U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Chronos Solutions, LLC; Inside Realty, LLC; BLB Resources, Inc.

File: B-417870.2; B-417870.3; B-417870.4

Date: October 1, 2020

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Jonathan E. English, Esq., William J. Selinger, Esq., and Julie K. Cannatti, Esq., Department of Housing and Urban Development, for the agency.
April Y. Shields, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests challenging the terms of a solicitation are sustained where the agency did not consider significant changes in the law, as well as the agency's policies and market conditions, directly applicable to the single-family mortgage insurance program for which the solicitation seeks asset management services; and where consideration of these changes could likely materially impact the procurement.

DECISION

Chronos Solutions, LLC, of Irving, Texas; Inside Realty, LLC, of Sylvan Lake, Michigan; and BLB Resources, Inc., of Irvine, California, protest the terms of request for proposals (RFP) No. 86544A19R00003, issued by the Department of Housing and Urban Development (HUD) for asset management services in support of HUD's real estate owned properties. The protesters argue that the terms of the solicitation, including estimates on which proposals are to be based and evaluated, do not accurately reflect the agency's needs in light of the coronavirus 2019 (COVID-19) pandemic. The large business protesters, Chronos and BLB Resources, also argue that the agency's decision to issue the RFP as a total small business set-aside was unreasonable.

We sustain the protests.

BACKGROUND

By way of background, HUD, through its Federal Housing Administration (FHA), is responsible for administering the single-family mortgage insurance program, under which it insures approved lenders against the risk of loss on loans financed for the purchase and rehabilitation of single-family homes. In the event of default on an insured loan, the lender may acquire title to the property by foreclosure, a deed-in-lieu of foreclosure, or other acquisition method; file a claim for insurance benefits; and convey the property to HUD. As a result, HUD "is the largest single seller of real estate in the [United States]" and "has a need to manage and sell a sizable inventory of single-family homes in a manner that promotes home ownership, preserves communities and maximizes return to the [agency's] insurance funds." Agency Report (AR), Tab 27, RFP amend. 15 Conformed Copy (RFP), June 25, 2020, at 24.[1] HUD relies on a variety of contractors to maintain and sell these properties throughout the country, including asset management contractors that are responsible for marketing and selling these properties.

The Solicitation

The RFP, referred to as the 3.9 Asset Management (3.9 AM) procurement, was issued on June 17, 2019 and amended 15 times. The most recent iteration of the RFP is a total small business set-aside that seeks asset management contractors for 11 contract areas, which are organized by geographic areas within the four Homeownership Centers through which HUD administers its real estate owned properties program (Philadelphia, Pennsylvania; Denver, Colorado; Atlanta, Georgia; and Santa Ana, California). RFP at 24-25. The RFP contemplates the award of 11 indefinite-delivery, indefinite-quantity (IDIQ) contracts, one for each contract area. Each contract would have a base period of performance of up to 12 months,[2] as well as four 1-year option periods and a 6-month extension option. *Id.* at 15. Each contract would have, depending on the estimated work for that geographic area, a guaranteed minimum amount ranging from $500,000 to $1,000,000, up to a maximum amount ranging from

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[1] References to the RFP, unless otherwise noted, are to the conformed version provided by the agency, which represents that the conformed RFP includes all 15 amendments. Chronos AR, Tab 27; Inside Realty AR, Tab 25; and BLB Resources AR, Tab 26. The agency provided Bates numbers for some, but not all, of the documents in its agency reports; therefore, we cite, unless otherwise noted, to the PDF page number for each document referenced in this decision. Finally, the protests were not consolidated during development and, therefore, references to the pleadings submitted in each protest are designated accordingly.

[2] The RFP asks offerors to propose prices for a seven-month base period. AR, Tab 27, RFP amend. 15, attach. 15, 3.9 AM Pricing Spreadsheet; *see also* Chronos AR, Memorandum of Law (MOL) at 2 (explaining that "[t]he plan is for a seven-month base period"); Inside Realty AR, MOL at 2 (same), BLB Resources AR, MOL at 2 (same).

$39,000,000 to $141,000,000. *Id.* at 149-150. The agency's independent government cost estimate (IGCE) calculates the estimated total value of the procurement as approximately $[REDACTED] million.[3] AR, Tab 24, Revised IGCE Spreadsheet, June 19, 2020, at Tab 1, Total Contract Value.[4]

The solicitation provides for the following 11 contract areas:

