



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Technica Corporation

File: B-416542; B-416542.2

Date: October 5, 2018

Damien C. Specht, Esq., James A. Tucker, Esq., and R. Locke Bell, Esq., Morrison & Foerster LLP, for the protester.

Paul F. Khoury, Esq., George E. Petel, Esq., and Nina S. Samuels, Esq., Wiley Rein LLP, for Leidos Innovations Corporation, the intervenor.

Colonel C. Taylor Smith, and Heather M. Mandelkehr, Esq., Department of the Air Force, for the agency.

Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's justification for not providing multiple-award indefinite-delivery, indefinite-quantity contract holders a fair opportunity to be considered for the issuance of a task order is denied where the agency reasonably concluded that urgent circumstances did not permit the agency to conduct a competition and required the issuance of the order on a sole-source basis.
 2. Protest challenging the duration of the sole-source task order is denied where the record shows that the duration is reasonable and consistent with the agency's estimates for the completion of a competitive acquisition.
 3. Protest that the agency failed to set aside the sole-source task order for a competition among small businesses is denied where neither applicable regulations nor the terms of the contract requires a set-aside, and the justification for issuing the order without providing contract holders a fair opportunity to be considered supports the agency's position that urgent circumstances did not allow for a competition.
-

DECISION

Technica Corporation, of Dulles, Virginia, a small business, protests the issuance of a task order on a sole-source basis to Leidos Innovations Corporation, of Reston, Virginia, by the Department of the Air Force, for support of classified and non-classified communications for the Air Force and Department of Defense in the National Capital

Region (NCR). The protester argues that the agency's justification for the issuance of the order on a sole-source basis was improper because it was based on a lack of advanced planning. In addition, the protester argues that the task order has an unreasonable duration and the agency failed to consider whether to set aside the task order for a competition among small businesses.

We deny the protest.

BACKGROUND

The Air Force is responsible for providing classified and unclassified information technology (IT) network services in the NCR, which includes support for approximately 18,000 users in the NCR and within a 300-mile radius of the Pentagon. Contracting Officer's Statement (COS) at 2. This program, known as the Air Force National Capital Region Information Technology (AFNCR-ITS) requirement, provides high-quality IT and capabilities necessary to support customers such as the Office of the Secretary of Defense, the Joint Chiefs of Staff, the National Military Command Center, Air Force Headquarters, and other agencies that interface with the Department of Defense. Id. The contractor supporting the AFNCR-ITS requirement must provide all IT and telecommunications services to support Air Force customers in the NCR. Id. The agency characterizes the requirement as a "24/7/365 no-fail mission where Strategic Watch, Crisis Response, and Worldwide Monitoring are executed in support of National Security." Agency Report (AR), Tab 33, Justification for an Exception to Fair Opportunity, at 2.

Technica is the incumbent contractor for the AFNCR-ITS requirement. The protester was awarded a task order for these requirements on July 15, 2016, following a competition among small business vendors who hold one of the Air Force's Network-Centric Solutions-2 (NETCENTS-2) multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contracts. COS at 4. The task order was for a 1-year base period and four 1-year options.¹ AR, Tab 36, Task Order Decision Document, July 5, 2016, at 1.

As discussed in detail below, in the fall of 2017, the Air Force identified concerns with the quality of Technica's performance of certain task order requirements, and held meetings with the protester to resolve these issues. The agency states that because these issues were not resolved as of March 2018, the agency was concerned that it could not exercise the second 1-year option for the incumbent task order. COS at 5-6. The agency states that, in order to ensure continuity, a transition to a different contractor would need to begin by August 1. AR, Tab 33, Justification for an Exception to Fair Opportunity, at 2-3. The agency therefore concluded that, because the current option on the incumbent task order would expire on October 31, and because a

¹ Performance of the task order began on November 1, 2016, following the resolution of two protests filed with our Office. COS at 4; see Abacus Tech. Corp.; SMS Data Prods. Grp., Inc., B-413421 et al., Oct. 28, 2016, 2016 CPD ¶ 317.

competition amongst NETCENTS-2 vendors could not be completed prior to the August 1 transition date, the agency would need to issue a sole-source “bridge” task order under NETCENTS-2. Id.

