



# DGS

State of California • Arnold Schwarzenegger, Governor  
State and Consumer Services Agency

**DEPARTMENT OF GENERAL SERVICES**

**Office of Legal Services**

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## FAX TRANSMITTAL

Date: March 3, 2010

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Fax: (See Above for fax numbers)	Phone: (916) 376-5091
No. of Pages Including Cover Page: 22	
Subject: <b>STATEMENT OF DECISION</b>	

### Message:

Attached is a copy of the final Decision in the Protest Case No. 09-113, EDS v. Department of Health Care Services. A hard copy of this Decision is also in the mail to each of you.

Problems with Transmission: Call Teresa Sousa at (916) 376-5091

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**BEFORE THE DEPARTMENT OF GENERAL SERVICES  
OF THE STATE OF CALIFORNIA**

In the Matter of the Protest of the Proposed  
Award of RFP No. 08-85022

ELECTRONIC DATA SYSTEMS,

Protestant,

vs.

DEPARTMENT OF HEALTH CARE SERVICES,

Awarding Agency.

**CASE NO. 09-113**

**STATEMENT OF DECISION**

TO: Allan L. Joseph  
Rogers, Joseph O'Donnel, Counsel for  
ELECTRONIC DATA SYSTEMS, Protestant

Thomas R. McMorrow and Randall Keen  
Manatt, Phelps, & Phillips, LLP, Counsel for  
ACS STATE HEALTHCARE, LLC, Proposed Awardee

Matthew McCormick, Counsel for  
DEPARTMENT OF HEALTH CARE SERVICES, Awarding Agency

This protest has been heard and decided pursuant to Public Contract Code section 10345 et seq. and California Code of Regulations, title 2, section 1195 et seq. through written submissions by Ramon de la Guardia, who has been duly appointed by Ronald L. Diedrich, Acting Director of the Department of General Services, to hear and decide this case. The written submissions were due to be received by the Department of General Services at 707 Third Street, Suite 7-330, West Sacramento, California 95605 by 5:00 p.m. on January 20, 2010.

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The following documents<sup>1</sup> were received from the parties:

From Awarding Agency Department of Health Care Services (DCHS):

1. Request for Proposal (RFP) No. 08-85022<sup>2</sup>
2. Proposed Awardee ACS State Healthcare, LLC's (ACS) Proposal
3. Protestant Electronic Data Systems (EDS), Proposal
4. Vendor Questions and Comments and DCHS' Responses
5. Detailed Score Reports on Proposals
6. CD-ROM labeled Bidders Package with the following documents:
  - A. Notice of Intent to Award
  - B. Evaluator Welcome Letter
  - C. Evaluation Orientation
  - D. List of Evaluation Teams/Areas of assignment including Team Leads
  - E. Rating Review Committee Comments
  - F. Proposer Legend
  - G. Evaluator Narrative and Cost Comments and Scores for Evaluated Proposals
  - H. Roll-Up Sheet
  - I. Executive Review Committee Approval Letter
  - J. Auditor's Report
  - K. Bidder's Conference Attendee Sheet
7. January 20, 2010 Statement in Support of Award of RFP and Exhibits
8. February 1, 2010 Rebuttal to EDS' Further Statement and Exhibits

From Protestant EDS:

1. December 16, 2009 Notice of Protest.
2. December 21, 2009 Detailed Statement of Protest and Exhibits.
3. January 20, 2010 Further Statement and Exhibits in Support of Protest and Exhibits.
4. February 2, 2010 Reply in Support of Protest and Exhibits.

From Proposed Awardee ACS:

1. January 20, 2010 Response to Protest and Exhibits.
2. February 2, 2010 Rebuttal to EDS' Further Statement and Exhibits.

<sup>1</sup> With the exception of correspondence related to procedural issues, the Parties provided the record documents in an electronic format. Hard copies were also provided with the exception of the DHCS documents related to the RFP and its evaluation and scoring. However, the other parties provided pertinent portions of these documents as exhibits.

<sup>2</sup> The documents consist of the Main RFP, and Appendices, Attachments and Exhibits to the RFP. The RFP was a work in progress: frequent changes were made after comments from reviewers or others. Where changes were made old pages were discarded and new pages inserted with the Addendum Number noted.

