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Decision

Matter of: Global Technical Systems

File: B-411230.2

Date: September 9, 2015

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DIGEST

1. Protest challenging the agency’s decision not to set aside a procurement for small business concerns is denied where the agency reasonably concluded from its market research that it did not have a reasonable expectation of receiving proposals from two or more small businesses capable of performing the required services at a fair and reasonable price.
 2. Protest that solicitation’s requirement for engineering services is ambiguous and vague is sustained where the solicitation fails to provide sufficient information to allow offerors to intelligently prepare their proposals and compete on a common basis for a fixed-price indefinite-delivery/indefinite-quantity contract.
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DECISION

Global Technical Systems (GTS), of Virginia Beach, Virginia, a small business, protests the terms of solicitation No. N00024-15-R-5201, issued by the Department of the Navy, Naval Sea Systems Command, for common processing system technology insertion (TI) 16 equipment. GTS contends that the procurement should have been set aside for small businesses and that the solicitation does not provide sufficient information to allow offerors to compete on a common basis.

We sustain the protest.

BACKGROUND

The Navy's common processing system (CPS) is a successor to the Navy's mission critical enclosures equipment that was historically deployed aboard certain ships to house the combat system computing environment. Protest at 8. CPS is the main processing and data storage cabinet for surface ship combat and weapon systems, and it provides computer processing and memory, data storage and extraction, and input/output interfaces to support host software applications of Navy combat systems. Agency Report (AR) at 3; AR, Tab 15, NAVSEA Brief to Small Business Office, at 2.

A technology insertion (TI) is a replacement or upgrade of combat system computing hardware. AR, Tab 3, Market Research Memorandum, at 4. TIs are named for the specific model year (thus, TI 16 at issue in this procurement is the 2016 replacement or upgrade for the current CPS). See id. The government developed CPS TI 16 and designed it with advanced processing, storage, and system resource management to support new combat system capabilities. Id.

The RFP anticipates the issuance of a fixed-price indefinite-delivery/indefinite-quantity (ID/IQ) contract, for a base year and four 1-year options. RFP at 38-40, 186. The solicitation states that award will be made to the offeror submitting the lowest-priced, technically acceptable proposal. With regard to technical proposals, the solicitation identified four technical factors that would be evaluated as acceptable or unacceptable: 1) manufacture, assembly, test, and engineering; 2) facilities; 3) program management and control; and 4) past performance. RFP at 188-89.

Under the manufacture, assembly, test, and engineering factor, the solicitation informed offerors that the Navy would evaluate whether the offerors demonstrated a thorough comprehension of the solicitation requirements and the capabilities to perform these requirements, including production engineering, manufacture and assembly, technical requirements, testing requirements, process management, material management, scheduled delivery, product quality assurance, management, resource and facility requirements, and all other requirements of the solicitation. RFP at 187. Proposals would also be evaluated for several other requirements under this factor, including an evaluation of offerors' capability of delivering the maximum order requirements. RFP at 187-88. In addition, the solicitation stated that the prime contractor and any major subcontractors "must demonstrate experience assembling, testing and delivering equipment similar in size, complexity and scope to CPS TI 16 equipment." RFP at 188.

Under the facilities factor, the Navy will evaluate offerors' facilities and the facilities of major subcontractors for production, manufacturing, and testing of the CPS systems and components. RFP at 188. Offerors' facilities will also be evaluated to determine whether they have sufficient throughput capability, and adequate

manufacturing processes and calibration procedures. Id. Under the program management and control factor, the Navy will evaluate the discussion of risks and mitigation for each identified risk, ability to meet the required lead times of the CPS units, plan for managing subcontractors, and proposed management system. Id. at 188-89.

With regard to the first three factors, a proposal will be rated acceptable if it “clearly meets the minimum requirements of the solicitation.” RFP at 189. With regard to past performance, a proposal would be rated acceptable if, “[b]ased on the Offeror’s performance record, the Government has a reasonable expectation that the Offeror will successfully perform the required effort, or the Offeror’s performance record is unknown.” Id.

Engineering Services

In addition to proposing prices for four variants of CPS TI 16, offerors were also required to provide prices for 20,000 hours of engineering services per year for the base year and each of the four option years. RFP at 9, 14, 20, 25, 30. The RFP requires offerors to describe their ability to provide “complex engineering services including[] detailed technical documentation and/or trouble shooting CPS TI 16.” Id. at 176. In this regard, the RFP requires that offerors “propose a labor mix with supporting rationale for engineering services as described in Section C. . . [and] provide job descriptions for each proposed labor category.” Id.

Section C’s description of the required engineering services states, in its entirety, the following:

ENGINEERING SERVICES CLINs 0009 (if exercised, 1009, 2009, 3009, and 4009) - If ordered, the Contractor shall provide engineering services (ES), conduct engineering studies, provide engineering analysis and trade-off studies, and/or support engineering changes as directed by the Government. Contractor shall provide any travel, incidental material consumed, and/or subcontractor effort necessary in the performance of the required ES. The specific tasks shall be defined in each Delivery Order.

RFP at 55.

The solicitation further instructed that “[a]ny travel, incidental material consumed, other direct costs (ODCs) and/or subcontractor effort associated with the performance of this effort shall be included in the proposed man-hour rate.” Id. at 50.

