



United States Government Accountability Office  
Washington, DC20548

**DOCUMENT FOR PUBLIC RELEASE**

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

## Decision

**Matter of:** Public Communications Services, Inc.

**File:** B-400058; B-400058.3

**Date:** July 18, 2008

---

James J. Regan, Esq., Daniel R. Forman, Esq., John E. McCarthy, Jr., Esq., Puja Satiani, Esq., Crowell & Moring LLP, for the protester.

Peter F. Garvin, III, Esq., Nancy L. Berardinelli-Krantz, Esq., Jones Day, for Value-Added Communications, Inc., an intervenor.

Michael J. Davidson, Esq., Bureau of Immigration and Customs Enforcement, Department of Homeland Security, for the agency.

Jonathan L. Kang, Esq., and Ralph O. White, Esq., Office of General Counsel, GAO, participated in the preparation of the decision.

---

### DIGEST

1. Government Accountability Office has jurisdiction to hear protest of the award of a no-cost contract for provision of phone services to detainees in the custody of the Bureau of Immigration and Customs Enforcement because the contract concerns a procurement for services by a federal agency and results in a benefit to the government.
2. Protest challenging the evaluation of offerors' prices is sustained where the solicitation required offerors to propose eight international calling rates, but the agency evaluated only one rate as a surrogate for the others without a reasonable basis to do so.
3. Protest challenging the evaluation of protester's technical proposal is sustained where the agency's identification of technical deficiencies was not reasonable because certain features viewed as missing from protester's proposal were not required by the solicitation, and because the record shows that the offerors were not evaluated equally.
4. Protest alleging that awardee made material misrepresentations concerning its proposal and in connection with a Small Business Administration size status protest is denied where the record does not show that misrepresentations were made.

---

## DECISION

Public Communications Services, Inc. (PCS) protests the award of a contract to Value-Added Communications, Inc. (VAC) under request for proposals (RFP) No. HSCETE-08-R-00001, issued by the Department of Homeland Security (DHS), Bureau of Immigration and Customs Enforcement (ICE) for detainee telephone services. PCS contends that ICE's evaluation of the offerors' price and technical proposals was unreasonable, that VAC made material misrepresentations concerning its proposal, and that the source selection decision was flawed.

We sustain the protest.

## BACKGROUND

The RFP was issued on January 3, 2008, and sought proposals to provide phone services for approximately 30,000 detainees in the custody of ICE at 231 primary and secondary detention facilities.<sup>1</sup> The detainees in the custody of ICE are foreign nationals who have been arrested for violations of U.S. immigration laws. The RFP required offerors to provide two types of services: (1) fee-based phone services for detainees at all ICE primary detention facilities, and (2) "pro bono" phone services for detainees at all primary and secondary facilities where the agency holds detainees for more than 72 hours. The fee-based phone services allow detainees to make calls at their own expense under a concession-type arrangement with the contractor. ICE is required to provide the pro bono services under the agency's National Detention Standards, which "guarantee[] all detainees free telephone access to ICE identified entities," including "foreign Embassies, Consulates, Immigration Courts and approved pro bono and community based free immigration legal services providers." RFP at 5. Offerors were required to propose the two types of phone services, as well as install a "state of the art" phone service at primary detention facilities, and transition from the incumbent contract. RFP at 6. PCS is the incumbent contractor currently providing these services.

The RFP anticipated award of a total small business set-aside contract, with a 2-year base period, and three 1-year option periods. The contract will be on a no-cost basis whereby the contractor will not receive payment from the government, but is instead permitted to collect revenue from detainees for the fee-based phone services. The contractor will not receive any payment for providing the pro bono services.

The RFP stated that proposals would be evaluated on the basis of the following three evaluation factors, in descending order of importance: technical capability, past performance, and price. The technical capability evaluation factor had four

---

<sup>1</sup> Primary facilities are run by ICE; secondary facilities are run by state and local governments, under Inter-Governmental Service Agreements with ICE. RFP at 5.

subfactors, listed in descending order of importance: statement of work, quality control plan, management/staffing, and schedule plan.

The RFP required offerors to propose per-minute calling rates for local, long distance, and international calls, under three types of payment plans: collect, debit, and pre-paid. For the international calls, the RFP required offerors to propose rates for calls to Mexico, Guatemala, El Salvador, Honduras, The Dominican Republic, Canada, and “All other Countries.” RFP at 55. The RFP provided the following data regarding calls, which addressed a 3-month period under the incumbent contract:

Revenue Calls For All Primary Facilities Average Monthly Collect Calls (3 Months: July 07 -- September 07)				
Revenue Calls	Collect Calls	Minutes for Collect Calls	Pre-paid/Debit Calls	Minutes for Pre-paid/Debit Calls
Total Calls	43,000	525,000	560,000	3,150,000
-Local		22%		34%
-Long Distance		70%		62%
-International		8%		4%

RFP at 37.

As indicated above, the data in the RFP did not distinguish between pre-paid and debit calls. The RFP also did not provide any data concerning the distribution of international calls among the countries for which rates were requested in the RFP. On January 18, 2008, the contracting officer (CO) sent the offerors an email containing a series of questions and answers, which included updated data for the incumbent contract for October to December 2007.<sup>2</sup> As relevant here, the revised data provided separate numbers and minutes for pre-paid and debit calls over the October to December period.

The agency received proposals from five offerors by the closing date of February 8, 2008, including PCS and VAC. In its evaluation of offerors’ proposed prices, the agency interpreted the data provided in the RFP to make assumptions regarding the number of calls and length of each call made by a single detainee each month. Agency Report (AR), Tab 6, Source Selection Decision (SSD), at 3. The agency’s calculations assumed that there are 10,000 detainees in the primary facilities, and

---

<sup>2</sup> As discussed below, these data were not incorporated into the subsequent amendment of the solicitation. In this regard, the table cited above did not change in the amended RFP. RFP amend. 00001 at 37.

that a detainee would make 384 minutes of calls in a 30-day period, resulting in the following data:

	Local	Long Distance	International
Collect	22% (one 12-minute call)	70% (three 12-minute calls)	8% (not used due to rounding)
Debit	34% (ten 6-minute calls)	62% (seventeen 6-minute calls)	4% (one 6-minute call)
Pre-Paid	34% (ten 6-minute calls)	62% (seventeen 6-minute calls)	4% (one 6-minute call)

Id.

The agency used the data in the table above to evaluate each offeror’s proposed rates. For example, the agency evaluated an offeror’s proposed rates for local collect calls by applying that rate to one 12-minute call. Using these data, ICE determined each offeror’s total price by multiplying the total rates by an assumed 10,000 detainees (the number held in ICE primary facilities), over the 5-year period of the contract.

