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# Decision

**Matter of:** Marine Hydraulics International, LLC

**File:** B-420562

**Date:** May 25, 2022

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## DIGEST

Protest challenging an agency's decision to set aside a delivery order under a multiple-award indefinite-delivery, indefinite-quantity contract that was awarded on an unrestricted basis is denied where the agency's set-aside decision was a reasonable exercise of its discretion.

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## DECISION

Marine Hydraulics International, LLC, of Norfolk, Virginia, protests the terms of request for proposals (RFP) No. N5005422R6001 (the Delivery Order RFP), issued by the Department of the Navy, Naval Sea Systems Command, for complex repair and maintenance services on the U.S.S. Cole. Marine Hydraulics argues that the agency's decision to set aside the procurement for small businesses was improper because the agency could not set aside the delivery order under the terms of the multiple award indefinite-delivery, indefinite-quantity (IDIQ) contract under which the delivery order will be issued. Alternatively, even if the agency had the discretion to set aside the order, the protester argues there was no reasonable basis to conclude that the agency would receive two or more offers from responsible small business concerns at fair and reasonable prices.

We deny the protest.

## BACKGROUND

The Navy must maintain its ships to meet current and future operational requirements. To support this objective, the Navy issued request for proposals No. N00002421R4428 (the Multiple Award IDIQ RFP) in November 2020 for the establishment of multiple-award, IDIQ contracts for repair, maintenance, and modernization requirements of non-nuclear Navy surface ships homeported and visiting the Norfolk, Virginia, homeport. Agency Report (AR), Tab 8, Multiple Award IDIQ RFP at 32.<sup>1</sup>

The Multiple Award IDIQ RFP divided the anticipated requirements into four “Lots.” Lot 1 is for complex ship repair and overhaul services on surface combatant class ships, and Lot 2 is for the same kind of complex services on amphibious class ships. *Id.* at 130. Lot 3 requires non-complex ship repair and overhaul services on surface combatant ships, and Lot 4 requires non-complex ship repair and overhaul services on amphibious class ships. *Id.* The Navy solicited Lots 1 and 2 (complex) using full and open competition on an unrestricted basis. *Id.* In contrast, the Navy set aside Lots 3 and 4 (non-complex) for small business concerns. *Id.*; *see also id.* at 143 (providing that the Navy anticipated making at least two IDIQ contract awards for Lots 1 and 2 using “Full and Open Competition (not set aside for small business unless there are two or more small businesses capable of performing)”).

The Multiple Award IDIQ RFP further established procedures for competing future delivery orders. *Id.* at 85. The solicitation specified that the ordering procedures were “developed and will be implemented in accordance with [Federal Acquisition Regulation (FAR)] 16.505,” and that “[t]he Government shall provide each IDIQ-MAC awardee a fair opportunity to be considered for all [delivery orders] exceeding \$3,000.”<sup>2</sup> *Id.* The solicitation further provided that “[o]rders issued non-competitively will be supported by documentation as required by FAR 16.505(b)(2)(i).” *Id.*

Relevant here, on January 6, 2022, the Navy awarded six IDIQ contracts for Lot 1 complex services for combatant class ships. The awardees included Marine Hydraulics and two other large business concerns, as well as three entities that qualified as small business concerns. *See, e.g.*, AR, Tab 17, Notice of Contract Awards at 1; Tab 6, Delivery Order Market Research Memo. at 2; Tab 14, Lot 1 IDIQ Contract No. N00024-22-D-4401; Tab 15, Lot 1 IDIQ Contract No. N00024-22-D-4402; Tab 16, Lot 1 IDIQ Contract No. N00024-22-D-4404.

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<sup>1</sup> References herein to the Multiple Award IDIQ RFP are to the version conformed through amendment 7 that was produced by the Navy. Additionally, references herein to page numbers for agency report exhibits are to the electronic pagination of the exhibits provided by the agency.

<sup>2</sup> Contracting officers are generally required to give every awardee a fair opportunity to be considered for a delivery or task order exceeding the micro-purchase threshold unless a statutory exception applies. FAR 16.505(b)(2)(i).

