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## Decision

**Matter of:** Blackhawk Medical Transportation, Inc. d/b/a Vandenberg Ambulance

**File:** B-419465.2; B-419465.3

**Date:** May 3, 2021

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Joseph G. Martinez, Esq., Eric P. Roberson, Esq., and Lisette S. Washington, Esq., Dentons US LLP, for the protester.

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Steven Devine, Esq., and Brian R. Reed, Esq., Department of Veterans Affairs, for the agency.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest that agency misevaluated awardee's proposal as technically acceptable is denied where the record shows the evaluation was reasonable and consistent with the solicitation evaluation criteria.
  2. Protest that agency improperly determined awardee's price was reasonable is denied where the record shows the contracting officer's judgment was reasonable and well documented.
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### DECISION

Blackhawk Medical Transportation, Inc., doing business as Vandenberg Ambulance, of Tinley Park, Illinois, protests the award of a contract to Freedom-Elite Joint Venture, of Shorewood, Illinois, a small business,<sup>1</sup> under request for proposals (RFP) No. 36C25221R0003, issued by the Department of Veterans Affairs (VA) for commercial non-emergency ambulance services for specific VA facilities in the Chicago, Illinois

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<sup>1</sup> The parties note that an issue regarding Freedom-Elite's small business status has been challenged in a protest pending before the Small Business Administration. Our description of the firm as a small business reflects its representation of its status in this procurement.

area. Blackhawk argues that the VA misevaluated Freedom-Elite's proposal as acceptable and awarded the contract at an unreasonable price.

We deny the protest.

## BACKGROUND

The RFP, issued November 17, 2020, sought proposals to provide non-emergency transportation and transport-of-deceased services, all on an as-needed basis, under a fixed-price, indefinite quantity contract for a 9-month base ordering period, four 1-year options, and a final 3-month option. Agency Report (AR), RFP at 7-16, 68.

The RFP described evaluation and contract award as being a lowest-priced technically acceptable process performed under a tiered set-aside beginning with service-disabled veteran-owned small businesses (SDVOSB).<sup>2</sup> The RFP explained that the VA would begin the evaluation with proposals submitted by SDVOSB firms (tier 1). If no award was made to an SDVOSB firm, the agency would proceed to evaluate proposals from veteran-owned small businesses (tier 2), and if no award was made at tier 2, proceed to consider proposals from small businesses (tier 3), and finally if no award had been made, consider offers on an unrestricted basis (tier 4). RFP at 4, 61. The acceptability of proposals would be assessed under a single technical capability factor, which consisted of three subfactors: company experience, management plan, and quality control plan. RFP at 68.

The performance work statement (PWS) described the requirement for ambulance services at the Jesse Brown VA Medical Center in Chicago, associated community-based outpatient clinics in Chicago, and Chicago Heights, Illinois, and at nearby locations in Indiana and at Chicago airports. The PWS required the contractor's services to be performed in accordance with all federal, state, and local regulations. RFP, PWS § 4.1.1. Additionally, the ambulance vehicles were required to meet all applicable federal, state and local regulations and specifications, including licensing, registration, and safety standards. RFP, PWS § 4.4.1.

Under the price factor, the RFP provided for the agency to calculate a total evaluated price (TEP) by multiplying the proposed prices for particular services by estimated quantities. The agency would assess the reasonableness of each offeror's price, and would analyze prices for unbalancing. RFP at 69. To assess price reasonableness, the agency would compare an offeror's prices to historical prices for similar efforts, to an independent government estimate (IGE), or to prices in competing proposals. *Id.* In amendment 5 to the solicitation, the agency clarified that any comparison to other offerors' prices would not utilize prices from offerors at lower tiers. AR, Tab 7, RFP amend. 5 at 1-2. The price reasonableness assessment would be based on whether an

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<sup>2</sup> In other circumstances, the tiered set-aside procedure also has been referred to as a cascading set-aside. *E.g.*, *Utech Prods.*, B-418060, Dec. 20, 2019, 2019 CPD ¶ 430 at 2 (solicitation utilized "a tiered, or 'cascading,' evaluation approach").

offeror's price would be paid by a prudent person in a competitive business environment. RFP at 69.

The VA received four proposals. Freedom-Elite's proposal was the only one in tier 1, none were in tier 2, one was in tier 3 (identified below as Offeror A), and two were in the unrestricted tier 4, including the proposal from Blackhawk. Memorandum of Law (MOL) at 4. The VA evaluated Freedom-Elite's proposal as technically acceptable and opened discussions both to clarify technical issues and to address the firm's proposed pricing. *Id.* Following discussions, Freedom-Elite submitted a final proposal revision, which the VA again evaluated as technically acceptable with complete and reasonable pricing, at a TEP of \$9.7 million. The contracting officer concluded that the firm was responsible and awarded the firm the contract. This protest followed.

## DISCUSSION

Blackhawk argues that the VA should have rejected Freedom-Elite's proposal as technically unacceptable and unreasonably priced. We deny the protester's allegations but first consider threshold issues regarding Blackhawk's interested party status, and the timeliness and sufficiency of Blackhawk's supplemental protest.

### Interested Party

The VA argues that Blackhawk is not an interested party to bring this protest. The agency contends that a firm that identified itself as a small business (Offeror A) submitted a proposal at tier 3 in the evaluation process--a higher tier than Blackhawk's proposal in the unrestricted tier (tier 4). As such, Offeror A's proposal would have been considered for award before the agency considered Blackhawk's proposal. The VA argues that Blackhawk's protest, even if successful, would not displace Offeror A's position in line for award ahead of Blackhawk, and consequently the protester is not an interested party. Agency's Request for Dismissal at 5 (citing *Bluewater Mgmt. Grp., LLC*, B-418831, Sept. 2, 2020, 2020 CPD ¶ 280 at 4-5).

Blackhawk contends that it is an interested party because the VA conducted no evaluation of any proposals other than Freedom-Elite's. As a result, Blackhawk argues that the VA cannot make a factual claim that Offeror A was in line for award, or even that Offeror A's proposal was minimally acceptable. Under such circumstances, Blackhawk contends, a protester is considered an interested party because where an agency "did not evaluate the intervening vendors' quotes, [GAO will] conclude that the protester is an interested party." Protester's Opposition to Dismissal at 2 (quoting *Alamo City Eng'g Servs., Inc.*, B-409072, B-409072.2, Jan. 16, 2014, 2014 CPD ¶ 32 at 3 n.1).

Under the bid protest provisions of the Competition in Contracting Act, 31 U.S.C. §§ 3551-3557, only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a)(1). Determining whether a party is

interested involves consideration of a variety of factors, including the nature of issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. *RELM Wireless Corp.*, B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2. Here, the existence of a proposal at a tier with priority over the protester's tier, by itself, does not provide a basis to conclude that the protester is not an interested party. The agency essentially asks us to assume that Offeror A's proposal was technically acceptable and reasonably priced, despite the lack of any evidence in the record to support such a conclusion. We will not make that assumption, and deny the request for dismissal.

### Supplemental Protest

After Blackhawk's counsel reviewed the agency report in this matter, the firm filed a supplemental protest arguing that the VA failed to properly document a basis for setting aside the RFP for SDVOSBs. Blackhawk contends that the record accompanying the agency report did not contain market research demonstrating that the VA expected to receive proposals from two or more SDVOSB firms at reasonable prices, and thus the VA's set-aside approach was improper.

In response to an inquiry from our Office about the factual basis and timeliness of this new ground of protest, Blackhawk argued that it "had no basis to question the agency's decision to set aside the procurement" until it received the agency report. Protester's Response Regarding Supplemental Protest at 2. Blackhawk notes that it was aware of potential SDVOSB competitors, and argues that only after receiving the agency report did it learn facts that allegedly showed the VA improperly set aside the award for SDVOSBs. In Blackhawk's view, the evaluation record showed that the VA had no reasonable expectation of receiving at least two proposals from SDVOSBs, or of being able to award an SDVOSB a contract at a fair and reasonable price. *Id.* at 1. Despite our Office's request for Blackhawk to clarify the factual basis for those allegations, it did not identify any information in the agency report that provided a basis for the new grounds of protest; instead, Blackhawk argues that it was the alleged absence of adequate market research in the agency report that provided a basis to allege that the RFP was improper.

