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

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Decision

Matter of: Philips Healthcare Informatics

File: B-405382.2; B-405382.3; B-405382.4

Date: May 14, 2012

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Kevin L. Pearson, Esq., Department of Veterans Affairs, for the agency.

Cherie J. Owen, Esq., Glenn G. Wolcott, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Final proposal revision is late where it was received by the agency after the time set for submission.
 2. Protest that agency's evaluation of past performance was unreasonable is sustained where the record does not contain any evidence that the agency performed a substantive review of past performance or considered the strengths and weaknesses associated with the past performance of the offerors.
 3. Protest is sustained where agency improperly waived a material solicitation requirement for awardee, and protester has shown a reasonable possibility that it was prejudiced.
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DECISION

Philips Healthcare Informatics of Foster City, California, protests the award of a contract to McKesson Technologies of Richmond, British Columbia, by the Department of Veterans Affairs (VA) under request for proposals (RFP) VA-246-10-RP-0136 for a picture archiving and communications system for the veterans

integrated service network 6 (VISN 6).¹ Philips contends that the agency's evaluation and source selection decision were unreasonable in several respects.

We sustain the protest.

BACKGROUND

The solicitation was issued by the VA on April 20, 2011, seeking proposals to provide an enterprise-wide picture archiving and communications system (PACS) under a fixed price requirements contract for a base year and four option years.² RFP at 8-17, 60. PACS is an image management system designed to acquire, store, distribute, process, and display digital radiological images and associated data. The solicitation stated that the purpose of this procurement was to implement and maintain VISN-wide PACS so that any image obtained at any VISN 6 site will be easily accessible from any other VISN 6 site and can be sent to private sector radiologists and academic institutions. Id. at 18. For each patient, the PACS will list prior imaging exams performed at any VISN 6 site. Id. To deliver this capability, the successful offeror will be responsible for providing PACS hardware, software, installation, training, maintenance, and support, including storage of the PACS images. Id.

The RFP informed offerors that evaluation would be conducted on a best value basis, considering the following evaluation factors in descending order of importance: technical qualifications/management approach; past performance; experience; and price. RFP at 64. The three non-price factors, when combined, were considered to be significantly more important than price. Id.

With regard to the past performance evaluation factor, the RFP directed offerors to "list and describe in detail at least two (2) examples of successfully completed interconnected multi-site installation[s] with the suggested product." Id. at 60. With regard to price, offerors were instructed to submit a unit price per study for the base year and each option year, based on the estimated number of studies provided in the RFP. Id. at 8. Offerors were also required to propose, as an option, a one-time fee for start-up and a price to cover the migration of approximately 40 to 45 terabytes of existing image data, which the RFP stated must occur with a period of 6 months to 5 years after award, depending on the option selected by the agency. RFP at 16, 19-20.

¹ The VA is divided into 21 VISNs, or regional authorities. VISN 6 is the VA regional authority responsible for certain medical facilities in North Carolina, Virginia, and West Virginia. RFP at 17.

² The RFP specified that the contractor would be paid a fixed price for each PACS study; once completed, the agency may view the studies an unlimited number of times. RFP at 8.

In response to the RFP, the agency received ten proposals, including those submitted by Philips and McKesson.³ After receiving the proposals, the agency convened a technical evaluation panel (TEP) to evaluate the technical ability/management approach and the experience factor. CO Statement at 1-2. In evaluating the technical ability/management approach and experience factors, evaluators assigned ratings of exceptional, acceptable, marginal, and unsatisfactory. See AR, Tab 2, Source Selection Decision Document (SSDD), at 2.

Additionally, the CO appointed a sub-group of the TEP to assist with the collection of past performance information. Id. In the source selection decision, the CO stated that “[a]ll [competitive range] vendors were found to have satisfactory or exceptional past performance with the exception of [offeror 3],” for whom the panel discovered “some serious problems with maintenance service, quality of service, timeliness and lack of company support when needed.”⁴ AR, Tab 2, SSDD, at 3. Notwithstanding the apparent qualitative difference between “satisfactory” past performance and “exceptional” past performance, all of the competitive range proposals (with the exception of offeror 3) were assigned past performance ratings of high confidence.⁵ Id. at 5.

