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Decision

Matter of: CGS Administrators, LLC

File: B-419539; B-419539.2

Date: April 28, 2021

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John Sorrenti, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's cost realism evaluation is denied where the record shows that the upward adjustments to protester's proposed costs were reasonable.
 2. Protest alleging that the agency did not conduct meaningful discussions is denied where record shows that the agency's discussions questions led the protester into the area of its proposal that required revision.
 3. Protest that awardee had impermissible impaired objectivity organizational conflict of interest is denied where record shows that agency meaningfully considered the potential for a conflict and reasonably concluded that a conflict did not exist.
 4. Protest that agency unreasonably and unequally evaluated technical approach and past performance is denied where record shows that the agency's evaluation was reasonable and consistent with the solicitation, and any differences in the evaluation arose from differences in proposals.
 5. Protest that best-value determination was flawed is denied where record shows that it was reasonable, supported by the record, and consistent with the solicitation.
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DECISION

CGS Administrators, LLC, of Nashville, Tennessee, protests the award of a contract to Noridian Healthcare Solutions, LLC, of Fargo, North Dakota, under request for proposals (RFP) No. 75FCMC19R0023, issued by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), for a Medicare Administrative Contractor (MAC) to provide services for the administration of Medicare Part A and Part B (A/B) fee-for-service benefit claims. CGS challenges almost every aspect of the agency's evaluation.

We deny the protest.

BACKGROUND

The RFP was issued under Federal Acquisition Regulation (FAR) part 15 procedures for a MAC to provide specified health insurance benefit administration services, including Medicare claims processing and payment services in support of the Medicare program for a geographic region known as Jurisdiction E (JE).¹ Agency Report (AR), Tab 7B, RFP amend. 4, at 9; AR, Tab 3B, Statement of Work (SOW) at 19. The RFP anticipated a cost-plus-award-fee contract with a 4 to 6-month implementation period, a 6 to 8-month base period, six 1-year option periods, and a close-out/transition option period not to exceed 6 months.² RFP at 9, 18.

The solicitation provided for award on a best-value tradeoff basis considering three evaluation factors: technical approach, past performance, and cost. *Id.* at 127-28. The RFP stated that the technical approach evaluation factor is more important than the past performance evaluation factor, and the two non-cost factors, when combined, are significantly more important than cost or price. *Id.* at 127.

The RFP instructed offerors to submit their proposals in five separate volumes, including a proposal assumption volume, a technical proposal volume (addressing the technical approach and past performance evaluation factors), a business proposal volume (addressing cost), and a conflict of interest volume. *Id.* at 95. For the technical approach evaluation factor, each offeror had to submit a program management plan, a staffing plan, and an explanation of how it would perform certain identified mission-

¹ CMS obtains Medicare claims processing and payment services from multiple MACs servicing specific geographical jurisdictions. Memorandum of Law (MOL) at 2. Noridian is the incumbent MAC in JE, which covers California, Hawaii, Nevada, American Samoa, Guam, and the Northern Mariana Islands. RFP at 9.

² The RFP stated that the implementation period would be 4 months for Part A and 6 months for Part B and the base period would run 8 months for Part A and 6 months for Part B. RFP at 18.

essential functions.³ *Id.* at 107-112. As relevant here, the staffing plan had to outline the total proposed staffing to perform the work from implementation to contract end. *Id.* Each offeror had to provide the total number of full-time employees (FTEs) by contract line item number (CLIN), an overview of all proposed sources of staffing, and a breakdown by labor category of the total FTEs and, separately, new-hire FTEs, for the base year and each option year. *Id.* at 109.

For the past performance factor, each offeror and its significant subcontractors had to provide a summary of all CMS contracts or task orders greater than the simplified acquisition threshold and all relevant contracts with federal government agencies, state agencies, local governments, and commercial customers, that had periods of performance ending within three years immediately preceding the initial posting date of the solicitation.⁴ *Id.* at 106. The RFP stated that the agency would evaluate the extent to which an offeror's past performance "demonstrate[d] the likelihood that the prospective contract will be performed successfully." *Id.* at 107.

For the business proposal volume, the RFP included cost templates on which offerors had to propose costs and fees for each CLIN.⁵ *Id.* at 118. Offerors had to propose costs for: direct labor rates for each proposed labor category and the associated costs for fringe benefits; subcontractors; other direct costs (ODCs); indirect costs; and a base and award fee. *Id.*, attachs. J.35-J.41. Offerors also had to provide a written cost narrative that addressed direct labor, indirect costs, indirect cost rates, and postage and printing costs. *Id.* at 120-21. The RFP stated that the business proposal would be "analyzed and evaluated . . . to determine the reasonableness and the realism of the proposed cost" and that the analysis would include a "price analysis, cost analysis and cost realism analysis pursuant to FAR Subpart 15.404." *Id.* at 128.

For the conflict of interest volume, the RFP included an attachment that addressed the offeror's business ethics, conflicts of interest, and compliance program. AR, Tab 4D, RFP amend. 1, attach. J.10. In this attachment, each offeror had to describe all actual, potential, and/or apparent conflicts of interest, and disclose any contracts that could pose an actual, potential, or apparent conflict of interest. *Id.* at 2. Offerors also had to disclose "any and all known violations and alleged acts, within the past five (5) years, related to the following for itself, its parent and affiliated companies or subcontractors . . . [f]alse [c]laims [a]ct, [c]ivil [m]onetary [p]enalties, [c]riminal investigations and/or indictments, and [q]ui tam lawsuits or other administrative misconduct." *Id.* at 3. The

³ The mission-essential functions were implementation, provider enrollment, provider customer service program, claims processing, appeals, medical review, and audit and reimbursement. RFP at 112.

⁴ A significant subcontractor was defined as "subcontractor performing major or critical aspects of the requirements relevant to the prospective contract." RFP at 105-06.

⁵ The CLINs corresponded to a contract period of performance; for example, CLIN 0001 was the implementation period, CLIN 0002 was the base year operations, and CLIN 0003 was for option year 1. RFP at 11.

RFP stated that this information was “so material to the award of this contract that a proposal failing to provide the requirements identified in [a]ttachment J.10 . . . may be ineligible for award.” RFP at 124.

The agency received proposals from three offerors, including CGS and Noridian. AR, Tab 20, Source Selection Decision Document (SSDD) at 2. After conducting an evaluation of the initial proposals, the agency established a competitive range that included only CGS and Noridian, and entered into discussions and solicited final proposal revisions (FPRs) from these two offerors. *Id.* The results of the agency’s evaluation of FPRs were as follows:

Offeror	Technical Approach	Past Performance	Total Proposed Cost	Total Probable Cost
CGS	Excellent	High Confidence	\$507,906,008	\$550,170,389
Noridian	Excellent	High Confidence	\$556,805,519	\$567,937,312

Id.

A technical evaluation panel (TEP) evaluated the technical approach and past performance factors and documented their findings in a detailed evaluation report.⁶ AR, Tab 18, TEP Report Final. The TEP assessed nine strengths and no weaknesses, significant weaknesses, or deficiencies to CGS’s proposal under the technical approach factor. *Id.* at 81-82. For Noridian, the TEP assessed 11 strengths, 1 weakness, and no significant weaknesses or deficiencies. *Id.* at 83-84. The one weakness was related to Noridian’s proposed staffing to perform [DELETED], which the agency found to be a reduction in staff that created a risk to successful contract performance. *Id.* at 84. For the past performance factor, the TEP assessed numerous strengths to both offerors’ proposals. *Id.* at 15, 54. The TEP assessed one weakness to CGS’s proposal and six weaknesses to Noridian’s proposal under the past performance factor. *Id.* at 27-28, 81-82, 71-74, 84-85.

A business evaluation panel (BEP) evaluated the business proposals and detailed the evaluation in a BEP report for each offeror. AR, Tab 19A, CGS FPR BEP Report; Tab 19C, Noridian FPR BEP Report. As relevant here, the agency determined that an upward cost realism adjustment of \$42,264,381 was appropriate for CGS’s proposal. AR, Tab 19A, CGS FPR BEP Report at 5. This reflected upward adjustments to a number of components of CGS’s proposed cost, including direct labor, direct labor escalation rate, ODCs, overhead, general and administrative (G&A) costs, and postage and printing costs. *Id.* The agency made an upward adjustment of \$11,131,793 to Noridian’s proposal, making adjustments mainly to Noridian’s proposed ODCs, services overhead, and indirect costs. AR, Tab 19C, Noridian FPR BEP Report at 5.

⁶ The TEP was comprised of the technical approach evaluators and the past performance evaluator. AR, Tab 18, TEP Report at 2.

The contracting officer, who was also the source selection authority (SSA), reviewed and concurred with the evaluation reports and detailed her decision in the SSDD. AR, Tab 20, SSDD. With respect to the technical approach factor, the SSA noted that Noridian's proposal was "particularly strong" for implementation, staffing plan, key personnel, [DELETED], and [DELETED].⁷ *Id.* at 43. For example, the SSA concluded that Noridian's proposal offered "100% Jurisdiction E experienced and knowledgeable personnel, who are immediately available, and ready at the start of implementation . . . with little to no need for recruiting, hiring, or training personnel." *Id.* In contrast, CGS's proposed implementation "requires the recruiting, hiring and training of [DELETED] or [DELETED]% new hires during this period, critical to successful contract performance." *Id.* at 47. The SSA also noted that both proposals "include similar benefits associated with automations and tools improving efficiencies; however, based upon the benefits to the [g]overnment associated with Noridian's implementation, staffing plan and key personnel, as well as its [DELETED] and [DELETED], I considered the Noridian proposed technical approach to be of greater value to the [g]overnment than the CGS proposed technical approach." *Id.* at 42.

Although both offerors received the highest rating under past performance, the agency found that Noridian's past performance record was superior. *Id.* at 48. The SSA based this finding "on the fact that for its two Most Relevant contracts of High Significance, namely, it's A/B MAC contracts, JE and [Jurisdiction] F, in addition to the successful management, productive efficiencies, and innovative processes and procedures implemented as indicated in the initial TEP report, Noridian experienced significant contract cost savings for sustained periods . . . even while processing greater workloads and without the need for additional funding." *Id.* at 48. In contrast, the cost savings achieved by CGS on its MAC contracts were not "quantitatively or qualitatively of the same quality or merit or value as those of Noridian." *Id.* at 49. With respect to the weaknesses assessed to Noridian's proposal for past performance, the SSA stated that she found the strengths outweighed the weaknesses, and that for the weaknesses that arose from Noridian's performance of its second most relevant contracts, the SSA found them to be moderate weaknesses, "without impact to my award decision." *Id.*

The SSA concluded:

When assessing the value of payment of the higher Noridian \$17,766,923 price premium (or \$2,733,373 per contract period of performance, from the base period through [option year] 6), when comparing the Noridian probable costs to the CGS probable cost, the value and benefit to the Government of the Noridian technical approach and past performance is worth the price premium. Moreover, it is my opinion that it is also worth the \$60,031,304 (or \$9,235,585 per contract period of performance, from

⁷ [DELETED] refers to Noridian's [DELETED], which is [DELETED]. AR, Tab 18, TEP Report Final at 46.

the base period through [option year] 6) price premium representing the difference between Noridian's probable cost and CGS' proposed cost.

Id. at 52.

On December 18, the agency notified CGS that it had made award to Noridian. After receiving a debriefing, CGS filed this protest with our Office.

DISCUSSION

CGS challenges the agency's evaluation under the cost, technical approach, and past performance evaluation factors and alleges that the agency conducted misleading discussions with respect to its cost realism evaluation. CGS also contends that Noridian had a disqualifying impaired objectivity organizational conflict of interest (OCI) and failed to disclose certain allegations relating to fraud. CGS further asserts that the agency's best-value determination contained multiple flaws.⁸ Based on our review of the record, we find that none of CGS's arguments provides a basis for sustaining the protest.

Cost Realism Analysis

As noted above, the agency made an upward adjustment of \$42,264,381 to CGS's proposed cost. CGS has challenged the adjustments the agency made to CGS's direct labor rates, indirect costs, direct labor escalation rate, and the postage and printing costs included with its ODCs. We address these challenges in turn.

When an agency evaluates a proposal for the award of a cost-reimbursement contract or task order, the offeror's proposed costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR 15.404-1(d), 16.505(b)(3); *AECOM Mgmt. Servs., Inc.*, B-418467 *et al.*, May 15, 2020, 2020 CPD ¶ 172 at 4. Consequently, the agency must perform a cost realism analysis to determine the extent to which the offeror's proposed costs are realistic for the work to be performed. FAR 15.404-1(d)(1); *see Noridian Admin. Servs., LLC*, B-401068.13, Jan. 16, 2013, 2013 CPD ¶ 52 at 4-5. An agency is not required to

⁸ CGS also raises a number of other collateral arguments. Although we do not address every argument, we have reviewed them all and find that none of them provides a basis to sustain the protest. For example, CGS asserts that the agency improperly credited Noridian with resources of its corporate affiliate where one of Noridian's proposed key persons was employed by a Noridian affiliate, and not the Noridian entity that proposed to perform the contract. Supp. Comments at 4-8. CGS's argument was based on the key person's public "LinkedIn" account, which listed the key person's employer as a Noridian affiliate. *Id.* at 8. In response, Noridian affirmatively stated that the key person is a Noridian employee and provided a page from Noridian's corporate directory confirming this fact. Intervenor Supp. Comments at 15. Accordingly, we find no reason to sustain the protest on this basis.

conduct an in-depth cost analysis, or to verify each and every item in assessing cost realism; rather, the evaluation requires the exercise of informed judgment by the contracting agency. See *Cascade Gen., Inc.*, B-283872, Jan. 18, 2000, 2000 CPD ¶ 14 at 8; see FAR 15.404-1(c). Our review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonable; a protester's disagreement with the agency's judgment, without more, does not provide a basis to sustain the protest. *Imagine One Tech. & Mgmt., Ltd.*, B-412860.4, B-412860.5, Dec. 9, 2016 CPD ¶ 360 at 14-15.

Direct Labor Rates

In conducting its cost realism analysis, the BEP used historical sources of information, including CGS's proposal for the recent 3-year extension of its Jurisdiction 15 (J15) MAC contract.⁹ AR, Tab 19A, CGS FPR BEP Report at 4. When reviewing CGS's initial proposal, the BEP found that the labor categories used in CGS's JE proposal did not align with the labor categories that CGS had used historically, including for the J15 contract. AR, Tab 11A, CGS Initial BEP Report at 7, 9. As a result, the agency submitted a discussion question to CGS, requesting that CGS provide a "comparison between the direct labor categories and the direct labor rates proposed for JE and those included in the current J15 [o]ption [y]ear 4." AR, Tab 14B, CGS Discussion Questions and Answers (Q&A) at 50. The agency also asked CGS to provide an explanation why any labor rates for JE were higher or lower than those for J15 and why CGS believed the proposed JE labor rates to be reasonable. *Id.*

In response, CGS provided the requested comparison of labor categories and rates for JE and J15, and explained that the rates for the majority of the JE labor categories were lower than the J15 historical rates. *Id.* CGS stated that the difference in rates was driven by lower proposed labor rates for new hires in the JE proposal versus the long-tenured staff for J15. *Id.* In particular, for the JE proposal, CGS proposed a number of new hires in [DELETED], which had a lower wage rate than the region in which the J15 employees worked. *Id.* CGS further stated that it [DELETED] but explained that [DELETED].¹⁰ *Id.*

After receiving CGS's FPR, which incorporated CGS's responses to the agency's discussions questions, the BEP compared CGS's total proposed direct labor costs for the JE contract to CGS's total historical direct labor costs on the J15 contract. AR,

⁹ CGS is the current A/B MAC for J15. Protest at 7. That contract was modified in August 2020 to include an additional three years. Contracting Officer's Statement (COS) at 5.

¹⁰ In response to a different question, CGS stated that its base year staffing plan [DELETED]. AR, Tab 14B, CGS Discussion Q&A at 4. CGS's proposal also explained that "CGS has built in a [DELETED] period for all new hires that [DELETED]." AR, Tab 16C, CGS Prop. Vol. III, Staffing Plan at 61.

Tab 19A, CGS FPR BEP Report at 15. The BEP found that there was a “significant discrepancy between the costs proposed for JE and the CGS J15 historic costs.”¹¹ *Id.* To further analyze the cost differences between the JE and J15 contracts, the BEP reviewed the direct labor rates for every direct labor category proposed for JE option year 1 and compared them to the rates in CGS’s most recent J15 proposal.¹² *Id.* at 16.