Shortly after it made the six Lot 1 IDIQ contract awards, the Navy issued a sources sought synopsis to identify which of the six contract holders had the resources to support requirements on board the U.S.S. Cole during two proposed availability periods.<sup>3</sup> The synopsis requested interested Lot 1 IDIQ contract holders to provide: (1) a completed eligibility criteria data sheet identifying the specific pier and dock intended to be used for each proposed availability period and indicating that the pier and dock meet the specified minimum technical requirements; (2) if utilizing a subcontractor for physical resources for the pier, a letter signed by the subcontractor identifying and confirming committed access to the proposed pier; (3) a brief narrative affirming the manpower resources required for both availabilities' durations; and (4) three similar in scope past performance references to support meeting the requirements and schedule. Depending on the responses received, the notice advised that "the requirement may be set-aside for small businesses or procured through full and open competition" among the Lot 1 IDIQ contract holders. AR, Tab 3, Solicitation Sources Sought Notice at 1.

The Navy initially received four responses to the sources sought notice; three of the responses were from the large business Lot 1 IDIQ contract holders, including Marine Hydraulics, and the fourth was from a small business Lot 1 IDIQ contract holder. AR, Tab 6, Solicitation Market Research Memo. at 3. Having received only one response from a small business Lot 1 IDIQ contract holder, the contracting officer concluded it was unlikely that the agency would receive two or more proposals from small business concerns, and, therefore, decided to issue the solicitation for the contemplated delivery order on an unrestricted basis. *Id.* at 3-4. Thus, on February 10, the Navy issued the Delivery Order RFP, which is the subject of this protest, on an unrestricted basis. Protest, exh. E, Initial Delivery Order RFP.

Subsequent to the issuance of the RFP, however, the agency found that a second small business Lot 1 IDIQ contract holder had also submitted a response by the established deadline, but the agency had not received it due to a technical issue. After reviewing this second response, the contracting officer reconsidered the initial set-aside decision and concluded there was a reasonable expectation that at least two eligible and responsible small businesses would submit proposals. Accordingly, the contracting officer elected to set aside the Delivery Order RFP for small business concerns. AR, Tab 6, Solicitation Market Research Memo. at 4; Tabs 4.a – 4.a.ix and 4.b – 4.b.iv, Small Business Market Research Responses.

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<sup>3</sup> The Navy's requirements contemplate that the contractor will make its proposed port facility available for the completion of necessary repairs and maintenance during two "availability periods," (1) October 3, 2022 – January 3, 2023, and (2) October 2, 2023 – January 2, 2024. See AR, Tabs 2.d.i and 2.d.i, Delivery Order RFP, attachs. J-3A and J-3B, Execution Milestones & Key Event Dates.

On February 14, the contracting officer notified Marine Hydraulics via telephone that the agency would reissue the Delivery Order RFP as a small business set-aside. Protest at 7. Based on the oral notification, Marine Hydraulics filed this protest on February 24. On March 4, the contracting officer issued amendment 1 to the RFP to set aside the procurement for small business concerns.<sup>4</sup>

## DISCUSSION

Marine Hydraulics challenges the propriety of the contracting officer's decision to set aside the Delivery Order RFP for small business holders of the Lot 1 IDIQ contract. The protester first alleges that, notwithstanding the ordinary discretion afforded agencies to set aside delivery orders under multiple award IDIQ contracts, the Navy was precluded from doing so here. Specifically, the protester argues that by partially setting aside the Multiple Award IDIQ RFP's non-complex requirements (Lots 3 and 4), the agency could not now set aside for small businesses orders for the complex requirements (Lots 1 and 2). In essence, the protester argues that since the IDIQ contract holders for Lots 1 and 2 competed on an unrestricted basis, the orders under those IDIQs also must be competed on an unrestricted basis.

