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Decision

Matter of: Cahaba Safeguard Administrators, LLC

File: B-401842.2

Date: January 25, 2010

Eric J. Marcotte, Esq., Scott A. Schipma, Esq., and Mark A. Smith, Winston & Strawn LLP, for the protester.

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Anthony E. Marrone, Esq., and Jeffri Pierre, Esq., Centers for Medicare and Medicaid Services, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where agency failed to reasonably consider plan proposed by awardee to mitigate its impaired objectivity organizational conflicts of interest.
 2. Agency's exchanges with offeror regarding its proposed mitigation strategy to address organizational conflicts of interest were not discussions such that the agency was required to reopen discussions with all offerors.
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DECISION

Cahaba Safeguard Administrators, LLC, of Birmingham, Alabama, protests the award of a contract to AdvanceMed Corp., of Rockville, Maryland, under request for proposals (RFP) No. RFP-CMS-2008-0014, issued by Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) for contracts in support of CMS's audit, oversight, and anti-fraud, waste and abuse efforts in two geographic zones (Zone 1 and Zone 2). Cahaba argues that CMS unreasonably concluded that AdvanceMed proposed an adequate strategy to mitigate its "impaired objectivity" organizational conflicts of interest (OCI) and that the agency held unequal discussions with offerors.¹

¹ Cahaba also argues that CMS's evaluation of offerors' proposals was flawed, the discussions CMS conducted with Cahaba were not meaningful, and that CMS failed
(continued...)

We sustain the protest on the basis that the agency failed to reasonably consider the awardees' proposed strategy to mitigate its conflicts.

BACKGROUND

As part of federal Medicare and Medicaid contracting reform, CMS intends to award contracts to entities referred to as Zone Program Integrity Contractors (ZPIC), which are to perform program integrity functions for Medicare Parts A, B, C, D, Durable Medical Equipment, Prosthetics, and Orthotics Supplier (DMEPOS), Home Health and Hospice (HH+H), and Medi-Medi (a partnership between Medicaid and Medicare designed to enhance collaboration between the two programs to reduce fraud, waste, and abuse). CMS has established seven geographic zones under the program and it intends to have one ZPIC serving each zone. According to CMS, the mission of the ZPIC program is to promote the integrity of the Medicare and Medicaid programs by accomplishing a variety of objectives. Specifically, ZPICs will aim to:

1. Identify, stop and prevent Medicare and Medicaid fraud, waste and abuse, and refer instances of such activity to the appropriate law enforcement agencies;
2. Decrease the submission of abusive and fraudulent Medicare and Medicaid claims;
3. Recommend appropriate administrative action, to ensure appropriate and accurate payments for services are made; and
4. Coordinate potential fraud, waste and abuse, which has been identified, with the appropriate Medicare and Medicaid entities.

RFP, Statement of Work, at 11; Contracting Officer's (CO) Statement at 4.

CMS issued the RFP on May 1, 2008. The RFP contemplates the award of two separate ZPIC indefinite-delivery/indefinite-quantity (ID/IQ) contracts (geographic Zones 1 and 2). The Zone 2 award, which is at issue in this protest, covers the following states: Alaska, Washington, Oregon, Montana, Idaho, Wyoming, Utah, Arizona, North Dakota, South Dakota, Nebraska, Kansas, Iowa, and Missouri. In conjunction with the award of the ID/IQ contract, the RFP also provided for the simultaneous issuance of two task orders for each Zone. Task order 0001 is for

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to make a reasonable tradeoff decision in its selection of AdvanceMed's proposal as the best value to the government. We have reviewed these allegations and conclude that they do not provide a basis to sustain Cahaba's protest.

Medicare Parts A and B, DMEPOS, and HH+H, while task order 0002 is for the Medi-Medi program. RFP, at 76.

According to the RFP, offerors were required to address the solicitation's requirements for Medicare Part A, B, C, D, DMEPOS, HH+H, Medi-Medi, as well as the specific requirements for each of the two task orders. The RFP provided that "[a]ward will be made to the Offeror(s) whose proposal contains the combination of criteria offering the best overall value to the Government." RFP, at 127. In making its selection, the RFP provided that CMS would evaluate and consider each offeror's proposal based on ten weighted technical evaluation criteria, and related sub-criteria.

Importantly, section H of the RFP specified that "the Contracting Officer shall not enter into a contract with an Offeror or maintain a contract with a Contractor that the Contracting Officer determines has, or has the potential for, an unresolved organizational conflict of interest," explaining that "[i]t is essential that the contractor and the services provided to Medicare beneficiaries under this contract be free, to the greatest extent possible, of all conflicts of interest." RFP, at 144. In order to assess offerors' potential for conflicts of interest, the RFP required offerors to include with their proposals an "Organizational Conflicts of Interest Certificate," identifying all known or potential conflicts, and a strategy for mitigating those conflicts. RFP, at 144.