Decision Not To Set Aside

In 2012, the agency conducted a procurement for CPS TI 12, the precursor to TI 16, as a small business set-aside. AR at 13. The agency received two proposals in response to the solicitation--one submitted by GTS and one from another offeror. The agency evaluated the proposals and concluded that the proposal submitted by the other offeror was technically unacceptable. AR at 14. Specifically, the proposal failed to meet the solicitation's requirements for production capability, systems engineering, and risk management. Id.; AR, Tab 8, Business Clearance Memorandum for TI 12, at 12-13. In addition, the evaluators concluded that the other offeror's proposal evidenced a clear lack of understanding of the requirement. AR, Tab 8, Business Clearance Memorandum for TI 12 at 13. Since GTS had submitted the only acceptable proposal, it was awarded the contract for TI 12 in May 2014. Id. at 15.

While the source selection process for TI 12 was underway, Navy officials began planning for the procurement of TI 16. AR at 14. In the fall of 2013, agency officials prepared 6 briefing slides for the NAVSEA small business office in support of the conclusion that the TI 16 procurement should not be set aside for small businesses. AR, Tab 15, Brief To NAVSEA Small Business Office. As relevant here, the slides state that the procurement and production of TI 16 would have a compressed schedule, would require a high level of production facility capacity for start-up and throughput, and would require weapon system integration experience. Id. at 3. The slides addressed each of these requirements and listed several justifications for full and open competition, including the agency's conclusions that "Small businesses will require more time for facility start up and production readiness which current schedule cannot afford;" "Small businesses have limited production facilities and throughput and will have issues producing quantities by required delivery dates;" "Small businesses have less experience with weapon system integration aboard multiple ship classes and platforms;" and "A small business is not as well equipped to deal [with] integration issues once equipment is fielded." Id. at 3. Citing these risks, the slides request approval to proceed with a "non small business acquisition strategy." Id. at 5; see AR, Tab 14, Memorandum for Record, at 2.

In November 2014, after the solicitation here was released for full and open competition, Navy procurement officials prepared and signed a memorandum detailing the basis for the decision not to set aside the procurement for small businesses and the market research performed prior to the issuance of the solicitation. AR, Tab 14, Memorandum for Record; see AR at 16 ("This memorialization of the pre-solicitation release decision did not occur until November 2014, and although after the date of release, it referenced the decision making that occurred prior to release of the solicitation").

The memorandum cites several justifications for the decision not to set aside the procurement. The memorandum cites the agency's "considerable past experience

procuring the CPS requirement and its previous TIs,” with particular emphasis on the absence of two capable small businesses submitting proposals for the TI 12 procurement. Id. at 2. Specifically, while the TI 12 procurement was set aside for small businesses and many sources expressed interest in the procurement asserting that they had the capability to perform, the agency received only two proposals. Id. at 3. Of those two proposals, only one--the proposal submitted by GTS--was technically acceptable. Id. The memorandum states that the recency of the TI 12 evaluation “informed the decision making process” with regard to whether to set aside the TI 16 procurement. Id.

Further, the memorandum concludes that CPS TI 16 is more complex and challenging than TI 12, explaining that:

[W]hile both CPS TI 16 and CPS TI 12 have the same minimum requirements, the CPS TI 16 procurement has added complexities. Those additional complexities are detailed in the . . . Technical Data Packages (TDPs) which alter both water and air-cooled enclosure requirements, cabinet arrangement and power supply. These added complexities make it highly unlikely, given information obtained through the CPS TI 12 procurement, that more than one responsible small business would submit a proposal.

Id. at 3.

The memorandum also states that the Navy consulted “knowledgeable specialists in the competency-fields of engineering and production at Headquarters as well as various Naval Surface Warfare Centers.” Id. at 2. The memorandum states that Navy officials presented the results of their market research to NAVSEA’s small business office in October 2013, and the small business office approved the decision not to set aside the TI 16 procurement. Id. As a result, the agency concluded that the solicitation for TI 16 would not be set aside for small businesses.

On September 17, 2014, the agency released a synopsis for TI 16. AR, Tab 10, Synopsis. Other than GTS,¹ the agency did not receive any expressions of interest from potentially responsible small businesses after releasing the synopsis. AR at 16. The agency issued the solicitation on an unrestricted basis on October 16.

On March 15, 2015, prior to the closing date of the solicitation, GTS filed a protest with our Office challenging the terms of the solicitation and the agency’s decision

¹ GTS contacted the agency’s small business office subsequent to the release of the synopsis expressing its disagreement with the agency’s decision not to set aside the procurement. AR, Tab 3, Market Research Memorandum, at 12; see Protest exh. 9, GTS Correspondence with Small Business Office.

not to set it aside. The Navy did not suspend the solicitation's closing date during the pendency of the protest, and on March 17, the solicitation closed. RFP at 1; see Comments at 5.

We dismissed the protest as academic on April 3, after the agency notified our Office that it would take corrective action. Global Technical Systems, B-411230, April 3, 2015. Specifically, the agency stated that it would conduct additional market research to determine whether to set aside the requirement for small businesses. Agency Notice of Corrective Action at 1. The agency also stated that it would consider GTS's other challenges to the solicitation, including its allegation that the solicitation omitted information about the requirement for engineering services which was necessary to propose these services on a common basis. Id.; see Initial Protest of GTS at 2.

As part of its corrective action, the agency performed additional market research regarding the existence of two or more responsible small businesses likely to submit a proposal. AR at 17. Specifically, the Navy issued a sources sought notice on April 3, 2015 informing potential offerors of the requirements for TI 16 and requesting responses from interested small businesses by April 10. After two small businesses contacted the agency to request an extension of time to submit responses, the agency extended the due date for responses to April 17.² AR at 17.

