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Decision

Matter of: AdvanceMed Corporation

File: B-415062; B-415062.2

Date: November 17, 2017

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Daniel R. Forman, Esq., Jonathan M. Baker, Esq., Daniel P. Wierzba, Esq., and Hart W. Wood, Esq., Crowell & Moring LLP, for Safeguard Services LLC, an intervenor.
Christian Maimone, Esq., Department of Health and Human Services, for the agency.
Young H. Cho, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where the solicitation stated that performance as a contractor under the procurement and as a Medicaid management information systems (MMIS) contractor in the same geographic jurisdiction was considered a conflict, and the record does not demonstrate that the agency meaningfully considered the conflict that arose due to the awardee's parent company's performance of MMIS contracts in several states in the same jurisdiction.
2. Protest challenging the awardee's proposal as technically acceptable is sustained where the acceptable rating was expressly contingent on remediation of several identified issues, and the identified issues were not remediated.

DECISION

AdvanceMed Corporation, of Reston, Virginia, protests the issuance of a task order to Safeguard Services LLC, of Plano, Texas, under task order request for proposals (RFP) No. HHSM-500-2017-RFP-0044, issued by the Department of Health and Human Services (HHS), Centers for Medicare and Medicaid Services (CMS), to conduct program integrity audit and investigation work across Medicare and Medicaid operations. The protester argues that Safeguard was ineligible for award under the express provisions of the RFP because Safeguard's parent company had an organizational conflict of interest (OCI) that the agency failed to meaningfully consider, and that Safeguard's proposal was also technically unacceptable.

We sustain the protest.

BACKGROUND

The solicitation was issued on February 3, 2017, under the agency's unified program integrity contractor (UPIC) multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contract.¹ The RFP was for services to support CMS's activities for the detection, deterrence, and prevention of fraud, waste, and abuse in Medicare and Medicaid claims in the defined geographic area known as the southeastern jurisdiction.² See Solicitation at 1, 5-7. The solicitation contemplated the award of a cost-plus-award-fee task order with a 1-year base period and four 1-year options. Id. at 5, 10, 22. The task order was to be issued on a best-value tradeoff basis considering the following evaluation factors, listed in descending order of importance: accomplishing and integrating functional requirements--scenario responses; key personnel and staffing plan; past performance; small business utilization; Section 508 compliance;³ and cost/price. Id. at 42-43. The non-cost factors, when combined, were significantly more important than cost. Id. at 42.

As relevant here, the solicitation informed offerors that "[t]o be considered technically acceptable, the offeror's proposed Electronic and Information Technology (EIT) supplies and/or services must conform to applicable Section 508 accessibility standards."⁴ Id. at 40. The solicitation required proposals to include the offerors' completed HHS Section 508 Product Assessment Template (PAT), and further advised that "[i]n making the determination of acceptability, CMS will review the offeror's completed . . . PAT." Id.

¹ The UPIC contract combines and integrates functions that were previously performed by multiple contractors into a single contract under which task orders for a defined geographic area or "jurisdiction" would be competed among the IDIQ contractors. See Agency Report (AR), Tab 10a, Safeguard IDIQ Contract at 6; AR, Tab 1z, UPIC Umbrella Statement of Work (SOW) at 7, 8, 12.

² This jurisdiction encompasses the states of West Virginia, Virginia (excluding the counties of Arlington, Fairfax, and Alexandria), North Carolina, South Carolina, Tennessee, Alabama, Georgia, Florida, and the U.S. territories of Puerto Rico and the Virgin Islands. AR, Tab 1b, Southeast Jurisdiction Task Order SOW at 1.

³ Section 508 refers to the Rehabilitation Act of 1973, as amended, which generally requires agencies to ensure when developing, procuring, maintaining, or using information and communication technology that it be accessible to people with disabilities. See 29 U.S.C. § 794(d).

⁴ The solicitation included HHS Acquisition Regulation (HHSAR) clause 352.239-74, Electronic and Information Technology Accessibility (Dec 2015), which states that EIT supplies and services developed, acquired, or maintained under the contract or order must comply with the accessibility standards set forth in 36 C.F.R. part 1194. Solicitation at 22-23.

