

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

Decision

Matter of: Wisconsin Physicians Service Insurance Corporation--Costs

File: B-401068.12

Date: March 22, 2013

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Jamie B. Insley, Esq., and Brian E. Hildebrandt, Esq., Department of Health and Human Services, for the agency.

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DIGEST

GAO recommends reimbursement of protest costs where agency unduly delayed taking corrective action in response to a clearly meritorious protest that challenged the agency's evaluation of proposed personnel, but limits recommendation to the costs reasonably related to protester's pursuit of that clearly meritorious issue.

DECISION

Wisconsin Physicians Service Insurance Corporation (WPS) requests that this Office recommend reimbursement of the costs WPS incurred in filing and pursuing its protest challenging the award of a contract by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), to National Government Services, Inc. (NGS) pursuant to request for proposals (RFP) No. CMS-2007-0013 to perform Medicare claims administration services.

We grant WPS's request in part and deny it in part.

In August 2007 CMS first published the solicitation at issue, seeking proposals to perform a cost-plus-award-fee contract as the Medicare Administrative Contractor (MAC) in a geographic area identified as "jurisdiction 6" (J6). Following the selection of an awardee in 2009, protests were filed challenging that selection decision. Thereafter, the agency cancelled the award, amended the solicitation, and sought new proposals.

As amended, the solicitation provided for award based on the proposal offering the best value to the government after considering two evaluation factors: offeror capability and cost/price. The offeror capability factor was divided into two subfactors: past performance and technical understanding.

With regard to demonstrating technical understanding, the solicitation required, among other things, that:

The Offeror shall submit a staffing plan that presents/outlines the Offeror's staffing strategy for providing and retaining qualified personnel for the life of the contract across the prime and subcontractors. The Offeror shall identify the total number of FTEs [full time equivalent personnel] required for each CLIN [contract line item number] of the contract.

For each labor category, the Offeror shall provide a description of the activities performed and the minimal education and/or experience requirements.

The Offeror shall provide its proposed labor mix for performing the requirements of the SOW [statement of work]. . . . At a minimum, the Offeror shall provide its direct labor . . . by labor category, number of hours and FTEs.^[1]

RFP at 108.

Initial proposals responding to the amended solicitation were submitted in July 2010. Thereafter, discussions were conducted and final proposal revisions (FPR) were submitted. In submitting its FPR, NGS significantly decreased the number of full time equivalent (FTE) personnel it proposed to perform the contract requirements, and changed the applicable labor categories for many of its proposed personnel. In evaluating NGS's FPR, the agency concluded that NGS had failed to provide sufficient information to support what the agency described as NGS's "dramatic reduction in FTEs." Agency Report (AR), Tab 4a, Final Technical

¹ Similarly, in connection with calculating the cost/price associated with each offeror's proposal, the solicitation required each offeror to "provide a crosswalk to the CLIN templates for the FTEs identified for each workload category." RFP, attach. J-07, Basis of Estimate Instructions, at 2.

Evaluation Report, at 56. Specifically, the agency's contemporaneous evaluation documentation stated:

In the Technical Proposal, [NGS] failed to adequately document its approach or how this dramatic reduction in FTEs in some areas will enable it to perform at the same level in order to meet CMS requirements. For example, [NGS] did not indicate how it will impact its [redacted]² strategy or how it [will] perform [redacted] without a [redacted] as originally proposed to perform [redacted]; [NGS] eliminated and/or reduced positions in many categories; for example, [redacted] positions were significantly reduced, [redacted] were inconsistently represented, and [redacted] staff were reduced from approximately [redacted] FTEs to approximately [redacted] FTEs. All reductions in the technical proposal are without explanation quantifying these reductions.

Id.

Nonetheless, the agency thereafter "sampled" a limited number of the contract's functional requirements, and concluded that a significant portion of NGS's proposed reductions were acceptable. AR, Dec. 14, 2011, at 6. In September 2011, the agency selected NGS's proposal for award. WPS's protest followed.³

In challenging the agency's September 2011 source selection decision, WPS challenged the agency's evaluation of NGS's FPR with regard to its reduction of FTEs. First Supp. Protest, Nov. 14, 2011, at 2-3. Additionally, WPS protested virtually every other aspect of the agency's evaluation of both WPS's and NGS's proposals. For example, WPS challenged the agency's evaluation of WPS's past performance, complaining that the agency "focus[ed] on isolated audit findings" and ignored WPS's responses to those findings, Protest, Oct. 24, 2011, at 8-10;⁴ challenged the agency's evaluation of its technical proposal, complaining that the agency erroneously criticized the experience of WPS's proposed personnel and should have awarded more strengths for WPS's key personnel and proposed management team, Second Supp. Protest, Dec. 2, 2011, at 13-21; challenged the agency's determination that NGS's technical proposal demonstrated a superior understanding with regard to the solicitation's home health and hospice (HH&H)

² We have redacted protected information from this decision.

