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Decision

Matter of: McGoldrick Construction Services Corporation

File: B-419327

Date: January 15, 2021

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DIGEST

1. Protest challenging the agency's determination that consolidating its requirements was necessary and justified is denied where the agency concluded that the consolidation would result in benefits critical to the agency's mission success.
 2. Protest challenging solicitation provisions as unduly restrictive of competition is denied where the provisions are reasonably related to the agency's requirements.
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DECISION

McGoldrick Construction Services Corporation, a small business of San Antonio, Texas, challenges the terms of request for proposals (RFP) No. W9126G20R0051, issued by the Department of the Army, United States Army Corps of Engineers (USACE) for vertical construction services. The protester contends that the solicitation is an inappropriate consolidation of several existing requirements, and is additionally unduly restrictive of competition.

We deny the protest.

BACKGROUND

The RFP is a 100 percent small business set-aside, and contemplates the award of five indefinite-delivery, indefinite-quantity (IDIQ) contracts for fixed-price vertical construction in Texas, Oklahoma, Louisiana, Arkansas, and New Mexico. Contracting Officer's Statement (COS) at 1-2. Previously, USACE maintained several separate contract vehicles for vertical construction in these states, and this RFP is one of several solicitations that the agency is pursuing to consolidate those previously separate

requirements.¹ Agency Report (AR), Tab 15, Consolidation Memorandum at 5. For example, prior to the issuance of this solicitation, the agency procured its vertical construction requirements, in part, through four multiple-award IDIQ contracts, with a total of 23 awardees. *Id.*

Because the current RFP consolidates multiple construction requirements at differing locations, the agency conducted market research and documented its determination that the consolidation was necessary and justified in accordance with Federal Acquisition Regulation (FAR) 7.107-2. *Id.* at 1 (*citing* FAR 2.101 and 7.107-2(a)). Specifically, the agency conducted market research by issuing two sources sought notices and conducting searches of relevant small business databases. *Id.* at 7-10. Relevant to this protest, the agency's market research, in total, found hundreds of small businesses with single project bonding capacity in excess of \$8 million. *Id.* Focusing on firms capable of performing higher dollar value projects from that initial pool, the market research found 106 potentially capable small businesses with an average single project bonding capacity of \$30 million and an average aggregate bonding capacity of \$136 million. AR, Tab 15, Consolidation Memorandum at 7-10. On the basis of this market research and the relevant small business size standard of \$39.5 million, the agency concluded that projects with expected values below \$30 million would be suitable to be set aside for small business concerns. *Id.*

The agency then prepared a written memorandum documenting the agency's market research, its rationale for consolidating these requirements, and the agency's determination and findings that the consolidation was necessary and justified. *See Id. generally.* This memorandum included a discussion of alternative contracting approaches and the impact of contract consolidation on small businesses. *Id.* at 11-18. The agency considered three alternatives: (1) procuring each construction project as a separate contract; (2) issuing four multiple award IDIQs covering smaller geographic regions; and (3) issuing a single IDIQ covering the entire region. *Id.* at 11-18. The agency's analysis concluded that, while the consolidation into a single regional IDIQ would only yield small reductions in time and cost when compared to four smaller multiple award IDIQs, the single regional IDIQ option would provide various efficiencies and flexibilities, which were critical to the agency's ability to accomplish its mission. AR, Tab 15, Consolidation Memorandum at 18.

On January 10, 2020, the Deputy Assistant Secretary of the Army (Procurement) signed the determination and findings that the agency's consolidation was necessary and justified as required by FAR 7.107-2. *Id.* at 25. Additionally, the agency provided its consolidation memorandum to the Small Business Administration (SBA) for review and consulted with SBA in developing the terms of the solicitation. *See* AR, Tab 15,

¹ As part of its consolidation, the agency has additionally planned other multiple award IDIQs for vertical construction on an unrestricted basis and as set-asides for specific small business categories, such as woman-owned small businesses and service-disabled veteran-owned small businesses. COS at 1. These other procurements are not at issue in this protest.

