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Decision

Matter of: Trailblazer Health Enterprises, LLC

File: B-407486.2; B-407486.3

Date: April 16, 2013

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Daniel P. Graham, Esq., Paul F. Khoury, Esq., Kathryn Bucher, Esq., Brian G. Walsh, Esq., Katherine R. McDonald, Esq., and Tyler E. Robinson, Esq., Wiley Rein LLP, for Novitas Solutions, Inc., an intervenor.
Erin V. Podolny, Esq., and Douglas Kornreich, Esq., Department of Health and Human Services, for the agency.
Louis A. Chiarella, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging a determination that the protester was not responsible is denied where the contracting officer's judgment was reasonably based.
2. A nonresponsible protester is not an interested party under Government Accountability Office Bid Protest Regulations to challenge the evaluation of the awardee's proposal, where the protester would not be in line for award if the protest were sustained.

DECISION

TrailBlazer Health Enterprises, LLC, of Dallas, Texas, protests the award of a contract to Novitas Solutions, Inc., of Camp Hill, Pennsylvania, under request for proposals (RFP) No. RFP-CMS-2012-0003, issued by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), to obtain a Medicare Administrative Contractor (MAC) to provide services for the administration of Medicare Part A and Medicare Part B (A/B) fee-for-service benefit claims. TrailBlazer challenges CMS's evaluation of proposals and selection decision. The protester also contends that the contracting officer's determination that TrailBlazer was not a responsible offeror was unreasonable.

We deny the protest in part and dismiss it in part.

BACKGROUND

The RFP, issued on January 5, 2012, provided for award without discussions of a cost-plus-award-fee contract for a 5-month implementation period, a 7-month base period, four 1-year options, and an optional outgoing contractor transition period of up to 6 months,¹ for A/B MAC services in Jurisdiction L.² Jurisdiction L consists of Delaware, Maryland, New Jersey, Pennsylvania, and the District of Columbia.³ In general terms the RFP's statement of work (SOW) requires the contractor to provide all the necessary personnel, material, equipment, and facilities to perform specified MAC services.⁴

¹ The implementation and base periods differed slightly for Part A and Part B Medicare workloads, but in each case total 12 months. RFP at 97.

² Pursuant to the Medicare Prescription Drug Improvement and Modernization Act of 2003 (MMA), 42 U.S.C. §§ 1395kk et seq. (2006), MACs perform the claims services that were previously performed by "legacy contractors" acting as "fiscal intermediaries" or "carriers" under the Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395c et seq. and 1395j et seq. (2000). Prior to the enactment of the MMA, fiscal intermediaries were generally responsible for processing claims from institutional providers, such as hospitals and nursing facilities, under Part A of the Medicare program; carriers were responsible for processing claims from professional providers, such as physicians and diagnostics laboratories, under Part B of the Medicare program. The MMA "required the phase-out of the legacy contracting method," which did not require that contracts for fiscal intermediary or carrier services be competitively awarded, and imposed competition requirements and the use of Federal Acquisition Regulation (FAR)-based contracting, with the intent of improving Medicare's administrative services to both beneficiaries and providers. See Highmark Medicare Servs., Inc., et al., B-401062.5 et al., Oct. 29, 2010, 2010 CPD ¶ 285 at 3 n.2.

³ In the first phase of its Medicare modernization program, CMS divided the United States into fifteen geographic jurisdictions (Jurisdictions 1 through 15) for the purposes of acquiring and providing MAC services. The agency has now combined certain of its legacy jurisdictions, resulting in ten separate jurisdictions (Jurisdictions E through N). See TrailBlazer Health Enters., LLC, B-406175, B-406175.2, Mar. 1, 2012, 2012 CPD ¶ 78 at 3 n.2. TrailBlazer was previously the MAC services contractor for Jurisdiction 4 (consisting of Texas, New Mexico, Colorado, and Oklahoma), while Novitas is the incumbent MAC services contractor for Jurisdiction 12, which is now Jurisdiction L.

