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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

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Decision

Matter of: Sierra Military Health Services, Inc.; Aetna Government Health Plans

File: B-292780; B-292780.2; B-292780.3; B-292780.4; B-292780.5; B-292780.6

Date: December 5, 2003

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DIGEST

Agency's communications with awardee during oral presentation did not constitute discussions, and agency thus was not required to conduct discussions with and request revised proposals from all offerors in the competitive range, where information furnished by awardee (with respect to staffing of effort to develop health care network) in response to agency questions after oral presentation was merely a clarification of information previously furnished by awardee in the presentation slides and accompanying oral presentation of slides.

DECISION

Sierra Military Health Services, Inc. and Aetna Government Health Plans (AGHP) protest the TRICARE Management Activity's (TMA) award of a contract (No. MDA906-03-C-0011) to Health Net Federal Services, Inc. (HNFS), under request for proposals (RFP) No. MDA906-02-R-0006, for the purpose of obtaining managed care support services for the North Region of the United States. The protesters

assert that TMA improperly made award without conducting discussions with them, and also challenge various aspects of the technical and past performance evaluations.

We deny the protests.

The RFP, issued on August 1, 2002, provided for award of three contracts, one for each of three geographic regions in the United States (North, South and West), to provide Managed Care Support (MCS) for a base or transition period, with 5 option years, to the Department of Defense TRICARE program. These protests concern the award to HNFS for the new North Region, which is comprised of the current Region 1, for which Sierra is the incumbent MCS contractor, and Regions 2/5, for which Humana, a proposed subcontractor to AGHP for this procurement, is the incumbent MCS contractor. The North Region includes Connecticut, the District of Columbia, Delaware, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Maine, Michigan, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia and Wisconsin.

The MCS contractor is to assist the Regional TRICARE Directors and Military Treatment Facility (MTF) Commanders in operating an integrated health care delivery system combining the resources of the military's direct medical care system and the contractor's managed care support to provide health, medical, and administrative support services to eligible beneficiaries. The TRICARE beneficiaries, who include, primarily, active duty services members and their families, military service retirees and their families, and family member survivors, have three options for health care: (1) providers of their own choosing on a fee-for-service basis (the TRICARE Standard program); (2) members of the contractor's preferred provider organization (the TRICARE Extra program); or (3) a contractor-established health maintenance organization (the TRICARE Prime program). The contractor is required to collaborate with the TRICARE Regional Director and the MTF Commanders to ensure the most efficient mix of health care delivery between the military health system (MHS) and the contractor's system. The solicitation's statement of work (SOW) generally set forth five objectives under the contract: optimization of the MHS, beneficiary satisfaction, best value health care, fully operational services and systems at the start of health care delivery, and ready government access to contractor TRICARE data. RFP § C-2.1.

The RFP provided for the submission of proposals generally consisting of: (1) a technical proposal, essentially limited to those slides addressed, discussed or presented in a 6-hour oral presentation, and written performance standards (without narrative explanation); (2) past performance information; (3) financial information; (4) a price and cost proposal; (5) a performance guaranty; (6) a corporate guaranty; (7) a small business subcontracting plan; and (8) certain required representations and certifications. The RFP provided that "[t]he Government intends to evaluate proposals and award a contract without discussions," and cautioned offerors that

“[p]roposals (written and oral) should contain the offeror’s best terms from a cost or price and technical standpoint.” RFP ¶ L.12.h, i.

Award was to be made to the offeror whose proposal represented the “best value” based on evaluation under factors: (1) technical approach, including optimization of the MHS, beneficiary satisfaction, best value health care, transition in, and access to data; (2) past performance/performance risk; (3) total evaluated price, including the price for administrative support services and the contractor’s health care cost underwriting fees for all contract periods other than the first option period; and (4) probable cost, including only the underwriting fee and the underwritten health care cost for the first option period. Technical approach was more important than past performance, which was more important than price and cost combined, while price was more important than cost. Within the technical approach factor, MHS optimization, beneficiary satisfaction and best value health care were of equal importance, and each was more important than transition and access to data, while transition was more important than access to data.

TMA received written proposals for the North Region from three offerors--HNFS, Sierra and AGHP. All three offerors then made oral presentations, which were followed by oral clarification sessions (OCS). Based upon its evaluation of the proposals, TMA determined that HNFS’s offered the best value.

As an initial matter, TMA determined Sierra’s proposal to be technically unacceptable, finding that it failed to meet the material requirements of the RFP and could not be made acceptable without a major proposal revision, and that it indicated a failure on the part of Sierra to understand the RFP requirements. Sierra, the incumbent TRICARE MCS contractor, received unacceptable (red) ratings with high proposal risk under the technical subfactors for MHS optimization, beneficiary satisfaction, best value health care, and transition, and a marginal (yellow) rating with moderate proposal risk for access to data. Source Selection Decision (SSD) at 2, 9-17; Source Selection Advisory Council (SSAC), Technical Considerations Regarding Discussions, at 12, 25-39; Source Selection Evaluation Board (SSEB) Report at 2-5; Source Selection Evaluation Team (SSET) Report on Sierra at 17-18, 70-71, 138-39, 171-72.