Consolidation Memorandum at 22; COS at 6. The SBA concurred with the agency's approach. *Id.*

On September 17, 2020, the agency issued the RFP. COS at 1. The RFP contemplated the award of five contracts, with an estimated overall capacity of \$620,140,000 for all contracts and task orders. AR, Tab 5, RFP at 4. Further, the RFP noted that individual task orders would range between \$75,000 and \$30,000,000. *Id.* Additionally, the solicitation provided for a two-phase evaluation. *Id.* at 4-5.

In the first phase, offerors would be evaluated on the basis of three evaluation criteria: (1) past performance; (2) organization and technical approach; and (3) IDIQ capability. *Id.* at 5. Relevant to this protest, the RFP provided that past performance would be evaluated for relevance, and that relevant past performance was defined as, among other things, demonstrated experience with projects in each of three project value ranges: \$1 million to \$10 million; \$10 million to \$20 million; and \$20 million to \$30 million. RFP at 9. Further, the RFP notes that, among other factors, past performance with project values between \$20 million and \$30 million may be considered more relevant. *Id.*

The solicitation also provided that the agency would assess an offeror's IDIQ capacity by evaluating bond capacity. *Id.* at 15-16. Specifically, offerors must show evidence of \$30 million bond capacity for a single project, and at least \$60 million aggregate capacity to support concurrent projects. *Id.* Offerors not able to meet the bonding requirements would be rated as unacceptable for the IDIQ capacity factor. *Id.*

Phase one offers were due on October 22, 2020, and the agency received 36 offers in response, including one from the protester. COS at 1, 9. McGoldrick filed this protest of the solicitation prior to the closing date for receipt of proposals.

DISCUSSION

The protester challenges the solicitation as unreasonable and unduly restrictive of competition in several respects. Primarily, the protester contends that the agency's decision to consolidate the requirements was unreasonable because the benefits the agency cited in justifying the consolidation decision were illusory or not logically supportable. Comments at 2-12. Moreover, the protester argues that the consolidation was also flawed because the agency failed to consider other viable and reasonable options. *Id.* at 13-14. Finally, the protester argues that several other aspects of the solicitation are unreasonable and unduly restrictive of competition, including the agency's decision to limit the number of awards to five, the bonding requirements, and the past performance evaluation criteria. *Id.* at 14-26. We address these arguments in turn.

Consolidation

The protester objects to the agency's consolidation decision in several respects.² First the protester argues that the agency's determination that the consolidation was necessary and justified was flawed and does not meet the requirements of section 7.107-2 of the FAR. Comments at 2-12. Specifically, the protester contends that the agency's justification explaining why the consolidation was critical to the agency's mission success was irrational, and did not provide for the maximum practicable participation by small business. *Id.* Additionally, the protester contends that, while the agency considered some alternatives to consolidation as required by section 7.107-2 of the FAR, the agency's analysis failed to consider procuring separate multiple award IDIQs based on the anticipated value of task orders, which was a viable alternative to the proposed consolidation. *Id.* at 13-14.

Relevant here, section 7.107-2 of the FAR implements the requirements of the Small Business Jobs Act of 2010 (SB Jobs Act), Pub. L. No. 111-240, 124 Stat. 2504 (2010) (codified at 15 U.S.C. § 657q), which requires agencies to consider the effect on small businesses of the consolidation³ of certain agency contract requirements over \$2 million. FAR 7.107-2(a); 15 U.S.C. § 657q(c). Specifically, prior to issuing a solicitation that involves the consolidation of contract requirements, section 7.107-2 requires agencies to: conduct market research; identify alternative contracting approaches that would involve a lesser degree of consolidation; assess and identify the impact of

² The protester raises other collateral arguments that are not addressed in this decision. While we do not address all the protester's arguments in this decision, we have considered them and conclude that they provide no basis to sustain the protest. For example, the protester challenges the agency's determinations that its proposed consolidation approach would result in cost and personnel time savings when compared to other alternatives. Comments at 2-5. However, while the consolidation memorandum discusses cost and personnel time savings, the agency does not argue that those cost and time savings justify its consolidation decision. See AR, Tab 15, Consolidation Memorandum at 22-23; MOL at 6 ("While there are still reduction[s] of administrative/time and personnel costs with the selected method over the four districts [IDIQ] alternative, the Agency did not rely on such savings in the selection of the regional [IDIQ] model."). Rather, the contemporaneous record and the agency's pleadings are clear that the agency's consolidation decision is predicated on other efficiency and flexibility benefits that are critical to accomplishing the agency's mission rather than cost and personnel time savings, so we need not address the protester's arguments concerning those issues. *Id.*

