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Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Computer World Services Corporation; CWS FMTI JV LLC

File: B-419956.18; B-419956.19; B-419956.24

Date: November 23, 2021

Michelle E. Litteken, Esq., C. Kelly Kroll, Esq., and Andrew J. Mohr, Esq., Morris, Manning & Martin, LLP, for the protesters.
Karyne Akhtar, Esq., and Krystal A. Jordan, Esq., Department of Health and Human Services, and Meagan K. Guerzon, Esq., Small Business Administration, for the agencies.
Jonathan L. Kang, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging a solicitation that limits the number of experience examples that may be submitted by a large business mentor in a mentor-protégé joint venture is sustained where, although the solicitation provision is not expressly prohibited by small business laws or regulations, the agency does not establish that the restriction is reasonable, and where the agency does not reasonably explain why mentor-protégé joint ventures with small business mentors are treated differently.

2. Protest that a solicitation provides for an improper responsibility determination based on the experience of a protégé member of a mentor-protégé joint venture is denied where the agency states that it does not intend to make such a determination, and where, in any event, the agency is not prohibited from making such a determination.

3. Protests that evaluation criteria for experience and past performance improperly require offerors to submit information regarding the obligated value of contracts performed, rather than the awarded value, is denied where the agency reasonably explains that the former metric provides more relevant information.

DECISION

Computer World Services Corporation (CWS), of Falls Church, Virginia, and CWS FMTI JV LLC (CWS FMTI), a mentor-protégé joint venture small business[1], of Luray, Virginia, challenge the terms of solicitation No. 75N98121R00001, which was issued by the Department of Health and Human Services, National Institutes of Health (NIH), for the award of multiple indefinite-delivery, indefinite-quantity (IDIQ) governmentwide acquisition contracts (GWACs) for information technology services, known as Chief Information Officer-Solutions and Partners (CIO-SP4). CWS FMTI argues that the request for proposals (RFP) is unduly restrictive of competition because it limits the number of experience examples that mentor-protégé joint venture offerors may submit from large business mentors, and that the agency intends to make an improper responsibility determination based on the experience of small business offerors. Both protesters also allege that the RFP is unduly restrictive of competition with regard to the basis for measuring the value of contracts performed for the experience and past performance factors.

We sustain CWS FMTI's protest in part, and deny the remaining protest grounds.

BACKGROUND

NIH issued the solicitation on May 25, 2021, seeking proposals to provide information technology (IT) solutions and services in the areas of health, biomedical, scientific, administrative, operational, managerial, and information systems requirements. Agency Report (AR) Tab 3b, Initial RFP at 9; Contracting Officer's Statement (COS) at 2.[2] The purpose of the CIO-SP4 contracts is to "provide government agencies a mechanism for quick ordering of IT solutions and services at fair and reasonable prices, to give qualified small businesses a greater opportunity to participate in these requirements, and give government agencies a mechanism to help meet their socio-economic contracting goals." RFP at 9. The CIO-SP4 contracts will replace the existing IDIQ GWACs administered by NIH, known as CIO-SP3. COS at 1.

The RFP anticipates the award of multiple contracts, each of which will have a base period of performance of 5 years and one 5-year option. RFP at 40. The solicitation states that the agency will award approximately 305 to 510 IDIQ contracts, including as

[1] As discussed below, a mentor-protégé joint venture is an arrangement between a small business protégé firm and a mentor firm that is treated as a small business.

[2] The agency filed identical documents in the agency reports responding to each protest. Citations to the record and the parties' briefings are to the Adobe PDF pages for those documents. Citations to the solicitation are to RFP amendment 11, unless otherwise noted. AR, Tab 14d, RFP amend. 11.

relevant here, 20 to 40 contracts to emerging large businesses[3], and 100 to 125 contracts to small businesses. *Id.* at 145. Each awarded contract will have a maximum ordering value of $50 billion. *Id.* at 52.

The RFP provides for a 3-phase evaluation of proposals. *Id.* at 173. As discussed below, the phase 1 competition requires offerors to submit a self-scoring sheet that assigns points based on offerors' representations concerning experience and other capabilities. *Id.* at 158. The solicitation advises that "[o]nly the highest rated offerors will advance to phase 2 of the evaluation." *Id.* at 174.

In phase 2 of the evaluation, the agency will validate whether offerors' proposals comply with "go/no-go" criteria and other mandatory certification requirements. *Id.* at 174. Proposals that satisfy the phase 2 evaluation criteria will advance to phase 3 of the evaluation. *Id.* In phase 3 of the evaluation, the agency will evaluate proposals under the following four evaluation factors: (1) health IT capability, (2) management approach, (3) past performance, and (4) price. *Id.* at 176. For purposes of award, the solicitation states that "the government will use a selection methodology that awards contracts to offerors whose proposals represent the best value to the government at fair and reasonable prices." *Id.* at 173.

CWS and CWS FMTI filed these protests prior to the then-applicable closing date for the receipt of proposals of August 20.[4] CWS is an emerging large business, as defined by the RFP, and CWS FMTI is a mentor-protégé joint venture comprised of CWS, the mentor firm, and Fusion Mastech Incorporated, the protégé firm, which is a small business and participant in the Small Business Administration (SBA) Historically Underutilized Business Zone program.[5] Protest (CWS) at 8; Protest (CWS FMTI) at 2.

