

July 2, 2021

By EPDS

The Office of General Counsel
Procurement Law Control Group
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548



**Re: Protest of Sara Software Systems, Inc.
National Institutes of Health Acquisition and Assessment Center
Solicitation No. 75N98121R00001**

Dear Counsel:

Sara Software Systems, Inc. (“Sara Software”) protests certain unduly restrictive terms of solicitation number 75N98121R00001 (the “Solicitation”) issued by the National Institutes of Health Acquisition and Assessment Center (the “Agency”).

As discussed below, the Competition in Contracting Act (“CICA”) permits agencies to include restrictive requirements only to the extent they are necessary to satisfy the Agency’s legitimate needs. 41 U.S.C. § 3306(a). Here, the Solicitation violates CICA by requiring members of contractor teaming arrangements (“CTA”) to share sensitive, proprietary financial information to the prime offeror for inclusion in the proposal.

I. THE PARTIES.

Sara Software is located at 804 N. Meadowbrook Drive, Suite 142, Olathe, Kansas. Their telephone number is (9013) 815-0499 and their email address is mkaur@sarasoftwaresystems.com.

The Contracting Officer for this procurement is Rose Shultz and her email address is CIOSP4.NITACC@nih.gov.

II. STANDING.

Sara Software is a prospective bidder whose economic interests will be impacted by the terms of the Solicitation. Therefore, Sara Software has standing to bring this protest.

III. TIMELINESS.

Proposals in response to the Solicitation are due on July 8, 2021. Accordingly, this protest of the terms of the Solicitation is timely filed prior to the deadline for the receipt of proposals. 4 C.F.R. § 21.2(a)(1).

IV. REQUEST FOR PROTECTIVE ORDER.

Sara Software expects that disposition of this protest will require the exchange of additional privileged and confidential information, as well as Agency source selection material. Under these circumstances, Sara Software requests that GAO issue a protective order. 4 C.F.R. § 21.4(a). In the interim, Sara Software requests that the GAO and Agency treat statements and attachments as protected and exempt from FOIA disclosure.

V. RELEVANT FACTS.

On May 25, 2021, the Agency issued this Solicitation for the award of multiple Government Wide Acquisition Contracts (“GWAC”), which will permit GWAC holders to compete for awards of orders for technology solutions and services. Each GWAC will have a base period of five (5) years, from May 2022 to May 2027, and an option for an additional five years—ending May 2032. Each contract awarded under the Solicitation will have a ceiling value of \$50 billion. The Solicitation requires offerors to provide proposals by 2pm Eastern on July 8, 2021 via the NIH Secure Email and File Transfer Service.

Relevant here, the Solicitation in Section L.5.3.2 requires each offeror to provide Standard Form 1407 (“SF 1407”). The purpose of the submission is to permit the Agency to “assess the offeror’s financial health. (Solicitation p. 169.) The Solicitation establishes that “[a]ll members of a CTA / JV] must submit this form, with the exception of subcontractors under FAR 9.601(2) arrangements.” (Solicitation p. 169.) SF 1407 requires the disclosure of detailed financial information, including a current balance sheet, profit and loss statements for the last three years, and ratios of assets to liabilities, cash and cash equivalents to current receivables, and total liabilities to net worth. (Solicitation, Section III, a true and correct copy of which is attached.) This information which looks back and provides as-is information, is highly sensitive financial information typically furnished only to company accountants and banks. It is provided to other companies only in company sales. Despite the sensitivity of the requested information, the Solicitation does not provide a means for members of a CTA to provide their respective SF 1407 directly to the government. Offerors who do not provide the required SF 1407 will be eliminated from the competition.

