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Decision

Matter of: CIGNA Government Services, LLC

File: B-401068.4, B-401068.5

Date: September 9, 2010

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Christine Simpson, Esq., Jamie B. Insley, Esq., Anthony E. Marrone, Esq., and Jeffri Pierre, Esq., Department of Health and Human Services, for the agency. Glenn G. Wolcott, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting officer's determination that awardee's activities, and access to information, in connection with performing contracts related to implementation of agency's new accounting system did not create organizational conflicts of interest (OCI) was not unreasonable where the determination was based on consideration of awardee's responses to specific questions regarding its activities and access to information; consideration of input from agency personnel knowledgeable of, and responsible for, the new accounting system; and consideration of the contracting officer's own independent internet research.
2. Protest challenging agency's waiver of an OCI is denied where, in accordance with requirements of the Federal Acquisition Regulation, waiver request detailed the extent of the conflict and authorized agency official determined that waiver was in the government's interest.
3. Agency's communications with awardee regarding OCI mitigation strategies, following submission of final revised proposals, did not constitute discussions or require that discussions be conducted with other offerors.

4. Protester's assertions that the agency failed to reasonably evaluate protester's and awardee's proposals under various evaluation factors and subfactors constitute mere disagreement with the agency's evaluation and source selection decisions, and do not provide any bases for sustaining protests.

DECISION

CIGNA Government Services, LLC, of Nashville, Tennessee, protests the award of a contract by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), to Palmetto GBA, LLC, of Columbia, South Carolina, pursuant to request for proposals (RFP) No. CMS-2007-0013 to perform Medicare claims administration services. CIGNA's various protest submissions assert that the agency failed to properly consider conflicts of interest, engaged in post-closing-date discussions, and improperly evaluated proposals under virtually every evaluation factor and subfactor.

We deny the protests.

BACKGROUND

In August 2007, CMS published the solicitation at issue, seeking proposals to perform a cost-plus-plus-award-fee contract as the Medicare Administrative Contractor (MAC)¹ in a geographic area identified as "jurisdiction 11"² for a 1-year base period and four 1-year option periods. Section L of the solicitation directed offerors to submit their proposals in separate volumes, as follows: technical proposal (volume I); business proposal spreadsheets (volume IIA); business proposal narrative (volume IIB); and conflict of interest/compliance program proposal (volume III). RFP at 127-39.

¹ Pursuant to the Medicare Prescription Drug Improvement and Modernization Act of 2003 (MMA), MACs perform the claims services that were previously performed by "fiscal intermediaries" and "carriers." Prior to enactment of the MMA, fiscal intermediaries were generally responsible for processing Medicare claims from institutional providers (hospitals, nursing facilities) under Part A of the Medicare program, and carriers were responsible for processing Medicare claims from professional providers (physicians, diagnostic laboratories) under Part B of the Medicare program.

² The statement of work (SOW) for the jurisdiction 11 competition encompasses Part A and Part B Medicare workload for the states of North Carolina, South Carolina, Virginia, and West Virginia; and Home, Health and Hospice workload for the states of Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Mississippi, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, and Texas.

Section M of the solicitation provided that award would be made on the basis of the proposal offering the best overall value to the government, based on consideration of cost/price and non-cost/price evaluation factors, and established the following non-cost/price factors, listed in descending order of importance: technical understanding, personnel, implementation, past performance, and information security plan.³ Id. at 142-60. Proposals were evaluated under the non-cost/price factors by assignment of the following adjectival ratings: outstanding, very good, good, marginal, and poor. With regard to evaluation of cost/price, the solicitation provided that business proposals would be evaluated for reasonableness and realism, but would not be assigned adjectival ratings, and stated that “the proposed cost/price for the base year requirements will be added to the proposed cost/price of the four, one-year options to come up with a total proposed estimated cost/price.” Id. at 143. The solicitation also provided that conflict of interest/compliance program proposals would be evaluated “to determine if an offeror is free, to the greatest extent possible of all conflicts of interest,” stating that no adjectival ratings would be assigned. Id. at 144. Finally, the solicitation stated that, in determining best value, the agency would “assess the relative risks associated with each offeror’s proposal and potential performance.” Id. at 142.

