

United States Government Accountability Office Washington, DC 20548

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: National Government Services, Inc.

File: B-412142

Date: December 30, 2015

Kara M. Sacilotto, Esq., Tracye Winfrey Howard, Esq., Nicole J. Owren-Wiest, Esq., George E. Petel, Esq., and Craig Smith, Esq., Wiley Rein LLP, for the protester. W. Jay DeVecchio, Esq., Kevin C. Dwyer, Esq., Rachael K. Plymale, Esq., and James A. Tucker, Esq., Jenner & Block LLP, for CGS Administrators, Inc., the intervenor.

Erin V. Podolny, Esq., Lucy G. Mac Gabhann, Esq., and Brian E. Hildebrandt, Esq., Department of Health and Human Services, for the agency.

Pedro E. Briones, Esq., and Nora K. Adkins, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's cost, past performance, and technical evaluations, and best-value tradeoff decision is denied where the record demonstrates that the evaluations and tradeoff decision were reasonable and consistent with the terms of the solicitation.

DECISION

National Government Services, Inc. (NGS), of Indianapolis, Indiana, protests the award of a contract to CGS Administrators, Inc. (CGS), of Nashville, Tennessee, under request for proposals (RFP) No. HHSM-500-2014-RFP-0096, issued by the Department of Health and Human Services (HHS), Centers for Medicare and Medicaid Services (CMS), for a Durable Medical Equipment (DME) Medicare Administrative Contractor (MAC). NGS challenges CMS's cost realism analysis, past performance and technical evaluations, and source selection decision.

We deny the protest.

BACKGROUND

The RFP was issued using Federal Acquisition Regulation (FAR) part 15 procedures and provided for the award of a cost-plus-award-fee contract for a DME MAC to

provide health insurance benefit administration services for Jurisdiction B, including processing and paying Medicare claims from beneficiaries and providers of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). RFP, amend. 1, at 2, 128; SOW at 10-11. The solicitation provided for a performance period of up to five years. RFP, amend. 1, at 10.

The RFP stated that award would be made on the basis of a best-value tradeoff considering three evaluation factors: past performance, technical approach, and cost. <u>Id.</u> at 128-29. The RFP also stated that the non-cost evaluation factors were of equal importance, and when combined, were significantly more important than cost. <u>Id.</u> The solicitation advised that in the evaluation process, primary consideration would be given to the technical quality of proposals. <u>Id.</u> at 128.

Offerors were instructed to submit their proposals in five separate volumes, including, as relevant here, a proposal assumption volume, a technical proposal volume (which was to address both technical approach and past performance), and a business (i.e., cost) volume. Id. at 90, 101, 103-04 (volumes 2-4). Offerors were also required to give an extensive oral presentation to CMS technical, program, and contracting staff. Id. at 90-94, 109, 111, 114, 116-17.

In their proposal assumption volume, offerors were to provide a detailed basis of estimate (BOE) for the base and option years and propose a level of effort (LOE)

Page 2 B-412142

¹ There are four DME MAC jurisdictions: A, B, C, and D. RFP, Statement of Work (SOW), at 10. NGS (the protester) is the incumbent DME MAC in Jurisdiction B, which covers Illinois, Indiana, Michigan, Ohio, Wisconsin, and Kentucky. <u>Id.</u>; Agency Report (AR), Tab 6c, NGC Tech. Proposal, at 1. CGS (the awardee) is the current DME MAC in Jurisdiction C, which covers Alabama, Arkansas, Colorado, Florida, Georgia, Louisiana, Mississippi, New Mexico, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, Virgin Islands, Virginia, and West Virginia. RFP, SOW, at 10; AR, Tab 7c, CGS Tech. Proposal, at 3.

² Specifically, the RFP provided for an implementation period of approximately six months from award (Contract Line Item Number (CLIN) 0001), an optional base period of up to seven months from exercise of the option (CLIN 0002), four 1-year option periods (CLINs 0003-0006), and a 6-month optional outgoing/transition period (CLIN 0007). RFP, amend. 1, at 10; Schedule, at 3-6. The RFP stated that CLINs 0001 and 0002 may overlap and that the outgoing/transition period option may be exercised approximately six months before the expiration of the current year of performance. RFP, amend. 1, at 10.

³ The other volumes were for administrative requirements and the responsibility determination (volume 1), and for the conflict of interest information (volume 5). RFP, amend. 1, at 90.

using a detailed spreadsheet provided with the RFP. <u>Id.</u> at 101-03; attach. J.18, BOE. The BOE template was broken down by SOW provision, which was further divided by subcontract line item number (SLIN) and workload category/subcategory (<u>e.g.</u>, SOW § D.1.2, SLIN AC, workload category/subcategory bills/claims-EMC), and included prepopulated annual workload estimates for each.⁴ RFP, amend. 1, attach. J.18, BOE. Offerors were required to provide their proposed labor categories, percentage of workload for each category, annual productive hours, hourly production per full time equivalent (FTE), total hours, and total FTEs that aligned with each SOW provision, SLIN, and workload category/subcategory. <u>Id.</u> Offerors were also required to provide corresponding historical baselines and summary narratives.⁵ <u>Id.</u>

The RFP stated that the purpose of the BOE was to assist CMS in evaluating an offeror's technical and business proposals. RFP, amend. 1, at 102. Offerors were informed that the BOE and other relevant historical data available to CMS would be used as a baseline tool for measuring and understanding how the offeror proposed to perform the SOW requirements--in contrast to how the offeror has historically performed DME MAC work or similar work such as MAC contracts under Medicare Part A or Medicare Part B (A/B MAC). Id. Offerors were advised that unexplained or unsupported variances--between an offeror's proposed and historical productivity rates, total labor hours, and skill mix--may result in a technical finding and/or a cost realism adjustment pursuant to FAR § 15.404-1(d). Id.