Thus, under the Section 508 compliance factor, offerors' proposals would be evaluated based on the submission of the PAT and ability to demonstrate compliance with the established EIT accessibility standards. Id. at 45. In this regard, the solicitation stated that to be rated acceptable, the offeror must demonstrate the offeror's ability to meet Section 508 standards for the proposed EIT. Id. at 46. The solicitation also stated that any offeror that did not complete the PAT or any offeror who completed the PAT, but did not demonstrate the ability to meet Section 508 standards for the proposed EIT would be rated as unacceptable. Id.

Also of particular relevance here, the solicitation required offerors to submit information regarding any business ethics, organizational, and personal conflicts of interest, and compliance information.⁵ Id. at 41. The RFP emphasized that this information was considered material to the award of the contract. Offerors were required to disclose "all current/active and known future non-foreign contracts that could give rise to an actual, potential, and/or apparent [OCI] for itself, its parent(s) and affiliate(s) . . ." Id., attach. J.6, Business Ethics, Conflict of Interest and Compliance Submission by Offeror at 1. Among other things, offerors were to indicate whether the identified contract presented a conflict. Id. at 2. For any disclosed contract that the offeror indicated did not present a conflict, the offeror was required to provide an explanation as to why the disclosed contract was not a conflict. Id.

The solicitation advised that this information would be reviewed with regard to the apparent successful offeror to determine whether the offeror satisfied the solicitation's conflict of interest requirements, including section H.1, Business Ethics, Conflict of Interest and Compliance (June 2015), which was incorporated into the solicitation from the IDIQ contract. Solicitation at 16, 46; AR, Tab 10a, SafeGuard UPIC IDIQ Contract at 26-35. As relevant here, section H.1 stated that "[t]he Contracting Officer [(CO)] has determined that this contract may involve significant potential [OCIs]," and provided examples of activities that "are considered to be an actual, potential or apparent [OCI] with the work to be performed under this contract." See AR, Tab 10a, Safeguard UPIC IDIQ Contract at 29-30. In the same "Significant Potential Conflict of Interest" section, the agency included the following:

2. Proposed Restraint on Future Contractor/Subcontractor Activities: CMS is proposing to restrain future Contractor/Subcontractor activities as follows:

⁵ The UPIC contract, as well as the solicitation, utilizes the term "conflicts of interest" or COI to refer to OCIs and personal conflicts of interest, individually and/or collectively. See, e.g., AR, Tab 10a, Safeguard UPIC IDIQ Contract at 26; Solicitation at 41, 46. Because AdvanceMed's protest does not raise arguments with regard to personal conflicts of interest, our decision uses the term OCI throughout.

CMS considers it a conflict to become a [Medicare Administrative Contractor (MAC)]⁶ . . . at any time in the jurisdiction where it holds a UPIC contract. Offerors should be aware that performing the same or similar functions as the MAC . . . programs for a state at any time in the jurisdiction where it holds a UPIC contract will also be considered a conflict.

Id. at 30 (underscore in original). Under the definition for OCI, section H.1 also specifically stated that “[f]or purposes of this contract, the . . . definition includes direct or indirect relationships including, but not limited to, the [c]ontractor and its parent company, subsidiaries, affiliates” See id. at 28 (italics in original).

The solicitation advised that in accordance with Federal Acquisition Regulation (FAR) § 9.504(e), award would be made to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided, neutralized, or mitigated. Solicitation at 46. The solicitation also stated that “CMS will not enter into a contract with an entity that CMS determines has, or has the potential for, an unresolved [OCI].” Id.

The agency received four proposals, including those from AdvanceMed and Safeguard, which were evaluated as follows:

	AdvanceMed	Safeguard
Overall Technical	Marginal	Exceptional
Accomplishing and Integrating Functional Requirements	Marginal	Exceptional
Key Personnel and Staffing Plan	Marginal	Exceptional
Past Performance	Satisfactory	Satisfactory
Small Business Utilization	Satisfactory	Satisfactory
508 Compliance	Acceptable	Acceptable ⁷
Total Probable CPAF	\$87,692,201	\$129,855,993

⁶ The protester has represented, and the parties have not disputed, that MACs process Medicare claims for Medicare fee-for-service beneficiaries and that in many states, the equivalent of the MACs are Medicaid management information systems (MMIS) contractors or fiscal agents, who implement and operate modern information technology (IT) systems to process Medicaid claims for a given state. See Protest at 9; Protester’s Comments at 14.