Regarding organizational conflicts of interest, Section M.3, Evaluation of Conflict of Interest Certification and Compliance Program, the RFP provided that CMS would review each offeror's conflict of interest submission and "make a determination if the Offeror meets the [conflict of interest] requirements." RFP, at 152. Reiterating the provisions in section H, Section M emphasized that "CMS will not enter into a contract with an entity that CMS determines has, or has the potential for, an unresolved organizational conflict of interest unless CMS determines that the risk can be sufficiently mitigated." RFP, at 152.

On June 9, 2008, CMS received four proposals, including those of Cahaba and AdvanceMed. As it relates to the protest, CMS performed an initial review of the information provided by the offerors concerning their conflicts of interest. In its proposal, AdvanceMed provided information regarding potential conflicts of interest and proposed various mitigation strategies to address particular areas of concern. According to CMS, AdvanceMed acknowledged a potential conflict of interest due to impaired objectivity as a consequence of Medicare Part D contracts held by Computer Sciences Corporation (CSC), which is AdvanceMed's ultimate parent company, and CMS concluded that AdvanceMed's proposed mitigation strategies "do

not appear to overcome this Impaired Objectivity Conflict of Interest.”² AR, N-1.a.1, Initial Conflict of Interest Review, at 6-8.

CMS then held discussions with offerors and in its discussions with AdvanceMed, CMS identified issues with its conflict of interest mitigation plan. Although AdvanceMed sought to address the agency’s concerns in its final proposal submission, its efforts proved to be insufficient. Specifically, the contracting officer found that CSC’s role as a subcontractor to [DELETED] for services related to its Medicare Part D plans, created the potential for an OCI. In this regard, the contracting officer determined that this relationship created an “impaired objectivity OCI for Part D” since AdvanceMed “may find [itself] evaluating work that is being performed by its parent company, CSC.” AR, Tab N-2.b.1, Pre-award OCI Analysis, at 5. In a similar vein, the contracting officer concluded that functions under another CSC contract held by CSC—a contract with [DELETED] to perform services for that company’s Part D plan— “also could pose an impaired objectivity [conflict of interest] as the Zone 2 ZPIC could be called upon to review services performed by CSC.” Id. Regarding each of these identified conflicts, the contracting officer specified that “[e]ven though Part D work is not being awarded at this time, AdvanceMed must identify an adequate mitigation strategy it intends to put in place to address this Part C&D OCI.”³ Id.

Having considered the conflicts identified by AdvanceMed, the contracting officer considered AdvanceMed’s proposed mitigation strategies, and found them to be inadequate. Specifically, in an effort to neutralize its conflicts, AdvanceMed proposed to implement a National Industrial Security Program Operating Manual (NISPOM) model proxy agreement, which would involve transferring CSC and DynCorp voting interests in AdvanceMed to a reconfigured AdvanceMed board of directors consisting of five independent members. This new board, among others, would oversee the conflict detection and mitigation process.

Apart from the contracting officer’s concern that key features of AdvanceMed’s NISPOM plan were undefined, the contracting officer concluded that the mitigation strategy would not adequately address the identified impaired objectivity conflicts since “AdvanceMed employees will know they are evaluating their parent company” and “AdvanceMed will still be working toward the financial and program goals of the entire CSC enterprise.” AR, Tab N-2.b.1, Pre-award OCI Analysis, at 6.

² As explained by CMS, AdvanceMed is a wholly-owned subsidiary of DynCorp, which is wholly owned by CSC.

³ While the parties at times refer to AdvanceMed’s conflicts in terms of both Medicare Parts C and D, it is apparent from the record that CMS’s concerns were limited to AdvanceMed’s conflicts associated with Medicare Part D.

The contracting officer also rejected a separate mitigation plan proposed by AdvanceMed, which involved the use of a number of fire-walled subcontractors to act as “gate keepers” where conflicts are identified. According to the contracting officer, “[AdvanceMed’s] subcontracting approach is not feasible or workable as it places additional contractual requirements on both CMS, [law enforcement] and other ZPICs to participate in steering committees for its proactive workload.” AR, Tab N-2.b.1, Pre-award OCI Analysis, at 7. In addition, the contracting officer was concerned that CMS could not ascertain the impact of this approach on AdvanceMed’s technical approach and cost. Id.