Under the past performance evaluation factor, offerors (including their significant subcontractors) that were current MAC contractors were to identify their past or current DME MAC contracts, A/B MAC contracts, and other relevant contracts. Id. at 106. The solicitation defined relevant as similar in size, scope, and complexity to the requirement, and advised offerors that DME MAC contracts were most relevant, A/B MAC contracts were less relevant, and that the relevance of all other past performance information would be determined on a case-by-case basis. Id. at 108. The RFP stated that CMS would evaluate the extent to which the offeror's past performance demonstrated the ability to successfully perform the contract. Id.

Page 3 B-412142

⁴ The RFP also provided assumptions for offerors to use in preparing their proposals, such as the number of DMEPOS providers by state, total physical space required for record retention, number of direct mailings, and number of Freedom of Information Act (FOIA) requests. RFP, attach. J.19, Gov't Provided Proposal Assumptions.

⁵ The RFP defined productive labor as labor that is solely dependent on workload volume and stated that as workload volume increased, productive labor hours would increase proportionally. RFP, amend. 1, attach. J.18, BOE.

⁶ The RFP defined current as completed within three years from issuance of the RFP (August 28, 2014) through contract award. RFP, amend. 1, at 108.

MAC contractors were advised that CMS would review relevant past performance information from a range of internal and external sources, including, but not limited to, PPIRS, CPARS, QASP, and Section 912 reports, as well as award fee determinations.⁷ See id. at 106.

Under the technical approach evaluation factor, offerors were to address four elements: program management, staffing plan, innovations, and mission-essential functions.⁸ Id. at 108-18. As relevant here, offerors were to submit a staffing plan that proposed, at a minimum, the following: (1) total number of FTEs by specified CLINs/SLINs; (2) total FTEs for specified SOW requirements; (3) proposed operational sites, including the SOW function to be performed at each site and total FTEs at each site for specified CLINs; (4) proposed sources of staffing (i.e., new hires, subcontracts, inter-organizational transfers, teaming arrangements, etc.) and total FTEs per source for the entire performance period; (5) number of new hires for the base and first option years by labor category, specified SOW functions, prime contractor, and subcontractor; and (6) overall timeline for recruiting and training staff prior to beginning operations. Id. at 110. The RFP stated that CMS would evaluate the extent to which an offeror's staffing plan would provide knowledgeable, qualified personnel in sufficient numbers to ensure quality performance starting on day one and throughout the contract. Id. at 113. The RFP also stated that the agency would evaluate the readiness of proposed staff for successful implementation and continued successful operations, and consider the adequacy and effectiveness of the offeror's function-specific training, recruitment, transfer strategies, etc. Id.

Also relevant here, offerors were to provide detailed descriptions of each proposed innovation, ⁹ including its anticipated benefits, implementation timeline, potential

Page 4 B-412142

⁷ That is, the Past Performance Information Retrieval System (PPIRS); Contractor Performance Assessment Reporting System (CPARS); Quality Assurance Surveillance Plans (QASP); annual audits of MACs' information security programs as required by Section 912 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003; and award fee determinations under FAR § 16.401(d). See AR, Tab 8a, TEP Report, append. A, Past Performance Data, at 83-90.

⁸ The RFP advised that these elements were not considered evaluation subfactors and that the solicitation did not include evaluation subfactors. <u>See</u> RFP, amend. 1, at 108.

⁹ The RFP defined innovation as a new or significantly improved practice, process, method, or system that results in qualitative (<u>i.e.</u>, measurable program efficiencies such as improved customer service and reductions to improper payments) and/or quantitative (<u>i.e.</u>, measurable cost savings) value and benefit to the government. RFP, amend. 1, at 113. The RFP stated that minor changes or improvements similar to those already in use, as well as practices, processes, methods, or systems (continued...)

risks, cost savings, and LOE. ¹⁰ <u>Id.</u> at 113-14. Among other things, offerors were to describe: (1) the SOW areas that would benefit from the proposed innovation and how they would benefit; (2) how and when (dates and timelines) the offeror would perform the innovation over the entire performance period; (3) how the relevant SOW functions are currently, or were historically, performed in comparison to the innovation; (4) significant assumptions used in developing the proposed innovation; and (5) up-front investments and/or ongoing expenses associated with implementing and operating the innovation over the entire performance period. <u>See id.</u> Offerors were also to provide a basis and supporting documentation (such as historical productivity data) for the proposed cost value of each innovation, and, if the offeror proposed LOE savings in that regard, the offeror was to separately identify the hourly savings for each SOW functional area by labor category. Id. at 114.

The RFP stated that CMS would evaluate the extent to which an offeror's proposed innovations reflected well-conceived and achievable contractual promises that were reasonably expected to result in qualitative and/or quantitative value and benefits. See id. at 115. The RFP also stated that the agency would evaluate the extent to which the plan for implementing an innovation mitigated risks (i.e., likelihood of government approvals, SOW requirement changes, etc.) to delivering the promised performance outcomes. Id. Offerors were cautioned that any proposed cost savings and price reductions associated with unattainable, unsupported, or unviable innovations and/or inadequate implementation plans, would likely result in an associated cost realism adjustment to the offeror's proposed cost pursuant to FAR § 15.404-1(d). Id.

Under the cost evaluation factor, the RFP provided cost templates (spreadsheets), for offerors to propose costs and fees under each CLIN. <u>Id.</u> at 119; Schedule at 3-6; RFP attachs. J.10-J.17; <u>see supra</u> n. 2 (CLINs). For each CLIN and SLIN, offerors were to propose direct labor rates for each proposed labor category and costs for fringe benefits, subcontractors, other direct costs (ODC), and indirect costs, as well as a base fee and an award fee. RFP attachs. J.11-J.16. For the base year and each option year, offerors were also to propose costs and award fees under SLINs corresponding to dozens of SOW performance requirements, such as claims processing, appeals, reopening claims, recovering overpayments, and provider outreach. RFP, amend. 1, at 119-23; RFP attachs. J.12-J.16. Business proposals

that have been adopted and/or are in use in Medicare industries, were not considered innovations. Id.