The sources sought notice required interested firms to provide information regarding their facilities, past performance of similar efforts, manufacturing capacity, technical capability, program management, technical data package maintenance capability, and financial capability.³ AR, Tab 3, Market Research Memorandum, at 18.

The agency ultimately received three responses by the April 17 due date and one additional response that was two weeks late.⁴ AR, Tab 3, Market Research Memorandum, at 18. NAVSEA then assembled a Capability Review Team of technical, program management, and business experts to review the responses to the sources sought notice. Id. After reviewing each of the four responses, as set forth in greater detail below, the agency concluded that none of the small

² One small business contacted the agency on April 10, stating that it had just viewed the notice that day, and requesting a seven-day extension to compile its response. AR, Tab 3, Market Research Memorandum, at 18. The Navy granted the request.

³ In issuing the notice, the agency coordinated with the agency's small business office; the small business office made no objections to the terms of the sources sought notice. AR, Tab 3, Market Research Memorandum, at 18.

⁴ GTS did not respond to the sources sought notice. AR, Tab 3, Market Research Memorandum, at 15.

businesses that responded to the sources sought notice were capable small businesses likely to submit an acceptable proposal at a fair and reasonable price. AR at 18; AR, Tab 3, Market Research Memorandum, at 35.

Since the March 17 closing time for the submission of proposals had passed prior to the agency's conclusion of its additional market research, the agency also performed a limited review of the proposals submitted by small businesses in response to the solicitation. [DELETED] small businesses--GTS [DELETED]--submitted proposals in response to the solicitation. The agency reviewed these proposals and concluded that [DELETED]. AR, Tab 3, Market Research Memorandum, at 13. For example, [DELETED].⁵ Id. at 13. As a result, the agency concluded that [DELETED].⁶

On May 27, 2015, agency officials met with representatives of the agency's small business office to discuss the results of their additional market research. AR, Tab 3, Market Research Memorandum, at 35. After considering all of the factors detailed above, and with the agreement of the small business office, the agency concluded that the agency did not have a reasonable expectation that offers will be received from at least two responsible small business concerns. Id. On May 29, the agency announced that no changes would be made to the previously-issued solicitation. Protest at 5. This protest followed.

DISCUSSION

GTS challenges the Navy's decision not to set aside this acquisition for exclusive small business participation. Specifically, GTS protests the adequacy of the agency's market research, arguing that it was flawed and designed only to support the agency's predisposition toward issuing the solicitation on a full and open basis. Comments at 2. GTS also contends that the solicitation is impermissibly vague in

⁵ The mission critical enclosure is a complex enclosure that requires a high degree of manufacturing and accounts for [DELETED]% to [DELETED]% of the total per-unit cabinet cost. AR, Tab 3, Market Research Memorandum, at 5.

⁶ The agency also raised several "doubt[s]" and concerns about the proposal submitted by GTS, and concluded, based on a limited review of GTS's proposal, and the fact that GTS did not respond to the sources sought notice, that GTS could no longer be considered a potential small business offeror capable of submitting an acceptable proposal at a fair market price. AR, Tab 3, Market Research Memorandum, at 14-16. For purposes of this protest, we need not resolve whether this conclusion was reasonable since, even if GTS is considered a capable small business likely to submit a proposal, we find that the agency reasonably concluded there was not a second capable small business likely to submit an acceptable proposal at a reasonable price.

its description of the engineering services that offerors were required to propose, which prevents offerors from competing on a common basis. Comments at 28. Based on our review of the record, we deny the protester's challenge to the agency's decision not to set aside the procurement for small businesses, but we sustain the protester's contention that the solicitation is impermissibly vague in its description of the engineering services required.

Set-Aside

GTS contends that the Navy's market research was flawed in several significant respects and that the agency's goal in conducting market research was to justify its prior conclusion that small businesses could not perform the contract, rather than to fairly assess whether the agency would likely receive proposals from two or more small businesses capable of performing the work. Comments at 7.

Under Federal Acquisition Regulation (FAR) § 19.502-2(b), a procurement with an anticipated dollar value of more than \$150,000, must be set aside for exclusive small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns, and award will be made at a fair market price. As a general matter, we regard such a determination as a matter of business judgment within the contracting officer's discretion that we will not disturb absent a showing that it was unreasonable. DNO Inc., B-406256, B-406256.2, March 22, 2012, 2012 CPD ¶ 136 at 4.

However, a contracting officer must make reasonable efforts to ascertain whether it is likely that offers will be received from at least two small businesses capable of performing the work. Safety Storage, Inc., B-280851, Oct. 29, 1998, 98-2 CPD ¶ 102 at 3. While the use of any particular method of assessing the availability of small businesses is not required, and measures such as prior procurement history, market surveys and/or advice from the agency's small business specialist and technical personnel may all constitute adequate grounds for a contracting officer's decision not to set aside a procurement, American Imaging Servs., Inc., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 at 3, the assessment must be based on sufficient facts so as to establish its reasonableness. Safety Storage, Inc., supra.

Here, the agency primarily relied on procurement history and responses to the sources sought notice. We discuss each of these below and conclude that the agency's decision not to set aside the procurement for small businesses is sufficiently supported by its market research.

