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## Decision

**Matter of:** Diversified Collection Services, Inc.

**File:** B-406958.3; B-406958.4

**Date:** January 8, 2013

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### DIGEST

1. Protest that firm should have been disqualified from competition due to a significant impaired objectivity organizational conflict of interest is denied, where the agency reasonably concluded that the vendor, if awarded the task order, would not be in a position to evaluate the services it provides to commercial customers.
2. Protest that contracting agency improperly conducted discussions solely with the selected vendor is denied where the record shows the exchange at issue constituted a clarification and there was no requirement to also seek clarification from protester.
3. Allegation that vendor's "points for negotiation" took material exception to the solicitation's terms is denied where the quote, when read as a whole, did not take exception to the terms of the solicitation, the agency did not negotiate any of the identified points with the selected vendor, and the agency's offer of the task order to the vendor evidenced the agency's rejection of the points of negotiation.

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### DECISION

Diversified Collection Services, Inc. (DCS), of Livermore, California, protests the decision of the Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS), to award a task order to CGI Federal, Inc., of Fairfax,

Virginia, under request for quotations (RFQ) No. CMS-RFQ-2012-121210, issued to contract holders under the General Services Administration's (GSA) Financial and Business Solutions Federal Supply Schedule (FSS), to serve as a Medicare Secondary Payer Recovery Audit Contractor. DCS argues that CMS improperly failed to identify and analyze CGI's organizational conflict of interest, improperly conducted discussions solely with CGI, and improperly accepted CGI's technically unacceptable quote.

We deny the protest.

## BACKGROUND

Medicare is the federal health insurance program for persons aged 65 and over, certain younger individuals with disabilities, and individuals with end-stage renal disease. Medicare Part A covers inpatient hospital stays, skilled nursing facility care, hospice care, and some home healthcare. Medicare Part B covers certain doctors' services, outpatient care, medical supplies, and preventive services. CMS contracts with private firms, known as Medicare Administrative Contractors (MAC), to process and pay Medicare claims. Contracting Officer's Supp. Statement at 4.

Eligible Medicare beneficiaries often have health insurance coverage in addition to Medicare, however, such as through an employer-sponsored Group Health Plan (GHP). In such cases, the GHP has the primary responsibility to pay their claims with Medicare acting as a secondary payer.<sup>1</sup> Because it is not always apparent that a beneficiary has other primary insurance, Medicare may inadvertently pay for services that are subsequently determined to be the financial responsibility of another payer. These mistaken payments represent money owned to Medicare and are known as Medicare Secondary Payer debt.<sup>2</sup>

In order to address such inadvertent payments, CMS's Coordination of Benefits program collects data on other insurance coverage for Medicare beneficiaries. CMS checks for potential GHP-based mistaken payments (situations where Medicare paid primary when it should have paid secondary) and pursues recovery as appropriate whenever it adds a new GHP Medicare Secondary Payer occurrence to its records. RFQ Statement of Work (SOW) at ¶ 1.2.

In this procurement, CMS seeks the services of a Medicare Secondary Payer (MSP) Recovery Audit Contractor (RAC) to identify and recover overpayments

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<sup>1</sup> Medicare is generally prohibited from paying for healthcare services if payment can reasonably be expected to be made by a GHP. 42 U.S.C. § 1395y(b)(2)(A).

<sup>2</sup> Medicare Secondary Payer: Improvement Needed to Enhance Debt Recovery Process, GAO-04-783 at 1-2 (Aug. 2004).

stemming from instances where Medicare made payment under Medicare Parts A or B as the primary insurer, but a GHP had primary payment responsibility.<sup>3</sup>

The RFQ explains that another contractor, the Coordination of Benefits & Recovery Business Process Operations Contractor, will be responsible for coordination of benefit activities, including the collection of data related to new MSP occurrences. This contractor is to post MSP occurrences, or “leads,” to the Common Working File and related systems. RFQ SOW at ¶ 2.2.3.2.1. The MSP RAC, which will have access to these systems, is to use these MSP leads to identify Medicare Part A and Part B claims that were incorrectly paid by Medicare as the primary insurer, and to recover those payments consistent with a process described in the SOW and CMS guidance.<sup>4</sup> RFQ SOW at ¶ 2.3.2.2.