⁴ The MAC will "receive and control Medicare claims from institutional and professional providers, suppliers, and beneficiaries within its jurisdiction and will perform standard or required editing on these claims to determine whether the claims are complete and should be paid." RFP attach. J-1, SOW, at 2. The MAC will also "calculate Medicare payment amounts and arrange for remittance of these

(continued...)

Offerors were informed that award would be made on a best value basis, considering past performance, technical understanding, and cost. Id. at 148-54. The noncost factors were of equal importance to each other and, when combined, were significantly more important than cost. Id.

Two offerors, TrailBlazer and Novitas, submitted proposals by the February 23 closing date. The agency’s business evaluation panel (BEP) evaluated offerors’ cost proposals for both reasonableness and realism. Technical proposals were evaluated by the technical evaluation panel (TEP), using the following adjectival rating scheme that was set forth in the solicitation: green (high expectation of successful performance); yellow (medium expectation of successful performance); and red (low expectation of successful performance). The firms’ proposals were evaluated as follows:

	TrailBlazer	Novitas
Past Performance	Yellow	Green
Technical Understanding	Yellow	Green
Proposed Cost	\$388,039,181	\$404,055,294
Evaluated Cost	\$400,162,071	\$413,460,127

Agency Report (AR), Tab 13, TEP Report, at 6, 27; Tab 14, BEP Report on TrailBlazer, at 7; Tab 15, BEP Report on Novitas, at 7. The TEP’s adjectival ratings were supported by narrative discussions identifying strengths and weaknesses in each firm’s technical proposal. Id., Tab 13, TEP Report, at 1-54. The BEP Report documented the cost evaluators’ realism analysis and adjustments. See AR, Tab 14, BEP Report on TrailBlazer, at 1-28; Tab 15, BEP Report on Novitas, at 1-30.

On September 14, the contracting officer, who served as the agency’s source selection authority, concluded that the evaluated superiority of Novitas’s proposal under both the past performance and technical understanding factors outweighed TrailBlazer’s cost advantage and, on that basis, selected Novitas for award. Contracting Officer’s Statement at 5.

(...continued)

payments to the appropriate party,” “enroll new providers,” “conduct redeterminations on appeals of claims,” “operate a Provider Customer Service Program . . . that educates providers about the Medicare program and responds to provider telephone and written inquiries,” “respond to complex inquiries from Beneficiary Contact Centers,” and “make coverage decisions for new procedures and devices in local areas.” Id.

The contract was awarded to Novitas on September 17, and TrailBlazer protested to our Office on October 2, challenging the agency's evaluation and best value tradeoff decision. By letter of October 22, CMS notified our Office that it would take corrective action by reevaluating the offerors' proposals and making a new source selection decision. Letter from HHS to GAO, Oct. 22, 2012. We dismissed TrailBlazer's protest as academic. TrailBlazer Health Enters., LLC, B-407486, Oct. 24, 2012.

Additional past performance information was considered for both firms, and the contracting officer reconsidered his selection decision. Contracting Officer's Statement at 5. The contracting officer again determined that Novitas's proposal represented the best value to the government.⁵ Id. at 6; AR, Tab 16, Source Selection Decision, at 35. Specifically, the contracting officer found Novitas's proposal possessed qualitative advantages over TrailBlazer's under both the past performance and technical understanding factors, and that these advantages outweighed the associated \$13 million (or 3.32%) cost premium. Id. at 22-30. Additionally, for both organizational and financial reasons, the contracting officer determined that TrailBlazer was ineligible for contract award because it was not a responsible offeror. Id. at 32-34.

Following notification of the agency's selection decision on December 12, and a debriefing, TrailBlazer protested to our Office on January 8, 2013.