Prior Procurement History

In considering the prior procurement history of the CPS, the agency reviewed information from the prior procurement (TI 12), which was set aside for small

businesses, and which was conducted only a few months prior. AR, Tab 3, Market Research Memorandum, at 10. As set forth above, the agency received only two proposals in response to the TI 12 solicitation--one submitted by GTS and one from another offeror. The agency evaluated the proposals and concluded that the proposal submitted by the other offeror was technically unacceptable in several areas, including a failure to meet the solicitation's requirements for production capability, systems engineering, and risk management. Id.; AR, Tab 8, Business Clearance Memorandum for TI 12, at 12-13. In addition, the evaluators concluded that the other offeror's proposal evidenced a clear lack of understanding of the requirement, and the offeror's price was so high (more than double the price proposed by GTS) that it was unreasonable. AR, Tab 8, Business Clearance Memorandum for TI 12 at 13; AR, Tab 3, Market Research Memorandum, at 10. After the other offeror's proposal was eliminated from the competition, the agency made award on the basis of the only acceptable proposal--the one submitted by GTS. AR, Tab 8, Business Clearance Memorandum for TI 12 at 15.

In considering the significance of this past procurement history, the agency noted that the TI 12 cabinet consisted of only a single enclosure that allowed for minimal external air and water cooling modification. AR, Tab 3, Market Research Memorandum, at 7. In contrast, TI 16 will consist of two different common processing system enclosure assemblies and four variants: 1) advanced storage area network (ASAN), which is a storage/extraction subsystem; 2) core computing system (CCS), which is a processing and input/output subsystem; 3) processing and storage subsystem water-cooled, which consists of processing, input/output, and storage subsystems; and 4) processing and storage subsystem air-cooled, which consists of processing, input/output, and storage subsystems. Id. at 3. Each variant requires a different cabinet configuration. Id. at 5.

Given the complexity of TI 16, the agency concluded that TI 16 is more similar to TI 08, which also involved separate cabinets for processing and storage, rather than to the less complex TI 12. Id. at 8. The agency further noted that the TI 08 contract was performed by a large business because at the time of that procurement, the agency determined that small businesses were not capable of meeting the solicitation's requirements. Id. The agency's market research also noted that, as compared to TI 12, TI 16 ASAN requires 10 times the amount of storage/extraction, and TI 16 CCS processing requires 4 ½ times the amount of processing. Id. at 7. According to the agency, this added complexity makes it even less likely that a small business would be able to meet the solicitation's requirements.

The agency also noted that the TI 12 contract had an anticipated maximum requirement of 179 production units over the 5-year life of the contract at an anticipated value of approximately \$85 million, while the TI 16 requirement here has an anticipated maximum requirement of [DELETED] production units over the 5-year life of the contract with an anticipated value of approximately \$[DELETED] million to \$[DELETED] million. Id. While TI 12 and TI 16 have the same minimum

throughput requirements, TI 16 has an overall quantity requirement that is three to four times greater than TI 12. Id. at 8-9. Moreover, in considering the complexity of the TI 16 procurement, the agency noted that CPS units are ordered as ship sets, so it is not possible to allow for cascading, sequential, or staggered deliveries. Id. at 9. The agency found that this requirement that all variants of the units be delivered at the same time adds significant complexity to the TI 16 procurement because it requires a “dynamic, flexible, and larger production line capable of concurrent production.” Id. at 9.

Based on the fact that the agency recently conducted a procurement for TI 12 in which it received only one acceptable proposal, and based on the agency’s conclusion that the TI 16 requirements would be more complex than the TI 12 requirements, the agency concluded that the TI 12 procurement history supported the conclusion that the agency could not expect to receive acceptable proposals from two or more capable small businesses at a fair market price. Id. at 10.

Responses to Sources Sought Notice

In addition to considering the procurement history detailed above, the agency also issued a sources sought notice and evaluated the four responses it received. With regard to the response from Company 1, the agency’s capability review team concluded that the offeror’s plan to meet the requirement for 20 units per month by producing five cabinets per week to result in 20 per month was overly rudimentary and failed to account for the fact that four variants of the cabinets are required. AR, Tab 3, Market Research Memorandum, at 20. In this regard, the capability review team expressed concern that the offeror did not explain how it could manufacture multiple variants of the cabinet on a single production line, and did not indicate that it intended to establish multiple production lines. Id. The agency also stated that Company 1 proposed to use a [DELETED] and Company 1 did not appear to have invested in [DELETED].⁷ Id. at 21.

With regard to Company 1’s experience, the agency found that the experience provided in the response did not demonstrate that the company had any history of performing requirements of similar size, scope, complexity, or capacity. Id. at 21-22. Company 1’s experience also did not demonstrate that the firm had the management expertise or capability to perform the requirements of the solicitation. Id. Further, the capability review team reviewed Company 1’s current Department of Defense related backlog over the course of the last two years and noted a [DELETED]% increase in backlog from 2013 to 2014. The capability review team

⁷ The agency noted that, while Company 1 recently invested significant resources in [DELETED], the company did not propose to use that facility in performing the requirements of the TI 16 solicitation. AR, Tab 3, Market Research Memorandum, at 21.

found this backlog to be significant because it could create a potentially unmanageable amount of throughput within the schedule constraints of the TI 16 requirements. Id. at 22-23. In addition, the capability review team found that Company 1's supply chain and financial management system presented an unacceptable amount of risk. For example, Company 1's supply chain is not diversified--the offeror relies on one manufacturer, and the failure of that manufacturer to fill orders on a timely basis could have a significant impact on the company's ability to meet the contract requirements. Id. at 23.

