between calculating dollar values based on the "total value of the contract including options" versus calculating dollar values based on obligated dollar amounts, and in the case of leading edge technology, not including the contract ceiling, options, NTE, etc. Allowing for the calculation of dollar values based on vastly different approaches will result in vastly different point scores, depending upon the approach selected by an offeror. This prevents offerors from submitting proposals on a level playing field and prevents the Agency from evaluating proposal evenhandedly against common requirements.

B. The New Certification Requirement Added to the Instructions at RFP Section L.3.7.3 Creates an Ambiguity for Mentor-Protégé Joint Venturers Participating in a CTA as Defined in FAR 9.601(2)

The RFP instructions for FAR 9.601(2) CTAs were amended by adding the following language: "Offerors that are seeking a small business award must also submit separate representations and certifications as required under Section K for each member of the CTA." Attachment 1 at 147. This added representation and certification requirement creates an ambiguity for mentor-protégé joint ventures participating as prime or subcontractors under a CTA as defined in FAR 9.601(2).

Under the language added to the RFP instructions for CTAs arranged in accordance with FAR 9.601(2), a certification requirement is now imposed upon "each ***member*** of the CTA." This new certification requirement creates an ambiguity for mentor-protégé joint ventures participating as either a prime or subcontractor in a FAR 9.601(2) CTA. It is unclear whether the mentor-protégé joint venture itself should certify under Section K or whether each member of the mentor-protégé joint venture is required to certify under Section K. If the latter, it is impossible for the mentor in an SBA approved mentor-protégé to certify that it is small. It is improper to require that the mentor large business participating as a member in an SBA approved mentor-protégé joint venture to submit representations and certifications under Section K. A mentor

participating as a member in a mentor-protégé small business cannot certify itself as small. Only the mentor-protégé joint venture itself can make such a representation.

The new certification requirement ushered in by Amendment 8 creates an ambiguity in this regard because it is not clear how the Agency is defining "each member of the CTA." RFP Section L.3.7.2 must be clarified to state that the only the mentor-protégé joint venture, not individual members, participating as either a prime or subcontractor in a FAR 9.601(2) CTA is obligated to certify under Section K.

C. The RFP Contains Several Additional Ambiguities Caused by Failures to Explain Critical Aspects of the Evaluation Process

In the context of evaluating experience, the RFP contains several ambiguities all associated with failure to explain critical aspects of the evaluation process. First, the RFP fails to explain if the Agency will attribute greater weight to Federal experience over commercial experience, or if the same weight will be attributable to Federal and commercial experience. This is especially important in phase 3 for offerors who have multiple relevant experiences. Without specifying, the Agency may arbitrarily attribute greater weight to one form of experience over another.

Second, the RFP fails to define what is meant by the term "project." It is not clear when determining the dollar value and number of experiences whether recompetes are separate projects or will recompete be evaluated as the same project. It is unclear if Task Orders on a single-award IDIQ or BPA may be aggregated as a single project or must be considered separate projects. Again, this is especially important in phase 3. Finally, the RFP fails to explain if subcontract experience under a Federal prime contract is categorized as Federal experience or is it commercial experience.

Here, allowing the procurement to proceed with "known-unknowns," as identified above by the failures to explain critical aspects of the evaluation process, will result in vastly different point scores, depending upon the interpretation selected by the Agency. This prevents offerors from submitting proposals on a level playing field and prevents the Agency from evaluating proposal evenhandedly against common requirements.

Third, the RFP contains a deviation to FAR 52.219-27, Notice of Service-Disabled Veteran-Owned Small Businesses. Attachment 1 at 67-69 (introduced in Amendment 7 and still present in Amendment 8). As presented, the clause appears to contain a typo that does not correspond to the intent of the FAR clause and greatly restricts the definition of an SDVO SB, contrary to the appliable SBA definition and requirements.

As written, the deviation improperly restricts the definition of a joint venture considered a SDVO SB. In the text of Amendment 7's reprinting of a portion of the deviation at subpart (c)(2), the deviation adds the word "and" after subpart (3). *Id.* at 68. This makes it a requirement that all elements (1) through (4) must be met for a concern to be considered an

[redacted]

SDVO SB. However, FAR 52.219-27 has a period "." after subclause (3), not the word "and." *See* https://www.acquisition.gov/far/52.219-27. The deviation improperly requires that a concern must meet all parts, (1) through (4), to be considered a SDVO SB. That is contrary to the definition in FAR 52.219-27 that only requires compliance with either subparts (1) and (4), or subparts (1) and (2) + (3). The Agency's proposed deviation changing the definition of a SDVO SB is not logical, reasonable, or consistent with FAR 52.219-27. In addition, the subpart cites to "13 CFR 125.15(b)" which is no longer in existence. It was moved to 13 C.F.R. § 125.18. The Agency should amend this deviation to properly reflect when a joint venture can be considered an SDVO SB.

Finally, Amendment 7 included language that was added at sections L.5.2.1, L.5.2.2, L.5.2.3, and L.5.2.4, which states that signatures will not be required to validate the self-scoring scorecards on attachment J.6, "if a printout from FPDS is provided." Attachment 1 at 157, 158, 160 (introduced in Amendment 7 and still present in Amendment 8). However, FPDS documents only validate that a contract was performed. FPDS documents do not validate scope of a project or accuracy of self-scoring scorecards. That is, FPDS documents only demonstrate or prove that a Federal prime contract exists and cannot be used as a substitute for a validation signature. In addition, allowing for validation of self-scoring scorecards with FPDS records treats prime and subcontractors disparately. If, for example, an offeror is proposing subcontract work and the prime contractor is a potential competitor who will not provide a signed/verification for attachment J.6, then the offeror with a subcontract cannot validate the points associated with that project on the scorecard. Yet, an offeror with a prime contract can simply validate its score card with FPDS records that, in reality, do not validate the scope of the work. Therefore, the language added by Amendment 7 (and that is still present in Amendment 8) – "if a printout from FPDS is provided" – treats subcontractors disparately and it not reasonable because FPDS records only show that a contract was awarded. An exception for FPDS records should not be allowed. The only fair and equitable way to verify a requirement identified in the attachment J.6 is by actual contractual documents.

