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Decision

Matter of: TrailBlazer Health Enterprises, LLC

File: B-406175; B-406175.2

Date: March 1, 2012

Kevin C. Dwyer, Esq., W. Jay DeVecchio, Esq., Daniel E. Chudd, Esq., Edward Jackson, Esq., Jennifer L. Dlugosz, Esq., and Zoila E. Hinson, Esq., Jenner & Block LLP, for the protester.

Daniel P. Graham, Esq., Paul F. Khoury, Esq., Kathryn Bucher, Esq., Brian G. Walsh, Esq., Tracye Winfrey Howard, Esq., Tara L. Ward, Esq., Craig Smith, Esq., and Katherine Rose McDonald, Esq., Wiley Rein LLP, for Highmark Medicare Services, Inc., an intervenor.

Jeffri Pierre, Esq. and Anthony E. Marrone, Esq., Department of Health and Human Services, for the agency.

Louis A. Chiarella, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's cost realism evaluation of protester's proposal is denied where the record demonstrates that agency's conclusions were reasonable.
 2. Protest that contracting agency improperly evaluated offerors' technical proposals is denied where the record shows that the evaluation was reasonable and consistent with the stated evaluation criteria.
 3. Protest challenging the agency's failure to take awardee's divestiture from its parent company into account as part of the technical and cost evaluations is denied where, at the time of contract award, the divestiture had not occurred and was only one possible response to an apparent organizational conflict of interest.
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DECISION

TrailBlazer Health Enterprises, LLC, of Dallas, Texas, protests the award of a contract to Highmark Medicare Services, Inc. (HMS), of Camp Hill, Pennsylvania, under request for proposals (RFP) No. CMS-RFP-2011-0005, issued by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), to obtain a Medicare Administrative Contractor (MAC) to provide certain health insurance benefit administrative services. The protester asserts that

CMS's evaluation of the technical and cost proposals, and the resulting selection of HMS's proposal for award, were unreasonable. Among other things, TrailBlazer contends that the agency unreasonably failed to consider the impact of the impending divestiture of HMS by its parent company as part of the evaluation of the awardee's proposal.

We deny the protest.

BACKGROUND

In December 2003, Congress enacted the Medicare Prescription Drug Improvement and Modernization Act of 2003 (MMA), 42 U.S.C. §§ 1395kk *et seq.* (2006). The MMA required, among other things, that CMS use competitive procurement procedures pursuant to the Federal Acquisition Regulation (FAR) to obtain Medicare claims processing services. Prior to the enactment of the MMA, CMS had relied on noncompetitively-selected "fiscal intermediaries" for processing Medicare claims from institutional providers, such as hospitals and nursing facilities, under Part A of the Medicare program, and "carriers" for processing Medicare claims from professional providers, such as physicians and diagnostics laboratories, under Part B of the Medicare program.¹ Pursuant to the MMA, the replacement contractors are referred to as "Medicare Administrative Contractors," or MACs.

The RFP, issued on March 4, 2011, contemplated the award of a cost-plus-award-fee contract for a base year with four 1-year options for MAC services for a specified geographic area, or "jurisdiction," in the United States. In general terms, the statement of work (SOW) requires the contractor to provide all the necessary personnel, material, equipment, and facilities to perform the specified MAC services. In this regard, the MAC will "receive and control Medicare claims from institutional and professional providers, suppliers, and beneficiaries within its jurisdiction and will perform standard or required editing on these claims to determine whether the claims are complete and should be paid." RFP, attach. J-1, SOW at 14. The MAC will also "calculate Medicare payment amounts and arrange for remittance of these payments to the appropriate party"; "enroll new providers"; "conduct redeterminations on appeals of claims"; "operate a Provider Customer Service Program . . . that educates providers about the Medicare program and responds to provider telephone and written inquiries"; "respond to complex inquiries from Beneficiary Contact Centers"; and "make coverage decisions for new procedures and devices in local areas." *Id.* at 15.

This protest concerns the award of a contract for Jurisdiction H (JH), which includes the administration of the Medicare Part A and Part B fee-for-service program for the

¹ See Highmark Medicare Servs., Inc., et al., B-401062.5 et al., Oct. 29, 2010, 2010 CPD ¶ 285 at 3 n.2 for additional details regarding the MMA.

states of Arkansas, Colorado, Louisiana, Mississippi, New Mexico, Oklahoma, and Texas.² In JH, the MAC contractor will service approximately 1,300 Medicare hospitals and 147,000 physicians and other Medicare Part B healthcare providers. RFP § L at 91.

The RFP provided that contract award would be based on cost and three technical evaluation factors: past performance (40% relative weight); technical understanding (40%); and implementation (20%). The RFP further provided that the agency would consider four common aspects—customer service, financial management, operational excellence, and innovations and technology—as part of the evaluation of each non-cost factor. *Id.*, § M at 137-38. The noncost factors, when combined, were significantly more important than cost, and contract award was to be made to the offeror whose proposal represented the “best value” to the government all factors considered. *Id.* at 131-38.

Four offerors, including TrailBlazer and HMS, submitted written proposals by the April 12 closing date. The offerors also delivered oral presentations to the agency which supplemented their written submissions (the scope and format of the oral presentations were prescribed by the RFP). A CMS business evaluation panel (BEP) evaluated the offerors’ cost proposals for reasonableness and realism. A separate agency technical evaluation panel (TEP) evaluated offerors’ technical proposals.