In addition, the agency considered the significant financial resources needed to meet the solicitation's requirements. Specifically, TI 16 requires that offerors either make or buy the mission critical enclosure--a complex enclosure that requires a high degree of manufacturing and accounts for 25% to 30% of the total cost of each unit. Id. at 23. None of the small businesses that responded to the sources sought notice indicated that they had the ability or intent to make the mission critical enclosure, nor did they propose to qualify a non-original equipment manufacturer. Id. at 19. Therefore, each of the small businesses will need to buy the mission critical enclosure from the original equipment manufacturer. In considering the ability of potential offerors to meet the solicitation's requirements, the agency considered that the mission critical enclosure is a long lead-time item with delivery estimated at eight to ten months after receipt of the order. The estimated cost of the mission critical enclosure is approximately \$[DELETED] per unit. Id. at 24. Under the solicitation's requirements, the contractor will need to order 160 to 200 mission critical enclosures for the first eight to ten months of the contract without receiving any payment from the agency for this financial commitment. Id. The agency noted that this will result in a cash outlay of \$[DELETED] million to \$[DELETED] million using the company's own funds, which cannot be invoiced to the government until delivery of the completed TI 16 units.⁸ Id.

With regard to Company 1, the agency considered its financial statements and concluded that the cash outlays for the mission critical enclosure alone would consume [DELETED]% to [DELETED]% of the firm's available cash or cash equivalents. The agency concluded that this factor presented additional risk associated with Company 1. Overall, the Navy concluded that Company 1 was not a small business capable of satisfying the requirements of the TI 16 solicitation.

The agency also found that Company 2 was not a capable small business likely to submit an acceptable proposal. For example, the agency found that Company 2's response appeared to base its approach to production on the assumption that it

⁸ The sources sought notice instructed interested firms to identify how they would finance the ordering of material (including the financial method of managing the make or buy of the mission critical enclosure) in advance of progress payments. AR, Tab 19, Sources Sought Notice, at 7.

would manufacture only one variant of TI 16, rather than the four variants required by the solicitation. Id. at 25. The capability review team also noted that Company 2's process for vetting vendors and suppliers was problematic because it would likely affect the delivery dates and compressed schedule required by the solicitation. Specifically, the company's vetting process requires that the company vet suppliers through an internal process, which the suppliers for CPS TI 16 components have not yet begun. Id. at 25. Although the company stated that it has an [DELETED], the agency nevertheless concluded that the additional time required to vet suppliers in compliance with Company 2's processes could delay the process for obtaining necessary components from suppliers, resulting in a delays in manufacturing and delivery of TI 16. Id.

Similarly, although Company 2 stated that it planned to integrate TI 16 into its overall production capabilities, the firm failed to provide information that would demonstrate that it could do so in accordance with the solicitation's schedule. Id. Further, the agency found that Company 2's response failed to address its plan to manage significant subcontractors. Given the importance of the mission critical enclosure, which would be manufactured by the original equipment manufacturer, the agency found that this failure was unacceptable. Id. Moreover, the Navy noted that, in Company 2's current state, it would not have the appropriate clearances to access the TI 16 competition library, which would make it impossible for Company 2 to submit an acceptable proposal. Id. at 26. Specifically, Company 2 stated that its facility is currently classified as a "Non-Holding Secret Site." Id. However, the agency noted that the solicitation requires that offeror possess a secret level facility clearance with secret level safeguarding capability in order to receive the CPS TI 16 competition library which includes the technical data and designs required to produce TI 16. Id. Since Company 2's facility is not cleared to safeguard the documents required for TI 16, the agency concluded that it would be unable to compete for this procurement. Id.

Based on its review of Company 2's submission, the Navy concluded that the firm would need to operate at over [DELETED]% capacity for the first year of the contract, and at [DELETED]% to [DELETED]% over the life of the contract. Id. at 28. However, given that the normal manufacturing capacity utilization rate is approximately 77%, and the average capacity utilization rate for durable goods manufacturing is approximately 76.6%, the Navy concluded that Company 2's plan to operate at such a high capacity rate would not be sustainable over time. Id. at 27-28. Further, the agency noted that Company 2's ability to operate at this capacity was not demonstrated by the company's submission or its performance on other contracts. Id.

With regard to the cash outlays required to purchase the mission critical enclosures for TI 16, the agency noted that Company 2 had \$[DELETED] million in cash and cash equivalents and \$[DELETED] million in net working capital. Company 2's submission did not state how it planned to finance the cash outlay of \$[DELETED]

million to \$[DELETED] million required to purchase the mission critical enclosures. Id. at 29. Overall, after examining all of the information submitted by Company 2, the agency concluded that the firm did not possess the financial capability to produce TI 16 on time and on budget. Id. at 29. The agency also concluded that Company 2 would be unlikely to be able to propose prices that would be reasonable, due to the firm's need to [DELETED] in order to finance the advance purchase of mission critical enclosures. Due to the numerous deficiencies in Company 2's submission, the agency concluded that it was not a capable small business likely to submit an acceptable proposal.

The Navy also found that Company 3's submission did not demonstrate that the firm was a capable small business likely to submit an acceptable proposal. For example, Company 3's submission stated that it would have a normal production rate of 10 units per month, with a surge capacity of 20 units per month. This surge capacity would require the firm to double its staff, and the response indicated that it would not be maintained throughout the performance of the contract. Id. at 30; AR, Tab 24, Company 3 Response to Sources Sought Notice, at 30. The agency found that this schedule evidenced a clear inability to meet the solicitation's requirements--"20 units per month is a constant requirement of the CPS TI 16 and the contractor is expected to meet the 20 units per month capacity in normal operating mode, not surge mode." AR, Tab 3, Market Research Memorandum, at 30. The agency also concluded that Company 3's submission failed to address warehousing capability or how delivery dates would be met, and gave no indication of how its subcontracting, supply chain, production line, financing, or overall management of the contract would meet the RFP's requirements. Id. at 30; see also id. at 31-33 (detailing additional problems with the submission). Therefore, the agency concluded that Company 3 was not a capable small business likely to submit an acceptable proposal.

