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Decision

Matter of: Data and Analytic Solutions, Inc.

File: B-405278.2

Date: February 27, 2012

Ira E. Hoffman, Esq., and Jerry Alfonso Miles, Esq., Shulman, Rogers, Gandal, Pordy & Ecker, P.A., for the protester.

William F. Savarino, Esq., John J. O'Brien, Esq., and Gabriel E. Kennon, Esq., Cohen Mohr LLP, for Provider Resources, Inc., the intervenor.

Anthony E. Marrone, Esq., and Brian E. Hildebrandt, Esq., Department of Health and Human Services, for the agency.

Christina Sklarew, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a negotiated procurement for the award of a cost reimbursement contract where offerors were provided a range of estimated monthly workloads and where offerors based their cost proposals upon differing workload assumptions, an agency reasonably normalized the cost proposals to the same workload estimate, where the anticipated workload was not dependent upon an offeror's approach and would be same regardless of which offeror performed the contract.

DECISION

Data and Analytic Solutions, Inc. (DAS), of Fairfax, Virginia, protests the award of a contract to Provider Resources, Inc. (PRI), of Erie, Pennsylvania, under request for proposals (RFP) No. CMS-2010-8(a)-0043, issued by the Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS), for services related to the evaluation of workers' compensation Medicare set-aside arrangement proposals.

We deny the protest.

BACKGROUND

Medicare is a nationwide Federal health insurance program, administered by the CMS, which Congress enacted in 1965 as Title XVIII of the Social Security Act,

42 U.S.C. § 301 et seq., for persons 65 years of age or older, and certain others. See RFP, Statement of Work (SOW), at 122.¹ One of the circumstances under which Medicare may not pay benefits is where payment has been made, or can reasonably be expected to be made, under a workers' compensation law or plan. Id.; see also Legal Memorandum at 3. When an individual receives a workers' compensation settlement that includes funds for future medical and/or prescription drug expenses, CMS recommends that parties to the settlement set aside funds based on a future cost projection--known as a Workers' Compensation Medicare Set-Aside Arrangement (WCMSA)--for all future medical and/or prescription drug expenses related to the workers' compensation injury or illness that would otherwise be reimbursable by Medicare. Id.

CMS issued the solicitation here, as a competitive section 8(a) set-aside, for a contractor to evaluate these future cost-projection proposals.² The RFP provided for the award of a cost-plus-fixed-fee contract for a 3-month transition period, a 9-month base period, and 4 option years. Offerors were informed that award would be made on a best value basis, under which the technical/non-cost factors would be approximately equal in weight to evaluated cost. See RFP amend. 10, at 574.

The RFP provided for the submission of written technical and business (cost) proposals and for oral presentations. Offerors were informed that the agency's technical evaluation panel (TEP) would evaluate and numerically score the offerors' technical proposals and oral presentations. Id. The following technical evaluation factors and associated maximum points were identified:³

	Oral	Written	TOTAL
Technical/Management Approach	550	700	1250
Corporate Experience	300	300	600
Transition Planning	100	100	200
Past Performance ⁴	N/A	100	100
Subcontracting/Teaming (Pass/Fail)	P/F	P/F	P/F
Total Overall Points	950	1200	2150

¹ Our citation to page numbers refer to the BATES numbers in the agency's report.

² Based on that evaluation, the contractor would either recommend that CMS accept the proposed set-aside amount, or recommend a new amount for that particular proposal. The final set-aside determination would be made by CMS.

³ The RFP also identified subfactors with associated maximum points under the technical/management approach factor.

⁴ The oral presentations would not include past performance information.

Id. at 578. The RFP also provided for a cost realism evaluation of offerors' business proposals.⁵ Id. at 574.

A detailed description of the required services was provided in the SOW. Among other things, offerors were informed that CMS would make available an electronic case control system and internet interface for the contractor's use and that offerors should anticipate receiving between 2,000 and 2,500 WCMSA proposals per month. The contractor was required to "review all WCMSA proposals within 20 business days of receipt, excluding development of the cases, and provide its recommended amount to CMS." See SOW at 128-29. Offerors were also informed that at least 8 percent of the proposals would require re-evaluation. Id. at 130. The contractor was also required to answer telephone inquiries from the public during regular business hours. Id. at 135.

CMS provided additional information in response to offerors' questions. Relevant here is the following question (submitted by DAS) and answer:

Q: It is our understanding that it takes on average roughly 1,500 to 2,000 seconds of delay time per case waiting for operations to be performed on the WCCCS [Workers' Compensation Case Control System]. This results in wait times of roughly 30 minutes per case. Should this factor be considered in estimates of daily production?

