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## Decision

**Matter of:** AdvanceMed Corporation; TrustSolutions, LLC

**File:** B-404910.4; B-404910.5; B-404910.6; B-404910.9; B-404910.10

**Date:** January 17, 2012

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### DIGEST

1. Protest that the award was tainted by organizational conflicts of interest is denied where the record shows that the agency reasonably concluded that the potential areas of concern either did not constitute significant conflicts that warranted disqualification of the awardee, or were significant conflicts that were adequately mitigated.
  2. Protest challenging evaluation of the realism of the awardee's proposed labor costs is denied where the contracting officer's use of a sampling method to evaluate the realism of the offerors' proposed costs provided a sufficient basis to conclude that they were realistic.
  3. Protest challenging evaluation of offerors' technical proposals is denied where the agency's evaluation was reasonable and consistent with the solicitation, with the exception of some minor non-prejudicial inconsistencies.
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### DECISION

AdvanceMed Corporation, of Baltimore, Maryland, and TrustSolutions, LLC, of Milwaukee, Wisconsin, protest the award of a contract to Cahaba Safeguard Administrators, LLC, of Birmingham, Alabama, under request for proposals (RFP) No. RFP-CMS-2009-0014, issued by the Department of Health and Human Services,

Centers for Medicare and Medicaid Services (CMS), for zone program integrity contractor (ZPIC) services. The protesters argue that the agency failed to reasonably evaluate organizational conflicts of interest (OCI) concerning the awardee, unreasonably evaluated the offerors' cost and technical proposals, and made an unreasonable award decision. In addition, AdvanceMed argues that the agency misled it during discussions.

We deny the protests.

## BACKGROUND

As part of federal Medicare and Medicaid contracting reform, CMS intends to award contracts to entities referred to as ZPICs, which are to perform program integrity functions for Medicare Parts A, B, C, and D;<sup>1</sup> Durable Medical Equipment Prosthetics, and Orthotics Supplier (DMEPOS); Home Health and Hospice (HH+H); and the Medicare-Medicaid Data Matching Program (a partnership between Medicaid and Medicare designed to enhance collaboration between the two programs to reduce fraud, waste, and abuse). RFP § B.1; Contracting Officer (CO) Statement at 1. CMS has established seven geographic zones under the program, and intends to have one ZPIC serving each zone. According to CMS, the mission of the ZPIC program is to promote the integrity of the Medicare and Medicaid programs by accomplishing the following objectives:

- Identify, stop and prevent Medicare and Medicaid fraud, waste and abuse and refer instances of potential fraud, waste and abuse to the appropriate law enforcement agencies.
- Decrease the submission of abusive and fraudulent Medicare and Medicaid claims.
- Recommend appropriate administrative action (e.g., payment suspension recommendations and [civil money penalties]) to CMS as necessary in accordance with Medicare and Medicaid laws and regulations, etc., to ensure that appropriate and accurate payments for services are made, which are consistent with all Medicare and Medicaid rules and regulations.

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<sup>1</sup> Medicare part A provides hospital care coverage; Medicare part B provides medical care insurance coverage; and Medicare part D provides prescription drug coverage. Medicare part C is known as the "Medicare Advantage Plan," and is a health plan offered by Medicare-approved private insurers who offer the same coverage as Medicare parts A and B, with the addition of other benefits such as vision, hearing, dental, and/or health and wellness program, and the prescription drug benefits under Medicare part D. See Medicare Benefits website, available at: <http://www.medicare.gov/navigation/medicare-basics/medicare-benefits/medicare-benefits-overview.aspx>.

- Coordinate potential fraud, waste and abuse [investigations] with appropriate Medicare & Medicaid Entities.

RFP, Statement of Work, at 12; CO Statement at 1.

CMS issued the RFP on June 12, 2009, seeking proposals for the award of ZPIC contracts in zones 3 and 6. This protest concerns the award of ZPIC zone 3, which covers the following states: Minnesota, Wisconsin, Michigan, Illinois, Indiana, Ohio, and Kentucky. The RFP anticipated award of an indefinite-quantity/indefinite-delivery contract with fixed-price and cost-reimbursement task orders, for a base period of 1 year with four 1-year options. The RFP stated that the two task orders would be placed at the time of award: task order 0001 for audit services concerning Medicare parts A, B, DMEPOS, and HH+H; and task order 0002 for the Medicare-Medicaid Data Matching Program. The RFP advised that the agency “may award a future task order for Part C and D.” RFP § L.

The technical evaluation score was based on the following non-price factors: technical understanding and approach (which had 12 subfactors, identified below); coordination and communication (which had 2 subfactors, identified below); key/essential personnel and staffing; security; ISO/quality assurance and improvement; past performance; small business utilization; and subcontracting approach. Each of the factors and subfactors also identified a number of sub-criteria, which were called “bullets” in the agency’s evaluation. As described in further detail below, each of the evaluation factors was assigned a point score with a total of 3,330 possible points (with the exception of subcontracting approach, which was a pass/fail factor). RFP § M.2.A. The business evaluation factor stated that the agency would consider the reasonableness and the realism of offerors’ proposed cost/price. For purposes of award, the agency’s cost evaluation was based on the offerors’ evaluated costs for the two task orders. All evaluation factors other than cost or price, when combined were “significantly more important than cost or price.” RFP § M.1.a.

As relevant here, the RFP stated that CMS would review each offeror’s conflict of interest submission and “make a determination if the Offeror meets the [conflict of interest] requirements.” RFP § M.3.A; see also id. § H.2. The RFP advised offerors that “CMS will not enter into a contract with an entity that CMS determines has, or has the potential for, an unresolved [OCI] unless CMS determines that the risk can be sufficiently mitigated.” Id. § M.3.A.

CMS received proposals from AdvanceMed, TrustSolutions, and Cahaba by the initial closing date of July 13, 2009. The agency evaluated each offeror’s proposal and oral presentation, and conducted discussions. Following discussions, in early 2011, the agency requested final proposal revisions (FPR). The agency evaluated the offerors’ FPRs and revised the technical evaluation ratings. The agency also conducted a cost realism evaluation of the offerors’ proposed costs, and made adjustments to

Cahaba’s proposed labor hours and indirect cost rates. With regard to the cost realism adjustments, the agency upwardly adjusted Cahaba’s proposed indirect rates, and made adjustments to Cahaba’s labor hours to reflect a more realistic labor mix. Agency Report (AR), Tab 4b, Cahaba Indirect Cost Rate Evaluation, at 3; Tab 4d, Cahaba FPR Cost Realism, Analysis Task Order 1, at 2-3; Tab 4e, Cahaba FPR Cost Realism Analysis, Task Order 2, at 2-3. The final technical ratings and cost evaluations were as follows:<sup>2</sup>

	<b>ADVANCEMED</b>	<b>TRUSTSOLUTIONS</b>	<b>CAHABA</b>
<b>Technical Understanding and Approach (1,800)</b>	<b>1168.64 (VG)</b>	<b>1070.08 (S)</b>	<b>991.03 (S)</b>
Technical Understanding (200)	137.5 (VG)	125 (VG)	112.5 (S)
Potential Fraud Investigations (200)	130 (VG)	135 (VG)	115 (S)
Case Referrals to Law Enforcement (200)	128.59 (VG)	128.59 (VG)	114.31 (S)
Administrative Actions/ Intermediate Sanctions (200)	114.31 (S)	107.17 (S)	107.17 (S)
Law Enforcement Requests (150)	93.76 (VG)	84.38 (S)	75.01 (S)
Information Technology (IT)/Data Analysis (250)	180.55 (VG)	166.65 (VG)	145.83 (S)
Medical Review for Benefit Integrity (100)	54.15 (S)	54.15 (VG)	54.15 (S)
High Risk Areas (150)	97.5 (VG)	90 (S)	90 (S)
Transition, Risk Analysis and Mitigation Plan (150)	91.65 (VG)	79.14 (S)	70.81 (S)
Audits (75)	56.25 (VG)	37.5 (S)	25 (S)
Public Relations (50)	34.38 (VG)	25 (S)	37.5 (S)
Cost Report Audit, Settlement and Reimbursement (75)	50 (VG)	37.5 (S)	43.75 (S)
<b>Coordination and Communication (600)</b>	<b>361.1 (VG)</b>	<b>336.1 (S)</b>	<b>308.33 (S)</b>
ZPIC Coordination and Communication (200)	116.68 (S)	125.01 (VG)	108.35 (S)
Coordination and Communication with Stakeholders/Partners (400)	244.42 (VG)	211.09 (S)	199.98 (S)
<b>Key/Essential Personnel and Staffing (200)</b>	<b>135.73 (VG)</b>	<b>121.45 (VG)</b>	<b>107.17 (S)</b>
<b>Security (100)</b>	<b>50 (S)</b>	<b>50 (S)</b>	<b>55 (S)</b>
<b>ISO/Quality Assurance and</b>			

