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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Palmetto GBA, LLC

File: B-410597.2; B-410597.3

Date: August 26, 2015

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DIGEST

Protest challenging the agency's evaluation of the awardee's proposal is sustained where the awardee's misrepresentation of its proposed key personnel materially affected the agency's technical and cost evaluations, resulting in a flawed best value tradeoff and source selection decision.

DECISION

Palmetto GBA, LLC, of Columbia, South Carolina, protests the award of a contract to AdvanceMed Corporation of Baltimore, Maryland, under request for proposals (RFP) No. HHSM-500-2012-RFP-0008, issued by the Department of Health and Human Services, Center for Medicare and Medicaid Services (CMS), for a National Supplier Clearinghouse Medicare Administrative Contractor (NSCMAC). Palmetto challenges the agency's technical and cost evaluations and source selection decision.

We sustain the protest.

BACKGROUND

The NSCMAC is the single CMS contractor that issues and revokes Medicare billing privileges for suppliers of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). RFP amend. 2, § J.1, Statement of Work (SOW), at 5. The

NSCMAC enrolls DMEPOS suppliers, conducts announced and unannounced site visits to their facilities, and hears appeals from suppliers whose billing privileges have been revoked. Id. § 3, Enrollment; § 4, Hearings; § 6, Supplier Site Visits. The NSCMAC also investigates potential fraud by DMEPOS suppliers, and assists other entities in that regard, including CMS Zone Program Integrity Contractors (ZPIC).[1] Id. § 5, Fraud, Supplier Audit & Compliance Unit (SACU).

The Solicitation

The RFP was issued under Federal Acquisition Regulation (FAR) part 15 on February 27, 2013, and was amended twice. The solicitation provided for award of a cost-plus-fixed-fee (CPFF) contract, for a base year and 4 option years, on a best-value basis considering cost and the following evaluation factors in descending order of importance: technical approach; implementation/transition approach and plan; staffing plan; past performance; key personnel; and quality control plan. RFP amend. 2, at 13, 102, 106. The RFP stated that all evaluation factors other than cost, when combined, were significantly more important than cost. Id. at 102. Offerors were to submit separate technical and business (i.e., cost) proposals, and conduct a 1-hour and 45-minute presentation.[2] Id. at 83, 98-99.

With respect to the implementation/transition approach and plan (hereinafter, transition plan) factor, offerors were to describe their proposed staffing for the implementation period (which was not to last more than 3 months) and their plan to ensure that employees are familiar with current issues and cases, among other things.[3] Id. at 94-95; SOW § 9, Transition, at 51-2; RFP, § J.1, app. 6, Implementation/Transition Tasks & Activities. Offerors were also to identify risks and describe their risk mitigation plan. RFP amend. 2, at 95. The RFP stated that offerors would be evaluated on the degree of risk and ability to be fully operational

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[1] ZPICs perform program integrity functions for Medicare and Medicaid, including identifying improper claims and payments, and preventing waste, fraud, and abuse. See TriCenturion, Inc.; SafeGuard Services, LLC, B-406032 et al., Jan. 25, 2012, 2012 CPD ¶ 52 at 2. ZPICs were formally known as Program Safeguard Contractors (PSC). AdvanceMed (the awardee) currently holds a number of ZPIC contracts, and has previously held other ZPIC and PSC contracts. See Agency Report (AR), Tab 4b, AdvanceMed Tech. Proposal, Past Performance, at 79-107.

[2] Offerors were also to submit organizational conflict of interest (OCI) disclosures. RFP at 33-37, 98, 106-7. Palmetto initially protested CMS's evaluation of AdvanceMed's OCI disclosures (based on its ZPIC contracts, noted above), but Palmetto later withdrew this protest ground. Protester's Comments at 1 n.1.

[3] Palmetto does not protest the agency's evaluations under the technical approach and quality control factors.

by a specified date; their ability to establish all necessary staffing and infrastructure; and the qualifications and experience of their proposed transition personnel. Id. at 104-5.

With respect to the staffing plan factor, offerors were to describe the proposed qualifications and number of staff for each labor category, and the offeror's plan for hiring, retaining, and increasing (or reallocating) staff. Id. at 95. The RFP stated that offerors would be evaluated on their ability to provide and retain qualified personnel; how quickly the offeror could provide staffing with the least amount of disruption; and the competence and experience of proposed staff. Id. at 105.