The solicitation, issued on April 24, 2012, anticipated the issuance of a fixed-price contingency fee task order to be performed over a 1-year base period, with up to four 1-year option periods. RFQ at ¶¶ 1.2, 3.1. The contractor is to perform its recovery activities in either the western or eastern part of the United States, as specified by CMS. RFP at § B.1.

CMS was to evaluate vendors’ technical quotes under evaluation factors that are not at issue here. RFQ at ¶ 10.2. In their business quotes, vendors were to include “**all** (if any) assumptions, conditions, or expectations upon which their technical and business quote volumes were based.” *Id.* at ¶¶ 8.2 (emphasis in original). Vendors were also required to submit a conflict of interest certification that described business or contractual relationships or activities that might be viewed as a conflict of interest; methods the firm would apply to mitigate any such situations; and financial interests in other entities. RFQ at ¶ 9.1; *see also* RFQ at ¶ 5.9. CMS was to evaluate this certification to ensure that any real, potential, or perceived organizational conflicts of interest were adequately mitigated. *Id.* at ¶ 10.1(3).

CMS deemed it essential that the contractor and its services be free, to the greatest extent possible, of all conflicts of interest. RFQ at ¶ 5.9(a). It recognized, however, that virtually every business by merit of its status as an employer that provides or facilitates GHP coverage for its employees is a potential debtor—including the recovery contractor and any entity with which it has a business relationship. As a

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<sup>3</sup> Under the Tax Relief and Health Care Act of 2006, the Secretary of Health and Human Services is authorized to utilize RACs to identify and recover these overpayments, and to compensate them on a contingency fee basis. Pub. L. No. 109-432, div. B, title III, § 302, 120 Stat. 2922, 2991 (2006).

<sup>4</sup> The RFQ includes an optional task for the recovery of Non-GHP Non-Beneficiary Debts, which is not at issue here. RFQ at ¶ 10.3; RFQ SOW at ¶ 5.1.

result, the RFQ included directions to address such situations. Agency Report (AR), Exh. 19, CGI OCI Analysis at 4, citing RFQ at ¶ 2.2.3.<sup>5</sup>

CMS was to select the quote that provided the best value to the government, based upon an assessment of the technical and business quotes. RFQ at ¶¶ 10.1, 10.2. CMS considered the non-price evaluation factors, when combined, to be equally important to the price/contingency fee percentage. Id. at ¶ 10.2.

CMS received quotes from two firms by the May 24 closing date, DCS and CGI, and selected CGI in June. DCS filed a protest of the selection in our Office challenging CMS' evaluation of the quotes and alleging that CGI had an organizational conflict of interest (OCI). CMS subsequently advised our Office that it intended to grant the relief requested by DCS, including reevaluating the quotes and making a new source selection decision. We dismissed the protest as academic on August 7.

On September 29, CMS re-issued the task order to CGI. CMS found that both quotes were acceptable and raised no concerns that needed to be addressed prior to issuance of the task order. AR, Exh. 18, Revised Award Decision Memorandum at 3-4. CGI's technical quote was evaluated as very good, with a proposed contingency fee of 14.95 percent. DCS' technical quote was evaluated as satisfactory, with a proposed contingency fee of 12.9 percent. Id. CMS determined that the risk in CGI's quote was substantially less than that presented by DCS, and concluded that CGI's quote was a better value despite its higher contingency fee. Id. at 5. The selection decision memorandum attached the contracting officer's OCI analysis with respect to CGI. As discussed below, the contracting officer identified and analyzed various potential OCIs and concluded that any potential conflict was not significant and could be adequately mitigated. AR, Exh. 19, CGI OCI Analysis.