DISCUSSION

Our decision addresses three primary arguments raised by the protesters. First, CWS FMTI argues that the solicitation's self-scoring evaluation criteria for experience are

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[3] The solicitation defines an emerging large business as a firm that has "average yearly revenue for the last five years . . . between $30 [million] and $500 [million] per year." RFP at 157. The RFP advises that firms will be considered emerging large businesses for the award of IDIQ contracts, but that for purposes of task order awards, these firms will be considered large businesses. RFP at 147.

[4] On August 20, prior to the noon Eastern Time closing date established by RFP amendment 9, the agency issued RFP No. 11, which extended the closing date to August 27. AR, Tab 14a, RFP amend. 11, Cover Letter at 1.

[5] The RFP provides that "an offeror may submit as a prime contractor and also as part of the [contractor team arrangement], [joint venture], or mentor-protégé arrangement." RFP at 148.

unduly restrictive of competition and inconsistent with the Small Business Act and regulations issued by SBA. Specifically, CWS FMTI contends that the solicitation improperly limits offerors who compete as a mentor-protégé joint venture, where a large business is the mentor firm, to using the experience of the large business mentor for no more than two of the three possible experience examples for each area of experience. Second, CWS FMTI argues that the agency's response to the first protest argument shows that the agency will make an improper responsibility determination for mentor-protégé joint venture offerors based on the experience of the small business protégé member. Third, CWS and CWS FMTI argue that the solicitation is unduly restrictive of competition because the evaluation criteria for experience and past performance require offerors to identify the value of contracts performed based on the obligated value, rather than the awarded value of the contracts. For the reasons discussed below, we sustain the first argument concerning the limitations on the number of examples of experience that large business mentors may submit in mentor-protégé joint ventures, but deny all other protest arguments.[6]

With respect to these challenges, agencies must specify their needs in a manner designed to permit full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy the agencies' legitimate needs or as otherwise authorized by law. 41 U.S.C. § 3306(a). Where a protester challenges a solicitation provision as unduly restrictive of competition, the procuring agency must establish that the provision is reasonably necessary to meet the agency's needs. *Remote Diagnostic Techs., LLC*, B-413375.4, B-413375.5, Feb. 28, 2017, 2017 CPD ¶ 80 at 3-4. We examine the adequacy of the agency's justification for a solicitation provision challenged as unduly restrictive to ensure that it is rational and can withstand logical scrutiny. *Coulson Aviation (USA), Inc.*, B-414566, July 12, 2017, 2017 CPD ¶ 242 at 3. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them, without more, does not establish that the agency's judgment is unreasonable. *Protein Scis. Corp.*, B-412794, June 2, 2016, 2016 CPD ¶ 158 at 2.

Experience Submitted by Large Business Mentor Firms

CWS FMTI argues that the solicitation's self-scoring criteria improperly limit the amount of experience that may be submitted by a large business mentor in a mentor-protégé joint venture. Protest (CWS FMTI) at 8-11. The protester contends that the limitations are unduly restrictive of competition, violate the Small Business Act and SBA regulations, and improperly treat mentor-protégé joint ventures with large business mentors differently than other similarly-situated offerors. For the reasons discussed below, we do not find that the solicitation violates any small business statutes or regulations. However, we agree with the protester that the limitations are unduly restrictive of competition because the agency does not provide a reasonable rationale to

[6] The protesters raise other collateral arguments. Although we do not address every argument, we have reviewed them all and find that none provides a basis to sustain the protests, apart from the single issue addressed herein.

support them. We also agree with the protester that the agency does not reasonably explain why the solicitation treats mentor-protégé joint ventures differently based on the size status of the mentor firm. We therefore sustain the protest.

SBA's Mentor-Protégé Joint Venture Program

SBA's small business mentor-protégé program allows small or large business firms to serve as mentors to small business protégé firms in order to provide "business development assistance" to the protégé firms and to "improve the protégé firms' ability to successfully compete for federal contracts." 13 C.F.R. § 125.9(a), (b); *see* 15 U.S.C. § 644(q)(1)(C). One benefit of the mentor-protégé program is that a protégé and mentor may form a joint venture. 13 C.F.R. § 125.9(d). If SBA approves a mentor-protégé joint venture, the joint venture is permitted to compete as a small business for "any government prime contract or subcontract or sale, provided the protégé qualifies as small for the procurement." *Id.* § 125.9(d)(1).

The Small Business Act requires agencies to consider the capabilities of small business joint venture members as the capabilities of the joint venture, as follows:

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

15 U.S.C. § 644(q)(1)(C).

The regulations promulgated by SBA implementing this statutory provision require agencies to consider the capabilities of small business offerors:

> When evaluating the capabilities, past performance, experience, business systems and certifications of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.

13 C.F.R. § 125.8(e).

Solicitation--Self Scoring Criteria for Experience of Large Business Mentors

The RFP identifies 10 task areas for performance.[7] RFP at 25. Offerors may propose to perform some or all of the task areas, depending on their business category; for example, large businesses (including emerging large businesses) must propose for all 10 task areas, whereas small businesses may propose for task area 1 (IT services for biomedical research, health sciences, and healthcare) and at least 7 other task areas. *Id.* at 160.

The self-scoring criteria for the phase 1 competition provide that offerors may claim points based on experience in the following areas: corporate experience; leading edge technology; federal multiple-award contracts; and Executive Order 13779, which concerns historically black colleges and universities.[8] *Id.* at 158-59. The value of each experience example will depend on the dollar value of the example, with larger values meriting more points. *Id.* at 159-63.

