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Comptroller General
of the United States

Decision

Matter of: International Global Solution, LLC; Definitive InfoTech Services and Solutions, LLC

File: B-419956.20; B-419956.22

Date: November 18, 2021

Shane M. McCall, Esq., Nicole D. Pottroff, Esq., Christopher S. Coleman, Esq., John L. Holtz, Esq., and Kevin B. Wickliffe, Esq., Koprince McCall Pottroff, LLC, for the protesters.
Krystal Jordan, Esq., Karyne Akhtar, Esq., and Martin McEnrue, Esq., Department of Health and Human Services, for the agency.
Jonathan L. Kang, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protests challenging as unduly restrictive of competition solicitation provisions that limit the ability of offerors competing for small business awards under a contractor team arrangement to propose large business subcontractors are denied where the provisions are reasonably related to the agency's interest in promoting small business subcontractors.

2. Protests that the agency did not provide a reasonable amount of time to respond to a solicitation amendment are denied where the relevant regulations do not establish a mandatory minimum amount of time for responses to amendments, and where the allotted time was otherwise reasonable.

3. Protests that solicitation provisions do not allow offerors to intelligently compete are denied where the provisions are not unclear or ambiguous.

DECISION

International Global Solution, LLC (IGS), a small business, of Indianapolis, Indiana, and Definitive InfoTech Services and Solutions, LLC (Definitive), a small business, of Louisville, Kentucky, 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). The protesters

allege that the request for proposals (RFP) is unduly restrictive of competition with regard to the ability of small business offerors to propose large business subcontractors; did not provide offerors a reasonable amount time to respond to solicitation amendments concerning the challenged subcontracting provisions; and contains provisions that are unclear or ambiguous.

We deny the protests.

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 1; Contracting Officer's Statement (COS) at 2.[1] 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 relevant here 75 to 125 contracts to other than small businesses. *Id.* at 145. Each awarded contract will have a maximum ordering value of $50 billion. *Id.* at 52.

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

The RFP provides for a 3-phase evaluation of proposals. *Id.* at 173. As relevant to the protest, the phase 1 competition requires offerors to submit a self-scoring sheet that assigns points based on offerors' representations. *Id.* at 158. Offerors may claim points

[1] 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. IGS and Definitive raise the same protest arguments, and their respective protests and comments are essentially identical; the COS and agency memorandum of law (MOL) are also essentially identical. References to the protests, comments, COS, and MOL are to the same page in the documents filed in each protest.

based on experience in the following areas: corporate experience under the task areas that the offeror proposes to perform; leading edge technology; federal multiple-award contracts; and Executive Order 13779, which concerns historically black colleges and universities.[2] *Id.* at 150. 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 the phase 3 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.

The initial RFP established a closing date for receipt of proposals of June 28. AR, Tab 3a, Initial RFP, Standard Form 33 at 1. The closing date was extended several times prior to the July 19 issuance of RFP amendment 7, which established a new closing date of August 3. AR, Tab 10a, RFP amend. 7, Cover Letter at 1. As relevant here, RFP amendment 7 revised requirements for offerors that intend to submit proposals as part of contractor team arrangements (CTAs) under the provisions of Federal Acquisition Regulation (FAR) section 9.601. AR, Tab 10c, RFP amend. 7 at 152-55. The agency issued RFP amendment 9 on August 2, which extended the closing date to August 20. AR, Tab 12a, RFP amend. 9, Cover Letter at 1. 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. IGS filed its protest challenging the terms of the RFP on August 19, and Definitive filed its protest on August 20.

DISCUSSION

IGS and Definitive raise three primary challenges to the terms of the solicitation: (1) the RFP provisions concerning the submission of proposals as CTAs are unduly restrictive of competition; (2) the RFP does not provide a reasonable time to respond to the changes to the CTA provisions in RFP amendment Nos. 7 and 11; and (3) the RFP is unclear regarding the basis on which experience will be evaluated with regard to the value of contracts performed, and is also unclear regarding the basis on which

[2] Offerors may also claim points based on whether they possess other capabilities or certifications. *See* RFP at 159-160.

proposals will be compared for purposes of award. Protests at 5-11. For the reasons discussed below, we find no basis to sustain either protest.[3]

Unduly Restrictive CTA Provisions

IGS and Definitive argue that the solicitation provisions concerning the submission of proposals for small business awards by firms competing as CTAs are unduly restrictive of competition. Protests at 5-9; Comments at 6-8. Specifically, the protesters argue that the RFP improperly prohibits small business offerors from proposing to perform with large business subcontractors. We find no merit to these arguments.