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INTRODUCTION

The California Medical Assistance Medicaid Program (Medi-Cal) provides a wide variety of health benefits to eligible persons throughout the State. Eligible persons are those whose income and resources are not sufficient to meet the cost of medical services without jeopardizing their own or their family's self-maintenance and security. Medi-Cal is funded primarily with federal and State funds. The Medi-Cal program is administered by the State in cooperation with federal and county governments. (RFP Main, p. 13.)

In calendar year 2007, there were 6,560,000<sup>3</sup> adults and children who were eligible Medi-Cal recipients and thousands more authorized Medi-Cal providers. In 2007 the State received 4,700,000 treatment authorization requests (TARs) and 507,000 service authorization requests. (RFP, Appen. 7, Medi-Cal Statistics.)

DHCS is the single State department responsible for administering and managing the Medi-Cal program. Within the DHCS, the Fiscal Intermediary & Contracts Oversight Division is responsible for the day-to-day operation and management of fiscal intermediary services.<sup>4</sup>

DHCS released RFP 08-85022 on December 9, 2008, to solicit proposals "from firms qualified to takeover and operate the existing Legacy California Medicaid Management Information System (CA-MMIS) and provide the latest advancements and innovations to eventually transition to a replacement CA-MMIS to meet new State and federal requirements." (RFP Main, p. 9.)

The RFP established a multi-level and hierarchical evaluation process to review and/or score Narrative Technical Proposals. Separate evaluation committees were used for all stages during the evaluation and selection process. The RFP provided for four groups of evaluation committees:

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<sup>3</sup> These are rounded figures.

<sup>4</sup> The RFP defines a fiscal intermediary as a contractor who performs Medi-Cal and other health program claims processing and management reporting functions for DHCS. (RFP, Exh. K, p. 11.)

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The **Preliminary Review Committee** (PRC) consists of team leads from OMCP and FI-Medicaid Management Information System (FI-MMIS) and conducts the Stage 1 review.

The **Evaluation Scoring Committee** (ESC) consists of Medi-Cal program staff, and staff from other State agencies with appropriate expertise. The ESC conducts the review of the proposals.

The **Rating Review Committee** (RRC) consists of OMCP management staff, the Director of the FI-MMIS project and members of the PRC. The RRC will interact with the ESC throughout the evaluation process. In fulfilling its functions, the RRC may consult with any appropriate individuals within DHCS, other State departments, or consultants.

The **Executive Review Committee** (ERC) consists of DHCS Executive management officials. The ERC acts as a final decision-making authority for Proposal evaluation issues without knowledge of any bidder to which the issue applies. The ERC assures all appropriate processes have been followed. Additionally, the ERC may seek independent review or advice from individuals, including internal auditors, from within DHCS or elsewhere regarding issues including, but not limited to, procurement policy matters, Narrative Technical Proposal and/or Cost Proposal deficiencies, and acceptability. Finally, the ERC provides final approval of the procurement process in order to determine the awardee.

DHCS internal Audits & Investigations Office performs a review of every procurement. The purpose of the review is to assure each Proposer that the requirements of the RFP have been followed exactly and that the evaluation process was conducted in the manner prescribed in the RFP. In some cases, two (2) reviews are performed – one (1) immediately upon conclusion of the scoring of the Narrative Technical portion of the Proposal and one upon the conclusion of the scoring of the Cost Proposal. DHCS will not proceed to the opening of the Cost Proposal until the review of the Narrative Technical Proposal is complete. Intent to Award the Contract is not released until the ERC is informed of the results of each review and approves the release of the Intent to Award.

DHCS will reject any Proposal that is found to be nonresponsive at any stage of the evaluation. (RFP Main, pp. 97-98, emphasis added.)

The RFP established an eight-stage evaluation process:

- Stage 1: Required Attachment/Certification Checklist Review of Narrative Technical Proposals.
- Stage 2: Narrative Technical Proposal Evaluation/Scoring.
- Stage 3: Attachment/Certification Review of Cost Proposals.

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- Stage 4: Calculation of Cost Proposal Scores,
- Stage 5: Addition of Narrative Technical and Cost Proposal Scores
- Stage 6: On-site Reviews
- Stage 7: Final Score Calculation.
- Stage 8: Adjustments to Score Calculations for Bidding Preferences  
(RFP Main, pp . 98-110.)

DHCS provided potential bidders the opportunity to review, comment, and propose changes and request clarifications of provisions of the RFP. This resulted in numerous changes and clarifications that are contained in Administrative Bulletins.

Three companies submitted bids: (1) Incumbent vendor, Protestant EDS, (2) Proposed Awardee, ACS, and (3) Noridian Administrative Services, LLC (Noridian).