In addition to identifying proposal strengths, weaknesses, and deficiencies, the TEP employed a convoluted “level of confidence assessment rating” (LOCAR) scheme³ that resulted in an overall letter grade, which was accomplished through the following steps. The evaluators first assigned a LOCAR score ranging from .1 (lowest) to .9 (highest) under each evaluation factor. An offeror’s LOCAR score for each evaluation factor was then multiplied by the evaluation factor’s weight (*e.g.*, a

² In the first phase of its Medicare modernization program, CMS divided the United States into fifteen separate jurisdictions for the purposes of acquiring and providing MAC services. The agency, believing that efficiency and effectiveness could be increased through consolidation, has now combined legacy Jurisdiction 4 (J4) and Jurisdiction 7 (J7) to form the new JH. Contracting Officer’s Statement, Dec. 21, 2011, at 1. TrailBlazer was the incumbent MAC services contractor for J4 (consisting of Texas, New Mexico, Colorado, and Oklahoma), while HMS is the current MAC services contractor for Jurisdiction 12 (J12) (consisting of Delaware, Maryland, New Jersey, Pennsylvania, and the District of Columbia).

³ According to the contracting agency, the LOCAR method was “based on the idea of determining a proposal’s likelihood of successful performance” under each evaluation criterion. Agency Report (AR), Tab 3, Source Selection Plan, app. A, at 20. Specifically, LOCAR scores were to indicate whether the proposal was more likely to succeed than fail, equally likely to succeed or fail, or more likely to fail than succeed. *Id.*

.8 LOCAR score for implementation x 20% = .16). The three weighted LOCAR scores were then added together to calculate a total weighted LOCAR score, and then converted to a percentage score (0 – 100%) by dividing the total LOCAR score by .9, the highest possible score. Finally, an offeror’s percentage score was converted into a corresponding letter grade. AR, Tab 8, TEP Report, at 5-6.

The final evaluation ratings and costs of the TrailBlazer and HMS proposals were as follows:

Factor	TrailBlazer	HMS
Past Performance (40%)	.71	.75
Technical Understanding (40%)	.7	.9
Implementation (20%)	.8	.8
Total LOCAR Score	.72	.82
Overall	80% (B-)	91% (A-)
Proposed Cost	\$428,695,103	\$406,473,150
Evaluated Cost	\$452,392,351	\$442,889,899

AR, Tab 8, TEP Report, at 11; Tab 9, BEP Report for TrailBlazer, at 3; Tab 10, BEP Report for HMS, at 3.

The contracting officer, who also served as the source selection authority (SSA) here, then determined that HMS’s proposal offered significant qualitative advantages over those of the other offerors, including TrailBlazer’s, under both the implementation and technical understanding factors. (The SSA found the differences between proposals in the area of past performance were not a significant distinguishing issue). AR, Tab 11, Source Selection Decision, at 37-43. The SSA also determined that HMS’s proposal had an evaluated cost that was more than \$9 million lower than TrailBlazer’s. *Id.* at 36. The SSA concluded that HMS’s highest technically-rated, lowest evaluated-cost proposal represented the best value to the government. Upon learning of the resulting, November 7 award of the JH MAC services contract to HMS, and after receiving a debriefing, TrailBlazer filed this protest.

DISCUSSION

TrailBlazer raises numerous challenges to the evaluation of the offerors’ cost and technical proposals. In addition, TrailBlazer maintains that CMS failed to properly consider the impending divestiture of HMS by its parent company as part of the agency’s evaluation of the awardee’s cost and technical proposals. Although we do not specifically address all of TrailBlazer’s arguments about the evaluation of the proposals, we have fully considered all of them and find that they afford no basis on which to sustain the protest.

Cost Realism Evaluation

TrailBlazer challenges CMS's cost realism evaluation of its proposal. The protester asserts that each of its proposed innovations and productivity gains was adequately supported, and therefore it was unreasonable for CMS to make adjustments to TrailBlazer's proposed direct labor amounts and costs. TrailBlazer also alleges that the agency treated offerors unequally in the cost realism evaluation.

The solicitation provided offerors with JH workload estimates for the various MAC services tasks (e.g., Part A Claims, Part B Redeterminations). RFP § L at 88-100. The RFP required that the business (cost) proposals include a detailed explanation of the offeror's labor rationale, describing how the basis of the proposed labor hours had been determined (e.g., historical data, technical experience, etc.). Id. § L at 117. Further, the RFP required that offerors, as part of the innovation section of their technical proposals,

discuss what each proposed innovation will do and describe the overall benefit to the Government. . . . Where applicable, the Offeror shall crosswalk the benefit to the line items/functional areas of its cost proposal. . . . Where level of effort savings are proposed for innovations, the Offeror shall separately identify the hourly savings to each functional area . . . by labor category . . . , and by [subcontract line item number].

Id., § L at 108-09. The solicitation provided that the agency would then evaluate the realism of each offeror's proposed cost in accordance with FAR § 15.404-1(d). Id., § M at 131.

TrailBlazer set forth in its cost proposal the various labor categories, staffing levels, direct labor rates, other direct costs, and indirect rates it deemed necessary to perform the JH workload estimates. TrailBlazer's proposal also included the claimed work productivity rates on which the offeror had based its proposed staffing levels. TrailBlazer asserted that its claimed productivity rates were based on its historic productivity rates, as adjusted for the various improvements and innovations detailed in both its cost and technical proposals. AR, Tab 5, TrailBlazer Proposal, Vol. IIB, Business Proposal, at 115-204.