With regard to price, the agency evaluated the prices submitted by the offerors without making any adjustments. Id. at 3. The four competitive range offerors were invited to provide a product demonstration, after which the TEP adjusted the offerors’ ratings under the technical evaluation factor. Id. As a result of these evaluations, the following ratings were assigned:

³ The agency eliminated four of these proposals from the competition as nonresponsive.

⁴ At the time it evaluated past performance, the agency had established a competitive range consisting of four offerors, including Philips and McKesson. Neither Philips nor McKesson were “offeror 3.”

⁵ The RFP did not disclose the adjectival ratings to be used in evaluating past performance; however, the two past performance scoring sheets in the record for each offeror apparently required evaluators to choose among the following adjectival ratings in evaluating the past performance “subfactors”: exceptional, very good, satisfactory, neutral, marginal, or unsatisfactory. AR, Past Performance Scoresheet for McKesson, at 1. Based on the evaluators’ ratings for each subfactor, evaluators were to assign an overall confidence level rating of: high confidence; significant confidence; satisfactory confidence; unknown confidence; little or no confidence; or no confidence, to each reference evaluated. Id. at 3.

	Philips	McKesson	Offeror 3	Offeror 4
Technical Ability/ Management Approach	Exceptional	Exceptional	Acceptable	Exceptional
Past Performance	High Confidence	High Confidence	Little Confidence	High Confidence
Experience	Exceptional	Acceptable	Exceptional	Exceptional
Price	\$7,737,000.00	\$6,742,450.00	\$9,952,850.00	\$7,486,915.00

AR, Tab 2, SSDD, at 5.

In his source selection decision, the CO stated that, with the exception of Offeror 3, “there is no clear-cut choice.” Id. at 7. The source selection decision further stated:

Normally under a best value decision you would try to trade-off cost against the benefits of a higher rated proposal. That is not the case here as the most important factor was the Technical Ability/Management Approach and there were three vendors with identical ratings for that factor. The second most important factor was experience and McKesson scored only slightly lower than other offeror[s] because they have minimal experience in VA . . . Given this, there was insufficient reason to make award to the highest technically rated vendor.

Id. at 7-8. Thereafter, the CO selected McKesson’s proposal for award. This protest followed.

DISCUSSION

Philips challenges the agency’s evaluation of proposals and award to McKesson on several bases, and maintains that, because the agency’s evaluation of proposals was unreasonable, its best value source selection also is unreasonable. We have carefully considered all of the protester’s assertions and sustain its protest for the reasons discussed below.⁶

⁶ In addition, the protester argues that the awardee’s proposal contained materially unbalanced pricing because it offered to perform the data migration and start-up activities required by the contract at no additional cost. Protest at 12. We deny this protest ground. Unbalanced pricing exists where the prices of one or more CLINs are significantly overstated, despite an acceptable total evaluated price (typically achieved through underpricing of one or more other line items). General Dynamics--
(continued...)

Interested Party

The intervenor contends that Philips is not an interested party to challenge the award to McKesson because Philips is not next in line for award.⁷ Specifically, the intervenor argues that even if the protester prevailed on its challenges to the evaluation, Philips still would not be eligible for award because another offeror received the same adjectival ratings and offered a lower price than Philips. Intervenor's Comments at 2-5.

