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Washington, DC 20548**

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## Decision

**Matter of:** ACS Education Solutions, LLC

**File:** B-401531; B-401531.2; B-401531.3

**Date:** October 5, 2009

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### DIGEST

Protest of award of four indefinite-delivery/indefinite-quantity, performance-based contracts for servicing direct federal student loans is denied where agency reasonably determined that while incumbent protester's offer would mitigate risk during transition and benefit government in the short term, these advantages were not worth the increased overall cost to the government resulting from the refusal of the protester (unlike the awardees) to accept the agency's proposed common pricing terms, and protester's proposal to continue servicing loans transferred from its contract would frustrate contemplated performance-based approach under the acquisition and introduce uncertainty in contract administration.

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### DECISION

ACS Education Solutions, LLC, of Germantown, Maryland, protests the Department of Education, Office of Financial Student Aid's (FSA) award of contracts to Great Lakes Educational Loan Services, Nelnet, Inc., Pennsylvania Higher Education Assistance Agency (PHEAA), and SLM Corporation (Sallie Mae), under Phase II of request for proposals (RFP) No. FSA-TitleIV-09, for student loan management and servicing. ACS challenges the evaluation of proposals and resulting source selection.

We deny the protest.

FSA administers several student aid programs furnishing federal financial assistance for education beyond high school, including, as relevant here, direct loans (DL) made by the federal government and loans guaranteed by the federal government under the Federal Family Education Loan Program (FFEL). Due to recent economic and liquidity uncertainty facing financial markets, many student loan vendors began dropping out of the market. With the markets unable to generate adequate capital at prices that would ensure that loans needed for the 2009-2010 academic year would be available, recent legislation authorized the agency to accept former FFEL loans tendered by private lenders, and to purchase former FFEL loans dating back to 2003, to return liquidity and stability to the student loan market. In this regard, FSA expected that lenders that had received federal funds under the agency's FFEL Loan Participation Purchase Program likely would transfer their student loans to the agency, rather than repay the federal funds, commencing in September 2009. In total, the agency originally anticipated an approximate doubling of the number of borrowers under the DL program, from the 6.5 to 7 million borrowers serviced by ACS in June 2008 under its Common Services for Borrowers (CSB) contract, to approximately 13 million borrowers. Hearing Transcript (Tr.) at 10-13, 50-58; RFP § C.1.

In order to accommodate the expected significant increase in borrowers under the DL program, FSA undertook to award several indefinite-delivery/indefinite-quantity (IDIQ), performance-based contracts. Under the Phase I solicitation, issued on January 14, 2009, offerors were required to demonstrate—by no later than August 31, 2009—experience in processing a minimum of 500,000 student loan sales conversions annually and in servicing at least 2,000,000 student loans, as well as the capability to process a minimum of 500,000 additional student loan sales conversions annually and to service at least 2,000,000 additional student loans. Six of the 10 offerors submitting timely responses under Phase I, including ACS, Great Lakes, Nelnet, PHEAA, Sallie Mae, and a sixth offeror, were selected to proceed to Phase II.

The Phase II RFP, in issue here, was issued April 22. It provided for the award of one or more performance-based IDIQ contracts—for a 5-year base period, with one 5-year option—under which contractors would be required to meet a set of Initial Requirements by August 31, 2009 in order to commence servicing the FFEL loans; Intermediate Requirements by March 31, 2010 (or risk being denied new volume and losing currently held volume); and Full Requirements by August 31, 2010 for servicing DL program loans (or risk being denied new volume and losing currently held volume). RFP § B.13(c). Award was to be made to the responsible offeror(s) whose offer was most advantageous to the government under two evaluation criteria: (1) technical, which included three technical factors (proposed plan, solution benefits/risks, and past performance); and (2) price, which included a business/price model factor, under which the government would “evaluate the potential total cost of ownership for each offeror.” RFP § D.4. The technical evaluation factors were of equal importance and, combined, were slightly more important than price. Id.