The corporate experience criterion allows offerors to claim points based on experience performing the 10 task areas. For each task area that an offeror proposes to perform, it "must provide corporate experience examples relevant to those task areas." RFP at 159. Offerors must provide "a minimum of three corporate experience examples," and may provide "[u]p to 30 examples . . . with no more than three examples per task area." *Id.* Offerors must provide at least one corporate experience example for task area 1. *Id.* Corporate experience examples may be reused in multiple task areas for corporate experience, with the exception of the one example in task area 1. *Id.* Aside from requiring relevant corporate experience examples for the task areas proposed, and a minimum of one example for task area 1, the RFP does not specify a minimum number of examples for task areas 2 through 10. *See id.* at 159-60.

The leading edge technology experience criterion allows offerors to claim points based on experience performing 9 requirements, and the federal multiple award experience criterion allows offerors to claim points based on experience performing federal IT multiple-award IDIQ contracts.[9] *Id.* at 161-63. Offerors are allowed to provide up to

[7] The 10 task areas are: (1) IT services for biomedical research, health sciences, and healthcare, (2) chief information officer support, (3) digital media, (4) outsourcing, (5) IT operations and maintenance, (6) integration services, (7) cyber security, (8) digital government and cloud services, (9) enterprise resource planning, and (10) software development. RFP at 25.

[8] Though not relevant here, offerors may also claim points based on whether they possess other capabilities or certifications. *See* RFP at 159-160.

[9] The nine requirements under the leading edge technology experience criterion are: (1) cyber security, (2) agile project management and / or agile coaching, (3) machine learning, (4) artificial intelligence, (5) cloud, (6) virtual desktop infrastructure,

three experience examples for each of these criteria. *Id.* at 161, 163. The RFP advises that "[t]he same examples may be used for corporate experience, leading edge technology experience, and federal multiple award experience." *Id.* at 160.

For the corporate experience, leading edge technology experience, and federal multiple award experience criteria, experience examples may be submitted by mentor-protégé joint venture members, or members of a contractor team arrangement (CTA).[10] *Id.* at 159-61, 163. For a mentor-protégé joint venture, however, a large business mentor "is limited 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. *Id.* at 160-61, 163. As discussed below, these criteria do not require a protégé to submit a minimum number of experience examples. *See id.* at 159-61, 163.

Unreasonable Limitations on Large Business Mentor Experience

CWS FMTI first challenges the provisions that limit large business mentors in mentor-protégé joint ventures to submitting a maximum of two of the three possible corporate experience examples for a task area, and two of the three examples for the leading edge technology experience and federal multiple award experience criteria. The protester contends that these limitations unreasonably restrict the ability of a protégé to take advantage of the experience of its large business mentor.

The protester argues the provisions violate the SBA regulation at 13 C.F.R. § 125.8(e) because agencies are prohibited from requiring "the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally." 13 C.F.R. § 125.8(e). The protester further contends that these provisions violate the

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(7) blockchain, (8) robotic process automation, and (9) future cutting edge technologies. RFP at 161-62.

[10] The Federal Acquisition Regulation (FAR) defines a CTA as an arrangement in which:

> (1) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or
>
> (2) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program.

FAR 9.601. As relevant here, the RFP provides that offerors seeking a small business award and competing as CTAs under FAR section 9.601(2), *i.e.*, a prime contractor-subcontractor team, "must establish a Small Business Teaming Arrangement made up of small business subcontractors and submit a copy of the written agreement, if they wish to have the team member experience considered." RFP at 151.

SBA regulation because they violate the agency's obligation to permit mentor-protégé joint ventures to demonstrate experience "in the aggregate." *Id.*

Our Office addressed the provisions of 13 C.F.R. § 125.8(e) in *Ekagra Partners, LLC*, B-408685.18, Feb. 15, 2019, 2019 CPD ¶ 83, which challenged the terms of a solicitation that required offerors to submit a minimum number of experience examples. The RFP stated that for mentor-protégé joint venture offerors, the large business mentor could submit only one of two required examples in the first experience category, and two of three required example in the second experience category-- meaning that the small business protégé was required to submit at least one example in each category.[11] *Id.* at 4-5. Our Office concluded that the solicitation provision did not violate 13 C.F.R. § 125.8(e) because the regulation did not specify the relative amount of experience that the mentor and protégé firms were required to submit. *Id.* at 6.

In the absence of an express statutory or regulatory provision, we then addressed whether the agency had a reasonable basis for the limitation. *Id.* at 6-7. We concluded that the agency reasonably explained that the limitation was needed to ensure that the protégé demonstrated its ability to perform the solicitation requirements. *Id.* at 6-7. In this regard, we noted that SBA's mentor-protégé joint venture regulations require the protégé to be the majority owner and managing partner of a mentor-protégé joint venture. *Id.* at 6 (*citing* 13 C.F.R. § 125.8(b)(2)). The agency explained that, in light of the important responsibilities assigned to the protégé under SBA regulations, it was necessary to ensure that the experience of that firm was adequately considered in the evaluation of a mentor-protégé joint venture offeror. *Id.* For these reasons, we concluded that the solicitation provision 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.[12] *Id.* at 7. We therefore denied the protest concerning this argument.

CWS FMTI acknowledges that our decision in *Ekagra* addressed the relevant provisions in 13 C.F.R. § 125.8(e), but argues that a revision of this SBA regulation in October 2020--after the February 2019 issuance of our decision in *Ekagra*--renders that decision inapplicable to the protest here. Protest (CWS FMTI) at 9 n.7; Comments (CWS FMTI) at 7. Specifically, the protester contends that the October 2020 revision to 13 C.F.R. § 125.8(e) added the following language that was not present in the version of the regulation at the time our Office issued our decision in *Ekagra*: "A procuring activity

[11] The RFP in *Ekagra* also imposed similar limitations on other categories where offerors, at their discretion, could submit additional experience examples. *Ekagra Partners, LLC*, *supra* at 5.

[12] We invited SBA to comment on the protester's arguments in *Ekagra*. *Ekagra Partners, LLC*, *supra* at 6. SBA advised that, in its view, neither the Small Business Act nor 13 C.F.R. § 125.8(e) "address the relative consideration that an agency must give to the past performance of a large business mentor in a mentor-protégé joint venture, as compared to a small business protégé." *Id.*

may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract." 13 C.F.R. § 125.8(e); 85 Fed. Reg. 66193, Oct. 16, 2020.

CWS FMTI argues that the solicitation's self-scoring experience criteria are inconsistent with the revised provisions in 13 C.F.R. § 125.8(e) because the limitations on the amount of experience that may be submitted by a large business mentor effectively require a protégé to meet the same requirements as non-protégé offerors, that is, submit at least some experience examples. Protest (CWS FMTI) at 9-10. The protester also argues that the RFP's limitations on the amount of experience that a large business mentor can submit fail to consider the experience of the mentor-protégé joint venture "in the aggregate," because they preclude the mentor from submitting all of the experience for the joint venture. *Id.* at 10.

NIH argues that the revised language in 13 C.F.R. § 125.8(e) does not affect the basis for our decision in *Ekagra*, because this language does not specifically address the issue in our decision, *i.e.*, the relative consideration to be given to mentor and protégé members of a joint venture. Memorandum of Law (MOL) (CWS FMTI) at 8 n.3. Moreover, the agency contends that the solicitation's limitations on the experience that may be submitted by a large business are reasonable because, as was the case in *Ekagra*, the RFP here ensures that the small business protégé demonstrates at least some experience in performing the solicitation requirements, and is not entirely dependent on the capabilities of the large business mentor. COS (CWS FMTI) at 6; MOL (CWS FMTI) at 7.

Our Office invited SBA to provide its views on CWS FMTI's arguments concerning 13 C.F.R. § 128.5 and the applicability of *Ekagra* to the solicitation here. SBA advised that it believes that our decision in *Ekagra* is not affected by the October 2020 revision to 13 C.F.R. 125.8(e), as relevant to the solicitation provisions challenged here. SBA Comments at 4-5. SBA also notes that the Federal Register notice in which it promulgated the October 2020 revision explains SBA's view that agencies are permitted to require protégés to submit experience showing their ability to perform the work required by a solicitation:

> *SBA's rules require a small business protégé to have some experience in the type of work to be performed under the contract*. However, it is unreasonable to require the protégé concern itself to have the same level of past performance and experience (either in dollar value or number of previous contracts performed, years of performance, or otherwise) as its large business mentor. . . . SBA believes that a solicitation provision that requires both a protégé firm and a mentor to each have the same level of past performance (*e.g.,* each partner to have individually previously performed 5 contracts of at least $10 million) is unreasonable, and should not be permitted. *However, SBA disagrees that a procuring activity should*

> *not be able to require a protégé firm to individually meet any evaluation or responsibility criteria*. SBA intends that the protégé firm gain valuable business development assistance through the joint venture relationship. *The protégé must, however, bring something to the table other than its size or socioeconomic status*. The joint venture should be a tool to enable it to win and perform a contract *in an area that it has some experience but that it could not have won on its own*.

85 Fed. Reg. 66146, 66167-68, Oct. 16, 2020 (emphasis added).

We conclude that 13 C.F.R. § 125.8(e), as revised in October 2020, does not affect the rationale for our decision in *Ekagra*. The RFP here limits a large business mentor firm from submitting more than two of three experience examples for each area of the self-scoring criteria. RFP at 159. If a mentor-protégé joint venture offeror wishes to submit the maximum of three examples for each area, then the protégé must submit at least one example. *See id.*

Despite the protester's arguments to the contrary, we think the limitations on the experience that may be submitted by the large business mentor do not impose on the protégé a requirement that is different than "other offerors generally," as the protégé is not required to submit any experience itself. *See* 13 C.F.R. § 125.8(e); RFP at 159. Moreover, the solicitation does not prohibit consideration of the experience of the joint venture "in the aggregate" as offerors are permitted to submit for the agency's consideration the experience of both members of the joint venture--provided no more than two of the three experience examples are from the large business mentor. *See id.* Because the revised language in 13 C.F.R. § 125.8(e) does not address the relevant experience of the mentor and protégé firm, we conclude that the RFP does not violate any specific statutory or regulatory provision.

We do conclude, however, that the limitations are unduly restrictive of competition. As in *Ekagra,* even though we conclude that the limitations are not specifically barred by 13 C.F.R. § 125.8(e), we still must examine whether the limitations are reasonable, that is, whether the provisions are reasonably necessary to meet the agency's needs. *See Remote Diagnostic Techs., LLC*, *supra*; *Coulson Aviation (USA), Inc.*, *supra*. We find that NIH's rationale for the limitations on the experience that may be submitted by a large business mentor relies on requirements found in the solicitation in *Ekagra* that are not present in the RFP here.

We concluded in *Ekagra* that the limitation on the experience submitted by a mentor was permissible because the agency "reasonably explain[ed] that limiting the amount of experience that may be credited to a large business mentor ensures that the agency will be able to meaningfully consider the experience of the protégé member of the joint venture." *Ekagra Partners, LLC*, *supra* at 7. Here, NIH contends that the same rationale justifies the limitations on the number of experience examples for a large business mentor. COS (CWS FMTI) at 6; MOL (CWS FMTI) at 7-9.