## DISCUSSION

DCS alleges that CMS improperly failed to identify and analyze a significant impaired objectivity OCI that would arise by issuance of the task order to CGI. DCS

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<sup>5</sup> Before initiating recovery actions beyond identification of cases, the MSP RAC is to submit a monthly report identifying any potential debtors, including business associates, that present a conflict of interest. If a conflict is identified at any point in the recovery process, the contractor is to halt all activities and provide case information to CMS. If the conflict cannot be mitigated, CMS may determine alternative recovery procedures for the case. RFQ SOW at ¶ 2.2.3.

also argues that CMS improperly conducted discussions solely with CGI, and improperly accepted CGI's technically unacceptable quote.<sup>6</sup>

#### Organizational Conflict of Interest

DCS argues that, in conducting its OCI investigation and analysis, CMS unreasonably concluded that CGI will not be in a position to evaluate services it has provided its commercial customers. Specifically, DCS contends that CGI, as the MSP RAC, will necessarily be required to evaluate coverage determinations and coordination of benefits determinations it has made on behalf of its commercial clients.<sup>7</sup> DCS also argues that CGI will be required to evaluate determinations it has made for its commercial clients in connection with post-payment audits to identify claims that were coded improperly or that were not medically necessary.

CMS counters that its investigation and analysis included meaningful consideration of all of these matters, and that it reasonably found that CGI would not be in a position to evaluate its own services. Specifically, CMS asserts that it reasonably found that CGI does not make coverage determinations or coordination of benefits determinations for its commercial clients. Additionally, to the extent CGI performs post-payment medical coding and medical necessity services for its commercial clients, CMS contends that these activities do not pose an OCI because the MSP RAC is not required to evaluate these matters.

As a general matter, the Federal Acquisition Regulation (FAR) requires that contracting officers avoid, neutralize or mitigate potential significant OCIs. FAR § 9.504(a). An impaired objectivity OCI, as addressed in FAR subpart 9.5 and the decisions of our Office, arises where a firm's ability to render impartial advice to the government would be undermined by the firm's competing interests. FAR § 9.505-3; Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 13. The concern in such impaired objectivity situations is that a firm's ability to render impartial advice to the government will be undermined by its relationship to the product or service being evaluated. PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7.

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<sup>6</sup> Our decision does not address all of DCS's arguments, but we have fully considered each of them and conclude that the remaining arguments do not provide a basis to sustain the protest.

<sup>7</sup> For the purposes of our decision, the phrase "coverage determination" refers to a determination whether a claim is covered by a particular insurance policy, and the phrase "coordination of benefits" refers to a determination as to which payer (whether a private insurer or other entity such as Medicare) has primary coverage responsibility. DCS Supp. Protest at 16, 17; CGI Supp. Comments at 7 n.3.

The FAR advises contracting officers to examine each situation individually and to exercise common sense, good judgment, and sound discretion in assessing whether a significant potential conflict exists and in developing an appropriate way to resolve it. FAR § 9.505. The responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting agency. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra, at 12.

OCI determinations must be based on hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. See Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011); PAI Corp. v. United States, 614 F.3d 1347, 1352 (Fed. Cir. 2010). The identification of conflicts of interest are fact-specific inquiries that require the exercise of considerable discretion. Axiom Res. Mgmt., Inc., 564 F.3d at 1382.

Our Office reviews a contracting officer's consideration of an OCI for reasonableness and, where an agency has given meaningful consideration to whether a significant conflict of interest exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. See TeleCommunication Sys. Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3-4; PCCP Constructors, JV; Bechtel Infrastructure Corp., B-405036 et al., Aug. 4, 2011, 2011 CPD ¶ 156 at 17.

Our review of the record, including all of the arguments raised by the parties, shows that the contracting officer meaningfully considered whether CGI had a significant impaired objectivity OCI. Given the considerable discretion afforded contracting officers, and the absence of any "hard facts" to the contrary, we have no basis on which to find the CO's determination unreasonable.<sup>8</sup> We begin our discussion by summarizing the relevant portions of the contracting officer's detailed OCI investigation and analysis.

The contracting officer reviewed the information in CGI's conflict of interest certification, and conducted an internet search to ascertain potential unknown or undisclosed facts that might present an actual or potential OCI. The information she gathered led her to identify various potential and/or actual OCIs for CGI, which

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<sup>8</sup> When CGI's potential OCIs were brought to CMS's attention during the prior protest, CMS investigated and analyzed whether the facts raised an OCI that could not be mitigated or neutralized. Insofar as CMS considered these potential OCIs after the initial award and protest, our Office has recognized that an agency may investigate possible OCIs after the filing of a bid protest. See, e.g., PCCP Constructors, JV; Bechtel Infrastructure Corp., supra, at 16.

she documented and analyzed. She flagged the fact that CGI has commercial healthcare payer customers as a concern on several fronts. To ascertain whether CGI's relationships with its commercial customers presented a potential or actual OCI here, and in light of the allegations raised in DCS's prior protest, the contracting officer asked CGI a series of questions about its commercial activities to ascertain whether the firm would be in a position to evaluate its own work. AR, Exh. 27, CGI's OCI Response at 3. She also consulted the agency's program office to better understand the MSP RAC process. AR, Exh. 19, CGI OCI Analysis at 9.

The contracting officer found, as a general matter, that in many of CGI's commercial customer arrangements, CGI performed post-payment audits to identify claims that were coded improperly or that were not medically necessary, but did not review claims on behalf of payers to make initial private insurance coverage determinations.<sup>9</sup> In this regard, the contracting officer found that when CGI provided audit services, the commercial client had already determined that the claim was one for which it was responsible. Since the role of the MSP RAC is to determine whether such coverage is primary or secondary, not whether claims have been coded properly or were medically necessary, the contracting officer concluded that performance by CGI did not pose an OCI. Id. at 10.

In responding to the contracting officer's questions, CGI affirmatively represented that it did not review claims on behalf of payers to make private insurance coverage determinations, and did not help payers decide whether they or another payer should be primarily responsible for a claim. AR, Exh. 27, CGI's OCI Response at 3. Based on CGI's response, the contracting officer concluded that CGI would not be in a position to review its own work. AR, Exh. 19, CGI OCI Analysis at 10. With respect to CGI's business relationships more generally, the contracting officer considered that any risk was insignificant, given the MSP RAC's limited ability to manipulate individual recovery cases and the various oversight mechanisms that were in place. As an additional measure, however, she required CGI to provide, on a monthly basis, a list of all of its current business partners and to flag those identified as recovery leads in order to enable CMS and another contractor to audit those recovery efforts. Id. at 13.

DCS takes issue with CGI's representations, arguing that CGI does in fact make coverage determinations and coordination of benefits determinations on behalf of its

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<sup>9</sup> CGI's post-payment audits allows for determinations regarding medical necessity, either for a particular diagnosis or for any diagnosis. By way of example, a determination that services paid were not medically necessary may occur where the services are considered experimental or cosmetic in nature. These determinations are not, however, based on coverage with respect to a particular insurance policy. CGI Comments, Attachment A, Declaration of CGI Vice-President of Health Compliance at ¶¶ 13, 14.

commercial customers. As support for its argument, DCS cites marketing materials on CGI's website. One brochure cited by DCS describes the firm's software and services by, among other things, including a bulleted list that includes "[c]oordination of benefits opportunities," "[i]neligible members," and "[n]on-covered services that were paid."<sup>10</sup> DCS Comments at 16. DCS argues that these materials evidence CGI's performance of coverage and coordination of benefits determinations, but that CMS failed to raise the information in this brochure and CGI's other marketing materials during its OCI investigation.

During her investigation of the alleged OCI, the contracting officer squarely addressed the question whether CGI makes coverage determinations and/or coordination of benefits determinations for its commercial customers. Again, a primary focus of her inquiry was the nature of CGI's work for its commercial customers and whether, as the MSP RAC, it would ever be in a position to evaluate that work. In response to her question on this very point, CGI explained that it serves payers by conducting post-payment audits to confirm that providers billed using proper diagnoses and procedure codes, and then evaluating those codes and determining whether the services were medically necessary. AR, Exh. 27, CGI OCI Response at 3. CGI explained, however, that this process is separate and distinct from the insurance coverage determination process. Id. CGI made the following express representations:

- Neither CGI nor its parent reviews claims on behalf of payers to make private insurance coverage determinations;
- CGI is not responsible for determining whether the medical procedure was covered under the particular benefit package, and does not know what the particular benefit packages are when performing its services;
- Because CGI does not render decisions on whether a benefit is covered by the benefit package, CGI does not help payers decide whether that payer or another payer, including Medicare, should be primarily responsible for paying a given claim;
- CGI's commercial healthcare clients have already determined that the claim is one for which they are responsible under their contracts with providers and consumers.