Homeownership Center	**Contract Area**	**Geographic Area**
Philadelphia, Pennsylvania	1P/4P	Michigan, Ohio
	3P	Maine, Vermont, New York, New Hampshire, Rhode Island, New Jersey, Massachusetts, Connecticut
	5P	Pennsylvania, Virginia, West Virginia, Delaware, Maryland, District of Columbia
Denver, Colorado	1D	New Mexico, North Texas, Colorado, Utah
	2D	Kansas, Oklahoma, Arkansas, Louisiana, Missouri, South Texas
	4D/5D	Wisconsin, Iowa, Nebraska, South Dakota, North Dakota, Wyoming, Montana, Minnesota
Atlanta, Georgia	3A/4A	Illinois, Indiana, Kentucky
	5A/8A	North Carolina, South Carolina, Florida, Puerto Rico, Virginia Islands
	6A/7A	Tennessee, Alabama, Mississippi, Georgia
Santa Ana, California	3S/5S	Arizona, California, Hawaii, Guam
	4S/6S	Nevada, Idaho, Alaska, Washington, Oregon

RFP at 149-150, 172-174. The RFP permits offerors to compete for any or all contract areas, but advises that the agency will restrict the number of awards within each Homeownership Center jurisdiction "to maintain the ability to quickly realign areas of performance."[5] *Id.* at 172-173; *see also id.* at 112-113.

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[3] We note, however, that adding the maximum amounts for all 11 contracts totals approximately $964 million. *See* RFP at 149-150.

[4] References to the IGCE are to the version provided by the agency in the Chronos AR, Tab 24; Inside Realty AR, Tab 22; and BLB Resources AR, Tab 23.

[5] The RFP includes a priority list to be used if an offeror is found to be the apparent awardee in more than one contract area, such that an offeror could receive a maximum

The RFP provides that proposals will be evaluated using technical acceptability, past performance, and price factors, and that award will be made on a best-value basis with a possible tradeoff between performance and price. The RFP provides that past performance and price will be considered approximately equal and cautions that award may not necessarily be made to the lowest-priced offeror or the offeror with the highest-rated past performance. The RFP provides for a multi-step evaluation and selection process in which the agency will: rank all proposals by price; evaluate technical acceptability and past performance, starting from the lowest-priced proposal, until at least two proposals are found to be minimally technically acceptable and at least one of the technically acceptable proposals achieves the highest available rating for past performance; evaluate price for the proposals evaluated in the prior step; and perform a tradeoff analysis and source selection decision based on the best value. RFP at 184, 191-192.

Of relevance here, the RFP provides estimates based on historical data up to late 2019, against which past performance and price will be evaluated. Under the past performance factor, the RFP provides that the agency will consider recency, relevancy (scope, value, and magnitude), and quality of the offeror's prior efforts.[6] RFP at 188. The RFP defines the magnitude portion of relevancy as "monthly inventory (which includes new inventory assigned during that month as well as inventory carried over from previous months) [that] will be evaluated in accordance with the monthly property assignment ranges set forth in Section L." *Id.* at 188-189. The RFP includes specific numeric ranges for monthly inventory for each contract area, against which proposals would be evaluated.[7] *Id.* at 180-181. The agency explains that these estimates are

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of two awards within the Philadelphia, Pennsylvania Homeownership Center; two awards within the Denver, Colorado Homeownership Center; two awards within the Atlanta, Georgia Homeownership Center; and one award within the Santa Ana, California Homeownership Center. RFP at 172-173. The RFP also includes a contract option to increase or decrease the geographic areas and provides that the government "reserves the right to realign for any reason." *Id.* at 112-113. The RFP provides, for example, that "[t]he Government intends to utilize this clause as a mechanism to incentivize a high level of performance by rewarding the satisfactory performing contractors with an opportunity to expand their geographic service area and provide a disincentive for non-performance of contract requirements by reducing the geographic service area of contractors who fail to meet contract expectations." *Id.* at 113.

[6] Proposals would be assigned the following past performance ratings: "excellent/very low risk/very high confidence," "good/low risk/high confidence," "satisfactory/medium risk/some confidence," "neutral/unknown risk/neutral confidence," or "poor/very high risk/low confidence." RFP at 189.

[7] For example, for Area 3A/4A (Illinois, Indiana, Kentucky), the RFP provides that an offeror's reference, in terms of magnitude, would be evaluated as "very relevant" if it involved more than 897 properties; "relevant" if it involved between 604 and 897

based on historical data for the monthly number of properties acquired (acquisitions) and monthly numbers of properties in inventory (end of month inventory) from October 2018 through November 2019. *See*, *e.g.*, Inside Realty AR, MOL at 3 (and internal citations).