Unlike the solicitation in *Ekagra*, however, the solicitation here does not require the protégé to submit any experience, and therefore does not ensure that the agency will be able to meaningfully consider that joint venture member's experience. Although the RFP requires offerors to submit a minimum of three, and a maximum of 30 corporate experience examples, and up to three examples each for leading edge technology experience and federal multiple award experience, the RFP does not state that any of the experience examples must be submitted by the protégé.[13] *See* RFP at 159-163. Thus, by implication, the large business mentor may submit all of the examples in the proposal--provided the mentor does not submit more than two examples in each area of the experience criteria.[14] *See id.* We therefore find that the RFP does not provide for the same kind of evaluation in *Ekagra*, in that the limitation on the experience that may be submitted by a large business mentor does not ensure that at least some experience will be submitted by the protégé.

Apart from the need to evaluate the experience of the protégé firm, NIH also argues that the limitations on the experience that may be submitted by a large business are reasonable to avoid competitive disadvantage to small business firms that do not partner with large business mentors. COS (CWS FMTI) at 6; MOL (CWS FMTI) at 8-9. In *Ekagra*, we noted that avoiding disadvantage to small businesses without large business mentors was cited as one of the agency's rationales. *Ekagra Partners, LLC*, *supra*, at 6. Our decision, however, did not find that an assumed advantage provided by a large business mentor was a basis, standing alone, for limiting the experience that may be submitted by such firms. *See id.* at 7. Instead, we found that the limitation on the experience submitted by a large business mentor was reasonable based on the need to ensure that the protégé submits at least some experience for evaluation. *Id.*

As discussed above, the purpose of the mentor-protégé joint venture program is to allow small business protégés to benefit from the capabilities of mentor firms--which may be large or small businesses. *See* 13 C.F.R. § 125.9(a), (b); 15 U.S.C. § 644(q)(1)(C). A mentor-protégé joint venture approved by SBA obtains its small business status for purposes of competing for contract awards where the protégé qualifies as a small business, regardless of the size of the mentor. 13 C.F.R. § 125.9(d)(1). NIH has not cited any basis in 13 C.F.R. § 125.8(e), or any other SBA statute or regulation, to support its conclusion that an agency may limit the submission of experience from a large business mentor for the purpose of favoring joint ventures with small business mentors.

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[13] While a mentor-protégé joint venture offeror seeking to self-certify a score higher than the maximum score that the mentor could achieve on its own would need the small business protégé to submit at least one experience example, there are no minimum experience requirements for the protégé. *See id.* at 159-63.

[14] SBA's comments mistakenly state that, in this procurement, "the small business protégé partner must submit at least one-third of the corporate experience examples included in the offer." SBA Comments at 4. As set forth above, this conclusion is not based on an accurate reading of the solicitation.

In sum, SBA regulations require that when an agency evaluates matters such as experience for a mentor-protégé joint venture offeror, it "must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously." 13 C.F.R. § 125.8(e). Our Office found in *Ekagra* that a solicitation may reasonably limit the amount of experience that a large business mentor may submit, to ensure that the protégé submits at least some experience demonstrating its ability to perform the work. *Ekagra Partners, LLC*, *supra*, at 7. SBA's explanation in the Federal Register notice promulgating the October 2020 revisions to 13 C.F.R. § 125.8(e) confirmed that "SBA's rules require a small business protégé to have some experience in the type of work to be performed under the contract . . . [and] [t]he protégé must . . . bring something to the table other than its size or socioeconomic status." 85 Fed. Reg. 66146, 66167-68, Oct. 16, 2020. Because the solicitation here does not require a protégé to submit any experience, we conclude that NIH has not reasonably justified the limitations on the amount of experience that a large business mentor may submit. We therefore sustain the protest on this basis.

Unequal Treatment as Compared to Other Offerors

CWS FMTI also argues that the limits on the experience that may be submitted by a large business mentor are unreasonable because they treat mentor-protégé joint ventures with a large business mentor unequally as compared to (1) mentor-protégé joint ventures with small business mentors, and (2) offerors that compete as CTAs under FAR section 9.601(2), which provides for prime contractor-subcontractor teams.

In this regard, while the RFP limits the number of experience examples that may be submitted by a large business mentor, there is not a similar limit on the experience that may be submitted by a small business mentor. RFP at 159-60. Thus, unlike a mentor-protégé joint venture with a large business mentor, a mentor-protégé joint venture with a small business mentor could submit a proposal with three examples from the small business mentor per relevant area of the self-scoring criteria for experience, and none from the protégé. *See id.*

For offerors that submit proposals as CTAs under FAR section 9.601(2), the RFP does not limit the experience that may be submitted by subcontractors. *Id.* Thus, a small business offeror could submit a proposal with all experience examples from its small business subcontractors, and no examples for itself as the prime contractor. *See id.*

In response to the protester's unequal treatment argument, NIH does not contend that the limitations on the experience that may be submitted by a large business mentor are related to the need to evaluate the experience of a protégé. In this regard, the RFP permits a mentor-protégé joint venture offeror with a small business mentor to rely entirely on the experience of the mentor. *See* RFP at 159-60. Instead, the agency argues that the different treatment challenged by the protester is reasonable because it avoids an unfair disadvantage for mentor-protégé joint venture offerors that do not have

large business mentors. Agency Resp. to GAO Questions, Nov. 4, 2021, at 2-3.[15] In this regard, the agency contends that it is reasonable to avoid the scenario where mentor-protégé joint venture offerors with large business mentors will be able to earn more points under the experience self-scoring criteria as compared to other small business offerors, including mentor-protégé joint venture offerors with small business mentors. *Id.* at 2.