As relevant here, the agency evaluated the offerors’ proposed international rates by considering only the rate for calls to Mexico. ICE states that at the time it evaluated proposals it did not have data regarding the breakdown for calls to each of the countries for which rates were requested in the RFP. Supp. CO Statement at 4. The CO explains that Mexico was chosen as the surrogate for international calls because “[a]necdotally, most detainees are from Mexico and so most international calls are made to Mexico.” CO Statement at 5. Further, under the agency’s price model, offerors were evaluated based on one only international debit and one international pre-paid call—thus, the agency believed, only one call with one rate could be evaluated per category. Id. For the debit and pre-paid calls, the agency assumed an equal number of calls and minutes because the data in the RFP as initially issued did not distinguish between these types of calls. AR, Tab 6, SSD, at 3.

For the technical capability and past performance evaluation factors, ICE rated PCS’s proposal as “good” under both factors, and rated VAC’s proposal as “excellent” under both factors.<sup>3</sup> As relevant here, PCS received a rating of “good” under the statement of work subfactor of the technical capability evaluation factor. AR, Tab 3, Technical Evaluation Panel (TEP) Report, at 8. The agency assessed two deficiencies for PCS’s proposal under the statement of work subfactor regarding the requirements to provide a debit calling system and a rebate and refund plan. As the

---

<sup>3</sup> For the technical capability and past performance factors, the agency used an evaluation scheme of excellent, good, fair, poor, and unacceptable.

CO explains, “[d]eficiencies are defined as severe issues and are much more indicative of a potential failure than is a weakness.” Supp. CO Statement at 5. Based on the two deficiencies, the agency concluded that PCS’s proposal warranted a rating of “good” rather than “excellent” for the statement of work subfactor. CO Statement at 2. PCS’s proposal was rated as “excellent” under the technical capability subfactors of quality control plan, management/staffing, and schedule plan. Id.

The results of ICE’s technical and price evaluations were as follows:

	PCS	VAC
<b>TECHNICAL CAPABILITY</b>	GOOD	EXCELLENT
Statement of Work	Good	Excellent
Quality Control Plan	Excellent	Excellent
Management/Staffing	Excellent	Excellent
Schedule Plan	Excellent	Excellent
<b>PAST PERFORMANCE</b>	GOOD	EXCELLENT
PRICE	\$34,200,000 <sup>4</sup>	\$29,664,000

AR, Tab 6, SSD, at 3.

In the selection decision, the agency concluded that VAC’s proposal “provides the best overall value to satisfy the DHS/ICE requirements.” Id. at 1. The CO, who also acted as the source selection authority, noted that VAC’s proposal received the highest technical ratings, and had the lowest evaluated price. Id. at 3-4.

The agency awarded the contract to VAC on March 28, and advised offerors of the decision on that date. PCS requested a debriefing, which was provided on April 4. This protest followed.

## DISCUSSION

PCS challenges the reasonableness of ICE’s evaluation of the offerors’ prices and technical proposals. The protester also contends that VAC made material misrepresentations in its proposal. For the reasons discussed below, we agree with the protester that ICE’s evaluation of the offerors’ prices contained several errors, and that the agency unreasonably concluded that PCS’s proposal had two

---

<sup>4</sup> The SSD provided in the record contains a typographical error, which states the evaluated price for PCS’s proposal as \$32,200,000. The parties agree that, based on the agency’s evaluation methodology in the SSD, the correct amount should be \$34,200,000. We have used the correct amount in the table above.

deficiencies under the technical capability evaluation factor. We disagree, however, with the protester's allegations regarding other areas of the technical evaluation, and also do not agree that VAC's proposal contained material misrepresentations.<sup>5</sup>

## Jurisdiction

As a threshold matter, ICE contends that our Office lacks jurisdiction to hear this protest because the RFP anticipated award of concession-type contract. As discussed in detail below, we conclude that our Office has jurisdiction because this protest concerns the award of a contract for the procurement of services by a federal agency for the benefit of the government.

Under the Competition in Contracting Act of 1984 (CICA) and our Office's Bid Protest Regulations, we review protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for procurement of goods and services, and solicitations leading to such awards. 31 U.S.C. §§ 3551, 3552 (2000); Bid Protest Regulations, 4 C.F.R. § 21.1(a) (2008). The parties do not dispute that this protest concerns a solicitation issued by ICE, a federal agency. Instead, ICE argues that the services being procured are for the benefit of detainees, not the government.

Our Office lacks jurisdiction to consider a protest challenging the award of a "pure" concession contract, that is, a no-cost contract that merely authorizes a concessionaire to provide goods or services to the public, as opposed to the government. See Great South Bay Marina, Inc., B-296335, July 13, 2005, 2005 CPD ¶ 135 at 2. We have long recognized, however, that some concession contracts are hybrids that require the delivery of goods and/or services to the government. Id.; see also, Shields & Dean Concessions, Inc., B-292901.2, B-292901.3, Feb. 23, 2004, 2004 CPD ¶ 42, recon. denied, B-292901.4, Mar. 19, 2004, 2004 CPD ¶ 71 (concessionaire required to provide maintenance, repair and other services for government facility as well as facility improvement valued at over \$800,000); Starfleet Marine Transp., Inc., B-290181, July 5, 2002, 2002 CPD ¶ 113 (concessionaire for ferryboat services

---

<sup>5</sup> The protester raised numerous collateral issues in this protest. Although we do not address every issue raised, we have reviewed all of the arguments and conclude that none has merit, aside from those we address. For example, PCS contends that ICE's evaluation of VAC's past performance was not reasonable. Specifically, PCS contends that the agency did not consider the relevance of VAC's past performance, and unreasonably concluded that VAC's past performance was similar to the requirements of the solicitation. Our review of the record shows that the agency reasonably reviewed the type and relevance of contracts performed by VAC, as well as the quality of the company's performance. AR, Tab 13, Past Performance Evaluation; Tab 3, TEP Report, at 10. On this record, we see no basis to sustain the protest based on these arguments.

required to provide janitorial services for agency's docks and piers, equip ferries with public address systems for use by park rangers, and provide transportation for rangers). It has consistently been our Office's view that a mixed transaction that includes the delivery of goods or services of more than de minimis value to the government is a contract for the procurement of property or services within the meaning of CICA. Great South Bay, supra; Starfleet Marine, supra, at 6.