With respect to the key personnel factor, offerors were to propose individuals for eight key positions required by the SOW, including, as relevant here, an Assistant Multi-specialty Provider Enrollment (MSPE) Project Administrator and a MSPE Hearings and Appeals Lead Analyst (hereinafter, assistant MSPE administrator and lead hearing analyst, respectively).[4] Id. at 96; SOW at 7-9. The RFP required resumes for each individual and specified qualifications for each position; for example, the lead hearing analyst must have at least 2 years of experience making relevant determination decisions and be familiar with applicable Medicare regulations and policies. RFP amend. 2, at 96; SOW at 7-9. A letter of commitment stating the individual's availability dates was required for any proposed key personnel not currently employed by the prime offeror. RFP amend. 2, at 96. The RFP stated that the experience and qualifications of proposed key personnel would be evaluated by comparing resumes and commitment letters to SOW requirements. Id. at 106.

With respect to the past performance factor, offerors were to provide (for themselves and for each proposed subcontractor) no more than three relevant performance evaluations for the same or similar SOW effort performed over the past 3 years. Id. at 96. The RFP stated that past performance would be evaluated, among other things, on an offeror's management of key personnel, including whether the offeror's work force was properly trained for their assigned tasks. Id. at 105-6.

With respect to the cost factor, offerors were to propose estimated costs, fixed-fees, and a total CPFF for each performance period, using pricing spreadsheets that were included as attachments to the RFP. Id. at 6, 89-92; § J, exh. E-1, Bus. Proposal Spreadsheet. Offerors were also to propose their own labor mix/hours and identify

[4] The other required key personnel were: (1) NSCMAC Director; (2) NSCMAC Assistant Project Administrator; (3) SACU Manager; (4) SACU Assistant Manager; (5) Hearings & Appeals Manager; and (6) MSPE Manager. SOW, § 2.1, Key Personnel Requirements, at 7-9. An offeror could also propose additional key personnel. See RFP amend. 2, at 96.

total FTEs and cost elements (such as direct labor rates, travel, and other direct costs) by performance period, proposed subcontractor, and SOW task. RFP amend. 2, at 91; § J, exh. E-1, Bus. Proposal Spreadsheet. Detailed bases of estimates were required; for example, proposed labor rates were to be supported by payroll information, letters of intent, or salary survey data, and offerors were to provide rationales for each proposed labor category and hours using historical data, the position's technical experience, etc. See id. at 91. The RFP provided assumptions for the numbers of applications, hearings, site visits, and other estimates that offerors were to use in developing their cost proposals. Id. at 89-90. The RFP stated that an offeror's total proposed estimated cost would include proposed costs for each performance period, and would be evaluated for reasonableness and cost realism. Id. at 109.

Proposals

CMS received proposals from four offerors, including AdvanceMed and Palmetto (the incumbent), by the April 23, 2013, due date. Contracting Officer's Statement (COS) at 4. AdvanceMed and Palmetto made presentations to agency evaluators on April 30 and May 9, 2013, respectively. Id. CMS conducted discussions with all four offerors and requested submission of final proposal revisions (FPR) by June 18, 2014 (that is, 14 months after receipt of initial proposals). Id. On September 25, CMS announced its (initial) award to AdvanceMed.

On September 29 (4 days after the initial award), AdvanceMed submitted a request to substitute five key personnel "[d]ue to various staffing changes that have transpired since our proposal was submitted[,]" including its proposed assistant MSPE administrator and lead hearing analyst.[5] AR, Tab 14, 1st Key Personnel Substitution Request, at 1-3. The agency did not immediately respond to AdvanceMed's request to substitute key personnel. COS at 5 n.2.

Palmetto's First Protest

On October 7, Palmetto filed a timely protest with our Office challenging the award to AdvanceMed and CMS' evaluations and best value tradeoff. Among other things, Palmetto alleged that AdvanceMed's unrealistically low proposed costs increased its performance risk, including for the transition period, and reflected AdvanceMed's proposal of inexperienced staff. Palmetto maintained that as the incumbent, it had more experience than AdvanceMed, and argued that CMS evaluated the two offerors' transition plans and performance risk unequally in that regard.

[5] The RFP provides that the contractor may not divert or otherwise replace any key personnel without the contracting officer's written consent. RFP amend. 2, at 17.

In response to Palmetto's protest, CMS informed our Office that it would take corrective action. CMS stated that it intended to review the issues raised in the protest and take all necessary and appropriate actions. CMS Notice of Corrective Action, Oct. 21, 2014. The agency also stated that it intended to reevaluate final proposal revisions, and reserved the right to reopen discussions and solicit further revised proposals if deemed necessary. Id. We dismissed Palmetto's (first) protest because CMS's proposed corrective action rendered the protest academic. Palmetto GBA, LLC, B-410597, Oct. 23, 2014 (non-digested dismissal). CMS issued a stop-work order to AdvanceMed and did not ultimately respond to its request to substitute key personnel. COS at 5 n.2.