Initial proposals, including those of CIGNA and Palmetto, were submitted in December 2007; revised proposals were submitted in November 2008. On January 7, 2009, CMS notified CIGNA that Palmetto had been selected for award.

On February 2, 2009, CIGNA filed its first protest challenging CMS’s award to Palmetto. Among other things, that protest challenged Palmetto’s prior involvement in two contracts related to an accounting system that CMS is in the process of implementing, referred to as the “Healthcare Integrated General Ledger Accounting System” or “HIGLAS.”⁴ Specifically, CIGNA complained that Palmetto has performed as a subcontractor to Quality Software Services, Inc. (QSSI) under two contracts that were awarded to QSSI in 2006, one for HIGLAS transition support services and one for HIGLAS training services. CIGNA protested that Palmetto’s performance under these contracts created organizational conflicts of interest (OCI)

³ The solicitation also established multiple subfactors for each listed non-cost/price factor.

⁴ HIGLAS is a general ledger, dual entry, integrated financial accounting system that will replace the existing separate accounting/payments systems used for the federal administration of the Medicare and Medicaid programs. It is expected to eliminate redundant/inefficient processes, and will eventually be used by all MACs; CMS is currently in the process of transitioning all MACs over to HIGLAS. Because of the ongoing transition, the agency excluded HIGLAS transition status from the solicitation’s evaluation factors. Declaration of Deputy Director, Financial Management Systems Group, Aug. 2, 2010, ¶ 3.

that should have resulted in Palmetto's exclusion from the competition. CIGNA's First Protest, Feb. 2, 2009, at 57.

In March 2009, following receipt of the agency report responding to its first protest, CIGNA filed a second protest in which it expanded on its initial protest assertions regarding Palmetto's alleged OCIs. Among other things, CIGNA protested that awarding the jurisdiction 11 MAC contract to Palmetto created an OCI between Palmetto and a Palmetto affiliate, Q² Administrators, that had been awarded a contract to perform as the qualified independent contractor (QIC) for jurisdiction 11. CIGNA's Second Protest, Mar. 19, 2009, at 22-24.

On April 1, 2009, CMS advised our Office that it was taking corrective action in response to CIGNA's second protest, and that such action would include reevaluating proposals; reopening discussions, if necessary; and making a new award determination. E-Mail from CMS Counsel to GAO (Apr. 1, 2009). On April 6, we dismissed CIGNA's protests based on the agency's pending corrective actions. CIGNA Gov't Servs. LLC, B-401068, B-401068.2, Apr. 6, 2009.⁵

In April 2009, the agency contracting officer who was responsible for the procurement at that time,⁶ prepared a 20-page document titled "Organizational Conflict of Interest Review for Palmetto GBA." Agency Report (AR), Tab 42. That document reflected the contracting officer's review of various Medicare contracts and subcontracts that Palmetto had identified in its proposal as being performed by

⁵ Following issuance of the dismissal, CIGNA filed its third protest, challenging the agency's then-ongoing corrective action and complaining that CMS had "initiated and accelerated" a recompetition of the jurisdiction 11 QIC requirements that had previously been awarded to Q² Administrators. More specifically, CIGNA complained that the agency was recompeting the QIC requirements in order to "relieve Palmetto of one of its unmitigable conflicts" and that such action was "anticompetitive and unfair." CIGNA's Third Protest, June 2, 2009, at 17. We rejected CIGNA's third protest noting that the agency's actions to replace the Palmetto affiliate as the QIC for jurisdiction 11 appeared "well within the scope of activities that FAR subpart 9.5 contemplates," further noting that "[r]ather than constituting an 'anticompetitive' practice, the agency's actions appear to be aimed at enhancing the field of competition." CIGNA Gov't Services, LLC, B-401068.3, June 11, 2009.

⁶ The record indicates there have been three contracting officers assigned to this procurement since the solicitation was issued in 2007.

itself or its affiliates.⁷ In anticipation of an internal agency meeting conducted on April 23, 2009, the contracting officer also prepared a memorandum that summarized her OCI review and identified three matters to be discussed at the meeting: (1) Palmetto's HIGLAS transition support and training services contracts; (2) Q² Administrators' performance as the QIC for jurisdiction 11; and (3) the fact that UCI-Medical Affiliates, Inc. (UCA-MA), an affiliate of Palmetto, operated as a Medicare provider in jurisdiction 11 and, accordingly, would submit claims to Palmetto as the MAC contractor for jurisdiction 11. *Id.* The record does not show that any resolution of these issues was reached at the April 23 meeting.

