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Decision

Matter of: Health Net Federal Services, LLC

File: B-421405.2; B-421405.3

Date: August 4, 2023

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DIGEST

1. Protest alleging that agency miscalculated proposals and made an unreasonable source selection decision is denied where the record shows that the agency’s evaluation was reasonable and consistent with the terms of the solicitation.
2. Protest that agency engaged in misleading discussions by raising several weaknesses early in discussions, but failing to raise them again in subsequent rounds of discussions is denied where the record shows that the agency raised the weaknesses several times and made no representations that might lead the protester to believe they were resolved.
3. Protest that the owners of an other-than-small business may not be excluded from a small business subcontracting plan as affiliates because they cannot meet the tests for affiliation in the Small Business Administration’s (SBA) regulations is denied, because the solicitation adopted the Federal Acquisition Regulation’s (FAR) general definition of

affiliates rather than the SBA's definition, and the agency's interpretation of the relevant FAR provision is reasonable.

4. Protest alleging material misrepresentations by awardee is denied where the record establishes that the disputed statements were not false statements, but represented, at worst, unacceptable aspects of the awardee's proposal that were subsequently corrected during discussions or otherwise were minor inconsistencies that had no bearing on the agency's evaluation.

DECISION

Health Net Federal Services, LLC, of Sacramento, California, protests the award of a contract to TriWest Healthcare Alliance Corporation, of Phoenix, Arizona, under request for proposals (RFP) No. HT9402-20-R-0005 issued by the Department of Defense (DOD), Defense Health Agency (DHA) for managed healthcare support services for the TRICARE program in the western region of the United States. The protester alleges that the agency erred in its evaluation and in the conduct of discussions, and that the awardee made multiple false representations concerning its small business subcontracting plan.

We deny the protest.

BACKGROUND

DOD provides healthcare to approximately 9 million military members and their families both by providing healthcare directly at military hospitals or clinics and by purchasing healthcare services on the open market through the TRICARE program. Contracting Officer's Statement (COS) at 1; Protest at 1-2. To provide these services, the TRICARE program relies on "managed care support" contracts, like the one at issue in this protest. *Id.* These contracts involve providing a suite of services for TRICARE beneficiaries analogous to the services provided by a conventional commercial health insurance provider: the contractor establishes and maintains networks of healthcare providers; processes claims; and provides customer service to beneficiaries. *Id.* In addition to providing services to beneficiaries, managed care support contractors also negotiate discounts with healthcare providers on behalf of the agency and integrate open market healthcare with the military's direct care system. *Id.*

Following significant market research and industry outreach, the agency issued the T-5¹ RFP on April 15, 2021. MOL at 9-10. The RFP advised that the government would award one managed care support contract for the eastern region of the United States and a second contract for the western region² of the United States, but only the

¹ This procurement is designated "T-5" because it is the 5th in a series of TRICARE contracts. Memorandum of Law (MOL) at 2.

² The western region includes all states west of the Mississippi river, with the addition of Wisconsin and Illinois. See Agency Report (AR), Tab 87, RFP at 47.

latter contract is at issue in this protest. RFP at 154; Protest at 1-2. Of note, the protester is currently the incumbent TRICARE managed care support contractor for the western region. Protest at 2.

The RFP contemplated a contract for each region with a 1-year base period, eight 1-year option periods, and an 18-month transition out period. RFP at 45. The RFP provided that the government would make award on the basis of a best-value tradeoff considering three factors, which are listed in descending order of importance: (1) technical/risk; (2) past performance; and (3) price/cost. RFP at 192-193. In addition, the RFP explained that the agency would evaluate a fourth factor, small business participation, on an acceptable/unacceptable basis; an offeror would need to be rated acceptable to be eligible for award. *Id.*

The technical/risk factor was composed of six subfactors: (1) network management; (2) clinical management; (3) administration and customer service; (4) claims and systems; (5) transition management; (6) future potential demonstrations/product improvements. *Id.* at 193. The RFP explained that the first five subfactors were weighted equally, while the sixth subfactor was less important. *Id.* Additionally, the RFP provided that the evaluators would assess adjectival ratings for both technical approach³ and technical risk⁴ for each of the six technical subfactors. *Id.*

Concerning the past performance factor, the RFP provided that the agency would assess past performance information submitted by offerors and obtained through other sources concerning recent, relevant contracts, and assign a single overall confidence assessment rating for each proposal.⁵ RFP at 210. However, the RFP also provided that each contract would be individually assessed for recency, relevance, and quality. *Id.* at 211-212. Relevant to this protest, the RFP also provided specific criteria that would be used to assess the scope, magnitude, and complexity of contracts in assessing relevancy, such as a list of 14 separate “complexities” that the evaluators would assess. *Id.* For example, this list of complexities included assessing whether a given past performance reference involved claims processing, maintaining a provider directory, and providing medical management services. *Id.*

With respect to the price evaluation, the RFP contemplated the award of a contract with both cost-reimbursable and fixed-price contract line items numbers (CLINs). RFP at 213. The agency provided “plug-in” numbers for the cost-reimbursable CLINs. *Id.* As a result, the RFP explained that the agency would conduct a limited cost realism

³ The RFP provided that the agency would assign one of the following technical ratings: outstanding; good; acceptable; marginal; or unacceptable. RFP at 194.

⁴ The RFP explained that the agency would assign one of the following risk ratings: low; moderate; high; or unacceptable. RFP at 195.

⁵ The RFP provided five potential past performance ratings: substantial confidence; satisfactory confidence; neutral confidence; limited confidence; and no confidence. RFP at 212-213.

evaluation by validating that the offerors correctly applied certain guaranteed discounts. *Id.* Concerning the fixed-price CLINs, the RFP explained that the agency would evaluate each offeror's total evaluated price for reasonableness and unbalanced pricing, but that no realism analysis would be performed other than the limited cost realism analysis described above. *Id.* at 214.

With respect to small business subcontracting, the RFP provided that the agency would evaluate an offeror's subcontracting plan and proposed participation of small businesses, and that offerors would be rated acceptable if they "clearly meet" the minimum requirements of the solicitation. RFP at 214. For example, the RFP explained that the agency would assess whether an offeror's plan demonstrated a good faith effort to meet the specific subcontracting goals outlined in the RFP, such as a 25 percent overall small business subcontracting goal. *Id.* Relevant to this protest, the RFP included FAR clause 52.219-9, Small Business Subcontracting Plan, which, among other things, provides that offerors may exclude contracts with their affiliates from the computation of their small business utilization. See RFP at 128; FAR clause 52.219-9(l).

The agency initially received three proposals on August 23, 2021, including proposals from Health Net and TriWest. COS at 13. Following additional solicitation amendments, the agency sought revised proposals, established a competitive range, and opened discussions. *Id.* Shortly after opening discussions, the third offeror withdrew from the competition, leaving only Health Net and TriWest in the competitive range. *Id.* The agency conducted seven initial rounds of discussions and then requested formal proposal revisions. *Id.* The agency then conducted another three rounds of discussions on the basis of the revised proposals and sought a second round of final proposal revisions by July 20 of 2022. *Id.* Following final proposal revisions, the agency evaluated the proposals of Health Net and TriWest as follows:

	Health Net	TriWest
TECHNICAL/RISK		
Network Management	Acceptable/Low Risk	Outstanding/Low Risk
Clinical Management	Good/Low Risk	Good/Low Risk
Administration and Customer Service	Acceptable/Low Risk	Acceptable/Low Risk
Claims and Systems	Good/Low Risk	Good/Low Risk
Transition Management	Acceptable/Low Risk	Acceptable/Low Risk
Future Potential Demos/ Product Improvements	Good/Low Risk	Good/Low Risk
PAST PERFORMANCE	Satisfactory	Satisfactory
SMALL BUSINESS PARTICIPATION	Acceptable	Acceptable
COST/PRICE	\$64,597,090,402	\$65,062,399,682

AR, Tab 141, Source Selection Decision Document (SSDD) at 46, 58-59.

The agency ultimately concluded that TriWest’s non-price proposal was superior to Health Net’s proposal in numerous respects. *Id.* at 60-70. Concerning the technical/management risk criterion, the source selection authority (SSA) found that, among other advantages, TriWest’s network management proposal was significantly better than Health Net’s because it proposed to build excess capacity into its networks, while the protester proposed a network size based on [DELETED]. *Id.* at 61, 71. As a result TriWest proposed a network of healthcare providers that was [DELETED] percent larger, including some excess capacity that was effectively already in place. *Id.* at 62-63. The agency concluded that this additional capacity, paired with TriWest’s broader technical approach, would provide numerous benefits to the agency. *Id.* For example, the SSA concluded that TriWest’s approach would result in improved access to care overall, increased access to high quality medical providers and medical specialists, and lower drive times for beneficiaries. *Id.* The SSA also concluded that the larger network would provide flexibility to accommodate changes in DOD’s direct care capacity.⁶ *Id.*

⁶ Because, as discussed above, managed care support contractors must integrate TRICARE with DOD’s direct care system, changes to the direct care system could result in increased TRICARE demand.

Concerning past performance, the agency concluded that, while both offerors received the same adjectival rating, TriWest's past performance was superior for several reasons. AR, Tab 141, SSDD at 70. For example, the agency notes that both Health Net and TriWest performed contracts for a similar managed care effort for the Department of Veteran's Affairs (VA), the VA Patient-Centered Community Care (PC3) contract, with each firm being responsible for managed care services in half of the United States. *Id.* at 51-53, 55-58, 70. However, contractor performance assessment reports (CPARs) reflected that Health Net experienced negative performance issues on its VA PC3 contract that resulted in the VA indicating that it would not recommend the protester for similar requirements in the future, while CPARs for TriWest during the same period reflected positively assessed performance. *Id.* Indeed, CPARs and interviews with VA officials indicated that, because of Health Net's performance problems, VA declined to exercise options on Health Net's contract, and instead expanded TriWest's contract to cover the region formerly operated by Health Net. *Id.*

For these reasons, the SSA concluded that TriWest's superior non-price proposal was worth a 0.7 percent price premium and made award to TriWest on December 21, 2022. *Id.* at 71; COS at 21. On January 17, 2023, Health Net filed a protest with our Office challenging the award to TriWest in numerous respects. COS at 21. Among other things, the protester challenged how TriWest calculated its small business participation in its small business utilization plan. Protest at 24. Health Net argued that when TriWest calculated its small business participation, TriWest improperly excluded contracts held by its non-profit owners on the basis that they were affiliates. In this regard, TriWest is owned by a consortium of 17 non-profit health insurance organizations and university hospital systems, such as Blue Cross Blue Shield (BCBS) of Arizona, Blue Shield of California, and BCBS of New Mexico. *Id.* at 33. According to Health Net, TriWest's consortium of owners do not meet the applicable legal definitions of affiliates, in large part because of their non-profit status. *Id.* at 24.