The protester further argues that the Navy cannot set aside Lot 1 requirements because it failed in the Multiple Award IDIQ RFP and resulting Lot 1 IDIQ contracts to comply with the requirements of FAR section 19.504(a)(1) to identify whether prospective Lot 1 delivery order set-asides would be mandatory or discretionary. Marine Hydraulics contends that by failing to specify in the Multiple Award IDIQ RFP and resulting Lot 1 IDIQ contract how set-aside decisions would be made for Lot 1 requirements, the agency waived its ability to set aside such requirements. In the alternative, Marine Hydraulics argues that even if the contracting officer had the discretion to set aside the Delivery Order RFP for small businesses, doing so here was unreasonable because the Navy did not have a reasonable expectation of receiving at least two proposals from responsible small business Lot 1 IDIQ contract holders at fair and reasonable prices.

For the reasons that follow, we find no basis on which to sustain the protest. Before turning to the merits of the protest, we must address our Office's jurisdiction to hear this protest involving a proposed issuance of a delivery order.

### Jurisdiction

Per 10 U.S.C. § 3406(f)(1), our Office is only authorized to hear protests involving the issuance or proposed issuance of a task or delivery order if the protest: (A) alleges that "the order increases the scope, period, or maximum value of the contract under which

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<sup>4</sup> On February 28, one of the small business Lot 1 IDIQ contract holders filed a protest asserting that the Delivery Order RFP should have been set aside for small businesses. That protester withdrew its protest after the Navy issued amendment 1.

the order is issued;” or (B) involves an order valued in excess of \$25 million.<sup>5</sup> Marine Hydraulics asserts that we have jurisdiction over its protest under both jurisdictional bases.

In its initial protest, Marine Hydraulics argues that jurisdiction is proper under 10 U.S.C. § 3406(f)(1)(A) because the firm alleges that the Navy’s set-aside decision improperly increases the scope of the LOT 1 IDIQ contract. Specifically, the protester asserted that “[b]y unilaterally adding set-aside restrictions to the [Lot 1 IDIQ contract] for orders placed under the unrestricted portions of the contract--the portion for ‘complex’ work--the [Navy] has materially increased the scope of the [Lot 1 IDIQ contract] and has materially changed the terms of the competition initially conducted for the [multiple award IDIQ contracts].”<sup>6</sup> Protest at 4.

The Navy requests dismissal of the protest, arguing that the protest does not set forth a legally and factually sufficient allegation that the agency improperly increased the scope of the Lot 1 IDIQ contract. The agency argues that the term “scope” as used in 10 U.S.C. § 3406(f)(1)(A) should be interpreted as effectively meaning only the Lot 1 IDIQ contract’s statement of work. The Navy asserts that there is no question that the anticipated services are within the Lot 1 IDIQ contract’s statement of work, and, thus, the protester fails to reasonably allege a material change to the scope of the Lot 1 IDIQ contract.

The agency further argues that our Office does not have jurisdiction over the protest under 10 U.S.C. § 3406(f)(1)(B) because the government’s independent cost estimate valued the procurement at less than \$25 million. See AR, Tabs 7.a – 7.c, Independent

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<sup>5</sup> The applicable jurisdictional provision was originally codified at 10 U.S.C. § 2304c, but was subsequently renumbered as 10 U.S.C § 3406. See National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat 3388, 4194 (2021). For the ease of reference, all citations herein are to the renumbered code provision.

<sup>6</sup> For clarity, there are no restricted portions of the Lot 1 IDIQ contracts, against which the challenged delivery order will be issued. In this regard, although the Navy issued one solicitation for its Lots 1-4 requirements--the Multiple Award IDIQ RFP--and indicated that Lots 3 and 4 would be set aside for small business concerns, the agency in fact created four separate sets of multiple award IDIQ contracts, one for each Lot. Specifically, the six contractors selected for award of Lot 1 IDIQ contracts were also awarded distinct contracts for Lot 2 work. See, e.g., AR, Tab 17, Notice of Contract Awards at 1-2 (identifying distinct contract awards for Lots 1 and 2). Both the Lots 1 and 2 IDIQ contracts were awarded on an unrestricted basis. The Navy similarly made distinct contract awards for Lots 3 and 4. See, e.g., “Contracts for Nov. 30, 2021,” Dept. of Defense, available at <https://www.defense.gov/News/Contracts/Contract/Article/2857360/source/GovDelivery/> (last visited May 19, 2022). As stated above, Lots 3 and 4 were set aside for small businesses.

Government Estimate Spreadsheets. Marine Hydraulics counters that the government's independent estimate of the value of the anticipated delivery order was unreasonable. In support of its assertion, the protester points to two recent projects for similar work it performed on two other guided-missile destroyers that the protester alleges are similar to the U.S.S. Cole; the protester represents that those projects were valued at \$26.2 million and \$30.3 million, respectively. Opp. to Req. for Dismissal at 9. Additionally, subsequent to the filing of the protest and initial briefing on the agency's request for dismissal, the Navy received two proposals from small business concerns by the Delivery Order RFP's initial closing date. Both proposals, inclusive of all contract line items including required ship security, were above \$25 million but below \$30 million.<sup>7</sup> AR, Tabs 20.a, 20.b, 21.a, 21.b, Small Business Offeror Cost Proposals.

For the reasons that follow, we agree with the Navy that the protester does not assert a legally sufficient allegation that the agency impermissibly increased the scope of the Lot 1 IDIQ contract. Nonetheless, we find that we have jurisdiction over the protest because the value of the delivery order is reasonably expected to exceed \$25 million.

As an initial matter, we reject the protester's argument that the delivery order at issue is outside the "scope" of the Lot 1 IDIQ contract. The protester's challenge is not to the scope of the work to be performed under the order, but rather to the scope of eligible competitors for the order. Marine Hydraulics's scope challenge argues that the delivery order is outside the scope of the Lot 1 IDIQ contract because the scope of competition for the delivery order has been limited to small business concerns, which Marine Hydraulics argues is inconsistent with the terms of the Lot 1 IDIQ contract.

We have explained, however, that in determining whether a proposed task or delivery order is outside the scope of the underlying contract, we will examine any changes in the type of work, performance period, and costs between the contract as awarded and modified by the proposed task order; and we consider whether the original contract solicitation adequately advised offerors of the potential for the type of task order to be issued. *Anduril Indus., Inc.*, B-419420, Feb. 22, 2021, 2021 CPD ¶ 83 at 4. When considering scope challenges, we have consistently understood scope to refer to the scope of work authorized in the underlying contract. *The MayaTech Corp.*, B-419313, Nov. 9, 2020, 2020 CPD ¶ 366 at 4; see also *DynCorp Int'l LLC v. United States*, 152 Fed. Cl. 490, 501 (2021) ("Congress clearly intended to cabin 'scope' [as used in 10 U.S.C. § 3406(f)(1)(A)] to the underlying contract's 'statement of work.'").

There is no question here that the services to be provided under the delivery order are within the scope of the Lot 1 IDIQ contract's statement of work; indeed, the protester must concede this point in order to obtain the relief it requests, *i.e.*, that it be permitted to compete for the delivery order on an unrestricted basis under the protester's own Lot 1 IDIQ contract. While couched as a scope challenge, Marine Hydraulics's

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<sup>7</sup> Because this is a pre-award protest involving an ongoing procurement, our Office will only address the general range of the proposals received in response to the Delivery Order RFP.

objection is really an assertion that the Navy has erroneously deprived the protester of its right to compete for the delivery order pursuant to the Multiple Award IDIQ RFP's and Lot 1 IDIQ contract's ordering procedures. The protester's contention that the agency has failed to provide a fair opportunity to compete, however, is not an assertion that the agency has increased the scope, period, or maximum value of the Lot 1 IDIQ contract. *Global Dynamics, LLC*, B-417776, Oct. 23, 2019, 2019 CPD ¶ 366 at 4.