In determining whether the government will receive the requisite value from the goods or services provided in connection with a concession, our Office examines whether the transaction in question reduces the agency's workload, or whether the effort is somehow rendered, either directly or indirectly, in support of the agency's mission requirements. Meyers Cos., Inc., B-275963 et al., Apr. 23, 1997, 97-1 CPD ¶ 148 at 4. For example, we have found that a benefit was conferred to the government through a concession for haircuts for new Air Force recruits, because "the concession agreement is a contract for services under which the [agency] will satisfy its need to obtain initial haircuts for its recruits—which the agency insists is an important aspect of the training experience." Gino Morena Enters., Feb. 5, 1987, B-224235, 87-1 CPD ¶ 121 at 4. Similarly, we have found that a benefit was conferred on the government through a concession for photocopy services at a U.S. District Court because the use of a concession-type contract aided the court's mission by reducing its workload and also providing a benefit to the public of more effective access to court records. West Coast Copy, Inc.; Pacific Photocopy and Research Servs., B-254044, B-254044.2, Nov. 16, 1993, 93-2 CPD ¶ 283 at 5-6; see also, New York Tel. Co.; New England Tel. & Tel. Co.; Bell Atlantic Network Servs., Inc., B-236023, B-236097, Nov. 7, 1989, 89-2 CPD ¶ 435 at 2-3 (concession to provide pay phone services to employees and visitors at a General Services Administration facility was subject to GAO protest jurisdiction where the services were intended to satisfy agency mission needs).

Here, we conclude that the pro bono phone services component of the contract, which the contractor must perform in addition to the fee-based phone services, furthers the mission of ICE. The RFP states that the purpose of the contract is to "support DHS/ICE[] operations and compliance with . . . [National Detention Standards]-Telephone Access" requirements, and to "provide DHS/ICE with repeatable, defined, accurate, timely, and well managed detention telephone services and processes that will ensure quality service and products that will meet these standards." RFP at 6.

As discussed above, the RFP states that the National Detention Standards "guarantee[] all detainees free telephone access to ICE identified entities," including "foreign Embassies, Consulates, Immigration Courts and approved pro bono and community based free immigration legal services providers." RFP at 5. ICE's website further confirms that the National Detention Standards are intended to aid the agency's mission:

The ICE National Detention Standards, promulgated in November 2000, are the result of negotiations between the American Bar Association (ABA), the U.S. Department of Justice (DOJ), the legacy Immigration and Naturalization Service (INS), and other organizations involved in pro bono representation and advocacy for immigration detainees. The 38 standards are comprehensive, encompassing areas from legal access to religious and medical services and marriage requests. The legal access standards concern visitation, access to legal materials, telephone access and group presentations on legal rights. The standards further the goals of ICE to provide safe, secure and humane conditions for all detainees in ICE custody.

ICE Detention Management Program Website, available at: <http://www.ice.gov/partners/dro/dmp.htm> (emphasis added).

On this record, we conclude that the RFP's requirement for the contractor to provide the pro bono portion of these services furthers ICE's mission and reduces the agency's workload by performing services that the agency would either need to perform itself, or procure under a separate contract. Thus, we conclude that our Office has jurisdiction to hear this protest because it concerns a procurement conducted by ICE to obtain services for the government.<sup>6</sup>

#### Price Evaluation Issues

PCS argues that the agency's evaluation of the offerors' proposed prices was unreasonable due to several evaluation errors. We agree. As discussed below, the agency concedes that it made two errors in the evaluation of the offerors' proposed prices, and the record shows that the agency made an additional error concerning the evaluation of international calling rates. These errors, when combined, leave PCS with a lower proposed price than VAC.

As a preliminary matter, the fact that the anticipated contract will not result in costs to the government does not absolve the agency of its duty to reasonably evaluate the

---

<sup>6</sup> PCS notes that the solicitation contains the "Service of Protest" clause at Federal Acquisition Regulation (FAR) § 52.233-2, and the "Protest After Award" clause at FAR § 52.233-3. RFP at 20-21. The protester contends that the inclusion of these clauses is evidence that the procurement is within our Office's jurisdiction. Although the inclusion of these clauses appears to indicate that ICE anticipated that offerors could file a protest concerning this procurement with our Office, the agency's intentions are not dispositive regarding jurisdiction. Instead, as discussed above, we conclude that the record shows that the procurement is within our statutory jurisdiction because it concerns a procurement by a federal agency for goods and services for the benefit of the government.

offerors' proposed prices. Even where a solicitation contemplates a no-cost contract, agencies are required to evaluate competing proposals in accordance with the terms of the solicitation. Miller, Davis, Marter & Oppen, P.C., B-242933.2, Aug. 8, 1991, 91-2 CPD ¶ 176 at 5 n.10. While agencies have the discretion to establish an appropriate and reasonable method for the evaluation of offerors' prices, an agency may not use an evaluation method that produces a misleading result. General Dynamics Info. Tech., B-299873, Sept. 19, 2007, 2007 CPD ¶ 194 at 10-11. The method chosen must also include some reasonable basis for evaluating or comparing the relative costs of proposals, so as to establish whether one offeror's proposal would be more or less costly than another's. Bristol-Myers Squibb Co., B-294944.2, Jan. 18, 2005, 2005 CPD ¶ 16 at 4.

1. Price evaluation errors conceded by ICE

In two areas, PCS argues, and ICE acknowledges, that the agency's evaluation of prices was flawed. First, the agency concedes that it evaluated PCS's proposed long-distance rate for collect calls as \$.15 per minute, instead of \$.10 per minute, as stated in PCS's proposal. Supp. AR at 5. Second, as discussed above, ICE intended to evaluate prices for long-distance pre-paid calls using an assumed 17 calls per month per detainee (and this was the approach used in evaluating PCS's price). In evaluating VAC, however, the agency concedes that it incorrectly used only 10 calls per month. Id.

The parties agree that correcting these two errors results in a reduction of PCS's price and an increase in VAC's price, as follows:

	VAC	PCS	Difference
Uncorrected Rate <sup>7</sup>	\$49.44	\$57.00	-\$7.56
Corrected Rate	\$54.58	\$55.20	-\$.62
Uncorrected Price	\$29,664,000	\$34,200,000	-\$4,536,000
Corrected Price	\$32,688,000	\$33,120,000	-\$432,000

See Protester's Comments, exh. 3; Intervenor's Comments, exh. B, at 2.

2. Evaluation of debit and pre-paid calls

Next, PCS argues that the agency's price evaluation unreasonably assumed an equal distribution of debit and pre-paid calls. ICE contends that its evaluation approach was reasonable because the solicitation did not distinguish between the volumes of each type of call--thereby indicating, the agency argues, that these calls would be

<sup>7</sup> This rate reflects ICE's price model's assumptions for the price of all calls that one detainee would make during the course of a 30-day period.

weighed equally. As a general matter, where a solicitation lists multiple price or cost elements but does not state how they will be weighted, offerors may assume that each cost or price element will be weighted equally. Beneco Enters., Inc., B-283154, Oct. 13, 1999, 2000 CPD ¶ 69 at 9. ICE also contends that this argument involves a solicitation impropriety that had to be raised prior to the time for submission of proposals. 4 C.F.R. § 21.2(a)(1). We agree with the agency.