Blackhawk's supplemental protest is untimely because it is in essence a challenge to the terms of the solicitation. In addition, the firm has not shown a sufficient factual basis to justify the allegations or timeliness on which the supplemental protest is based. Blackhawk contends that as of the time proposals were due, it had no reason to contend that the terms of the RFP were improper; indeed, the protester acknowledges that the VA could have received proposals from two firms purporting to be SDVOSBs. On these facts, we cannot see how Blackhawk can show that, at the time the RFP was

issued, the VA could not reasonably expect to receive proposals from two or more capable SDVOSBs or make award at a reasonable price.<sup>3</sup>

Even if there were a basis to support the contention that the RFP was improperly set aside, Blackhawk has not identified facts sufficient to support the basis or timeliness of this supplemental protest allegation. Specifically, the protester does not identify essential facts that could only have been learned within the 10 days before it filed its supplemental protest. Instead, Blackhawk merely contends that the record accompanying the agency report fails to show that the set-aside was proper. This argument overlooks the fact that the VA was not required to document the basis for the structure of the RFP in the agency report because the issue was irrelevant to Blackhawk's initial protest. The fact that the VA did not produce support for the terms of the RFP in the agency report--where such documentation was immaterial to the issues in the protest--cannot provide a timely basis for the protester to argue that the structure of the RFP is defective. In sum, since Blackhawk concedes that the solicitation as issued does not support a contention that the solicitation was improperly set aside and the firm has not identified facts sufficient to support this contention, we dismiss the supplemental protest. 4 C.F.R. § 21.2(a)(1).

#### Technical Evaluation of Freedom-Elite's Proposal

Blackhawk argues that the VA should have evaluated Freedom-Elite's proposal as unacceptable because it allegedly lacks resources and capabilities. Specifically, the protester contends that Freedom-Elite has no operations in Chicago, and lacks the licenses required to perform the advanced life support and critical care ambulance transport services anywhere in Illinois. Protest at 8.

The VA argues that Blackhawk's arguments are insufficient to overturn its evaluation judgment. The agency notes that the RFP expressly instructed offerors to provide information about qualifications and licensing for personnel, but did not request information about licensing of vehicles. The VA also argues that even though one joint venture member of Freedom-Elite did not have licensed vehicles when proposals were submitted, this did not provide a basis to find the Freedom-Elite proposal technically unacceptable. MOL at 7-8.

The evaluation of an offeror's proposal is a matter largely within the agency's discretion. *RADeCO, Inc.*, B-410632, Dec. 15, 2014, 2014 CPD ¶ 374 at 4. In reviewing a protest that challenges an agency's evaluation of proposals, our Office will not reevaluate proposals; rather, we will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and

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<sup>3</sup> Although Blackhawk argues that the VA also should have expected that the prices submitted by SDVOSBs would be unreasonable, the protester presents no meaningful factual support for that claim that would justify our Office considering that point separately from the challenge to the reasonableness of Freedom-Elite's pricing.

applicable statutes and regulations. *Id.* The record here provides a reasonable basis for the VA's technical evaluation of Freedom-Elite's proposal.

The RFP provided for a "ramp-up period" in the initial weeks of the contract during which the contractor would gradually receive more transport orders until reaching the full order level. RFP at 5. As a result, it was not necessary for offerors to demonstrate that they had the capability to perform all aspects of the RFP at the time of proposal submission. Further, the database listing submitted by Blackhawk shows that one of the two members of Freedom-Elite already has multiple licensed ambulances in Chicago. Protest, attach. 6 at 1-6 (table showing ambulance license entries for the firm); see *also* Comments & Supp. Protest at 2. Blackhawk provides no basis to conclude that Freedom-Elite would be unable to use those vehicles to meet at least the initial ramp-up in transport orders, and thus, able to perform consistent with the RFP.

Beyond determining that Freedom-Elite proposed an acceptable approach under the RFP criteria, the awardee's ability to obtain licenses for any additional ambulances needed later during the term of the contract is a matter of contract administration, which our Office does not review. 4 C.F.R. § 21.5(a). Blackhawk has not provided a sufficient basis for our Office to overturn the evaluation judgment that Freedom-Elite's proposed technical approach was acceptable.<sup>4</sup> Accordingly, we deny Blackhawk's challenges to the technical evaluation.<sup>5</sup>

#### Price Reasonableness

Finally, Blackhawk argues that the VA improperly failed to consider the agency's own IGE, or prices offered by other competitors (particularly Blackhawk's own price), and as a result lacked a factual basis to determine that Freedom-Elite's TEP was reasonable. The VA responds that it properly assessed price reasonableness, and contends that the RFP expressly informed competitors that prices from offerors at lower tiers, such as Blackhawk, would not be used in assessing price reasonableness of proposals from offerors in higher tiers. The agency argues that the record documents a reasonable assessment of whether Freedom-Elite's prices were too high, and that Blackhawk has not shown that the contracting officer's judgment was unreasonable.