Proposals were due on June 15, 2009. Between June 17<sup>th</sup> and June 25, 2009, DHCS evaluated the technical proposals for compliance with the RFP's "Pass/Fail" requirements. (RFP Main, p. 97-100.) All three proposals passed the "Pass/Fail" review. DHCS then spent almost three months scoring the proposals.

Because of the size and complexity of the responses, DHCS executive staff requested management staff, the RRC to review the proposals to determine if there were any serious flaws or deficiencies. The RRC determined the EDS proposal was nonresponsive because it had four material deviations. After further review on August 11, 2009, the ERC adopted the recommendations of the ERC and declared the EDS proposal nonresponsive.

At the conclusion of the evaluation and scoring process, ACS was declared the winning bidder. This protest followed after DHCS issued the Notice of Intent to Award.

### THE PROTEST AND FINDINGS

The grounds for this protest are limited to those set forth in Public Contract Code section 10345. They are:

- (A) The state agency failed to follow the procedures specified in either subdivision (b) or (c) of Section 10344.

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(B) The state agency failed to apply correctly the standards for reviewing the format requirements or evaluating the proposals as specified in the request for proposal.

(C) The state agency used the evaluation and selection procedure in subdivision (b) of Section 10344, but is proposing to award the contract to a bidder other than the lowest responsible bidder.

(D) The state agency used the evaluation and selection procedure in subdivision (c) of Section 10344, but failed to follow the methods for evaluating and scoring the proposals specified in the request for proposal.

(E) The state agency used the evaluation and selection procedure in subdivision (c) of Section 10344, but is proposing to award the contract to a bidder other than the bidder given the highest score by the state agency evaluation committee.

Competitive bidding laws are enacted for the benefit and protection of the taxpaying public, not for the benefit and enrichment of bidders. [Citation.] Their purposes, among others, are "to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public." (*Stacy & Witbeck, Inc. v. City and County of San Francisco* (1995) 36 Cal.App.4th 1074, 1094-1096)

These considerations must be viewed from a practical perspective lest competitive bidding provisions be misapplied, denying the contracting public entity "authority to deal with problems in a sensible, practical way." (Citations omitted) (*M & B Construction v. Yuba County Water Agency* (1999) 68 Cal.App.4th 1353, 1360)

An agency action is upheld unless the action is arbitrary, capricious, or lacking in evidentiary support. A reviewer must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choices made, and the purposes of the enabling statute. (See *Golden Drugs Inc. v. Maxwell-Jolly* (2009) 179 Cal.App.4th 1455, Slip Opn. p. 18, Rem. Issued 2/9/2010.)

### GAP ANALYSIS ISSUES

The RFP required bidders to complete a Gap Analysis<sup>5</sup>. Specifically, the RFP provided:

<sup>5</sup> A "Gap Analysis" is an assessment or comparison of actual performance to potential performance. (RFP, Exh. K, p. 11.)

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**21) Gap Analysis and Requirements Validation**

Requirements are described in Exhibit A, Attachments II, Exhibit A, Attachment VI, Section 4 and Exhibit L.

- a) Proposers must complete Exhibit L, Gap Analysis, indicating the level of compliance or extent of modification to the proposed transfer system necessary to meet both Legacy and Replacement System business requirements. The Proposer must follow the specific instructions in Exhibit L in completing the Gap Analysis. (RFP Main, p. 72, emphasis added)

Exhibit L contained the following directive regarding a base transfer system:

**Box A - Transfer System:** Enter the source of the proposed base transfer system, e.g., a state MMIS, other government payor or commercial payer and if the transfer system is MMIS Certified, in production awaiting certification, in development as a MMIS, or is part of a government payer or commercial payer system that will be modified to meet CMS certification. All entries must specify the actual state name, location of the developed system, and/or location of the actual government or commercial payer system name where it can be demonstrated. There is only one entry for the base transfer system in this table. All descriptions for each requirement need to explain how it is or will be integrated into the base transfer system. (RFP, Exh. L, p. 2.)

EDS omitted Box A from the Exhibit L it submitted with its proposal and it did not identify a base transfer system. DHCS found the EDS Proposal nonresponsive because of this omission. (Exh. 2, RRCSC<sup>6</sup>.)

