

CIO-SP4 Solicitation Found Unduly Restrictive of Competition

Executive Summary

On November 23, 2021, the U.S. Government Accountability Office (GAO) sustained in part a protest challenging the requirements of the Chief Information Officer-Solutions and Partners (CIO-SP4) Request for Proposal (RFP) issued by the National Institutes of Health's (NIH) Information Technology Acquisition and Assessment Center (NITAAC). GAO agreed with the protester's argument that the RFP unduly restricted competition by limiting the number of experience examples that mentor-protégé joint venture (JV) offerors could submit from large business mentors—a limitation not applied to JVs with small business mentors.

There are several key takeaways for NIH and contractors concerning the future of the CIO-SP4 procurement:

Key Takeaways for NIH:

- NIH will need to decide whether to develop a new justification for the limitations in the CIO-SP4 RFP that it believes would withstand scrutiny by GAO. If it takes this course, then NIH may elect to retain the current version of the RFP and its contemplated timeline may continue as intended.
- Alternatively, NIH may choose to amend the RFP to either remove the limitations or to otherwise revise the evaluation criteria to level the playing field to address GAO's concerns. If NIH pursues this route, it is likely that it will follow GAO's recommendation to provide offerors with an opportunity to submit revised proposals.
- If NIH decides to amend the RFP, it will need to decide whether any subsequent changes could require the contracting officer to cancel the original solicitation and issue a new one pursuant to FAR 15.206(e).

Key Takeaways for Contractors:

- Contractors should be aware that there will likely be further delays in the evaluation and award of CIO-SP4.
- Contractors should be closely tracking any amendments to the RFP in the coming weeks.

Introduction

The CIO-SP4 procurement, which contemplates the award of 305 to 510 indefinite-delivery/indefinite-quantity governmentwide acquisition contracts (GWACs) (including 100 to 125 contracts to small businesses) for information technology services, has been fraught with issues. The acquisition has seen double-digit amendments with changed requirements, evaluation criteria, and due dates, and there have been 24 protests challenging the terms of the RFP. GAO's decision in [Computer World Services Corporation; CWS FMTI JV LLC, B-419956.18 et al.](#),

[Nov. 23, 2021](#) is the first to sustain a protester’s argument and signals further delays to the evaluation and award of CIO-SP4 contracts.

Summary of Decision

Phase 1 of the CIO-SP4 solicitation, like GSA’s OASIS and ASTRO procurements, required offerors to submit self-scoring sheets with points assigned based on experience and capabilities. The self-scoring criteria provide that offerors could claim points based on experience in the areas of corporate experience, leading edge technology, and federal multiplate-award contracts. Relevant to the protest, experience examples could be submitted by mentor-protégé joint venture members. However, the RFP limited large business mentors “to two examples for each task area” in corporate experience, and two of the three possible experience examples for leading edge technology experience and federal multiple award experience. No such limitation was in place for JVs with small business mentors. The RFP does not require a protégé to submit a minimum number of experience examples.

CWS FTMI, a mentor-protégé joint venture competing for one of the small business awards under CIO-SP4, challenged the limitations on large business mentor experience, arguing that the limitations (1) violate the Small Business Act and SBA regulations, (2) are unduly restrictive of competition, and (3) improperly treat mentor-protégé joint ventures with large business mentors differently than other similarly situated offerors. GAO made the following findings:

GAO Finding: The Solicitation Does Not Violate any SBA Statutes or Regulations

The protester first argued that the mentor experience limitation violated 13 C.F.R. § 125.8(e) which prohibits agencies from requiring “the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally” and requires agencies to permit mentor-protégé JVs to demonstrate experience “in the aggregate.” GAO invited SBA to provide its views on the protestors’ arguments concerning § 125.8(e). Citing the Federal Register notice for the most recent revision to the regulation in October 2020, SBA explained that agencies are permitted to require a protégé to submit some experience showing their ability to perform the work in a solicitation, but it’s unreasonable to require a protégé to have the same level of past performance and experience as its large business mentor. 85 Fed. Reg. 66146-66167-68, Oct. 16, 2020.