⁷ The source selection decision contained an asterisk accompanied by the following notation: “*This criteri[on] is considered acceptable, contingent upon the contractor’s remediation of the issue(s) identified in the 508 [c]ompliance [o]fficer[’]s review.” AR, Tab 7, Source Selection Decision Document (SSDD) at 4; see also AR, Tab 4b, Safeguard Final Technical Evaluation Report (TER) at 2.

AR, Tab 7, SSDD at 3-4.

A technical evaluation panel (TEP) evaluated the technical proposals under all the technical factors except the Section 508 compliance factor, which was evaluated by a Section 508 compliance officer. See AR, Tab 4a, AdvanceMed TER; AR, Tab 4b, Safeguard TER; see also Agency Oct. 20 Response to GAO Request for Information (RFI) (Agency Oct. 20 Response) ¶ 2.

With regard to AdvanceMed's proposal, the Section 508 compliance officer stated that he did not find "any 508 compliance issues with [AdvanceMed's] proposal, so [AdvanceMed's] submission is [a]cceptable." AR, Tab 4d, AdvanceMed 508 Compliance Officer Email. With regard to Safeguard's proposal, the Section 508 compliance officer found that five of Safeguard's PATs were unacceptable due to issues identified with the PATs.⁸ AR, Tab 4c, Safeguard 508 Compliance Officer Email. For each of these PATs, the 508 compliance officer also stated that "Note: This Section would be considered acceptable, contingent upon the contractor's remediation of these issues." Id.

The TEP assigned an acceptable rating to Safeguard's proposal under the Section 508 compliance factor. AR, Tab 4b, Safeguard TER at 1, 18. In this regard, the TEP found that for the sections that were deemed unacceptable by the 508 compliance officer, those sections would "be considered acceptable, contingent upon the contractor's remediation of these issues." Id. at 18-19.

The CO, who was the source selection authority for this procurement, performed a comparative assessment of the proposals against the evaluation factors in the solicitation as part of his tradeoff/best value analysis to determine whether the strengths in Safeguard's technical proposal warranted paying the associated price premium for those services. See AR, Tab 7, SSDD at 7-13. As a result, the CO found Safeguard's proposal to be significantly stronger than AdvanceMed's under the most important factor, accomplishing and integrating functional requirements-scenario responses; and the second most important factor, key personnel and staffing plan factor. Id. at 8-9. In doing so, the CO identified advantages under both factors that warranted a substantial price premium. Id.

The CO did not identify any discriminators between the two proposals under the remaining factors. Id. at 9-10. As relevant here, "the CO found that both offerors provided an acceptable 508 compliance submission as required by the solicitation. [Safeguard's] [a]cceptable rating is contingent upon the remediation of the issues

⁸ In each instance, the 508 compliance officer stated that "There are still a few issues with this PAT, it is unacceptable (please see reasons below)" and identified in bullet points the issue with the PAT by section. AR, Tab 4c, Safeguard 508 Compliance Officer Email.

identified in the 508 [c]ompliance [o]fficer[']s review, but does not detract from its overall acceptability.” Id. at 10.

In the CO’s summary of the tradeoff between Safeguard and AdvanceMed, the CO found that the benefits of Safeguard’s technical proposal and additional labor hours warranted the price premium over that of AdvanceMed’s proposal “to ensure that the [g]overnment obtains superior technical features throughout the entirety of the contract.” Id. The CO also performed a comparative assessment and tradeoff analysis between Safeguard and the other remaining offeror. Id. at 10-13. As a result, as between the three offerors, the CO found that Safeguard’s proposal represented the best value to the government. Id. at 13.

AdvanceMed was notified of the award and debriefed on August 4, 2017. This protest followed.⁹

DISCUSSION

AdvanceMed argues that Safeguard has an OCI that the agency failed to meaningfully consider and that Safeguard’s proposal was technically unacceptable. We have fully considered all the arguments raised by AdvanceMed but sustain the protest only on the grounds discussed below.¹⁰

Organizational Conflict of Interest

AdvanceMed argues that although the solicitation expressly informed offerors of CMS’s determination that an OCI existed where an offeror (or its affiliates) served both as a UPIC and as a MMIS contractor in the same geographic jurisdiction, the agency failed to meaningfully consider the conflict that arose here due to Safeguard’s parent company’s performance of MMIS contracts in four states in the southeast jurisdiction. See Protest at 7-11; Protester’s Comments at 15.

