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Decision

Matter of: Veterans Care Medical Equipment, LLC

File: B-420726; B-420726.2

Date: July 29, 2022

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Peter B. Ford, Esq., Katherine B. Burrows, Esq., and Eric A. Valle, Esq., Piliero Mazza PLLC, for Mid-Cities Home Medical Delivery Service, LLC, the intervenor.
Daniel J. McFeely, Esq., Department of Veterans Affairs, for the agency.
Sarah T. Zaffina, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest arguing that agency improperly required protégé partner in Small Business Administration-approved mentor-protégé joint venture offeror to individually meet the same experience requirements as other offerors is denied where the record fails to show that the agency imposed such a requirement.
2. Protest alleging that small business awardee should not have been found responsible is dismissed where protester fails to demonstrate circumstances warranting our Office's review of agency's affirmative responsibility determination.

DECISION

Veterans Care Medical Equipment, LLC (Veterans Care),¹ a service-disabled veteran-owned small business (SDVOSB), of Vista, California, protests the award of a contract to Mid-Cities Home Medical Delivery Service, LLC (Mid-Cities Medical), an SDVOSB, of Grand Prairie, Texas, under request for proposals (RFP)

¹ Veterans Care is an unpopulated joint venture under an approved Small Business Administration (SBA) mentor-protégé agreement. The joint venture consists of Avenue Mori Medical Equipment, Inc. (AMME), the protégé and joint venture managing partner, and Rotech Healthcare Inc. (Rotech), the mentor partner and incumbent contractor. Protest at 3; Supp. Comments at 2. As relevant here, a joint venture is "unpopulated" where personnel who will perform work under a contract are employed by the firms that comprise the joint venture. See 13 C.F.R. § 121.103(h).

No. 36C26221R0082, issued by the Department of Veterans Affairs (VA). The RFP seeks in-home oxygen and ventilator services for the Phoenix VA Health Care System (PVAHCS) and the Northern Arizona VA Health Care System (NAVAHCS). The protester challenges the agency's evaluation of proposals and resulting award decision.

We deny the protest in part and dismiss it in part.

BACKGROUND

The agency issued the solicitation as a total SDVOSB set-aside on May 8, 2021 pursuant to Federal Acquisition Regulation (FAR) parts 12 and 15, and VA acquisition regulations. Agency Report (AR), Tab 2, RFP at 2, 62.² The RFP anticipated award of a single, fixed-price indefinite-delivery, indefinite-quantity contract for a base period of one year and up to seven 1-year option periods.³ RFP at 5, 61. The successful contractor will furnish all labor, facilities, transportation, and management needed to perform in-home oxygen and in-home ventilator services for veterans served by PVAHCS and NAVAHCS. *Id.* at 14. The solicitation requires in-home oxygen services for an estimated 3,500 patients per month and in-home ventilator services for an estimated 20 patients per month. *See id.*

The RFP provided that award was to be made without discussions to the responsible offeror whose proposal represented the best value to the government, considering experience and price. *Id.* at 58, 62. The solicitation specified that experience was more important than price and provided that award might be made to other than the lowest-priced proposal. *Id.* at 62. As relevant to this protest, for the experience factor, the RFP instructed offerors to describe their experience providing at-home oxygen and ventilation services, including the average monthly number of patients served, the geographic location of the services, and a description of the tasks performed. *Id.* at 61.

Four offerors, including Veterans Care and Mid-Cities Medical, submitted proposals by the November 1 deadline for receipt of proposals. COS at 3. After the solicitation closed, the VA emailed amendment 7 to all offerors on December 16. This amendment added VA Acquisition Regulation (VAAR) clause 852.219-77, VA Notice of Limitations on Subcontracting—Certificate of Compliance for Services and Construction (SEP 2021) (DEVIATION). *Id.*; AR, Tab 3, RFP amends. at 127-131. VAAR clause 852.219-77 implements a statutory requirement, applicable to all VA procurements set aside for SDVOSB concerns after October 31, 2020, for written certification from each offeror of the offeror's intent to comply with the limitation on

² All citations to the record are to the pages of the Adobe PDF documents produced in the agency report.