<sup>2</sup> The agency evaluated each offeror’s proposal under the sub-criteria for the factors and subfactors, and assigned a rating of excellent (E), very good (VG), satisfactory (S), poor (P), and unsatisfactory (U). AR, Tabs 31, 32, 33, Offeror Technical Evaluations, at 2.

<b>Improvement (100)</b>	<b>50 (S)</b>	<b>60 (S)</b>	<b>50 (S)</b>
<b>Past Performance (400)</b>	<b>323 (E)</b>	<b>292 (VG)</b>	<b>339 (E)</b>
<b>Small Business Utilization (100)</b>	<b>58.32 (S)</b>	<b>54.15 (S)</b>	<b>58.32 (S)</b>
<b>Subcontracting Approach (Pass/Fail)</b>	<b>PASS</b>	<b>PASS</b>	<b>PASS</b>
<b>TOTAL SCORE (3,300)</b>	<b>2,146.79 (VG)</b>	<b>1,983.78 (VG)</b>	<b>1,908.85 (S)</b>
<b>PROPOSED COST</b>	<b>\$109.2M</b>	<b>\$95.8M</b>	<b>\$67.7M</b>
<b>EVALUATED COST</b>	<b>\$109.2M</b>	<b>\$95.8M</b>	<b>\$73.5M</b>

AR, Tab 30, Source Selection Decision (SSD), at 2, 4-5.

The Contracting Officer (CO), who served as the source selection authority for the procurement, concluded that a cost-technical tradeoff was required to assess the merits of each offeror’s proposal. Id. at 10.

First, the CO compared the “two offerors rated highest in technical merit,” TrustSolutions and AdvanceMed. Id. The CO noted that “[a]lthough the Government is most concerned with obtaining superior technical/management features rather than with making an award to the lowest overall cost to the Government,” she concluded that “the slightly superior technical features offered by AdvanceMed compared to TrustSolutions do not warrant the \$13.3M or 12% higher cost.” Id.

Next, the CO compared the proposals of TrustSolutions and Cahaba. The CO noted that she considered the “advantages/strengths that were identified in both offerors’ proposals, as well as the fact that no major weaknesses or deficiencies were identified in either offeror’s proposal.” Id. She concluded that while “the advantages of TrustSolutions’ proposal make it slightly superior compared to the technical merit of Cahaba’s proposal . . . the technical merit of TrustSolution[s] proposal does not warrant the approximate \$22.3M cost differential.” Id.

Notwithstanding the foregoing comparisons, the CO also compared the proposals of AdvanceMed and Cahaba. The CO concluded that while “[t]he technical merit of AdvanceMed’s proposal was found to be superior to Cahaba’s in many aspects . . . AdvanceMed’s proposal does not substantiate payment of such significantly higher costs.” Id. at 11.

In sum, the CO found that neither protester’s offered technical strengths or advantages merited the proposed cost premiums over Cahaba’s proposal, which was \$22.3 million for TrustSolutions (more than 30 percent higher), and \$35.6 million for AdvanceMed (more than 48 percent higher). Id. at 10, 11.

CMS notified AdvanceMed and TrustSolutions on April 22, 2011, of the award to Cahaba. AdvanceMed and TrustSolutions filed protests with our Office on April 26, and April 27, respectively. The agency subsequently advised our Office that it would take corrective action to address concerns raised by the protesters regarding

potential OCIs posed by the award to Cahaba. Based on the proposed corrective action, our Office dismissed the protest on May 16.

The CO, who made the initial selection decision, was subsequently replaced by a second CO, who conducted the corrective action concerning the reevaluation of Cahaba's OCIs.<sup>3</sup> The second CO conducted several rounds of exchanges with Cahaba concerning the OCI issues. After receipt of Cahaba's final proposed mitigation plans concerning OCIs, the CO prepared a memorandum which stated that all of the potential areas of concern had either been found not to constitute a disqualifying OCI, or had been adequately mitigated by Cahaba. On October 4, CMS advised AdvanceMed and TrustSolutions that the award to Cahaba had been confirmed. These protests followed.

## DISCUSSION

AdvanceMed and TrustSolutions each argue that the award to Cahaba was tainted by OCIs. The protesters also challenge CMS's cost and technical evaluations. AdvanceMed also argues that the CMS misled it during discussions. For the reasons discussed below, we deny all of the protest arguments.<sup>4</sup>

### Organizational Conflicts of Interest

AdvanceMed and TrustSolutions each argue that the award to Cahaba was tainted by OCIs arising from Cahaba's status as a wholly-owned subsidiary of Blue Cross/Blue Shield of Alabama (BCBSAL), as well as conflicts arising from Cahaba's own business activities. For the reasons discussed below, we conclude that CMS reasonably evaluated the potential conflicts posed by the award to Cahaba, and concluded that the conflicts were either mitigated, or did not constitute significant OCIs that merited exclusion of Cahaba's proposal from the competition.<sup>5</sup>

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<sup>3</sup> With the exception of the portion of the decision below concerning OCIs, all references in this decision are to the first CO, who made the initial award decision and cost realism evaluation.

<sup>4</sup> The protesters raised numerous other collateral arguments concerning the evaluation of OCIs and the offerors' cost and technical proposals. We have reviewed all issues raised in the protests and find that none provides a basis to sustain the protest.

<sup>5</sup> As discussed above, the corrective action and final OCI determination was made by a second contracting officer, different than the CO who was responsible for the evaluation of offerors' proposals and the initial award. All references to the CO in the discussion of the agency's OCI evaluation concern the second CO.

The Federal Acquisition Regulation (FAR) requires that contracting officers avoid, neutralize or mitigate potential significant OCIs so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504(a), 9.505. The responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting agency. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12.

The protesters' arguments here concern the category described in FAR subpart 9.5 and the decisions of our Office as arising from impaired objectivity. An impaired objectivity OCI exists where a firm's work under one government contract could entail its evaluating itself. FAR § 9.505-4; Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254297.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 13. The concern in such "impaired objectivity" situations is that a firm's ability to render impartial advice to the government will be undermined by its relationship to the product or service being evaluated. PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7.

In reviewing bid protests that challenge an agency's conflict of interest determinations, the Court of Appeals for the Federal Circuit has mandated application of the "arbitrary and capricious" standard established pursuant to the Administrative Procedures Act. See Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1381 (Fed. Cir. 2009). To demonstrate that an agency's OCI determination is arbitrary or capricious, a protester must identify "hard facts" that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011); PAI Corp. v. United States, 614 F.3d 1347, 1352 (Fed. Cir. 2010). In Axiom, the Court of Appeals noted that "the FAR recognizes that the identification of OCIs, and the evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion." Axiom Res. Mgmt., Inc., 564 F.3d at 1382. The standard of review employed by this Office in reviewing a contracting officer's OCI determination mirrors the standard required by Axiom. In this regard, we review the reasonableness of the CO's investigation and, where an agency has given meaningful consideration to whether an OCI exists, will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. See Enterprise Info. Servs., Inc., B-405152 et al., Sept. 2, 2011, 2011 CPD ¶ 174 at 8.