Id.

CMS contends that it was entitled to rely on CGI's representations absent significant countervailing evidence, of which it was reasonably aware, that should create doubt

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<sup>10</sup> DCS also cites marketing materials specific to CGI's software and proposed for use here. Our conclusion concerning the brochure applies equally to these marketing materials, and we see no need to discuss them separately.



as to whether the representations are accurate. See Vinculum Solutions, Inc., B-406760, B-406760.2, Aug. 22, 2012, 2012 CPD ¶ 249 at 9. CMS asserts that its OCI investigation, which relied in part on information raised in DCS' prior protest, sought to ascertain not what CGI advertised it could do, but what it actually did. In our view, while the marketing materials cited by DCS raise the question whether CGI provides the services at issue, CGI's responses to the agency's inquiry answer that question in the negative. We agree with CMS that the fact that CGI has marketed these services in the past does not contradict its express representation that it has not actually sold these services.

CGI has provided an affidavit from the individual who signed CGI's quotation and responded to the contracting officer's OCI questions. He reaffirms the statements he made, cited above, concerning CGI's actual commercial activities. Again, he specifically represents that neither CGI nor its affiliates "reviews claims on behalf of commercial payers to make private insurance coverage determinations or to identify other payers that have primary coverage responsibility, and "[no] software sold by" CGI or its affiliates "performs these functions for commercial payers either." CGI Comments, Attachment A, Declaration of CGI Vice-President of Health Compliance at ¶¶ 5, 8. He also indicates that neither CGI nor its affiliates "performs coordination of benefits work for commercial payers, nor do the software products sold by CGI Federal and its affiliates provide that functionality for commercial payers." Id. at ¶ 9. He explains that the reference to, for example, "coordination of benefits" in its marketing materials refers to functionality that the firm contemplated at one point could be offered to commercial payers through its software but never was. As he notes, the firm could write software code that would allow commercial payers to use it to make coordination of benefits determinations, but neither CGI nor its affiliates have done so, or intend to do so in the future. Id. at ¶¶ 9, 10, 11.

In the face of CGI's express representation that it does not actually make coverage or coordination of benefits determinations for its commercial customers, we cannot conclude that the marketing materials proffered by DCS, standing alone, constitute the requisite hard facts necessary for us to find the contracting officer's OCI determination unreasonable.

DCS next disputes the CO's determination that the MSP RAC will not be required to evaluate the types of post-payment audit work performed by CGI for its commercial clients--to identify claims that were coded improperly or not medically necessary. The record does not, however, support the protester's contentions in this regard.

During the course of the OCI investigation, CGI informed CMS that it served payers by confirming that providers billed using the proper diagnosis and procedure codes and then evaluating those codes and determining whether the services were medically necessary. AR, Exh. 29, CGI OCI Response at 3. In her OCI memorandum, after consulting with the program office, the contracting officer stated that the MSP RAC was not responsible for determining whether a claim was

properly coded or whether a billed service was necessary, and, therefore, CGI would never be in a position to review these services. AR, Exh. 19, CGI OCI Memorandum at 10. The contracting officer explained that it is the Medicare Administrative Contractors (MACs) that make these determinations as part of their responsibility to process and pay claims submitted to Medicare for reimbursement. For every MSP lead, Medicare has already paid the claim--a MAC has already determined that the claimed service was properly coded and medically necessary--and the MSP RAC does not “second guess” this determination. Contracting Officer’s Supp. Statement at 4, 5. The only question for the MSP RAC is whether Medicare’s coverage is primary or secondary. Id.

DCS points to the requirement that the MSP RAC “identify” and recover payments, mirrored in CGI’s quote, to support its argument that the MSP RAC must necessarily make or review these types of determinations. We are not persuaded by this argument.

