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**United States Government Accountability Office  
Washington, DC 20548**

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## Decision

**Matter of:** B&B Medical Services, Inc.; Ed Medical, Inc.

**File:** B-409705.4; B-409705.5

**Date:** June 29, 2015

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Richard L. Moorhouse, Esq., Greenberg Traurig, LLP, for B&B Medical Services, Inc.; and Bryan R. King, Esq., Todd R. Overman, Esq., and Richard W. Arnholt, Esq., Bass, Berry, and Sims PLC, for Ed Medical, Inc., the protesters.  
Michael Hordell, Esq., Pepper Hamilton LLP, for First Community Care, LLC, an intervenor.

Tracy Downing, Esq., Department of Veterans Affairs, for the agency.  
Frank Maguire, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Agency's contention that protests challenging the agency's review of price realism should be rejected as untimely because they were not filed within 10 days of the protester's receipt of the preaward notice to unsuccessful offerors under a small business set-aside, provided pursuant to the requirements in Federal Acquisition Regulation § 15.503(a)(2), is rejected where the record shows that the notice identified only the name of the prospective awardee, did not include the prospective award price, and advised that no further response was required unless the recipient had a basis to challenge the small business status of the apparently successful offeror; instead, the protests were timely filed because they were submitted within 10 days of receipt of the post-award notice identifying the award price, which provided the first basis for the protesters' contention that the award price was unrealistic.
2. Protest alleging that the agency either failed to conduct a price realism analysis, or conducted an unreasonable analysis, is sustained where (1) the solicitation advised that proposals unrealistically high or low in price could be rejected; (2) the awardee's price was significantly lower than the other prices received and the government estimate; and (3) there is no evidence in the contemporaneous record that the agency conducted such an analysis.

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## DECISION

B&B Medical Services, Inc. (B&B), of Oklahoma City, Oklahoma, and Ed Medical, Inc. (EMI), of Hendersonville, Tennessee, protest the Department of Veterans Affairs' (VA) award of contracts for three service locations to First Community Care, LLC (FCC), of Midland, Michigan, under request for proposals (RFP) No. VA249-14-R-0173, for home oxygen supply. The protesters primarily assert that the awardee's proposed prices were unrealistically low and that the agency did not conduct an adequate price realism evaluation.

We sustain the protests.

## BACKGROUND

The RFP, issued on March 11, 2014, as a total small business set-aside, provided for the award of indefinite-delivery/indefinite-quantity contracts, with a 1-year base period and four 1-year options, for the provision of home oxygen services to patients in Veterans Integrated Service Network 9 (VISN 9), including, as relevant here, medical centers in Mountain Home, Tennessee; Memphis, Tennessee; and Nashville, Tennessee (Tennessee Valley Healthcare System (TVHS)). RFP at 6; B&B Agency Report (AR), exh. AA, Source Selection Decision Document (SSDD), at 4-5; B&B Contracting Officer's Statement (COS) at 1. Award for each location was to be made to the offeror whose proposal represented the best value to the government considering: (1) technical capability, (2) past performance, (3) socioeconomic status, and (4) price. RFP at 59, 66. All non-price factors when combined were significantly more important than price. Id.

Relevant here, the RFP included the following provision with regard to price realism:

Proposals unrealistically high or low in price, when compared to the Government estimate, and market conditions evidenced by other competitive proposals received, may be indicative of an inherent lack of understanding of the solicitation requirements and may result in proposal rejection without discussion.

RFP at 65.

B&B submitted proposals for all three locations relevant here. COS at 2.<sup>1</sup> EMI submitted a proposal only for the TVHS location. Id. After evaluation of proposals,

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<sup>1</sup> The solicitation here also sought proposals for other locations in VISN 9, which are not at issue here. For example, in B&B Medical Services, Inc., B-409705.2, Apr. 17, 2015, 2015 CPD ¶ 142, and SS Medical, Inc., B-409705, Apr. 17, 2015, 2015 CPD

(continued...)