**1. The Materiality of The Omission.**

While candidly admitting that Box A was omitted and that it did not identify a transfer system, EDS protests the omission was immaterial and DHCS should have waived the deviation. EDS states that DHCS should have asked EDS to identify the transfer system or it could have determined the identity of its transfer system elsewhere in its Gap Analysis.

<sup>6</sup> "RRCSC" refers to the Rating Review Committee Summary Comments.

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DHCS and ACS respond that the omission was material and that it was not permitted to allow EDS to change its proposal. (See *Valley Crest Landscape v. City Council of the City of Davis* (1996) 41 Cal.App.4<sup>th</sup> 1432.)

ACS argues allowing EDS to change its bid and to identify its transfer system and its location after bids were submitted would grant EDS a competitive advantage.

DHCS states that the identity of the EDS transfer system was necessary to validate the EDS Gap Analysis. Both responding parties further state that reference to the "interChange MMIS" in the EDS Gap Analysis does not satisfy the requirements of the RFP for a number of reasons. Its location is not identified and it cannot be determined if interChange MMIS is a software product EDS is proposing to license to the State or whether it is a system EDS is creating. This distinction between a licensed software product and a system is significant for purposes of federal funds participation (FFP). The federal government will only reimburse the State for 75 per cent of the cost of licensed software but it will reimburse the State for 90 per cent of the cost of a developed system. (See ACS Resp., p. 21. fn4, DHCS Stat. In Support, p. 10, DHCS Rebuttal, p. 18-20.)

## 2. Unequal Scoring of Proposals.

EDS also protests that the proposals were not scored equally because the Gap Analysis in the other proposals had material deviations but they were not declared nonresponsive<sup>7</sup>.

EDS protests the ACS Gap Analysis did not identify and list the system requirements in the transfer system and that it omitted 472 legacy system business requirements.

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<sup>7</sup> "Unequal scoring" or "unequal treatment" are not enumerated grounds for protest in Public Contract Code section 10345 but we will treat this as a claim that DHCS failed to correctly apply standards for evaluating proposals. We are also allowing EDS some latitude to raise issues regarding bidder Noridian regarding the application of RFP standards. This is unusual, but this is an important and unusual procurement.

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ACS and DHCS respond that EDS' protest is vague because it does not specify what the 472 omitted requirements are or how it determined this was the number of missing requirements. They note that the RFP instructed bidders not to include "operational requirements" in the Gap Analysis. The RFP supports this assertion. (RFP, Exh. L, p. 2; RFP, Exh. A, Att.<sup>8</sup> VI, p. 788.)

### 3. The Identification of Multiple Transfer Systems.

EDS also protests that bidder Noridian violated the terms of the RFP by identifying more than one transfer system in more than one location.

DHCS and ACS respond that the Noridian Proposal was consistent with the RFP and cite Administrative Bulletin 23, Question and Answer 65 which read:

Question: The RFP states, "there is only one entry for the base transfer system in this table". Does this mean that there can only be a single transfer system identified for the entire gap analysis? For example, if your transfer system is an MMIS from state X then the only allowable entry in this box for the entire Gap analysis would be "MMIS State X". Thus a pharmacy component from "MMIS State Y" would not be an allowable entry in box A. Please clarify how bidders are to complete Box A of Exhibit L.

Answer: No change required to RFP.

Box A is intended to identify the core transfer system, which would include, at a minimum, the MMIS claims engine and all integrated components transferred with it.

If the vendor is proposing transfer of separate components for POS, data analysis and reporting or other functionality, the Proposer must describe, in the remaining Boxes, the source of the transferred components and the required integration to meet the functionality described in the RFP. (Exh. 236, emphasis added.)

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<sup>8</sup> The abbreviation "Att." is used for Attachment.

#### **4. DHCS Accepted A Bid With An Omission of Total Hours.**

EDS also claims disparate treatment and not following the procedures of the RFP because the Noridian Proposal omitted a grand total of the hours for development and configuration and it was not found to be nonresponsive.

DHCS and ACS respond the grand total was easily determined from other hours within the Noridian Gap Analysis and the doing this simple calculation did not change the amount of the Noridian Proposal.

### **FINDINGS**

*Finding No. 1:* The RFP required bidders to identify a base transfer system in Box A of Exhibit L. EDS omitted Box A and did not identify a transfer system in its proposal. As a result of this omission the EDS Proposal did not fulfill the content requirements of the RFP and was incomplete.

*Finding No. 2:* Proposals that fail to meet proposal content requirements or are materially incomplete are nonresponsive. (RFP Main, Item Q. 1. a (2) and (b), p. 111.)