The BEP noted that in response to the agency’s discussions questions, CGS explained that it was able to lower its proposed JE costs by utilizing newly hired employees. *Id.* at 16. The BEP determined that of the [DELETED] proposed labor categories, [DELETED] (or [DELETED] percent) were new hires. *Id.* For the implementation and base periods of the JE contract, CGS proposed the new hires at lower labor rates that were “consistent with the new hire, inexperience status.” *Id.* The BEP stated that “[o]f concern . . . is that the new hires were not considered ‘new’ after the implementation and base period; however, their labor rates were not escalated up to the same pay as those J15 FTEs with Medicare experience.” *Id.*

Comparing the proposed JE labor rates to the J15 rates, the BEP found that there were lower labor rates for [DELETED] of the [DELETED] new hire labor categories and [DELETED] of the [DELETED] labor categories with Medicare experience. *Id.* With respect to the labor rates for new hires, the agency did not adjust the rates for the implementation or base periods, but explained that:

Because (1) CGS considers these new hire labor categories experienced by [DELETED]; (2) those labor categories would be required to perform at the same level as an experienced employee in [DELETED]; and, (3) the complexity of the MAC work and the obligation of the CMS Medicare program to the Medicare community requires the level of stability afforded by equitable labor rates; the BEP adjusted the lower new hire labor rates upward by [DELETED]% for [DELETED].¹³ The BEP

¹¹ In particular, the BEP noted that the effort required for the JE contract is 79 percent larger than the J15 contract but that CGS’s proposed costs for JE option year 1 were only approximately \$1.6 million higher than the J15 option year 5. AR, Tab 19A, CGS FPR BEP Report at 15.

¹² CGS submitted its JE FPR on August 28, 2020; the J15 proposal used by the agency for its cost realism analysis was submitted on July 20, 2020, and revised on July 28. AR, Tab 19A, CGS FPR BEP Report at 1, 8. The agency states that it used the costs for option year 1 of the JE proposal because it is the first full 12-month operational period of performance and is “therefore representative of the full range of labor rates proposed for the JE contract” and compared them to the costs for option year 5 of the J15 proposal, which also represented a 12-month period. *Id.* at 8.

¹³ The agency explains that the BEP report incorrectly stated that the labor rates were adjusted upward by [DELETED] percent; in fact, the BEP adjusted the labor rates upward by [DELETED] percent. COS at 11. For those labor categories where the

adjusted the rates up by [DELETED]% and not up to the total amount of the J15 . . . rates, because, although the new hires are required to perform the work of experienced employees, the BEP recognizes that the new hires are actually not as experienced, and would not have the same length of service as those more tenured J15 employees.¹⁴

Id.

The BEP further stated that it was “of the opinion that the risk of instability and ultimately increased contract cost that underpaid employees represent for the Medicare Program is mitigated by the more realistic cost for the work to be performed with the expectations of the complex Medicare Program.” *Id.* at 16-17. After adding the additional costs created by the adjusted rates to CGS’s proposed rates, and applying escalation for the remaining years of the contract, the total direct labor cost was increased by \$[DELETED]. *Id.* at 17.

The agency applied this same analysis with respect to the labor costs associated with CGS’s A/B MAC customer service centers, which were included under CGS’s ODCs.¹⁵ *Id.* at 26-27. Here again, for the new hires proposed to work in the customer service centers, the agency increased the labor rates in option year 1 to reflect that these employees were expected to perform at the level of an experienced employee by that time. *Id.* at 26.

The agency then adjusted other costs upwards to account for the increase in direct labor costs. For example, applying CGS’s proposed fringe benefit rate to the increased direct labor costs resulted in an increase to the fringe benefit costs. *Id.* at 19. In addition, CGS’s overhead and G&A costs also were adjusted upward to account for the increase in costs associated with the adjustments in the direct labor and fringe benefit costs.¹⁶ *Id.* at 36, 39.

CGS argues that the upward adjustment to its direct labor rates was improper because it was “based on the fiction that CGS would have to provide abnormally large pay raises to its newly hired employees after six to twelve months and thereby match the pay scale of CGS’s long-tenured ‘J15 FTEs’ working in a different city and provide escalation as

proposed JE rates were lower than the J15 rates, the agency increased the JE rates by [DELETED] percent of the difference between the JE and J15 rates. See AR, Tab 19B, CGS FPR BEP Report Attachments, Attach. 22 CGS Labor Rate Comparison.

¹⁴ For the labor categories for employees with Medicare experience, the BEP upwardly adjusted CGS’s proposed JE labor rates to the J15 rates. AR, Tab 19A, CGS FPR BEP Report at 16.

¹⁵ CGS explained that it [DELETED]. Protest at 24.

¹⁶ As a result of the adjustment to ODCs, overhead, and G&A, the agency also increased CGS’s base and award fee. AR, Tab 19A, CGS FPR BEP Report at 39.

well.” Comments & Supp. Protest at 8. CGS notes that the agency did not question CGS’s assumption that a new hire would increase his or her productivity to that of a more experienced employee after [DELETED]. *Id.* at 10. However, CGS contends, the agency then “made the illogical leap that all staff hired by CGS at a realistic lower base year rate must, at [DELETED], be plussed up to the same blended rate of long tenured staff performing J15.” *Id.* at 10. CGS also asserts that the agency’s adjustments failed to account for the fact that the J15 rates represented a blended rate consisting of a different pool of employees working in different locations than the JE employees. *Id.* at 11-12.

The agency argues that it adjusted the rates for the new hires because the agency assumed that “the employees CGS proposed as being experienced at [DELETED] on the job, would be paid at a realistic rate for experienced employees, consistent with CGS’s own historic and recent J15 . . . labor rate experience.” COS at 7. The agency further contends that it determined that “having [DELETED] [percent] experienced former new hires underpaid, was not realistic, and not supportive of successful contract performance.” *Id.* The agency also maintains that it increased the JE new hire rates only by [DELETED] percent of the difference between the JE and J15 rates to “account[] for the fact that the new employees, although experienced, may not be as tenured as some of the J15 experienced employees” and “to account for the variables, experience, seniority and location; and at the same time reduce the risk represented by the much lower labor rates proposed in this competition as compared to the CGS historical rates.” *Id.* at 12; Supp. COS at 1. The agency concludes that it was unreasonable for CGS to assume that the newly hired employees would work for significantly lower pay while performing the same work as more experienced Medicare employees. Supp. COS at 1.

On this record, we find the agency’s upward adjustments to the proposed JE labor rates for new hires to be reasonable. While the agency accepted CGS’s proposed approach to utilize a number of new hires on the JE contract to keep costs low, it found CGS’s decision to maintain lower labor rates for the new hires while also assuming increased productivity at [DELETED] to be unreasonable. In this regard, the agency reasonably determined that a JE employee performing at the level of a long-tenured J15 employee should be paid a rate commensurate with their productivity, regardless of their tenure. Moreover, CGS’s complaint that the agency improperly increased CGS’s JE rates to its J15 rates, and that this increase failed to take into account the differences between the JE and J15 contracts, is not supported by the record. Rather, the agency explains that it increased the rates by only [DELETED] percent of the difference between the JE and J15 rates in order “to account for the variables, experience, seniority, and location” difference between the two contracts. Thus, the record shows that the agency did not arbitrarily increase the JE rates to the same level as the J15 rates, but rather intentionally limited the increase to account for differences in CGS’s approach to both

contracts. We therefore find that the agency's decision to increase the proposed labor rates was reasonable.¹⁷

Direct Labor Escalation Rate

CGS also challenges the agency's decision to increase CGS's proposed direct labor escalation rate from [DELETED] to [DELETED] percent. The BEP found CGS's proposed escalation rate of [DELETED] percent to be inconsistent with the IHS Global Insight escalation factor, which showed a low rate of 2.9 percent and an average rate of 3.1 percent.¹⁸ AR, Tab 11A, CGS Initial BEP Report at 16. In addition, the BEP found that CGS's proposed escalation rate was inconsistent with the [DELETED] percent escalation rate that CGS recently proposed for its J15 and Jurisdiction C (JC) contracts. *Id.* The BEP concluded that because of the difference in CGS's proposed escalation rate of [DELETED] percent and the IHS Global Insight average of 3.1 percent, as well as the recently proposed escalation rates of [DELETED] percent on the J15 and JC contracts, an adjustment was warranted. *Id.* at 17.

CGS asserts that the agency failed to consider CGS's most recent J15 extension proposal, which proposed a [DELETED] percent escalation rate. Comments & Supp. Protest at 15; Supp. Comments at 17. CGS argues that despite relying on that J15 proposal for its analysis of labor rates, the agency unreasonably decided that it was not a good point of comparison for the escalation rate. Comments & Supp. Protest at 15.