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 specification or requirement as unduly restrictive of competition, the procuring agency must establish that the specification or requirement 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.

The determination of a contracting agency's needs, including the selection of evaluation criteria, is primarily within the agency's discretion and we will not object to the use of particular evaluation criteria so long as they reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interests. *SML Innovations*, B-402667.2, Oct. 28, 2010, 2010 CPD ¶ 254 at 2. 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.

The 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

[3] 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.

> to have them act as its subcontractors under a specified Government contract or acquisition program.

FAR 9.601.

The solicitation initially advised that "[p]otential offerors may form a CTA or a mentor-protégé arrangement that has been approved by the Small Business Administration."[4] Initial RFP at 156. Prior to the due date for proposals, NIH issued RFP amendment 7, which revised RFP section L.3.7.3 by adding additional requirements for offerors that intend to compete for small business awards as CTAs under FAR section 9.601(2). RFP amend. 7 at 155. Significantly, such offerors were required to form small business teaming arrangements, meaning that all members of the CTA are required to be small businesses:

> Offerors forming CTAs as defined under FAR 9.601(2) are not required to submit any additional documentation regarding the proposed prime / subcontractor contractual relationship or the qualifications of the proposed subcontractors *unless the offeror is seeking a small business award.*
>
> *Offerors that are seeking a small business award must establish a Small Business Teaming Arrangement as defined in 52.207-6(a)*[5] *and submit a copy of the written agreement required per FAR provision 52.207-6(a)(1)(ii).*

Id. (emphasis added to denote amended text).

The final RFP amendment issued by the agency, No. 11, revised this language and states that offerors seeking to compete as CTAs under FAR section 9.601(2) "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*

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[4] The purpose of the Small Business Administration's (SBA) mentor-protégé program is to enhance the capabilities of small business protégé firms and to improve their ability to successfully compete for contracts. *See* 13 C.F.R. § 125.9(a). The mentor-protégé program allows a large business mentor firm and a small business protégé firm to form a joint venture that may compete as a small business for a prime contract or subcontract, provided the protégé individually qualifies as small for the procurement. *See* 13 C.F.R. § 125.9(d)(1); *see also* 13 C.F.R. §§ 121.103(b)(6), (h)(1)(ii).

[5] As relevant here, FAR provision 52.207-6, states that a small business teaming arrangement is formed where "[a] small business offeror agrees with one or more other small business concerns to have them act as its subcontractors under a specified Government contract." FAR provision 52.207-6(a)(1)(ii). A small business teaming arrangement must be formed through a written agreement that "[s]ets forth the different responsibilities, roles, and percentages (or other allocations) of work as it relates to the acquisition." *Id.*

team member experience considered." RFP amend. 11 at 151 (emphasis added to denote amended text).

IGS and Definitive argue that the solicitation is unduly restrictive of competition because it prohibits offerors seeking small business awards from "utiliz[ing] a large business subcontractor," unless they form mentor-protégé joint ventures. Protests at 7; Comments at 7. The protesters argue the prohibition is burdensome for small businesses because they will not be able to rely on the capabilities of large businesses in their proposals. Protests at 7. The protesters contend that the RFP prohibition on large business subcontractors is unnecessary and therefore unreasonable because other existing regulations encourage participation of small business subcontractors. Comments at 7.