With regard to price, the RFP provides that the agency would evaluate prices for reasonableness and that contracts would be awarded according to fixed unit rates, which include marketing fees paid on a percentage fee basis. RFP at 16-17, 190-191. The RFP requires offerors to complete an attached pricing spreadsheet based on estimated quantities provided by the agency. *See* AR, Tab 27, RFP amend. 15, attach. 15, 3.9 AM Pricing Spreadsheet. The agency explains that the pricing spreadsheet is based on the agency's IGCE, which was last updated in September 2019 to reflect historical inventory through August 2019. AR, Tab 24, Revised IGCE Spreadsheet, June 19, 2020, at Tab 1, Total Contract Value; *see also*, *e.g.*, Inside Realty AR, MOL at 3 (and internal citations). The IGCE estimates a start date of performance of June 1, 2020, and was "adjusted to account for [REDACTED] volume" over the five-year period of performance. AR, Tab 15, IGCE Explanation Spreadsheet, Sept. 26, 2019, at Tab 1, Explanation.[8]

Procurement History

Before the August 20, 2019 initial due date for proposals, which was after the agency issued amendment 8 to the RFP, Chronos filed a protest challenging the terms of the solicitation including, among other things, the agency's decision to set aside three of the contract areas for small businesses. The agency took corrective action, and we dismissed the protest as academic. *Chronos Sols., LLC*, B-417870, Sept. 20, 2019 (unpublished decision).

On October 28, the agency issued a sources-sought notice to determine the availability and capability of small businesses to perform its requirements. On March 19, 2020, the agency finalized its market research report. The agency reviewed, among other things: the proposals received in August 2019; the responses received in November 2019 to the sources-sought notice; current and previous asset management contracts, and past

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properties; "somewhat relevant" if it involved between 302 and 603 properties; or "not relevant" if it involved fewer than 302 properties. RFP at 180.

The RFP also provides value ranges, against which the value portion of relevancy for each identified reference will be evaluated. *Id.* at 180-181. For example, for Area 3A/4A, the RFP provides that an offeror's reference would be evaluated as "very similar in value" if it involved work valued above $3 million; "similar in value" if it involved between $2 million and $3 million; "somewhat similar in value" if it involved between $1 million and $2 million; and "not similar in value" if it involved less than $1 million. *Id.*

[8] References to the IGCE Explanation are to the version provided by the agency in the Chronos AR, Tab 15; Inside Realty AR, Tab 15; and BLB Resources AR, Tab 14.

performance information; queries in the Federal Business Opportunities (FBO) database; and "the opinion of technical experts." Market Research Report, Mar. 19, 2020, at 3, 14.[9] The agency concluded that "[r]esearch found that there is a reasonable expectation that at least two (2) responsible small business concerns can perform Asset Management (AM) services at a fair market price in all of the proposed contract areas[.]"[10] *Id.* at 14.

After finalizing its market research report, however, HUD did not immediately amend the RFP.

On March 27, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The CARES Act contains various provisions addressing the national public health and economic threats resulting from COVID-19. Section 4022 of the CARES Act, "Foreclosure Moratorium and Consumer Right to Request Forbearance," covers property owners with federally backed single-family mortgages, including those insured by FHA for properties that are the subject of this procurement. In sum, this section prohibits foreclosures and foreclosure-related evictions for 60 days beginning on March 18, 2020 and mandates up to 180 days of mortgage forbearance, with potential extensions of up to an additional 180 days, for borrowers who have experienced a financial hardship related to the COVID-19 emergency. CARES Act, Pub. L. No. 116-136, § 4022, 134 Stat. 281, 490-91 (2020); 15 U.S.C. § 9056.

On April 1, HUD announced various mortgage payment relief options for single family homeowners with FHA-insured mortgages experiencing financial hardship related to COVID-19. BLB Resources Protest, B-417870.4 at 9, *citing* Press Release, HUD

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[9] References to the market research report are to the version provided by the agency in the Chronos AR, Tab 18; Inside Realty AR, Tab 16; and BLB Resources AR, Tab 17.

[10] The record reflects some discrepancy as to whether HUD identified five or six small businesses capable of meeting its requirements. The market research report concludes that "HUD is confident that these five small businesses would be capable of performing all 11 of the new contract areas." Market Research Report at 14. Another section of the market research report discusses a sixth small business that the agency considered would be capable of performing in some of the geographic areas, but that was not included in the agency's conclusions. *Id.* at 10. We also note that the agency's initial briefings to our Office were consistent with the conclusion about five small businesses noted above, while its supplemental briefings brought up the sixth small business. *Compare* Chronos AR, MOL at 4, 7 *with* Chronos Agency Additional Briefing, Aug. 17, 2020, at 2 (claiming in a supplemental briefing that the agency had identified six small businesses instead of five); *but see*, *e.g.*, Chronos AR, Tab 28, Decl. of Contracting Officer, Aug. 5, 2020 (explaining the agency's review of a sixth small business). As this difference is immaterial to our analysis, we need not discuss it further; however, in light of our conclusions and recommendations discussed herein, the agency may wish to clarify this when it reviews its market research report.

No. 20-048, “HUD Issues New CARES Act Mortgage Payment Relief for FHA Single Family Homeowners,” Apr. 1, 2020 https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_048 (last visited Sept. 30, 2020). In addition to implementing the special COVID-19 forbearance mandated by the CARES Act, HUD introduced other measures directly applicable to the single-family mortgage insurance program.[11] As HUD explained, in a letter to its mortgage servicers:

> HUD is working to provide mortgagees and borrowers with additional Loss Mitigation Home Retention Options due to the COVID-19 National Emergency, and to clarify requirements around these options and to fully implement the CARES Act. HUD anticipates that financial impacts of COVID-19 on many borrowers will include a combination of wage reductions, job losses or interruptions, and the inability to work for a variety of reasons, such as a lack of telework options or lack of child care – on top of potential impacts of contracting COVID-19. To alleviate concerns and burdens, as well as relieve additional stress and uncertainty on borrowers and mortgagees impacted by the COVID-19 National Emergency, the U.S. federal government is putting forward a number of policies and programs. The Loss Mitigation Options put forward in this [mortgagee letter] are part of this broader effort.

Press Release, HUD No. 20-048, *supra*, *citing* HUD, Mortgagee Letter 2020-06, “FHA’s Loss Mitigation Options for Single Family Borrowers Affected by the Presidentially-Declared COVID-19 National Emergency in Accordance with the CARES Act,” Apr. 1, 2020, https://www.hud.gov/sites/dfiles/OCHCO/documents/20-06hsngml.pdf (last visited Sept. 30, 2020).

On April 27, HUD issued amendment 9 to the RFP, which, among other things, changed the procurement to a total small business set-aside and reopened the competition. Of note, the RFP did not acknowledge the COVID-19 pandemic, the forbearance mandated by the CARES Act, or the mortgage payment relief options implemented by HUD. In questions and answers later incorporated into the RFP, the agency briefly addressed questions about the impact of COVID-19 on timelines, stating that, “[u]nder the current environment, vendors have still been able to operate within the current timelines,” and that, “[i]n the event that COVID-19 mandates require adjustments, such adjustments may be executed by the Contracting [Officer].” AR, Tab 27, RFP amend. 15, Questions and Answers, at 23, 26. In response to other questions, of

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[11] For example, HUD implemented a “COVID-19 National Emergency Partial Claim,” an option to be used by servicers when the COVID-19 forbearance period ends, which “will help eligible homeowners who have been granted special COVID-19 National Emergency forbearance to reinstate their loans by authorizing servicers to advance funds on behalf of homeowners.” This option “will defer the repayment of those advances through an interest-free subordinate mortgage that the borrower does not have to pay off until their first mortgage is paid off.” Press Release, HUD No. 20-048, *supra*.

relevance here, the agency advised: “In general, historical volumes are the basis of inventory levels utilized to assess offerors. Market conditions will determine the volume of [real estate owned property] acquisitions. Each [asset management contractor] is required to be knowledgeable about its market in prevailing trends, which will impact its ability to sell [real estate owned] properties timely.” *Id.* at 8. The agency also provided historical volumes of sales from March 2019 to March 2020, while cautioning that “[o]fferors are expected to know their market areas.” *Id.* at 29-30.

Prior to June 30, the proposal due date established by amendment 15 to the RFP, Chronos, Inside Realty, and BLB Resources filed protests with our Office challenging various aspects of the terms of the solicitation.

DISCUSSION

The protesters’ various arguments concern, essentially, whether the terms of the solicitation accurately reflect the agency’s needs in light of the COVID-19 pandemic. The protesters argue that the agency failed to consider the impact of the CARES Act, as the volume of foreclosures--and, therefore, the number of properties for which asset management services will be required--will decrease during the mandatory forbearance period. The protesters also argue that the volume of foreclosures will likely significantly increase once the mandatory forbearance period expires, based on their knowledge of the housing market and views of changed economic conditions. *See*, *e.g.*, Chronos Protest, B-417870.2 at 9 (“The COVID-19 pandemic will radically increase the number of homes that the contractors in these areas will be required to manage, given the severe adverse effect that the pandemic has had on the economy and the rise in foreclosures that accompanies every economic downturn”); Inside Realty Protest, B-417870.3 at 12-13, 18 (“The agency’s estimates fail to recognize or consider the effect that the current financial crisis will have on the housing market, foreclosures, and the number of properties that HUD will need to sell as a result of the deteriorating financial conditions”); BLB Resources Protest at 9 (“HUD’s estimates for asset management work do not reflect the increased workloads” and, because they are “grounded in historical data gathered from the relatively prosperous years of the last decade, do not accurately approximate HUD’s actual requirements”).

In this regard, Inside Realty, a small business, argues that the estimates on which past performance and price are to be evaluated “are wildly inaccurate because of the CARES Act and the changed economic circumstances caused by the coronavirus pandemic.” Inside Realty Protest at 9. In Inside Realty’s view, “[t]he problem is that the solicitation estimates, created in 2019, do not take into account these legal changes [*i.e.*, the CARES Act], which unquestionably will affect the number of foreclosures in at least the base period and first option period of the Solicitation.” Inside Realty Comments at 6. Chronos and BLB Resources, two large businesses, further contend that the estimates are flawed such that the agency did not consider, and cannot reasonably expect, small businesses to be able to handle the likely significantly increased volume of work. Chronos Protest at 9-11; Chronos Comments at 4-7; BLB Resources Protest at 10-11; BLB Resources Comments at 7-8.

The contemporaneous record contains no documentation to show that HUD considered the effects of the CARES Act enacted on March 27 (as well as its own mortgage relief payment programs announced on April 1, or other effects of the COVID-19 pandemic) in amending the solicitation and reopening the competition on April 27. Indeed, in its various briefings responding to the protests, HUD primarily asserts that it did not, and was not required to, consider any changes. The agency argues that, because the RFP contemplates the award of IDIQ contracts: "[E]stimated quantities for purposes of evaluation in IDIQ contracts are not contract requirements, subject to [Federal Acquisition Regulation] FAR 15.206(a). Thus, even if HUD's estimates had changed, which they have not, solicitation amendment would not be required." Inside Realty AR, MOL at 6; *see also id.* at 7 ("HUD has made no such determination…"); BLB Resources AR, MOL at 6 (arguing that, "even if the estimates did change, which HUD denies, a change in estimates--even a significant change--does not require amendment when, as here, it is evident that quantities may fluctuate"); Inside Realty Agency Additional Briefing, Aug. 11, 2020, at 1-3; BLB Resources Agency Additional Briefing, Aug. 12, 2020, at 1-2.

HUD asserts, without citation to the contemporaneous record, that its requirements have not changed. Inside Realty AR, MOL at 4 ("HUD's requirements have not changed, nor have its estimates"); Chronos AR, MOL at 7 ("HUD has not subsequently materially changed its requirements or its IGCE"); BLB Resources AR, MOL at 9 (same). While the agency also claims that the information it used--that is, historical information up to late 2019--"is the most relevant information available," HUD then acknowledges that, "if the most recent historical information was considered, the estimates may actually decrease." BLB Resources AR, MOL at 6. In this regard, the agency concedes that, "due to the [CARES Act] requirement for forbearance, it is likely that foreclosures of federally backed mortgages will decline during that year-long period, along with overall inventories of properties serviced by HUD's [asset management] contractors." Inside Realty AR, MOL at 11; BLB Resources AR, MOL at 6 (same); *see also* Chronos AR, MOL at 6 ("contract inventories may actually decrease in the first year of the contract, not increase").

Finally, HUD argues that: "any alleged future fluctuation in volume is, at this point, speculative," Inside Realty AR, MOL at 7; the protesters have not challenged the guaranteed minimum quantity contemplated by each award; and the maximum amount contemplated by each award "will not be exceeded." BLB Resources AR, MOL at 4. *See also* Chronos AR, MOL at 1, 4-6 (arguing that the protest should be dismissed as speculative); Inside Realty AR, MOL at 1, 4-5 (same); BLB Resources AR, MOL at 1, 4-5 (same). Finally, HUD argues that the RFP already sufficiently cautioned potential offerors about "inherent fluctuation in the market" and that "HUD cannot eliminate this risk." Inside Realty AR, MOL at 5, 12.

We have considered the record and all of the parties' arguments, and we sustain the protest as discussed below. We cannot conclude, based on this record, that the terms of the solicitation are reasonable where the agency did not contemporaneously consider significant changes in the law, and other circumstances, directly applicable to the program for which this procurement seeks services, and where consideration of these changes could likely materially impact the procurement.[12]

As a preliminary matter, we reject the agency's position that it was not required to consider any changes because the RFP contemplates the award of IDIQ contracts. The FAR provides for the use of IDIQ contracts where the government cannot predetermine, above a specified minimum, the precise quantity of services that will be required during the contract period, and where it is inadvisable for the government to commit itself for more than a minimum quantity. FAR 16.504(b). Where an agency's estimates for the amount of work to be ordered under an IDIQ contract changes significantly, prior to award, the agency must amend the solicitation and provide offerors an opportunity to submit revised proposals. *Global Comput. Enters., Inc.; Savantage Fin. Servs., Inc.*, B-404597 *et al.*, Mar. 9, 2011, 2011 CPD ¶ 69 at 8; *Symetrics Indus., Inc.*, B-274246 *et al.*, Aug. 20, 1997, 97-2 CPD ¶ 59 at 6. That is because, as required by the FAR, where an agency's requirements materially change after a solicitation has been issued, it must issue an amendment to notify offerors of the changed requirements and afford them an opportunity to respond. FAR 15.206(a); *Global Comput. Enters., Inc.; Savantage Fin. Servs., Inc.*, *supra*, at 8; *Murray-Benjamin Elec. Co., L.P.*, B-400255, Aug. 7, 2008, 2008 CPD ¶ 155 at 3-4. Amending the solicitation provides offerors an opportunity to submit revised proposals on a common basis that reflects the agency's actual needs. *Multimax, Inc., et al.*, B-298249.6 *et al.*, Oct. 24, 2006, 2006 CPD ¶ 165 at 6.