Five timely Phase II proposals were received, including those submitted by ACS, Great Lakes, Nelnet, PHEAA, and Sallie Mae. Following pricing discussions with offerors on June 3, FSA issued proposed initial Common Pricing and Additional Terms and Conditions. In this regard, the RFP provided for a performance-based allocation methodology, under which the “allocation of ongoing volume will be determined based on the performance of each servicer in relation to the other servicers awarded.” RFP attach. A-4. Specifically, servicers (contractors) were to be informed of their “allocation of new volume” of borrowers by July 15 of each contract year, with the allocation to be determined based upon performance metrics in five areas, including percentage of “In Repayment” portfolio loan dollars that go into default, percentage of “In Repayment” portfolio borrowers that go into default, borrower satisfaction surveys, school satisfaction surveys, and surveys of FSA personnel. Id. FSA determined that obtaining common pricing among the servicers, in conjunction with the above performance-based allocation methodology that will award the highest percentages of new borrowers to servicers that perform best with respect to customer satisfaction and default aversion, would best ensure that servicers continue to provide excellent service by forcing them to compete for new borrowers solely on basis of superior service, without regard to price. Contracting Officer’s Statement (COS) at 9-10; Tr. at 129..

As subsequently amended, FSA’s proposed Common Pricing and Additional Terms and Conditions set forth initial common unit prices per month per borrower in various status categories, as well as an escalation methodology by which these prices would be modified based upon a Bureau of Labor Statistics Employment Cost Index, with the adjustment limited to the amount by which the index change exceeds plus or minus 3%. However, under the proposed terms, the government “reserve[d] the right to periodically review and equitably adjust the rate structure to maintain effectiveness of the services provided.” Final Proposed Common Pricing and Additional Terms and Conditions. In addition, proposed Common Pricing term No. 7 stated that the “[t]he Government makes no guarantee to any awardee that their organization will retain their current loan servicing volume.” Id. Indeed, the proposed terms provided as follows:

The Government reserves the right to unilaterally shift borrowers in the best interest of the Government or Borrowers, at no additional cost to the Government. It is anticipated that this will be done only with reasonable and prudent cause.

Id. In addition, FSA submitted to ACS--which was servicing the agency’s current DL borrowers under the CSB contract--certain proposed terms relating to retirement of the CSB contract and incorporation of the CSB-serviced borrowers under the contemplated IDIQ contracts. In this regard, FSA proposed that, in the event ACS received one of the contemplated awards, eligible CSB borrowers (as determined by the government) would then “transfer from CSB to the new contract” without

payment by the government of the transfer fee otherwise applicable under the CSB contract. ACS-Only Additional Terms.

Of the five offerors that subsequently submitted final proposal revisions (FPR), only ACS declined to accept all of the amended proposed Common Pricing and Additional Terms and Conditions. In this regard, for two of the seven borrower status categories, ACS proposed higher pricing than was set forth in the proposed Common Pricing--a monthly service fee of \$[REDACTED] per borrower in In-school Status, versus FSA's proposed \$1.05, and a monthly service fee of \$[REDACTED] per borrower in Grace or Current Repayment Status, for quantities of 1 to 3,000,000 borrowers, versus the proposed \$2.11. ACS also proposed escalation based upon the selected Bureau of Labor Statistics Employment Cost Index, with the adjustment limited to the amount by which the index change exceeded plus or minus [REDACTED]%, rather than plus or minus 3%, as proposed by FSA. Further, ACS's proposal effectively rejected FSA's proposal to retain the right to periodically review and equitably adjust the rate structure to maintain the effectiveness of the services provided. Finally, while ACS stated that it accepted proposed Common Pricing term No. 7--the provision stating that the government "makes no guarantee to any awardee that their organization will retain their current loan servicing volume"--ACS's FPR elsewhere provided as follows:

Effective July 1, 2010, CSB non-defaulted FFEL and Direct Loan borrower[s] being serviced under the CSB contract shall be transferred to the . . . contract. These borrowers shall be serviced under the . . . contract and shall not be subject to transfer to another servicer prior to January 1, 2014.

ACS FPR at 2-8.