VA found FCC's proposal to be the best value for the TVHS, Mountain Home, and Memphis locations. COS at 2. The offeror ratings, proposed prices, and the evaluation for each of the three locations is set forth below.

**Competition for TVHS Location**

<b>Offeror</b>	<b>Technical Capability</b>	<b>Past Performance</b>	<b>Socioeconomic</b>	<b>Price</b>
<b>FCC</b>	Good	Significant Confidence	No Credit	\$7,717,775
<b>Offeror 1</b>	Acceptable	Significant Confidence	No Credit	\$9,677,520
<b>EMI</b>	Acceptable	High Confidence	No Credit	\$10,737,870
<b>Offeror 2</b>	Acceptable	Significant Confidence	Full Credit	\$11,221.150
<b>B&amp;B</b>	Good	Significant Confidence	No Credit	\$11,291,052
<b>Offeror 3</b>	Acceptable	Neutral	Full Credit	\$12,015,140
<b>Gov't Estimate</b>				\$16,768,434

SSDD at 7; B&B COS at 9.

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(...continued)

¶ 143, we denied protests regarding awards to Greene Respiratory for locations in Lexington and Louisville, Kentucky, and Huntington, West Virginia.

### Competition for Mountain Home Location

<b>Offeror</b>	<b>Technical Capability</b>	<b>Past Performance</b>	<b>Socioeconomic</b>	<b>Price</b>
<b>FCC</b>	Good	Significant Confidence	No Credit	\$7,939,700
<b>Offeror 1</b>	Acceptable	High Confidence	No Credit	\$9,486,492
<b>Offeror 2</b>	Acceptable	Significant Confidence	No Credit	\$9,626,200
<b>Offeror 3</b>	Acceptable	Neutral	Full Credit	\$10,151,933
<b>Offeror 4</b>	Acceptable	Significant Confidence	No Credit	\$10,714,000
<b>B&amp;B</b>	Good	Significant Confidence	Some Credit	\$11,616,870
<b>Offeror 5</b>	Acceptable	Significant Confidence	Full Credit	\$12,242,000
<b>Gov't Estimate</b>				\$11,752,053

SSDD at 7; B&B COS at 9.

### Competition for Memphis Location

<b>Offeror</b>	<b>Technical Capability</b>	<b>Past Performance</b>	<b>Socioeconomic</b>	<b>Price</b>
<b>FCC</b>	Good	Significant Confidence	No Credit	\$2,641,650
<b>Offeror 1</b>	Acceptable	Significant Confidence	Full Credit	\$3,879,525
<b>B&amp;B</b>	Good	Significant Confidence	No Credit	\$3,964,784
<b>Offeror 2</b>	Acceptable	Significant Confidence	No Credit	\$3,971,420
<b>Offeror 3</b>	Acceptable	Neutral	Full Credit	\$4,368,270
<b>Gov't Estimate</b>				\$4,101,879

SSDD at 7; B&B COS at 9.

For the TVHS location, FCC submitted the lowest proposed price, which was, as shown above, well below the other prices received, and significantly below (54% lower) the government estimate. For the TVHS location, the source selection authority (SSA) concluded:

B&B and First Community Care ranked essentially the same in all factors other than price. First Community Care's price was \$3,573,277.00 less than B&B and represented the best value to the Government.

SSDD at 8; see also B&B AR, exh. BB, Evaluation Panel Consensus Report (EPCR), at 18.

For the Mountain Home location, FCC submitted the lowest proposed price, which was, as shown above, well below the other prices received, and significantly below (32% lower) the government estimate. For the Mountain Home location, the SSA concluded:

B&B ranked the highest in non-price factors in that they received "some credit" for Socio-Economic Consideration; however, the increased price of approximately \$3.7 million was the determining factor for the [contracting officer] to make the final award to First Community Care. B&B's Technical Capabilities and Past Performance did not merit premium price award.

SSDD at 8; see also EPCR at 18.

