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# Decision

**Matter of:** Vyaire Medical, Inc.

**File:** B-421262.2

**Date:** March 8, 2023

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## DIGEST

Protest challenging the agency's exclusion of the protester's proposal from the competitive range is denied where the agency's decision was reasonable and in accordance with the terms of the solicitation.

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## DECISION

Vyaire Medical, Inc., of Mettawa, Illinois, protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. 75A50122R00018, issued by the Department of Health and Human Services, for the storage and maintenance of ventilators and powered air purifying respirator systems. The protester contends that the agency unreasonably concluded that its proposal was technically unacceptable.

We deny the protest.

## BACKGROUND

On July 7, 2022, the agency issued the subject solicitation in accordance with Federal Acquisition Regulation (FAR) parts 12 and 15. The RFP anticipated the award of a contract containing both fixed-price and time-and-material line items, for a period of performance of five years, consisting of a transition-in period of six months, one 12-month base period with three 1-year option periods, and one 6-month option period.

Agency Report (AR), Tab 6, RFP at 18, 53, 61.<sup>1</sup> The due date for proposals was August 8, 2022. Contracting Officer's Statement (COS) at 3.

The RFP provided for the evaluation of proposals under four factors: technical compliance, technical capability, past performance, and price. RFP at 58. As relevant here, under the technical compliance factor, the agency would evaluate whether offerors had proposed medical equipment management facilities that met the facility requirements identified in section C.5 of the solicitation. *Id.* at 58. Under section C.5, the RFP provided specific criteria for the medical equipment management facilities that offerors were required to meet. For example, the RFP required that the facilities were to be located within 30 miles of the international airports of Atlanta, Baltimore, Salt Lake City, Memphis, Dallas, and Indianapolis. *Id.* at 25. Additionally, within 6 months of award, offerors were to obtain occupancy and appropriate licenses, and transition to these facilities. *Id.* The remainder of section C.5 listed several requirements and prohibitions for proposed facilities.<sup>2</sup> *Id.* at 25-26.

The RFP provided that the technical compliance factor would be evaluated on a "go/no-go" basis, meaning that any proposal that failed to satisfy the requirements under this factor would be deemed "technically unacceptable" and would not be evaluated under the remaining factors.<sup>3</sup> *Id.* at 58.

#### The Initial Evaluation and Vyaire's First Protest

Vyaire submitted its proposal on August 8. COS at 3. After reviewing the proposal, the technical evaluation panel (TEP) recommended that the agency find Vyaire's proposal technically unacceptable because Vyaire's proposed facilities failed to meet the requirements of section C.5. *Id.* Accordingly, on October 21, the agency notified Vyaire that its proposal was technically unacceptable and was excluded from the competitive range. *Id.* Vyaire requested a debriefing, which the agency provided on October 25. *Id.*

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<sup>1</sup> On October 6, 2021, Vyaire filed a protest with our Office challenging the terms of a preceding version of the solicitation (RFP No. 75A50121R00046) as unduly restrictive of competition. Contracting Officer's Statement (COS) at 1-2. In response, the agency canceled the RFP, and our Office dismissed the protest as academic. *Vyaire Med., Inc.*, B-420235, Oct. 19, 2021 (unpublished decision). The agency subsequently issued an amended solicitation. COS at 2. All citations are to the final version of that solicitation.

<sup>2</sup> The remaining requirements of section C.5 included, for example, requirements pertaining to facility location (*i.e.*, ensuring warehouses are not located over watersheds, wetlands, floodplains) and ambient warehouse storage with the ability to maintain temperature ranges from 59 to 86 degrees Fahrenheit. RFP at 25-26.

<sup>3</sup> The remaining evaluation factors are not at issue in this protest and thus are not described in detail.

On November 4, Vyaire filed a protest with our Office, challenging the agency's finding that its proposal was technically unacceptable and the decision to exclude its proposal from the competitive range. Protest, exh. D, November 4 Protest at 1. On November 30, the agency informed our Office that it intended to take corrective action. COS at 4. Specifically, the agency stated that it would reevaluate its competitive range determination. *Id.* Accordingly, our Office dismissed Vyaire's protest as academic on December 5. *Vyaire Med., Inc.*, B-421262, Dec. 5, 2022 (unpublished decision).