Proposals with the same adjectival ratings are not necessarily equal. Pemco Aeroplex, Inc., B-310372, Dec. 27, 2007, 2008 CPD ¶ 2 at 6-7. Where, as here, the RFP provides for a best value evaluation, as opposed to selection of the lowest-priced, technically acceptable offer, a proper evaluation is not limited to a consideration of the proposals' adjectival ratings. See Technology Concepts & Design, Inc., B-403949.2, Mar. 25, 2011, 2011 CPD ¶ 78 at 7; Johnson Controls World Servs., Inc.; Meridian Mgmt. Corp., B-281287.5 *et al.*, June 21, 1999, 2001 CPD ¶ 3 at 4. More significantly, and as discussed in more detail below, Philips asserts that the agency failed to conduct a proper past performance evaluation with regard to three of the competitive range offerors, including the allegedly intervening offeror. If Philips' allegations are meritorious, the agency would need to conduct a new evaluation of past performance, potentially resulting in new ratings for all of the competitive range offerors. Accordingly, Philips' protest includes allegations which could result in the agency properly determining that Philips' proposal merited higher past performance ratings than the other offerors, and that it represents the best value to the government. See Northwest EnviroService, Inc., B-247380, B-247380.2, July 22, 1992, 92-2 CPD ¶ 38 at 5. Accordingly, we reject the assertion that Philips is not an interested party.

(...continued)

Ordnance & Tactical Systems, B-401658, B-401658.2, Oct. 26, 2009, 2009 CPD ¶ 217 at 5; Triple H Servs., B-298248, B-298248.2, Aug. 1, 2006, 2006 CPD ¶ 115 at 2. The protester has neither alleged nor shown that McKesson's prices were overstated. Low prices (even below-cost prices) are not improper and do not themselves establish (or create the risk inherent in) unbalanced pricing. General Dynamics, *supra*; Diversified Capital, Inc., B-293105.4, B-293105.8, Nov. 12, 2004, 2004 CPD ¶ 242 at 2 n.1; Islandwide Landscaping, Inc., B-293018, Dec. 24, 2003, 2004 CPD ¶ 9 at 3.

⁷ The agency did not raise the protester's status as an interested party until GAO requested the parties to address the issue.

Late Proposal

Philips first protests that McKesson's proposal was ineligible for award because McKesson's final proposal revision (FPR) was not submitted by the date and time set for receipt of FPRs. Supp. Protest at 4-5. We agree.

The record here establishes that the deadline for submission of FPRs was noon on December 2, 2011. Agency Request for McKesson Final Proposal, at 1. The record further establishes that the agency did not receive McKesson's FPR until 1:04 pm on December 2. Second Supp. AR at 2. In transmitting its FPR, McKesson stated that it "struggled . . . to get this attachment [containing a portion of its FPR] to send properly." First Supp. AR, Tab C, Agency E-mail correspondence with McKesson, at 2. The agency acknowledges that McKesson did not submit its FPR until after the established deadline, stating that "[a] problem with the email address, due to an uncommon spelling of the contracting officer's name resulted in [McKesson's proposal] not being received before Noon." Second Supp. AR at 2.

It is an offeror's responsibility to deliver its proposal to the proper place at the proper time and late delivery generally requires rejection of the proposal. FAR § 15.208; PMTech, Inc., B-291082, Oct. 11, 2002, 2002 CPD ¶ 172 at 2. Similarly, it is an offeror's responsibility, when transmitting its proposal electronically, to ensure the proposal's timely delivery by transmitting the proposal sufficiently in advance of the time set for receipt of proposals to allow for timely receipt by the agency. Associated Fabricators & Constructors, Inc., B-405872, Dec. 14, 2011, 2011 CPD ¶ 279 at 3. Proposals that are received in the designated government office after the exact time specified are late, and generally may not be considered for award. U.S. Aerospace, Inc., B-403464, B-403464.2, Oct. 6, 2010, 2010 CPD ¶ 225 at 10. While the rule may seem harsh, it alleviates confusion, ensures equal treatment of all offerors, and prevents one offeror from obtaining a competitive advantage that may accrue where an offeror is permitted to submit a proposal later than the common deadline set for all competitors. NCI Information Sys., Inc., B-405745, Dec. 14, 2011, 2011 CPD ¶ 280 at 5; U.S. Aerospace, Inc., *supra*; Inland Serv. Corp., Inc., B-252947.4, Nov. 4, 1993, 93-2 CPD ¶ 266 at 3.