For the Memphis location, FCC submitted the lowest proposed price, which was, as shown above, well below the other prices received, and significantly below (36% lower) the government estimate. For the Memphis location, the SSA concluded:

B&B and First Community Care ranked essentially the same in all factors other than price. First Community Care price was \$1,323,134.60 less than B&B and represented the best value to the Government.

SSDD at 9; see also EPCR at 19.

Award was made to FCC for all three locations at a cumulative award price of \$18,299,125. B&B AR, exh. A, FedBizOpps Award Notice, March 13, 2015. These protests followed.

## DISCUSSION

### Timeliness

As an initial matter, VA asserts that the protests are untimely and should not be considered by our Office. In this regard, the source selection decision was approved by the SSA on September 22, 2014. B&B COS at 2. On October 24, the agency issued a preaward “Notification to Unsuccessful Offeror” to B&B and EMI in which the agency advised that, “in accordance with FAR § 15.503(a)(2)(i)(A) the proposal your company submitted in response to the subject solicitation was unsuccessful and that further proposal revision will not be considered.” B&B AR, exh. U; EMI AR, exh. U. The notice further advised that award would be made to FCC for the Memphis, Mountain Home and TVHS locations, but added that: “No response is required unless a basis exists to challenge the size status or small business status of the apparently successful offeror (e.g., small business concern, small disadvantaged business concern . . .).” Id.; see FAR § 15.503(a)(2)(ii)(C). Consistent with the purpose of the preaward notice under FAR § 15.503(a)(2)(i)(A), that is, to enable offerors to file preaward size status or small business status protests in small business set-asides, see FAR § 15.503(a)(2)(ii)(C), the notice here did not disclose the prices of the apparent successful offerors. B&B AR, exh. U; EMI AR, exh. U.

On October 27, EMI filed a size status protest against FCC, along with an agency-level protest that FCC failed to meet certain solicitation licensing requirements. On October 30, B&B also filed a size status protest against FCC. On November 5, the agency denied EMI’s agency-level protest based on the solicitation licensing requirements. On November 6, EMI requested a pre-award debriefing, which the agency refused to provide on the grounds that it considered the debriefing request “untimely.” EMI AR at 4 n.3. After the Small Business Administration (SBA) regional office found FCC to be a small business on December 5, B&B filed an appeal of the size status ruling with the SBA’s Office of Hearing and Appeals (OHA). OHA denied the appeal on February 18, 2015. On March 13, the agency posted on FedBizOps notice of award to FCC and included the award price for the three locations. FedBizOps Notice, Mar. 13, 2015. B&B and EMI requested debriefings on March 16, which the agency again refused to provide on the grounds that it considered the requests untimely. B&B (on March 20) and then EMI (on March 23) protested to our Office. The protests primarily challenged the realism of FCC’s prices, and were filed within 10 days of when FCC’s price for the three locations was disclosed on March 13.

The VA argues that the protests here should be dismissed as untimely because they were not filed within 10 days of when the protesters received the October 24 “Notification to Unsuccessful Offeror;” or in the alternative, within 10 days of when the SBA regional office found FCC to be small; or, at the latest, within 10 days of

when the protesters learned that OHA had denied the appeals of the size determination by the regional office.

Under our Bid Protest Regulations, a protest other than one based on alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Since the VA's October 24 notice did not disclose the award prices, and since the focus of these protests is that the award prices were unrealistic, we see no support for VA's contention that the notice provided sufficient information to alert the protesters to the issue they now raise--i.e., whether the awardee's prices can be viewed as realistic. Nor do we see how rulings by the SBA on the size status protests furnished a basis for challenging the evaluation of proposals. Rather, we find that the basis for the protesters' challenge to the realism of FCC's pricing first arose when the protesters received notice of FCC's pricing. We also disagree with the VA's apparent view that since the protesters were not, in the VA's view, entitled to a required debriefing, they did not diligently pursue a basis for their protests. See Empire Veterans Group, Inc., B-408866.2, B-408866.3, Dec. 17, 2013, 2013 CPD ¶ 294 at 4 (where protester is not entitled to a required debriefing, the timeliness of its protest is measured by the date that it first knew or should have known of the basis for the protest).

