



## Decision

**Matter of:** Velos Inc.--Reconsideration

**File:** B-400500.11

**Date:** May 26, 2011

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### DECISION

Velos, Inc., of Fremont, California, requests that we reconsider our dismissal on December 20, 2010 of its protest of the award of a contract to Medidata Solutions, Inc., of New York, New York, under request for proposals (RFP) No. 1406-04-08-RP-20201, issued by the Department of the Interior on behalf of the National Cancer Institute (NCI), for data capture and management system software.

We deny the request for reconsideration.

The RFP, issued on October 30, 2007, sought to acquire commercial-off-the-shelf data capture and management systems software, a perpetual use license to the software, and related installation, support, and maintenance services. This software was to be used to support clinical and other human subjects cancer research within the NCI Clinical Research Enterprise. The contractor was required to deliver commercial clinical management software that met the RFP requirements, including updated versions of the software and technical support. The RFP contemplated the award of a fixed-price contract for a 6-month base period with 9 option years.

Award was to be made to the offeror whose proposal represented the best-value considering the following evaluation factors: (1) technical approach, (2) business experience/history, (3) past performance, (4) small disadvantaged business participation, (5) small business participation, and (6) price. The technical approach factor was the most important technical factor, followed by the equally-weighted business experience/history and past performance factors, followed by the least and equally-weighted small disadvantaged business participation and small business participation factors. The combined weight of the technical factors was more important than price. RFP § M.1. The RFP, as amended, further stated that “[t]he government will evaluate whether it shall be granted a perpetual use license in accordance with the requirements [stated in the RFP]. Contractors unable to comply with this requirement will not be considered for award.” RFP § C.1.

Interior initially awarded the contract to Medidata on August 14, 2008. Protests of this award were filed by Velos and two other unsuccessful offerors. These protests concerned the evaluation and rejection of the protesters' proposals, the evaluation of Medidata's proposal, and the conduct of discussions. On November 28, we sustained Velos's protest finding that Velos was prejudicially misled in discussions concerning its license agreement. We recommended that the agency consider amending the RFP to change or clarify its license requirements to reflect the agency's actual needs, conduct meaningful discussions with the offerors determined to be in the competitive range, request final proposal revisions (FPR), and make a new source selection. We denied the other two protests. Velos, Inc; OmniComm Sys. Inc.; PercipEnz Techs., Inc., B-400500 et al., Nov. 28, 2008, 2010 CPD ¶ 3.

On August 10, 2009, the agency again awarded the contract to Medidata. After the agency's debriefing of August 24, on September 3, Velos again protested the award to Medidata. On December 14, we again sustained Velos's protest because the agency's award decision did not account for information provided in the FPRs and was otherwise unreasonable. We recommended that the agency reopen discussions if appropriate, request FPRs, and/or otherwise reevaluate proposals, and make a new source selection. Velos, Inc., B-400500.8, B-400500.9, Dec. 14, 2009, 2010 CPD ¶ 13.

Meanwhile, Medidata, pursuant to the awarded contract, delivered its perpetual use license to NCI on the day of award, August 10, and its software on August 13. Because Velos did not request a debriefing within 3 days of date of when it received notice of the Medidata contract award, its debriefing was not a "required debriefing." 41 U.S.C. § 253b(e)(1) (2006). The agency was therefore not required to stay performance of Medidata's contract while the protest was being considered. 31 U.S.C. §§ 3553(d)(3), (d)(4)(B) (2006). In this case, the agency did not stay contract performance and Medidata continued contract performance up to November 15, 2010.

On November 4, 2010, after reevaluating proposals in response to the recommendation made in our second decision, the agency made award to Medidata for the third time. On November 15, Velos again protested to our Office, challenging multiple areas of the agency's evaluation.<sup>1</sup> On December 15 (before the due date for its report on the protest), Interior advised our Office that it had "decided to cancel the underlying procurement [and] the agency's determination to cancel the underlying solicitation includes terminating for convenience the current contract award." Interior Letter (Dec. 10, 2010). Because the cancellation of the solicitation rendered the protest academic, we dismissed the protest on December 20.

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<sup>1</sup> The agency stayed contract performance because of this last protest.