On June 18, 2009, the agency re-opened discussions with the offerors. By letter to Palmetto dated June 24, 2009, CMS requested that Palmetto, among other things, describe the activities it performed as a subcontractor on the HIGLAS training and transition support contracts, stating:

Your proposal notes that Palmetto is a subcontractor to QSSI on two contracts: HIGLAS Transition Training and HIGLAS Transition Support. Without more information as to the scope of Palmetto's work under these contracts, CMS cannot determine if there is a conflict of interest. Please provide CMS with detailed descriptions of work being performed by Palmetto under these subcontracts. Additionally, please address the following issues:

- A. To what, if any, nonpublic information not available to its MAC competitors does Palmetto GBA gain access as a result of these subcontracts. Please explain why access to this information does not provide Palmetto an advantage in this competition.
- B. Do one or both of these subcontracts entail reviewing, analyzing, providing feedback, or similar activities on the performance of its MAC competitors, Palmetto, or any subsidiary of Palmetto's parent company?
- C. Do either of these subcontracts include designing specifications or requirements that may be applicable to A/B MACs?

AR, Tab 6, Agency Letter to Palmetto, June 24, 2009, at 5.

⁷ Section L.18 and section H.3 of the solicitation identified specific information that offerors were required to submit with their proposals, including "[a] description of all other Medicare contracts held by the Contractor, its parent company, subsidiaries or other affiliated entities," warning offerors that "[f]ailure to submit the required information may deem an offeror's proposal to be non-responsive to the solicitation." RFP at 41, 137.

By letter dated June 29, 2009, Palmetto responded to the agency's June 24, 2009 discussion questions. With regard to the HIGLAS transition support contract, Palmetto referenced the contract's stated scope of work, as defined in the applicable SOW, elaborating that:

As set forth in the SOW, the role Palmetto GBA plays as part of the HIGLAS TSC [transition support contractor] in supporting CMS' HIGLAS transition efforts is very specific:

- Assist in transitions involving:
 - i. Workload Splits – separating existing HIGLAS workloads into the new MAC jurisdictions
 - ii. Workload Renames – updating existing HIGLAS workloads to change the designation to the new MAC jurisdiction
 - iii. Workload Merges – combining existing HIGLAS workloads into the new MAC jurisdictions
 - iv. Transitions of MACs to HIGLAS – converting existing legacy system financial data into HIGLAS
- The TSC's HIGLAS transition support includes meeting attendance, testing support, data conversion reconciliation support, and cutover support activities. The TSC does not provide support or input into any HIGLAS transition scheduling efforts.

AR, Tab 6, Palmetto Response to Agency Questions, June 29, 2009, at 20.

With regard to the HIGLAS training services contract, Palmetto similarly referenced the contract's stated scope of work, as defined in the applicable SOW, elaborating that:

As set forth in the SOW, the role Palmetto GBA plays as part of the HIGLAS TC [training contractor] is specific and limited in scope:

- Maintain and update CMS HIGLAS training material to be utilized in Medicare contractor training efforts.
- Provide Instructor Led Training classes to Medicare contractors during their HIGLAS transitions.

Id. at 21.

Finally, in responding to the agency's specific questions, lettered A, B, and C above, Palmetto provided several pages of narrative, describing the particular activities it performed under the two contracts, identifying the type of information to which it had access, and explaining why none of its activities or access to information provided an advantage in this competition. Id. at 21-26.

In July 2009, the final contracting officer assigned to this procurement,⁸ provided a copy of Palmetto's June 29, 2009 response to personnel within the CMS program office that is responsible for HIGLAS.⁹ The contracting officer requested that personnel in that office provide feedback regarding Palmetto's written responses to the agency's questions, as well as provide their own independent views regarding potential OCIs flowing from Palmetto's HIGLAS-related activities. AR, Tab 31, OCI Analysis Memo, at 4-6; Tab 41, Palmetto OCI Information, at 6-7.¹⁰ The program office personnel responsible for the HIGLAS system advised the contracting officer that, due to the nature of the system itself, and the nature of the activities associated with transitioning to, and providing training for, the HIGLAS system, Palmetto did not have access to non-public information that could provide a competitive advantage in competing for the jurisdiction 11 MAC contract. AR, Tab 31, OCI Analysis Memo, at 4-6, Tab 41, Palmetto OCI Information, at 6-7. Based on all of the information provided to the contracting officer, including Palmetto's June 29 responses, the assessments of the CMS personnel responsible for the HIGLAS system, the advice of counsel, and her own independent research, the contracting officer concluded that Palmetto's performance of the HIGLAS contracts did not create an OCI. AR, Tab 31, OCI Analysis Memo, at 5-6, 19.