*Finding No. 3:* All proposals were required to be complete when submitted. (RFP Main, Add. 12, Item Q. 2, p. 112.)

*Finding No. 4:* EDS has not met its burden of proving that the omissions in its Gap Analysis were immaterial.

*Finding No. 5:* EDS has not proven that the reference to infoChange MMIS in its Gap Analysis cured its omissions. Even if it did identify a system, ambiguities remained about the nature and status of this system and DHCS had no obligation to make inquires regarding these ambiguities.

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*Finding No. 6:* Assuming for arguments sake the EDS' deviations were immaterial, DHCS had the discretion not to waive these deviations.

*Finding No. 7:* EDS has failed to specify or to meet its burden of proving the ACS Gap Analysis was nonresponsive or that it contained material deviations.

*Finding No. 8:* The entries in Noridian's Exhibit L regarding its Gap Analysis were consistent with the requirements of the RFP. ( Exh. 236: Adm. Bul. 23, Q&A 65.)

*Finding No. 9:* DHCS properly treated Noridian's failure to provide a grand total of its proposed development and configuration hours as an immaterial deviation because the grand total could be determined from other entries without changing the Noridian bid or the amount of its bid. This was also consistent with the RFP provisions regarding immaterial deviations. (RFP Main, Item Q. 9. d (1) and (4) at p. 120.)

*Finding No. 10:* EDS has not proven its claim that its Gap Analysis was reviewed in a disparate or unequal manner or that DHCS acted unfairly or did not comply with the terms of the RFP.

### PHARMACY REPLACEMENT SYSTEM ISSUES

The RFP contained several provisions regarding replacement systems. The Pharmacy system was among those items being replaced. The RFP instructed bidders:

- d) Proposers must describe their approach to an early implementation of the Pharmacy replacement, including DUR and the Rebate Management System and the TPL replacement. Proposers must describe the potential impact to users, and the associated risks. The requirement is mandatory.
- e) Proposers must demonstrate the flexibility of the application to allow integration into the Legacy System, then transfer without significant modification to become a key component of the Replacement System. (RFP Main, p.73., emphasis added.)

Bidders were advised:

### 3.2.10.1 Overview

Because of the technical complexity of Medi-Cal and associated programs under the FI Contract, DHCS required a phased implementation model for the Replacement System.

\* \* \*

DHCS has also mandated an early replacement of the Pharmacy claims processing and Pharmacy Rebate systems to be implemented twenty-four (24) months from assumption of operations. This includes three (3) major components; the real-time Point of Service (POS) and batch claim processing, the rebate collection and tracking system, and drug utilization review. The major improvement required by DHCS in this RFP is better data manipulation tools and more sophisticated presentation of options and results in PRODUR and Retro DUR.

\* \* \*

Early implementation of any component of the Replacement System must also meet the requirements found in Exhibit A, Attachment VI, Sections 1-3 General System Requirements (Exh. 238, RFP, Exh. A, Att. VI, pp. 66-67.)

EDS proposed to modify the Legacy System to perform certain new operations until it could be integrated into the final replacement system. EDS characterized its proposal as moving new components to the Legacy System and not striving for "Level 4 SOA maturity." (Exh. 218: EDS Proposal Tab 10, p. 10. 4-112.)

DHCS found this proposal a nonresponsive material deviation:

The RFP specifically state that DHCS mandates an early implementation of the replacement system for Pharmacy claims processing, Pharmacy rebate and DUR functions within two (2) years of Assumption of Operations (AOO) of the Legacy System. Proposers A responded to this requirement with a two-phased approach. The first phase would be completed within the two-year requirement. The second phase, which is the majority of the Pharmacy system, would not be fully functional until the entire system is replaced. (Exh. 2, RRCSC.)

EDS protests that its proposal was consistent with the RFP's phased approach, which envisioned the integration of the newly developed pharmacy system into the replacement system after the integration period. EDS also argues that ACS submitted a noncompliant two-phased proposal. Finally EDS has submitted ratings from the ERC, which it claims show its proposal, was compliant and favorably scored.

DHCS responds that EDS was proposing to graft a temporary solution onto the existing or Legacy System in two years. The required Pharmacy Replacement System would not be in place for four years. This is two years longer than the RFP requires. DHCS claims this amounts to a counter proposal and would also give EDS a competitive advantage because it would be paid in advance of completing its work.