Following that protest, the agency indicated that it intended to take corrective action by reevaluating the small business participation factor and reopening discussions with respect to that factor, and we dismissed the protest as academic. *Health Net Federal Services, LLC*, B-421405, Feb. 9, 2023 (unpublished decision). On February 15, the agency reopened discussions, and asked both offerors to clarify or confirm aspects of their small business subcontracting plans. COS at 22. The agency later issued a separate evaluation notice (EN) to both offerors. The EN clarified that the agency intended to use the definition of "affiliates" at FAR 2.101 in considering which entities an offeror may exclude from its small business plan. *Id.* The agency then permitted offerors to submit new small business plans; TriWest submitted a new plan, but Health Net declined to do so. *Id.*

Relevant to this protest, TriWest's new plan was revised to include certain categories of subcontracts that TriWest had previously excluded, but that the solicitation required to be included. See AR, Tab 150, TriWest's Revised Subcontracting Plan at 10-14. The agency then evaluated TriWest's revised small business utilization proposal and concluded that it was acceptable. COS at 22-23. Additionally, as part of the agency's

responsibility determination for TriWest, the contracting officer asked TriWest to explain why its original proposal had omitted certain categories from its small business subcontracting plans, and received detailed answers from TriWest. *Id.* After considering TriWest's answers, the contracting officer concluded that TriWest was responsible, and the agency again made award to TriWest on April 20, 2023. *Id.* This protest followed.

DISCUSSION

The protester challenges the agency's evaluation of the technical/management risk, past performance, and small business participation factors. Additionally, the protester alleges that the awardee made several material misrepresentations related to its proposed and historical small business utilization, which collectively warrant the awardee's exclusion from the competition. Finally, the protester alleges that the agency conducted misleading discussions with respect to price and performed an impermissible price realism evaluation. We address these arguments in turn.⁷

⁷ The protester raises several collateral arguments not addressed in this decision. We have considered each of these arguments and conclude they provide no basis to sustain the protest. For example, the protester alleges that TriWest's proposal should have been rejected because TriWest failed to include a letter of commitment for BCBS of Alabama, and the solicitation expressly required offerors to submit letters of commitment for all leased or parent healthcare networks. Protester's Comments and Supp. Protest at 19-21. However, the record does not suggest that TriWest proposed to rely on BCBS of Alabama as a healthcare network provider. While TriWest's proposal makes a single reference to BCBS of Alabama, it does so by way of identifying it as a shareholder in TriWest, not necessarily as a healthcare provider. AR, Tab 103, TriWest Final Proposal Revision Volume II at 5. Similarly, while TriWest included BCBS of Alabama in a list of affiliated subcontractors during discussions, TriWest represents that BCBS of Alabama was included as a clerical error and the agency did not understand it to be proposing BCBS of Alabama as a healthcare provider. Intervenor's Supp. Comments at 11-12 (*citing* AR, Tab 146, TriWest Response to Small Business Participation Evaluation Notice 1 at 11); Supp. MOL at 24-25. In support of TriWest's representation, we note that Alabama is not within the geographic region covered by this contract, so it would indeed be anomalous to include an insurance network that covers Alabama as a healthcare provider for the western region. RFP at 47.

In any case, we note that TriWest's discussion response, which referenced BCBS of Alabama, was labelled "Other Professional Services," suggesting that TriWest was, at best, relying on that organization for support services, not as a healthcare network provider. AR, Tab 146, TriWest Response to Small Business Participation Evaluation Notice 1 at 11. That is to say, even if we were to disregard the intervenor's plausible representation that BCBS of Alabama was included in error, TriWest's proposal and discussion responses do not provide evidence that TriWest relied on BCBS of Alabama as a healthcare network provider such that a letter of commitment would be required. Accordingly, we see no basis to sustain this protest ground.

Technical Evaluation

The protester challenges both the agency's evaluation of its own and TriWest's technical proposals in numerous respects. Concerning TriWest's proposal, the protester argues that the agency misunderstood or overlooked significant substantive flaws in TriWest's proposal and failed to adequately assess technical risk as required by the solicitation. With respect to its own proposal, the protester alleges that the agency erred in assigning two weaknesses to its proposal, conducted misleading discussions, and disparately evaluated similar proposal features.

TriWest's Technical Evaluation

The core of the protester's argument concerning the agency's evaluation of TriWest's technical proposal focuses on the fact that TriWest lacks an existing TRICARE network, while the protester has already established one. See Protest at 35-57; Protester's Comments and Supp. Protest at 34-52. For that reason, the protester contends that TriWest will face various technical challenges and risks that the agency failed to reasonably consider, and which the protester has already surmounted. *Id.* Specifically, the protester notes that TriWest's existing network was developed for two different managed care support contracts for VA, but those contracts differ from the current procurement in several key ways. *Id.* For example, Health Net alleges that the VA contracts have less complex care requirements than TRICARE, and also have more generous reimbursement rates for network providers. *Id.*

For these reasons, the protester contends TriWest will need to negotiate new agreements with its healthcare providers currently providing services under TriWest's VA contracts, and argues that the agency ignored or misunderstood the significant risk that many of TriWest's network providers will be unwilling to accept, what in effect, will require the providers to do more for less money. *Id.* For example, while the protester notes that TriWest claims it has the contractual right to unilaterally alter approximately [DELETED] percent of its agreements with its providers to bring them into compliance with TRICARE's requirements, the protester argues that this aspect of TriWest's approach is illusory. Protester's Comments and Supp. Protest at 38-43. While TriWest's provider agreements do permit TriWest to unilaterally alter the agreements, they also permit providers to opt-out of the changes within [DELETED]. *Id.* Moreover, for approximately [DELETED] percent of its providers, TriWest will need to negotiate entirely new agreements. *Id.* The protester also contends that TriWest will face hurdles in credentialing its providers. *Id.*

The protester contends that all of these factors pose significant risk to TriWest's proposed technical approach, and maintains that the contemporaneous record suggests that the agency either failed to appreciate the risks or did not reasonably consider them. For example, the protester alleges that the evaluators unreasonably described TriWest's network as already being [DELETED] percent built. *Id.* at 34-37, 45-48. Additionally, the protester notes that the agency erroneously concluded that TriWest

had already credentialed [DELETED] percent of the providers it proposed in the western region, when TriWest, at best, had only credentialed [DELETED] percent of its existing network. *Id.* Similarly, the agency's evaluation praises TriWest's ability to unilaterally alter its provider agreements, but does not acknowledge or discuss the healthcare providers' ability to opt-out of such changes. *Id.* at 37-43. The protester argues that these errors were especially harmful to the evaluation because, by hand-waving away the challenges TriWest will face in establishing its network, the agency effectively neutralized one of the protester's major competitive advantages--it's mature, existing TRICARE network and the experience the protester gained in creating it. *Id.* at 43-44.

In response, the agency argues, preliminarily, that the solicitation did not require offerors to have an existing, established network that would meet the requirements of the solicitation, but instead simply required offerors to propose how they would meet the RFP's requirements. MOL at 26-27. In fact, contrary to the protester's claims, the agency notes that the protester does not have a compliant existing network because the current TRICARE procurement covers a different geographic region due to the addition of more covered states, and has significantly different substantive requirements than the prior TRICARE contract. *Id.* As a result, both offerors will necessarily face challenges in negotiating changes with their existing providers and in finding new providers. *Id.* Therefore, to the extent that the protester argues that the agency was required to assign risk to TriWest's proposal for not having a fully compliant network in place at the time of proposal submission, Health Net's proposal would similarly needed to have been assessed similar risk.

More significantly, the agency argues that it was well aware of the risks the protester claims the agency ignored with respect to TriWest's proposed approach and reasonably considered them. In this regard, the agency contends that its evaluators carefully considered TriWest's approach to network management and concluded that it was outstanding and would permit a rapid network build in the western region, assigning ten strengths and no weaknesses. MOL at 28-34. Specifically, the evaluators noted that TriWest could cover significant portions of the required network through its existing network of providers and that TriWest proposed to supplement that existing network with major health plans in all 26 states in the coverage area. The evaluators further recognized that TriWest had obtained letters of commitment from these new prospective providers. *Id.* at 31-32. This was part of TriWest's overall approach to build a network with significant excess capacity, and as a result, TriWest proposed to exceed the solicitation's requirements by significant margins. *Id.* at 33.

Turning to the specific examples above, the agency argues that the record supports that the agency reasonably understood that, in a representative sample of healthcare markets, TriWest's existing network would provide [DELETED] percent coverage, and, thus, the protester's argument that this representation applied to TriWest's total network is erroneous and unsupported. Supp. MOL at 27 (*citing* AR, Tab 126, TriWest Final Technical Evaluation Team (TET) Report at 8-9). The agency further suggests that this was simply a supporting example in an evaluation that was generally focused on TriWest's proposal to build a network that was designed to provide significant excess

capacity by leveraging not only its existing network, but also other stable healthcare networks in all 26 states. *Id.* Similarly, the agency contends that the protester's arguments that the agency unreasonably evaluated TriWest's ability to credential providers relies on an out of context reading of a summary sentence in the TET report. *Id.* at 28. That is to say, the agency was well aware that TriWest's statements concerning provider credentialing applied only to [DELETED] percent of its existing providers, not to all providers proposed in the western region, which the agency contends would have been implausible. *Id.*

Moreover, while the agency concedes that the final evaluation does not discuss the opt-out provision, the agency explains that it contemporaneously considered the opt-out provision at length. Supp. MOL at 28; *see also* Supp. MOL, exh. 2, Decl. of TET Lead and Draft TET Report *generally*. In this regard, an intermediate draft of the TET report initially assigned TriWest a strength for its unilateral ability to alter its agreements. Supp. MOL, exh. 2, Decl. of TET Lead and Draft TET Report at 2, 5. However, the intermediate report also noted that the strength was of limited value because healthcare providers were able to opt out of changes to the agreement, and because the clause only applied to [DELETED] percent of providers in question. *Id.* The TET ultimately concluded that while TriWest's approach to amending its existing agreements met the solicitation's requirements, it did not merit a strength because of uncertainties regarding the providers' ability to opt out. *Id.* at 2-3. Accordingly, the strength was removed from the final TET report, as was the additional discussion of the opt-out provision that formed the basis for the agency's determination that any such strength was of minimal value. *Id.* The agency contends that this contemporaneous evidence, while not part of the agency's final evaluation, clearly demonstrates that the evaluators were aware of the opt-out provision and considered it. Supp. MOL at 28.