Finally, with regard to Company 4's submission, the Navy noted that it was submitted two weeks late, but the agency nevertheless considered the submission "in the spirit of market research." Id. at 33. The agency noted that Company 4 had also submitted a proposal in response to the solicitation, and considered both submissions in evaluating whether Company 4 was a capable small business likely to submit an acceptable proposal.

One problem the agency noted with Company 4's submissions was that it apparently planned to rely on a [DELETED] to finance the "additional [DELETED] required for the ordering of material in advance of progress payments." Id. at 34 (quoting AR, Tab 23, Company 4 Response to Sources Sought Notice, at 43). The agency found this assumption to be problematic, given that the mission critical enclosures required to be ordered in advance are estimated to cost \$[DELETED] million to \$[DELETED] million. AR, Tab 3, Market Research Memorandum, at 34-35. In addition, the agency found that Company 4 did not appear to have experience performing contracts of similar size, scope, or capacity. In this regard,

the Navy considered contracts identified by Company 4 in its submission, as well as a contract not identified by the firm, but of which NAVSEA was aware. This last contract, under which Company 4 is a subcontractor, had to be modified because Company 4's production capacity did not meet the requirements of the contract. The contract also had to be modified to allow for cascading/sequential delivery of units not originally contemplated by the contract, in order to "provide contractual delivery relief" for Company 4. Id. at 34. Moreover, in reviewing Company 4's proposal submitted in response to the solicitation, the agency found that the proposal failed to provide prices for each of the contract line item numbers (CLINs), making it unacceptable. As a result, the agency concluded that Company 4 was not a capable small business likely to submit an acceptable proposal in response to the solicitation. The agency also concluded that it was "highly doubtful" that Company 4 would be able to propose reasonable pricing. Id. at 35.

We find that the agency's extensive market research, including its well-documented consideration of the procurement history of the CPS requirement, as well as its evaluation of the responses to the sources sought notice, provided the agency a reasonable basis on which to base its conclusion that it would not be likely to receive acceptable proposals from two or more capable small businesses at a fair market price. We address several of GTS's more significant challenges to the market research below.

In arguing that the agency's market research was unreasonable, GTS disagrees with the agency's characterization of TI 16 as more complex than TI 12, and instead argues that the TI 12 requirement was more complex and challenging than TI 16. Comments at 8. For example, the protester cites a 2014 pre-solicitation agency document stating that the existing U.S. industrial base is adequate to support development, production, fielding, and installation of TI 16, a conclusion that the Navy based on "the similarities in complexity of the TI 16 design concepts with the TI 12 variant." AR, Tab 2, Single Acquisition Management Plan, at 26. The document also stated that CPS production does not require any special manufacturing processes or equipment, and that the TI 16 design was based on a stable design that has been updated from TI 12. Id. In further support of this argument, the protester also cites several characteristics of TI 12 that GTS argues make it more complex or challenging than TI 16. Comments at 11-15. For example, GTS argues that the TI 12 procurement had shorter lead times (6 months), as compared to TI 16 (8-12 months).⁹ Id. at 12. GTS also notes that the TI 12 procurement, similar to the TI 16 procurement, also had a 20-unit per month throughput requirement, which GTS successfully performed. Comments at 13. Finally, GTS notes that TI 12 also had several variants, and involved a higher number of parts per unit and work instructions. Comments at 14.

⁹ This longer lead time is apparently due to the need to make or buy the mission critical enclosures. See AR, Tab 3, Market Research Memorandum, at 23-24.

However, these arguments fail to demonstrate that the agency's market research conclusions were unreasonable. Although GTS contends that the TI 12 procurement was "successfully set aside" for small businesses, Comments at 8, the fact is that the agency received only one acceptable proposal for that procurement--the proposal submitted by GTS. Even if we were to agree with GTS that the TI 16 requirements are no more complex or challenging than TI 12, the fact that the agency received only one acceptable proposal in that procurement reasonably led the agency to conclude, based on the similarities of the requirements and the recency of the TI 12 procurement, that it was unlikely to receive two or more proposals from capable small businesses in the TI 16 procurement.

Next, GTS challenges the agency's sources sought notice and its evaluation of the responses. Specifically, the protester complains that the notice made "excessive demands" of small businesses by requiring excessive amounts of information in a short timeframe. Comments at 18. However, as the agency notes, GTS was the only company that voiced a concern regarding the amount of information required. Further, when the agency received requests for an extension of time to submit responses, it granted them, and even considered a submission that was submitted two weeks late. Moreover, given the procurement history here, in which the agency received only one acceptable proposal for the TI 12 requirement, we find that the agency reasonably requested that interested offerors "demonstrate [their] technical approach to deliver the required system capabilities;" "address and discuss previous experience in producing products of similar complexity;" "[p]rovide a top-level manufacturing plan and work flowchart demonstrating throughput and major process activities;" and "demonstrate that it has the financial capability to perform the required throughput capacity." Protest at 37-38 (quoting AR, Tab 19, Sources Sought Notice).