³ In this context, consolidation means the use of a solicitation to obtain offers for a single contract or a multiple award contract: (1) to satisfy 2 or more requirements for goods or services that have been provided to or performed under 2 or more separate contracts lower in cost than the total cost of the contract for which the offers are solicited; or (2) to satisfy requirements for construction projects to be performed at 2 or more discrete sites. FAR 2.101; see also 15 U.S.C. § 657q(a).

contract consolidation on small businesses; and make a written determination that the consolidation is “necessary and justified” in accordance with 15 U.S.C. § 657q. *Id.* Further, section 7.107-2 explains that an agency may conclude that these requirements are necessary and justified if: (1) the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternatives identified; or (2) the expected benefits are critical to the agency’s mission success and the procurement strategy provides for maximum practicable participation by small business. FAR 7.107-2(b), (e).

Our Office has addressed the bundling or consolidation of contract requirements with regard to the requirements of the SB Jobs Act, as well as the Small Business Act, 15 U.S.C. § 631(j)(3), and the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 3306(a)(2)(B). See *InSap Services, Inc.*, B-417596.2; B-417596.3, Sept. 23, 2019, 2019 CPD ¶ 343 at 4-5; *American Toner & Ink, et al.*, B-409528.7, *et al.*, June 9, 2014, 2014 CPD ¶ 161 at 7-9. Because bundled or consolidated procurements combine separate and multiple requirements into one contract, they have the potential for restricting competition by excluding firms that furnish only a portion of the requirement; we therefore review challenges to such solicitations to determine whether the approach is reasonably required to satisfy the agency’s needs.⁴ *2B Brokers et al.*, B-298651, Nov. 27, 2006, 2006 CPD ¶ 178 at 9. Additionally, our inquiry concerning the consolidation requirements of the SB Jobs Act of 2010, which section 7.107-2 of the FAR implements, is similar to the inquiries set forth in our prior decisions concerning consolidation or bundling under the Small Business Act and CICA.⁵ See *American Toner & Ink, et al.*, *supra* at 7. Specifically, we will look to whether an agency has

⁴ While this procurement is a consolidation subject to the requirements of section 7.107-2 of the FAR, the procurement does not constitute “bundling” subject to the requirements of section 7.107-3 of the FAR. The FAR defines “bundling” as a “subset of consolidation that combines two or more requirements for supplies or services, previously provided or performed under separate smaller contracts [. . .], into a solicitation for a single contract, a multiple-award contract, or a task or delivery order *that is likely to be unsuitable for award to a small business concern*[. . .]” FAR 2.101 (emphasis supplied). This procurement is a 100 percent small business set-aside, which means that the agency’s procurement strategy has, by definition, not rendered the requirement unsuitable for award to a small business concern. See AR, Tab 15, Consolidation Memorandum at 21; see also *Phoenix Scientific Corp.*, B-286817, Feb. 22, 2001, 2001 CPD ¶ 24 at 7-8 (similar statutory bundling provisions do not apply where the consolidated requirements are not “unsuitable for award to a small business concern”).

⁵ The Small Business Act, as amended in relevant part, states that, “to the maximum extent practicable,” each agency shall “avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors.” 15 U.S.C. § 631(j)(3). CICA contains a similar limitation on unnecessary consolidation of agency requirements. We have concluded that an agency’s compliance with the Small Business Act requirements may constitute compliance with the similar CICA requirements. See *Nautical Eng’g Inc.*, B-309955, Nov. 7, 2007, 2007 CPD ¶ 204 at 13-14.

conducted market research, and has reasonably found that the consolidation is “necessary and justified.” *Id.* (citing 15 U.S.C. § 657q(c)(2)).

Benefits of Consolidation

First, the protester contends that the agency’s justification explaining why the consolidation was critical to the agency’s mission success was irrational, and the benefits the agency identified were nonsensical or illusory. Comments at 2-12. Here, the agency concluded that consolidation was critical to the agency’s mission success primarily on the basis of two categories of benefits of the proposed consolidation.