#### BCBSAL's Relationship with Prime Therapeutics LLC

AdvanceMed argues that the agency failed to reasonably evaluate an OCI arising from BCBSAL's 17-percent ownership stake in Prime Therapeutics LLC, a pharmacy benefit management company. The protester contends that BCBSAL's ownership of Prime Therapeutics creates an OCI in the event that Cahaba is issued a task order to

conduct audits in connection with Medicare part D, which is for prescription drug benefits, and part C, which can include part D coverage.

As part of its corrective action in response to AdvanceMed's and TrustSolution's initial protests, CMS asked Cahaba to address the potential OCI arising from BCBSAL's ownership stake in Prime Therapeutics. The CO noted that BCBSAL "acquired 16.78% investment interest in Prime Therapeutics LLC (Prime) in 2010," and holds one of the 10 seats on Prime Therapeutics' board of directors. AR, Tab 22a, Letter from CMS to Cahaba (June 28, 2011) at 2. The CO further noted that "Prime offers pharmacy services, Medicare Part D administration, and other consulting services" for customers of Blue Cross Blue Shield plans, and also provides services for four customers in Zone 3. *Id.* Based on these concerns, the CO stated that she determined that an unmitigated impaired objectivity OCI existed "because in the event that a Part D task order is issued, [Cahaba] may have to investigate/evaluate Prime in its role as a [pharmacy benefit management] company for possible fraud, waste and abuse." *Id.* The CO requested that Cahaba provide a mitigation plan to address the concern.

In response to the request for a mitigation plan, Cahaba expressed its view that its ownership stake in Prime Therapeutics did not create an OCI because: (1) there are no direct contractual relationships between Prime Therapeutics and Cahaba; (2) Cahaba does not receive any direct financial benefit from Prime Therapeutics' actions; (3) Cahaba's management is independent of BCBSAL; and (4) in Cahaba's view, BCBSAL's "small ownership interest in Prime is too attenuated to create an OCI." AR, Tab 22i, Letter from Cahaba to CMS (July 22, 2011), at 4-5. Nonetheless, Cahaba also proposed several mitigation strategies, including [deleted]. *Id.* at 16-17.

The CO advised Cahaba that the agency did not accept its views concerning BCBSAL's ownership of Prime Therapeutics, and still viewed the relationship as creating a potentially disqualifying OCI for Cahaba. The CO also stated that the agency did not view the proposed mitigation strategies as acceptable, in part because of the additional administrative duties they would impose on the agency. The CO advised that Cahaba was required to provide an acceptable response to the agency's concerns, and that "failure to avoid, neutralize or mitigate a conflict of interest may result in the award of this contract to another offeror." AR, Tab 22b, Letter from CMS to Cahaba (Sept. 23, 2011), at 3.

Cahaba subsequently advised CMS that BCBSAL had agreed to divest itself of Cahaba upon notice that CMS intended to issue a task order for Medicare parts C or D. AR, Tab 22h, Letter from Cahaba to CMS, Sept. 29, 2011, at 1. Cahaba's proposed mitigation approach provided a timeline with five milestones from the date of CMS's announcement of its intent to issue a task order: (1) within [deleted]: establish the terms of sale, obtain approval from BCBSAL's Board of Directors, and issue a formal announcement of the intent to sell Cahaba; (2) within [deleted]: identify and vet prospective buyers, conduct industry research of prospective buyers, and conduct OCI analyses; (3) within [deleted]: agree on terms of sale with



buyer; (4) within [deleted]: execute the sale and complete all required corporate actions and approvals; and (5) within [deleted]: execute state corporate documents and novate required leases. Id. at 2-3. In addition, Cahaba provided the following “contingency plan” in the event that the milestones are not met:

If BCBSAL cannot identify a buyer within the timeline listed above, BCBSAL shall [deleted].

Id. at 3-4. Cahaba’s response also included a letter from the BCBSAL Senior Vice President and Chief Financial Officer stating that the parent company “is in agreement with the mitigation plan proposed by Cahaba . . . related to any future Part C or D task order for the above mentioned solicitations [zones 3 and 6].” AR, Tab 22g, Letter from BCBSAL to CMS (Sept. 29, 2011), at 1.

The CO concluded that Cahaba’s proposed mitigation plan was acceptable. AR, Tab 22d, OCI Memorandum, at 6. The CO found that Cahaba’s proposed [deleted] schedule for divestiture was reasonable and realistic. In this regard, the CO noted that CMS expected that it could take between 7-8 months from announcement of the agency’s intent to issue a task order for part C or D to develop a statement of work, obtain funding approval, negotiate the task order with Cahaba, and complete the transition of the work from the incumbent. Id. at 5.

The CO also stated that, in the event the divestiture could not be achieved within the proposed [deleted] time frame, and CMS required the services from Cahaba at that time, the cognizant head of the CMS contracting activity (HCA) “will authorize a waiver of the Prime Therapeutics conflict during the time that the contingency plan is in place.” Id. at 6. The FAR provides that an HCA may “waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government’s interest.” FAR § 9.503. Here, the OCI memorandum included a memorandum from the HCA, which stated as follows:

With regard to the mitigation strategy for the OCI caused by BCBSAL’s ownership in Prime Therapeutics, should it be necessary to afford [Cahaba] additional time, in excess of the [deleted] proposed, to finalize the sale of [Cahaba] and should CMS require [Cahaba] to begin work on a Part C and/or Part D task order, the HCA will authorize a waiver in accordance with FAR 9.503 while the contractor’s contingency plan is being finalized. The waiver would be in affect only until such time as the sale of [Cahaba] is completed. Once the sale of [Cahaba] is completed, the waiver would no longer be necessary and the conflict would be fully mitigated.

AR, Tab 22d, OCI Memorandum, at 11.

AdvanceMed argues that the CO unreasonably accepted the divestiture plan because it did not provide adequate details to address the OCI. In particular, AdvanceMed

contends that the plan lacks specificity because it does not identify a potential buyer or sales terms. The protester cites two decisions in which our Office sustained protests of awards to AdvanceMed for ZPIC zones 1 and 2, based on what the protester contends were similar OCI concerns and divestiture plans to those at issue here. See C2C Solutions, Inc., B-401106.5, Jan. 25, 2010, 2010 CPD ¶ 38; Cahaba Safeguard Adm'rs, LLC, B-401842.2, Jan. 25, 2010, 2010 CPD ¶ 39. As relevant here, we concluded in both protests that the CO failed to evaluate AdvanceMed's proposed mitigation approach of divestiture, in part because the proposed plans lacked any meaningful detail. In this regard, the record in the C2C Solutions and Cahaba decisions shows that the CO's OCI analysis merely observed that "[t]he other mitigation strategy, total divestiture of AdvanceMed, includes some uncertainties as to the particulars of the divestiture that are and cannot be known at this time." C2C Solutions, Inc., *supra*, at 5; Cahaba Safeguard Adm'rs, LLC, *supra*, at 6. In light of the lack of any meaningful details to support the divestiture plans, we sustained both protests.

In contrast to C2C Solutions and Cahaba, however, the awardee's mitigation plan here provided specific details and milestones. As discussed above, the awardee stated that BCBSAL would, upon notice of the agency's intent to begin the process of issuing a task order for Medicare parts C and D, commence the necessary steps to divest itself of Cahaba. The mitigation plan included five milestones, which the agency evaluated and concluded were reasonable. Additionally, as the intervenor notes, the lack of a specific price or buyer was not unreasonable, as there was no timeframe for a possible parts C and D task order at the time of the award.<sup>6</sup> On this record, we conclude that the CO acted within the reasonable exercise of her discretion in concluding that Cahaba's proposed mitigation plan adequately addressed the OCI concerning BCBSAL's ownership of Cahaba and its 17 percent stake in Prime Therapeutics.<sup>7</sup>

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<sup>6</sup> AdvanceMed also argues that an HCA's indication of an intent to waive an OCI should not be given the same weight as an actual waiver of an OCI. We agree that HCA's written statement of an intent to issue a waiver under a specific set of circumstances cannot properly be viewed as the equivalent of a waiver. However, we find that the HCA's statement of an intention to waive the OCI for a limited period of time to ensure completion of the mitigation plan could be reasonably relied upon by the CO as an additional assurance concerning the adequacy of the proposed OCI plan.