In August 2009, the agency requested submission of final revised proposals (FRP). FRPs were submitted in September 2009 and thereafter evaluated. On April 19, 2010, the contracting officer made a presentation to the source selection board during which the various proposals and the agency's evaluation thereof were discussed. At

⁸ The final contracting officer assumed her responsibilities in July 2009.

⁹ CMS's Office of Financial Management, Financial Management Systems Group, is the program office directly responsible for the HIGLAS system. Declaration of Deputy Director, Financial Management Systems Group, June 29, 2010, ¶ 2.

¹⁰ The contracting officer also performed her own independent internet searches, and reviewed Palmetto's internet website, to determine whether potential OCI issues were created regarding any other matter that had not previously been identified. AR, Tab 31, OCI Analysis Memo, at 3. These additional searches and review did not identify any further information regarding OCIs or potential OCIs. Id.

the end of that meeting, the contracting officer also discussed OCI issues related to Palmetto's proposal. Hearing Transcript (Tr.) at 477-78.¹¹

On April 29, 2010, the contracting officer again met various agency personnel to further discuss OCI issues related to Palmetto's proposal. AR, Tab 32, Request for Waiver, at 2. During that meeting, the attendees specifically discussed the relationship between Palmetto and UCI-MA (a Palmetto affiliate operating as a Medicare-provider in jurisdiction 11). Id. Based on that discussion, the contracting officer concluded that the Palmetto/UCI-MA relationship created an OCI, since UCI-MA would submit claims to Palmetto. The contracting officer further concluded that, although the volume of claims submitted by UCI-MA to Palmetto would be relatively small (less than [deleted] percent of the anticipated claim volume for jurisdiction 11), Palmetto's proposed mitigation approach (to subject UCI-MA's claims determinations to review by an independent auditor) should be reconsidered. Id.

Accordingly, on April 29, 2010, the contracting officer sent a letter to Palmetto referencing Palmetto's proposed mitigation strategy and stating, "CMS does not believe that the proposed mitigation strategy effectively avoids or mitigates the impaired objectivity organizational conflict of interest [created by UCI-MA]." AR, Tab 33A, Agency Letter to Palmetto, Apr. 29, 2010, at 1. After sending the April 29 letter, the contracting officer continued to examine and consider the extent of the Palmetto/UCI-MA conflict. AR, Tab 32, Request for Waiver, at 3. By letter dated May 5, 2010, Palmetto responded, identifying three alternative avoidance/mitigation strategies.¹²

Thereafter, the contracting officer concluded that the Palmetto/UCI-MA OCI was not significant, opting to request a waiver pursuant to the provisions of Federal Acquisition Regulation (FAR) § 9.503.¹³ The contracting officer prepared and submitted a written waiver request outlining the extent of the conflict, specifically including a detailed discussion of her bases for concluding that the conflict was not significant and that a waiver would be in the best interests of the government. AR, Tab 32, Request for Waiver, at 2-7. The requested waiver was subsequently executed

¹¹ In resolving this protest, GAO conducted a 2-day hearing on the record, during which testimony was provided by the contracting officer, the head of the contracting activity, the deputy director for the Financial Management Systems Group, the past performance evaluation panel chair, and the agency official responsible for making award fee determinations under the MAC contracts.

¹² Specifically, Palmetto's response indicated that: [deleted].