## Reevaluation and Current Protest

In accordance with the agency's notice of corrective action, the TEP reevaluated proposals under the technical compliance factor. COS at 4. The TEP's reevaluation confirmed its initial finding that Vyaire's proposal failed to demonstrate that the protester's proposed facilities met the requirements of section C.5. AR, Tab 15, TEP Report at 4-5. For example, the TEP concluded that Vyaire's proposal failed to provide sufficient information demonstrating that its proposed facilities were not located over watersheds, wetlands, or floodplains. *Id.* at 8. In another area, the TEP concluded that Vyaire's proposal failed to provide sufficient information demonstrating that its ambient warehouse storage had the ability to maintain a temperature range from 59 to 86 degrees Fahrenheit. *Id.* at 12. Accordingly, the TEP concluded that Vyaire's proposal was technically unacceptable. *Id.* at 5. The contracting officer concurred with the evaluation results. *Id.* at 5. Because the agency concluded that Vyaire's proposal was technically unacceptable, it was not included in the competitive range. *Id.*

On December 6, 2022, the agency notified Vyaire that its proposal was technically unacceptable and not included in the competitive range. *Id.* Vyaire filed this protest with our Office on December 16. *Id.*

## DISCUSSION

Vyaire raises two protest grounds. First, Vyaire contends that the agency's evaluation was unreasonable in that it applied unstated evaluation criteria in finding Vyaire's proposal technically unacceptable. Protest at 12. Second, Vyaire contends that its proposal was in fact technically acceptable, and that the agency should therefore not have excluded it from the competitive range without considering its cost/price. *Id.* at 17. For reasons discussed below, we deny the protest.<sup>4</sup>

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. *Choctaw Defense Munitions, LLC*, B-420003, B-420003.2, Oct. 27, 2021, 2022 CPD ¶ 66 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.

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<sup>4</sup> Although we do not address every argument raised by the protester, we have considered them and find none to be meritorious.

*Id.* A protester's disagreement with the agency's judgment, without more, is insufficient to establish that an evaluation was unreasonable. *Id.*

As relevant here, section L of the RFP provided as follows with regard to the technical compliance factor:

Offerors shall propose medical equipment management facilities within 30 miles of the vicinity of the International Airports in Atlanta, Baltimore, Salt Lake City, Memphis, Dallas, and Indianapolis. Offeror shall demonstrate that they can meet the facility requirements identified (Section C.5, Facility Requirements). This is a mandatory requirement that the contractor have facilities within 30 miles of an International Airport in the six mandatory cities. If the requirement cannot be met, the proposal shall not be considered for further evaluation.

RFP at 55 (emphasis omitted). Further, as previously noted, section M of the RFP provided:

The Government will evaluate whether Offerors proposed medical equipment management facilities within 30 miles of the vicinity of the International Airports in Atlanta, Baltimore, Salt Lake City, Memphis, Dallas, and Indianapolis that meet the facility requirements identified (Section C.5, Facility Requirements). If the Offeror's proposal does [not] meet this requirement, the Offeror's proposal shall be considered technically unacceptable and will not be considered for further evaluation.

RFP at 58 (emphasis omitted).

Vyaire first argues that the agency unreasonably concluded that Vyaire's proposal was technically unacceptable for failing to demonstrate compliance with the requirements of section C.5. Protest at 12. According to Vyaire, the RFP did not require offerors to demonstrate compliance with the requirements of section C.5 in their proposals; rather, Vyaire maintains that the "sole . . . criterion" under the technical compliance factor was the requirement to propose facilities within 30 miles of the six enumerated airports.<sup>5</sup> *Id.* In support of this argument, Vyaire contends that the RFP required offerors to meet "this requirement," which is a singular noun. Protest at 14. The use of this singular noun, according to Vyaire, indicated that offerors were required only to propose facilities within 30 miles of the international airports for their proposals to be technically compliant; the remaining requirements of section C.5 were to be evaluated either under the technical capability factor, or within six months after award. *Id.*

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<sup>5</sup> Vyaire does not dispute the agency's finding that its proposal failed to demonstrate compliance with a number of the requirements of section C.5. Rather, it argues that the RFP did not require it to demonstrate such compliance in its proposal.