The BEP evaluated TrailBlazer's proposed direct labor hour amounts and productivity rates by comparing them to the offeror's historical levels, specifically, TrailBlazer's J4 MAC services contract for the 2010-11 time period. In those instances where TrailBlazer appeared to have proposed productivity rates that differed significantly from what the offeror had historically achieved, the agency reviewed the discrepancy to determine whether there was a valid explanation (e.g., a change in work requirements, economics of scale, proposed innovation, etc.). When the agency found TrailBlazer's explanation for a claimed productivity rate to be insufficient, the BEP made corresponding adjustments to the proposed direct labor

hours based on the offeror's historic productivity rates and the JH-estimated workloads. In this regard, the BEP found that TrailBlazer's proposed direct labor hour amounts in certain areas--Part A Claims, Part B Claims, Part A Redeterminations, Part B Redeterminations, Part B Reopenings, and Part B Medical Reviews--were based on unsupported productivity rates that differed substantially from the offeror's historic ones. This resulted in a total upward adjustment to TrailBlazer's proposal of approximately \$23 million in direct and associated indirect costs.⁴ AR, Tab 9, BEP Report for TrailBlazer, at 3-6.

When an agency evaluates proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated cost of contract performance is not considered controlling since, regardless of the costs proposed by the offeror, the government is bound to pay the contractor its actual and allowable costs. Metro Machine Corp., B-402567, B-402567.2, June 3, 2010, 2010 CPD ¶ 132 at 6; Honeywell Tech. Solutions, Inc., B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 17; see FAR § 16.301. As a result, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract costs are likely to be under the offeror's unique technical approach, assuming reasonable economy and efficiency. FAR §§ 15.305(a)(1), 15.404-1(d)(1), (2); The Futures Group Int'l, B-281274.2, Mar. 3, 1999, 2000 CPD ¶ 147 at 3. A cost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror's cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with the unique methods of performance and materials described in the offeror's proposal. FAR § 15.404-1(d)(1); Advanced Commc'n Sys., Inc., B-283650 et al., Dec. 16, 1999, 2000 CPD ¶ 3 at 5. Based on the results of the cost realism analysis, an offeror's proposed costs should be adjusted when appropriate. FAR § 15.404-1(d)(2)(ii). The end product of a cost realism analysis is the total estimated cost that the agency realistically expects to pay for the offeror's proposed effort, as it is the estimated cost and not the offeror's proposed cost that must be the basis of the agency's source selection determination. Magellan Health Servs., B-298912, Jan. 5, 2007, 2007 CPD ¶ 81 at 13 n.13.

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 agency's conclusions about the most probable costs under an

⁴ The agency utilized the same process for the cost realism evaluation of HMS's proposal. In some instances the BEP found that HMS's proposed innovations and approach adequately supported the claimed productivity rates and in other instances they did not. The BEP likewise utilized HMS's historical productivity rates (under its J12 MAC services contract) when determining the amount of the resulting cost adjustments. The BEP made a total upward adjustment of approximately \$36 million to HMS's proposed costs. AR, Tab 10, BEP Report for HMS, at 1-5.

offeror's proposal are reasonable and realistic in view of the cost information reasonably available to the agency as of the time of its evaluation. Metro Mach. Corp., *supra*. We review an agency's judgment in this area only to see that the agency's cost realism evaluation was reasonably based and not arbitrary, and adequately documented. Honeywell Tech. Solutions, Inc., B-400771; B-400771.2 Jan. 27, 2009, 2009 CPD ¶ 49 at 18; Jacobs COGEMA, LLC, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16 at 26.

TrailBlazer does not dispute that CMS properly identified both the offeror's proposed and historic productivity rates in each instance where the agency found that a cost adjustment was warranted. Nor does the protester challenge how the BEP computed the amounts of the various cost adjustments--determining how many additional direct labor hours would be required to perform the estimated JH-workloads based on TrailBlazer's historic productivity rates. Rather, TrailBlazer argues that because its proposed productivity gains were fully supported and explained, it was unreasonable for CMS to make any associated cost adjustments to its proposal.

We have reviewed all of the protester's numerous arguments regarding the propriety of the agency's cost realism evaluation of its proposal. Although we do not address each specific adjustment, we find CMS's cost realism evaluation of TrailBlazer's proposal to be reasonable and consistent with the solicitation's evaluation scheme.

As a preliminary matter, we find that the agency's methodology for determining the realism of TrailBlazer's proposed direct labor hours was a reasonable one. Again, the CMS cost evaluators examined TrailBlazer's proposed productivity rates, on a task-by-task basis, by comparing them to the offeror's own historical experience (*i.e.*, TrailBlazer's J4 MAC services contract for the 2010-11 performance period). Where TrailBlazer's proposed productivity rate differed significantly from the offeror's historic one, CMS then considered the sufficiency of the offeror's explanation regarding whether the innovation would result in the claimed cost savings and/or productivity gain. Finally, the agency used the offeror's historic productivity rate when determining the amount of any resulting cost adjustment. In our view, such a methodology appears well suited to a full and fair consideration of the unique characteristics of the offeror's proposed approach.

Beyond the general methodology, we also find that the specific adjustments made by CMS to TrailBlazer's cost proposal were reasonable. For example, with regard to the Part B Redeterminations task--redeterminations are essentially appeals of initial Medicare claims determinations, performed at the request of a party to the initial determination, RFP, attach. J-1, SOW, at 140-41--TrailBlazer's proposed direct labor

hours were based on a productivity rate of [DELETED] redeterminations per hour.⁵ AR, Tab 5, TrailBlazer Proposal, Vol. IIB, Business Proposal, at 163. The BEP found, by contrast, that TrailBlazer's historic productivity rate for this same task was only [DELETED] redeterminations per hour. The agency then reviewed the sufficiency of TrailBlazer's rationale for the substantial increase in productivity, focusing on TrailBlazer's proposed [DELETED] innovation. The CMS evaluators concluded, however, that TrailBlazer's proposal failed to adequately explain how the [DELETED] innovation would result in the claimed level of productivity and/or labor savings. AR, Tab 9, BEP Report for TrailBlazer, attach. C, Cost Findings, at 7. As a result, the BEP determined that a total increase of 325,487 direct labor hours was warranted based on TrailBlazer's historic productivity rate. *Id.*, attach. D, TEB Cost Adjustment Calculations, at 8-9.

In challenging the agency's adjustment, TrailBlazer argues that its proposal fully described the various features of [DELETED], and that a number of its cost saving innovations flowed from [DELETED]. TrailBlazer also claims that, as explained in the proposal, its research showed that the [DELETED] innovation would reduce staffing levels by approximately 44.5 FTEs. Supp. Protest, Jan. 3, 2012, at 28-30.

As noted by the protester, TrailBlazer's proposal described the properties of the [DELETED] and the efficiencies the offeror believed would result across functional areas during contract performance (e.g., [DELETED]), resulting in a claimed savings of either 62,330.56 direct labor hours or approximately 44.5 FTEs (depending on the proposal reference). AR, Tab 5, TrailBlazer Proposal, Vol. I, Technical Proposal, at 15-22; Vol. IIB, Business Proposal, at 169. However, we find that the evaluators reasonably determined that TrailBlazer had not adequately supported how the alleged labor hour savings had been derived or how the proposed innovation would result in the claimed savings. AR, Tab 8, TEP Report, at 14-15. Specifically, nothing in TrailBlazer's proposal demonstrated how it had determined that the [DELETED] innovation would result in the claimed labor hour savings, while likewise nothing in TrailBlazer's proposal demonstrated how the offeror would achieve a Part B Redetermination productivity rate of [DELETED] per hour when its historic rate for performing this function was [DELETED] per hour. As the solicitation required offerors to adequately support the adequacy of their proposed costs, and TrailBlazer failed to do so, we find reasonable CMS's decision to base its cost realism evaluation of TrailBlazer's direct labor hours on the offeror's historic productivity rates.

TrailBlazer also asserts that CMS improperly ignored the fact that the offeror had experienced regular productivity gains during the performance of its incumbent J4 contract. TrailBlazer contends that it reasonably projected that it would continue

⁵ The Part B Redeterminations represented the single largest cost adjustment made to TrailBlazer's proposal--\$[DELETED] of the total \$[DELETED] adjustment to the offeror's direct labor costs.

this trend, and that these projections were both reasonable and fully supported by TrailBlazer's proposal.

We find no merit in TrailBlazer's argument. As a preliminary matter, the record indicates that CMS used TrailBlazer's most recent historic productivity rates as the basis of comparison when assessing the realism of the offeror's proposed productivity rates. In doing so, the agency effectively captured (rather than ignored) TrailBlazer's previous productivity gains. Moreover, TrailBlazer represented that its historic efficiency gains were [DELETED]% and [DELETED]% for Medicare Part A and Part B transactions, respectively. AR, Tab 5, TrailBlazer Proposal, Vol. IIB, Business Proposal, at 120. TrailBlazer, however, proposed productivity increases that were substantially greater than its historic ones. For example, for Medicare Part B Redeterminations, TrailBlazer proposed an increase from [DELETED] per hour to [DELETED] per hour, for an increase of 143%. AR, Tab 9, TEP Report for TrailBlazer, attach. C, Cost Findings, at 7. Similarly, for Medicare Part A Claims, TrailBlazer proposed an increase from [DELETED] per hour to [DELETED] per hour, for an increase of 43%. *Id.* at 5. Quite simply, TrailBlazer's historic productivity gains were not what the offeror actually proposed, and CMS reasonably considered the realism of the productivity rates which TrailBlazer proposed vis-à-vis the offeror's own historic rates.

TrailBlazer argues that the agency's cost realism treated offerors unequally. Specifically, the protester alleges that because HMS's proposed innovations provided no better support for the resulting cost savings than TrailBlazer's, but the agency nonetheless made no offsetting cost adjustments to HMS's proposal, CMS treated the offerors disparately.

It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. Brican Inc., B-402602, June 17, 2010, 2010 CPD ¶ 141 at 4; BAE Technical Servs., Inc., B-296699, Oct. 5, 2005, 2006 CPD ¶ 91 at 5. This includes subjecting offerors' proposals to equal standards, or scrutiny, when assessing the adequacy of the proof provided to substantiate a proposal's claims. BAE Technical Servs., Inc., *supra*; Lockheed Martin Info. Sys., B-292836 *et al.*, Dec. 18, 2003, 2003 CPD ¶ 230 at 12.

TrailBlazer has made no showing of disparate treatment in the evaluation. Instead, the record indicates that the agency reasonably evaluated each proposal according to its merits. In this regard, HMS's proposal identified [DELETED] innovations, the primary one being its [DELETED]. AR, Tab 6, HMS Proposal, Vol. I, Technical Proposal, at 6-12. The [DELETED] is [DELETED]. *Id.* HMS indicated that it was already in the process of implementing the [DELETED] as part of its J12 MAC services contract, and had conducted research, which indicated that [DELETED]% of

Medicare providers would [DELETED].⁶ *Id.* at 6-8; Tab 8B, Oral Presentation Questions and Answers, at 9. Based on this research, HMS estimated that the [DELETED] would result in, among other things, a [DELETED]% reduction in [DELETED]. AR, Tab 6, HMS Proposal, Vol. I, Technical Proposal, at 6-8. HMS then calculated (in labor hours and dollars) the savings that would result from the [DELETED] workload. *Id.*, Vol. IIB, Business Proposal, § F.1.h, at 3.

As part of its cost realism evaluation of HMS, the agency reasonably concluded that many of the claimed cost savings that would result from the offeror's innovations were adequately explained and supported. For example, with specific regard to the [DELETED], the evaluators found HMS's rationale for a [DELETED]% reduction in [DELETED] to be "well thought out and reasonable," in light of the provider survey results that suggested [DELETED]. AR, Tab 8, TEP Report, at 42. The cost evaluators also found that the stated capabilities of HMS's [DELETED] were "feasible, realistic, and expected to be approved for implementation under HMS's J12 contract later in the year." AR, Tab 10, BEP Report for HMS, attach. C, Cost Findings, at 2.

Thus, the agency reasonably determined that HMS's overall cost savings were generally adequately supported while TrailBlazer's were not. The evaluators found that HMS had performed surveys regarding the rates at which Medicare providers would [DELETED]. In light of these survey results, which suggested [DELETED]% reduction in [DELETED], the agency found HMS's proposed [DELETED]% reduction to be both reasonable and adequately supported. By contrast, TrailBlazer's proposal essentially provided only an unsupported guess of the labor hour savings that it believed would flow from its planned innovations.

Furthermore, we note that contrary to what the protester suggests, the agency did not accept that HMS's innovations would always result in the claimed cost savings. In the areas of Part B Provider Enrollment, Claims Examiner, and Medical Review, the BEP found that while the HMS innovation would increase productivity, the offeror's proposal still did not adequately support the proposed productivity rate, and made labor hour adjustments based on the awardee's historic productivity levels. *Id.* at 9-13. Overall, the BEP made a total upward adjustment of approximately \$36 million to HMS's proposed cost. AR, Tab 10, BEP Report for HMS, at 1-5.

In sum, the difference in the cost realism adjustments to the HMS and TrailBlazer proposals here was not the result of unequal treatment by the agency, but instead

⁶ As part of its oral presentation, the awardee explained that,

HMS believes that [DELETED].

AR, Tab 8B, Oral Presentation Questions and Answers, at 9.

resulted from the agency's recognition of differences with respect to the offerors' substantiation for their proposed approaches and the underlying facts.⁷

Non-Cost Evaluation

TrailBlazer challenges the propriety of the agency's evaluation of the HMS and TrailBlazer proposals under the non-cost (technical understanding, implementation, and past performance) evaluation factors. The protester alleges that had CMS conducted a reasonable evaluation, TrailBlazer's proposal would have been rated as significantly superior to HMS's proposal.

The evaluation of proposals, including the determination of the relative merits of proposals, is primarily a matter within the contracting agency's discretion, since the agency is responsible for defining its needs and the best method of accommodating them. Highmark Medicare Servs., Inc., et al., *supra*, at 12. In reviewing an agency's evaluation, we will not reevaluate the proposals, but will examine the record of the evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria as well as with procurement law and regulation. *Id.* A protester's mere disagreement with a procuring agency's judgment is insufficient to establish that the agency acted unreasonably. See Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5.

We have reviewed all of the protester's numerous arguments regarding the propriety of the agency's evaluation of the offerors' proposals under the technical evaluation factors. We do not find the agency's evaluation of proposals under the non-cost factors to be unreasonable or inconsistent with the solicitation's evaluation scheme. We discuss some examples below.

Implementation Factor

TrailBlazer challenges the evaluation of HMS's proposal under the implementation factor. The protester argues that HMS should have been assessed weaknesses for both its staffing plan and its lack of familiarity with the JH-specific requirements. TrailBlazer also argues that CMS failed to give incumbent TrailBlazer sufficient credit for both its "no-risk" staffing approach and familiarity with the jurisdiction JH-specific requirements.

⁷ The SSA also considered the adequately-supported nature of HMS's claimed productivity gains to be one of many discriminators between offerors' proposals under the technical understanding evaluation factor. AR, Tab 11, Source Selection Decision, at 40. The record reflects, however, that the SSA found the strength of HMS's [DELETED] and the unique capabilities of the [DELETED] to be the principal technical advantages possessed by HMS over TrailBlazer's proposal, advantages which TrailBlazer does not protest. *Id.* at 40-41.

The SOW identified seven requirements for the MAC services contract that were specific to jurisdiction JH: 1) centralized billing for mass immunizers; 2) Indian Health Services (IHS); 3) Rural Community Hospital Demonstration; 4) Veterans Affairs Medicare equivalent remittance advice project; 5) frontier extended stay clinic demonstration; 6) “pay for performance” check-writing; and 7) high risk fraud and abuse areas. RFP, attach. J-1, SOW, at 20. The RFP also required that offerors’ proposals demonstrate a clear understanding of the JH MAC contract implementation activities as well as the ability to resolve issues that could arise during transition. *Id.*, § L at 111. Both HMS’s written technical proposal and oral presentation addressed project implementation, including the awardee’s staffing plan and its understanding of the JH-specific requirements. AR, Tab 6, HMS Proposal, Vol. I, Technical Proposal, at 17-50, Vol. IV, Oral Presentation, at 10-50, 96-177.

The TEP found that HMS’s proposal contained detailed staffing, contingency, and risk mitigation plans for implementation. HMS’s proposal provided, among other things, a “clear, detailed staffing plan for each segment of the transition noting key hiring, training, and operational start dates.” AR, Tab 8, TEP Report, at 38. The agency evaluators identified as another strength HMS’s understanding and implementation planning for the JH-specific workload requirements: “[t]he Offeror clearly discussed, for example, having a focused outreach and education plan for IHS providers and how HMS would develop relationships with these specific stakeholders.” *Id.* The details provided in these areas “gave the TEP confidence that [HMS] had a well thought out implementation approach specifically tailored to JH” requirements. *Id.*

TrailBlazer argues that CMS’s evaluation failed to adequately consider the risks posed by HMS’s need to hire a substantial number of new and inexperienced employees. Despite the alleged severe risks to contract performance, TrailBlazer contends, CMS failed to undertake any evaluation of the feasibility of HMS’s staffing plan.

We find the agency’s evaluation of HMS’s staffing plan to be reasonable. In this regard, the TEP found HMS’s staffing plan to be clear and detailed for each segment of the implementation. Specifically, in its oral presentation, the awardee detailed all the various sources from which it would rely to obtain the necessary employees for the JH contract: [DELETED]. AR, Tab 6, HMS Proposal, Vol. IV, Oral Presentation, at 16. HMS also provided its estimates of the number of current HMS employees and new hires (by performance period, by task, and by labor category), its recruitment strategy, its training strategy, its staffing deployment timeline, how it would ensure sufficient staffing was in place, and its staffing contingency plans. *Id.* at 17-46. The record indicates that, in light of this detail, the TEP did not view HMS’s staffing plan to be unduly risky. Supp. AR, Jan. 27, 2012, at 4-5; AR, Tab 8, TEP Report, at 38. TrailBlazer has not shown this judgment to be unreasonable.

Nor has the protester shown the agency's evaluation of HMS regarding the JH-specific requirements to be unreasonable or inconsistent with the stated evaluation criteria. As a preliminary matter, while the RFP required the agency to evaluate an offeror's implementation approach, prior experience with the JH-specific requirements was not mandated. Further, HMS's proposal detailed its understanding and implementation planning for the JH-specific requirements. AR, Tab 6, HMS Proposal, Vol. I, Technical Proposal, at 17, 23-24, Vol. IV, Oral Presentation, at 96, 98, 102, 104, 123, 135-36, 158, 160. For example, with regard to the IHS requirement, HMS's proposal stated as follows:

We will also utilize that experience [of servicing the needs of a specialized provider group located throughout a large geographic area] and existing strategies to service the [IHS] providers and Tribal Organizations. [DELETED].

Id., Vol. I, Technical Proposal, at 23-24. It was this understanding of, and planning for, the JH-specific requirements which the TEP reasonably found merited recognition in the evaluation of HMS's proposal.

TrailBlazer suggests that the agency ignored and failed to assess HMS's proposal with respect to the six remaining JH-specific requirements. The agency, however, reports that while the evaluators highlighted HMS's implementation planning with regard to IHS—which was clearly the JH-specific requirement considered to be the most “unique, technically demanding, and politically sensitive”—the TEP considered all aspects of HMS's proposal, including the remaining six JH-specific requirements, and found that HMS's proposal materials (written and oral) demonstrated a satisfactory understanding and approach toward each evaluation aspect. AR, Tab 8, TEP Report, at 11-12; Supp. AR, Jan. 27, 2012, at 8. TrailBlazer has not shown the agency's position in this regard to be in error or otherwise unreasonable.

We also find no merit to TrailBlazer's assertion that CMS failed to give the protester sufficient credit for both its staffing approach and its familiarity with the JH-specific requirements. The TEP found that TrailBlazer's J4 incumbency status (which represented 74% of the JH workload requirements by claims volume) would provide benefits to the government during implementation—a virtual “implementation in place” that would minimize disruption and ensure continuity of operations to Medicare beneficiaries and providers. AR, Tab 8, TEP Report, at 12. The TEP identified, as another strength, TrailBlazer's experience administering the unique JH-specific requirements. Id.

The SSA, as part of the best value determination, also recognized the various strengths in TrailBlazer's proposal resulting from its incumbent contractor status. AR, Tab 11, Source Selection Decision, at 38. The SSA concluded, however, that HMS's proposal nevertheless had a slight advantage over TrailBlazer's resulting from the fact that HMS had proposed two unique system consolidation and integration activities not normally expected during implementation which would result in a

more efficient operating environment for claims processing: (1) the [DELETED]; and (2) the [DELETED]. *Id.* at 37-38. It was HMS's proactive and innovative approach, as compared to TrailBlazer's more passive risk mitigation emphasis, which the SSA found to be a discriminator between the offerors' proposals. *Id.* at 38. TrailBlazer has not shown this judgment to be unreasonable.

Past Performance

TrailBlazer challenges the agency's evaluation of its past performance. The agency evaluators identified four strengths and four weaknesses in TrailBlazer's past performance. The SSA, in turn, concluded that past performance was not a discriminator on which the award decision was based since all offerors had reasonably good performance records and had demonstrated their ability to perform MAC services contracts similar in scope and nature the JH requirements. AR, Tab 8, TEP Report, at 16-20, Tab 11, Source Selection Decision, at 41-42. TrailBlazer, however, contends that the agency's adverse past performance findings were inaccurate and based on outdated information, and that CMS failed to give the protester proper credit for numerous examples of positive past performance.

The evaluation of an offeror's past performance is a matter of agency discretion, which we will not find improper unless unreasonable or inconsistent with the solicitation's evaluation criteria. *Concepts & Strategies, Inc.*, B-405930, Jan. 12, 2012, 2012 CPD ¶ __ at 7; *National Beef Packing Co.*, B-296534, Sept. 1, 2005, 2005 CPD ¶ 168 at 4. Further, the evaluation of past performance, by its very nature, is subjective, and we will not substitute our judgment for reasonably based evaluation ratings; an offeror's mere disagreement with an agency's evaluation judgments does not demonstrate that those judgments are unreasonable. *FN Mfg., LLC*, B-402059.4, B-402059.5, Mar. 22, 2010, 2010 CPD ¶ 104 at 7; *MFM Lamey Group, LLC*, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10. As detailed below, our review of the record leads us to conclude that CMS's past performance evaluation of the protester was unobjectionable.

For example, TrailBlazer challenges the weakness assigned its past performance related to the quality assurance surveillance plan (QASP) reviews from its J4 MAC services contract. The TEP found that, in the area of Medicare Secondary Payer (MSP),⁸ TrailBlazer only met [DELETED]% of the performance metrics during the most recent performance period, which constituted a downward trend for the contractor and unfavorably compared with the national average for the same period of 61%. AR, Tab 8, TEP Report, at 17. In this regard, the fact that TrailBlazer's performance as measured by the applicable performance metrics was significantly below the national average led to a concern on the part of the TEP that TrailBlazer might be unable to meet contract requirements in this functional area and would require greater oversight. *Id.* at 17-18.

⁸ MSP is the term used by Medicare when Medicare is not responsible for paying first.

TrailBlazer does not dispute the MSP QASP rating of [DELETED]%. Rather, the protester argues that the agency failed to properly consider TrailBlazer's corrective actions in this area, which it claims fully addressed its performance shortcoming. Notwithstanding its claimed corrective action, we find no basis to question the assignment of a weakness on account of TrailBlazer's inability to maintain standards in the MSP area, with performance significantly below the national average. Id.

TrailBlazer also challenges the weakness assigned to its past performance related to its comprehensive error rate testing (CERT) scores. In this regard, CMS implemented the CERT program to measure improper payments by MAC contractors in the Medicare fee-for-service program. The TEP found that TrailBlazer's CERT scores for its J4 MAC services contract were substandard; while the 2010 national averages were 6.9% and 12.9% for Part A and Part B claims, respectively, TrailBlazer's corresponding CERT scores were [DELETED]% and [DELETED]%, thus indicating an above-average rate of improper payments. The TEP concluded that TrailBlazer's financial management of program benefit funds may not be as strong as the agency expected. Id. at 18.

TrailBlazer argues that the evaluators improperly failed to consider the most recent, 2011 CERT scores, which indicated that the protester had achieved an overall error rate of [DELETED]% as compared to the national average of 8.6%. It is undisputed, however, that the 2011 CERT scores were not issued by CMS until November 15 (and contractors did not receive their individual CERT scores until the beginning of December), after the November 7 contract award decision had been made here. We find nothing objectionable in the agency's failure to consider information that was not available to it at the time it performed the past performance evaluation. CMJR, LLC d/b/a Mokatron, B-405170, Sept. 7, 2011, 2011 CPD ¶ 175 at 8; see Honolulu Shipyard, Inc., B-291760, Feb. 11, 2003, 2003 CPD ¶ 47 at 6. Further, while TrailBlazer suggests that the TEP members would have had access to unreleased 2011 CERT scores (at least in draft form) when performing their evaluation, the agency reports that draft CERT scores for 2011 were not accessible throughout CMS (and that neither the contracting officer nor the TEP knew of the 2011 CERT scores during the source selection process). Supp. AR, Jan. 27, 2012, at 16. As such, the record does not demonstrate that outside information was so "close at hand" regarding TrailBlazer's prior performance that the agency either improperly ignored or erroneously failed to obtain the information. See East-West Indus., Inc., B-297391.2, B-297391.3, July 19, 2006, 2006 CPD ¶ 161 at 6.

Divestiture of HMS From its Parent Company

TrailBlazer protests that CMS's evaluation of HMS was improper insofar as the agency failed to consider the impact of the impending divestiture of HMS by its parent company on contract performance and on HMS's proposed approach and probable cost. The protester alleges that because the agency knew when the source selection was made that HMS would be sold, and because HMS's evaluation did not

consider whether and to what extent the divestiture would affect HMS's cost and technical proposals, the award decision was improper.

A source selection decision based on inconsistent or inaccurate information concerning the relative merits of the offerors' proposals is not reasonable. Martin Elecs., Inc., B-290846.3, B-290846.4, Dec. 23, 2002, 2003 CPD ¶ 6 at 8; New Breed Leasing Corp., B-259328, Mar. 24, 1995, 96-2 CPD ¶ 84 at 4. However, in situations where a change to the information within an offeror's proposal is speculative, or does not occur until after the source selection decision, the agency's decision not to consider the information does not cast doubt on the propriety of its evaluation. Metro Machine Corp., *supra*, at 9-10; SAMS El Segundo, LLC, B-291620, B-291620.2, Feb. 3, 2003, 2003 CPD ¶ 44 at 23.

The following sequence of events is relevant to the protest here. As set forth above, HMS submitted its proposal for the JH MAC services contract by the April 4, 2011 closing date. HMS's technical proposal indicated that its parent company, Highmark, Inc., was [DELETED], and that HMS would use the services of Highmark for [DELETED]. AR, Tab 6, HMS Proposal, Vol. I, Technical Proposal, at 42, Vol. IV, Oral Presentation, at 16. HMS's cost proposal also stated that Highmark performed [DELETED] and various [DELETED] services for HMS. *Id.*, Vol. IIB, Business Proposal, §§ F, H.

On June 28, Highmark announced its intent to purchase the West Penn Allegheny Health System (WPAHS), a group of hospitals operating in the Pittsburgh and western Pennsylvania area.⁹ Highmark's purchase of WPAHS was subject to various governmental and regulatory agency approvals before becoming final. As HMS was the current MAC services contractor for J12, which included Pennsylvania, Highmark's purchase of WPAHS resulted in an apparent organizational conflict of interest (OCI) for HMS since it would be administering the Medicare claims in instances where WPAHS was the Medicare provider.¹⁰

Sometime in July, CMS held a meeting with HMS senior personnel regarding J12 performance during which Highmark's purchase of WPAHS was discussed. According to the declarations submitted by agency personnel, CMS officials did not

⁹ Highmark described its relationship with WPAHS as a potential "affiliation," which involved an immediate financial commitment of \$50 million and a total financial commitment of up to \$475 million. The parties definitized their affiliation on October 31. Irrespective of terminology, we find that Highmark acquired a significant financial interest in WPAHS as of June 28.

¹⁰ This situation appears to represent an "impaired objectivity" OCI, where the primary concern is that a government contractor would be in the position of evaluating itself or a related entity, which would cast doubt on the contractor's ability to render impartial performance to the government.

believe that Highmark's divestiture of HMS was the only possible OCI mitigation strategy. Further, according to agency personnel, at no time did CMS communicate to HMS (or Highmark) that divestiture was the only acceptable OCI mitigation strategy.¹¹ Rather, the agency's expressed position on the WPAHS-related OCI was essentially one of "waiting and seeing" what HMS proposed. AR, Tab 17E, Declaration of CMS Director of the Office of Acquisition and Grants Management, Feb. 10, 2012; Tab 17D, Declaration of J12 Contracting Officer, Feb. 2, 2012.

On August 12, in accordance with the terms of its J12 MAC services contract, HMS submitted an updated OCI plan. HMS informed the CMS J12 contracting officer of Highmark's financial interest in WPAHS, the apparent OCI caused by this interest, and HMS's planned mitigation. Specifically, HMS detailed the various organizational barriers and internal controls (e.g., "benchmarking" measures) it would utilize to provide assurance that HMS was objectively performing its MAC contractual responsibilities and not favoring WPAHS. Importantly, HMS's OCI plan did not envision divestiture. AR, Tab 16a, HMS OCI Plan, Aug. 12, 2011, at 10-11. HMS submitted another updated OCI plan on September 30 with the same mitigation strategy for the WPAHS-related OCI. The cognizant contracting officer never passed judgment on the adequacy or acceptability of HMS's mitigation strategy, as Highmark's purchase of WPAHS was still pending government and regulatory agency approval. AR, Tab 17D, Declaration of J12 Contracting Officer, Feb. 2, 2012, at 1.

According to HMS's President, in mid-August, Highmark began exploring whether interest existed in a sale of HMS. Several entities expressed interest in a potential purchase of HMS, and beginning in October, Highmark provided two prospective purchasers with summary information about HMS's operations. HMS informed the agency of Highmark's exploration of a possible sale of HMS. AR, Tab 17C, Declaration of HMS President, Jan. 31, 2012, at 2. However, just as the agency never indicated or directed that HMS be divested, HMS never stated to CMS that divestiture was being pursued to the exclusion of other possible OCI mitigation strategies (no such decision had been made). *Id.* at 3.

On November 11--4 days after the JH contract award was made--Highmark permitted Diversified Service Options, Inc. (DSO) to conduct a "due diligence" audit of HMS's sensitive financial and operational information as part of a potential sale. Both the due diligence review and stock purchase agreement negotiations continued until December 7 when the parties reached agreement. Highmark announced the planned divestiture of HMS on December 8, and the sale closed on January 3, 2012. *Id.* at 2-3.

¹¹ On this matter, we received declarations from the CMS Director of the Office of Acquisition and Grants Management, the J12 contracting officer, and the JH contracting officer.

TrailBlazer does not dispute that Highmark's divestiture of HMS had not in fact taken place prior to contract award, or contend that the awardee failed to adequately inform CMS of known information regarding the divestiture. Rather, TrailBlazer alleges that the agency knew at the time of the source selection decision of HMS's impending divestiture because CMS had advised HMS that nothing short of divestiture would mitigate the WPAHS-related OCI.

For the reasons stated below, we find the fact that CMS did not take HMS's possible divestiture from Highmark into account as part of the evaluation of JH proposals does not provide a basis on which to sustain the protest. The record reflects that at no time did CMS officials—including the J12 contracting officer who was the individual responsible for identifying and resolving OCIs on that contract, see FAR § 9.504—ever tell HMS or Highmark that divestiture was required. Further, at no time did the agency indicate to HMS (or Highmark) that nothing short of divestiture would be acceptable. While Highmark's purchase of WPAHS created an apparent OCI for HMS for J12, there were a number of possible alternative OCI mitigation options available to HMS short of divestiture by Highmark, and the J12 contracting officer never indicated the strategies that HMS had proposed were unacceptable. Similarly, the record indicates that HMS never believed that divestiture was the only option available to mitigate the OCI (as evidenced by its OCI plan), and it never informed CMS that it had decided to pursue divestiture to the exclusion of other mitigation strategies.

Furthermore, although TrailBlazer characterizes the HMS divestiture as "impending" at the time of the JH contract award, the record indicates that it was, at best, only a possibility. As detailed above, as of the date of contract award, Highmark had provided two prospective purchasers with summary-level information about HMS's operations and engaged in discussions about the potential terms on which HMS might be sold. It was not until after the JH contract award, however, that Highmark first agreed to permit prospective buyer DSO to conduct a "due diligence" audit of HMS; DSO was given access to sensitive HMS financial and operational information in order that DSO could make an informed decision about whether it desired to proceed with further discussions; Highmark and DSO conducted negotiations regarding the terms of a stock purchase agreement; a stock purchase agreement was actually executed; the diligence review was completed; and the sale of HMS to DSO was closed. AR, Tab 17C, Declaration of HMS President, Jan. 31, 2012, at 2-3.

In sum, we find that the protester has failed to establish that CMS "knew" prior to contract award that HMS's divestiture was either certain or required: CMS never directed or ordered HMS's divestiture; HMS never considered divestiture to be the only mitigation option available to it for the J12 OCI; and the HMS buyer and seller did not conclude negotiations and reach agreement until after JH contract award

was made. In these circumstances, we find unobjectionable the fact that CMS did not take into account in the evaluation the possible divestiture of HMS by its parent company.

The protest is denied.

Lynn H. Gibson
General Counsel