As discussed above, the purpose of the mentor-protégé joint venture program is to allow a protégé to benefit from the experience of a mentor. *See* 13 C.F.R. § 125.9(a), (b); 15 U.S.C. § 644(q)(1)(C). When a mentor-protégé joint venture is approved by SBA, that entity is treated as small for competitions where the protégé firm qualifies as a small business offeror. 13 C.F.R. § 125.9(d)(1). In light of the purpose of the mentor-protégé joint venture program, we do not find that the agency explains why it has the discretion to competitively disfavor a mentor-protégé joint venture with a large business mentor as compared to all other small business offerors. We also do not find that the agency reasonably explains why it has the discretion to, in effect, favor mentor-protégé joint ventures with small business mentors over mentor-protégé joint ventures with large business mentors. We therefore sustain the protest on this basis.

With regard to unequal treatment as compared to offerors that compete for small business awards as CTAs under FAR section 9.601(2), the protester does not demonstrate that the agency is prohibited from allowing an offeror to submit all experience from small business subcontractors, while providing no experience for the small business prime contractor. In any event, the protester also does not establish that the small business protégé partner in the mentor-protégé joint venture is similarly situated to a prime contractor in a CTA under FAR section 9.601(2) in a manner that constitutes improper unequal treatment. We therefore find no basis to separately sustain the protest based on this argument. However, it is not clear from NIH's briefing that it acknowledges that the RFP allows for small business subcontractors to submit all experience for an offeror that competes for a small business award as a CTA under FAR section 9.601(2), with no experience required from the small business prime contractor. To the extent NIH views this possibility as a concern with the agency's ability to evaluate the capabilities of the prime contractor, it may wish to address this matter.

Improper Responsibility Determination

CWS FMTI argues that NIH's responses to the challenges to the experience evaluation criteria show that the agency intends to improperly assess the responsibility of mentor-protégé joint venture offerors based on the experience of the small business protégé member of the joint venture. Supp. Protest (CWS FMTI) at 3-5. We find no merit to this argument.

[15] We also invited SBA to submit comments responding to CWS FMTI's argument concerning unequal treatment, but SBA declined to comment on this argument. SBA Notice, Nov. 2, 2021, at 1.

Contracts may only be awarded to responsible contractors. FAR 9.103(a). In most cases, responsibility is determined on the basis of general standards set forth in FAR section 9.104-1, which include whether a prospective contractor has "the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them." FAR 9.104-1(e); *see Reyna-Capital Joint Venture*, B-408541, Nov. 1, 2013, 2013 CPD ¶ 253 at 2. Such determinations involve subjective business judgements that are within the broad discretion of the contracting activities. *Mountaineers Fire Crew, Inc., et al.*, B-413520.5 *et al.*, Feb. 27, 2017, 2017 CPD ¶ 77 at 10.

When an agency concludes that a small business is not responsible, the Small Business Act requires that the agency must refer that determination to the SBA for a Certificate of Competency (COC) review, if the nonresponsibility determination would preclude the small business from receiving an award. 15 U.S.C. § 637(b)(7); 13 C.F.R. § 125.5; FAR subpart 19.6. Such a COC determination is required when the contracting officer has refused to consider a small business concern for award of a contract or order "after evaluating the concern's offer on a non-comparative basis (*e.g.*, pass/fail, go/no go, or acceptable/unacceptable) under one or more responsibility type evaluation factors (such as experience of the company or key personnel or past performance)." 13 C.F.R. § 125.5(a)(2)(ii). SBA has the sole power to make a final judgement about, and thus to certify, the responsibility of the small business concern to the agency. 15 U.S.C. § 637(b)(7)(A).

In response to CWS FMTI's arguments regarding the limitations on the experience that may be submitted by a large business mentor firm, the contracting officer stated that the limitations are justified for the following reason:

> SBA said the protégé must have some experience in the type of work performed under the contract. This is exactly what the government is assessing. When a small business forms teams with a large business in an [mentor-protégé agreement], the government must know whether the small business is capable of performing some amount of the work and is not totally reliant on their mentor. What CWS FMTI is requesting is a total reliance upon a large business mentor for experience, which defeats the agenc[y's] attempt to assess the small business's ability to perform any work under the contract.

COS (CWS FMTI) at 6.

CWS FMTI contends that the contracting officer's statement reflects an intent to make a responsibility determination based on a protégé's experience during the phase 1 evaluation. Supp. Comments (CWS FMTI) at 5-6. The protester argues that the RFP's requirement that a protégé submit experience is intended "to allow NIH to determine whether a given small business protégé was capable of performing" the contract

requirements.[16] *Id.* at 6. The protester concludes that this use of offeror experience for a responsibility determination is a "clear violation of applicable law" because only the SBA may make a final judgment regarding the responsibility of a small business firm. *Id.*

NIH states that the solicitation does not provide for the evaluation of offeror responsibility in phase 1 of the solicitation in connection with the experience self-scoring criteria. Supp. MOL (CWS FMTI) at 2. Instead, the RFP provides that responsibility will be determined in phase 3, prior to award. *Id.* NIH further states that it does not intend to evaluate offerors' experience on a non-comparative, go/no go basis in phase 1 of the competition. *Id.* at 8.