First, the agency concluded that the consolidation would provide efficiency benefits. See AR, Tab 15, Consolidation Memorandum at 15. Specifically, the agency noted that a smaller number of contract awardees would be more efficient because: (1) the vertical construction market in the region is constrained by a limited pool of skilled labor and local suppliers, and (2) the efficiency and performance of construction contractors tends to improve over the course of the IDIQ as the contractors become more familiar with the agency’s processes. *Id.*

Second, and more significantly, the agency noted that its construction requirements are not static over time and the locations and costs of planned construction are uncertain. *Id.* at 18. This led to inefficiencies in the use of smaller IDIQ pools: some were overutilized and exhausted before their expiration, while others were underutilized resulting in contract-holders receiving substantially less work than expected. See, e.g., *Id.* at 5. As a result, the agency was concerned that pursuing an approach with four separate multiple award regional IDIQs for this procurement could result in a misalignment of capacity that would prevent the agency from rapidly addressing various urgent military construction needs. *Id.* at 18-20; Memorandum of Law (MOL) at 6.

In response, the protester contends that the agency’s justifications for the consolidation--efficiency and flexibility--are irrational, especially when compared to the alternative of four regional IDIQ pools. Comments at 5-12. First, the protester argues that the agency’s conclusion that a smaller pool of contractors would provide efficiencies by placing a smaller burden on construction capacity is flawed. *Id.* Specifically, the protester speculates, without evidence, that it is the volume of construction work that places a burden on the labor and supply pools, not the number of contractors performing the work. *Id.* The protester posits that the consolidated contract would have the same total project volume as the hypothetical four smaller regional pools, and so this benefit is illusory. *Id.*

We do not agree. While the total volume of construction work is likely to be a driver of the load on the local work force and supply chain, the agency’s conclusion that a larger number of contractors administering the same work could place a larger burden on construction capacity is not irrational. That is to say, 20 contractors directing the same quantity of work could present greater opportunities for scheduling conflicts or supply

chain delays than 5 contractors, due to a lack of coordination between those contractors.

Similarly, the protester contends that the agency's concerns about misaligned capacity on smaller regional multiple award IDIQs are also irrational. Comments at 5-12. For example, the protester argues that the agency is concerned that five contractors on a smaller regional multiple award IDIQ may not be able to handle the higher load if the agency underestimates its work requirements in that region. *Id.* However, that problem is only exacerbated by consolidating the entire requirement into a single IDIQ pool with only five contractors for all four regions. *Id.* Likewise, the protester argues that there is no harm if a smaller regional multiple award IDIQs' workload was underestimated because the minimum contract guarantees are small enough that they would certainly be met. *Id.*

Here, the protester appears to misunderstand the agency's concerns. The consolidation memorandum made clear that the issue was neither that the underestimation of regional requirements would lead to overwhelmed contractors nor that overestimated requirements would leave the agency unable to meet the contractual minimums. Rather, the agency made clear that its construction requirements can be uncertain and that construction sometimes occurs in locations other than initially anticipated. AR, Tab 15, Consolidation Memorandum at 18; MOL at 6. As a result, the agency was at risk of underestimating the workload for some regions, which would reach their contractual maximums earlier than expected and leave the agency unable to swiftly meet planned and emerging military requirements in those regions.⁶ *Id.* Similarly, the agency was also at risk of overestimating the workload for other regions leading to waste of significant capacity in those regions. *Id.* The agency was additionally concerned that contractors receiving award under regional multiple award IDIQs with overestimated workloads would be dissatisfied and uninterested in competing for agency procurements in the future. *Id.* Because the protester has not advanced arguments to challenge the agency's actual concerns in this regard, we have no basis to find the agency's justifications unreasonable.

