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ATTORNEYS AT LAW



## SUSPENSION OF AWARD REQUIRED

July 29, 2021

Office of General Counsel  
U.S. Government Accountability Office  
441 G Street, N.W.  
Washington, D.C. 20548

**VIA EPDS**

Attention: Procurement Law Control Group

Re: Protest of Bering HumanTouch JV 1, LLC Under RFP No. 75N98121R00001

Dear Sir or Madam:

Protester, Bering HumanTouch JV 1, LLC (“Protester”) hereby files this protest challenging the terms of Solicitation No. 75N98121R00001 (Solicitation) issued by the National Institutes of Health Acquisition and Assessment Center (NITAAC or agency). The terms of the Solicitation unduly restrict competition. As discussed below, protester is prejudiced by the unduly restrictive terms; therefore, this protest should be sustained.

### I. THE PARTIES TO THIS PROTEST

The protester has an office at 3301 C Street, Suite 400, Anchorage, Alaska 99503. Its telephone number is (907)-563-3788. The e-mail address is [REDACTED] The Cordatis attorneys on this pleading are Daniel Strouse ([dstrouse@cordatislaw.com](mailto:dstrouse@cordatislaw.com)), Norah Molnar ([nmalnar@cordatislaw.com](mailto:nmolnar@cordatislaw.com)) and John O'Brien ([jobrien@cordatislaw.com](mailto:jobrien@cordatislaw.com)). The contact information for Cordatis is set forth above.

The contracting agency is the United States National Institutes of Health Acquisition and Assessment Center. The Contracting Officer is Ms. Rose Schultz, whose contact information is as follows:

Rose Schultz  
Procuring Contracting Officer

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National Institutes of Health  
Information Technology Acquisition and Assessment Center  
6011 Executive Blvd, Suite 503  
Rockville, MD 20852  
Email: CIOSP4.NITAAC@nih.gov

## **II. INTERESTED PARTY STATUS**

Protester is an interested party because it intends to participate in this procurement as an offeror competing [REDACTED]. However, the unduly restrictive provisions hinder its chances of receiving award. But for the violations alleged in this protest, Protester would have a better opportunity to compete on a common basis for this award.

## **III. TIMELINESS**

Protester files this protest prior to the due date for initial proposals, currently set for August 3, 2021. Because this protest is filed prior to the time for proposal submission the protest is timely filed in accordance with 4 C.F.R. § 21.2(a)(1). Further, the agency has not yet made an award under this procurement. Therefore, pursuant to 31 U.S.C. § 3553, the agency may not make an award decision while this protest is pending.

## **IV. FACTUAL SUMMARY**

### **A. The Solicitation**

In March of 2020 the agency issued a draft solicitation for an indefinite delivery indefinite quantity (IDIQ) contract known as CIO-SP4, the follow on procurement to the agency's current large IDIQ contract vehicle, CIO-SP3. This gave government contractors significant time to prepare for the upcoming procurement of this large IDIQ contract vehicle under which the Solicitation would not be issued until March of 2021.

As described in the Solicitation—now amended 8 times—the CIO-SP4 contract vehicle will be used by the government to procure information technology solutions and services including those related to health, biomedical, scientific, administrative, operational, managerial, and information systems. *Solicitation at 1.*<sup>1</sup> The vehicle would also cover more general information technology services. *Id.* Under this vehicle, warranted government agencies would be authorized to award task orders under the IDIQ contract. *Id.* at 1-2.

This procurement is significant in value, scope and length of time, with a base period to run from May of 2022 to May of 2027, followed by a five year option period, spanning until May of 2032. *Solicitation at 32.* And, the government, recognizing the significance of this

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<sup>1</sup> Unless otherwise stated, the citation to the Solicitation refers to the tracked changes version of Amendment 8.

[REDACTED]

[REDACTED]

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procurement, indicated that it would make awards across the spectrum of contractor designations as follows:

Other Than Small Business	About 75 to 125 awards
Emerging Large Business	About 20 to 40 awards
Small Business	About 100 to 125 awards
Woman Owned Small Business	About 20 to 40 awards
Veteran Owned Small Business	About 20 to 40 awards
Service Disabled Veteran Owned Small Business	About 20 to 40 awards
HUBZone	About 20 to 40 awards
8A	About 20 to 40 awards
Indian Economic Enterprise	About 5 to 10 awards
Indian Small Business Economic Enterprise	About 5 to 10 awards

Solicitation at 141.

In addition to accepting offers from individual prime contractors, the Solicitation contemplated that offerors would utilize Contractor Team Arrangements which could come in two forms:

9.601(1): Two or more companies form a partnership or joint venture to act as a potential prime contractor. This type of CTA will receive one contract award (for all members of the CTA).

9.601(2): A potential prime contractor agrees with one or more other companies to have them act as its first-tier subcontractors under a specified government contract or acquisition

*Id.* at 144. 9.601(1) CTAs effectively amount to joint venture agreements, whereas 9.601(2) CTAs constitute prime contractor/subcontractor relationships. For a 9.601(1) CTA, the Solicitation identified the applicable requirements offerors were to include in the agreement. Until the 7<sup>th</sup> amendment issued by the agency, the government did not require any documentation for a 9.601(2) CTA; however, amendment 7 mandated that for offerors bidding

[REDACTED]

[REDACTED]

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on any of the small business tracks, those offerors must provide documentation consistent with FAR 52.207-6. Solicitation at 147. For a CTA bidding as other than small (either as an Emerging Large Business or a Large Business), no such documentation was required.

The Solicitation explained that offerors were to submit proposals consisting of six volumes. Volume 1 was to include administrative information as well as a self-scoring worksheet; Volume 2 was to address numerous Go/No-Go Requirements; Volume 3 related to Health IT Capability; Volume 4 was for offerors to identify their management approach; Volume 5 was Past Performance; and Volume 6 was Price. Solicitation at 151-152. As relevant to this protest, Section L.5.2 listed the requirements for the self-scoring worksheet to accompany Volume 1. The self-scoring worksheet listed 12 different areas under which offerors would be scored:

- L.5.2.1 Row 8 Corporate Experience
- L.5.2.2 Row 9 Leading Edge Technology Experience
- L.5.2.3 Row 10 Federal Multiple Award Experience
- L.5.2.4 Row 11 Executive Order 13779
- L.5.2.5 Row 12 CMMI Certification Level 2
- L.5.2.6 Row 13 Earned Value Management System
- L.5.2.7 Row 14 Acceptable Estimating System
- L.5.2.8 Row 15 ISO 9001 Certification
- L.5.2.9 Row 16 ISO 20000 Certification
- L.5.2.10 Row 17 ISO 27001 Certification
- L.5.2.11 Row 18 Approved Purchasing System
- L.5.2.12 Row 19 Facility Clearance Level

Solicitation at 154-55. Each row on the scoring sheet would be accompanied by a certain number of points, depending on the amount of experience the offeror had with that specific section of Section L. For instance, under Section L.5.2.1, offerors were to provide up 30 examples of experience, with up to three for each of the task areas identified under the performance work statement. *Id.* at 155. Points would be assigned depending on the dollar values associated with those experiences.

The evaluation of proposals would come in three phases. First, the government would validate the offerors' self-scoring sheet. "Only the highest rated offerors will advance to phase 2 of the evaluation." Solicitation at 169. That is, based exclusively on scores validated from the self-scoring worksheet, the government would assess which offerors moved on to Phases 2 and 3. In Phase 2, the government would verify the go/no-go requirements. For Phase 3, the government would evaluate the written proposals. *Id.* at 168.

[REDACTED]

[REDACTED]

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## B. The Protester

The Protester is a potential offeror for this procurement intending to submit an offer as a joint venture, constituting a CTA consistent with 9.601(1). The Joint Venture [REDACTED]

[REDACTED]. The Joint Venture therefore intends to submit a proposal [REDACTED]. In addition, the Joint Venture Protester [REDACTED]

As explained in more detail below, the agency's most recent amendment resulted in material deviations from the agency's previous statements—statements upon which Protester relied in order to submit its proposal. These changes unduly restrict competition, particularly given that the agency has made this about face just days prior to the due date for proposals, after allowing offerors more than a year to establish their CTAs—CTAs whose strategic purpose have now been turned on their head.

## V. GROUND OF PROTEST

### **The Solicitation Unduly Restricts Competition by Prohibiting Offerors from Using Large Business Subcontractors.**

In May of 2021, the agency issued the Solicitation which allowed for contractors to enter into CTAs in order to enhance their own experiences and the abilities it could provide to the government under the awarded contract. The Solicitation allowed for CTAs as a joint venture (9.601(1)) or as a prime/sub relationship (9.601(2)). Initial Solicitation at 148. The Solicitation explained that "Although the experience and abilities of the prime's subcontractors may be used in the offeror's proposal, only the prime contractor will receive a contract award." *Id.* at 149 (emphasis added). While the language was ambiguous in the initial Solicitation, the agency made clear that offerors would be able to use the experience of its affiliates or members (e.g., subcontractors) of the CTA, provided there was a "clear relationship" between the resources the subcontractor would provide on the project. *Id.* at 156. That is, as of the date of the initial Solicitation, offerors understood that they could use experience from their subcontractors to obtain points and other team members.

The agency further clarified this through amendment 4. More specifically, in amendment 3, the agency amended the Solicitation to state that "The Government will not consider the members of a 'Contract Team Arrangement' defined under FAR 9.601(2) for evaluation purposes for the contract except in the limited context of evaluating an Offeror's proposal under paragraph L.5.6.2, Resources." Solicitation, Amendment 3 at 181. However, the agency reversed course just one day later, issuing amendment 4. The agency noted, in a letter to offerors that "It is not NITAACs intent to remove the ability of offerors to utilize first tier subcontractors

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that are part of a CTA as defined in FAR 9.601.” CIO-SP4 Letter to Potential Offerors June 23. And, amendment 4 made good on that promise, deleting the language from amendment 3. Solicitation, Amendment 4 at 173. Stated differently, as of June 24, 2021, the agency had notified offerors competing for the small business tracks (and any small business designations therein) would be able to use their large business first tier subcontractors to obtain points and leave themselves in line for award.

Nearly one month later, after offerors had spent considerable time, effort, and money developing their proposed teams based on the terms of the solicitation, the agency reversed course again. In amendment 7, for small business offerors, the agency established new requirements. While previously small business offerors entering into CTAs with large businesses would be able to use their large business teaming partners, amendment 7 removed that path; with amendment 7, “Offerors that are seeking a small business award must establish a **Small Business Teaming Arrangement** as defined in 52.207-6(a) and submit a copy of the written agreement required per FAR provision 52.207-6(a)(1)(ii).” Solicitation, Amendment 7 at 147 (emphasis added). Notably, 52.207-6 allows only teams consisting of other small businesses—removing large businesses from the equation. Amendment 7 further explained that the self-scoring worksheet would only allow for use of small business subcontractors. *Id.* at 154. The agency explained “For a small business award, the Government will only consider the members of a CTA defined under FAR 9.601(2) for evaluation purposes if the Offeror includes a **proposed team of small business subcontractors** as defined in provision 52.207-6(a).” *Id.* at 168 (emphasis added). With that, the government took away what it had given back in amendment 4—notably, the ability of small businesses to subcontract with large businesses and obtain credit for that work. *See also, id.* at 170. SBA reiterated this point in amendment 8, explaining that “Consideration of member information for CTAs under 9.601(1) or 9.602(2)...will occur if the member is a small business.” Solicitation at 168. And, the agency made these changes while providing offerors just 11 business days to craft new teaming agreements, as necessary, to leave themselves competitive for award.

In crafting these amendments, the agency has unduly restricted competition. GAO has explained that an agency may only restrict competition when doing so is necessary to satisfy its legitimate needs. *See, e.g. Total Health Resources*, B-403209, Oct.4, 2010, 2010 CPD ¶ 226. In *Total Health Resources*, GAO held that absent a showing as to why the government needed experience directly from the prime contractor, the government acted unreasonably by mandating prime contractor experience. Because the restriction did not satisfy the government’s legitimate needs, GAO found that the government’s restriction of only prime contractor experience unduly restricted competition.

A similar result should hold in this case. Here, the government, after months of permitting small business contractors to work with and gain credit for the experience of large business subcontractors (as well as for their purchasing systems), the agency reversed course at the last minute. In doing so, it prevents small businesses that had intended to team with (and had



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entered into agreements with) large businesses from reasonably competing for this work. This is particularly true here, when the agency had expressly notified offerors that it would consider the experience of first-tier subcontractors (including large business subcontractors) until the last minute.

The agency's last-minute change restricts competition without any reasonable or legitimate reason for such a change. In fact, as of June, the agency saw no need to restrict competition by limiting a small business's ability to use a large business. This change is unreasonable, unduly restricts competition, and prevents offerors from bidding on a common basis. Therefore, this protest must be sustained.

## **VI. REQUEST FOR DOCUMENTS**

Pursuant to 4 C.F.R. § 21.3(d), Protester requests that the agency file with its agency report the documents required by 4 C.F.R. § 21.3(d), and also produce the following relevant documents, including but not limited to e-mails and e-mail attachments. Protester requests that it be provided with native electronic versions of the documents in the form received by the agency (*e.g.*, Word or Excel).

1. All documents related to the agency's decision to limit competition for small businesses only to consider experience of small business teams. These documents are relevant to all protest grounds.
2. All source selection plan documents. These documents are relevant to all protest grounds.
3. All communications between agency personnel involved in recommending requirements or in preparing the Solicitation and all amendments. These documents are relevant to all protest grounds.
4. All communications related to the agency's decision to change the requirement for CTAs to preclude using the experience and purchasing systems of large business subcontractors.

Protester further requests GAO issue a protective order pursuant to 4 C.F.R. § 21.4. Protester and its attorneys will comply with the terms of the GAO's standard protective order.

## **VII. RESERVATION OF RIGHT TO REQUEST A HEARING**

Protester does not believe at this time that a hearing will be required, but reserves its right to request a hearing in the future after reviewing the agency report.

## **VIII. RELIEF REQUESTED**



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Protester requests that the agency sustain this protest and amend the Solicitation to permit small businesses to use large business teaming partners and for the agency to consider large business subcontractors under each evaluation phase and factor of this procurement. Further, Protester requests that the agency to provide sufficient time to submit its proposal. In the event GAO sustains the protest or the agency takes corrective action, Protester requests that the agency reimburse its costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1)-(e).

Respectfully submitted,



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