Finally, we also disagree with the VA's contention that EMI was required to file its protest with our Office within 10 days of when the agency denied its agency-level protest challenging FCC's compliance with certain solicitation licensing requirements. While our Bid Protest Regulations provide that "[i]f a timely agency-level protest was previously filed, any subsequent protest to GAO filed within 10 days of actual or constructive knowledge of initial adverse agency action will be considered," 4 C.F.R. § 21.2(a)(3), that provision has no application to a subsequent GAO protest raising different issues, where the basis for the new issues was neither known nor could have been known earlier. See Masai Technologies Corp., B-400106, May 27, 2008, 2008 CPD ¶ 100 at 3 (timeliness of GAO protest following agency protest is not governed by 4 C.F.R. § 21.2(a)(3) where GAO protest does not raise the same issue as the agency-level protest).

### Price Realism

B&B and EMI primarily assert that FCC's pricing was unrealistically low. B&B Protest at 3; EMI Protest at 5-8. Both protesters point to the discrepancy between FCC's prices and the prices of the other offerors, as well as the government estimate, concluding that either the VA failed to perform the price realism analysis provided for under the solicitation, or performed an inadequate analysis which led to an unreasonable conclusion that FCC's pricing was realistic. B&B Protest at 5; EMI Protest at 5-7. According to B&B, the incumbent contractor for one of the locations (Memphis) awarded to FCC, it:

would be simply impossible for FCC to perform this contract at a price so much below B&B's unless (i) FCC were performing the contract at a steep loss; and/or (ii) it did not fully understand the requirements of the Solicitation and, therefore, had not properly priced its offer to fully comply with and meet those requirements.

B&B Protest at 5; see also B&B Comments at 2-4. EMI further maintains that the:

unrealistically low price proposed by FCC puts the Government at significant risk of substandard performance, interruptions in performance, or worse, a complete failure to perform on the part of the contractor which would have severe consequences to the veteran patients.

EMI Protest at 7; see also EMI Comments at 4-8.

In response, the VA argues that the solicitation did not require it to perform a price realism review. B&B AR at 18. The agency further argues, in the alternative, that it in fact performed a price realism analysis that complied with all applicable requirements. B&B AR at 20-23.

As a general matter, when awarding a fixed-price contract, an agency is only required to determine whether offered prices are fair and reasonable. FAR § 15.402(a). Price realism need not necessarily be considered in evaluating proposals for the award of a fixed-price contract, because these contracts place the risk of loss upon the contractor rather than the government. Nonetheless, an agency may include in a solicitation a provision which provides for a price realism evaluation for the purpose of assessing whether an offeror's low price reflects on its understanding of the contract requirements and/or the risk inherent in a proposal. Federal Acquisition Regulation (FAR) § 15.404-1(d); General Dynamics One Source, LLC; Unisys Corp., B-400340.5, B-400340.6, Jan. 20, 2010, 2010 CPD ¶ 45 at 9.

Here, although the solicitation did not expressly provide for a price realism analysis under the price factor, the RFP nonetheless informed offerors that: "Proposals unrealistically high or low in price . . . may be indicative of an inherent lack of understanding of the solicitation requirements and may result in proposal rejection without discussion." RFP at 65. Given the solicitation's express statement that proposals would be evaluated to determine if prices were "unrealistically high or low," and the statement that the agency reserved the right to reject proposals if prices were "unrealistically high or low," id., we see no basis for any conclusion other than that the agency committed itself to a review of price realism. Logistics 2020, Inc., B-408543, B-408543.3, Nov. 6, 2013, 2013 CPD ¶ 258 at 8 (where the solicitation established that the agency would evaluate whether offeror's prices were unrealistically high or low, agency was required to conduct a price realism analysis); see Esegur-Empresa de Seguranca, SA, B-407947, B-407947.2, Apr. 26, 2013,



2013 CPD ¶ 109 at 4 (where the solicitation established that the agency would evaluate whether offeror's prices were unrealistically low, agency was required to conduct a price realism analysis).