Sierra’s unacceptable ratings were assigned based on a number of significant evaluated weaknesses, several of which resulted from its statement during the oral clarification session that it had terminated its relationship with WellPoint Health Networks, Inc. Sierra had proposed to have WellPoint provide consultative services to improve medical management decision support, and to utilize WellPoint’s current operations for provider relations in the 11 states of Regions 2/5 to facilitate network development. The SSA concurred with the determination of the SSAC, SSEB, and SSET to assign a significant weakness to Sierra’s proposal under the MHS optimization subfactor based on concerns as to Sierra’s ability to accomplish network development and maintenance in Regions 2/5 without a definite alternative plan to compensate for the termination of the WellPoint arrangement. In this regard,

the SSA noted that, while Sierra stated in its presentation that it would assume the duties of network development in Regions 2/5, its plan lacked substance. Likewise, while Sierra mentioned the alternative of possibly purchasing the Humana network in Region 2/5, Sierra furnished no details in this regard, and the agency discounted the likelihood of this happening, since Humana was a competitor of Sierra's. Hearing Transcript (Tr.) at 558, 582, 1,002-03, 1,180, 1,214.¹ While Sierra had an extensive network in the current Region 1 (the Northeast) and specified in its proposal that [DELETED] network development personnel would service that area, its proposal (after the loss of WellPoint) identified no personnel for development and maintenance of provider networks in Regions 2/5. The SSAC concluded that it would take a major proposal revision for Sierra to adequately describe how it would provide network development in Regions 2/5 without WellPoint. SSAC, Technical Considerations Regarding Discussions, at 26.

In addition to contributing to the determination that its proposal was unacceptable with respect to MHS optimization, Sierra's failure to demonstrate an ability to develop and maintain an adequate provider network contributed to a determination that its proposal also was unacceptable with respect to beneficiary satisfaction, best value health care, and (insofar as it concerned initial network development) transition. As the SSA noted with respect to beneficiary satisfaction, the impact of a deficient network occurs when beneficiaries cannot get necessary medical care at a convenient location or time due to a lack of network providers. SSD at 12.

The SSA and the evaluators also found other significant weaknesses in Sierra's proposal. Thus, while the proposal was evaluated as offering good technology to support Sierra's overall medical management program, the agency found that it did not adequately describe how Sierra's staff would use the technology in interacting with providers and beneficiaries, and that it did not include adequate staff with the required skills for such elements of Sierra's medical management program as health care coordination and mental health case management. TMA also found that Sierra had proposed a confusing referral management process, with respect to beneficiaries referred for specialty care by a civilian provider, which (1) was not user friendly because the beneficiaries would have to contact Sierra to determine if a referral had been approved, and (2) did not appear to enforce the MTF's "right of first refusal" because it appeared that providers could refer patients to even non-network providers. Oral Presentation, Slide 219.

In addition, TMA questioned Sierra's proposal of a new claims processing system, [DELETED]. The agency determined that Sierra had failed to furnish sufficient details to demonstrate [DELETED]'s ability to accurately adjudicate TRICARE claims, the critical feature of any claims system, including the ability to distinguish non-network providers from network providers, apply different TRICARE payment

¹ Our Office conducted a hearing in connection with this matter.

methodologies, calculate patient liability/out-of-pocket expenses, and apply catastrophic caps and deductibles. Tr. at 1434-36. While Sierra proposed licensing a claims processing system from Wisconsin Physician System—which provides claims processing services for several MCS contracts—should [DELETED] fail to be operational in time, the agency expressed concern that there would be insufficient time before the contractor was required to commence delivery of health care services to train Sierra’s claims processing staff on the use of the WPS system. Because of this concern, the SSEB determined that there was “extreme risk” associated with Sierra’s claims processing ability. SSEB Report at 4. The agency also found that Sierra had proposed an Internet Based Claims Processing (IBCP) system that failed to meet the RFP requirement for an interactive IBCP; while an interactive system edits information as critical fields are entered on the screen by a provider, thus allowing for the correction of errors throughout the claim submission process, Sierra’s system as described in its proposal apparently required providers to complete submission of a claim before editing would begin.

Given the finding that Sierra’s technical proposal was unacceptable, the SSA’s final source selection focused on HNFS’s and AGHP’s proposals, which it found were relatively equal. In this regard, HNFS’s technical proposal was rated acceptable (green) with moderate risk for MHS optimization, beneficiary satisfaction, best value health care, and transition, and exceptional (blue) with low proposal risk for access to data, while AGHP’s proposal was rated acceptable with low risk for all five technical subfactors.

The moderate proposal risk assigned to HNFS’s proposal reflected the fact that HNFS lacked an existing network in the North Region (other than in four states). However, the agency viewed this as a manageable risk rather than as a weakness, since HNFS’s proposal was evaluated as offering a good approach to network development and HNFS had a start on network development as a result of its presence in four states in the North Region. AGHP, in contrast, possessed a commercial network in the North Region, and Humana, its proposed subcontractor, was the incumbent MCS contractor for Regions 2/5. Meanwhile, HNFS’s proposal was evaluated as more advantageous under the past performance factor; HNFS, the incumbent MCS contractor for Regions 6, 9/10/12 and 11, received a high confidence rating, while AGHP, which lacked recent corporate MCS experience and [DELETED], received only a confidence rating. The SSA concluded that HNFS’s moderate proposal risk was more than offset by its network development plan and its superior, relevant past performance, which demonstrated HNFS’s ability to accomplish the requirements and meet challenges similar to those associated with implementing TRICARE in a new region. The SSA’s determination in this regard was strengthened by several advantages offered by HNFS’s proposal that provided definite benefits to the government, including, for example, the fact that HNFS was offering TRICARE Prime coverage to additional, new beneficiaries.