Page 5 B-412142

^{(...}continued)

¹⁰ Although the RFP did not explicitly require offerors to propose a specified number of innovations in their technical proposals, the RFP stated that the offeror, in its oral presentation, "shall elaborate on up to three" of its proposed innovations. RFP, amend. 1, at 114.

were to provide written cost narratives and cost or pricing data for each cost element under each CLIN, and identify additional cost elements such as postage and proposed escalation factors. RFP, amend. 1, at 119-23. The RFP stated that business proposals would be evaluated for reasonableness and realism using cost/price analysis techniques under FAR § 15.404. Id. at 129.

The agency received proposals from NGS and CGS, which were evaluated as follows:

| | Past Performance | Technical Approach | Overall Technical Capability | Proposed Cost | Total Evaluated Cost |
|-----|---------------------|-----------------------|------------------------------------|------------------|----------------------------|
| CGS | Good | Good | Good | \$77,679,589 | \$85,166,683 |
| NGS | Good | Excellent | Good | \$132,154,296 | \$132,662,605 |

AR, Tab 12b, Source Selection Decision (SSD), at 3, 51. Technical proposals and past performance were evaluated by a technical evaluation panel (TEP), which documented its findings, including its assessment of strengths and weaknesses, in a detailed evaluation report. <u>See</u> AR, Tab 8a, TEP Report.

Business proposals were evaluated by a business evaluation panel (BEP), which included the contract specialist, a technical cost analyst, and a cost-price analyst/auditor. See AR, Tab 5, Source Selection Plan, at 10-13; Contracting Officer (CO) Statement ¶¶ 51, 53. The TEP, upon completing its technical evaluations, also reviewed business proposals as part of the agency's cost realism analysis. CO Statement ¶ 52. Like the technical evaluators, the BEP also documented its findings and analyses in detailed, lengthy evaluation reports (for each offeror), which included numerous appendices of independent audit reports, cost realism adjustments, etc. See, e.g., AR, Tab 8b, CGS BEP Report, at 1-75; attachs. 1-10.

The contracting officer, who was the source selection authority (SSA), reviewed and concurred with the evaluation reports, conducted an independent review of the offerors' proposals and past performance records, and performed a cost/technical tradeoff. AR, Tab 12b, SSD, at 2, 17-19, 41. The contracting officer concurred with the TEP's evaluation ratings and findings, and assessed additional strengths and weaknesses in the offerors' proposals based on his review. <u>Id.</u> at 17-41. He also approved the BEP report and conducted an "additional [cost] exercise" as discussed

Page 6 B-412142

¹¹ Offerors' oral presentations were attended by the contracting officer, contract specialist, BEP, TEP, and various subject matter experts. CO Statement \P 28; see AR, Tabs 8d-8e, Oral Presentations Mems. to File.

below. <u>Id.</u> at 41, 53. The contracting officer acknowledged the strengths of NGS's higher technically-rated proposal, including its strong staffing plan and implementation approach, but concluded that NGS's strengths did not warrant paying a \$47 million or 55.8 percent price premium over CGS's proposal, particularly since CGS was performing successfully as a DME MAC in another jurisdiction. <u>Id.</u> at 52. The contracting officer noted that CGS had a long history of smooth transitions and implementations, and that he was willing to assume the limited risk and small degradation in overall technical capabilities associated with CGS's proposal, rather than pay the significant premium for NGS's proposal. <u>See id.</u>

The contracting officer determined that CGS's proposal provided the best overall value to the government, and CMS awarded the contract to CGS. <u>Id.</u> at 53. This protest followed.

DISCUSSION

NGS protests CMS's cost, technical, and past performance evaluations, as well as the agency's cost/technical tradeoff and best-value determination. While our decision here does not specifically discuss every argument, we have considered all of NGS's assertions and find none furnish a basis for sustaining the protest.

Cost Realism

NGS challenges CMS's evaluation of CGS's business proposal and argues that CGS's labor mix, productive hours, direct labor costs, and proposed technical innovations are unrealistic. NGS maintains that the agency's cost realism analysis ignored key considerations and contained quantifiable calculation errors that should have alerted the agency that CGS could not perform the contract at its low proposed costs. NGS contends that these flaws resulted in a significantly understated total evaluated cost for CGS's proposal, which "should have been evaluated at costs much closer to NGS's evaluated cost[s.]" Protester's Comments at 19, 23-24. NGS asserts that it was prejudiced because it submitted a technically superior proposal that provided a better value to CMS.

Page 7 B-412142

¹² NGS submitted a report prepared by a cost consultant (who was admitted to the protective order) who scrutinized selective aspects of CMS's cost realism analysis and proposed "corrected" cost adjustments. <u>See</u> Protester's Comments, exh. 2, Cost Consultant Report. According to NGS, the report (as well as the protester's additional calculations, see Protester's Comments, exh. 1, Unit Cost Figures) reveals flawed mathematical formulas in CMS's evaluation of CGS's proposed costs. <u>See</u> Protester's Comments at 17-20; <u>see also</u> Protester's Supp. Comments, exh. 1, Cost Consultant's 2nd Report.

When an agency evaluates a proposal for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR §§ 15.305(a)(1); 15.404-1(d); Palmetto GBA, LLC, B-298962, B-298962.2, Jan. 16, 2007, 2007 CPD ¶ 25 at 7. Consequently, the agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed. FAR § 15.404-1(d)(1). A cost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror's proposed cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the unique methods of performance and materials described in the offeror's technical proposal. Id.