A. There is no established requirement regarding the speed of the WCCCS. However, it is CMS[']s expectation that the [workers compensation review contractor] Offeror will perform and meet all the requirements stated in the SOW [Statement of Work]. Proposal estimates should be based on the information contained in the SOW.

RFP amend. 8, Question/Answer No. 8, at 441.

Also provided was the following question/answer concerning the requirement in the SOW that the contractor include, as part of its Business Contingency Plan, tasks that would be performed where the WCCCS was unavailable for more than 8 hours (see SOW at 130):

Q: For appropriate planning and assumptions can CMS share how many instances in the last 12-24 months that lasted longer than 8 hours that the WCCCS experiences unscheduled down time?

⁵ Offerors were also informed that the agency would not evaluate the offeror's proposed transition costs. RFP amend. 10, at 574.

A. The CMS has one (1) report of an instance where a server failed, and a new part was required, and the WCCCS system experienced unscheduled down time of over 8 (eight) hours.

RFP amend. 8, Question/Answer No. 28, at 450.

CMS received proposals and oral presentations from four offerors, including DAS and PRI. The proposals and oral presentations were point scored by the TEP. The agency established a competitive range and conducted discussions with three offerors, including DAS and PRI. Legal Memorandum at 7. CMS also had separate conference calls with the competitive range offerors to advise them, among other things, that offerors should assume that the contractor would receive up to 200 solicited or unsolicited telephone calls per day. Offerors were also advised that the agency expected that the operation of a CMS web portal within 6 months of the contract start date would reduce the number of phone inquiries over time.

Final proposal revisions were received and evaluated by the TEP. The evaluators were instructed by the contracting officer not to lower the initial technical evaluation scores based upon responses to discussions, but to note in the consensus report instances where a downward change in point scoring might be warranted. Contracting Officer's Statement at 10. DAS's and PRI's final revised technical proposals were point scored as follows:⁶

	DAS	PRI
Technical/Management Approach	1,016	1,054
Corporate Experience	556	508
Transition Planning	200	187
Past Performance *	81	83
Subcontracting/Teaming (Pass/Fail)	Pass	Pass
Total Points	1,853	1,832

AR, Tab 5j, Source Selection Decision, at 807.⁷

⁶ The TEP's point scores were supported by narrative discussions of the offerors' evaluated strengths and weaknesses. See, e.g., AR, Tab 5g, Post Discussion Evaluation Sheets.

⁷ The agency states that the assignment of point scores did not change as a result of the agency's corrective action, except with respect to a minor mathematical error. See Contracting Officer's Statement at 9; see also Protest, B-405278, July 5, 2011, at 10.

DAS was informed that PRI's proposal was selected for award, based upon PRI's lower costs. In this regard, DAS was also informed that both DAS and PRI proposed costs that were below the independent government cost estimate (IGCE). See Protest, B-405278, July 5, 2011, at 10.

Following a debriefing, DAS protested to our Office.⁸ Prior to submitting a report in response to the protest, CMS took corrective action, informing our Office that the agency would reconsider its selection decision to ensure that proposals had been evaluated in accordance with the RFP. The agency stated that its corrective action might include examining the agency's cost realism and technical proposal evaluations, but that the agency did not intend to re-open discussions. We dismissed as academic DAS's initial protest.

CMS reviewed its evaluation of the technical and business proposals and its selection decision.⁹ See Legal Memorandum at 9; Contracting Officer's Statement at 2-3. In its review of the realism of the offerors' proposed costs, the agency evaluated each firm's business proposal with respect to the number (and mix) of labor hours proposed for various labor categories; the kinds and quantities of material, equipment, and supplies; the types and amount of proposed consultants; the logic of proposed subcontracting; analysis of the travel proposed; the kinds and quantities of information technology; and the rationale used in determining that the price or cost was fair and reasonable. AR, Tab 5h, Final Cost Realism Analysis Report. CMS's cost/price analyst also evaluated the realism of the offerors' proposed direct labor and indirect rates. AR, Tab 5i, Cost Evaluation Reports.