In response, the agency states that all MMIS-related contracts held by Safeguard’s parent company were disclosed and reviewed for evaluation. CO’s Statement (COS) at 2. In this regard, the agency explains that “[i]n fact, the [CO] has discussed this perceived conflict with [Safeguard] prior to this award, the award of the [n]ortheast [j]urisdiction, and the award of the UPIC IDIQ.” Id. The agency also states that

⁹ The awarded value of the task order at issue exceeds \$10 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award IDIQ contracts. 41 U.S.C. § 4106(f).

¹⁰ The protester has raised arguments in addition to, or are variations of, those discussed below. While we do not address every issue raised, we have considered all of the protester’s arguments and allegations and find that, except as discussed below, they provide no basis to sustain the protest.

“[t]hroughout those discussions the [CO] had two separate conference calls with [the company] where [Safeguard] disclosed and reiterated . . . that the questioned contracts were primarily of an [IT] system and support nature with no fraud investigation work.” Id. Finally, the agency argues that “much like the [MACs], an affiliate of [Safeguard] performing the duties of a claims processor in the area where [Safeguard] serves as the UPIC is not an actual conflict of interest,” and that “having recognized this perceived conflict of interest on their own, [Safeguard provided information] as it pertains to these contracts to eliminate any concern regarding OCI.” Id. at 3.

The FAR requires that contracting officers identify and evaluate potential OCIs, and directs contracting officers to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor’s objectivity. FAR §§ 9.504(a), 9.505. The situations in which OCIs arise, as described in FAR subpart 9.5 and the decisions of our office can be broadly categorized into three types: (1) biased ground rules; (2) unequal access to information; and (3) impaired objectivity. As relevant here, an impaired objectivity OCI, as addressed in FAR subpart 9.5 and the decisions of our Office, arises where a firm’s ability to render impartial advice to the government would be undermined by the firm’s competing interests. FAR § 9.505(a); Diversified Collection Servs., Inc., B-406958.3, B-406958.4, Jan. 8, 2013, 2013 CPD ¶ 23 at 5-6. 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.

Our Office reviews the reasonableness of a contracting officer’s OCI investigation and, where an agency has given meaningful consideration to whether a significant conflict of interest exists, we will not substitute our judgment for the agency’s, absent clear evidence that the agency’s conclusion is unreasonable. See TeleCommunication Sys. Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3-4. In this regard, the identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. Guident Techs., Inc., B-405112.3, June 4, 2012, 2012 CPD ¶ 166 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 § 9.504; RMG Sys., Ltd., B-281006, Dec. 18, 1998, 98-2 CPD ¶ 153 at 4. Once an agency has given meaningful consideration to whether an OCI exists, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. See DV United, LLC, B-411620, B-411620.2, Sept. 16, 2015, 2015 CPD ¶ 300 at 6; Alion Sci. & Tech. Corp., B-297022.4, B-297022.5, Sept. 26, 2006, 2006 CPD ¶ 146 at 8.

We agree with the protester that despite the fact that the solicitation clearly informed offerors that CMS viewed an offeror (or its affiliates) serving both as a UPIC contractor and an MMIS contractor in the same geographic jurisdiction as having an OCI, the

record here does not demonstrate that the agency meaningfully considered the conflict that arose due to Safeguard's parent company's performance of MMIS contracts in four states in the southeast jurisdiction where Safeguard would be performing as a UPIC contractor.