³ The RFP was amended seven times; unless otherwise noted, all references to the RFP are to the original solicitation. AR, Tab 1, Contracting Officer's Statement (COS) at 2-3.

subcontracting applicable to the procurement. Memorandum of Law (MOL) at 20. This VAAR clause went into effect on September 15, 2021.⁴ For this solicitation, VAAR clause 852.219-77 requires the contractor to certify that it will not subcontract more than 50 percent of the work to firms that are not SDVOSBs or veteran-owned small businesses.

The amendment notified offerors that to remain eligible for award, they were required to “complete, sign, and return” the contractor certification of compliance with the limitation on subcontracting by December 27. AR, Tab 3, RFP amends. at 127. All offerors timely submitted certifications.

The technical evaluation board (TEB) evaluated the proposals, and as relevant here, assigned the proposals of both Veterans Care and Mid-Cities Medical the highest rating of good for the experience factor.⁵ AR, Tab 7, TEB Report at 2, 12, 15. The source selection authority (SSA) conducted a comparative analysis in which she considered the proposals, the TEB report, and the price analysis. AR, Tab 6, Source Selection Decision Document (SSDD) at 12. The SSA concluded that Mid-Cities Medical’s proposal, which was 21 percent lower in price than Veterans Care’s proposal, offered the best value to the government. *Id.* at 12, 17. The VA notified the protester of the award to Mid-Cities Medical and this protest followed. COS at 4.

DISCUSSION

The protester argues the agency failed to follow the evaluation criteria and SBA regulations in evaluating proposals. In particular, Veterans Care asserts that the agency failed to consider differences in the offerors’ experience, thereby converting the experience factor into “a pass/fail criterion” and the procurement into a lowest-priced, technically-acceptable competition. Protest at 7-9. Veterans Care also contends that the agency’s evaluation violated SBA regulation, 13 C.F.R. § 125.8(e), when it required AMME, the joint venture protégé partner, to individually meet the same evaluation criteria as other offerors. Comments & Supp. Protest at 11-13. The protester further contends that the VA failed to consider relevant information in making its affirmative responsibility determination for Mid-Cities Medical. Protest at 11. While our decision here does not specifically discuss every argument raised, we have considered all the protester’s allegations and find no basis to sustain the protest.

⁴ U.S. Dep’t of Veterans Affairs, Memorandum, VA Acquisition Regulation (VAAR) Class Deviation to Implement Service-Disabled Veteran-Owned Small Business (SDVOSB) and Veteran-Owned Small Business (VOSB) Certification Requirements – VAAR Part 819 and Part 852 (2021), *available at* <https://www.va.gov/oal/docs/business/pps/deviationVaar20210915.PDF> (last visited July 19, 2022).

⁵ The ratings for the experience factor were good, satisfactory, marginal, or unsatisfactory. AR, Tab 7, TEB Report at 2.

Experience Factor Evaluation

Veterans Care challenges the agency's experience evaluation, arguing that the agency disregarded qualitative differences between the awardee's experience and its own.

Protest at 9. The protester highlights the difference between the total number of patients it serviced under all referenced contracts (30,595 in-home oxygen patients and 139 in-home ventilator patients) and the total number of patients that Mid-Cities Medical serviced (4,102 in-home oxygen patients and 36 in-home ventilator patients).

Comments & Supp. Protest at 3-5. Veterans Care complains that the number of patients it serviced exceeded the requirement here "by orders of magnitude," whereas the number of patients the awardee serviced did not, yet the agency assessed both proposals a similar strength for exceeding the agency's requirement.⁶ Comments & Supp. Protest at 4.

In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals or substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency's discretion. *SDS Int'l, Inc.*, B-291183.4, B-291183.5, Apr. 28, 2003, 2003 CPD ¶ 127 at 5. Rather, we will review the record to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. *MVM, Inc.*, B-407779, B-407779.2, Feb. 21, 2013, 2013 CPD ¶ 76 at 6. A protester's disagreement with the agency's judgment, without more, is insufficient to establish that an evaluation was unreasonable. *Id.* at 5.

Here, the evaluation criteria do not give additional weight for experience that significantly exceeds the agency's requirements. Moreover, the record reveals that the SSA considered the differences between the offerors' experience in her tradeoff analysis and emphasized Veterans Care's "numerically superior experience." AR, Tab 6, SSDD at 17. In this respect, the SSA explicitly recognized that even though the proposals of both the protester and Mid-Cities Medical received ratings of good for experience, the protester offered more experience than Mid-Cities Medical in terms of the number of in-home oxygen and ventilation patients served. *Id.* at 16. The SSA found, however, that "Mid-Cities [Medical] offers better value to the [g]overnment

⁶ As noted above, the protester also argued in its initial protest that the VA improperly converted the basis for award from best value tradeoff to lowest-priced, technically acceptable by evaluating the experience factor on a pass/fail basis. The agency responded to this argument in its report. COS at 3-4; MOL at 5-14. In its comments on the report, the protester failed to address the VA's response. Where, as here, an agency provides a detailed response to a protester's assertions and the protester either does not respond to the agency's position or provides a response that merely references or restates the original protest allegation without substantively rebutting the agency's position, we deem the initially raised arguments abandoned. *People, Tech. & Processes, LLC*, B-417208, Mar. 21, 2019, 2019 CPD ¶ 113 at 11. We therefore conclude that these arguments have been abandoned, and do not consider them further.

notwithstanding the stronger experience offered by Veterans Care” because Mid-Cities Medical also has extensive experience providing in-home oxygen and ventilator services at a significantly lower price. *Id.* at 16-17. Based on the agency’s reasonable discussion and assessment of the relative advantages and disadvantages associated with the specific content of the proposals, we find that the protester’s disagreements with the actual ratings are without merit, given that they do not affect the reasonableness of the judgments made in the source selection decision. See *Centerra-Parsons Pac., LLC*, B-414686, B-414686.2, Aug. 16, 2017, 2020 CPD ¶ 249 at 8-9 (explaining that adjectival ratings are merely guides for intelligent decision-making in the procurement process and what’s important is whether the record shows that the agency has reasonably considered the underlying basis for the ratings). On this record, we have no basis to conclude that the agency’s evaluation was unreasonable.

Additionally, the protester contends that the agency improperly evaluated the experience of Mid-Cities Medical’s subcontractor, CalOx. Comments & Supp. Protest at 5-6, 8-9. In particular, Veterans Care asserts that the agency relied upon CalOx’s experience in its evaluation of Mid-Cities Medical’s proposal even though the proposal does not indicate what work CalOx will perform. *Id.* at 8-9.

We disagree. Here again, the record disproves the protester’s allegations. The SSA acknowledged that Mid-Cities Medical’s proposal does not demonstrate that CalOx has a binding obligation to perform work under the contract, does not demonstrate that CalOx will perform work for the full period of performance, and does not indicate what tasks or percentage of the work CalOx will perform. AR, Tab 6, SSDD at 6, 17. The SSA nevertheless found that Mid-Cities Medical by itself “has all the experience it needs at the outset to manage and deliver the services required by this procurement, giving the Government high confidence that there will be no disruption of these life-critical services.” *Id.* at 17. With regard to CalOx, the SSA assigned less weight to CalOx’s experience and found that it would “enhance[] the experience that Mid-Cities [Medical] possesses, further adding to the [g]overnment’s high confidence that [Mid-Cities Medical] will be successful in providing the services required by this procurement.” *Id.* at 6; see also *id.* at 17.

Our review of the record confirms that the SSA did not improperly rely upon CalOx’s experience in its evaluation of Mid-Cities Medical; instead, the SSA concluded that Mid-Cities Medical’s experience alone had the experience warranting a rating of good and the government’s “high confidence” of successful performance of the contract. We find the agency’s conclusion to be reasonable and Veterans Care’s disagreement with the agency’s judgment, without more, is insufficient to establish that the agency acted unreasonably.

SBA Regulation 13 C.F.R. § 125.8(e)

Veterans Care protests the VA’s evaluation of its experience and argues that the agency violated SBA regulation 13 C.F.R. § 125.8(e) when it assigned its proposal a major weakness based on the protégé partner’s lack of experience providing in-home

oxygen and ventilator services. Comments & Supp. Protest at 11-13. The protester also contends that the agency failed to treat it like a joint venture and improperly required the protégé partner, AMME, to individually meet the same evaluation criteria that the other offerors were generally required to meet. *Id.*; Supp. Comments at 2-9. The protester argues that the major weakness assigned to its proposal therefore influenced the award decision to its competitive prejudice. Comments & Supp. Protest at 11-13; Supp. Comments at 14-18.

In response, the VA asserts that the protester's proposal included no experience providing at-home oxygen and ventilator services for Veterans Care, as a joint venture. Supp. MOL at 5. The agency also asserts that its evaluation properly considered the experience of each joint venture partner and that the protégé joint venture partner is not exempt from meeting evaluation criteria. *Id.* at 5-9. Furthermore, the agency responds that Veterans Care was not competitively prejudiced because it received the highest rating possible for experience and the VA explicitly recognized Veterans Care's superior experience in the tradeoff analysis. *Id.* at 10-11.

The SBA's small business mentor-protégé program allows small or large business firms to serve as mentors to small business protégé firms in order to provide "business development assistance" to the protégé firms and to "improve the protégé firms' ability to successfully compete for federal contracts." 13 C.F.R. § 125.9(a), (b); see 15 U.S.C. § 644(q)(1)(C). Under the SBA's small business mentor-protégé program, an SBA-approved joint venture is permitted to compete as a small business for "any government prime contract, subcontract or sale, provided the protégé qualifies as small for the procurement[.]" 13 C.F.R. § 125.9(d)(1); see also 13 C.F.R. §§ 121.103(b)(6), (h)(1)(ii).

In addition, when evaluating a small business joint venture, the Small Business Act requires agencies to consider the capabilities of the individual members of the joint venture "if the joint venture does not demonstrate sufficient capabilities or past performance to be considered for award of a contract opportunity[.]" 15 U.S.C. § 644(q)(1)(C). The SBA regulations implementing this statutory provision require agencies to consider the capabilities of small business offerors as follows:

When evaluating the capabilities, past performance, experience, business systems and certifications of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past

performance, experience, business systems and certifications necessary to perform the contract.

13 C.F.R. § 125.8(e).

Our Office has previously considered arguments based on the above language that a procuring agency may not require the protégé firm to individually meet the same evaluation criteria as other offerors. See *Computer World Servs. Corp.; CWS FMTI JV LLC*, B-419956.18 *et al.*, Nov. 23, 2021, 2021 CPD ¶ 368 at 7-12 (sustaining protest of solicitation terms limiting the number of references that may be submitted by a large business mentor partner as unreasonable while finding that limitation is not prohibited by small business laws or regulations). As we noted in that decision, SBA has explained that its rules require a small business protégé “to have some experience in the type of work to be performed under the contract” albeit not the same level of experience as its mentor partner. *Id.* at 9 (quoting 85 Fed. Reg. 66146, 66167, Oct. 16, 2020). The SBA has further affirmed that the protégé must “bring something to the table other than its size or socioeconomic status[;] [t]he joint venture should be a tool to enable it to win and perform a contract in an area that it has some experience but that it could not have won on its own.” *Id.* at 9-10 (quoting 85 Fed. Reg. 66146, 66168, Oct. 16, 2020).

Here, the record establishes that the VA reasonably evaluated Veterans Care’s experience, consistent with the requirements of 13 C.F.R. § 125.8(e). Veterans Care is an unpopulated, SBA-approved mentor-protégé joint venture that did not include any experience for the joint venture in its proposal. The agency therefore evaluated the experience of each joint venture partner. AMME, the protégé partner, provided two contracts and Rotech, the mentor partner and incumbent contractor, provided three contracts. AR, Tab 7, TEB Report at 15.

The agency evaluated the experience of AMME and Rotech individually using the “same level of scrutiny” and then aggregated the experience of both joint venture partners in its evaluation. Supp. MOL at 5-6. Neither of AMME’s contracts was for in-home oxygen or ventilation services, and the VA concluded that Veterans Care’s proposal did not indicate that AMME had experience providing in-home oxygen and ventilation services; as a result, the agency assessed a major weakness. AR, Tab 6, SSDD at 7; AR, Tab 7, TEB Report at 15. The evaluators found that Rotech, on the other hand, is the incumbent contractor at PVAHCS and NAVAHCS and has been performing in-home oxygen and ventilator services for VA medical centers since 2003. AR, Tab 6, SSDD at 7, 15-16. The SSA further noted that Rotech is “currently providing in-home oxygen services to approximately 30,000 patients and in-home ventilator services to approximately 250 patients for VA medical centers located in approximately 25 states, greatly exceeding the number of in-home oxygen and in-home ventilator patients required by this procurement.” *Id.* at 15-16.

