



441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

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Decision

Matter of: Hometown Veterans Medical, LLC

File: B-422751; B-422751.2

Date: October 11, 2024

William M. Jack, Esq., and Ken M. Kanzawa, Esq., Kelley Drye & Warren LLP, for the protester.

Deborah K. Morrell, 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.

DIGEST

Protest that agency improperly rejected protester's proposal is sustained where the agency conducted an initial cursory review of proposals and rejected the proposal of the protester (and other proposals) that had not submitted copies of two representations even though the solicitation did not expressly require their submission with the proposal or state that such a review would be used to evaluate proposals and thus misevaluated the proposals by applying unstated evaluation criteria.

DECISION

Hometown Veterans Medical, LLC, of Whitley City, Kentucky, a small business, protests the rejection of its proposal under request for proposals (RFP) No. 36C24724R0054, issued by the Department of Veterans Affairs (VA) for home oxygen services for patients served by the VA's Birmingham Veterans Medical Center, in Birmingham, Alabama. Hometown argues that the VA improperly rejected the firm's proposal as unacceptable.

We sustain the protest.

BACKGROUND

The RFP, issued on April 29, 2024, sought proposals from service-disabled veteran-owned small businesses to provide commercial home oxygen services to patients of the VA's Birmingham Veterans Medical Center, which is part of the VA's Veterans Integrated Service Network 7. The RFP employs commercial item procedures of Federal Acquisition Regulation (FAR) part 12 and provides that proposals would be

evaluated using FAR part 15 procedures. Agency Report (AR), Tab 3, RFP at 9, 122. The RFP contemplates the award of a single indefinite-delivery contract with a 5-year ordering period, which is to be awarded to the firm whose proposal offers the best value to the government considering two factors: experience and price. *Id.* at 117, 122.

Among the standard solicitation provisions for commercial items, the RFP included the standard instruction at FAR 52.212-1, and an addendum to that provision in section E.1 of the RFP. As relevant to the protest, paragraph “a” of the addendum directed offerors to date and sign the proposal cover sheet indicating agreement to all terms and conditions; paragraph “b” required all proposals to include a table of contents; paragraph “e” required offerors to submit their prices using the schedule in the RFP; and paragraph “h” required a certification of each offeror’s veteran-owned status by submitting a completed copy of VA Acquisition Regulation clause 852.219-75, VA Notice of Limitations on Subcontracting--Certificate of Compliance for Services and Construction (NOV 2022). Additionally, paragraph “c” informed offerors of matters such as the proposal due date and time and the email addresses to which they were to send proposals, followed by this statement:

All proposals received without requested documentation will not be considered. Failure to comply with ALL criteria as set forth by the solicitation and ALL documentation requested in this basis of award will result in your proposal being rejected and therefore not evaluated. No proposal will be accepted via postal mail.

AR, Tab 3, RFP at 112 (FAR provision 52.212-1 addendum ¶ 1.c).

Elsewhere, the RFP included several standard representations and certifications, three of which are relevant here. First, the RFP included the provision at FAR 52.209-7, which requires offerors with current active federal contracts and grants over \$100,000 to disclose certain types of legal proceedings by posting the required information in the Federal Awardee Performance and Integrity Information System (FAPIIS) database “through maintaining an active registration in the System for Award Management [(SAM)], which can be accessed via <https://www.sam.gov> (see 52.204-7).” AR, Tab 3, RFP at 119. Relatedly, the RFP expressly cautioned offerors that they were required to be registered in SAM at the time they submitted an offer and to continue to be registered in SAM until the time of award, during performance, and through final payment of the contract, as provided by the provision at FAR 52.204-7, System for Award Management, which was incorporated by reference. RFP at 109, 110.

The RFP also included the provision at FAR 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment. AR, Tab 3, RFP at 114-15. While that provision contains two representations, it begins by instructing that

[t]he Offeror shall not complete the representation at paragraph (d)(1) of this provision if the Offeror has represented that it “does not provide

covered telecommunications equipment or services as a part of its offered products or services to the Government in the performance of any contract, subcontract, or other contractual instrument” . . . in paragraph (v)(2)(i) of the provision at 52.212-3, Offeror Representations and Certifications—Commercial Products and Commercial Services.

AR, Tab 3, RFP at 114. The provision further instructs the offeror not to complete the second, related representation

if the Offeror has represented that it “does not use covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services” . . . in paragraph (v)(2)(ii) of the provision at 52.212-3.

Id. at 115.

As of the proposal due date, Hometown had posted completed online representations and certifications using SAM.gov, including FAPIIS entries in response to FAR provisions 52.209-7 and 52.212-3. AR, Tab 8, Hometown SAM.gov Records at 2-10, 14, 32-55. Under paragraphs (v)(2)(i) and (v)(2)(ii) of the latter provision, the firm responded “does not” on the representations about providing or using covered telecommunications equipment or services, etc. *Id.* at 2, 55. As a result, the firm’s representations did not include FAR provision 52.204-24.

The VA received proposals from eight offerors, including Hometown. Memorandum of Law (MOL) at 2; Supp. AR, Tab 10, Supp. Contracting Officer’s Statement (COS) at 1. The contracting officer retrieved each offeror’s SAM.gov records, AR, Tab 9, Supp. COS at 1, and made what the agency describes variously as a “proposal compliance check,” “initial cursory review” or “initial compliance review.” AR, Tab 2, COS at 1; MOL at 2, 4; AR, Tab 9, Supp. COS at 1. That review included “determin[ing] whether [each] offeror had complied with the RFP requirements to provide all documentation with its proposal.” MOL at 2. Specifically, the contracting officer checked whether the proposal had a copy of the offeror’s completed responses to FAR provisions 52.209-7 and 52.204-24.¹ MOL at 2. Four proposals, including Hometown’s, did not include copies of those representations in their respective proposals, so the VA informed all four that their

¹ The contracting officer explains that Hometown’s proposal did not include a copy of FAR provision 52.212-3, and because of that omission, the proposal needed to include a copy of FAR provision 52.204-24. AR, Tab 2, COS at 2. Hometown counters that the RFP included FAR provision 52.212-3, which, in part, provides that the offeror “verifies by submission of this offer that the representations and certifications currently posted electronically at FAR 52.212–3, Offeror Representations and Certifications--Commercial Products and Commercial Services . . . are incorporated in this offer by reference,” making it unnecessary to submit a copy. AR, Tab 3, RFP at 122.

proposals were rejected as unacceptable. *Id.* Hometown subsequently filed this protest.²

DISCUSSION

Hometown challenges the rejection of its proposal on multiple grounds. The firm principally argues that the rejection of its proposal was based on the application of unstated criteria, and was unreasonable, contrary to regulation, and effectively constituted a negative responsibility determination that the VA improperly failed to refer to the Small Business Administration (SBA) for consideration under that agency's certificate of competency process. The firm also argues that the VA has treated offerors unequally by not similarly rejecting another proposal that the contracting officer's "initial screening" also identified as incomplete because the proposal did not provide pricing for several contract line item numbers. AR, Tab 5, Offeror Submission Spreadsheet at 1.

The VA counters that the rejection of Hometown's proposal was reasonable and consistent with the terms of the RFP and applicable regulations, that referral to the SBA was not required, and that Hometown's argument of unequal treatment is speculative. The VA principally argues that the rejection of Hometown's proposal was proper because the RFP expressly directed offerors to submit "requested documentation" and "ALL documentation requested," and those instructions were followed by the warning that any failure would result in the proposal being excluded from any further evaluation. AR, Tab 3, RFP at 112 (addendum ¶ 1.c). The VA argues that the rejection of Hometown's proposal was "for failure to follow the [RFP]'s clearly stated requirements," and that Hometown "ignored this explicit requirement in the [RFP]" regarding submission of all documentation requested. MOL at 4-5. Ultimately, the agency contends that it "adhered to [the RFP] language in reviewing Protester's proposal for submission of all requested documentation and then rejecting it for failure to submit responses in its proposal to FAR 52.209-7 and FAR 52.204-24." MOL at 6.³

In reviewing a protest challenging an agency's evaluation of a proposal, this Office does not independently evaluate the proposal. We review the record to determine whether the evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. We will not substitute our judgment for that of the agency, so for this Office to sustain a protest the record must show that the agency's conclusions were inconsistent with the evaluation criteria, inadequately documented, or unreasonable. *McCann-Erickson USA, Inc.*, B-414787, Sept. 18, 2017, 2017 CPD ¶ 300 at 3. The evaluation of proposals thus must be based on the evaluation factors

² The VA states that it has not proceeded with the evaluation of the remaining proposals during this protest. Supp. AR, Tab 10, Supp. COS at 1.

³ The VA acknowledges that the responses to the provisions at issue were part of Hometown's SAM.gov record, yet it contends that the contracting officer has "no obligation to seek out information that a Protester neglects to include in its proposal," which extends to reviewing a firm's representations on SAM.gov. MOL at 5.

stated in the solicitation. Where a solicitation directs offerors to provide informational, technical, or administrative details in the instructions for proposal preparation, compliance with those requirements is not a basis for evaluating proposals independent of the stated evaluation criteria. Accordingly, compliance with such instructions does not provide a basis for eliminating a proposal from consideration unless the additional requirements also are specified as a basis for proposal evaluation. *Id.* at 4.

At the outset, the VA distinguishes between what it characterizes as an “initial compliance review” of proposals (which resulted in rejection of four of the eight received) and evaluation (which the VA maintains has not occurred). Supp. MOL at 4; MOL at 6. We decline to adopt that distinction for purposes of our consideration of Hometown’s protest. See FAR 15.305 (describing the assessment of an offeror’s proposal as evaluation). More importantly, however the agency’s review is characterized, the record shows that the VA’s rejection of proposals was not consistent with the RFP’s stated evaluation criteria. The agency does not point to any language in the solicitation indicating that it would perform an “initial compliance review” as part of the evaluation. Rather, the evaluation factors identified for the basis of award pertained to the agency’s consideration of the offeror’s experience and price. RFP at 117. The rejection of Hometown’s proposal (along with three others) occurred after the VA performed only a superficial review of each proposal to identify instances where it allegedly did not fully comply with the instructions for proposal preparation regarding matters that had nothing to do with the experience or price factors, but by their terms relate to matters that concern an offeror’s responsibility. *McCann-Erickson USA, Inc.*, B-414787, *supra.* at 6 (explaining that the representations and certifications in a proposal relate to the responsibility of the firm rather than the acceptability of its proposal). Because the RFP did not provide for evaluation of proposals using this cursory review/compliance check with respect to information that did not pertain to the basis for evaluation and award, its use to reject Hometown’s proposal was improper.

We are also not persuaded by the VA’s argument that the RFP instructions to provide “ALL documentation requested,” AR, Tab 3, RFP at 112 (addendum ¶ 1.c), directed offerors to include copies of the responses to the specific FAR provisions at issue. That contention is inconsistent with the fact that the RFP specifically instructed offerors to submit certain documentation in the proposal: a table of contents, experience narrative, pricing using the RFP pricing schedule, and a veteran-owned status certificate. *Id.* (addendum ¶¶ 1.b, 1.e, 1.h). Moreover, the agency’s reliance on the additional admonishment about failing “to comply with ALL criteria as set forth by the solicitation and ALL documentation requested in this basis of award will result in your proposal being rejected and therefore not evaluated” when read in context relate to the documentation for the evaluation criteria, experience and price, which form the solicitation’s stated basis of award. Further, the VA’s contention is also at odds with the purpose of the establishment of SAM.gov as an electronic repository of offerors’ responses to FAR provisions 52.209-7 and 52.204-24. See FAR 4.1200.

The evaluation of Hometown’s proposal used unstated evaluation criteria and unreasonably eliminated the proposal from consideration for award based on alleged

noncompliance with the RFP instructions, rather than an evaluation based on the factors specified in the RFP. Additionally, the contracting officer had retrieved the firm's SAM.gov record, including its representations responding to both FAR provisions 52.207-9 and 52.204-24. Contrary to the VA's position here, the FAR expresses a policy of requiring the contracting officer to review the SAM.gov record to obtain those representations, so it is not an improper burden to oblige a contracting officer to "search out and review" an offeror's SAM.gov record. *Cf.* MOL at 4 n.2 (arguing that the single issue posed by the protest was "whether VA was required to search out and review Protester's SAM.gov submissions, which it was not"). As noted above, nothing in the RFP evaluation criteria advised offerors that the agency would perform the preliminary compliance review of proposals to determine whether firms had complied strictly with what the agency believed were clear instructions and reject those that had not.

