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Decision

Matter of: Wisconsin Physicians Service Insurance Corp.

File: B-401063

Date: May 4, 2009

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DIGEST

1. Protest challenging agency's cost realism evaluation is sustained where the agency concedes an error in accepting awardee's proposed labor rates for its existing staff based on market surveys, rather than the actual labor rates for its staff, and where the agency unreasonably ignored assumptions made in awardee's proposal regarding indirect costs.
 2. Protest challenging agency's technical and past performance evaluations is sustained where the record does not demonstrate that the agency reasonably evaluated offerors' proposals.
 3. Protest is sustained where agency failed to conduct discussions regarding adverse past performance that the protester had not previously had an opportunity to address.
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DECISION

Wisconsin Physicians Service Insurance Corp. (WPS), of Madison, Wisconsin, protests the award of a contract to National Government Services, Inc. (NGS) under request for proposals (RFP) No. CMS-2007-0018 (jurisdiction 8), issued by the Department of Health and Human Services, Centers for Medicare and Medicaid

Services (CMS) for Medicare administrative contractor (MAC) services. WPS contends that the agency improperly evaluated offerors' cost and technical proposals and past performance, and conducted unfair and inadequate discussions.

We sustain the protest.

BACKGROUND

The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), Pub. L. No. 108-173, requires CMS to use competitive procedures to replace all current fiscal intermediary, carrier, durable medical equipment regional carrier, and regional home health intermediary contracts with uniform contract services provided by a MAC. CMS has awarded 15 primary MAC contracts for Medicare Part A and B benefits in different geographic jurisdiction across the country. The RFP here was issued for jurisdiction 8, which covers Michigan and Indiana; jurisdiction 9, which covers Florida, Puerto Rico and the U.S. Virgin Islands; and jurisdiction 10, which covers Alabama, Georgia and Tennessee. Offerors were required to submit separate proposals for each jurisdiction, and were advised that each proposal would be evaluated independently for award. RFP § M.2.c. The contract awarded to NGS and challenged by WPS here is for jurisdiction 8.

The RFP was initially issued on August 31, 2007. The RFP anticipated the award of a cost-reimbursement contract, with a 1-year base performance period and four 1-year option periods. The RFP stated that proposals would be evaluated on the basis of cost and the following five non-cost factors: technical understanding (30%), personnel (25%), implementation (20%), past performance (15%), information security plan (10%).¹ RFP § M.3.a. Offerors were advised that cost proposals would be evaluated for cost reasonableness and realism, in accordance with Federal Acquisition Regulation (FAR) part 15.4. The RFP stated that offerors' proposed costs would be evaluated to determine whether they "are realistic for the labor proposed and reflect a clear understanding of the requirement." *Id.* § M.2.a.

¹ The technical understanding factor had six subfactors--program management, claims processing, provider customer service program, audit and reimbursement, provider enrollment, and fraud and abuse; the personnel factor had two subfactors--key personnel and staffing plan; the implementation factor had four subfactors--jurisdiction implementation project management approach, jurisdiction implementation project plan, implementation personnel, and implementation risk management plan; and the past performance factor had four subfactors--quality of service, cost control, timeliness of performance, and business relations. RFP § M.3.e. All subfactors within an evaluation factor were of equal weight. RFP § M.3.a.

The RFP also stated that “[i]n determining Best Value, CMS will assess the relative risks associated with each offeror’s proposal and potential performance,” and that “[t]he evaluation team will assess risk and assign a risk rating to each evaluation factor, subfactor and the overall proposal.” RFP § M.2.b. The RFP stated that for purposes of award, “all evaluation factors other than cost or price, when combined, are more important than cost or price.” Id. § M.2.a.

CMS received proposals from three offerors by the closing date of November 20, 2007: WPS, NGS, and a third offeror. The agency convened a past performance evaluation panel (PPEP), a technical evaluation panel (TEP), and a business evaluation panel (BEP) to evaluate offerors’ proposals.

The agency conducted an initial evaluation of the offerors’ proposals and found all three to be in the competitive range. Contracting Officer (CO) Statement at 4. The agency conducted two rounds of discussions with offerors. Each round of discussions had a series of follow-up exchanges with offerors. Following the two rounds of discussions and responses, the agency issued final questions and a request for final proposal revisions (FPRs).

The BEP’s final report on the business proposals adopted the findings of the TEP’s cost realism evaluation, and recognized the audits conducted by the Defense Contract Audit Agency (DCAA). The TEP’s cost realism evaluation reviewed each offeror’s proposed costs in the areas of direct labor, subcontractors, equipment, travel, other direct costs, business proposal assumptions, and miscellaneous costs. See Agency Report (AR), Tab 56, TEP Final Report for WPS, at 1; Tab 58, TEP Final Business Report for NGS, at 1. DCAA’s audit evaluated the offerors and their subcontractors to determine whether the proposed costs were acceptable as a basis to negotiate a fair and reasonable price. See AR, Tabs 108-111, DCAA Audit Reports.

As relevant here, NGS stated in its technical proposal that it would perform the contract requirements using its existing staff. Instead of proposing direct labor rates based on its current labor rates, however, NGS proposed rates that were based on market surveys that identified average salary rates for positions within the relevant labor markets. See AR, Tab 122, NGS FPR, Vol. IIB, Business Proposal Assumptions, Tab 4a, at 1. The BEP accepted NGS’s proposed labor rates and made no cost realism adjustments to the offeror’s proposed costs.

During discussions, the agency asked offerors to explain their assumptions concerning their indirect costs. Specifically, each offeror was asked whether it was basing its proposed indirect cost rates on the assumption that it would win additional contracts, besides jurisdiction 8. The agency identified a number of scenarios and asked each offeror to state which scenario represented its assumptions. NGS stated that it based its indirect rates on scenario 5, which assumed that NGS would win contracts for jurisdictions 6 and 15, in addition to jurisdiction 8. AR, Tab 122, NGS FPR Discussions Summary, at 105. WPS stated that its indirect rates assumed only winning a contract for jurisdiction 8. AR, Tab 123,

WPS FPR, Discussions Questions, at 51-52. DCAA accepted NGS's proposed indirect rates as reasonable, and the BEP made no cost realism adjustments to the offeror's proposed costs. AR, Tab 57, BEP Final Report for NGS, at 5-6. The BEP made a \$[deleted] cost realism adjustment to WPS's proposed costs based on a concern regarding its proposed postage costs. AR, Tab 55, BEP Final Report for WPS, at 12.

The final technical evaluation and past performance ratings and cost realism adjustments for WPS and NGS were as follows:²

	WPS	NGS
TECHNICAL UNDERSTANDING	GOOD/L	GOOD/L
Program Management	Good/L	Very Good/M
Provider Customer Service Program	Good/L	Good/L
Claims Processing	Good/L	Good/L
Audit and Reimbursement	Good/L	Good/L
Provider Enrollment	Good/L	Good/L
Fraud and Abuse	Marginal/L	Marginal/L
PERSONNEL	GOOD/L	VERY GOOD/L
Key Personnel	Good/L	Very Good/L
Staffing Plan	Good/L	Good/L
IMPLEMENTATION	GOOD/L	GOOD/L
Project Management Approach	Good/L	Good/L
Project Plan	Good/L	Good/L
Implementation Personnel	Good/L	Good/L
Risk Management Plan	Good/L	Good/L
PAST PERFORMANCE	VERY GOOD/L	GOOD/L
Quality of Service	Very Good/L	Good/L
Cost Control	Very Good/L	Very Good/L
Timeliness of Performance	Good/L	Very Good/L
Business Relations	Very Good/L	Good/M
INFORMATION SECURITY PLAN	GOOD/L	GOOD/L
OVERALL TECHNICAL RATING	GOOD/L	GOOD/L
PROPOSED COST	\$293,254,912	\$262,325,443
EVALUATED COST	\$294,686,940	\$262,325,443

AR, Tab 61, Source Selection Board (SSB) Award Recommendation, at 4.

² The agency used an evaluation scheme of outstanding, very good, good, marginal, and poor. AR, Tab 12, Source Selection Plan, at 26. Each evaluation factor and subfactor was also evaluated for risk, with a rating scheme of high (H), medium (M), or low (L) risk.

In addition to WPS and NGS, the third offeror was also rated good overall, with low risk, and had a proposed cost of \$260,962,331, and an evaluated cost of \$266,301,330.³ Id.

The CO concluded that the three offerors' technical proposals were equal. Id. at 21. On this basis, the CO recommended NGS's proposal for award of the contract for jurisdiction 8 because its evaluated cost was the lowest. Id. The source selection authority (SSA) agreed with the CO's award recommendation for jurisdiction 8. AR, Tab 62, Award Decision Memo, at 2. The SSA also selected proposals for awards of contracts in jurisdictions 6, 10, 11, and 15; NGS did not receive any of these other awards.⁴ Id. at 5.

CMS awarded the contract for jurisdiction 8 to NGS on January 6, 2009; it advised WPS of the award the following day. WPS requested a debriefing, which was provided on January 21. This protest followed.

DISCUSSION

WPS argues that the agency's cost realism and technical evaluations were flawed. The protester also contends that the agency conducted unfair discussions and failed to provide the protester with an opportunity to address adverse past performance during discussions. We discuss each of these issues in turn, and conclude that the agency evaluation was flawed under each area. We also discuss the prejudice to WPS stemming from these evaluation errors because, as the agency and intervenor note, all three offerors were rated technically equal and WPS was ranked third in terms of evaluated cost. As discussed below, we conclude that WPS was prejudiced by the errors in the agency's evaluations.

A. Cost Realism Evaluation

WPS raises four primary challenges to CMS's evaluation of the offerors' proposed costs. The protester argues that the agency failed to reasonably evaluate NGS's indirect cost rates, its direct labor rates, and its overall evaluated costs on a cost-per-claim basis. With respect to its own proposal, WPS argues that the agency unreasonably evaluated its costs for postage. As discussed below, we agree with the

³ In its report on the protest, CMS did not disclose the identity of this third offeror, and provided only the overall technical rating and proposed and evaluated cost for this offeror. The agency redacted all other references to the third offeror's technical and cost proposal and evaluation.

⁴ The awards for jurisdictions 6, 11, and 15 were made under a different solicitation than the RFP for jurisdictions 8, 9, and 10.

protester that the agency unreasonably evaluated NGS's indirect costs and direct labor rates, but disagree with the protester's other arguments.

When an agency evaluates a proposal for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR §§ 15.305(a)(1); 15.404-1(d); Palmetto GBA, LLC, B-298962, B-298962.2, Jan. 16, 2007, 2007 CPD ¶ 25 at 7. Consequently, the agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed. FAR § 15.404-1(d)(1). An agency is not required to conduct an in-depth cost analysis, see FAR § 15.404-1(c), or to verify each and every item in assessing cost realism; rather, the evaluation requires the exercise of informed judgment by the contracting agency. Cascade Gen., Inc., B-283872, Jan. 18, 2000, 2000 CPD ¶ 14 at 8. Further, an agency's cost realism analysis need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate and provide some measure of confidence that the rates proposed are reasonable and realistic in view of other cost information reasonably available to the agency as of the time of its evaluation. See SGT, Inc., B-294722.4, July 28, 2005, 2005 CPD ¶ 151 at 7.

1. Indirect rates

First, WPS argues that CMS's evaluation of NGS's proposed indirect rates was unreasonable because it ignored assumptions made by the awardee in its proposal regarding the impact of the award of additional MAC contracts on its indirect costs. We agree.

As set forth above, CMS requested during discussions that NGS and WPS explain their assumptions concerning the award of other MAC contracts, and the effect that the awards would have on the offerors' indirect rates. As relevant here, scenario 1 assumed that NGS would win a MAC contract for only jurisdiction 8, while scenario 5 assumed that NGS would win MAC contracts for jurisdictions 6, 8 and 15. AR, Tab 40, First NGS Discussions, at 111. In its FPR, NGS stated that its indirect cost assumptions were based on scenario 5, and explained that its proposed indirect rates were as follows:

	Fringe	G&A	IT Overhead
Scenario 1 (J8, only)	[deleted]	[deleted]	[deleted]
Scenario 5 (J6, J8, and J15)	[deleted]	[deleted]	[deleted]

AR, Tab 122, NGS FPR Discussions Summary, at 105.

NGS further explained that the difference in assumptions between scenarios 1 and 5 would have a cost impact of \$[deleted]. Id. at 106. In other words, NGS's proposal

stated that its indirect costs for jurisdiction 8 would increase by \$[deleted] if NGS did not also win contracts for jurisdictions 6 and 15.

In its evaluation of NGS's proposed indirect costs, CMS did not evaluate NGS's indirect rates based on scenario 1. Instead, the agency accepted NGS's lower proposed rates under scenario 5. AR, Tab 57, BEP Final Report for NGS, at 6. The record shows, however, that CMS knew at the time it awarded the jurisdiction 8 contract that NGS would not be awarded contracts for jurisdictions 6 or 15. In this regard, the selection decision made a simultaneous decision to award contracts for jurisdictions 6, 8, 10, 11, and 15. AR, Tab 62, Award Decision Memo, at 5.

The agency contends that its evaluation of NGS on the basis of the scenario 5 indirect rates was reasonable because "despite NGS's claimed assumption that it would win three MAC contracts, its rates compared favorably with its most current actuals submitted to CMS." Supplemental Agency Report (SAR) at 14. In the final cost realism evaluation, the agency concluded that the awardee's proposed G&A and IT overhead rates were adequately supported because these rates were similar to the offeror's rates under the jurisdiction 13 MAC contract, which was awarded to NGS in March 2008, and which NGS was currently performing. AR, Tab 57, BEP Final Report for NGS, at 7-8, 15-16. The agency also noted that the rates would be capped with a 3 percent rate ceiling, which would protect the government against increases in NGS's costs. Id. at 8, 16.

We think CMS's evaluation of NGS's indirect costs was unreasonable because the agency knew that the assumptions underlying scenario 5 would not be met, *i.e.*, that NGS would not win MAC contracts for jurisdictions 6 and 15. In this regard, NGS's FPR explicitly stated that NGS's indirect cost proposal assumed award of three jurisdictions, and stated that, in the event NGS was awarded only jurisdiction 8, there would be a \$[deleted] increase in its indirect costs. Despite this statement, the agency concluded that NGS would not experience an increase in its indirect costs, and made no adjustment to NGS's costs. While we recognize that CMS relied on the similarity between the scenario 5 rates and the rates experienced in jurisdiction 13, we think that the agency could not ignore the plain language of NGS's proposal, which offered higher indirect rates if it received only one contract.⁵ On this record, we think the agency had no reasonable basis to assume that NGS would experience the lower indirect costs identified under scenario 5, and failed to make an appropriate adjustment to the awardee's proposed costs.

⁵ We are also unpersuaded by the agency's reliance on a 3 percent cap on indirect rate growth. We note for the record that the difference between NGS's rates under scenarios 1 and 5, discussed above, are each less than 3 percent. Thus, the cap at issue would not avoid the additional costs identified in NGS's proposal.

2. Actual vs. survey labor rates

Next, WPS argues that CMS's evaluation of NGS's proposed direct labor rates was flawed because, although the awardee proposed to perform the work with its existing staff, NGS proposed, and the agency accepted, labor rates that relied on market surveys, rather than NGS's actual labor rates. As discussed below, the agency concedes that it erred in this area of its evaluation and that the probable cost for NGS's proposal should be increased.

NGS indicated in its technical proposal that it would perform the jurisdiction 8 contract using its existing staff of approximately 3,000 employees. AR, Tab 122, NGS FPR, Vol. 1, Tab 5B, at 4. The agency credited NGS for the experience of its existing staff, noting a strength in its proposal for "a minimal workload transition effort," and "incumbent knowledge of the jurisdiction." AR, Tab 61, SSB Award Recommendation, at 11.

Instead of basing its proposed costs on its actual labor rates, however, NGS stated that its proposed labor rates were based on market surveys, and a method of estimating labor costs called the market reference point (MRP).⁶ AR, Tab 122, NGS FPR, Vol. IIB, Business Proposal Assumptions, Tab 4a, at 1. The MRP approach examines a range of staff competency levels for a given position, and compares it to salary survey data in the labor market in a particular geographic area. Intervenor's Comments on SAR, at 4. NGS's proposal states that it based its MRP calculations for its proposed labor rates on "a compilation of market surveys." AR, Tab 122, NGS FPR, Vol. IIB, Business Proposal Assumptions, Tab 4a, at 1. The proposed labor rates were based on 85 percent of the MRP average rates for the positions proposed, with an adjustment for geographic rate differences; these rates were then subject to a [deleted] percent escalation for each period of performance. Id.

DCAA reviewed the MRP survey submitted by NGS, and took no exception to the labor rates. AR, Tab 117, DCAA Audit of NGS Proposed Costs, at 8. Although NGS provided DCAA with data concerning its 2007 payroll, the record does not indicate that DCAA evaluated the offeror's actual labor rates in addition to the MRP survey data.

In its evaluation, CMS found that NGS had provided adequate support for its direct labor costs, noting particularly that DCAA took no exception to NGS's proposed labor rates. AR, Tab 57, Final BEP Report for NGS, at 5. On this basis, the agency concluded that the proposed direct labor rates were reasonable and realistic. Id. at 6.

⁶ In contrast, WPS based its proposed labor rates on its current labor rates. See AR, Tab 123, WPS FPR, Vol. IIB, Tab 4(a), Proposal Assumptions, at 12-14.

In its response to the protest, CMS now concedes that, because it understood NGS to be proposing its incumbent staff, the cost realism evaluation should have considered NGS's actual labor rates, as opposed to rates based on market surveys. SAR at 6. In particular, the agency agrees that the record does not demonstrate that DCAA considered the 2007 payroll data provided by NGS:

CMS recognize[s] that, regardless of the thoroughness of DCAA's review, there was no evidence in the record that DCAA compared NGS's MRP with the actual rates DCAA had in its possession. CMS also recognizes that since NGS has an existing workforce as part of its proposal, the current actual labor rates are preferable over market surveys.

Id.

In its supplemental report on the protest, the agency attempted to calculate the "maximum likely labor rates" using NGS's 2007 payroll data. SAR at 6-7. The agency states that it reviewed the payroll data and calculated an average hourly rate for each labor category, based on the salaries from the 2007 data. CMS Senior Auditor Decl. ¶ 5. The agency used the [deleted] percent escalation factor identified in NGS's proposal to escalate the labor rates to the midpoint of the first option year, and then applied the escalation rate for each option year. Id. The agency concluded that, after the appropriate labor rate calculations and escalations, NGS's actual labor rates would be 11.34 percent higher than NGS's proposed labor rates. Id. The agency then applied NGS's proposed indirect rates to the direct labor rates to calculate NGS's overall labor costs. Id. Notably, however, CMS applied NGS's proposed indirect rates that were based on scenario 5, *i.e.*, the scenario which assumed award of contracts for jurisdictions 6, 8, and 15; as discussed above, we conclude that those rates were not properly accepted by the agency. Following this methodology, the agency concluded that a "conservative" calculation of the "maximum impact" of using NGS's actual labor rates yields a \$[deleted] increase to NGS's probable cost. Id. ¶ 6.

In its response to the agency's calculations, WPS argued that CMS's methodology failed to adequately escalate the labor costs to fully account for the first option year. Protester's Comments on SAR, at 5-6. The protester argued that NGS's actual labor rates were 15.19 percent higher than NGS's proposed labor rates, resulting in a probable cost increase of \$[deleted]. Id. at 6. WPS also argued that CMS improperly applied the scenario 1 indirect rates to NGS's direct labor.

CMS concedes that its supplemental report on the protest did not accurately escalate NGS's labor costs. Agency Responses to GAO Questions, Apr. 10, 2009, at 1. The agency states that its revised calculations show that NGS's actual labor rates were 14.85 percent higher than its proposed rates, resulting in an overall increase to NGS's probable costs of \$[deleted]. Id.

CMS agrees with the protester that in light of NGS's proposal to use incumbent labor, the agency should have evaluated NGS's actual labor rates, as opposed to surveys of the average labor rates for the geographic area. SAR at 6. The agency argues, however, that its method of calculating the impact of using NGS's incumbent labor rates would result in a \$[deleted] cost adjustment, and would not allow WPS to overcome the \$32.3 million difference between NGS's and WPS's probable costs.⁷

While we have concerns regarding the reliability of CMS's *post hoc* cost calculations,⁸ see Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15, we think that CMS's calculations demonstrate that WPS was prejudiced by the agency's error in evaluating NGS's labor rates. In this regard, the agency's "conservative" estimate of a \$[deleted] cost impact, in addition to the \$[deleted] adjustment based on CMS's flawed evaluation of NGS's indirect costs, makes NGS's probable cost higher than WPS's probable cost. Further, as the protester notes, application of the higher scenario 1 indirect rates requires an additional increase to NGS's probable costs because those higher rates would be applied to an additional \$[deleted] in direct labor. We agree, and note that applying the scenario 1 rates to CMS's calculations of NGS's higher direct labor results in \$[deleted] higher indirect costs. The effect of these adjustments to NGS's proposed costs are as follows:

NGS evaluated cost	\$262,325,443
Direct labor adjustment (CMS calculation)	\$[deleted]
Indirect costs adjustment (using NGS's scenario 1 rates)	\$[deleted]
Scenario 1 rates applied to direct labor adjustment	\$[deleted]
Revised NGS evaluated cost	\$[deleted]

⁷ In contrast, NGS argues that no adjustment to its direct labor is required. Specifically, NGS contends that if it had submitted labor rates based on its actual incumbent labor costs, rather than market survey data, its proposed labor rates would have been the same. Intervenor's Comments on Supp. AR, at 5. NGS also argues that a different escalation rate than what it identified in its proposal should be used to calculate its labor rates, because its actual costs for 2008 did not increase as much as NGS assumed in its proposal. *Id.* We do not consider NGS's post-protest statements reliable or relevant, as they are based on information and assumptions that are not reflected in the contemporaneous record, and were not considered by the agency.

⁸ As the protester notes, the agency did not provide a detailed analysis of its calculations, particularly with regard to its calculation of NGS's labor rates. Although the protester's overall calculations are close to the agency's overall calculations, we are unable to account for the difference because of the lack of details from the agency.

As the chart above shows, the adjustments for CMS's cost realism evaluation errors makes NGS's evaluated cost \$[deleted]—which is \$[deleted] million higher than WPS's evaluated cost of \$294,686,940.

3. Evaluation of offerors' historical costs per claim

Next, WPS argues that CMS's evaluation of NGS's proposed costs was flawed because the agency did not consider the realism of the awardee's overall cost on a per-claim basis. In this regard, the protester argues that if CMS had considered NGS's costs-per-claim, the agency would have seen that they are below the current figure for NGS's other Medicare contracts.

The agency states that it did not evaluate the offerors' proposed costs by calculating the costs-per-claim under each proposal. Instead, the agency evaluated the awardee's proposed costs on a component-level basis, that is, the agency evaluated whether the individual cost elements were realistic to perform the offeror's technical approach. See generally AR, Tab 57, BEP Final Report for NGS, at 3-11; Tab 58, TEP Final Business Report for NGS, at 4-17. As part of its evaluation, the agency considered historical information cited in NGS's proposal regarding, for example, claims processing and customer service. See AR, Tab 58, TEP Final Business Report for NGS, at 6-9.

There is no requirement that an agency follow any particular cost realism evaluation method, or evaluate offerors' proposed costs using every possible method of analysis. See Cascade Gen., Inc., supra, at 8; SGT, Inc., supra, at 7. Here, the record shows that the agency evaluated the individual cost elements of NGS's proposal and concluded that the costs were reasonable, overall. The protester's argument that its analysis of NGS's costs, *i.e.*, the per-claim costs, suggests that the awardee's costs are too low, does not clearly demonstrate that the agency's evaluation was flawed. On this record, we find no basis to sustain this element of the protest.

4. Cost realism adjustment to WPS's postage costs

Finally, WPS argues that the agency unreasonably adjusted its proposed costs for postage by \$[deleted]. The protester argues that the agency's cost realism adjustment was improper because the protester provided sufficient information to justify its proposed costs. We disagree.

In its initial proposal, WPS stated that its historical data showed that the company could process [deleted] claims per mailing of quarterly Medicare summary notice (MSN) statements. By the time WPS submitted its FPR, the protester stated that its updated data showed that the company was processing [deleted] claims per mailing; as a result, WPS reduced its proposed costs by \$[deleted]. AR, Tab 123, WPS FPR, Vol. IIA, Summary of Changes. The protester explained that the costs were revised because WPS "has a greater amount of actual experience now, as opposed to our

original Business Proposal,” and that the “actual [MSN] savings were greater than WPS estimated previously.” Id.

The agency concluded that the protester had not adequately explained the basis for its cost reduction. AR, Tab 55, BEP Final Report for WPS, at 12. Specifically, the agency stated that WPS had not provided adequate historical information “illustrating the change in claims per mailing.” Id. We think that the protester’s argument is based on its disagreement about the adequacy of the data supporting WPS’s change in its proposed costs. In our view, the agency’s concerns here were reasonable, and WPS’s disagreement with the agency provides no basis to sustain the protest. See Honeywell Tech. Solutions, Inc., B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 18-19.

In sum, we conclude that the agency’s evaluation of NGS’s proposed costs was flawed because the agency ignored NGS’s assumptions regarding its indirect costs, and because the agency accepted NGS’s calculation of its labor costs using market surveys rather than its actual labor rates. Because these errors would appear to make NGS’s evaluated costs more than \$[deleted] higher than WPS’s evaluated costs, we conclude that WPS was prejudiced by the agency’s cost evaluation, and we sustain the protest on this basis.

B. Technical Evaluation

Next, WPS argues that CMS’s evaluation of both offerors’ technical proposals was flawed in a number of areas. We agree with the protester’s arguments concerning the Healthcare Integrated General Ledger Accounting System (HIGLAS), as well as its arguments concerning performance risks posed by NGS’s proposed labor rates. We find no merit to the remaining arguments.

1. Claims processing subfactor--HIGLAS

WPS argues that NGS’s proposal showed a lack of experience with and understanding of HIGLAS, a specialized dual accounting and financial management system that will replace and modernize a number of existing Medicare systems. The protester contends that an offeror’s understanding of HIGLAS was directly relevant to the claims processing subfactor evaluation, and that therefore WPS should have been favorably evaluated, and NGS unfavorably evaluated under this subfactor.

As a preliminary matter, all MACs will be required to utilize HIGLAS in performance of the MAC contracts, although at the time of the issuance of the RFP not all jurisdictions had been converted from the legacy systems to the HIGLAS. AR at 4. As relevant here, all of the jurisdiction 8 requirements have been transitioned to HIGLAS, with the exception of Medicare Part B requirements for Indiana. RFP at 106.

In the protester's view, experience with HIGLAS should have been considered under the claims processing subfactor of the technical understanding evaluation factor, which stated that offerors must demonstrate "the ability to maintain the proper systems infrastructure to appropriately interact with CMS's standard systems." RFP § M.3.I.B. We agree. In this regard, the statement of work (SOW) stated that "[f]inancial reporting for the existing Medicare contractor workloads is performed using HIGLAS or CAFM. Eventually, HIGLAS will be used by all Medicare contractors."⁹ RFP, SOW § C.5.11.9.

In answering the protester's contentions, CMS does not dispute the protester's characterization of NGS's experience with HIGLAS.¹⁰ Instead, CMS initially argued that an offeror's experience with or understanding of HIGLAS experience was not relevant to the evaluation of offerors' proposals. The agency noted that the RFP instructed offerors not to propose costs for HIGLAS transition. RFP § L.11.6.a. The agency further argued that experience with HIGLAS was not required under any evaluation factor, and that therefore "HIGLAS was not to be considered by CMS in the evaluation of proposals under the Technical Understanding factor." AR at 20.

The agency subsequently acknowledged, however, that an offeror's understanding of HIGLAS was relevant to certain SOW requirements. SAR at 30. In this regard, the agency states that "the TEP did consider each offeror's demonstrated understanding of HIGLAS, and the role it plays in the A/B MAC environment as part of the TEP's review [of] SOW C.5.11.9."¹¹ SAR at 30. Notwithstanding the agency's statement that it considered offerors' understanding of HIGLAS, the agency concedes that there are no contemporaneous documents which indicate that the agency considered offerors' understanding of the SOW as it relates to HIGLAS. Agency Responses to GAO Questions, Apr. 14, 2009, at 5.

⁹ The SOW also included "Additional HIGLAS Requirements," which detailed the role of HIGLAS in contract performance. See id. § C.9.7, App. G. Section L of the solicitation advised offerors to assume that "[a]ll awarded MACs must obtain the capability to process claims with HIGLAS (establish connectivity, training, etc.) in order to assume workload from any [fiscal intermediaries] or Carriers that have already been transitioned to HIGLAS." RFP § L.11.a.1.x.

¹⁰ NGS contends that it does have specific experience performing contract requirements using HIGLAS. Intervenor's Comments on AR at 11. As discussed above, however, the agency has not expressed a view as to NGS's experience with or understanding of HIGLAS.

¹¹ Moreover, the record shows that the agency considered experience with HIGLAS in the past performance evaluation. In particular, the agency gave a weakness to one of NGS's subcontractors, [deleted], and a strength to another one, [deleted], regarding their respective performance records concerning HIGLAS. AR, Tab 52, PPEP Final Report, at 20-21.

We think the record supports the protester's contention that an offeror's understanding of HIGLAS is relevant to the claims processing subfactor of the technical understanding factor. The record, however, is not clear as to whether the agency considered offerors' understanding of HIGLAS relevant to the evaluation of offerors' proposals, or whether the agency evaluated offerors' understanding of HIGLAS.¹² Since the documentation in the record does not demonstrate that the agency's evaluation in this area was reasonable, we sustain this basis of protest.

2. Effect of proposed labor rates on technical evaluation

Next, WPS argues that the agency failed to adequately evaluate the effect of NGS's decision to utilize its existing staff to perform the contract requirements. As discussed above, WPS argues, and the agency concedes, that the agency's cost realism evaluation of NGS's proposal was unreasonable because it accepted labor rates based on market surveys, rather than NGS's actual labor rates. WPS further argues that the agency should have concluded that there would be a negative effect on NGS's ability to provide its existing staff because of the apparent reduction in labor rates. WPS contends that this negative effect should have resulted in lower technical ratings for NGS under a number of technical evaluation factors, particularly those where CMS credited the experience of NGS's existing staff, such as the implementation factor. See, e.g., AR, Tab 61, SSB Award Recommendation, at 11.

The agency argues that it would not have been appropriate to consider the effects of low proposed labor rates on NGS's technical evaluation because the cost and technical evaluations were separate.¹³ In this regard, the agency states that as a

¹² The agency also argues that although it considered offerors' understanding of the HIGLAS requirements, it was not appropriate for the agency to assign any strengths or weakness to an offeror's proposal based on an offeror's experience with HIGLAS because an offeror would only have had an opportunity to gain such experience if the agency had authorized performance of a HIGLAS transition on its contract. SAR at 30. We do not think that this is a reasonable basis for ignoring the role of HIGLAS under the RFP, or for ignoring how experience with HIGLAS might enhance an offeror's understanding of that system. The opportunity to perform a transition to the HIGLAS system is no different than any other opportunity for experience under a contract; some offerors may have the experience and some may not, and an agency is not required to equalize or neutralize the different levels of experience or incumbency advantage. See Navarro Research and Eng'g, Inc., B-299981, B-299981.3, Sept. 28, 2007, 2007 CPD ¶ 195 at 4.

¹³ The FAR, however, states that "[c]ost information may be provided to members of the technical evaluation team in accordance with agency procedures." FAR § 15.305(a)(4).

result of NGS's low proposed labor rates, "CMS recognizes that it may be forced to pay more, but this is strictly a cost risk." SAR at 17.

Our Office has held that where a solicitation advises offerors that the agency could consider the results of its cost realism evaluation in the evaluation of technical proposals, the agency may make a cost realism adjustment for unrealistic proposed personnel costs as well as assess the impact the proposal of unrealistic rates could have upon technical performance. Northrop Grumman Tech. Servs., Inc.; Raytheon Tech. Servs. Co., B-291506 et al., Jan. 14, 2003, 2003 CPD ¶ 25 at 24-25.

Here, the solicitation stated that the agency would consider technical, cost and risk factors in conjunction with each other. In this regard, the business proposal evaluation factor stated that the agency would consider risks associated with offerors' business proposals, as follows:

CMS will evaluate the Business Proposal to assess CMS' level of confidence in the offeror's ability to deliver efficient, risk free performance at a fair and reasonable cost. In that regard, the evaluation will focus on the offeror's indirect rate history, accounting system adequacy, within budget history, and projected future direct labor rate and indirect cost rate stability and competitiveness.

RFP § M.4.

A separate risk evaluation factor also stated that the agency would consider risk in all areas of the agency's evaluation, including the selection decision, as follows:

CMS will assess the relative risks associated with each offeror's proposal and potential performance. Risk is defined as the likelihood that the Government will be negatively impacted by the offeror's failure to meet the negotiated business, technical, management, and schedule performance and cost. Risk is associated with an offeror's proposed approach in meeting the Government's needs and requirements. The evaluation team will assess risk and assign a risk rating to each evaluation factor, subfactor and the overall proposal.

RFP § M.2.b.

Finally, the solicitation states that "[i]f a cost realism analysis is performed, cost realism may be considered by the source selection authority in evaluating performance or schedule risk." RFP § L.3(f)(9).

CMS agrees that the awardee proposed to utilize its existing work force to perform the contract requirements. SAR at 9. The agency also concedes that its evaluation of NGS's proposed costs was unreasonable because it considered proposed labor rates that were based on market surveys that resulted in labor rates below those currently

paid by NGS for its incumbent staff. SAR at 6. Further, the record shows that the agency specifically credited the awardee under the implementation evaluation factor with providing staff that was currently providing Medicare services in Indiana and therefore demonstrated “incumbent knowledge of the jurisdiction.” AR, Tab 61, SSB Award Recommendation, at 11.

On this record, we think that the agency is incorrect in its assertion that it was barred from considering the effect of NGS’s low proposed labor rates on its technical proposal. At a minimum, the agency was permitted under the terms of the solicitation to consider whether NGS’s labor rates posed a performance risk under any of the technical evaluation factors and subfactors which addressed offerors’ ability to provide adequate staffing and services to meet the requirements of the SOW, e.g., the technical understanding, implementation, and personnel evaluation factors.

Further, we think the record is unclear as to what NGS intends to pay its existing workforce. In this regard, while the agency in its supplemental report on the protest states that it now believes an adjustment to NGS’s labor rates is appropriate, NGS contends that it would have proposed the same direct labor rates that CMS believes do not reflect its actual labor costs. See Intervenor’s Comments on SAR at 5. Because we sustain the protest on the basis of the flawed cost realism evaluation, we think the agency should also reevaluate NGS’s proposed labor costs and consider whether this situation—i.e., uncertainty about the rates NGS will pay its existing staff—will require reopening discussions.

3. Other technical evaluation issues

The protester raises a number of additional challenges to the agency’s evaluation of its own proposal and the awardee’s technical proposal. We have reviewed the record and find no merit to these additional arguments. For example, the protester argues that the agency improperly assigned NGS a strength under the program management subfactor of the technical understanding factor for its approach to using “shared MAC functional services.” AR, Tab 49, TEP Final Report, at 22. This approach organizes contract performance into “functional areas” such as claims processing and customer service centers, and allows each functional area to perform requirements for different contracts in different MAC jurisdictions.

The agency stated that NGS’s proposed approach of organizing its performance of the contract requirements in this manner was a strength because of “potential benefits for performance, quality and cost control.” Id. WPS argues that this strength was not reasonable, because it was premised on the awardee winning additional MAC contracts—which, as discussed above, the agency knew would not occur. The record shows, however, that the awardee’s proposal and the agency’s evaluation were based on NGS’s proposed approach of “managing across its A/B MAC contracts,” and does not mention winning additional contracts in addition to jurisdiction 8. Id. In this regard, NGS had already won a MAC contract for

jurisdiction 13, and NGS is also a subcontractor for the jurisdiction 14 MAC and durable medical equipment regions A and B MAC contracts. On this record, we find no merit to the protester's argument.

C. Past Performance Evaluation

Next, WPS argues that CMS's evaluation of the offerors' past performance was unreasonable because it ignored relevant information concerning the offerors' past performance. We agree with the protester that the agency's past performance evaluation does not appear to have reasonably considered information identified by WPS in its proposal. We find no merit to the balance of the protester's arguments in this area.

As a general matter, the evaluation of an offeror's past performance is a matter within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. However, we will question an agency's evaluation conclusions where they are unreasonable or undocumented. Clean Harbors Env'tl. Servs., Inc., B-296176.2, Dec. 9, 2005, 2005 CPD ¶ 222 at 3; OSI Collection Servs., Inc., B-286597, B-286597.2, Jan. 17, 2001, 2001 CPD ¶ 18 at 6. The critical question is whether the evaluation was conducted fairly, reasonably, and in accordance with the solicitation's evaluation scheme, and whether it was based on relevant information sufficient to make a reasonable determination of the offerors' past performance. Clean Harbors Env'tl. Servs., Inc., *supra*.

WPS contends that the agency's evaluation of its past performance failed to consider its ratings under the Medicare Contractor Provider Satisfaction Survey (MCPSS), a program which asks Medicare providers to rate the performance of fee-for-service contractors, including MACs, in various functions in the prior year. The protester states that it identified positive MCPSS data in its proposal, and argues that the data were relevant past performance information that should have contributed to a higher evaluation rating.

On the one hand, CMS states that it did not review this information because it was not considered reliable, *e.g.*, the agency could not always attribute the survey results to a specific contractor. *See* AR at 50; SAR at 37; PPEP Chair Second Decl. ¶ 5. On the other hand, the agency states that it would have considered an offeror's MCPSS results if the offeror had cited it in its proposal, in which case "the PPEP would confirm this information, but otherwise the MCPSS results were not used." AR at 50.

CMS also concedes that there is no indication in the contemporaneous record that the agency considered this information with regard to WPS's proposal. SAR at 38. Instead, the agency offers the following explanation:

The PPEP did not keep documentation on information reviewed, but which did not result in a finding. If WPS mentioned MCPSS in the

proposal, the PPEP would have considered this information. However, the fact that we had no finding means that the PPEP did not deem this information in WPS[s] proposal concerning MCPSS to be worthy of a finding.”

PPEP Chair Second Decl. ¶ 9.

While the agency appears to raise a reasonable concern regarding the relevance of the past performance data, and would otherwise have the discretion to disregard this information in its evaluation of the offerors’ past performance, the agency nonetheless suggests it did in fact consider the information for certain offerors, *i.e.*, those who chose to specifically reference it in their proposals. We find that the record is not clear as to whether the agency considered the MCPSS data relevant to offerors’ past performance, and whether the agency evaluated the MCPSS data identified in WPS’s proposal. On this record, we are unable to conclude that the agency’s evaluation was reasonable, and sustain the protest on this basis.

In addition to its argument concerning the MCPSS data, the protester raises a number of other arguments concerning the agency’s past performance evaluation. We have reviewed the record and find no merit to these additional arguments. For example, the protester contends that the agency should have considered the past performance of NGS’s parent company, Wellpoint—which the protester argues should have resulted in a lower rating for the awardee. WPS contends that Wellpoint will be involved in NGS’s contract performance because [deleted]. *See* AR, Tab 122, NGS FPR, Tab 4, at 8.

An agency may consider the past performance and experience of an offeror’s parent company, if the offeror’s proposal demonstrates that the resources of the parent will have a meaningful affect on the offeror’s performance. *Perini/Jones Joint Venture*, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68 at 4. Here, the agency states that it did not consider Wellpoint’s past performance because it did not view the parent company’s involvement with NGS’s proposal as significant. AR at 49. Given the limited [deleted] role indicated in NGS’s proposal, we think that the agency’s decision not to evaluate Wellpoint’s past performance was reasonable.

D. Improper Discussions

Next, WPS argues that CMS failed to conduct reasonable discussions in three areas, one concerning the program management subfactor of the technical understanding evaluation factor, and two concerning past performance. As discussed below, we agree with the protester that the agency did not conduct reasonable discussions concerning one of the two past performance issues, but disagree regarding the other two discussions issues.

It is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful, equitable, and not misleading. *ACS Gov’t Solutions*

Group, Inc., B-282098 et al., June 2, 1999, 99-1 CPD ¶ 106 at 13-14. Discussions may not mislead offerors and must identify deficiencies and significant proposal weaknesses that could reasonably be addressed in a manner to materially enhance the offeror's potential for receiving award. Lockheed Martin Corp., B-293679 et al., May 27, 2004, 2004 CPD ¶ 115 at 7. Agencies are also required to provide an offeror with an opportunity to address adverse past performance information to which the offeror has not previously had an opportunity to respond. FAR § 15.306(d)(3); Apptis, Inc., B-299457 et al., May 23, 2007, 2008 CPD ¶ 49 at 20.

1. Program management--organizational alignment

First, the protester argues that the agency conducted unfair discussions because it conducted two rounds of discussions with NGS concerning organizational alignment, an element of the program management subfactor of the technical understanding evaluation factor, but did not provide a similar opportunity for WPS. We find no merit to this argument.

The agency found a "significant weakness" with "high risk" in NGS's initial proposal based on the awardee's approach of utilizing "Shared MAC Functional Services," which, as described above, organizes contract functions into service groups that can be shared among different contracts. The agency assigned the significant weakness because "NGS does not specify in the technical proposal how many MAC contracts it is proposing to integrate into its management structure," and did not explain how the offeror would ensure that the shared services approach would avoid poor performance in jurisdiction 8. AR, Tab 51, TEP Consensus Evaluation, at 1.

The agency requested that NGS address this issue in discussions. In its first response, NGS revised its organization chart and explained how the shared services approach would involve dedicated staff for jurisdiction 8. Id. As a result of these discussions, the agency revised the "significant weakness" to a "meets requirements" rating. Id. Despite concluding that the significant weakness was addressed, the agency asked NGS to further address risks, mitigation strategies and benefits from the shared services approach. AR, Tab 45, NGS Second Discussions Questions, at 3. The agency states that the additional questions were asked because the agency viewed the shared services approach as new and untested, and had ongoing concerns regarding this approach. SAR at 28-29.

Based on the second discussions response, the agency concluded that NGS's proposal merited a strength, but also a medium risk rating, based on the untested nature of the shared services approach. AR, Tab 51, TEP Consensus Evaluation, at 1-2. This strength was the primary basis for NGS's rating of "very good" under the program management evaluation factor. AR, Tab 49, TEP Final Report, at 22.

CMS states that it did not conduct discussions with WPS concerning organizational alignment because the protester had no weakness in this area. The protester argues that the agency conducted unfair discussions because, after the first round of

discussions, NGS had resolved its weakness and therefore did not require additional discussions. WPS argues that the two offerors were at that point in the same position, and that the agency should have provided the protester an equal opportunity for discussions concerning organizational alignment.

We do not think that there was any requirement for the agency to conduct discussions with the protester regarding this matter because WPS was not in a situation similar to that of NGS. WPS did not have a similar approach or feature concerning organizational alignment that required discussions. Instead, its proposal had a “meets requirements” rating, with no distinguishing features. In this regard, while discussions must be meaningful, leading an offeror into the areas of its proposal requiring amplification or revision, the agency is not required to “spoon-feed” an offeror as to each and every item that could be raised to improve its proposal. S³ LTD, B-287019.2 et al., Sept. 14, 2001, 2001 CPD ¶ 165 at 4.

We think this situation is different from that where both offerors had the same area of weakness or concern, and where the agency conducts additional rounds of discussions with one offeror but not another. See, e.g., Front Line Apparel Group, B-295989, June 1, 2005, 2005 CPD ¶ 116 at 4. Here, although NGS received additional discussions concerning organizational alignment during the second round of discussions, the agency also conducted discussions with WPS regarding numerous areas of its proposal that required further discussions. On this record, we think the agency reasonably tailored its discussions to each offeror’s unique situation, and we therefore find no basis to sustain the protest.

2. Past performance--systems security and appeals

Next, WPS contends that CMS identified two weaknesses concerning its past performance, but did not conduct discussions regarding these issues. The protester argues that the agency’s failure to provide discussions was unreasonable because the agency conducted discussions with NGS regarding one of these issues, and because both issues were areas of adverse past performance that the protester had not had an opportunity to address.¹⁴ We disagree with the protester concerning the systems security weakness, but agree concerning the appeals weakness.

¹⁴ As an initial matter, the agency argues that it was not required to conduct discussions regarding either of the two past performance weaknesses because it did not regard the past performance concerns as “adverse” information. Agency Responses to GAO Questions, Apr. 14, 2009, at 9; Supp. CO Statement, Apr. 14, 2009, at 1. This argument is contradicted by the record, as the agency clearly considered both issues to indicate negative past performance by WPS. An agency cannot escape its obligations to conduct discussions in a reasonable manner by characterizing an evaluated weakness in past performance as something less than adverse. See Dismas Charities, Inc., B-292091, June 25, 2003, 2003 CPD ¶ 125 at 8.

The agency rated WPS's past performance as very good overall, with 22 strengths, 32 meets, and 2 weaknesses. AR, Tab 53, PPEP Consensus Report for WPS, at 1-15. The two weaknesses were in the areas of appeals, under the quality of service subfactor, and systems security, under the business relations subfactor.

With regard to the systems security weakness, the PPEP stated that WPS had a "High Overall Risk rating in systems security," and that there was a trend over the prior 3 fiscal years of performance which "suggests a lack of effective management and business practices and systems." AR, Tab 53, PPEP Consensus Report for WPS, at 15. The agency did not conduct discussions with WPS regarding this weakness. The agency conducted discussions with NGS, however, and provided NGS an opportunity to address a similar weakness concerning a "High Overall Risk rating in systems security . . . [which] suggests a lack of effective management and business practices and systems." AR, Tab 54, PPEP Consensus Report for NGS, at 28.

The agency does not dispute that it conducted discussions with NGS and not with WPS regarding systems security as part of the jurisdiction 8 competition. See SAR at 46-47. The agency argues, however, that WPS was not prejudiced by this unequal treatment, nor was the agency obligated to identify this as adverse past performance during discussions, because the agency would not have given WPS a higher evaluation rating even if the protester had received an opportunity to resolve this weakness. In this regard, the agency notes that it discussed this issue with WPS during the course of the jurisdiction 6 procurement, which took place during the same time as the jurisdiction 8 procurement. See AR, Tab 130, WPS Discussions Questions for Jurisdiction 6, at 69. In that exchange, the protester was asked to explain how it was addressing the agency's concerns regarding WPS's systems security risk; the protester responded that it had been advised of the high-risk findings in October 2007, and "immediately created and implemented our corrective action plans." Id.

In its jurisdiction 6 evaluation, the agency concluded that the systems security weakness was not resolved because although "WPS considers the findings closed and has filed the appropriate reports with CMS to formally close them . . . CMS has not yet done so." AR, Tab 131, Jurisdiction 6 PPEP Consensus Report for WPS, at 16.

CMS explains that it did not accept WPS's response to the discussions question in jurisdiction 6--just as it did not accept NGS's response to the same question in jurisdiction 8--because the PPEP did not view the systems security issue as eligible for resolution since the agency's review had not been completed at the time of the evaluation. PPEP Chair Second Decl. ¶¶ 26-27. Notably, the same PPEP and chair conducted the evaluations in both jurisdictions 6 and 8. In effect, the agency argues that a second chance for WPS to address this issue in the jurisdiction 8 procurement would not have changed the agency's view that the concerns with either offeror's systems security could not be resolved through discussions.

While we agree that CMS did not provide both offerors the same opportunity for discussions in jurisdiction 8, the record shows that WPS was not prejudiced by the agency's actions. In this regard, the record here shows that the PPEP viewed this matter as one that offerors could not resolve through discussions because CMS had not yet completed the reviews necessary to validate offerors' corrective action plans. More importantly, WPS does not explain how it would have responded differently or more thoroughly if it had been provided an opportunity to address the issue again in the jurisdiction 8 procurement. At best, the protester argues that the jurisdiction 8 CO might have asked different discussions questions, leading WPS to respond in a different manner. Protester's Comments on SAR at 64. We think that the protester's argument posits a scenario too remote and speculative to demonstrate that it was prejudiced here. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see also Statistica, Inc. v. Christopher, 102 F.3d 1577, 1681 (Fed. Cir. 1996).

Next, with regard to the appeals weakness, the PPEP stated that WPS's past performance raised a number of concerns. The PPEP found that WPS had performance issues regarding WPS/Mutual¹⁵ Part A appeals processing "that have required CMS oversight." AR, Tab 52, PPEP Final Report, at 7-8. Next, the agency found that although WPS met timeliness standards for Medicare Part B appeals reports in FY 2007, WPS "submitted several requests for relief for accuracy of reporting on the 2592 report [concerning appeals activities] and hearing officer standards." Id. at 8. The evaluation also cited concerns regarding the quality of decision letters in FY 2007. Id. Finally, the agency cited ongoing concerns regarding Medicare Part B appeals in FY 2008 that were reported by agency staff in July 2008. AR, Tab 53, PPEP Consensus Report for WPS, at 8. Based on these concerns, the agency assigned WPS a weakness under the quality of service subfactor of the past performance evaluation factor. Id. AR, Tab 52, PPEP Final Report, at 8.

The agency did not discuss this weakness with the protester. CMS argues, however, that WPS was "well aware that most of the issues existed" as a result of exchanges concerning WPS's performance on other Medicare contracts. Agency Response to GAO Questions, Apr. 14, 2009, at 11. In this regard, CMS contends that it was not obligated to raise this concern with WPS during discussions because the protester submitted requests for waivers of the accuracy standards relating to the 2592 reports in 2006 and 2007. AR, Tab 54, at 8. The record shows that WPS submitted two waiver requests in December and November 2006, which were granted by CMS. See AR, Tabs 136-37, WPS Waiver Requests and CMS Responses.

However, WPS submitted an additional waiver request in July 2007, which was denied on August 17, 2007, and a January 2008 request that was denied on February

¹⁵ The protester acquired parts of Mutual of Omaha's Medicare Part A business; references to "WPS/Mutual" refer to the past performance for this portion of WPS. See, e.g., AR, Tab 52, PPEP Final Report, at 7-8.

8, 2008. See AR, Tabs 138-40, WPS Waiver Requests and Responses. With regard to the denied waiver requests, the agency advised WPS that it was not excused from the requirement for timely processing of appeals, advised WPS of the specific bases for the denials, and provided a point of contact for additional questions. CMS also argues that it discussed concerns regarding WPS/Mutual's appeals processing during a 2007 report of contractor performance (RCP) review, which is annual performance feedback provided by CMS to contractors. Agency Response to GAO Questions, Apr. 14, 2009, at 10-11. In the 2007 RCP for WPS/Mutual, the agency states that it noted concerns regarding some timeliness issues, while rating the contractor as meeting expectations overall. Id.; SAR at 42-43.

Although agencies must advise offerors during discussions of adverse past performance regarding which the offeror has not yet had an opportunity to respond, we have held that an offeror is not entitled to discussions if it has previously had an opportunity to address the issue during other exchanges with the agency. Del-Jen Int'l Corp., B- 297960, May 5, 2006, 2006 CPD ¶ 81 at 6. Here, two of WPS's requests for waivers of the 2592 report standards were denied by the agency in writing prior to the submission of FPRs, with written explanations for the denials, and a point of contact for additional questions. See AR, Tabs 138-40, WPS Waiver Requests and Responses. On this record, we agree with the agency that it was not required to provide WPS an opportunity to address this adverse past performance.

However, the record shows that the weakness assessed in WPS's past performance regarding appeals was broader than the issues discussed in the waiver requests or the 2007 RCP reviews. Specifically, although the PPEP report stated that "the quality of the decision letters was poor in FY 2007" for Medicare Part B, AR, Tab 52, PPEP Report, at 8, the agency does not dispute that this issue was not identified in any prior exchanges between the agency and WPS. Agency Response to GAO Questions, Apr. 14, 2009, at 11. Next, although the agency states that it raised some concerns regarding WPS/Mutual's appeals processing in the 2007 RCP, the agency acknowledges that the past performance information here is based on "more recent information." Id. at 10-11. Finally, the agency concedes that it did not note any problems with WPS's performance of Medicare Part B appeals in its 2007 RCP (which was separate from the RCP for WPS/Mutual), and did not raise the new concerns regarding appeals performance in 2008 cited in the PPEP report during discussions here. Id.

In sum, we think that the record shows that a substantial portion of the agency's basis for assessing a weakness for WPS's past performance in the area of appeals was based on adverse past performance information that the protester had not had an opportunity to address, and we sustain the protest on this basis.

E. Prejudice with Respect to Third Offeror

As discussed above, we conclude that NGS's evaluated costs, once the errors reviewed in this decision are corrected, may well have been higher than WPS's

evaluated costs, and the other evaluation flaws call into question the agency's conclusion that these two offerors were technically equal. CMS noted in a request to dismiss the protest, however, that the third offeror was also rated technically equal to WPS and NGS, and that offeror's evaluated cost was lower than WPS's evaluated cost. On that basis, CMS questions whether WPS's chances of obtaining the contract--rather than having it shift from NGS to the third offeror--were actually affected by any errors alleged by the protester. As noted above, the agency did not provide any information concerning the evaluation of the third offeror's technical proposal, aside from its overall technical rating, and it is true that the protester has not challenged any aspect of the evaluation of the third, unnamed offeror. Nonetheless, and despite the third offeror's lower evaluated costs, we conclude that WPS was prejudiced by the agency's flawed evaluations here because WPS's proposal might merit a higher technical rating (which was more important than cost), either through discussions or through a reevaluation of the offerors' technical and past performance proposals, which would make it superior to the third offeror's proposal; that is, but for CMS's actions, the protester would have had a substantial chance of receiving the award. See McDonald-Bradley, *supra*, at 3; Statistica, 102 F.3d at 1681.

CONCLUSION AND RECOMMENDATION

We recommend that CMS reevaluate the offerors' cost and technical proposals, and past performance, consistent with our decision. The agency should also conduct discussions with WPS to address the area of adverse past performance discussed above, and should consider whether uncertainty about the rates NGS will pay its existing staff will require reopening discussions. The agency should obtain revised proposals from offerors, and make a new selection decision. If NGS is not found to offer the best value to the government, the agency should terminate NGS's contract for the convenience of the government.

We also recommend that WPS be reimbursed the costs of filing and pursuing this protest, including reasonable attorney fees. 4 C.F.R. § 21.8(d)(1) (2008). WPS should submit its certified claim for costs, detailing the time expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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