GAO, relying in part on the SBA’s invited comments, concluded the CIO-SP4 solicitation did “not impose on the protégé a requirement that is different than ‘other offerors generally,’ as the protégé was not necessarily required to submit any experience itself.” Instead, the RFP merely limited the number of examples a large business mentor could submit to two. Moreover, GAO found the solicitation requirements allowed for the evaluation of the JV “in the aggregate” as both members could provide examples, provided no more than 2 were from the large business mentor. GAO, therefore, found the limitations did not violate SBA regulations.

GAO Finding: The Limitations Are Unduly Restrictive of Competition

The protestor also argued that the limitations were unduly restrictive of competition. In response, NIH made two arguments. First, NIH pointed to the decision in *Ekagra Partners, LLC*, B-408685.18, Feb. 15, 2019, 2019 CPD ¶ 83, which concerned a procurement featuring the same type of limitations. There, GAO concluded that the restriction prohibiting the large business mentor from providing all of the examples for each experience category, and requiring the protégé to submit at least one example for each category, was reasonable because the agency properly explained the requirement was needed to ensure that the protégé demonstrated its ability to perform solicitation requirements. GAO, however, reasoned the same did not hold true for the CIO-SP4 solicitation because there is no requirement that the protégé submit any experience. Instead, there is only a limit on how much experience the large business mentor could submit. This, according to GAO, undermined any argument by NIH that the restriction would allow the agency to evaluate the protégé’s ability to perform, thus reasonably justifying its inclusion in the RFP.

Second, NIH argued that the limitation was reasonable “to avoid competitive disadvantage to small business firms that do not partner with large business mentors.” Citing the purpose of the SBA mentor-protégé joint venture program—to allow small business protégés to benefit from capabilities of mentor firms (regardless of the mentor size)—GAO found NIH’s argument unpersuasive. GAO, therefore, concluded that because NIH had failed to provide a reasonable basis for the RFP’s limitations on large business mentor experience, the solicitation was unduly restrictive of competition and sustained the protest on this basis.

GAO Finding: The Agency Does Not Reasonably Explain Why the Solicitation Treats Mentor-Protégé JVs Differently

Finally, the protestor argued the limitations were unreasonable because they treat mentor-protégé JVs with large business mentors unequally compared to JVs with small business mentors. NIH attempted to justify the restrictions by arguing the limitations avoid an unfair disadvantage for mentor-protégé JV offerors that do not have large business mentors. Again, citing the purpose of the SBA program, GAO found that NIH had not reasonably explained why it had the discretion to competitively disfavor mentor-protégé JVs with a large business mentor as compared to all other small business offerors or, in effect, favor mentor-protégé JVs with small business mentors over mentor-protégé JVs with large business mentors

GAO denied the other protest grounds brought by CWS FTMI.

Impact of Decision

This case indicates that further delays in the evaluation and award of CIO-SP4 should be expected. In its decision, GAO made two alternative recommendations to NIH—which recommendation the agency chooses to follow will dictate how the remainder of the procurement plays out. First, GAO recommended NIH reconsider the limitation on the experience that may be submitted by large business mentors and decide whether the agency can articulate a reasonable justification. If NIH develops a new justification and elects to retain the current version of the RFP, GAO recommends that the agency disclose the new justification for the limitations to the protestor. While it seems unlikely NIH will be able to develop a justification that would

withstand GAO's scrutiny, the CIO-SP4 procurement and its contemplated timeline may continue as intended if NIH does so. Notably, however, there is a high likelihood that any attempts by NIH to justify the limitations would invite further protests.

Alternatively, GAO recommended NIH "amend the solicitation to either remove the limitations, or to revise the evaluation criteria in a manner that treats offerors in an equal manner and is consistent with the provisions of 13 C.F.R. § 125.8(e)." If NIH pursues this route, GAO recommends providing offerors with an opportunity to submit revised proposals. Offerors should keep a close eye out for any amendments in the coming weeks.

It is also important to note that any subsequent changes NIH makes to the CIO-SP4 RFP could require the contracting officer to cancel the original solicitation and issue a new one, if a proposed amendment "is so substantial as to exceed what prospective offerors reasonably could have anticipated, so that additional sources likely would have submitted offers had the substance of the amendment been known to them." *See* FAR 15.206(e). If NIH were to decide this FAR provision would be implicated by amending the solicitation, the CIO-SP4 procurement may be yet further delayed.