We nevertheless recognize that we have rejected a protester's contention that the firm's SAM.gov representations provide a sufficient response to a requirement to submit a copy of FAR provision 52.204-24, and therefore an agency may properly reject a proposal that does not attach a completed copy of that provision. *Futron, Inc.*, B-420703, July 25, 2022, 2022 CPD ¶ 189. However, the solicitation provision at issue in that decision was explicit and the protester failed to challenge the provision prior to the time set for receipt of proposals. See 4 C.F.R. 21.1(a)(1). As we noted in the decision:

Offerors must complete the representation fill-in at FAR 52.204-24(d), Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, and 52.204-26(c), Covered Telecommunications Equipment or Services. *Both provisions must be completed and attached to the Cover Letter. . . . Failure to complete the representations will deem the proposal ineligible for award.*

Id. at 2 (quoting solicitation instructions; italicization added).

In our view, the RFP instructions at issue here are not comparable to those quoted in our decision in *Futron*, and therefore our conclusion in that protest does not extend to these facts. Unlike the specific instructions to "complete the representation fill-in" and the instructions that "[b]oth provisions must be completed and attached," the RFP here only refers nonspecifically to "requested documentation" and "ALL documentation requested," without fairly informing offerors that the required documentation includes providing copies of their SAM.gov representations, or specific FAR provisions. *Compare id. with* AR, Tab 3, RFP at 112.

Accordingly, we sustain the protest.

We recognize that Hometown raises additional grounds of protest. Hometown contends that even if the RFP required the submission of FAR provisions FAR 52.209-7 and FAR 52.204-24, the contracting officer had already obtained a copy of the firm's completed representations as part of its SAM.gov record. Hometown argues that the contracting officer should have reviewed the SAM.gov record to ascertain the firm's responses to

both provisions. Specifically, the firm argues that its SAM.gov record contained FAPIIS information that fulfilled the instruction in FAR provision 52.209-7, and also contained the firm's representations in FAR provision 52.212-3(v)(2), based on which it was directed not to submit FAR provision 52.204-24. Hometown also argues that even if the agency was not obliged to review the copies it had retrieved from SAM.gov, the firm's failure to submit them still constituted only a minor error that it should have been permitted to correct through a clarification, and that the VA has treated offerors unequally by failing to similarly reject its proposal upon noting that it failed to submit complete pricing as the RFP required. And Hometown argues that even if the omission of copies of its responses to FAR provisions 52.209-7 and 52.204-24 were not correctible through clarifications, the lack of completed representations is a matter of responsibility that, because Hometown is a small business, should have been referred to the SBA for consideration of a certificate of competency.

As indicated below, however, our recommendation to address the application of unstated evaluation criteria to reject Hometown's proposal is that the VA either revise the RFP and evaluate revised quotations, or else reevaluate all quotations consistent with the terms of the RFP and this decision. Our recommendation, when implemented, renders academic the protester's arguments in the previous paragraph. That is, whether the agency permits submission of revised quotations in response to an amended RFP, or reevaluates the existing quotations, the basis for the VA's rejection of Hometown's quotation will be superseded by a new evaluation that will be based on a new assessment of whether there is a valid basis to reject the protester's quotation. Only that new evaluation will affect the potential of selecting the protester's quotation for award. Accordingly, the protester's challenges to the course of events surrounding the original rejection are rendered academic. We do not consider academic protests. *Ferris Optical*, B-403012.2, B-403012.3, Oct. 21, 2010, 2010 CPD ¶ 265 at 1-2. Accordingly, we do not reach the protester's additional challenges at this time.

RECOMMENDATION

We recommend that the VA either amend the RFP to state the additional criteria on which it intends to evaluate proposals, including any initial compliance review, invite all offerors to submit revised proposals addressing the agency's revised evaluation criteria, and proceed to evaluate them under those criteria; or that the VA reevaluate all proposals consistent with the existing evaluation criteria in the RFP and this decision. We also recommend that the VA reimburse Hometown for the reasonable costs associated with filing and pursuing its bid protest, including attorneys' fees. The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Edda Emmanuelli Perez
General Counsel