* * *

The failures to plainly state the Agency's needs and to explain critical aspects of the evaluation create ambiguities in the solicitation that must be resolved so that offerors will be competing on a common basis. GAO has held that an ambiguity must be resolved before the due date and time for proposal submission so that offerors will be submitting proposals on a level playing field and so that the Agency will be evaluating proposals evenhandedly against common requirements. *See, e.g.*, *CRAssociates, Inc.*, B-282075.2-.3, Mar. 15, 2000, 2000 CPD ¶ 63 ("It is a fundamental principle of government procurement that the contracting agency must treat all offerors equally; it must evaluate offers evenhandedly against common requirements and evaluation criteria"); *Brican, Inc.*, B-402602, June 17, 2010, 2010 CPD ¶ 141 at 4 (holding all offerors must be treated equally, and proposals must be evaluated evenhandedly against the solicitation requirements and evaluation criteria) (citing *CRAssociates*, *supra*, at 5).

[redacted]

MDV is materially prejudiced by the ambiguities because they prevent MDV from competing on a level playing field with other offerors. The failure to clearly state the Agency's requirements demonstrates that the Agency is not procuring its actual minimum needs as required by CICA and the FAR. Specifying the requirements discussed here ensures that all potential contractors are submitting proposals on a level playing field and that the Agency will be able to meaningfully evaluate proposals. The Agency action is contrary to CICA and the FAR.

REQUEST FOR ISSUANCE OF PROTECTIVE ORDER

This protest includes MDV's proprietary information. The agency report required under 4 C.F.R. § 21.3 will also contain source selection sensitive and proprietary information. Accordingly, MDV requests that GAO issue a protective order. 4 C.F.R. § 21.4(a). MDV will separately file a redacted version of this filing for release to the public.

NOTICE TO CONTRACTING OFFICER

The contracting officials' contact information is as follows:

Rose Schultz, Procuring Contracting Officer
Brian K. Goodger, Contracting Officer
National Institutes of Health, Information Technology
Acquisition and Assessment Center (NITAAC)
6011 Executive Blvd., Suite 503
Rockville, MD 20892-7511
Tel: (888) 773-6542
Email: CIOSP4.NITAAC@nih.gov

Pursuant to 4 C.F.R. § 21.1(e), a copy of this protest is being furnished via email to Ms. Schultz and Mr. Goodger today through the email listed above.

REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to GAO bid protest regulations, 4 C.F.R. § 21.1(d), MDV requests that the Agency produce the following documents:

1. The RFP, including all amendments.

2. All questions received by NIH from any potential offeror concerning the Past Performance factor under the terms of the RFP.

3. All answers to questions received by NIH concerning the Past Performance factor.

[redacted]

4. Any internal documents concerning NIH's determination and reasoning to restrict submissions and references for the Past Performance factor as set forth in the Solicitation and Amendment 8.

5. All documents showing the relationship between NIH's limitations on submissions and references for relevant past performance to the Agency's actual minimum needs.

6. All documents related to the Agency's certification requirement at Section L.3.7.3.

7. All documents showing the Agency's weighting to be given to Federal versus commercial contract references.

8. All documents showing the Agency's interpretation of "project."

9. All documents showing whether the Agency will credit a subcontractor working under a Federal prime contract with experience on a Federal contract or will consider it a commercial experience example.

10. All documents showing the full text of the deviation for FAR 52.219-27 and any Agency justification and approval from SBA to deviate from the applicable laws and regulations.

11. The acquisition plan, the source selection plan, and all related documents.

12. All documents not already requested that are related to the protest grounds set forth in this letter.

13. List and describe any documents withheld by the Agency on grounds of privilege or any other ground.

Pursuant to 4 C.F.R. § 21.1(d)(2), the documents requested above are relevant because they relate to each ground of the protest and the factual background of this procurement. The documents being requested are relevant to MDV's protest grounds as set forth above.

The term "document" is used in its broadest sense and includes, without limitation, information contained in electronic storage, electronic mail, internal memoranda, notes, and all non-identical copies of all requested documents.

Pursuant to 4 C.F.R. § 21.3(c), the agency is required to identify all documents it intends to produce or withhold and provide a specific explanation as to why it is not required to produce each of the requested documents at least five days prior to the filing of the agency's report.

[redacted]

CONCLUSION AND REQUEST FOR RELIEF

MDV requests a ruling by the Comptroller General of the United States that the solicitation is contrary to the requirements of CICA and the FAR by failing to provide fair, full, and open competition. MDV requests that the GAO recommend NIH amend the Solicitation to address the issues raised in this protest and provide a Solicitation based on the Agency's actual needs.

MDV also requests a ruling that it is entitled to an award of protest costs, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d).

Respectfully submitted,

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DUNLAP BENNETT & LUDWIG PLLC

Attorneys for Mission Driven Ventures, LLP

Attachments: 1-2

cc: Rose Schultz, NIH Procuring Contracting Officer
Brian K. Goodger, NIH Contracting Officer