Further, the IDIQ contract must contain a minimum quantity which is more than nominal and a maximum quantity which is realistic and based upon the most current information

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[12] While we do not address in detail every argument raised by the protesters, we have reviewed each issue and, with the exception of those issues discussed below, do not find another sufficient basis to sustain the protest. For example, Chronos challenges various aspects of the RFP's evaluation scheme, including arguing that the "evaluation methodology is unreasonable because it places an undue emphasis on low price" and "is essentially an LPTA [lowest-price technically acceptable] methodology." Chronos Protest at 12. The RFP provides for "a competitive best value acquisition utilizing Performance Price Trade-Off," which the agency explains "ensures that the offeror has an acceptable technical approach, while focusing on the importance of the offeror's past performance." RFP at 184; Chronos AR, MOL at 9.

We note that such a selection method is not prohibited by the FAR and, in our view, the protester has not established that its contemplation here is improper or unreasonable. We also note that, generally, a contracting agency has discretion to determine its needs and the best means to accommodate them, and 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. *See, e.g.*, *Harris Enters., Inc.*, B-311143, Mar. 27, 2008, 2008 CPD ¶ 60 at 2; *Parcel 49C Limited P'ship*, B-412552 *et al.*, Mar. 23, 2016, 2016 CPD ¶ 95 at 11.

available. FAR 16.504(a)(1). Estimated maximum quantities need not be precise; rather, such estimates are unobjectionable so long as they were established in good faith or based on the best information available, and are reasonably accurate representations of the agency's anticipated needs. *Bristol-Myers Squibb Co.*, B-294944.2, Jan. 18, 2005, 2005 CPD ¶ 16 at 7; *Aalco Forwarding, Inc., et al.*, B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 at 6. Moreover, where proposals are solicited for IDIQ contracts on a fixed-price basis, the solicitation must contain estimates of future requirements or some reasonable alternative so that offerors are able to calculate their risks and compete on a reasonable basis. In this regard, when estimates are used, they must be established in good faith and based upon the best available information. *See*, *e.g.*, *Sletager, Inc.*, B-244710, Nov. 13, 1991, 91-2 CPD ¶ 452 at 4.

Here, the RFP contemplates the award of 11 IDIQ contracts, each with a guaranteed minimum amount and a maximum amount based on the estimated work for the corresponding geographic area. RFP at 149-150. The RFP also provides estimates based on historical data as recent as late 2019, against which past performance and price will be evaluated. *Id.* at 179-181, 188-189; AR, Tab 15, IGCE Explanation Spreadsheet, Sept. 26, 2019, at Tab 1, Explanation. The RFP also contemplates award according to fixed unit rates, which include marketing fees paid on a percentage fee basis, and requires offerors to complete an attached pricing spreadsheet based on the included estimated quantities. RFP at 16-17, 190-191; AR, Tab 27, RFP amend. 15, attach. 15, 3.9 AM Pricing Spreadsheet.

As discussed above, HUD is required to amend this RFP should its requirements change significantly prior to award--including, as here, the needs and estimates that inform the evaluation scheme and the basis on which offerors are required to prepare their proposals.[13] FAR 15.206(a); *see*, *e.g.*, *Global Comput. Enters., Inc.; Savantage Fin. Servs., Inc.*, *supra*, at 8.

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[13] We also note that failure to amend the RFP, under these circumstances, is compounded should the RFP fail to comply with other requirements for the award of IDIQ contracts. *See*, *e.g.*, *Sletager, Inc.*, *supra*, at 3 (finding errors "compounded by the failure of the solicitation to comply with other requirements for indefinite quantity contracts"). In light of our conclusions and recommendations discussed herein, the agency may also wish to review the minimum and maximum quantities for the contemplated IDIQ contract awards to the extent those were also based on the agency's estimates.

With that in mind, we next turn to the question of whether the agency's requirements here have changed. In our view, the agency's assertion that its requirements have not changed--repeated in its various briefings responding to the protests, without citation to the contemporaneous record--is not reasonably defensible. Before amending the RFP and reopening the competition on April 27, and up to the June 30 due date for proposals, the agency did not consider the multitude of significant changes directly applicable to the program under this procurement, to include, as discussed above: the enactment of the CARES Act on March 27 and the mandatory mortgage forbearance period for up to 360 days; HUD's implementation of various mortgage payment relief options as announced on April 1; and, relatedly, changing economic conditions affecting the housing market as a result of the COVID-19 pandemic.

Indeed, HUD acknowledges in its pleadings that these changed circumstances will affect the volume of properties to be serviced by asset management contractors. In response to the various protest grounds, the agency concedes that, "due to the [CARES Act] requirement for forbearance, it is likely that foreclosures of federally backed mortgages will decline during that year-long period, along with overall inventories of properties serviced by HUD's [asset management] contractors." Inside Realty AR, MOL at 11; BLB Resources AR, MOL at 6; *see also* Chronos AR, MOL at 6. In this regard, while the agency argues that it already used "the most relevant information available"--that is, recent historical information up to late 2019--HUD also acknowledges that, "if the most recent historical information was considered, the estimates may actually decrease." BLB Resources AR, MOL at 6.

