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Decision

Matter of: VetPride Services, Inc.

File: B-419622; B-419622.2

Date: June 7, 2021

Sarah Schauerte Reida, Esq., Legal Meets Practical, LLC, for the protester.
Daniel McFeely, Esq., Department of Veterans Affairs, for the agency.
Kasia Dourney, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that the awardee's proposal could not have complied with the technical requirements of the solicitation, given its low price, is dismissed where, in essence, the protester contends that the agency should have performed a price realism evaluation that was neither provided for nor permitted under the solicitation.
 2. Protest alleging that the agency improperly defined its requirement, resulting in a latently ambiguous solicitation, is denied where the record shows that the terms of the solicitation are not ambiguous and the solicitation provides sufficient information to allow offerors to intelligently prepare their proposals on a common basis.
 3. Protester is not an interested party to challenge other aspects of the agency's award decision where its proposal was found unacceptable and excluded from further consideration, based on its proposed price exceeding the available funding limit for the procurement, and where there is no basis to conclude that the agency's evaluation of the awardee's proposal was unreasonable or the agency improperly defined the requirement.
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DECISION

VetPride Services, Inc., a service-disabled veteran-owned small business (SDVOSB) of Raleigh, North Carolina, protests the award of a contract to Marquis Solutions, LLC, an SDVOSB of Westfield, Indiana, under request for proposals (RFP) No. 36C26221R0012, issued by the Department of Veterans Affairs (VA) for valet parking services at the VA Medical Center in Long Beach, California. The protester challenges the agency's evaluation of the awardee's proposal, and contends that the agency improperly defined the requirement.

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

BACKGROUND

On December 1, 2020, the VA posted the RFP on the System for Award Management website as a set-aside for SDVOSBs.¹ Agency Report (AR), Exh. 2, RFP at 6; AR, Exh. 1, Contracting Officer's Statement (COS) at 3. The procurement was conducted under the commercial item acquisition and simplified acquisition procedures of Federal Acquisition Regulation (FAR) parts 12 and 13. RFP at 47.

The solicitation contemplated the award of a fixed-price contract on a best-value tradeoff basis, considering the following factors, listed in descending order of importance: experience, past performance, and price. *Id.* With respect to price, the RFP provided that proposals would be evaluated for the reasonableness of the proposed prices. *Id.* The solicitation instructed that when combined, the experience and past performance factors were significantly more important than price. *Id.*

As relevant to this protest, the agency was initially informed by the requiring activity that the funding available for the base period of performance for this procurement was \$428,071.32. COS at 3. After a follow-up inquiry by the contracting officer, the requiring activity confirmed that no additional funds could be made available. *Id.*

The VA received five proposals in response to the solicitation, including those from VetPride and Marquis. COS at 3. During the evaluation of proposals, the evaluation panel concluded that four of the five proposals, including the one submitted by VetPride, offered prices for the base year that substantially exceeded the agency's available funding. AR, Exh. 4, Source Selection Decision (SSD) at 78. Accordingly, since the requiring activity confirmed that no additional funds would be made available for the requirement, the contracting officer found those four proposals unacceptable and excluded them from further consideration. *Id.* Marquis was the only offeror whose proposed price was below the available funding limit. *Id.*

The technical evaluation panel evaluated Marquis's proposal, and found its experience and past performance "satisfactory." *Id.* at 80, 83. Subsequently, with respect to price, the contracting officer compared Marquis's total proposed price of \$1,930,329 with the independent government cost estimate (IGCE) of \$2,227,700, and concluded that Marquis's price was reasonable. *Id.* at 80. The contracting officer also noted that Marquis's proposed price for each contract line item was more than 10 percent lower than the IGCE and thus, "could be considered to be significantly understated and therefore, 'unbalanced,' as . . . defined [in] FAR [section] 15.404-1(g)(2)." *Id.* The contracting officer concluded, however, that there was no unacceptable risk the government would have to pay unreasonably high prices because the "risk and responsibility for contract costs" for this fixed-priced contract "lies entirely with Marquis Solutions." *Id.*

¹ The RFP was amended once, to include answers to offerors's questions received in response to the solicitation. RFP at 69-71.

The contracting officer, acting as the source selection authority (SSA), adopted the findings of the technical evaluation panel. *Id.* at 79. The SSA also determined that Marquis represented the best value to the government and awarded the contract to that firm. *Id.* at 81; COS at 3. On February 17, 2021, the agency provided VetPride with a brief explanation of the basis of award pursuant to FAR section 13.106-3(d). This protest followed.