The RFP required offerors to propose rates for calls under three payment categories: collect, debit, and pre-paid. RFP at 55. In addition, the RFP provided call volumes for three months of performance under the incumbent contract, July 2007 through September 2007, detailing the total number of collect calls and minutes, and the total number of combined debit and pre-paid calls and minutes. RFP at 37. The RFP did not, however, provide a breakdown of the number of debit and pre-paid calls. The agency evaluated the offerors' proposals on the assumption that the number and duration of debit and pre-paid calls was equal. AR, Tab 6, SSD, at 3.

PCS disagrees with the agency's assertion that the solicitation should be interpreted as giving equal weight to these call types. Instead, PCS argues that ICE's provision of the October through December 2007 data constituted a de facto amendment to the solicitation.<sup>8</sup>

Our Office has held that that information provided by the contracting officer to all offerors as part of a question and answer document regarding the solicitation can be deemed a de facto amendment. E.g., Audio Visual Concepts, Inc., B-227166, July 24, 1987, 87-2 CPD ¶ 86 (written record of questions and answers provided by the contracting officer to all offerors was a "de facto amendment" to the solicitation where the information clearly changed the terms of the solicitation). Here, however, the information that the protester contends constituted an amendment to the solicitation was not clearly designated as a revision to the terms of the solicitation. ICE's presentation of the new data showed three columns of information, as follows:

---

<sup>8</sup> The protester acknowledges that ICE had no access to data distinguishing debit and pre-paid calls at the time the solicitation was issued: "Although the data in the Solicitation, as initially published, was based on information provided by PCS, that data did not distinguish between debit and prepaid calls, because, at that time, the reports PCS used could not distinguish between prepaid and debit calls." Protester's Supp. Comments at 15.

	Oct.-Dec. 2007		RFP Information		Difference <sup>9</sup>	
	Calls	Minutes	Calls	Minutes	Calls	Minutes
Collect	36,810	411,857	43,000	525,000	-6,190	-113,143
Debit	587,334	3,247,277	560,000	3,150,000	27,334	97,277
Free	105,711	213,305	80,000	255,000	25,711	-41,695
Pre-paid	14,369	191,983	N/A	N/A	14,369	191,983

AR, Tab 12, Email from CO to Offerors, Question and Answer (Q&A) No. 28.

The agency’s table shows new information for Oct.-Dec. 2007, and contrasts it to “RFP Information.” We think this distinction does not clearly indicate that the new data were intended to amend the data in the “RFP Information” column, nor did the agency state that the October through December data would be added to the data in the RFP. In fact, ICE’s evaluation of the offerors’ proposals was conducted solely using the July through September 2007 data announced in the RFP.<sup>10</sup>

Moreover, we note that ICE issued an amendment to the solicitation after providing offerors with the October through December data in the January 18 questions and answers. This amendment did not incorporate the new data into the solicitation, but instead provided the same data shown in the table above as “RFP Information.” RFP amend. 00001 at 37. Because the amendment gave no indication that October through December 2007 data would be considered in the agency’s evaluation, we do not think PCS can reasonably claim that the RFP was amended to advise that the agency would accord different weights to the prices for debit and pre-paid calls.

<sup>9</sup> The “difference” column shows the difference between the data provided in the RFP, which addressed calls for July through September 2007, and the data provided in the questions and answers, which addressed calls for October through December 2007.

<sup>10</sup> PCS’s own arguments concerning ICE’s evaluation of the offerors’ prices are at odds with its contention that the October through December 2007 data amended the solicitation. The protester’s critique of the agency’s evaluation of international rates, for example, assumes that the proper set of data for review for call volumes is the July through September 2007 data disclosed in the solicitation. In this regard, the protester’s arguments apply the 98 to 2 ratio of debit to pre-paid calls to the July through September 2007 data, ignoring the October through December 2007 data itself. Protester’s Comments, exh. 5. In essence, PCS’s arguments in this protest are based on extrapolating a ratio of debit to pre-paid calls from the October to December 2007 data, but ignoring those data for all other purposes in the evaluation of the offerors’ costs.

In summary, we agree with the agency that in the absence of data showing how the debit and pre-paid calls would be evaluated, the solicitation required the two categories of calls to be weighted equally. On this record, we conclude that the protester's challenge to the agency's approach to evaluating these categories of calls involves a matter that could have been determined from the solicitation, and is therefore untimely.

### 3. Evaluation of international rates

Next, PCS argues that the agency's evaluation of the offerors' proposed prices for international calls was flawed. Here, we agree with PCS.

The RFP required offerors to propose international calling rates for collect, debit, and pre-paid calls to six identified countries, plus a seventh rate for "all other countries." RFP at 55. The RFP did not advise offerors about how the various rates would be evaluated, e.g., whether the rates would be weighted equally or evaluated based on a specific distribution of calls.

As discussed above, ICE evaluated offerors' rates for calls to Mexico as a surrogate for all international calls. The agency states that, at the time of evaluation, it did not have detailed data concerning the destination of international calls made by detainees, and therefore had no way to evaluate the rates that offerors were required to propose.<sup>11</sup> Supp. CO Statement at 4. The agency states that Mexico was selected as the surrogate for all international calls because "[a]necdotally, most detainees are from Mexico and so most international calls are made to Mexico." CO Statement at 5.

In its report on the protest, ICE also argues that its use of Mexico as a surrogate was supported by data showing the countries to which detainees are sent. These data, which the agency calls "removal rates," show that 57 percent of detainees are sent from ICE custody to Mexico. The agency acknowledges, however, that it did not possess or consider these data during its evaluation, and that the data were produced and reviewed in response to the protest. Agency Response to GAO Questions, July 1, 2008, at 1-2.

---

<sup>11</sup> ICE also states that its use of a surrogate was required because its model for evaluating prices allocated only one international debit and one international pre-paid call per detainee per month. AR at 6; CO Statement at 5. We do not think this rationale is reasonable, as the agency could have used rates that were composites of the different international calling rates and applied those composite rates to each of the two calls in the agency's price evaluation model. As discussed herein, we think the solicitation required the agency to use some sort of composite rate (like an average of all the categories), rather than looking only at the rate for calls to Mexico.

In assessing the agency's approach to evaluating these prices, we note first that the agency requested unique rates for specific countries. This approach implied that all of the rates proposed would be evaluated. See M&S Farms, Inc., B-290599, Sept. 5, 2002, 2002 CPD ¶ 174 (price evaluation was unreasonable where agency did not account for all prices that offerors were required to propose); see also Aurora Associates, Inc., B-215565, Apr. 26, 1985, 85-1 CPD ¶ 470 at 3 (cost evaluation was unreasonable where solicitation requires offerors to address three cost elements, but agency chose to evaluate only one cost element). Next, in light of the reasonable expectation that all international rates would be evaluated, there is the question of how the rates would be weighed. As discussed above, when a solicitation lists multiple categories of prices, but does not state how they are to be weighted, offerors should expect that the categories will be weighted equally. Beneco Enters., supra. While we recognize that an agency could choose to review these calls on a weighted basis, there is nothing in this solicitation that advises offerors that a weighted approach will be used.