On September 30, 2009, based on the technical and price evaluation, AdvanceMed’s proposal was determined to represent the best value to the government. The contracting officer, however, contacted AdvanceMed that day and informed it that CMS was unable to accept AdvanceMed’s proposal based on the identified conflicts and explained that AdvanceMed’s proposed mitigation strategies were considered unacceptable.⁴ The contracting officer then provided AdvanceMed with an opportunity to respond to CMS’s concerns.

AdvanceMed forwarded a letter from CSC, dated that same day (September 30) purporting to “amend” AdvanceMed’s OCI mitigation plan. The body of the letter, in its entirety, reads as follows:

In the event that CMS issues a task order to AdvanceMed for Medicare Part C or D efforts, CSC, at its discretion, will divest AdvanceMed; terminate the Part D contracts that it has with [DELETED] and [DELETED]; or retain the Part D contracts with [DELETED] and [DELETED], but subcontract out the functions that pose an OCI with the work of AdvanceMed under any Medicare Part C/D task order(s).

AR, Tab N-2.a.2.

In a memorandum also dated September 30, the contracting officer concluded that the above response was acceptable and that AdvanceMed was eligible for award of the ZPIC Zone 2 contract. In connection with this determination, the contracting officer wrote the following:

The CO has determined that AdvanceMed’s implementation of the above mitigation strategy does not cause any change in AdvanceMed’s technical or cost proposal submitted on July 9, 2009, as the mitigation would not take effect until such time as a Part C&D task order is

⁴ The record reflects that Cahaba also had issues with impaired objectivity OCIs; however, the contracting officer concluded that Cahaba’s mitigation strategy was acceptable. AR, Tab N-2.b.1, Pre-award OCI Analysis, at 10.

issued. Further, two of the mitigation strategies solely involve CSC (CSC terminating its C&D contracts with Universal American and HealthNet or CSC subcontracting out the conflicted work). The other mitigation strategy, total divestiture of AdvanceMed, includes some uncertainties as to the particulars of the divestiture that are and cannot be known at this time. If total divestiture of AdvanceMed occurs, the CO will ensure that they are done so and are in compliance with FAR novation requirements and ensure that Government does not pay any increased costs due to the divestiture.

AR, Tab R-3, at 12.

Thereafter, CMS made award to AdvanceMed and Cahaba filed this protest.

DISCUSSION

Cahaba asserts that CMS acted unreasonably in concluding that the amended mitigation strategy presented in the letter from CSC was acceptable. We agree.

Contracting officers are required to identify potential conflicts of interest as early in the acquisition process as possible. Federal Acquisition Regulation (FAR) §§ 9.505, 9.508. Situations that create potential conflicts of interest include situations in which a firm's work under a government contract entails evaluating itself. The concern in such "impaired objectivity" situations is that a firm's ability to render impartial advice to the government will be undermined by its relationship to the product or service being evaluated. PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7. The primary responsibility for determining whether a conflict is likely to arise, and the resulting appropriate action, rests with the contracting agency. FAR § 9.505; RMG Sys., Ltd., B-281006, Dec. 18, 1998, 98-2 CPD ¶ 153 at 4. Once an agency has given meaningful consideration to potential conflicts of interest, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. Alion Sci. & Tech. Corp., B-297022.4, B-297022.5, Sept. 26, 2006, 2006 CPD ¶ 146 at 8.

Here, it is undisputed that AdvanceMed's proposal presents the potential for an impaired objectivity conflict of interest where AdvanceMed, as a ZPIC contractor, could be placed in the position of evaluating its parent corporation, CSC, in connection with CSC's Medicare Part D work. The contracting officer initially determined that AdvanceMed was ineligible for award, finding that AdvanceMed's proposed mitigation strategies were inadequate. In making this initial determination, the record reflects that the contracting officer exercised deliberate care in analyzing and documenting her review of the conflicts identified by AdvanceMed in its proposal, and the mitigation plan proposed by AdvanceMed to address these conflicts. Specifically, the record reflects the contracting officer's consideration of a detailed analysis of AdvanceMed's conflicts and proposed mitigation strategies,

prepared by a CMS compliance policy specialist, as well the contracting officer's own conclusions and documented analysis. CO Supplemental Statement, at 4; AR, Tab N-2.b.1, Pre-award OCI Analysis.