The agency contends that it was entitled to accept McKesson's late proposal because the language of Federal Acquisition Regulation (FAR) § 52.212-1(f)(2)(i) "allows late offers to be considered if they are received before award and would not unduly delay award." Second Supp. AR at 2; Second Supp. CO Statement at 1. The agency also argues that its acceptance of McKesson's late proposal was permissible under FAR § 52.212-1(f)(2)(ii), which allows the agency to accept a late modification of an

“otherwise successful proposal” that makes its terms more favorable to the government.⁸

The agency is mistaken with regard to both assertions. With regard to the agency’s first argument, FAR § 52.212-1(f)(2) states in its entirety:

(2)(i) Any offer, modification, revision, or withdrawal of an offer received at the Government office designated in the solicitation after the exact time specified for receipt of offers is “late” and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition; **and**—

(A) If it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of offers; or

(B) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government’s control prior to the time set for receipt of offers; or

(C) If this solicitation is a request for proposals, it was the only proposal received.

(ii) However, a late modification of an otherwise successful offer, that makes its terms more favorable to the Government, will be considered at any time it is received and may be accepted.

FAR § 52.212-1(f)(2) (emphasis added).

In short, FAR § 52.212-1(f)(2)(i) provides that, in order for the agency to properly accept a late proposal pursuant to this provision, the proposal must be received before award, its acceptance will not unduly delay the acquisition, and one of the alternatives listed in subsections (A), (B), or (C) must apply. Here, the agency has not asserted that any of the alternatives in subsections (A), (B), or (C) apply, and our review of the record confirms that none is applicable. Accordingly, the agency’s acceptance of McKesson’s late proposal does not fall under the exceptions specified in FAR § 52.212-1(f)(2)(i).

⁸ FAR §§ 52.212-1(f)(2)(i) and 52.212-1(f)(2)(ii) are codified in the Code of Federal Regulations at 48 C.F.R. § 52.215-1(c)(3)(ii)(A) and 48 C.F.R. § 52.215-1(c)(3)(ii)(B).

Next, the agency's assertion that McKesson's late FPR constituted a late modification of an otherwise successful proposal that makes its terms more favorable to the government, and is therefore properly acceptable pursuant to FAR § 52.212-1(f)(2)(ii), is equally without merit. This exception applies only to an "otherwise successful proposal." The Sandi Group, Inc., B-401218, June 5, 2009, 2009 CPD ¶ 123 at 3. It is well-settled that the term "otherwise successful" restricts this exception to permit the government's acceptance of a late modification offering more favorable terms only from the offeror already in line for the contract award. Environmental Tectonics Corp., B-225474, Feb. 17, 1987, 87-1 CPD ¶ 175 at 4; see The Sandi Group, Inc., supra; Phyllis M. Chestang, B-298394.3, Nov. 20, 2006, 2006 CPD ¶ 176 at 5 n.3. Thus, an offeror cannot avail itself of the late proposal submission provision where the agency has not already identified an "otherwise successful offeror." Global Analytic Info. Tech. Servs., Inc., B-298840.2, Feb. 6, 2007, 2007 CPD ¶ 57 at 5-6.

Here, the record establishes that, prior to the agency's review of FPRs, the agency had not identified any offeror as being in line for award. To the contrary, even after receipt of FPRs, the source selection authority stated that there was "no clear-cut choice." AR, Tab 2, SSDD, at 7. Accordingly, the exception set forth in FAR § 52.212-1(f)(2)(ii) is inapplicable, and there was no basis for the agency to accept McKesson's late proposal.