The agency represents that the final revision to the RFP requirements permits subcontracts with large businesses, provided that the experience of those subcontractors is not submitted for self-scoring evaluation credit for phase 1 of the evaluation. Agency Resp. to GAO Questions, Oct. 12, 2021, at 1. Thus, as a preliminary matter, the agency states that the protesters' characterization of the RFP provisions is incorrect, as the protests did not address the final version of the solicitation in RFP amendment 11. In this regard, the protesters initially argued that the RFP, through amendment 10, expressly prohibits any offeror competing for award as part of a FAR section 9.601(2) CTA from proposing a large business subcontractor. Protests at 5. Although the protesters' comments acknowledge that their protests did not address RFP amendment 11, they nonetheless contend that the solicitation still prohibits offerors competing for a small business award as part of a FAR section 9.601(2) CTA from proposing large business subcontractors. Comments at 5-6; *id.* at n.2.

As noted above, the final version of the RFP states that a firm competing for a small business award as part of a FAR section 9.601(2) CTA must establish a CTA "made up of small business subcontractors" if the offeror wishes to have the experience of those subcontractors considered. RFP at 151. The agency explains that while these provisions prohibit an offeror competing for a small business award from claiming the experience of a large business subcontractor in completing the solicitation's experience self-scoring criteria, the RFP does not preclude an offeror from proposing a large business subcontractor where self-scoring credit will not be claimed. MOL at 13; Agency Resp. to GAO Questions, Oct. 12, 2021, at 1. We agree with the agency that its interpretation of the challenged provisions is consistent with the language in RFP amendment 11.

NIH also argues that the challenged solicitation provisions are reasonable because they promote participation by small business subcontractors. MOL at 13-14.[6] The agency

[6] NIH identifies other rationales in support of the reasonableness of the challenged provisions. Because we conclude that the goal of prompting participation of small

contends that the provisions are consistent with the goals set forth in FAR section 19.201, which states that agencies should maximize opportunities for small businesses to participate in government contracting as subcontractors:

> (a) It is the policy of the Government to provide maximum practicable opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. *Such concerns must also have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance*. . . .

FAR 19.201(a) (emphasis added).

We agree with NIH that the challenged solicitation provisions are not unreasonable or unduly restrictive of competition. First, the protesters do not contend or otherwise establish that the provisions violate any procurement laws or regulations. Second, we think the agency reasonably explains that the provisions are related to the agency's needs, specifically the policy of promoting opportunities for small business subcontractors. We think that the agency reasonably concluded that the limitation on large business subcontractors will increase subcontracting opportunities for small businesses. Although the protesters contend that the provisions are not needed to promote small business subcontracting opportunities in light of other policies promoting small business participation, such as the FAR's limitation on subcontracting provisions[7], we find that the protesters' disagreement with the agency's judgment here does not provide a basis to sustain the protest.

Finally, the protesters contend that the prohibition on large business subcontractors will preclude small business offerors from meeting the RFP's go/no-go requirement in phase 2 of the competition to have an "accounting system that has been audited and determined adequate for determining costs applicable to this contract in accordance with FAR 16.301-3(a)(1)." Protests at 4 (*quoting* RFP at 168). The protesters contend that most small businesses do not have the ability to maintain their own approved accounting systems and must therefore rely on large business subcontractors to provide these services. *Id.*

As discussed above, NIH explains that offerors competing for small business awards are not prohibited from proposing large business subcontractors; rather, they are prohibited from using the experience of large business subcontractors for the phase 1 experience self-scoring evaluation criteria. MOL at 16; RFP at 151. However, offerors

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business subcontractors provides a reasonable basis for the challenged solicitation provisions, we do not address the other arguments.

[7] *See, e.g.*, FAR 19.507; FAR clause 52.219-14, Limitations on Subcontracting.

are not required to demonstrate or self-certify experience for the phase 2 go/no-go requirements, such as an approved accounting system. *See* RFP at 168. We therefore agree with the agency that the protesters' ability to satisfy the requirements for an approved accounting system through large business subcontractors is unaffected by the restrictions on claiming self-certification points for large business subcontractors in connection with the experience criteria. On this record we conclude that the challenged solicitation provisions are reasonable and not unduly restrictive of competition, and therefore find no basis to sustain the protest.

Time to Submit Proposals

Next, IGS and Definitive argue that RFP amendments 7 and 10 did not provide a reasonable amount of time for offerors to respond to changes in the requirements concerning CTAs under FAR section 9.601(2) set forth in each of those amendments. Protests at 6-8; Comments at 2-6. We find no merit to these arguments.

