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## Decision

**Matter of:** CRAssociates, Inc.

**File:** B-414171

**Date:** March 16, 2017

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Matthew R. Keller, Esq., and Charlotte R. Rosen, Esq., Odin Feldman Pittleman PC, for the protester.

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### DIGEST

Protest challenging agency's failure to include provision in solicitation providing for evaluation of realism of offerors' professional employee compensation is denied because no such evaluation is required where the solicitation is for the procurement of commercial items issued pursuant to the procedures established under Federal Acquisition Regulation Part 12.

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### DECISION

CRAssociates, Inc., of Newington, Virginia, protests the terms of request for proposals (RFP) No. VA263-17-R-0013, issued by the Department of Veterans Affairs for community-based outpatient clinic services in Williston and Dickinson, North Dakota. The protester contends that the solicitation improperly fails to require an evaluation of price realism; specifically, the firm contends that the agency is required to include in the solicitation the provision at Federal Acquisition Regulation (FAR) § 52.222-46, Evaluation of Compensation for Professional Employees, to assess the realism of offerors' prices.

We deny the protest.

### BACKGROUND

The RFP, issued on October 24, 2016, as a commercial item procurement under FAR Part 12, contemplates the award of a fixed-price indefinite-delivery, indefinite-quantity contract for clinic services for veterans. The solicitation establishes a minimum staffing requirement for a primary care physician, a Registered Nurse or

Licensed Practical Nurse, a Clerical Associate (with a Master of Science degree in Administration), and a Telehealth Clinical Technician. RFP at 28. The RFP includes annual workload projections based on historical data of the number of patients served at the Williston and Dickinson clinics from 2010 to 2013, as well as projected growth estimates through 2017. RFP at 92-93. Work minimums and maximums are also included in the RFP. RFP at 17.

Proposals are to be assessed under the following factors, listed in descending order of importance: (1) technical capability (including subfactors for quality; management, experience and staffing, and transition plan; and geographic location); (2) past performance; (3) veterans preference; and (4) price. Offerors are to provide per patient per month unit prices (along with extended prices based on stated quantity estimates). RFP at 17. Price is to be evaluated for fairness and reasonableness. RFP at 128. Award is to be made to the offeror with the proposal considered to be most advantageous to the agency based on the technical factors and price. Id. This protest was filed on December 6, the amended closing date for the receipt of proposals. Contracting Officer Statement at 1.

## DISCUSSION

CRAssociates contends that the solicitation is defective because it does not provide for the evaluation of price realism, specifically in terms of compensation for professional employees, and that the solicitation is ambiguous with respect to certain provisions regarding the RFP's Quality Assurance Surveillance Plan (QASP).<sup>1</sup> With regard to its price realism arguments, the protester maintains that, in accordance with FAR § 22.1103, the agency was required to include in the solicitation the provision at FAR § 52.222-46, Evaluation of Compensation for Professional Employees, for the purpose of evaluating whether an offeror's compensation plan for hiring professional employees is realistic.<sup>2</sup> This provision

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<sup>1</sup> In its protest, CRAssociates also challenged the QASP's "liquidated damages" terms for reduced payment for failure to meet acceptable quality levels; the protester contended the terms were vague, unlawfully punitive, and contrary to liquidated damages regulations. Protest at 2-7. In response to the protest, the agency represented that it was taking corrective action to remove the challenged terms from the solicitation. Agency Report (AR) at 2. The protester does not object to the agency's corrective action. Comments at 1. CRAssociates also contended that the RFP's "Telehealth Services" requirement is ambiguous regarding the number of required Telehealth Clinical Technicians and the number of rooms to be provided for the services. The protester withdrew this challenge in its comments responding to the agency's report. Comments at 6.

<sup>2</sup> Section 22.1103 of the FAR, in furtherance of the policy that all professional employees "shall be compensated fairly and properly," instructs contracting officers to insert the provision at FAR § 52.222-46 "in solicitations for negotiated contracts  
(continued...)"

would require each offeror to submit a total compensation plan for professional employees, and for the agency to evaluate the offeror's plan to assure that it reflects "a sound management approach and understanding of the contract requirements." FAR § 52.222-46.