We sustain the protest on this basis.⁹

Past Performance Evaluation

Philips also alleges several flaws in the agency's evaluation of the second most important evaluation factor, past performance. Philips contends that McKesson failed to provide the information required by the solicitation and that the CO improperly determined that offerors were essentially equal under the past performance factor. Protest at 10; Supp. Protest at 23-25. Philips further asserts that the agency failed to consider the relevance of the past performance references, as required by the RFP and FAR § 15.305(a)(2). Supp. Protest at 24.

⁹ The contracting officer states that McKesson's late submission is understandable, given that the contracting officer's e-mail address uses an uncommon spelling of a common name, and that such mistakes occur "quite often." Second Supp. CO Statement at 1. However, as set forth above, offerors are responsible for submitting proposals so as to reach the designated government office by the specified time. Further, the correct e-mail address for submission of proposals was set forth in the agency's request for McKesson's FPR. See Agency Request for McKesson Final Proposal, at 1. The uncommon spelling of the CO's e-mail address does not excuse McKesson's late submission.

An agency is required to consider, determine, and document the similarity and relevance of an offeror's past performance information as part of its past performance evaluation. The Emergence Group, B-404844.5, B-404844.6, Sept. 26, 2011, 2011 CPD ¶ __ at 6; see FAR §15.305(a)(2). As a general matter, the evaluation of an offeror's past performance, including the agency's determination of the relevance and scope of an offeror's performance history to be considered, is a matter within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. The Emergence Group, supra, at 5; MFM Lamey Group, LLC, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10; Yang Enters., Inc.; Santa Barbara Applied Research, Inc., B-294605.4 et al., April 1, 2005, 2005 CPD ¶ 65 at 5. However, we will question an agency's evaluation conclusions where they are unreasonable or undocumented. Clean Harbors Env'tl. Servs., Inc., B-296176.2, Dec. 9, 2005, 2005 CPD ¶ 222 at 3. The critical question is whether the evaluation was conducted fairly, reasonably, and in accordance with the solicitation's evaluation scheme, and whether it was based on relevant information sufficient to make a reasonable determination of the offeror's past performance. DRS C3 Sys., LLC, B-310825, B-310825.2, Feb. 26, 2008, 2008 CPD ¶ 103 at 22.

Here, the solicitation required that offerors "list and describe in detail at least two (2) examples of successfully completed interconnected multi-site installation[s] with the suggested product." RFP at 60. In responding to this requirement, offerors were instructed that their proposals should address the following: (1) contract compliance; (2) quality of service/work performed; (3) timeliness of performance; (4) business relations; (5) customer satisfaction; (6) subcontracting; and (7) provide a minimum of five client references for the systems and applications being proposed. Id.

The agency has produced minimal documentation supporting its past performance evaluation. More specifically, the record contains only two evaluator scoresheets for McKesson--each prepared by a different member of the past performance sub-group, and each apparently evaluating a different past performance reference. Neither scoresheet identifies the reference/source of the information being evaluated. The record contains two similar scoresheets for Philips. Each scoresheet lists seven subcategories that the evaluators were supposed to assess: (1) demonstration of successful installation of interconnected, multi-site projects with the suggested product; (2) demonstration of contract compliance; (2) quality of service/work; (3) timeliness of performance; (4) business relations; (5) customer satisfaction; and (6) subcontracting. See McKesson Past Performance Scoresheets at 1-2. Under the various categories, the evaluator placed his or her evaluation notes, which ranged from a single word to a few phrases. For example, under the business relations subcategory for one of McKesson's references, the evaluator's only noted observation was "Great company." Id. at 2. Similarly, under the subcategory of contract compliance, the same evaluator noted only "Very little issue." Id. at 1.