We do not think the agency's use of the offered rates for calls to Mexico was a reasonable way to evaluate the international calls component of the prices offered here, nor is there anything in the solicitation that anticipates or allows the agency to evaluate one calling rate and ignore all the other calling rates. In addition, neither the anecdotal evidence nor the removal rate data support the use of only calls to Mexico as a surrogate for the price of all international calls because both arguments rely on the premise that Mexico represents approximately half of all international calls. The natural consequence of this analysis is that the cost of approximately half of international calls is not accounted for in the agency's evaluation. Not accounting for the cost of calls to other international destinations is especially significant since, as shown in the table below, almost all of the international calling rates proposed were higher than those proposed for Mexico:

	<b>VAC debit</b>	<b>VAC pre-paid</b>	<b>PCS debit</b>	<b>PCS pre-paid</b>
<b>Mexico</b>	<b>\$.50</b>	<b>\$.50</b>	<b>\$.50</b>	<b>\$1.50</b>
Guatemala	\$.75	\$.75	\$.50	\$1.50
El Salvador	\$.75	\$.75	\$.50	\$1.50
Honduras	\$.85	\$.85	\$.50	\$1.50
The Dominican Republic	\$.50	\$.50	\$.50	\$1.50
Canada	\$.50	\$.50	\$.50	\$1.00
All other Countries	\$1.25	\$1.25	\$.75	\$2.50
<b>Average for all countries, including Mexico</b>	<b>\$.73</b>	<b>\$.73</b>	<b>\$.54</b>	<b>\$1.57</b>

See AR, Tab 1, VAC Proposal, Vol. 3., at 2; Tab 17, PCS Proposal, Vol. 3, at 2.

The table above also shows that ICE's use of only the rates for calls to Mexico as a surrogate for the price of all international calls distorts the offerors' prices. We reach this conclusion because, while both offerors' prices increase when considering the average of all international rates, the increase for VAC's rates is higher than the increase for PCS. On this record, we conclude that the price evaluation was not reasonable because it does not adequately capture the differences in international call rates proposed by these offerors.

#### 4. Prejudice to PCS from price evaluation errors

During the course of this protest the parties raised extensive arguments about whether PCS could claim to be prejudiced by the agency's price evaluation. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

As discussed above, the agency concedes that it made two errors regarding the evaluation of the offerors' prices. As also discussed above, we conclude that the agency's evaluation of the offerors' proposed rates for international calls was unreasonable. As set forth below, we conclude that PCS was prejudiced by ICE's price evaluation errors because when all of the international rates requested under the solicitation are considered, PCS becomes the lower-priced offeror. As also set forth below, we disagree with the agency's arguments (raised during this discussion of prejudice) that any errors in the evaluation should be offset by the addition of costs to the PCS proposal that were not assessed in the agency's contemporaneous evaluation.

Because the solicitation here did not state how the rates for each country would be evaluated, we think that, for purposes of considering prejudice, it is reasonable to assume that the rates would be weighted equally--as the agency argued in its response to PCS's challenge to the equal weighting of debit and pre-paid call rates. Averaging all of the proposed rates, rather than considering only the rates for calls to Mexico, leads to a significantly different evaluation result. In fact, doing so eliminates VAC's price advantage, as detailed below:

	VAC	PCS	Difference
Corrected Price <sup>12</sup>	\$32,688,000	\$33,120,000	-\$432,000
Corrected price, with averaged international rates	\$34,344,000	\$33,516,000	\$828,000

See Supp. AR at 7.

On this record, we conclude that ICE’s decision to use Mexico as a surrogate to evaluate the international rates required under the RFP prejudiced PCS because an evaluation consistent with the terms of the solicitation would have resulted in a lower evaluated price for the protester.

Next, during the exchanges regarding prejudice here, the agency argued that any changes in the relative standing of PCS in the price competition should be offset by certain fees associated with PCS’s proposal that ICE now argues should have been added to PCS’s price. This adjustment alone would more than double PCS’s evaluated price. We disagree with the agency’s argument and we do not think this offset should be taken at this juncture when it was not part of the agency’s contemporaneous evaluation conclusions.

PCS’s proposal narrative explained that it would charge an “initial connection fee” for collect calls. AR, Tab 17, PCS Price Proposal, at 2. The rationale for the fee and explanation of the changes was as follows:

The primary difference between collect and debit calling rates is an initial connection fee on collect whereas debit is on a flat permanent rate absent a connection fee. Collect calls have cost components relating to billing through the local phone company, bad debt, and other non-collectable charges. By comparison, debit calls do not have any of the billing costs associated with collect calls. In reference to prepaid services, these calls are processed to call centers where the customary method of payment is credit cards and other type of credit billing that creates a similar upfront cost as collect calls.

Id.

PCS’s proposal also contained a table listing collect, debit, and pre-paid rates for local, long distance, and international calls. Below the table, PCS provided this additional explanation of its rates:

---

<sup>12</sup> The corrected price incorporates the two errors conceded by ICE, discussed above.

- PCS intends to include a connection fee for the initial Collect connection of \$1.50 per collect call.
- Debit calls will not be assessed a connection fee.
- Prepaid rates are the same as collect rates.

Id.

In its evaluation of PCS's prices, ICE added a \$1.50 fee for each collect call. AR, Tab 9, Price Evaluation, at 6. ICE did not, however, add a \$1.50 fee for pre-paid calls. In response to the protest, ICE now argues that the evaluation of PCS's price should have included a \$1.50 fee for each pre-paid call because PCS's proposal stated that "[p]repaid rates are the same as collect rates." AR, Tab 17, PCS Price Proposal, at 2. In ICE's view, this language implies that the \$1.50 connection fee applicable to collect calls also applied to pre-paid calls. If this fee were applied, PCS's price (assuming the other corrections discussed above) would be \$58,716,000.

In our view, ICE's mid-protest reassessment of PCS's proposal does not provide a reasonable basis for our Office to conclude that PCS was not prejudiced by the errors in the agency's evaluation of proposed prices. In this regard, PCS's proposal does not state that pre-paid "fees" are the same as collect fees; instead, the proposal states that only the collect and pre-paid "rates" are the same. We note that this statement is superfluous in light of the table in PCS's proposal showing that, in fact, the collect and pre-paid rates are the same. Id. Nonetheless, we do not think that this statement, nor any other part of PCS's proposal reasonably shows that the \$1.50 fee applies to pre-paid calls.