First, we note that while Safeguard's proposal disclosed the contracts at issue, it did not "recognize [] this perceived conflict on its own," as the agency asserts. Instead, Safeguard represented that there were no OCIs and that no mitigation was necessary despite representing that "[u]nder this contract [Safeguard's parent company] processes Medicaid [c]laims" for those states. See AR, Tab 3d3/Tab 11, SafeGuard J.6 attach. B, Disclosure of Contracts at B-25, B-33, B-34, B-45 (in each instance summarily concluding that "no OCI exists with the UPIC IDIQ contract therefore, no mitigation is necessary"). Id. at B-26, B-33, B-34-35, B-45-B-46; See also AR, Tab 3d1, Safeguard Conflict of Interest and Compliance Program Response at 16 (stating that Safeguard determined "[a]fter thorough review of the UPIC [j]urisdiction and these contracts . . . no actual OCIs exist between [the UPIC and MMIS] contracts.").

The CO's preaward OCI memorandum, the stated purpose of which "is to document the [CO's] identification, evaluation and determination of significant (actual, apparent or potential) [OCIs]," also fails to address Safeguard's parent company's contracts. See generally AR, Tab 5a, Preaward OCI Memorandum (Memo.). While the CO's memorandum included information from the offeror's proposal, internet and database searches, a conference call, and identified several potential OCIs that required "actions in order to avoid, neutralize or mitigate actual, apparent or potential [OCIs]," it did not include discussion of the MMIS-related contracts held by Safeguard's parent company. Id. In this regard, the CO concluded that unless specifically identified, the CO did not identify any concerns "with the offeror's assessment of the [OCIs] associated with the contracts listed in the submission." Id. at 2-6.

During the development of the protest, our Office requested that the agency provide additional information pertaining to its consideration of the alleged conflict, including any documentation of the conference call referenced in the CO's preaward OCI memorandum.¹¹ In response, the agency pointed to an email in which CMS asked Safeguard to verify whether the Florida and Georgia Medicaid contracts support has changed, and Safeguard's response. See AR, Tab 3d7, Safeguard Aug. 3, 2017 Email. However, nothing in the record shows the agency's consideration or analysis of this information.

In its responses to GAO's questions, the agency explained that performance by one entity as both an MMIS provider and as a UPIC is merely a perceived conflict and that the agency discussed this "perceived conflict" with Safeguard prior to the award of this

¹¹ The preaward OCI memorandum stated that the purpose of the call was "to verify that any identified conflicts were in fact mitigated as proposed." AR, Tab 5a, Preaward OCI Memo. at 5.

task order, the award of the task order for the northeastern jurisdiction, and the award of the UPIC.¹² Agency's Oct. 20 Responses at ¶¶ 3, 4. We find the agency's responses troubling for several reasons.

First, the agency's characterization of these types of conflicts as merely presenting a "perceived conflict"¹³ is inconsistent with the clear language of the solicitation, which states that they present a conflict. Further, to the extent the agency considered this issue during the award of the northeastern jurisdiction task order, as it pertained to the potential conflicts that may have occurred due to Safeguard's parent company's performance of MMIS contracts in that jurisdiction, again, the identification of conflicts of interest is a fact-specific inquiry. Guident Techs., Inc., supra at 7. Thus, to the extent that the agency may have considered a similar type of conflict in the award of a task order in a different jurisdiction does not discharge its obligation to meaningfully consider whether a significant conflict of interest exists for this specific procurement.¹⁴ Id.

On this record, we cannot find that "CMS clearly gave meaningful consideration to the potential for conflicts of interest" and that the "record here is replete with solid analysis of the potential for concern with regard to the Awardee's conflict of interest," as argued by the agency. See AR, Memo. of Law at 5. Accordingly, since there is nothing in the record documenting that the agency meaningfully considered Safeguard's conflict, we conclude that the agency's actions here were not reasonable, and sustain this ground of protest.

Technical Evaluation

AdvanceMed also argues that Safeguard's proposal is not technically acceptable, and therefore ineligible for award. Supp. Protest at 2. In this regard, the protester argues that the 508 compliance officer identified features of Safeguard's Electronic and

¹² The agency has provided no information with regard to its consideration of this conflict as part of the award of the IDIQ contract.

¹³ The solicitation defined an apparent or perceived conflict as one that "on first observation appears to be an actual or potential [OCI], but may or may not be after analysis. Even if the apparent [OCI] is determined to be non-existent, this perception may still require further explanation." See AR, Tab 10a, Safeguard IDIQ Contract at 26.