Corrective Action

According to CMS, its corrective action involved reevaluating AdvanceMed's and Palmetto's past performance, and reevaluating AdvanceMed's cost proposal. See COS at 6. In its agency report submitted in response to the instant protest, CMS states that it reviewed its evaluators' earlier consensus evaluations under the other evaluation factors (i.e., technical approach; transition plan; staffing plan; key personnel; and quality control plan) and determined that there was no reason to fully reevaluate proposals under those factors.[6] Id.

The agency did not reopen discussions, but requested (on February 10, 2015) that AdvanceMed provide a statement stipulating that its previously submitted FPR continued to meet all RFP terms and conditions, and that AdvanceMed extend its proposal's acceptance period through April 30. See AR, Tab 3d-1, CMS Letter to AdvanceMed, Feb. 10, 2015, at 17. AdvanceMed replied on that same date and extended the acceptance period as requested. AR, Tab 3d-1, AdvanceMed Email to CO, Feb. 10, 2015, at 18. AdvanceMed's reply did not stipulate that its FPR continued to meet the solicitation's terms and conditions, as requested by CMS, nor is there any indication in the record that AdvanceMed ever made such a stipulation. See id.

[6] However, CMS states that it "ma[d]e some changes to the portions of the consensus evaluations addressing the non-past performance technical factors." COS at 6. CMS states that those changes were finalized in May 2015, but the agency does not explain, nor does the record indicate, the nature of those changes. See id., citing AR, Tab 8c, TEP Chairman's Email to Contract Specialist, May 1, 2015.

FPRs were rated as follows:

		AdvanceMed	Palmetto	Offeror C	Offeror D
Technical Approach		Very Good	Excellent	Very Good	Very Good
Transition Plan		Very Good	Excellent	Very Good	Very Good
Staffing Plan		Very Good	Excellent	Very Good	Satisfactory
Past Performance		Very Good	Excellent	Very Good	Satisfactory
Key Personnel		Very Good	Excellent	Very Good	Very Good
Quality Control		Excellent	Excellent	Excellent	Excellent
Cost	Proposed	$51,914,775	$66,491,357	$76,544,420	$95,784,709
	Probable	$52,453,036	--	--	--

AR, Tab 13, Source Selection Decision (SSD), at 28-29.[7] Technical proposals were evaluated by an agency technical evaluation panel (TEP), which documented its findings and assignment of strengths, weaknesses, and consensus ratings in a detailed evaluation report. See AR, Tab 8, Tech. Evaluations. Past performance was evaluated by the agency's contract specialist. COS at 4, 6; see AR, Tab 9, Past Performance Evaluations. Their evaluation findings are discussed in relevant part below.

Of significance here, CMS only evaluated and conducted a cost realism analysis of AdvanceMed's cost proposal; the agency did not evaluate cost proposals submitted by the other offerors, including Palmetto. AR, Tab 11, Pre-Negotiation Mem., at 6; Supp. Mem. of Law (MOL) at 1-2; COS at 8. The record states that, since AdvanceMed submitted the offer with the lowest proposed cost and one of the highest evaluated technical proposals, "all other proposals were evaluated at their submitted value until such a time when determining the realism of those proposals would have been necessary." AR, Tab 11, Pre-Negotiation Mem., at 9.

The TEP chairman and the contract specialist evaluated AdvanceMed's cost proposal using the following cost analysis techniques: (1) comparing AdvanceMed's proposed labor rates to Bureau of Labor Statistic rates for similar labor categories in the relevant geographic area; (2) comparing its proposed labor mix/hours to its technical proposal and the SOW tasks; (3) evaluating its method for estimating labor hours; (4) evaluating its (and its proposed subcontractors')

[7] For the sake of brevity, we list only the offerors' overall ratings for each evaluation factor and omit the ratings for the 21 evaluation subfactors.

assumptions regarding staffing, experience, and training, among other things; (5) comparing its proposed labor escalation rate to market forecasts for the relevant outyears; and (6) performing a structured, weighted profit/fee analysis.[8] See id. at 9-20; Tab 10, Cost Evaluation. The cost evaluators recommended an upward adjustment of approximately $540,000 to AdvanceMed's proposed costs to provide for an additional provider enrollment representative and longer training periods for those proposed positions.[9] AR, Tab 11, Pre-Negotiation Mem., at 9. The evaluators also concluded that AdvanceMed's costs were fair and reasonable. See id. at 29.