Again, MSP RACs are responsible for obtaining and reviewing insurance information to determine whether Medicare should have been the primary payer, or whether the beneficiary had other insurance that may have been responsible for the primary payment. According to information on the Medicare Secondary Payer Recovery Contractor (MSPRC) website,<sup>11</sup> they begin this process by verifying the MSP leads with the relevant employers and insurers to ensure the accuracy of such information as coverage dates for the beneficiary, dates of retirement (if applicable), and policy numbers. MSP GHP Recovery Process at 7, 9-22. This “identification” of payments does not involve second guessing a MAC’s determination whether a claimed service was properly coded and medically necessary but, as CMS has explained, involves reviewing insurance information to verify whether there is a primary payer other than Medicare that is financially responsible for the claim. Similarly, the section of CGI’s quote that specifically addresses “identification” of MSP claims for recovery explains how CGI intends to verify MSP leads for errors (with respect to such things as names, addresses, and amounts), and for exclusions and other matters that have nothing to do with whether a claim was properly coded and medically necessary. AR, Exh. 5, CGI Technical Quote at ¶¶ 1.3.2.

It is true that a GHP may assert a defense to an MSP overpayment demand, and the MSP RAC is required to respond to valid documented defenses. However, the contracting officer states that it is not a valid defense for a GHP to assert that a claim was not properly coded or medically necessary. CO’s Supp. Statement at 5,

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<sup>11</sup> The website, <http://www.msprc.info/>, was among the references contractors were required to use in performing this work. RFQ SOW at ¶ 1.2.1.1; see also RFQ Vendor Questions and Answers (Q/A) Exchange No. 61 and 62. The MSPRC is the current contractor performing MSP recovery, including the GHP recovery work solicited here. Id. at Exchange No. 7.

citing relevant portions of CMS' MSP Manual. On this record, there is no evidence that CGI, as the MSP RAC, would be called upon to review the post-payment services it provided to its commercial clients.<sup>12</sup>

In conclusion, we find that CMS gave meaningful consideration to whether a significant conflict of interest exists here. We further find that DCS has presented no hard facts that compel us to find that the agency's conclusion that any potential OCI was not significant and mitigated was unreasonable.

#### CGI's Assumptions and Points for Negotiation

DCS argues that CMS improperly conducted discussions with CGI concerning its proposed pricing, and permitted the firm to revise its unacceptable quote without affording DCS the same opportunity. The agency counters that it never considered CGI's quote to be unacceptable and CGI's quote was never revised. CMS asserts that the exchange at issue was merely a clarification of one of the assumptions CGI was required to include in its quote.

Clarifications are "limited exchanges" that agencies may use to allow offerors to clarify certain aspects of their proposals or to resolve minor or clerical mistakes.<sup>13</sup> FAR § 15.306(a)(2). Requesting clarification from one offeror does not trigger a requirement to seek clarification from other offerors. See Gulf Copper Ship Repair, Inc., B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108 at 6; Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5. Discussions occur when an agency communicates with an offeror for the purpose of obtaining

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<sup>12</sup> DCS argues that CGI has an incentive to structure its commercial services in a way that leads to fewer claims covered by private insurance and more claims covered by Medicare. This argument is misplaced, since it raises a concern regarding CGI's objectivity with respect to the performance of its commercial contracts. Moreover, as explained above, CGI provides its post-payment audit services to clients who have already determined that they are responsible for the claims. Hence, DCS' scenario depends on a series of speculative events, including the private insurer using CGI's input to reverse its determination that it is responsible for a given claim, and the MAC determining that the claim involves an MSP debt. Thus, the allegation is entirely too speculative and remote to establish a significant conflict of interest.

<sup>13</sup> The procedures of FAR Part 15 governing contracting by negotiation, including those concerning exchanges with offerors after receipt of proposals, do not govern competitive procurements under the FSS program. FAR § 8.404(a); USGC Inc., B-400184.2 et al., Dec. 24, 2008, 2009 CPD ¶ 9 at 3. However, exchanges that do occur with vendors in a FAR subpart 8.4 procurement, like all other aspects of such a procurement, must be fair and equitable; our Office has looked to the standards in FAR Part 15 for guidance in making this determination. Id.

information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect. Gulf Copper Ship Repair, Inc., *supra*, at 6; *see also* FAR § 15.306(d). The record shows that the exchange here was a limited exchange to clarify one of CGI's pricing assumptions and the agency was not required to seek clarification from DCS.