We agree with the agency that the solicitation expressly provides that the agency will evaluate responsibility during phase 3 of the competition. RFP at 176, 181. In this regard, the RFP identifies a "Responsibility Determination" as one of the elements of the phase 3 evaluation. *Id.* at 181. The RFP states that "[t]he government will use all information submitted in the offeror's proposal as well as any other information the government obtains from its information system and other legitimate sources of information to arrive at this determination." *Id.*

We also think the agency reasonably explains that the phase 1 evaluation criteria do not anticipate the assessment of offeror responsibility. The phase 1 criteria anticipate that offerors will be compared based on the number of self-scoring points claimed, and provide that the highest-scoring proposals will advance to the phase 2 competition. *See* RFP at 173-74. These evaluation criteria do not provide for rejection of proposals based on a go/no go assessment of offeror capability. *See id.*

We recognize that the contracting officer's response to CWS FMTI's protest appears to state that the agency intends to assess a protégé's experience to determine its ability to perform the contract. *See* COS (CWS FMTI) at 6. However, even if the agency--despite its subsequent representations to the contrary--intends to make a responsibility determination based on the experience of protégé firms, such a determination would not be improper.

The protester correctly notes that our Office has found that where an agency finds a small business offeror to be nonresponsible, and therefore ineligible for award, the agency must refer the matter to SBA for a COC determination. Supp. Comments (CWS FMTI) at 5-6 (*citing Cascadian Am. Enters.*, B-412208.3, B-412208.4, Feb. 5, 2016, 2016 CPD ¶ 29). The protester, however, incorrectly contends that an agency may not request information from a small business or protégé for the purpose of making a responsibility determination. Instead, agencies are required to make responsibility determinations for all potential awardees, including small businesses. *See* FAR 9.103(a). The COC process in fact anticipates that an agency makes a

[16] As discussed above, however, the RFP does not require mentor-protégé joint venture offerors to submit any experience from the protégé member.

nonresponsibility determination before the COC process begins. *See Specialty Marine, Inc.*, B-292053, May 19, 2003, 2003 CPD ¶ 106 at 3 (noting that the determination of small business offeror responsibility begins with a finding by the procuring agency, followed by a referral of nonresponsible offerors to SBA for a COC review). Consistent with this requirement, the RFP provides that the agency will refer offerors found not to be responsible to SBA for a COC review. RFP at 181.

At this time, any argument concerning the possibility that the agency might make an improper responsibility determination is premature. *See Booz Allen Hamilton, Inc.*, B-414822.5, Oct. 13, 2017, 2017 CPD ¶ 315. In this regard, our Office assumes that agencies will conduct procurements in a fair and reasonable manner in accordance with the terms of the solicitation, and we will not consider a protest allegation which speculates that an agency will not evaluate proposals in the manner set forth in the solicitation. *Hewlett Packard Enter. Co.*, B-413444.4, B-413444.5, Jan. 18, 2017, 2017 CPD ¶ 29 at 5.

On this record, we find no basis to conclude that the RFP is flawed based on the requirement to submit information regarding experience. We also find no basis to conclude that the agency is prohibited from assessing the responsibility of small business offerors based on their capabilities, as reflected by their experience. If the protester believes that the agency, in the evaluation of proposals, makes an improper finding that it is not a responsible offeror based on the experience of the protégé member of the joint venture, and if the agency fails to refer that matter to SBA for a COC, the protester may file a protest challenging this matter, consistent with our Bid Protest Regulations.

Value of Experience and Past Performance Examples

CWS and CWS FMTI argue that the solicitation's evaluation criteria improperly measures the value of experience and past performance examples based on the obligated value of contracts, rather than the awarded value of contracts.[17] CWS Protest at 6-10; CWS FMTI Protest at 11-14. The protesters contend that this metric for valuing contracts is unduly restrictive of competition. We find no merit to this argument.

As discussed above, the self-scoring criteria for the phase 1 competition provide that offerors may claim points for experience in the following areas: (1) corporate experience; (2) leading edge technology; (3) federal multiple-award contracts; and (4) Executive Order 13779, which concerns historically black colleges and universities. RFP at 158. For the first three areas of experience, RFP sections L.5.2.1, L.5.2.2, and

[17] In the context of appropriations decisions, our Office has explained that funds are recorded as an obligation of the United States when supported by documentary evidence of a binding written agreement between an agency and another person. 31 U.S.C. § 1501; *see* Principles of Federal Appropriations Law (2017), Vol. II, Ch. 7 at 264.

L.5.2.3, offerors may claim points for each example submitted, with a maximum of three examples per task area.[18] *Id.* at 159-63. The value of each example depends on the dollar value of the example, with larger values meriting more points. *Id.*

The RFP defines the dollar value of an experience example as follows:

> The dollar value utilized for experience in sections L.5.2.1, L.5.2.2, and L.5.2.3 is determined by the total dollars that were obligated (funded).
>
> Experience examples can be either a collection of orders or one single order placed under an IDIQ contract or [blanket purchase agreement (BPA)]. If an experience example is a "collection of orders" placed under an IDIQ contract or BPA, the dollar value will be the sum of all orders based on the methods above being applied to each individual order.

RFP at 159; *see also* 159-63.

The phase 3 competition provides for the evaluation of past performance, and permits offerors to submit up to three past performance examples. *Id.* at 170. The past performance factor states that "[t]he dollar value utilized for past performance [examples] is determined by the total dollars that were obligated (funded)." *Id.* at 171.

The protesters contend that the use of obligated values as a metric for contract performance is unduly restrictive of competition because the award value for contracts is often larger than the value of funds obligated for that contract. For example, an IDIQ contract may have an award value equal to its maximum ordering value, whereas the actual obligated amounts for the IDIQ contract may be far smaller, as the obligated value may reflect only the funding authorized for the issuance of each task order.

