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## Decision

**Matter of:** BillSmart Solutions, LLC

**File:** B-413272.4; B-413272.5

**Date:** October 23, 2017

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### DIGEST

1. Protest challenging the evaluation of awardee's past performance is denied where the record shows the agency reasonably considered the offeror's prior performance references; protester's assertion that agency unreasonably ignored certain past performance information is denied where the protester fails to demonstrate that the information in question was relevant, or that the agency evaluators knew or should have known of the information.
2. Protest challenging evaluation of awardee's price is denied where the nature and extent of the agency's price realism analysis was a matter within its discretion, and the record shows that the evaluation was reasonable.
3. Protest challenging the agency's evaluation of offerors' prior experience is denied where the evaluation was reasonable and consistent with the stated evaluation criteria and adequately documented.
4. Protest that the awardee's proposal improperly took exceptions to the solicitation requirements is denied where the agency reasonably determined that the awardee's assumptions were not exceptions, and where proposal language in question reflects the reservation of a right to request, rather than receive, a price adjustment.

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## DECISION

BillSmart Solutions, LLC, of Irving, Texas, protests the award of a contract to Client Network Services, Inc. (CNSI), of Gaithersburg, Maryland, under request for proposals (RFP) No. DOL141RP21903, issued by the Department of Labor (DOL) for medical bill processing services. BillSmart argues the agency's evaluation of offerors' proposals and resulting award decision were improper.

We deny the protest.

## BACKGROUND

The DOL Office of Workers' Compensation Programs (OWCP) administers disability compensation programs which mitigate, through the provision of wage replacement and cash benefits, medical treatment, vocational rehabilitation and other benefits, the financial burden on certain workers, or their dependents or survivors, resulting from work-related injury, disease, or death. Agency Report (AR), Tab 32, RFP amend. 7, Performance Work Statement (PWS) § 1.1. To achieve its responsibilities and objectives, OWCP developed the workers' compensation medical bill processing (WCMBP) PWS, that would provide services to support the consolidated processing of bills for each OWCP program; support the prior authorization of services in each program; and respond to inquiries related to medical services from both claimants and providers. Id., § 1.2.

The procurement here has been a long and contentious one. The RFP, issued on January 14, 2014, contemplated the award of a fixed-price contract for a base year with four 1-year options and two 1-year award options.<sup>1</sup> RFP § B.3. In general terms, the RFP required the contractor to provide all personnel, processes, and systems necessary to perform the required WCMBP tasks. PWS § 1.1. The RFP established that contract award would be made on a best-value basis, based on price and four non-price factors, in descending order of importance: (1) technical approach; (2) management approach; (3) prior experience; and (4) past performance.<sup>2</sup> Although, the non-price factors, when combined, are approximately equal to price, the RFP informed offerors that price would become the determinative factor where proposals received the same overall technical (non-price) rating. RFP § M.3.2.

Three offerors, including CNSI and BillSmart, submitted proposals by the August 8 closing date. Agency evaluation teams assessed offerors' non-price proposals using the following adjectival rating scheme: exceptional, very good, satisfactory, and

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<sup>1</sup> The RFP was subsequently amended eight times. Unless stated otherwise, all citations are to the final, conformed version of the solicitation.

<sup>2</sup> The RFP stated that the agency would also assess the relative risks associated with each offeror's price and non-price proposals. RFP § M.3.2.

unsatisfactory.<sup>3</sup> AR, Tab 29, Source Selection Decision (SSD) at 6-7. A separate price evaluation team analyzed offerors' prices for both reasonableness and realism, but did not assign ratings. Contracting Officer's Statement (COS)/Memorandum of Law (MOL) at 2. On December 28, 2015--some 16 months after proposal submission--the agency completed its initial evaluation and established a competitive range which included the CNSI and BillSmart proposals. AR, Tab 29, Source Selection Decision at 15. The agency thereafter conducted discussions and received offerors' final proposal revisions (FPR) by January 29, 2016.

On May 17, the agency made contract award to CNSI. On June 15, after receipt of a debriefing, BillSmart filed a protest with our Office challenging the agency's evaluation of proposals and award decision. On July 8, the agency informed our Office of its decision to take corrective action by reevaluating offerors' proposals and making a new award decision. AR, Tab 29, SSD at 25-26. Subsequently, we dismissed the earlier BillSmart protest as academic. BillSmart Solutions, LLC, B-413272.2, July 14, 2016 (unpublished decision).

On January 25, 2017, after removing the third offeror from the competitive range, DOL requested that CNSI and BillSmart submit revised prices and updated past performance information (the agency subsequently permitted the offerors to revise any aspect of their proposals deemed necessary). AR, Tab 29, Source Selection Decision at 26; COS/MOL at 2. CNSI and BillSmart submitted second FPRs by February 27, and then third FPRs by May 12. COS/MOL at 2.

The agency thereafter evaluated offerors' final FPRs, with the final evaluation ratings and prices of the CNSI and BillSmart proposals as follows:

	CNSI	BillSmart
Technical Approach	Very Good	Very Good
Management Approach	Very Good	Very Good
Prior Experience	Very Good	Satisfactory
Past Performance	Exceptional	Exceptional
Overall	Very Good	Very Good
Price	\$166,520,492	\$169,169,458

AR, Tab 29, Source Selection Decision at 31-32.

The agency evaluators also made narrative findings (e.g., strengths, weakness, risk assessments) in support of the evaluation ratings assigned to the offerors' proposals. Id. at 27-31.

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<sup>3</sup> With regard to the past performance factor, an additional adjectival rating (neutral) was available.