As described above, the RFP stated that business proposals would be evaluated for reasonableness and realism under FAR § 15.404, and the solicitation advised offerors that CMS would use their BOE and agency data as a baseline for comparing an offeror's technical and business proposal, to the offeror's historical performance of the same or similar requirements. See RFP, amend. 1, at 102, 129. Offerors were further advised that unexplained or unsupported variances—between an offeror's proposed and historic productivity rates, total labor hours, and skill mix—may result in a technical finding and/or a cost realism adjustments. ¹³ Id. at 102.

Consistent with these provisions, the BEP here used a number of historical sources to evaluate CGS's proposed costs, including: (1) invoices from CGS's current DME MAC contract for Jurisdiction C (JC); (2) historical productivity rates for that contract; (3) incurred cost proposals (ICP) submitted by CGS for fiscal years (FY) 2013 and 2014; (4) a 2014 audit report (conducted by an independent auditing firm) of CGS's FY 2012 ICP; and (5) a 2013 audit report (conducted by a CMS contract audit firm) of CGS's proposal for an A/B MAC competition. AR, Tab 8b, CGS BEP Report, at 4. The BEP determined that these sources provided "excellent benchmarks" to evaluate CGS's proposal, for a number of reasons. Id. For example, the BEP found that the JC invoices illustrated CGS's recent actual costs and labor rates for performing "the exact same work" as the Jurisdiction B (JB) requirement. Id. The BEP also found that while the JC contract was different in volume, its productivity rates were nevertheless useful because CGS was performing successfully as the DME MAC in that jurisdiction, and CGS proposed a similar approach to perform the JB contract. Id. at 5. Moreover, the BEP found

Page 8 B-412142

-

¹³ NGS and CGS, as noted above, are both DME MAC contractors. <u>See supra</u> n.1.

¹⁴ According to CMS, the total annual claims volume for JB constitutes 20.7 percent of the national DME workload, while the volume for JC constitutes 40.1 percent. Supp. AR, attach. 1, Response to Protester's Comments, at 4.

that the audit reports and ICPs were relatively recent and reflected identical or similar CGS cost accounting operations. <u>Id.</u> at 4.

To evaluate CGS's proposed labor hours, the BEP (with assistance from the TEP) examined CGS's labor mix, productive hours, and assumptions for all direct labor, across all performance periods and SOW functional areas. <u>Id.</u> at 11-58. As relevant here, the TEP assessed a weakness in CGS's staffing plan because CGS proposed to hire [DELETED] percent new staff, which the evaluators found presented risks of excessive claim errors, untimely completion of work, and performance quality. AR, Tab 8a, TEP Report, at 39-40. The technical and cost evaluators also found that CGS proposed insufficient productive hours and/or workloads in nine SOW functional areas. ¹⁵ AR, Tab 8b, BEP CGS Report, at 11. Therefore, based on TEP recommendations, the BEP adjusted CGS's labor hours to realistic LOEs for those functional areas, which resulted in a total increase of 131,434 labor hours (or approximately 77 FTEs) to CGS's proposal. <u>See id.</u> at 11-58; attach. 2, Cost Adjustments by Functional Area, at 1-27.

To evaluate CGS's proposed labor rates, the BEP compared the rates of four labor categories that represented 76 percent of CGS's proposed labor hours (or [DELETED] of CGS's [DELETED] proposed FTEs) for the first full performance year to rates for those same categories in recent CGS invoices for its JC contract. AR, Tab 8b, CGS BEP Report, at 7. To evaluate the reasonableness of the proposed JB rates for these categories, the BEP first determined an average JC monthly rate for each labor category based on invoices from October through December of 2014, ¹⁶ and then compared those averages to CGS's proposed JB rates for the base year. <u>Id.</u> at 7-8. The BEP determined that the proposed JB rates were reasonable because they were less than the average JC rates. <u>Id.</u> at 8. The BEP report states that during this analysis, "the BEP kept in mind CGS'[s] proposed technical approach, which includes [DELETED] of new hires who[] are paid less than veteran employees." <u>Id.</u>

To evaluate the realism of these labor rates, the BEP used the same method above, except that, for comparison purposes, the BEP averaged the lowest labor rates from the JC invoices for that same period. Id. The BEP determined that the proposed JB rates were realistic, because multiple JC employees in the same labor categories were performing the same work at hourly wages that were less than the proposed

Page 9 B-412142

¹⁵ Those areas were: bills/claims; reopenings; appeals; recovery audit contractor (RAC) adjustments; provider customer service; overpayments; medical reviews; Medicare Secondary payer (MSP); and RAC non-MSP overpayments. AR, Tab 8b, BEP CGS Report, at 11.

¹⁶ The BEP chose invoices from this period because CGS submitted its proposal on October 29, 2014 (the proposal due date). AR, Tab 8b, BEP CGS Report, at 4.

JB labor rates. <u>Id.</u> The BEP also noted that for three of the four labor categories, the JB rate (including labor escalation) was still higher than the invoiced JC rates. <u>Id.</u> To confirm its analysis, the BEP compared the four rates to CGS's June 2015 JC invoices. ¹⁷ <u>Id.</u> at 9. The BEP also found that for Service Contract Act employees, CGS proposed labor rates that were consistently higher than the applicable Department of Labor wage determinations, and thus realistic. <u>Id.</u> Finally, the BEP found that CGS's proposed [DELETED] labor escalation rate for the base and option years (for all labor categories), was reasonable, but unrealistic. <u>Id.</u> at 10-11. The BEP determined that a [DELETED] escalation factor was more realistic, because it was roughly the median between CGS's proposed factor and a 2.8 annual forecast published by IHS Global Insight, ¹⁸ and because [DELETED] was closer to CGS rates for other MAC proposals. Id. at 11.

Based on this methodology and the various sources described above, as well as the cost evaluators' "experience and familiarity with CGS," the BEP upwardly adjusted CGS's total proposed costs by approximately \$7.5 million, including a \$2.3 million upward adjustment to CGS's direct labor cost. <u>Id.</u>, at 4-5, 73; <u>see</u> Table <u>supra</u> at 6 (evaluated costs). The BEP calculated the cost adjustment for direct labor by applying CGS's proposed labor rates to the TEP's adjusted labor hours, and by applying an additional [DELETED] escalation rate for each performance year. <u>See</u> AR, Tab 8b, CGS BEP Report, at 11-12.