On April 18, the agency issued a justification under the provisions of Federal Acquisition Regulation (FAR) § 16.505(b)(2)(i)(A) finding that, due to “urgent” circumstances, it was in the best interest of the government to issue a task order to Leidos without providing all NETCENTS-2 vendors a fair opportunity to be considered. Id. at 1-2. The justification approved a task order with a base period of 1 year and two 6-month options, for a total value of \$92,450,000. Id. at 2.

The Air Force advised Technica on May 2 that the agency would not be exercising the option on the protester’s task order due to Technica’s sustained marginal performance and failure to adequately perform in the base year. Protest, Exh. A, Letter from Air Force to Technica, May 2, 2018, at 1. The agency subsequently advised the protester on June 21 that the agency had issued the justification authorizing the issuance of the order to Leidos. Protest at 10. This timely protest was filed on July 2.² On July 31, the Air Force issued the order to Leidos, with an effective performance date of August 1.³

DISCUSSION

Technica raises three primary arguments challenging the Air Force’s issuance of the task order to Leidos: (1) the agency improperly found that urgent circumstances justified issuance of the task order without providing vendors a fair opportunity to be considered; (2) the task order has an unreasonable duration; and (3) the agency failed to give reasonable consideration to whether the task order should have been set aside for a competition among small business vendors. For the reasons discussed below, we find no basis to sustain the protest.

² On July 30, the Air Force advised that it had issued an override of the stay on contract award and performance that was triggered by Technica’s filing of a protest with our Office. Agency Override Notice, July 30, 2018, at 1. The notice stated that the cognizant Air Force official found that issuance of the order to Leidos was required, notwithstanding the protest, for the following reasons: “In accordance with Federal Acquisition Regulation 33.104(b)(1), I find that continued contract performance based on urgent and compelling circumstances that significantly affect the interest of the United States will not permit waiting for the decision of the Government Accountability Office.” Id.

³ The justification approved a task order with a value of \$92,450,000. AR, Tab 33, Justification for an Exception to Fair Opportunity, at 1. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under multiple-award IDIQ contracts issued by a defense agency where the task order exceeds \$25 million. 10 U.S.C. § 2304c(e)(1)(B).

Justification for Issuance of Sole-Source Task Order

Technica argues that the Air Force's justification for issuing a task order to Leidos without providing all NETCENTS-2 contractors a fair opportunity to be considered for the agency's requirements was unreasonable because it was based on a lack of advance planning. In this regard, the protester contends that the urgency cited in the justification was the result of the agency's failure to act on information it knew months before issuing the justification. For the reasons discussed below, we find no basis to sustain the protest.

Agencies that issue orders under multiple-award IDIQ contracts must provide all contract holders a "fair opportunity to be considered" for the issuance of all orders in excess of \$3,500. 10 U.S.C. § 2304c(b); FAR § 16.505(b)(1). In addition, all orders over the simplified acquisition threshold "shall be placed on a competitive basis," following the procedures set forth in FAR § 16.505(b)(1). FAR § 16.505(b)(1)(iii)(A). Agencies may issue orders without providing a fair opportunity under certain circumstances, including those where "the agency's need for the services or property ordered is of such unusual urgency that providing such opportunity to all such contractors would result in unacceptable delays in fulfilling that need." 10 U.S.C. § 2304c(b)(1); see also FAR § 16.505(b)(2)(i)(A) (exception applies where "[t]he agency need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays."). A justification for issuing an order without providing a fair opportunity to all contract holders must be in writing, set forth the basis for using the exception, and be approved by the appropriate agency official. FAR § 16.505(b)(2)(ii).

As discussed above, the Air Force awarded a task order for the agency's AFNCR-ITS requirement to Technica on July 15, 2016, following a competition among NETCENTS-2 small business vendors. COS at 4. The agency exercised the first 1-year option on Technica's task order, and performance on that option ends on October 30, 2018. Supp. COS at 5. Technica argues that the Air Force was aware of concerns regarding its performance of the task order as of at least September 2017. Protester's Comments, Aug. 17, 2018, at 1. The protester also contends that a November 21, 2017, briefing demonstrates that the agency was at least contemplating at that time whether it would exercise the next 1-year option on Technica's task order. Id. at 3-4. The protester argues, therefore, that the agency's decision to issue a justification on April 18, 2018, for the issuance of a sole-source order to Leidos due to an urgent need was the result of a lack of advance planning, and was therefore unreasonable. Protest at 6; Protester's Comments, Aug. 17, 2018, at 4.

The Competition in Contracting Act of 1984 provides that agencies must award contracts on the basis of full and open competition, absent a specific exception. 10 U.S.C. § 2304. For example, one exception is that agencies may issue a justification and approval where the agency's need is of such "unusual and compelling" urgency that the circumstances require the use of other than full and open competition procedures, but may not use such procedures where the need arose from a "lack of advance planning." 10 U.S.C. §§ 2304(c)(2), (f)(4)(A). FAR part 6 provides for the use

of other than full and open competition where “the agency’s need for the supplies or services is of such an unusual and compelling urgency that the Government would be seriously injured” unless the agency is permitted to limit competition. FAR § 6.302-2(a)(2). The FAR also states, however, that use of other than full and open competition “shall not be justified on the basis of . . . [a] lack of advance planning. . . .” FAR § 6.301(c)(1).

As discussed above, 10 U.S.C. § 2304c and FAR subpart 16.5 provide for issuance of orders under IDIQ contracts. When placing orders under IDIQ contracts, agencies are not required to use full and open competition or to justify an exception from full and open competition. 10 U.S.C. § 2304c(a). Instead, for orders above \$3,500, agencies must either provide all contract holders a fair opportunity to be considered for task orders or issue a justification for not providing a fair opportunity. Id. § 2304c(b); see also FAR §§ 16.505(b)(1), (b)(2). We note that the IDIQ ordering procedures and the exceptions to the requirement for a fair opportunity in 10 U.S.C. § 2304c(b) and FAR § 16.505(b)(2) do not contain the same “lack of advance planning” prohibition set forth in 10 U.S.C. § 2304(f)(4). We further note that the FAR expressly states that the full and open competition provisions of FAR part 6, which include the “lack of advance planning” prohibition in FAR § 6.301(c)(1), do not apply to the issuance of orders under FAR subpart 16.5. FAR § 16.505(b)(1)(ii).

Technica argues that the authority to justify exceptions to the fair opportunity requirement under FAR § 16.505(b)(2) should nonetheless be subject to the same requirements as the urgent and compelling exception to full and open competition under the Competition in Contracting Act, 10 U.S.C. § 2304. Protester’s Comments, Aug. 17, 2018, at 4 n.3. The agency’s response to the protest does not appear to dispute the protester’s contention that the lack of advance planning requirement should apply to orders placed under IDIQ contracts through the provisions of FAR subpart 16.5. See Memorandum of Law at 8 (“The Air Force is aware that GAO has held that an agency cannot avoid competitive procedures due to its own lack of planning.”). For the reasons discussed below, we conclude that, even if the provisions of 10 U.S.C. § 2304(f)(4) and FAR § 6.301(c)(1) applied to the issuance of orders under IDIQ contracts, the record here does not show that the urgency cited by the agency arose from a lack of advance planning. We therefore need not resolve whether the lack of advance planning standard applies to a justification for other than a fair opportunity, or whether, for example, a similar standard is implied or encompassed within the requirement to explain why the agency’s requirement is “urgent.” See 10 U.S.C. § 2304c(b)(1); FAR § 16.505(b)(2)(i)(A).