¹³ FAR § 9.503 authorizes an agency head or appropriate designee to waive an OCI, based on a determination that such waiver is in the interests of the government, provided the waiver request sets forth the extent of the conflict in writing.

by the head of the contracting activity, and the alternative avoidance/mitigation strategies identified by Palmetto were not implemented. *Id.* at 8. Following the agency’s final evaluation, the proposals of CIGNA and Palmetto were rated as follows:

Evaluation Factors	CIGNA	Palmetto
Technical Understanding (Risk)	Very Good (Low)	Very Good (Low)
Personnel (Risk)	Outstanding (Low)	Outstanding (Low)
Implementation (Risk)	Very Good (Low)	Very Good (Low)
Past Performance (Risk)	Good (Low)	Good (Medium)
Information Security Plan (Risk)	Very Good (Low)	Very Good (Low)
Evaluated Cost/Price	\$332,546,903	\$304,452,184

AR, Tab 28, Recommendation for Award Slides, at 30-31.

Based on the agency’s final evaluation, the contracting officer concluded that Palmetto’s and CIGNA’s proposals were “essentially technically equal.” *Id.* at 29. This determination reflected consideration of differing strengths and weaknesses of the two proposals under various evaluation factors and subfactors.¹⁴ The source selection authority (SSA) concurred with the contracting officer’s assessment of technical equality, adding:

It is my understanding that essentially technically equal means no proposal contains any meaningful advantage that was not otherwise balanced by, encompassed in, or provided for in the other offerors’ proposals. It does not mean that the proposals are identical in every respect. Under essentially technically equal, each proposal may be superior to the others in one or more areas. Essentially technically equal means that, while the proposals offer different advantages, overall there is essentially no meaningful difference in what they have to offer.

AR, Tab 29, SSA’s Decision Memorandum, at 1.

¹⁴ For example, the contracting officer considered the fact that Palmetto’s past performance risk was evaluated as “Medium” due to what she described as “a number of repeated high-risk findings” with regard to Palmetto’s past performance in the area of [deleted]. Tr. at 450.

Based on the determination that the proposals were essentially technically equal, along with the fact that Palmetto's proposal offered a lower evaluated cost/price, a contract was awarded to Palmetto on May 21, 2010. On June 1, CIGNA filed its fourth protest, again challenging various aspects of the agency's source selection process. On July 9, following receipt of the agency's response to its fourth protest, CIGNA filed its fifth protest.

DISCUSSION

Alleged OCIs Based on HIGLAS Contracts

CIGNA first protests that Palmetto's performance under the HIGLAS transition and training support contracts created "[u]nfair, [u]nmitigated, and [u]nallowable" OCIs which the contracting officer failed to reasonably recognize. CIGNA's Fourth Protest, June 1, 2009, at 30. CIGNA maintains that Palmetto's prior performance under those contracts mandate its exclusion from this competition. *Id.* at 3. We disagree.

The situations in which OCIs arise, as addressed in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups.¹⁵ The first group consists of situations in which a firm has access to nonpublic information as part of its performance of a government contract and that information provides a competitive advantage in a later competition. FAR § 9.505-4. The second group consists of situations in which a firm, as part of its performance of a government contract has, in some way, set the ground rules for another contract competition, thereby skewing the competition in its own favor. FAR §§ 9.505-1, 9.505-2. The third group consists of situations where a firm's ability to render impartial advice to the government would be undermined by the firm's competing interests. FAR §§ 9.505-3.

In challenging the award to Palmetto, CIGNA maintains that Palmetto's performance of the HIGLAS contracts creates each of the three types of OCIs discussed above, noting that the HIGLAS system "interacts" with the MACs systems, will eventually be used by all MAC contractors, and therefore will "impact" those contractors. CIGNA's Post-Hearing Comments, Aug. 13, 2010, at 8-17. Among other things, CIGNA asserts

¹⁵ In revising the agency's Medicare contracting procedures through enactment of the MMA, Congress specifically provided that the conflict of interest standards to be applied to MACs are those that are "generally applicable to Federal acquisition and procurement." 42 U.S.C.A. § 13955kk-1(a)(2)(B) (West Supp. 2010). Accordingly, in reviewing protests regarding alleged OCIs in MAC procurements, we consider and apply the OCI provisions of the FAR.

that Palmetto's activities regarding "workload splits," "workload renames," and "workload merges" create OCIs. Id. at 13-17. In this context, CIGNA also complains that QSSI/Palmetto is involved in updating CMS's "internet only manual" (IOM), which provides instructions to MACs regarding claims processing procedures. Id. at 10. CIGNA further asserts that information Palmetto has received in resolving transition problems encountered by other MACs, as well as information obtained in performing the HIGLAS training contract, create OCIs.¹⁶ Id. at 14-15. Accordingly, CIGNA maintains that the contracting officer could not have reasonably determined that performance of the HIGLAS contracts did not create an OCI.

In responding to CIGNA's numerous protest assertions, the agency has provided information and explanations regarding the HIGLAS system, and the nature of the activities that are required by the agency in transitioning to that system. For example, the agency explains that Palmetto's activities with regard to "splits," "renames," and "merges" reflect the fact that the prior accounting system data was not divided by the geographical boundaries established for the current MAC jurisdictions. Tr. at 40. Accordingly, Palmetto's activities regarding these matters involve reorganization of data from the prior organizational structure to a structure consistent with the MAC jurisdictional boundaries—not a review of other MACs' claim processing operations or procedures. Tr. at 43, 45; Declaration of Deputy Director, Financial Management Systems Group, Aug. 2, 2010, ¶¶ 11, 13, 14. More specifically, the agency states that, in performing the HIGLAS contracts, Palmetto does not "obtain access to the contractor's systems, data, business process documents, or any other documents pertaining to the transitioning contractors." Declaration of Deputy Director, Financial Management Systems Group, June 29, 2010, ¶ 30.

In responding to Palmetto's assertion's regarding the agency's IOM, CMS states that, although QSSI/Palmetto have been tasked with comparing the content of the IOM with the content of HIGLAS training manuals and identifying areas in the IOM that could benefit from the addition of HIGLAS-related information, QSSI/Palmetto's input is made publicly available to all Medicare claims processing contractors. Tr. at 393. Further, no IOM revisions flowing from QSSI/Palmetto's activities have been implemented. Id. at 395.

Consistent with the above, the agency further states that, in assisting with specific problems encountered by transitioning contractors, QSSI/Palmetto have viewed "screen prints" of specific problem transactions. However, even with regard to such

¹⁶ These specifically referenced bases for alleged OCIs flowing from the HIGLAS contracts reflect merely a few of the numerous allegations contained in CIGNA's various protest submissions.

“screen prints,” the information accessed does not involve the contractor’s claims processing operations or procedures since “[t]he only financial information that

HIGLAS is involved with is the accounting data.” Declaration of Deputy Director, Financial Management Systems Group, June 29, 2010, ¶ 30. Finally, with regard to the performance of the HIGLAS training services contract, the agency states that Palmetto does not have access to actual “production data” or “contractor-specific data,” but rather relies on “dummy data”; that is, data used to simulate how the modules operate and the system works. Tr. at 44.

The responsibility for determining whether a conflict exists rests with the procuring agency. Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12. In making this determination, the FAR expressly directs contracting officers to examine the particular facts associated with each situation, paying consideration to the nature of the contracts involved, and further directs contracting officers to obtain the advice of counsel and appropriate technical specialists before exercising their own sound discretion in determining whether an OCI exists. FAR §§ 9.504, 9.505. In reviewing bid protests that challenge an agency’s conflicts determinations, the Court of Appeals for the Federal Circuit has mandated application of the “arbitrary and capricious” standard established pursuant to the Administrative Procedures Act (APA). See Axiom Res. Mgmt, Inc. v. United States, 564 F.3d 1374, 1381 (Fed. Cir. 2009). In Axiom, the Court of Appeals noted that “the FAR recognizes that the identification of OCIs, and the evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion.” Id. The standard of review employed by this Office in reviewing a contracting officer’s OCI determination mirrors the standard required by Axiom. In this regard, where an agency has given meaningful consideration to whether an OCI exists, we will not substitute our judgment for the agency’s, absent clear evidence that the agency’s conclusion is unreasonable. See, e.g., MASAI Tech. Corp., B-298880.3, B-298880.4, Sept. 10, 2007, 2007 CPD ¶ 179 at 8; Business Consulting Assocs., B-299758.2, Aug. 1, 2007, 2007 CPD ¶ 134 at 9-10; Overlook Sys. Techs., Inc., B-298099.4, B-298099.5, Nov. 28, 2006, 2006 CPD ¶ 185 at 10-18; Alion Sci. & Tech. Corp., B-297022.4, B-297022.5, Sept. 26, 2006, 2006 CPD ¶ 146 at 5-8.