In the alternative, the protester argues that the agency has not demonstrated that these benefits are critical to the agency's mission success or that the procurement strategy provides for maximum practicable participation by small businesses. Comments at 5-12. In this regard, the protester notes the FAR provides that reduction of administrative or personnel costs alone is not sufficient justification for consolidation unless they result in cost savings more significant than the agency anticipates here, and that the agency's anticipated benefits are effectively matters of administrative convenience. *Id.* Further, the protester maintains that four regional pools of multiple award IDIQs would allow for award to 20 small business concerns, which would permit

⁶ For example, the agency notes this IDIQ will provide construction services for several expanding major military medical centers, as well as major military hubs at Fort Hood, Fort Bliss, and Fort Sam Houston. MOL at 7.

significantly greater competition among small businesses than the 5 awards anticipated under this procurement. *Id.*

These arguments are likewise without merit. Here, the benefits the agency relies on are not appropriately characterized as reduced administrative or personnel costs. Rather, they relate to the agency's ability to efficiently and quickly adapt to changing mission requirements and reduce potential construction delays. We cannot conclude, on the record before us, that the agency's determination that these benefits were critical to mission success was clearly unreasonable or otherwise inconsistent with the requirements of section 7.107-2 of the FAR.

Furthermore, we reject the protester's contention that the agency erred in concluding that this procurement provided for maximum small business participation. In the protester's view, four regional pools of multiple award IDIQs would provide for greater small business competition. In reaching our conclusion rejecting the protester's contention, we note that maximizing the number of small business awards is not what the FAR requires; rather, the agency must determine that its chosen procurement strategy provides for "maximum practicable participation by small business." FAR 7.107-2(e)(1)(ii). Relevant here, 15 U.S.C. § 657q, which section 7.107-2 of the FAR implements, provides, as a statement of policy, that agency heads "shall ensure that the decisions made by the Federal agency regarding consolidation of contract requirements of the Federal agency are made with a view to providing small business concerns with appropriate opportunities to participate as prime contractors and subcontractors in the procurements of the Federal agency." This language suggests that participation in this context means that small businesses will have appropriate opportunities to compete as prime contractors or subcontractors in the procurement.

As noted above, the protester has not challenged the agency's planned unrestricted procurement for vertical construction projects valued over \$30 million. Rather the protester only challenges the structure and number of awards planned under this procurement, which is a 100 percent small business set-aside. On the record before us, the agency was reasonable in concluding that a 100 percent small business set-aside provided for the maximum practicable participation by small business,⁷ especially when, as here, the agency coordinated its consolidation strategy with the SBA and the SBA agreed with the agency's approach. See AR, Tab 15, Consolidation Memorandum at 22; COS at 6.

⁷ In support of its protest, McGoldrick relies on our decisions in *EDP Enters., Inc.*, B-284533.6, May 19, 2003, 2003 CPD ¶ 93, and *Airport Markings of America, Inc., et al.*, B-238490, *et al.*, June 8, 1990, 90-1 CPD ¶ 543, where we sustained protests because an agency inappropriately consolidated requirements. See, *EDP Enters. Inc., supra* at 7-8; *Airport Markings of America, Inc., et al., supra* at 3. In those cases, however, we concluded that the agency had failed to articulate any valid reason for consolidating requirements. *Id.* Here, as discussed above, the agency has contemporaneously documented several rational benefits of its proposed regional consolidation.

Other Alternatives

The protester also notes that section 7.107-2 of the FAR requires that agency consolidation determinations ensure that “[a]ny alternative contracting approaches that would involve a lesser degree of consolidation have been identified.” According to the protester, the agency’s analysis failed to consider the alternative approach of procuring three separate smaller IDIQ pools based on the anticipated value of task orders. Comments at 12-14. For example, the protester contends that the agency could have solicited for separate pools of multiple-award IDIQs for projects with anticipated values between: (1) \$75,000 and \$10 million; (2) \$10 million and \$20 million; and (3) \$20 million and \$30 million. *Id.* This approach, the protester maintains, would have provided for a larger number of small business awards and more suitable opportunities for small businesses with lower bond capacity. *Id.*

Preliminarily, it is not clear that the FAR’s requirement that agencies identify alternatives that would result in a lesser degree of consolidation requires an agency to identify and reject *all* conceivable alternatives, regardless of their practicality or suitability. In this regard, the record reflects that, while the RFP contemplates a wide range of possible project sizes, the agency anticipates, as part of its comprehensive consolidation strategy, that the majority of its smaller dollar value construction projects will be set aside for other small business categories under other ongoing procurements. MOL at 2-3; 11. By contrast, this small business set-aside is primarily focused on larger dollar value construction projects with an average project cost of \$15 million, which suggests that further dividing the requirements by dollar value in the way the protester describes would be impractical. *Id.* Accordingly, it is not clear that the agency erred by failing to consider the approach identified by the protester.