The Air Force states that it had concerns with Technica’s performance of the task order from the inception of the order in November 2016. COS at 5; see also AR, Tab 18, Acquisition Strategy Briefing, Mar. 29, 2018, at 7-12. In particular, the protester’s ratings for the Contractor Performance Assessment Reporting System for the base year (ending October 2017) were marginal in three areas (quality, schedule, and management), satisfactory in one area (regulatory guidance), and very good in one area (cost control). AR, Tab 18, Acquisition Strategy Briefing, Mar. 29, 2018, at 6. The

agency also states that the Defense Information Systems Agency conducted independent assessments of the protester's performance in September 2017 and identified performance concerns regarding requirements for classified and non-classified networks. COS at 5.

In November 2017, the agency issued a cure notice to the protester regarding its performance of vulnerability management requirements. AR, Tab 44, Cyber Readiness Update Briefing, Nov. 21, 2017, at 3. A November 2017 briefing prepared by the Air Force stated that the agency and protester were working to address the concerns, and characterized the status of performance as follows: "Confident With Recovery, but Keeping All Options on the Table." Id. at 4, 6. At that time, the agency stated that a decision as to whether to exercise the next 1-year option on Technica's task order needed to be made by April 2, 2018. Id. at 6.

On November 30, the commander of the Air Force District of Washington (AFDW) met with Technica to discuss performance concerns. AR, Tab 45, Air Force Summary of Nov. 30, 2017 Meeting, at 1. The AFDW commander noted in a summary of the meeting, which was prepared for the Administrative Assistant to the Secretary of the Air Force, that although the agency was "skeptical" of Technica's ability to address the performance problems, the agency would "do everything we can to enable their success, but will be prepared should they fail." Id. at 2.

The Air Force had an additional meeting with Technica on January 9, 2018, also to address the agency's performance concerns. AR, Tab 46, Air Force Summary of Jan. 9, 2018, Meeting, at 1. In notes summarizing that meeting, the agency stated as follows: "We believe the company is on track to make corrective actions and has the potential to recover from their poor performance. We will continue to work Sole Source [justification and approval] for bridge contract as a risk mitigation measure." Id. at 1. In its response to the protest, the agency explains that "[t]he Air Force was considering a sole source task order at that point," as a potential risk mitigation in the event Technica's performance did not improve in a manner that allowed exercise of the option. Supp. COS at 4.

On February 20, the commander of the AFDW briefed the Administrative Assistant to the Secretary of the Air Force, and advised that, with regard to Technica's performance, "[o]ur assessment remains unchanged-cautiously optimistic." AR, Tab 47, Briefing for Administrative Assistant to the Secretary of the Air Force, Feb. 20, 2018, at 1. The commander of the AFDW made the following recommendation to exercise Technica's option:

We recommend using Option Year 2 as our de facto Bridge Contract and evaluate whether to re-compete prior to Option Year 2 expiration (30 Oct 19). We feel that this offers the least amount of risk, while providing necessary time to evaluate performance and then execute an acquisition strategy to re-compete with an objective of combining contracts.

Id. at 1.

On March 9, the contracting officer prepared a briefing that addressed the agency's strategy for conducting a competition for the follow-on task order. This briefing stated that, as part of the strategy, a "[b]ridge contract will be used." AR, Tab 17, Early Strategy & Issues Briefing, Mar. 9, 2018, at 3. On March 29, another briefing was prepared for the commander of the AFDW to "[d]etermine [the course of action] leading to the acquisition strategy" for the follow-on task order. AR, Tab 18, Acquisition Strategy Briefing, Mar. 29, 2018, at 3. This briefing identified continued unresolved concerns regarding Technica's performance, and presented three options: (1) exercise the second 1-year option in Technica's task order, (2) issue a bridge task order to a different contractor to perform during the competition for the follow-on task order, or (3) terminate Technica's task order. Id. at 7-12, 13-15; see also COS at 5-6. The briefing recommended the second course of action and set forth a series of milestones for achieving this result. AR, Tab 18, Acquisition Strategy Briefing, Mar. 29, 2018, at 16. On April 3, the commander of the AFDW briefed the Administrative Assistant to the Secretary of the Air Force and advised that the contracting officer had found that exercise of the second 1-year option in Technica's task order was not in the best interest of the government. Supp. COS at 6; see also AR, Tab 48, Air Force "AFNCR ITS Way Ahead" Briefing, at 4-7.

On April 18, the Air Force approved the justification for issuance of a bridge task order to Leidos without providing the other NECENTS-2 vendors a fair opportunity to be considered. AR, Tab 33, Justification for an Exception to Fair Opportunity, at 1. The justification stated as follows: "The requirements under the current [task order] are not being executed at [task order] performance thresholds resulting in vulnerable networks, unacceptable risk, schedule slips, disruptions to users, and cost overruns requiring additional government resources." Id. at 3.

Technica argues that the record shows that the Air Force was aware of concerns regarding its performance of the task order as of September 2017, and that decisions regarding the issuance of a sole-source task order to Leidos were made well in advance of the issuance of the April 18 justification. In support of its argument, the protester notes that the agency began discussing the possibility of not exercising Technica's second 1-year option in November 2017. Protester's Comments, Aug. 17, 2018, at 3-4 (citing AR, Tab 44, Cyber Readiness Update Briefing, Nov. 21, 2017, at 6). Based on this record, the protester contends that the agency knew or should have known that it would not exercise the option as of the fall of 2017.

Technica also argues that, even if the date of the agency's final decision not to exercise the second 1-year option on the incumbent task order cannot be definitively pegged to the fall of 2017, the agency's briefing on January 9, 2018, indicated that the agency would "continue to work Sole Source [justification and approval] for bridge contract as a risk mitigation measure." AR, Tab 46, Air Force Summary of Jan. 9, 2018, Meeting, at 1. The protester further notes that the contracting officer's March 9, 2018, briefing

stated that a “[b]ridge contract will be used.” AR, Tab 17, Early Strategy & Issues Briefing, Mar. 9, 2018, at 3. The protester argues that these statements indicate that the decision to use a bridge award must have been made prior to March 9, and likely closer to January 9. See Protester’s Comments, Aug. 17, 2018, at 6-8. The protester argues, therefore, that the agency’s decision to issue a sole-source order to Leidos on April 18, 2018, was the result of a lack of advance planning.

The Air Force acknowledges that it was concerned about the quality of Technica’s performance in September 2017, but states that it attempted to work with Technica to resolve the performance concerns. Supp. COS at 2-3. In essence, the agency states that its approach to ensuring adequate time for the follow-on competition for the task order was to rely on exercising a 1-year option for the incumbent task order, while also preparing a contingency plan of issuing a sole-source task order in the event Technica’s performance problems could not be resolved. Id. at 7-8.

In this regard, the Air Force’s briefings on November 21, 2017, and January 9, 2018, state that although the agency was skeptical of Technica’s ability to resolve its performance problems, the agency was nonetheless working with the protester to resolve the problems. AR, Tab 44, Cyber Readiness Update Briefing, Nov. 21, 2017, at 6; Tab 46, Air Force Summary of Jan. 9, 2018, Meeting, at 1. The agency states that between October 2017 and April 2018, it “dedicated almost 20,000 of its own personnel’s labor hours toward remedying vulnerability management and assisting Technica in Windows 10 migration efforts.” Supp. COS at 3. Although the protester contends that the January 9 briefing reflects the agency’s decision to use a sole-source justification for issuance of the bridge task order, the briefing states, and the agency confirms, that this approach was intended to be a potential “risk mitigation” measure. AR, Tab 46, Air Force Summary of Jan. 9, 2018, Meeting, at 1; Supp. COS at 4 (“The Air Force was considering a sole source task order at that point, because if Technica could not improve its performance, the NCR – including the Pentagon and [the National Military Command Center] – would have no IT support services as of October 31, 2018 (and a bridge contract to include transition would need to be awarded no later than August 1, 2018).”).

The agency also states that, although the contracting officer’s March 9 briefing stated that a “bridge contract will be used,” the agency was still considering whether to exercise Technica’s option at that time. Supp. COS at 5 n.2 (citing AR, Tab 17, Early Strategy & Issues Briefing, Mar. 9, 2018, at 3). In this regard, the agency explains that after this briefing, several options were presented to the commander of the AFDW on March 29, including exercising Technica’s option. AR, Tab 18, Acquisition Strategy Briefing, Mar. 29, 2018, at 13-15. The agency notes, moreover, that even if the March 9 briefing reflected a final decision, the record shows that, 17 days prior, the commander of the AFDW had recommended to the Administrative Assistant to the Secretary of the Air Force that the next 1-year option on Technica’s task order be exercised to ensure adequate time for the follow-on competition. Supp. COS at 8 (citing AR, Tab 47, Briefing for Administrative Assistant to the Secretary of the Air Force, Feb. 20, 2018, at 1).

Based on the record set forth above, we think the Air Force's justification for the sole-source task order was reasonable. Although the record in the fall of 2017 shows that the agency had concerns about Technica's performance and had raised the possibility that the next option on the incumbent task order might not be exercised, the record shows that the agency attempted to resolve these problems. Consistent with the agency's explanations, the record also shows that the agency simultaneously pursued a contingency plan by preparing a justification for the issuance of a sole-source task order without providing other NETCENTS-2 vendors a fair opportunity to be considered. Once the agency reached a final conclusion not to exercise the option on the protester's task order, it was prepared to issue that justification. In sum, we find the record supports the justification that the agency's need for the services is of an urgent nature, and that providing a fair opportunity to all NETCENTS-2 vendors would result in unacceptable delays. We also find no basis to conclude that the agency's actions reflect a lack of advance planning--even assuming this or an analogous standard applies here. We therefore find no basis to sustain the protest.⁴

Duration of the Task Order

Next, Technica argues that the duration of the task order is unreasonably long. In this regard, the protester contends that the task order will have a 2-year period of performance, despite the agency's anticipated award of the follow-on task order by May 2019. For reasons discussed below, we find no basis to sustain the protest.

As with Technica's challenge to the Air Force's justification for the issuance of the order without providing a fair opportunity to be considered, the protester's argument that the order has an unreasonable duration relies on principles set forth in FAR part 6. Specifically, the protester cites FAR § 6.302-2(d)(1)(ii), which states that the award of a sole-source contract based on urgent and compelling circumstances "[m]ay not exceed one year, including all options, unless the head of the agency determines that exceptional circumstances apply." As discussed above, however, the competition procedures of FAR part 6 do not apply to orders issued under FAR subpart 16.5. FAR § 16.505(b)(1)(ii). Nonetheless, even applying a general standard of reasonableness to the duration of this task order, we find no basis to conclude that the agency's actions here were improper.

⁴ Technica states it "is not protesting the failure to exercise the option." Protest at 7 n.3. Nonetheless, the protester argues that the justification was flawed because it was based on an unreasonable assessment of the protester's performance of the incumbent task order, which in turn led to the decision not to exercise the second 1-year option on the protester's task order. Protester's Comments, Aug. 17, 2018, at 10-11. As our Office has consistently explained, however, an agency's decision not to exercise an option is a matter of contract administration that we do not review. See, e.g., Jones, Russotto & Walker, B-283288.2, Dec. 17, 1999, 99-2 CPD ¶ 111 at 4; 4 C.F.R. § 21.5(a). We find no basis to review the agency's decision not to exercise the option.

The justification provides for the issuance of a 1-year task order with two 6-month options. AR, Tab 33, Justification for an Exception to Fair Opportunity, at 2. The Air Force states that agency guidance for the issuance of a competitive contract or task order valued at \$10 to \$50 million anticipates a requirement of up to 18 months of lead time, and that contracts or task orders valued in excess of this amount will “take much longer to award due to increased oversight requirements.” COS at 15 (quoting AR, Tab 35, Air Force Guidance on Contract Action Lead Time, July 11, 2017, at 1-2). As relevant here, the agency notes that the competition for the incumbent task order issued to Technica took 16 months. COS at 15. The agency states that it began the process for competing the follow-on requirement in June 2018, and expects to award the new task order in May 2019. Id. at 11. The agency also explains that the 6-month options would be exercised only in the event the award of the follow-on task order is delayed. Id. at 16.

