

CLIENT ALERT

GAO Sustains Protests Alleging Agency Failed to Consider Pandemic Impacts on its Requirements

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In *Chronos Solutions et al.*, GAO sustained a pre-award protest challenging the terms of a solicitation issued by the United States Department of Housing and Urban Development (HUD). The solicitation sought asset management services to support the disposition of properties conveyed to HUD following foreclosure of loans guaranteed by the Federal Housing Authority. The solicitation was initially issued in June 2019, but HUD encountered multiple delays, including a prior pre-award bid protest. Following that protest, on April 27, 2020, HUD issued a solicitation amendment that changed the procurement to a total small business set-aside and reset the deadline for receipt of proposals to June 30, 2020, but did not update the solicitation's original 2019 estimated quantities of services.

Three potential offerors filed pre-award protests, alleging that HUD had failed to account for the effects of the COVID-19 pandemic on the real estate market. In particular, the protesters argued that the public policy response, including foreclosure protections included in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), would dramatically distort the number of foreclosures over the life of the resulting contracts by first depressing the number of foreclosures while the CARES Act protections were in place, and then by prompting a significant upsurge in foreclosures once those protections expired. As a result, the protesters asserted the solicitation's estimated quantities did not reasonably reflect HUD's actual requirements, and challenged the decision to set the procurement aside for small business.

GAO sustained the protest, finding that HUD unreasonably failed to consider that the pandemic and resultant legislation had materially changed HUD's requirements. GAO rejected HUD's argument that because the solicitation anticipated the award of Indefinite-Delivery Indefinite-Quantity (IDIQ) contracts, it was not required to consider the impact of such changes. GAO explained that the IDIQ contract type did not relieve the agency of its obligations to provide reasonable estimates of anticipated work volumes. And because the estimates provided in the solicitation were based on historical data that HUD acknowledged was unlikely to be representative of what contractors would experience during performance, GAO found the agency's failure to make any attempt to update the estimates or otherwise amend the solicitation to account for the COVID-19 pandemic was unreasonable. Anticipating that reconsideration of these issues could also impact the small business set-aside rationale, GAO also recommended that HUD revisit its set-aside decision as well.

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