NGS argues that labor rates and productive hours for the JC contract provided an invalid baseline for evaluating CGS's proposed costs for the JB contract, because CGS proposed a "fundamentally" different staffing plan that included transferring [DELETED] percent of its JC workforce to the JB contract, hiring [DELETED] percent new staff, and using temporary workers during the implementation period. ¹⁹ Moreover NGS argues, at length, that CMS was required to evaluate CGS's proposed bottom line unit costs per claim (BLUC, which is calculated by dividing an offeror's total cost by the number of processed claims), because, according to the

Page 10 B-412142

¹⁷ The BEP completed its cost evaluations in August 2015. <u>See</u> AR, Tab 8b, BEP CGS Report, at 1. As noted above (n.16), the BEP chose CGS's 2014 fourth quarter JC invoices for comparison purposes, because those invoices were recent relative to CGS's October 2014 JB proposal.

¹⁸ See generally www.ihs.com/index.html (last visited Dec. 29, 2015).

¹⁹ <u>See</u> Protester's Comments at 8-10, <u>citing</u> AR, Tab 7cE, CGS Staffing Plan, at 1 ("Leveraging our current JC operation, we are staffing the JB contract with a combination of Medicare-experienced personnel from our JC contract [DELETED] and new hires [DELETED]"); Tab 7bC, CGS Proposal Assumptions, No 5 at 1 (CGS "is proposing temporary staff during implementation as a risk mitigation strategy to ensure sufficient staff is available [on] Day 1 of JB operations.")

protester, CGS relied on BLUCs "to justify the realism of its proposed costs." Protester's Comments at 4. NGS also claims that CGS proposed a "two-tiered" pay structure whereby transferred JC staff would be paid, throughout the life of the contract, a higher salary than JB staff to perform the same work. See id. at 9-11. NGS asserts that "[n]either the TEP report nor the [SSA's source selection decision] reflects any consideration of CGS's [] reliance on temporary workers or the strategy to pay unequal pay for equal work once the new hires become experienced." Id. at 35-36. NGS further argues that the BEP should have, but failed to, compute blended labor rates to analyze CGS's proposed mix of experienced and inexperienced staff. In NGS's view, CMS failed to consider the risk that this labor mix would not perform as productively as CGS's JC contract, and the protester insists that CGS's productivity assumptions were thus "wildly optimistic." See id. at 8, 12.

CMS argues that it thoroughly evaluated CGS's business proposal in accordance with FAR § 15.404 and the RFP, and that the agency's realism analysis was based on a detailed examination of CGS's individual cost elements and valid comparisons to its historical JC workload and hours. CMS maintains that the TEP, BEP, and SSA were all fully aware of the differences in JB and JC staffing, and that they all recognized the risks of CGS's JB staffing plan. In this respect, CMS asserts that the BEP properly adjusted CGS's costs where they were inconsistent with its historical costs and productivity rates, and where CGS failed to explain the variance to the agency's satisfaction. CMS also disputes that CGS proposed a two-tiered pay structure, and states that NGS's claims in that regard are speculative, unsupported by the record, and ignore CGS's training plan and proposed innovations. CMS argues that it properly did not evaluate CGS's BLUCs, because they represent a fraction of what a DME MAC contractor does and do not account for cost elements

Page 11 B-412142

²⁰ CGS's business proposal included a cost realism narrative that, among other things, compared CGS's BLUC for the JC contract and CGS's proposed BLUC for the JB contract. AR, Tab 7dC, CGS Bus. Proposal.

According to NGS's cost consultant, CGS "implicitly [] proposed to permanently keep [] labor rate differentials between experienced personnel transferred from JC and personnel hired at the onset of JB[,] regardless of when the newly hired personnel reached essentially the same level of productivity as those transferred from JC[; this] is apparent from CGS proposing the CLIN 0002 [base period] direct labor rate for all subsequent CLINs, adjusted only for [DELETED] annual escalation." Protester's Comments, exh. 2, Cost Consultant Report ¶ 37 at 14. NGS claims that this two-tiered system will lead to overtime and attrition, and that to achieve CGS's proposed productivity levels, "logic dictates that the new [JB] personnel must immediately perform at the same (or higher) productivity levels as the experienced JC workforce[,]" even though new JB staff will earn less pay. See Protester's Comments at 10-11, 19; Protester's Supp. Comments at 10.

such as direct labor, indirect costs, travel costs, ODCs, and fees. CMS contends that the BEP evaluated blended labor rates by averaging actual JC labor rates for comparison purposes. In CMS's view, NGS's protest of the cost realism analysis only reflects the protester's disagreement with the agency's analytical approach. CMS also contends that the fact that the agency did not evaluate CGS's business proposal in the manner that NGS claims was necessary, does not make the agency's approach unreasonable.

Agencies are given broad discretion to conduct cost realism evaluations, thus our review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonably based and not arbitrary. See Tridentis, LLC, B-410202.2, B-410202.3, Feb. 24, 2015, 2015 CPD ¶ 99 at 7; Jacobs COGEMA, LLC, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16 at 26; Burns & Roe Indus. Servs. Co., B-233561, Mar. 7, 1989, 89-1 CPD ¶ 250 at 2.

We find, based on our review of the record, that CMS's evaluation of CGS's business proposal, including the agency's cost realism adjustments, were reasonable. As described above, the contemporaneous record shows that the agency evaluated CGS's business proposal by considering: CGS's recent historical costs for performing virtually the same requirement; CGS's historical labor hours, labor mix, and productive hours in that regard; a number of independent audits and ICPs; and CGS's unique technical approach. These analysis techniques are consistent with FAR requirements and unobjectionable.