¹⁴ Even if we were to find that the CO's consideration of the conflicts in the northeastern jurisdiction adequate, there is nothing in the record showing that the agency meaningfully considered those conflicts. The preaward OCI memorandum for that jurisdiction did not identify the performance of the MMIS contracts in those jurisdictions as actual, apparent, or potential conflicts. See AR, Tab 5g, Northeastern Jurisdiction Preaward OCI Memo. at 5-7. Further, to the extent that the agency raised any concerns, see, e.g., AR, Tab 5f, CMS Question 10-25-16, at 2-5, there is no documentation of the agency's consideration of these conflicts. See AR, Tab 11e, Northeastern Jurisdiction Post-Negotiation Memo. at 12-17.

Information Technology (EIT) products that did not meet applicable EIT accessibility standards, and identified the modifications that were required to make those products compliant. Id. at 6. The protester further argues that both the TEP and the CO identified those issues as matters that Safeguard must remediate in order to become acceptable under the Section 508 compliance factor. Id. at 2-7.

In response, the agency argues that “[t]he plain language of the RFP makes it clear that offerors were not required to be fully compliant with all Section 508 requirements at the time of award.” Supp. AR at 1. In this regard, the agency states that the solicitation “requirement was not [for] full compliance with all Section 508 requirements, but rather the demonstrated ability to meet the standards.” Id.; see also id. at 2 (reiterating that under the solicitation, “offerors needed only demonstrate an ability to comply with the Section 508 standards.”) (emphasis in original).

The agency acknowledges that “CMS clearly identified certain concerns . . . but the totality of the record makes clear that the CMS evaluators understood that [Safeguard] could remediate the concerns . . . [s]o, consistent with the plain language of the RFP, CMS’s evaluation of [Safeguard’s] proposed [EIT] found that [Safeguard] had the ability to comply with Section 508 requirements.” Id. at 2 (emphasis in original). The agency further argues that because the solicitation did not require proposals to be fully compliant, the awardee was not required “to amend or modify its proposal or otherwise remediate in order to be eligible for award.” Id.

When a dispute arises as to the actual meaning of solicitation language, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. See Level 3 Commc’ns LLC, B-412854 et al., June 21, 2016, 2016 CPD ¶ 171 at 7; KAES Enters., LLC, B-411225 et al., June 18, 2015, 2015 CPD ¶ 186 at 5. A solicitation is not ambiguous unless it is susceptible to two or more reasonable interpretations. WingGate Travel, Inc., B-412921, July 1, 2016, 2016 CPD ¶ 179 at 7. If the solicitation language is unambiguous, our inquiry ceases. Id.

Further, clearly stated RFP requirements are considered material to the needs of the government, and a proposal that fails to conform to such material terms is unacceptable and may not form the basis for award. AttainX, Inc.; FreeAlliance.com, LLC, B-413104.5, B-413104.6, Nov. 10, 2016, 2016 CPD ¶ 330 at 5; TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5; National Shower Express, Inc.; Rickaby Fire Support, B-293970, B-293970.2, July 15, 2004, 2004 CPD ¶ 140 at 4-5.

On this record, we do not find the agency’s interpretation of the solicitation, when read as a whole, reasonable. Here, while the agency correctly points out that the solicitation advised that the offerors’ proposals would be evaluated based on their ability to demonstrate compliance with the established EIT accessibility standards, the solicitation also clearly stated that “[t]o be considered technically acceptable, the offeror’s proposed Electronic and Information Technology (EIT) supplies and/ or services must conform to

applicable Section 508 accessibility standards.”¹⁵ Compare Supp. AR at 1-2 with Solicitation at 46 with id. at 40.

We also are not persuaded by the agency’s arguments that the TEP’s evaluation was reasonable because the TEP “understood that [Safeguard] could remediate the concerns” and was able to determine that Safeguard “had the ability to comply with Section 508 requirements.” Supp. AR at 2 (emphasis in original).

During the development of the protest, our Office requested that the agency address what information and/or documents were provided to the TEP or the CO with regard to the evaluation of the offerors’ proposals under the section 508 compliance factor. GAO RFI ¶ 2. The agency explained that the 508 compliance officer provided an email with input with regard to each offeror’s 508 compliance. Agency Oct. 20 Response ¶ 2. The agency further explained that the TEP did not perform an independent 508 evaluation, but adopted the 508 compliance officer’s evaluation. Id. The agency also stated that the CO reviewed the TEP report, which incorporated “the substantive portion of [the 508 compliance officer’s] email in its entirety” and relied on it in making his decision. Id.