In contrast to the contracting officer's initial, deliberate evaluation of the conflicts posed by award to AdvanceMed and mitigation strategies, the record reflects a seemingly last-minute and hasty acceptance of AdvanceMed's "amended" mitigation strategy, which itself comprised a single sentence. The contracting officer's immediate acceptance of this revised mitigation approach is defective in several respects. As an initial matter, it is readily apparent that the amended plan lacks the necessary level of detail to reasonably assess the viability of AdvanceMed's mitigation approach. While the plan identified three potential approaches to mitigate the identified conflicts, there are no details explaining how any of the plans would work or when they would, or could, be implemented. This lack of detail is significant given the inherently complex nature of the proposed strategies, which could involve divestiture of a large corporate entity. Given the plan's inherent lack of detail, it is not surprising that the record does not contain any analysis by CMS addressing the viability of the various plans.

CMS attempts to justify its lack of analysis by arguing that the work which gives rise to the conflict, the Medicare Part C and D work, would not be ordered until some point in the future--suggesting that AdvanceMed did not need to provide a detailed mitigation plan for this work, notwithstanding the identified potential conflicts. CMS's arguments in this regard, however, are contrary to the terms of the solicitation and CMS's contemporaneous consideration of AdvanceMed's conflicts.

Specifically, sections H and M of the RFP established that CMS would not enter into a contract with an entity that has the potential for an unresolved OCI. This requirement expressly applied to the Medicare Part C and D related work where the solicitation provided as follows:

At this time, task orders will not be awarded for Part C and Part D. CMS may award a task order for Part C and Part D no earlier than October 2009. Although a Part C and/or Part D task order is not being awarded at this time, Offerors are required to propose on the [statement of work] requirements for Part C and D as outlined in Section M. Offerors will be required to provide an acceptable Conflict of Interest mitigation strategy to CMS . . . if award of Part C and/or D is an actual or perceived Conflict of Interest.

RFP, at 83-84.

Moreover, Medicare Part C and D services were an integral part of the agency's technical evaluation; 10 of 12 technical approach sub-criteria involved capability to perform Part C and D work. RFP, at 140-146.

Further, during evaluation of proposals, the contemporaneous documentation reflects the contracting officer's recognition of the need for AdvanceMed to submit, with its proposal, an adequate strategy to mitigate its Medicare Part D conflicts. In fact, regarding these conflicts, the contracting officer specifically stated, "[e]ven though Part D work is not being awarded at this time, AdvanceMed must identify an adequate mitigation strategy it intends to put in place to address this Part C&D OCI." AR, Tab N-2.b.1, Pre-award OCI Analysis, at 5-6. Significantly, AdvanceMed's failure to provide an adequate strategy to address the Part D conflicts resulted in the contracting officer's initial determination that AdvanceMed was ineligible for award. Based on this record, it is clear that AdvanceMed was required to submit, and CMS was required to evaluate, a mitigation strategy which CMS could reasonably conclude would resolve AdvanceMed's Medicare Part D conflicts. As set forth above, this did not happen.

In addition to the undefined and general nature of AdvanceMed's amended mitigation plan, various aspects of the plan are fundamentally problematic. Since implementation of one of the three identified mitigation strategies is entirely at CSC's "discretion," each of the three options must be capable of effectively mitigating the identified conflicts.⁵ It is apparent, however, that the contracting officer has focused her attention on the viability of only one of the three options--divestiture. In a supplemental statement in response to the protest, she specifically indicates a "preference" for CSC's divestiture of AdvanceMed, notwithstanding the fact that the terms, timing, and process for such an involved process are entirely undefined and there is a concomitant lack of understanding regarding the viability of such an option. Supplemental CO Statement, at 7. Moreover, while the contracting officer readily admits to her "concerns regarding the feasibility of CSC using subcontracting to mitigate conflicts," this option "did not alarm" her because it was only one of the three possibilities and CMS had "reserved the right to terminate the contract." Id.

We think that the contracting officer's underlying concerns regarding the "subcontracting" option are understandable. While CSC indicates a general plan to "subcontract out the functions that pose an OCI with the work of AdvanceMed," it is not apparent how such an option would be feasible or effectively mitigate the conflict. As a ZPIC contractor, AdvanceMed would be responsible for identifying fraud, waste, or abuse by performing audit-type activities. Because such work may necessarily involve a retrospective look at the activities performed by a particular entity, it is not apparent how CSC's post-award subcontracting of the particular Medicare Part D work would insulate AdvanceMed from potentially auditing

⁵ The protester also argues that the amended mitigation strategy at issue is unenforceable, and therefore unacceptable, because it was submitted by CSC and CMS would not be in privity of contract with CSC.