Under the first subcategory, demonstration of successful installation of interconnected, multi-site projects, one of McKesson's scoresheets states "3.5 years of install. Install went quite well. Single site though." *Id.* at 1 (emphasis added). Similarly, in discussing the same subcategory, the scoresheet for McKesson's other past performance reference contains the following: "2/3 months for install of system[;] On demand retrieval of image data[;] 160 workstation[;] Single site facility." *Id.* at 4 (emphasis added). These scoresheets establish that both of McKesson's evaluated references failed to satisfy the RFP's clearly stated requirement for "multi-site installation," *see* RFP at 60, noting that both references were for "single site" facilities. *Id.* at 1, 4. Beyond that observation, little else of substance is recorded, and the scoresheets are the only past performance evaluation documentation in the record. Nevertheless, the agency assigned both references the highest possible past performance rating.

Further, in discussing the past performance evaluation, the source selection decision stated that, except for "offeror 3" (an offeror other than Philips or McKesson), "[a]ll vendors were found to have SATISFACTORY or EXCEPTIONAL Past Performance." AR, Tab 2, SSDD, at 3 (capitalization in original). This statement was followed by a two-sentence discussion of Offeror 3's past performance problems, but included no further detail regarding any of the other offerors' past performance. *Id.* The SSDD did not identify which offerors were found to have satisfactory past performance or which offerors were rated exceptional. Nor did the document discuss the relative strengths of the offerors' past performance or provide any explanation or support for concluding that the proposals were essentially equal. Similarly, nothing in the record indicates that the agency gave any consideration to the relevance of the past performance references.

Under the heading "best value determination," the CO referred to the past performance adjectival ratings assigned to some of the proposals, but did not discuss past performance in any way beyond that passing reference.¹⁰ AR, Tab 2, SSDD at 6-7. Similarly, under the heading "decision," the CO appears to have effectively eliminated any consideration of the past performance evaluation factor.¹¹ The decision moves from the statement that all offerors received identical technical/management ratings, to a consideration of the offerors' experience, which

¹⁰ Indeed, McKesson's past performance was not mentioned at all in this section of the SSDD.

¹¹ In response to the protester's argument that McKesson's proposal failed to provide the past performance information requested by the solicitation, the agency states that such information was inconsequential because "the technical evaluation panel felt past performance information provided by the offeror is generally not very useful as you tend to get the positive information only." Supp. CO Statement at 3.

the CO inaccurately characterized as the second most important evaluation factor.¹² Id. at 7-8. Missing from the decision is any evidence of any substantive evaluation or comparative assessment of the offerors' past performance.

It is fundamental that contracting officials may not announce in the solicitation that they will use one evaluation scheme, and then follow another without informing offerors of the changed plan and providing them an opportunity to submit proposals on that basis. Fintrac, Inc., B-311462.2, B-311462.3, Oct. 14, 2008, 2008 CPD ¶ 191 at 6.

Here, we find the record to be devoid of any justification for the agency's determination that the offerors were essentially equal under the past performance factor. More specifically, there is no documentation for the agency's determination that McKesson's two past performance references warranted the highest past performance rating—despite the fact that neither satisfied the RFP's basic requirement that they demonstrate successful multi-site installations. Finally, it appears that the past performance factor was eliminated from consideration or, at best, was converted to a pass/fail assessment. This is evidenced by the CO's statement in the SSDD that all offerors (with the exception of Offeror 3) were either satisfactory or exceptional, followed by the conclusion that these proposals all merited a past performance rating of high confidence.¹³ AR, Tab 2, SSDD, at 3, 5. On this record, we conclude that the agency's evaluation of past performance was unreasonable, inconsistent with the RFP, and insufficiently documented. Accordingly, we sustain the protest on this basis.

Waiver of Uptime Requirement

Next, Philips protests that the agency improperly waived several material solicitation requirements with regard to McKesson's proposal. Specifically, Philips asserts that the agency improperly waived the solicitation's clearly stated requirement that “[v]endors shall guarantee 99.99 percent uptime of the system.”¹⁴ RFP at 18.

As noted above, contracting officials may not evaluate proposals in a different manner, or against a different set of requirements, than stated in the solicitation. See

¹² The RFP established past performance as the second most important evaluation factor.