The VA asserts that, notwithstanding its view that there was no requirement under the solicitation for a price realism analysis, the agency in fact performed one, finding FCC's prices to be realistic. B&B AR at 20-21; B&B COS at 10. In reviewing protests against an agency's evaluation of proposals, our Office will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3; see General Dynamics One Source, LLC; Unisys Corp., *supra* (protests challenging price realism evaluations). The FAR recognizes a number of price analysis techniques that may be used to determine whether prices are reasonable and realistic, including a comparison of proposed prices with each other and with an independent government estimate. See FAR §§ 15.404-1(b)(2)(i), (ii), (iv); Islandwide Landscaping, Inc., B-293018, Dec. 24, 2003, 2004 CPD ¶ 9 at 2. However, where an agency fails to document its evaluation, it bears the risk that there may not be an adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for its source selection decision. See Navistar Def., LLC; BAE Sys., Tactical Vehicle Sys. LP, B-401865 *et al.*, Dec. 14, 2009, 2009 CPD ¶ 258 at 13.

Here, we find that the record does not document a reasonable price realism analysis. As an initial matter, we note that the contemporaneous evaluation record is silent as to whether the agency considered the realism of FCC's pricing. In this regard, the record does not include any separate price evaluation report. Further, the source selection decision generally describes the agency's approach to evaluating prices as follows:

#### **Factor 4 – Price**

Price Proposals will be evaluated to determine if the prices and support costs are:

**Complete** – The proposal contains costs to perform all tasks required by the Statement of Work (SOW)/Specifications.

**Reasonable** – The price is determined fair and reasonable using cost or price analysis

The Government conducted an evaluation of each offeror's price proposal to determine whether or not each proposal complies with the stated criteria: "Reasonableness" and "Completeness."

SSDD at 3 (emphasis in original and added). Likewise, the source selection decision further explains the price evaluation as follows:

## **8. Price Evaluation**

Price analysis was conducted by the Contracting Team in accordance with procedure outlined in FAR 15.404-1. To preclude prejudice, pricing was not disclosed to the SSEB during the Technical Evaluations. An analysis was conducted on price proposals submitted in order to determine price reasonableness and completeness. The total overall price including all options and pricing for individual CLINS were considered to ensure they were not unbalanced. Price Reasonableness was determined based on Price competition of the proposal submitted for this solicitation. The Contracting Officer determined that all price proposals as submitted are complete, and determined to be fair and reasonable.

Id. at 6 (emphasis added). Thus, the contemporaneous evaluation record only refers to evaluating prices to determine “price reasonableness and completeness.” Id. However, price reasonableness refers to whether offered prices are higher than warranted, Logistics 2020, Inc., supra, at 7, while price realism instead measures whether a proposed price is so low that it poses a performance risk. Id. at 3. Further, we cannot conclude from the fact that the agency conducted a “completeness” evaluation that it also conducted an evaluation of the awardee’s proposed prices. Id. at 9.

In its response to these protests, the VA nevertheless maintains that the agency

did indeed perform a price realism analysis on FCC’s pricing simply by comparing FCC’s award pricing amounts for the respective stations to the pricing of the other offerors . . . and that of the Government’s independent estimate and then making sure that FCC did indeed “understand the requirement.”

B&B AR at 21; EMI AR at 12. Despite the absence of any documentation in the contemporaneous record, the contracting officer, in response to these protests, stated:

The Government did a complete price analysis and determined First Community Care pricing to be complete, competitive and realistic compared to the IGCE and other proposals received for the subject award. First Community Care is the current incumbent for the VISN 11 VA Medical Centers providing home oxygen services for seven (7) VA Medical Centers and has the understanding of the contract requirements to provide accurate pricing information. First Community

Care and B&B Medical had technically equal proposals. First Community Care's proposal did not raise any concerns about being able to perform and therefore, the Government wanted to take advantage of the considerable cost savings.