In response, the agency contends that the technical compliance factor “explicitly state[d]” that offerors were to propose facilities that met the requirements listed in section C.5, such as proposing facilities that were not located over watersheds, wetlands, or floodplains and ambient warehouse storage with the ability to maintain the required temperature range, which Vyaire failed to do. Memorandum of Law (MOL) at 24; AR, Tab 15, TEP Report at 8, 12.

Essentially, this protest involves different views as to what the solicitation required offerors to demonstrate for their proposals to be found technically acceptable. Where a protester and an agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with such a reading. *Desbuild Inc.*, B-413613.2, Jan. 13, 2017, 2017 CPD ¶ 23 at 5. Here, based on our review of the solicitation, we conclude that the agency’s interpretation of the language is reasonable and that the protester’s is not.

As noted above, section L of the solicitation unambiguously instructed offerors to demonstrate in their proposals that they “can meet the facility requirements identified (Section C.5, Facility Requirements).” RFP at 55. Section M of the solicitation then specifically provided that “[t]he Government will evaluate whether Offerors proposed medical equipment management facilities . . . that meet the facility requirements identified (Section C.5, Facility Requirements).” *Id.* at 58. Accordingly, as section L and section M demonstrate, Vyaire’s argument that the solicitation did not require offerors to demonstrate that their proposed facilities met the requirements of section C.5 as a matter of technical acceptability is without merit.

In this context, for example, section C.5 required offerors to demonstrate that the proposed facilities were not located over watersheds, wetlands, or floodplains. RFP at 25. The TEP report explains that the agency concluded that the protester’s proposal did not demonstrate compliance with this requirement because the proposal did not indicate whether each proposed facility was located over a watershed or in wetlands. AR, Tab 15, TEP Report at 9. Instead, Vyaire’s proposal contained only a general statement that the proposed facilities “[met] the requirements of the RFP,” which was insufficient to demonstrate compliance. *Id.* The agency thus reasonably concluded that Vyaire’s proposal was technically unacceptable due to the protester’s failure to provide sufficient information demonstrating compliance with these requirements.

In support of its interpretation, however, Vyaire argues that it would be “unreasonable” to require non-incumbent offerors to meet the section C.5 requirements prior to actual occupancy of the proposed facilities because non-incumbent offerors are unlikely to have sufficient pre-award access to the proposed facilities. Protest at 16. Thus, Vyaire contends that the RFP should be interpreted as requiring compliance with section C.5 only at some point prior to the conclusion of the six-month transition-in period (as opposed to prior to award). *Id.* at 16. We disagree.

As discussed above, the RFP clearly provided that proposals had to meet the section C.5 requirements to be technically compliant and thus, eligible for award. To the extent that Vyaire now contends this requirement is “illogical,” protest at 15, we dismiss that challenge as an untimely protest of the terms of the solicitation as Vyaire first raised this argument after the closing date for proposals. 4 C.F.R. § 21.2(a)(1); see *American Sys. Grp.*, B-418535, June 9, 2020, 2020 CPD ¶ 190 at 3. In sum, we find no basis upon which to sustain the protester’s complaint that the solicitation did not require offerors to demonstrate compliance with the requirements of section C.5 in their proposals.

Last, Vyaire contends that the agency unreasonably failed to consider the cost/price of its proposal when making the competitive range determination. Protest at 17. Vyaire predicates this argument, however, on the assumption that its proposal was technically acceptable. See *id.* at 16-17. As discussed above, we have no basis to object to the agency’s finding that Vyaire’s proposal was technically unacceptable. Therefore, we deny this protest ground.

The protest is denied.

Edda Emmanuelli Perez  
General Counsel