DISCUSSION

TrailBlazer's protest raises numerous challenges to the agency's evaluation and selection decision. The protester argues that CMS's evaluation of the firms' proposals was flawed under every evaluation factor. Among other things, the protester contends that its proposal should have received higher adjectival ratings, and that the awardee's proposal should have received lower ratings. TrailBlazer also complains that the agency did not reasonably assess the fact that, after contract award and during the agency's corrective action, the awardee's proposed executive contractor medical director, a key person, became unavailable. TrailBlazer further challenges the contracting officer's determination that it was not a responsible offeror. Protest at 1-78; Supp. Protest at 7-11.

As detailed below, we find reasonable the contracting officer's determination that TrailBlazer was not responsible, and, on that basis, conclude that TrailBlazer is not an interested party with respect to its remaining protest grounds.

⁵ The offerors' adjectival ratings and evaluated costs did not change in the agency's re-evaluation. AR, Tab 16, Source Selection Decision, at 4.

TrailBlazer's Nonresponsibility

The RFP informed offerors that the contracting officer would make a responsibility determination in accordance with FAR Subpart 9.1, and required offerors to demonstrate the degree to which they met each area of responsibility. RFP at 143. In this regard, the solicitation expressly required offerors (i.e., the "proposal submitter") to demonstrate adequate financial capability to perform the contract, including having a net worth in excess of 10% of the annual total cost-plus-fee amount. Id. at 143-44. As relevant here, offerors were to submit a staffing plan with their proposals that presented the firm's strategy for providing and retaining qualified personnel for the life of the contract.⁶ Id. at 125.

In its business proposal, TrailBlazer stated it was a wholly-owned subsidiary of BlueCross BlueShield of South Carolina, a company with 2010 annual revenues of \$2 billion and capital/surplus of \$1.7 billion. AR, Tab 7, TrailBlazer Proposal, Vol. IIB, Narrative Business Proposal, at 827. TrailBlazer also provided its own audited financial statement for 2010, which indicated that the firm had assets of \$49.2 million, total liabilities of \$16.5 million, equity of \$32.7 million, and revenue of approximately \$120.5 million. Id., TrailBlazer Financial Statements, Feb. 23, 2011, at 2.

TrailBlazer also provided its staffing plan. At the time it submitted its proposal here, TrailBlazer had recently lost the competition for the MAC work it had been performing for Jurisdiction 4.⁷ TrailBlazer based its staffing plan upon the assumption that the Jurisdiction 4 work would transition to the new Jurisdiction H MAC contractor before the implementation cutover date for Jurisdiction L, and that TrailBlazer would essentially staff the Jurisdiction L operations with its experienced, Jurisdiction 4 MAC contract workforce.⁸ See AR, Tab 5, TrailBlazer Proposal, Vol. I, Technical Proposal, at 30. TrailBlazer anticipated that, given its existing and

⁶ The RFP anticipated that MAC contract award for Jurisdiction L would be made on or about August 20, 2012, thereby resulting in Medicare Part A and Part B implementation cutover dates of January 20 and February 18, 2013, respectively. See RFP at 97.

⁷ In a competitive solicitation issued in 2011, CMS consolidated Jurisdictions 4 and 7 to form Jurisdiction H. Contract award for Jurisdiction H was made to Highmark Medicare Services, Inc. (now Novitas) on November 7, 2011. TrailBlazer's protest of that award to our Office was denied on March 1, 2012. See TrailBlazer Health Enters., LLC, supra.

⁸ TrailBlazer noted the use of its Medicare-experienced staff (including management and operational support) would provide for a seamless transition that minimized risk for Jurisdiction L. AR, Tab 5, TrailBlazer Proposal, Vol. I, Technical Proposal, at 30-31.

available workforce, the firm would only have to hire 3 full-time equivalent (FTE) employees--of a total proposed staff of 732.6 direct FTEs--to perform the Jurisdiction L work.⁹ Id. at 31, 34. TrailBlazer's staffing plan also included a description of various risk mitigation and contingency planning measures (e.g., temporary staffing, registered nurse staffing firms, potential subcontractors) the offeror would use if the Jurisdiction L transition did not occur as planned, necessitating the need to hire additional personnel to achieve the required staffing. Id. at 42-43.

After its protest of the Jurisdiction H contract was denied by our Office on March 1, 2012, TrailBlazer began to transition its Jurisdiction 4 work to the new MAC contractor. Simultaneously, TrailBlazer began to close out its Jurisdiction 4 contract with the agency's assigned administrative contracting officer (ACO). The ACO learned that on April 20 TrailBlazer notified its landlord of TrailBlazer's intent to terminate the firm's lease for its Dallas facility (effective April 30, 2013).¹⁰ AR, Tab 47, ACO's Statement, at 1. In this regard, TrailBlazer informed the ACO that "[a]s a result of not being awarded the contract for MAC Jurisdiction H award, TrailBlazer no longer needs the Dallas facility" Id. at 2.

On July 24, TrailBlazer submitted its closeout proposal for the Jurisdiction 4 contract to CMS. That proposal requested costs for the disposition of nearly all the assets it held to conduct business as a MAC contractor, including desks, chairs, work stations, telephones, and computers. Id. TrailBlazer stated that, "[t]his consists of asset disposal costs, which, due to a fundamental economic change, are considered by TrailBlazer to be beyond expected business occurrence." Id. TrailBlazer also detailed the costs associated with its "reduction-in-force" (RIF) of its Jurisdiction 4 MAC contract workforce (e.g., severance costs, temporary retention costs), as this contract had represented 95% of TrailBlazer's existing business. Id. TrailBlazer's closeout proposal for the Jurisdiction 4 contract also represented that, "[d]ue to the significant reduction in business base, TrailBlazer has planned to discontinue the business operation as of April 30, 2013." Id.

⁹ TrailBlazer proposed an additional 18 indirect FTEs, as well as 44.5 non-TrailBlazer direct FTEs, for a total proposed staffing of 795 FTEs for the base period. AR, Tab 5, TrailBlazer Proposal, Vol. I, Technical Proposal, at 36.

¹⁰ TrailBlazer proposed the following two facilities for the performance of the Jurisdiction L contract here: its corporate headquarters in Dallas and a facility located in Denison, Texas. AR, Tab 5, TrailBlazer Proposal, Vol. I, Technical Proposal, at 30.

On September 19,¹¹ in response to questions from CMS regarding TrailBlazer's closeout proposal, TrailBlazer informed the agency as follows:

The reduction-in-force (RIF) of the J4 staff . . . will significantly reduce the overhead labor base for CY 2012. TrailBlazer will also experience non-recurring expenses as it closes three facilities utilized for the Medicare operations and disengages from related equipment, software leases and services.

* * * * *

As explained in the Asset Disposal Narrative included in . . . TrailBlazer's Closeout proposal, TrailBlazer will initiate disposal activities related to the closeout of the J4 contract . . . TrailBlazer was notified by the J4 contracting officer that the incoming MAC . . . is not interested in acquiring any of the related asset inventory. . . . TrailBlazer believes that if any proceeds from liquidating the assets are received, they will be very minimal and immaterial. Per CMS Information Security Acceptable Risk Safeguards . . . all computers and servers that are disposed of must have their hard drives removed and destroyed, in addition, there is no current market for aged workstations and office furniture and software is generally licensed and non-transferrable. . . . As stated above, TrailBlazer will work diligently to minimize the disposal cost of Medicare Assets.

* * * * *

As stated in the [closeout] proposal, due to the significance of the RIF, which affects over 95% of TrailBlazer's workforce, the payout would be classified as abnormal or mass severance, and is included in the proposal as other direct costs

* * * * *

[CMS Question]: Please explain to us why [TrailBlazer] believes it is facing a mass severance event and that it will, in fact, be closing its doors upon close-out of J-4 operations in-light-of the fact that the organization continues to bid on CMS contracts, MAC or otherwise?

¹¹ As set forth above, the award of the Jurisdiction L contract to Novitas was announced on September 17.

[TrailBlazer] Response: The J4 contract represents approximately 95% of TrailBlazer's yearly revenue. TrailBlazer has made attempts at replacing this business by responding to other CMS MAC solicitations. The award of Jurisdiction L, which represents the last competitive MAC solicitation that TrailBlazer responded to, signals the end of TrailBlazer's attempt at supplanting the J4 workload. RIF notices have been issued to over 95% of the employees and the mass severance event is a fait accompli.

* * * * *

The close out of the J4 contract required the initiation of plans to discontinue the TrailBlazer Medicare operations, infrastructure and closure of existing facilities. Management recognized that this environment would provide TrailBlazer employees with no future employment or growth opportunities and would make the task of maintaining the required level of experienced workforce through the cutover periods extremely "challenging".

* * * * *

With the J4 contract comprising over 95% of TrailBlazer's business base, the workload cutovers will significantly reduce the G&A base for CY 2012. TrailBlazer will also experience non-recurring expenses for severance related to the RIF and closeout activities of the G&A staff supporting the overall TrailBlazer and Medicare operation.

AR, Tab 46, Questions/Answers Regarding TrailBlazer J4 Closeout Extension Proposal, Sept. 19, 2012, at 1-7.

Shortly thereafter, TrailBlazer submitted to CMS an updated RIF plan for its workforce as follows:

RIF Date	Direct Employees	Workforce Reduction Percentage	Remaining Workforce Percentage ¹²
October 19, 2012	17	2%	98%
October 26, 2012	214	26%	72%
November 16, 2012	508	62%	10%
November 30, 2012	28	3%	7%
December 7, 2012	29	4%	3%
December 21, 2012	10	1%	2%
January 18, 2013	6	1%	1%
February 1, 2013	5	1%	0%
Total RIF	817	100%	0%

AR, Tab 45, TrailBlazer RIF Plan, Sept. 27, 2012; Tab 16, Source Selection Decision, Dec. 11, 2012, at 33.

The ACO shared TrailBlazer’s closeout proposal responses and RIF plan with the Jurisdiction L contracting officer here. AR, Tab 47, ACO’s Statement, at 3. The ACO also advised the procuring contracting officer of TrailBlazer’s plans to terminate the lease of its Dallas facility and to dispose of all its non-real property (in fact, the contractor had already begun doing so and was scheduled to have a majority of property disposed of by December 2012). Id.

As part of his revised source selection decision, the contracting officer determined that TrailBlazer was not responsible. AR, Tab 16, Source Selection Decision, at 32-34. Specifically, the contracting officer found that, although TrailBlazer’s proposal showed that the firm’s financial net worth in 2010 substantially exceeded the RFP’s requirements, TrailBlazer’s loss of the Jurisdiction 4 contract had resulted in a 95% reduction of its business. Id. at 32. As a result, the contracting officer concluded, since the time of proposal submission TrailBlazer’s “financial circumstances may have changed dramatically as a result of a diminishing business base.” Id. The contracting officer also concluded that TrailBlazer no longer had the organizational ability to perform the Jurisdiction L contract. Id. at 33. Specifically, the contracting officer noted that TrailBlazer was eliminating its entire workforce as part of its close out of the Jurisdiction 4 contract, and the RIF plan submitted by

¹² The first three columns were provided in TrailBlazer’s RIF plan submission, while the last column was calculated by the contracting officer in his responsibility determination. Hearing Transcript (Tr.) at 30.

TrailBlazer indicated that by December 7 TrailBlazer would have only 21 employees (3%) of its 817 pre-RIF staffing. Id. The contracting officer concluded:

This RIF plan indicates that at the time of the writing of this memorandum, it is likely that [TrailBlazer] no longer possesses the qualified and MAC-experienced workforce it proposed to staff the [Jurisdiction] L contract. If [TrailBlazer] were to staff the [Jurisdiction] L contract with a workforce without MAC experience, especially in a new and unfamiliar jurisdiction, this would place the Medicare program at an unacceptable level of risk. . . . Performance of an A/B MAC contract with staff with no or a reduced level of experience would increase the risk of unsuccessful contract performance.

Id. at 33-34.

At the hearing conducted by our Office, the contracting officer provided additional details regarding his determination that TrailBlazer was not responsible. Specifically, the contracting officer found that TrailBlazer's RIF plan was 'in direct conflict' with the offeror's proposal, given that TrailBlazer's staffing plan for Jurisdiction L relied primarily on its use of the firm's Jurisdiction 4 staff. Tr. at 30, 34-35. The contracting officer testified that "as of December 7, only 21 employees, or 3 percent of TrailBlazer's staff, remains," and that "[y]ou're proposing over 800 FTEs to perform this work, and you're down to 21." Id. at 30, 56. The contracting officer stated that he found this conflict to be of great concern.¹³ Id. at 30. The contracting officer also testified that he expected TrailBlazer's RIF would have a significant impact on the company's ability to meet the contract schedule, as "it would be very difficult to get that experienced staff back and up to speed in order to process and complete the work as required." Id. at 53.

The contracting officer also questioned whether TrailBlazer had the ability to obtain the necessary staffing in light of its RIF. Id. at 56. He explained that he was aware of the various contingencies measures in TrailBlazer's proposal, but considered these measures to be uncertain, "very risky," and not designed to deal with the need to fill 97 percent of the offeror's total staff. Id. at 55-59, 146-47. The contracting officer concluded that TrailBlazer's ability to obtain sufficient qualified personnel within the required schedule was such a "huge undertaking" that the risk to the

¹³ The contracting officer also stated, with respect to the Jurisdiction 4 contract closeout, that TrailBlazer would not be entitled to reimbursement of its mass severance costs if the firm intended to turn around and rehire these employees. Id. at 27-28, 140-41.

agency was unacceptable.¹⁴ Id. at 34, 55-57, 147-48. Further, the contracting officer concluded that TrailBlazer's RIF plan was part of a larger scheme to end its business operations. Id. at 38-40. Finally, the contracting officer concluded that his assumption here was buttressed by TrailBlazer's decision to terminate its Dallas facility lease and sell off the building's contents.¹⁵ Id. at 60-63.

As set forth below, the facts surrounding the significant changes in TrailBlazer's operating status raise questions about its ability to perform the work at issue here. As an initial matter, it is an axiom of federal contracting law that an offeror is ineligible for the award of a contract unless the contracting officer makes an affirmative determination of responsibility. FAR § 9.103(b). In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer must find that the firm is not responsible. Id. To be determined responsible, a prospective contractor must, among other things: "[h]ave adequate financial resources to perform the contract, or ability to obtain them;" "[b]e able to comply with the required delivery or performance schedule;" and "[h]ave the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them." FAR § 9.104-1(a), (b), (e).

The determination of a prospective contractor's responsibility rests within the broad discretion of the contracting officer who, in making that decision, must necessarily rely on his or her business judgment. We therefore will not question a negative determination of responsibility unless the determination lacks a reasonable basis. KMS Solutions, LLC, B-405323.2, B-405323.3, Oct. 6, 2011, 2011 CPD ¶ 209 at 12; Colonial Press Int'l, Inc., B-403632, Oct. 18, 2010, 2010 CPD ¶ 247 at 2. An offeror's responsibility is to be determined based on any information received by the agency up to the time award is proposed to be made. FAR § 9.105-1(b)(3); Sygnetics, Inc., B-404535.5, Aug. 25, 2011, 2011 CPD ¶ 164 at 4. In addition, contracting officers are "generally given wide discretion" in determining the amount of information that is required to make a responsibility determination. See Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1334-35 (Fed. Cir. 2001). While the contracting officer may elect to open a dialogue with an offeror to address responsibility concerns, such a dialogue is not required where an agency has an otherwise reasonable basis for assessing the firm's responsibility. KMS Solutions, LLC, supra, at 12-13.

¹⁴ The contracting officer opined that, given the offeror's loss of almost its entire existing workforce, it was likely or possible that TrailBlazer would staff the MAC contract with inexperienced personnel, which also posed an unacceptable level of risk. Id. at 49-50, 147-48.

¹⁵ The information subsequently received by the contracting officer--that TrailBlazer completed the RIF of its workforce and closed its Dallas facility--has not altered his conclusion regarding the offeror's nonresponsibility. Id. at 184-86.

Here, the record supports the reasonableness of the contracting officer's judgment that TrailBlazer was not responsible. In this regard, the record shows that the contracting officer reasonably concluded that TrailBlazer did not have the necessary organization (*i.e.*, staffing) to perform the Jurisdiction L MAC contract, or the ability to obtain that staffing--at least not within the time required to comply with the contract schedule. As discussed above, TrailBlazer's February 2012 proposal anticipated using its existing workforce and hiring only 3 FTEs, but, by December 2012, TrailBlazer had only 21 FTEs (or 3%) of its workforce remaining. This meant that TrailBlazer would have been required to hire, or otherwise obtain, almost the entire workforce necessary to perform the Jurisdiction L contract. The contracting officer specifically considered the magnitude of this endeavor, as well as TrailBlazer's various risk mitigation strategies, which the contracting officer found to be unproven and risky.¹⁶ Tr. at 55-59.

TrailBlazer does not dispute that it informed CMS, as part of the Jurisdiction 4 contract closeout process, that it was terminating its existing workforce, closing its headquarters facility, and discontinuing Medicare operations. Rather, TrailBlazer maintains that the contracting officer could not reasonably conclude that the company would fail to have an experienced workforce available to successfully perform the Jurisdiction L contract in light of its proposed contingency measures. Moreover, TrailBlazer states that it had surveyed all its RIF-affected employees and the majority expressed an interest in returning, which TrailBlazer states is a fact that the contracting officer did not know.¹⁷ Protest, Jan. 8, 2013, at 28-32.

Although TrailBlazer characterizes the contracting officer's responsibility determination as being based upon "ill-informed" speculation, and contends that the contracting officer accorded insufficient weight to the protester's generalized risk mitigation strategies in its proposal, this disagreement with the contracting officer's decision does not show it to be unreasonable. Here, the contracting officer relied upon TrailBlazer's repeated and more recent communications with CMS about the actual loss of its entire experienced workforce. Notwithstanding the fact that TrailBlazer was also disposing of its facilities and all its equipment, and had made statements about ending its Medicare operations completely, the contracting officer reasonably focused on whether the company had, or could successfully obtain, the necessary workforce. Quite simply, the only information that TrailBlazer claims the contracting officer did not consider when making his responsibility determination are

¹⁶ The contracting officer was also aware that TrailBlazer would have had to reestablish its facilities at the same time it was trying to hire almost 800 employees. See tr. at 61-63.

¹⁷ The protester also argues that the cause of the RIF was the failure of CMS to award the Jurisdiction L contract on or about August 20, 2012, as the solicitation had anticipated.

the results of an alleged employee survey, which TrailBlazer has never provided to the agency or to our Office. We do not agree that the information considered by the contracting officer (most of which was provided by TrailBlazer) in concluding that the company lacked the requisite responsibility to perform this contract was either inadequate or outdated.

In short, the record shows that the contracting officer reasonably considered TrailBlazer's ability to perform the contract and found that TrailBlazer's organization (*i.e.*, staffing) was inadequate. Accordingly, we see no basis to disagree with the contracting officer's conclusion that TrailBlazer could not be considered a responsible offeror.

Evaluation of Novitas's Proposal

TrailBlazer also protests CMS's evaluation of Novitas's proposal under the past performance, technical understanding, and cost evaluation factors, arguing generally that the agency's determinations were too favorable.¹⁸ The protester also argues that Novitas should have been found ineligible for award, because the individual that Novitas proposed as its executive contract medical director (CMD)--a key personnel position--was no longer available at the time of contract award.¹⁹ With respect to TrailBlazer's challenges to the evaluation of the Novitas proposal, both the agency and intervenor argue that TrailBlazer is not an interested party to pursue the remaining contentions in light of the nonresponsibility determination.

In order for a protest to be considered by our Office, a protester must be an interested party, that is, an actual or prospective offeror whose direct economic interest would be affected by the award or failure to award a contract. 4 C.F.R. §§ 21.0(a)(1), 21.1(a) (2012); Cattlemen's Meat Co., B-296616, Aug. 30, 2005,

¹⁸ For example, TrailBlazer argues that CMS improperly ignored a number of assumptions in Novitas's proposal. The record shows, however, that CMS was fully aware of and reasonably considered both Novitas's and TrailBlazer's assumptions in its evaluation of proposals.

¹⁹ Novitas proposed Dr. Robert Muscalus, its executive CMD from the incumbent (but still in progress) contract, for the same position here, and the TEP found this aspect of Novitas's proposal to be a strength. By the time of his revised source selection decision, the contracting officer became aware that Dr. Muscalus had resigned from Novitas and was no longer available; the contracting officer also knew that Novitas had already replaced Dr. Muscalus with another individual acceptable to CMS as part of the administration of the incumbent, Jurisdiction 12 contract (the incumbent contract, as well as the Jurisdiction L solicitation, contained a clause requiring the replacement of key personnel with individuals acceptable to the agency). Tr. at 70-77.

2005 CPD ¶ 167 at 2 n.1. A firm is not an interested party if it is ineligible to receive award under the protested solicitation, Acquest Dev. LLC, B-287439, June 6, 2001, 2001 CPD ¶ 101 at 6, The Swanson Group, Inc., B-249631, Aug, 10, 1992, 92-2 CPD ¶ 93 at 2, or if it would not be in line for award if the protest were sustained. RCI Mgmt., Inc., B-239938, Oct. 12, 1990, 90-2 CPD ¶ 283 at 4. TrailBlazer is ineligible for award because, as discussed above, the contracting officer reasonably determined the firm to be nonresponsible. The firm therefore lacks the direct economic interest necessary to be an interested party to protest the evaluation of proposals and Novitas's technical eligibility; even if the protest were sustained there is no requirement that the agency hold discussions with a nonresponsible offeror.²⁰

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel

²⁰ Moreover, we find TrailBlazer's challenge to the departure of Novitas's proposed executive CMD provides no basis to conclude that Novitas was ineligible for award here. There is no evidence in the record (nor does the protester suggest) there was a material misrepresentation (*i.e.*, "bait and switch") on Novitas's part when it proposed Dr. Muscalus. Additionally, the substitution of employees after award is not prohibited; such substitution is unobjectionable where the offeror acted reasonably and in good faith. Hornet Joint Venture, B-258430.3, B-258430.4, Feb. 22, 1995, 95-1 CPD ¶ 110. Under the circumstances presented here, the fact that Novitas will provide a substitute for this individual does not make the award improper or require the agency to reopen the competition. See SRS Techs., B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95 at 4. We also note for the record that the contracting officer elected not to consider the strength assigned to Novitas's proposal as a result of offering Dr. Muscalus. AR, Tab 16, Source Selection Decision, at 31; tr. at 67-77.