It is a fundamental procurement principle that agencies must evaluate proposals consistent with the terms of a solicitation and, while evaluation of offerors’ proposals is generally a matter within the procuring agency’s discretion, our Office will question an agency’s evaluation where it is unreasonable, inconsistent with the solicitation’s stated evaluation criteria, or undocumented. Exelis Sys. Corp., B-407111 et al., Nov. 13, 2012, 2012 CPD ¶ 340 at 5; Public Commc’ns Servs., Inc., B-400058, B-400058.3, July 18, 2008, 2009 CPD ¶ 154 at 17. Contracting officials do not have the discretion to announce in the solicitation that they will use one evaluation plan, and then follow another without informing offerors of the

¹⁵ The agency argues, in the alternative that Section 508 does not require compliance for systems that CMS and/or the general public will not access. In addition the agency contends, because the tool that the 508 compliance officer found noncompliant was to be used internally by Safeguard and not by CMS or the public, the tool was not required to be Section 508 compliant. See Supp. AR at 2-3. Where, as here, an agency proffers an explanation of its evaluation during the heat of litigation that is not borne out by the contemporaneous record, we give little weight to the later explanation. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. As discussed above, the solicitation required that “the offeror’s proposed [EIT] supplies and/ or services must conform to applicable Section 508 accessibility standards” and that offerors’ proposals would be evaluated based on the submission of the PAT and ability to demonstrate compliance with the established EIT accessibility standards. Solicitation at 40, 45. Here, Safeguard actually submitted a PAT for the tool, which the agency’s 508 compliance officer evaluated, and the acceptability of which was considered by the TEP and the CO. We therefore find that, contrary to the agency’s current explanation, the contemporaneous record appears to show that the agency considered the tool to be subject to the 508 compliance requirements of the solicitation.

changed plan. Nuclear Prod. Partners LLC; Integrated Nuclear Prod. Solutions LLC, B-407948 et al., Apr. 29, 2013, 2013 CPD ¶ 112 at 14. Further, while source selection officials may reasonably disagree with the evaluation ratings and results of lower-level evaluations, they are nonetheless bound by the fundamental requirements that their independent judgments must be reasonable, consistent with the stated evaluation factors, and adequately documented. Nuclear Prod. Partners, supra; AT&T Corp., B-299542.3, B-299542.4, Nov. 16, 2007, 2008 CPD ¶ 65 at 16; AIU N. Am., Inc., B-283743.2, Feb. 16, 2000, 2000 CPD ¶ 39 at 8-9.

Here, the agency has represented that neither the TEP nor the CO performed an independent evaluation of the offerors' 508 compliance, but instead adopted the 508 compliance officer's evaluation that found issues with the EIT proposed by the offeror. See AR, Tab 4c, Safeguard 508 Compliance Officer Email. Further, there is nothing in the record that shows that the awardee's proposal addressed or remediated the issue noted by the 508 compliance officer. In these circumstances, where an acceptable rating was expressly contingent on remediation, and the identified issues were not remediated, we cannot find reasonable the TEP or CO's conclusion that Safeguard's proposal was acceptable under the 508 compliance factor. Accordingly, this protest ground is sustained.

RECOMMENDATION

As set forth above, we sustain the protest because the agency failed to meaningfully consider Safeguard's OCI due to its parent company's performance of several MMIS contracts. We also sustain the protester's challenge to the agency's evaluation of Safeguard's technical proposal under the Section 508 compliance factor.

As a result, we recommend that the agency meaningfully consider and document its consideration of Safeguard's parent company's OCI, as well as conduct a technical evaluation under the Section 508 compliance factor consistent with this decision and make a new selection decision. In the alternative, to the extent that the agency does not consider performance as a UPIC contractor and MMIS contractor in the same jurisdiction to be a conflict, amend the solicitation as necessary, seek revised and updated proposals, reevaluate the proposals, and make a new selection decision consistent with this decision.

We also recommend that the agency reimburse AdvanceMed its costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

Susan A. Poling
General Counsel