In sum, we conclude that ICE's evaluation of the offerors' prices was unreasonable. As discussed above, ICE's evaluation of the offerors' prices showed a \$4,536,000 advantage for VAC. Correcting the two errors acknowledged by the agency narrows the difference, leaving VAC with a \$432,000 advantage. In addition to the two errors, we conclude that the agency's evaluation of the international rates was unreasonable. Using the average of all international rates yields a price advantage for PCS of \$828,000. On this record, we sustain the protest because the agency's errors clearly prejudiced PCS, which, but for the agency's errors, would have had the lower-evaluated price. See McDonald-Bradley, *supra*; Statistica, 102 F.3d at 1581.

#### Technical Capability Factor Evaluation

PCS argues that ICE's evaluation of the offerors' proposals under the technical capability factor was flawed. As discussed below, we conclude that the agency's evaluation of both offerors' proposals was unreasonable in the following areas: (1) the assessment of two deficiencies in PCS's proposal under the statement of work subfactor of the technical capability factor, and (2) the evaluation of VAC's proposal under the management/staffing approach subfactor of the technical capability factor.

The evaluation of an offeror's proposal is a matter within the agency's discretion. IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 7, 13. Although we will not substitute our judgment for that of the agency, we will question the agency's conclusions where they are inconsistent with the solicitation criteria, undocumented, or not reasonably based. Sonetronics, Inc., B-289459.2, Mar. 18, 2002, 2002 CPD ¶ 48 at 3.

## 1. Evaluation of PCS's Proposal

PCS raises numerous challenges regarding the agency's evaluation of its proposal under the technical capability evaluation factor, arguing that ICE unreasonably assessed deficiencies in PCS's proposal and treated the offerors unequally.<sup>13</sup> As relevant here, the statement of work subfactor required offerors to "explain in detail how they plan to carry out all required tasks," and to "include enough details to allow the Government to verify that the offeror has a complete understanding of the [statement of objectives]." RFP at 8. Among the list of objectives was to provide for a debit calling system, a rebate and refund plan, and biometric security. As discussed below, we agree with the protester that the agency's evaluation of PCS's proposal under the statement of work subfactor was unreasonable in its conclusions about the debit calling system, and the rebate and refund plan. We conclude that the remaining challenges to the agency's evaluation of PCS's proposal lack merit.

### a. Debit calling system

ICE assessed a deficiency for PCS's proposal under the statement of work subfactor based on perceived weaknesses regarding the requirement to provide a "[d]ebit calling system (with prices described in the pricing volume)." RFP at 8. The agency cited three areas of concern regarding PCS's proposal: (1) PCS's proposal does not state whether debit cards can be transferred between facilities; (2) PCS's debit cards cannot be used outside ICE facilities; and (3) PCS's proposal for international calls triggers a deduction after 30 seconds of call time, which, in the agency's experience, has led to complaints from detainees. AR, Tab 3, TEP Report, at 8.

PCS argues that the agency's first two criticisms lack a reasonable basis because the RFP did not require offerors to provide transferability for debit cards between ICE facilities or to allow use of the cards outside the facilities. We agree with the protester that the RFP does not contain these requirements.

---

<sup>13</sup> PCS also contends that the agency failed to recognize certain strengths in its proposal that provided value to the government. We have reviewed all of these arguments and conclude that the protester's disagreement with the agency's assessments provide no basis to sustain the protest. See Cherry Road Techs; Electronic Data Sys. Corp., B-296915 et al., Oct. 24, 2005, 2005 CPD ¶ 197 at 14.

ICE does not dispute that the RFP did not contain these requirements. The agency contends, however, that because VAC's proposal allowed its debit cards to be used outside ICE facilities, the agency reasonably evaluated VAC's proposal more favorably than PCS's proposal. See id. at 15. ICE's argument, however, addresses only the relative merits of the offerors' proposals—it does not provide a reasonable basis for assessing a deficiency for PCS's proposal. As the CO explains, “[d]eficiencies are defined as severe issues and are much more indicative of a potential failure than is a weakness.” Supp. CO Statement at 5.

Because the RFP did not require offerors to provide debit card transferability between ICE facilities, or even address the use of the cards outside the facilities, we conclude that the agency's evaluation was unreasonable. Additionally, although VAC's proposal was credited with a strength for allowing use of debit cards outside ICE facilities, PCS notes that the agency did not document in its evaluation whether VAC's proposal allows transferability between facilities. Neither the evaluation record nor the agency's response to the protest supports the agency's determination that VAC's proposal deserved a strength in this regard.

On this record, since two of the three criticisms for PCS are not reasonable, and one of those two may have been unequally applied to PCS and not VAC, we find that the agency's conclusion that PCS's proposal had a deficiency was not reasonable.

b. Rebate and Refund Plan

ICE assessed a deficiency for PCS's proposal under the statement of work subfactor based on perceived weaknesses regarding the requirement to provide a “[r]ebate and refund plan including time-line and defaults.” RFP at 8. The agency cited four areas of concern regarding PCS's proposal: (1) PCS's proposal lacked detail regarding the information needed to process detainee rebate and refund requests; (2) PCS's proposal stated that “contract data will only be available for life of the contract plus 2 years while the Federal Acquisition Regulation (FAR) requires life of the contract plus 6 years”; (3) PCS's plan to require detainees to mail cards and wait six weeks to receive rebates was “impractical”; and (4) PCS did not provide a sample of the instructions detainees must follow to obtain rebates. AR, Tab 3, TEP Report, at 9. In contrast, the agency determined that VAC's proposal provided a strength under this requirement, based on the following evaluation: “Rebate & refund. Not specific with this process and procedure. However, upon release, detainee can use balance on card by calling an 800 number.” Id. at 16.

With regard to ICE's first criticism, PCS argues that its proposal regarding its rebate and refund plan was adequate because it provided the following details regarding its plan: “Debit cards can be refunded by following the instructions on the back of the card, which require the detainee to mail the card to PCS along with their contact information. Requests for refunds will take up to six weeks to process after being received by PCS.” AR, Tab 17, PCS Proposal, Statement of Work, at 35. The protester concedes ICE's fourth criticism, however, that the offeror did not provide a

sample of the instructions that offerors must follow. Protester's Supp. Comments at 22.