<sup>7</sup> AdvanceMed raises other arguments that Cahaba's performance of audits of Medicare parts C and D gives rise to OCIs. For example, the protester argues that Cahaba would be in a position to audit competitors to BCBSAL who provide Medicare parts C and D services, and as well as BCBSAL's network relationship with national pharmacy chains. Because we find that the CO reasonably relied on Cahaba's proposed divestiture plan to address OCIs arising from BCBSAL's ownership of Prime Therapeutics, we also conclude that any OCI's arising from the

(continued...)

### BCBSAL's Other Contractual Relationships

Next, AdvanceMed argues that Cahaba will be in a position to conduct audits of companies with whom BCBSAL has contracts, thereby creating an OCI. In this regard, AdvanceMed argues that those providers could threaten to sever their relationship with BCBSAL in the event of an audit or negative finding by Cahaba, and that the threat of such actions would impair Cahaba's judgment.

During the corrective action, the CO asked Cahaba to address BCBSAL's contractual relationships with healthcare facilities and providers who operate within zone 3. AR, Tab 22a, Letter from CMS to Cahaba (June 28, 2011), at 3-4. The CO requested that Cahaba address the "perception that [Cahaba's] objectivity could be viewed as being impaired" when it investigates an entity that has a contractual relationship with BCBSAL. Id. at 4.

Cahaba stated that BCBSAL has a network of preferred provider relationships with national companies, or affiliates of national companies. Under this arrangement the healthcare provider agrees to participate in the BCBSAL network, and BCBSAL agrees to pay claims in accordance with a fee schedule. AR, Tab 22i, Letter from Cahaba to CMS (July 22, 2011), at 22. Cahaba acknowledged that BCBSAL has contractual relationships with entities, who, in turn, have affiliates that provide services within Zone 3. Id. at 21-22. Cahaba argued, however, that such BCBSAL relationships do not give rise to a disqualifying OCI for Cahaba because the relationship is too remote and attenuated to constitute a disqualifying OCI. Id. at 22.

With regard to scenarios where BCBSAL has a contract with an entity who is affiliated with a healthcare provider, who provides services in zone 3, the CO concluded that the possibility of a conflict was too remote and too far removed to constitute an OCI that requires mitigation. Id. at 10. In this regard, the CO stated that the possibility that the health care provider would complain to its affiliate in order to have the affiliate pressure BCBSAL to in turn pressure Cahaba was "too remote and too far removed to be considered an OCI that requires mitigation." Id. Additionally, in response to the protest, the CO also noted Cahaba's explanation that the relationships between BCBSAL and its contractual partners creates a "strong, pre-existing financial incentive not to terminate their relationship with BCBSAL" because of the benefit that the contractual partner enjoys from having access to the BCBSAL customer network. Supp. CO Statement (Dec. 13, 2011) at 6.

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(...continued)

evaluation of BCBSAL's competitors or its pharmacy network relationships are also addressed.

Our Office has recognized that an agency may reasonably find that certain relationships between companies or corporate affiliates are too remote or that the possibility of a conflict is too unlikely or speculative to conclude that there is a disqualifying OCI. See Valdez Int'l Corp., B-402256.3, Dec. 29, 2010, 2011 CPD ¶ 13 at 5-6; L-3 Servs., Inc., B-400134.11, B-400134.12, Sept. 3, 2009, 2009 CPD ¶ 171 at 15; American Mgmt. Sys., Inc., B-285645, Sept. 8, 2000, 2000 CPD ¶ 163 at 5. In such cases, we look for some indication that there is a direct financial benefit to the firm alleged to have the OCI. Here, the CO concluded that the relationship between Cahaba and the contractual partners of its parent company were too remote, and that there was no direct financial benefit to Cahaba. We conclude that the CO was within her discretion to draw these conclusions and therefore find no basis to sustain the protest.

#### Cahaba's LASER SA<sup>2</sup>PHE<sup>2</sup> Service

Finally, AdvanceMed and TrustSolutions argue that Cahaba offers an auditing service, known as LASER SA<sup>2</sup>PHE<sup>2</sup>, which could create an OCI.<sup>8</sup> This service is a data analysis tool offered by Cahaba to assist clients in the identification and prevention of healthcare fraud, waste, and abuse. Unlike the potential conflicts arising from Cahaba's relationship with BCBSAL, the protesters argue that Cahaba's offered services would create a direct OCI by creating the possibility that the awardee would audit companies for which the awardee had provided data analysis services.

During corrective action, the CO asked Cahaba to identify the clients for whom it has provided services through its LASER SA<sup>2</sup>PHE<sup>2</sup> solution, and to propose a mitigation strategy to address any conflicts that could arise from its provision of these services. AR, Tab 22a, Letter from CMS to Cahaba (June 28, 2011), at 3.

Cahaba responded that it had used LASER SA<sup>2</sup>PHE<sup>2</sup> for its contracts with CMS and the TRICARE Management Activity, and also has a master services agreement which allows [deleted] to place task orders with Cahaba for data analytics services (such as LASER SA<sup>2</sup>PHE<sup>2</sup>). AR, Tab 22i, Letter from Cahaba to CMS (July 22, 2011), at 18-19. The awardee stated that it currently "does not have active task orders with [deleted], and has no other commercial clients," and further stated that the company [deleted]. Id. at 19. Cahaba also stated that it would advise the CO of any requests for work concerning LASER SA<sup>2</sup>PHE<sup>2</sup> from [deleted], and "will not contest any Contracting Officer determination that the task order gives rise to a [conflict of interest] and will refuse any task order as to which the Contracting Officer has made such a determination." Id.

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<sup>8</sup> LASER SA<sup>2</sup>PHE<sup>2</sup> is an acronym for "Learning Analytical System for Enlightened Recognition through Scientific, Accurate, Accelerated Prioritization with Holistic Examination and Enforcement."

The CO concluded that Cahaba's use of the LASER SA<sup>2</sup>PHE<sup>2</sup> solution for contracts performed for the government did not give rise to any OCIs. AR, Tab 22d, OCI Memorandum, at 7. The CO also concluded that because Cahaba did not have existing commercial clients and [deleted] there were no potential OCIs. Id.

The protesters argue that the CO's conclusion was unreasonable because it relied on Cahaba's statement that [deleted] for its LASER SA<sup>2</sup>PHE<sup>2</sup> service. In this regard, the protesters contend that Cahaba could, in effect, change its mind and [deleted] and thereby create an OCI. We think that the CO was within her discretion to conclude that there was no OCI, based on her acceptance of Cahaba's statements regarding its LASER SA<sup>2</sup>PHE<sup>2</sup> solution.

On this record, we find no basis to sustain any of the protesters' arguments regarding the CO's OCI analysis.

#### Cost Realism Evaluation

AdvanceMed and TrustSolutions argue that CMS unreasonably evaluated Cahaba's proposed costs, in particular its direct labor rates and indirect cost rates. AdvanceMed also argues that the record does not explain how the agency evaluated a reduction in Cahaba's FPR labor hours for certain IT support positions.

When an agency evaluates a proposal for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR §§ 15.305(a)(1); 15.404-1(d); Palmetto GBA, LLC, B-298962, B-298962.2, Jan. 16, 2007, 2007 CPD ¶ 25 at 7. Consequently, the agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed. FAR § 15.404-1(d)(1). An agency is not required to conduct an in-depth cost analysis, see FAR § 15.404-1(c), or to verify each and every item in assessing cost realism; rather, the evaluation requires the exercise of informed judgment by the contracting agency. Cascade Gen., Inc., B-283872, Jan. 18, 2000, 2000 CPD ¶ 14 at 8. Further, an agency's cost realism analysis need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate and provide some measure of confidence that the rates proposed are reasonable and realistic in view of other cost information reasonably available to the agency as of the time of its evaluation. See SGT, Inc., B-294722.4, July 28, 2005, 2005 CPD ¶ 151 at 7. Our review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonably based and not arbitrary. Jacobs COGEMA, LLC, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16 at 26.

## Direct Labor Rates

The protesters argue that the methodology used by CMS to evaluate the realism of the offerors' proposed direct labor rates was not reasonable and that Cahaba's proposed labor rates were unreasonably low.

The agency's cost realism analysis of the offerors' proposed direct labor rates was prepared by the CO and was primarily based on a sample of the offerors' proposed rates. See Hearing Transcript (Tr.)<sup>9</sup> at 151:1-19; 152:8-15; 165:20-166:4; AR, Tab 5, FPR Cost Realism Evaluation, at 12-13. The labor categories included in the CO's sample were those that (1) had a corresponding rate in the independent government cost estimate (IGCE), and (2) were comparable between the offerors, i.e., were rates proposed by all or most of the three offerors. Id.

The CO's analysis consisted of reviewing whether the offerors' rates were significantly higher or lower than the IGCE, and their relative differences from each other. Tr. at 151:1-19. The CO found that Cahaba's rates were in almost all cases between the proposed rates of AdvanceMed and TrustSolutions. Tr. 151:14-19. The CO concluded that the awardee's proposed direct labor rates for contract line item numbers (CLINs) 0001 and 0002 were all reasonable: "No adjustments were made to the proposed direct labor rates, based on the cost analysis [performed] by the Contracting Officer which found the rates as well as the rationale for the basis of establishing the rates to be reasonable and realistic." AR, Tab 4a, Cahaba FPR Cost Realism Evaluation, at 4; Tab 4d, Cahaba FPR Cost Realism Analysis Task Order 1, at 2; Tab 4e, Cahaba FPR Cost Realism Analysis, Task Order 2, at 2.

The protesters first argue that the CO's sampling approach was not reasonable. As discussed above, the CO considered the realism of a particular rate only if there was a corresponding IGCE rate and if each offeror had proposed the same rate. Thus, for rates that did not meet these two criteria, the CO did not perform a cost realism analysis.

As set forth in the charts below, the CO's sampling of labor rates took into account a large percentage of the labor rates, full-time equivalent (FTE) positions, and direct labor costs proposed by Cahaba. We prepared these charts for illustrative purposes based on the calculations reflected in the post-hearing exhibits filed by AdvanceMed and TrustSolutions.<sup>10</sup> See AdvanceMed Post-Hearing Comments, exhs. 1, 3;

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<sup>9</sup> Our Office conducted a hearing on January 4, 2012, to further develop certain protest issues, at which the initial CO provided testimony.

<sup>10</sup> These charts reflect adjustments to the protester's calculations. Although the protesters considered Cahaba's three labor categories for benefit integrity (BI) analyst positions as part of the "not evaluated" category, we considered them under the "evaluated" category because the CO performed a realism evaluation on those  
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TrustSolutions Post-Hearing Comments, exhs. A, B. The resulting data are as follows:

	Labor Categories Evaluated	Labor Categories Not Evaluated
Task Order 1	26 (81%)	6 (19%)
Task Order 2	13 (42%)	18 (58%)
TOTAL	39 (62%)	24 (38%)

	FTEs Evaluated	FTEs Not Evaluated
Task Order 1	64 (94%)	4 (6%)
Task Order 2	15 (38%)	25 (62%)
TOTAL	79 (73%)	29 (27%)

	Direct Labor Costs Evaluated	Direct Labor Costs Not Evaluated
Task Order 1	\$16.1M (92.5%)	\$1.3M (7.5%)
Task Order 2	\$4.2M (39%)	\$6.68M (61%)
TOTAL	\$20.3M (72%)	\$7.9M (28%)

As these charts show, the CO considered 62 percent of Cahaba’s proposed labor categories, and these categories applied to 73 percent of the awardee’s proposed FTEs and 72 percent of the overall direct labor costs. The labor categories evaluated also included all of the key personnel positions identified in the RFP.

As discussed above, an agency’s cost realism analysis need not consider every element of an offeror’s cost proposal, nor must the analysis achieve scientific certainty regarding the realism of an offeror’s proposed costs. Cascade Gen., Inc., supra, at 8; SGT, Inc., supra, at 7. However, the methodology employed must be reasonably adequate and provide some measure of confidence that the rates proposed are reasonable and realistic in view of other cost information reasonably available to the agency as of the time of its evaluation. SGT, Inc., supra, at 7; Science Applications Int’l Corp., B-290971 et al., Oct. 16, 2002, 2002 CPD ¶ 184 at 17. Here, we think that the CO’s sample of the labor rates encompassed a sufficiently large

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positions. As discussed below, the CO did not include the three Cahaba BI analyst positions in the comparison with the other offerors because she did not believe that the three positions could be directly compared to the single positions proposed by the other offerors; she did, however, compare these positions to salary survey data.

amount of the awardee's proposed FTEs and costs, so as to permit the CO to conclude that they were representative of the likely costs that the government would incur based on Cahaba's performance. On this record, we see no basis to question the CO's judgment or exercise of discretion here.

Next, we address whether the analyses performed on the sample of the direct labor rates were reasonable. The CO's evaluation considered whether the proposed rates were above or below the IGCE, and whether a particular rate was above or below the rates proposed by the other offerors. Tr. at 151:14-19. The CO concluded that the overall rates proposed by Cahaba were higher than the IGCE. See AR, Tab 5, FPR Cost Realism Evaluation, at 13-14. Our review of the record shows that this conclusion was accurate, that is, while some rates were higher and some were lower, the rates were, in the aggregate, higher than those listed in the IGCE. The CO also concluded that almost all of the rates proposed by Cahaba—including those that were below the IGCE—were between the rates proposed by TrustSolutions and AdvanceMed. *Id.* Again, our review of the record shows that this is generally accurate. *Id.* Although there are a small number of examples where a rate proposed by Cahaba was below the IGCE and below the rates of the other two offerors, the CO stated that her overall conclusions regarding the rates informed her judgment and gave her “reassurance of the reasonableness of [Cahaba's] rates.” Tr. at 151:18-19. On this record, we conclude that CO reasonably concluded that Cahaba's labor rates were realistic.

In addition to the comparison of the offerors' labor rates, the CO also conducted a separate evaluation of four BI analyst positions proposed by Cahaba for task order 0001. The CO noted that because the awardee used three positions (BI analyst 1, 2, and 3) for work where the other offerors proposed only one BI analyst category, she could not make a direct comparison between the offerors. Tr. at 157:19-158:1; 163:16-164:1. Because this labor category was considered among the more important categories, Tr. at 161:3-8, the CO compared Cahaba's proposed salaries for these positions against salary survey data from a commercial service, Salary.com, and found that the Cahaba salaries were, on average, [deleted] percent lower than the salary survey rates. AR, Tab 5, FPR Cost Realism Evaluation, at 13-14. In her testimony, the CO explained that although she noted these differences, she did not conclude that the rates were unrealistically low. Tr. at 171:13-21. The CO stated that, in her judgment, such variations were “something that occurs” in the labor market, and that her understanding of the current weak economic conditions led her to believe that it was not unrealistic to expect that individuals would accept work at such levels. Tr. at 171:20-21; 209:2-5; 210:3-7.

The protesters contend that the CO's evaluation and acceptance of the lower salaries proposed by Cahaba for the BI analysts demonstrate that the CO's judgment was flawed. In this regard, the protester argues that the difference between the salary survey and the proposed Cahaba salaries cannot be explained or rationalized on the basis of expected variation or the CO's assumptions concerning the state of the economy. As discussed above, however, our review of an agency's evaluation of the



realism of proposed costs is for reasonableness, and we will not substitute our judgment for that of the agency. Jacobs COGEMA, LLC, supra. On this record, we cannot find that the CO's judgment concerning Cahaba's proposed rates was unreasonable.<sup>11</sup>

Finally, the protesters argue that the CO failed to consider the fact that Cahaba's proposed labor rates in its FPR reflected lower salaries for many of the individuals identified in its initial proposal. The protesters contend that the record does not show whether it would be reasonable to assume that the individuals would be willing to perform at a lower salary under the new contract. As the intervenor notes, however, Cahaba's proposal provided revised salary data showing that many of the individuals cited by the protester were currently performing at the lower salaries. See AR, Tab 13, Cahaba FPR IDIQ Appendix C, Payroll Documentation. For the other positions, the individuals were performing in labor categories that had been addressed in the CO's evaluation of Cahaba's direct labor rates. See AR, Tab 5, FPR Cost Realism Evaluation, at 13-14. On this record, we find that, here too, the agency reasonably exercised its judgment in determining that these proposed costs were reasonable and realistic.

In sum, we see no basis to find that the agency's evaluation of the realism of the offerors' proposed direct labor rates was unreasonable.

#### Indirect Cost Rates

Next, the protesters argue that the agency unreasonably evaluated Cahaba's proposed indirect cost rates. The protesters note that the awardee's initial proposal offered an overhead rate of [deleted] percent, and a general and administrative (G&A) rate of [deleted] percent. These proposed rates were lower than Cahaba's 2009 and 2010 rates of [deleted] percent and [deleted] percent for overhead, respectively, and [deleted] percent and [deleted] percent for G&A, respectively. AR, Tab 13, Cahaba FPR, Indirect Cost Rate Data, at C-2. In its revised proposal, Cahaba

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<sup>11</sup> While the protesters suggest that the CO did not consider the BI analysts in the cost evaluation, the record shows that the CO made adjustments to the BI analysts hours to reflect the judgment of the technical evaluation panel (TEP) that the work would require less labor from the lower-cost positions, and more labor hours from the higher-cost positions. AR, Tab 4d, Cahaba FPR Cost Realism Analysis, Task Order 1, at 3-4. Specifically, the CO increased the BI manager hours, adjusted downward the hours for the lower-cost BI analyst 1 position (which was [deleted] percent below the Salary.com rate), and increased the number of hours for the higher-cost BI analyst 3 position (which was [deleted] percent below the Salary.com rate). Id.

further reduced its proposed overhead rate to [deleted] percent and its G&A rate to [deleted] percent. Id., Cahaba FPR, Business Proposal Assumptions, at B.3-19. The protesters contend that the agency failed to account for the risk that Cahaba's proposed indirect rates would exceed their proposed levels, thus creating a performance risk.

During discussions, CMS asked Cahaba to provide an explanation of its reduced indirect rates. Cahaba's FPR provided projections of its indirect costs, as well as a narrative justification for the reductions. Cahaba also proposed caps to its indirect costs of [deleted] percent for overhead and [deleted] percent for G&A. AR, Tab 4b, Cahaba Indirect Cost Rate Evaluation, at 3.

CMS's evaluation of Cahaba's revised indirect cost rates was prepared by a senior auditor, who provided her findings to the CO. Id. The CO testified that her analysis of the offerors' indirect rates relied primarily on the findings of the senior auditor. Tr. at 32:14-19; 34:19-35:5. The cost analyst noted that Cahaba had provided its indirect costs and rates for 2009 and 2010, and provided projections of the same cost data to justify its proposed reductions of its indirect rates. AR, Tab 4b, Cahaba Indirect Cost Rate Evaluation, at 1-3. In addition, the cost analyst identified the following six factors in support of the lower rates: [deleted]. Id. Based on these factors, the senior auditor found that the proposed rates were realistic.

The protesters argue that Cahaba did not provide a detailed cost breakdown for each of its proposed indirect cost pools, and thus the senior auditor was not able to specifically verify each of the indirect cost projections. Furthermore, the protesters argue that the senior auditor did not quantify each of the cost projections. However, as discussed above, cost realism analysts do not need to achieve scientific certainty in the review of what is, inherently, a projected estimate of future costs. SGT, Inc., supra, at 7. Here, the cost realism evaluation relied on the explanations and found them reasonable, which we find unobjectionable under the circumstances.

Additionally, we note that the record shows that the awardee capped its indirect cost rates, and that the agency accepted these capped rates to protect the government's cost risk. AR, Tab 4b, Cahaba Indirect Cost Rate Evaluation, at 3. When an offeror agrees to cap certain cost items—including indirect rate ceilings—then that cap may reasonably be used by the agency as the probable cost for purposes of a cost realism analysis. BNF Techs., Inc., B-254953.3, Mar. 14, 1994, 94-1 CPD ¶ 274 at 5.

### IT Labor Hours

Finally, AdvanceMed argues that the record does not show how CMS evaluated a reduction in Cahaba's proposed labor hours for certain IT support positions. During discussions, CMS asked Cahaba to address the agency's concern that the offeror's proposed level of data analyst staffing was understated. AR, Tab 7a, Cahaba Discussion Questions, at 5. Cahaba's revised proposal notes that this issue was a subject of oral discussions with CMS, and that "CMS confirmed during conversations

on 2/18/11 that there were no further concerns with this labor category.” AR, Tab 13, Cahaba FPR Business Proposal, Response to Discussion Questions, at 12. In addition to this response, Cahaba also stated that three positions, covering four FTEs, had been removed from its FPR—operational systems manager, database administrator, and systems administrator. Id. at 13. The awardee explained that those positions “are part of the Data Analysis labor category,” and were therefore eliminated. Id.

Although Cahaba’s FPR states that this issue was “confirmed” during oral discussions, its FPR does not specifically address this issue. Nor is there any contemporaneous documentation or analysis that shows how the agency evaluated Cahaba’s elimination of the three positions in its cost evaluation. The CO states that she relied on the TEP to advise her of any concerns regarding an offeror’s technical approach that had cost realism implications, and that the TEP did not advise her of a concern here. Tr. at 259:13-260:3; 263:10-14; 263:21-264-6.

However, even if we were to assume that Cahaba’s proposed costs and technical evaluation required an adjustment to reflect part or all of this reduced labor, there is no basis to conclude that AdvanceMed was prejudiced by this issue. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency’s actions. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed Cir. 1996).

In this regard, AdvanceMed notes that the three eliminated positions comprise [deleted] hours of labor for the proposed task orders. See AdvanceMed Comments (Nov. 14, 2011) at 18. Although the protester did not provide any calculations of the potential cost for the eliminated labor categories, when applied to the labor rates for these categories, it appears from our review of the record that the proposed costs for these positions total approximately \$[deleted] in direct labor; with the application of Cahaba’s overhead and G&A rates this amount increases to approximately \$[deleted].<sup>12</sup> See AdvanceMed Comments (Nov. 14, 2011) at 18. However, AdvanceMed’s proposed costs were \$35.6 million higher than Cahaba’s (48 percent higher). Thus, we find that a potential adjustment to reflect the eliminated labor does not create a reasonable possibility of prejudice for AdvanceMed and find no basis to sustain the protest.

Additionally, we note that only AdvanceMed raised this argument—TrustSolutions did not. As discussed above, the CO’s tradeoff analysis expressly concluded that AdvanceMed’s higher-rated, higher-cost proposal did not merit award as compared

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<sup>12</sup> The labor positions are operational systems manager, database administrator, and systems administrator. Our calculations applied the average rates for these positions for contract line item numbers 0001-0006.

to TrustSolution's lower-rated, lower-cost proposal. AR, Tab 30, SSD, at 10. Thus, even if we were to agree with AdvanceMed's argument here, this would not improve its prospect for award. This is so because even if Cahaba's evaluated costs were adjusted upward, this adjustment would not improve AdvanceMed's standing as compared to TrustSolutions, given that neither AdvanceMed's nor TrustSolutions' technical standing or evaluated costs are implicated by this issue.<sup>13</sup> For this reason, we find no basis to sustain the AdvanceMed's protest concerning this aspect of the evaluation. See Restoration & Closure Servs., LLC, B-295663.6, B-295663.12, Apr. 18, 2005, 2005 CPD ¶ 92 at 5-6.

In sum, we find no basis to sustain the protests based on any of the cost realism arguments raised by AdvanceMed or TrustSolutions.

### Technical Evaluation

AdvanceMed and TrustSolutions also challenge CMS's technical evaluation. The protesters primarily contend that the agency treated the offerors unequally in the assignment of point scores and adjectival ratings based on the strengths identified for their proposals.

The evaluation of an offeror's proposal is a matter within the agency's discretion. IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 7, 13. A protester's mere disagreement with the agency's judgment in its determination of the relative merit of competing proposals does not establish that the evaluation was unreasonable. VT Griffin Servs., Inc., B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4. In reviewing a protest against an agency's evaluation of proposals, our Office will not reevaluate proposals but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. See Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3.

As a preliminary matter, both protesters argue that the agency's evaluation was unreasonable because it awarded Cahaba a "very good" rating for every sub-criterion where the agency identified a strength for the awardee, but failed to award the protesters very good ratings for certain sub-criteria where the protesters had

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<sup>13</sup> AdvanceMed argued that TrustSolution's proposal should have been eliminated from the competition based on an OCI. We dismissed this protest, based on CMS's statement that, because TrustSolutions was not the awardee, it had not performed an OCI analysis on that offeror. Our discussion of the CO's tradeoff between AdvanceMed and TrustSolutions is intended to illustrate the remoteness of any possibility of prejudice to AdvanceMed, separate and apart from the effect of the small cost adjustment that could arise from a potential adjustment to Cahaba's proposed costs.

evaluated strengths and no offsetting weaknesses. The protesters also argue that the agency unreasonably assigned equal ratings to the offerors where the protesters were evaluated as having greater numbers of strengths than Cahaba.

Agencies may reasonably distinguish between the strengths assigned to offerors, and may also conclude that a single strength is of more value than multiple, lesser strengths. See Wackenhut Servs., Inc., B-400240, B-400240.2, Sept. 10, 2008, 2008 CPD ¶ 184 at 7. Here, neither the RFP nor the agency's evaluation plan indicated that the agency would assign offerors a very good, as opposed to a satisfactory, rating in every instance where the agency identified an evaluated strength for an offeror. Instead, the agency's evaluation definitions stated that a very good rating would be assigned where "[t]he proposal contains major strengths and/or minor strengths which indicate the proposed approach will benefit the program." AR, Tabs 31, 32, 33, Offeror Technical Evaluations, at 2. This definition does not state, as the protesters suggest, that an offeror is entitled to a very good rating each time any strength is identified and there are no identified weaknesses; rather, the rating would be merited when the "proposed approach will benefit the program." Id. Our review of the record finds that the agency identified strengths and weaknesses for each offeror, and identified the rating that was merited. For the most part, the protester's arguments merely express disagreement with the weight or importance attached to particular strengths, and thus provide no basis to sustain the protests. We address certain examples below.<sup>14</sup>

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<sup>14</sup> Our review of the record includes the responses to the protest provided by the CO and a declaration by a TEP member. While we consider the entire record in resolving a protest, including statements and arguments in response to a protest, in determining whether an agency's selection decision is supportable, we accord greater weight to contemporaneous evaluation and source selection materials than to new judgments made in response to protest contentions. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. In this regard, we accord lesser weight to post hoc arguments or analyses because we are concerned that judgments made "in the heat of an adversarial process" may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process. Id. In contrast, 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 evaluations and award determinations, so long as those explanations are credible and consistent with the contemporaneous record. ITT Fed. Servs. Int'l Corp., B-283307, B-283307.2, Nov. 3, 1999, 99-2 CPD ¶ 76 at 6. As discussed below, we find that the CO's statements and the TEP member's declaration clarify details in a manner consistent with the agency's contemporaneously documented evaluation.

## AdvanceMed's Technical Evaluation

AdvanceMed argues that the agency's evaluation was unreasonable because it resulted in a distorted view of the offerors' relative technical merit. For example, the protester notes that in instances where it received a large number of strengths under a single sub-criterion, the agency's scoring method tended to minimize this achievement because the multiple strengths could earn no more points than was assigned to that sub-criterion. Thus, where AdvanceMed received a very good rating for multiple strengths under one sub-criterion, and Cahaba received a very good rating for a single strength under another sub-criterion, the offerors would be viewed as having equal scores despite a difference in the number of evaluated strengths.

We recognize that the natural effect of the agency's use of such a large number of evaluation factors, subfactors, and sub-criteria is a tendency to minimize the importance of achievement in any one of the sub-criteria. Nonetheless, we find that there was nothing unreasonable about this evaluation scheme, as applied here by the agency, where it was consistent with the RFP. Moreover, the record shows that CMS recognized that AdvanceMed's proposal was technically superior to Cahaba's, and assigned it significantly higher ratings. The selection decision shows that the agency looked behind the evaluation ratings to identify specific strengths in AdvanceMed's proposed technical approach in addressing whether the protester's higher proposed costs merited award. See AR, Tab 30, SSD, at 9-12. To the extent that the protester argues that the agency's evaluation should have placed a greater emphasis on the number of strengths received by AdvanceMed, as opposed to viewing those strengths in the context of the evaluation factors, subfactors, and sub-criteria set forth in the solicitation, this disagreement by the protester provides no basis to sustain the protest.<sup>15</sup>

With regard to its specific challenges of the technical evaluation, AdvanceMed argues that the agency treated the offerors unequally when it assigned Cahaba a very good rating for a sub-criterion where a single strength was identified, but did not

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<sup>15</sup> AdvanceMed also argues that CMS's evaluation failed to consider whether its proposal had strengths outside the evaluation sub-criteria, which were identified in the solicitation. As the protester notes, the RFP stated that offerors would be evaluated on their understanding of and ability to meet the requirements of each subfactor, including "but not limited to" the sub-criteria identified for each subfactor. AdvanceMed argues that the agency's evaluation was unreasonably limited to strengths and weaknesses associated with the identified sub-criteria. This argument, however, was first raised in the protester's comments on the agency report, which were filed 39 days after its initial protest, and 20 days after receipt of the agency's early production of relevant documents. Because the protester knew of the specific strengths identified for its proposal in its initial debriefing and the agency's production of relevant documents, this argument is untimely. 4 C.F.R. § 21.2(a)(2).

assign AdvanceMed a very good rating, despite receiving a strength in eight sub-criteria. As discussed above, the RFP and internal agency scoring guidance did not specify that a single strength would automatically earn a very good rating, and thus it would not be unreasonable for the agency to assign one offeror a very good rating for a strength while assigning another offeror a lower rating of satisfactory for a different, less important strength, where the agency found this was warranted.

Here, in each instance cited by AdvanceMed, the record shows that the agency recognized the strengths for the protester, but did not assign a very good rating. See AR, Tab 31, AdvanceMed FPR Technical Evaluation. In its response to the protest, CMS explained that, in each case, the strengths were not viewed as sufficiently important to warrant a very good rating. Decl. of TEP Member (Nov. 16, 2011) at 3. This explanation was consistent with the contemporaneous record, which shows that the agency did recognize each strength, but did not consider the strengths to merit higher ratings.

For example, the TEP noted under the acquisition of medical records sub-criterion of the medical review for benefit integrity subfactor, that AdvanceMed proposed to “[deleted].” AR, Tab 31, AdvanceMed FPR Technical Evaluation, at 36. The agency cited this as a strength, stating that “[t]his is not a requirement of the statement of work but will add efficiency.” Id. at 37. Taking this strength into account, the TEP concluded that the protester’s approach for this sub-criterion was “satisfactory.” Id. at 36. In response to the protest, the agency elaborated, stating that although the [deleted] provided an efficiency, it did not necessarily address the core issue of “acquiring” the medical records themselves. Decl. of TEP Member (Nov. 16, 2011) at 3. On this record, we find no basis to conclude that the agency’s evaluation was unreasonable.

In sum, we find no basis to sustain AdvanceMed’s protest concerning the technical evaluation.

#### TrustSolutions’ Technical Evaluation

With regard to specific issues raised by TrustSolutions concerning unreasonable or unequal treatment in the technical evaluation, we find that the protester’s arguments are primarily based on disagreements with the agency’s judgment that provide no basis to sustain the protest.

For example, under the enrollment, eligibility and marketing surveillance for Parts C and D sub-criterion of the potential fraud investigations subfactor, the TEP identified a strength for TrustSolutions based on its presentation of “detailed information relative to their understanding and knowledge” of the requirements, such as “identifying vulnerabilities and the ability to work with state licensing agencies.” AR, Tab 33, TrustSolutions FPR Technical Evaluation, at 16. The TEP also concluded that the protester’s “knowledge and understanding” of the requirements for this sub-criterion were “sufficient . . . to determine a rating of satisfactory.” Id. at 14. As

discussed above, neither the RFP nor the agency's evaluation ratings mandated a very good rating every time an offeror received an evaluated strength. Although TrustSolutions argues that the assignment of a strength here should have resulted in a higher rating, the protester's disagreement with the agency's judgment does not provide a basis to sustain the protest.

Next, TrustSolutions argues that the agency's evaluation of its FPR failed to revise its score despite the fact that the agency concluded that initially assessed weaknesses had been addressed. For example, under the organization and management structure sub-criterion of the high risk areas subfactor, the agency's evaluation of the protester's FPR found that the protester had addressed a weakness resulting from the proposed allocation of staff. *Id.* at 37; *see* Decl. of TEP Member (Nov. 16, 2011), attach 5, at 1. Despite the removal of this weakness, the protester's rating for this sub-criterion remained satisfactory. AR, Tab 33, TrustSolutions FPR Technical Evaluation, at 37. As the agency notes, however, there were no strengths identified for this sub-criterion; for this reason, the removal of the weakness did not merit an increased score.

In another example, for the transition activities and plans sub-criterion of the transition, risk analysis and mitigation plans subfactor, the agency's evaluation of the protester's FPR concluded that the "minor weakness" given concerning the assignment of a [deleted] had been addressed by an increase in the number of hours for that position. *Id.* at 41; Decl. of TEP Member (Nov. 16, 2011), attach 5, at 1. The agency explains that this minor weakness did not affect the overall rating of satisfactory, and its removal did not merit a higher rating. *Id.* Although the protester contends that the removal of this minor weakness should have resulted in a higher rating, here too, its disagreement with the agency's judgment provides no basis to sustain the protest.

Finally, TrustSolutions argues that CMS treated it unequally in certain areas by recognizing AdvanceMed for strengths, but not recognizing that TrustSolutions proposed a similar solution. Although the protester merely states its general disagreement with the agency's explanation for the differences between the evaluation of these two offerors, CMS effectively concedes that it failed to note that TrustSolutions had proposed a strength similar to one recognized for AdvanceMed under the work to be performed by small businesses sub-criterion of the small business utilization subfactor. Decl. of TEP Member (Nov. 16, 2011), attach. 4, at 4. As the agency notes, recognition of this strength--and an increase of TrustSolutions rating from satisfactory to very good--could result in an increase in TrustSolution's technical score of 7 points out of its total technical score of 1,983.78 points. This would represent a 0.35 percent increase in the protester's technical score. Under these circumstances, and in light of the selection decision's reliance on the large difference between TrustSolutions and Cahaba's proposed costs, we think the potential prejudice to the protester from possible errors in CMS's evaluation is too speculative and remote to warrant sustaining the protest. *See FedSys, Inc.,*



B-401453, Sept. 8, 2009, 2009 CPD ¶ 181 at 9; TELESIS Corp., B-299804, Aug. 27, 2007, 2007 CPD ¶ 150 at 7.

On this record, we find no basis to sustain TrustSolutions' protest concerning the technical evaluation.

#### Discussions with AdvanceMed

Finally, AdvanceMed argues that CMS failed to provide meaningful discussions because the agency misled the protester into increasing its proposed costs, despite the fact that it had already proposed the highest costs.

The FAR requires agencies to conduct discussions with offerors in the competitive range concerning, "at a minimum . . . deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond." FAR § 15.306(d)(3). Discussions, when conducted, must be meaningful; that is, they may not mislead offerors and must identify proposal deficiencies and significant weaknesses that could reasonably be addressed in a manner to materially enhance the offeror's potential for receiving award. Serco Inc., B-405280, Oct. 12, 2011, 2011 CPD ¶ 237 at 11.

During discussions, the CMS asked AdvanceMed to address several areas where it believed that the protester had not adequately explained its proposed costs, including this example:

For CLIN 0001, please provide rationale for not proposing FTE[s] for the following labor categories relative to the projected workload as well as your unique technical approach: [deleted].

AR, Tab 6a, AdvanceMed Discussions, at 4.

AdvanceMed contends that this and similar questions led it to believe that the agency required the protester to propose additional staff. The protester contends that these discussions were prejudicially misleading because they caused it to increase its costs, despite having already proposed higher costs than the other offerors. As the agency explains, however, the questions did not expressly require or instruct the protester to increase its costs. Although the protester contends that it reasonably interpreted the discussion questions as requiring increased staffing, we do not think that the questions precluded AdvanceMed from explaining a technical approach that did not require the FTEs at issue, nor did they preclude the protester from proposing to reduce its costs in those areas or other areas in its proposal. In sum, we find no basis to conclude that the discussions were misleading.

## Selection Decision

Finally, the protesters argue that the selection decision placed improper emphasis on Cahaba's low cost, despite the RFP's statement that the technical evaluation factors were "significantly more important than cost or price."<sup>16</sup> See RFP § M.1.a.

Source selection officials in negotiated procurements have broad discretion in determining the manner and extent to which they will make use of the technical and price evaluation results; price/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the test of rationality and consistency with the solicitation's evaluation criteria. World Airways, Inc., B-402674, June 25, 2010, 2010 CPD ¶ 284 at 12. Even where, as here, technical merit is significantly more important than cost, an agency may properly select a lower-cost, lower-rated proposal if it reasonably decides that the cost premium involved in selecting a higher-rated, higher-cost proposal is not justified. Hogar Crea, Inc., B-311265, May 27, 2008, 2008 CPD ¶ 107 at 8.

Here, the CO's selection decision specifically acknowledged that the RFP's evaluation scheme stated that CMS was more concerned with obtaining superior technical/management features than with making an award to the proposal with the lowest overall cost. AR, Tab 30, SSD, at 9. The CO specifically noted the superior technical proposals and strengths offered by the protesters, but ultimately concluded that the price premium for the protesters' higher technically-rated proposals, as compared to Cahaba's lower technically-rated proposal, was not warranted. Id. at 9-11. On this record, we find no basis to conclude that the CO abandoned the RFP evaluation criteria or abused her discretion in making award to Cahaba.

The protests are denied.

Lynn H. Gibson  
General Counsel

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<sup>16</sup> The protesters also argue that CMS did not consider the risk associated with the award of multiple ZPIC zones to a single contractor, as required by the solicitation. RFP § M.2.A.1.I. The record shows that the agency conducted a separate analysis of the risk of awarding more than one ZPIC contract to Cahaba. AR, Tab 35, Multi-Zone Risk Analysis, at 1-2.