Ultimately, the SSA’s best value determination turned on the relative prices of HNFS’s and AGHP’s proposals, a consideration that was termed a “distinguishing

factor” in the best value decision.² Source Selection Decision (SSD) at 31. In this regard, while the evaluated price of HNFS’s proposal was \$[DELETED] billion, the evaluated price of AGHP’s proposal was \$[DELETED] billion, approximately \$[DELETED], or [DELETED] percent, higher.³ According to the SSA,

the essential difference between the [AGHP] and [HNFS] proposal is [AGHP] offers a network essentially in place throughout the North Region. . . .

Given the small differences in technical merit and [HNFS’s] highly relevant past performance, the [DELETED] price for [HNFS] is significant in determining the overall best value in the North Region. The technical strengths and benefits in AGHP’s proposal do not merit the [DELETED] price premium. [HNFS’s] proposal meets the Government’s requirements and provides added strengths that will further enhance the quality of health care services, beneficiary satisfaction and accountability for health care costs.

SSD at 31-32.⁴ Upon learning of the SSA’s determination that HNFS’s proposal offered the best value, and of the resulting award to HNFS, AGHP and Sierra filed these protests with our Office.

DISCUSSIONS

AGHP and Sierra primarily argue that TMA was required to conduct negotiations with all offerors and provide them an opportunity to submit revised proposals before making award.⁵ The protesters’ argument in this regard is based to a large extent on

² The evaluated most probable cost of the offers—which was based on only the underwriting fee and underwritten health care cost for the first option period—was not a discriminator; the evaluated cost of HNFS’s proposal (approximately \$[DELETED] million) was [DELETED] lower than AGHP’s (approximately \$[DELETED] million).

³ The difference in prices between AGHP and HNFS resulted from a number of factors, including: (1) the impact of subcontracting a significant part of the proposed effort to Humana, whose profit rates exceeded [DELETED] percent, and to whose subcontract price was added [DELETED]; and (2) a difference in approach to [DELETED]. Initial Price Evaluation Report—North Region, at 11-13, 20; SSAC Award Recommendation at 12-13.

⁴ The evaluated price of Sierra’s proposal was approximately \$[DELETED] billion.

⁵ The protesters also assert that the agency’s decision to make award without discussions was unreasonable, given the complexity of the procurement and the service being procured. In addition, AGHP asserts that the agency acted improperly
(continued...)

their assertions that the agency engaged in discussions with HNFS during its oral presentation, and thus was required to conduct discussions with and request revised proposal from all offerors. Alternatively, the protesters assert that HNFS's proposal was unacceptable, and that the agency thus could not make award without first providing HNFS--and the protesters--an opportunity to correct the deficiencies in their proposals.

The FAR generally anticipates "dialogue among the parties" in the course of an oral presentation, FAR § 15.102(a), and we see nothing improper in agency personnel

(...continued)

in refusing to open discussions so as to provide it with an opportunity to offer a lower, more competitive price, while Sierra complains that the contracting officer improperly refused to permit it to revise its proposal to account for the termination of WellPoint's participation in its team, thereby preventing the firm from explaining how it would undertake the network development and other responsibilities that WellPoint had been proposed to perform. These arguments are untimely, in view of the express statement in the solicitation that the agency intended to make award without discussions. To the extent that the protesters believed the provisions for award without discussions were inappropriate for this type of procurement, the protest concerns an alleged impropriety that was apparent from the face of the solicitation and thus should have been protested prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (2003); see Norden Sys., Inc., B-255343, B-255343.3, Apr. 14, 1994, 94-1 CPD ¶ 257 at 3. In any case, there generally is no requirement that a contracting agency conduct discussions to permit offerors to improve their proposals where, as here, the RFP specifically informs offerors of the agency's intent to award a contract on the basis of initial proposals. Federal Acquisition Regulation (FAR) § 15.306(a)(3); Robotic Sys. Tech., B-278195.2, Jan. 7, 1998, 98-1 CPD ¶ 20 at 8; Infotec Dev., Inc., B-258198 et al., Dec. 27, 1994, 95-1 CPD ¶ 52 at 6-7. The protesters also argue that our prior decision in The Jonathan Corp.; Metro Machine Corp., B-251698.3, B-251698.4, May 17, 1993, 93-2 CPD ¶ 174, recon. den., Moon Eng'g Co., Inc., B-251698.6, Oct. 19, 1993, 93-2 CPD ¶ 233, mandates overturning the agency's decision not to hold discussions in this case. We disagree. In Jonathan, discussions were necessary where the agency could not reasonably determine which proposal represented the best value to the government, given that the cost realism review was flawed and the competition was close. The Jonathan Corp.; Metro Machine Corp., supra, at 13-15; see Henry A. Stroh Assocs., Inc., B-274335, Dec. 4, 1996, 97-1 CPD ¶ 18 at 3; Southwest Marine, Inc.; American Sys. Eng'g Corp., B-265865, et al., Jan. 23, 1996, 96-1 CPD ¶ 56 at 15. Here, in contrast, the evaluation was not fundamentally flawed and the information available to the agency was sufficient to enable it to differentiate between the proposals in its selection decision. See Island Serv. Corp., B-282272, June 21, 1999, 99-1 CPD ¶ 113 at 3. In these circumstances, we find that the protesters have not shown that the agency abused its discretion in determining to make award on the basis of initial proposals.