Notwithstanding the first and fourth criticisms, the protester contends that the agency's evaluation of the offerors was unequal because VAC's proposal also lacked meaningful details regarding its rebate and refund plan—an issue noted by the agency, but not deemed a deficiency. In fact, VAC's proposal regarding the rebate and refund plan appears to be limited to the following statement: “Refunds and credits. Refunds will only be given to inmates when they are being released or upon determination by ICE.”<sup>14</sup> AR, Tab 1, VAC Proposal, Statement of Work, at 24. In the absence of a meaningful explanation from the agency as to why VAC's cursory statement provided adequate details regarding its rebate and refund plan, it appears from the record that ICE treated the offerors unequally when it reviewed these similar proposals and concluded that PCS's proposal had a weakness, but that VAC's proposal did not. See TFA, Inc., B-243875, Sept. 11, 1991, 91-2 CPD ¶ 239 at 4-5 (agency's evaluation of offerors' proposals was unequal where the agency assessed a weakness in the protester's proposal based on a lack of detail, but did not assess a weakness in the awardee's proposal, which provided the same level of detail).

Next, with regard to the agency's criticism that PCS's proposal did not meet the requirements for contract data storage, PCS contends that its proposal does not state that it would store contract data for only two years, but rather that it would store recordings of calls for two years.<sup>15</sup> See AR, Tab 17, PCS Proposal, Statement of Work, at 35. The protester contends that it did not otherwise take exception to any requirements concerning storage of contract data. PCS's Comments at 28. ICE does not dispute the protester's argument regarding its proposal, but instead states that its criticism regarding the storage of contract data was “relatively minor in importance.” Supp. AR at 10.

---

<sup>14</sup> In its comments on the supplemental agency report, VAC cites other areas of its proposal which it argues contains more detail regarding its rebate and refund plan. Intervenor's Supp. Comments at 10. These references, however, were primarily to pages of VAC's proposal that were not addressed in the agency's evaluation. See AR, Tab 3, TEP Report, at 15-17. Furthermore, the proposal references cited by VAC do not appear to provide any more details regarding the process detainees must follow to obtain rebates or refunds, which was the basis of the agency's criticism of PCS's proposal.

<sup>15</sup> The protester argues, and the agency does not dispute, that there is no requirement in the FAR for storage of contract data for six years after contract performance. The questions and answers regarding the solicitation, however, advised offerors that the agency would require storage of contract data for six years after contract performance. AR Tab 13, Q&A Set 1, Q&A No. 7.

Finally, with regard to ICE's criticism that PCS's proposal to provide refunds to detainees through a mail-in process was deficient, the agency stated that the "[p]rocess is deemed not practical due to the nature of ICE detainees deported to countries around the world." AR, Tab 3, TEP Report, at 9. With regard to VAC's proposal, however, ICE noted that the offeror did not provide "system listed refunds if the detainee [was] removed from" the continental United States. *Id.* at 15. It is not clear from the record why either offeror's rebate and refund plans addresses the agency's concerns, and neither the record nor ICE's response to the protest provides a reasonable basis for concluding that the agency's treatment of the offerors here was equal.

### c. Biometrics

The statement of work subfactor required offerors to propose methods for providing biometric security systems for calls. ICE determined that PCS's proposal showed an "understanding" of the requirement; in contrast, the agency determined that VAC's proposal had a "strength" for its biometrics solution. AR, Tab 3, TEP Report at 9, 16. PCS argues that the agency's evaluation here was unreasonable because PCS's proposal was as detailed as VAC's, and therefore should have also received a strength. We disagree.

The agency's evaluation stated that PCS's proposal did not address a specific solution, but instead provided a "vague discussion of different biometric types . . . [and] [s]uggests that ICE would have to explain how biometrics would help 'satisfy our needs.'" *Id.* at 9. We think that the agency's evaluation of PCS's proposal was reasonable. PCS's proposal discusses the "SECURUS Voice Biometrics" system, but does not clearly indicate that PCS will use this system. *See* AR, Tab 17, PCS Proposal, Statement of Work, at 30. Rather, the proposal states that "PCS would be interested in discussing other biometrics and how ICE perceives each will satisfy their needs." *Id.* In contrast, VAC's proposal discusses its specific plan to provide a "VAC Focus V-Pin" biometrics system. AR, Tab 1, VAC Proposal, Statement of Work, at 14. On this record, we conclude that the agency's evaluation of the offerors' proposals regarding biometrics was reasonable.

In sum, we conclude that the two deficiencies assessed for PCS's proposal under the statement of work subfactor were unreasonable. We conclude that PCS was prejudiced by this evaluation because the record shows that the two deficiencies were the agency's primary basis for assigning PCS a rating of "good," rather than "excellent" for this subfactor. Additionally, the statement of work subfactor was the only subfactor under the technical capability evaluation factor where PCS received a lower rating than VAC. On this record, we sustain the protest.

## 2. Evaluation of VAC's Proposal

PCS next argues that ICE's evaluation of VAC's proposal as "excellent" under the management/staffing approach subfactor of the technical capability factor was

unreasonable. As discussed below, we agree with the protester that the agency's evaluation of VAC's proposal under this subfactor was unreasonable, but conclude that the protester's other arguments concerning the evaluation of VAC's proposal under the technical capability factor, and ICE's determination to rate VAC's proposal as "excellent," lack merit.

a. Key personnel resumes

PCS contends that VAC's proposal was technically unacceptable because it did not include resumes for all key personnel, as required under the management/staffing approach subfactor of the technical capability evaluation factor. We do not agree that VAC's proposal was unacceptable under the terms of the RFP, but agree that the agency's evaluation of its proposal was inconsistent with the terms of the subfactor.

Offerors were required to detail their approach to managing the requirements of the contract, and were required to "identify key personnel and provide resumes." *Id.* at 9, 62. ICE rated VAC's proposal as "excellent" under this subfactor. In its evaluation, ICE determined that VAC's proposal "provided an exceptionally thorough and comprehensive management/staffing plan," and "[a] complete list of all key personnel and resumes." AR, Tab 3, TEP Report, at 17. The agency's evaluation also noted, however, that "only the top two management resumes were submitted." *Id.*

VAC's proposal identified three "key team member" positions: principal engineer, operations manager, and program manager.<sup>16</sup> AR, Tab 1, VAC Proposal, Staffing and Program Management Plan, at 28. VAC's proposal, however, provided resumes for only two of these three positions, stating as follows:

Below and in the pages to follow, VAC has provided resumes of the Sr. Program Manager and the Unisys Program Manager. Given that this document is subject to open records, as stated by ICE, VAC will provide all other personnel resumes upon request.

*Id.* at 29.

ICE contends that VAC's decision to provide only two of the three key personnel resumes was a "minor" omission that did not merit a deficiency. The RFP, however, stated that offerors' proposals for this subfactor would be evaluated as follows:

---

<sup>16</sup> In addition to these three "key team members," VAC's proposal also lists at least nine other individual team member positions, several of which had individuals assigned, but did not provide resumes. AR, Tab 1, VAC Proposal, Staffing and Management Plan, at 3.