NIH argues that the RFP reasonably assesses the value of experience and past performance examples based on the obligated value of the contract because that metric better reflects the work performed by a contractor, as compared to the awarded value. COS (CWS) at 5; COS (CWS FMTI) at 7. In this regard, the agency contends that obligated dollars "is a better indicator of experience obtained under a contract (or order) than the awarded dollar value," because "a client may award a contract with a high ceiling but choose not to execute any options, orders, or fully fund performance under the contract." *Id.* The agency further states that the use of award values "provides an unfair advantage to [offerors] that have been awarded large IDIQ contracts . . . because these [contract] vehicles have ceilings valued in the billons, but there is the potential that no orders are placed against these awards." *Id.* For these reasons, the agency states that the use of award value as a metric does not meet the agency's requirement to measure work performed. *Id.*

[18] For the fourth area, RFP section L.5.2.4, which concerns Executive Order 13779, offerors may claim points for each experience example, without regard to the value of the contract. *Id.* at 164.

The purpose of evaluating an offeror's experience and past performance is to assess whether the work performed is relevant to the work required under the solicitation, and thereby enable the agency to predict whether the offeror is likely to succeed in performing the solicitation requirements. *See* RFP at 159, 170-71; *see also* FAR 15.305(a)(2); *Choctaw Staffing Solutions*, B-413434, Oct. 24, 2016, 2016 CPD ¶ 298 at 4. The protesters are correct that award value and obligated value are both, in essence, proxy metrics for work performed. In this regard, the RFP allows an offeror to claim experience based on the obligated value of a contract, despite the possibility that it may have performed only part of the obligated value.

As between the two potential alternatives discussed here, we think the agency reasonably explains that obligated value is the better proxy for measuring experience, as it is more predictive of work performed than award value. The metric of awarded value advocated by the protesters is necessarily less predictive of the ability to perform because it includes amounts that an offeror may never be authorized to perform, and also includes large multiple-award IDIQ contract ceiling values that are likely unrelated to the work actually performed.

Additionally, the protesters argue that the RFP's self-scoring criteria uses a point scale that may not permit emerging large businesses, such as a CWS, and small businesses, such as CWS FMTI, to earn the maximum number of points for experience. Protest (CWS) at 8-9; Protest (CWS FMTI) at 13. The protesters contend that while the RFP sets a maximum revenue annual limit of $500 million for emerging large businesses and $30 million for small businesses, the RFP also sets the threshold for claiming the higher number of points for an experience example at a high level that these firms may not be able to meet--$31 million for an emerging large business, and $7 million for a small business. *See* RFP at 124, 157, 160-64. The protesters contend that it will be difficult for either of these categories of offeror (*i.e.*, emerging small businesses or small businesses) to have performed the maximum of 30 contracts that would merit the maximum number of points, while also staying under the annual revenue limits. For these reasons, the protesters argue that the agency should allow offerors to claim points based on the awarded values of contracts, which would be higher than the obligated value of the contracts.

NIH argues that the protesters' concerns regarding the ability to earn the maximum point scores do not demonstrate that the use of obligated funds to measure experience is unduly restrictive of competition in a manner that warrants using the alternative metric of award value. MOL (CWS) at 8-9; MOL (CWS FMTI) at 13. The agency notes that the same experience examples may be reused (with the exception of a single example for task area 1); for this reason, offerors need not submit unique contracts for each task area, as the protesters suggest. *See* RFP at 159. We agree with the agency that, in light of the ability of offerors to reuse contract examples, the protesters do not establish that the metric of obligated funds for the value of self-scoring points is unduly restrictive of competition.

Moreover, even if the protesters were correct that the use of obligated funds as a metric for the self-scoring points makes it more difficult for emerging large business or small business firms to claim the maximum number of points, this alone does not establish that the metric is unduly restrictive of competition. As discussed above, offerors within a business category compete only against other similarly-situated offerors. Thus, even if emerging large businesses or small businesses are unlikely to claim the maximum number of points, these offerors are all similarly disadvantaged.

To the extent there are a comparatively small number of offerors that are able to submit more relevant experience to demonstrate their abilities to meet the agency's needs, the protesters do not establish that the agency is prohibited from selecting such higher-qualified offerors for award. The fact that the protesters may not be situated to earn the maximum number of points allowed does not, standing alone, establish that the evaluation criteria are unreasonable. *See Management & Tech. Servs. Alliance Joint Venture*, B-416239, June 25, 2018, 2018 CPD ¶ 218 at 4-5 (an agency is not required to eliminate a disadvantage an offeror may experience because of its particular business circumstances, where that advantage or disadvantage does not result from improper or unfair action by the government). On this record, we find no basis to sustain the protests.

CONCLUSION AND RECOMMENDATION

For the reasons discussed above, we sustain CWS FMTI's protest challenging the limitations on the number of examples that may be submitted by a large business mentor in a mentor-protégé joint venture. We recommend that the agency reconsider its requirements and the limitations the RFP imposes on the experience that may be submitted by large business mentors, and whether the agency believes there are justifications for the limitations that are consistent with our discussion herein. If the agency elects to retain the current version of the RFP, it should advise the protester of the new justification for the limitations. In the alternative, we recommend that 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), as discussed above. If the agency amends the solicitation, it should provide offerors an opportunity to submit revised proposals.

We also recommend that the agency reimburse CWS FMTI's costs of filing and pursuing its protest concerning the experience self-scoring criteria, including reasonable attorneys' fees. The protester should submit its certified claim for costs directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

CWS FMTI's protests is sustained in part and CWS's protest is denied.

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