U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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

Comptroller General
of the United States

Decision

Matter of: VSolvit, LLC

File: B-421048; B-421048.2

Date: December 6, 2022

Casey J. McKinnon, Esq., and Stephen D. Tobin, Esq., Cohen Seglias Pallas Greenhall & Furman PC, for the protester.
David S. Cohen, Esq., John J. O'Brien, Esq., and Rhina M. Cardenal, Esq., Cordatis LLP, for Deloitte Consulting LLP, the intervenor.
Azine Farzami, Esq., Department of Agriculture; Christopher R. Clarke, Esq., Small Business Administration, for the agencies.
Michael P. Grogan, Esq., and Evan D. Wesser, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest arguing that the agency erred in declining to consider proposed subcontractors' experience is dismissed as untimely where the protester did not file its protest with our Office within 10 days of receiving actual notice of adverse agency action on its *de facto* agency-level protest raised with the agency's senior procurement executive. Supplemental protest allegations that the agency's subsequent evaluation unreasonably considered subcontractor experience in a manner inconsistent with the agency's previously communicated interpretation of the solicitation is denied where the agency's evaluation was reasonable and consistent with the terms of the solicitation.

2. Protest that the agency could not eliminate the protester's quotation from the competition based on negative evaluation findings under alleged responsibility-like criteria without referring the matter to the Small Business Administration for review under its certificate of competency procedures is denied where the protester is not eligible for a review under those procedures.

DECISION

VSolvit, LLC, of Ventura, California, protests the issuance of a call order to Deloitte Consulting LLP, of Arlington, Virginia, pursuant to request for quotations (RFQ) No. 12SAD122Q0012, issued by the Department of Agriculture (USDA), Rural Utilities Service (RUS), for information technology services for system enhancements and improvements. The protester principally objects to the agency's evaluation under the

experience evaluation subfactor, and argues the agency improperly eliminated VSolvit from the competition without referring the firm to the Small Business Administration (SBA) for review under the SBA's certificate of competency (COC) procedures.

We deny in part and dismiss in part the protest.

BACKGROUND

The agency issued the solicitation, on an unrestricted basis, on July 20, 2022, pursuant to the procedures in Federal Acquisition Regulation (FAR) subpart 8.4, to firms holding USDA's Salesforce Portal Development and Support Services blanket purchase agreement (BPA), established under the General Service Administration's (GSA) federal supply schedule (FSS) 70 contract. Req. for Dismissal, exh. 1, Conformed RFQ at 1, 59.[1] The solicitation contemplated the issuance of a single fixed-price call order, with a 1-year base period of performance and three 1-year option periods. *Id*. at 13. The solicitation sought contractor support for information technology development, modernization, and enhancement services. Contracting Officer's Statement (COS) at 1.

The solicitation provided for award on a best-value tradeoff basis, considering three evaluation factors: (1) technical; (2) past performance; and (3) price. RFQ at 62-65. The technical factor included four subfactors: (a) experience; (b) technical approach; (c) qualifications; and (d) quality control.[2] *Id*. at 62-64. As relevant to this protest, under the experience subfactor, vendors were to provide up to five relevant and recently performed contract references, which the agency would evaluate "to determine how closely [the reference] matches the [performance work statement's] requirements in scope and size." *Id*. at 62. Under the past performance factor, the agency would undertake a qualitative evaluation--based upon information in the contractor performance assessment reporting system (CPARS)--of those references submitted under the experience subfactor. *Id*. at 64. The solicitation explained that the agency would evaluate the reasonableness of offered prices, whether a vendor's pricing was reflective of its offered contract line item number (CLIN) structure, and whether a vendor's deliverable pricing schedule was balanced. *Id*. at 65.

The solicitation advised that all of the evaluation factors were of equal importance. *Id*. at 60. RUS would assign one of five adjectival confidence ratings for the non-price factors: supreme confidence; high confidence; satisfactory confidence; low confidence;

[1] Our references to the solicitation are to the conformed version included as an exhibit to the agency's request for dismissal, unless otherwise noted.

[2] The RFQ provided that the technical factor would be "cumulatively assessed" based on the four technical subfactors, as well as a vendor's "[a]bility to follow Solicitation instructions and Quote Organization, appearance, & completeness[.]" RFQ at 62.

and no confidence.[3] *Id.* at 66. The RFQ explained that RUS would issue a call order to the vendor whose quotation was determined to be most advantageous to the agency, "and is deemed to provide at least a satisfactory confidence level or above." *Id.* at 61.

The agency received quotations from VSolvit and Deloitte by the submission deadline. COS at 1. RUS evaluated the quotations of VSolvit and Deloitte as follows:

	VSolvit	Deloitte
Overall	Low Confidence	High Confidence
Technical	Low Confidence	High Confidence
Past Performance	Satisfactory Confidence	High Confidence
Total Base Year Price	$6,883,442	$9,807,406

Agency Report (AR), Tab 5, Award Decision at 4, 8-9.

The technical evaluation board (TEB) determined that VSolvit's quotation warranted a rating of low confidence under the technical factor. AR, Tab 4, TEB Report at 5-8. In reaching this conclusion, the TEB identified numerous elements that "decreased confidence in VSolvit's ability to successfully manage this type of project[,]" to include a failure to provide demonstrable experience across several performance work statement (PWS) platforms and applications. *Id.* at 6. The TEB also noted that "VSolvit's quoted Technical Approach shows little understanding of all the needs of the PWS." *Id.* For past performance, the TEB assigned a rating of satisfactory confidence, noting that while "CPARS provides ratings from Satisfactory to Exceptional and does not denote any negative ratings[,]" the firm's "past performance does not cover similar acquisition work." *Id.* at 8. The TEB concluded that the protester's quotation, overall, did "not meet the threshold of having at least Satisfactory Confidence and therefore does not meet the minimum threshold of being a vendor qualified to perform this acquisition work." *Id.*

The contracting officer, who was also the selection official, agreed with the TEB's assessment, finding that VSolvit's quotation did not receive at least a rating of satisfactory confidence, was not responsive to the solicitation on several key points, and did not demonstrate balanced and complete pricing. AR, Tab 5, Award Decision at 19. As such, the contracting officer determined that Deloitte's quotation represented the best value to the government. *Id.* at 20. The agency notified VSolvit that it was not selected for award of the call order on September 1. Protest, exh. C, Notice of Non-Selection at 526. Following a brief explanation of RUS's selection decision, VSolvit filed the instant protest on September 12.

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[3] With respect only to the past performance factor, a rating of "unknown confidence" would be assigned if "no recent/relevant performance record is available, or the offeror's performance record is so sparse that no meaningful confidence assessment rating can be reasonable assigned[.]" RFQ at 66.

DISCUSSION

The protester marshals several challenges to the agency's conduct of the procurement. In this regard, VSolvit principally objects to the agency's evaluation under the experience subfactor. Initially, the protester contended the agency unreasonably failed to evaluate its proposed subcontractors' experience. As addressed herein, we previously dismissed those protest allegations as untimely. VSolvit subsequently raised a supplemental protest allegation, arguing that the agency did, in fact, evaluate subcontractor experience, but did so unreasonably and in a manner inconsistent with the solicitation by discounting such experience as compared to a prime offeror's own experience. The protester alternatively contends the agency, having eliminated the protester from the competition based on responsibility-like criteria, was required to refer VSolvit's quotation to the SBA for a COC determination. For the reasons that follow, we find no basis to sustain the protest.[4]

Untimely Initial Challenges to the Experience Evaluation

All but one of VSolvit's initial protest allegations concerned the agency's failure to consider the experience of VSolvit's offered subcontractors. Protest at 11-22. Specifically, the protester alleged RUS's decision not to consider subcontractor experience under the technical and past performance evaluation factors was unreasonable and contrary to the terms of the solicitation. *Id*. On September 23, the agency asked our Office to dismiss VSolvit's protest as untimely. Req. for Dismissal at 1. RUS contended that VSolvit knew (or should have known) the bases for its protest arguments challenging the agency's failure to consider subcontractor experience more than 10 days prior to the protest being filed. *Id*. at 10; *see also* 4 C.F.R. § 21.2(a)(2). On September 30, our Office explained that we intended to dismiss VSolvit's challenges

[4] VSolvit raises other collateral allegations; although our decision does not specifically address them all, we have considered each allegation and find that none provides a basis on which to sustain the protest.

For example, VSolvit alleges that the agency conducted an impermissible price realism evaluation of its quotation. Comments and Supp. Protest at 6-7. As addressed herein, we find the agency reasonably found VSolvit ineligible for award based on the "low confidence" rating assessed under the non-price factors. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding competitive prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. *Environmental Chem. Corp.*, B-416166.3 *et al.*, June 12, 2019, 2019 CPD ¶ 217 at 14. Therefore, because we find that VSolvit would be ineligible for award even if we were to sustain its objections to the agency's price evaluation, we find that the protester cannot establish a reasonable possibility of competitive prejudice with respect to those objections.

to the agency's consideration of subcontractor experience, but would, "in a decision on the merits of the protest, [] more fully address the timeliness of VSolvit's allegations."[5] GAO Notice of Resp. to Req. for Dismissal at 1.

As noted above, the solicitation required the submission of up to five "relevant and recent past contracts[,]" which would be considered under the technical and past performance factors. RFQ at 62, 64. On August 15, after the initial deadline for the submission of quotations, the contracting officer requested clarification from VSolvit whether it was the prime or subcontractor on a specific experience reference. Req. for Dismissal, exh. 14, Email Correspondence between VSolvit and RUS, at 3-4. The protester explained that VSolvit had no involvement on the contract, as one of its proposed subcontractors exclusively performed the work. *Id*. at 1-2. In response, on August 16, the contracting officer explained that "work an intended subcontractor performed on a prior contract cannot stand in place of Experience for the Offeror[]" and that because "the BPA was solely awarded to VSolvit, unfortunately the only Experience listings we can fully evaluate [ ] will be the tasks/work that VSolvit itself did and not the intended subcontractors[.]" *Id*. at 1.

That same day, VSolvit responded to the contracting officer. *Id*., exh. 15, VSolvit's Aug. 16 Clarification Letter at 1. The protester asserted: (a) the RFQ does not prohibit the inclusion of subcontractor experience; (b) the solicitation allows for consideration of past performance of an "offeror's team" (RFQ at 64), which would include subcontractors; and (c) that under FAR part 15, the agency was required to consider subcontractor past performance. *Id*. at 1-2.

The contracting officer provided her response that same evening. *Id*., exh. 16, Contracting Officer's Email Reply, Aug. 16, 2022. The contracting officer explained that she was providing her response "for information[al] purposes only" and that the agency's "evaluation process is not complete." *Id*. at 1. She went on to explain that the solicitation sought a vendor's experience, not the experience of its subcontractors, and that the solicitation's reference to an "offeror's team" refers to "a unit of employees that work directly for the Offeror, not the Offeror's subcontractors." *Id*. The contracting officer further stated that the acquisition was being conducted under FAR subpart 8.4, not FAR part 15, and the agency was not required to consider subcontractor past performance. *Id*. The contracting officer concluded that "the Government is NOT required to evaluate subcontractor [experience] in lieu of an Offeror's, who will be acting in a Prime role, [experience]." *Id*.

[5] Our Office explained that VSolvit's "sole remaining allegation, concerning whether the agency was required to refer VSolvit's quotation to the Small Business Administration for a Certificate of Competency determination, is best addressed on the merits, given the information provided in the record developed to date." GAO Notice of Resp. to Req. for Dismissal at 1.

On August 22, VSolvit emailed the senior procurement executive for USDA, expressing "concern[] with [RUS's] interpretation of the solicitation requirements" and "specifically, [. . .] the exclusion of subcontractors and teaming partners past performance/past experience (which are restrictive and do not support the SBA/Small Business competition)." Req. for Dismissal, exh. 17, Email Exchange between VSolvit and USDA Senior Procurement Executive, at 5. VSolvit stated it "would like to raise these concerns to your attention for appropriate action(s) and oversight." *Id*. at 6. On August 29, the senior procurement executive provided a substantive reply to VSolvit, explaining, among other things, that "[c]urrently a subcontractor's experience is not required to be considered as experience for the prime" under the FAR. *Id*. at 3. VSolvit filed its protest on September 12.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Under these rules, if a timely agency-level protest was previously filed, any subsequent protest to GAO must be filed within 10 days of actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a)(3).

On this record, we conclude that VSolvit's August 22 email to the senior procurement executive was a *de facto* agency-level protest. We note the FAR prescribes substantive requirements for all agency-level protests, and requires that a protest include, among other things, a detailed statement of the legal and factual grounds for the protest, a request for a ruling by the agency, and a statement requesting a form of relief. FAR 33.103(d)(2)(v)-(vi). Although a letter or email does not have to state explicitly that it is intended as a protest for it to be so considered, it must, at least, express dissatisfaction with an agency decision and request corrective action. *Western Star Hosp. Auth., Inc.*, B-414198.2, B-414198.3, June 7, 2017, 2017 CPD ¶ 183 at 6.

As applied, VSolvit's August 22 email to the agency's senior procurement executive meets the standard for an agency-level protest. The gravamen of the email is an appeal to a higher agency authority concerning the contracting officer's interpretation of the solicitation. The email expresses concern with RUS's interpretation of the RFQ regarding subcontractor experience, and provides a detailed legal and factual basis for VSolvit's concerns. The email also requests specific relief from the senior procurement executive. Req. for Dismissal, exh. 17, Email Exchange between VSolvit and USDA Senior Procurement Executive, at 5 ("Considering the broader team capabilities and experience as opposed to merely the prime's experience has more practical value for USDA [. . .]. Therefore, past performance/experience evaluation, if at all evaluated, should include the broader team of companies who commit to performing the work."). And finally, VSolvit's August 22 email requests relief from the senior procurement executive on the issue raised. *Id*. at 6 ("We would like to raise these concerns to your attention for appropriate action(s) and oversight."). Because the protester's August 22 email to the USDA senior procurement executive has all the hallmarks and trappings of

an agency-level protest, we treat VSolvit's email as such. *American Material Handling, Inc.*, B-250936, Mar. 1, 1993, 93-1 CPD ¶ 183 at 2-3

Accordingly, to be timely, VSolvit's protest to our Office, following its August 22 agency-level protest, was required to be filed within 10 days of actual or constructive knowledge of initial adverse agency action on its agency-level protest. 4 C.F.R. § 21.2(a)(3). Here, the agency, by a reply email dated August 29, declined to adopt VSolvit's suggested modifications to, and interpretation of, the solicitation, and instead, reiterated the position advanced by the RUS contracting officer. Req. for Dismissal, exh. 17, Email Exchange between VSolvit and USDA Senior Procurement Executive, at 3 ("Currently a subcontractor's experience is not required to be considered as experience for the prime by the [FAR.]").

The agency's email further conveyed that it would not implement the protester's requested interpretation of the solicitation. *Id.* ("I know this likely isn't the response you wanted but I hope you can see that we take concerns like this seriously and do our best to investigate and take action as appropriate."). Additionally, the record demonstrates that VSolvit, on the same day, received the agency's response, indicating that "it is most certainly a corporate and personal disappointment[,]" but thanking the agency for the "prompt response from all levels of the organization." *Id.* at 2.

As VSolvit had actual knowledge of adverse agency action on its agency-level protest on August 29, VSolvit was required to file its protest with our Office no later than 10 days after that date, which was September 8. Because the protester did not file its protest until September 12, we dismiss its allegations concerning the treatment of subcontractor experience as untimely. 4 C.F.R. § 21.2(a)(3); *see also Sikorsky Aircraft Corp.*, B-416027, B-416027.2, May 22, 2018, 2018 CPD ¶ 177 at 9 ("[W]here the agency has clearly advanced an interpretation of the solicitation during discussions that is contrary to the protester's understanding of the solicitation, and the protester challenges that interpretation in an agency-level protest, the agency's substantive response to that agency-level protest renders the issue sufficiently final such that our Office's consideration of the issues during discussions is the most efficient, least intrusive alternative.").

Supplemental Experience Evaluation Challenges

Turning to the remaining protest allegations, based on the agency's production of the contemporaneous evaluation record in response to VSolvit's initial protest, the protester alleges the record demonstrates that RUS in fact evaluated VSolvit's subcontractors' experience, despite the agency's representations, as discussed above, that such experience would not be considered under the terms of the RFQ.[6] In this regard,

[6] The protester also argues the agency's evaluation, in this regard, was contrary to RUS's adopted legal position during the pendency of this protest. Supp. Comments at 4-5.

VSolvit alleges that the agency applied an unstated evaluation criterion by discounting a proposed subcontactor's experience as compared to a prime offeror's own experience. In response, the agency argues that its evaluation was reasonable, and consistent both with the terms of the solicitation and the contracting officer's previously explained interpretation. Supp. Memorandum of Law (Supp. MOL) at 5-6; Supp. Contracting Officer's Statement (COS) at 7-8. On this record, we find no basis to sustain the protest allegation.

As discussed above, the agency, prior to award, unambiguously--both in communications from the contracting officer and in response to VSolvit's *de facto* agency-level protest to the USDA senior procurement executive--represented that the agency's evaluation of experience would be limited to the prime offeror's relevant experience. While we dismiss as untimely the protester's objection to that interpretation, VSolvit's supplemental protest latches on to a statement in the contemporaneous record to argue that the agency in fact did evaluate subcontractor experience. Specifically, the protester relies on a portion of the TEB's evaluation report which states that "the evaluation team did not evaluate VSolvit's proffered sub-contractor's experience on the same level as a Prime but noted that VSolvit's strategy is to subcontract with subcontractors possessing work experience such as those vendors." AR, Tab 4, TEB Report at 5. The protester contends that the agency's evaluation of subcontractor experience as being less important than the prime offeror's experience imposed an improper, unstated evaluation criterion. We find no merit to this argument.

The protester's selective reading of the TEB Report does not demonstrate that the agency's evaluation was inconsistent with the pre-award interpretation of the solicitation that RUS conveyed to VSolvit. In this regard, the contemporaneous evaluation reflects that the agency did not credit VSolvit for the corporate experience of its proposed subcontractors. Instead, the TEB Report reflects that "VSolvit's quoted Experience section relied mostly on its subcontractors' experience in developing this quote, *but the reviewers only considered the experience of the offeror.*" *Id.* (emphasis added). The accompanying evaluation narrative supports this assertion.

For example, VSolvit does not argue that its quotation demonstrates that the firm, itself, has experience with the digital e-signature and e-notary applications, but, rather, contends that the quotation demonstrated such experience through a proposed subcontractor. *See* Protest at 16 (*citing* Protest, exh. B, VSolvit Quotation Vol. 1, at 2). While generally acknowledging the experience of VSolvit's proposed subcontractors, including the subcontractor relied upon to demonstrate digital e-signature and e-notary experience, the record reflects that the TEB did not consider those experience references. Rather, consistent with the TEB's assertion that they only evaluated the protester's own experience, the contemporaneous evaluation report found that the "Vendor does not have experience with digital e-signature and e-Notary [ ]." AR, Tab 5, TEB Report at 6.

Similarly, regarding the solicitation's requirement for experience with developing reusable components utilizing the SalesForce Lightning Design System, the protester only argues that its quotation demonstrated such experience through a proposed subcontractor. *See* Protest at 15-16 (*citing* Protest, exh. B, VSolvit Quotation Vol. 1). Here again, consistent with the TEB's assertion that it only evaluated VSolvit's experience, the contemporaneous evaluation report found that the "Vendor does not provide any experience developing reusable components utilizing the Salesforce Lightning Design System." AR, Tab 5, TEB Report at 6.