FPRs were evaluated under the technical criterion as follows:

|             | Proposed Plan       | Solution Benefits/Risks | Past Performance    |
|-------------|---------------------|-------------------------|---------------------|
| ACS         | Highly Satisfactory | Highly Satisfactory     | Satisfactory        |
| Great Lakes | Satisfactory        | Highly Satisfactory     | Satisfactory        |
| Nelnet      | Satisfactory        | Satisfactory            | Highly Satisfactory |
| PHEAA       | Satisfactory        | Highly Satisfactory     | Highly Satisfactory |
| Sallie Mae  | Highly Satisfactory | Highly Satisfactory     | Highly Satisfactory |

Source Selection Decision (SSD) at 6.

ACS's proposal was evaluated as offering a number of advantages, primarily related to ACS's status as the incumbent DL contractor and its offer of early compliance with the contract requirements, which, the agency found, would afford the

government significant risk mitigation with respect to ability to service loans in the near or immediate future. However, FSA calculated that ACS's refusal to accept the proposed Common Pricing monthly service fees would result in an additional cost to the government of \$11,429,832 per year versus the cost under the proposed Common Pricing for a sample loan portfolio, and an additional yearly cost of \$233,933 to \$3,343,815 due to ACS's higher proposed escalation rates. SSD at 25-27. In addition, FSA determined that ACS's proposal that borrowers being serviced under the CSB that are transferred to the Title IV contract "shall not be subject to transfer to another servicer prior to June 1, 2014" implied that the agency would be unable to transfer the borrowers to another servicer even if ACS failed to comply with the contract requirements. Tr. at 173, 273-75, 306. In any case, the SSA determined that ACS's proposal to retain the transferred CSB borrowers until 2014 "frustrates the performance-based objective of the acquisition." SSD at 28. (Indeed, the SSA believed that this one provision by itself "would render ACS's proposal unacceptable... ." *Id.* ) FSA concluded that these considerations outweighed any risk mitigation benefits from ACS's proposal and that ACS's proposal therefore did not represent the best value to the government; accordingly, FSA made awards only to Great Lakes, Nelnet, PHEAA, and Sallie Mae.

ACS challenges the evaluation of proposals and the resulting source selection decision. We have considered all of ACS's arguments and find that none furnishes a basis for questioning the awards. We discuss the most significant arguments below.

#### PAST PERFORMANCE EVALUATION

ACS challenges the highly satisfactory past performance rating assigned Nelnet and the satisfactory past performance rating assigned ACS in the evaluation, maintaining that its rating should have been higher than Nelnet's. In this latter regard, ACS cites the fact that the SSA found that performance/satisfaction survey results regarding ACS's performance of the CSB contract for servicing DL borrowers "provided a strong indication of positive performance." SSD at 9. ACS further notes that, in a performance questionnaire the SSA completed for another federal agency in May 2009 regarding ACS's CSB performance, he acknowledged that "ACS is an above average contractor," and rated the "overall quality" of ACS's performance as "Good-3" on a scale of Unsatisfactory-1/Acceptable-2/Good-3/Outstanding-4. Performance Questionnaire for Dept. of Homeland Security, May 12, 2009; Tr. at 247.

We will review a past performance evaluation only to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and applicable statutes and regulations. Guam Shipyard, B-311321, B-311321.2, June 9, 2008, 2008 CPD ¶ 124 at 3. The evaluation of past performance, by its very nature, is subjective; an offeror's mere disagreement with the agency's evaluation judgments does not demonstrate that those judgments are unreasonable. SDV Telecomms., B-279919, July 29, 1998, 98-2 CPD ¶ 34 at 2.

We find that the agency reasonably determined that Nelnet's past performance was superior to ACS's. First, while the SSA expressed a positive view of ACS's performance of its CSB contract, this does not establish that ACS was entitled to the highest available past performance rating. In this regard, as noted by the agency, the "Good" rating assigned by the SSA on the past performance questionnaire was part of a four-level rating scale, "Outstanding" being the best available rating, while the agency used a 3-level scale--Highly Satisfactory, Satisfactory, or Unsatisfactory--in evaluating past performance under the RFP. Since ACS's "Good" rating on its CSB contract was not the best available rating, there simply is no reason to equate it directly with a Highly Satisfactory past performance rating, the best available past performance rating under this RFP.

Further, an offeror was to be rated Highly Satisfactory only where it had demonstrated high levels of customer satisfaction through its past performance response (as supported by identified strengths), and a strong commitment and practicable approach to improving customer service. Source Selection Plan at 6. FSA notes that ACS's performance under the CSB contract was lacking in several respects. For example, as the record indicates, at the request of FSA, ACS proposed an approach to modifying the Conditional Disability Discharge Tracking System, one of the major CSB components, and a system that had been developed in 2002 by a company ACS later acquired. Although ACS had been working with the system on the CSB contract for over 5 years at the time, it was unable to successfully modify the system, leading it to refund in 2009 the entire task order price paid by the government, and the agency found that the changes ACS made before it abandoned the project "really destabilized the system." Tr. at 90-99, 309-17. The agency also noted that ACS had failed consistently to conduct user satisfaction surveys on a monthly basis; conducted other surveys only on an annual basis; and did not capture relevant information in the surveys (e.g., the identity of specific customer service representatives) needed to ensure effective feedback and improvement. Technical Evaluation Committee Results at 22-23; ACS Proposal at 21-24. Considerations such as these led the agency to conclude that ACS should not receive the highest available rating.

In contrast, FSA found that Nelnet's performance of servicing contracts under the FFEL program demonstrated a strong commitment to improving customer service. In this regard, the agency noted that Nelnet had a very thorough survey process, under which surveys were broken down to more specific target audiences, thereby assisting in the identification and quicker resolution of issues. More specifically, the agency noted that Nelnet had designed multiple satisfaction surveys for borrowers, focusing on their satisfaction during the term of the loan, as well additional surveys for schools, employees, and lenders. The agency also determined that Nelnet had clearly demonstrated how it used survey results to improve performance. For example, using its online web interface, Nelnet first used survey feedback to identify an issue, then made changes to its operations to address the issue and, finally, resurveyed (and used other means to measure results) to ensure that the changes

met the customer's needs. In addition, FSA noted that Nelnet had demonstrated an ability to quickly turn requirements into an implemented system with respect to the recent FSA "Put Program"/Participation Program, the very program under which FFEL loans may ultimately become federal assets. Technical Evaluation Committee Results at 14; Nelnet Proposal at 1-3 to 1-4, 3-1 to 3a-12.<sup>1</sup> FSA concluded that Nelnet's demonstrated superior commitment and systematic approach to improving customer service warranted a Highly Satisfactory past performance rating, whereas ACS's past performance warranted a Satisfactory rating. We find that the record supports the agency's differentiation between the two offerors.

## PRICE EVALUATION

ACS challenges the source selection decision on the basis that FSA did not adequately consider cost to the government. In this regard, notes the protester, the SSD did not identify a total evaluated contract price for any of the offerors.

Agencies must consider cost to the government in evaluating proposals, 41 U.S.C. § 253a(c)(1)(B) (2006), and while it is up to the agency to decide upon some appropriate and reasonable method for evaluating offerors' prices, it may not use a method that produces a misleading result. See Bristol-Myers Squibb Co., B-294944.2, Jan. 18, 2005, 2005 CPD ¶ 16 at 4; AirTrak Travel et al., B-292101 et al., June 30, 2003, 2003 CPD ¶ 117 at 22. The method chosen must include some

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<sup>1</sup> Nelnet's proposal included extensive survey results. ACS points out that some of the detailed results appear inconsistent with the summary statement in Nelnet's proposal that "[o]ver the last four years, we have increased process satisfaction from 87% to 95% based on surveys of the Apply Borrowers Payment (ABP) process." Nelnet Proposal at 3-5. As noted by the protester, the "Process Survey Apply Borrower Payment" chart in Nelnet's proposal included an entry indicating that only 89.97% of borrowers in 2008 (up from 88.11% in 2007) responded that "Overall, I am satisfied with Nelnet." Id. at 3a-2. However, while the formula by which the overall asserted improvement in satisfaction numbers was derived is not clearly set forth in the proposal, it is clear from Nelnet's detailed survey results that they include a number of very favorable user ratings. For example, Nelnet's proposal also included a "CIC Borrower Satisfaction Survey Results" chart that indicated an "Overall Service" score of 91% average for 2006, 93% average for 2007, and 91% average for 2008, but with scores of 93% in September, October and December 2008 and February 2009, and 95% in January 2009. Id. at 3a-6 to 3a-7; Tr. at 225-27. We find that the totality of the various reported user satisfaction scores was consistent with Nelnet's Highly Satisfactory past performance rating.

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. PlanetSpace, Inc., B-401016; B-401016.2, Apr. 22, 2009, 2009 CPD ¶ 103 at 15; see R&G Food Serv., Inc., d/b/a Port-A-Pit Catering Servs., LLC, B-296435.4, B-296435.9, Sept. 15, 2005, 2005 CPD ¶ 194 at 4; cf. Federal Acquisition Regulation (FAR) § 15.405(b) (primary concern is overall price the government will pay).

The record indicates that price was reasonably considered in the source selection. In this regard, the SSD includes a comparison of the proposed unit prices for borrowers in each repayment status under the Common Pricing adopted by Great Lakes, Nelnet, PHEAA, and Sallie Mae, and the pricing under ACS's proposal, as well as various comparisons between the overall monthly price to the government under the Common Pricing and ACS's pricing for various sample loan portfolios. Applying ACS's higher unit prices for borrowers in In-school Status (\$[REDACTED] versus FSA's proposed \$1.05) and in Grace or Current Repayment Status for quantities of 1 to 3,000,000 borrowers (\$[REDACTED] versus FSA's \$2.11), and averaging the pricing results for the various sample loan portfolios, FSA calculated (as noted above) that ACS's refusal to accept the proposed Common Pricing unit prices could result in an additional cost to the government of \$11,429,832 per year, and that ACS's higher proposed escalation rates would increase those costs by an additional \$233,933 to \$3,343,815 annually. ACS has not demonstrated that the various comparisons in the SSD misrepresented the relative costs associated with the two pricing approaches. We thus find the agency's price evaluation unobjectionable--ACS's pricing approach resulted in prices for the services which were higher than the common pricing accepted by the other competitors.

#### INCUMBENT STATUS

ACS maintains that the price/technical tradeoff decision did not adequately account for the significant risk mitigation that the agency found would inure from ACS's status as the incumbent DL contractor and its offer of early compliance with the contract requirements.

Our review of price/technical tradeoff decisions is limited to determining whether the tradeoff was reasonable and consistent with the solicitation's evaluation criteria. WorldTravelService, B--284155.3, Mar. 26, 2001, 2001 CPD ¶ 68 at 8. Notwithstanding a solicitation's emphasis on technical merit, an agency properly may select a lower-priced, lower technically rated proposal if it decides that the cost premium involved in selecting a higher-rated, higher-priced proposal is not justified, given the level of technical competence available at the lower price. Id.

The tradeoff here was reasonable. While, as discussed, the SSA acknowledged that ACS's advantage with respect to transitioning to the new contract mitigated start-up risk, SSD at 7-8, he viewed this advantage as only an initial, temporary advantage that did not offset the cost impact from ACS's refusal, unlike the other four offerors, to



accept the agency's proposed Common Pricing, and the program impact from ACS's refusal to fully accept the performance-based approach contemplated by the solicitation. The SSA ultimately concluded that, while ACS's offer would mitigate risk and provide benefits to the government in the short term, these advantages were not worth the increased overall cost to the government, frustration of the contemplated performance-based approach under the acquisition, and introduction of uncertainty with respect to contract administration associated ACS's proposal. SSD at 27-28, 32-33. We find no basis to object to this determination.

The protest is denied.

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Managing Associate General Counsel