In their business quotes, vendors were required to provide any explanations deemed imperative for CMS to understand the derivation of their proposed pricing. RFQ at ¶ 8.1. Further, vendors were to submit "all (if any) assumptions, conditions, or expectations upon which their technical and business quote volumes were based." *Id.* at ¶ 8.2 (emphasis in original). CGI's business quote complied with this instruction. As relevant here, the firm's business quote stated:

CGI's price quote is predicated in the following assumptions. These items are not intended as exceptions to the RFQ or the GSA FABS schedule terms and conditions, but rather are intended to help [the] agency understand how CGI estimated project scope, timing, resources, roles, and responsibilities. They represent the underlying beliefs used to prepare our proposed solution, implementation approach, and price quote.

Given the amount of upfront and operational costs associated with this type of contract, should the actual volumes during project execution be substantially less than the CMS estimates, CGI reserves the right to enter into discussions with CMS regarding the contingency rate.

AR, Exh. 6, CGI Business Quote at ¶ 1.4.

After CMS made its initial source selection decision, the contracting officer contacted CGI to notify the firm of its selection and to clarify that she "took exception" to this assumption. The contracting officer states that she advised CGI that it should not assume that CMS would enter into discussions with CGI concerning the firm's proposed contingency fee if there were variances in the workload volumes, and CGI confirmed that it understood this position. Contracting Officer's Supp. Statement at 1. This exchange is recounted in the revised award decision memorandum. AR, Exh. 18, Revised Award Decision Memorandum at 4.

DCS argues that the contracting officer considered that CGI took exception to the RFQ's requirements for a fixed-price contingency fee, rendering the quote unacceptable. Based upon this premise, DCS contends that the above exchange constituted discussions because it had the effect of converting the quote from one that was unacceptable to one that was acceptable and, having opened discussions with CGI, CMS was required to also conduct meaningful discussions with DCS.

The premise of DCS' argument is erroneous. There is no evidence that CMS considered CGI's quote to be unacceptable. That the contracting officer "took exception" to CGI's assumption does not mean that CGI "took exception" to the solicitation's terms. CGI's quote was merely complying with the RFQ's requirement to include "any and all" assumptions upon which its quote was based, and clearly stated that its assumptions were "not intended as exceptions" to the RFQ or its schedule contract's terms and conditions. AR, Exh. 6, CGI Business Quote at ¶ 1.4. Moreover, there is no evidence that CGI revised its quote. Communications that do not permit an offeror to revise or modify its proposal, but rather request that the offeror confirm what it has already committed to do, are clarifications and not discussions. Highmark Medicare Servs., Inc., et al., B-401062.5 et al., Oct. 29, 2010, 2010 CPD ¶ 285 at 11. We view the contracting officer's exchange with CGI for confirmation that it should not assume that CMS would enter into these discussions to constitute a clarification that it would perform under the contingency fee included in its quote. Accordingly, there was no requirement to also seek clarification from DCS, or to enter into discussions with either vendor. See Serco Inc., B-406061.1, B-406061.2, Feb. 1, 2012, 2012 CPD ¶ 61 at 13.

In addition to describing its assumptions, CGI's business quote included a section entitled "Points for Negotiation." AR, Exh. 6, CGI Business Quote at ¶ 1.6. Under that heading, CGI stated:

CGI understands that the CMS is acquiring the Medicare Secondary Payer Services under the terms of the GSA FABS schedule which includes FAR Clause 52.212-4, Commercial Terms and Conditions. CGI has reviewed the terms and conditions and in accordance with our general practice, is proposing the following points for negotiation.

Id. This paragraph was followed by a bulleted description, in more declarative language, of "points for negotiation" concerning such things as the termination, warranty, and limited liability provisions of FAR § 52.212-4. Id.

DCS argues that these points for negotiation take material exception to the standard FAR clause, rendering the quote technically unacceptable. DCS contends that, by including CGI's quote as an attachment to the awarded task order, CMS improperly accepted these material exceptions.

CMS and CGI counter that CGI did not take material exception to the clause, but merely proposed items for discussion that represented the firm's effort to explain the terms of the standard clause in the context of this fixed-price contingency fee task order. Moreover, CMS argues, the contracting officer did not negotiate these points with CGI, and the clause was not changed in CGI's schedule contract or the awarded task order. CMS contends that its mere attachment of CGI's quote to the task order does not mean that it accepted CGI's points for negotiation.