As further support for its belief that a realism evaluation is required under the RFP, the protester alleges that the clinics' remote locations will make it more difficult to recruit and retain professional employees, and offerors will need to pay them well given the limited number of qualified health care providers the protester states are available in the area. CRAssociates also alleges that without an evaluation of professional employee compensation for realism, it will be disadvantaged by offerors that may undercut prices and consequently increase performance risk for the agency. In this regard, the protester contends that the solicitation must include a requirement for offerors to submit cost and pricing information, specifically in terms of professional employee compensation, to determine the reasonableness and realism of proposed prices.

The agency maintains that FAR § 52.222-46 is not required here because it is not among the list of required solicitation provisions identified in FAR Part 12 for inclusion in solicitations for commercial items. Specifically, the agency notes that the matrix at FAR § 52.301 identifies, for each type of procurement, to include those conducted under FAR Part 12, the applicable FAR clauses and provisions. With respect to the provision in question, FAR § 52.222-46, the matrix indicates that the provision is not required in, or otherwise applicable to, commercial item procurements. The agency notes that this is consistent with FAR § 12.301, which generally requires that, to the maximum extent practicable, only clauses that are required to implement commercial item laws or executive orders, or are determined to be consistent with customary commercial practice, are to be included in commercial item solicitations. This section of the FAR also lists the various clauses to be included in commercial item solicitations, and it does not identify FAR § 52.222-46. FAR § 12.301(a)(1) and (2). According to the agency, the inapplicability of FAR § 52.222-46 is further confirmed by the instructions included under FAR § 12.301(d), which provides that "[n]otwithstanding prescriptions contained elsewhere in the FAR, when acquiring commercial items, contracting

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(...continued)

when the contract amount is expected to exceed \$700,000 and services are to be provided which will require meaningful numbers of professional employees." FAR § 22.1103. Under this provision, offerors submit total compensation plans, including salary and fringe benefit information for evaluation; plans indicating unrealistically low compensation may be assessed adversely. Id. The protester contends that, since the agency contemplates the award of a contract exceeding \$700,000 that requires the services of meaningful numbers of professional employees, the provision must be included in the solicitation.

officers shall be required to use only those provisions and clauses prescribed in this part” (i.e., FAR Part 12, which, as noted above does not include a requirement for the inclusion of FAR § 52.222-46, or any other similar provision). (Emphasis added.)

The protester has not refuted the agency’s arguments, other than to note instances when agencies have included FAR § 52.222-46 in solicitations for commercial items. Such references to other procurements are irrelevant, however, given the clear guidance in the FAR establishing that the provision is not applicable to procurements conducted under FAR Part 12. Our Office has found that each federal procurement stands on its own. See Wego, Inc., B-405673.3, May 21, 2012, 2012 CPD ¶ 161 at 3. Accordingly, the agency’s inclusion of the provision in other solicitations does not provide a basis to conclude that the agency erred by not including the provision here. Since the protester has failed to demonstrate that the agency was required to include the provision in question in its RFP, the protest contention in this regard is denied.<sup>3</sup>

The protester also generally contends that the solicitation is defective because it does not require offerors to submit cost or pricing data. The protester maintains that this information is necessary for the agency to evaluate the reasonableness and realism of the offerors’ prices. The protester’s arguments in this regard are without merit. Regarding price reasonableness, FAR § 15.404-1(b) establishes that contracting officers are to request cost or pricing data if it is the contracting officer’s only means to determine if prices are fair and reasonable. That is not the case here. As the agency explains, it anticipates receiving adequate price competition in response to the RFP, and, accordingly, expects to determine price reasonableness through a comparison of offered prices. Such a methodology is expressly provided for by FAR § 15.404-1(b)(2)(i). Accordingly, we have no basis to conclude that the agency is required to seek cost or price information from offerors to assess whether their prices are fair and reasonable.