Medicare Part D work previously performed by CSC. In addition, it is not apparent how use of subcontractors in this situation would address the fundamental concern in connection with AdvanceMed's impaired objectivity--AdvanceMed being placed in the position of reviewing the work of its parent, CSC. Since CSC would ultimately remain contractually responsible for the functions it subcontracts, AdvanceMed's review of work performed by CSC's subcontractors could be considered a review of CSC's contractual obligations and responsibilities.⁶ Thus, AdvanceMed could be viewed as in the position of evaluating CSC, notwithstanding CSC's use of an intervening layer of subcontractors.

In addition, regarding the latter point raised by the contracting officer--that CMS's reservation of the right to terminate AdvanceMed's contract somehow negated the need for AdvanceMed to submit an adequate mitigation strategy--this argument flies in the face of the solicitation, which, as discussed above, expressly provided that the agency would not make award to an offeror with an unmitigated conflict. Accordingly, we sustain the protest on the basis that CMS failed to reasonably consider or evaluate the OCI mitigation strategy ultimately proposed by the awardee, AdvanceMed.⁷

As a final related matter, Cahaba argues that the exchanges between CMS and AdvanceMed regarding AdvanceMed's OCI mitigation plan constituted discussions, which, therefore, should have been held with Cahaba as well. We disagree.

⁶ This decision does not stand for the proposition that the subcontracting mitigation strategy identified in AdvanceMed's amended plan is not viable under any circumstances. Rather, based on the particular record in this case, where few details regarding the approach are provided, and given the limited record of the agency's analysis of the matter, there is no basis to reasonably conclude that the approach adequately addresses AdvanceMed's identified Medicare Part D conflicts.

⁷ Cahaba also argues that AdvanceMed is ineligible for award based on impaired objectivity conflicts of interest stemming from CSC's healthcare consulting line of business. Cahaba alleges that this business "involves CSC's intimate involvement with provider health care charging and compliance practices that will be subject to review under the ZPIC program." Protester's Supplemental Comments at 12. Although the contemporaneous record reflects the contracting officer's conclusion that AdvanceMed's consulting services present the potential for a conflict, in a supplemental filing, the contracting officer asserts, without any explanation, that this aspect of the record is in error. Given our decision in this case, we recommend that the agency fully consider the potential conflicts associated with CSC's healthcare consulting business activities in any corrective action it takes and document its analysis in this regard.

Where an agency holds exchanges with an offeror regarding the offeror's plan to mitigate identified conflicts of interest, we have held that such exchanges do not constitute discussions and, as a consequence, they do not trigger the requirement to hold discussions with other offerors. See Overlook Systems Technologies, Inc., B-298099.4, B-298099.5, Nov. 28, 2006, 2006 CPD ¶ 185. Rather, such exchanges are more closely related to matters concerning the offeror's responsibility. Id. at 20.

In this regard, the FAR states as follows:

The contracting officer shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated. Before determining to withhold award based on conflict of interest considerations, the contracting officer shall notify the contractor, provide the reasons, therefore, and allow the contractor a reasonable opportunity to respond.

FAR § 9.504(e).

As explained in Overlook, this provision contemplates a review after evaluations are completed and after an apparent awardee has been identified—it does not suggest reopening discussions with all offerors.

Here, after identifying AdvanceMed as the apparently successful offeror but for concerns regarding unmitigated conflicts, the agency gave AdvanceMed an opportunity to respond to the concerns in this regard. CMS's actions, while ultimately flawed, were consistent with the process outlined in FAR § 9.504(e). To the extent the protester argues that the agency provided AdvanceMed with additional information regarding the timing of the agency's issuance of future task orders (specifically, when it intended to issue task orders for Medicare Parts C and D work) during its exchanges, which necessitated opening discussions with all offerors, this information related solely to the need for and viability of AdvanceMed's amended mitigation strategy, and did not result in AdvanceMed making any changes to its proposal in terms of its technical approach or price.⁸ Accordingly, we conclude that CMS's exchanges with AdvanceMed regarding its OCI plan, did not constitute discussions.

RECOMMENDATION

⁸ While we conclude, based on the particular facts in this case, that the agency was not required to reopen discussions with all offerors based on its exchanges with AdvanceMed regarding its conflict of interest mitigation strategy, it may be that reopening discussions would be appropriate under different circumstances where exchanges regarding an offeror's conflicts of interest and mitigation strategy result in material changes to an offeror's proposal in terms of its technical approach or price.

We recommend that the agency reconsider its determination that AdvanceMed is eligible for award based on the amended OCI mitigation plan submitted on behalf of AdvanceMed by its parent company, CSC. In addition, we recommend that the protester be reimbursed its costs of filing and pursuing the protest, limited to the issues in connection with its OCI arguments, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2009). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
Acting General Counsel