On January 28, 2011, Velos requested reconsideration of our dismissal, based upon information it claims to have learned from a reporter for a trade publication. Velos notes that it then learned that NCI publicly represented that it planned to directly procure the remainder of the goods and services covered by the RFP.

Reconsideration Request at 8. Velos therefore contends that it was apparent that this cancellation was to avoid our Office's review of the agency's corrective action taken in response to our December 14, 2009 decision. Velos argues that NCI's conduct either amounts to "(1) misrepresentation made to GAO in order to create a pretext in which to secure the dismissal of Velos's meritorious protest, or (2) a repudiation of the government's previous intentions to take any--let alone meaningful--corrective action." Id. at 20.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted specifying any errors of law made or information not previously considered. Bid Protest Regulations, 4 C.F.R. § 21.14(a) (2010). Here, we find that Velos's request for reconsideration fails to satisfy this standard.

In response to the request for reconsideration, Interior stated that on December 13 NCI decided not to continue with the contract and directed Interior to terminate the existing contract and cancel the solicitation. Interior explained that when it suspended contract performance in response to Velos's last protest, NCI determined that its needs had changed in view of the facts that the agency already had obtained the license and the software and Medidata had legally performed the contract for over a year, during which time it made various improvements to the software and had implemented its software for some NCI activities. Because the agency acquired the license and software under Medidata's contract, the agency no longer needed these items, but now needed support and maintenance services to support the government-owned data rights that it acquired under Medidata's contract. Interior advised that, as a result of these factors, cancellation became an option where it had not been in 2009, when the agency began implementing our recommended corrective action. Medidata's contract was terminated for the convenience of the government by Interior on December 28 and NCI is acquiring support for the Medidata software under another contract vehicle (which has not been protested by Velos). While Velos asserts that this termination was a pretext to avoid review of its protest, we think it was not unreasonable for NCI to conclude that its needs had changed as a result of obtaining the Medidata license, software, and performance. In addition, we think it was reasonable for NCI to decide that it now only has requirements for supporting the software, as opposed to the requirements that were solicited under the terminated contract and canceled RFP.

Velos argues that NCI's actions here are improper because allowing the agency to use the Medidata software and license permits NCI to obtain all the benefits associated with the procurement without addressing its allegations. However, NCI legally obtained the Medidata software and license under the Medidata contract prior to Velos's last protest, and prior to its ultimate decision to terminate Medidata's

contract and cancel the RFP. To the extent that Velos argues that the agency does not have the rights to use the Medidata license and software because the contract and solicitation have been canceled, this constitutes a question of the administration of the Medidata contract. Our Office will not review this issue as it concerns a matter of contract administration, which is within the discretion of the contracting agency and for review by a cognizant board of contract appeals or the Court of Federal Claims. 4 C.F.R. § 21.5(a).

Finally, we note that the agency took the promised corrective action in response to our December 14, 2009 decision by reevaluating proposals and making a new source selection decision with a different source selection authority. Nevertheless, Velos argues that the corrective action was a “sham,” given Interior’s view that the government had already accepted the license and software when it promised to undertake corrective action. However, Interior explains that had Velos been selected for award, after this corrective action was completed, the agency would have received a new license and software from Velos as well as the corresponding support services, while retaining the license and software already acquired from Medidata. Notwithstanding Velos’s claim that the procurement was canceled to avoid review of its most recent protest, the agency explains that the procurement was cancelled because its needs have changed. On this issue, the agency’s explanations appear reasonable, and are supported by the facts surrounding this procurement. Moreover, government officials are presumed to act in good faith, and a protester's claim that contracting officials were motivated by bias or bad faith must be supported by convincing proof; our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Operational Support & Servs., B-299660.2, Sept. 24, 2007, 2007 CPD ¶ 182 at 3.

In sum, we find that Velos has not shown, on the basis of the information that is has presented here, that our dismissal of the protest as academic contained any errors of fact or law, or information not previously considered, that warrant granting reconsideration of our dismissal decision.<sup>2</sup>

The request for reconsideration is denied.

Lynn H. Gibson  
General Counsel

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<sup>2</sup> Velos also claims that it should be reimbursed its protest costs for filing its November 15, 2010 protest and this request for reconsideration because the cancellation of the procurement was a pretext or sham to avoid GAO review. Because we have not found that Velos has shown that this was the case, we deny its cost claim.