In this regard, we find our recent decision in *The MayaTech Corporation* instructive. In that case, the protester asserted the agency failed to compete task orders in accordance with the base contract's ordering clause. The protester contended that the IDIQ contract's ordering clause required the agency to evaluate order proposals in accordance with specific evaluation criteria, and the agency's deviation from those criteria resulted in a material change to the scope of the IDIQ contract and deprived the protester of a fair opportunity to compete in accordance with FAR section 16.505(b). *The MayaTech Corp.*, *supra* at 5 (internal quotation omitted). We rejected the protester's expansive definition of "scope" as used in 41 U.S.C. § 4106(f)(1)(A)--which contains the identical protest limitation as 10 U.S.C. § 3604(f)(1)(A)--because the protester's "expansive definition of 'scope' would render the task order protest bar meaningless . . . any departure from the task order solicitation or underlying contract would result in a task order that exceeds the scope of the contract." *Id.* Accordingly, we found that the protest amounted to the protester's "disagreement with the manner in which the agency evaluated the task order proposals--which the exception to the task order protest bar does not encompass." *Id.*

As in *The MayaTech Corporation*, Marine Hydraulics's argument is that the Navy has deviated from the Multiple Award IDIQ RFP's and Lot 1 IDIQ contract's ordering clause, which in turn has deprived the protester of a fair opportunity to compete for the delivery order. This argument, however, is not about the award of work outside the "scope" of the underlying IDIQ contract, but rather, challenges the manner of the competition for work that is clearly contemplated by the terms of the Lot 1 IDIQ contract. Accordingly, the protest does not pertain to the scope exception to the task order protest bar.

While the protest does not assert a challenge that falls under 10 U.S.C. § 3406(f)(1)(A), we, nevertheless, have jurisdiction to resolve the protest under 10 U.S.C. § 3406(f)(1)(B) because the value of the challenged delivery order is in excess of \$25 million. Because the protest concerns the terms of the delivery order solicitation, and no award has been made, we do not have a definitive benchmark for applying the statutory threshold. However, the preponderance of the evidence suggests that the value of the order will be in excess of \$25 million. Although the agency's independent cost estimate valued the task order at less than \$25 million, the protester contested that valuation based on costs of similar projects that it has previously performed.

In our view, the strongest evidence of the value of the order is reflected by the values of the two proposals actually received by the agency in response to the Delivery Order RFP, both of which exceed \$25 million when all costs are considered. *ICI Servs., Inc.*, B-409231.2, Apr. 23, 2014, 2014 CPD ¶ 132 at 3 n.3 (considering in the context of a

pre-award protest the value of proposals received when assessing whether the task order jurisdictional value threshold is satisfied). Thus, on this record, we find that the likely value of the task order will exceed \$25 million, and, therefore, we have jurisdiction to consider the protest.

### Discretion to Set Aside the Delivery Order

This protest requires our Office to interpret the intersection between an agency's obligation to provide multiple award IDIQ contract holders with a fair opportunity to compete for task or delivery orders, and an agency's discretion to set aside order competitions for small business concerns. As to the former requirement, a contracting agency is generally required to provide every IDIQ contract awardee a fair opportunity to be considered for a delivery or task order exceeding the micro-purchase threshold unless a statutory exception applies. 10 U.S.C. § 3406(c); FAR 16.505(b)(2)(i).

One of the express exceptions to the fair opportunity requirements, however, is an agency's discretion to set aside task and delivery orders issued under multiple award IDIQ contracts for small business concerns. Specifically, the FAR states that one of the statutory exceptions to the fair opportunity process is: "[i]n accordance with [15 U.S.C. § 644(r)], contracting officers may, at their discretion, set aside orders for any of the small business concerns identified in [FAR] 19.000(a)(3)." FAR 16.505(b)(2)(i)(F); see *also* 13 C.F.R. § 125.2(e)(6).

In this regard, the "rule of two"--the applicable legal framework that generally governs small business set-aside requirements--describes a long-standing regulatory policy intended to implement provisions in the Small Business Act, 15 U.S.C. § 644(a), requiring that small businesses receive "a fair proportion of the total purchases and contracts for property and services for the Government." 49 Fed. Reg. 40,135 (Oct. 3, 1984). Accordingly, the general practice is that when the conditions of the rule of two are met agencies are required to set aside certain procurements for small businesses. For example, for stand-alone acquisitions exceeding the simplified acquisition threshold, a contracting officer shall set aside the acquisition for small businesses if there is a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns, and (2) award will be made at fair market prices. FAR 19.502-2(b).