Thus, the record demonstrates that the agency's contemporaneous evaluation was fully consistent with its pre-award communication to VSolvit that only the prime offeror's experience would be evaluated. The protester's efforts to resuscitate its untimely objection to the agency's decision not to evaluate subcontractor experience, by suggesting that the agency in fact subsequently evaluated proposals in an inconsistent manner, are unavailing.

Certificate of Competency

VSolvit--which contends that it qualifies as a small business for the purposes of this unrestricted procurement--argues that RUS's evaluation conclusions concerning the protester's lack of experience were tantamount to a nonresponsibility determination, which necessitated the agency's referral of VSolvit to SBA under its COC procedures. In this regard, VSolvit contends the firm's overall rating of low confidence was predicated upon its lack of experience, which, it asserts, is a traditional responsibility factor. Accordingly, because the RFQ required a vendor to achieve at least a rating of satisfactory confidence to be eligible for award, the agency's assignment of a rating of low confidence (thereby making the firm ineligible for award) based on a responsibility-type criterion was effectively a determination of nonresponsibility. Thus, the protester argues RUS was required to refer VSolvit to SBA for a COC determination. Protest at 20-21; Comments and Supp. Protest at 2-4; Supp. Comments at 2-4; Resp. to SBA's Comments at 1-3. In response, the agency argues it was not required to refer VSolvit to the SBA under the COC regulations. In this regard, the agency contends the protester is not presently registered in the System for Award Management (SAM) as a small business under the applicable North American Industry Classification System (NAICS) code, and that RUS did not otherwise determine that VSolvit was nonresponsible, but, rather, merely qualitatively evaluated the protester's quotation. Memorandum of Law (MOL) at 2-9; Supp. MOL at 2-5.

Under the Small Business Act, agencies may not find a small business nonresponsible without referring the matter to the SBA, which has the ultimate authority to determine the responsibility of small businesses under its COC procedures. 15 U.S.C. § 637(b)(7); FAR subpart 19.6; *FitNet Purchasing Alliance*, B-410263, Nov. 26, 2014, 2014 CPD ¶ 344 at 6-7. Experience can be considered a responsibility factor, as a lack of experience may be a matter relating to a vendor's ability to perform a contract. *See* FAR 9.104-1(e) (noting that a responsible prospective vendor must, among other factors, have the necessary organization, experience, and technical skills to perform the

contract); *see also Federal Support Corp.*, B-245573, Jan. 16, 1992, 92-1 CPD ¶ 81 at 4. The SBA's regulations specifically require a contracting officer to refer a small business concern to the SBA for a COC determination when the contracting officer has refused to consider a small business concern for award of a contract or order "after evaluating the concern's offer on a non-comparative basis (*e.g.*, pass/fail, go/no go, or acceptable/unacceptable) under one or more responsibility-type evaluation factors (such as experience of the company or key personnel or past performance)." 13 C.F.R. § 125.5(a)(2)(ii); *see AttainX, Inc.; FreeAlliance.com, LLC*, B-413104.5, B-413104.6, Nov. 10, 2016, 2016 CPD ¶ 330 at 4; *Coastal Envtl. Grp., Inc.*, B-407563 *et al.*, Jan. 14, 2013, 2013 CPD ¶ 30 at 4-5.

The parties dispute whether RUS was required, under SBA's regulations, to refer VSolvit for a COC determination. The agency avers that the protester is currently not a small business under the relevant NAICS code, and was not certified as a small business under that code when the RFQ for this call order was issued in 2022 or when the underlying BPA was established in 2020. MOL at 3; AR, Tab 6, VSolvit's Responsibility Assessment at 5; AR, Tab 7, VSolvit's SAM Representations and Certifications, at 6. According to RUS, VSolvit is not eligible for a COC determination because the firm would not be a small business at the time VSolvit was referred for a COC (*i.e.*, at the time RUS eliminated VSolvit from the competition). *See* 13 C.F.R. § 121.404(c) ("The size status of an applicant for a Certificate of Competency (COC) relating to an unrestricted procurement is determined as of the date of the concern's application for the COC."); *see also* 13 C.F.R. § 125.5(b)(1)(i) ("To be eligible for a COC, an offeror must qualify as a small business under the applicable size standard in accordance with part 121 of this chapter."). As such, RUS contends because VSolvit is not eligible for a COC, the agency was not required to refer the protester to SBA.