DISCUSSION

VetPride first challenges several aspects of the agency's evaluation of the awardee's technical and price proposals. Protest at 6-7; Comments and Supp. Protest at 5-7. Next, the protester contends that the agency improperly defined its needs by failing to reasonably adjust the requirement due to the changed circumstances resulting from the COVID-19 pandemic.² Protest at 7-8. In addition, the protester asserts that the agency misled offerors by providing incorrect specifications and estimated quantities, arguing that this resulted in a latent ambiguity in the RFP.³ Comments and Supp. Protest at 7-9.

For the reasons discussed below, we find no basis upon which to sustain the protest.⁴ First, we conclude that the agency reasonably evaluated the awardee's proposal and properly found it eligible for award. Second, we find the agency's definition of its

² COVID-19 is the most recent outbreak of coronavirus, a virus that can spread rapidly and cause outbreaks with high mortality rates. Science & Tech. Spotlight: Coronaviruses, GAO-20-472SP at 1 (Mar. 2020).

³ Initially, VetPride also alleged that the VA's "summary rejection" of its proposal for exceeding the available funding for the requirement amounts to an unstated evaluation criteria; later, however, VetPride withdrew this protest ground. Resp. to Agency Req. for Summary Dismissal at 4.

⁴ In its various protest submissions, VetPride raises arguments that are in addition to, or variations of, those specifically discussed below. While we do not specifically address all of VetPride's arguments, we have considered them all and find no basis to sustain the protest. For example, VetPride alleges that the VA violated the Competition in Contracting Act by failing to secure sufficient funding for the requirement and establishing a "cut off" threshold amount that resulted in the summary rejection of several proposals. Protest at 5. We see no merit in VetPride's argument here. Decisions on how an agency chooses to spend its appropriation and budget its priorities are determinations left to the agency's discretion. See, e.g., *OMNIPLEX World Services Corp.--Recon. and Protest*, B-278105.2, B-278105.3, Nov. 13, 1997, 97-2 CPD ¶ 147 at 2-3 (denying request for reconsideration of dismissal where protester's proposed and evaluated costs exceeded the available funding for the project); *Charles Trimble Co.*, B-250570, Jan. 28, 1993, 93-1 CPD ¶ 77 at 2-3 (denying challenge to award where protester submitted proposal in excess of agency's available funding). Consequently, we reject the protester's contentions.

requirements unobjectionable and that the protester has failed to establish that the solicitation contained a latent ambiguity. Finally, we conclude that, under the circumstances presented here, the protester is not an interested party to challenge any other aspects of the agency's award decision because its proposal was properly found unacceptable and excluded from further consideration for offering a price that exceeded the available funding limit.

Evaluation of the Awardee's Proposal

VetPride, an incumbent on the current contract for valet services at VA Medical Center in Long Beach, initially argued the awardee's price is too low to enable it to perform the contract. Protest at 6-7. In its comments on the agency report, VetPride failed to address the VA's response to its initial allegation, and instead, raises a new protest ground--styled as a "revised ground"--asserting that Marquis's proposal, on its face, failed to comply with the technical requirements of the RFP because it proposed insufficient staffing. Comments and Supp. Protest at 5-6. Additionally, the protester contends that Marquis improperly proposed unbalancing pricing. *Id.* at 7.

In response, the agency asked our Office to dismiss the original protest ground alleging that the awardee's proposed price is too low to perform the work required by the RFP on the basis that VetPride abandoned its argument by failing to address, refute, or otherwise rebut the VA's response included in the agency report. Supp. Memorandum of Law (MOL) at 4. Regarding VetPride's revised protest argument, asserting that Marquis failed to propose sufficient staffing required by the solicitation, the VA maintains that the protest ground should be dismissed because VetPride fails to state a valid basis of protest; evaluation of offerors' staffing plans was not part of the source selection process for this procurement. *Id.* at 5-7.

As an initial matter, we agree with the agency that VetPride's comments on the agency report provide no substantive response to the agency's arguments answering the protester's original allegation that Marquis's proposed price was too low to perform the work required by the solicitation. In this regard, where an agency provides a detailed response to a protester's assertions and the protester fails to rebut or otherwise substantively address the agency's arguments in its comments, the protester provides us with no basis to conclude that the agency's position is unreasonable or improper. *Atmospheric Research Sys., Inc.*, B-240187, Oct. 26, 1990, 90-2 CPD ¶ 338 at 3; see also *Israel Aircraft Indus., Ltd.--TAMAM Div.*, B-297691, Mar. 13, 2006, 2006 CPD ¶ 62 at 6-7 (finding that where the protester either does not respond to the agency's position, or provides a response that merely references or restates the original allegation without substantively rebutting the agency's position, the originally raised allegation should be deemed abandoned). Therefore, we dismiss the protester's initial protest contention as abandoned.