Relevant here, on September 27, 2010, Congress passed the Small Business Jobs Act of 2010, amending the Small Business Act to address procuring agencies' discretion with respect to, among other matters, set-asides of task or delivery orders under multiple-award contracts. Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat 2504 (2010). Specifically, the Jobs Act directed the promulgation of regulations establishing guidance whereby contracting agencies "at their discretion" and "notwithstanding the fair opportunity requirements under" 10 U.S.C. § 3406(c) could set aside orders placed against multiple award contracts for small business concerns.



15 U.S.C. § 644(r)(2). Consistent with this statutory directive, the FAR was updated to establish this discretion.<sup>8</sup> FAR 16.505(b)(2)(i)(F); FAR 19.504(a).

Thus, the Jobs Act and its implementing regulations provide broad discretion to contracting officers as to whether to set aside task or delivery orders for small business concerns, notwithstanding the obligation to provide multiple-award IDIQ contract holders with a fair opportunity to compete for task or delivery orders. See *ITility, LLC, supra* at 20 (“Where Congress has enunciated a clear policy granting contracting officials discretion, and the Executive Branch’s regulatory implementation similarly emphasizes the statutory grant of discretion, our Office cannot substitute the parties’ or our own judgments on the matter.”). Notwithstanding the unequivocal statutory and regulatory grant of discretion to contracting agencies whether to set aside task or delivery orders issued under multiple award IDIQ contracts, Marine Hydraulics argues that the Navy in fact could not set aside the delivery order at issue.

According to Marine Hydraulics, because the Multiple Award IDIQ RFP included a partial set-aside for Lots 3 and 4 requirements, the Navy was precluded from setting aside work to be performed under Lots 1 and 2 requirements. We find no merit to this argument. In addition to providing contracting agencies with the discretion to set aside task orders, the Jobs Act also authorized the partial set-aside of multiple-award contracts. 15 U.S.C. § 644(r)(1). Under the implementing regulations, when the contracting officer decides to partially set aside requirements, the solicitation shall identify which portion or portions are set aside. FAR 19.502-4(b). Thus, agencies have the discretion to both partially set aside contract requirements and to set aside individual task or delivery orders. See FAR 19.502-4 and FAR 19.504.

We do not view these grants of discretion to be mutually exclusive. In other words, we do not find that the agency’s exercise of discretion to set aside the IDIQs for the Lots 3 and 4 requirements precluded the agency from also exercising its discretion to set aside individual task or delivery orders under the IDIQs for the Lots 1 and 2 requirements. The protester points to nothing in the Jobs Act or the implementing regulations that would restrict the Navy’s discretion to use both grants of discretionary authority for different requirements under the Multiple Award IDIQ RFP.

Alternatively, Marine Hydraulics argues that even assuming the applicable regulations would generally afford the Navy with discretion to set aside Lot 1 delivery orders for small business concerns, the Navy forfeited this discretion because it failed to comply with the notice requirements of FAR section 19.504(a)(1). Specifically, this provision requires that “[t]he contracting officer shall state in the solicitation and resulting contract whether order set-asides will be discretionary or mandatory” when applicable

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<sup>8</sup> For additional discussion regarding the Jobs Act, its regulatory implementation, and GAO’s prior decisions with respect to the question of task and delivery order set-asides under multiple award contracts, please refer to our decision in *ITility, LLC*, B-419167, Dec. 23, 2020, 2020 CPD ¶ 412 at 10-14.

requirements are met.<sup>9</sup> Marine Hydraulic argues that because the Multiple Award IDIQ RFP and resulting Lot 1 IDIQ contracts do not establish whether set asides will be discretionary or mandatory, the contracting officer is precluded from setting aside such orders at all. We disagree.

As set forth above, the Jobs Acts and its implementing regulations provide contracting officers with a broad grant of discretion with respect to setting aside task or delivery orders. Consistent with the understanding that contracting officers retain such discretion, the language of FAR section 19.504(a)(1), by its terms, requires a contracting officer to delineate whether orders will be set aside at the contracting officer's discretion or whether all orders that meet the rule of two requirements will be automatically set-aside for small business concerns. To the extent the solicitation did not specify which of these two methods would be used when setting aside an order, any resulting ambiguity concerns the choice between discretionary versus mandatory set-asides, and not whether the contracting officer had the authority to set aside an order at all. Accordingly, we find no support for the protester's argument that the notice requirement in FAR section 19.504(a)(1) is a condition precedent to the contracting officer's decision to set aside orders for the Lot 1 requirements.

In any event, we find that the Multiple Award IDIQ put the contract holders on notice that the agency had reserved the discretion to set aside orders. Specifically, as addressed above, the Multiple Award IDIQ RFP's section G fair opportunity process (ordering procedures), which were incorporated into the Lot 1 IDIQ contracts, states that the instructions "were developed *and will be implemented in accordance with FAR 16.505.*" AR, Tab 8, Multiple Award IDIQ RFP at 85 (emphasis added); Tab 16, Lot 1 IDIQ Contract No. N00024-22-D-4404 at 65. Section 16.505 of the FAR expressly states that contracting officers may, "at their discretion," set aside orders for small business concerns. FAR 16.505(b)(2)(i)(F). To the extent the protester's arguments attempt to read out the exception to the fair opportunity requirement established by FAR subsection 16.505(b)(2)(i)(F), such arguments are inconsistent with the Multiple Award IDIQ RFP and Lot 1 IDIQ contracts. Therefore, we find that the Navy had the discretion to set aside the delivery order for small business concerns, and, thus, deny the protest on this basis.

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<sup>9</sup> We note that the Small Business Administration's regulations in Title 13 of the Code of Federal Regulations do not mirror the "shall" language included in FAR section 19.504(a)(1). In this regard, SBA's regulations provide that the contracting officer *may* state in the solicitation and resulting contract for a multiple award contract that orders will be set aside for small businesses (or any subcategory) whenever the rule of two (or alternative set-aside requirements) have been met, or that the agency is preserving the right to consider set-asides using the rule of two (or alternative set-aside requirements) on an order-by-order basis. 13 C.F.R. § 125.2(e)(6).

## Rule of Two Analysis

Marine Hydraulics's final argument is that, even assuming the Navy had the discretion to set aside the delivery order for small business concerns, the agency's set-aside decision was improper because the agency could not reasonably expect that it would receive at least two offers from responsible small business concerns at fair and reasonable prices. According to the protester, the Navy received only two small business responses to the request for information for the Lot 1 order and the agency failed to reasonably consider the relationship between the two small business concerns in making its rule of two assessment. Specifically, the protester contends that one of the small business Lot 1 IDIQ contract holders that responded to the request for information, and also submitted a proposal, is owned by a private equity firm that also owns an affiliated company that owns the port facilities where the small business Lot 1 IDIQ contract holder will perform the work. Marine Hydraulics further contends that the second Lot 1 IDIQ contract holder that responded to the request for information and submitted a proposal will subcontract with the other Lot 1 IDIQ contractor's affiliate for the necessary port facilities. The protester argues that the Navy failed to account for this relationship and its potential impact "over the ability of [the second small business offeror] to respond to the [Delivery Order RFP] at a fair market price using a facility controlled by its ostensible competitor." Comments at 2. For the reasons that follow, we find no basis on which to sustain the protest.

As addressed above, the applicable analysis for deciding whether to set aside a procurement for small businesses requires the contracting officer to conclude that (1) offers will be obtained from at least two responsible small business concerns, and (2) award will be made at fair market prices. FAR 19.502-2(b); *see also* FAR 19.504(a) (allowing for the set aside of a task or delivery order if the requirements of FAR section 19.502-2(b) are satisfied). Generally, our Office regards such a decision as a matter of business judgment within the contracting officer's discretion, which we will not disturb absent a clear showing that it has been abused. *Encompass Grp. LLC*, B-296602, B-296617, Aug. 10, 2005, 2005 CPD ¶ 159 at 2.

As also addressed above, the Navy conducted market research among the Lot 1 contract holders to identify interested and capable sources for fulfilling its requirements. The agency solicited and reviewed from the contract holders: (1) information about the specific pier and dock intended to be used for each proposed availability and their compliance with the designated technical requirements; (2) if utilizing a subcontractor for physical resources for the pier, a signed letter from the subcontractor identifying and confirming committed access to the proposed pier; (3) information about available manpower resources; and (4) similar in scope past performance references to support meeting the requirements and schedule. AR, Tab 3, Solicitation Sources Sought Notice at 1. The Navy received two responses from independent small business concerns indicating their capability to provide the required labor and port facilities during both availability periods. Based on the responses received from these two small business Lot 1 IDIQ contract holders, the contracting officer concluded it was likely that the agency would receive at least two offers from responsible small business concerns at

fair and reasonable prices. Given this record, we have no basis to object to the contracting officer's exercise of business judgment in the set-aside determination.

In its protest, Marine Hydraulics argues that the agency was effectively required to look beyond the expression of interest submitted by a second, independent small business Lot 1 IDIQ contract holder to assess its motivations and likelihood of submitting a competitively priced proposal.<sup>10</sup> In essence, Marine Hydraulics speculates that the second small business will be unable to submit a competitive proposal because it will be manipulated by its proposed facility subcontractor to favor the subcontractor's corporate affiliate.<sup>11</sup> There is no requirement, however, for a contracting officer to speculate about a potential offeror's motives.

Instead, where two qualified, independent small business contract holders have demonstrated their interest in the procurement--including demonstrating that they possess the required manpower, port facilities, and general experience to perform the work--we think the agency can reasonably conclude it will likely receive two or more proposals from responsible small business concerns at fair and reasonable prices.<sup>12</sup> See also *InfoReliance Corp.*, B-413298, Sept. 19, 2016, 2016 CPD ¶ 263 at 4 (denying a protest arguing that a set-aside determination was unreasonable because the agency failed to evaluate whether small business concerns would violate the limitation on subcontracting, as such an argument "puts the cart before the proverbial horse: an

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<sup>10</sup> Marine Hydraulics's focus on small business offerors' proposed prices also ignores that the Delivery Order RFP establishes a best-value tradeoff basis for award, where the non-price technical and past performance evaluation factors, when combined, are significantly more important than price. AR, Tab 2.a, Delivery Order RFP at 95.

<sup>11</sup> Marine Hydraulics also appears to imply that the second small business offeror may be colluding with the first small business offeror. See, e.g., Comments at 2 (arguing that the Navy failed to consider whether the small business offerors "submitted truly independent proposals in accordance with [FAR] 3.103-1"); see also FAR 3.301(a) (noting anticompetitive practices can include collusive bidding or sharing of the business). Setting aside that the contracting officer's analysis of independent pricing must be done after the submission of proposals, and, thus, is not a necessary consideration as part of a reasonable rule of two analysis, the protester's speculation as to potentially serious violations of federal civil and criminal antitrust laws generally involve matters outside of our bid protest jurisdiction. Such matters are reserved for the contracting agency, Department of Justice, and federal courts. *Sterisyn, Inc.*, B-418366 et al., Apr. 1, 2020, 2020 CPD ¶ 114 at 9 n.10.

<sup>12</sup> As to the protester's assertion that the agency had no reasonable basis to find that it would receive fair and reasonable pricing, we note that the proposed prices received by the agency are in line with the protester's representations regarding what it believes the work should cost based on the alleged value of projects with similar scopes that were previously performed by Marine Hydraulics. See, e.g., Opp. to Req. for Dismissal at 9 (arguing that the protester's prior work of similar scope on similar ships were valued at approximately \$26.2 million and \$30.3 million respectively).

agency's determination whether a small business concern will comply with a solicitation's subcontracting limitation is to be made as part of the award decision, and based on the particular quotation submitted"); *Marshall & Swift-Boeckh, LLC*, B-407329, B-407329.2, Dec. 18, 2012, 2013 CPD ¶ 10 at 4 (same, where the protester argued that the agency's market research did not reasonably consider potential affiliation issues inherent in likely subcontracting or teaming arrangements because such arguments conflate the standard for determining whether an agency may accept a small business's self-certification when its offer is being considered for award, and whether there is a reasonable expectation that two or more offers will be submitted by capable small businesses).

The protest is denied.

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General Counsel