In assessing the realism of the offerors' proposed costs, the agency relied in part upon its IGCE. The record shows that the IGCE was revised during the procurement. In addition, because all of the offerors' labor hour estimates for performing pharmacy cost reviews were below the government estimate for this work, the agency reviewed the IGCE as part of its correction action. AR, Tab 5h, Final Cost Realism Analysis, at 744. CMS states that the IGCE was developed based upon historical costs and invoiced hours from invoices for 2-week periods over 2 months of the incumbent contract. See id.; Legal Memorandum, at 10. The agency concluded that its IGCE overstated the number of hours required. The agency revised the IGCE to reflect a lower estimated number of labor hours; the new estimated amount of labor hours reflects an average of the labor hours proposed by the competitive range offerors for processing each proposal. AR, Tab

⁸ In its original protest, B-405278, DAS challenged the agency's technical and cost evaluations, conduct of discussions, and selection decision.

⁹ The agency also reviewed its discussions with offerors and concluded that the discussions were meaningful. Contracting Officer's Statement at 2.

5h, Final Cost Realism Analysis, at 744. In this regard, CMS normalized the estimated number of proposals that each firm would receive per month to 2,500 cases and an additional 200 proposals, which reflected the 8 percent of proposals that would require reevaluation. Id.

DAS's and PRI's proposed costs were evaluated as follows:¹⁰

	Proposed Cost	Probable Cost
PRI	\$23,859,412	\$27,997,018
DAS	\$30,815,788	[deleted]

See AR, Tab 5h, Final Cost Realism Analysis Report, at 754, 763; Tab 5j, Source Selection Decision, at 805.

The technical and cost evaluations were presented to the agency's source selection authority (SSA), who recognized that DAS's proposal received a slightly higher technical point score. The SSA also noted that DAS's proposed and evaluated costs were higher than PRI's. See AR, Tab 5j, Source Selection Decision, at 807-08. The SSA concluded that DAS's and PRI's proposals were essentially technically equal, and selected PRI's proposal for award. In this regard, the SSA noted that PRI's evaluated probable costs were lower than DAS's proposed and probable costs. Id. at 822-23.

This protest followed notification that PRI's proposal was again selected for award.

DISCUSSION

DAS's protest challenges the agency's evaluation of offerors' cost and technical proposals. Although we do not specifically address all of DAS's arguments, we have fully considered all of them and find that they afford no basis on which to sustain the protest. We discuss DAS's principal arguments below.¹¹

¹⁰ The agency's original IGCE for this work was approximately \$36.2 million. See Contracting Officer's Statement at 11-12; AR, Tab 11, IGCE, at 2,164. Following corrective action, the agency's IGCE was calculated as being between \$35.4 million and \$35.7 million. AR, Tab 11, IGCE, at 2,167.

¹¹ In its protest, DAS challenged the agency's evaluation of the protester's technical proposal, alleging that specific criticisms of its proposal (such as finding overreliance on peer review for Quality Assurance, the omission of certain information in the workflow chart, an erroneous statement in DAS's oral presentation, a failure to propose new outreach or education plans, etc.) were erroneous. Protest at 21-22. DAS also generally challenged the agency's conduct of discussions. CMS specifically responded to these arguments in its report. DAS
(continued...)

Cost Realism

DAS challenges CMS's cost realism analysis, arguing that the agency could not reasonably find PRI's low cost to be realistic.¹² In this regard, DAS complains that PRI's cost proposal was based upon processing fewer proposals (2,430 proposals per month) than DAS's proposal (2,700 proposals per month) and that the agency's normalizing PRI's cost to reflect 2,700 proposals per month does not "magically create a valid comparison of equivalent proposals." See Protester's Comments at 12.

When an agency evaluates a proposal for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR §§ 15.305(a)(1); 15.404-1(d); Tidewater Constr. Corp., B-278360, Jan. 20, 1998, 98-1 CPD ¶ 103 at 4. Consequently, the agency must perform a cost realism analysis to evaluate the extent to which an offeror's proposed costs are realistic for the work to be performed. FAR § 15.404-1(d)(1); Hanford Envtl. Health Found., B-292858.2, B-292858.5, Apr. 7, 2004, 2004 CPD ¶ 164 at 9. The evaluation will determine what the government should realistically expect to pay for the proposed work, the offeror's understanding of the work, and the offeror's ability to perform the contract. FAR §§ 15.305(a)(1), 15.404-1(d)(1). The agency adjusts the proposed cost to reflect any additions or reductions in cost elements to realistic levels based on the results of the cost realism analysis, allowing the agency to determine the probable cost of performance. FAR § 15.404-1(d)(2)(ii). The adjusted offers are then used in the agency's best value analysis. FAR § 15.404-1(d)(2)(i).