Even if we did not consider this initial protest ground abandoned, we would dismiss it for failure to state a valid basis of protest. The solicitation here did not require the agency's evaluation of the realism of the proposed prices. Our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds for protest,

and that the stated grounds be legally sufficient. 4 C.F.R. §§ 21.1(c)(4), (f). 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.

Here, VetPride's initial challenge to the agency's evaluation of Marquis's proposal was based on the protester's contention that the awardee's price was too low to perform. In the protester's view, the awardee's low price suggests that the agency "unreasonably determined that Marquis's proposal met its needs" because "there is no possibility that Marquis's proposal complied with the technical requirements" of the solicitation. Protest at 6-7. Although VetPride's initial argument was styled as a challenge to the technical acceptability of Marquis's proposal, it essentially amounted to an allegation that the agency failed to conduct an appropriate price realism analysis. See *PricewaterhouseCoopers Public Sector LLP*, B-415129.3, July 31, 2018, 2018 CPD ¶ 272 at 3 (argument that agency should have found awardee's price too low to perform its technical approach is essentially a price realism argument); see also *NJVC, LLC*, B-410035, B-410035.2, Oct. 15, 2014, 2014 CPD ¶ 307 at 8 (allegation that the agency failed to consider the awardee's low price as part of the agency's technical analysis is an allegation that the agency failed to conduct a price realism analysis).⁵

However, absent a solicitation provision requiring a price realism analysis, an agency is neither required nor permitted to evaluate price realism in awarding a fixed-price contract. *IBM U.S. Fed., a div. of IBM Corp.; Presidio Networked Solutions, Inc.*, B-409806 *et al.*, Aug. 15, 2014, 2014 CPD ¶ 241 at 17. Therefore, we dismiss, as failing to state a legally sufficient basis of protest, VetPride's protest allegation based on challenges to the awardee's allegedly low price. See 4 C.F.R. §§ 21.1(f), (i).

⁵ To the extent the protester attempts to characterize its argument as a challenge to the affirmative responsibility determination and not a price realism challenge, we note that, as a general matter, our Office does not review affirmative determinations of responsibility by a contracting officer except for specific circumstances not applicable here. 4 C.F.R. § 21.5(c) (identifying exceptions as "protests that allege that definitive responsibility criteria in the solicitation were not met and those that identify evidence raising serious concerns that . . . the contracting officer unreasonably failed to consider available relevant information."); see, e.g., *Southwestern Bell Telephone Co.*, B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 7 (sustaining protest of an affirmative determination of responsibility where the contracting officer had general knowledge through various media outlets of allegations of misconduct by the awardee's parent company but failed to obtain and consider sufficient information about the allegations). VetPride's general allegations regarding "the huge discrepancy in the awardee's price with the current cost to perform the contract" in support of its contention that Marquis could not have demonstrated compliance with the RFP's technical requirements, or that "the current economic climate . . . would prevent an SDVOSB from performing a contract at a loss" do not meet this threshold. Resp. to Req. for Dismissal at 6. Accordingly, we will not consider them further.

With regard to the revised protest ground, alleging that the awardee's proposal failed to comply with the technical requirements of the RFP because it proposed insufficient staffing for the requirement, VetPride also has failed to allege a cognizable basis of protest. Comments and Supp. Protest at 5-6. Specifically, as the agency correctly points out, the solicitation neither prescribed the required staffing levels, nor provided for the agency's evaluation of the proposed staffing plans. Supp. MOL at 4-6.

As noted above, our regulations require that a protest include a detailed statement of the legal and factual grounds for protest, and that the stated grounds be legally sufficient. 4 C.F.R. §§ 21.1(c)(4), (f). Here, although VetPride complains that the agency failed to reasonably evaluate Marquis's technical proposal, including its proposed staffing, the protester does not provide a clear statement as to what the agency did wrong, or how the awardee's proposal violated the terms of the RFP. As such, the protester's allegations are legally insufficient and we dismiss them.

