

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

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Decision

Matter of: Express Medical Transporters, Inc.

File: B-412692

Date: April 20, 2016

E.A. "Seth" Mills, Jr., Esq., and Jordan Miller, Esq., Mills Paskert Divers, for the protester.

Mark M. Barber, Esq., and David M. Brickhouse, Esq., Broad and Cassel, for the intervenor, Wheelchair Transport Service, Inc.

Neil S. Deol, Esq., Department of Veterans Affairs, for the agency.

Elizabeth Witwer, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that the awardee's proposal violated the solicitation's subcontracting limitation clause is denied where the awardee's proposal did not indicate that the awardee took exception to the limitation.
 2. Protest alleging that the agency failed to forward the protester's challenge to the awardee's size status to the Small Business Administration (SBA) is dismissed as academic where the record demonstrates that the agency subsequently forwarded the protest to the SBA.
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DECISION

Express Medical Transporters, Inc. (EMT), a small business, of St. Louis, Missouri, protests the award of a contract to Wheelchair Transport Services, Inc. (WTS), a small business, of Clearwater, Florida, under request for proposals (RFP) No. VA248-15-R-0828, issued by the Department of Veterans Affairs (VA) for non-emergency special mode transportation services for beneficiaries at the James A. Haley Veterans' Hospital in Tampa, Florida. EMT contends that the awardee's proposal should have led the agency to conclude that the awardee had specifically taken exception to the subcontracting limitation in Federal Acquisition Regulation (FAR) clause 52.219-14. EMT also contends that the agency erred in not forwarding EMT's protest of WTS's size status to the Small Business Administration (SBA).

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

BACKGROUND

The VA issued the RFP on July 21, 2015, as a set-aside for small businesses. RFP at 1. The RFP contemplated the award of a fixed-price requirements contract with economic price adjustment for a base year and four option years. Id. at 17. The RFP sought non-emergency special mode transportation services for the beneficiaries of the James A. Haley Veterans' Hospital in Tampa, Florida, to include all supervision, personnel, vehicles, equipment, transportation, material, supplies, and other items necessary to provide transportation. Id. at 17. The RFP provided that an award would be made to the offeror that submitted the lowest-priced technically acceptable offer. Id. at 67.

Of relevance here, the RFP incorporated, by reference, FAR clause 52.219-14, Limitations on Subcontracting (Nov. 2011). RFP at 48. This clause provides, in relevant part:

(c) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for—

* * *

(1) *Services (except construction)*. At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

FAR clause 52.219-14(c)(1) (emphasis in original).¹

The VA received proposals from five offerors, including EMT and WTS. Agency Report (AR), Exh. A, Contracting Officer's (CO) Statement, at 2. On December 29, the VA notified EMT that its proposal was unsuccessful and that the VA intended to award the contract to WTS. AR, Exh. H, Notice to EMT. On January 4, 2016, the VA awarded the contract, with an estimated value of \$23,976,604, to WTS. AR, Exh. A, CO Statement, at 2.

¹ The RFP also provided that "the prime contractor must ensure that their employees are providing 51% [or] more of the effort at all times under the contract." RFP § 16.1, at 42. It is unclear whether the VA intended to define "effort" here in a manner similar to the FAR clause, i.e., as a percentage of the cost of the contract performance incurred for personnel. In any event, the imprecision of this requirement and its potential conflict with the FAR clause in terms of required percentages, i.e., 50 versus 51 percent, does not impact our decision.

On January 8, EMT filed an agency-level protest with the VA contending that WTS was not a responsive or responsible offeror because WTS allegedly failed to comply with the RFP's subcontracting limitation and applicable wage requirements. AR, Exh. J, Agency-Level Protest, at 2. Of relevance to EMT's protest before our Office, in its agency-level protest, EMT included a footnote that stated, in its entirety, "[i]n addition to the other matters raised in this Protest, EMT questions whether WTS has the required Small Business Certification required to be a responsible offeror on this Solicitation." Id. at 2 n.1.

On January 26, the VA dismissed EMT's agency-level protest. AR, Exh. K, Response to Agency-Level Protest. In doing so, the agency did not address EMT's footnote regarding WTS's small business certification, nor did the VA forward EMT's protest to the SBA. On January 29, EMT filed a protest with our Office.

On March 7, while EMT's protest was pending before our Office, the VA forwarded EMT's agency-level protest of WTS's size status to the SBA. AR, Exh. L, VA Submission of EMT Protest to SBA. On March 10, the SBA determined EMT's protest to be untimely because it was not received by the contracting officer within five business days after the date the agency notified EMT of the identity of the successful offeror. SBA Initial Determination, Mar. 10, 2016, at 1 (citing 13 C.F.R. § 121.1004(a)(2)). Nevertheless, the SBA Area Director initiated a size protest.² Id.

On April 1, the SBA issued a decision determining WTS to be small for the purpose of this procurement. SBA Size Determination, Apr. 1, 2016, at 7. The VA forwarded the SBA's decision to our Office, at which time the intervenor moved for dismissal of EMT's protest. Intervenor's Req. for Dismissal, April 6, 2016.

DECISION

EMT raises two grounds for protest. First, EMT contends that WTS's proposal, on its face, should have led the VA to conclude that the awardee had specifically taken exception to the subcontracting limitation in FAR clause 52.219-14(c)(1).³ Protest

² The SBA may timely protest the small business representation of an offeror in a specific offer at any time prior to or after award, without regard to the time limits applicable to private party size protests, and such protests will apply to the procurement in question. FAR § 19.302(a); 13 C.F.R. §§ 121.1001(a)(iii), 121.1004(b), (c); Alliance Detective & Security Serv., Inc., B-299342, Apr. 13, 2007, 2007 CPD ¶ 56 at 4 n.6.

³ EMT alleged that the awardee's proposal was not "responsive." Protest at 4. Because the procurement was conducted pursuant to FAR part 15, however, we read EMT to be arguing that the awardee's proposal was not technically acceptable because it did not comply with a material term of the solicitation.

at 4-6. Second, EMT contends that the agency erred in not forwarding EMT's protest of WTS's size status to the SBA. Protest at 6-7. For the reasons discussed below, we find no basis upon which to sustain EMT's protest.⁴

Compliance with Subcontracting Limitations

EMT claims that WTS's proposal, on its face, demonstrates that WTS intends to rely, almost exclusively, upon independent contractors to perform the transportation services contemplated under the contract.⁵ Protest at 6; Comments at 2-5. As such, EMT claims that WTS's proposal demonstrates that WTS has not agreed to comply with the subcontracting limitation clause. Id.

⁴ In its protest, EMT also alleged that WTS failed to obtain, prior to award, a Certificate of Public Necessity licensed by the Hillsborough County Public Transportation Commission to provide "handicab" services, as required by the RFP. Protest at 3-4. See AR, Exh. D, Amend. No. 00002, at 1. We dismissed this ground as untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), because EMT did not file its protest within 10 days of when it knew of this basis for protest. GAO Email, Mar. 3, 2016. EMT also challenged the VA's affirmative determination of WTS's responsibility. Protest at 4-6. We dismissed this ground, GAO Email, Mar. 3, 2016, because, except in limited circumstances not applicable here, our Office will not consider a protest challenging an agency's affirmative determination of an offeror's responsibility. 4 C.F.R. § 21.5(c); Gaver Indus., Inc., dba Barker & Barker Paving, B-412428, Feb. 9, 2016, 2016 CPD ¶ 57 at 4. Finally, EMT alleged that WTS will not comply with the applicable wage requirements and, therefore, could not have submitted a "responsive" proposal. Protest at 5-6. In its report, the agency responded to this allegation. AR, Legal Memorandum, Mar. 7, 2016, at 1. EMT's comments on the report did not address the agency's response. We, therefore, consider EMT to have abandoned this allegation, and we will not consider it further. 22nd Century Technologies, Inc., B-412547 et al., Mar. 18, 2016, 2016 CPD ¶ 93 at 10.

⁵ EMT also relies upon extrinsic evidence. Protest at 5-6; Comments at 3-4. Specifically, EMT submits sworn testimony by WTS's president at a public hearing, during which WTS's president stated that 90 percent of WTS's drivers are independent contractors. Protest at 5. EMT also submits sworn affidavits from former WTS drivers alleging that they served as independent contractors for WTS on a prior VA contract. Id. This evidence, however, does not appear to be related to the subject procurement and is quite dated, occurring months prior to the issuance of the RFP. In any event, our review of an offeror's compliance with the subcontracting limitation clause is confined to the proposal itself. Reliable Builders, Inc., B-402652, B-402652.3, June 28, 2010, 2010 CPD ¶ 260 at 5.

In support of its argument, EMT cites primarily to internal training manuals and safety plans, included as attachments to WTS's technical proposal, in which WTS repeatedly uses the term "independent contract driver." See Comments at 2-3 (citing AR, Exh. F, WTS Technical Proposal, Part I, Hurricane and Disaster Operations Policy; Exh. G, WTS Technical Proposal, Part II, Attach. 3; Exh. G, WTS Technical Proposal, Part II, System Safety Program Plan). For instance, in one attachment, WTS states that "[s]afe operations and reduction in hazards is accomplished by proper and adequate training for new employees and independent contract drivers and refresher training courses for existing employees and independent contract drivers." AR, Exh. G, WTS Technical Proposal, Part II, System Safety Program Plan, at 3. In another attachment, WTS provides an agenda for its existing new driver training. One of the agenda items is to "[e]xplain the difference between being [an] employee and an [independent contractor]." Id., Attach. 3, Training Agenda, at 1. The training also covers "[c]ompany procedures for the independent contractor" and a "final session to make sure the new [independent contractor] is ready for the road." Id. at 3, 4. Also attached to WTS's proposal are a consent form and an agreement that appear to apply only to independent contract drivers. See e.g., id., Attach. 3, Drug and Alcohol Consent to Testing. EMT claims that the above language "proves that the independent contractor drivers will be providing the bulk of the work under the contract." Comments at 3.

The VA responds that these passages do not demonstrate that WTS intends to rely almost exclusively upon independent contractor drivers to perform the contract, nor do they demonstrate that WTS takes exception to the subcontracting limitation clause. Agency Supp. Legal Memorandum, Mar. 24, 2016, at 2-3. The VA explains that the RFP did not prohibit the use of subcontractors. Id. at 2. See RFP § 16.1, at 42 ("The Contractor is free to subcontract service in order to satisfy the service request."). Thus, the VA argues that the references to independent contract drivers alone do not demonstrate that WTS takes exception to the subcontracting limitation. Agency Supp. Legal Memorandum, Mar. 24, 2016, at 2-3. In its comments, the intervenor adds, among other things, that "[g]iven the subject matter of these documents (e.g., training, safety policies, transport procedures, HIPAA compliance etc.), it is entirely appropriate for such documents to cover both employees and independent contractors." Intervenor's Supp. Comments, Mar. 24, 2016, at 3 n.1.

As a general matter, an agency's judgment as to whether a small business offeror will comply with the subcontracting limitation clause is a matter of responsibility, and the contractor's actual compliance is a matter of contract administration. Geiler/Schrudde & Zimmerman, B-412219 et al., Jan. 7, 2016, 2016 CPD ¶ 16 at 7. Neither issue is one that our Office generally reviews. 4 C.F.R. § 21.5(a), (c); Geiler/Schrudde & Zimmerman, supra, at 7-8. As our Office has consistently held, however, where a proposal, on its face, should lead an agency to conclude that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of proposal acceptability. See e.g., Geiler/Schrudde & Zimmerman, supra, at 8;

Sealift, Inc., B-409001, Jan. 6, 2014, 2014 CPD ¶ 22 at 4; TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5, 6. See also 13 C.F.R. § 125.5(b)(ii). This is because the limitation on subcontracting is a material term of the solicitation, and a proposal that fails to conform to a material term or condition of a solicitation is unacceptable and may not form the basis for an award. Geiler/Schrudde & Zimmerman, *supra*, at 8; Addx Corp., B-404888, May 4, 2011, 2011 CPD ¶ 89 at 3-4.

An offeror, however, need not affirmatively demonstrate compliance with the subcontracting limitations in its proposal. Dorado Serv., Inc., B-408075, B-408075.2, June 14, 2013, 2013 CPD ¶ 161 at 12. Rather, such compliance is presumed unless specifically negated by other language in the proposal. The plain language of the subcontracting limitation clause provides that the act of proposal submission itself is sufficient to demonstrate agreement to be bound by the limitation. FAR clause 52.219-14(c)(1) (“By submission of an offer . . . the Offeror/Contractor agrees that . . . [a]t least 50 percent of the cost of the contract performance incurred for personnel shall be expended for employees of the concern.”). Accordingly, where an offeror submits a proposal in response to an RFP that incorporates FAR clause 52.219-14, the offeror agrees to comply with the limitation, Dorado Serv., Inc., *supra*, at 12, and in the absence of any contradictory language, the agency may presume that the offeror agrees to comply with the subcontracting limitations.⁶

Of course, this presumption may be rebutted by other language in the proposal. It is the protester, however, that bears the burden to affirmatively demonstrate that the awardee’s proposal takes exception to the limitations on subcontracting. *Id.* (“[T]he protester confuses the applicable standard by attempting to shift to the awardee and the agency the burden of affirmatively demonstrating that the awardee’s proposal will comply with the limitation on subcontracting requirement.”); KAES Entprs., LLC, B-408366, Aug. 7, 2013, 2013 CPD ¶ 192 at 3 (“[I]t is the protester who bears the burden of demonstrating that the proposal should have led the agency to conclude that the awardee did not comply with this limitation; simply arguing that the awardee’s quotation did not contain sufficient information to demonstrate whether the awardee will comply does not meet this burden.”).

This burden is met where the protester demonstrates that the awardee has specifically taken exception to the subcontracting limitation. Sealift, Inc., *supra*, at 5; Addx Corp., *supra*, at 3; Reliable Builders, Inc., *supra*, at 5; TYBRIN Corp.,

⁶ For this reason, EMT’s contention that an offeror must specifically affirm that it will comply with the subcontracting limitations is unavailing. EMT Supp. Comments, Mar. 29, 2016, at 1. No such affirmation is necessary unless mandated by RFP. Here, EMT does not contend that the RFP required an affirmative declaration of compliance with the subcontracting limitation.

supra, at 6. That is, the protester must identify information in the offeror's proposal that shows the offeror has not agreed to comply with the subcontracting limitation. Mere assumptions, inferences, and speculation are generally insufficient to demonstrate noncompliance.⁷ See Dorado Serv., Inc., supra, at 12. Here, we conclude that nothing on the face of WTS's technical proposal or the associated attachments should have led the VA to determine that WTS had taken exception to the subcontracting limitation.

The RFP did not prohibit the use of subcontractors. RFP § 16.1, at 42. Thus, WTS's references to "independent contract driver," without more, do not demonstrate that it took exception to the subcontracting limitation. Furthermore, although EMT highlights several instances in which WTS refers to independent contract drivers, EMT fails to point to any language indicating that WTS intends to rely almost exclusively upon independent contract drivers for this effort. Moreover, as explained above, the references to independent contract drivers are contained in internal training manuals and safety plans that were attached to WTS's proposal.⁸ Considering the nature of these documents and their apparent applicability to a wide-variety of contexts, we fail to see that their references to independent contractors demonstrate noncompliance with the subcontracting limitation clause.⁹

Additionally, even if WTS has relied heavily on independent contractor drivers to perform prior contracts, as EMT seems to allege, see Protest at 4-6, there is no indication that WTS intends to do so here.¹⁰ Rather, WTS's proposal indicates that

⁷ Overcoming the presumption of compliance is even more challenging where, as is the case here, the RFP does not require offerors to submit cost data in their price proposals, RFP at 73, because the protester does not have the benefit of information indicating the anticipated cost of contract performance incurred for personnel.

⁸ EMT identifies only one reference to independent contract drivers in WTS's proposal itself, in which WTS states that all personnel, contractors, subcontractors, and affiliates "are charged with the responsibility of [] insuring the safety of employees and independent contract drivers, property passengers, and those who come in [] contact with our service." Comments at 3 (citing AR, Exh. F, WTS Technical Proposal, Part I, at 18). This statement provides no insight into whether WTS intends to use independent contract drivers almost exclusively to perform the subject contract.

⁹ Furthermore, in at least one instance, an internal policy document refers to both independent contractor and employee drivers. AR, Exh. G, WTS Technical Proposal, Part II, Attach. 3, Safety Policy Statement.

¹⁰ EMT's highlights a reference in WTS's System Safety Program Plan, included as an attachment to its technical proposal, which may imply that WTS has relied exclusively on independent contract drivers in the past. Comments at 3.

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it has not yet hired its full fleet of drivers. AR, Exh. F, WTS Technical Proposal, Part I, at 20. At the time of proposal submission, it had retained only 25 percent of its driver fleet. Id. Upon receipt of a required certificate from the local county board, WTS intends to hire “a sufficient number of drivers and vehicles to ensure timely service[.]” Id. The proposal also states that “additional drivers can be easily added to meet all contract requirements.” Id. We have previously held that an offeror is not prohibited from hiring additional personnel as needed to complete the project or to comply with the subcontracting limitations. Geiler/Schrudde & Zimmerman, supra, at 9. There is no indication from WTS’s proposal that it intends to hire independent contractor drivers exclusively.¹¹

In sum, EMT fails to point to any portion of WTS’s proposal in which WTS states an intent to rely almost exclusively on independent contract drivers. In the absence of any such indication, we conclude that there was nothing on the face of the proposal that should have led the agency to conclude that WTS had not agreed to comply with the subcontracting limitation.¹²

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Specifically, WTS identifies “all job classifications . . . which pose the risk of exposure” to blood and other potentially infectious body fluids and materials. AR, Exh. G, WTS Technical Proposal, Part II, System Safety Program Plan, at 51. The plan identifies 11 positions, including “Independent Contractors Drivers,” and their exposure risk. Id. at 52. Notably, there is no corresponding “employee” driver position listed. Id. The plan is dated January 2015 and does not appear to have been drafted to apply specifically to the subject contract. Therefore, although the absence of an “employee” driver position might indicate that WTS has not used employee drivers in the past, it does not indicate that WTS will not use employee drivers on the subject contract.

¹¹ To the contrary, there is every indication from WTS’s proposal that it understands the RFP’s requirements and has procedures in place to ensure compliance with relevant FAR provisions and contract requirements during performance. AR, Exh. F, WTS Technical Proposal, Part I, at 1 (“We have a full and complete understanding of the VA transportation system and the requirements of the [RFP].”); id. at 12 (“The Contract Compliance Manager position ensures that contract performance expectations, relevant FAR regulations identified in the contract, and general government regulations are adhered to. The compliance manager works closely with the contracting officer and their technical representative (COTR) to ensure that all contract provisions are met.”).

¹² As part of its size determination in this matter, the SBA found that “independent subcontractor drivers will supply less than 3 [percent] of the direct labor cost for this contract.” SBA Size Determination at 6. The SBA also found that “52 [percent] of the cost will be for full and part time drivers who are employees of WTS.” Id. The SBA reached these determinations after reviewing a cost breakdown provided by WTS to the SBA. Id. at 2-3, 6. The intervenor argues that, because the SBA

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Failure to Forward Size Protest to the SBA

EMT contends that the agency violated FAR § 19.302(c)(1) when it failed to forward EMT's agency-level protest to the SBA.¹³ Protest at 6-7; Comments at 5-7. EMT further contends that judgments regarding the timeliness and sufficiency of a size protest submitted to the contracting officer are matters reserved for the SBA. Comments at 5-6 (citing Eagle Mktg. Grp., B-242527, May 13, 1991, 91-1 CPD ¶ 459; Consol. Constr., Inc., B-219107.2, Nov. 7, 1985, 85-2 CPD ¶ 529).

In response, the agency argues that it was not clear from EMT's agency-level protest that EMT was raising a challenge to WTS's small business representation. Legal Memorandum at 2. Accordingly, the VA contends that the requirement to forward the protest to the SBA was not triggered. Id. In any event, the VA argues that, in light of the fact that it subsequently forwarded EMT's protest to the SBA during the pendency of the GAO protest, this protest ground has been rendered "moot." Id.

We concur that this ground has been rendered academic by the VA's subsequent action. In its protest, EMT requested that our Office require the VA to refer the matter to the SBA. Protest at 7. The VA granted the relief EMT requested, which renders the protest academic.¹⁴ We do not consider academic protests because to

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has conclusively refuted the protester's contentions, our Office must dismiss the protest. Intervenor's Req. for Dismissal, Arp. 6, 2016. We disagree. The intervenor conflates the SBA's determinations with respect to size and responsibility with our Office's determinations with respect to proposal acceptability. The SBA's size determination does not impact or alter the matter pending before our Office, i.e., whether WTS's proposal, on its face, demonstrated that the awardee had not agreed to comply with a material term of the solicitation. TYBRIN Corp., supra, at 6.

¹³ Upon receipt of a protest of a small business representation of an offeror, FAR § 19.302(c)(1) requires the contracting officer to forward the protest, whether timely or not, to the SBA office servicing the offeror.

¹⁴ In its comments, EMT argues for the first time that, in addition to the VA's failure to forward EMT's size protest to the SBA, the VA also erred in not initiating its own size protest with the SBA. Comments at 6. As a consequence, EMT requests additional relief in the form of a recommendation from our Office that the VA "join the SBA's ongoing size protest." Id. at 7. This protest ground was untimely raised as it was not filed within 10 days of when the protester knew or should have known of this basis for protest. 4 C.F.R. § 21.2(a)(2). In any event, this ground is now moot as a result of the SBA's subsequent size determination.

do so would serve no useful public policy purpose. Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132. Accordingly, this protest ground is dismissed.

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel