[redacted]

February 11, 2022

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 Summit Technologies, Inc
Solicitation No. 75N98121R00001
Award Suspension Required

Dear Sir or Madam:

Summit Technologies, Inc. ("Summit")[1] protests the overly 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 ("DHS").

I. Summary.

It is unreasonable and overly restrictive for the Solicitation to allow offerors in a mentor-protégé arrangement to increase their evaluate point totals based on higher FPDS obligated funds numbers, while not similarly allowing non mentor-protégé offerors to also update their FPDS numbers and thereby increase their point totals. The uneven restrictions (i.e. only allowing a subset of offerors to increase their point totals) in the Solicitation imposed by the implementation of Amendments 12 through 16 unnecessarily provides advantages for only certain offerors and creates ambiguity as to the Solicitation terms.

The effect of the amendments is to give an unreasonable advantage to offerors submitting offerors as part of a mentor-protégé arrangement by allowing these offerors to update their solicitations with more recent information, including revenues received over a longer period of time than other offerors, resulting in higher scores under the self-scoring system. GAO should

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

Summit Technologies, Inc.
430 New Park Avenue, Suite 201
Hartford, Connecticut 06106
(860) 570-0661

recommend that, due to the ambiguous and uneven permissions for proposal revisions, NIH allow all offerors to revise their offers to make the self-scoring system equitable for all offerors.

II. Summit is an interested party.

Summit is an interested party for purposes of filing and pursuing this protest because it is a bidder under the Solicitation, whose direct economic interest will be affected by the award or failure to award the contract. See 4 C.F.R. § 21.0(a)(1).

III. This protest is timely.

Because proposals are due under the Solicitation no later than 5:00 p.m. Eastern on February 11, 2022, 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, [redacted] believes that its resolution may involve discussions of its capabilities and intended response to the Solicitation. To protect this sensitive information, [redacted] 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 February 3, 2022. See Amendment 16.[2] The Solicitation is under NAICS code 541512. Id. at 128. It 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 sixteen times. Relevant to this Protest are Amendments 12 through 16.

Amendment 12, issued December 15, 2021, added guidance for offerors with a Mentor-Protégé Agreement ("MPA") to follow. See Amendment 12 at 152. Section L.5.2 limited the number of experience examples that a mentor, regardless of business size, could submit to a total of eight. Id. This was broken down in to two experience examples in each of the following categories: corporate experience, leading edge technology, federal multiple award experience, and Executive Order 13779 experience. Id. Protégés were only required to submit one experience example in any one category. Id. Only those offerors who submitted a proposal by the initial August 27, 2021, date were eligible to submit a revised proposal and proposal revision changes were limited to changes to sections L.5.2.1 through L.5.2.4 and corresponding sections of the self-scoring sheet. Id. At 139.

Amendment 13, issued January 11, 2022, removed the requirement of the J.6 Self-Scoring Sheet, and required all offerors to submit their offers through the iNsight application. See Amendment 13 at 152. In place of each offeror computing its score, offerors were to input the

[2] All references to Amendment [number] in this protest refer to the amended versions of the Solicitation.

information required, and iNsight would then "automatically calculate the total Self Score based on the offeror's data entry." Id. According to the Solicitation, this self-score is what will be used to determine whether an offeror advances to Phase II or is eliminated from the competition. Id. Section L.3.1.2 Submission Instructions, clearly states, "[o]fferors are required to submit their proposal, to include any revisions, using the web-based iNsight application, regardless of whether their proposals were substantively revised." Id. At 139. Further, Amendment 13 included the following language in section L.3.1:

> (c)(6) Offerors may continuously modify their self-scoring data and uploaded proposal files until such time as they submit self-scoring data and submit their proposal files. After submission of each component, no further modification is possible.

Id.

Amendment 14, issued January 14, 2022, required offerors to submit a completed J.6 Self Scoring Sheet for each experience example submitted. See Amendment 14 at 154-155. The Solicitation also included language indicating experience examples used could be updated to more recent experiences.

> The Government is not requiring new J.6 forms, new signatures, or new FPDS records for any experience examples that were originally submitted and are not changing. If there is a new experience example being submitted based on changes from Amendment 0012, that experience example would need a new J.6 along with a signature within one week of phase 2 notification. If an FPDS record is provided for the new experience example, then a signature is not required.

Id. at 155.

Amendment 15, issued January 27, 2022, removed the language from Section L.3.1 which Amendment 13 imposed. See Amendment 15 at 139.

Amendment 16, issued February 3, 2022, removed the requirement of submission through iNsight and the automatically calculated "self-score," and implemented the self-scoring sheet once again. See Amendment 16 at 139, 151. It also allowed those offerors who were revising their proposals due to the changes of sections L.5.2.1 though L.5.2.4, relating to the number of mentor and protégé experience examples permitted, to submit amendments via email. Id. at 139. Amendment 16 stated, for the various corporate experience examples:

> The Government is not requiring new J.6 forms, new signatures, or new FPDS records for any experience examples that were originally submitted and are not changing. If there is a new experience example being submitted based on changes from Amendment 0012, that experience example would need a new J.6 along with a signature within one week of phase 2 notification. If an FPDS record is provided for the new experience example, then a signature is not required.