Finally, in its supplemental protest, VetPride also challenges the agency's evaluation of Marquis's proposed pricing, asserting that the pricing was unbalanced, and the agency's analysis of the pricing was inadequate and unreasonable. Comment and Supp. Protest at 7. In this regard, VetPride maintains that because the awardee's price was significantly lower than the price of all other offerors, and more than 10 percent lower than the IGCE, the SSA's conclusion that the proposed price presented no unacceptable risk to the government was unreasonable. *Id.*

With respect to unbalanced pricing, the FAR requires that contracting officers analyze offers with separately-priced line items or subline items to detect unbalancing. FAR 15.404-1(g)(2). Where unbalancing is detected, the contracting officer must then 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. at (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. See *AIS Eng'g, Inc.*, B-410246, B-410246.2, Nov. 21, 2014, 2015 CPD ¶ 5 at 3.

Here, as noted above, the record shows that the contracting officer conducted an unbalanced pricing analysis of the awardee's price proposal as required by the FAR. Specifically, the contracting officer compared Marquis's price to the IGCE, for each of the contract line items, to detect unbalancing. AR, Exh. 4, SSD at 80. After concluding that the proposed price could be considered "unbalanced," she considered the risk of paying an unreasonably high price. *Id.* The contracting officer ultimately concluded that because Marquis bears the "risk and responsibility for contract costs" for this fixed-priced requirement, the risk to the government was not unacceptable. *Id.*

In our view, the agency has satisfied the requirements of the FAR to conduct an unbalanced pricing analysis by reasonably determining that the risk posed to the

government was not significant enough to render Marquis's proposal unacceptable and VetPride has failed to establish that any additional analysis was required here. We will not disturb an agency's assessment of the risk posed by unbalanced pricing when, as here, the agency reasonably considers the relevant circumstances. See, e.g., *Gulf Master Gen. Trading, LLC*, B-407941.2, July 15, 2013, 2013 CPD ¶ 210 at 5.

In sum, we find no merit to the protester's challenges to the evaluation of the awardee's proposal under the technical and price factors.

Defining the Requirement

The protester asserts that the VA improperly defined the requirement by not identifying the impact of the COVID-19 pandemic on the agency's needs.⁶ Protest at 7-8; Comments and Supp. Protest at 6-7. VetPride also contends that the VA misled offerors by providing incorrect specifications, estimated quantities, and expected level of service for the requirement, which resulted in a latent ambiguity in the RFP, and led to the exclusion of four of the five offerors for proposing prices exceeding the available funding limit. Comments and Supp. Protest at 6-7; Supp. Comments at 1.

The agency rejects VetPride's contention that it failed to adjust the requirement due to the pandemic, and contends that the solicitation properly reflects the agency's changed needs. MOL at 19-20. The VA also points to the protester's incumbent status, asserting that VetPride was uniquely qualified to assess the impact of the pandemic on the required level of service. *Id.* at 19. In addition, the agency represents that the solicitation specifically advised that the level of services required might fluctuate over time. MOL at 19-20, citing RFP at 10-11. Finally, the agency maintains that the protester failed to identify any language in the solicitation that created the alleged ambiguity regarding the level of effort required. Supp. MOL at 17.

In assessing a protester's claim that a solicitation is not adequately defined, our Office will review the solicitation to determine whether it provides sufficient information for offerors to compete intelligently and on a relatively equal basis. *Chenega Fed. Sys., LLC*, B-414478, June 26, 2017, 2017 CPD ¶ 196 at 6. In making this determination, our Office has stated that there is no requirement that a solicitation be drafted in such detail as to completely eliminate all risk or remove every uncertainty from the mind of every prospective offeror. *Phoenix Envtl. Design, Inc.*, B-411746, Oct. 14, 2015, 2015 CPD

⁶ As one of the many variations of the protester's argument that the agency failed to properly account for the impact of the pandemic on the requirement, VetPride also alleges that the VA based its estimates on "pre-vaccine requirements," and failed to account for an increased level of traffic in connection with the administration of vaccines at the medical center. Protest at 7-8. The agency maintains, however, that the COVID vaccine clinic is located in a separate section of the medical center campus, with its own designated parking lot, which does not offer valet parking services, and was not included in this requirement. COS at 4. Accordingly, we see no merit in VetPride's arguments in this regard.

¶ 319 at 3. Indeed, it is within the administrative discretion of an agency to offer for competition a proposed contract that imposes maximum risks on the contractor and minimum burdens on the agency. *Fluor Fed. Sols., LLC*, B-414223, Mar. 29, 2017, 2017 CPD ¶ 109 at 5. Risk is inherent in most types of contracts and firms must use their professional expertise and business judgment in anticipating a variety of influences affecting performance costs. *Id.* at 8.

Based on our review of the record, we find no basis to conclude that the agency did not provide sufficient information in the solicitation to permit offerors to compete intelligently and on a relatively equal basis.