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<sup>4</sup> The VA submitted a screen shot of the same database Blackhawk relied on to challenge Freedom-Elite's ability to supply licensed ambulances. The screenshot appears to show that the other member of the joint venture now has its own ambulances that have been licensed to operate in Chicago. MOL at 9.

<sup>5</sup> Although Blackhawk also contends that Freedom-Elite does not hold local licenses for stretcher transports as the RFP requires, Protest at 7, 9, the VA explains that using ambulances to perform those requirements was a permissible approach that the awardee proposed. MOL at 11. The agency notes that Blackhawk itself indicates that it also proposed to use ambulances when stretcher transport services were required. *Id.*

A price reasonableness determination is a matter of administrative discretion involving the exercise of business judgment by the contracting officer that our Office will only question where it is shown to be unreasonable. *TCG, Inc.*, B-417610, B-417610.2, Sept. 3, 2019, 2019 CPD ¶ 312 at 7. The depth of an agency's price analysis is a matter within the sound exercise of the agency's discretion. *Id.*

The record demonstrates that the contracting officer exercised reasonable judgment in assessing Freedom-Elite's prices. In a pre-negotiation memorandum, the contracting officer addressed the fact that the TEP in the firm's initial proposal was 19 percent higher than the IGE. AR, Tab 8, Pre-Negotiation Memorandum at 7. The contracting officer compared rates for similar services from contracts at three other VA facilities in the geographic area in order to confirm that the unit prices offered by Freedom-Elite were within expected ranges for rates charged on contracts at other nearby VA facilities.<sup>6</sup> AR, Tab 8, Pre-Negotiation Memorandum at 7; *accord.* COS at 9-10. Finally, the contracting officer noted that Freedom-Elite's prices were lower for some services than the agency was paying under a contract with another small business for services at a VA facility in North Chicago. AR, Tab 8, Pre-Negotiation Memorandum at 7; MOL at 14. Based on that assessment, the contracting officer assessed Freedom-Elite's prices to be reasonable, but decided that discussions should be held with an objective of negotiating lower prices. *Id.*

Following discussions, the contracting officer documented an additional assessment of price reasonableness in the source selection decision document (SSDD). The SSDD noted that Freedom-Elite provided lower prices in its final proposal revision, but its TEP remained 1.3 percent above the contracting officer's negotiation objective. AR, Tab 9, SSDD at 5. The contracting officer reiterated the evidence considered in assessing price reasonableness and determined that Freedom-Elite's final prices were reasonable.

As described above, the contemporaneous record shows that the contracting officer made a detailed analysis of historical prices for similar services at VA facilities in the geographic area. The contracting officer also made reasonable efforts to assess stretcher van pricing when comparable pricing was not available. Those efforts showed that while Freedom-Elite's final prices exceeded the agency's IGE, they were comparable to historical prices, and in line with those being paid by the VA for services in North Chicago. The fact that an awardee's prices may exceed the government estimate does not compel the conclusion that the prices are unreasonable. *See, e.g.,*

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<sup>6</sup> The contracting officer notes that pricing for stretcher van service in the geographic area under other VA contracts was not available for comparison. The IGE had used Medicaid reimbursement rates for this price element, but the contracting officer explained that Medicaid rates were significantly lower than the agency expected to incur for contract services. AR, Tab 8, Pre-Negotiation Memorandum at 6. As a result, the contracting officer analyzed other non-ambulance transportation rates, as well as stretcher transportation rates listed online for firms elsewhere in the United States, and found that Freedom-Elite's pricing for stretcher van services was consistent with those rates. *Id.*; AR, Tab 1, Contracting Officer's Statement (COS) at 9-10.

*First Choice, LLC, B-417196 et al.*, Mar. 25, 2019, 2019 CPD ¶ 158 at 13. The record demonstrates that the contracting officer exercised reasonable business judgment and documented the basis for the conclusion that Freedom-Elite's final prices were reasonable.

The protest is denied.

Thomas H. Armstrong  
General Counsel