The solicitation was issued on May 25, and offerors were permitted a total of 94 days to submit proposals between that date and the final closing date of August 27, established by RFP amendment 11. RFP amendment 7, which introduced the limitation on large business subcontractors for offerors seeking to compete for small business awards as CTAs under FAR section 9.601(2), was issued on July 19, which resulted in a total of 39 days from the issuance of that amendment to submit proposals. RFP amendment 10, which required offerors to provide additional information regarding the limitation on subcontracting in FAR clause 52.219-14, was issued on August 16, which resulted in a total of 11 days from the issuance of that amendment to submit proposals. RFP amendment 11, which clarified the limitation on large business subcontractors concerning experience credit, was issued on August 20, which resulted in a total of 7 days from the issuance of that amendment to submit proposals.

IGS and Definitive argue that the RFP did not provide offerors a reasonable amount of time to submit proposals in response to the new solicitation provisions in RFP amendment 7 that limit the ability of offerors seeking to compete for small business awards as CTAs under FAR section 9.601(2) from proposing large business subcontractors.[8] Protests at 6. The protesters initially argued that the RFP failed to provide the minimum time required by FAR section 5.203(c), which states: "Except for the acquisition of commercial items (*see* 5.203(b)), agencies shall allow at least a

[8] IGS and Definitive initially argued that the challenged provisions were "introduced" in RFP amendment 7, but made "express" in amendment 10. Protests at 6. The protesters argued, therefore, that the agency improperly allowed only 3 days for submission of revised proposals, calculating that time based on the August 16 issuance of RFP amendment 10 and the then-applicable closing date of August 20. *Id.* In their comments on the agency report, however, the protesters acknowledge that the challenged provisions were first included in RFP amendment 7, and that the agency therefore permitted 39 days for offerors to respond to the changed provisions in that amendment. Comments at 3-5.

30-day response time for receipt of bids or proposals from the date of issuance of a solicitation, if the proposed contract action is expected to exceed the simplified acquisition threshold." FAR 5.203(c).

In its response to the protests, NIH notes that FAR section 5.203(c) applies to the issuance of solicitations, and does not expressly refer to amendments or state that the 30-day minimum resets with the issuance of each amendment. MOL at 8-9. The agency argues that the RFP satisfied the requirements of FAR section 5.203(c) because it provided 94 days from the issuance of the solicitation, and that the agency in any event provided 39 days from the issuance of RFP amendment 7. *Id.*

The protesters' comments do not directly respond to the agency's arguments concerning FAR section 5.203(c), and instead argue that the RFP violated FAR section 5.203(b). Comments at 4-6. This section of the FAR, which applies to commercial item procurements valued at more than $25,000, requires agencies to "establish a solicitation response time that will afford potential offerors a reasonable opportunity to respond to each proposed contract action," and to consider "the circumstances of the individual acquisition, such as the complexity, commerciality, availability, and urgency, when establishing the solicitation response time." FAR 5.203(b).

The protesters argue that the RFP amendments violate FAR section 5.203(b) because they fail to take into consideration the RFP's complex requirements and the challenges posed by eliminating the ability to propose large business subcontractors. In particular, the protesters contend that the agency does not explain why "39 days was a sufficient amount of time for a small business to completely shift its business strategy, establish new contacts, vet these new contacts to ensure they are competent and actually able to perform, and prepare new agreements." *Id.* at 5.

To the extent the protesters initially argued that NIH failed to provide a minimum of 30 days to respond to RFP amendment 7, as required by FAR section 5.203(c), the protesters' comments do not address the agency's response to this issue; we therefore consider this argument abandoned. 4 C.F.R. § 21.3(i)(3) (GAO will dismiss any protest allegation or argument where the agency's report responds to the allegation or argument, but the protester's comments fail to address that response). In any event, NIH is correct that the 30-day period in FAR section 5.203(c) does not apply to solicitation amendments, that is, each amendment does not trigger a new 30-day minimum requirement. *See Lanier Worldwide, Inc.*, B-249338, Nov. 12, 1992, 92-2 CPD ¶ 343 at n.1. Moreover, the agency, through several extensions to the closing date, provided 94 days in total to respond to the solicitation, and 39 days from the issuance of RFP amendment 7. Thus, even if the protesters had pursued their argument concerning FAR section 5.203(c), the record shows that the agency did not violate this FAR requirement.

To the extent the protesters argue that NIH violated the requirements of FAR section 5.203(b), which require agencies to provide "a reasonable opportunity to respond to each proposed contract action," this argument was not raised in the initial protests and

was filed after the closing date for the solicitation. We therefore conclude it is untimely. 4 C.F.R. 21.2(a)(1) (challenges to the terms of a solicitation must be filed prior to the initial closing date). In any event, our Office has explained that FAR section 5.203(b), which applies to commercial item procurements, is an exception to the 30-day minimum period in FAR section 5.203(c). *See AeroSage, LLC*, B-416381, Aug. 23, 2018, 2018 CPD ¶ 288 at 12. In this regard, FAR section 12.205 explains that "[c]onsistent with the requirements at 5.203(b), the contracting officer may allow fewer than 30 days response time for receipt of offers for commercial items, unless the acquisition is covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement (*see* 5.203(h))." FAR 12.205(c). Thus, even if the protesters were correct that FAR section 5.203(b) should apply to this solicitation, this argument does not establish that the agency failed to provide a reasonable time for submission of proposals.

The protesters also argue that, even if the RFP did not specifically violate any FAR provisions, the agency did not provide a reasonable amount of time to respond because the revised provisions effectively prohibited offerors seeking small business awards from proposing large business subcontractors, unless they form mentor-protégé joint ventures. Protests at 6-7; Comments at 5. The protesters note that an SBA website indicates that the "application processing timeframe" for mentor-protégé joint ventures is 105 days. Protests at 6-7 (*citing* SBA Mentor-Protégé Website, www.sba.gov/federal-contracting/contracting-assistance-programs/sba-mentor-protege-program (last visited Nov. 1, 2021). For this reason, the protesters contend that the agency failed to provide a reasonable amount of time for offerors to revise their proposals. *Id.* at 7. We see no merit to the protesters' argument.

The protesters do not cite any regulatory requirements or FAR provisions that require agencies to hold all solicitations open for at least the amount of time required to form a mentor-protégé joint venture. The fact that particular offerors, such as the protesters here, may not be situated to compete at the time of proposal submission does not establish that the time for proposal submission is 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 an improper preference or unfair action by the government). In sum, we find no basis to conclude that NIH violated any procurement law or regulation by providing offerors 39 days to respond to the revised CTA provisions in RFP amendment 7.

Ambiguous Solicitation Provisions

Finally, IGS and Definitive argue that the RFP is unclear or ambiguous in two areas: (1) the basis on which the agency will assess the value of contracts performed in connection with the experience self-certification evaluation criteria; and (2) the method by which the agency will compare small business offerors for award. For the reasons

discussed below, we find that none of the provisions challenged by the protesters are unclear or ambiguous.

A solicitation must be drafted in a fashion that enables offerors to intelligently prepare their proposals and must be sufficiently free from ambiguity so that offerors may compete on a common basis. *Raymond Express Int'l*, B-409872.2, Nov. 6, 2014, 2014 CPD ¶ 317 at 9. Further, specifications must be free from ambiguity and describe the minimum needs of the procuring activity accurately. *Arch Sys., LLC; KEN Consulting, Inc.,* B-415262, B-415262.2, Dec. 12, 2017, 2017 CPD ¶ 379 at 10. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them, without more, does not show that the agency's judgment is unreasonable. *Gallup, Inc.*, B-410126, Sept. 25, 2014, 2014 CPD ¶ 280 at 5.

As to the first area, the RFP's initial phase I evaluation self-certification criteria stated that points for the experience factor may be claimed based on the "total value of the contract including options." Initial RFP at 164. The final version of the criteria in RFP amendment 11 states that points may be claimed based on the "obligated (funded) dollar value" of the identified experience examples. RFP at 159-63.