expressing their view about vendors' quotations or proposals, in addition to listening to the vendors' presentations, during those sessions. Once the agency personnel begin speaking, rather than merely listening, in those sessions, however, that dialogue may constitute discussions. As we have long held, the acid test for deciding whether an agency has engaged in discussions is whether the agency has provided an opportunity for quotations or proposals to be revised or modified. See, e.g., TDS, Inc., B-292674, Nov. 12, 2003, 2003 CPD ¶ __ at 6; Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5. Accordingly, where agency personnel comment on, or raise substantive questions or concerns about, vendors' quotations or proposals in the course of an oral presentation, and either simultaneously or subsequently afford the vendors an opportunity to make revisions in light of the agency personnel's comments and concerns, discussions have occurred. TDS, Inc., supra, at 6; see FAR § 15.102(g). Once an agency opens discussions, the FAR requires, at a minimum, that (1) contracting officers discuss with each firm being considered for award "deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond," and (2) at the conclusion of discussions, each offeror still in the competitive range be given an opportunity to submit a final proposal revision. FAR §§ 15.306(d)(3), 15.307.⁶ We find that TMA properly made award without initiating discussions.

⁶ Here, as envisioned by FAR § 15.102(d), the solicitation set forth the particular allowable scope and content of exchanges that were to occur as part of the oral presentations. In this regard, the RFP, after indicating that oral presentations would not constitute discussions, stated that communications would be conducted by presenting the offeror, after the oral presentation, with written clarification questions that "serve to enhance the Government's understanding of the proposal, allow reasonable interpretation of the proposal, and/or facilitate the Government's evaluation process." RFP § L.14.d(8). The RFP cautioned, however, that such communications would "not be used to cure proposal weaknesses or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal. Communications shall not provide an opportunity for an offeror to revise their proposal, but may address ambiguities in the proposal or other concerns such as minor errors or mistakes." Id.

Communications With HNFS

HNFS Network Staffing

Sierra and AGHP assert that discussions with HNFS concerning its network development effort occurred during the oral presentation process. According to the protesters, in response to agency questions, HNFS significantly increased its proposed network development staffing during the clarification sessions. This argument is without merit.

The protest in this regard is based on the fact that HNFS's proposal presentation slides specifically identified only [DELETED] positions within the initial network development staff that would appear to be involved in network development, including: [DELETED] senior executive who would provide "[l]eadership region-wide for provider development"; and [DELETED] directors, [DELETED] negotiators and [DELETED] clerical staff, who would be "[c]ontracting and network operations . . . for network development and contracting to develop and maintain an adequate network." HNFS Slides I-69.

Although the [DELETED] HNFS staff positions specifically enumerated above were significantly fewer than the [DELETED] positions that remained in Sierra's network development effort even after the removal of the WellPoint contribution, Agency Report, Declaration of SSET/SSEB Chairman, at 13, as repeatedly noted in the contemporaneous evaluation documents, HNFS furnished additional information with respect to its network development effort during the clarification sessions. In this regard, during the initial clarification session, TMA, referring to HNFS's statement made during the presentation of its slides that it would "deploy a team and start early," asked the offeror to explain, and to specify who and how many were on the team. Initial OCS, Question No. 24. When HNFS answered that it would deploy teams of [DELETED] members in all Prime Service Areas (PSA), TMA asked in the follow-up clarification session how many areas HNFS had defined as PSAs. Transcript, OCS I, at 6, 24-25; Transcript, OCS II, at 6. This led HNFS to respond that "we believe that we need about [DELETED] provider contracting staff to set up the network. And that is our plan at this point." Transcript, OCS II, at 6. This exchange led the SSAC, in its award recommendation, to conclude that

HNFS does not have an established network in the region, but has proposed a creditable network development plan, with staffing identified for each market area to develop a fully operational network at the start of health care delivery. . . . In addition, during the OCS and the follow-up session, HNFS stated they would have [DELETED] provider contracting staff to develop the network in the North Region. [DELETED] person network development teams will deploy in 30 to 40 overlapping Prime Service Areas in the North Region under the leadership of a [DELETED] person central team immediately after contract award. The SSEB noted that the [DELETED] network

development staff could not be identified in the business proposal, but cited a statement by HealthNet in its Cost Proposal that “[DELETED].” This suggests that staff will be available to meet HealthNet’s commitment to develop an adequate network. These details of HealthNet’s approach to network development mitigate the risk associated with not having an extensive, existing network in the Region.

SSAC Award Recommendation at 11-12; SSEB Report at 28; SSET Report on HNFS at 33. Indeed, testimony from HNFS’s president during the hearing conducted by our Office attested to the importance of the information regarding network development staffing that was furnished during HNFS’s clarification sessions, as follows:

Question: What in the proposal in your view gave the agency confidence that you could successfully come up with a network on a timely basis for the north region?

Answer: . . . In the oral presentation there was discussion about—in follow-on questions and answers with us, clarification questions about the number of staff that would be available to develop the network. We disclosed to the agency about [DELETED] individuals working in teams, creating 30 to 40 service areas with teams of between [DELETED] people. So it’s [DELETED] individuals who on the ground were doing network development.

Question: Anything else you can point to?

Answer: The only other relevant issue, I think, which again is known to the agency—again, when I talk about experience, we’ve all done this within less than six months and all the relevant experience.

Tr. at 1631-32.

We agree with TMA that the references during HNFS’s clarification sessions to [DELETED] network development staff amounted to no more than a clarification of information already furnished by HNFS during the preceding oral presentation. In this regard, HNFS presented during the MHS optimization portion of its oral presentation several slides describing how its medical management program “will ensure we support the MTF’s first right of refusal for all care in its Prime Service Area, and ensure that high quality care is being achieved.” Transcript, HNFS Oral Presentation, Subfactor 1 (Subfactor 1 Tr.), at 6-7. Slide I-13 discussed clinical quality in terms of “[s]ignificantly enhanc[ing] communication between direct and purchased care providers,” and included a three-step flow chart starting with “[d]evelop/foster a preferred network in proximity to the MTF Prime Service Area,” followed by “[p]urchased care network providers understand their role in the Defense Health Program,” and followed by “[m]anagement controls ensure providers

provide clearly legible reports and summaries,” that result in improved patient care coordination “leading to higher quality care outcomes and a more effective overall health benefit.” HNFS Oral Presentation, Slide I-13. In presenting Slide I-13, HNFS’s representative orally stated as follows:

Clinical quality starts with our--with our network design approach. In the network development slides to come, you will see that we focus on developing a tailored network in proximity to the MTF for easier, more effective communications between MTF and civilian providers. With over [DELETED] associates who touch provider contracting and relations activities, we will be there to provide support and reinforcement of the message to doctors and hospitals to coordinate care between the two systems. Once in place, management controls, built on a foundation of education, regular communications, and adherence to timely reporting among MTF and civilian providers in the treatment of patients.

Subfactor 1 Transcript at 10.

Although the protesters question TMA’s determination that the reference to “over [DELETED] associates” was a reference to network development staff, we note that a review of the contemporaneous notes of the SSET evaluators who attended the oral presentation reveals that at least 5 of the 11 evaluators specifically indicated that, based on HNFS’s presentation of Slide I-13, HNFS was proposing a network development staff of [DELETED] associates. Indeed, the draft evaluation of one evaluator which, according to TMA, was projected for use by the entire SSET, noted that “[d]uring the oral presentation, while discussing Slide I.13, HNFS stated they would have ‘[DELETED] associates for provider network development.’” SSET Notes at 110. Given Slide I-13’s reference to developing a preferred network; the oral reference by HNFS’s representative in presenting Slide I-13 to the importance of developing a tailored network in proximity to the MTF for easier, more effective communications; and the representative’s oral reference to “over [DELETED] associates who touch provider contracting,” we agree with the agency that HNFS essentially described its proposed network development staffing of [DELETED] in its initial oral presentation. Since this occurred prior to the agency’s speaking during the session, the information could not have been the result of discussions. Further, since HNFS’s written material indicated that [DELETED], and a separate headcount of all labor working on transition was not included in the cost/price proposal, the agency reasonably concluded that there was no inconsistency between the written and oral information (which, under the RFP § L.14.d(4), would have required the agency to ignore the oral information).⁷ In these circumstances, we conclude that

⁷ HNFS’s Price and Cost Narrative stated with respect to the transition as follows:

[DELETED]

(continued...)

HNFS was not permitted to revise its proposal to set forth a materially higher level of network development staffing so that the exchange did not constitute discussions. It follows that the question regarding its network development did not require the agency to conduct discussions with all offerors and request revised proposals.

HNFS Network in Pennsylvania

In its comments on the agency report, AGHP cites agency question No. 23 as an example of TMA's alleged discussions with HNFS. AGHP Comments, Sept. 25, 2003, at 13. Question No. 23, after reciting HNFS's statement on a slide that "[HNFS's] strong commercial presence in Region 1 provides the foundation for provider network management and rapid acceptance," asked as follows: "(a) Please explain [HNFS's] strong commercial presence in Region one; (b) Does this include the entire Region or certain states in Region one." In response, HNFS advised the agency that its commercial network in Region 1 operated in only 4 of the 20 states in that region, including Pennsylvania. Tr., OCS I, at 24.⁸ We find that this question and answer did not amount to discussions. Rather, we view the question as simply a request for clarification of a reference in HNFS's proposal, which did not provide HNFS an opportunity to modify its proposal.⁹

(...continued)

HNFS Price and Cost Narrative at 19.

⁸ AGHP also essentially argues that HNFS's reference during the June 5 clarification sessions to a commercial network in Pennsylvania constituted a misrepresentation, because HNFS had issued a press release, dated March 18, indicating that it would withdraw from the commercial market in Pennsylvania effective September 30, 2003, and that coverage under the Federal Employee Health Benefit Plan would continue only until December 31, 2003. An offeror's material misrepresentation in its proposal can provide a basis for disqualification of the proposal and cancellation of a contract award based upon the proposal. A misrepresentation is material where the agency relied upon it and it likely had a significant impact upon the evaluation. Integration Techs. Group, Inc., B-291657, Feb. 13, 2003, 2003 CPD ¶ 55 at 2; Sprint Communications Co. LP; Global Crossing Telecomms., Inc.—Protests and Recon., B-288413.11, B-288413.12, Oct. 8, 2002, 2002 CPD ¶ 171 at 4. Even if we agreed with AGHP, there is no basis for concluding that the reference to commercial operations in Pennsylvania, only one of the 20 states (plus the District of Columbia) in the North Region, had a significant impact upon the evaluation.