Relying on the “depth and breadth” of Rotech’s experience, the VA assigned Veterans Care’s proposal a rating of good--the highest rating--for experience and concluded that

the VA had “high confidence” in Veterans Care’s ability to successfully perform the contract. *Id.* at 7. Although the agency found that AMME’s lack of experience was a major weakness in the protester’s proposal, the record does not demonstrate that the agency improperly required AMME to individually meet the same evaluation criteria that the other offerors were generally required to meet. Rather, the record shows that the SSA reasonably considered the abilities of each joint venture partner and, notwithstanding AMME’s inability to show that it had any experience providing at-home oxygen and ventilator services, the agency attributed Rotech’s extensive experience to the joint venture so that Veterans Care’s proposal received a rating of good for experience. Accordingly, we conclude the agency’s evaluation was reasonable, and therefore, we deny this protest ground.

Responsibility Determination

Lastly, the protester challenges the agency’s affirmative responsibility determination with respect to Mid-Cities Medical, alleging that Mid-Cities Medical will fail to comply with applicable limitations on subcontracting, notwithstanding Mid-Cities Medical’s certification of compliance. Comments & Supp. Protest at 14-15. As discussed below, we dismiss this protest ground.

An agency’s judgment as to whether a small business offeror will comply with the subcontracting limitation generally is a matter of responsibility, and the contractor’s actual compliance with the clause is a matter of contract administration. *Chapman Law Firm, LPA*, B-293105.6 *et al.*, Nov. 15, 2004, 2004 CPD ¶ 233 at 6; *Symtech Corp.*, B-285358, Aug. 21, 2000, 2000 CPD ¶ 143 at 12. Neither issue is one that our Office generally reviews. 4 C.F.R. § 21.5(a), (c). We do not review affirmative determinations of responsibility, since the determination that an offeror is capable of performing a contract is largely committed to the contracting officer’s discretion. *FN Mfg., Inc.*, B-297172, B-297172.2, Dec. 1, 2005, 2005 CPD ¶ 212 at 8. The exceptions to this rule are protests that allege that definitive responsibility criteria in the solicitation were not met and those that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. *Id.* at 8-9.

The protester does not argue that the awardee failed to meet definitive responsibility criteria; it does, however, assert that the contracting officer unreasonably failed to consider available relevant information. Protest at 11; Comments & Supp. Protest at 14-15. In support of this argument, the protester contends that Mid-Cities Medical is incapable of performing in Arizona because it does not have a presence in that geographical area and must rely on subcontractors to perform the contract. The protester alleges that the contracting officer had personal knowledge that Mid-Cities Medical relied upon a subcontractor to perform without oversight on another contract, and therefore, the contracting officer failed to consider relevant information about Mid-Cities Medical. Veterans Care also argues that the Mid-Cities Medical’s proposal failed to explain how it would satisfy the limitation on contracting so that the contracting

officer unreasonably determined that Mid-Cities Medical was capable of performing the contract and was a responsible contractor. Comments & Supp. Protest at 14-15.

We do not regard the protester's allegations here as evidence raising serious concerns that the contracting officer unreasonably failed to consider available relevant information in making her responsibility determination, and thus find no basis to review the contracting officer's affirmative determination of Mid-Cities Medical's responsibility. In this respect, the protester has not provided evidence that demonstrates that the contracting officer ignored evidence raising serious concerns. Instead, the protester simply challenges the contracting officer's conclusion that Mid-Cities Medical will be able to perform the contract. While this argument is couched as an allegation that the agency "ignored relevant information," it, in fact, asks us to second-guess the contracting officer's subjective business judgment regarding whether the offeror will be ready to perform the contract, which we decline to do.

With regard to the protester's contention that the agency should not have relied on the awardee's certification of compliance with the subcontracting limitation where its proposal failed to demonstrate how it would satisfy the limitation, an offeror need not affirmatively demonstrate compliance with a solicitation's subcontracting limitation in its proposal. *Express Med. Transporters, Inc.*, B-412692, Apr. 20, 2016, 2016 CPD ¶ 108 at 6. Rather, such compliance is presumed unless there is other language in the proposal that takes exception to the subcontracting limitation requirement. *Id.* The protester has not alleged the presence of such language here. This allegation therefore provides no basis upon which to sustain the protest.

The protest is denied in part and dismissed in part.

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