While CMS may not have evaluated CGS's cost proposal to the more exacting degree that NGS (and its cost analyst) would have preferred, an agency is not required to conduct an in-depth cost analysis, see FAR § 15.404-1(c), or to verify each and every item in assessing cost realism; rather, the evaluation requires the exercise of informed judgment by the contracting agency. Cascade Gen., Inc., B-283872, Jan. 18, 2000, 2000 CPD ¶ 14 at 8. Moreover, an agency's cost realism analysis need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate and provide some measure of confidence that the rates proposed are reasonable and realistic in view of other cost information reasonably available to the agency as of the time of its evaluation. See SGT, Inc., B-294722.4, July 28, 2005, 2005 CPD ¶ 151 at 7; Metro Mach. Corp., B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶ 112 at 10-11.

Here, after thorough analysis, CMS adjusted CGS's proposed labor hours and probable costs to levels that the agency's cost and technical evaluators reasonably determined were realistic for CGS to successfully perform the contract, given the offeror's unique technical approach and its recent experience performing virtually the identical requirement. While NGS strongly disagrees with CMS's analytical methods (including the agency's use of CGS's JC productivity and labor rates as a baseline,

Page 12 B-412142

because of the number of inexperienced new hires that CGS proposed for the JB contract) we find NGS's disagreement with CMS's judgements to be meritless. ²² In fact, contrary to the protester's assertions, the record clearly demonstrates that CMS gave extensive consideration to CGS's proposed staffing plan, labor mix, and productive hours (among other things) for performing each of the dozens of SOW functional areas.

In this regard, CMS made adjustments in nine functional areas where agency cost and technical evaluators determined that CGS had proposed too few hours or proposed unrealistically high productivity levels. For example, with respect to the Bill/Claims, Claims-Processing Claims area, the evaluators reduced CGS's proposed productivity (from [DELETED] percent to [DELETED] percent) over its JC historical rate "[g]iven the fact that over [DELETED] of the staff in this area will be new hires" and there will be a "learning curve associated with the new staff." AR, Tab 8b, CGS BEP Report, at 14. The agency also made various other adjustments to account for newly-hired and inexperienced staff. See id. at 15, 17, 31, 33, 50, 53-54. Although NGS contends that these adjustments should be to levels below JC historical averages, aside from its preference, the protester has failed to demonstrate that the agency's adjustments, to levels at or slightly above JC historic averages, were unreasonable.

Moreover, with regard to NGS's argument that CGS's proposed technical innovations are unrealistic and will not yield the productivity and savings that CGS claims, we find that the protester has not persuasively rebutted the SSA's contemporaneous determinations that, even if all of CGS's proposed innovations were unrealistic, CGS's proposal would still provide the best value.²³ In this regard,

Page 13 B-412142

²² Insofar as NGS argues that the agency failed to consider qualitative differences between the JB and JC workloads, the agency concluded that the JC DME work was "almost identical work to the JB DME contract with the exception of volume," AR, Tab 8b, CGS BEP Report, at 5, and the protester has not identified any such qualitative differences that allegedly contributed to the agency's flawed cost realism evaluation. See Protester's Comments at 8-10, 14, 37-39; compare Supp. AR, attach. 1, Response to Protester's Comments, at 4-6 with Protester's Supp. Comments at 21.

²³ To the extent that NGS challenges the agency's technical evaluation of CGS's staffing plan with regard to training, its arguments in that regard are premised on CMS's allegedly flawed cost realism analysis. Moreover, NGS does not substantively challenge the merits of CGS's training program, including its timeline for training staff in specific SOW functional areas, the program's methodology, or the details for partnering and mentoring by experienced JC staff. Indeed, NGS essentially concedes that CGS's training program "offered CMS similar benefits" and was comparable to NGS's program. Protester's Comments at 36-37.

the SSA, as part of his cost/technical tradeoff and source selection decision, conducted a further cost analysis given the overall differences in the offerors' total evaluated costs. See AR, Tab 12b, SSD, at 53. Although the SSA explicitly concurred with the evaluators' findings, he felt that it was prudent to perform an additional cost analysis to consider "what if" CGS could not meet even the BEP's adjusted proposed productivity levels. Id. In this respect, the SSA assumed that if virtually all of CGS's innovations failed to produce cost savings, this failure would add an additional \$25.7 million in costs to CGS's total evaluated cost (raising it to \$103 million).²⁴ Id. The SSA concluded that even under this worse-case scenario, CGS would still provide the best value to the agency.²⁵

As noted above, agencies are accorded broad discretion in conducting a cost realism analysis, and we find no basis to question the reasonableness of CMS's cost realism analysis based on the record here. See Palmetto GBA, LLC, supra, at 10-11 (protest of cost realism analysis denied where CMS reasonably evaluated awardee's cost proposal based on the awardee's historical claims processing rates).

Past Performance Evaluation

NGS next argues that CMS's past performance evaluation was unreasonable and contrary to the terms of the RFP, and that the agency evaluated NGS's and CGS's past performance records unequally. According to NGS, the agency assessed strengths and weaknesses in the offerors' CPAR, QASP, Section 912, and award

Page 14 B-412142

²⁴ CMS concedes that the BEP miscalculated CGS's escalation rates for direct labor and postage and printing, and that CGS's total evaluated cost should have included an additional upward adjustment of \$1.6 million in that regard. Supp. AR, attach. 1, Response to Protester's Comments, at 9. Because this amount is negligible considering the overall difference in probable cost between the two proposals, we find the protester was not prejudiced by these errors. Competitive prejudice is an essential element of a viable protest; where, as here, the record establishes no reasonable possibility of prejudice, we will not sustain a protest even if a defect in the procurement is found. Health Innovation & Tech. Venture, B-411608.2, Sept. 15, 2015, 2015 CPD ¶ 298 at 7-8.

²⁵ Notably, NGS does not challenge the TEP's assessments that CGS's proposed medical review strategy would result in increased efficiencies and timeliness in reducing payment error rates, fraud, and abuse, and therefore protect the Medicare Trust fund; that CGS's program management plan would result in a reduction in improper payments and administrative costs, increased performance quality and accuracy, and improved customer satisfaction; and that CGS's provider outreach program will ensure that claims are properly submitted, will reduce error rates, and effectively educate providers and suppliers to achieve accurate billing. AR, Tab 8a, TEP report at 35-39.

fee reports disparately. NGS contends that CMS did not differentiate between the two offerors' past performance in conducting its best value tradeoff.

We note, as an initial matter, that many of NGS's arguments are based on the protester's view that as the incumbent contractor, NGS's proposal merited the highest past performance ratings and the greatest number of assessed strengths. See Protest at 14-15 (as the incumbent DME MAC for JB, NGS had the more relevant and specific past performance record and should have been rated far better than CGS). In this respect, the protester repeatedly complains about its evaluation ratings and number of assessed strengths and weaknesses as compared to the awardee. See id. at 18 (nine strengths were assigned to NGS and it was irrational, therefore, to equate NGS's performance with merely a good rating); Protester's Comments at 24, 35 ("NGS's Performance is so much better than CGS's (and the national average) that NGS should have been assigned a strength.").

NGS's belief that its incumbency status entitles it to higher ratings or additional assessed strengths does not provide a basis for finding CMS's past performance evaluations unreasonable. See Belzon, Inc., B-404416 et al., Feb. 9, 2011, 2011 CPD ¶ 40 at 5-6. There is no requirement that an incumbent be given extra credit for its status as an incumbent, or that the agency assign or reserve the highest rating for the incumbent offeror. See Modern Techs. Corp. et al., B-278695 et al., Mar. 4. 1998, 98-1 CPD ¶ 81 at 7. Furthermore, the protester's disagreement with the assigned evaluation ratings is insufficient to render the agency's evaluation unreasonable.²⁶ See Glenn Def. Marine--Asia PTE, Ltd., B-402687.6, B-402687.7, Oct. 13, 2011, 2012 CPD ¶ 3 at 7. The evaluation of proposals and assignment of adjectival ratings should generally not be based upon a simple count of strengths and weaknesses, but on a qualitative assessment of the proposals consistent with the solicitation's evaluation scheme. Epsilon Sys. Solutions, Inc., B-409720, B-409720.2, July 21, 2014, 2014 CPD ¶ 230 at 8. The essence of an agency's evaluation is reflected in the evaluation record itself, not the adjectival ratings. Stateside Assocs., Inc., B-400670.2, B-400670.3, May 28, 2009, 2009 CPD ¶ 120 at 8.

Based on our review of the record, we find that CMS reasonably evaluated NGS's and CGS's past performance. Where a protester challenges an agency's past performance evaluation, we will review the evaluation to determine if it was reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations, and to ensure that it is adequately documented. <u>Falcon Envtl. Servs.</u>, Inc., B-402670, B-402670.2, July 6, 2010, 2010 CPD ¶ 160 at 7.

Page 15 B-412142

-

²⁶ It is well established that ratings, be they numerical, adjectival, or color, are merely guides for intelligent decision making in the procurement process. <u>Burchick Constr. Co.</u>, B-400342.3, April 20, 2009, 2009 CPD ¶ 102 at 4-5.

An agency's evaluation of past performance, including its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of discretion which we will not disturb unless the agency's assessments are unreasonable or inconsistent with the solicitation criteria. SIMMEC Training Solutions, B-406819, Aug. 20, 2012, 2012 CPD ¶ 238 at 4.

As noted above, the RFP stated that CMS would consider the extent to which an offeror's past performance demonstrated the ability to successfully perform the contract, and that the agency would review relevant information from a number of sources, including PPIRS, CPARS, QASP, Section 912 evaluation reports, and award fee determinations.

Consistent with these evaluation criteria, the record here reflects that CMS evaluators conducted a methodical, well-documented, and qualitative assessment of both offerors' past performance considering numerous sources of available information; nothing in the record suggests that the offerors were evaluated unequally in that regard. See AR, Tab 8a, TEP Report, at 11-33, 42-71. Moreover, the contracting officer reviewed and approved those evaluations, and performed an extensive, independent assessment, including of new past performance information that became available after the TEP's evaluations. See AR, Tab 12, SSD, at 19-24, 29-36.

For example, with regard to their DME MAC contracts, the record shows that NGS and CGS were given extensive--and largely equal--consideration for the quality of their products and services, schedule, cost control, and business relations. AR, Tab 8a, TEP Report, at 16-23, 48-54; Tab 12b, SSD, at 19-24, 29-36. In fact, while NGS complains that CMS did not properly credit NGS's incumbent performance, and suggests that the agency did not properly evaluate NGS's CPARS for that contract, the protester concedes that the agency "credited NGS for its CPAR scores" and that "CMS did acknowledge that NGS's ratings for each CPAR element represent a strength[.]" See Protester's Comments at 24-25.

In addition, with regard to QASP reports, the record further shows that CMS evaluated both offerors' performance under various functional areas and compared

Page 16 B-412142

²⁷ NGS suggests that CMS ignored recent, positive past performance information that was "too close at hand" regarding one of NGS's A/B MAC contracts, because the agency did not consider a pending draft CPAR report for this contract. The agency explains that it did not consider the draft CPAR report because it had not been finalized and sent to NGS for review. CO Statement at ¶ 43. We find nothing objectionable in CMS's decision not to consider past performance information from this draft CPAR. See Trailblazer Health Enters., LLC, B-406175, B-406175.2, Mar. 1, 2012, 2012 CPD ¶ 78 at 15.

their performance to national averages, including for claims processing, FOIA requests, and MSP requirements. AR, Tab 8a, TEP Report, at 29-30, 43, 46-47; Tab 12b, SSD, at 30-32, 34-36. In this respect, the TEP found that CGS' positive trend and strong performance in five functional areas weighed heavily in the evaluators' assignment of a strength to CGS for its QASP scores, (including notable performance in claims processing, where CGS met 100 percent of its QASP metrics for all performance periods reviewed). AR, Tab 8a, TEP Report, at 29. While the TEP also considered a number of QASP reports for NGS, the evaluators reasonably concluded that NGS met QASP performance requirements, but that its QASP scores did not rise to the level of a strength. Id. at 43, 46-67. The fact that the agency assessed a strength to CGS for its QASP reports, but did not assess a strength to NGS in that regard, does not, without more, indicate unequal treatment, as NGS insists.

With regard to Section 912 reports, the record shows that, for both offerors and their significant subcontractors, CMS considered their section 912 audit reports for the same period of time (2011-2014), considered the number of high and medium risk findings for all of the firms, and assessed the risk that those findings presented to the security of Medicare data. AR, Tab 8a, TEP Report, at 31-33, 70-71; Tab 12b, SSD, at 20-21, 30, 32. NGS and CGS, including their respective subcontractors, were assigned weaknesses in that regard. AR, Tab 8a, TEP Report, at 31-33, 70-71.

Finally, with regard to award fee determinations, the record also shows that CMS evaluated both offerors' performance in the areas of customer service, claims processing, medical reviews, timeliness of redeterminations, among other things, and that the agency compared their performance in that regard to national averages. AR, Tab 8a, TEP Report, at 23, 28, 64; Tab 12b, SSD, at 19-24, 29-36. In doing so, the TEP explicitly recognized that NGS exceeded the national average for award fees under a number of the firm's MAC contracts; that this demonstrated NGS's excellence with regard to contract schedules, administration, and compliance; and that this record of past performance provided a benefit to the government. AR, Tab 8a, TEP Report, at at 64.

After considering these sources, CMS concluded that NGS and its proposed subcontractor consistently achieved strong performance, provided quality service, and delivered benefits to the government, and that NGS's record of past performance gave CMS solid confidence that NGS would successfully perform the contract with low risk. See id. at 42-3. While the agency did assess three past performance weaknesses to NGS, the evaluators specifically found that several of the offeror's strengths were "notable," of particular weight and importance, and

Page 17 B-412142

outweighed any assessed weaknesses.²⁸ <u>Id.</u> at 42, 70-71; Tab 12, SSD, at 33-34. Moreover, contrary to NGS's assertions, the contracting officer, in his source selection decision, explicitly acknowledged NGS's strong performance as the incumbent and its low risk of unsuccessful performance in that regard.²⁹ AR, Tab 12, SSD, at 36, 45, 52.

In short, we find that the agency's evaluation of both offerors' past performance was reasonable, despite NGS's objections. The evaluation of experience and past performance, by its very nature, is subjective, and NGS's disagreement with the agency's evaluation judgments does not demonstrate that those judgments are unreasonable. See Glenn Def. Marine-Asia PTE, Ltd., B-402687.6, B-402687.7, Oct. 13, 2011, 2012 CPD ¶ 3 at 7.

Best Value Determination

Finally, NGS protests CMS's source selection decision, arguing that it was flawed because it was based on the allegedly improper evaluation conclusions discussed above.

Selection officials have considerable discretion in making cost/technical tradeoff decisions. American Material Handling, Inc., B-297536, Jan. 30, 2006, 2006 CPD ¶ 28 at 4. When proposals are compared for purposes of a best value tradeoff decision, the number of identified strengths is not dispositive; rather, it is the qualitative information underlying the ratings that the source selection authority should consider in assessing whether and to what extent meaningful differences exist between proposals. Walton Constr. - a CORE Co., LLC, B-407621, B-407621.2, Jan. 10, 2013, 2013 CPD ¶ 29 at 6. The propriety of a cost/technical tradeoff decision does not turn on the difference in the technical scores or ratings per se, but on whether the selection official's judgment concerning the significance

Page 18 B-412142

²⁸ These notable strengths included: (1) a three year trend of increased positive performance of its incumbent contract in the areas of quality of products and services and business relations; (2) superior contract administration as evidenced by NGS's percentage of award fees under other MAC contracts; and (3) consistent beneficial reports of contractor performance for fiscal years 2011 and 2012. AR, Tab 8a, TEP Report, at 42.

²⁹ Similarly, with regard to CGS, the agency concluded that CGS and its proposed subcontractor demonstrated consistently strong performance, quality service, and benefits to CMS. AR, Tab 8a, TEP Report, at 11. The TEP also assessed a number of strengths for CGS's past performance, and found that they collectively outweighed any assessed weaknesses. <u>See id.</u> at 11-33. These strengths, like NGS's strengths, included the quality of CGS's products and services, its QASP scores in a number of functional areas, and its award fee determinations. Id. at 11.

of the difference was reasonable and adequately justified in light of the RFP's evaluation scheme. Manassas Travel, Inc., B-294867.3, May 3, 2005, 2005 CPD ¶ 113 at 5.

As discussed above, the SSA, in conducting his cost/technical tradeoff, acknowledged the strengths of NGS's higher technically-rated proposal, including its strong staffing plan and implementation approach. AR, Tab 12b, SSD, at 52. The SSA also recognized that NGS already had full staffing, facilities, and infrastructure in place to perform the requirement, and that NGS's technical approach would provide CMS with significant benefits and very little risk. See id. at 40, 52. However, the SSA found that these considerations did not warrant paying the significant price premium over CGS's proposal, particularly since CGS was already performing successfully as a DME MAC, and had a long history of smooth transitions and implementations. Id. at 52. We find these conclusions reasonable, and NGS's disagreement provides no basis to sustain the protest. See Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 10-11.

The protest is denied.

Susan A. Poling General Counsel

Page 19 B-412142