On June 29, the contracting officer as source selection authority (SSA) determined that notwithstanding the equivalent overall (non-price) ratings, CNSI's proposal was superior to that of BillSmart under both the technical approach and prior experience factors. Id. at 61. The SSA thereafter concluded that insofar as CNSI's proposal was both technically superior to, and lower-priced than, that of BillSmart, CNSI's proposal represented the overall best value to the government.<sup>4</sup> Id.

On June 30, the agency provided BillSmart with notice of contract award. After providing BillSmart with a written debriefing on July 10, this protest followed.

## DISCUSSION

BillSmart raises various issues regarding the agency's evaluation of proposals. The protester first alleges that the agency's evaluation of CNSI's past performance was unreasonable. BillSmart also asserts that DOL failed to reasonably evaluate the realism of the awardee's proposed price. The protester also contends that the agency unreasonably evaluated offerors under the prior experience factor. Lastly, BillSmart asserts that CNSI was ineligible for award because it took exception to the fixed-price contract type, and should have been found technically unacceptable because of the alleged exceptions and qualifications in its technical proposal.<sup>5</sup> Had the agency conducted a proper evaluation, protester argues, BillSmart would have instead been found to represent the overall best value. We have considered all the issues and arguments raised by BillSmart and, although we do not address them all, find no basis on which to sustain the protest.

### Past Performance Evaluation of CNSI

BillSmart challenges the agency's evaluation of CNSI's past performance. BillSmart alleges, among other things, that DOL failed to consider all available information when assessing CNSI's past performance. BillSmart also maintains that had the agency performed a proper evaluation of CNSI, DOL would not have considered the offerors' past performance to be equal.

An agency's evaluation of past performance, which includes its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of discretion which we will not disturb unless the assessment is unreasonable or inconsistent with the solicitation criteria. WingGate Travel, Inc., B-412921, July 1, 2016, 2016 CPD ¶ 179 at 4; Metropolitan Life Ins. Co., B-412717, B-412717.2, May 13, 2016, 2016 CPD ¶ 132 at 14. Where a protester challenges an agency's past performance

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<sup>4</sup> The contracting officer also determined, based on available information, that CNSI was a responsible business concern and therefore eligible for contract award. Id. at 61.

<sup>5</sup> BillSmart also initially alleged that the agency failed to evaluate offerors' final FPRs. Protest at 10-11. The protester subsequently withdrew this protest ground. BillSmart Comments at 1 n.2.

evaluation, we will review the evaluation to determine if it was reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations, and to ensure that the agency's rationale is adequately documented. DynCorp Int'l, LLC, B-412451, B-412451.2, Feb. 16, 2016, 2016 CPD ¶ 75 at 14; Falcon Env'tl. Servs., Inc., B-402670, B-402670.2, July 6, 2010, 2010 CPD ¶ 160 at 7. A protester's disagreement with the agency's judgment, without more, is insufficient to establish that an evaluation was improper. WingGate Travel, Inc., *supra*; Beretta USA Corp., B-406376.2, B-406376.3, July 12, 2013, 2013 CPD ¶ 186 at 10.

The RFP instructed offerors to submit past performance references demonstrating their ability to successfully perform projects that were similar in type, complexity, and scope to the project here. RFP § L.3.2.1.18. The solicitation also established that the past performance evaluation would assess each offeror's past performance record, "considering the currency and relevance of the information, source of the information, context of the data, and general trends in the [o]fferor's performance." *Id.*, § M.4.4. Additionally, the RFP stated that "[t]he Government may look to sources of [past performance] information beyond those provided by the Offeror." *Id.*

CNSI submitted a total of four past performance references--three for itself and one for proposed subcontractor, CGS.<sup>6</sup> These references provided by CNSI were: (1) its Washington state ProviderOne Medicaid management information system contract; (2) its Michigan community health automated Medicaid payment system contract; (3) its Centers for Medicare & Medicaid Services (CMS) encounter data processing system subcontract; and (4) CGS's CMS A/B MAC Jurisdiction 15 contract. AR, Tab 12, CNSI FPR, Prior Experience Proposal; Tab 13, CNSI FPR, Past Performance Project Reference List.<sup>7</sup> For each reference, CNSI provided a detailed project description, contract dollar value, and period of performance. AR, Tab 12, CNSI FPR, Prior Experience Proposal; Tab 13, CNSI FPR, Past Performance Project Reference List; *see* RFP § L.3.2.1.15.

The agency evaluated CNSI's past performance references and found them to be comparable in size, scope, and complexity to the WCMBP effort. AR, Tab 21, Past Performance Evaluation Report at 4. The evaluators found, for example, that CNSI's past "experience migrating similar capabilities from a similar, if not identical, legacy mainframe system [was] a significant strength due to the low risk it represents for transitioning OWCP's complicated set of requirements." *Id.* at 7. The agency also reviewed the past performance questionnaires it received from CNSI's references, and conducted follow-up interviews, and found the quality of CNSI's prior performance to be very good to exceptional. *Id.* at 3-12. Lastly, the evaluators conducted a search of the past performance information retrieval system (PPIRS) and found no adverse

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<sup>6</sup> CNSI's proposal only identifies the subcontractor by the three-letter acronym, CGS.

<sup>7</sup> In accordance with the RFP instructions, CNSI's past performance references were also its prior experience references. *See* RFP § L.3.2.1.18.

information regarding CNSI.<sup>8</sup> Id. at 4. Based on an overall assessment of the relevance and quality of CNSI's prior work, the agency assigned an exceptional rating to CNSI's past performance. Id. at 7.