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<sup>3</sup> We also note, as the agency points out, that FAR § 22.1103 does not define “meaningful numbers” of professional employees for purposes of applying FAR § 52.222-46 in a procurement. The agency contends that, since the RFP’s staffing requirement calls for a small number of professional employees at the clinics, the requirement does not anticipate a “meaningful number” of professional employees and that FAR § 52.222-46 need not be included in the solicitation. AR at 2-3. In light of our decision above, regarding the protester’s failure to demonstrate that the provision is required in this commercial item procurement, we need not resolve the agency’s argument in regard to whether the services the agency is attempting to procure require a “meaningful number” of professional employees to be provided here.

Regarding the protester's contention that cost or price data is necessary for the agency to perform a realism evaluation, the contention is misplaced. The solicitation does not include a provision for the evaluation of price realism, nor is such an evaluation required, to the extent the protester's arguments suggest otherwise. Where a solicitation, such as the one here, contemplates the award of a fixed-price contract, agencies retain broad discretion when deciding whether to include a price realism evaluation provision. In this regard, the FAR establishes that the inclusion of a price realism evaluation is reserved for "exceptional cases" when awarding a fixed-price contract, as is the case here. See FAR 15.404-1(d)(3) (indicating that an agency "may . . . in exceptional cases" include a price realism evaluation provision when awarding a fixed-price contract but is not required to do so); Ripple Effect Comms., Inc., B-413722.2, Jan. 17, 2017, 2017 CPD ¶ 27 at 3-4 (rejecting protest arguing that agency was required to include a price realism evaluation in solicitation for the award of a fixed-price contract). Given the agency's broad discretion in this instance, we have no basis to find the agency's decision, not to seek cost or price information, or to include a price realism evaluation provision in the solicitation, unreasonable.

Finally, the protester argues that the RFP is defective because the QASP set forth in the solicitation is ambiguous, pointing to questions and concerns raised by CRAssociates in connection with the QASP. See Protest at 11. As a general matter, the RFP's QASP lists tasks to be monitored (referred to as "indicators"), and for each indicator, identifies a standard, acceptable level of quality, method of surveillance, as well as any contractual incentives or disincentives for meeting or failing to meet the established standards.

A first set of questions submitted by CRAssociates asked how the contractor will be measured under the QASP and whether the contractor will have access to data generated by clinic location as part of the monitoring of the contractor's performance. A second set of questions specifically concerned the QASP's appointment cancellation provisions. The protester argues that the agency's responses to both sets of questions were inadequate since the agency failed to provide offerors with "baseline data used for assessment of penalties." Protest at 10. The protester contends that this performance data is necessary for it to understand the possibilities and probabilities of non-conformance. Protest at 10. In responding to the protest, the agency rendered issues in connection with the second set of questions moot by representing that it was amending the solicitation to remove the appointment cancellation provisions. AR at 6.

In its comments in response to the agency's report, CRAssociates does not challenge the deletion of the QASP's appointment cancellation provisions. Rather, the protester generally asserts that it needs "underlying data" in order "to understand the risks involved with performance. . . ." Id. at 6.

We find CRAssociates' arguments in this regard unclear and unpersuasive. The QASP data, which was the subject of CRAssociates' first set of questions, concerns the extent to which a contractor has met the QASP metrics established under the contract. Beyond asserting that such data is necessary to understand the risks of performance, CRAssociates has not shown, and it is not otherwise apparent, how another contractor's QASP performance data is necessary for, or relevant to, the submission of an intelligent proposal. Rather, it would appear that the risks of performance are based on the solicitation requirements, as well as the offeror's unique approach to performance. Accordingly, we find that CRAssociates provides no basis to question the RFP's omission of such information.<sup>4</sup>

The protest is denied.

Susan A. Poling  
General Counsel

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<sup>4</sup> We also note that, to the extent the protester for the first time in its comments indicated that data regarding "historical trends in [v]eteran and clinic activity" are required, we find this to be different from its protest challenging the RFP's omission of "baseline data used for assessment of penalties." Protest at 10. We consider this new argument to be untimely and will not consider it further. 4 C.F.R. § 21.2(a)(1).