In response, the protester contends that the agency, in effect, fails to rebut its principal protest allegations. For example, the protester contends TriWest will face significant challenges in building a TRICARE network because of the differences in fee structures between its existing VA contracts and this effort, but that the agency's evaluation did not meaningfully consider the differences. Protester's Supp. Comments at 28-31. Additionally, the protester contends that the agency now impermissibly attempts to supplement the record with self-serving *post hoc* statements about the evaluation, which we should not consider because they are inconsistent with the contemporaneous record. Protester's Supp. Comments at 31-33 (*citing AT&T Corp.*, B-421195, B-421195.2, Jan. 17, 2023, 2023 CPD ¶ 26). For example, the protester notes that the contemporaneous evaluation contains a statement that "[t]he Offeror states it has contracted and credentialed [DELETED] [percent] of the providers in the West Region." Protester's Supp. Comments at 36 (*citing AR*, Tab 126, TriWest Final TET Report at 49). Health Net alleges this is inconsistent both with the agency's representation that it understood the scope of TriWest's credentialing, and with the agency's representation that those providers may ultimately opt out.

When reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals, nor substitute our judgment for that of the agency, as the

evaluation of proposals is a matter within the agency's discretion. Rather, we will review the record to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations. *AECOM Mgmt. Servs., Inc.*, B-417639.2, B-417639.3, Sept. 16, 2019, 2019 CPD ¶ 322 at 9. A protester's disagreement, without more, does not form the basis for us to conclude that an evaluation was unreasonable. See *DynCorp Int'l, LLC*, B-412451, B-412451.2, Feb. 16, 2016, 2016 CPD ¶ 75 at 7-8.

Moreover, in reviewing an agency's evaluation, we do not limit our consideration to contemporaneously-documented evidence, but instead consider all the information provided, including the parties' arguments, explanations, and any hearing testimony. *The S.M. Stoller Corp.*, B-400937 *et al.*, Mar. 25, 2009, 2009 CPD ¶ 193 at 13. While we generally give little or no weight to reevaluations and judgments prepared in the heat of the adversarial process, *Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15, post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, will generally be considered in our review of the rationality of selection decisions--so long as those explanations are credible and consistent with the contemporaneous record. *Remington Arms Co., Inc.*, B-297374, B-297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 12.

Turning to the substance of the evaluation, the record shows that the agency carefully considered TriWest's proposed approach to building out its network and reasonably concluded that TriWest would be able to meet and exceed the requirements of the solicitation. While the agency's evaluation did not specifically engage with the differences in fee structure between TriWest's existing VA contracts and the instant effort, the RFP did not require offerors to explain their approach to negotiating reimbursement rates, nor did it require the agency to evaluate such approaches. Instead the RFP explained that the agency would "evaluate the effectiveness of the Offeror's proposed approach for developing and maintaining a provider network[.]" and articulated several specific factors that the agency would assess, such as whether the network would meet access to care standards and include high quality providers. RFP at 196.

In this regard, the contemporaneous evaluation reflects that the agency carefully addressed the evaluation criteria in the RFP and concluded that TriWest provided a robust plan that was not solely dependent on its existing network, but instead contemplated a network that would include significant excess capacity involving both its existing provider network and numerous additional providers. Put another way, even if the protester is correct that some portion of TriWest's existing network will opt out of accepting TRICARE patients, TriWest's proposed network exceeded historical utilization by such a significant margin that the agency reasonably concluded that TriWest would nonetheless be able to meet--and in fact exceed--the requirements of the RFP. See MOL at 37-38. In short, the protester disagrees with the agency's reasonable technical judgment in this regard on the basis of risk factors that the RFP did not require the agency to consider. We see no basis to question the agency's judgment in this regard.

Turning to the protester's specific examples of irregularities in the evaluation and the question of the agency's *post hoc* representations, we see no basis to disregard the additional information provided by the agency in this case because the evidence is either contemporaneous, or is plausible and consistent with the contemporaneous record.

First, while the agency has sought to supplement the protest record with some additional statements, we note that the most significant evidence provided by the agency in this regard is, in fact, contemporaneous. Specifically, concerning the opt-out provision, the agency provided an excerpt of an intermediate draft of the TET report that shows the agency clearly considered both the opt-out provision and the fact that TriWest could only seek unilateral modification with [DELETED] percent of its existing providers. Supp. MOL, exh. 2, Decl. of TET Lead and Draft TET Report at 5-6. Significantly, this draft reflects that the agency also considered the possibility that portions of TriWest's existing network may elect not to participate in TriWest's proposed TRICARE network, underscoring the reasonableness of the agency's evaluation discussed above. *Id.* The existence of this draft and the agency's decision to ultimately remove the strength assigned in the final evaluation represents significant contemporaneous evidence of the agency's reasonable consideration of issues related to the opt-out provision and TriWest's existing network. While the protester has expressed its disagreement with the agency's judgment, such an argument, without more, provides no basis for our Office to supplant our judgment for that of the agency.

Second, we find no basis to conclude that the agency's responses to the protest concerning the evaluators' understanding--that TriWest's network was not [DELETED] percent built or [DELETED] percent accredited--are inconsistent with the contemporaneous record. For example, the TET report includes the following as part of a long discussion of TriWest's network capacity: "[i]n Attachment L-3w, the Offeror presents data indicating that approximately [DELETED] [percent] of the required build is already established." AR, Tab 126, TriWest Final TET Report at 9. However, as the agency notes, the statement in the TET report is in specific reference to data included in attachment L-3w, which was an attachment to the RFP that offerors were to prepare as part of their respective proposals. *Id.* Significantly, the RFP's instructions for preparing that attachment directed offerors to apply their sizing models only to a representative sample of markets. RFP at 167. Accordingly, the agency reasonably contends that the TET report statement must be understood as a summary of TriWest's response to the representative sample markets included in the attachment, not as a statement about the state of TriWest's entire proposed network. Supp. MOL at 27. On this record, the agency's explanation is reasonable and consistent with the contemporaneous record.

Similarly, the record includes a summary statement near the end of the report that TriWest "states it has contracted and credentialed [DELETED] [percent] of the providers in the West Region." AR, Tab 126, TriWest Final TET Report at 49. The agency contends that this statement was intended to refer only to the [DELETED] percent of TriWest's existing providers with agreements that permit for unilateral amendment.

Supp. MOL at 28. This representation is supported by the fact that this statement is immediately followed by a statement discussing TriWest's unilateral amendment structure. AR, Tab 126, TriWest Final TET Report at 49. Moreover, the section of the TET report in question effectively summarized a much longer discussion earlier in the same document, and that longer discussion appropriately reflected that the [DELETED] percent figure referred to the proportion of TriWest's existing network providers whose agreements permitted unilateral amendment. See, e.g., *Id.* at 11. Here again, the agency's explanation in response to the protest is credible and consistent with the contemporaneous record.

While Health Net disagrees with the agency's evaluation of TriWest's technical proposal in numerous respects, disagreement, without more, is insufficient to establish that the agency erred. *DynCorp Int'l, LLC, supra*. In short, we see no basis to question the agency's detailed technical evaluation.

Health Net's Technical Evaluation

Health Net also challenges the agency's assignment of two weaknesses to its proposal. Protest at 58-74; Comments and Supp. Protest at 52-61. Specifically, the agency's evaluators assigned the first weakness because they could not validate that Health Net would be able to develop a compliant network in [DELETED] of six states that were new to this contract as compared to Health Net's current incumbent contract. *Id.* They assigned the second weakness because the contract requires in-home case management visits to occur in rural and remote areas within 48 to 72 hours, but the protester's proposed approach to such visits involved a complex [DELETED] process that will require coordination among multiple stakeholders, and the evaluators were concerned that the combination of complexity and tight timelines posed performance risk. *Id.*

The protester also argues that the agency raised questions related to these weaknesses early in discussions, but then did not raise them again in subsequent discussions, which the protester contends misled it into believing that it had resolved the issues to the agency's satisfaction. *Id.* In the alternative, the protester contends that the issues the agency raised in discussions did not adequately inform Health Net of the agency's actual concerns, which did not afford the protester a meaningful opportunity to address the weaknesses. *Id.* Finally, the protester asserts that with respect to the first weakness, the agency appears to have applied an unstated evaluation criterion and applied a more stringent standard to its proposal than to TriWest's proposal. *Id.*

Turning to the first weakness, Health Net explains that the agency's discussions noted that Health Net's proposal contained "inadequate evidence as to the size and extent of the new network build" in the expansion states, and asked Health Net to identify the approach it would employ to build its network as required given what appeared to be a limited number of providers available through Health Net's proposed network. Protester's Comments and Supp. Protest at 53 (*citing* AR, Tab 56, Health Net Round 1 Discussions at 20-22). The protester notes that it responded to this evaluation notice in

March of 2022, but the agency did not raise any additional questions on this point despite dozens of additional questions over multiple successive rounds of discussions conducted over many months. *Id.* at 53-56. Moreover, the protester argues that the final assessed weakness was ultimately focused on issues in [DELETED] expansion states in particular, but Health Net never received notice in discussions that those specific states were a concern. *Id.* Further, the protester notes that, to the extent the agency assigned this weakness because the evaluators could not “validate” the protester’s proposed approach, this validation concern represents both an unstated evaluation criterion and unfair disparate treatment as no such network validation was performed as part of TriWest’s evaluation. *Id.* at 56-59.