The contracting officer, who was the source selection authority (SSA) for the procurement, independently reviewed proposals and concurred with the evaluation ratings and findings, and she conducted a best value tradeoff.[10] AR, Tab 13, SSD, at 2, 31-35. She acknowledged that Palmetto's proposal was stronger and offered advantages over AdvanceMed's proposal. Id. at 35. However, she attributed those advantages to Palmetto's experience as the incumbent and concluded that they did not warrant paying the 27 percent cost premium over AdvanceMed's lower-cost proposal, which otherwise exceeded RFP requirements. Id. The contracting officer determined that AdvanceMed's proposal provided the best value to the government and selected it for award. Id. at 36.

On April 30, CMS announced its new award decision to AdvanceMed and notified unsuccessful offerors.[11] COS at 9. On May 18, Palmetto filed the instant protest challenging, once again, the award to AdvanceMed.

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[8] The record states that the cost evaluators also verified current payroll records submitted by AdvanceMed in order to determine whether its labor rates for its proposed key personnel were realistic; however, as discussed below, the purported verification is not supported by the record. See AR, Tab 11, Pre-Negotiation Mem., at 12-15.

[9] CMS's independent government cost estimate (IGCE) for the procurement was approximately $142 million. 2nd Supp. MOL at 6 n.3. However, the agency determined that the IGCE was flawed because of the significant differences between it and offerors' proposed costs. As a result, the evaluators did not rely on the IGCE in their cost analysis. AR, Tab 11, Pre-Negotiation Mem., at 9.

[10] The contracting officer that performed the best value determination and source selection decision was assigned to the procurement in June 2014; a different contracting officer was previously assigned to the procurement. AR, Tab 13, SSD, at 2; COS at 1.

[11] On May 12, AdvanceMed submitted a second request to CMS to substitute five key personnel "[d]ue to the various staffing changes that have occurred during the Stop Work Order," including, again, its proposed assistant MSPE administrator and (continued...)

DISCUSSION

Palmetto protests CMS's evaluation of proposals under the transition plan, staffing plan, past performance, key personnel, and cost evaluation factors, and the agency's best value tradeoff. We have considered each of the protester's allegations, and while our decision here does not specifically discuss each of the protester's arguments, we sustain Palmetto's protest based on CMS's flawed key personnel and cost evaluations, and the agency's best value tradeoff and source selection decision.[12]

Key Personnel Evaluation

Palmetto alleges that AdvanceMed's (June 18, 2014) FPR misrepresented that its proposed assistant MSPE administrator and proposed lead hearing analyst would perform the contract. Palmetto cites publicly available LinkedIn profiles[13] indicating that the individual proposed as the assistant MSPE administrator left the employment of AdvanceMed in October 2013, and that the individual proposed as the lead hearing analyst left the employment of AdvanceMed in May 2014.[14] Palmetto points out that AdvanceMed's FPR included resumes for these individuals even though they were no longer employed by the company at the time it submitted its FPR. Palmetto also complains that AdvanceMed's FPR did not include letters of commitment from these individuals (indicating their availability dates), as required by the RFP for proposed key personnel that were not currently employed by the offeror. In that regard, Palmetto maintains that CMS should have rejected AdvanceMed's proposal as technically unacceptable for failing to meet a material solicitation requirement, or reopened discussions with all offerors.

An offeror may not propose to use specific personnel that it does not expect to use during contract performance, as doing so would have an adverse effect on the

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(...continued)
lead hearing analyst. AR, Tab 14b, 2nd Key Personnel Substitution Request, at 36. CMS denied the request on that same date. Id.

[12] For example, we find no merit to Palmetto's challenge of CMS's documentation of oral presentations, which, consistent with FAR requirements, includes evaluators' notes on the presentations and AdvanceMed's and Palmetto's presentation materials. See AR, Tabs 6-7, Presentation Slides & Notes; FAR § 15.102(e).

[13] LinkedIn is a social networking website for people in professional occupations, and is used mainly for professional networking. See www.linkedin.com.

[14] Compare Protester's Comments, exh. A-B, LinkedIn Profiles with AR, Tab 4a, AdvanceMed FPR, Bus. Proposal, Key Personnel Salary Summary, at 149 and Tab 4b, AdvanceMed FPR, Tech. Proposal, Key Personnel Resumes, at 75-78.

integrity of the competitive procurement system and generally provides a basis for proposal rejection. See AdapTech Gen. Scientific, LLC, B-293867, June 4, 2004, 2004 CPD ¶ 126 at 5. Where an offeror knows prior to submission of its final offer that proposed key employees are no longer available, the offeror should withdraw the individuals and, in its final offer, propose substitutes who will be available. CBIS Fed. Inc., B-245844.2, Mar. 27, 1992, 92-1 CPD ¶ 308 at 5. To do otherwise is, in effect, to misrepresent the availability of proposed personnel which, in turn, compromises the validity of the technical evaluation, regardless of whether post-award substitutions of key personnel may later be made and approved by the agency pursuant to a clause in the awardee's contract. Id. An offeror's material misrepresentation in its response to a solicitation can provide a basis for disqualification and cancellation of an award based upon the response. Johnson Controls Sec. Sys., B-296490, B-296490.2, Aug. 29, 2005, 2007 CPD ¶ 102 at 5.

Significantly, neither CMS, nor AdvanceMed (which intervened in this protest), refutes Palmetto's allegation. See 2nd Supp. MOL at 3-4; Intervenor's Supp. Comments at 7-9. Neither party disputes the employment dates identified in the LinkedIn profiles, nor Palmetto's assertion that AdvanceMed was required to submit letters of commitment. Also noteworthy, on February 10, 2015, CMS requested that AdvanceMed stipulate that its June 18, 2014, FPR continued to meet all RFP terms and conditions; however, as stated above, nothing in the record indicates that AdvanceMed ever made the requested stipulation. Thus, by not refuting Palmetto's allegation, CMS and AdvanceMed, in our view, have essentially conceded that AdvanceMed misrepresented that its proposed assistant MSPE administrator and proposed lead hearing analyst would perform the contract, and there is nothing in the record to demonstrate otherwise.[15]

Nonetheless, CMS argues that any alleged misrepresentation did not materially impact its evaluation and selection of AdvanceMed's proposal, because AdvanceMed was not specifically assigned strengths for proposing those two individuals. See 2nd Supp. MOL at 3. AdvanceMed also maintains that the alleged misrepresentation had no material impact on the award, because according to AdvanceMed, it proposed to replace those individuals, post-award, with more qualified personnel. Intervenor's Supp. Comments at 8-9, citing AR, Tab 14, Key Personnel Substitution Requests, at 1-3, 19-21. AdvanceMed argues that, even assuming that Palmetto's allegations are correct, the protester cannot demonstrate the elements necessary to establish an improper "bait and switch." Intervenor's Supp. Comments at 7.

[15] To be clear, our finding that AdvanceMed misrepresented the availability of the two individuals is not based on Palmetto's submission, or the accuracy, of the LinkedIn profiles.

To establish an improper bait and switch, a protester must generally show that the firm in question either knowingly or negligently made a misrepresentation regarding resources that it did not expect to furnish during contract performance, and that the misrepresentation was relied upon by the agency in the evaluation and had a material impact on the evaluation results. Aerospace Design & Fabrication, Inc., B-278896.2 et al., May 4, 1998, 98-1 CPD ¶ 139 at 5-11.

Palmetto has made the requisite showing here. Based on our review of the evaluation record, we find that AdvanceMed misrepresented that its proposed assistant MSPE administrator and proposed lead hearing analyst would perform the contract. The record also demonstrates that the misrepresentation materially impacted CMS's evaluation of AdvanceMed's proposal under a number of evaluation factors, including cost.

For example, AdvanceMed's FPR states that all key personnel--including its proposed assistant MSPE administrator and lead hearing analyst--would be assigned to its transition team on a full-time basis throughout the transition, and that they were directly involved in designing AdvanceMed's transition plan. See AR, Tab 4a, AdvanceMed FPR, Bus. Proposal, at 145, 149, 291, 296, 299; Tab 4b, AdvanceMed FPR, Tech. Proposal, at 31-32. The FPR also states that the assistant MSPE administrator coordinated transitions of PSC and ZPIC contracts. See AR, Tab 4b, AdvanceMed FPR, Tech. Proposal, at 75-76; supra n.1 (describing ZPIC and PSC contracts). Moreover, the record indicates that both the proposed assistant MSPE administrator and the lead hearing analyst participated in AdvanceMed's oral presentation to the TEP in 2013. AR, Tab 6, AdvanceMed Presentation Slides, at 2; Tab 6a, Evaluator Presentation Notes, at 1. By not advising the agency that these employees had departed, the company continued to benefit from the agency's view--apparent from the evaluation materials--that these individuals would contribute to the AdvanceMed's performance of the contract.

In this respect, the evaluation record shows that AdvanceMed's proposal was assessed a strength under the transition plan evaluation factor, because it proposed to have all key personnel "on board" at award, which the TEP found "alleviates some risks associated with the startup and transition activities." See AR, Tab 8a, AdvanceMed TEP Evaluation, at 13. AdvanceMed's overall rating under the transition plan factor also reflected the evaluators' finding that AdvanceMed was experienced in, and demonstrated a full understanding of, transitions of the type required here. Id. During AdvanceMed's oral presentation, individual evaluators also noted a number of strengths in that regard, including that AdvanceMed clearly had past experience with successful transitions and presented a methodical approach to implementation and transition; that most of its staff had exceptional knowledge base of ZPIC work; and that its key personnel were available at award. See AR, Tab 6a, Evaluator Presentation Notes, at 21, 43, 50, 68.

AdvanceMed's FPR also states that its proposed lead hearing analyst has 13 years of experience making determination decisions. AR, Tab 4b, AdvanceMed FPR, Tech. Proposal, at 77. In this respect, the record shows that AdvanceMed's overall rating under the key personnel factor reflected the evaluators' finding that AdvanceMed's key personnel were "highly experienced in . . . the area of hearings and appeals." AR, Tab 8a, AdvanceMed TEP Evaluation, at 19. (As stated above, the RFP only required that the lead hearing analyst have at least 2 years of experience making determination decisions. SOW at 9.)

Furthermore, AdvanceMed's FPR cites its past performance of a PSC contract, and, as noted above, states that its proposed assistant MSPE administrator coordinated transitions of PSC and ZPIC contracts. AR, Tab 4b, AdvanceMed FPR, Tech. Proposal, at 75-76, 101-7. The contract specialist assigned a strength to AdvanceMed's FPR under the past performance factor, based, in part, on a Contractor Performance Assessment Report (CPAR) prepared by CMS's contracting officer for the PSC contract that described AdvanceMed's management team as "experienced, reliable, and responsive."[16] AR, Tab 9, Past Performance Evaluation, at 4-6; Tab 9a, AdvanceMed PSC CPAR, at 1-6.

Moreover, with regard to CMS's cost evaluation, the record of the agency's cost realism analysis states that, during discussions, CMS took exception to AdvanceMed's proposed labor rates for these two individuals, based on the agency's initial evaluation of AdvanceMed's cost proposal and market research. AR, Tab 11, Pre-Negotiation Mem., at 12-14.

The record also states that:

> In response, AdvanceMed provided payroll verification for the [two positions]. This was determined to be acceptable because the payroll information indicated that the individual[s] proposed [were] already employed by AdvanceMed and currently being paid at the proposed rate.

Id. at 14.

While AdvanceMed's FPR states that it includes its most recent payroll records for the two individuals, the FPR does not, in fact, include those records, and the contemporaneous record contains no evidence of the purported payroll records. See id.; compare AR, Tab 4a, AdvanceMed FPR, Bus. Proposal, June 28, 2014,

[16] As noted above, the RFP stated that past performance would be evaluated, among other things, on an offeror's management of key personnel, including whether the offeror's work force was properly trained for their assigned tasks. RFP amend. 2, at 105-6.

at 149 with append. C, Payroll Date for Key Personnel, at 361-67. Additionally, as stated above, nothing in the record indicates that AdvanceMed responded to CMS's February 10, 2015, request that AdvanceMed stipulate that its FPR continued to meet all RFP terms and conditions.[17] As also noted above, AdvanceMed does not refute Palmetto's allegation that these individuals were not, in fact, employed by AdvanceMed at the time that it submitted its FPR.

Accordingly, based on the misrepresentations in AdvanceMed's FPR described above, and the corresponding evaluations, we sustain Palmetto's protest of CMS's evaluation of AdvanceMed's technical proposal with regard to its proposed assistant MSPE administrator and lead hearing analyst.[18] Aerospace Design & Fabrication, Inc., supra (misrepresentations in awardee's proposal had a ripple effect on its evaluation); see Omni Analysis, B-233372, Mar. 6, 1989, 89-1 CPD ¶ 239 at 2-3 (protest sustained in part where awardee failed to disclose material changes in the availability of its proposed key personnel which occurred between the submission of initial and best and final offers), recon. den., Omni Analysis; Dep't of the Navy--Recon., B-233372.2, B-233372.3, July 24, 1989, 89-2 CPD ¶ 73 at 2-3 (affirming prior decision sustaining protest despite the agency's contention that protester was not prejudiced where the record remains unclear as to what selection decision would have been made if the awardee had submitted a factually accurate final offer concerning the availability and number of its proposed key personnel).

[17] We note that CMS claims that it reevaluated AdvanceMed's final cost proposal as part of its corrective action in response to Palmetto's initial protest, which, among other things, specifically challenged the agency's cost realism analysis.

[18] We otherwise find no merit to Palmetto's allegation that AdvanceMed also misrepresented its proposed NSCMAC Director, NSCMAC Assistant Project Administrator, and SACU Manager (see key personnel positions, supra n.4), because the protester's arguments in that regard are premised on AdvanceMed's September 29, 2014, request to substitute key personnel. As CMS points out, a request to substitute key personnel, without more, does not establish an improper bait and switch. AdapTech Gen. Scientific, LLC, supra, at 5-6; RONCO Consulting Corp., B-280113, Aug. 11, 1998, 98-2 CPD ¶ 41 at 6 (Substitution of key personnel after contract award generally is not objectionable unless the offeror intentionally misrepresented the availability of personnel or was aware of the unavailability of personnel during the procurement process.) Unlike its submission of LinkedIn profiles for the other challenged personnel, Palmetto has not made any showing that AdvanceMed misrepresented its proposed NSCMAC Director, NSCMAC Assistant Project Administrator, or SACU Manager.

Cost Realism

Palmetto also argues that CMS's failure to perform cost realism analyses of all offerors' cost proposals violated the FAR and the terms of the solicitation and resulted in a flawed best value tradeoff. According to Palmetto, CMS was required to evaluate the realism of all cost proposals in order to account for offerors' differing assumptions regarding key cost drivers, particularly labor hours and the type of personnel proposed for enrolling suppliers and conducting site visits. We agree.

In reviewing protests of an agency's evaluation and source selection decision, our Office does not reevaluate proposals; rather, we review the record to determine if the evaluation was reasonable, consistent with the solicitation's evaluation scheme, as well as procurement statutes and regulations, and adequately documented. See Wackenhut Servs., Inc., B-400240, B-400240.2, Sept. 10, 2008, 2008 CPD ¶ 184 at 6.

The FAR requires that when an agency evaluates a proposal for the award of a cost-reimbursement contract, the evaluation must include a cost realism analysis to determine what the government should realistically expect to pay for the proposed effort, the offeror's understanding of the work, and the offeror's ability to perform the contract. FAR § 15.305(a)(1). An offeror's proposed costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR § 15.404-1(d); TriCenturion, Inc.; SafeGuard Services, LLC, supra at 6. Our review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonably based and not arbitrary. Id.

Specifically, the FAR states that:

> (1) Cost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror's proposed cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the unique methods of performance and materials described in the offeror's technical proposal.
>
> (2) Cost realism analyses shall be performed on cost-reimbursement contracts[19] to determine the probable cost of performance for each offeror. (i) The probable cost may differ from the proposed cost and

[19] As noted above, the RFP provided for award of a CPFF contract, which is a type of cost reimbursement contract. RFP amend. 2, at 6; see FAR § 16.306, CPFF Contracts.

> should reflect the Government's best estimate of the cost of any contract that is most likely to result from the offeror's proposal. The probable cost shall be used for purposes of evaluation to determine the best value. (ii) The probable cost is determined by adjusting each offeror's proposed cost, and fee when appropriate, to reflect any additions or reductions in cost elements to realistic levels based on the results of the cost realism analysis.

FAR § 15.404-1(d) (emphasis added).

These provisions, unequivocally, required CMS to perform a cost realism analysis of each cost proposal, including Palmetto's. In addition, the FAR language above specifically recognizes that a realism review should reflect additions or reductions to proposed costs. We see no basis in the FAR provisions quoted above to limit cost realism analyses, as CMS did here, to the proposal offering the lowest estimated cost. Likewise, the RFP specifically provided that cost proposals would be evaluated for cost realism. RFP amend. 2, at 109.

Competitive Prejudice

CMS acknowledges that it did not perform cost realism analyses of all offers, but asserts that Palmetto was not competitively prejudiced by the agency's "favorable assumptions" that as the incumbent, Palmetto proposed realistic costs that reflected its clear understanding of the requirement and were consistent with its technical proposal. Supp. MOL at 1-2. CMS suggests that Palmetto's challenge to the cost realism analysis is disingenuous, because Palmetto has not shown any elements of its own cost proposal that the agency should have adjusted downward to make it more competitive. Id. In any event, CMS argues that such a showing would only indicate that Palmetto's cost proposal was unrealistic and reflected a misunderstanding of the requirements. Id.

Palmetto contends that it was prejudiced by CMS's failure to evaluate offerors' cost proposals equally. Palmetto argues that by limiting its cost realism analysis to only the lowest estimated cost proposal (i.e., AdvanceMed's), CMS could not identify pricing differences and make probable cost adjustments necessary to evaluate the true cost of proposals and conduct a proper cost/technical tradeoff decision.

Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. Supreme Foodservice GmbH, B-405400.3 et al., Oct. 11, 2012, 2012 CPD ¶ 292 at 14. We resolve any doubts regarding competitive prejudice in favor of a protester; thus, where there is a reasonable possibility that the protester was

prejudiced by the agency's actions, we will sustain a protest. Coburn Contractors, LLC, B-408279.2, Sept. 30, 2013, 2013 CPD ¶ 230 at 5.

Since CMS's selection decision, discussed below, was based in part on considerations that did not accurately reflect differences between offerors' cost proposals, we conclude that Palmetto has met its burden in establishing prejudice, and we therefore sustain its protest of CMS's cost evaluation.[20]

Best Value Determination

In our view, CMS's best value tradeoff was flawed because it relied on technical and cost evaluations that, as described above, were materially impacted by AdvanceMed's misrepresentation of two of its eight proposed key personnel. The record shows that in weighing the relative technical merits of proposals, the SSA considered AdvanceMed's "sound [implementation/transition] approach based on [its] experience in transitions" and its proposal of "highly experienced" key personnel with an "abundance" of Medicare experience. AR, Tab 13, SSD, at 33-34. The record also shows that the probable cost of AdvanceMed's proposal was determined, in part, based on an unsupported finding that its proposed labor rates for the two misrepresented personnel were realistic.[21] Such flaws, as the protester asserts, provided no true basis for CMS to weigh the overall technical merit of AdvanceMed's and Palmetto's proposals relative to their probable costs.

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[20] We find no merit to Palmetto's challenge to AdvanceMed's submission of financial statements from its parent company, instead of financial statements from AdvanceMed itself, because the RFP permitted such submissions. RFP amend. 2, at 87.

[21] Palmetto also disputes CMS's cost realism analysis of AdvanceMed's proposal, arguing that it was "perfunctory" and should have resulted in "massive" cost adjustments. Protester's Comments at 26-28. However--with the fatal exception of CMS's failure to evaluate the realism of other cost proposals and its unsubstantiated reliance on AdvanceMed's payroll records--we otherwise find that the evaluators' cost analysis techniques described above (supra at 6-7) were consistent with FAR requirements. 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. In this respect, we find no merit to Palmetto's argument that the cost realism analysis was necessarily flawed because it failed to consider the agency's IGCE. As a general matter, when assessing cost realism, there is no per se requirement that an agency compare offerors' proposed costs with the government estimate. CGI Fed. Inc., B-403570 et al., Nov. 5, 2010, 2011 CPD ¶ 32 at 7.

In light of the multiple flaws in the agency's cost and technical evaluations, we have no basis to speculate on how the agency would have viewed the overall relative merit of proposals. See Aerospace Design & Fabrication, Inc., supra; see, e.g., Future-Tec Mgmt. Sys, Inc.; Computer & Hi-Tech Mgmt., Inc., B-283793.5, B-283793.6, Mar. 20, 2000, 2000 CPD ¶ 59 at 18 (protest of agency's source selection decision sustained where it was based on both improper cost realism adjustment and flawed technical evaluation). Accordingly, we find that CMS's best value determination and source selection decision were unreasonable, and we sustain Palmetto's protest.

RECOMMENDATION

We recommend that the agency reevaluate technical and cost proposals, and if appropriate, conduct discussions and obtain revised proposals.[22] At the conclusion of this review, we recommend that CMS make a new source selection decision. In the event that a proposal other than AdvanceMed's is found to offer the best value to the government, the agency should terminate AdvanceMed's contract and make award on the basis of that proposal. Finally, we recommend that Palmetto be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). Palmetto should submit its certified claims for costs directly to the contracting agency within 60 days after receipt of this decision. Id., § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel

[22] We recognize that in some cases we have recommended that the awardee be disqualified from the competition based on the awardee's significant misrepresentations; however, disqualifying a proposal or barring an offeror from consideration for award is a remedy that we reserve for the most serious of material misrepresentations. A&T Eng'g Techs., VECTOR Research Div., B-282670, B-282670.2, Aug. 13, 1999, 99-2 CPD ¶ 37 at 10 n.6, citing Informatics, Inc., B-188566, Jan. 20, 1978, 78-1 CPD ¶ 53 at 13 (where our disqualification recommendation was based on the awardee's significant misrepresentations and pervasive disregard for the truth).