⁹ AGHP asserts that TMA asked HNFS other questions during the clarification sessions that afforded HNFS an opportunity to revise its proposal. However, when AGHP first raised the argument that TMA had conducted discussions with offerors, it only cited questions addressed to AGHP, Sierra and an offeror in another region. AGHP Comments, Sept. 15, 2003, at 8-15. Since it did not assert that questions had been posed to HNFS, such questions did not provide a basis for protest. See BE,

(continued...)

Acceptability of HNFS's Proposal

The protesters assert that HNFS's proposal was unacceptable as submitted, as evidenced by the evaluation findings of the SSET. They also point specifically to HNFS's approach to meeting the RFP's data access requirements as being unacceptable.

In reviewing an agency's technical evaluation, our Office will not evaluate proposals anew, but will examine the record to ensure that the evaluation was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. Advanced Communication Sys., Inc., B-271040, B-271040.2, June 10, 1996, 96-1 CPD ¶ 274 at 4. The evaluation here was unobjectionable.

SSET Report

The protesters essentially argue that, given the SSET's ratings and determinations, it was unreasonable to determine that HNFS's proposal was acceptable as submitted, such that discussions were not necessary. In this regard, the SSET evaluated proposals based on whether and how they addressed the requirements in the SOW. Where a proposal did not show compliance with one of the SOW requirements, the SSET assigned no higher than a marginal rating under the applicable subfactor. As a result, the SSET assigned HNFS's proposal a marginal rating (with moderate proposal risk) under the technical subfactors for MHS optimization, beneficiary satisfaction, best value health care, and transition, and an outstanding rating (with low risk) for access to data; AGHP's proposal a marginal rating (with low risk) under

(...continued)

Inc.; PAI Corp., B-277978, B-277978.2, Dec. 16, 1997, 98-1 CPD ¶ 80 at 4 n.4; General Physics Fed. Sys., Inc., B-275934, Apr. 21, 1997, 97-1 CPD ¶ 171 at 4-6. In its second supplemental protest, which followed its receipt of the core evaluation documents, including a record of HNFS's oral presentation and clarification sessions, AGHP generally asserted that TMA had posed a series of discussion questions to HNFS, but did not cite any specific questions. AGHP Comments, Sept. 25, 2005, at 2. AGHP first cited specific questions as constituting discussions in its comments filed on October 25. Since these specifics were filed more than 10 days after its receipt of the record of HNFS's oral presentation and clarification sessions, they are untimely. 4 C.F.R. § 21.2(a)(2). Presenting a general allegation in an initial protest does not render timely subsequently submitted specific examples of the alleged general flaws in a procurement. See LeBoeuf, Lamb, Greene & MacRae, B-283825, B-283825.3, Feb. 3, 2000, 2000 CPD ¶ 35 at 7-8; Advanced Communication Sys., Inc. B-283650 et al., Dec.16, 1999, 2000 CPD ¶ 3 at 8; GE Gov't Servs., B-235101, Aug. 11, 1989, 89-2 CPD ¶ 128 at 3-4.

the technical subfactors for MHS optimization, beneficiary satisfaction, best value health care, and transition, and an acceptable rating (with high risk) for access to data; and Sierra's proposal an unacceptable rating (with moderate risk) under the technical subfactors for MHS optimization, beneficiary satisfaction, best value health care, and transition, and a marginal rating (with moderate risk) for access to data.

We find no basis to question the agency's determination that HNFS's proposal was acceptable as submitted. The record establishes that agency procurement officials conducted a detailed, in-depth review of the SSET's findings, fully considering the basis for the SSET's evaluation ratings, and reasonably accounted for them in determining to make award on the basis of initial proposals. In this regard, in its review of the proposals and the SSET's evaluation, the SSEB distinguished between weaknesses that warranted consideration in the source selection decision and those that would not have a significant impact on the contractor's ability to perform. Applying that standard, the SSEB determined that none of the evaluated weaknesses of HNFS's proposal were sufficiently significant as to render HNFS's proposal unacceptable, and it thus recommended award to HNFS. SSEB Report at 2-5, 26-27, attach. F.

The SSAC likewise reviewed and took into consideration the basis for the SSET's ratings. As noted in an SSAC report,

the SSET assigned a yellow rating any time a proposal fell short of fully meeting all requirements, regardless of how easily associated concerns or weaknesses could be rectified, and regardless of how significant the weakness. As a result, sub-factors may receive a yellow rating based on weaknesses or issues at the requirement level that are not significant and would have minimal impact on the offeror's capability to successfully achieve the government's objectives. . . .

In view of this, the SSAC assessed the significance of each weakness identified by the SSET at the requirement level, and reviewed its potential impact on performance at the objective level. In addition, the SSAC examined the weaknesses in the aggregate to determine whether there was cause for concern about the offeror's capability to be successful. The SSAC has determined that the yellow ratings assigned by the SSET do not mean that the offerors are not capable of successfully meeting the objectives under the contract; rather, they serve as useful indicators of where the government should focus its post-award monitoring activities.