In this regard, a contracting agency's investigation to determine the availability of responsible small business concerns for set-aside purposes, must address not only the existence of small businesses that might submit proposals, but also their capability to perform the contract. Triad Isotopes, Inc., B-411360, July 16, 2015, 2015 CPD ¶ 220 at 5; see The Protective Grp., Inc., B-310018, Nov. 13, 2007, 2007 CPD ¶ 208 at 3. The fact that multiple small businesses are identified in the course of market research is not necessarily determinative. Triad Isotopes, Inc., supra. Rather, the contracting officer must make reasonable efforts to ascertain whether it is likely that offers will be received from at least two small businesses capable of performing the work. DNO Inc., supra; Information Ventures, Inc., B-279924, Aug. 7, 1998, 98-2 CPD ¶ 37 at 3; see Rice Servs., Inc., B-411540, B-411540.2, Aug. 20, 2015, 2015 CPD ¶ ___ at 2 (agency issued sources sought notice requiring interested firms to demonstrate five or more years of experience in performing contracts of similar size and complexity; although agency received responses from seven small businesses, it reasonably concluded, based on its evaluation of the responses, along with procurement history, that it would not receive acceptable

proposals from two or more responsible small businesses). We find that the contracting officer here did precisely that.

Next, GTS challenges the agency's evaluation of the responses to the notice. Specifically, the protester argues that the agency's evaluation of Company 4's response was unreasonable and cannot form the basis for concluding that Company 4 is unlikely to submit an acceptable proposal.¹⁰ Comments at 24. In this regard, the protester contends that Company 4's submission was considered to be unacceptable primarily based on its lack of similar prior contracts and its lack of financial capability to perform the contract. Id. GTS contends that a company's lack of past performance may not be treated unfavorably, but instead must be assigned a neutral rating. However, as set forth above, the solicitation here requires that the prime contractor and any major subcontractors "must demonstrate experience assembling, testing and delivering equipment similar in size, complexity and scope to the CPS TI 16 equipment" in order to be found acceptable. RFP at 188. The experience requirement was separate and distinct from the past performance factor.

Our Office has held that, an agency's evaluation under an experience factor is distinct from its evaluation of an offeror's past performance-- the former focuses on the degree to which an offeror has actually performed similar work, whereas the latter focuses on the quality of the work. Amyx, Inc., B-410623, B-410623.2, Jan. 16, 2015, 2015 CPD ¶ 45 at 14; Commercial Window Shield, B-400154, July 2, 2008, 2008 CPD ¶ 134 at 3. Thus, under the terms of the solicitation, an offeror could be found unacceptable if it lacked adequate experience. Therefore, we find the agency's conclusions in this area to be reasonable.¹¹

¹⁰ GTS also contends that the sources sought notice was fatally flawed because "the types and amounts of information required" were unreasonable and improper. Protest at 32. In support of this argument, GTS compares the notice to sources sought notices used by the Navy for earlier TI procurements, which required far less information. Id. at 34. We have reviewed the notice and we find that the amount and types of information required are reasonable in the context of the solicitation's requirements and the procurement history here.

¹¹ We also find the agency's conclusions regarding Company 4's financial capability to be reasonable. As set forth above, the sources sought notice specifically instructed interested firms to explain how they would finance the ordering of material "(including the financial method of managing the make-or-buy of the Mission Critical Enclosure) in advance of progress payments." AR, Tab 19, Sources Sought Notice, at 7 (emphasis in original). Company 4's response referenced [DELETED]. Although Company 4's response also stated generally that its [DELETED] Company 4 provided no indication that this could include a [DELETED] to order the mission critical enclosures. AR, Tab 23, Company 4's Response to Sources Sought Notice, at 40; see AR, Tab 3, Market Research

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“Post-Hoc” Documentation

Finally, we address GTS’s assertions that we should give the majority of the agency’s market research little or no weight because it constitutes “post-hoc” analysis that was conducted after the initial issuance of the solicitation. See, e.g., Comments at 2, 15, 16, 17. In this regard, GTS contends that any documents prepared after the initial protest filing were prepared with the intention of “refuting a specific set of live protest allegations.” Comments at 17. Thus, GTS contends, since the agency’s 35-page Market Research Memorandum and other documents were “made under threat of” protest, these documents should be given little weight. Id.

In some situations, our Office accords less weight to post-hoc arguments or analyses made in response to protest allegations because we are concerned that new judgments made in the heat of an adversarial process may not represent the fair and considered judgment of the agency. See Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

However, the record here, including the agency’s extensive market research memorandum, was prepared prior to the agency’s conclusion, on May 29, 2015, that the solicitation would not be set aside for small businesses. That is, the documents in the record constitute contemporaneous documentation of the agency’s May 29 decision not to set aside the procurement--not documents prepared in the heat of litigation. We conclude that these documents constitute contemporaneous documentation of the agency’s May 29, 2015 decision that the procurement would not be set aside for small businesses, and instead would be issued on an unrestricted basis. Therefore, we find no merit in the protester’s arguments that the agency’s market research should be accorded little or no weight because the documentation of it is “post-hoc.”

Ability to Compete on Common Basis

GTS also contends that the solicitation is unreasonably vague and ambiguous regarding the requirement for engineering services, thus preventing offerors from competing on a common basis. In this regard, the protester notes that the solicitation contains contract line items (CLINs) for 100,000 hours of engineering services, and requires offerors to propose a labor mix, but does not contain information essential for offerors to formulate an acceptable labor mix or labor rates. Protest at 3-4.