BillSmart argues that the evaluation of CNSI's past performance was improper because none of CNSI's prior projects involved workers' compensation billing systems. The protester also points to the fact that two of CNSI's four references considered CNSI's performance to be very good, rather than exceptional. The gravamen of BillSmart's challenge, however, is that the agency was unaware of and failed to consider news accounts and other media reports of CNSI's alleged poor performance on various state Medicaid bill processing contracts. BillSmart Comments at 8. For example, with regard to CNSI's Washington state ProviderOne reference, BillSmart faults DOL for relying on the "alleged" statements of a state government employee, and for failing to perform "any independent review of CNSI's performance of the Washington contract." Id. at 7-8. The protester also maintains that the agency should have taken the cited news stories into account as part of its evaluation because the information was "easily accessible," "publicly-available," and "too close at hand" to ignore. Id. at 9-14.

The agency argues that CNSI's past performance references were uniformly highly relevant and of high quality, such that the assigned exceptional rating was reasonable. The agency also argues that it was not required by the terms of the solicitation to take into account the news stories to which BillSmart cites as part of the evaluation of CNSI's past performance. The agency further contends that the news stories on which the protester relies are "innuendo and supposition" and do not constitute "hard facts" of poor performance on the part of CNSI. COS/MOL at 5.

We find the past performance evaluation of CNSI to be unobjectionable. The record reflects that the agency assessed the relevance of CNSI's references--all of which involved medical bill processing services--and reasonably found them to be similar in size, scope, and complexity to the work here. The mere fact that a reference supplied by CNSI did not involve performing requirements identical to those contained in the solicitation here did not mean that DOL was precluded from considering it to be highly relevant. See Flight Safety Servs. Corp., B-403831, B-403831.2, Dec. 9, 2010, 2010 CPD ¶ 294 at 9. Likewise, we find no merit, and the RFP provides no support, in BillSmart's assertion that the awardee was required to receive exceptional quality assessments from every past performance reference in order to receive an overall exceptional rating.

We next address BillSmart's challenge regarding the scope of the information which the agency considered when evaluating offerors' past performance. As set forth above, the RFP provided that in addition to considering offerors' past performance references, the

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<sup>8</sup> PPIRS, a component of the Federal Awardee Performance and Integrity Information System (FAPIIS), is a government-wide database which permits access to contractor performance assessment reports.

agency “may” look to sources of past performance information beyond those provided by the offeror. RFP § M.4.4. This is consistent with the discretion that rests with agencies in determining the scope of performance history to be considered when evaluating offerors’ past performance. See Hygeia Solutions Partners, LLC; STG, Inc., B-411459 et al., July 30, 2015, 2015 CPD ¶ 244 at 13 (agency’s decision to limit its evaluation to documented sources of past performance information found to be unobjectionable); Braswell Servs. Group, Inc., B-278921.2, June 17, 1998, 98-2 CPD ¶ 10 at 6 (no legal requirement for agency to consider all listed past performance references).

While agencies generally need not evaluate all past performance references or those not reflected in the proposals, our Office has recognized that in certain limited circumstances an agency evaluating an offeror’s past performance has an obligation (as opposed to the discretion) to consider “outside information” bearing on the offeror’s past performance. See Hygeia Solutions Partners, LLC; STG, Inc., supra, at 12; International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5. Where we have charged an agency with responsibility for considering such outside information, the record has demonstrated that the information in question was “simply too close at hand to require offerors to shoulder the inequities that spring from an agency’s failure to obtain, and consider, the information.” International Bus. Sys., Inc., supra; see GTS Duratek, Inc., B-280511.2, B-280511.3, Oct. 19, 1998, 98-2 CPD ¶ 130 at 14 (agency should have considered offeror’s performance of a prior contract where the contract was discussed in the offeror’s past performance proposal, was so relevant as to have served as the basis for the government estimate for the subject solicitation, and the contracting officer’s technical representative for the contract was a member of the technical evaluation team for the subject solicitation); G. Marine Diesel, B-232619.3, Aug. 3, 1989, 89-2 CPD ¶ 101 at 4-6.<sup>9</sup> Further, our Office has limited application of this principle to situations where the alleged “too close at hand” information relates to contracts for the same services with the same contracting activity, or information personally known to the evaluators. Orbital Scis. Corp., B-414603, B-414603.2, July 26, 2017, 2017 CPD ¶ 249 at 10.

On this record, we fail to see how the agency miscalculated the awardee’s past performance. As a preliminary matter, the outside information to which BillsMart refers (e.g., state Medicaid claims contracts) was not with the same procuring agency as the subject solicitation, nor is it evident that it was information personally known to the

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<sup>9</sup> In G. Marine, the contracting officer was personally aware of the awardee’s continuing difficulties in performing a contract for services related to the subject solicitation, and she considered the performance difficulties relevant to the extent that the agency determined not to exercise the options in the related contract. In those circumstances, we found that the agency erred in not considering the awardee’s performance difficulties when determining whether the contract under the subject solicitation had been properly awarded. Id.

evaluators.<sup>10</sup> Moreover, we find nothing improper with DOL's decision to limit its review here to the past performance information that was submitted in the proposals, as well as to other official government sources (*i.e.*, PPIRS), and to not consider unproven outside information. For example, with regard to CNSI's ProviderOne reference, the agency considered the information it received from that contract's designated agency official (a Washington state government employee), but did not attempt to review news stories regarding the installed system's performance. AR, Tab 14, CNSI Past Performance Questionnaires at 2-4; Tab 21, Past Performance Evaluation Report at 6-7. There was simply no requirement, as the protester suggests, for the agency to perform an "independent review (*i.e.*, run an internet search) to confirm what it was being told" as part of its evaluation. BillSmart Comments at 13. In sum, the report received from an official government source, coupled with the other past performance information reviewed by the agency related to CNSI's other prior contracts, reasonably led the evaluators to assign an exceptional performance rating, a determination we find unobjectionable. See AR, Tab 21, Past Performance Evaluation Report at 10.