B&B COS at 10; see also B&B AR at 20-21; EMI AR at 11-15.

As noted by the agency, the nature and extent of an agency's price realism analysis generally are matters within the sound exercise of the agency's discretion. Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 5. In this regard, our Office has not objected to a price realism analysis based on a comparison of proposed prices where such comparison indicated the realism of the awardee's pricing. See, e.g., B&B Medical Services, Inc., supra (awardee's prices only between approximately 2.0% and 7.4% lower than protester's prices depending on the location); Accumark, Inc., B-310814, Feb. 13, 2008, 2008 CPD ¶ 68 at 3 (proposed prices "fall within a narrow range," with the awardee's prices "compar[ing] favorably to the other prices"). FCC's pricing however, was significantly lower than the pricing of the other offerors, the government estimate, and the incumbent contract prices.

While the agency generally claims that FCC's pricing was "realistic," the record contains no indication of how the agency reached this conclusion, given that FCC's pricing was so significantly below all of the other prices, including those proposed under this solicitation and those paid under the incumbent contracts. Simply put, there is no support in the record for the agency's claim that FCC's prices were realistic for the work to be performed, or that the agency even meaningfully considered the realism of FCC's low prices. Again, where an agency fails to document its evaluation, it bears the risk that there may not be an adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for its source selection decision. See Navistar Def., LLC; BAE Sys., Tactical Vehicle Sys. LP, supra, at 13.

Further, while the agency asserts that it concluded from FCC's current home oxygen contract and favorable technical evaluation that the awardee understood the contract requirements, the agency's position ignores that a price realism review includes consideration of whether the prices are too low to accomplish the work identified in the proposal, such that there may be a risk of poor performance. Iron Vine Security, LLC, B-409015, January 22, 2014, 2014 CPD ¶ 193 at 6 n.5; Logistics 2020, Inc., supra, at 7-9; see Sigmatech, Inc., B-409837 et al., Aug. 22, 2014, 2014 CPD ¶ 245 at 8; C.L. Price & Assocs., Inc., B-403476.2, Jan. 7, 2011, 2011 CPD ¶ 16 at 3; SDV Solutions, Inc., B-402309, Feb. 1, 2010, 2010 CPD ¶ 48 at 4. As discussed, the record is devoid of any consideration of whether the prices are too low, such that

there may be a risk of poor performance. Accordingly, we conclude that the record does not indicate that the agency conducted a reasonable price realism analysis.<sup>2</sup>

## RECOMMENDATION

We recommend that the VA evaluate the realism of FCC's prices, as well as those of the other offerors, consistent with our decision; document its consideration of realism; and make a new best value determination. If the agency determines that an offeror other than FCC is in line for award of any of the three locations at issue here, the agency should terminate FCC's contract for such location(s) and make award accordingly. We also recommend that the VA reimburse B&B and EMI the costs of filing and pursuing their protests, including reasonable attorney's fees. 4 C.F.R. § 21.8(d)(1). The protesters should submit their certified claims for costs, detailing the time expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

Susan A. Poling  
General Counsel

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<sup>2</sup> B&B and EMI also challenge the evaluation of proposals under the technical capability factor. The evaluation record reflects that the agency assigned numerous, sometimes duplicative strengths, as well as lesser numbers of weaknesses, to the proposals under that factor. EPCR at 5-6, 10-12. However, while EMI asserts that the agency failed to recognize a number of strengths in its proposal, and improperly assigned a number weaknesses to it, our review of the record furnishes no basis for questioning the overall ratings of good for FCC and acceptable for EMI under this factor. EMI Comments at 14-20. As for B&B, its focus is on differences between the evaluators, while our review is focused on whether the final, assigned consensus scores accurately reflect the relative merits of the proposals. B&B Comments at 4-9; see Neeser Constr., Inc./Allied Builders Sys., A Joint Venture, B-285903, Oct. 25, 2000, 2000 CPD ¶ 207 at 3.