Id. at 155, 157-59. This allowed MPA offerors only to submit updated proposals.

All other offerors who were not submitting changes in accordance with Amendment 12, were required to fill out attachment J.9 Amendments Acknowledgements and submit only the attachment via email. Id.

In addition to the advantages granted to mentor-protégé offerors, the Solicitation is ambiguous in terms of what period of time offerors are permitted to draw their recent past performance from. All amendments mentioned above state, "[t]o be recent, the past performance must have occurred within the last three years from the date the Solicitation was originally released (May 25, 2021)." See Amendment 16. p. 166.

This protest follows.

VI. Discussion.

This Solicitation allows offerors submitting bids under a mentor-protégé arrangement the benefit of including more recent work, and therefore increased contract values which can result in higher self-scores. Permitting those under mentor-protégé arrangements to include more recent experience will lead to an unfair advantage which unreasonably restricts competition because the self-score is the measure which determines whether an offeror moves to Phase II of the selection process. In addition to the unreasonably restrictive nature of the Solicitation, this Solicitation's provisions regarding past experience allowances are vague or otherwise ambiguous. GAO should recommend that NIH allow all offerors to revise their offers by submitting new J.6 forms, new signatures, and/or new FPDS records.

A. The CIO-SP4 Solicitation is unreasonably restrictive of competition.

The Solicitation bars non-MPA offerors from submitting updated proposals and FPDS records, thereby unreasonably restricting 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 (Comp. Gen. 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 as non-restrictive as possible and will require an agency to demonstrate, when challenged, why the restriction is necessary to meet its needs. Id.

1. The Solicitation unreasonably restricts offerors that are not part of a Mentor-Protégé Agreement.

Amendments 12 through 16 primarily affected offerors with an MPA, and as a result gave such offerors an advantage by allowing those offerors to include more recent experiences for calculation of their self-score. As mentioned before, the self-score is the mechanism by which the Agency will determine which offerors advance to Phase II of the selection process. See Amendment 13, p. 152. Allowing only one subset of offerors to update their bids is an unreasonable Solicitation term.

Amendment 12 added language to section 5.2 and its subsections by advising offerors submitting bids as part of an MPA on the number of experience examples both the mentor and the protégé are permitted to include. See Amendment 12, p. 152. Mentors may submit up to two experience examples in each of the four required categories, while protégés must submit at least one example in any one of the required categories. Id. Further, the Solicitation included the following language, "[a]ll proposal revision changes are limited to changes to sections L.5.2.1 through L.5.2.4 and corresponding sections of the self-scoring sheet." Id. At 139. The due date proposal revisions were due by was changed from August 27, 2021 to January 21, 2022. Id.

Because Amendment 12 limited changes to the amendment of section L.5.2.1 through L.5.2.4—and the only changes to those sections were applicable to offerors in a Mentor-Protégé Agreement—offerors in a Mentor-Protégé Agreement were permitted to include additional experience examples from the time period of August 27, 2021 to January 21, 2022. All other offerors were only permitted to include experience examples up until the initial August 27, 2021 submission date because they would not have changes to the applicable sections. The self-score that is calculated based on experience examples included in the offer is what the Agency will use to determine what offerors advance to Phase II. Id. at 151. This gave certain offerors a competitive advantage by their ability to include more recent experience examples, restricting full and open competition by all offerors, and in turn violated 41 U.S.C. § 3301(a) of the Competition in Contracting Act and unreasonable restricted competition.

With the implementation of Amendment 13, all offerors were required to submit their offers through iNsight. See Amendment 13 at 152. In the process of submitting offers through iNsight, offerors were instructed to input information regarding past work experience. Id. Along with the use of iNsight, offerors were permitted to "continuously modify their self-scoring data and uploaded proposal files until such time as they submit self-scoring data and submit their proposal files." Id. This language addition in Amendment 13 leveled the playing field as it permitted all offerors, not only those with Mentor-Protégé Agreements, to update their self-scoring data with more recent information. This change allowed Summit to increase their self-score by an

additional [redacted] based on more recent information taken from FPDS that reflected higher Action Obligations for examples submitted by Summit. See Declaration, ¶ 3-4 (Decl. or Exhibit A); Relevant Summit and Teaming Partner FPDS Reports (Exhibit B). The FPDS reports show the obligated value as of August 27, 2021, versus February 11, 2022. If allowed to submit the more recent FPDS report, the total obligated value would push these contract examples over the threshold and garner Summit an additional [redacted] on three different examples for a total of [redacted] on the self-score. Id. More specifically, one of Summit's corporate experiences based on the FPDS record available at that time which showed the contract obligated value at [redacted], while as of February 11, 2022 the total value of the contract would be over [redacted], increasing the points from [redacted] to [redacted] for this corporate experience. Id. This happened to Summit in [redacted] experience examples [redacted] through one FPDS example used for multiple categories and [redacted] example of a teaming partner) so the total impact is [redacted] additional points. Id.

Amendment 14 further indicated that all offerors were permitted to use more recent experience examples. The Amendment, in relevant part, stated if an offeror was including a new experience example in their offer, the offeror would be required to submit a new J.6 Self-Scoring Sheet within one week of Phase II notification, unless an FPDS record is provided for the new experience example. See. Amendment 14 at 155. FPDS records are continually updated with new contract information. If new FPDS records are permitted to validate work experience, logic would follow that recent work experience would be permitted for use in calculating the Self-Score. This maintained the level playing field created with Amendment 13 by allowing offerors both with and without an MPA to utilize more recent data.

Once Amendment 15 was released, language allowing revisions to self-scoring data up until submission for all offerors was removed and the submission date was again moved to February 11, 2022. See Amendment 15 at 138-139. Submissions were still required through iNsight, but no additional revisions were permitted once uploaded. Id.

Currently, Amendment 16 is the final amendment. The Cover Letter issued with Amendment 16 states the following:

> Amendment 0016 is now released, and all offerors fall into one of two categories:
>
> 1. Offerors that need to change their proposals due to the changes of sections L.5.2.1 through L.5.2.3 in accordance with Amendment 12; and
>
> 2. All other offerors who as of August 27, 2021, have submitted proposals.
>
> Offerors who already submitted their proposals as of August 27, 2021 are only required to sign attachment J.9 Acknowledgement of Amendments and email a copy to NITACC.

> Offerors who are providing a changed proposal in accordance with Amendment 0012 must email their entire proposal along with a signed copy of J.9 to NITACC.

See Amendment 16 Cover Letter. This information can also be found in Amendment 16 at pages 139 and 151.

Essentially, Amendment 16 did away with nearly all changes relevant to experience examples that occurred in Amendments 13 through 15. The manner of submission changed from iNsight to email. Id. at 139. Only those offerors affected by Amendment 12 (MPA offerors) were permitted to re-submit an entire offer. Id. All other offerors, meaning all offerors who are not competing under an MPA, are only permitted to submit a form J.9 Acknowledgement of Amendments. Id. Amendment 16 goes back to allowing offerors with a Mentor-Protégé Agreement a competitive advantage by their ability to include more recent experience examples. See id. at 151. These MPA offerors are allowed to include information on experience examples and contract revenue up until the current submission date of February 2, 2022. Offerors who submitted their proposals by the initial August 27, 2021 date are left with an offer including information regarding experience and contract revenue dating back nearly six months to August 27, 2021.

In the case of Summit, and no doubt many other offerors competing without a Mentor-Protégé Agreement, this takes away any competitive edge. If an offeror with a Mentor-Protégé Agreement has an additional 5.5 months of experience and revenue to include, it is probable that offeror will find itself in a higher bracket, thereby resulting in a higher score and greater likelihood of advancing to Phase II of the selection process. For Summit, this meant its score would drop [redacted] as compared to the score assigned under Amendment 13. See Exs A-B. With the implementation of Amendment 16, the Agency is back to unreasonably restricting full and open competition by all offerors in direct violation of 41 U.S.C. § 3301(a) of the Competition in Contracting Act.

NIH may attempt to justify its amendment by noting that GAO recommended that it change its Solicitation terms to alter how MPA offerors are allowed to submit experience. However, in making that change, NIH is not allowed to then prejudice all offerors by allowing MPA offerors a leg up based on increased contract values. To allow such an even revision means that MPA offerors are unreasonably granted a leg up on the competition. NIH cannot justify the uneven application of the ability to amend proposals.

B. The CIO-SP4 Solicitation is ambiguous in terms of past experience time period.

In addition to the unreasonable restriction of full and open competition discussed above, the Solicitation contains an ambiguous Solicitation term. 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 Solicitation ambiguities mean that the Solicitation lacks the minimum information needed for offerors to bid intelligently. Section L.5.7 of the Solicitation states, "[t]o be recent, past performance must have occurred within the last three years from the date the solicitation was originally released (May 25, 2021)." See Amendment 16 at 166. There is no further clarification as to what "must have occurred" means and could be taken multiple ways. This could be interpreted to mean that the offeror must have completed work on the contract, that the contract simply must have been awarded by that date, or any number of situations in between. Without further clarification, offerors are at a loss of how to proceed.

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 unreasonably allows certain offerors in an MPA to increase their point scores through revised proposals, while not similarly allowing other offerors to revise their proposals. It is also 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 and simply allow all offerors to submit new J.6 forms, new signatures, and, most importantly, new FPDS records. GAO should also grant Summit its attorneys' fees and costs and any other relief it deems appropriate.

Respectfully submitted,

Shane M. McCall
Nicole D. Pottroff
John L. Holtz
Kevin B. Wickliffe
Stephanie L. Ellis
KOPRINCE MCCALL POTTROFF, LLC
smccall@koprince.com
npottroff@koprince.com
jholtz@koprince.com
kwickliffe@koprince.com
sellis@koprince.com

Counsel for Summit Technologies, Inc.

Enclosures: Exhibits A-B

EXHIBITS A-B REDACTED IN THEIR ENTIRETY