The evaluation of competing cost proposals requires the exercise of informed judgment by the contracting agency. We review an agency's judgment in this area

(...continued)

abandoned these issues, when it did not further address them in its comments. Cedar Elec., Inc., B-402284.2, Mar. 19, 2010, 2010 CPD ¶ 79 at 3 n.4.

¹² DAS also challenges the upward adjustment made in its proposed costs. These challenges, first raised in the protester's comments, are untimely, as they were not filed within 10 calendar days of the protester's receipt of documents that apprised the protester of this ground of protest. While DAS was granted an extension of time in which to file its comments, such extension does not toll our timeliness requirements for the filing of new protest contentions. See Exelon Servs. Fed. Group, B-291934, Apr. 23, 2003, 2003, CPD ¶ 86 at 7 n.4. Also, in any event, because DAS's proposed costs are higher than PRI's evaluated probable costs, even accepting DAS's arguments, the protester was not prejudiced.

only to see that the agency's cost realism evaluation was reasonably based and not arbitrary. Jacobs COGEMA, LLC, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16 at 26. An agency's cost realism analysis need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate and provide some measure of confidence that the rates proposed are reasonable and realistic in view of other cost information reasonably available to the agency as of the time of its evaluation. See Metro Mach. Corp., B-297879.2, May 3, 2006, 2006 CPD ¶ 80 at 9-10.

Here, the RFP informed offerors that they should anticipate reviewing between 2,000 and 2,500 proposals each month and that at least 8 percent of those proposals would require re-evaluation. SOW at 130. In calculating their estimated costs, DAS and PRI used different assumptions with respect to how many proposals they would have to review on a monthly basis. The agency recognized that difference, normalizing all firms to 2,700 proposals per month. This resulted in an upward adjustment in PRI's estimated costs, which were based upon only receiving 2,430 proposals per month.

We find that CMS's adjustment of PRI's proposed costs to reflect the receipt of 2,700 proposals per month is a reasonable cost normalization. Cost normalization involves the measurement of offerors against the same baseline where there is no logical basis for differences in approach or where there is insufficient information provided with the proposals, leading to the establishment of common "should have bid" estimates by the agency. The purpose of such an analysis is to segregate cost factors which are "company unique" from those which are generally applicable to all offerors. See The Research Found. of State Univ. of New York, B-274269, Dec. 2, 1996, 96-2 CPD ¶ 207 at 5. Here, the number of proposals that will be received each month is not dependent upon an offeror's approach, but will be the same regardless of which offeror performs the contract.¹³ Although DAS generally complains that normalizing the firms' proposals in this way will not allow for a fair or equal comparison, it has not explained why this is the case or how it is prejudiced.¹⁴

¹³ For this reason, we find our decision in Information Ventures, Inc., B-297276.2 et al., Mar. 1, 2006, 2006 CPD ¶ 45, to which DAS cites, to be inapposite. In that decision, unlike here, we found that an agency could not reasonably adjust offers to the same number of labor hours, where the differing estimates reflected different technical approaches.

¹⁴ Similarly, DAS generally complains that the agency's revision of its IGCE as part of its corrective action (to reflect the agency's view that its IGCE may have overstated the number of hours required to perform the contract work) was improper, but does not explain how that adjustment prejudiced DAS, nor do we see any evidence in the record that it did.

DAS also complains that CMS's cost realism evaluation did not account for "downtime" that would occur during the performance of the contract. Specifically, DAS contends that historically, there have been significant problems with WCCCS (the case control system the contractor is required to use), causing performance downtime that offerors must account for in analyzing and predicting costs. DAS states that it was aware of these problems; informed CMS about them (as evidenced by the questions and answers, set forth above); and factored their impact into DAS's costs. DAS complains that CMS did not consider the impact of the predicted downtime in its cost realism evaluation.

We find no merit to the protester's arguments in this regard. As DAS acknowledges in its protest, the RFP and CMS did not advise offerors to account for downtime in their proposals. Protest at 8. In fact, CMS advised offerors in response to their questions that there had only been one occasion in the prior year where WCCS was down for more than 8 hours. See RFP amend. 8, Question/Answer No. 28, at 450. Moreover, although DAS contends that it factored downtime into its cost estimates, it has not directed us to any part of its proposal that apprised the agency that it had done so, nor have we found from our review of the protester's business proposal that DAS informed CMS that its cost estimates included a factor for downtime.¹⁵ Accordingly, we fail to see in any event how the agency should have been aware that the DAS's approach included additional labor hours to account for the downtime that DAS insists it included in its cost calculation.