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Memorandum, at 34-35 (cash outlays for mission critical enclosures are estimated to be \$[DELETED] million to \$[DELETED] million).

As set forth above, the RFP requires that offerors “propose a labor mix with supporting rationale for engineering services as described in Section C. . . [and] provide job descriptions for each proposed labor category.” RFP at 176. However, the description of these services in Section C provides only a vague outline of the requirement, which is shown here in its entirety:

ENGINEERING SERVICES CLINs 0009 (if exercised, 1009, 2009, 3009, and 4009) - If ordered, the Contractor shall provide engineering services (ES), conduct engineering studies, provide engineering analysis and trade-off studies, and/or support engineering changes as directed by the Government. Contractor shall provide any travel, incidental material consumed, and/or subcontractor effort necessary in the performance of the required ES. The specific tasks shall be defined in each Delivery Order.

RFP at 55. Further, the solicitation requires that, in proposing rates for these general engineering services, “[a]ny travel, incidental material consumed, other direct costs (ODCs) and/or subcontractor effort associated with the performance of this effort shall be included in the proposed man-hour rate.” Id. at 50; see also AR, Tab 30, Questions and Answers, at 2 (“The costs for travel, incidental material consumed, [and] subcontracted effort shall be included in the offeror’s proposed hour rate”).

When the agency received questions from potential offerors regarding these services, it refused to provide any additional information. See, e.g., AR, Tab 30, Questions and Answers, at 4. In this regard, one offeror asked: “Please provide guidance as to which labor categories are desired, and provide additional details on what tasks are required for Engineering Services.” Id. The agency, however, did not furnish any additional information, answering instead that: “The Offerors shall propose the labor categories necessary to succes[s]ful[l]y complete the tasks iden[tifi]ed for the statement of line items 0009, 1009, 2009, 3009, and 4009.” Id.¹² However, each of these CLINs described the requirement only as “Engineering

¹² Another question from a potential offeror asked the following:

[H]ow is the Government . . . justifying an Offeror to utilize the composite rate for estimated cost and to establish a fixed fee when the labor mix will be unknown until receipt of the request at the Order level, which would include the SOW? To require an Offeror to establish a fixed fee based on a composite rate at the IDIQ level is not establishing a good cost estimate since labor mix will not be known until receipt and review of request. The fixed fee should be established at the Order level based on the work requested and the

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Services,” and contained references to a “note” informing offerors that “[l]abor hours for each task shall be established through negotiation in each delivery order via a Government-provided Statement of Work (SOW).” RFP at 50; see, e.g., id. at 20.

GTS contends that the lack of any meaningful description of the types of engineering services required or the goals to be achieved, coupled with the fact that award under the solicitation is to be made to the lowest-priced, technically acceptable proposal, RFP at 191, will encourage offerors to propose unrealistic labor mixes in order to achieve the lowest possible price; according to the protester, offerors who do not “play the lowball pricing game” will be disadvantaged for proposing what they believe to be a more realistic labor mix. Protest at 45. In any event, the protester argues that, given the current dearth of information regarding the engineering services requirement, offerors will be forced to make “wild guesses” in proposing engineering services costs. Id.

As a general rule, 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. That is, offerors must be given sufficient detail to allow them to compete intelligently and on a relatively equal basis; the agency’s description of its needs must be free from ambiguity and describe the agency’s minimum needs accurately. See Haworth, Inc.; Knoll N. Am., Inc., B-256702.2, B-256702.3, Sept. 9, 1994, 94-2 CPD ¶ 98 at 5.

The solicitation’s requirement for engineering services does not meet this standard. Although Offerors were required to “propose a detailed labor mix,” RFP at 176, the RFP’s vague description of the engineering services required did not provide offerors with a sufficient description of the work to be performed or the results to be achieved on which to base their proposed labor mix. In this regard, the solicitation’s description stated only that the engineering services could include tasks such as providing engineering analysis, conducting studies “and/or” supporting engineering changes. RFP at 55.

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costs estimated based on the labor mix, etc. . . . If the Engineering Services only included labor and it was clear on what labor categories and hours would be used based on the Orders with requirements known, then this could provide a more streamlined acquisition approach to Ordering.

AR, Tab 30, Questions and Answers, at 6. The entirety of the agency’s response to this question stated, “The Offeror is responsible for providing a labor mix that will perform the required efforts detailed in Section C, Statement of Work.” Id.

The agency argues that, when the statement of work outlines the work to be performed, the agency is not required to prescribe a particular labor mix or level of effort--rather, agencies may require offerors to propose the appropriate labor mix and level of effort to achieve the identified goals. AR at 35-39. However, while an agency may require offerors to propose the labor mix and level of effort appropriate for performing the work required under the solicitation, the solicitation must provide a sufficiently detailed description of the work to be performed or the goals to be achieved to allow offerors to intelligently propose a labor mix and level of effort.

Here, the solicitation contains no description, beyond the vague requirement to provide analysis, conduct studies and/or support engineering changes, of the type of work to be performed or the goals to be achieved. As a result, offerors had no basis on which to formulate their proposed labor mix under this lowest-priced technically acceptable procurement. Therefore, we sustain the protest on this basis.

RECOMMENDATION

We recommend that the agency amend the solicitation to provide an adequate description of the engineering services required under the contract or to otherwise allow offerors to compete on a common basis. We also recommend that the protester be reimbursed its reasonable costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). The protester's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel