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Decision

Matter of: TriWest Healthcare Alliance Corporation

File: B-401652.12; B-401652.13

Date: July 2, 2012

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DIGEST

1. Protest that agency misevaluated proposals and made an unreasonable source selection decision is denied where record shows that agency's evaluation and source selection were reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations.

2. Agency evaluators' decision not to credit protester's proposal with approximately \$200 million in cost savings for the firm's additional network discount guarantee related to active duty service member beneficiaries was reasonable where agency analyzed all of the information regarding the discount and concluded that the additional guarantee would not result in quantifiable cost savings above those already obtained by operation of law as a result of the offeror's primary discount.

3. Protest alleging that, in its evaluation of the protester's proposal, the agency unreasonably ignored information that was "too close at hand" is denied where the

protester fails to demonstrate that the information in question was relevant, or that the agency evaluators knew or should have known of the information.

4. Protester's assertions challenging the agency's past performance evaluation reflect mere disagreement with the agency's reasonable judgments where the record establishes that the agency comprehensively considered relevant past performance information for both offerors, recognized positive and negative aspects of both offerors' past performance, and reasonably determined that the proposals were essentially equal.

5. In making a best value source selection decision, an agency may properly rely on a single evaluation factor--even a lower-weighted factor--if it is determined to be a key discriminator.

6. A patent ambiguity must be protested prior to the next closing time for the submission of proposals in order to be considered timely.

DECISION

TriWest Healthcare Alliance Corporation, of Phoenix, Arizona, protests the Department of Defense TRICARE Management Activity's (TMA) award of a contract to UnitedHealth Military & Veterans Services (United), of Minnetonka, Minnesota, under request for proposals (RFP) No. H94002-07-R-0007 to provide T-3 TRICARE managed health care support services for the West Region of the United States. TriWest, the incumbent contractor, challenges TMA's technical, past performance, and price evaluations, along with the source selection decision, and argues that United should be excluded from the competition based on common ownership of its stock and the stock of other TRICARE contractors.

We deny the protests.

BACKGROUND

TRICARE is a managed health care program implemented by the Department of Defense (DOD) for active-duty and retired members of the uniformed services, their dependents, and survivors. TRICARE is an integrated network, which combines resources of the Military Health System's direct medical care services, largely through government-operated military treatment facilities (MTF), and a network of civilian health care providers operating under managed care support (MCS) contracts. TMA is the DOD field activity responsible for awarding and managing these contracts.

Currently, there are approximately 9.7 million TRICARE-eligible beneficiaries, and the program is divided into three regions (North, South, and West). The West

Region, which is the subject of this protest,¹ covers approximately 2.9 million TRICARE beneficiaries.² Contracting Officer's Statement at 2. Under TRICARE, eligible beneficiaries have three health care options: TRICARE Standard (a standard fee-for-service plan), TRICARE Extra (a network of preferred providers for Standard plan beneficiaries), and TRICARE Prime (a health maintenance organization (HMO)-type plan, in which enrollees are required to use MTFs or network providers, or pay higher out-of-network co-payments).

History of this Procurement

On March 24, 2008, TMA issued an RFP for the third generation of MCS contracts, referred to as T-3. On July 13, 2009, Aetna Government Health Plans was awarded the contract for the North Region, United was awarded the contract for the South Region, and TriWest was awarded the contract for the West Region. All three awards were challenged by the respective disappointed bidders. In the North Region, the award to Aetna was ultimately terminated following a GAO bid protest, and the contract was awarded to Health Net, Inc. In the South Region, the award to United was successfully challenged by Humana Military Healthcare Services, Inc. In the West Region, United filed an agency-level protest on July 22, 2009, challenging TriWest's award. The agency held United's protest in abeyance while the protests concerning the South Region were pending, as United's West Region protest would have become moot if it had prevailed in the South.

In response to GAO's decision sustaining Humana's protest, the agency amended the solicitation, reevaluated proposals, and awarded the South Region contract to Humana. After the South region contract was awarded to Humana, United's agency-level protest in the West Region was revived. On April 6, 2011, the agency partially sustained United's agency-level protest and took corrective action by reopening the procurement and issuing RFP Amendment 0014. The RFP amendment permitted offerors to submit proposed guaranteed network provider discounts and to revise all other parts of their proposals, with the exception of past performance.

¹ Contracts for the North and South Regions were recently awarded.

² The West Region covers care for beneficiaries residing in the following areas: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Iowa (except Rock Island Arsenal area), Kansas, Minnesota, Missouri (except St. Louis area), Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas (area of West Texas only), Utah, Washington, and Wyoming.

Terms of the RFP

The RFP contemplated the award of contracts (one for each Region--North, South, and West) with a base transition-in period, plus five 1-year option periods of actual health care delivery, and a 1-year transition-out option period. RFP at 26. In describing the requirements, the T-3 solicitation set forth five objectives: (1) optimization of the delivery of health care services in the direct military-provided health care system for all military health system beneficiaries; (2) beneficiary satisfaction at the highest level possible throughout the period of performance through delivery of world-class health care and customer friendly program services; (3) attainment of "best value health care" as defined in the TRICARE Operations Manual; (4) provision of fully operational services and systems at the start of health care delivery and minimal disruption to beneficiaries and MTFs; and (5) full and real time access to contractor maintained data to support the DOD's financial planning, health systems planning, medical resource management, clinical management, clinical research, and contract administration activities. RFP at 15.

According to the RFP, a prime contractor could not receive an award for more than one of the three contract regions. Id. at 97. The agency was to select "the proposal representing the best value (which will include the risk associated with the proposal) to the Government . . . consistent with furnishing high quality health care in a manner that protects the fiscal and other interests of the United States." Id. at 111. In this regard, the RFP set forth three evaluation factors: (1) technical approach, (2) past performance, and (3) price/cost. Technical approach was the most important factor, past performance was second, and price/cost was the least important factor. The technical approach and past performance factors, when combined, were significantly more important than the price/cost factor. Id. at 112.

Under the technical approach factor, the RFP identified the following evaluation subfactors, which were equal in terms of importance: (1) network development and maintenance; (2) referral management; (3) medical management; (4) enrollment; (5) beneficiary satisfaction/customer service; (6) claims processing; and (7) management functions. Id. at 111-12.

Regarding the evaluation of technical approach, the RFP provided that "[p]roposals will be evaluated on the basis of how well an offeror's proposed approach adequately describes their procedures, methods, and delivery of services that meet or exceed the Government's minimum requirements. . . . The Government will consider offers that commit to higher performance standard(s) or requirements, if the offeror clearly describes the added benefit to the Government." Id. at 112. As

part of the evaluation, the seven technical subfactors were to be assigned individual merit ratings, as well as risk ratings.³ Id.

In connection with each offeror's technical approach, the RFP contemplated the proposal of guaranteed network discounts applicable to the two underwritten populations of beneficiaries.⁴ With regard to such discounts, the RFP provided that:

A guaranteed network provider discount shall consist of an overall average percentage discount for care by civilian network providers for each of the two underwritten populations ["Contractor Prime network enrollees" and "MTF Prime plus non-enrolled beneficiaries"] even if the percentage explicitly proposed for each of the two populations is the same value. A network provider discount guarantee proposed by the offeror will be measured as an overall average percentage discount for care by civilian network providers, using the same measurement methodology and data specifications

³ TMA employed the following rating scheme for the purpose of evaluating technical merit:

Blue (Exceptional) – Exceeds minimum requirements in a manner beneficial to the Government; has no weaknesses. The offer has exceeded some requirements and is at least acceptable in all other requirements. Where exceeded, it must be documented by a strength(s) that is of clear benefit to the Government.

Green (Acceptable) – Meets minimum requirements. Any requirements exceeded in the offer are offset by one or more weaknesses. Weaknesses are readily correctable.

Yellow (Marginal) – Fails to meet minimum requirements and contains significant weaknesses. The offer is correctable without a major proposal revision.

Red (Unacceptable) – Fails to meet minimum requirements and contains significant weaknesses that are not correctable without a major proposal revision.

Agency Report (AR), Tab 5, Source Selection Evaluation Guide (SSEG), at 12-13.

⁴ The solicitation defined the underwritten populations--that is, the populations for which the contractor bears risk--as "Contractor Prime network enrollees" and "MTF Prime enrollees plus non-enrolled beneficiaries." RFP at 49-50, 101.

described for the discount incentive provision in [RFP] Section H.2.3.1⁵].

RFP at 101.

Offerors were also permitted to propose additional discounts, beyond the primary discounts discussed above, subject to the following RFP provisions:

An offeror who offers any discounts as described above may offer additional guaranteed network provider discounts beyond those set forth in the format above. If an offeror chooses to offer such additional network discounts, the offeror must provide adequate language that may be incorporated into the contract as an enforceable provision, which must describe measurement methodology, post award administration, and any impact/connection to existing incentives.

Id. at 102.

Network discount guarantees were to be evaluated under technical subfactor 1, network development and maintenance, and would be considered only if the offeror committed to incorporating the guaranteed discounts into the awarded contract, and the guarantee was otherwise determined to be a strength by the agency. Id. at 101, 113. Additionally, the RFP provided that, in considering such additional discounts, the agency would consider information submitted by the offeror, including enforceable contract language regarding any “impact/connection to existing incentives,” as well as the agency’s “own historical and relevant information.” RFP section L at 102; RFP section M at 113. Finally, the RFP stated that network provider discounts would be considered as part of the best value decision, which would consider projected healthcare cost savings associated with proposed network provider discounts; however, the cost savings would not be considered as an adjustment within the price/cost evaluation factor. RFP at 113.

With regard to past performance, the amended RFP informed offerors that the agency planned to rely on its previous past performance evaluations unless it discovered information that would cause the evaluators to question the initial 2009 evaluation. Id. at 115. With regard to the initial past performance submissions, the offerors were required to provide narratives describing their relevant past

⁵ Section H.2.3.1 of the RFP states: “Network Discount Incentive. The purpose of this incentive is to encourage Contractors to proactively negotiate discounts with network providers and thereby reduce underwritten health care costs. The incentive will be calculated separately for two different categories of beneficiaries. The first category includes all Contractor Prime network enrollees and the second category consists of all MTF Prime enrollees and non-enrolled beneficiaries.” RFP at 51.

performance, and to submit their five largest relevant contracts performed during the past 3 years. Id. at 104-05. These requirements also applied to first tier subcontractors.⁶ Offerors were further required to submit completed past performance questionnaires for each of the five contracts. For offerors and any first tier subcontractors without any relevant past performance information, the RFP indicated that the agency would consider relevant information of a parent organization or consortium member, considering the amount of involvement the parent organization or consortium member would have in the daily operations of the offeror. Id. at 105.

The RFP specified that the agency would “determine how well an offeror has performed in the past on similar relevant work and then assess a performance confidence rating relative to the offeror’s ability to successfully perform the requirements of this solicitation.” RFP at 115. In evaluating the past performance information, TMA contemplated examining the “degree to which the work performed is relevant to the T-3 contract, and . . . how well the work was done.” AR, Tab 5, Source Selection Evaluation Guide (SSEG), at 14. In considering the degree of relevance, the SSEG indicated that TMA would consider how closely related an offeror’s performance history was to the proposed functions and complexities under this solicitation, whether the work was recent, and the magnitude of the effort in terms of size. According to the SSEG, relevance would “increase as the size of the historical efforts increase.” Id. at 16. In addition, the relevance of first tier subcontractors’ past performance was to be based on those tasks/functions the subcontractor was proposed to perform under the RFP.⁷ The SSEG provided that,

⁶ The RFP defined a first tier subcontractor as a company with a direct contractual relationship with the offeror and whose total contract price exceeds \$100 million, or a subcontractor who has direct responsibility for providing/authorizing health care, managing or directing the health care of TRICARE beneficiaries, or who provides claims processing services regardless of the price. RFP at 104.

⁷ TMA used the following rating scale in assessing relevance:

Relevant--Past/present performance effort is similar in functions/complexities, involves much of the same scope/magnitude of effort, is recent and includes performance in critical areas that this solicitation requires.

Somewhat Relevant--Past/present performance effort involves some of the key relevance factors, but not all, that this solicitation requires. For example, the past performance effort is similar in functions, but not at the same scope/magnitude.

(continued...)

after assessing the degree to which the past performance information was relevant, TMA would perform a qualitative assessment of the offeror's past performance information, identifying any positive or negative findings and assign a performance rating of exceptional, satisfactory, marginal, or unsatisfactory.⁸ Finally, each offeror would be assigned an overall past performance confidence rating of high confidence, confidence, little confidence, no confidence, or "not favorable and not unfavorable." AR, Tab 5, SSEG, at 20.

The RFP stated that, in updating its past performance evaluation pursuant to the amended solicitation, the agency would seek information from the offerors' points of contact for the past performance information used in the initial evaluation to determine whether there had been a change in performance. RFP at 115. If the agency found that there had been a change in performance since the prior evaluation, TMA would evaluate the new information in accordance with the RFP's evaluation criteria, and update the performance confidence rating accordingly. Id.

(...continued)

Not Relevant--Past/present performance effort involves little or none of the key relevance factors that this solicitation requires.

AR, Tab 5, SSEG, at 16.

⁸ The SSEG provided the following definitions for the adjectival ratings:

Exceptional--Performance met contract requirements and exceeded some. Where requirements were exceeded, the result was a significant benefit to the other contracting party. Contractual performance was accomplished with few, if any, minor problems. Any corrective actions taken by the contractor were prompt and effective.

Satisfactory--Performance met contract requirements. Contractual performance was accomplished with few, if any, minor problems. Any corrective actions taken by the contractor were prompt and effective.

Marginal--Performance met most contractual requirements. Contractual performance reflects problem(s) for which the contractor did not perform (or has not yet performed) corrective actions, or corrective actions were only marginally effective, or not fully implemented.

Unsatisfactory--Performance failed to meet most contractual requirements. Contractual performance contains serious problems for which the contractor's corrective actions, if any, were incorrect or ineffective.

AR, Tab 5, SSEG, at 17.

With regard to the price/cost evaluation factor, the RFP stated that the agency would evaluate the following cost-reimbursement and fixed-price contract line item numbers (CLINs):

CLIN 0001	Transition In
CLIN X001 & X002	Underwritten Health Care Cost
CLIN X003 & X004	Underwritten Health Care Fixed Fee
CLIN X005	Disease Management Cost
CLIN X006	Disease Management Fixed Fee
CLIN X007	Electronic Claims Processing
CLIN X008	Paper Claims Processing
CLIN X009	Per Member Per Month (PMPM) ⁹
CLIN X010	TRICARE Service Centers (TSC) ¹⁰
CLIN 9001	Transition Out
CLIN 9002	Transition Out Fixed Fee

AR, Tab 29, Final Cost Evaluation Report, at 7.¹¹

The CLINs were to be used as the basis for calculating the total evaluated price for each offeror.¹² AR, Tab 5, SSEG, at 21. With the exception of CLINs X001, X002, and X005, which concerned costs for underwritten health care and disease management, the RFP provided that TMA would evaluate the CLINs for price and cost reasonableness and perform realism analyses in accordance with the Federal Acquisition Regulation (FAR). With regard to the fixed price CLINs, the RFP provided that “in accordance with FAR 15.404-1(d)(3), cost realism analysis may be used on competitive fixed price contracts.” RFP at 116. For the underwritten health care and disease management CLINs, which were cost-reimbursable items, TMA provided cost estimates that offerors were required to use as “plug numbers” that were not comparatively evaluated.

⁹ The PMPM CLIN X009 was in essence a catch-all fixed-price line item, designed to include any proposed costs not otherwise identified under a separate CLIN. RFP at 106.

¹⁰ TRICARE Service Centers are facilities operated by the MSC contractor which allow beneficiaries to obtain walk-in customer service support in connection with their benefits under the TRICARE health program.

¹¹ CLINs X001, X002, and X005 were cost reimbursement CLINs; X003, X004, X006, and 9002 were fixed fee; 9001 was cost plus fixed fee; the remainder of the CLINs were fixed price. AR, Tab 29, Final Cost Evaluation Report, at 7.

¹² The total evaluated price did not include any of the award fee CLINs. AR, Tab 5, SSEG, at 21.

For the purpose of evaluating the price/cost factor, offerors were instructed to submit price and cost information, to include: forward pricing rate agreements or proposals; total cost summaries with cost element build-ups by CLIN; proposal estimating assumptions and pricing considerations; and a consolidated project manning summary segregating, by direct labor category, the direct labor hours with a display of hours by CLIN, and direct and indirect labor rates. RFP at 106-07.

Results of the Evaluation

United and TriWest both participated in the earlier round of competition in the West Region, and both submitted the required updates to their proposals in response to the amended RFP. The proposals were evaluated by a Source Selection Evaluation Board (SSEB) comprised of three teams: the technical evaluation team (TET), which evaluated technical proposals; the performance assessment group (PAG), which evaluated offerors’ past performance information; and the price/cost team, which analyzed the price/cost proposals. The teams’ findings were then compiled and summarized in the SSEB chair’s report, which made a best value award recommendation for consideration by the source selection authority (SSA). The SSA, with advice from a source selection advisory council (SSAC), made the final best value award decision.

TriWest’s and United’s final technical ratings, after a round of discussions, were as follows:

Technical Approach						
Subfactor	TriWest			United		
	Technical Merit	Proposal Risk	Strengths	Technical Merit	Proposal Risk	Strengths
Network Development & Maintenance	Blue	Low	4	Blue	Low	4
Referral Mgmt.	Blue	Low	3	Blue	Low	4
Medical Mgmt.	Blue	Low	3	Blue	Low	7
Enrollment	Blue	Low	1	Green	Low	0
Beneficiary Satisfaction/Customer Service	Blue	Low	3	Blue	Low	3
Claims Processing	Blue	Low	3	Blue	Low	3
Management Functions	Blue	Low	3	Blue	Low	2

AR, Tab 7, Source Selection Decision Document (SSDD), at 3-4.

With regard to the technical evaluation factor, agency evaluators found that United’s proposal was superior under the network development and maintenance subfactor. Specifically, the evaluators found that, although both proposals earned four

strengths, the benefits and value to the government provided by United's strengths were "significantly higher" than the benefits and value provided by the strengths proposed by TriWest. AR, Tab 9, SSEB Chair Report, at 18.

The evaluators noted the strengths that United received for its Premium Provider Program,¹³ Convenience Care Clinics,¹⁴ Centers of Excellence (COE) transplant program,¹⁵ and network provider discounts. AR Tab 9, SSEB Chair Report, at 18. With regard to network provider discounts, the agency evaluators found that United's proposal offered higher cost savings in the form of guaranteed network discounts than TriWest's proposal. Specifically, for purposes of comparison, the SSEB chair concluded that United's guaranteed discounts offered cost savings of approximately [deleted], while TriWest's proposal offered lower cost savings of approximately [deleted]. Id. The SSEB noted that, in addition to the primary discount guarantees for the underwritten populations, TriWest's proposal offered a discount guarantee for active duty service members (ADSM), which TriWest claimed carried an additional cost savings of approximately \$200 million.¹⁶ However, the agency did not consider TriWest's ADSM discount to create additional quantifiable savings because "the provider discounts automatically extend to ADSMs with or without a guarantee in place." Id. at 22. Therefore, TriWest was granted a strength for its ADSM discount guarantee, but the agency did not calculate an additional amount of cost savings associated with it.

¹³ The agency concluded that the Premium Provider Program identifies civilian providers who produce better outcomes and cost efficiency results through [deleted] cost effective care delivery, which will result in achieving better clinical outcomes and reduce overall health care costs. AR, Tab 7, SSDD, at 5.

¹⁴ The agency found that these clinics add a significant degree of flexibility with regard to the treatment of non-emergency care which will prevent relatively minor medical concerns from being treated in more expensive venues, such as, emergency room care. Therefore, the SSA believed that the clinics would improve access for TRICARE beneficiaries while decreasing beneficiary out-of-pocket expenses and government costs. AR, Tab 7, SSDD, at 5.

¹⁵ The agency found that United's COEs exceeded the national transplant survival rate by more than [deleted] percent, produced a [deleted] percent reduction in inappropriate transplants per every 1 million beneficiaries, and resulted in a [deleted] percent decrease in overall hospital length of stay. AR, Tab 9, SSEB Chair Report, at 23. The agency found that this strength would result in better outcomes and provide more cost-effective care, which would provide a benefit to TRICARE beneficiaries and cost savings to the government. Id.

¹⁶ TriWest's proposal calculated the additional cost savings to be \$199,621,253. AR, Tab 33, TriWest FPR, at 290.

Under the medical management subfactor, United's proposal was considered to be superior based on the value of its seven strengths, compared to TriWest's three strengths. Id. at 27. TriWest's proposal was considered to be superior under the enrollment subfactor, in which its proposal earned one strength for offering [deleted] of enrollment transactions.¹⁷ Id. at 31. With regard to the remaining subfactors, the agency found that the two proposals were essentially equal. Id. at 39.

With regard to past performance, the agency evaluators determined that the prior rating of "high confidence" should be retained for both offerors. In accordance with RFP amendment 14, the agency sought information from the offerors' past performance points of contact to determine whether there had been changes in their earlier performance assessments. The individual past performance ratings remained the same as the initial evaluations with the exception of TriWest's Tidewater, VA, Multi-Service Market, Multiple Award Task Order (MATO) Appointing contract.¹⁸ The agency changed TriWest's rating for the Tidewater MATO contract from "exceptional" to "satisfactory" based on updated past performance information that it received. AR, Tab 27, 2011 Addendum to PAG Report for TriWest at 1.

The agency also noted a qui tam Letter of Agreement (LOA) regarding TriWest's failure to pay LOA negotiated rates to non-network providers for certain health care encounters.¹⁹ The agency concluded that TriWest's administrative processes had failed to systematically identify LOA discounts but there was no indication that TriWest had attempted to profit from this action. The agency also found that TriWest failed to notify the government in a timely manner and failed to take corrective measures within a reasonable time period. The settlement agreement to resolve civil false claims allegations required TriWest to fully account to the TMA contacting officer for claims paid under LOAs and to identify recoupment. The agency noted that, in response to the qui tam action, TriWest had reimbursed the TRICARE program, taken action to recoup any outstanding amounts from paid providers, and installed enhanced assurances regarding the quality of its processing of claims subject to LOAs. The percentage of claims involved in this situation were below the contractual standard for the claims error rate of two percent. Despite the qui tam action, the agency determined that the original "exceptional" rating for this past performance reference was still applicable. Id. at 14.

¹⁷ United's proposal did not earn any strengths under this subfactor.

¹⁸ This contract was considered to be "somewhat relevant."

¹⁹ A qui tam action allows for a private individual with knowledge of past or present fraud committed against the federal government to bring suit on the government's behalf.

Regarding the third evaluation factor, price/cost, the agency stated that, in accordance with FAR § 15.404-1(d), it considered the realism of fixed price CLINs by reviewing and evaluating specific elements of each offeror's proposed cost estimate and prices to determine whether the estimated proposed cost elements were realistic for the work to be performed, reflected a clear understanding of the requirements, and were consistent with the unique methods of performance and materials described in the offeror's technical proposal. AR, Tab 29, Final Price-Cost Report, at 6, 22.

The agency had conducted a realism analysis of the FPRs initially submitted in this procurement; however given the length of time that had elapsed between the initial rounds of FPRs (FPR1) and the most recent round (FPR3), and in light of the fact that one of United's teaming partners changed its direct labor rate categories and its indirect rate structure for FPR3, the agency performed additional analyses. AR, Tab 29, Final Price-Cost Report, at 6. Specifically, the agency requested that DCAA perform labor salary verifications of the firm's payroll records and that DCMA perform an indirect rate audit of the firm. Id. at 6. The agency further noted that United's proposed labor salaries had been previously audited by DCAA in the context of the FPR1 evaluation. Id. at 20. As a result of its cost realism analysis of the fixed price CLINs, the agency concluded that no significant performance risk was identified for either offeror's price proposal. Id. at 1.

TriWest's final total evaluated price was \$20,299,082,750, while United's final total evaluated price was \$20,374,671,387, a difference of approximately \$75.6 million. AR, Tab 9, SSEB Chair Report, at 41.

The SSEB chair compiled the evaluators' findings and concluded that United's proposal was significantly technically superior to TriWest's, that past performance was essentially equal between the two proposals, and that United's price was only 0.37% higher based on the total evaluated price (or 6.3% higher based solely on the administrative price). The SSEB chair also concluded that the technical superiority of United's proposal outweighed the cost difference. AR, Tab 9, SSEB Chair Report, at 44. As a result, the SSEB chair recommended to the SSA that award be made to United as the best value offeror.

Source Selection Decision

The SSA concurred with the findings of the various evaluation teams. With regard to network discounts under the technical evaluation factor, the SSA stated that he did not consider TriWest's additional discount to create additional quantifiable savings, as explained below:

[T]he additional guarantee should not be considered as additive to the primary discount dollar amount above since the value of these Active Duty discounts are most likely to be obtained under the primary

guarantee already. (The primary discounts apply to the two underwritten groups, and while Active Duty beneficiaries are non-underwritten eligibles, discount rates offered by civilian network providers must also apply to care provided to Active Duty beneficiaries. Therefore, for either offeror, the Active Duty beneficiaries will receive the benefit of the guaranteed discount when they receive care from the network provider. Accordingly, since discounts automatically extend to Active Duty beneficiaries--with or without a guarantee in place--the savings associated with the secondary guarantee does not automatically increase the value of the primary guarantee.) The secondary guarantee does however limit the Government's risk in the unlikely event of drastic discount erosion over the life of the contract, and also provides an additional incentive to TriWest to maintain proposed discount levels.

AR, Tab 7, SSDD, at 6.

Overall, with regard to the technical evaluation factor, the SSA found that the two proposals each offered different strengths of varying value, but when viewed as a whole, the SSA concluded:

[United's] substantially higher guaranteed discounts with an approximately [deleted] advantage, their emphasis on including network providers of high quality that will produce better outcomes and greater cost efficiency, and their medical management tools with programs that identify and prioritize care for high-risk beneficiaries which will positively impact the health and wellness of TRICARE beneficiaries in the West Region, provides a technical proposal that is substantially superior to TriWest's proposal. UMVS' approach [deleted] to project high-risk beneficiaries, and their much more robust medical management approach, is far and away better than what TriWest has proposed.

AR, Tab 7, SSDD, at 12. With regard to past performance, the SSA concurred in the evaluators' determinations that TriWest and United were essentially equal. Id. at 16. The SSA also considered the \$75,588,637 price differential between the offerors, noting that TriWest had the lower total evaluated price. Based on these considerations, the SSA selected United for award. Id. at 19. After receiving notice of the award and a debriefing, TriWest filed this protest.

DISCUSSION

TriWest challenges various aspects of the agency's evaluation of technical approach, past performance, and price/cost, as well as the source selection decision. For example, TriWest protests: (1) the agency's evaluation of network

discounts; (2) the results of the agency's past performance evaluation; (3) the agency's price realism analysis of fixed price CLINs; (4) the source selection decision trade-off; and (5) the agency's decision not to exclude United from the competition for what TriWest argues is a failure to comply with the RFP's prohibition on any company receiving contracts for more than one of the three regions. As discussed below, we deny the protests.²⁰

Network Discounts

As set forth above, the RFP contemplated network provider discount guarantees consisting of a percentage discount for care provided by civilian network providers. RFP at 101. In this regard, the RFP further provided that cost savings associated with such network discounts would be considered under the technical approach evaluation factor, and in the best value decision, but not under the price/cost evaluation factor. RFP at 113. TriWest contends that the agency committed various errors in evaluating the offerors' network discounts, including: (1) the agency's failure to consider \$200 million of cost savings associated with TriWest's active duty service member (ADSM) discount; (2) the agency's improper acceptance of United's assumptions; (3) the agency's acceptance of United's aggressive approach to network provider discounts; (4) the agency's failure to consider the present value of cost savings associated with network discounts; and (5) the agency's mathematical error in computing the cost savings associated with network discounts. We address each of these arguments below.

TriWest's Discount for the ADSM Population

First, TriWest contends that the agency acted unreasonably by failing to include in the best value tradeoff the approximately \$200 million in savings associated with TriWest's discount guarantee for ADSMs.²¹ TriWest complains that, as a result, the

²⁰ TriWest's protest and supplemental protest raised numerous allegations. While our decision here does not specifically discuss each and every argument and/or variations of the arguments, we have considered all of TriWest's assertions and find no basis to sustain the protest.

²¹ The agency notes that ADSM health care costs were not a part of the evaluated price of the contract. AR at 82. Specifically, the agency notes the following with regard to ADSMs:

The ADSM population is a "non-underwritten" beneficiary population markedly different from the underwritten [populations]. Although ADSMs, by necessity, use the contractor's provider network they are not "CHAMPUS eligibles" as defined by the TRICARE regulation and policy. ADSM health care costs are expressly deemed by the RFP not to be part of the contractor's costs. ADSM health care costs are not "at

(continued...)

agency's comparison of TriWest's and United's network discount cost savings overstated the cost savings advantage for United, and improperly contributed to the agency's determination that United's proposal was superior under the technical approach evaluation factor.²² Protest at 18; Comments at 9-11.

The agency responds that each offeror was permitted to propose an additional discount only if it first proposed the guaranteed primary discounts applicable to the two underwritten populations.²³ See RFP at 98.²⁴ The agency contends that, in the context of the primary discount "backdrop," it reasonably concluded that TriWest's additional guarantee for the ADSM population would not result in additional quantifiable cost savings beyond the savings flowing from the guaranteed discount for the underwritten populations. Hearing Tr. at 121; AR, Tab 12, TET Report for TriWest Subfactor 1, at 38-39 (Kennell & Assoc. Report); Id. at 17, 23; AR, Tab 9, SSEB Chair Report, at 21; AR, Tab 7, SSDD, at 19. Specifically, the agency notes that, once a healthcare provider in either offeror's network agrees to provide a discount to one beneficiary population, the discount must be provided to all TRICARE beneficiary populations by operation of law. See AR, Tab 9, SSEB Chair Report, at 21 (citing 32 C.F.R. § 199.17(p)(4)(vi)²⁵ and TRICARE Operations

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risk" for the contractor. ADSM health care costs are funded through the Supplemental Healthcare Program, not the TRICARE contract.

Agency Post-Hearing Brief, at 26 n.11.

²² In order to specifically address this allegation, our Office conducted a hearing on the record, during which testimony was provided by the TET chair; a senior consultant with Kennell and Associates, a firm that assisted the agency in its evaluation of proposals; and a TriWest employee who serves as an advisor to the president and CEO of TriWest.

²³ As noted above, the underwritten populations were defined in the solicitation as "Contractor Prime network enrollees" and "MTF Prime enrollees plus non-enrolled beneficiaries." RFP at 101.

²⁴ "L.6.2.1.6.1.2 An offeror who offers any discounts as described above may offer additional guaranteed network provider discounts beyond those set forth in the format above. If an offeror chooses to offer such additional network discounts, the offeror must provide adequate language that may be incorporated into the contract as an enforceable provision, which must describe measurement methodology, post award administration, and any impact/connection to existing incentives."

²⁵ 32 C.F.R. § 199.17(p)(4)(vi) provides that all preferred providers must "agree to accept the same payment rates negotiated for Prime enrollees for any person whose care is reimbursable by the Department of Defense, including, for example, (continued...)"

Manual, Ch. 5, § 1, ¶ 2.4.1). As a result, the agency concluded that, even without TriWest's additional guarantee for the ADSM population, the discount rates negotiated by either offeror would automatically extend to care received by ADSMs, and the government would realize those cost savings. Hearing Tr. at 120-21. Accordingly, the agency concluded that "TriWest's [additional] guarantee of discounts for ADSM care does not automatically increase the value of TriWest's overall discount guarantee (primary and additional combined) as they claim."²⁶ AR, Tab 12, TET Report for TriWest Subfactor 1, at 17.

Essentially, the parties disagree about how the beneficial value of the cost savings associated with TriWest's additional discount guarantee should be measured. TriWest argues that the agency should use the same formula that it used to compute the cost savings under the primary discount—that is, the difference between the amount the government would pay for ADSMs who receive care from network providers at the TRICARE Maximum Allowable Charge (in other words, the price with no discounts), and the amount the government would pay for ADSMs who receive care from network providers with TriWest's discounted rates.²⁷ In contrast, the agency contends that the value of TriWest's discount should be the difference between what the government would pay without TriWest's additional discount guarantee, and what the government would pay with TriWest's additional discount guarantee. The agency states that the additional value of the ADSM discount is not quantifiable because the agency will receive the discounted rates for ADSMs by operation of law even in the absence of the additional guarantee. AR, Tab 12, TET Report for TriWest Subfactor 1, at 38-39 (Kennell & Assoc. Report); *Id.* at 17, 23; AR, Tab 9, SSEB Chair Report, at 21; AR, Tab 7, SSDD, at 19; see also Hearing Tr. at 246.

In reviewing a protest against an agency's evaluation of proposals, our Office will not substitute our (or the protester's) judgment for that of the agency; rather, we will

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Extra participants, supplemental care cases, and beneficiaries from outside the area."

²⁶ Although the agency did not quantify the cost savings associated with the ADSM population, it nonetheless assigned a strength to TriWest's proposal for the additional guarantee, finding that the guarantee provided additional financial protection against the (albeit unlikely) possibility of discount erosion (that is, the inability of an offeror to maintain its network discounts), and an additional incentive for the contractor to obtain and maintain its discount percentages over the life of the contract. AR, Tab 12, TET Report for TriWest Subfactor 1, at 17.

²⁷ The parties agree that the amount of this difference is reasonably calculated to be approximately \$200 million.

examine the record to determine whether the agency's judgments were reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. U.S. Textiles, Inc., B-289685.3, Dec. 19, 2002, 2002 CPD ¶ 218 at 2. In this regard, the evaluation of an offeror's proposal is a matter within an agency's broad discretion, since the agency is responsible for defining its needs and the best method for accommodating them. Id. A protester's mere disagreement with an agency's judgment is insufficient to establish that the agency acted unreasonably. Fiserv NCSI, Inc., B-293005, Jan. 15, 2004, 2004 CPD ¶ 59 at 9.

As set forth above, section M of the RFP provided that the agency would consider offerors' network provider discounts if the offeror committed to a guarantee of such discounts, and the offered guarantee was otherwise determined to be a strength by the government. Further, in considering such discounts, the agency was to "consider its own historical and relevant information." RFP section L at 102; RFP section M at 113. With regard to any additional proposed discounts, the RFP also provided that the agency would consider information submitted by the offeror, including enforceable contract language regarding "any impact/connection to existing incentives." RFP at 102. Finally, additional guarantees could be proposed only if the offeror had first proposed and guaranteed network discounts for the underwritten populations. RFP at 102.

Here, the record shows that the agency fully considered TriWest's network provider discount for the ADSM population, as contemplated by the RFP. Consistent with the RFP's requirements, the agency, in evaluating the ADSM discount guarantee "consider[ed] its own historical and relevant information," RFP at 113, including the current state of the law and the TRICARE Operations Manual provisions, and the relationship between the ADSM discount and the primary discount. Based on its consideration of all such relevant information, the agency found that TriWest's claimed cost savings did not provide any quantifiable cost savings in addition to what the agency was already receiving from TriWest without the additional guarantee.²⁸ In short, the agency considered TriWest's additional network discount, acknowledged that, when compared to no discounts, the value of the cost savings under the additional guarantee was approximately \$200 million, but ultimately concluded that, as a financial reality, the government would not receive additional

²⁸ Although the agency's analysis focused on the fact that the agency would receive the same amount of savings from TriWest with or without the discount, the SSEB chair also noted that, because all TRICARE populations will benefit from the cost savings automatically produced by the primary network discounts, "this means that even though [United] did not propose an additional discount guarantee for . . . ADSMs, the [g]overnment will also realize a cost savings associated with their negotiated civilian provider discounts when ADSMs receive care in [United's] provider network." AR, Tab 9, SSEB Chair Report, at 21-22.

cost savings above what it would receive under either offeror's primary discount. Accordingly, the agency declined to credit TriWest's proposal with the additional cost savings.²⁹

Based on the record discussed above, we cannot find the agency's evaluation to be unreasonable. As required by the solicitation, the agency considered whether TriWest's additional discount guarantee offered cost savings that were likely to accrue. We reject TriWest's assertion that the ADSM cost savings had to be computed in comparison to the non-discounted cost for the same healthcare. Rather, we find that, in making its best value determination, the agency reasonably considered all of the relevant information before it concluded that the relative value provided by TriWest's additional guarantee was not \$200 million. Accordingly, this protest ground is denied.³⁰

²⁹ TriWest also contends that the agency acted inconsistently by evaluating both portions of the primary discount by calculating the difference between the amount the government would pay for beneficiaries who receive care from network providers at the TRICARE Maximum Allowable Charge (the price with no discounts). TriWest notes that once an offeror negotiated a discount for one portion of the underwritten population (Contractor Prime Enrollees), the other portion of the underwritten population (MTF Prime Enrollees and Other Beneficiaries) would automatically receive the same discount by operation of law, just as the agency recognized would occur for the ADSM population. Accordingly, the protester contends that the agency acted unreasonably in evaluating the discount applicable to the MTF Prime Enrollees and Other Beneficiary population by comparing it to no discounts, but evaluating the cost savings associated with the ADSM discount only with regard to savings offered above what would be achieved by operation of law. Comments at 10. We do not find the agency's differing evaluation methods to be unreasonable. The RFP provided, and the agency evaluators used, a specific formula for computation of the primary discounts for the underwritten populations. RFP at 101. Further, the RFP provided that a primary discount, if proposed, must be proposed for both underwritten populations. Id. In contrast, the RFP provided simply that any additional discounts "beyond" the primary discounts would be considered if certain conditions were met. Id. at 102. We find that the agency reasonably distinguished between the calculation method applicable to the underwritten populations and to the ADSM population.

³⁰ TriWest also argued that the agency engaged in misleading discussions with regard to its ADSM discount. Protest at 21. During discussions, the agency informed the protester that its additional discount of [deleted] for ADSMs was not considered to be a strength because it was "not at a level that is significant or meaningful" and because "the Government will benefit from any cost savings associated with care provided by discounted network providers to [ADSMs] and this will occur with or without the TriWest additional guarantee in place." AR, Tab 69, (continued...)

Assumptions Upon Which United’s Network Discounts Were Based

The protester also contends that TMA’s evaluation of the network provider discounts was fatally flawed because the agency failed to recognize alleged flaws in the assumptions upon which United’s proposal was based. For example, TriWest contends that the calculation of United’s discount improperly relied on United’s estimate that [deleted] percent of its claims dollars would be in-network during option year 1, and that this percentage would [deleted] each year over the life of the contract. Supp. Protest at 7. The protester contends that the agency should have realized that this number was unrealistic because, elsewhere in United’s proposal, the firm only committed to achieving a [deleted] percent rate regarding the number of in-network claims. Id. at 7-8. Thus, the protester argues that the agency should have made a downward adjustment to United’s estimated discount savings to account for the firm’s lower anticipated network usage. Id. at 9.

In response, the agency notes that, although United’s proposal only committed to [deleted], the proposal demonstrated that United would likely achieve a considerably higher percentage. Specifically, following United’s [deleted] percent commitment, the proposal stated, “our network is already greater than [deleted].” AR, Tab 38, United FPR3, at 105. In this regard, the proposal presented the following table comparing the RFP’s requirement, United’s current percentage of in-network claims, and the amount by which United exceeded the RFP’s requirement:

	% of TRICARE Total Claims Volume From Network Providers During Option Year 1 (Requirement)	% of Total Claims Volume Paid to UnitedHealth Group Network Providers (Current Overlap)	% UnitedHealth Group Network is Greater than TRICARE Requirement
West Region Prime Service Area	[deleted]	[deleted]	[deleted]

AR, Tab 38, United FPR3, at 105.

(...continued)

TriWest Discussions at 756. Thereafter, TriWest [deleted] its ADSM discount guarantee to [deleted], and in response the agency informed the protester that it now considered the additional guarantee to be a strength. Id. at 475. Not only do we find nothing misleading in the foregoing exchange, but the exchange clearly indicated the agency’s ultimate view that it would receive the claimed savings for the ADSM population “with or without the TriWest additional guarantee.”

The agency states that its evaluators found United's estimates of in-network dollars to be reasonable based on the level of in-network usage currently being achieved, the high degree of overlap between UnitedHealth Group providers and providers in TriWest's network, and United's plans for network expansion.³¹ AR at 56; AR, Tab 19, Final TET Report for United, Subfactor 1, at 36.

As a general matter, in evaluating proposals an agency may reasonably rely on information provided by an offeror in its proposal, especially where it has no reason to question that information. Applied Bus. Mgmt. Solutions, Inc., LLC, B-405724, Dec. 15, 2011, 2012 CPD ¶ 14 at 5; see Able Bus. Techs., Inc., B-299383, Apr. 19, 2007, 2007 CPD ¶ 75 at 5; NCR Gov't Sys. LLC, B-297959, B-297959.2, May 12, 2006, 2006 CPD ¶ 82 at 8-9. On the other hand, an agency may not accept representations in a proposal at face value where there is significant countervailing evidence reasonably known to the agency evaluators that should or did create doubt as to whether the representations are accurate. Applied Bus. Mgmt. Solutions, Inc., LLC, *supra* (citing Alpha Marine Servs., LLC, B-292511.4, B-292511.5, Mar. 22, 2004, 2004 CPD ¶ 88 at 4; Maritime Berthing, Inc., B-284123.3, Apr. 27, 2000, 2000 CPD ¶ 89 at 9.

Here, we find that the agency acted reasonably in evaluating and accepting United's estimates regarding the percentage of the dollar value of its claims that would come from in-network providers. The record reflects that the agency did not simply accept United's estimates, but analyzed the estimates and ultimately concluded that they were reasonable. AR, Tab 19, Final TET Report for United, Subfactor 1, at 36. Although it is true that United's proposal stated that it would [deleted], the proposal also stated that the firm's network was already greater than [deleted]. AR, Tab 38, United FPR3, at 105. After reviewing United's statements in this regard, in addition to United's representations regarding the amount of network provider overlap and the firm's plans for network expansion, the agency determined that United's estimate that it could achieve [deleted] percent of claims dollars from within the network was reasonable. We find no basis to question the agency's judgment in this regard.³² This protest ground is denied.

³¹ The agency further maintains that it would have been inappropriate and illogical to use United's [deleted] percent commitment regarding the number of in-network claims as the basis for determining United's in-network dollar percentages, because United's commitment regarding number of claims related only to [deleted], whereas the in-network dollar percentages were for health care dollars from [deleted]. AR at 56.

³² The protester also contends that TMA unreasonably relied on United's allegedly incorrect assumptions regarding overlap of in-network hospitals, assumptions that United could obtain higher discounts than are currently being achieved, and estimates of TriWest's current discounts. Supp. Protest at 22-28. As with the issue
(continued...)

United's "Aggressive" Discounts

Similarly, TriWest challenges the agency's decision to award strengths based on United's "aggressive" discounts because, the protester claims, the agency "took no heed of the fact that, just months prior," United had argued before GAO and the Court of Federal Claims that aggressive discounts were unattainable without compromising provider networks and contract performance. Protest at 22 (referring to United's protests of the award of the TRICARE contract for the South region; see UnitedHealth Military & Veterans Servs., LLC v. United States, Case No. 11-405C, 2011 U.S. Claims LEXIS 2128 (Fed. Cl. Oct. 25, 2011); UnitedHealth Military & Veterans Servs., LLC, B-401652.8 et al., June 14, 2011, 2012 CPD ¶ 83). TriWest quotes extensively from the two prior UnitedHealth decisions. TriWest points out that the awardee previously argued that there was substantial risk of future Medicare rate reductions and other factors that will make it increasingly difficult for contractors to achieve their discounts. Protest at 23. In the prior litigation, United argued that contractors' efforts to maintain unrealistic discount levels will drive providers out of the provider network and adversely impact network quality and compliance with network access standards, and that aggressive network provider discounts harm the quality of, and threaten the long-term viability of, the TRICARE provider network. Id. TriWest contends that TMA should have considered these risks when evaluating United's aggressive network provider discounts, and downgraded United's proposal accordingly. Id. at 24.

As the intervenor notes, both GAO and the Court of Federal Claims rejected United's arguments in the prior litigation. UnitedHealth Military & Veterans Servs., LLC, supra at 16 (denying protest and stating that, while the protester believed that its proposed business strategy was the most appropriate in light of all the circumstances, the protester's arguments amounted to a disagreement as to business judgment, and holding that "disagreement of one offeror with the business strategy proposed by another, in the face of a reasonable evaluation by the agency, and without an objective showing that the questioned strategy is inherently unreasonable, does not provide a basis for our Office to object to the agency's evaluation"). Here, as in UnitedHealth Military & Veterans Servs., LLC, supra the record shows that United's proposal provided an explanation of how it had calculated its proposed discounts. The agency, in turn, reviewed United's assumptions and calculations, and concluded that United's proposed discounts were reasonable in light of the totality of circumstances. On this record, we do not question the agency's judgment, and this protest ground is denied.

(...continued)

discussed above, TriWest has not shown that the agency's reliance on the awardee's assumptions was unreasonable.

Present Value of Cost Savings

TriWest also complains that the agency improperly failed to take into account the “present value” of the cost savings associated with the offerors’ network discount proposals. The protester contends that this error favored United, which used a [deleted] to calculate its network discounts, over TriWest, which used a [deleted]. Supp. Protest at 9-11; Comments at 28.

It is up to the agency to decide upon the appropriate method for evaluation of cost or price in a given procurement, although the agency must use an evaluation method that provides a basis for a reasonable assessment of the cost of performance under the competing proposals. QinetiQ North America, Inc., B-405163.2 et al., Jan. 25, 2012, 2012 CPD ¶ 53 at 17.

Here, we find nothing in the RFP, nor has TriWest identified any such RFP provision, that required the agency to evaluate the offerors’ network discounts on the basis of present value. Accordingly, we find nothing objectionable in the agency’s evaluation method in assessing the value of network discounts without performing a present value calculation. The mere fact that the protester disagrees with agency’s chosen evaluation method does not provide a basis on which to sustain the protest. This protest ground is denied.

Mathematical Error in Cost Savings Computation

Finally, TriWest challenges a \$5.4 million mathematical error in the agency’s computation of the protester’s network discounts. Supp. Protest at 11. The protester contends that this error resulted in an undervaluation of the cost savings associated with TriWest’s network provider discounts. Id. In response, the agency concedes that its evaluator made a \$5.4 million error in calculations. AR at 60.

Nonetheless, the agency maintains, and we agree, that this error was *de minimis*. The amount of the error constitutes less than [deleted] of United’s approximately [deleted] advantage with regard to evaluated network discount savings and less than one-tenth of one percent of the total evaluated price. Our Office will not sustain a protest where an agency’s error has a *de minimis* impact on an evaluation factor. See Giberson Plumbing & Excavating, Inc., B-245798, Dec. 27, 1991, 91-2 CPD ¶ 589 at 3 (finding a difference of 5 percent of the protester’s total cost to be *de minimis* where the addition of it would not have affected the parties’ competitive standing); TECOM, Inc., B-236929.2, May 11, 1990, 90-1 CPD ¶ 463 at 4 (finding amount to be *de minimis* where it represented 5.8 percent of the difference between the protester’s and awardee’s prices and did not adversely affect the relative competitive standing of the parties). Based on the size and relative insignificance of the agency’s error, we decline to sustain the protest on this basis.

Past Performance

The protester raises several challenges to the agency's evaluation of past performance. Among other things, the protester argues that: (1) United's contract with AARP is not a "contract" for purposes of the past performance evaluation; (2) the agency improperly considered Health Net to be a first tier subcontractor and improperly evaluated Health Net's past performance; (3) the agency's evaluation of United's performance of two contracts with the Centers for Medicare and Medicaid Services was unreasonable; (4) the agency failed to consider negative information about United's past performance; and (5) TMA improperly downgraded TriWest's past performance. We address each of these topics below and find no merit in TriWest's assertions.

Where a solicitation requires the evaluation of offerors' past performance, we will examine an agency's evaluation to ensure that it was reasonable and consistent with the solicitation's evaluation criteria. The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 10; Hanley Indus., Inc., B-295318, Feb. 2, 2005, 2005 CPD ¶ 20 at 4. An agency's evaluation of past performance, which includes its consideration of the relevance, scope, and significance of an offeror's performance history, as well as consideration of actions taken to resolve prior problems, is a matter of agency discretion which we will not disturb unless the agency's assessments are unreasonable, inconsistent with the solicitation criteria, or undocumented. USIS Worldwide, Inc., B-404671, B-404671.3, Apr. 6, 2011, 2011 CPD ¶ 92 at 6; Smiths Detection, Inc.; Am. Sci. & Eng'g, Inc., B-402168.4 et al., Feb. 9, 2011, 2011 CPD ¶ 39 at 9.

AARP Contract

TriWest contends that United's AARP contract is not a "contract" for purposes of the past performance evaluation.³³ Specifically, the protester alleges that United's contract with AARP is nothing more than a licensing agreement under which United pays fees to AARP in exchange for the exclusive opportunity to market its healthcare services to AARP members. Protest at 45; Protester's Comments at 36-37. TriWest argues that such a relationship could not properly be considered a contract under the solicitation's past performance evaluation criteria, and that even

³³ In accordance with the solicitation, because the awardee, United Military and Veterans Services, is a newly formed company and did not have any past performance, the agency evaluated the past performance of its parent organization, UnitedHealth Group, and its consortium member partner, Public and Seniors Market Group (PSMG). See RFP at 115.

if United's relationship with AARP is considered to be a contract, the contract is not relevant to the procurement here. Id. at 36-52.³⁴

With regard to the substantive evaluation of past performance, the RFP stated that the agency would evaluate past performance information to determine how well an offeror has performed in the past on similar, relevant work. RFP at 115. Further, the RFP provided that "[p]ast performance history not specifically related to providing any of the services in this solicitation will not be considered relevant. . . ." Id.

Initially, we note that, while TriWest argues that the agreement with the AARP could not properly be considered a contract under the RFP's criteria for the evaluation of past performance, the only RFP provision cited in the protest to support this position is § L.7.3, which requires that for each contract, the offeror must identify a "customer, a verified point of contact for the customer . . . who will be able to discuss the offeror's performance with the Government." Protest at 45 (quoting RFP at 105). United's contract with AARP clearly satisfied this requirement, as evidenced by the questionnaire completed by the AARP point of contact who discussed United's performance. See AR, Tab 82, PAG Report for United, at 24-27.

In evaluating United's AARP past performance reference, TMA noted that the contract involved roughly 4 million beneficiaries, substantially more than the 2.9 million beneficiaries under the TRICARE West contract. AR, Tab 7, SSDD, at 15. The agency also concluded that the AARP contract involved similar functions to the functions described in the TRICARE solicitation. In its response to the past performance questionnaire, the past performance point of contact noted that United had performed medical management, claims processing, and enrollment functions. AR, Tab 82, Performance Assessment Group (PAG) Report for United, at 25-26. The questionnaire also addressed United's performance under several other areas that comprise the RFP's technical subfactors, such as beneficiary satisfaction,

³⁴ The agency contends that the protester's challenges to the agency's past performance evaluations are untimely because RFP amendment 14 stated that all prior performance ratings would be relied upon unless new information was discovered. Therefore, the agency contends that, for all past performance ratings that remained unchanged from the 2009 evaluation, if the protester wished to challenge the ratings, it was required to do so prior to the due date for receipt of proposals because the ratings were effectively incorporated into the ground rules of the competition. Agency Dismissal Request at 6-9; AR at 12. We decline to dismiss the challenges to the ratings of United as untimely since the protester did not know the basis of United's past performance ratings until after the contract was awarded.

claims processing, and management. Id. at 24-26. For example, with regard to subfactor 3, medical management, the AARP questionnaire response stated:

For its care management programs, United utilizes a fully integrated care model that is being leveraged to improve the health of AARP members who are insured through United. UHG has exhibited truly innovative thinking in working with ASI to develop new programs for AARP members in a market space for supplemental insurance products that did not previously offer health improvement programs. United brings best practices to medical care management through programs that are developed via access to an industry leading data warehouse that creates treatment algorithms that are evidence based. The programs jointly developed by United and ASI are new and reflect innovation and value.

AR, Tab 82, Performance Assessment Group (PAG) Report for United, at 25.

When given the chance to provide additional comments regarding United's performance, AARP stated "United has achieved strong member satisfaction, low administrative costs and continued growth in a flat industry . . . The retention rate and new sales are good indicators of the quality and performance of the product." Id. at 26. After reviewing the questionnaire responses as well as United's own description of the contract, TMA found the AARP contract to be similar in both scope and magnitude to the TRICARE solicitation. Id. at 3.

We find no basis to question the agency's judgment. As set forth above, the agency found that United had performed many of the same functions under the AARP contract that will be required under the TRICARE contract. The past performance questionnaire discussed United's performance of at least five of the seven technical subfactors. See AR at 166. For some of these subfactors, the past performance reference provided specific examples of United's performance of these tasks. For example, the questionnaire response stated that, with regard to the task of claims processing, United had, in response to rising claims volume, invested in system upgrades to ensure processing accuracy thereby exceeding established metrics. AR, Tab 82, PAG Report for United, at 25-26. On this record, we cannot find the agency's judgments to be unreasonable.

Finally, we reject the protester's argument that the AARP questionnaire cannot be relied upon because it is the product of a biased evaluation. Supp. Protest at 34; Comments at 50-53. Specifically, the protester contends that AARP derives substantial monetary benefit from its dealings with United, and therefore, "[b]ecause

of its obvious conflict of interest, AARP could not be expected to provide reliable, objective information about its contract.”³⁵ Supp. Protest at 34.

The agency argues, and we agree, that the fact that an organization benefits financially from its contractual dealings with the offeror does not require such organization’s views to be disregarded with regard to the quality of the offeror’s contract performance.³⁶ See AR at 171 (comparing the situation here to one in which an agency provides past performance information on concession contract procurements where the agency receives fees from the offeror). Further, several of the exceptional ratings assigned to United’s performance rested upon objective contract performance measures. Id. For example, the AARP reference cited to the fact that United met its service level agreements related to enrollment and claims processing and maintained low administrative costs and continued sales growth in a flat economy. AR, Tab 82, PAG Report for United, at 25-26. The reference also stated that nearly [deleted] percent of members reported being highly satisfied, while only [deleted] percent reported being dissatisfied, and noted that United had been willing to stake its performance assessment to annual measures and metrics. Id. at 25-26. Based on this record, we find that the agency reasonably determined that AARP’s observations should be considered in the agency’s evaluation of past performance.

Health Net

Next, TriWest argues that the agency improperly considered Health Net to be a first tier subcontractor of United, and unreasonably evaluated Health Net’s past performance. Comments at 36-42. More specifically, the protester claims that TMA’s decision to consider Health Net as a first tier subcontractor was unreasonable, given the firm’s limited involvement in performance of the contract. Id. at 36-39. The protester also contends that TMA’s assignment of a rating of exceptional to Health Net’s past performance was unreasonable because the agency failed to consider negative information in its possession regarding the firm’s past performance. Id. at 39-42.

The RFP required that each offeror submit past performance information for the prime contractor and its first tier subcontractors. RFP at 104-09; see also RFP at 115 (stating that the agency would evaluate such past performance information). The solicitation expressly defined first tier subcontractors as follows:

³⁵ The protester also contends that it is unclear whether AARP’s performance standards and measures are similar to the requirements under the TRICARE contract. Comments at 52.

³⁶ Indeed, it seems self-evident that, as a general rule, ongoing contractual relationships are likely to be mutually beneficial.

[A] first tier subcontractor is a company with a direct contractual relationship with the offeror and whose total contract price exceeds \$100,000,000 or a subcontractor who has direct responsibility for providing/authorizing health care, managing or directing health care of TRICARE beneficiaries, or who provides claims processing services regardless of the price.

RFP at 104 (emphasis added).

The agency determined that Health Net satisfied the second part of this definition because it bears responsibility for “providing/authorizing . . . managing or directing” health care for TRICARE beneficiaries. Specifically, United’s proposal stated that Health Net would be “directly responsible for directing health care and coordinating beneficiary activities” at [deleted], in addition to providing advice, consultation and operational resources, generally. AR, Tab 38, United FPR3, at 285. The agency expressly identified Health Net’s role in directing the health care of TRICARE beneficiaries in making the determination that Health Net qualified as a first tier subcontractor: “[Health Net] will support UMVS through the provision of . . . ongoing beneficiary TRICARE [deleted] services.” AR, Tab 28, 2011 Addendum to PAG Report for United, at 3.

The agency’s decision to consider Health Net to be a first tier subcontractor was consistent with the solicitation. Specifically, the RFP’s definition of first tier subcontractors included firms that bear direct responsibility for providing, authorizing, managing, or directing health care of TRICARE beneficiaries. United’s proposal stated that Health Net would be directly responsible for directing health care, and TriWest has not provided any basis to question that assertion. Accordingly, we find the agency reasonably concluded that Health Net’s activities qualified the firm as a first tier subcontractor.

TriWest also complains that, even if Health Net qualifies as a first tier subcontractor, it should not have received a rating of exceptional for its performance of the TRICARE North contract. Supp. Protest at 39-42. The protester bases its complaint on the fact that Health Net received very few ratings of exceptional in its CPARS evaluations, and received interim feedback for the most recent option period stating that the firm’s current performance was [deleted]. Id.

The definition of an exceptional rating used by the PAG was as follows:

Performance met contract requirements and exceeded some. Where requirements were exceeded, the result was a significant benefit to the other contracting party. Contractual performance was

accomplished with few, if any, minor problems. Any corrective actions taken by the contractor were prompt and effective.

AR, Tab 26, PAG Addendum Introductory Memorandum, at 3.³⁷

The record contains nine single-spaced pages of the PAG's analysis of Health Net's performance under the TRICARE North contract. AR, Tab 82, 2009 PAG Report for United, at 44-53. The agency's analysis reflects that it delved beyond the single-word adjectives assigned to Health Net in CPARS and analyzed all of the information available regarding Health Net's past performance. For example, the PAG conducted a detailed analysis of the references' answers to questionnaires and narratives. The PAG noted that, with regard to provider networks, the point of contact stated that Health Net had been very proactive in recruitment of network providers and had increased the size of the prime network by [deleted] percent during the most recent option period alone. Id. at 44. Health Net also exceeded the contract's requirement that at least [deleted] percent of qualifying referrals be to military treatment facilities or network providers. Id. at 45. With regard to referral management, the point of contact stated that Health Net's process met or exceeded overall contract requirements for timeliness and accuracy and the contractor provides a highly successful right of first refusal process. Id. For the last 38 consecutive months, Health Net's performance exceeded the contract requirement that the firm issue a referral authorization or denial on at least [deleted] of requests within [deleted] working days, with Health Net achieving an overall contract percentage of [deleted]. Id. at 46.³⁸

³⁷ The ratings used by the PAG differed in some respects from the ratings used under the CPARS system. For example, the CPARS rating system defines an exceptional rating to mean "meets contractual requirements and exceeds many"; under the definitions used by the PAG, exceptional was defined as "met contract requirements and exceeded some." AR, Tab 26, PAG Addendum Introductory Memorandum, at 2-3. Also, the CPARS system includes a rating of "very good" that is not included in the PAG rating scale. Therefore, for each rating of very good under CPARS, the PAG had to determine whether the performance should be categorized as satisfactory or exceptional under the PAG's rating system. Id. at 3.

³⁸ The agency noted that Health Net met or exceeded three of five performance metrics. The two exceptions were: (1) the requirement that the contractor issue determinations on [deleted] percent of all requests within [deleted] working days of the request (Health Net's average performance over the last 28 months was [deleted] percent); and (2) the requirement that the contractor issue a referral authorization or denial on [deleted] of all requests within [deleted] working days (Health Net's average performance over the last 29 months was [deleted] percent). AR, Tab 82, 2009 PAG Report for United, at 45-46.

With regard to medical management, the PAG quoted the point of contact: “[Health Net]’s medical management processes deliver high level services . . . performance overall optimizes use of the direct care system . . . initiated a Warrior Care Support program in conjunction with and in response to the problems identified at Walter Reed Army Medical Center in 2007.” Id. at 46. The PAG also noted that in 41 of 46 months, Health Net had ensured that [deleted] of case management treatment plans were established within [deleted] working days from the date of receipt of the request.³⁹ Id. With regard to enrollment, the PAG noted that the reference stated that Health Net’s performance on the TRICARE North contract in this area was quite strong, and that Health Net had remained customer focused, ensuring enrollment processing was completed in a timely manner and striving to optimize enrollments within the military treatment facilities. Id. at 47. Similarly, with regard to beneficiary satisfaction/customer service, the PAG noted that the past performance reference stated that Health Net’s customer satisfaction program was solid and that the firm continually improved its processes to pinpoint and correct problems with minimal disruption. Id. The PAG further noted that Health Net had exceeded all performance metrics under this category. Id. With regard to claims processing, the PAG noted that Health Net’s reference stated that Health Net performed consistently above contract standards for claims timeliness and accuracy, and was quick to respond to and correct any issues. Id. at 48. With regard to management functions, the PAG quoted the point of contact’s statement that the firm’s internal quality management system is extensive, visible, and effective, and that the firm had met or exceeded all overall contract standards. Id.

In addition to its in-depth analysis of the agency representative’s responses, the PAG also considered the CPARS ratings for Health Net. Id. at 49-53. The PAG noted that during the most recent option period, the contracting officer had provided interim feedback to Health Net regarding its cost control and business relations elements of the CPARS. The PAG noted that the assessments of unsatisfactory and marginal performance for the cost control and business relations categories, respectively, are not final ratings for option period 5, but rather an interim review designed to allow Health Net the opportunity to correct the issues before ratings for the option period are finalized. Id. at 50; see id. at 82-85. In response to the interim feedback, Health Net submitted an 18-page letter explaining why it believed the ratings were not warranted, but also detailing the many steps Health Net planned to take to remedy the perceived problems with its performance. Id. at 86-104.

³⁹ In the other 5 of 46 months, Health Net allowed no more than [deleted] cases each month to exceed this timeframe. AR, Tab 82, 2009 PAG Report for United, at 46. The PAG also found that in 40 of 46 months, Health Net had ensured that [deleted] of all case management requests were evaluated for case management intervention within [deleted] working days, missing only [deleted] cases out of [deleted]. Id.

Our review of the record reflects that the agency performed an extensive substantive analysis of Health Net's performance of the TRICARE North contract which included a consideration of the negative interim feedback for option year 5 as well as the final CPARS ratings for each year of contract performance and the narrative descriptions of Health Net's performance under the contract. The record shows that ultimately, the agency determined that Health Net's extensive multi-year record, as evidenced in particular by the narrative descriptions of Health Net's performance, merited a past performance rating of exceptional for this past performance reference. We find no basis to question the reasonableness of the agency's judgment. Therefore, this protest ground is denied.

CMS Contracts

TriWest next challenges the agency's assignment of a rating of satisfactory to United's performance of two contracts with the Centers for Medicare and Medicaid Services (CMS).⁴⁰ Supp. Protest at 35-36; Comments at 53-54. In its initial evaluation of this past performance reference in 2009, the PAG determined that the CMS contracts were somewhat relevant and assigned a performance rating of satisfactory to each. AR, Tab 82, 2009 PAG Report for United, at 2. With regard to the Medicare Advantage contract, the PAG noted that the point of contact for this contract stated that the offeror was in good standing in response to all questions and did not mention any failures that would contribute to a rating of less than satisfactory. Id. at 3. With regard to the Medicare Part D contract, the PAG found that, while the offeror had received several high ratings, the reference identified some deficiencies in performance that had been corrected after a corrective action plan was requested. Id. at 3-4. Based on this information, the PAG assigned ratings of satisfactory to both past performance references.

As explained above, RFP amendment 14 stated that in performing its reevaluation of proposals, the agency would rely on the previous past performance evaluations as long as the agency did not discover information that would cause the evaluator to question the initial evaluations. RFP at 115. When TMA contacted CMS regarding these contracts, the point of contact stated that the agency had "taken steps to curtail expansion of the program until certain performance standards are improved." AR, Tab 28, Addendum to PAG Report, at 2. However, the point of contact stated that she still considers the firm's performance of both contracts from 2008 to the present to be satisfactory. Id. The reference also noted that no sanctions had been imposed and there had been no attempt to remove the contractor. Id. Based on these statements, the PAG determined that the ratings for the CMS contracts should remain satisfactory. Id. at 1.

⁴⁰ One contract was under the Medicare Advantage and Medicare Advantage Special Needs Plan; the other contract was under Medicare Part D.

The record reflects that the agency considered both the positive and negative information provided by the point of contact and, based upon the totality of the information, determined that a rating of satisfactory was appropriate. We do not find these judgments to be unreasonable. Therefore, this protest ground is denied.

Publicly Available Information about United

TriWest also contends that TMA's evaluation of United's past performance was flawed because the agency did not consider negative information regarding United's past performance that was too "close at hand" to be ignored. Protest at 51-54; Comments at 56-61. Specifically, TriWest maintains that there existed a "vast array of publicly-available publications, articles, and reports [that] disclose numerous United performance problems, fines, and other legal problems." Protest at 52. For example, TriWest lists the following: United's 2009 settlement of an investigation by the New York Attorney General;⁴¹ its 2009 settlement of class action lawsuits brought by the American Medical Association, policy holders, and providers;⁴² fines levied against a subsidiary of UnitedHealth Group in Texas for failure to provide contract performance;⁴³ fines levied against PacifiCare, a company acquired by UnitedHealth, for violations of California insurance laws;⁴⁴ a Consumer Reports publication addressing insurance plans nationwide; an article in The Atlantic stating that United is the eleventh most-hated company in America and the most-hated insurance company in America;⁴⁵ and information contained in United's 10-Q and 10-K reports.⁴⁶ Protest at 51-54; Supp. Protest at 43-47.

The agency argues that the RFP limited the evaluation of past performance to "similar relevant" work being performed by entities that would actually do TRICARE work, and that the protester has made no showing that these settlements, fines, and news articles satisfied this requirement. AR at 184. The agency also contends that the information identified by TriWest involved dissimilar work and entities unrelated

⁴¹ Protest at 52 (citing to news article in the Wall Street Journal and an online video from www.videowired.com).

⁴² Id. (citing to a UnitedHealth Group Annual Report and a news report from the Reuters website).

⁴³ Id. at 53 (citing to a news report from the CBS News website).

⁴⁴ Id. (citing a UnitedHealth Group Annual Report and a news report from the website for NBC Los Angeles).

⁴⁵ Id. at 54.

⁴⁶ Reports required by the Securities and Exchange Commission to be filed by public companies.

to the performance of the TRICARE contract. Id. TMA also notes that, contrary to the protester's assertions, there was no legal duty for the agency to "track down and investigate every negative story or allegation about unrelated work and entities." Id. at 185.

Our Office has recognized that in certain limited circumstances an agency evaluating an offeror's past performance has an obligation (as opposed to the discretion) to consider outside information bearing on an offeror's past performance. New Orleans Support Services LLC, B-404914, June 21, 2011, 2011 CPD ¶ 146 at 5. Where we have charged an agency with responsibility for considering such outside information, the record has demonstrated that the information in question was simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain, and consider, the information. Id.; International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5; see GTS Duratek, Inc., B-280511.2, B-280511.3, Oct. 19, 1998, 98-2 CPD ¶ 130 at 14 (agency should have considered offeror's performance of a prior contract where the contract was discussed in the offeror's past performance proposal, the contract was so similar that it served as the basis for the government estimate for the work, and the contracting officer's technical representative for the contract was a member of the technical evaluation team for the subject solicitation); G. Marine Diesel, B-232619.3, Aug. 3, 1989, 89-2 CPD ¶ 101 at 4-6 (contracting officer who was personally aware of the awardee's continuing difficulties in performing a contract for services related to the subject solicitation, and who considered the performance difficulties in deciding not to exercise the remaining options, erred in not considering the awardee's performance difficulties when determining whether the contract under the subject solicitation had been properly awarded); G. Marine Diesel; Phillyship, B-232619, B-232619.2, Jan. 27, 1989, 89-1 CPD ¶ 90 at 4-5 (agency should have considered awardee's prior experience under a directly relevant contract where the contract was referenced in the awardee's proposal and agency personnel were familiar with the awardee's performance). However, the "close at hand" information in these cases generally concerned contracts for the same services with the same procuring activity, or at least information personally known to the evaluators. New Orleans Support Services LLC, supra, at 6.

In order to succeed on this claim, the protester must show that the agency was aware (or should have been aware) of the information, and that the agency acted unreasonably in failing to consider it. With regard to the majority of the outside information identified by the protester, TriWest has made no showing that the TMA evaluators were aware or should have been aware of the information cited in its protests. For example, with regard to the Consumer Reports article, the protester merely states that, "[s]urely, one or more of the dozens of TMA personnel involved in the evaluations and award process must subscribe to Consumer Report[s]." Protest at 53 n.24. With regard to the information contained in United's 10-Q and 10-K reports, the protester has shown that the agency had the information in its possession (it was submitted as part of Volume VI, Financial), but has not shown

that the information was sufficiently relevant to the agency's consideration of past performance to be considered in that evaluation.⁴⁷ With regard to the fines levied against a subsidiary of UnitedHealth Group for failure to provide contract performance, the protester contends that the information is relevant to the agency's past performance evaluation because United included a summary of the contract under its "referral management section." Protester's Comments at 58. However, the protester has made no showing that the agency was aware of, or should have been aware of, the information TriWest cites regarding fines for nonperformance of the contract. Accordingly, we find no basis to conclude that the agency improperly disregarded relevant close-at-hand information during its past performance evaluation.

TriWest's Past Performance Rating

TriWest also contends that TMA improperly downgraded the protester's past performance rating. The protester contends that its rating was lowered from "solidly superior" to United's past performance (as a result of the FPR1 evaluations) to essentially equal in the reevaluation. Supp. Protest at 31-32.⁴⁸ The protester contends that "the record is devoid of any discussion that explains why the agency concluded TriWest was suddenly now equal to [United] when TriWest was found to be 'solidly superior' during the prior evaluation." Id. at 32.

As set forth above, the RFP here said that the agency would sustain its previous past performance evaluations unless it discovered information that would cause the evaluators to question the initial evaluation. RFP at 115. We initially note that both offerors' adjectival ratings remained the same from FPR1 to FPR3. Further, to the extent that the evaluators determined that TriWest's past performance was no longer solidly superior to United's past performance, we find that determination to be reasonable.

⁴⁷ We also note that, with regard to the SEC filings, this protest ground is likely untimely, since the allegation was raised in the protester's supplemental protest and is based on publicly-available SEC filings which were available to the protester at the time of its initial protest. See Sunrise Med. HHG, Inc., B-310230, Dec. 12, 2007, 2008 CPD ¶ 7.

⁴⁸ In support of its contention that its past performance was previously considered to be "solidly superior" to United's, the protester cites to an agency-level protest decision attached as an exhibit to TMA's dismissal request. The agency-level protest decision simply stated that, while United had claimed in its agency-level protest that TriWest had improperly been considered to be solidly superior to United with regard to past performance, the agency found no merit to this protest ground. Protester's Opp. to Request for Dismissal, at 3 (citing only to Agency's Request for Dismissal, Exh. 1, Decision on Agency-Level Protest of United).

As set forth above, in accordance with RFP amendment 14, the agency contacted the offerors' past performance points of contact to determine whether there had been a change in performance. The ratings for TriWest's past performance references remained unchanged, with the exception of the Tidewater, VA, Multi-Service Market, Multiple Award Task Order (MATO) Appointing contract. The rating for this contract changed from "exceptional" to "satisfactory" based on a CPARS narrative indicating that communication with the contractor was not always optimal and that corrective action was sometimes slow. AR, Tab 7, SSDD, at 13-14. The agency evaluators also acknowledged a qui tam Letter of Agreement (LOA) regarding TriWest's failure to pay LOA negotiated rates for certain health care encounters to non-network providers under the predecessor TRICARE contract. In this regard, the evaluators noted that TriWest's administrative processes had failed to systematically identify LOA discounts and that TriWest had failed to notify the government in a timely manner and failed to take corrective measures within a reasonable time period. Although the agency ultimately determined that the adjectival rating for the TRICARE contract should remain exceptional, and that TriWest's overall past performance rating should also remain exceptional. AR, Tab 7, SSDD, at 14, we find that these changes in TriWest's performance provide ample justification for a determination that TriWest's past performance was no longer "solidly superior" to United's past performance. This protest ground is denied.⁴⁹

Cost/Price Evaluation

The protester contends that the agency failed to perform a sufficient price realism analysis of United's fixed price CLINS to evaluate labor rates. Supp. Protest at 57-59. Specifically, TriWest argues that TMA improperly relied on an outdated three-year-old DCAA audit to conclude that United's labor rates were realistic. Id. at 57. The protester also contends that United drastically lowered its rates in its final FPR, and that the agency failed to compare the awardee's labor rates in FPR3 to the rates in FPR1. Id. at 58. Therefore, the protester contends that the agency

⁴⁹ TriWest also raised several other challenges to the agency's past performance evaluations; for example, that the agency irrationally rated United's partner, PGBA as essentially equal to WPS (Supp. Protest at 42-43) and that the agency treated offerors unequally by considering TriWest's settlement for improper conduct during its incumbent performance of the TRICARE contract (despite the fact that the agency did not lower the protester's ratings because of this issue), while not considering settlements and lawsuits in which UnitedHealth Group or UnitedHealth subsidiaries have been involved (Supp. Protest at 47). We have considered all of the protester's arguments and find that the record here does not provide a basis to sustain any of the protest grounds.

ignored the risk presented by what the protester characterizes as United's drastic salary reductions. Id.

The RFP here stated that, in accordance with FAR § 15.404-1(d)(3), "cost realism analysis may be used on competitive fixed price contracts. The results of this realism analysis . . . may be used in the performance risk assessments and the responsibility determination." RFP at 116.

First, TriWest's assertion that United drastically lowered its rates in its last FPR is incorrect. United reorganized its labor categories, bringing its price proposal into accord with its revised cost accounting standards disclosure statement, which DCMA certified as accurate in August 2011, but it did not lower its labor rates. Intervenor's Comments at 52. In this regard, the agency points out that, despite the protester's claims to the contrary, United generally proposed more staff and higher prices to support those staff than TriWest did. AR at 216-17; AR, Tab 29, 2012 Price/Cost Team Report, at 15 (noting that TriWest proposed an average of [deleted] FTEs per year, while United proposed an average of [deleted] FTEs per year).

Cost realism, which measures the likely cost of performance, is a mandatory consideration for the award of cost-reimbursement contracts because the government will generally bear the actual costs of performance. However, cost realism is typically not a factor in the evaluation of proposals when a fixed-price contract is contemplated, because the government's liability is fixed and the contractor bears the risk of any cost escalation. J&J Maintenance, Inc., B-244366.2, Mar. 7, 1994, 94-1 CPD ¶ 177 at 10. Since the government exposes itself to the risk of poor performance when a fixed-price contractor is forced to provide services at little or no profit, where a solicitation provides for the award of a fixed-price contract, or a fixed-price portion of a contract, an agency may provide in the RFP for the use of price realism analysis for the limited purpose of measuring an offeror's understanding of the requirements or to assess the risk inherent in an offeror's proposal. FAR § 15.404-1(d)(3) (cost realism may be used in competitive fixed-price contracts when new requirements may not be fully understood by competing offerors, there are quality concerns, or past experience indicates that contractor's proposal costs have resulted in quality or service shortfalls); Raytheon Tech. Servs. Co. LLC, B-406136, B-406136.2, Feb. 15, 2012, 2012 CPD ¶ 99 at 5; see J&J Maintenance, Inc., supra, at 10. The depth of such an analysis is a matter within the sound exercise of the agency's discretion. Grove Resource Solutions, Inc., B-296228, B-296228.2, July 1, 2005, 2005 CPD ¶ 133 at 5; Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 4-5.

Here, the record reflects that the agency adequately considered the realism of United's fixed-price CLINs. The agency's price/cost team report reflects that, in initially reviewing the offerors' proposals, the agency's realism analysis consisted of

review and evaluation of specific elements of each offeror's proposed cost estimate and prices to determine whether the estimated proposed cost elements were realistic for the work to be performed, reflected a clear understanding of the requirements, and were consistent with the unique methods of performance and materials described in the offeror's technical proposal. AR, Tab 29, 2012 Price/Cost Team Report, at 1. The agency's initial realism analysis included DCAA audits performed in 2008. Id. at 19. The agency's price/cost team stated that during the reevaluation, no labor salary verifications were requested from DCAA for United because the firm is not currently in operation, the rates did not change significantly since FPR1, and the proposed labor salaries were previously audited by DCAA for the original proposal. Id. at 20. However, the agency did have DCAA perform labor salary verifications of the firm's payroll records, which did not result in any significant differences between the proposed labor rates and the payroll records. Id. The agency also requested that DCMA review the awardee's proposed indirect rates. Id. Finally, DCMA reviewed the revisions to United's cost accounting standards disclosure statement and found them to comply with the cost accounting standards and FAR Part 31. AR, Tab 98, DCMA/DCAA Review, at 1. On this record, we find that the agency's analysis of offerors' fixed-price CLINs was sufficient. This protest ground is denied.

Source Selection Decision Trade-Off

The protester argues that the agency improperly gave unequal weight to certain subfactors rather than valuing them equally as required by the RFP. Specifically, TriWest contends that the SSA diminished the importance of the subfactor in which TriWest's proposal was considered to be superior, and elevated the importance of the two subfactors in which United was found to have the advantage. Comments at 85. The protester bases this claim, in part, on the SSA's statement that "the significant advantage that [United] demonstrated in Subfactors 1 and 3 of the technical approach provides clear discriminators that outweigh the relative parity between the [United] and TriWest proposals otherwise." Comments at 85 (quoting AR, Tab 7, SSDD, at 1). This statement, the protester claims, proves that the SSA ignored TriWest's acknowledged technical advantage under subfactor 4, enrollment.

It is well settled that a single evaluation factor--even a lower-weighted factor--may properly be relied upon as a key discriminator for purposes of a source selection decision. Smiths Detection, Inc.; American Science and Engineering, Inc., B-402168.4 et al., Feb. 9, 2011, 2011 CPD ¶ 39 at 16 (citing DPK Consulting, B-404042, B-404042.2, Dec. 29, 2010, 2011 CPD ¶ 12 at 13 (source selection authority, in making a tradeoff analysis, may ultimately focus on a particular discriminator, even if it is not the most heavily weighted factor)).

The SSA here properly focused on the subfactors in which he found key discriminators. Specifically, the SSA concluded that the offerors were essentially equal under four subfactors, TriWest had a slight advantage under subfactor 4, and

United had a substantial advantage under subfactors 1 and 3. Although the RFP provided that all technical subfactors were to be given equal weight, to the extent that the SSA properly determined that there were key discriminators under certain subfactors, there is nothing objectionable in the SSA's reliance upon those key discriminators for purposes of his source selection decision. Further, while the SSA acknowledged that TriWest had an advantage under one subfactor, the record reflects that the protester's advantage in this regard was consistently referred to as "slight." See, e.g., AR, Tab 7, SSDD, at 4, 14; AR, Tab 9, SSEB Chair Report, at 39, 43.⁵⁰ In comparison, the contemporaneous documentation supports the agency's characterization of United's advantage under subfactors 1 and 3 as "substantial." AR, Tab 7, SSDD at 4, 10, 18; AR, Tab 9, SSEB Chair Report, at 43. We find that the SSA properly relied upon the key discriminators between the proposals in making the selection. Therefore, we deny this basis of protest.

Common Stock Ownership

Finally, TriWest contends that United was ineligible for award under the terms of the RFP because the stock of United and other TRICARE contractors are held by common investors, which TriWest asserts is prohibited by the solicitation. Protest at 68. In this regard, the RFP states that no company or business entity may be awarded more than one TRICARE contract as a prime contractor. In connection with this prohibition, the solicitation states:

For purposes of exclusion of sources under this solicitation, a company or business entity identified in an offer as a potential prime Contractor shall be considered to include the named company or business entity, its parent or subsidiary, or a company or business entity directly related to the company or business entity through common (regardless of the percentage) ownership, control, or management (whether by a parent company or otherwise).

RFP at 97.

The protester contends that this exclusion provision renders United ineligible for award because United is a publicly traded company and its stock is held by entities

⁵⁰ See also, AR, Tab 8, Source Selection Advisory Committee Report, at 6-7 (stating that the members of the SSAC believed that the SSEB chair had been conservative in awarding strengths, and that, in reviewing the logic applied to the reports prepared by the TET, the SSAC believed that United also could have been considered superior under subfactors 2 and 7, and noting that, had these two subfactors been awarded as advantages to United, the final tally would have shown United superior under four subfactors and TriWest superior under one subfactor).

that also own the stock of other publicly-traded TRICARE contractors, such as Humana (South Region) and Health Net (North Region). Protest at 68-70.

The agency maintains that the solicitation provision does not provide a basis to disqualify a publicly-traded contractor based only on stock ownership. Moreover, the agency maintains, and we agree, that TriWest's allegations regarding this matter are based on information that was readily apparent to TriWest long before this protest was filed.

As discussed above, this procurement has an extensive history. During the first round of awards, TMA awarded the contract for the TRICARE West Region to TriWest. In 2009, United filed an agency-level protest, which eventually resulted in the agency's decision to take corrective action. There is no indication in the record that TriWest challenged United's standing to file a protest of the 2009 award based on United's alleged failure to comply with the RFP provision regarding common ownership--even though the type of information on which TriWest now relies was publicly available at that time. In short, it has been clear to TriWest since 2009 that the agency considered United to be eligible to receive the award of the contract here.⁵¹ Since TriWest chose to wait until after the contracts had been awarded in the last round of competition before raising this matter, this protest ground is untimely and will not be considered. 4 C.F.R. § 21.2(a)(1).

CONCLUSION

In summary, for the reasons discussed above, we conclude that TriWest's protest is without merit. While we understand that the protester disagrees with various aspects of the agency's evaluation and source selection decision, such disagreements provide no basis for our Office to sustain the protest.

The protest is denied.

Lynn H. Gibson
General Counsel

⁵¹ To the extent TriWest's protest is based on an assertion that the solicitation was ambiguous, it is clear that such ambiguity was readily apparent from the face of the solicitation and, as such, constitutes a patent ambiguity. See Harrington, Moran, Barksdale, Inc., B-401934.2, B-401934.3, Sept. 10, 2010, 2010 CPD ¶ 231 at 5; Ashe Facility Servs., Inc., B-292218.3, B-292218.4, Mar. 31, 2004, 2004 CPD ¶ 80 at 11. A patent ambiguity must be protested prior to the next closing time for the submission of proposals in order to be considered timely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1); Ashe Facility Servs., Inc., *supra*.