SSAC Technical Considerations Regarding Discussions at 12. Based on its review, the SSAC determined that the weakness in HNFS's proposal with respect to fully describing a process regarding referral information was not significant and was readily correctable during performance. The SSAC concluded that HNFS's proposal was in compliance with the material requirements of the RFP. Id. at 13-14; SSAC

Award Recommendation at 16. The SSA concurred with the SSAC's determination, and HNFS's (as well as AGHP's) evaluation ratings were increased from marginal to acceptable. SSD at 6-8.

Adjectival ratings are only guides to assist contracting agencies in evaluating proposals; they do not mandate automatic selection or rejection of particular proposals. Chemical Demilitarization Assocs., B-277700, Nov. 13, 1997, 98-1 CPD ¶ 171 at 6. Source selection officials, as well as reviewers at an intermediate level, are not bound by the recommendations or evaluation judgments of lower-level evaluators. PRC, Inc., B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115 at 7. Source selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results, and their judgments are governed only by the tests of rationality and consistency with the stated evaluation criteria. Keane Federal Systems, Inc., B-280595, Oct. 23, 1998, 98-2 CPD ¶ 132 at 15.

There was nothing unreasonable in the agency's ultimate conclusion. Given that the RFP generally provided for the assessment of weaknesses against, rather than rejection of, a proposal in the event that it failed to comply with an SOW requirement,¹⁰ and since the agency's procurement officials specifically considered this issue, the SSA reasonably determined that HNFS's proposal was acceptable notwithstanding the SSET's marginal ratings. The protesters have not shown otherwise. See Physician Corp. of America, B-270698 *et al.*, Apr. 10, 1996, 96-1 CPD ¶ 198 at 9 (a contracting agency may properly find acceptable a proposal that is in substantial, although not total, compliance with a solicitation requirement, where such a determination does not prejudice any other offeror and the proposal meets the agency's needs).

¹⁰ The RFP's evaluation approach focused on the offeror's overall approach to performing the contract and meeting the five objectives established by the SOW, and rather than establishing a pass/fail scheme, the RFP provided that the government would evaluate "the extent to which" or "likelihood" that the offeror's approach would be successful. RFP § M.3.b. According to the RFP, "[f]ailure to address any of the specified technical subfactor requirements will be considered a significant weakness. Proposals will be evaluated on the basis of how well an offeror's proposed procedures, methods, and delivery of services meet or exceed the Government's minimum requirement." RFP § M.6. Where the agency sought to establish a specific pass/fail requirement, it did so expressly. Thus, for example, with respect to data access, Section M of the RFP provided that "[p]roposals that do not include on-line, real-time access to data will be considered unacceptable." RFP § M.6.e.

Data Access

As noted above, the RFP established a pass/fail criterion with respect to data access. Section L of the RFP addressed this requirement as follows:

Subfactor 5 - Provide ready access to contractor maintained data to support DOD's financial planning, health systems planning, medical resource management, clinical management, clinical research, and contract administration activities.

The offeror shall describe access to and use of its proposed on-line, real-time data storage system. . . . The offeror shall describe the content of the data that will be available to the Government, restrictions and/or limitations.

RFP § L.14.e(5). Section M of the RFP further provided with respect to data access as follows: "The ease with which the offeror provides access, the breadth and depth of information/data available, and the training and on-going support proposed by the contractor will be evaluated. Proposals that do not include on-line, real-time access to data will be considered unacceptable." RFP § M.6.e. When asked during the procurement what the "government definition of 'real time data storage system'" was, as used in RFP § L.13.e(5), the agency responded that "[t]he Government wants access to the data as it is updated minute by minute, not access to a storage system that the data could be days or weeks old." Question and Answer No. 778.

Sierra, citing the reference in the answer to question No. 778 to "data as it is updated minute by minute," argues that, because not all of HNFS's TRICARE data would be updated minute-by-minute, HNFS's proposal did not meet the data access requirement, and thus was unacceptable. TMA responds that minute-by-minute updating was not required.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Fox Dev. Corp., B-287118.2, Aug. 3, 2001, 2001 CPD ¶ 140 at 2.

We find that offerors were, or should have been, aware that minute-by-minute updating was not required. While Sierra reads the answer to question 778 as referring to data "updated" minute-by-minute, we agree with the agency that the minute-by-minute language--read in the context of the data access requirement--referred instead to access to the data; that is, the agency only wanted to be able to access data on a minute-by-minute basis. This interpretation is consistent with the testimony of the drafter of the section M data access requirement, the SSET/SSEB chairman. He stated that the agency sought "online, real-time access to data" in the contractor's "commercial data warehouses," not access to data that is updated

minute-by-minute; according to the SSET/SSEB chairman, rather than having to request a special report from the contractor, as is the practice under the current contracts, the agency wanted immediate access to the contractor's TRICARE data warehouse. Tr. at 1052-66.

