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# Decision

**Matter of:** Veterans Choice Medical Equipment, LLC

**File:** B-415583

**Date:** December 12, 2017

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David F. Dowd, Esq., Mayer Brown LLP, for the protester.  
Barton Evans, Esq., Department of Veterans Affairs, for the agency.  
Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. Protest challenging an ambiguity in a solicitation concerning the evaluation of option pricing is dismissed where the agency has taken corrective action which renders the protest academic.
  2. Protest challenging the inclusion in a solicitation of an unbalanced pricing clause is dismissed where the protester does not demonstrate that its inclusion violates any procurement laws or regulations.
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## DECISION

Veterans Choice Medical Equipment, LLC (VCME), a service-disabled veteran-owned small business (SDVOSB), of Vista, California, protests the terms of request for proposals (RFP) No. VA256-17-R-0994, which was issued by the Department of Veterans Affairs (VA) for home oxygen services. The protester contends that the terms of the solicitation are ambiguous with regard to the evaluation of options and that the RFP does not contain adequate information concerning the agency's intended evaluation of unbalanced pricing.

We dismiss the protest.

## BACKGROUND

The VA issued the solicitation on September 22, 2017, under the commercial item provisions of Federal Acquisition Regulation (FAR) part 12. RFP at 74. The RFP is set aside for SDVOSB firms and seeks proposals to provide home oxygen services to various VA medical centers in Veterans Integrated Service Network 16, which includes

Arkansas, Louisiana, Mississippi, and Texas. Id. at 8. The RFP states that the contractor will be required to provide services to an estimated 7,602 veteran beneficiaries per month and 91,224 beneficiaries a year. Id. The solicitation anticipates the award of multiple contracts with a base period of 2 years and one 3-year option. Id. at 32. The RFP advised that proposals will be evaluated on the basis of price and the following three non-price factors: (1) technical capability, (2) key personnel, and (3) past performance. Id. at 74. For purposes of award, the non-price factors, when combined, will be “significantly more important than price.” Id.

VCME filed this protest on October 18, prior to the November 8 closing time for the solicitation. On November 2, the VA filed a request that our Office dismiss the protest. Our Office provided VCME an opportunity to respond to the request for dismissal, which the protester filed on November 7.

## DISCUSSION

VCME raises two primary arguments: (1) the solicitation is ambiguous as to how the agency will evaluate prices for the 3-year option, and (2) the solicitation lacks adequate information concerning how the agency will evaluate unbalanced pricing. For the reasons discussed below, we conclude that the VA has taken corrective action with regard to the first issue, which rendered it academic, and that VCME’s second argument fails to state a valid basis of protest.

### Option Pricing

VCME argues that the RFP is ambiguous as to how the agency will evaluate offerors’ prices for the 3-year option for purposes of making award. The RFP includes FAR provision 52.212-2, Evaluation-Commercial Items, which states that the agency will evaluate offerors’ proposed prices for the option period as follows:

(b) Options. The Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. The Government may determine that an offer is unacceptable if the option prices are significantly unbalanced. Evaluation of options shall not obligate the Government to exercise the option(s).

RFP § E.9 at 74.

The RFP, however, also states that the agency may elect not to evaluate option pricing, as follows:

Except when it is determined not to be in the Government’s best interest, the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. The Government may determine that an offer is unacceptable if the option

prices are materially unbalanced. Evaluation of options shall not obligate the Government to exercise the option(s).

Id.

The VA advised our Office on November 2 that it would take corrective action in response to this protest argument. Specifically, the agency explained that it will issue a solicitation amendment that will remove the second RFP provision cited above, which states that options will be evaluated “[e]xcept when it is determined not to be in the Government’s best interest.” Agency Request for Dismissal, Nov. 2, 2017, at 3-4. The agency further advised that offerors will be allowed to submit revised proposals in response to the amendment. Email from VA to GAO, Nov. 14, 2017.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. Pacific Photocopy & Research Servs., B-278698, B-278698.3, Mar. 4, 1998, 98-1 CPD ¶ 69 at 4. We conclude that the VA’s decision to amend the solicitation to clarify how it will evaluate offerors’ prices, and to allow offerors to submit revised proposals, effectively grants the relief requested and therefore renders the protest academic. See Dyna-Air Eng’g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132. We therefore dismiss this protest argument.

#### Unbalanced Pricing

Next, VCME argues that the solicitation does not provide adequate information as to how the VA will evaluate whether offerors’ proposed prices are unbalanced. The protester argues that the RFP’s provision regarding unbalanced pricing is unduly restrictive of competition in the context of the nature of the work and the SDVOSB set-aside.

Our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

The RFP states that the agency will evaluate offerors’ proposed prices as follows: “The Government may determine that an offer is unacceptable if the option prices are significantly unbalanced.” RFP at 74. With respect to unbalanced pricing generally, contracting officers must analyze offers with separately-priced line items, including options, to detect unbalancing. FAR § 15.404-1(g)(2). Where unbalancing is detected, the contracting officer must consider the risk posed, including the risk of paying an unreasonable price, and must consider whether to reject the offer if the risk is

unreasonable. Id. § 15.404-1(g)(2)-(3). While both understated and overstated prices are relevant to the question of whether unbalanced pricing exists, the primary risk to be assessed in an unbalanced pricing context is the risk posed by overstatement of prices because low prices (even below-cost prices) are not improper and do not themselves establish (or create the risk inherent in) unbalanced pricing. Crown Point Sys., B-413940, B-413940.2, Jan. 11, 2017, 2017 CPD ¶ 19 at 5.

As our Office has explained, the current version of FAR § 15.404-1(g), postdating the 1997 FAR part 15 rewrite, does not provide for rejection of unbalanced offers where acceptance would be tantamount to an advance payment, and instead requires the agency to perform a risk analysis. See FAR; Part 15 Rewrite; Contracting by Negotiation & Competitive Range Determination, 62 Fed. Reg. 51224, 51225 (Sept. 30, 1997); Ultimate Concrete, L.L.C., B-412255, B-412255.2, Jan. 13, 2016, 2016 CPD ¶ 20 at 14. Thus, an offer may not automatically be rejected merely because it presents some risk of an advance payment; rather, the government must conduct a reasonable assessment of the potential risks.

VCME argues that the RFP does not explain how the agency will evaluate whether proposed option prices are unbalanced, i.e., what degree of unbalancing between the base and option price will be considered unacceptable. The protester states that the lack of specific guidance from the agency as to this matter is prejudicial to SDVOSB firms because the scope of work set forth in the solicitation will require the successful contractor to provide oxygen services to thousands of beneficiaries over a large geographical area. Protest at 9. The protester contends that the need for firms to capture costs of capital equipment in the base period should not be viewed as unbalanced pricing, and that the agency should therefore advise offerors as to whether it shares this view. See id.

The VA has argued, and we agree, that the RFP's provision concerning unbalanced pricing does not violate any procurement law or regulation. See 31 U.S.C. § 3552(a); Cybermedia Techs., Inc., B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2 (GAO reviews alleged violations of procurement laws and regulations to ensure that the statutory requirements for full and open competition are met). In this regard, the solicitation was issued under the authority of FAR part 12, which expressly authorizes the agency to incorporate solicitation provisions that provide for the evaluation of unbalanced pricing. FAR § 12.301(c); FAR provision 52.212-2(b).

Additionally, we agree with the VA that it is not required to provide any additional information to offerors concerning how the agency will evaluate unbalanced pricing. As a general rule, agencies must provide sufficient detail in a solicitation to enable offerors to compete intelligently and on an equal basis. Glenn Def. Marine-Asia PTE, Ltd. B-402687.4, B-402687.5, Nov. 19, 2010, 2010 CPD ¶ 277 at 5. There is no requirement, however, that an agency eliminate all risk from a solicitation; to the contrary, an agency may provide for a competition that imposes maximum risks on the contractor and minimum burdens on the agency. JRS Mgmt., B-402650.2, June 25, 2010, 2010 CPD ¶ 147 at 5.

Here, although VCME argues that it, along with other SDVOSBs, may face challenges in pricing their proposals with regard to up-front capital costs, the protester does not demonstrate that the inclusion of the clause is prohibited by any procurement law or regulation or that the agency is otherwise obligated to disclose additional information. We therefore conclude that the protest fails to set forth a valid basis.

The protest is dismissed.

Thomas H. Armstrong  
General Counsel