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**Comptroller General
of the United States**

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

Decision

Matter of: Federal Management Systems, Inc.

File: B-293336

Date: February 20, 2004

Keith Calhoun-Senghor, Esq., for the protester.
Michael Colvin, Department of Health and Human Services, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest is denied where the protester failed to demonstrate that the agency unreasonably rejected its proposal—the only proposal received from a private-sector offeror as part of a cost comparison conducted pursuant to Office of Management and Budget Circular A-76—as technically unacceptable.

DECISION

Federal Management Systems, Inc. (FMSI) protests the rejection of its proposal as technically unacceptable under request for proposals (RFP) No. 263-03-P(GK)-0059, issued by the National Institutes of Health (NIH), Department of Health and Human Services, for administrative support services for grants application management, program, and review support for NIH facilities in Maryland (Bethesda, Rockville, and Frederick) and in North Carolina (Research Triangle Park).¹ The RFP was issued pursuant to Office of Management and Budget (OMB) Circular A-76 and the Circular's Revised Supplemental Handbook (RSH) to determine whether it would be more economical to perform the required services in-house or to contract for these services under the referenced RFP. FMSI was the only offeror to submit a proposal in the private-sector portion of this A-76 cost comparison. FMSI argues that the

¹ The NIH consists of 20 institutes and 7 centers. FMSI currently provides, or has provided, some of the services required under this RFP at five NIH facilities, all of which are located in Bethesda at the NIH main campus. Source Selection Evaluation Board (SSEB) Report at 6.

agency did not have a reasonable basis to reject its proposal as technically unacceptable.

We deny the protest.

On May 22, 2003, NIH issued the RFP on an unrestricted basis in order to select a private-sector offeror to compete against the government's "most efficient organization" (MEO) under the A-76 cost comparison process.² More specifically, the RFP stated that the agency would conduct the cost comparison between the MEO and the private-sector offeror that submitted the low priced, technically acceptable proposal. As relevant here, in determining the technical acceptability of a private-sector offeror's proposal, the RFP contained the following four equally weighted technical evaluation factors: (1) past performance; (2) understanding of the requirements/technical approach; (3) understanding of staffing requirements; and (4) understanding of management requirements. For each of these technical evaluation factors, the RFP provided that proposals could receive one of the following adjectival ratings: (1) excellent; (2) good; (3) marginal; and (4) poor.³ For each of the four technical evaluation factors, the RFP specifically stated that a proposal "must receive a rating of good or excellent to be considered technically acceptable." RFP at 124-26. The RFP further defined technical acceptability as follows:

Technically acceptable is defined through the performance levels in the PWS [Performance Work Statement] ([§] C, and [§] J attachments). This requires meeting all the requirements (services and service levels) and standards within the workload variances. Technically acceptable is NOT meant to imply "marginal," "partial compliance," or "what is acceptable on other contracts." NIH has specific and unique extramural programs and requirements. Technically acceptable in this case implies a historical level of performance that effectively achieves the NIH mission in a cost efficient manner.

Id. at 122.

² The procedures applicable here for determining whether the government should perform an activity in-house, or have the activity performed by a contractor, are set forth in OMB Circular A-76 and the Circular's RSH (March 1996). Although the Circular and the RSH were revised on May 29, 2003, those revisions were not applicable to this competition as this RFP was issued 1 week before the May 2003 revisions were issued.

³ For past performance, proposals also could receive a neutral rating.

The RFP advised that a private-sector offeror's initial proposal should contain the firm's most favorable terms since the agency could select a proposal from a private-sector offeror and proceed to the A-76 cost comparison without having conducted discussions with the private-sector offerors. RFP Cover Letter.

Section C of the RFP contained the PWS requirements. Section C-1 required that the private-sector offeror or the MEO, depending on the outcome of the A-76 cost comparison, provide all management, supervision, administration, and labor to support the grants management, program, and review support services identified in this "Performance-based [PWS]." RFP § C-1, General Information, at 1. The PWS stated that the "major functional requirements" contained in the PWS describe the supplies and services the government will purchase and, therefore, are the foundation of the RFP. RFP § C-5, Specific Tasks, at 37. The PWS further stated that the "functional area approach . . . express[es] minimum performance requirements . . . [and] [i]t is neither reflective nor indicative of any existing or required organizational arrangement. Minimum requirements are set forth in brief performance requirement statements, supplemented by corresponding standards of performance . . . [which] are measures of quality and timeliness." *Id.* The PWS encouraged the submission of proposals that would achieve savings through "innovative process improvement[s] and resource management." RFP § C, Description/Specification, PWS Cover Page.

FMSI, an incumbent contractor, was the only private-sector offeror to submit a proposal. Seven evaluators rated FMSI's technical proposal, as well as FMSI's responses to more than 100 proposal clarification questions posed by the agency to FMSI prior to the final evaluation of its proposal. For the past performance evaluation factor, each of the evaluators assigned a good rating to FMSI's proposal; however, for the other three technical evaluation factors, the evaluators generally assigned ratings no higher than poor to FMSI's proposal. (For the understanding of the requirements/technical approach evaluation factor, two of the seven evaluators assigned marginal ratings to FMSI's proposal, while the other five evaluators each assigned poor ratings; for each of the other two technical evaluation factors, each of the evaluators assigned poor ratings to FMSI's proposal.) These adjectival ratings were supported by contemporaneous evaluation narratives which showed that FMSI's proposal was deficient in three areas—technical, staffing, and management. The agency concluded that these deficiencies permeated the entire FMSI proposal and were too substantial to be susceptible to correction.

The record shows that the agency had a significant concern with FMSI's proposed staffing approach. In this regard, the agency commented that FMSI's proposed staffing levels were "incongruent with past performance and would, in some cases[,] result in FMSI supplying fewer staff to perform than under its current NIH

contracts.” SSEB Report at 56.⁴ The agency believed that the staffing levels proposed by FMSI were unrealistically low in terms of FMSI being able to adequately perform the PWS requirements. *Id.* at 50. The agency noted that FMSI failed to address in its proposal any process improvements (other than a few minor improvements based on changes already ongoing at the NIH), efficiencies, consolidations, or reorganizations that would explain how the firm’s proposed staffing approach would be “viable.” *Id.* at 50, 56. The agency stated that while not all of the NIH institutes and centers were understaffed by FMSI, the agency nevertheless believed that FMSI’s proposal presented an unacceptable level of risk in terms of all NIH facilities being able to accomplish their workloads with the staffing levels proposed by FMSI. *Id.* at 57.

Because FMSI’s proposal was determined to be deficient, *i.e.*, FMSI’s proposal did not receive good or excellent ratings for each of the technical evaluation factors, the agency rejected FMSI’s proposal as technically unacceptable. As a result, there was no technically acceptable proposal from the private sector to compare to the MEO. Accordingly, the agency canceled the RFP.⁵

FMSI filed this protest on November 24, 2003. FMSI challenges the reasonableness of the agency’s evaluation of its proposal, arguing that it fully addressed in its proposal all of the PWS requirements. FMSI contends that in rejecting its proposal as technically unacceptable, the agency used criteria that were not included in, or required by, the PWS. FMSI does not articulate what these unstated criteria were, other than speculating that “NIH . . . appears to have wanted a specific number of personnel organized and managed in a particular manner.” Protest at 19.

In its administrative report filed with our Office and with FMSI on December 19, the agency explains that the PWS requirements, as stated above, were performance-based, meaning that the government did not tell offerors how to perform the PWS requirements, but rather expected each offeror to explain in its proposal its technical approach for satisfying these requirements. It is clear from the RFP language, as quoted above, that the PWS requirements were stated in terms of functional or performance requirements, which permitted an offeror, like FMSI, the option to choose and propose its own unique approach to fulfilling the technical, staffing, and management requirements of the PWS. Where, as here, the PWS allows for alternative approaches to meeting performance requirements, the manner in

⁴ As part of the debriefing, NIH provided FMSI with a copy of the MEO/management plan. The record shows, and FMSI does not dispute, that FMSI’s proposed staffing, in terms of full-time equivalent personnel, was at least 20 percent less than the MEO’s proposed staffing. Protest at 18-19.

⁵ The agency advised that it would implement the MEO. Contracting Officer’s Statement at 3.

which offerors are to fulfill the requirements need not be specified in the PWS and do not constitute unstated criteria. See, e.g., Cerner Corp., B-293093, B-293093.2, Feb. 2, 2004, 2004 CDP ¶ ___ at 8; Canadian Commercial Corp./Canadian Marconi Co., B-250699.4, Mar. 5, 1993, 93-1 CPD ¶ 251 at 7.

FMSI also contends that, in evaluating its proposal, the agency held it to a higher standard than it held the MEO/management plan. For example, FMSI argues that it devoted a greater number of pages in its proposal to addressing the PWS requirements than did the MEO/management plan. However, in making this argument, based on page counts, FMSI does not point to any PWS requirement that the MEO/management plan fails to satisfy. In addition, FMSI states that it “takes no issue with NIH’s finding that its own [i.e., the government’s] cursory . . . Management Plan meets the technical requirements of the PWS. If NIH’s . . . [management plan] is the definition of [‘]technically acceptable[’] for purposes of this [RFP], FMSI has no quarrel with that fact. FMSI only wants that same standard applied to its detailed, comprehensive proposal, as applied to NIH’s superficial technical effort.” Protester’s Comments at 9. Accordingly, FMSI has not provided any basis to show that the MEO/management plan was somehow substantively noncompliant with the PWS requirements or otherwise received more favorable treatment than did FMSI’s proposal. Rather, the record shows that the agency reasonably evaluated the substantive contents of FMSI’s proposal in accordance with the terms of the RFP. In its administrative report, as supported by the contemporaneous evaluation record, the agency provides examples of the numerous deficiencies in FMSI’s proposal that led the agency to conclude that FMSI failed to demonstrate its understanding of the technical, staffing, and management requirements of the PWS, thus rendering FMSI’s proposal technically unacceptable.

One of these examples involves the National Cancer Institute’s (NCI) Cancer Research Development Center (CRDC) in Frederick, Maryland, which was listed in the RFP as a performance site. RFP § C-1, General Information, at 11. (FMSI was not performing any work as an incumbent contractor at the CRDC in Frederick.) In evaluating FMSI’s proposal, the agency was concerned that FMSI had not adequately addressed how it would perform the PWS requirements at the CRDC in Frederick. The agency brought this matter to the attention of FMSI in the clarification questions issued to the firm prior to the agency’s final evaluation of its proposal. In one question, referring to a page in FMSI’s proposal containing the firm’s organizational chart, the agency asked FMSI how it proposed to service the CRDC in Frederick. FMSI referenced its organizational chart and responded, without elaboration, that it was aware of the NCI’s programs at the Frederick site and that it planned to staff this location with nine grants program assistants and one supervisory grants program assistant as shown in the organizational chart. Protester’s Response to Clarification Question at 4. The agency viewed this response as “unacceptable as it does not adequately explain how the Frederick offices would be serviced or justify staffing numbers to support the volume of workload.” Final Technical Evaluation Report at 36-37. In another question, the agency referred to FMSI’s transition plan, pointing out that the firm’s transition plan for the CRDC in Frederick could not be located;

the agency asked FMSI to address this matter. Again, without elaboration, FMSI responded that its transition plan for the CRDC in Frederick was incorporated into its transition plan for the other NIH Maryland sites, which were located approximately 36 miles away in Bethesda at the NIH main campus and that it intended to meet with the NCI program officials located in Frederick to achieve a smooth and efficient transition. Protester's Response to Clarification Question at 38. The agency stated that "[n]either the proposal nor the response acceptably describes the transition plan for the Frederick facilities nor has the proposal acceptably defined the positions involved to service this site." Final Technical Evaluation Report at 47.

This discussion of the CRDC in Frederick illustrates the agency's concerns, as set forth above, with FMSI's failure to provide within the four corners of its proposal, or in its responses to the agency's numerous clarification questions, a complete discussion of its technical, staffing, and management approaches in order to demonstrate its understanding of the PWS requirements.⁶ While FMSI filed comments on the agency's administrative report on January 5, 2004,⁷ FMSI did not rebut the detailed positions articulated by the agency in that report, as supported by the contemporaneous evaluation record. On this record, where FMSI essentially does no more than express its disagreement with the outcome of the agency's evaluation, we conclude that there is no basis for our Office to question the reasonableness of the agency's rejection of FMSI's proposal as technically unacceptable.⁸

⁶ We point out that the MEO/management plan specifically incorporated all performance sites contained in the RFP, including the CRDC in Frederick. Protest, exh. 19, MEO Management Plan, at 9.

⁷ The original due date for the filing of NIH's administrative report was December 26, 2003, thus making comments due 10 calendar days later on January 5, 2004. However, the NIH advised GAO and FMSI that it would be filing its report on December 19, thereby making comments due 10 calendar days later on December 29. By letter dated December 18, and received by our Office on December 19, FMSI requested that GAO grant it an extension of time for filing comments until January 5, the original comment due date. By written notice dated December 19, and sent to both the NIH and FMSI, GAO granted FMSI's request for an extension of time to file comments until January 5.

⁸ In its comments on the agency's administrative report, FMSI points to general statements in its proposal that it would service all performance sites contained in the RFP and would perform all of the PWS requirements. However, such blanket statements of compliance, without supporting details and explanations as required by the RFP, fail to demonstrate FMSI's understanding of the agency's technical, staffing, and management requirements as described in the PWS. See, e.g., Wahkontah Servs., Inc., B-292768, Nov. 18, 2003, 2003 CPD ¶ 214 at 5.

In addition, in its January 5 comments, FMSI raised five new grounds of protest involving procedural and technical aspects of the agency's conduct of this A-76 cost comparison. For example, FMSI questioned whether any of the agency evaluators should have been disqualified due to alleged conflicts of interest.

We do not address these new grounds of protest because they were not timely raised within 10 days (by December 29) after FMSI received the agency's administrative report. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2003). In this respect, FMSI filed its comments 17 days after it received the agency's administrative report. While FMSI requested, and our Office granted, an extension of time for filing comments on this report, the comment extension did not toll or otherwise waive the time for filing new grounds for protest. ATA Def. Indus., Inc., B-282511.8, May 18, 2000, 2000 CPD ¶ 81 at 4. Since the nature of the allegations raised for the first time in FMSI's comments are materially different than the issues raised in its protest concerning the technical acceptability of its proposal and since these allegations were not timely raised after FMSI received the agency's administrative report, we will not address them here.⁹

Finally, in light of our conclusion that FMSI's proposal was reasonably rejected as technically unacceptable, there is no basis in this record to support FMSI's contention that it is entitled to recover its proposal preparation costs.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁹ As discussed above, FMSI presented no basis for our Office to question the reasonableness of the agency's rejection of FMSI's proposal—the only proposal received from a private-sector offeror—as technically unacceptable. Other than speculation, FMSI has provided no basis for our Office to conclude that the agency rejected FMSI's proposal in order to avoid the A-76 cost comparison, which could have resulted in the private-sector offeror prevailing over the MEO. Cf. Consolidated Eng'g Servs., Inc., B-291345, B-291345.2, Dec. 23, 2002, 2002 CPD ¶ 220.