Alternatively, while the protester is correct that the agency’s contemporaneous analysis did not address awarding multiple IDIQ pools divided in the way the protester identified, the agency’s analysis addressed awarding multiple IDIQ pools as an alternative, as discussed above. Specifically, the agency’s analysis compared awarding several smaller pools of multiple award IDIQs rather than a single larger pool of IDIQs, and concluded that the approach of awarding a single larger pool of IDIQs presented significant efficiency and flexibility benefits over several smaller pools of IDIQs. See AR, Tab 15, Consolidation Memorandum at 5, 15-20. While the agency’s analysis focused on dividing the requirement on a regional basis, and did not specifically consider dividing the requirement on the basis of price ranges, the benefits the agency identified appear to apply with equal force to the protester’s suggested alternative. *Id.* That is to say, the award of additional IDIQ pools divided by price range would still potentially place greater strain on a limited supply of labor and supplies, and could also lead to misaligned contract capacities.

Number of awards

The protester additionally alleges that the agency's decision to target five awards for this procurement is irrational and inconsistent with section 16.504(c) of the FAR. Comments at 14-19. The protester notes that, historically, the agency's requirements were distributed across four pools of IDIQs, each with five awardees. *Id.* As a result, the consolidation will reduce the number of awardees eligible to perform the work from 20 to 5. *Id.* Because the overall value of the work remains similar, the work value per contractor will increase by more than threefold. *Id.* The protester maintains that the agency did not adequately consider the additional burden this might place on contractors or the effect of having significantly fewer awardees would have on competitive pricing. *Id.*

Section 16.504(c) of the FAR requires contracting officers to consider several factors when determining the number of awards, including the scope and complexity of the contract requirement and the ability to maintain competition among awardees throughout the contract's period of performance. The agency responds that it addressed those requirements by undertaking a careful analysis before determining the optimal number of contractors, considering, among other things, market research findings, efficiency during task order source selection, and procurement history. COS at 9-10. The agency notes that it has historically targeted five awards for its vertical construction multiple award IDIQs, because the agency's experience has been that fewer awards provided for insufficient competition, and more awards hindered efficiency. *Id.*

Specifically, with respect to efficiency, the agency notes that a significant portion of the work under this requirement will be two-phase design-build work, and that the FAR provisions governing two-phase design-build selection procedures provide that ordinarily, unless the agency makes a special determination, the maximum number of offerors selected for phase two of design-build selection procedures is five. *Id.* (citing FAR 36.303-1). This is particularly relevant because the agency intends to use the IDIQ award as the first phase in the two-phase design-build process, and making five awards will allow the agency to start every design-build task order at phase two, which the government estimates will generate 60 to 90 days of time savings per design-build task order. *Id.* Accordingly, the contracting officer concluded that five awards would strike an appropriate balance between competition and efficiency. *Id.*

The protester responds that the agency did not contemporaneously document any analysis on this point, and if the agency is in fact concerned about the provisions of section 36.303-1 of the FAR the agency could have split these IDIQs into two pools of IDIQs, one for design-build requirements and one for other construction requirements. Comments at 14-19. We do not agree that the agency did not document the factors supporting its decision to make five contract awards. For example, the contemporaneous record clearly reflects that the agency considered how the scope and complexity of the work would interact with the number of awards in structuring the

procurement.⁸ Even setting that aside, the agency's *post hoc* explanation of its decision to make five awards is reasonable and consistent with the contemporaneous record, and with the FAR's requirements. We see no basis to object to the agency's decision to make five contract awards in this procurement. See *Sevatec, Inc., et al.*, B-413559.3, et al., Jan. 11, 2017, 2017 CPD ¶ 3 at 9. While the protester may prefer that the agency take a different approach, such disagreement does not support a conclusion that the agency's decision was unreasonable.