¹³ See also, AR, Tab 3, Philips Debriefing Letter, at 2 (under the heading of past performance information on the debriefed offeror, the letter stated only that there was no adverse past performance information for the protester).

¹⁴ Immediately following this statement, the solicitation further provided, “Uptime is defined as imaged reports being available to users and users being able to generate VISN-wide reports.” RFP at 18-19.

Fintrac, Inc., supra. Further, it is a fundamental principle that competitions must be conducted on an equal basis, that is, offerors must be treated equally and be provided with a common basis for the preparation of their proposals. The S.M. Stoller Corp., B-400937 et al., Mar. 25, 2009, 2009 CPD ¶ 193 at 5; Continental RPVs, B-292768.2, B-292768.3, Dec. 11, 2003, 2004 CPD ¶ 56 at 8. Finally, our Office will sustain a protest that an agency improperly waived or relaxed its requirements for the awardee where the protester establishes a reasonable possibility that it was prejudiced by the agency's actions. Datastream Sys., Inc., B-291653, Jan. 24, 2003, 2003 CPD ¶ 30 at 6.

Here, the RFP discussed uptime percentages in two different sections. First, as noted above, the solicitation unambiguously stated that vendors were required to "guarantee 99.99% up-time of the system," immediately following that requirement with a definition of system uptime. RFP at 18. Additionally, RFP section B--Schedule of Supplies and Services, established monetary penalties for failing to comply with this requirement. Specifically, RFP section B provided that the agency would pay the base price for all new studies, unless service fell below the 99.99 percent uptime requirement--in which case the agency would subtract 20 percent from the price paid. RFP at 7. The RFP further specified that, for any month in which the system was down greater than 4.32 minutes (meaning the system failed to achieve 99.99 percent uptime for that month), all studies for that month would suffer the 20 percent financial penalty for failure to meet the requirement. Id.

In responding to this requirement, McKesson's proposal offered to comply--contingent upon several conditions. McKesson Tech. Proposal at 1,14. Specifically, McKesson's proposal states that it will comply with the 99.99 percent uptime requirement "contingent upon subsequent negotiations/discussions on agreeable commercially reasonable remedies and service level agreements and appropriate equipment configurations," further limiting its commitment by stating, "[t]his applies to the monthly Fee per Exam pricing proposal, assuming the exclusions outlined."¹⁵ Id. McKesson's proposal further provided that each period of downtime would be calculated starting 15 minutes after notification of an incident is provided by the customer to the McKesson call center. Id. at 14. Finally, McKesson's proposal completely changed the solicitation's stated 20 percent financial penalty for non-compliance, providing instead that, if McKesson failed to meet the uptime requirement during a measurement period, the agency would be entitled to a credit of [deleted] percent of the software maintenance services fees applicable for that measurement period for each [deleted] percent or part thereof that the uptime fell

¹⁵ Elsewhere in its proposal, McKesson expressly acknowledges that its proposal does not comply with all of the solicitation requirements, stating: "McKesson is able to comply with most requirements outlined in the SOW." McKesson Tech. Proposal at 29.

below the standard, which cumulatively could not exceed the total fees for software maintenance services applicable for that period. Id. at 15.¹⁶

Philips contends that McKesson's conditional offer to meet the 99.99 percent uptime requirement did not satisfy the RFP's requirement. Philips further notes that McKesson's insertion of a 15-minute grace period in calculating each instance of downtime conflicts with the RFP's statement that 99.99 percent uptime equates to 4.32 minutes of downtime per month. Thus, in just one occurrence of downtime in which McKesson was allowed a 15 minute grace period, the monthly 4.32-minute allowance for downtime would have been exceeded several times over before McKesson would even begin to count the minutes of downtime. Supp. Protest at 7. Philips also contends that the awardee's proposal failed to adhere to the RFP's 20 percent financial penalty for noncompliance with the uptime requirement. Id. The protester states that, using McKesson's alternate financial penalty, uptime would have to fall to 95.99 percent before McKesson's financial penalty equaled the financial penalty imposed by the RFP's requirements. Id. Finally, Philips notes that it was clearly competitively prejudiced by the agency's waiver of the requirement because, had the agency provided Philips the opportunity to offer the same reduced services for lower prices, it would have done so. Second Supp. Protest at 9.