IGS and Definitive argue that offerors cannot intelligently prepare proposals because the term "total obligated value" is not expressly defined. Protests at 9-10. The protesters further argue that the addition of the term "funded" does not clarify the matter, as that term is also not expressly defined. Comments at 8. The protesters contend that the lack of a definition causes doubt in connection with the following questions: "[1] Is it the value that the government is obligated to pay at the time of award? [2] Is it the value that the government is obligated to pay at the end of the entire project, after all the equitable adjustments and various other changes are made that are common to this type of project?" Protests at 10.

NIH states that RFP amendments 9 and 10, along with answers to offeror questions, resolve the concerns raised by the protesters. MOL at 21. The agency notes that questions and answers (Q&As) in RFP amendment 3 advised that the dollar values for the experience must be obligated amounts, rather than the award values of the contracts:

> [Question 55] Section L.5.2.3 how are dollar values to be calculated for federal multiple award experiences?
>
> [Answer 55] Dollar values are calculated for federal multiple award experiences, by *combining all the awarded Task Orders' obligated dollar amounts* under a single multiple award contract. . . .
>
> [Question 56] Row 9 self-scoring sheet - how to calculate dollar values for multiple award experiences?

> [Answer 56] Dollar values are calculated for Leading Edge Technology experiences, by calculating *the [amount] obligated up to the date of submission* - obligated *not contract ceiling, options, [not to exceed], etc.* - dollar amounts for each experience. . . .

AR Tab 6h, Q&As at 18 (emphasis added).

The agency states that RFP amendment 9 added the term "obligated value" to the evaluation criteria to incorporate the Q&As from RFP amendment 3, thereby avoiding an ambiguity between the terms "obligated" and "awarded." RFP amend. 9, Cover Letter at 1. Additionally, RFP amendment 10 added the term "funded," to clarify the meaning of the term "collection of orders." AR, Tab 13c, RFP amend. 10 at 159-63. Thus, the final version of the RFP defines the value of an experience example as follows:

> The dollar value utilized for experience . . . 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. With regard to options, the RFP also states that "[t]he dollar value of the corporate experience example is the total obligated (funded) value of the contract including exercised options." *Id.* at 160. Based on these solicitation amendments, the agency contends that there is no merit to the protesters' arguments regarding a lack of clarity concerning awarded and obligated contract values, and whether other potential contract modifications should be included in the contract value. *See* MOL at 21.

Although IGS and Definitive are correct that the RFP does not expressly define the term obligated, the protesters do not show that the lack of a definition precludes their ability to prepare their proposals and compete for award. We think the term obligated is reasonably understood to mean the amount of funds that is the subject of a binding agreement between the offeror and the government. In this regard, in the context of appropriations decisions, our Office has explained that funds are obligated under the following circumstances:

> (a) An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of--
>
> > (1) a binding agreement between an agency and another person (including an agency) that is--
> >
> > > (A) in writing, in a way and form, and for a purpose authorized by law; and

> (B) executed before the end of the period of availability for obligation of the appropriation or fund used for specific goods to be delivered, real property to be bought or leased, or work or service to be provided.

31 U.S.C. § 1501; *see* Principles of Federal Appropriations Law (2017), Vol. II, Ch. 7 at 264.

Additionally, FAR section 32.703-1 distinguishes between contracts that are fully and incrementally funded, as follows:

> (a) If the contract is fully funded, funds are obligated to cover the price or target price of a fixed-price contract or the estimated cost and any fee of a cost-reimbursement contract.
>
> (b) If the contract is incrementally funded, funds are obligated to cover the amount allotted and any corresponding increment of fee.

FAR 32.703-1.