When a request for proposals or an invitation for bids is issued, vendors are required to respond with offers that must comply with all material provisions of the solicitation. An offeror's failure to comply with all such provisions renders the bid nonresponsive or the proposal unacceptable. When quotations are solicited from FSS vendors, however, the situation is not the same. The quotations are not offers that can be accepted by the government; rather, they are informational responses, indicating the goods or services the vendors would propose to meet the agency's requirements and the price of those goods or services that the government may use as the basis for issuing a task order to an FSS contractor. There is, therefore, no requirement that the quotation comply precisely with the terms of an RFQ, since the quotation is not subject to government acceptance. Spacesaver, B-224339, Aug. 22, 1986, 86-2 CPD ¶ 219 at 2; see also Zarc Int'l, Inc., B-292708, Oct. 3, 2003, 2003 CPD ¶ 172 at 2 (vendors in the RFQ context hold the power of acceptance).

Here, the record shows that CGI's points for negotiation cannot reasonably be read as taking exception to the solicitation's provisions or as conditioning its acceptance of the government's offer on CMS' agreement to its points of negotiation.<sup>14</sup> To the extent that the awarded task order evidences any intent on behalf of CMS, it evidences a rejection of CGI's points of negotiation.

CGI's quote acknowledged that the procurement was conducted under the terms of its schedule contract, which included the standard clause at FAR § 52.212-4. AR, Exh. 6, CGI Business Quote at ¶ 1.6. CGI also stated that it would provide these services "in accordance with the terms and conditions of [its] GSA Schedule contract." Id. at ¶ 1.4.1. Having expressly committed to the terms and conditions of its schedule contract, including this standard clause, we cannot read CGI's proposed points for negotiation as taking exception to those terms and conditions; rather, the relevant language in CGI's quote, which, as explained above, was not an offer, merely served as an invitation to the agency to further negotiate the identified points.

This is not a case where a vendor makes it clear that it does not intend to commit to the solicitation's terms. See, e.g., Rel-Tek Sys. & Design, Inc., B-280463.3, Nov. 25, 1998, 99-1 CPD ¶ 2. DCS's interpretation of CGI's quote would require us to ignore all of its language except the bulleted descriptions of its proposed points for negotiation, which we will not do. See, e.g., McAbee Constr., Inc. v. United States, 97 F.3d 1431, 1435 (Fed. Cir. 1996) ("Where, as here, the provisions of the Agreement are phrased in clear and unambiguous language, they must be given their plain and ordinary meaning . . . . The Agreement must be considered as a

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<sup>14</sup> Because we conclude that CGI's points for negotiation did not take exception to the solicitation's terms, we need not reach the question whether they represent material departures from the standard FAR clause.

whole and interpreted so as to harmonize and give reasonable meaning to all of its parts.”).

The record also further shows that CMS did not take the invitation to negotiate any of these points with CGI, and the standard FAR clause was not revised in CGI’s schedule contract or in the awarded task order that CGI signed to signify its acceptance of the government’s offer. At most, CMS’s inclusion of CGI’s quote as an attachment to the task order simply incorporates the firm’s proposal of these points for negotiation.<sup>15</sup> Instead of indicating CMS’s agreement to the points of negotiation, the task order itself evidences their rejection. In this regard, FAR § 52.212-4 is a clause in CGI’s GSA schedule contract, and the task order explicitly states:

Only those contract sections which differ from General Services Administration (GSA) Contract Number GS-23F-0019Y under FABS Schedule 520-9 for Recovery Audit Services terms and conditions, or provide more detailed information specific to this particular Task Order, are provided below. For those contract sections not identified below, all terms and conditions of the contract remain in effect.

AR, Exh. 20, Task Order at 2. None of the contract sections in the task order mention FAR § 52.212-4 or address any intent by the parties to modify the clause.

The protest is denied.

Susan A. Poling  
General Counsel

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<sup>15</sup> CMS argues that there is no evidence of mutual intent to be bound by these points for negotiation, citing Rumsfeld v. Freedom NY, Inc., 346 F.3d 1359, 1361 (Fed. Cir. 2003) (“[o]ne party to a contract cannot bind the other simply by attaching a document to a copy of the contract.”).