#### Price Realism Evaluation of CNSI

Next, BillSmart contends that the agency failed to properly evaluate the realism of CNSI's proposed price, that was below both BillSmart's price and the independent government cost estimate (IGCE). The protester alleges that the awardee's price reflects an unreasonable performance risk to the agency. Protest at 9-10; BillSmart Comments at 14-19. The agency maintains that CNSI's price, which was only "2% lower than the protester's price," was properly found to be realistic. COS/MOL at 9. We find no basis to question the agency's analysis.

Where, as here, a solicitation contemplates the award of a fixed-price contract, there is generally no requirement that an agency analyze the realism of offerors' proposed prices; this is because a fixed-price (as opposed to a cost-reimbursement) contract places the risk and responsibility for contract costs and ensuing profit or loss on the contractor.<sup>11</sup> Star Contract Servs., LLC, B-409424, Apr. 23, 2014, 2014 CPD ¶ 133 at 6. An agency may, however, at its discretion, provide for the use of a price realism analysis for the limited purpose of assessing an offeror's understanding of the solicitation requirements or the risk inherent in an offeror's proposal.<sup>12</sup> Id.; see Federal

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<sup>10</sup> In fact, the protester states that the agency was unaware of the information that it did not consider. BillSmart Comments at 8 ("DOL was unaware of and failed to take into consideration . . . .")

<sup>11</sup> An offeror's business judgement to submit an extremely low price, or even a below-cost price, is not per se improper. See Triple H Servs., B-298248, B-298248.2, Aug. 1, 2006, 2006 CPD ¶ 115 at 2.

<sup>12</sup> As the limited purpose of a price realism analysis is to assess an offeror's technical understanding or performance risk, there is no requirement that an agency determine whether an offeror's price includes all of its anticipated costs. See Optex Sys., Inc., B-408591, Oct. 30, 2013, 2013 CPD ¶ 244 at 5-6 (even where a solicitation

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Acquisition Regulation (FAR) § 15.404-1(d)(3). The nature and extent of a price realism analysis are generally within the sound exercise of the agency's discretion, and our review of such an evaluation is limited to determining whether it was reasonable and consistent with the terms of the solicitation. Star Contract Servs., LLC, supra; Smiths Detection, Inc.; Am. Sci. & Eng'g, Inc., B-402168.4 et al., Feb 9, 2011, 2011 CPD ¶ 39 at 17.

With regard to price, the solicitation required offerors to submit the following information in their price proposals: prices for each contract line item number (CLIN); prices for each performance period; a detailed pricing table, attached to the RFP, with the labor hours by skilled category that will be applied to the completion of each PWS task; and a "basis of estimate" narrative identifying the offeror's price rationale. RFP §§ L.3.2.4; Attach. J-1, Price Cost Schedule. With regard to the evaluation of offerors' prices, the RFP stated that "[p]rice proposals may also be evaluated for price realism to measure an Offeror's understanding of the technical requirements and/or examine the performance risk of proposals, with particular attention to the risk of low-priced proposals." RFP § M.4.5.

CNSI submitted its FPR price proposal in accordance with the RFP instructions, and included the required pricing template that identified the offeror's prices by performance period, CLIN, and cost component, as well as CNSI's labor categories and labor hours for each PWS task. AR, Tab 18, CNSI FPR, Price Volume; Tab 19, CNSI FPR, Pricing Worksheets; Tab 17, CNSI FPR, Basis of Estimate. The agency evaluators, as part of their price realism analysis, compared CNSI's prices--by PWS task, CLIN, and overall--to BillSmart's prices and the IGCE. AR, Tab 25, CNSI Price Realism Evaluation Report at 1. The price evaluators also analyzed the mix and levels of CNSI's labor categories for conformance with the offeror's technical solution, inclusion of required positions, and comparability of labor rates to market conditions. Id. The evaluators concluded that CNSI's price--which was 10 percent below the IGCE and 2 percent below that of BillSmart--was consistent with the offeror's technical solution, reflected a solid understanding of the PWS requirements, and carried low risk, and was therefore realistic. Id. at 2, 15; see also AR, Tab 27, FPR Price Analysis Report at 3-17.

BillSmart argues that the price realism evaluation of CNSI was unreasonable because the agency "failed to focus on a key difference in what CNSI and BillSmart bring to the table regarding software solutions." Protest at 9. Specifically, the protester maintains that while it proposed a mature software solution for the workers' compensation environment, CNSI did not. Id.; BillSmart Comments at 16-19. BillSmart essentially argues that because of the software maturity difference between offerors, its proposed price of \$169 million was realistic while CNSI's proposed price of \$166.5 million was not. We find no merit in the protester's assertions.

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(...continued)

contemplates a price realism evaluation, there is no bar to an offeror proposing--and an agency accepting--a below-cost price).

As a preliminary matter, the record reflects that the agency was fully aware of, and reasonably considered, the matter which BillSmart now raises. Specifically, as part of the price realism evaluation the agency analyzed the various reasons why CNSI's price was below the IGCE, including that "CNSI identified that its core bill processing platform eCAMS, meets approximately 70% of the OWCP requirements out of the box." Further, the agency noted that "eCAMS is web-based and highly configurable; such that many changes needed to bridge the 30% gap can be implemented by configuration changes rather than more expensive and time-consuming customization."<sup>13</sup> AR, Tab 25, CNSI Price Realism Evaluation Report at 4. While the protester asserts that the offerors were not similarly situated with regard to software maturity, this does not provide a sufficient basis to show the agency's price realism analysis here was unreasonable. The fact that an offeror's price is below the IGCE, or that of a competitor, does not require the agency to conclude that the price is unrealistically low. Arrington Dixon & Assocs., Inc., B-409981, B-409981.2, Oct. 3, 2014, 2014 CPD ¶ 284 at 7. Moreover, our Office has found that an agency may rely on comparisons between offerors' prices, or comparison of those prices to an IGCE, to conclude that similarly-priced proposals are realistic. Id.; see Accumark, Inc., B-310814, Feb. 13, 2008, 2008 CPD ¶ 68 at 3.