We think the RFP's definition of total value is not unclear or ambiguous, in that it is tied to the term obligated, and therefore directs offerors to calculate the value of a experience example based on the contractual obligations between the offeror and the government, rather than a hypothetical potential value of a contract. In this regard, the RFP's definition excludes other hypothetical potential value metrics, such as contract ceilings or not-to-exceed values. AR Tab 6h, Q&As at 18. The RFP also makes clear that total value is determined at the "date of submission," therefore excluding unexercised options or potential equitable adjustments. *Id.*; RFP at 160. Most significantly, the RFP distinguishes between orders issued under IDIQ contracts where funds are obligated, from the maximum ordering value under the contract. RFP at 159-60. On this record we find that the protesters' questions regarding the solicitation's definition of total value are addressed by the RFP, and therefore do not show that offerors are unable to intelligently prepare their proposals.[9]

As to the second area, IGS and Definitive argue that the RFP does not explain how the agency will compare proposals from offerors in different socio-economic categories, or within the same category, for purposes of award. Protests at 11. For example, the protesters note that offerors seeking awards as small business firms must propose to perform at least eight task areas, and thus provide corporate experience examples

[9] In their comments on the agency report, the protesters argue for the first time that the RFP terms obligated and funding are unclear with regard to non-government contracts. Comments at 8. We conclude that the protesters' new argument, which was filed after the time for proposal submission, is a new and therefore untimely challenge to the terms of the solicitation. *See* 4 C.F.R. § 21.2(a)(1).

under the self-scoring criteria for those eight areas, while offerors seeking awards as 8(a), woman-owned small business, or historically underutilized business zone firms must propose to perform a minimum of only five task areas. *See* RFP at 160. The protesters contend that the RFP does not explain how the agency will compare firms in different socio-economic categories, in light of the differing minimum requirements. *Id.* The protesters also contend that the solicitation does not explain how the corporate experience self-certification scores of offerors in the same socio-economic category will be "normalized," *i.e.*, how the agency will compare a small business offeror that provides references for eight tasks as compared to another small business offeror that provides references for all 10 tasks. *Id.*

NIH explains that the RFP does not provide for comparison of proposals from different socio-economic categories. Instead, the RFP expressly states that a proposal from a firm in a particular category is compared only to proposals from similarly-situated firms:

> During this solicitation, socioeconomic categories are not competing against each other to receive awards. Only businesses within their respective socioeconomic category are competing against the other businesses within that category.
>
> * * * * *
>
> For example, a small business is not competing against an other than small business (OTSB). An OTSB is not competing against an [emerging large business]. An 8a business is not competing against a [woman-owned small business]. Each socioeconomic category will compete against its own set of evaluation criteria, particularly during Phase 1 Self Score Sheet.

RFP at 147.

We agree with the agency that the RFP clearly states that each socio-economic group will be considered on its own, for example, small businesses will compete only against other small businesses for awards in the small business pool. *See id.* For this reason we conclude that the solicitation is not unclear or ambiguous with regard to the basis on which offerors will be compared for award, and therefore does not fail to provide offerors an intelligent basis upon which to prepare their proposals.

With regard to the comparison of proposals from offerors within the same socio-economic category, the agency explains that, all other things being equal, an offeror that identifies more experience references under more task areas can claim more self-scoring points and therefore will have a better chance for award. COS at 10; MOL at 23. The agency states that this evaluation scheme is clearly set forth in the solicitation, which provides points for self-certifying experience in each of the RFP's 10 task areas. *See* RFP at 159-64. For example, offerors are limited to a maximum of three examples per task area; thus, an offeror that self-certifies the maximum number of

points for three examples under 10 task areas will earn a higher score as compared to an offeror that self-certifies the maximum number of points for three examples under only eight task areas. *See id.* at 159.

We agree with the agency that the RFP does not anticipate any normalization between the scores of small business offerors. *See id.* at 159. Moreover, the protesters do not explain why normalization is required, that is, why the agency is precluded from providing in the solicitation for higher scores for offerors that identify more corporate experience examples under more task areas. On this record, we find no basis to sustain the protest.[10]

The protests are denied.

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General Counsel

[10] In their comments on the agency report, the protesters also argue that the RFP is flawed because it does not specify how many awards will be made in each business category, and instead discloses only a potential range of awards. Comments at 9. We conclude, however, that the protesters' new argument, which was filed after the time for proposal submission, is an untimely challenge to the terms of the solicitation. *See* 4 C.F.R. § 21.2(a)(1). As such, this allegation is dismissed.