This interpretation also is consistent with another question and answer, where the agency specifically clarified that it was only seeking access to the contractor's commercial data warehouses as usually maintained. Specifically, in response to a question concerning the data to which access is to be provided, the agency responded that "[w]e have not specified the full extent of data required. Rather, we have asked offerors to provide the Government with access to the information they maintain in their data warehouse employing their 'best practices.'" Question and Answer No. 368. The reference to data as maintained in accordance with the contractor's "best practices" is significant, since consultants for both Sierra and HNFS testified that minute-by-minute updating of such data is inconsistent with commercial practice. Tr. at 1499-1500, 1941-42. Likewise, Sierra has acknowledged that, under its current TRICARE contract, it [DELETED], Sierra Comments, Nov. 26, 2003, at 2, and AGHP likewise acknowledges that [DELETED]. AGHP Comments, Nov. 26, 2003, at 1. Consultants for both Sierra and HNFS testified that minute-by-minute access to contractor-maintained data was not necessary, and that less frequent updating was sufficient, to support the stated purpose for the access, that is to "support DOD's financial planning, health systems planning, medical resource management, clinical management, clinical research, and contract administration activities." RFP § L.14.e(5). Sierra's consultant, when asked whether minute-by-minute access was needed to serve the stated purposes, responded that "in the context of [the] private sector, I'd say unequivocally the answer is no." Tr. at 1496-98, 1526-28, 1941. Indeed, according to a consultant testifying on behalf of HNFS, updating on a minute-by-minute basis actually would have a "huge" negative impact on a system. Tr. at 1499-1500.

We conclude that, in the context of the RFP as a whole, including the stated purposes for which the access was sought, TMA's statement that it sought access to data as maintained in accordance with the contractor's "best practices," and current commercial practice with respect to updating, it was unreasonable to interpret the data access requirement as mandating that all TRICARE data be updated minute-by-minute. Thus, we find no basis to question TMA's determination that HNFS's approach to furnishing the required data access was acceptable.

Conclusion

Because we have found that the agency both did not conduct discussions with HNFS, and was not required to conduct discussions with that firm--and, thus, also with Sierra and AGHP--we conclude that the agency properly made award to HNFS based on its initial proposal. Further, because it follows that the material deficiencies identified by the agency remain in Sierra's proposal, and cannot be remedied, we conclude that the agency reasonably determined that Sierra's proposal

was unacceptable in numerous areas. In particular, we find reasonable TMA's position that an offeror with an inadequate approach to network development, such as Sierra's after the loss of WellPoint, could reasonably be found to be incapable of meeting the stated procurement objectives, including optimization of the MHS, beneficiary satisfaction, and best value health care, from the commencement of services.¹¹

ADDITIONAL ARGUMENTS

AGHP challenges various other aspects of the evaluation, concluding that the agency should have found its proposal to be worth its higher cost. We have reviewed all of AGHP's arguments, and find that they are without merit.

For example, AGHP challenges the past performance evaluation, where HNFS was rated superior to AGHP. In this regard, the RFP provided for evaluation of "past performance relevant to this solicitation," to determine "a confidence level in an offeror's ability to successfully perform all requirements." RFP § M.7. Offerors were instructed to describe "the relevant past performance that the prime contractor and first tier subcontractor(s) has in performing work that is relevant to this solicitation," and also to submit information on the qualifications and demonstrated performance relevant to their proposed positions for the key personnel of the prime contractor and first tier subcontractors. RFP § L.14.f(2). The RFP cautioned, however, that only relevant past performance gained within the last 3 years would be considered. Id.

HNFS was credited with satisfactory performance on three current TRICARE MCS contracts (Regions 6, 9/10/12 and 11), which were viewed as highly relevant, and exceptional or satisfactory performance on other relevant contracts (with the exception of one subcontractor whose clients generally were satisfied with its performance but who received a marginal rating from one of its clients (Sierra)). In addition, most of HNFS's management/supervisory staff had extensive TRICARE (and TRICARE-predecessor) experience. TMA concluded that, given HNFS's highly relevant past performance and numerous documented records of satisfactory or exceptional performance in executing essentially similar contractual expectations, no doubt existed that HNFS could successfully perform the contemplated contract; it therefore assigned HNFS a high confidence rating.

In contrast, AGHP had no TRICARE experience since the termination of its contract for the former Regions 9/10/12 in 1996, and had no active accounts since that time. AGHP did receive credit for the satisfactory performance of its parent (Aetna, Inc.)

¹¹ Sierra also challenges other aspects of the evaluation. However, given our conclusion that the agency reasonably rejected Sierra's proposal as unacceptable, its arguments in this regard are academic and will not be addressed.

on Medicare/Medicaid and Federal Employees Health Benefits Program contracts, and of a proposed first-tier subcontractor, Humana, who was the current MCS contractor for old Regions 2/5. Overall, AGHP was credited with satisfactory or exceptional experience, except for one marginal rating. However, TMA noted that [DELETED]. Therefore, TMA determined that “little doubt” (as compared to “no doubt” regarding HNFS’s proposal) existed that AGHP could successfully perform the contemplated contract, and the agency assigned it a confidence rating.

AGHP essentially asserts that TMA failed to account for the fact that HNFS’s three current TRICARE MCS contracts were for regions outside of the North Region, while AGHP’s subcontractor had a current MCS contract for part of the North Region and AGHP has commercial experience in the North Region.

While we agree that geographic location is a proper consideration in determining the relevance of past performance, there is no basis for questioning the agency’s position that consideration of geographic location would not have altered the evaluation here. First, it is undisputed that TRICARE is a statutorily-created health care benefit that is uniform across the United States, except for Alaska, such that, while contractors may have different approaches, each contractor is required to comply with extensive and detailed requirements set forth in applicable statutes, regulations and agency manuals. Moreover, AGHP’s position simply does not adequately account for HNFS’s three current TRICARE MCS contracts. We find reasonable TMA’s determination that a prime contractor with extensive current, satisfactory performance of essentially the same services as solicited was more likely to satisfactorily perform the contemplated contract than a prime contractor without such experience.

The protests are denied.

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General Counsel