### **ANALYSIS AND FINDINGS**

EDS and DHCS have different interpretations about what constitutes an allowable replacement system. EDS proposes to jury rig the Legacy System within two years with the addition of a low level application and then to have a new pharmacy system with mature SOA architecture within four years.

DHCS says the RFP required the new high-level pharmacy system to be fully functioning as a next generation system within two years. This is what it wanted and expected. The RFP supports this claim that the replacement system would be new technology and architecture. (See for example RFP Main, p. 11.)

EDS could have avoided this conflict seeking clarification that this type of proposal complied with the terms of the RFP. The record is replete with questions and answers regarding the RFP.

*Finding No. 11:* DHCS' decision to declare the EDS Pharmacy Replacement System nonresponsive is supported by the terms of the RFP and there is no evidence DHCS acted improperly or otherwise abused its discretion. EDS misunderstood what constituted a conforming replacement system, but EDS had ample opportunity to seek

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clarification. EDS' failure to seek clarification means it submitted its proposal at its own risk. (RFP Main, pp. 16 and 27.)

*Finding No. 12:* ACS did submit a two phased pharmacy proposal, but it specified the components of the Pharmacy Replacement System and said it would be operational as a replacement system within the required two year schedule. (See Exh. 219 ACS Proposals p. G21.k-2 and Exh. 220 G.23-10 & 11.)

*Finding No. 13:* EDS has failed to show disparate treatment of its Pharmacy System Proposal.

*Finding No. 14:* The Evaluation Comments and Scores in EDS' Exhibit 51 have no probative value because they were opinions and recommendations that were not final until the RRC reviewed and adopted them and the proposals were audited. (RFP Main, Item c.3, p. 100.)

Procedurally, the Evaluation of the EDS proposal was to cease when it had been found nonresponsive and DHCS could not consider scores after a material deviation had been found. (RFP Main, Item 2, p. 99.)

### FIELD OFFICE CONSOLIDATION ISSUES

The RFP required the consolidation of five Field Office Automation Groups (FOAG) and two Pharmacy Offices into two Treatment Authorization Request (TAR) Processing Centers (TPC). The purpose of the consolidations is to realize efficiencies in operations. The FOAG consolidations are part of the early implementation of the replacement TAR System and scheduled to be completed within 24 months of assumptions of operations. (Exh. 222: Adm. Bulletin No. 14.) Contractors were directed to present a proposal that provided for consolidation with "minimal disruption to current users." (RFP, Exh. A, Att. VI, p.121.)

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EDS proposed to implement an interim application, the "SURGE Stopgap", at the FOAGs and to open the TPC's a year early, in 2011. According to EDS, one of the benefits of this proposal was that EDS could use its existing workforce and not hire new staff. (Exh. 222: EDS Prop, p: 11, 7-55 & 56.)

DHCS determined this proposal was not viable and that it was a schedule alteration and a material deviation. (Exh. 2: RRCSC.)

EDS protests DHCS' determination was invalid because it was based on an "unstated RFP requirement" and because DHCS treated EDS differently because the ACS proposal also did not comply with the RFP's deadline. According to EDS, ACS proposed to complete the TAR/TPC project one month late.

DHCS responds the EDS proposal was nonresponsive because it unnecessarily and expensively disrupted its business processes. The EDS proposal would cause DHCS to alter its business processes and to hire additional staff to simultaneously operate the FOAGs and the TPCs. Additionally, because there is no provision in the RFP for the early operation of the TPCs, DHCS would have to negotiate a payment scheme for this unrequested work.

*Finding No. 15:* The EDS proposal to open the TPCs a year early was not responsive and was a schedule change and a counteroffer that would be more costly to DHCS. The whole point of the FOAG consolidation was to save money, but the EDS proposal has the State spending extra money unnecessarily. The proposal seems to be designed more for the convenience of EDS than its client. This was a material deviation.

*Finding No. 16:* EDS' proposal is based on its own understanding of the RFP, but the language of the RFP and not EDS' interpretation is controlling. EDS could have and should have sought clarification that its admittedly novel strategy was responsive. DHCS is not responsible for EDS' misunderstanding or failure to seek clarification. (RFP Main, pp. 16 & 27.)

*Finding No. 17:* EDS has not met its burden of proving DHCS based its decision on an unstated RFP requirement. EDS' proposal was a counteroffer that was more costly to the State.

