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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Software Engineering Services, Inc.

File: B-401645

Date: October 23, 2009

John M. Heida, Esq., for the protester.

David S. Black, Esq., and Jessica M. Madon, Esq., Holland & Knight, LLP, for Edaptive Systems, LLC, an intervenor.

Jeffri Pierre, Esq., and Anthony Marrone, Esq., Department of Health and Human Services, for the agency.

Glenn G. Wolcott, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's assertions that agency improperly rated its proposal "Marginal" with regard to non-cost/price evaluation factors constitutes mere disagreement with the agency's judgment and does not provide a basis for sustaining the protest.
 2. Protest based on an alleged conflict of interest created by awardee's proposed use of a subcontractor, who is also the prime contractor in another phase of the program, is denied where the solicitation specifically provides that the subcontractor's involvement in both phases of the program is not precluded, and agency specifically considered the various tasks contemplated under both program phases and determined that no conflict of interest was created.
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DECISION

Software Engineering Services, Inc. (SES), of Bellevue, Nebraska, protests the award of a contract by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), to Edaptive Systems, LLC, of Baltimore, Maryland, pursuant to request for proposals (RFP) No. CMS-2009-8A-PMBR-01 to provide various information technology support services. SES protests that the agency improperly evaluated SES's and Edaptive's proposals, and maintains that Edaptive's proposal should have been excluded from the competition based on an alleged conflict of interest.

We deny the protest.

BACKGROUND

The solicitation was issued in November 2008, seeking proposals to provide program management and business requirements services to support certain application groups within CMS's Healthcare Quality Information Systems (HCQIS).¹ Agency Report (AR), Tab 1, RFP at 8. Offerors were advised that the source selection decision would be based on the agency's "best value" determination, which would reflect consideration of the following evaluation factors: technical understanding, key personnel and staffing plan, management approach, past performance, and cost/price. Id. at 105-10.²

The solicitation further stated that the contract to be awarded under this solicitation would be the first phase of a 4-phase program, further identifying the program phases as:

- Phase 1 – Program Management and Business Requirement Contract
- Phase 2 – Infrastructure Contract
- Phase 3 – Reports and Analytics Contract
- Phase 4 – Development Contract

Id. at 8-9.³

¹ The solicitation states that the HCQIS "is a major application environment that uses application groups, shared servers, and WAN [wide area networks] to monitor and improve utilization and quality of care for Medicare and Medicaid beneficiaries," elaborating that the HCQIS is composed of five application groups, including the Standard Data Processing System (SDPS) and Value Based Purchasing (VBP) application groups. RFP at 8. The solicitation sought support for these two application groups, describing, SDPS as "an information system solution that provides a common platform for users to share applications and data to promote efficiency and increase productivity," and stating that "[t]he VBP application group utilizes SDPS applications and warehouses." Id. at 9, 10.

² The solicitation stated that non-cost/price evaluation factors, when combined were significantly more important than cost/price. Id. at 106.

³ The agency states that the four program phases are not listed in chronological order, elaborating that the phase 1 contractor will first identify the requirements to be met; thereafter, the phase 4 "development" contractor will design/develop a system that meets those requirements; and finally, the phase 2 "infrastructure" contractor will test and maintain the system as designed/developed by the phase 4 contractor. Hearing Transcript (Tr.) at 4-6. The phase 3 contract--which is not at issue in this protest--will include responsibilities for ad hoc reports and analysis.

The agency states that it considered whether performance of the various contract phases would create conflicts of interest if performed by the same or affiliated contractors, and concluded that the performance of the tasks contemplated under phase 1 (including identification of requirements) would create a potential conflict of interest with performance of the tasks contemplated under phase 4 (design/development of the system to meet the identified requirements).

Consistent with that determination, the solicitation, as initially issued, stated:

The Healthcare Quality Improvement Systems Program Management and Business Requirements [phase 1] contractor will not be eligible to bid on any follow up development work associated with this effort (Phase 4 – Development Contract).

Id. at 9.

In December 2008, following issuance of the solicitation but prior to the closing date, potential offerors sought clarification regarding their eligibility to participate in the various program phases. In response, the agency further considered whether performance of the tasks contemplated under the various program phases would create conflicts of interest. Upon consideration of the tasks involved, the agency reaffirmed its initial determination that no contractor (prime or subcontractor) involved in identifying the agency's requirements (phase 1) could also be involved in the design/development of the system (phase 4) that would fill those requirements. However, the agency further concluded that the various activities contemplated under phase 2, including testing, operating, and maintaining the system designed/developed during phase 4, did not conflict with the activities performed by the phase 1 contractor. Accordingly, the agency documented its conclusions by issuing solicitation amendment Nos. 2 and 3 on December 23 and 24, respectively. As finally revised by amendment No. 3, the solicitation stated:

* The Prime and Sub-contractor(s) awarded Phase (I)⁴ Business Requirements and Program Management, both will be excluded from eligibility on Phase (IV) Development.

* The Prime contractor awarded Phase (I) Business Requirements and Program Management, will be excluded from eligibility on Phase (II) Infrastructure.

⁴ The agency's procurement record refers to the program phases using, alternatively, Arabic and Roman numerals.

- * The Prime contractor awarded Phase (II) Infrastructure, will be excluded from eligibility on Phase (I) Business Requirements and Program Management and Phase (IV) Development
- * Any Sub-contractor(s) of Phase (I) Business Requirements and Program will be excluded from eligibility of Phase (IV) Development.
- * Any Sub-contractor(s) awarded Phase (I) Business Requirements and Program Management, may be eligibility [sic] to bid on Phase (II) Infrastructure.

AR, Tab 1, RFP amend. No. 3, at 2.

In short, the final “bullet” above, included in RFP amendment No. 3, put offerors on notice that performance of the phase 2 contract requirements did not disqualify a company from performing as a phase 1 subcontractor. SES did not challenge the terms of the revised solicitation prior to submitting its proposal.

On or before the January 27, 2009 closing date, proposals were submitted by four offerors, including SES and Edaptive. Edaptive’s proposal contemplated reliance on Buccaneer Computer Systems & Services, Inc. (BCSSI) as a subcontractor. There is no dispute that BCSSI was selected as the prime contractor under phase 2 prior to award of the phase 1 contract to Edaptive at issue here.

In evaluating SES’s proposal, the agency assigned it an overall rating of “Marginal.”⁵ The agency summarized its evaluation of SES’s proposal stating, among other things:

SES has demonstrated a marginal understanding of the statement of work. . . . SES had a shallow technical understanding of linkage between [deleted], [deleted], and [deleted] programs and their business requirements development and management. This Proposal shows very little knowledge and technical understanding within the [deleted]. There is a lack of technical understanding on a very complex and arduous transition timetable.

SES proposed marginal key staff and personnel. . . . There is no indication of number of staff FTE dedication. They do not describe the staffing plan or explain the relationship of positions to program in the organizational chart. The Offeror failed to demonstrate “appropriate

⁵ The agency applied an adjectival evaluation system under which it assigned ratings of “Exceptional,” “Very Good,” “Acceptable,” “Marginal,” and “Unacceptable.” Id. at 106.

technical knowledge, expertise and experience” in SOW programs and issues.

SES[’s] management approach is marginal. They have a [deleted]. However, the management plans are theoretical and make no reference to specific services listed in the SOW. [SES] demonstrates a marginal[ly] effective approach to planning, organizing, and executing the contract activities as presented in the SOW. The technical organizational structure had minimal appropriate disciplines, [and] unclear lines of authority, communication and responsibility.

AR, Tab 5, Competitive Range Memo, at 9.

In contrast, the agency assigned Edaptive’s proposal an overall rating of “Exceptional,” stating, among other things, that:

Edaptive has an exceptional technical understanding of the statement of work. The proposal demonstrated a comprehensive and well integrated knowledge of products and processes that support the required CMS programs. The Offeror understands the crucial role that accurate business requirements play in fulfilling prescribed program needs. Their thorough understanding of the various existing IT [information technology] tools will dramatically reduce the need for and risks associated with a start-up learning curve.

Edaptive proposed [an] exceptional team of key personnel and staffing. Key staff experience matrix clearly identifies the extensive experience with existing programs and products and/or project management and SDLC processes. The Offeror staffing plan is filled with seasoned key personnel and more than qualified management staff that has exceptional experience on the Government’s QIO and VBP programs.

Edaptive has proposed a very good management approach. They demonstrate a well thought out plan to manage multiple project schedules and mitigate risks utilizing program management plans and ongoing communications with incumbent contracts. This proposed management team shows a great understanding of maintaining and managing project plans and project schedules. Their management approach highlights business-level operations, identification of high-level risks, constraints, assumptions, inter-relationship with other programs and projects and alignment across other themes and

programs. This also includes plans to track and mitigate issues that impact cost, timetable and quality of work within the SOW.

Id. at 7.

In summary, the overall proposal ratings, along with each proposal's evaluated cost/price, were as follows:

| Offeror | Overall Rating | Cost/Price |
|----------------|-----------------------|-------------------|
| Edaptive | Exceptional | \$69,443,170 |
| Offeror A | Acceptable | \$62,326,940 |
| Offeror B | Acceptable | \$65,767,710 |
| SES | Marginal | \$51,792,651 |

Id. at 6-7.

Based on this evaluation, the agency concluded that only Edaptive's proposal had a reasonable chance for award, and established a competitive range consisting of that proposal.

Thereafter, the contracting officer considered whether a potential conflict of interest was created by Edaptive's proposal of BCSSI as a subcontractor, and concluded it did not. Specifically, the contracting officer states:

I considered whether the work Buccaneer would be performing as the prime contractor awarded the Phase II contract presented an organizational conflict of interest with respect to the award of the Phase I contract to Edaptive as prime with Buccaneer as a subcontractor. Prior to award, I solicited input from other staff in CMS including the Division Director of Quality Contracts and the Deputy Director Information Systems Group. After considering the role of Buccaneer with respect to the different contract phases and the guidance provided offerors in the RFP, I determined that no COI [conflict of interest] existed between the work Buccaneer would be performing as the Prime Contractor under Phase II and the work they would be performing as a subcontractor to Edaptive under Phase I and the exclusion would not apply.

AR, Contracting Officer's Statement, at 8.

On June 30, 2009, the agency awarded the phase 1 contract to Edaptive. This protest followed.

DISCUSSION

SES first protests that the agency's rating of "Marginal" with regard to SES's proposal was unreasonable. We disagree.

The evaluation of an offeror's proposal is a matter largely within the agency's discretion. IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 7, 13. In reviewing a protest that challenges an agency's evaluation of proposals, our Office will not reevaluate the proposals but, rather, will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. A protester's mere disagreement with the agency's judgment in its determination of the relative merit of competing proposals does not establish that the evaluation was unreasonable. VT Griffin Servs., Inc., B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4.

Here, we have reviewed the agency's evaluation record and find no basis to question the various assessments. For example, with regard to the evaluation factor, key personnel and staffing plan, the solicitation stated that each proposal would be evaluated as to whether it "provide[d] a clear demonstration that [proposed personnel] are available and dedicated (specify a percentage of time) to this effort." RFP at 107. Notwithstanding this requirement, SES's proposal failed to disclose the number of full time equivalent personnel (FTEs) on which its proposal was based, disclosed the identities of only a limited number of the personnel on which it intended to rely, and failed to specify any percentage of time that even the identified personnel would be dedicated to perform under this contract.

Similarly, under the evaluation factor, technical understanding, the solicitation provided that proposals would be evaluated as to the offeror's demonstrated understanding of various specifically identified programs, and "the interrelationship between applications, warehouses/database, reports, and websites components." RFP at 106. The agency concluded that SES's proposal showed "very little knowledge and technical understanding" with regard to the specifically identified programs and, more generally, failed to demonstrate "appropriate technical knowledge, expertise" with regard to "SOW programs and issues." AR, Tab 5, at 9. In its comments responding to the agency report, SES does not meaningfully challenge the agency's assessments regarding its limited knowledge and understanding, expressly conceding that "additional knowledge transfer is desired." Undated SES Comments on Agency Report, at 11. Nonetheless, SES complains that the agency's criticism was improper because SES "is committed to readily obtain the necessary technical knowledge from the existing CMS staff." Id.

Based on our review of the entire record, including the examples discussed above, we find no basis to question the agency's evaluation of SES' proposal. SES's

complaints constitute mere disagreement with the agency's evaluation and, as such, do not provide a basis for sustaining the protest.

Next, SES protests the award to Edaptive on the basis that the terms of the solicitation precluded the phase 2 prime contractor from performing as a subcontractor in phase 1. Specifically, SES asserts: "the prime contractor of Phase II [BCSSI] was not eligible to bid the Phase I solicitation – neither as a prime contractor or a subcontractor included in the bid." Protest at 16. SES's assertion is contrary to the language of the solicitation.

As discussed above, RFP amendment No. 3 specifically stated: "Any Sub-contractor(s) awarded Phase (I) Business Requirements and Program Management, may be eligib[le] to bid on Phase (II) Infrastructure." AR, Tab 1, amend. 3, at 2. That is, as amended, the solicitation put offerors on notice that performance of the phase 2 contract requirements did not disqualify a company from performing as a phase 1 subcontractor. To the extent SES's protest is based on the assertion that the terms of the solicitation created a per se prohibition on Edaptive's proposed use of BCSSI as a subcontractor in phase 1, the protest fails to state a valid basis.

More generally, SES's various protest submissions alternatively assert that, even if the solicitation did not create a per se prohibition on Edaptive's reliance on BCSSI as a subcontractor, the agency failed to adequately consider the potential for impaired objectivity conflicts flowing from the specific facts presented here.

The responsibility for determining whether a conflict of interest will arise, and to what extent a firm should be excluded from the competition, rests with the contracting agency. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶129 at 12. Because conflicts may arise in various factual situations, including those not directly addressed in the Federal Acquisition Regulation (FAR), that regulation directs contracting officers to examine each situation individually in assessing whether conflicts exist. FAR § 9.505. Provided an agency gives meaningful and thorough consideration to potential conflicts, our Office will not overturn a determination based on such consideration absent a showing that it is unreasonable. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra.

In response to SES's assertions that the agency failed to reasonably consider whether Edaptive's particular proposed use of BCSSI as a subcontractor created impaired objectivity conflicts of interest, this Office sought additional information from the agency regarding the basis for its determination. Specifically, following submission of the agency report, this Office conducted a recorded telephone hearing during which testimony was provided by the contracting officer regarding the basis for determining that Edaptive's proposal of BCSSI as a subcontractor did not create a conflict, as well as for the agency's issuance of solicitation amendment Nos. 2

and 3; thereafter, the agency submitted declarations from the agency's technical evaluation panel chair and deputy director of its information systems group further explaining the agency's actions. Based on our review of the entire record, we do not question the reasonableness of the agency's determination regarding conflicts.

Specifically, as discussed above, the agency first determined that conflict of interest concerns precluded any contractor that performed under phase 1 (during which the program requirements are identified) from performing in any capacity under phase 4 (during which a system will be designed/developed to meet the requirements identified in phase 1). Given the required separation between identification of the requirements and design/development of a system, the agency concluded that the objectivity of a contractor in performing the phase 2 tasks, including testing, operating and maintaining the system as developed by the independent phase 4 contractor, was not threatened by the phase 2 contractor's involvement in the phase 1 identification of requirements. That is, the agency considered the phase 4 contract to, in effect, create a "buffer" between performance of the phase 1 and phase 2 contract requirements.

In supporting its conclusions regarding this matter, the agency has provided a comprehensive analysis of the various tasks contemplated under the phase 1 and phase 2 contracts. Agency's Post-Hearing Comments; Declaration of CMS Technical Panel Chair; Declaration of Deputy Director of CMS Information Systems Group. The agency's analysis discusses the various activities contemplated under each contract, and provides the agency's narrative assessment regarding its bases for concluding that no conflict of interest is created. Although protester's various submissions express disagreement with the agency's analysis and conclusions, that disagreement fails to demonstrate that such conclusions are unreasonable or provide this Office with a basis to question the agency's judgments. Accordingly, SES's protest that award to Edaptive was improper due to an alleged conflict of interest is without merit.

The protest is denied.⁶

Lynn H. Gibson
Acting General Counsel

⁶ In pursuing this protest, SES has raised various additional arguments, or variations of the arguments addressed above, including assertions that the agency's debriefing was defective and that Edaptive is not sufficiently experienced to perform the contract requirements. We have reviewed all of SES's assertions and find no basis for sustaining the protest.