The agency counters that it did not ignore the J15 proposed escalation rates, but that it looked at the rates actually used for CGS's J15 and JC contracts "for a more extended historical period." Supp. COS at 3. In this regard, the agency states that it "compared the consistency of the use of the rates and found CGS's consistent historical use of a [DELETED]% rate," along with the IHS Global Insight rates, provided a basis to use a [DELETED] percent rate. *Id.* The agency further contends that it was not obligated to use the more recently proposed J15 escalation rate when that rate was contradicted by other historical CGS data. *Id.*

On this record, we find the agency's decision to increase the escalation rate was unobjectionable. The agency's analysis was based on recently proposed escalation rates for two different MAC contracts, J15 and JC. While CGS had more recently proposed an escalation rate on the J15 contract of [DELETED] percent, we find nothing unreasonable with the agency deciding that the historical, and more consistently used rate of [DELETED] percent--as opposed to the [DELETED] percent rate from the J15

¹⁷ Because we find that the agency's upward adjustment to CGS's direct labor rates was reasonable, we also find that the corresponding increase to CGS's fringe benefits and other indirect labor costs was reasonable.

¹⁸ The IHS Global Insight is an annual forecast of various labor markets. See *Engility Corp.*, B-413120.3 *et al.*, Feb. 14, 2017, 2017 CPD ¶ 70 at 20 n.19.

proposal that was submitted only one month prior to CGS's JE FPR--was more realistic. As such, we deny this protest ground.

Postage and Printing Costs

CGS also challenges the agency's decision to increase CGS's postage and printing costs, which were included in CGS's ODCs. With respect to postage, the BEP noted that while the J15 postage volumes increased by [DELETED] percent per year for the 3-year extension period, CGS's JE proposal showed that it anticipated the postage volumes to decrease, including for the years that overlapped with the J15 extension years. AR, Tab 19A, CGS FPR BEP Report at 23. Thus, the BEP concluded that "it is reasonable for the JE postage volumes [to] be adjusted to reflect an increase consistent with the recently submitted J15 . . . proposal as it is reasonable to assume that initiatives proposed for JE would have been included in the J15 . . . proposal." *Id.* With respect to printing costs, the BEP similarly noted that the J15 print volumes increased by [DELETED] percent per year while the proposed JE print volumes decreased each year.¹⁹ *Id.* at 24. The BEP stated that it had a concern with the JE projections "particularly when the same level of projections do not hold true for CGS's current MAC contract in a proposal submitted close in time to the JE FPR." *Id.* Accordingly, the BEP increased the print volumes and costs for CGS's JE proposal. *Id.*

CGS contends that these upward adjustments ignored the trending data that CGS submitted in its FPR to substantiate the postage and printing volumes proposed for the JE effort. Comments & Supp. Protest at 16. In this regard, CGS states that it proposed to increase the utilization of [DELETED], which would drive down the postage and printing volumes. *Id.* at 16-17; Protest at 22-23; see also AR, Tab 14B, CGS Discussions Q&A at 11. CGS asserts that it explained how it had already increased the use of [DELETED] and how it had "additional phases of the plan" to further grow beneficiary use of [DELETED]. Protest at 23. Moreover, CGS argues that the agency accepted CGS's forecast for greater adoption of [DELETED] and therefore it was unreasonable for them to overlook this data and increase CGS's proposed postage and printing costs.

The agency argues that because of the overlap in performance periods for JE and J15, "it was reasonable for CMS to assume that CGS would have applied its 'additional phases of the plan' . . . for [DELETED] adoption to the J15 . . . proposal, submitted on July 28, 2020, as it did in its JE FPR, submitted essentially one month later." COS at 10. The agency also asserts that it was reasonable for it to assume that CGS would want to achieve the same cost savings and efficiencies on the J15 contract. *Id.* at 10-11. Thus, the agency used the postage and print volume increases from the J15 proposal "to achieve a realistic assessment of proposed JE print and postage costs." *Id.* at 11. The agency maintains that "[t]o do otherwise, would ignore the actual, realistic

¹⁹ The BEP noted that the postage and print volumes drive cost; the higher the volume of postage and printing, the higher the costs. AR, Tab 19A, CGS FPR BEP Report at 23-24.

data and base the cost realism analysis on more speculative data, resulting in risk of unsuccessful contract performance.” *Id.*

We find the agency’s analysis and decision to upwardly adjust CGS’s postage and printing costs reasonable. CGS focuses on the fact that the agency accepted CGS’s forecast of the increased adoption of [DELETED], which would in turn decrease the postage and printing volume. Although CMS accepted this forecast, in our view, the agency also reasonably assumed that a decrease in postage and print volume would be reflected in the J15 proposal, given the overlapping years of the JE and J15 contracts. As the record reflects, the data shows that for the J15 proposal, CGS showed year-to-year increasing postage and printing volumes. This was inconsistent with the JE proposal, which showed decreasing postage and printing volumes. Given this inconsistency between the proposals, we find it reasonable that the agency had concerns with the JE projections, and decided that a more realistic cost would be based on the postage and printing volumes from the J15 proposal. As a result, we deny this protest ground.²⁰

Failure to Engage in Meaningful Discussions

CGS alleges that the agency failed to engage in meaningful discussions with regard to the agency’s concerns about CGS’s proposed direct labor rates and its direct labor escalation rate. Protest at 28-29. As noted above, during discussions, the agency requested that CGS provide a comparison between the direct labor categories and labor rates proposed for JE and the J15 contract. AR, Tab 14B, CGS Discussions Q&A at 50. The agency also asked that CGS explain any differences in the rates and why the JE rates are reasonable. *Id.* The agency did not ask any discussions questions regarding CGS’s proposed direct labor escalation rate. *See id.*

When discussions are conducted in a negotiated procurement, they must be meaningful, equitable, and not misleading. *QinetiQ N. Am., Inc., B-405163.2 et al.*, Jan. 25, 2012, 2012 CPD ¶ 53 at 16. To satisfy the requirement for meaningful discussions, an agency need only lead an offeror into the areas of its proposal requiring amplification or revision; all-encompassing discussions are not required. *Id.* Agencies are not required to “spoon-feed” an offeror during discussions by identifying every

²⁰ The agency acknowledges that it made some mistakes in conducting its cost realism evaluation, including incorrectly calculating the impact on indirect costs. COS at 12-13. After correcting these mistakes, the agency states that the total cost realism adjustment would be \$39,996,069, or \$2,268,312 lower than what CMS calculated in the contemporaneous evaluation. *Id.* at 13. The agency also states that this error “did not have a significant impact on the overall probable cost” and that it did not give the SSA any reason to question the award decision. *Id.* We agree; given the SSA’s explanation for why Noridian’s proposal was worth the price premium--and the SSA’s statement that it would have awarded to Noridian even without the cost adjustments to CGS’s proposal--we find that these errors, amounting to a decrease in CGS’s total probable cost of 0.4 percent, were not prejudicial to CGS.

possible area where a proposal might be improved or suggesting alternative approaches. *Torrent Techs., Inc.*, B-419326, B-419326.2, Jan. 19, 2021, 2021 CPD ¶ 29 at 12.

CGS argues that the agency's discussions were not meaningful because none of the questions addressed the labor rates of new hires or the direct labor escalation rate. Supp. Comments at 19. In this regard, the protester contends that "the [a]gency failed to frame any question to address the cost evaluators' productivity rate confusion or raise its concern that CGS's proposed labor escalation rate did not match direct labor escalation rates recently proposed by CGS." Comments & Supp. Protest at 25.

The agency responds that CGS's argument is based on its incorrect assertion that the agency made adjustments to CGS's direct labor rates based on productivity rates rather than labor rates. COS at 14; Supp. COS at 6. Rather, the agency maintains, it made these adjustments "based upon the labor category designations and rates included in the CGS final JE proposal . . . compared to the rates proposed for the same labor categories in the J15 . . . proposal." COS at 14. In this regard, the agency notes that the discussion questions clearly addressed the cost differential between the JE and historic J15 costs, including differences in direct labor rates. *Id.* Thus, CMS states that its discussions questions raised in various ways the agency's concerns related to CGS's low proposed JE costs as compared to its J15 costs, and that these questions were more than sufficient to alert CGS to the concerns the agency had about CGS's proposal. *Id.* at 15; Supp. COS at 6.

The agency also contends that questions related to direct labor cost "inherently include the escalation rates as part of the basis for the establishment of labor rates." COS at 16. The agency points out that as part of the direct labor instructions, the RFP instructed offerors to provide the basis of proposed labor rates, including any proposed escalation factors. *Id.* (citing RFP at 119). Accordingly, the agency argues that "[g]iven that escalation is a component of direct labor costs, the fact that the [a]gency clearly questioned the CGS direct labor costs certainly met the [a]gency's obligation to 'lead an offeror into the areas of its proposal requiring amplification or revision.'" MOL at 28 (quoting *Epsilon Sys. Sols., Inc.*, B-409720, July 21, 2014, 2014 CPD ¶ 230).

We agree with the agency that it conducted meaningful discussions with CGS. The agency's discussions questions expressly asked CGS to provide a comparison between its proposed JE direct labor categories and rates and its J15 labor categories and rates. The agency also asked CGS to provide an explanation where the JE rates were lower than the J15 rates and why the JE rates were reasonable. Thus, we find that these questions alerted CGS to the agency's concerns; namely that the proposed labor rates for JE were lower than those proposed for J15. Moreover, we agree with the agency that its decision to increase CGS's proposed labor rates was not based on confusion about productivity rates versus labor rates. Rather, the agency increased the rates because it believed it was not realistic for CGS to assume that employees who were expected to perform at a level commensurate with an experienced employee would accept [DELETED]. We also agree with the agency's argument that escalation rates

are necessarily included with direct labor rates, and find that this argument is supported by the RFP. Thus, the fact that the agency did not specifically ask CGS about its proposed escalation rate does not mean that the discussions were not meaningful, since the questions conveyed to CGS the agency's concerns regarding labor rates that appeared lower than the historical rates used by CGS. We deny this protest ground.

Organizational Conflict of Interest

CGS alleges that Noridian's role as the Supplemental Medical Review Contractor (SMRC) creates a disqualifying impaired objectivity OCI because Noridian will be processing Medicare claims as the MAC and also monitoring the Medicare system for fraud, waste, and abuse as the SMRC. Supp. Comments at 20. We find that the agency reasonably concluded that no OCI exists here.

The FAR requires contracting officials to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR 9.504(a), 9.505. The situations in which OCIs arise, as described in FAR subpart 9.5 and the decisions of our Office, can be categorized into three groups: (1) biased ground rules; (2) unequal access to information; and (3) impaired objectivity. As relevant here, an impaired objectivity OCI arises where a firm's ability to render impartial advice to the government would be undermined by the firm's competing interests. FAR 9.505(a); *Diversified Collection Servs., Inc.*, B-406958.3, B-406958.4, Jan. 8, 2013, 2013 CPD ¶ 23 at 5-6.

The identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. *Guident Techs., Inc.*, B-405112.3, June 4, 2012, 2012 CPD ¶ 166 at 7; see also *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1382 (Fed. Cir. 2009). A protester must identify hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. *TeleCommunication Sys. Inc.*, B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3. We review OCI investigations for reasonableness, and where an agency has given meaningful consideration to whether a significant conflict of interest exists, we will not substitute our judgment for the agency's absent clear evidence that the agency's conclusion is unreasonable. *TISTA Sci. & Tech. Corp., Inc.*, B-408175.4, Dec. 30, 2013, 2014 CPD ¶ 17 at 6.

As background, in February 2018 CMS issued to Noridian the SMRC task order under Noridian's Unified Program Integrity Contractor (UPIC) indefinite-delivery, indefinite-quantity (IDIQ) contract. The SMRC performs medical reviews and medical-review-related activities at CMS's direction to support the Center for Program Integrity within CMS. AR, Tab 23A, SMRC SOW at 2. A medical review entails "the evaluation of the beneficiary's information and medical records by Medicare Contractors to ensure that payment is made only for services that meet all Medicare coverage, coding, and medical necessity requirements." *Id.* at 10. The SMRC requests the beneficiary information and medical records from the healthcare provider or supplier to conduct this

review. See *id.* As noted above, Noridian is the incumbent contractor for the JE MAC and was performing as the JE MAC at the time it was issued the SMRC task order.

Prior to issuing the solicitation for the SMRC, the SMRC contracting officer considered the potential conflicts of interest that might arise from the performance of other Medicare-related contracts. See AR, Tab 24, SMRC Pre-Solicitation OCI Memo. With respect to the MAC contract, the SMRC contracting officer explained that the SMRC “reviews claim payments made by MACs on a post pay basis but only if no prior medical review has occurred by the processing MAC” or other contractor.²¹ *Id.* at 2. If an SMRC identifies an overpayment, the MAC is required to collect that overpayment from the healthcare provider or supplier. The SMRC contracting officer found that this was not an OCI because the MAC is contractually required to recover overpayments even where it discovers such an overpayment on its own. *Id.*

The SMRC contracting officer also noted that MACs conduct healthcare provider outreach and education to train providers about the Medicare program and billing issues in an effort to reduce the error rate. With respect to this work, the SMRC contracting officer’s analysis posited:

There is a perception of a conflict here if the MAC educates a provider about a billing issue and the SMRC found that there was an error in the billing, the provider would then say that the MAC provided education and told them to bill that way. If the SMRC and the MAC were the same or a related entity, that could pose a conflict in that the SMRC would not want to point out the error that the MAC made.

Id. However, the SMRC contracting officer concluded that this did not create an OCI because “[e]ven in the rare occurrence that the MAC may have provided incorrect education to a provider [a]nd a provider subsequently submitted erroneous claims as a result of the MAC education, there is no negative consequence or advantage for the SMRC to point out such an error.” *Id.* The SMRC contracting officer stated that CMS would view such feedback as “beneficial for improved outreach and education, and accurate claims processing.”²² *Id.*

²¹ The MACs, including the JE MAC, are required to conduct their own medical reviews of claims they have paid. See AR, Tab 3B, JE SOW at 115. The SMRC would not conduct any review of a medical review already conducted by a MAC.

²² Consistent with the findings in the pre-solicitation OCI memo, in response to a question about the draft SMRC solicitation asking the agency to confirm that “it would not be a conflict for a MAC to be the SMRC,” the agency replied, “[g]enerally speaking, we do not consider the MAC and the SMRC to be a conflict.” AR, Tab 23B, CMS Response to Questions of Draft SMRC Solicitation, Question 30.

Prior to the award of the JE MAC contract to Noridian, the JE contracting officer conducted both a pre-solicitation and pre-award OCI analysis.²³ See AR, Tab 21, JE Pre-Solicitation OCI Memo; Tab 22A, JE Pre-Award OCI Memo. In the pre-solicitation memo, the contracting officer stated that there was a perceived impaired objectivity OCI with the UPIC contractor because the UPIC contractors investigated fraud, waste, and abuse in Medicare while the MACs were responsible for paying Medicare funds to healthcare providers. AR, Tab 21, JE Pre-Solicitation OCI Memo at 4. The contracting officer concluded that the RFP should include a clause stating that a MAC may not become a UPIC contractor “at any time in the same [j]urisdiction where the MAC has a contract to process Medicare claims.” *Id.* Reflecting this analysis, the JE RFP included a clause titled “[p]roposed [r]estraint on [f]uture [c]ontractor/[s]ubcontractor [a]ctivities” which stated that “[a]n AB-MAC may not become a . . . UPIC . . . at any time in the jurisdiction where the AB-MAC holds a contract to process Medicare claims.” RFP at 38.

In the pre-award OCI memo, the contracting officer referred to this RFP clause and noted that in its OCI disclosure submission, Noridian stated that a conflict did not exist because the UPIC IDIQ contract did not require Noridian to perform any work. AR, Tab 22A, Pre-award OCI Memo at 6. The contracting officer agreed with Noridian, stating that the “UPIC contract does not in and of itself require any specific tasks, in Jurisdiction E or elsewhere.” *Id.* The contracting officer thus concluded that “Noridian does not hold a UPIC contract ‘in the jurisdiction where the A/B MAC holds a contract to process Medicare [c]laims’ as contemplated by the RFP.” *Id.*

With respect to the SMRC task order, the contracting officer again referred to Noridian’s OCI disclosure submission, which explained that the SMRC primarily conducted medical reviews, and stated that the SMRC task order did not create an impaired objectivity OCI because the SMRC task order did not permit Noridian to evaluate itself as the JE MAC. AR, Tab 22A, JE Pre-Award OCI Memo at 6. The contracting officer explained that the MAC program office “confirmed that the special projects performed by the SMRC are ‘supplemental’ to those medical review activities that are performed by the MACs.” *Id.* The contracting officer concluded that she “concur[red] with Noridian’s rationale that the SMRC task order does not permit Noridian to evaluate itself as the JE MAC, and the JE MAC contract does not permit Noridian to evaluate itself as the SMRC; therefore, there is no impaired objectivity type of OCI.” *Id.*

CGS raises two primary arguments regarding an impaired objectivity OCI: (1) the solicitation prohibited a single contractor from serving as both the JE MAC and the SMRC; and (2) there are various aspects of Noridian’s “dual role” as SMRC and JE MAC that demonstrate an impaired objectivity OCI. Comments & Supp. Protest at 27, 30. We address each of these arguments in turn.

²³ The contracting officer states that in conducting this analysis, she applied her experience as a MAC contracting officer and consulted with a subject matter expert in the MAC program office. COS at 16.

With respect to the first argument, CGS points to the RFP clause stating that an AB MAC may not become a UPIC at any time in the jurisdiction where the AB MAC processes Medicare claims. *Id.* at 27. CGS contends that because Noridian’s SMRC task order was issued under its UPIC IDIQ contract vehicle, this RFP clause requires a finding that Noridian has an impermissible OCI.

The agency counters that under the UPIC IDIQ contract, the “SMRC task order is fundamentally different than the regional, jurisdiction-specific UPIC task orders.” Supp. COS at 7. In this regard, the agency states that the SMRC “is a national (non-regional) contractor that performs supplementary medical review projects that [are] focused on identifying cases of provider non-compliance with Medicare billing requirements,” and that the SMRC “does not perform an investigative function.” *Id.* at 8. The agency asserts that “[i]n contrast, the regional UPICs are specifically focused to address and investigate fraud, waste, and abuse cases in their respective regional jurisdictions.” *Id.* Thus, the agency asserts that the clause in the solicitation is “focused on precluding a jurisdictional MAC from serving in the same geographic area where it would be serving as a regional, jurisdictional-based UPIC.” *Id.*

On this record, we find the agency has identified a reasonable distinction between the SMRC and other task orders that are issued under the UPIC IDIQ contract. As further discussed below, the agency has explained that the work an SMRC performs is focused on healthcare provider compliance and does not require the SMRC to evaluate or investigate the performance of a MAC. Thus, because of the nature of the work performed by the SMRC, we find that the agency reasonably concluded that the solicitation language relied on by CGS did not expressly prohibit a contractor from serving as both the JE MAC and the SMRC.

With respect to CGS’s second argument, CGS asserts that in performing post-pay medical reviews of claims, Noridian as the SMRC “will review the claims determination of Noridian or a Noridian competitor” and that if the review finds that the MAC should not have authorized claim payment, the SMRC “is judging the MAC’s payment authorization [to be] incorrect.” Comments & Supp. Protest at 31. CGS also contends that the SMRC has to report each MAC’s error rates that represent the original paid amount and the final amount paid in error. *Id.* CGS maintains that “Noridian as SMRC is less likely to find and report . . . erroneous payment [to] a provider where Noridian serves as MAC than where a Noridian competitor serves as MAC.” *Id.*

The agency argues that the SMRC’s primary work in performing medical reviews is focused on healthcare provider compliance and not MAC performance. Supp. COS at 8. In this regard, the agency states that “the SMRC only reviews medical and clinical records submitted by Medicare providers, and not the internal records of MACs, in order to determine whether the medical services furnished were medically reasonable and

necessary, and the billings to the Medicare program were correct.”²⁴ MOL at 35. The agency thus contends that “[f]undamentally, the SMRC assesses provider compliance, not MAC compliance.” *Id.* Consistent with this concept, the agency asserts that “[a]ny SMRC identified errors are imputed to the Medicare provider, who receives a demand letter and is required to repay the amount owed; these SMRC-identified provider billing errors do not feed into CMS’s evaluation of the MAC.” COS at 19. The agency also maintains that the error rates reported by the SMRC are not used by CMS to evaluate the MACs or otherwise affect CMS’s view of the MAC’s performance. Supp. COS at 8. Rather, “CMS requires this information from the SMRCs to allow CMS to understand its program vulnerabilities and the extent to which these vulnerabilities are exploited in different localities.”²⁵ COS at 18.

We find reasonable the agency’s explanation that the SMRC’s work does not create an impaired objectivity OCI. As noted above, the medical reviews involve the review of beneficiary information and medical records from the healthcare provider to determine whether they support the payment of a Medicare claim for the services. The agency distinguishes between review of healthcare provider compliance in submitting a claim versus review of the MAC’s compliance with reviewing and paying a claim. In this regard, because the SMRC is performing the former--reviewing whether the provider has complied with the applicable procedures--and not the latter--whether the MAC has appropriately determined that a claim should be paid--the SMRC is not evaluating or investigating the performance of the MAC. Accordingly, we find that the agency reasonably concluded that the SMRC does not give rise to an impaired objectivity OCI.²⁶

CGS also challenges the SMRC contracting officer’s conclusion that the SMRC would not have an OCI where it finds a provider’s billing practices to be incorrect and the provider maintains that it was instructed to bill that way by the MAC. CGS contends that “Noridian’s objectivity as the SMRC is impaired when making any assertions that would undermine the training that Noridian provides as the JE MAC.” Comments & Supp.

²⁴ The intervenor also notes that under the MAC contracts, most Medicare claims are processed automatically without any subjective review by the MAC. Intervenor Supp. Comments at 9. In support of this argument, the intervenor cites to the JE MAC SOW, which states that “[m]ost claims are processed automatically through shared systems provided by CMS . . . and are usually resolved without requiring manual intervention on the part of the [c]ontractor.” *Id.* (quoting AR, Tab 3B, JE SOW at 80).

²⁵ The agency also states that these error rates “are not designed to create statistically-valid projections of improper Medicare payments for the nation and the MAC regions.” COS at 19. Rather, CMS uses a different contractor under the comprehensive error rate testing program for statistically valid projections. *Id.*

²⁶ CGS raises other variations of this argument and identifies other aspects of the SMRC work that it claims demonstrate an impaired objectivity OCI. We have considered these arguments, and the agency’s responses, and determined that none provides a basis on which to sustain the protest.

Protest at 36. In other words, Noridian as the SMRC will be less likely to find fault with Noridian's training as the JE MAC. *See id.*

The agency contends that CGS's assertion is incorrect because CMS creates the majority of Medicare billing rules and the educational content that the MACs use in educating providers. Supp. COS at 12. Thus, with respect to the scenario described by the SMRC contracting officer, the MAC and SMRC are both working to support provider compliance using the same guidance developed by CMS. *Id.* The agency maintains that the SMRC contracting officer reviewed this exact possibility and appropriately found that such a rare scenario did not create a conflict of interest. *Id.*

We find the agency's analysis to be reasonable. The agency has explained that the SMRC is tasked with conducting medical reviews of claims and determining whether the provider complied with the requirements. In this role, the SMRC does not review or evaluate the MAC's educational outreach to the provider; as explained above, the SMRC evaluates healthcare provider--not MAC--compliance. In determining whether a provider properly billed for a particular service, CGS has not shown that the SMRC would have any incentive to avoid reporting an erroneous billing, even if it was the result of incorrect education from the MAC. We note that the agency reviewed this potential scenario prior to issuing the SMRC task order back in 2018 and found that it did not create an OCI. We therefore find that the agency has meaningfully considered this potential issue and reasonably determined that an impaired objectivity OCI does not exist here.²⁷

Failure to Disclose Allegations Relating to Fraud

CGS argues that Noridian failed to disclose allegations relating to fraud and civil monetary penalties that arose out of Noridian's performance of a contract to implement the Maryland healthcare exchange and, as a result, the agency should have found Noridian to be ineligible. As noted above, the RFP required offerors to disclose in the conflict of interest volume "all known violations and alleged acts, within the past five (5)

²⁷ CGS also contends that Noridian's role as the SMRC created an unequal access to information OCI because Noridian "has access to valuable information about nationwide Medical Review trends in provider compliance that benefitted Noridian in preparing its JE MAC proposal." Comments & Supp. Protest at 37-38; Supp. Comments at 29. In its pre-award OCI memorandum for the JE MAC contract, the JE contracting officer stated that "the non-public data held by the SMRC primarily consist of clinical records pertaining to claims that were not previously reviewed by the JE MAC or any other MAC." AR, Tab 22A, JE Pre-Award OCI Memo at 6. The contracting officer concluded that "[t]his information does not give Noridian as the SMRC unequal access to information allowing it a competitive advantage in the JE competition." *Id.* Based on our review of the record, we find the agency's conclusion that there was no unequal access to information OCI was reasonable. While CGS has made vague references to Noridian's access to nationwide medical review trends in provider compliance, CGS has not established how this information would have been competitively useful to Noridian.

years, related to . . . False Claims Act, Civil Monetary Penalties, Criminal investigations and/or indictments, and, *qui tam* lawsuits or other administrative misconduct.” AR, Tab 4D, RFP amend. 1, attach. J.10 at 3. The RFP stated that the information in the conflict of interest volume was “so material to the award of this contract that a proposal failing to provide the requirements identified in [this volume] . . . may be ineligible for award.” RFP at 124. In its proposal, Noridian asserted that it had nothing to disclose with respect to this particular requirement.

CGS argues that Noridian failed to disclose that it was the subject of a federal fraud investigation related to its implementation of the Maryland healthcare exchange. Comments & Supp. Protest at 43. CGS asserts that the window for disclosing alleged violations began on September 4, 2014, and that in July 2014, Noridian received a subpoena related to an investigation on how federal funds were spent on the Maryland exchange. *Id.* CGS argues that the investigation was ongoing until July 2015 when Noridian reached a \$45 million settlement with the government. CGS contends that “from the date that the Solicitation’s disclosure window opened on September 4, 2014, through the mid-2015 settlement, Maryland and federal entities had Noridian under investigation for alleged acts that implicated, at the least, civil False Claims Act liability and ‘Civil Monetary Penalties.’” *Id.* at 44.

The agency contends that no disclosure was required because Noridian ceased performing on the Maryland healthcare exchange contract in February 2014, prior to the beginning of the disclosure period for alleged acts. Supp. MOL at 5. Thus, “no improper acts related to Noridian’s performance of the Maryland [healthcare exchange] contract could have taken place on or after September 4, 2014, because Noridian had not performed the contract for over 6 months at that point.” *Id.*

We agree with the agency’s interpretation of the provision in its RFP that Noridian was not required to disclose the alleged acts that occurred during performance of its Maryland healthcare exchange contract because they did not occur within the 5-year window contemplated by the solicitation. The RFP required that offerors disclose “all known violations and alleged acts, within the past 5 years.” As the agency notes, Noridian ceased performance on the Maryland healthcare exchange contract in February 2014. Moreover, CGS states that Noridian received the subpoena that launched the investigation in July 2014. Both of these occurred prior to the disclosure window opened on September 4, 2014. Thus, any alleged acts would have occurred before September 2014 and therefore happened before the 5 year window contemplated by the solicitation.²⁸ This protest ground is denied.

²⁸ CGS argues that the solicitation “does not require disclosure of improper acts committed within five years of the Solicitation close, it requires disclosure of all known allegations, investigations, etc. within five years prior to the Solicitation close.” Supp. Comments at 12. This claim is not factually accurate. As noted above, the solicitation requires disclosure of all known violations or alleged acts, not known allegations or investigations, as claimed by CGS. Any alleged acts stemming from Noridian’s

Unequal Technical Evaluation

CGS alleges that the agency “unequally assigned technical strengths to Noridian’s proposal without recognizing the strength of substantively identical aspects of CGS’s proposed technical approach.” Comments & Supp. Protest at 44. CGS identifies four instances which it alleges show that the agency unequally evaluated the proposals. *Id.* at 44-49. We address some representative examples below.²⁹

When reviewing protests alleging improper evaluations we do not reevaluate proposals; rather, we examine the record to determine whether the agency’s judgments were reasonable and in accordance with the solicitation’s evaluation criteria and applicable procurement statutes and regulations. *Quantech Servs., Inc.*, B-417347, B-417347.2, May 29, 2019, 2019 CPD ¶ 203 at 7; *SGT, Inc.*, B-405736, B-405736.2, Dec. 27, 2011, 2012 CPD ¶ 149 at 4; *Technology Concepts & Design, Inc.*, B-403949.2, B-403949.3, Mar. 25, 2011, 2011 CPD ¶ 78 at 8. The evaluation of proposals is a matter within the agency’s discretion, and a protester’s disagreement with the agency’s judgment of the relative merit of competing proposals, without more, does not establish that the evaluation was unreasonable. *DRS ICAS, LLC*, B-401852.4, B-401852.5, Sept. 8, 2010, 2010 CPD ¶ 261 at 4-5. Further, when a protester alleges disparate treatment in a technical evaluation, it must show that the differences in ratings did not stem from differences between the proposals. *IndraSoft, Inc.*, B-414026, B-414026.2, Jan. 23, 2017, 2017 CPD ¶ 30 at 10; *Paragon Sys., Inc.; SecTek, Inc.*, B-409066.2, B-409066.3, June 4, 2014, 2014 CPD ¶ 169 at 8-9.

CGS states that Noridian was assessed a strength for an aspect of its proposal that presented a “[DELETED] approach to develop and deliver focused education” and another strength for its [DELETED]. Comments & Supp. Protest at 46-47 (quoting AR, Tab 20, SSDD at 22-23). CGS argues that it also proposed [DELETED] and other features that provided the same benefits as those highlighted by the evaluators for Noridian’s proposal. *Id.* at 47. In this regard, CGS states that it uses a [DELETED] and provide claim review assistance.” *Id.* (quoting AR, Tab 16C, CGS Vol. III, Tab F at 131). CGS also contends that its [DELETED] program provides additional education to providers, and that CGS also offers [DELETED] to providers at any time through its

performance on the Maryland healthcare exchange contract occurred prior to the five year window. CGS also argues that this allows Noridian to hide from CMS recent allegations of fraud. We disagree. The RFP limited the disclosure window to 5 years, and by its terms did not require disclosure of alleged acts that occurred prior to this window. To the extent CGS disagrees with this time limit, it is a matter that could only be timely raised prior to the closing time for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1).

²⁹ Although we discuss only 2 of these 4 instances, we have considered all 4 instances raised by CGS and find that the agency’s evaluation was reasonable and equal.

website. The protester also asserts that it proposed a monthly [DELETED] to “identify and integrate issues that might affect potential [DELETED].” *Id.*

The agency contends that virtually all MACs have online tools for education and that CGS’s [DELETED] program is not unique to CGS and is also offered by Noridian and other MACs. Supp. COS at 16. The agency notes that CGS’s proposed approach provides educational services to providers with [DELETED] and that its [DELETED] program is driven by the requirements stated in the “direct member reimbursement” for all MACs. Supp. MOL at 20. In addition, with respect to the [DELETED], the agency states that CGS offered “no quantification as to the positive impact that this has had on the provider community.” *Id.* The agency further argues that Noridian’s proposal was unique “in its extensive and comprehensive approach” that was far more comprehensive than CGS’s proposal. *Id.* The agency highlights that Noridian’s approach “will educate providers to ‘[DELETED].’” *Id.* (quoting AR, Tab 9C, Noridian Prop. Vol. III, Staffing Plan). Thus, the agency states, the TEP found that CGS’s approach merely met the SOW requirements and did not qualify as a strength. *Id.*

In our view, the agency’s evaluation is unobjectionable. The agency’s explanation shows that it reasonably determined that Noridian’s approach to education was more comprehensive than that of CGS, and that CGS’s approach merely met the SOW requirements. The agency notes that many of CGS’s proposed educational resources are not unique, as they also are offered by Noridian and other MACs. Moreover, the agency notes that CGS’s proposed approach provides educational services only to providers with [DELETED], while Noridian’s approach educates providers to better understand how to [DELETED]. In addition, CMS explains that CGS did not explain or quantify the impact of its monthly information meetings. We find that the agency’s decision to assess two strengths to these aspects of Noridian’s proposal and not to CGS’s proposal was based on a difference in the two proposals and was reasonable.

CGS also argues that the agency “unequally assigned Noridian two strengths based on proposed features to assist Noridian in efficiently responding to provider inquiries while failing to recognize a comparable feature of CGS’s proposal that offers the same benefits.” Comments & Supp. Protest at 47. In this regard, CGS explains that Noridian received a strength for the use of [DELETED] that will listen to provider inquiries and help Noridian respond, and a strength for the use of [DELETED] which is an [DELETED] that [DELETED]. *Id.* CGS contends that the agency also should have given CGS’s proposal a strength for its [DELETED] because it provided similar benefits to those provided by Noridian’s proposal. *Id.* at 48. CGS argues that its [DELETED] is an [DELETED] that assist CGS in responding to provider inquiries. *Id.* CGS contends that “[l]ike the [DELETED] and [DELETED], CGS’s [DELETED] platform compiles internal resources to make them readily available to CGS personnel and allows them to respond more efficiently and quickly to provider inquiries.” *Id.*

The agency responds that most MACs have internal resources similar to those proposed by CGS, and that it considered the [DELETED] platform to merely meet the SOW requirements. Supp. COS at 17. The agency stated that Noridian’s use of

[DELETED] and [DELETED] was “substantively different from Protester’s proposed [DELETED].” Supp. MOL at 20-21. The agency points out that the TEP found that the [DELETED] were [DELETED] that listen to provider inquiries and allow Noridian to “more quickly research the inquiry and have the answer readily available when the [DELETED].” AR, Tab 18, TEP Report FPR at 48-49; Supp. MOL at 20-21. In contrast, CGS’s [DELETED] resource did not offer the benefits of Noridian’s [DELETED] or [DELETED], and merely provided resources for CGS to use when responding to provider inquiries. See Supp. MOL at 21.

In our view, the agency’s decision to assess two strengths to Noridian for its [DELETED] and [DELETED], but no strengths to CGS’s proposed use of [DELETED] was reasonable. As set forth above, the agency has identified distinguishing characteristics between these two approaches and explained why Noridian’s approach deserved the strengths. We find that the agency reasonably determined that there was a distinction between these two approaches.

Past Performance Evaluation

CGS also alleges that the agency’s past performance evaluation was flawed and unequal. Comments & Supp. Protest at 49-50. As relevant here, in the SSDD, the SSA noted that Noridian’s comprehensive error rate testing (CERT) scores exceeded Government Performance and Results Act (GPRA) goals in option years 4 and 5 of Noridian’s incumbent JE MAC contract.³⁰ AR, Tab 20, SSDD at 27. The SSA also highlighted that Noridian’s CERT score had exceeded the GPRA goal in option year 6 of Noridian’s Jurisdiction F MAC contract. *Id.* at 28. The SSA noted that “[a] MAC’s ability to achieve GPRA goals is significant and rare” and identified the scores as one aspect of Noridian’s past performance that distinguished it from CGS’s past performance. See *id.* at 42-43.

An agency’s evaluation of past performance, which includes its consideration of the relevance, scope, and size of an offeror’s or vendor’s performance history, is a matter of discretion, which we will not disturb unless the agency’s assessment is unreasonable or inconsistent with the solicitation criteria. See *Metropolitan Life Ins. Co.*, B-412717, B-412717.2, May 13, 2016, 2016 CPD ¶ 132 at 14. When 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 the agency’s rationale is

³⁰ According to the agency, CMS implemented the CERT program “to measure improper payments in the Medicare Fee-for-Service program.” Supp. COS at 18. Because CERT measures an error rate, a lower rate is better than a higher one. Supp. MOL at 24. The CERT rates were compared to the GPRA goals; exceeding those goals--i.e., having a CERT score lower than the GPRA goal--indicated good performance with respect to decreasing improper payments. See AR, Tab 20, SSDD at 27.

adequately documented. *DynCorp Int'l, LLC*, B-412451, B-412451.2, Feb. 16, 2016, 2016 CPD ¶ 75 at 14.

CGS contends that the technical evaluators unequally reported to the SSA only Noridian's CERT scores but not CGS's CERT scores. *Id.* at 50. CGS asserts that the SSA therefore never considered CGS's CERT scores, which exceeded the GPRA goals for two years under each of CGS's Jurisdiction B and C durable medical equipment (DME) MAC contracts.³¹ CGS also argues that its CERT scores were "trending in a positive direction" for its J15 MAC contract. *Id.* at 51. The protester also maintains that the SSA "placed great emphasis" on Noridian's CERT scores and "identified these scores as a basis for her conclusion that Noridian has a superior performance record to CGS."³² *Id.*

The agency asserts that it focused on Noridian's CERT scores for its JE MAC contract because they were achieved on A/B MAC contracts, and the evaluators "considered A/B MAC past performance record[s] as being more relevant and of higher significance." Supp. COS at 19. In contrast, CGS had CERT scores that exceeded the GPRA goals only on its DME MAC contracts, and the agency "did not consider reaching these goals a strength for either CGS or Noridian for their second most relevant/high significance DME MAC contracts." *Id.* With respect to CGS's CERT scores trending downward for its J15 MAC contract, the agency notes that the GPRA goals also were trending downward and CGS's CERT scores still did not exceed the GPRA goals on this contract. *Id.* Thus, "Noridian's CERT rates that were evaluated as strengths were on

³¹ The agency explains that there are primarily two different types of MACs, A/B MACs and DME MACs. Supp. MOL at 23. The A/B MACs process Part A and B Medicare claims for 12 different defined geographic jurisdictions, while the DME MACs process Medicare durable medical equipment, orthotics, and prosthetics claims for 4 different defined geographic jurisdictions. *Id.*

³² CGS also argues that the agency improperly failed to consider negative Noridian performance data from an agency Office of the Inspector General (OIG) report. Comments & Supp. Protest at 52. We have recognized that in certain limited circumstances, an agency has an obligation to consider outside information bearing on an offeror's past performance when those circumstances support a conclusion that the agency should have been aware of the information. *International Bus. Sys., Inc.*, B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5. Our Office has generally limited application of this principle to circumstances where the information relates to contracts for the same services with the same procuring activity, or information personally known to the evaluators. *TRW, Inc.*, B-282162, B-282162.2, June 9, 1999, 99-2 CPD ¶ 12 at 5; *Leidos, Inc.*, B-414773, B-414773.2, Sept. 12, 2017, 2017 CPD ¶ 303 at 10. Here, the agency states that the OIG report was not provided or available to the evaluators and that the evaluators "did not know about the OIG report." Supp. COS at 19; Supp. MOL at 26. We find that CGS has not shown that the evaluators knew, or should have known, about the information in the report and therefore deny this protest ground.

[the] most similar and therefore most relevant A/B MAC contracts; Protester's were on less similar, and therefore less relevant DME contracts." Supp. MOL at 23.

On this record, we find the agency's past performance evaluation was reasonable and equal. We find reasonable the agency's distinction between CERT scores on A/B MAC and DME MAC contracts, as described above; we also note that CGS has not challenged the agency's determination that the A/B MAC contracts were more relevant than the DME MAC contracts. Accordingly, we deny this protest ground.

Best-Value Determination

Finally, CGS argues that the agency conducted a flawed best-value determination. Comments & Supp. Protest at 54. In this regard, CGS asserts that the agency applied an unstated incumbent preference and that the agency's conclusion that Noridian had superior past performance cannot be reconciled with the record.³³ *Id.* at 55-66.

The agency maintains that it conducted a reasonable best-value tradeoff determination that was consistent with the evaluation criteria in the RFP. Supp. MOL at 28. The agency asserts that there is nothing inherently improper with crediting an incumbent's proposal with strengths that are due to its incumbency. *Id.* The agency also contends that the record supports its finding that Noridian had better past performance, and that CGS's argument is nothing more than disagreement with this finding. *Id.* at 30.

On this record, we find that the agency's best-value determination was reasonable, supported by the record, and consistent with the RFP evaluation criteria. As explained above, the SSA detailed her best-value tradeoff decision in a lengthy SSDD. In comparing the two offerors, the SSA focused in part on the fact that Noridian's proposal offered a low risk implementation, staffing plan, and key personnel that would ensure a seamless transition of the JE workload. In this regard, the SSA stated that Noridian proposed 100 percent JE experienced and knowledgeable personnel who would be ready to start contract performance immediately.

In contrast, CGS's proposed approach required [DELETED] percent new hires. We note that the RFP stated that offerors had to address their implementation, staffing plan, and key personnel and that the agency would evaluate the staffing plan for "the readiness of the Offeror's proposed staff (all sources) for successful implementation and continued successful operations, considering the adequacy and effectiveness of the Offeror's function-specific recruitment strategy, training program, and transfer strategy." RFP at 111. Thus, we find that the agency's conclusion that Noridian's proposal was superior where it required no recruitment or training of new employees and provided for a seamless transition was reasonable. While this advantage may have arisen from Noridian's status as the incumbent JE MAC, the agency identified a meaningful

³³ CGS also argues that the best-value determination is flawed because the agency's underlying evaluation of proposals was unreasonable. Because we find that the agency reasonably evaluated proposals, this argument provides no basis to sustain the protest.

distinction between the two proposals that does not evidence an improper incumbent preference. See *ASRC Commc'ns, Ltd.*, B-414319.2 *et al.*, May 9, 2017, 2017 CPD ¶ 167 at 9 (“The existence of an incumbent advantage, in and of itself, does not constitute preferential treatment by the agency, nor is such a normally occurring advantage necessarily unfair.”).

We also find that the agency reasonably determined that Noridian had superior past performance. CGS’s argument to the contrary focuses mainly on the fact that the agency identified six weaknesses under the past performance factor for Noridian while CGS received only one weakness. However, the SSA explained that Noridian’s “performance record strengths collectively, and significantly, outweigh the weakness identified.” AR, Tab 20, SSDD at 49. In this regard, the SSA highlighted Noridian’s performance on the JE and Jurisdiction F MAC contracts, the two most relevant contracts, for which Noridian experienced significant contract cost savings for sustained periods. *Id.* at 48. The SSA also stated that some of the weaknesses were assessed based on less relevant contracts of medium significance, and were very moderate weaknesses that had no impact on the award decision. *Id.* at 49.

In short, we find the SSA reasonably considered the strengths, weaknesses, and benefits offered by each of these proposals and made a rational best-value tradeoff decision. We therefore deny this protest ground.

The protest is denied.

Thomas H. Armstrong
General Counsel