The agency's response to this allegation was addressed in a single paragraph of its four-page supplemental agency report, wherein the agency asserts that "the 99.99% uptime 'requirement' . . . was not included in the Statement of Work, but rather was stated in the preface to the Schedule of Supplies, as a goal." Supplemental AR at 2. The agency contends that McKesson's proposal offered to meet the requirement, if the agency takes certain steps to "make that possible." Id. Accordingly, the VA asserts that McKesson's conditional offer to meet the agency's "goal" was "a reasonable alternative to this requirement that resulted in a cost saving." Supplemental CO Statement at 2.¹⁷

We reject the agency's assertion that the solicitation's requirement for 99.99 percent uptime was merely a "goal." The requirement was stated in two different sections of the RFP, was described as something with which vendors must "guarantee"

¹⁶ In contrast, the protester's proposal stated that Philips provides a 99.99 percent warranted system uptime, and acknowledged the RFP's stated financial penalties for failure to meet this requirement. Philips FPR at 3.

¹⁷ In its second supplemental agency report, the agency acknowledges that "McKesson proposed an alternative to the uptime requirement as stated in the solicitation," but asserts that this alternative was "both reasonable and offered cost savings." Second Supp. AR at 3. The agency further asserts that McKesson's proposed alternative was not a "material" departure from the RFP's terms. Second Supp. AR at 3.

compliance, and to which a financial penalty for failure to comply was attached. See RFP at 7, 18-19. We find it difficult to imagine how the agency could have more clearly identified this as a requirement. Additionally, the protester has established prejudice, noting that it would have offered a lower price for reduced service had it been afforded such an opportunity. Accordingly, the agency's acceptance of McKesson's conditional offer to meet the RFP's 99.99 percent uptime requirement clearly constituted an improper waiver of the RFP's uptime requirement, and we sustain the protest on this basis.¹⁸

The protest is sustained.

RECOMMENDATION

Based on our review of the record, it appears the agency may believe the solicitation's requirements do not reflect its minimum needs. Accordingly, we recommend that the agency consider its needs and, if appropriate, amend the solicitation. In the event the solicitation is amended, the procurement should be re-opened to permit all offerors to compete against the agency's actual requirements.

Alternatively, if the agency concludes that the terms of the solicitation accurately reflect its minimum needs, the agency should conduct a new evaluation of proposals and award the contract on the basis of the proposal offering the best value to the government, consistent with the solicitation. In making the new source selection decision, the agency may consider all of the materials submitted by offerors prior to the deadline at noon on Friday, December 2, 2011, or take such other actions consistent with our decision.

We further recommend that the agency reimburse the protester the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1)

¹⁸ The protester also contends that the agency improperly waived several other RFP requirements, such as: (1) the RFP's availability of funds clause; (2) the RFP's improper termination penalty; (3) the requirement to confirm compatibility with agency's 3-D and voice recognition software; (4) the requirement that offerors' products be clinical context object workgroup (CCOW) compliant; and (5) the requirement that the offered system allow for the retrieval of exams from teaching folders. Supp. Protest at 2-3, 10-13, 16-17; Second Supp. Protest at 11-12, 14-18; see also McKesson Tech. Proposal at 29-30 ("McKesson is able to comply with most requirements outlined in the SOW") (emphasis added). In light of the other multiple flaws in this procurement, we do not address each of these arguments.

(2011). The protester's certified claim for costs, detailing the time spent and the cost incurred, must be filed to the agency within 60 days after receiving this decision.

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General Counsel