First, we reject the protester's argument that the agency failed to consider the impact of the COVID-19 pandemic on the requirement as the record shows that the agency made contemporaneous determinations in this regard. For example, in response to questions received from potential offerors regarding the requirement, the VA provided historical data regarding its daily pre-pandemic needs, and contrasted them with the current level of services required during the pandemic. RFP amend. 1 at 70-71. The VA also estimated that the volume of traffic to the emergency department would increase during the pandemic. *Id.* at 70.

Previously, our Office sustained protests raising similar allegations where agencies failed to contemporaneously consider the impact of changed circumstances on the services procured. See, e.g., *Chronos Sols., LLC, et al.*, B-417870.2, *et al.*, Oct. 1, 2020, 2020 CPD ¶ 306 at 12-15 (sustaining a protest challenging the terms of solicitation where the agency failed to consider significant changes in the law, and other circumstances, due to the COVID-19 pandemic, directly applicable to the program for which it procured services, and where such changes could materially impact the procurement). Unlike in *Chronos Sols.*, the agency here specifically considered the implications of the pandemic on its needs, including adjusting the level of services procured. See RFP amend. 1 at 70-71. On this record, we find no basis upon which to sustain this aspect of VetPride's protest.

Second, we disagree with the protester that offerors were provided "misleading" information regarding the specifications, estimated quantities and the level of service required for this procurement. The RFP specified the services and quantities offerors were to price, and then included additional information, in an amendment to the RFP, regarding historical daily vehicle counts for patients using valet parking services. Our Office has found that firms must use their professional expertise and business judgment in anticipating a variety of influences affecting performance costs. *JRS Mgmt.*, B-402650.2, June 25, 2010, 2010 CPD ¶ 147 at 5. As discussed above, the solicitation's placement of risk upon offerors does not render the solicitation defective. As a result, we fail to see any basis for the protester's contention that offerors will be unable to intelligently submit a proposal containing prices reflecting the agency's needs.

Finally, we conclude that the protester has not established the existence of a latent ambiguity in the solicitation. An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. *Colt Def.*,

LLC, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. A solicitation requirement is only considered ambiguous when it is susceptible to two or more reasonable interpretations, and the mere allegation that a solicitation is ambiguous or restrictive does not make it so. See *DocMagic, Inc.*, B-415702, B-415702.2, Feb. 16, 2018, 2018 CPD ¶ 96 at 3. Here, the protester cannot point to any specific solicitation language that allegedly was ambiguous, and instead, it asserts that “an ambiguity existed with respect to the volume of [f]acility traffic to support.” Supp. Comments at 8. Based upon our review of the record, however, we find no ambiguity in the solicitation’s terms. Thus, because we conclude that the agency properly defined the requirement, and contemporaneously considered the implications of the pandemic on its needs, we deny this protest ground.

Remaining Allegations

Since we find no basis to object to the agency’s evaluation of the awardee’s proposal and find no merit to VetPride’s argument that the protester was prevented from competing intelligently under the solicitation here, we need not address the protester’s remaining challenges to the agency’s award decision as VetPride is not an interested party to raise them.⁷

Under the bid protest provisions of the Competition in Contracting Act of 1984, 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 offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. *OMNIPLEX World Servs. Corp.*, B-278105, Oct. 15, 1997, 97-2 CPD ¶ 145 at 2 (protester lacked requisite economic interest where its proposed price exceeded the funding limitation and other eligible offerors existed); see also *OMNIPLEX World Servs. Corp.--Recon. and Protest, supra* at 2-3 (denying request for reconsideration).

Here, VetPride’s proposal was found unacceptable and excluded from further consideration for proposing a price that exceeded the agency’s available funding. AR, Exh. 4, SSD at 78. Even if we found that VetPride’s remaining allegations had merit, its proposal would still be ineligible for award for exceeding the funding limit for this procurement. As stated above, we have no basis to disagree with the agency’s evaluation of VetPride as ineligible for award, or to disturb the award to Marquis. Accordingly, we dismiss VetPride’s remaining arguments. 4 C.F.R. § 21.0(a)(1); see also *Zodiac-Poettker HBZ JV, LCC*, B-419292, Jan. 15, 2021, 2021 CPD ¶ 54 at 6-7 (concluding that the agency reasonably found the protester’s proposal unawardable for

⁷ VetPride also alleges that the VA failed to conduct a best-value tradeoff analysis. Protest at 5-6.

exceeding the available funding limit and finding that the protester was not an interested party to raise its remaining protest arguments).

The protest is dismissed in part and denied in part.

Thomas H. Armstrong
General Counsel