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# Decision

**Matter of:** Sterling Medical Associates, Inc.

**File:** B-419794

**Date:** June 25, 2021

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Deborah K. Morrell, Esq., and Kathleen Ellis, Esq., Department of Veterans Affairs, for the agency.

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## DIGEST

Post-award protest challenging alleged solicitation ambiguity is dismissed as untimely where any ambiguity in the solicitation language was patent.

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## DECISION

Sterling Medical Associates, Inc., located in Cincinnati, Ohio, protests the award of a contract to Valor Healthcare, Inc., of Dallas, Texas, pursuant to request for proposals (RFP) No. 36C24920R0010, issued by the Department of Veterans Affairs (VA), for community based outpatient clinic (CBOC) services at two locations in Tennessee. The protester argues that the agency unreasonably and unequally evaluated proposals and conducted a flawed best-value tradeoff.

We dismiss the protest.

## BACKGROUND

On June 2, 2020, the agency issued the solicitation seeking primary medical and mental health care services through primary care CBOCs located within Maury County, Tennessee and McMinnville, Tennessee.<sup>1</sup> The RFP contemplated the award of a fixed-

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<sup>1</sup> The protester is the incumbent contractor at the McMinnville CBOC.

price, indefinite-delivery, indefinite-quantity contract with a 1-year base period and six 1-year options.

The solicitation required the contractor to conform to the standards established by The Joint Commission (TJC), and to submit proof of conformance to those standards.<sup>2</sup> Protest, exh. A, RFP at 15, 128. The RFP further provided that “facility Joint Commission or equivalent accreditation must be maintained throughout the contract period of performance.” *Id.* at 33. The contractor qualifications section of the performance work statement (PWS) required the contractor to meet “all applicable standards in the most current version of *The Joint Commission Accreditation Manual for Hospitals* regarding the operation of this type of service” and to “comply with all applicable facility requirements and standards as set forth herein.” *Id.* at 40. The PWS further provided that the “[c]ontractor shall be accredited by TJC and maintain a level of service that is in compliance with all current TJC standards”; also, if TJC accredited, the contractor “will be required to furnish a copy of the accreditation letter(s) upon request by the Contracting Officer prior to award.” *Id.* at 98. The PWS also stated that the “[c]ontractor shall be TJC [a]ccredited and responsible for meeting or exceeding VA and TJC (or equivalent) standards.” *Id.* at 44.

The solicitation provided for the evaluation of price and the following factors, in descending order of importance: technical capabilities, business operations, small business participation, and past performance. *Id.* at 152-158. The non-price factors, when combined, were significantly more important than price. *Id.* at 152. Subfactors under the technical capabilities factor were experience, suitability and accessibility of facility, management plans/quality control, coordination and continuity of care, and key personnel. *Id.* at 152-157.

Three offerors, including Sterling and Valor, timely submitted proposals in response to the solicitation. The agency evaluated the proposals of Sterling and Valor as follows:

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<sup>2</sup> TJC is an independent, not-for-profit organization that is “the nation’s oldest and largest standards-setting and accrediting body in health care.” <https://www.jointcommission.org/about-us/facts-about-the-joint-commission/> (last visited June 1, 2021).

	<b>Sterling</b>	<b>Valor</b>
<b>Technical Capabilities</b>	<b>Satisfactory</b>	<b>Good</b>
Experience	Satisfactory	Good
Suitability and Accessibility of Facility	Satisfactory	Good
Management Plans/Quality Control	Unsatisfactory	Satisfactory
Coordination and Continuity of Care	Unsatisfactory	Satisfactory
Key Personnel	Satisfactory	Satisfactory
<b>Business Operations</b>	<b>Very Low Risk</b>	<b>Very Low Risk</b>
<b>Small Business Participation</b>	<b>Satisfactory</b>	<b>Satisfactory</b>
<b>Past Performance</b>	<b>Very Relevant<sup>3</sup></b>	<b>Very Relevant</b>
<b>Total Evaluated Price</b>	<b>\$52,897,659 to \$53,640,369<sup>4</sup></b>	<b>\$47,437,670</b>

Protest, exh. C, Debriefing at 3-4; Protest, exh. B, Notice of Award Decision at 1.