Turning to the second weakness, the protester argues that the agency followed a similar course. Protester’s Comments and Supp. Protest at 59-61. The agency asked the protester to clarify its approach to completing clinical management in-home visits within the required 48-72 hour timeframe, and Health Net responded, but then allegedly never heard about the issue again in subsequent rounds of discussions. *Id.* Moreover, as with the first weakness, the protester contends that the agency did not adequately explain its true concerns--the agency asked for an explanation of how the protester would complete the in-home case management visits in the required time, but the agency’s actual concern was not with the timeline, but with the complexity of Health Net’s proposed process. *Id.*

As a general matter, discussions, when conducted, must be meaningful--that is, they must identify deficiencies and significant weaknesses that exist in an offeror’s proposal--but that requirement is satisfied when an agency leads an offeror into the areas of its proposal that require amplification or revision. See, e.g., *Epsilon Systems Solutions, Inc.*, B-409720, B-409720.2, July 21, 2014, 2014 CPD ¶ 230 at 16. In this regard, we have repeatedly noted that an agency is not obligated to “spoon-feed” an offeror as to the particular manner in which each and every item could be revised. See, e.g., *ITT Indus. Space Sys., LLC*, B-309964, B-309964.2, Nov. 9, 2007, 2007 CPD ¶ 217 at 12; *OMV Med., Inc.*, B-281490, Feb. 16, 1999, 99-1 CPD ¶ 38 at 7. Moreover, an agency is generally not required to afford an offeror multiple opportunities to cure a weakness remaining in a proposal that previously was the subject of discussions. *Delfasco, LLC*, B-409514.3, Mar. 2, 2015, 2016 CPD ¶ 192 at 7.

Preliminarily, contrary to the protester’s suggestion that the agency failed to adequately address these issues over multiple rounds of discussions, the agency in fact raised both issues repeatedly, including cross-references to the prior evaluation notices. See, e.g., AR, Tab 73, Health Net Round 6 Discussions at 9 and Tab 77, Health Net Round 7 Discussions at 1 (showing that the agency raised subsequent questions about Health Net’s new network build that included specific cross-references to the earlier EN); Tab 61, Health Net Round 2 Discussions at 18 (showing the agency revisited the question of the protester’s process for in-home care management visits with a specific cross-reference to the earlier EN). The protester is simply incorrect; the agency unambiguously raised both of these weaknesses multiple times.

Regardless, the protester argues that, by conducting far-ranging discussions across multiple rounds, the protester was misled into believing that the agency would continue raising the issues until they were resolved. Protester's Comments and Supp. Protest at 54-55. Contrary to the protester's suggestion, our decisions recognize no obligation for an agency to continue raising an unresolved issue simply because the issue was previously raised, whether once or more than once, absent other facts not present here. *Portfolio Disposition Mgmt. Grp., LLC*, B-293105.7, Nov. 12, 2004, 2004 CPD ¶ 232 at 2. In this regard, the protester principally relies on our decisions in *Delfasco, LLC*, B-409514.3, Mar. 2, 2015, 2016 CPD ¶ 192, and *ASRC Federal Sys. Solutions, LLC*, B-420443, B-420443.2, Apr. 12, 2022, 2022 CPD ¶ 96, but both of those decisions are inapposite here. See Protester's Comments and Supp. Protest at 54-55.

In *Delfasco*, during the final round of discussions before final proposal revisions, the agency provided the protester with a list that expressly represented that it included all remaining weaknesses in its proposal. During the final evaluation, however, the agency assessed numerous weaknesses that had been raised earlier in discussions, but were not included on the list of remaining weaknesses provided to the protester during the final round of discussions. *Delfasco, LLC, supra* at 6-7. By contrast, in this case, the agency provided no such exhaustive list and made no representation that all weaknesses were resolved, nor was it required to do so. In *Delfasco* the key issue was that the agency, in effect, took inconsistent positions to the protester's detriment, which is simply not the case here.

Similarly, in *ASRC Federal*, we concluded that discussions were misleading where an agency advised the protester that it considered an issue raised in discussions to be "resolved," but subsequently assigned a weakness on that basis. *ASRC Federal System Solutions, LLC, supra* at 9. Again, the agency in that case made inconsistent representations to the protester's detriment, which is simply not the case here. In sum, we are unpersuaded that the agency was under any obligation to continue raising the weaknesses it identified in the protester's proposal indefinitely, or that the discussions were misleading because the agency failed to continue raising them.

As to the protester's arguments that the agency failed to advise the protester of its true concerns, we likewise do not agree. Concerning the first weakness, the agency specifically advised Health Net that it was concerned about "inadequate evidence as to the size and extent of the new network build" in the expansion states, and asked Health Net to identify the approach it would employ to build its network as required given what appeared to be a limited number of providers available through Health Net's proposed network. AR Tab 56, Health Net Round 1 Discussions at 20-22. This is precisely the scope of the weakness ultimately assigned, with the sole exception that the weakness focused on [DELETED] of the six expansion states because Health Net's discussion responses had resolved the agency's concerns with respect to the other [DELETED] states.

Similarly, the agency clearly advised the protester of the concerns underlying the second weakness. The protester is correct that the agency was concerned with the

complexity of the protester's process, but the record suggests that the agency was only concerned about that complexity to the extent it would jeopardize the protester's ability to achieve required timeframes, and the evaluation notice specifically asked the protester to explain how it proposed to achieve the required timeframes. *Id.* at 58-59. Moreover, we note that the protester's discussion responses suggest that the protester, as a factual matter, understood the agency's concern. That is, the protester originally proposed a [DELETED] process for coordinating in-home case management visits, but in its final proposal revision streamlined the process down to [DELETED]. *Compare* AR, Tab 62, Health Net Round 2 Discussion Responses at 9-10 *with* AR, Tab 107, Health Net Final Proposal Revision Volume II at 96-97. This implies that, the protester's current litigation position notwithstanding, the protester made the link between the agency's concern about its ability to timely complete case management visits and the complexity of its process.

In any case, as discussed above, our decisions have consistently concluded that an agency is not obliged to "spoon-feed" an offeror, but rather is only required to lead an offeror into the general area of concern, which the agency unquestionably did in both cases here. *See, e.g., ITT Indus. Space Sys., LLC, supra.* The agency unambiguously identified a concern with Health Net's ability to timely complete case management visits; to the extent the agency's final evaluated weakness was driven by the same principal concerns that the complexity of Health Net's proposed approach would potentially impact the ability of the protester to timely provide the required services, we find nothing inherently misleading in that result.

Finally, we find no merit to the protester's complaint that its first weakness resulted from the application of an unstated evaluation criterion or from impermissible disparate treatment because the agency attempted to validate the protester's new network build. Preliminarily, the RFP specifically contemplated that the agency would evaluate the size and extent of an offeror's proposed network. RFP at 197. Relevant here, Health Net's proposal included a section entitled "Network Build Requirement Approach" that outlined Health Net's approach to building its network, and explained that "[v]alidation of the [DELETED] provider network counts can be partially accomplished" by visiting a weblink provided in the proposal. *See, e.g.,* AR, Tab 107, Health Net Final Proposal Revision Volume II at 40. As part of its evaluation of the size and extent of the protester's proposed network, the record suggests that the evaluators followed the weblink provided by the protester and attempted, as the protester suggested, to validate its provider network, but could not validate that the protester's proposed approach would meet the RFP's requirements with respect to [DELETED] of the six expansion states. AR, Tab 132, Health Net Final TET Report Subfactor 1 at 9, 13, 37-39. Moreover, the agency raised the issue in discussions, repeatedly, eventually specifically explaining that it had "tried to understand the networks using internet searches," but still had concerns with inconsistencies in the protester's proposal and discussion responses. AR, Tab 73, Health Net Round 6 Discussions at 12-13.

Here, the agency did not invent an unstated evaluation criterion or apply a more stringent evaluation standard to Health Net's proposal than it applied to TriWest's

proposal. Rather, the evaluators simply took Health Net up on its invitation to validate its provider network as part of the agency's required evaluation of the size and extent of Health Net's proposed network build. And the evaluators were concerned by what they found, because the information provided by the protester appeared to be inconsistent with its proposal or with the requirements of the RFP. Multiple rounds of discussions in which the agency explained its concerns failed to resolve the issues. We note that it is an offeror's responsibility to submit a well-written proposal that allows a meaningful review by the procuring agency, and where an offeror fails to do so, it runs the risk that a procuring agency will evaluate its proposal unfavorably. *Lovelace Scientific and Tech. Servs.*, B-412345, Jan. 19, 2016, 2016 CPD ¶ 23 at 10. In short, where an offeror's proposal provides the evaluators with a means by which the evaluators may assess the offeror's claims, and invites the agency to do so, we see no basis to fault the agency for doing exactly as the offeror suggested.

Past Performance Evaluation

The protester raises three principal challenges to the agency's past performance evaluation.⁸ Protester's Comments and Supp. Protest at 61-85. First, the protester alleges that the agency unreasonably ignored "close at hand" information about Health Net's incumbent contract performance. *Id.* Second, the protester alleges impermissible disparate treatment of similar past performance trends in the protester's and awardee's proposals. *Id.* Third, the protester contends the agency erred in its assessment of the relevancy of one of TriWest's past performance references. *Id.*

The evaluation of the relative merit or relevance of past performance references is generally a matter within the agency's discretion, which our Office will not disturb unless it is shown to be unreasonable or inconsistent with the solicitation's evaluation criteria. *American Sys. Corp.*, B-413952.3, B-413952.4, June 23, 2017, 2017 CPD ¶ 204 at 6-7; *NCI Info. Sys., Inc.*, B-412680, B-412680.2, May 5, 2016, 2016 CPD ¶ 125 at 4. A protester's disagreement, without more, does not form the basis for us to conclude that an evaluation was unreasonable. *See DynCorp Int'l, LLC, supra.*

Close at Hand Information

First, the protester contends that the agency ignored publicly available information relevant to the protester's past performance on the incumbent TRICARE managed care support contract. Protester's Comments and Supp. Protest at 63-71. Specifically, the

⁸ The protester initially raised numerous arguments challenging the agency's past performance evaluation, to which the agency responded in detail. In its comments, the protester affirmatively withdrew some of its initial arguments, and responded only briefly concerning certain other arguments. Protester's Comments and Supp. Protest at 21, 61-85. In this regard, the protester explained that it intended to focus on three specific arguments that it believed to be most significant. *Id.* at 62. We adopt the protester's focus and address only those three arguments here.

evaluators negatively evaluated Health Net's incumbent performance because of performance problems in the early years of the contract principally related to an inadequate network of providers leading to access to care issues, complicated by inaccurate provider directories. *Id.* The protester, however, contends that a GAO audit report evaluating DOD's management of the transition to the incumbent contract identified issues in the agency's management of the effort that would have improved the agency's assessment of the protester's performance had the agency considered them.⁹ *Id.* (citing GAO-20-39, *Defense Health Care: Opportunities to Improve Future TRICARE Managed Care Support Contract Transitions*, Nov. 2019). The protester contends that the agency was obliged to consider this information, principally, because it relates to a contract for the same services with the same procuring activity, and our decisions have concluded that such information is generally "too close at hand" to ignore. *Id.* (citing *Exelis Sys. Corp.*, B-407111 *et al.*, Nov. 13, 2012, 2012 CPD ¶ 340; *SURVICE Eng'g Co., LLC*, B-414519, July 5, 2017, 2017 CPD ¶ 237).

In this regard, we have recognized that, in certain limited circumstances, an agency has an obligation to consider information bearing on an offeror's past performance when it is "too close at hand" to require offerors to shoulder the inequities that spring from an agency's failure to obtain and consider the information. See, e.g., *Affordable Eng'g. Servs., Inc.*, B-407180.4 *et al.*, Aug. 21, 2015, 2015 CPD ¶ 334 at 13. Moreover, the protester is correct that our Office has generally limited application of this principle to situations where the alleged "too close at hand" information relates to contracts for the same services with the same procuring activity, or information personally known to the evaluators. *Exelis Sys. Corp.*, *supra*.

However, the GAO report relied on by the protester is not the kind of extrinsic information we have concluded an agency must consider when evaluating past performance. As the agency notes, the report was an evaluation of the agency's management of the contract transition and did not evaluate or purport to evaluate any contractor's performance on the contract. MOL at 99. Put another way, it is not clear in what sense the report is a meaningful source of past performance information concerning Health Net's past performance, as opposed to the agency's management of TRICARE more generally.

Moreover, the protester has not demonstrated that the evaluators were specifically aware of the GAO report in question, instead claiming that the agency was obliged to consider the GAO report whether they personally were aware or it or not, because it relates to the same contract and procurement. However, while the protester is correct

⁹ We have previously explained that GAO's audit function, which evaluates--and makes policy and legislative recommendations to improve the responsiveness, efficacy, and affordability of--federal programs, is broader in scope than GAO's bid protest function, which is limited to deciding challenges to whether an agency's actions with respect to a specific procurement are reasonable and in accordance with applicable procurement laws and regulations. *Blue Origin Florida, LLC*, B-417839, Nov. 18, 2019, 2019 CPD ¶ 388 at 12-13 n.8.

that our decisions have, in effect, charged agency officials with knowledge of information that arose out of the same agency contracting office, our decisions have not consistently required agency officials to consider information developed by other organizations of which the agency was not aware. *Compare Contrack Int'l, Inc.*, B-401871.5 *et al.*, May 24, 2010, 2010 CPD ¶ 126 (sustaining protest where agency failed to consider an Inspector General report where it was known to the agency evaluators, specifically evaluated the contractor's performance, and was accompanied by negative CPARs that corroborated the report's negative assessment) *with Exelis Sys. Corp.*, *supra* at 22 (denying protest where agency did not consider Inspector General reports developed by the same agency's Inspector General, but that were unknown to the contracting officer). Accordingly, because the GAO report was not an evaluation of Health Net's contract performance, and because the protester has not demonstrated that the evaluators were aware of the report, we cannot conclude that the agency was obliged to consider the GAO report in the context of evaluating Health Net's past performance.

However, even assuming for the sake of argument that the agency should have considered the information in question, it is not clear that the agency failed to consider the substance of the information the protester alleges should have been considered. While the agency has not indicated that it was aware of the GAO report specifically, the agency has explained that the evaluators were well aware of the agency's own role in the incumbent contract transition because they "lived the transition." Supp. MOL at 33-34. Moreover, the contemporaneous record supports the agency's representations that it was aware that factors beyond the protester's control affected its performance on the incumbent contract. For example, the SSDD explains that the agency recognized that the agency's role in the implementation was "part of the issue," but noted that Health Net was nonetheless initially unsuccessful at building the network it proposed. See AR, Tab 141, SSDD at 50. That is to say, the agency acknowledged that factors beyond the protester's control affected its performance, but concluded that the Health Net's unreadiness to build the network it proposed was more relevant to the past performance evaluation. Supp. MOL at 34. Accordingly, even if we agreed with the protester that the GAO report was the kind of extrinsic information that we have concluded an agency must consider, the record suggests that the agency was aware of the general facts underlying the GAO report and specifically acknowledged that factors beyond the protester's control impacted its ability to perform.

While the protester may disagree with the relative weight of the responsibility assigned by the agency to the protester's shortcomings on the incumbent contract, as opposed to issues arising from the agency's management of the contract, such disagreement provides no basis on which to sustain the protest. In this regard, we have explained that an agency's past performance evaluation may be based on a reasonable perception of a contractor's prior performance, regardless of whether the contractor disputes the agency's interpretation of the underlying facts, the significance of those facts, or the significance of corrective action. *Fluor Intercontinental, Inc.--Advisory Opinion*, B-417506.14, Nov. 5, 2019, 2020 CPD ¶ 46 at 29.

Disparate Treatment

The protester also alleges that the agency disparately evaluated similar past performance information. Protester's Comments and Supp. Protest at 71-76. The core of the protester's arguments is that both it and TriWest experienced substantial performance problems in the past, but improved their performance over time such that more recent CPARs reflected significantly improved performance. *Id.* The protester argues that the agency's evaluation did not treat these similar trends equally. *Id.*

For example, the protester notes that TriWest experienced poor performance in the early years of the VA PC3 contract that was in part caused by changes in government requirements, but ultimately improved its performance in later years, and the evaluators assigned the reference a quality rating of "very good" because TriWest saw sustained improvement throughout the contract and received only positive ratings for the final three years for which there were CPARs. *Id.* By contrast, while Health Net also experienced poor performance in the early years of the incumbent contract in part caused by changes in government requirements and improved its performance in later years, the evaluators assigned the reference a quality rating of "satisfactory" because the evaluators concluded that the services provided early in the contract were of equal importance to those provided later in the contract. *Id.* The agency cannot have it both ways, the protester contends. *Id.* That is to say, the agency cannot evaluate TriWest's improvement trend positively while discounting the protester's effectively identical improvements. *Id.* The agency responds that material differences in the offerors' respective past performance records support the different evaluation outcomes.

It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. *Rockwell Elec. Commerce Corp.*, B-286201 *et al.*, Dec. 14, 2000, 2001 CPD ¶ 65 at 5. However, when a protester alleges unequal treatment in a technical evaluation, it must show that the differences in the evaluation 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. Accordingly, to prevail on an allegation of disparate treatment, a protester must show that the agency unreasonably downgraded its proposal for deficiencies that were substantively indistinguishable from, or nearly identical to, those contained in other proposals. *Office Design Group v. United States*, 951 F.3d 1366, 1372 (Fed. Cir. 2020); *Battelle Memorial Inst.*, B-418047.3, B-418047.4, May 18, 2020, 2020 CPD ¶ 176 at 5.

We cannot conclude that impermissible disparate treatment occurred in this case because the agency did not treat substantively identical proposal features differently. Preliminarily, we note that the protester selectively quotes the agency's evaluation. In the evaluation of both references the agency credited offerors for a trend of improving their prior poor performance, but also noted that services provided early in the contract were of equal importance to services provided at the end of the contract. See AR, Tab 141, SSDD at 51, 56-57. The difference in the ratings was not driven by a

difference in the agency's rationale, but by underlying differences in the past performance references themselves.

First, and most significantly, we note that TriWest's improvement trend was more robust than Health Net's and this alone provides a reasonable basis to treat the references differently. For example, while TriWest received ratings of marginal in the first years of its VA PC3 contract, from October of 2016 to 2021 it received no "marginal" ratings, and in the final three years of that period received only a single "satisfactory" rating, with all other ratings being either "very good" or "exceptional." *Id.* at 56. By contrast, the protester's most recent three CPARs had five "satisfactory" ratings and ten "very good" or "exceptional" ratings, in part because of ongoing issues related to provider directory accuracy. *Id.* at 50-51, *see also* AR, Tab 125, Health Net CPARs at 3, 18, 28, and 37. That is to say, while both references show a trend of improvement, TriWest's reference showed a more pronounced improvement.

Second, we note that the agency evaluators specifically noted that, unlike TriWest, some of Health Net's performance problems persisted throughout the period of performance. For example, the evaluators noted that issues with reaching the required level of accuracy for Health Net's provider directory have persisted throughout the period of performance. AR, Tab 141, SSDD at 50. Health Net contests the feasibility of this requirement and notes that the current contract has reduced the benchmark for provider directory accuracy to 74 percent from 95 percent. *See, e.g.*, Protester's Comments and Supp. Protest at 68. Indeed, the protester contends that its network provider directory accuracy would meet the requirements under the current RFP. *Id.* However, it is undisputed that the incumbent contract required Health Net to meet a specific level of accuracy that Health Net has never reached. *Id.* The fact that the agency concluded that it would be willing to accept a lower level of accuracy going forward is irrelevant to the question of whether Health Net successfully performed its existing contractual obligations.¹⁰

Third, the underlying factual circumstances of the two contracts were distinct. Of note, TriWest's VA PC3 reference concerned a contract that originally involved providing managed care support services for half of the United States, much like the current contract. AR, Tab 141, SSDD at 56. Under the VA PC3 contract, the managed care support contractor for the other half of the United States was initially Health Net, and Health Net included its own VA PC3 performance as a reference. *Id.* at 51. However, Health Net's performance under the VA PC3 contract was marginal, and VA ultimately declined to exercise options on Health Net's contract, instead expanding the scope of

¹⁰ Relatedly, the protester argues that the evaluators favorably viewed TriWest's [DELETED] percent provider directory accuracy on the VA PC3 contract, but penalized the protester for achieving a similar level of accuracy under the incumbent TRICARE contract. Protester's Comments and Supp. Protest at 80. The critical flaw in this argument is that the incumbent TRICARE contract specifically required a higher level of accuracy that the protester did not meet. *Id.* at 68. TriWest's performance is simply not analogous in this respect.

TriWest's contract to cover the entire United States. *Id.* at 51, 70 (among other things, quoting the VA contracting officer as saying that he "would not recommend [Health Net] for similar requirements in the future"). So TriWest's VA PC3 reference performance involved TriWest effectively doubling its coverage area on short notice, in part due to Health Net's poor performance. *Id.* Significantly, TriWest's CPARs continued to improve during the period of that build out, and VA personnel were extremely complimentary concerning TriWest's performance under the circumstances. *Id.* at 70. There is simply no analogous fact pattern in Health Net's incumbent reference.

In short, the protester cannot demonstrate that the agency treated substantively identical past performance references differently, and we see no basis to question the reasonableness of the agency's evaluation on this point.

Relevance

Next, the protester challenges the agency's assessment that TriWest's VA PC3 managed care support contract was "very relevant." Protester's Comments and Supplemental Protest at 76-85. The protester notes that the solicitation provided that a rating of very relevant would only be assigned for efforts that involved essentially the same scope, magnitude of effort, and complexities as the RFP required. *Id.* Moreover, the solicitation also explained that it would consider 14 specific factors when evaluating complexity, and the agency found only 10 of the 14 factors to be essentially the same for TriWest's VA reference. *Id.* The protester contends that this, alone, suggests the contract was not "essentially the same" in scope, but also argues that several of the agency's findings concerning the similarity of these factors were unreasonable and conclusory. *Id.*

For example, concerning the "provider directory" factor, the RFP requires contractors to provide a directory to both DHA and to TRICARE beneficiaries with approximately 17 distinct data fields.¹¹ RFP at 22-23. By contrast, the protester contends that the VA PC3 contract required contractors to provide a list with only 7 data fields to the agency. Protester's Comments and Supplemental Protest at 79-80. The protester contends this is not essentially the same as the RFP's requirements. *Id.* Similarly, the protester contends that the agency's assessment of the specialty referrals and utilization management factors were unreasonable because TriWest's VA PC3 contract did not involve providing either of those services in a way that is comparable to what is required by the RFP. *Id.* at 81-83.

Finally, the protester also argues that TriWest's VA contract is, for several reasons not considered by the agency, dramatically different in scope and complexity than the TRICARE program. Among other things, the VA contract only services veterans, which requires a different selection of medical specialties than TRICARE because TRICARE covers service members and their entire families. For example, because the VA

¹¹ The RFP requires 12 data fields be provided to beneficiaries and 14 to DHA, but the lists overlap with respect to 9 fields, resulting in 17 distinct data fields. RFP at 22-23.

contract only covered veterans it involved the provision of only limited pediatric care for newborns, while the TRICARE RFP requires provision of the full spectrum of pediatric care. For all of these reasons the protester contends that the agency's assessment of TriWest's VA PC3 contract as very relevant was irrational.

As a general matter, the evaluation of an offeror's past performance is within the agency's discretion. We will question the evaluation conclusions where they are unreasonable or undocumented. *Clean Harbors Env'tl. Servs, Inc.*, B-296176.2, Dec. 9, 2005, 2005 CPD ¶ 222 at 3. The critical questions are whether the evaluation was conducted fairly, reasonably, and in accordance with the stated evaluation terms. *Id.*

As a preliminary matter, we note that, as discussed above, Health Net's proposal also included a past performance reference for the VA PC3 program as Health Net initially was performing half of the effort alongside TriWest. See AR, Tab 111, Health Net's Final Proposal Revision Vol. III at 6, 38-40. In this regard, we note that the record shows that the agency concluded that Health Net's own VA PC3 performance would also have been considered very relevant, but for the fact that Health Net transitioned off of the VA PC3 effort prematurely and only performed transition and close out activities for the latter years of the effort. See AR, Tab 141, SSDD at 51.

However, as the intervenor notes, the protester's proposal took positions concerning the relevance of its VA PC3 reference that are directly contradictory to the arguments it has now raised in this protest. Intervenor's Supp. Comments at 69-71. For example, the protester's proposal included a matrix addressing each of the complexity factors. AR, Tab 111, Health Net's Final Proposal Revision Vol. III at 6. The matrix specifically represented that the VA PC3 effort involved comparable specialty referrals and utilization management, and a similar but not identical network provider directory. *Id.* at 6, 38-40. The proposal also included substantive narrative supporting why the protester believed that specialty referrals and utilization management under the VA PC3 contract were directly comparable to those outlined in the RFP. *Id.* In short, the protester has taken inconsistent positions concerning at least two of the specific complexity factors it challenges here: the protester argued they were comparable in its proposal, but contends that they are entirely different in its protest. Thus, we necessarily must apply a more critical eye towards the protester's subsequent inconsistent positions.

However, even setting aside the protester's inconsistent positions, considered as a whole, we believe that the agency's relevance determination was not unreasonable on the specific facts presented here. For example, concerning the complexity of the provider directory--a point on which the protester's proposal and current litigation posture are at least reconcilable--we note that, while the VA PC3 may have only required the collection of 7 data fields, TriWest's proposal specifically explained that as part of its VA PC3 performance it collected 9 additional data fields (for a total of 16) the majority of which are the same as the 17 data fields that the current RFP requires. AR, Tab 104, TriWest's Final Proposal Revision Vol. III at 9. Accordingly, it was not at all unreasonable to conclude that TriWest's VA PC3 performance was similar in complexity with respect to the provider directory.

Further, even assuming, for the sake of argument, that TriWest's VA PC3 contract was meaningfully less complex than the instant procurement in certain respects, it is unquestionable that the VA PC3 contract also involved a larger magnitude of effort or greater complexity in other respects. For example, as discussed above, following the end of Health Net's VA PC3 performance in 2018, TriWest began managing a nationwide network under its VA PC3 contract, which is nearly double the geographic scope of the current effort. Accordingly, even if some aspects of the VA PC3 effort were less complex, the agency could reasonably conclude that the increased magnitude or complexity in other areas resulted in an overall scope, magnitude and complexity that were effectively similar, which is precisely what the record suggests occurred. See, e.g., AR, Tab 120, TriWest Past Performance Evaluation Report at 6 (noting that while the effort was only similar on 10 of 14 complexity factors, "[t]he scope, magnitude, and complexity of work conducted by TriWest significantly increased once the additional nationwide scope was awarded, and hence was close to essentially the same as required by T-5 in most areas"). In short, the protester has provided no basis for us to question the reasonableness of the agency's determination of relevance for TriWest's VA PC3 past performance reference.

Small Business Participation

The protester raises several overlapping challenges to the agency's evaluation of TriWest's small business participation proposal. Protest at 20-35; Protester's Comments and Supp. Protest at 5-19, 21-34. First, the protester argues that TriWest's proposal did not clearly meet the minimum requirements of the solicitation in several respects. *Id.* Relatedly, the protester argues that TriWest impermissibly excluded the non-profit concerns that own TriWest from its subcontracting plan because they do not meet the FAR's definition of affiliates. *Id.* Finally, the protester alleges that TriWest made a series of material misrepresentations concerning its small business participation at various times throughout the procurement, and accordingly should be excluded from the competition.¹² *Id.*

¹² Collaterally, the protester also contends that TriWest's proposal is fatally internally inconsistent. Protester's Comments and Supp. Protest at 12-16. Specifically, the protester notes that, in the final round of discussions during the agency's corrective action, TriWest amended its small business participation proposal but was not permitted to amend its technical proposal. *Id.* The protester points out that TriWest increased its small business subcontracting by more than \$[DELETED], shifting numerous areas of work from large to small businesses. Supp. Comments at 13-16. Moreover, TriWest's proposal represented that more than [DELETED] percent of its small business contractors supported specific statement of work requirements from the solicitation. *Id.* These changes, the protester argues, necessarily implicated TriWest's technical approach and rendered TriWest's proposal fatally inconsistent. *Id.* (citing *FCi Fed., Inc.*, B-408558.7, B-408558.8, Aug. 5, 2015, 2015 CPD ¶ 245 for the proposition that an

Minimum Requirements

The protester alleges that TriWest's small business subcontracting plan should have been found unacceptable because it did not clearly meet the minimum requirements of the solicitation. Protester's Comments and Supp. Protest at 21-28. For example, the protester argues that the solicitation required, among other things, that offerors include a statement of the total dollars planned to be subcontracted to small business. *Id.* The protester contends that TriWest's subcontracting plan included inaccurate math that exaggerated its proposed small business subcontracting.¹³ *Id.*

In this regard, the protester notes that TriWest initially proposed subcontracting approximately \$[DELETED] to other-than-small businesses. *Id.* However, because TriWest initially improperly excluded certain other-than-small businesses from its subcontracting plan, TriWest was compelled to add over \$[DELETED] in other-than-small business spending to its subcontracting plan. *Id.* Added together, the protester contends that TriWest necessarily subcontracted just over \$[DELETED] to other-than-small businesses against a subcontracting base of only \$[DELETED], leaving only \$[DELETED] for subcontracting to small businesses, which is far less than the 25

agency may not award to an offeror where its proposal represents that the offeror will perform in a different manner than the offeror actually intends to perform).

However, we note that the areas of work that TriWest shifted to small business concerns principally include support services such as [DELETED]. See AR, Tab 150, TriWest's Revised Small Business Plan at 19. TriWest's healthcare network providers and claims processing were not affected by the changes; indeed the solicitation categorically excluded healthcare network providers from the small business subcontracting plan. *Id.*; RFP at 163. Here, the technical evaluation contemplated by the solicitation principally focused on network and clinical management, healthcare administration, customer service, and claims processing. Against that background, there is no reason to conclude that changes in ancillary support services, even if they ultimately support statement of work requirements, would of necessity affect TriWest's technical proposal. Moreover, the features of TriWest's proposal that the agency found to be discriminators in favor of TriWest's proposal primarily related to TriWest's much larger proposed network of healthcare providers, which was necessarily unaffected by changes to the small business participation plan because such providers were expressly excluded from the small business subcontracting requirements. In short, this protest ground relies entirely on a questionable chain of inferences, and we therefore dismiss it as speculative. *Science Applications Int'l Corp.*, B-265607, Sept. 1, 1995, 95-2 CPD ¶ 99 at 2.

¹³ The protester also argues that TriWest failed to identify certain subcontractors and did not demonstrate a good faith effort to meet the subcontracting goals. Protester's Comments and Supp. Protest at 21-28. These allegations substantially overlap with the protester's other arguments concerning misrepresentations, and will be effectively addressed in our discussion of material misrepresentations below.

percent goal required by the solicitation. *Id.* Accordingly, the protester contends the agency should have rejected TriWest's claim that it was subcontracting 25 percent to small business and found TriWest unacceptable. *Id.*

The problem with the protester's argument is that it would require the agency to ignore what TriWest actually proposed. While the protester is loosely correct about the underlying numbers, the protester misses a significant intermediate step: TriWest shifted over \$[DELETED] in its proposed subcontracting spend from other-than-small to small businesses as part of its proposal revisions. See AR, Tab 150, TriWest Revised Small Business at 17. As a result TriWest proposed to subcontract \$[DELETED] to other-than-small businesses and approximately \$[DELETED] to small businesses, *i.e.* TriWest proposed to subcontract exactly 25 percent to small businesses. *Id.* Put another way, if TriWest had been compelled to add in the improperly excluded subcontractors with no other changes to its subcontracting plan, the protester's math would be essentially accurate. However, that is simply not what occurred and is not supported by the record. In short, this argument relies on a selective and misleading presentation of the facts, and is without merit.

Affiliate Issue

The protester next contends that TriWest inappropriately excluded its owner organizations from its subcontracting plan because those owners do not meet the FAR's definition of an affiliate in several respects. Protest at 25-34, Protester's Comments and Supp. Protest at 28-33. As discussed above, TriWest is owned by a group of non-profit health insurance organizations. *Id.* The agency explained in discussions that the agency intended to use the FAR section 2.101 definition of "affiliate" for purposes of its evaluation. That definition provides that affiliates are "associated business concerns or individuals if, directly or indirectly either one controls or can control the other; or third party controls or can control both." *Id.* (*citing* FAR 2.101). The protester explains that neither the term "concern" nor "control" are defined in FAR section 2.101, but are defined elsewhere in the FAR and in the Small Business Administration's (SBA) regulations. *Id.*

Specifically, the protester contends that TriWest's owners are not "concerns" as defined in FAR section 19.001 because they are organized as non-profit corporations, and the definition of concern in FAR section 19.001 includes only business entities organized for profit. Protester's Comments and Supp. Protest at 28-33 (*citing* FAR 19.001). Similarly, the protester argues that, primarily because TriWest's owners are numerous and none holds a majority share, none of them satisfy the various definitions of control set forth in 13 C.F.R. § 121.103(c). Protest at 28.

In response, the agency contends that it is unreasonable to read the FAR section 2.101 definition in light of the more specific definitions included in FAR part 19 or the SBA's regulations. MOL at 13-21. The agency notes that FAR section 2.101 applies to the entire FAR, while the other definitions only apply in their own specific contexts, and had the FAR council intended them to apply universally they would have included them in

the definition included in FAR section 2.101. *Id.* In support of this view, the agency explains that the awardee is not a small business nor claims to be one, so there is no intrinsic reason that definitions drawn from SBA regulations applicable to small business concerns should apply to TriWest. *Id.*

Reinforcing this argument, the agency notes that the FAR section 2.101 general definition of affiliates includes an exception explaining that it does not apply in size determinations and directs the reader to a more specific definition for size determinations, which incorporates some of the provisions the protester references. *Id.* (*citing* FAR 2.101). Accordingly, the agency argues that the FAR section 2.101 definition of affiliate is different and broader than the definitions applied in the small business size determination context, and that this is what the agency intended to communicate to offerors in discussions by emphasizing that it intended to use the definition of “affiliates” in FAR section 2.101 rather than the definition in FAR clause 52.219-9. *Id.* (*citing* AR, Tab 149, Health Net Discussion Letter, Feb 24, 2023, at 5). Accordingly, consistent with this reading of the FAR section 2.101 definition of affiliates, the agency determined that TriWest’s non-profit owners were affiliates because they were business concerns that controlled TriWest in the ordinary meaning of those terms. MOL at 19-20.

We find that the agency’s reading of the definition of affiliates in FAR section 2.101--relying on the ordinary meanings of “concern” and “control” and without importing the definitions from FAR part 19 or SBA’s regulations--is reasonable and permissible.

First, although the protester is correct that the term “control” is undefined in FAR section 2.101, the protester has not explained why the definitions of control provided in 13 C.F.R. § 121.103, which govern small business affiliation should, of necessity, be imported into the FAR 2.101 definition of affiliates when considering affiliation between other-than-small businesses. For example, a key difference between the definition of affiliates included in FAR section 2.101 and the definition of affiliates offered elsewhere in FAR clause 52.219-1 is that the latter includes a specific cross-reference to 13 C.F.R. § 121.103 that is omitted from the FAR section 2.101 definition. *Compare* FAR 2.101 *with* FAR clause 52.219-1.

Similarly, the definition of affiliates in FAR section 2.101 makes it clear that it does not apply in the context of size determinations, instead directing the reader to the definition of “small business concern” in the same FAR section, which also includes a cross-reference to 13 C.F.R. § 121.103. *See* FAR 2.101. In this context, where certain FAR definitions expressly reference SBA’s regulations, and others omit such references entirely, it would be anomalous to read such a reference into the FAR where it is omitted. In short, both the text and context of the FAR 2.101 definition of affiliates suggest that it does not incorporate SBA’s regulations in the way the protester suggests, and the protester has not clearly explained why the SBA’s tests for control of a small business would be meaningful or appropriate in the context of assessing control of other-than-small businesses.

Here, TriWest has provided credible evidence that it is organized as a Delaware close corporation, and that Delaware law permits close corporations to permit their stockholders to directly manage the corporation in lieu of a board of directors. See Intervenor Comments at 16-18 (*citing* 8 Del. C. 1953 § 351). Further, TriWest provided to the agency, during discussions, an excerpt of its articles of incorporation that show that TriWest has done precisely that. AR, Tab 150, TriWest’s Revised Small Business Plan at 11. Accordingly, applying the common meaning of the word “control,”¹⁴ the agency concluded that TriWest’s owners act directly to control TriWest as though they were its board of directors. MOL at 18-19.

In response, the protester argues that Delaware law also requires ownership of a majority stake or evidence of control of corporate conduct in order to establish control. Protester’s Comments and Supp. Protest at 36. However, while it is appropriate to consult Delaware corporate law to assess the structure of a corporation incorporated under Delaware law, it is not at all clear that the definitions of terms outlined in other contexts in Delaware case law are at all relevant to our construction of a FAR provision. We see no reason to question the agency’s facially reasonable conclusion that a corporation’s board of directors collectively control that corporation’s conduct.

Turning to the definition of “concerns,” we similarly see no reason to import the SBA’s definition of “concerns” in assessing affiliation between two other-than-small businesses. Here, the protester relies on the definition of “concerns” from FAR section 19.001, which principally governs determinations of small business size status, but also governs the requirements for small business subcontracting plans such as the one at issue here. FAR 19.001. However, that definition of concern, while it may superficially appear applicable in this context, includes a note at its conclusion that those seeking more information about the definition should “see 13 C.F.R. § 121.105.” *Id.* Section 121.105 of C.F.R. part 13 includes a definition of concern or business concern that is consistent with the definition at FAR section 19.001, but includes additional detail. 13 C.F.R. § 121.105. Of note, the regulation explains that it defines “a business concern *eligible for assistance from SBA*,” that is to say, a small business concern. *Id.* (emphasis supplied). In short, FAR section 19.001 explains that those seeking more information should consult 13 C.F.R. § 121.105, and the latter provision expressly limits the definition to small businesses.

For these reasons, we see no basis to apply the FAR 19.001 definition of concern to the broad definition of affiliates included at FAR 2.101, especially in this specific context, where the agency is assessing the affiliation of entities that are themselves not small

¹⁴ Black’s Law Dictionary defines “control,” in relevant part, as “[t]he direct or indirect power to govern the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise.” Black’s Law Dictionary (11th ed. 2019). Similarly Black’s defines “working control” of a corporation as “[t]he effective control of a corporation by a person or group who owns less than 50 [percent] of the stock.” *Id.*

business concerns. Accordingly, we give the term “concern” its ordinary definition,¹⁵ and there can be no question that TriWest’s owners, which are non-profit entities engaged in the business of providing health insurance and related services, are business concerns in the conventional sense.

Accordingly, because the solicitation unambiguously permitted offerors to exclude affiliates, TriWest was permitted to exclude its affiliates from its small business subcontracting plan, and the agency did not err in permitting TriWest to exclude them.

Material Misrepresentations

Next, the protester argues that the awardee engaged in a series of material misrepresentations concerning its small business subcontracting plan. Protester’s Comments and Supp. Protest at 5-12, 17-19. First, the protester alleges that TriWest deliberately and impermissibly excluded several categories of subcontracting, such as non-biddable costs and network subcontractors, from its initial proposal in order to artificially inflate its small business subcontracting percentage. *Id.* Relatedly, the protester contends that TriWest, in effect, admitted to some of these material misrepresentations in subsequent exchanges with the agency, but continued to impermissibly exclude other subcontracts from its plan. *Id.* Finally, the protester alleges that these misrepresentations continued into TriWest’s response to the agency’s corrective action discussions and responsibility determination. *Id.*

In response, the agency argues that none of the alleged misrepresentations meet our definition for material misrepresentations, principally because none of them were false statements relied on by the agency in making award. Supp. MOL at 3-13. In several cases, the agency contends that TriWest’s proposal correctly excluded certain categories of subcontracts, and, thus, to the extent the protester disagrees with the agency’s determinations, TriWest’s shared interpretation, even if in error, would not constitute a misrepresentation. In other instances, where the agency determined that certain exclusions were impermissible, the agency argues that the protester unreasonably attempts to convert proposal noncompliances into misrepresentations. In this regard, the agency argues that TriWest contemporaneously explained what categories of subcontracts it was excluding, and subsequently has brought its proposal into full compliance through discussions and proposal revisions. *Id.* Again, regardless of whether the awardee’s initial positions met the RFP’s requirements, the agency contends that TriWest consistently disclosed and explained its interpretation, and, thus, the protester has failed to demonstrate any material misrepresentations. *Id.*

¹⁵ For example, the Oxford English Dictionary defines “concern” in relevant part as “[a] business organization; a business or firm; a commercial or manufacturing establishment.” The Compact Oxford English Dictionary (2nd ed. 1989). Similarly, Black’s Law Dictionary defines a “going concern” as “[a] commercial enterprise actively engaging in business with the expectation of indefinite continuance.” Black’s Law Dictionary (11th ed. 2019).

An offeror's material misrepresentation in its proposal can provide a basis for disqualifying the proposal and canceling a contract award based on the proposal. *Integration Techs. Group, Inc.*, B-291657, Feb. 13, 2003, 2003 CPD ¶ 55 at 2-3. A misrepresentation is material where the agency relied on it and it likely had a significant impact on the evaluation. *Sprint Commc'ns Co. LP; Global Crossing Telecommc'ns., Inc.--Protests and Recon.*, B-288413.11, B-288413.12, Oct. 8, 2002, 2002 CPD ¶ 171 at 4. For a protester to prevail on a claim of material misrepresentation, the record must show that the information at issue is false. *Vizada Inc.*, B-405251 *et al.*, Oct. 5, 2011, 2011 CPD ¶ 235 at 9; *Commercial Design Grp., Inc.*, B-400923.4, Aug. 6, 2009, 2009 CPD ¶ 157 at 6.

We concur with the agency that no material misrepresentations occurred in this case. In each case, the awardee's proposal either fully explained its erroneous assumptions and exclusions or correctly excluded certain categories of subcontracts that the solicitation or regulation made clear were exempt.

For example, TriWest's proposal clearly explained that subcontracts for "[s]upplies and services provided by employees, governmental units, [g]overnment-endorsed monopolies, non-biddable costs, health care agreements with providers, and network arrangements are excluded." AR, Tab 102, TriWest Final Proposal Revision Vol. I at 46. The protester is correct that certain of these categories were not appropriately excluded from the subcontracting plan. Specifically, while the solicitation made clear that "network providers" (subcontracts with healthcare networks) should be excluded from the plan to the extent they are for health care services, subcontracts with healthcare networks for other services (such as administrative support or professional services) were not appropriately excluded from the subcontracting plan. See RFP at 163. Similarly, there was no exclusion for the kinds of "non-biddable" costs TriWest attempted to exclude, such as contracts for which there was no meaningful competition from small business concerns.

However, TriWest's proposal was open about its exclusions, noting that it excluded both non-biddable costs and network arrangements from its calculation. AR, Tab 102, TriWest Final Proposal Revision Vol. I at 46. It is clear that Tri-West initially proposed an approach that did not conform to the requirements of the solicitation, but it did so forthrightly, with an explanation of what it proposed. In short, we see no basis to conclude TriWest's proposal contained material misrepresentations, but rather simply submitted a non-conforming proposal.

Similarly, the protester's argument that the awardee failed to list a significant number of its subcontractors in response to a later agency query also fails to establish a misrepresentation. During discussions, the agency asked TriWest for more information concerning the subcontractors TriWest intended to rely on to meet its small business subcontracting goals. AR, Tab 144, TriWest Corrective Action Discussion Letter at 6. Specifically, the agency's query asked TriWest to provide a more comprehensive list of both its small and other-than-small business subcontractors, as well as any who were previously excluded. *Id.* Here, the protester is correct that TriWest omitted a number of

its subcontractors from its response, but the subcontractors that it omitted were all in categories that were appropriately excluded from its subcontracting plan. AR, Tab 146, TriWest Response to Corrective Action EN 1 at 10-12. For example, TriWest did not include numerous healthcare providers with which it proposed to subcontract, but the solicitation explicitly excluded subcontracts with network providers for health care services from the subcontracting plan, and TriWest's response specifically explained that it was excluding health care agreements with providers. *Id.*; RFP at 163. As an additional example, TriWest did not list [DELETED] among its subcontractors because it was relying on [DELETED] as a bank for a line of credit, and because banking costs are specifically excluded as indirect costs by FAR clause 52.219-9(g). See Supp. MOL at 30. In short, we are unpersuaded that TriWest improperly omitted any subcontractors from its response to the agency. Moreover, even assuming that TriWest's proposal was unclear in this regard, a lack of clarity does not, of necessity, rise to the level of a misrepresentation. See *Avar Consulting, Inc., B-417668.3 et al.*, June 10, 2020, 2020 CPD ¶ 191 at 10 (noting that inconsistencies in a proposal do not rise to the level of a material misrepresentation).

Price

Finally, the protester principally alleges that the agency conducted misleading discussions with respect to price because it suggested to the protester that the agency had conducted a prohibited price realism evaluation. Protester's Comments and Supp. Protest at 85-90. In this regard, the solicitation did not contemplate that the agency would perform an evaluation of price realism, but did provide for an unbalanced pricing analysis. RFP at 213-214. As part of discussions, the agency indicated that it was concerned that the protester's negotiated network discounts were too high (resulting in a lower overall proposed price), while its fixed fee was also too high (resulting in a potentially higher price risk to the government), which created various risks for the agency. AR, Tab 56, Health Net Round 1 Discussions at 228.

The protester contends that the record shows that the agency's true concern was not related to price risk created by unbalanced pricing, but rather that the protester's discount rates were excessive, which created a risk that network providers would decline to participate in TRICARE, or that only low-quality providers would be willing to do so. Protester's Comments and Supp. Protest at 85-90. The protester maintains that this is a performance risk that speaks to the realism of its proposed pricing, and not a price risk created by unbalanced pricing. *Id.* Accordingly, because the solicitation did not contemplate or permit a price realism analysis, the discussion notice was misleading and inappropriately induced the protester to raise its price. *Id.*

The agency responds by noting that it did not conduct a realism evaluation, but instead issued several ENs that either reflected an appropriate unbalanced pricing evaluation or were simply requests for clarification. Supp. MOL at 34-36. Specifically, the agency issued two price-related evaluation notices: one seeking to confirm that a portion of the protester's proposal was accurate because the agency had reason to suspect it may have been an error; and a second notice that was solely concerned by the risks, both to

performance and price, stemming from the protester's unbalanced pricing. *Id.* Concerning the latter notice, the agency explained that it viewed the risk as not being driven solely by the protester's excessive negotiated discounts, but rather as being created by the combination of the negotiated discounts and a fixed fee that was more than [DELETED] percent higher than the independent government estimate. *Id.* Specifically, the agency explains that the solicitation provided that offerors that did not achieve their proposed negotiated discounts would have to reimburse the government. The agency was concerned that, by proposing excessive negotiated discounts and an extremely high fixed fee that the protester was attempting to give itself "some cushion" to absorb losses, defeating the purpose of the incentive. *Id.*; see also COS at 100 (noting that too aggressive negotiated discounts could actually increase underwritten health care costs, as despite lower per claim payments healthcare volume could increase due to worsening outcomes). Moreover, the agency contends that the protester made a business decision to raise its prices, and the fact that it now regrets that decision does not render the discussions misleading. *Id.*

With respect to unbalanced pricing generally, the FAR requires that contracting officers analyze offers with separately-priced line items or subline items to detect unbalancing. FAR 15.404-1(g)(2). Where unbalancing is detected, the contracting officer must then consider the risk posed, including the risk of paying an unreasonable price, and must consider whether to reject the offer if the risk is unreasonable. See FAR 15.404-1(g)(2)-(3). While both understated and overstated prices are relevant to the question of whether unbalanced pricing exists, the primary risk to be assessed in an unbalanced pricing context is the risk posed by overstatement of prices because low prices (even below-cost prices) are not improper and do not themselves establish (or create the risk inherent in) unbalanced pricing. See *AIS Eng'g, Inc.*, B-410246, B-410246.2, Nov. 21, 2014, 2015 CPD ¶ 5 at 3. Our Office reviews the reasonableness of an agency's determination about whether a firm's prices are unbalanced, and an agency's determination as to whether the unbalanced prices pose an unacceptable risk. *Triumvirate Eenvt', Inc.*, B-406809, Sept. 5, 2012, 2012 CPD ¶ 244 at 5.

While the protester is correct that an agency may not, in effect, conduct a price realism evaluation under the auspices of an evaluation of unbalanced pricing, the record does not suggest that is what occurred in this case. See, e.g., *CrowderGulf, LLC et al.*, B-418693.9 *et al.*, Mar. 25, 2022, 2022 CPD ¶ 90 at 13,16 (noting that an agency may not consider performance risk solely created by understated pricing as part of an unbalanced pricing analysis). Here, the agency identified a plausible concern and explains how a superficially lower price created by large negotiated discounts combined with inflated fixed fees could create significant cost and performance risks to the agency, which is supported by the contemporaneous record. For example, the discussion notice itself makes clear that the issue the agency identified was created by an imbalance in pricing and could both "increase performance and price risks to the Government." AR, Tab 56, Health Net Round 1 Discussions at 228. Similarly, while the agency's unbalanced pricing analysis expresses concern about performance risks, it notes that those performance risks are created by a pricing strategy that also creates price risk. See AR, Tab 64, Unbalanced Pricing Report at 9.

The nature of the concern is made even clearer in the transcripts of the oral discussions related to this EN. Specifically, Health Net asked “does the Government believe that on a standalone basis the underwritten fee is overstated?” to which the contracting officer replied “[s]o just to kind of reiterate the EN and the RFP, the Government is not conducting price realism here. [. . .] [O]n its own, no, the [underwritten] fixed fee is not overstated on its own. It’s in conjunction with the understated network at total cost of healthcare and vice versa. Those two together form the unbalanced pricing.” AR, Tab 58 at 131-132. In short, the record amply supports the agency’s characterization of the exchanges, and we see no basis to object to the agency’s unbalanced pricing evaluation.

The protest is denied.

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