Bonding requirements

The protester also alleges that the bonding requirements of the solicitation are unduly restrictive of competition. Comments at 19-26. The protester notes that, while the agency requires offerors to demonstrate a \$30 million single project bond capacity, the agency anticipates that projects will range from \$75,000 to \$30,000,000 and that the average project value will be only \$15 million.⁹ *Id.* It is unduly restrictive of competition, the protester contends, to require all offerors to demonstrate bonding capacity that is significantly higher than will be required for the majority of the work under the IDIQ. *Id.*

Furthermore, the protester argues that the agency's requirement for aggregate bonding capacity of \$60 million does not reflect the agency's actual needs, but rather is an artificial result of the agency's decision to award to only five offerors. *Id.* That is to say, the agency's decision to require \$60 million aggregate bonding capacity per offeror was based on the agency's estimate of the amount of simultaneous work to be performed across the entire multiple award IDIQ divided among five offerors. *Id.* Had the agency chosen to make award to more offerors, the aggregate bonding requirement would have been reduced. Comments at 19-26. Accordingly, the protester contends that the aggregate bonding requirement is also unreasonable and unduly restrictive of competition. *Id.*

The determination of the government's needs and the best method of accommodating them is primarily the responsibility of the procuring agency. *Columbia Imaging, Inc.*, B-286772.2, B-287363, Apr. 13, 2001, 2001 CPD ¶ 78 at 2. Our Office will not sustain a protest challenging an agency's determination of its needs unless the protester presents

⁸ For example, the record reflects that the agency considered the rate, quantity, and scope of task order awards that would be allocated among five awardees in its decision to lower the aggregate bond requirement to \$60 million from \$90 million. See AR, TAB 5, Amendment 0002 to RFP; COS at 5-6.

⁹ In its pleadings, the protester vacillates between claiming that the agency anticipates the average project value will be \$8 million and \$15 million. Compare Comments at 26 ("the Agency itself admits that the average size of the project would be \$8 million") with Comments at 20 ("[i]n other words, the Agency recognizes that the average task order will be valued at \$15 million"). While the agency's market research initially looked for firms with bonding capacities in excess of \$8 million, the agency has been clear that the average anticipated project value under this IDIQ is \$15 million. See COS at 6, 12.

clear and convincing evidence that the specifications are in fact impossible to meet or unduly restrict competition. *Instrument Control Services, Inc.; Science & Management Resources, Inc.*, B-289660, B-289660.2, Apr. 15, 2002, 2002 CPD ¶ 66 at 6. To the extent a protester challenges a specification as unduly restrictive, that is, challenges both the restrictive nature of the requirement as well as the agency's need for the restriction, the procuring agency has the responsibility of establishing that the specification is reasonably necessary to meet its needs. *Smith and Nephew, Inc.*, B-410453, Jan. 2, 2015, 2015 CPD ¶ 90 at 5. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether it can withstand logical scrutiny. *Id.*

Preliminarily, the protester appears to misunderstand our decisions with respect to solicitation requirements that are unduly restrictive of competition. While it is true that we have sustained protests of solicitation requirements that restrict competition and are not reasonably related to the agency's needs, in those cases the solicitation requirements generally restricted competition by preventing the protester from competing. See, e.g., *Pitney Bowes, Inc.*, B-413876.2, Feb 13, 2017, 2017 CPD ¶ 56.

In this case, the protester has not suggested that it cannot meet the bonding requirement, and has, in fact, submitted an offer under the existing RFP. Comments at 25-26. In this regard, the protester only contends that it and other unnamed small businesses may "have difficulty" meeting the requirement, but has pointedly avoided suggesting that it cannot meet the requirement. See *Id.* at 25. Accordingly, because the protester clearly believed it was able to make a responsive offer to the RFP as written and has not argued to the contrary, the protester has not demonstrated competitive prejudice with respect to the bonding requirement.

Competitive prejudice is an essential element of every viable protest, and, where a prospective offeror has not shown competitive prejudice stemming from a solicitation provision, the offeror is not an interested party to challenge that provision. See *DNC Parks & Resorts at Yosemite, Inc.*, B-410998, April 14, 2015, 2015 CPD ¶ 127 at 12-13 (concluding that an offeror that did not demonstrate that it was competitively prejudiced by a solicitation provision was not an interested party to challenge that provision); see also *Government & Military Certification Sys., Inc.*, B-409420, Apr. 2, 2014, 2014 CPD ¶ 116 at 4 (concluding that a prospective offeror generally is not an interested party to challenge a specification as unduly restrictive in cases where it can meet the requirement, because its economic interests are not prejudiced). Here, the protester has submitted a proposal and has not otherwise alleged or demonstrated that it is unable to compete.