The agency assigned the protester’s proposal a deficiency under the management plans/quality control subfactor because Sterling was “[n]ot Joint Commission accredited.” Protest, exh. C, Debriefing at 3. Based on the protester’s failure to provide evidence of TJC accreditation by the award date, the agency determined the proposal was technically unacceptable. *Id.*

On April 15, 2021, the agency notified Sterling that it had awarded a contract to Valor. Protest at 3. This protest followed.

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<sup>3</sup> The agency’s notice of award listed Sterling’s past performance rating as relevant, whereas the debriefing listed it as very relevant. See Protest, exh. C, Debriefing at 4; Protest, exh. B, Notice of Award Decision at 1.

<sup>4</sup> Sterling’s price varied depending on the option for the McMinnville CBOC selected by the agency.

## DISCUSSION

The protester takes issue with the deficiency noted above and argues that the solicitation contained a latent ambiguity regarding the requirement to possess a TJC accreditation. The protester asserts that TJC grants accreditation in two different ways: (1) an individual contractor-based accreditation (corporate accreditation) or (2) a facility-based accreditation. Response to Dismissal Req. at 3. Sterling argues that the solicitation language led it to believe that a facility-level TJC accreditation (as opposed to a corporate TJC accreditation) would be sufficient.

The agency and intervenor argue that Sterling's challenge to the alleged ambiguity should be dismissed as an untimely challenge to the terms of the solicitation. The VA and intervenor further argue that Sterling's remaining arguments should then be dismissed because the protester is not an interested party to raise them.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the submission deadline for the receipt of proposals be filed before that time. 4 C.F.R. § 21.2(a)(1). One such impropriety is a patent ambiguity, which is an ambiguity in the solicitation that is an obvious, gross, or glaring error. *Sheritech Pharmacy Piedmont, LLC*, B-413945, Nov. 7, 2016, 2016 CPD ¶ 325 at 4 n.2. A latent ambiguity, by contrast, is more subtle. *Democracy Int'l, Inc.*, B-415243, B-415243.2, Dec. 13, 2017, 2018 CPD ¶ 293 at 7. An offeror has an affirmative obligation to seek clarification of a patent ambiguity prior to the due date for proposal submission. *Pitney Bowes, Inc.*, B-294868, B-294868.2, Jan. 4, 2005, 2005 CPD ¶ 10 at 5. When a patent ambiguity exists but is not challenged prior to the proposal submission deadline, we will not consider subsequent untimely arguments asserting the protester's own interpretation of the ambiguous provision. *FFLPro, LLC*, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 10.

Here, we find the protester's challenge to the agency's interpretation of the TJC accreditation requirement to be untimely. As noted above, the PWS advised offerors that the "[c]ontractor shall be accredited by TJC and maintain a level of service that is in compliance with all current TJC standards," and that, if TJC accredited, the contractor "will be required to furnish a copy of the accreditation letter(s) upon request by the Contracting Officer prior to award." RFP at 98; see also *id.* at 44 ("**Contractor shall be TJC [a]ccredited** and responsible for meeting or exceeding VA and TJC (or equivalent) standards."). The solicitation expressly cited this PWS requirement while stating that offerors' quality assurance plans "should also demonstrate that Joint Commission and other regulatory requirements, as indicated in the solicitation, have been met or exceeded." *Id.* at 154.

The solicitation thus contained language requiring contractors to be TJC accredited. While the protester asserts that other language in the solicitation was conditional or referenced facility-level TJC accreditation, we find that any inconsistencies were clear on the face of the solicitation and thus gave rise to, at best, a patent ambiguity. Since

Sterling did not challenge these alleged ambiguities prior to the submission deadline for proposals, we find this protest ground to be untimely.

Because Sterling's proposal was unacceptable and there is an acceptable offer in addition to the awardee's, see Protest, exh. C, Debriefing at 5, Sterling is not an interested party to pursue the remaining issues in its protest. See *Tetra Tech Tesoro, Inc.*, B-403797, Dec. 14, 2010, 2011 CPD ¶ 7 at 6. In this regard, an entity is not an interested party to protest where it would not be in line for award even if its arguments were found to have merit. *BANC3, Inc.*, B-416486, B-416486.2, Sept. 10, 2018, 2018 CPD ¶ 316 at 9.

The protest is dismissed.

Thomas H. Armstrong  
General Counsel