The protester does not contend that it presently qualifies as a small business under the RFQ's applicable NAICS code. Rather, the protester argues that it should be considered a small business for purposes of this solicitation because VSolvit was a small business in 2011--when it submitted an offer on the GSA schedule contract under which USDA's BPA (from which RUS now seeks to issue a call order) was established. To support its position, VSolvit relies on a different provision of SBA's regulations, as well as an SBA Office of Hearings and Appeals (OHA) size appeal decision, to support its contention that "the controlling period for determining a concern's size is at the time of submission of the offer on the GSA Schedule Contract, not the BPA issued against it." Comments and Supp. Protest at 3; *see* 13 C.F.R. § 121.404(a); *Total Systems Technologies Corp.*, SBA No. SIZ-5562 (2014).

Because this protest raises a question interpreting SBA's regulations, we asked SBA, pursuant to 4 C.F.R. § 21.3(j), to provide its views as to whether RUS was required to refer the protester for a COC. SBA explains that "[a]s is clear by the [COC implementing] statute, and SBA's regulations, the COC Program is only available to small businesses." SBA's Comments at 1. SBA also provides insight on when a firm's

size status should be determined and under what circumstances, as outlined in 13 C.F.R. § 121.404. SBA maintains that 13 C.F.R. § 121.404(a)[7] is the general rule, and that the accompanying provisions set forth in § 121.404(b)-(h) represent what SBA "currently and historically has referred to as exceptions to the general rule in (a)." SBA Comments at 2. Indeed, SBA states:

> Therefore, when determining when the Government should evaluate a firm's size, one must look not just to the general rule, but also evaluate if the circumstances fit within one of the clearly articulated exceptions to that general rule. If one of the exceptions apply, SBA would apply the alternative timing method described in the exception.

Id. at 2.

SBA further provides that "if the criteria of the exception applies, SBA would apply the alternative timetable articulated in the exception, and there is no need or use for reference or application of general principle." *Id*.

Because the procurement at issue was conducted on an unrestricted basis, SBA explains that the applicable exception to be analyzed in this case is set forth in 13 C.F.R. § 121.404(c). *Id.* As such, SBA submits that it would determine VSolvit's size status as of the date of VSolvit's application for a COC. *See* 13 C.F.R. § 121.404(c). The import of SBA's comments is that VSolvit would not be deemed small at the time it was referred to the SBA because it is presently other than small under the applicable NAICS code, and thus would be ineligible for a COC.

Additionally relevant is the SBA's explanation that its "regulations have been clear that contracting officers can and should rely on a firm's self-certification of size." SBA's Comments at 2, *citing* 13 C.F.R § 121.405(b). SBA provides:

> SBA believes that this general principle makes clear that if a firm certifies it is small, absent some other intervening event or information, the contracting officer can and should accept that certification as true and accurate. The unstated but clear inference also goes the other way - if a firm certifies it is other than small, the contracting officer can and should accept that certification as well. In this case, it appears that the contracting officer checked the firm's certifications, and correctly relied upon those certifications in making a decision. This procedure is the exact procedure that SBA would expect from a contracting officer adhering to SBA's regulations.

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[7] 13 C.F.R. § 121.404(a) provides: "SBA determines the size status of a concern [. . .] as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer or response which includes price."

SBA's Comments at 2-3. Put simply, the SBA finds no fault in the contracting officer's determination that VSolvit was not a small business (and ineligible for a COC referral), based on the protester's lack of a certification that it was a small business under the applicable NAICS code.