Past Performance

DAS also challenges the agency's evaluation of the protester's past performance, arguing that CMS failed to credit the firm for the performance of the incumbent contract, where, in its proposal, DAS had informed CMS that the firm would acquire the incumbent prime contractor and that it would team with the prime's current subcontractor, if DAS was awarded the contract.¹⁶

The RFP instructed offerors to provide a minimum of two relevant past performance references for itself and each subcontractor, and stated that offerors would be evaluated on their performance of work on contracts currently in progress, or completed within the last 2 years. See RFP amend. 10, at 562, 574. CMS

¹⁵ In fact, DAS was asked in discussions to explain its "labor requirement assumption to work a case," and did not address its asserted downtime assumption. See AR, Tab 7d, DAS Discussion Response, at 1,890.

¹⁶ In its comments, DAS also challenges other aspects of the agency's evaluation of DAS's past performance and of PRI's past performance. These additional challenges are untimely, as they are raised more than 10 calendar days after receipt of the agency's report.

assigned 81 of 100 points to DAS's proposal under the past performance factor.¹⁷ See AR, Tab 5a, Revised Past Performance Analysis, at 597. The record shows that the agency did not credit DAS for the past performance of the incumbent contractor and subcontractor.

Even if we accept the protester's argument that the agency should have considered the incumbent prime contractor's and subcontractor's past performance as if it were DAS's own, DAS has failed to demonstrate that it was prejudiced. Here, the record shows that CMS assigned point scores of 3.83, 4.3, 4.2, and 3.85 for four past performance references. The average of those scores (4.04 points) was multiplied by 20 to arrive at a final past performance score of 81 points (rounded up from 80.8). If DAS received a perfect, 5-point rating for the incumbent contract, this additional rating would result in an increased average point score of 4.23, which when multiplied by 20 would result in a final score for past performance of 84.6 points. Given the 2,150 point scale used here, we see no reasonable possibility that the additional 3.6 points would result in a determination that DAS's proposal was technically superior to PRI's.¹⁸ Moreover, since the record shows that the SSA was aware of DAS's plan to acquire the incumbent contractor and team with the subcontractor, and did not base his determination that DAS's and PRI's proposals were essentially equal technically on point scores alone but on a qualitative assessment of proposals (as explained further, below), we find no prejudice to DAS. See AR, Tab 5j, Source Selection Decision, at 808.

Selection Decision

The protester complains that CMS unreasonably found DAS's and PRI's proposals to be essentially technically equal, where DAS had a higher total point score than PRI. Protester's Comments, at 2. DAS contends that CMS effectively made award on a lowest-price, technically acceptable basis for award, rather than best value as provided for by the RFP. Id. at 23.

Source selection officials have broad discretion to determine the manner and extent to which they will make use of evaluation results, which are merely guides for the source selection official, who must use his own judgment to determine what the underlying differences between proposals might mean to successful performance of the contract. Information Network Sys., Inc., B-284854, B-2848954.2, June 12, 2000, 2000 CPD ¶ 104 at 12.

¹⁷ The evaluation record shows that each performance reference was rated on a 5-point scale, and then averaged. The average performance rating was multiplied by 20 points to convert the ratings to a 100-point scale.

¹⁸ DAS's total score would increase to 1,857, which is approximately 1.4 percent higher than PRI's 1,832 total points.

Here, the difference in point scores between DAS's and PRI's proposals was very small--approximately 1.1 percent. The agency report shows that CMS considered the strengths and weaknesses of the two offerors, conducting a qualitative comparison of proposals, and did not rely only upon numerical ratings. In this regard, we find without merit DAS's suggestion that the agency was required to find DAS's proposal technically superior to PRI's based only upon DAS's slightly higher technical score. Although DAS disagrees with the agency's judgment that the two proposals were approximately equal technically, it has not shown that judgment to be unreasonable.

The protest is denied.¹⁹

Lynn H. Gibson
General Counsel

¹⁹ DAS raised a number of additional grounds of protest in its comments, based upon information it received in the agency's report (for instance, challenging the evaluation of DAS's proposal for medical claims review and asserting that CMS evaluated the firms' proposals disparately). These new protest challenges, which cite to the agency's report as their basis, are untimely, because they were filed more than 10 days after the protester's receipt of the agency report.