³ WPS filed its initial protest on October 24, 2011, filed its first supplemental protest on November 14, and filed its second supplemental protest on December 2.

⁴ WPS's also challenged the agency's evaluation of NGS's past performance.

workload.⁵ First Supp. Protest, Nov. 14, 2011, at 39-40; and challenged the cost/price evaluation with regard to both offerors' proposals. Second Supp. Protest, Dec. 2, 2011, at 60-78.

Following the agency's responses to all of WPS's protest allegations, this Office conducted a two-day hearing during which testimony was provided by various witnesses. Thereafter, the GAO attorney handling the protest conducted a conference call with the parties, advising that the protest would likely be sustained on the basis of the agency's evaluation of NGS's FTE reduction.⁶ In response, the agency advised our Office that it would take corrective action, elaborating that it would either reevaluate proposals on the basis of the existing record or reopen the procurement and request proposal revisions.⁷ E-mail from CMS to GAO, Jan. 25, 2012. Accordingly, we dismissed WPS's protest. Wisconsin Physicians Service Insurance Corp., B-401068.8, B-401068.10, B-401068.11, Jan. 26, 2012.

On February 10, WPS submitted this request for our recommendation that WPS be reimbursed "for the costs of all issue[s] pursued in its protest." Request for Reimbursement, Feb. 10, 2012, at 2. We grant WPS's request in part and deny it in part.

When a procuring agency takes corrective action in response to a protest, we may recommend that the agency reimburse the protester its protest costs where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2007); Pemco Aeroplex, Inc.--Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. Nevertheless, we will not recommend reimbursement of protest costs in every case where an agency takes corrective action but, rather, only where an agency delays taking corrective action in the face of a clearly meritorious protest allegation. Information Ventures, Inc.--Costs, B-294580.2 *et al.*, Dec. 6, 2004, 2004 CPD ¶ 244 at 2; Triple Canopy, Inc.--Costs, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 2-3. Further, we will not recommend that a protester's recovery of protest costs extend to issues that are not clearly meritorious where such issues are clearly severable

⁵ CMS views the HH&H requirements as presenting unusual challenges, including a high propensity for fraud. See AR, Tab 3a, Source Selection Decision, at 11.

⁶ Pursuant to GAO's Bid Protest Regulations and our established practice, the GAO attorney handling a protest may conduct "outcome prediction" alternative dispute resolution (ADR) by advising the parties of what the likely outcome will be. See 4 C.F.R. §§ 21.10(e),(f) (2102); Pond Sec. Group Italia JV--Costs, B-400149.2, Mar. 19, 2009, 2009 CPD ¶ 61 at n.1.

⁷ In February 2012, the agency reopened the procurement, conducted discussions with the offerors, and requested and received proposal revisions.

from clearly meritorious issues. See Sodexho Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29.

Here, the record establishes that WPS's protest challenging the agency's evaluation of NGS's insufficiently documented reduction of FTEs in its FPR was clearly meritorious. Further, this issue was first raised in the supplemental protest WPS filed on November 14, 2011. In responding to this specific issue, the agency maintained that its evaluation of NGS's FPR was proper--first, defending its evaluation in the agency report submitted to our Office on December 14 and, thereafter, during the hearing conducted by our Office on January 12-13, 2012. Following the hearing, the agency took corrective action on January 25. A reasonable agency inquiry into WPS's allegation would have revealed facts showing the absence of a defensible legal position. Accordingly, we conclude that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, and we recommend reimbursement of WPS's protest costs that are reasonably related to pursuit of this issue.

In contrast, none of the multiple other protest allegations raised by WPS met the clearly meritorious standard necessary for our cost reimbursement recommendation. For example, WPS's various complaints regarding the evaluation of both offerors' past performance and its challenges to the evaluation of its own proposal with regard to technical understanding and cost/price were not clearly meritorious; further, we view these issues as severable. Accordingly, we decline to recommend reimbursement of WPS's protest costs with regard to protest issues that are not reasonably related to the agency's evaluation of NGS's FTE reduction.

WPS's request for our recommendation that it be reimbursed its protest costs is granted in part and denied in part.

Susan A. Poling
General Counsel