We also point out that HUD, in its April 1 announcement of various mortgage relief payment options, represented then that it "anticipates [ ] financial impacts of COVID-19 on many borrowers" and that, "[t]o alleviate concerns and burdens, as well as relieve additional stress and uncertainty on borrowers and mortgagees impacted by the COVID-19 National Emergency, the U.S. federal government is putting forward a number of policies and programs." Press Release, HUD No. 20-048, *supra*, *citing* HUD, Mortgagee Letter 2020-06, *supra*.

Despite HUD's apparent recognition of such changes affecting its needs and estimates, HUD argues that the protests amount to mere speculation about the future of the housing market--such that, for instance, "a purely speculative future increase in volume does not constitute a present, known change in minimum requirements." Inside Realty AR, MOL at 7. While the protesters collectively argue that foreclosures will significantly increase over the period of performance, and the agency represents that foreclosures will decline at least during the forbearance period, we offer no opinion as to how HUD's requirements have changed, or will change. While we acknowledge the inherent uncertainties around the COVID-19 pandemic, we think that the protesters' concerns--based in part on the concrete changes mandated by the CARES Act and implemented by HUD, which HUD acknowledges will affect the volume of properties--amount to more than mere speculation.

To the extent HUD believes that these circumstances were insufficient to prompt the agency to take another look at its procurement, we disagree. For example, in *Global Comput. Enters., Inc.; Savantage Fin. Servs., Inc.*, *supra*, our Office sustained a protest where the Office of Management and Budget issued guidance for executive branch agencies prior to award, indicating that the agency knew, prior to award, that the agency's needs had materially changed from the assumptions set forth in the solicitation, on which offerors were required to base their proposals. Here, HUD argues: "[T]he agency in that case knew--it had specifically decided in response to [Office of Management and Budget] guidance--that the contract's requirements would be radically reduced. That is far different from the present case, where HUD has made no such determination, and any alleged future fluctuation in volume is, at this point, speculative." Inside Realty AR, MOL at 7. In light of the CARES Act and HUD's announced policies directly affecting the single-family mortgage insurance program, HUD's professed lack of knowledge about its needs does not excuse its failure to contemporaneously consider these changes affecting its procurement.

As another example, in *Supreme Foodservice GmbH*, B-405400, B-405400.2, Oct. 31, 2011, 2011 CPD ¶ 244, our Office denied a protest that a solicitation's estimates did not accurately reflect the agency's needs where, after a Presidential announcement on troop withdrawals, the agency had amended the solicitation to advise offerors that the agency was aware of the President's announcement, but that the estimates included in the solicitation would not be revised unless and until the agency received official notice and guidance regarding the announced troop withdrawal. We concluded, in that case, that "[t]he agency has determined that the estimates in the solicitation continue to reflect its current projected needs, and the agency has advanced a reasonable basis for deciding to wait for official notification and guidance regarding the announced troop withdrawal before amending the solicitation." *Id.* at 8. We cannot reach the same conclusion about HUD's actions in this procurement, where HUD did not make a contemporaneous determination about its needs nor present a reasonable basis for its position; where following legal changes such as the CARES Act is not discretionary; and where HUD has proceeded with other relevant actions, including implementing the CARES Act's mandatory forbearance period and offering other mortgage payment relief options.

As yet another example, in *Northrop Grumman Info. Tech., Inc., et al.*, B-295526 *et al.*, Mar. 16, 2005, 2005 CPD ¶ 45 at 13, our Office sustained a protest where the agency, prior to award, negotiated a memorandum of understanding with other agencies that significantly changed the approach set forth in the solicitation and the FAR, making it significantly less likely that the options, which were part of the evaluation, would be exercised. HUD's attempt to distinguish its procurement here because, for example, "there is no such [memorandum of understanding]," Inside Realty AR, MOL at 9, fails again to recognize the impact of the law. Indeed, as BLB Resources points out, "Congress cannot signal its concern with higher, COVID-fueled foreclosure rates while HUD simultaneously relies on historical information alone to estimate foreclosures." BLB Resources Comments at 6.

In our view, the changing circumstances resulting from the COVID-19 pandemic, as evidenced in part by the enactment of the CARES Act and HUD's own policies on the single-family mortgage insurance program, represent a material departure from the assumptions set forth in the solicitation. These circumstances should have prompted the agency to make a reasonable effort to reconsider its needs and estimates.

We next consider HUD's argument that the burden of determining the effects of the COVID-19 pandemic is more appropriately borne by interested offerors, noting that the RFP already cautions potential offerors about "inherent fluctuation in the market" and that "HUD cannot eliminate this risk." Inside Realty AR, MOL at 5, 12; *see also id.* at 9 (arguing that "GAO case law shows that a change in estimates for a contract, even a significant change, does not require amendment when it is evident that quantities may fluctuate"), *citing Liquidity Servs., Inc.*, B-409718 *et al.*, July 23, 2014, 2014 CPD ¶ 221. For example, HUD points out that the questions and answers later incorporated into the RFP advised: "In general, historical volumes are the basis of inventory levels utilized to assess offerors. Market conditions will determine the volume of [real estate owned property] acquisitions. Each [asset management contractor] is required to be knowledgeable about its market in prevailing trends, which will impact its ability to sell [real estate owned] properties timely." AR, Tab 27, RFP, amend. 15, Questions and Answers, at 8. HUD also asserts that "offerors are already aware of the COVID-19 emergency, have access to information about the housing market, and can make their own informed business judgments about potential future inventories and appropriate competitive pricing." Inside Realty AR, MOL at 9.

We think HUD's arguments here conflate the agency's discretion to determine its needs and craft its solicitation with its obligation to provide a meaningful basis to evaluate proposals. *See*, *e.g.*, *Global Comput. Enters., Inc.; Savantage Fin. Servs., Inc.*, *supra*, at 11 (rejecting a similar argument). Risk is inherent in most types of contracts, especially fixed-price contracts, and firms are expected to allow for that risk, and use their professional expertise and business judgment, in preparing their proposals. *See*, *e.g.*, *Katmai Info. Techs., LLC*, B-406885, Sept. 20, 2012, 2012 CPD ¶ 227 at 5. Yet, an agency cannot use that general principle to supersede its obligation to conduct a proper competition and, as here, to reasonably assess its needs and the estimates on which its solicitation is based.

As in every protest, our Office must consider the propriety of the agency's actions based on a review of the record presented and the circumstances of the procurement. Here, we cannot conclude that the terms of the solicitation are reasonable where the agency did not, and argues that it was not required to, consider material changes applicable to the procurement; and where consideration of those changes could likely, as the agency acknowledges to some degree, materially impact the procurement. We therefore sustain the protest.

As a final matter, Chronos and BLB Resources, the large business protesters, also challenge the total small business set-aside decision, arguing that the decision was unreasonable in light of the flawed estimates. As Chronos notes, "the record contains no evidence that the agency even considered the potential impacts of the pandemic on the ability of small business concerns to manage the 11 geographic areas covered by the solicitation." Chronos Comments at 2. As BLB Resources further argues, "[b]ecause these estimates do not consider the best available information, HUD's market research also fails the test of reasonableness." BLB Resources Comments at 1.

Under FAR 19.502-2(b) (commonly referred to as the "rule of two" requirement), 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. 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 at a fair market price. *Global Tech. Sys.*, B-411230.2, Sept. 9, 2015, 2015 CPD ¶ 335 at 15.

The agency correctly points out that our Office has found that the "rule of two" anticipates a prospective determination made prior to the issuance of a solicitation. Chronos AR, MOL at 7; BLB Resources AR, MOL at 9; *see* FAR 19.202-2(a); *Synchrogenix Info. Strategies, LLC*, B-414068.4, Sept. 8, 2017, 2017 CPD ¶ 283 at 4. Under these circumstances, however, where our Office recommends the agency revisit its needs and estimates used in the solicitation, it would be prudent for the agency also to revisit its small business set-aside decision, given that its conclusion about the availability and capability of small businesses to fulfill its requirements was based on those needs and estimates. Where, as here, our Office recommends corrective action, and that corrective action will supersede and potentially alter prior procurement actions, our Office will generally decline to decide challenges to the agency's prior actions on the basis that the protest is rendered academic. *See Dyna-Air Eng'g Corp.*, B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132. In this regard, we decline to address the various other allegations raised by Chronos and BLB Resources regarding the agency's small business set-aside decision.[14]

RECOMMENDATION

We recommend that HUD review the changes in the law, its policies, market conditions, and any other circumstances as appropriate. Based on that review, we also

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[14] Among other allegations, Chronos and BLB Resources argue that the agency failed to determine whether the small businesses on which the agency bases its set-aside decision, together, had the capacity to handle the solicitation's requirements for all 11 contract areas. Chronos Comments at 10-11; BLB Resources Comments at 10-11. Chronos also more specifically challenges the agency's set-aside decision for four high-volume contract areas, and argues that the agency used flawed metrics for assessing the small businesses' past performance and improperly attributed capabilities to small businesses that previously performed as parts of joint ventures. Chronos Protest at 9-11; Chronos Comments at 8-19; Chronos Supp. Comments at 2-4.

recommend HUD document its review and consider its needs in that context to determine whether it needs to revise its estimates before amending the solicitation and requesting revised proposals, consistent with our decision and applicable procurement law and regulation. We also recommend that the protesters be reimbursed the reasonable costs of filing and pursuing their protests, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protesters' certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel