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Decision

Matter of: First Coast Service Options, Inc.

File: B-401429

Date: July 31, 2009

Thomas K. David, Esq., and Kenneth D. Brody, Esq., David, Brody & Dondershine, LLP, for the protester.

Agnes P. Dover, Esq., and Michael D. McGill, Esq., Hogan & Hartson LLP, for Maximus, Inc., an intervenor.

Christine Simpson, Esq., Department of Health and Human Services, for the agency.
Glenn G. Wolcott, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where performance of more than one-third of the contract requirements created a conflict of interest for the protester, agency reasonably rejected protester's final revised proposal that, for the first time, offered to perform the conflicted requirements by relying on a "firewalled subcontractor," but failed to meaningfully address the cost and technical impacts associated with this significant proposal revision.

DECISION

First Coast Service Options, Inc. (FCSO), of Jacksonville, Florida, protests the issuance of a task order by the Department of Health and Human Service (HHS), Centers for Medicare and Medicaid Services (CMS), to Maximus, Inc., of Reston Virginia, pursuant to request for proposals (RFP) No. 90010. The solicitation sought proposals from "qualified independent contractors" (QIC) to perform reviews of initial medicare payment determinations made by the medicare administrative contractor (MAC) within a particular geographic area, which included Florida, Puerto Rico, and the U.S. Virgin Islands; FCSO is the MAC contractor for those areas. FCSO complains that the agency improperly rejected FCSO's proposal based on concerns regarding conflicts of interest.

We deny the protest.

BACKGROUND

On September 17, 2008, CMS released the solicitation at issue to seven contractors who currently hold indefinite-delivery/indefinite-quantity (ID/IQ) contracts for QIC services, including FCSO and Maximus. The solicitation provided that award would be made on a “best value” basis and identified various evaluation factors.¹

Consistent with the statutory requirement that a QIC be independent from the MAC whose determinations the QIC is reviewing,² the solicitation stated:

It is essential that the contractor and the services provided to Medicare beneficiaries under this contract be free, to the greatest extent possible, of all conflicts of interest (COI). Except as provided below, the CO [contracting officer] shall not enter into a contract with an offeror or maintain a contract with a contractor that the CO determines has, or has the potential for, an unresolved organizational COI. **Due to the nature of the Medicare Appeals process and this contract, Medicare Contractors are not permitted to be a QIC in any region in which it processes claims, absent an approved mitigation strategy in accordance with Section H.2.d below.**^{3]}

AR, Tab 2, at 21. (Bold in original.)

The agency states, and FCSO does not dispute, that more than one-third of the requirements contemplated by this solicitation will involve review of the MAC’s initial benefit determinations that are made in response to claims from beneficiaries

¹ Specifically, the solicitation established the following evaluation factors: technical approach; key personnel; business/cost approach; quality assurance; security; past performance; and subcontracting approach. Agency Report (AR), Tab 3, at 17.

² Section 521 of the Benefits Improvement and Protection Act (BIPA) provides that, “[t]he Secretary [of HHS] shall enter into contracts with qualified independent contractors to conduct reconsiderations of initial determinations made [by MACs]” and defines a “qualified independent contractor” as “an entity or organization that is independent of any organization under contract with the Secretary that makes initial determinations [regarding claims for benefits]. 42 U.S.C. § 1395ff(c)(1), (2) (2006).

³ Section H.2(d) required that offerors submit an “Organizational COI certificate” which required offerors to identify “all business or contractual relationships or activities that may be viewed by a prudent businessperson as a COI,” along with “[a] description of the methods the offeror or contractor will apply to mitigate any situations listed in the Certificate that could be identified as a COI.” AR, Tab 2, at 24.

in Florida, Puerto Rico, and the U.S. Virgin Islands; FCSO is the MAC contractor for those areas.⁴

On or before the October 8 closing date, proposals were submitted by various offerors, including Maximus and FCSO. In its initial proposal, FCSO maintained that the conflict of interest created by FCSO's review, as a QIC, of its own initial MAC determinations "is mitigated by the separation and segregation of the day-to-day management and operation of the QIC line of business from the Medicare claims line of business." AR, Tab 4, at 8. Additionally, FCSO's proposal indicated that, after award, it intended to novate the QIC contract to a sister corporation. Id.

By letter to FCSO dated December 22, 2208, the agency advised FCSO as follows:

As FCSO is the current MAC for the J9 jurisdiction, which includes Florida, the Virgin Islands, and Puerto Rico, FCSO has a conflict of interest in proposing to review appeals as a QIC in the same jurisdiction where it processes claims.

Additionally, FCSO's current mitigation strategy of novating the subject QIC work to [its sister corporation] has been deemed to be an unacceptable approach. . . .

In accordance [with] FAR [Federal Acquisition Regulation] 9.504(e)⁵ we are providing you with an opportunity to submit a response to this issue . . . by . . . January 5, 2009.

AR, Tab 5, at 18.

On January 5, FCSO responded, continuing to argue that novating the QIC contract to its sister corporation should be considered an acceptable mitigation plan based on various organizational barriers that FCSO proposed to create between the two affiliated companies. AR, Tab 5, at 23-26.

⁴ Specifically, FCSO holds the MAC contract for an area referred to as "jurisdiction 9," which includes Florida, Puerto Rico, and the U.S. Virgin Islands.

⁵ FAR § 9.504(e) provides that:

Before determining to withhold award based on conflict of interest considerations, the contracting officer shall notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond.

By letter dated January 28, CMS again advised FCSO that its proposal to novate the QIC contract to its sister corporation would not mitigate the conflict of interest, explaining, among other things, that “both FCSO and [its sister corporation] are ultimately working for the same organization, [the common parent corporation], with an incentive to benefit [the parent corporation] overall.” AR, Tab 5, at 38. The agency further stated:

[W]e are reopening discussions on the [protested procurement] in order to provide you with the opportunity to address, in detail, FCSO’s proposed mitigation plan. Your revised proposal shall include, at a minimum, proposed timeframes, and any technical and cost impact for proposed revisions to FCSO’s proposal. . . .

This is a request for a final proposal revision, so any submissions must be complete and comprehensive as there will not be further opportunities for additional discussions or proposal revisions.

Id. at 38-39.

On February 11, FCSO submitted a 3-page final revised proposal in which it proposed, among other things, to perform the QIC workload for Florida, Puerto Rico, and the U.S. Virgin Islands through a “firewalled subcontractor.”⁶ AR, Tab 5, at 65-67. Notwithstanding the agency’s specific direction that FCSO submit its mitigation plan “in detail,” that it include “at a minimum proposed timeframes and any technical and cost impact for proposal revisions,” and that the proposal be “complete and comprehensive,” the entire description of FCSO’s new “firewalled subcontractor” approach was presented in five paragraphs. More specifically, FCSO’s final proposal did not provide the requested detailed description of how FCSO proposed to perform more than one-third of the total contract requirements by relying on an entity that had not previously been part of its proposal, nor did it identify the impact that this substantial revision would have on its previously-proposed cost and technical approach; rather, FCSO advised the agency that, if its proposal were accepted, “FCSO would of course revise its operational procedures and processes accordingly in consultation with [the agency].” AR, Tab 5, at 67.

The agency thereafter concluded that FCSO’s proposal was unacceptable on the basis that it reflected an insufficiently mitigated conflict of interest. Maximus’s

⁶ FCSO’s 3-page submission also suggested that the agency “carve out” the conflicted work from the solicitation’s requirements and issue a task order to FCSO for the remaining workload. The agency rejected this approach since it would have resulted in issuance of a task order for requirements that were materially different than the statement of work for which all of the offerors had competed.

proposal was subsequently selected for award, and FCSO was notified of that source selection decision. This protest followed.

DISCUSSION

FCSO protests that the agency was required to accept its proposed “firewalled subcontractor” approach as an acceptable mitigation plan, and asserts that the agency’s documentation regarding the basis for rejecting FCSO’s proposal was inadequate. We disagree.

Contracting officers are required to identify potential conflicts of interest as early in the acquisition process as possible, and to avoid, neutralize, or mitigate such conflicts to prevent the existence of conflicting roles that might impair a contractor's objectivity. In assessing potential conflicts of interest, the FAR directs the contracting officer to examine each contracting situation individually on the basis of its particular facts and the nature of the proposed contract, and to exercise common sense, good judgment, and sound discretion with regard to whether a conflict exists and, if so, the appropriate means for resolving it; the primary responsibility for determining whether a conflict is likely to arise, and the resulting appropriate action, rests with the contracting agency. FAR § 9.505; Alion Sci. & Tech., B-297022.4, B-297022.5, Sept. 26, 2006, 2006 CPD ¶ 146 at 6; RMG Sys. Ltd., B-281006, Dec. 18, 1998, 98-2 CPD ¶ 153 at 4. Once an agency has given meaningful consideration to potential conflicts of interest, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. Alion Sci. & Tech., supra.

Here, as discussed above, FCSO’s October 8, 2008 initial proposal contemplated that FCSO would perform both the QIC and the MAC contracts for the same area, and that “separation and segregation of the day-to-day management and operation” of the two contracts should be considered sufficient COI mitigation; alternatively, FCSO’s initial proposal contemplated transferring performance of the QIC contract to its sister corporation. In December, the agency clearly advised FCSO that neither approach was acceptable, and offered FCSO another opportunity to meaningfully address the COI. In January 2009, FCSO responded, continuing to argue for acceptance of the novation approach it had previously proposed. Thereafter, the agency again told FCSO that its proposed approach was unacceptable and, yet again, offered FCSO an opportunity to meaningfully address the COI. In seeking yet another response from FCSO, the agency specifically reminded FCSO that its proposed mitigation plan must be complete, comprehensive, and detailed, and that it must discuss, “at a minimum,” the cost and technical impact created by any proposed revisions. Notwithstanding the agency’s clear directions, FCSO’s

response—which reflected material changes to its previously-proposed approach—provided virtually none of the specific information the agency requested.⁷

Based on our review of this record, as discussed above and specifically including FCSO’s various responses to the agency’s multiple requests that FCSO meaningfully address the clear conflict of interest, we find no merit in FCSO’s assertion that the agency was required to accept, or that it inadequately documented the basis for rejecting, FCSO’s “firewalled subcontractor” approach.

The protest is denied.

Daniel I. Gordon
Acting General Counsel

⁷ In pursuing this protest, counsel for FCSO describes FCSO’s responses to the agency’s multiple requests that FCSO meaningfully address the COI, stating: “Instead of detailing all possible strategies in their initial offer, FCSO chose to use a graduated approach that would allow [FCSO] to weigh [the agency’s] feedback and respond accordingly.” FCSO Comments on Agency Report, June 23, 2009, at 2. FCSO’s “graduated approach” was not what the agency requested, nor what the solicitation required.