We also find no merit to BillSmart's assertion that the agency's price realism evaluation failed to adequately consider the risks attendant to CNSI's software system that was "only 70% complete 'out of the box,'" or "to quantify the impact it would have on CNSI's actual price to DOL." BillSmart Comments at 17, 19. In view of the fact that this is a fixed-price contract, the agency was under no obligation to verify each and every cost element, or cost assumption, used by CNSI to generate its fixed prices. See Optex Sys., supra. Furthermore, while a price realism analysis may be used in technical performance risk assessments, it cannot properly lead, as the protester suggests, to the adjustment of a firm's fixed prices. FAR § 15.404-1(d)(3); Powersolv, Inc., B-402534, B-402534.2, June 1, 2010, 2010 CPD ¶ 206 at 12. The depth of an agency's evaluation in this regard is a matter within the sound exercise of the agency's discretion. Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 4-5. In essence, BillSmart disagrees with the nature and extent of DOL's price realism methodology; this, however, does not provide a basis on which to sustain a protest.

#### Prior Experience Evaluation

BillSmart protests the agency's prior experience evaluation. The protester alleges that the "very good" rating assigned to CNSI's proposal, and the "satisfactory" rating assigned to its proposal, were both unreasonable. BillSmart also contends that DOL's evaluation was disparate and unequal.

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<sup>13</sup> The agency also found that CNSI's proposed bill process platform was integrated with mailroom, imaging, pharmacy, call center, and IVR, further reducing the cost to integrate, test, and implement these parts of the solution. Id.

In reviewing a protest challenging the agency's evaluation of proposals, our Office will not reevaluate proposals nor substitute our judgment for that of the agency regarding a proposal's acceptability or relative merits. See Del-Jen Educ. & Training Group/Fluor Fed. Solutions LLC, B-406897.3, May 28, 2014, 2014 CPD ¶ 166 at 8; FPM Remediations, Inc., B-407933.2, Apr. 22, 2013, 2013 CPD ¶ 107 at 3. Rather, we will review the record to determine whether the agency's evaluation was reasonable; consistent with the stated evaluation criteria and applicable procurement statutes and regulations; and adequately documented. Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. A protester's disagreement with the agency's judgment, without more, is insufficient to establish that an evaluation was improper. Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5.

The RFP required offerors to identify prior experience of both the business concern and its key personnel demonstrating the offeror's ability to perform the PWS requirements. RFP § L.3.2.2. The solicitation also established that the prior experience factor would assess the extent to which an offeror's institutional and personnel capabilities on prior relevant requirements demonstrated the ability to successfully perform the PWS requirement here. RFP § M.4.3.

#### Prior Experience Evaluation of CNSI

CNSI submitted its prior experience proposal and provided a detailed project description for each reference. AR, Tab 12, CNSI FPR, Prior Experience at 1-19. The agency evaluated CNSI's prior experience and found the awardee's references to be very similar to the size, scope, and complexity of the WCMBP requirements. AR, Tab 22, CNSI Prior Experience Evaluation Report, at 1. The evaluators also identified a total of 12 strengths in the areas of medical bill processing services, call center experience, and mailroom services, and 1 weakness for the lack of direct workers' compensation processing experience: "[a]lthough the extent of the medical bill processing cited in [CNSI's] Prior Experience projects is impressive, there is no mention of specific experience with worker's compensation medical bill processing." Id. at 1, 3-7. Overall, the evaluators concluded that while CNSI's lack of experience with the unique facets of workers' compensation services created some risk, it was offset by the offeror's strengths, and assigned CNSI's prior experience a very good rating. Id. at 1.

BillSmart challenges the agency's evaluation of CNSI's prior experience. The protester does not dispute any of the strengths identified in the awardee's proposal. Rather, BillSmart contends that the agency "unreasonably minimized" the assigned weakness, and thereby unreasonably concluded that it was offset by CNSI's strengths. Supp. Protest at 46. We find no merit to the protester's argument.

As set forth above, the record reflects that the agency was fully aware of CNSI's lack of direct workers' compensation processing experience. AR, Tab 22, CNSI Prior Experience Evaluation Report at 1, 3-7. However, the evaluators reasonably concluded

that the identified weakness was offset by the numerous strengths in CNSI's medical bill processing, mailroom, and call center experience. Id. at 1. BillSmart essentially disagrees with the evaluators' judgment regarding the significance of the identified weakness, as compared to the identified (and unchallenged) strengths. The evaluation of proposals, including determinations regarding the magnitude and significance of evaluated strengths and weaknesses, is a matter largely within the agency's discretion, and, as here, a protester's mere disagreement with the agency's judgment does not establish a basis for our Office to sustain a protest.<sup>14</sup> Pemco Aeroplex, Inc., B-310372, Dec. 27, 2007, 2008 CPD ¶ 2 at 7; see also SETA Support Servs. Alliance; Sigmatech, Inc., B-401754 et al., Nov. 23, 2009, 2010 CPD ¶ 10 at 11.

#### Prior Experience Evaluation of BillSmart

BillSmart also challenges the evaluation of its own prior experience. Specifically, the protester maintains that the agency improperly failed to assign it a strength for its prior experience with workers' compensation services, and the evaluators' determination that the offeror's projects were only somewhat similar in scope and complexity to the PWS requirements was unreasonable.<sup>15</sup> Supp. Protest at 47-53. We find BillSmart's protest here to be untimely.

After contract award to CNSI, BillSmart received a written debriefing explaining that, among other things, DOL had not assigned BillSmart's prior experience proposal a strength for workers' compensation services ("the Offeror's proposal meets the minimum requirements for prior experience with workers' compensation program services"), and that its prior experience was found to be "somewhat similar to the size, scope and complexity of the WCMBP requirements." AR, Tab 30, BillSmart Debriefing, July 10, 2017, at 8-9. However, BillSmart did not raise the challenges here regarding the evaluation of its prior experience until filing its supplemental protest on August 28, more than 10 days after the basis of protest was known. Supp. Protest, Aug. 28, 2017, at 47-53. Where a protester initially files a timely protest, and later supplements it with new grounds of protest, the later-raised allegations must independently satisfy our timeliness requirements, since our Regulations do not contemplate the piecemeal

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<sup>14</sup> BillSmart also argues that the agency's prior experience evaluation of CNSI was unreasonable for failing to consider the alleged adverse performance on various state Medicaid contracts. Supp. Protest at 53-55. Inasmuch as the prior experience factor, unlike the past performance factor, considered only whether an offeror had previously performed relevant projects (and not how well the offeror had previously performed), we find this fails to state a valid basis of protest. 4 C.F.R. § 21.5; see RFP §§ M.4.3, §M.4.4. We also find this protest ground to be untimely, as it was not raised within 10 days of when BillSmart knew or should have known of its basis of protest (this is the exact same information which BillSmart asserted, in its initial protest, DOL failed to consider when evaluating CNSI's past performance). 4 C.F.R. § 21.2(a)(2).

<sup>15</sup> The issues here were in fact not ones raised by BillSmart in its initial protests. See Protest at 10.

presentation or development of protest issues. Planning & Dev. Collaborative Int'l, B-299041, Jan. 24, 2007, 2007 CPD ¶ 28 at 11; Biospherics, Inc., B-285065, July 13, 2000, 2000 CPD ¶ 118 at 12-13. Because BillSmart did not raise its challenge to the agency's evaluation of its prior experience in its initial protest and waited more than a month to raise the objection, this protest ground represents an untimely and improper piecemeal presentation of arguments and will not be considered.<sup>16</sup> 4 C.F.R. § 21.2(a)(2); Technology Mgmt. Co. Inc., B-409976, Sept. 26, 2014, 2014 ¶ 294 at 5.

### CNSI's Proposal Assumptions

BillSmart next argues that the agency failed to review the various assumptions contained within CNSI's price and technical proposals. The protester alleges, among other things, that CNSI's price proposal took exception to the RFP requirement that offerors propose fixed prices.<sup>17</sup> Supp. Protest at 8-10; Supp. Comments at 1-5. Based on the alleged exceptions, BillSmart argues that the agency should have rejected CNSI's proposal as unacceptable.<sup>18</sup> Supp. Protest at 8-10; Supp. Comments at 1-5. Our review of the record finds that while CNSI's proposal, like that of BillSmart's, contained various assumptions, the agency reasonably concluded that none of the assumptions took exception to the material requirements of the RFP.

A proposal that takes exception to a solicitation's material terms and conditions must be considered unacceptable for award. See, e.g., Kratos Defense & Rocket Support Servs., Inc., B-413143.2, Aug. 23, 2016, 2016 CPD ¶ 227 at 5. Material terms of a solicitation are those which affect the price, quantity, quality, or delivery of the goods or

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<sup>16</sup> We also find no merit in the protester's assertion that DOL applied different standards in evaluating prior experience. Protest at 10; BillSmart Comments at 24-25. While BillSmart maintains that it possesses more direct workers' compensation billing system experience than does CNSI, it has failed to demonstrate that the agency's evaluation was unreasonable or inconsistent with the solicitation's stated evaluation criteria.

<sup>17</sup> As part of its assertion that CNSI's proposal contained improper price and technical assumptions, BillSmart states that its protest provides "some of the more egregious examples," and "only a sampling." Supp. Protest at 6, 29. However, our Bid Protest Regulations do not contemplate being able to plead or preserve protest issues by means of examples. See DWK Comms., Inc., B-414476, B-414476.2, June 23, 2017, 2017 CPD ¶ 206 at 5 n.8; Jacobs Tech., Inc., B-413389, B-413389.2, Oct. 18, 2016, 2016 CPD ¶ 312 at 6. To the extent that BillSmart was aware of other, yet-to-be-mentioned examples of alleged exceptions taken by the awardee, we find this aspect of BillSmart's protest untimely. BillSmart also subsequently elected to refine its protest ground here to the five specific CNSI assumptions. BillSmart Supp. Comments at 2 n.2.

<sup>18</sup> BillSmart also expends considerable effort trying to quantify the additional cost to be incurred by the agency associated with the alleged exceptions taken by CNSI to the fixed-price contract requirement. We find this to be immaterial to our analysis of whether CNSI's proposal took exception.

services being provided. Id. Where a solicitation requests offers on a fixed-price basis, an offer that is conditional and not firm cannot be considered for award. Dev Tech. Grp., B-412163, B-412163.5, Jan. 4, 2016, 2016 CPD ¶ 10 at 5; see Advanced Techs. & Labs. Int'l, Inc., B-411658 et al., Sept. 21, 2015, 2015 CPD ¶ 301 at 10. Nonetheless, this Office will not sustain a protest where the record reflects a procuring agency's reasonable determination that the awardee's proposal did not take exception to the solicitation's requirements. See SRA Int'l, Inc.; NTT DATA Servs. Fed. Govt., Inc., B-413220.4 et al., May 19, 2017, 2017 CPD ¶ 173 at 20-21; Arrington Dixon & Assocs., Inc., B-409981, B-409981.2, Oct. 3, 2014, 2014 CPD ¶ 284 at 11; Dataproducts New England, Inc. et al., B-246149.3 et al., Feb. 26, 1992, 92-1 CPD ¶ 231 at 14-15.

The RFP instructed offerors to complete a proposal compliance matrix, which referenced the solicitation's various requirements, as part of their submissions. RFP § L.3.2.1. Also, as part of both the technical and price proposals, offerors were required to identify all assumptions, constraints, and exceptions regarding their proposed solutions. Id., §§ L.3.2.1.8, L.3.2.4.2.

CNSI's FPR included the required compliance matrix which indicated that the awardee's proposal complied with, and took no exceptions to, the solicitation requirements. AR, Tab 9, CNSI FPR, Compliance Matrix at 1-125, Tab 17, CNSI FPR, Basis of Estimate at 1 ("[w]e acknowledge all contract terms and clauses . . . and have not taken any exceptions to the requirements of the RFP"). Additionally, in accordance with the RFP's instructions, CNSI's technical and price proposals set forth the assumptions on which each submission was based. See id., Tab 17, CNSI FPR, Basis of Estimate; Tab 18, CNSI FPR, Price Proposal. The agency evaluators, as part of their review of CNSI's FPR, found that none of CNSI's assumptions took exception to any solicitation requirements or were otherwise unacceptable.<sup>19</sup> AR, Tab 52, Declaration of Evaluator M.W. at 1-12; Tab 53, Declaration of Technical Evaluation Chairman at 1-11. While BillSmart asserts that the agency's evaluation was unreasonable, we agree with the agency that the protester has not shown that any of the assumptions took exception to material provisions of the solicitation. We discuss some examples below.

BillSmart contends the CNSI's assumption regarding taxes improperly took exception to the fixed-price contract requirement. The RFP stated, in relevant part, that "[t]he contractor shall include all applicable [f]ederal, state, and local taxes in all prices." RFP § B.1. CNSI's FPR, in its compliance matrix template, expressly provided that the

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<sup>19</sup> BillSmart contends that the agency's declarations constitute post-hoc rationalizations to support award to CNSI. BillSmart Supp. Comments at 2. As we do not expect an agency's evaluation report to "prove a negative," and document why an offeror's assumptions were not considered exceptions, we view the evaluators' declarations to be post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and not post-hoc rationalizations. Compare NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158, with Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91.

proposal complied with this specific requirement. AR Tab 7, CNSI FPR, Compliance Matrix at 1. Additionally, CNSI's Basis of Estimate stated:

Per Section B.1 of the RFP, CNSI understands the Government's request for vendors to include all applicable federal, state, and local taxes in all prices. CNSI consulted with its tax auditors and our pricing assumes that we will receive a tax exemption certificate from the State of Tennessee in an effort to save the Government 7% State Sales and Use Tax and 2.25% on the Nashville Sales & Use Tax. Both taxes would typically be applied to hardware and software; however, this savings is already being passed on to DOL. CNSI's pricing also assumes we will receive a tax exemption certificate from Colorado, Maryland, and Virginia as some of our proposed equipment will reside in those locations.

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Should the states' tax codes significantly change, CNSI will work with DOL to obtain a change order.

Id., Tab 17, CNSI FPR, Bases of Estimate § 4.2.2.4.

The DOL evaluators were aware of CNSI's assumption regarding taxes and found it to be reasonable; the evaluators also concluded that the assumption did not take exception to the fixed-price contract requirement. Id., Tab 52, Declaration of Evaluator M.W. at 12-3; Tab 53, Declaration of Technical Evaluation Chairman at 2.

BillSmart argues that because CNSI's price proposal assumes the awardee will receive various state tax exemptions, "CNSI suggests that, if this is not the case, its price proposal is not really 'fixed' in that regard." Supp. Protest at 11. The protester then argues that CNSI has thus qualified its fixed price proposal by reserving the right to pass on to DOL taxes the awardee would incur if its assumption about obtaining tax exemption certificates turns out to be wrong. Id. We find the protester's assertion to be devoid of merit, as it completely distorts the record.

We find that CNSI's tax assumption was not an exception to the terms of the solicitation, as the protester suggests. As set forth above, CNSI's proposal did not state that its price was contingent on the accuracy of its tax assumptions, or that the offeror believed that it was entitled to a price adjustment if its tax assumptions were incorrect. See AR, Tab 17, CNSI FPR, Bases of Estimate § 4.2.2.4. In this regard, this is not a case where an offeror makes it clear that it does not intend to commit to the solicitation's terms. See, e.g., Rel-Tek Sys. & Design, Inc., B-280463.3, Nov. 25, 1998, 99-1 CPD ¶ 2 (award was improper where proposal failed to conform to material solicitation requirements). Rather, CNSI's assumption here reflected one of the offeror's underlying beliefs used to prepare its price proposal. See Arrington Dixon & Assocs., Inc., B-409981, B-409981.2, Oct. 3, 2014, 2014 CPD ¶ 284 at 11 (finding that assumptions did not qualify a price quotation where quotation advised that it took no exception to and

agreed to comply with the solicitation). Quite simply, the protester attempts to create an exception in CNSI's price proposal where none, in fact, exists.

We also find CNSI's declaration that "[s]hould the states' tax codes significantly change, CNSI will work with DOL to obtain a change order," was not an improper exception. See AR, Tab 17, CNSI FPR, Bases of Estimate § 4.2.2.4. We view the statement as reasonably being read to mean that CNSI assumes it may attempt to renegotiate pricing in the event that the described scenario--a significant change to existing tax law--manifests itself. As we previously have established, however, the mere reservation of the right to request a price adjustment--a request that the agency here could decline--is not equivalent to the right to receive an adjustment. See Dev Tech. Grp., *supra*, at 5-6 (reservation of a right to request, rather than receive, a price adjustment was not an exception to solicitation's fixed-price requirements); Language Servs. Assocs., Inc., B-297392, Jan. 17, 2006, 2006 CPD ¶ 20 at 10 n.10 (statement reserving right to negotiate equitable adjustment was not exception to solicitation's fixed-price term); Jantec, Inc., B-292668, B-292668.2, Nov. 6, 2003, 2003 CPD ¶ 222 at 9-10 (statement that "we would ask the Government to consider this extra cost" was not exception to solicitation's fixed-price term). In sum, as CNSI's proposal was not conditioned on the right to receive an additional payment, BillSmart's claim that the proposal should have been rejected as taking exception to the solicitation's fixed-price term is denied.

In this regard, we find BillSmart's reliance on our decision in Solers, Inc., B-404032.3, B-404032.4, Apr. 6, 2011, 2011 CPD ¶ 83, to be misplaced. In Solers, we found that the awardee had taken exception to the requirement to propose a fixed price where the statements in its proposal amounted to the offeror conditioning its pricing on circumstances other than those contemplated or authorized in the solicitation (*i.e.*, the availability of government work facilities). Here, by contrast, BillSmart has not identified anything in CNSI's proposal making the firm's performance contingent on an additional payment if the offeror's assumptions were incorrect ones. To the contrary, CNSI's proposal included statements (*e.g.*, a detailed compliance matrix) that the firm agreed to all solicitation requirements, including specifically, the fixed-price contract type.

BillSmart also argues that CNSI took various other exceptions or made improper assumptions within its proposal. For example, BillSmart contends that the agency failed to properly evaluate CNSI's price proposal because of the assumptions CNSI made with regard to the implementation phase approval process. Supp. Protest at 16-19. CNSI's technical proposal stated that, as part of the project schedule, "[t]he project schedule is based on ten (10) business days for OWCP deliverable review for the first submission of the deliverable. Thereafter, the project schedule provides five business days for OWCP approval after comment resolution. Team CNSI has planned for one round of comment review of each deliverable." AR, Tab 7, CNSI FPR, Technical Proposal § 1.9.28.1.2; see also Tab 18, CNSI FPR, Price Proposal, Price Proposal Assumptions at 1. BillSmart proclaims that had DOL properly evaluated CNSI's assumption, it would have recognized "a CNSI risk-shift to DOL that, by itself, obliterates the price advantage DOL perceived CNSI to offer." Supp. Protest at 16. Contrary to the protester's assertions, the agency evaluators reviewed CNSI's proposal here and found the awardee's three-

iteration approval process to be a reasonable one. AR, Tab 53, Declaration of Technical Evaluation Chairman at 3-5. The agency also concluded that CNSI's proposal here had not taken exception to the fixed-price contract requirement. Id.

The protester asserts that CNSI's assumption of a three-iteration approval process was unrealistic and would severely limit DOL's ability to perform software deliverables review without a CNSI change request being triggered. Supp. Protest at 17. We also find no merit in this assertion. First, as set forth above, the agency evaluators were aware of CNSI's assumption here and found it to be a reasonable one. Specifically, the chairmain of the evaluation teams noted: "In a firm-fixed price proposal, it is my experience that the offeror will assume a limited number of iterations of deliverable reviews . . . . In my experience with numerous deliverable to the Government, three iterations to a final document is a common objective and is a reasonable goal."<sup>20</sup> AR, Tab 53, Declaration of Technical Evaluation Chairman at 4. Further, the fact that a contractor may submit a change request in the event that the scenario in the assumption manifests itself is not the right to receive an adjustment. Dev Tech. Grp., supra, at 6. Again, as CNSI's proposal was not conditioned on the right to receive an additional payment, BillSmart's claim that the proposal should have been rejected as taking exception to the RFP's fixed-price requirement is unfounded.

As another example, BillSmart contends that the agency failed to consider the effect of CNSI's assumption that DOL furnish appropriate resources for testing schedule and, as a result thereof, should have rejected CNSI's proposal as technically unacceptable. Supp. Protest at 28-29, 35. CNSI's technical proposal stated that, with regard to the PWS comprehensive testing program requirement, "Team CNSI assumes that OWCP will make appropriate resources available to conduct testing within the time frame provided for Government Acceptance Testing in the approved project schedule." AR, Tab 7, CNSI FPR, Technical Proposal § 1.9.28.1.6; see also Tab 18, Price Proposal, Price Proposal Assumptions at 2. BillSmart argues that CNSI's assumption here constituted "a barn door-size 'out' to CNSI's" commitment to meeting the contract deadlines and should have been a disqualifying exception. Supp. Protest at 35. We disagree.

Here, the record shows that the agency considered CNSI's assumption and found that it was not an exception to the RFP requirements. Again, the evaluators noted: "The Government would, of course, need to provide the appropriate resources as necessary to complete government acceptance testing. CNSI was not imposing any burden on DOL that we do not routinely accept to complete our own testing." AR, Tab 53, Declaration of Technical Evaluation Chairman at 8. Moreover, because assumptions were but one part of offerors' technical proposals and the technical evaluation factor, the RFP did not indicate that an offeror would be eliminated based on its proposed

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<sup>20</sup> The agency also points to the fact that, by contrast, BillSmart's approach to the implementation phase approval process assumed only one iteration. Supp. MOL at 9; AR, Tab 53, Declaration of Technical Evaluation Chairman at 4.

assumptions. Akira Techs., Inc.; Team ASSIST, B-412017 et al., Dec. 7, 2015, 2015 CPD ¶ 383 at 7. We agree with the agency's assertion that CNSI's use of the assumption at issue here was not an exception to any stated PWS requirements, nor fatal under the terms of the solicitation. In sum, we find the agency's evaluation reasonable in this regard.

The protest is denied.

Susan A. Poling  
General Counsel