However, even disregarding the fact that the protester has not demonstrated competitive prejudice with respect to the bonding restriction, this protest ground is also substantively without merit. The agency has indicated that the average project size will be \$15 million, but the nature of an average is that some number of the anticipated projects will be in excess of \$15 million. Indeed, the agency's forecasted requirements include several projects in excess of \$20 million, and the IDIQ's maximum single project size is \$30 million. See AR, Tab 15, Consolidation Memorandum at 3-5. The single

project bonding requirement is therefore directly and reasonably related to the agency's requirements.¹⁰

Moreover, the agency was also clear that this effort would require contractors to undertake some number of simultaneous projects. See COS 5-6. The agency's projected requirements contemplate between 16 and 35 projects per year, and the agency reasonably concluded that this project volume will require some level of concurrent work. See AR, Tab 15, Consolidation Memorandum at 3-4. Here, the aggregate bonding requirement of \$60 million¹¹ is double the maximum single project size under the contract. That is to say, this aggregate capacity would narrowly permit an offeror to undertake two of the largest projects simultaneously, or multiple smaller projects. Accordingly, this provision also appears reasonably related to the agency's requirements.

Past Performance

Finally, the protester argues that the RFP's past performance evaluation criteria are also unduly restrictive of competition. Comments at 19-26. Specifically, the protester notes that the agency anticipates that projects will range from \$75,000 to \$30,000,000 and that the average project value will be only \$15 million. *Id.* The protester contends that the fact that the RFP defines relevant past performance as, among other things, demonstrating experience with projects valued between \$20 million and \$30 million is unduly restrictive of competition because it effectively excludes a significant number of small businesses who could nonetheless perform many of the projects anticipated under this IDIQ. *Id.* Furthermore, the fact that the RFP also provides that additional consideration may be given for firms that can demonstrate three or more projects worth more than \$20 million only reinforces this disadvantage. *Id.* Accordingly, the protester contends that the evaluation criteria are unduly restrictive of competition.

As noted above, to the extent a protester challenges a specification as unduly restrictive, that is, challenges both the restrictive nature of the requirement as well as the agency's need for the restriction, the procuring agency has the responsibility of establishing that the specification is reasonably necessary to meet its needs. *Smith and*

¹⁰ As an aside, the agency's market research revealed hundreds of small businesses with bonding capacity in excess of \$8 million, and, from that larger pool, the agency identified 106 small businesses with an average single project bonding capacity of \$30 million and an average aggregate bonding capacity of \$136 million. AR, Tab 15, Consolidation Memorandum at 7-10. While the protester contends that the agency's market research was flawed in several respects, the agency nonetheless received 36 proposals in response to the solicitation. COS at 13.

¹¹ We note that the solicitation originally required a \$90 million aggregate bonding capacity, which the agency reduced to \$60 million as it anticipated that contractors with that smaller aggregate bonding capacity could still meet the agency's needs for concurrent projects. COS at 5-6.

Nephew, Inc., supra. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether it can withstand logical scrutiny. *Id.*

This protest ground is also without merit. Preliminarily, we note that the solicitation does not provide that offerors who lack experience with construction projects in excess of \$20 million will be ineligible for award. See RFP at 9; COS at 11. Rather, the solicitation merely provides that the past performance of offerors who can show experience with projects of all sizes will be considered more relevant, and that offerors who can show substantial experience with larger projects will receive additional consideration. *Id.*

Furthermore, as discussed above, the solicitation contemplates task order projects with values of up to \$30 million, and the agency's projected requirements identify several specific projects in excess of \$20 million. See AR, Tab 15, Consolidation Memorandum at 3-5. It is entirely reasonable to conclude that experience performing projects with values between \$20 million and \$30 million is relevant to the agency's past performance evaluation for this requirement. Moreover, the \$20 million to \$30 million project range represents the most challenging and complex portion of the agency's requirements, so the solicitation's preference for firms that can demonstrate significant experience with projects of that size is also reasonable. In short, these evaluation criteria are reasonably related to the agency's requirements, and are not unduly restrictive of competition.

The protest is denied.

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General Counsel