*Finding No. 18:* EDS has not met its burden of proving its proposal was treated unfairly or differently than the ACS proposal. The ACS proposal has a July 1, 2012 completion date but contemplated maintaining support for the old SURGE application for one month after "cutover"<sup>9</sup>

### **STATE ACCESS TO CONTRACTOR ENVIRONMENTS**

The RFP requires the contractor to make all environments concurrently available to authorized State users, the Contractors staff, and any oversight contractors maintained by the State. (Exh. 209, and RFP Exh. A. Att. VI, Item 1.9.1.8 at p.18.)

EDS' Proposal states:

Traditionally [EDS] does not grant access to the development environment to State staff, as this environment is intended to be used by system developers, The [EDS] team will however, provide the State with interChange MMIS access to the other multiple environments. (Exh. 218, EDS Proposal p. 10. 8-43.)

DHCS determined that EDS was denying the State access to the development environment and this was a material deviation because it was a counteroffer and an alteration of contract Scope of Work requirements. (Exh.2. RRCSC Report.)

EDS protests that the Response does not deny the State and its agents access to all environments, if they obtain authorized access. In any event, EDS argues the Proposal language was an immaterial deviation.

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<sup>9</sup> Cutover means to transfer existing data, functions, or users of a computer system to new facilities or equipment in a synchronized manner. (See MSN Encarta online.)

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In subsequent filings, EDS argues that the individual raters did not disqualify EDS for not granting access to all environments. Finally EDS argues it was not treated equally in the rating process because the ACS proposal limits State access to "test environments" and the ACS proposal was not disqualified.

DHCS responds that State access to all environments is critical to the Design Development and Implementation stage of the contract. This access would insure, on an ongoing basis, that the contractor's development work complies with the contract and no hidden flaws in the system will appear after time and money have been spent on the project. Concurrent access prevents delays and payouts for noncompliant work. DHCS says access is also required by the State Chief Information Officer (CIO), who has mandated the employment of an Independent Verification and Validation Contractor on every IT procurement,

DHCS and ACS both submitted evidence that is in compliance with the RFP because the term "test environment" encompasses all ACS environments including the development environment. (Exh. 226, p. G8.4.)

ACS states the EDS limitation on access to all environments is material because it creates a "potentially significant effect" on the delivery of services to the State. (See RFP Main, p. 99.)

ACS disputes the admissibility of the evaluator's scores and comments regarding the EDS proposal. It argues they are not admissible because they were not adopted by DHCS and they are not probative because the evaluators were not asked to determine whether a bidder was providing access to all environments. (ACS Rebuttal, p. 33-34, Exh. 267 RFP Att, 20 at p. 88.)

*Finding No. 19:* The RFP requires the contractor to grant the State and its agents access to all environments. The EDS Proposal did not grant the State and its agents access to the developer environment. This was a material deviation.

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*Finding No. 20:* The RFP required proposals to comply with State CIO and Department standards for IT projects. (RFP Main, Item k.4.b, p. 75.)

*Finding No. 21:* The State CIO requires Independent Verification and Validation Contractors for IT Projects and the EDS restriction interfered with their function.

*Finding No. 22:* The scores and evaluations EDS submitted in support of its argument have no probative value because they are preliminary data that was not adopted by DHCS pursuant to the terms of the RFP. Additionally they have no probative value on the issue of denial of access to all environments because the reviewers were not charged with determining if a proposal restricted State access to all environments. (Exh. 267) A report cannot be authority for something that was not considered.

*Finding No. 23:* DHCS did not act contrary to the RFP and it did not abuse its discretion when it determined the EDS denial of access to development environment was a material deviation.

*Finding No. 24:* There is no factual basis to the EDS claim that ACS' proposal denied the State access to all environments.

### APPENDIX A ISSUES

#### **1. ACS Issues**

EDS' Detailed Statement contains a section titled "Appendix A." This section contains five alleged instances where the ACS proposal is said to be materially nonresponsive:

1. ACS failure to allow 10 working days for review of deliverables.
2. ACS did not provide time estimates for the effort required for State Subject Matter Experts in all phases.
3. The Resume of ACS' Takeover Director did not show the required experience.
4. An ACS Hardware Schematic did not show the required Telecommunications Redundancy.
5. ACS excluded required services from the fixed price items.

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DHCS responds the issues should be dismissed because EDS does not provide a legal basis for the issues. DHCS then responds to the merits as follows:

1. ACS provided 10 workdays for some deliverables and proposed two iterations for some five-day reviews.
2. Time estimates were only required for the DDI Phase. (Citing Adm. Bulletin 15, Exh. 241.)
3. DHCS did not require resumes to contain a checklist of qualifications. The ACS Takeover Director's resume was satisfactory.
4. ACS verified it was providing a redundant telecommunications system several places in its proposal.
5. Contractors were to be reimbursed for actual printing costs related to General Adjudicated Claim Line.

*Finding No. 25:* EDS has not provided a legal basis for its Appendix A issues regarding the ACS proposal. It has not related the claims to any of the grounds for protest in Public Contract Code section 10345. EDS is asking the Hearing Officer to second guess DHCS and reweigh and rescore the ACS proposal. This is not permitted. The Appendix A claims involving the ACS proposal are dismissed.

## **2. Noridian Issues**

In Appendix A, EDS also raises issues involving the Noridian proposal. These issues/claims are summarily dismissed. DHCS does not intend to award the contract to Noridian and Noridian is not a party to these proceedings. Additionally, EDS has failed to relate the issues to any of the enumerated grounds for protest. The Noridian issues in Appendix A are not cognizable and do not state valid grounds for protest.

## **MISCELLANEOUS ISSUES**

EDS has belatedly raised the issue that the DHCS review lacked transparency. This issue was not raised in EDS' Detailed Statement and it cannot be considered now. (Cal. Code of Regs. tit. 2, sec. 1195, subd. (d).) Additionally, this is not a valid ground for protest in Public Contract Code section 110345.

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EDS has also attempted to score itself and declare itself the winning bidder. It has done this with the scores that were not validated by DHCS and on the basis of a declaration from one of its own employees. The EDS Evaluations and Scores, Exhibit 51, are ordered stricken as incompetent evidence. The Declaration of Brett Barton, Exhibit 46, is also ordered stricken because he is not authorized to score proposals or to declare a winning bidder and his statements are based in turn on evidence that is incompetent—the evaluation process should have ceased after EDS was disqualified. The statements are also defective because Mr. Barton has an obvious bias as an EDS employee.

**DECISION**

Based solely on the foregoing facts and findings and the hearing record, the protest of EDS is not upheld.

March 3, 2010  
Date

Ramon de la Guardia  
Ramon de la Guardia  
Hearing Officer

**DECLARATION OF SERVICE**

I, Teresa Sousa, declare as follows:

I am employed in the County of Yolo, State of California; I am over the age of eighteen years and am not a party to this action; my business address is Department of General Services, Office of Legal Services, 707 Third Street, Suite 7-330, West Sacramento, in said County and State. On, March 3, 2010, I served the within document:

**STATEMENT OF DECISION, Bid Protest No. 09-113**

by placing a true copy thereof in an envelope addressed to each of the persons named below at the address shown in the following manner:

**SEE ATTACHED SERVICE LIST**

X **BY MAIL:** On March 3, 2010, I placed a true copy in a sealed envelope addressed to each person specifying service by U.S. Mail at the address shown. I am familiar with the office's practice of collection and the processing correspondence for my mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

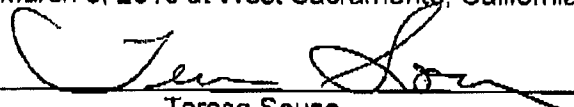
— **BY PERSONAL SERVICE:** I placed a true copy in a sealed envelope addressed to each person(s) named at the address(es) shown and giving same to a messenger for personal delivery before 5:00 p.m. on \_\_\_\_\_.

X **BY FACSIMILE:** From facsimile machine telephone number (916) 376-5088, on the above-mentioned date, I served a full and complete copy of the above-referenced document(s) by facsimile transmission to the person(s) at the telephone number(s) indicated.

— **BY ELECTRONIC MAIL:** I sent true copy PDF versions to e-mail addresses of each party indicated below, on \_\_\_\_\_.

— **BY OVERNIGHT DELIVERY:** I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the Department of General Services' practice in its above-described West Sacramento office for the collection and processing of correspondence for distributing by Golden State Overnight Express, Federal Express, UPS, and/or U.S. Postal Service Overnight Mail; pursuant to that practice, envelopes placed for collection at designated locations during designated hours are deposited at the respective office that same day in the ordinary course of business.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that the foregoing document(s) were printed on recycled paper, and that this Certificate of Service was executed by me on March 3, 2010 at West Sacramento, California.

  
Teresa Sousa