### 1.3 Management/Staffing Approach

Proposals for this subfactor will be graded based on the following criteria:

Excellent—The offeror provided an exceptionally thorough and comprehensive management/staffing plan that included a complete list of key personnel/resumes and a very clear description on how SOO requirements will be managed and coordinated.

Good—The offeror provided a thorough management/staffing plan that included some key personnel/resumes and a clear description on how SOO requirements will be managed and coordinated. . . .

RFP at 64 (emphasis added).

We think the RFP advised offerors that there was a qualitative difference between proposals that provided “a complete list” of key personnel resumes, and proposals that provided “some” key personnel resumes. Because the agency’s evaluation was inconsistent with the evaluation scheme set forth in the RFP, we sustain the protest on this basis.

#### b. Other challenges to the evaluation of VAC’s proposal

The protester raises numerous other challenges to the evaluation of VAC’s proposal under the technical capability factor, and ICE’s determination to rate it as “excellent” overall. We have reviewed all of these arguments and conclude that none has merit. For example, PCS contends that VAC’s proposal should have been rejected as technically unacceptable based on its proposal to record all detainee phone calls.

VAC’s proposal stated that its system “will allow live monitoring and will store up to six (6) months of recorded conversations accessible from any VAC provided System Workstation.” AR, Tab 1, VAC Proposal, Statement of Work, at 2. As PCS notes, the National Detention Standards, which were incorporated into the RFP, prohibited monitoring of certain detainee calls: “Facility staff shall not electronically monitor detainee phone calls on their legal matters, absent a court order.” RFP at 26. In its evaluation of VAC’s proposal, the agency stated: “Page 15 refers to pro bono system, including the ability to record/monitor 6 months of data (not allowed and will be explained after award).” AR, Tab 3, TEP Report, at 15. Based on this record, PCS argues that VAC’s proposal was technically unacceptable. We disagree.

VAC’s proposal stated that its system “will allow” monitoring and recording of detainee’s conversations. It did not state, for example, that its system would always or automatically do so, nor that such monitoring was an essential element of its system. Additionally, ICE notes that agency, and not the contractor, will decide whether calls are recorded. Supp. CO Statement at 6. In this regard, the RFP states

that “[c]urrently, there are not calls being recorded or monitored, although that option is available.” RFP at 5. On this record, we find no basis to conclude that VAC’s proposal was technically unacceptable.

In sum, we conclude, as discussed above, that ICE’s evaluation of VAC’s proposal as “excellent” under the management/staffing proposal evaluation subfactor of the technical capability evaluation factor was inconsistent with the solicitation. Because a lower rating under this subfactor could result in a lower overall rating for the technical capability evaluation factor, we sustain the protest on this basis.

#### Representations in VAC’s proposal

Next, PCS argues that VAC’s proposal contained material misrepresentations concerning its use of Unisys Corp. as a subcontractor. An offeror’s material misrepresentation in its proposal may provide a basis for disqualifying the proposal and canceling a contract award based on the proposal. A misrepresentation is material where the agency relied on it and it likely had a significant impact on the evaluation. Greenleaf Constr. Co., Inc., B-293105.21 et al., Apr. 4, 2007, 2007 CPD ¶ 84 at 8. We find no basis to conclude that VAC’s proposal contained material misrepresentations.

VAC’s proposal stated that it would use Unisys Corporation, a large business, as a subcontractor. VAC’s quality control plan contains a matrix detailing numerous areas where a “Unisys Oversight Program Manager” will have responsibility. AR, Tab 1, VAC Proposal, Quality Control Plan, at 2-7. On April 4, 2008, PCS filed a size-status protest with the Small Business Administration (SBA) Area Office in Denver, Colorado, alleging that VAC’s affiliation with Unisys made VAC an other-than-small business for purposes of this procurement. During the size protest, VAC represented to the SBA that “VAC will provide greater than 99% of the work. Unisys will provide only the part time consulting function in Washington, D.C. EVERYTHING else will be performed by VAC.” SBA Size Determination, 05-2008-040 et al., Apr. 28, 2008, at 7. The SBA Area Office in Denver denied the protest, concluding that VAC was a small business for purposes of the procurement. Id. at 13.

PCS contends that the degree of responsibility for the oversight program manager implies that Unisys will play a large role in VAC’s contract performance, and that VAC’s representations in its proposal regarding the role of Unisys misrepresent that role. We disagree.

VAC’s proposal stated that “[w]ith the exception of the Unisys Oversight Program Manager,” all personnel are full time VAC employees.” AR, Tab 1, VAC Proposal, Staffing and Program Management Plan, at 2. Although VAC’s quality control matrix details numerous areas of responsibility for the single Unisys employee, we do not think that record supports PCS’s claim that VAC misrepresented the role of Unisys. To the extent that PCS believes that VAC made a misrepresentation to the SBA in its claim that the company will perform 99% of the work of the contract, this is matter

for the SBA's review in connection with its proceedings. In this regard, the Small Business Act, 15 U.S.C. § 637(b)(6), gives the SBA, not our Office, the conclusive authority to determine matters of small business size status for federal procurements. 4 C.F.R. § 21.5(b)(1).<sup>17</sup>

### Selection Decision

Finally, the protester contends that the selection decision was unreasonable based on flaws in ICE's evaluation of the offerors' technical and price proposals. We agree. The selection decision was based on agency's determination that VAC's proposal was more highly rated technically than PCS's proposal, and that VAC's proposed price was lower. Based on the price and technical errors discussed above, we conclude that the selection decision was not reasonable.

### RECOMMENDATION

We recommend that ICE reevaluate the offerors' proposed prices and technical proposals, consistent with this decision, and conduct a new selection decision. If the agency concludes that a new price or technical evaluation methodology is required, the agency should amend the solicitation and solicit new proposals from offerors. For example, the agency may wish to amend the solicitation to evaluate offerors' proposed international rates by using a composite rate that reflects the agency's best information concerning the distribution of international calls. If VAC's proposal is not found to offer the best value to the government, ICE should terminate VAC's contract for the convenience of the government consistent with the new selection decision.

We also recommend that PCS be reimbursed the costs of filing and pursuing this protest, including reasonable attorney fees. 4 C.F.R. § 21.8(d)(1). PCS should submit its certified claim for costs, detailing the time expended and cost 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.

Gary L. Kepplinger  
General Counsel

---

<sup>17</sup> PCS appealed the SBA's denial of its size status protest to the SBA Office of Hearings and Appeals (OHA) on May 14, 2008. OHA subsequently remanded consideration of the protest to the Denver Area Office for consideration of additional materials. On June 30, the SBA Denver Area Office again ruled that VAC was a small business for purposes of this procurement. SBA Size Determination, 05-2008-049, remand, June 30, 2008, at 16.