VI. DISCUSSION.

A. The Solicitation’s requirement that CTA members share financial information is unduly restrictive of competition.

The Agency’s failure to provide a mechanism for CTA members to provide SF 1407 directly to the government is unduly restrictive of competition. “In preparing a solicitation, a

contracting agency must specify its needs in a manner designed to achieve full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy the agency's legitimate needs, or are otherwise authorized by law.” *Ekagra Partners, LLC*, B-408685.18, Feb. 15, 2019, 2019 CPD ¶ 83 at 2 (citing, 41 U.S.C. § 3306(a)). Here, the Agency is effectively requiring firms acting in concert for this procurement (but who otherwise are competitors of each other) to share their most sensitive financial information. Faced with the prospect having to reveal sensitive financial information to its competitors, Sara Software (and other prospective offerors) will decline to participate in the procurement.

The “agency has the responsibility of establishing [that a challenged solicitation term] is reasonably necessary to meet the agency’s needs.” *Total Health Resources*, B-403209, Oct. 4, 2010, 2010 CPD ¶ 226 at 3; see also *Navajo Nation Oil & Gas Co.*, B-261329, Sep. 14, 1995, 95-2 CPD ¶ 133 at 3. Here, the Agency cannot meet that burden. The Agency can obtain the SF 1407 from each member of CTA without requiring each SF 1407 to be submitted as part of the proposal submission by the prime offeror. In fact, the government commonly permits CTA members to submit sensitive financial information directly to the government rather than through the prime offeror. Because there is a readily available alternative means for the Agency to obtain the information requested that would not restrict competition, the Agency’s requirement is unduly restrictive.

B. The Solicitation includes an improper special responsibility criterion.

In requiring Form SF 1407 to “assess an offeror’s financial health” the Agency has established a standard for definitive responsibility without establishing any objective measure of how the standard will be satisfied.

GAO has long held that definitive responsibility criteria” are “specific and objective standards designed to measure a prospective contractor’s ability to perform the contract.” *J2A² JV, LLC*, B-401663.4, Apr. 19, 2010, 2010 CPD ¶ 102 (citing, *D.H. Kim Enters., Inc.*, B-255124, Feb. 8, 1994, 94-1 CPD ¶ at 2.) Further, special standards of responsibility are only appropriate where they are “necessary for a particular acquisition or class of acquisitions[.]” 48 C.F.R. (“FAR”) § 9.104-2. Here, the Solicitation’s lack of any objective standard of financial health indicates that the normal, general standards of responsibility established by FAR § 9.104-1 are adequate for a responsibility for this procurement. Here, the Agency mandates that contractors provide evidence of “financial health” without establishing any standards by which financial health will be measured. Consequently, the Solicitation fails to adequately inform offerors of the requirements for contract award and is, thus, impermissibly vague. *Global Technical Sys.*, B-411230.2, Sept. 9, 2015, 2015 CPD ¶ 335. Accordingly, the Agency has no reasonable basis to include definitive responsibility criterion in the Solicitation.

VI. REQUEST FOR DOCUMENTS.

Sara Software requests that the Agency produce all relevant documents as required by 4 C.F.R. § 21.3(c)–(d). In addition, Sara Software makes the following requests for specific relevant documents:

1. Any documents demonstrating that specific, definitive responsibility criteria relating to offerors' financial health are required to satisfy the Agency's needs.
2. Any and all documents reflecting the Agency's determination that SF 1407 is necessary to establish responsibility.

Sara Software requests that all documents be provided with native, searchable electronic version, including any spreadsheets or other electronic records that were provided with or used in the evaluation of offerors' proposals.

VII. RESERVATION OF RIGHT TO REQUEST A HEARING.

Sara Software does not currently believe a hearing is necessary, but reserves its right to request a hearing after reviewing the Agency Report.

VIII. SERVICE OF PROTEST.

Counsel for Sara Software has filed this protest through EPDS in accordance with 4. C.F.R. § 21.1(b).

IX. REQUEST FOR RELIEF.

In consideration of the above, Sara Software asks that GAO grant this protest and recommend that the Agency amend the Solicitation to more clearly state its requirements and to permit CTA members to submit the SF 1407 directly to the government.

Sara Software also requests an award of its costs in pursuing this protest, including, but not limited to, reasonable attorneys' fees and such other relief as GAO deems just and appropriate.

Respectfully submitted,



Jon Levin

jlevin@maynardcooper.com