On this record we find no basis to conclude that the duration of the task order is unreasonable. We therefore find no basis to sustain the protest.

Decision not to Set Aside for Small Businesses

Next, Technica argues that even if the Air Force properly justified the issuance of the task order without providing vendors a fair opportunity to be considered, the agency nonetheless failed to consider setting aside the task order for a competition among small businesses. The protester contends that the NETCENTS-2 contract requires agencies to set aside orders above the simplified acquisition threshold for a competition among small business if at least two small business vendors are capable of performing the work. The protester contends that two or more small businesses are capable of performing the work, and that the issuance of the order to Leidos, a large business, was therefore unreasonable. For the reasons discussed below, we find no basis to sustain the protest.

The ordering provisions of FAR subpart 16.5 state that as an exception to fair opportunity, agencies “may, at their discretion,” set aside orders for small business concerns. FAR § 16.505(b)(2)(i)(F). As our Office has explained, this provision, along with the relevant provision in 15 U.S.C. § 644(r), make clear that agencies are not required to set aside an order for small businesses, absent specific contractual language obligating the agency to do so. Edmond Sci. Co., B-410179, B-410179.2, Nov. 12, 2014, 2014 CPD ¶ 336 at 7.

As the protester notes, the NETCENTS-2 contract contains the following provision addressing small business set-asides:

- a. Each acquisition of services that has an anticipated dollar value exceeding the micro-purchase threshold, but not over the simplified acquisition threshold shall be competed in the NetOps Small Business Companion Contracts pool of awardees

b. For orders exceeding the simplified acquisition threshold the task order Contracting Officer should conduct market research to determine whether or not there is a reasonable expectation of receiving offers from at least two small business companion contractors. If market research reveals that at least two small businesses in the Small Business Companion contract are capable of performing the work, the task order should be competed in the NetOps Small Business Companion contract pool of awardees. If a task order is competed in the NetOps Small Business Companion contract pool of awardees and the task order contracting officer receives no offers, or no acceptable offers from a small business companion contract ID/IQ awardee, the RFP shall be withdrawn and the requirement, if still valid, shall be resolicited in the NetOps full and open pool of ID/IQ contracts awardees.

AR, Tab 50, NETCENTS-2 Contract, at 53, ¶ H137.5 (emphasis added).

The protester contends that the language above in paragraph b. obligates the agency to determine whether there is a reasonable expectation of receiving offers from at least two small business vendors. Protester's Comments, Aug. 17, 2018, at 13; Protester's Response to GAO Questions, Sept. 20, 2018, at 1-2. As the agency and intervenor note, however, the NETCENTS-2 contract states that orders under the simplified acquisition threshold "shall" be set aside for small businesses. AR, Tab 50, NETCENTS-2 Contract, at 53, ¶ H137.5.a. In contrast, the contract states that for orders exceeding the simplified acquisition threshold, agencies "should" conduct market research regarding small business vendors, and "should" set aside task orders for small business vendors if there is a reasonable expectation of receiving proposals from two or more such firms. Id. ¶ H137.5.b.

Where a protester and agency disagree as to the meaning of solicitation or contract language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. C&S Corp., B-411725, Oct. 7, 2015, 2015 CPD ¶ 311 at 3. Where a dispute exists as to a solicitation's terms, we will first examine the plain language of the solicitation. Point Blank Enters., Inc., B-411839, B-411839.2, Nov. 4, 2015, 2015 CPD ¶ 345 at 3. Our Office has recognized that, under some circumstances, the terms "should" or "may" are capable of expressing a mandate. See KPMG LLP, B-406409 et al., May 21, 2012, 2012 CPD ¶ 175 at 11 n.11. We have found, however, that where a disputed provision uses differing terms, such as "may" and "shall," the terms should be understood to convey different meanings, with the former being permissive and the latter being mandatory. See Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ 112 at 5.

Based on the language above, we conclude that use of the term "shall" in the NETCENTS-2 contract requires agencies to set aside orders valued between the micro-purchase and simplified acquisition for vendors in the small business pool. See AR, Tab 50, NETCENTS-2 Contract, at 53, ¶ H137.5.a. We conclude that for orders value

above the simplified acquisition threshold, the use of the term “should” in the NETCENTS-2 contract does not require the agency to assess whether to conduct market research for the purpose of determining whether to set aside an order for small businesses, nor does the contract require the agency to set aside an order if market research shows that two or more small businesses are capable of performing the work. Id. at 53, ¶ H137.5.b. Instead, these set-aside actions for orders above the simplified acquisition threshold are discretionary on the part of the agency. See Edmond Sci. Co., supra.

Technica argues that, even if we agree with the agency and intervenor that the NETCENTS-2 contract’s use of the term “should” means that the agency was not required to conduct market research and a set-aside analysis, the agency acknowledges that it did perform research for small business opportunities and relied upon that market research to conclude that there were no small business vendors capable of performing the work. COS at 13-14; see AR, Tab 34, Market Research Report, at 3; Tab 36, Task Order Decision Document, July 5, 2016, at 4. In this regard, the agency’s market research relied on the evaluations for the competition for the incumbent task order, which found that only one of the 11 proposals received-- Technica’s--was technically acceptable. Id. The agency concluded that since it intended to sole-source the task order to Leidos, there would be small business opportunities through subcontracting. AR, Tab 34, Market Research Report, at 3. The protester argues that we should, notwithstanding any interpretation of the NETCENTS-2 contract, evaluate the reasonableness of the agency’s market research.

In this regard, Technica argues that the agency’s market research was unreasonable because it relied on proposal evaluations that took place prior to the July 5, 2016, award of the incumbent task order, meaning that they were approximately 22 months old at the time of the April 12, 2018, market research report and the issuance of the justification on April 18. The protester notes that FAR part 10 states that a contracting officer “may use market research conducted within 18 months before the award of any task or delivery order if the information is still current, accurate, and relevant.” FAR § 10.002(b)(1). We conclude that, even if there was a basis to review the reasonableness of the agency’s market research, and even if the protester’s argument regarding the recency of the agency’s market research had merit, there is no basis to sustain the protest.

As discussed above, we find that the Air Force reasonably justified the issuance of a sole-source task order without providing vendors a fair opportunity to be considered for the agency’s requirements. This justification reasonably relied on urgent circumstances to conclude that the agency could not conduct a competition to select a vendor for the task order, due to the critical nature of the requirement and the need to have a new vendor in place by August 1, 2018, in order to ensure a timely transition. AR, Tab 33, Justification for an Exception to Fair Opportunity, at 2-3.

We conclude that the agency’s authority to issue a justification for not providing a fair opportunity to be considered, as set forth in statute and the FAR, effectively supersedes

the requirement in paragraph H137.5.b of the NETCENTS-2 contract. The provision cited by the protester concerns whether to set aside a task order for competition among small business vendors. AR, Tab 50, NETCENTS-2 Contract, at 53, ¶¶ H137.5.b. We agree with the agency that it would be unreasonable to conclude here that it justified issuance of a sole-source task order based on urgent circumstances that preclude a competition amongst vendors, while also finding the agency was required to conduct a competition among small business vendors in the event it finds that two or more such vendors are capable of performing the work. In sum, we conclude that the authority in 10 U.S.C. § 2304c(b)(1) and FAR § 16.505(b)(2)(i)(F), by virtue of their authorization of the issuance of a task order when urgent circumstances preclude a competition, effectively authorizes an exception to a requirement to conduct a competition amongst small business vendors.⁵ We therefore find no basis to sustain the protest.

The protest is denied.

Thomas H. Armstrong
General Counsel

⁵ The ordering provisions of the NETCENTS-2 contract state that “[t]he procedures for selecting Contractors for order awards under this contract are governed by FAR 16.505 and supplements.” AR, Tab 50, NETCENTS-2 Contract, at 52, ¶¶ H137.