On this record, we find no basis to conclude that RUS's failure to refer VSolvit to the SBA for a COC was unreasonable. While the protester seemingly disagrees with SBA's interpretation of its own regulations, we do not find VSolvit's arguments persuasive. First, VSolvit's interpretation of 13 C.F.R. § 121.404(c) is facially irreconcilable with the plain text of the regulation. The protester contends that if RUS referred VSolvit to the SBA for a COC, "SBA would have then looked at whether VSolvit was small for purposes of this specific procurement." Resp. to SBA's Comments at 3. That is not what SBA's regulation provides. Instead of determining a COC applicant's size for the purposes of a "specific procurement," the regulation explains that "size status of an applicant for a [COC] relating to an unrestricted procurement is determined as of the date of the concern's *application* for the COC." 13 C.F.R. § 121.404(c) (emphasis added). Thus, had RUS referred VSolvit to the SBA for a COC when it eliminated the firm from the competition, the protester's application for a COC would not have been considered by SBA because VSolvit was not a small business at the time it would have applied for the COC.[8] As such, we find no basis to sustain this protest allegation.[9]

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[8] As addressed above, VSolvit relies on an SBA-OHA size appeal decision for its contention that "the relevant time for a determination of VSolvit's size for this procurement is VSolvit's offer on the [FSS] Contract" under which USDA's BPA was established. *Total Systems Technologies Corp.*, SBA No. SIZ-5562 (2014). However, that decision did not examine SBA's regulations concerning when a business would be deemed small for purposes of a COC determination pursuant to 13 C.F.R. § 121.404(c), which is at issue here. Accordingly, we find that decision's analysis inapposite to the issues at hand.

[9] We additionally note that separate from the issue of VSolvit's eligibility for a COC based on its size, our Office has concluded that where an agency rejects a quotation as technically unacceptable on the basis of factors not related to responsibility, as well as responsibility-related ones, referral to the SBA is not required. *Tyonek Worldwide Servs., Inc.; DigiFlight, Inc.*, B-409326 *et al*,, March 11, 2014, 2014 CPD ¶ 97 at 12; *Paragon Dynamics, Inc.*, B-251280, Mar. 19, 1993, 93-1 CPD ¶ 248 at 4. Here, the record clearly reflects that the agency's negative technical findings were based not only on the protester's lack of demonstrated experience, but also numerous other factors, to include concerns with VSolvit's offered technical approach, its demonstrated understanding of the requirements, the qualifications of its offered key personnel, its quality control plan, and a failure to provide sufficient information and detail in its quotation. *See* AR, Tab 4, TEB Report at 5-8; AR, Tab 5, Award Decision at 5-8; *see also* Supp. COS at 3 ("Here, USDA's concern was not that VSolvit's lacked adequate staffing or capability to perform, but on the way that VSolvit said it would perform in its quote, VSolvit's technical approach to perform the PWS work, and quoted areas where provided information was inadequate or missing, which creates a risk of unacceptable

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Second, even assuming that SBA's interpretation is reasonable, VSolvit argues that we should nevertheless sustain the protest because the contracting officer failed to refer the matter to SBA for its consideration. In this regard, the protester contends that it was not within RUS's purview, pursuant to 13 C.F.R. § 121.404(c), to determine VSolvit's size status; instead, that authority rests exclusively with the SBA, and, therefore, the matter must still be referred to the SBA for its determination. Resp. to SBA's Comments at 2. Even assuming for the sake of discussion that RUS should have referred VSolvit to SBA for the SBA's consideration, we view RUS's actions as non-prejudicial, where SBA would have found VSolvit ineligible for a COC because it would not qualify as a small business under 13 C.F.R. § 121.404(c). Here, SBA has clearly articulated its interpretation of its regulations and the specific application to the facts of this case. On this record, we find no basis to sustain the protest for the purely ministerial process of SBA formally rejecting the application on the identical bases expressed by SBA in response to VSolvit's protest. *Raytheon Co.*, B-416211 *et al.*, July 10, 2018, 2018 CPD ¶ 262 ("Competitive prejudice is an essential element of every viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found.").

The protest is denied in part and dismissed in part.

Edda Emmanuelli Perez
General Counsel

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performance."). While the record does not clearly establish whether the non-experience related concerns, alone, would have been sufficient to support the assessed low-confidence rating, we note that the record does suggest other concerns that would not have triggered the requirement for a COC referral.