Here, based on our review of the entire record, we cannot conclude that the contracting officer unreasonably determined that Palmetto’s performance of the HIGLAS contracts does not create an OCI. That is, the record shows that the contracting officer followed the FAR direction to consider the particular facts involved, including the nature of the contracts at issue, and to obtain the advice of counsel and the assistance of technical specialists before exercising her sound

discretion.¹⁷ While we agree that the matters presented raise legitimate concerns regarding Palmetto's involvement in activities that relate to the performance of the MAC contracts, CIGNA has failed to persuasively explain how any of Palmetto's activities or access to information pursuant to performance of the HIGLAS contracts provided Palmetto a competitive advantage in competing for the jurisdiction 11 MAC contract. Based on our consideration of the record presented, including the testimony and declarations of the various agency personnel associated with, and knowledgeable of, the matters at issue, we cannot conclude that the contracting officer's decision reflected an abuse of her discretion. CIGNA's protests to the contrary are denied.

Waiver of the Palmetto/UCI-MA OCI

Next, CIGNA protests that it was improper for the agency to waive the OCI created by the fact that Palmetto will review Medicare claims submitted by UCI-MA, a Palmetto affiliate. CIGNA's Fifth Protest, July 9, 2010, at 25-28. We disagree that the agency's waiver was improper.

As noted above, contracting officers must identify potential OCIs as early in the acquisition process as possible, and generally must avoid, neutralize or mitigate significant conflicts prior to award. FAR § 9.504(a). However, the FAR further establishes that, as an alternative to avoidance, neutralization, or mitigation, an agency head or designee¹⁸ may execute a waiver. Specifically, the FAR provides:

The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or designee.

¹⁷ CIGNA argues that the contracting officer's OCI determination was fatally flawed because she did not specifically discuss the OCI issues with the contracting officers responsible for the HIGLAS transition support and training contracts. However, in developing the record in response to these protests, CIGNA has been provided an opportunity to review the available contract documentation regarding those contracts and has not persuasively demonstrated from such documentation that Palmetto's activities or access to information provided a competitive advantage. On this record, while the contracting officer could have included the further inquiry that CIGNA asserts was mandatory, we reject CIGNA's assertion that the contracting officer was required to do so, given the alternative sources of information that she considered.

¹⁸ The designee must be at a position no lower than the head of the contracting activity. FAR § 9.503.

FAR § 9.503.

Here, as discussed above, the contracting officer prepared and submitted a written waiver request that outlined the extent of the conflict and provided a detailed discussion of the bases for her conclusions that the conflict was not significant and that waiver would be in the best interests of the government. AR, Tab 32, Request for Waiver. The requested waiver was duly executed by the head of the contracting activity, as authorized by FAR § 9.503. Id. at 8.

During the hearing conducted by GAO in this matter, the head of the contracting activity further testified that he attended various meetings with agency personnel, during which the Palmetto/UCI-MA OCI was discussed at length. Tr. at 10-30. We have reviewed the record, both with regard to CMS's compliance with the FAR procedural requirements regarding waiver, as well as the substance of the contracting officer's waiver request, and find no basis to question the agency's compliance with the FAR requirements or the reasonableness of the agency's actions. See MCR Fed., LLC, B-401954.2, Aug. 17, 2010, 2010 CPD ¶ __ at 5; see also Knights' Piping, Inc.; World Wide Marine & Indus. Servs., B-280398.2, B-280393.3, Oct. 9, 1998, 98-2 CPD ¶ 91 at 6.

Alleged Post-FRP Discussions

CIGNA next protests that the agency's post-FRP communications with Palmetto regarding potential avoidance/mitigation strategies constituted discussions and, accordingly, maintains that the agency was required to similarly conduct discussions with the other competitive range offerors. CIGNA's Fifth Protest, July 9, 2010, at 5-13. In this regard, CIGNA maintains that the solicitation for this procurement made the portion of the offerors' proposals responding to the requirements to submit OCI-related information matters of responsiveness. Therefore, the protester asserts, the contracting officer's concerns regarding Palmetto's proposed mitigation approach, as reflected in the April 29, 2010 letter, constituted her determination that Palmetto's FRP was non-responsive. Id.

As noted above, RFP sections L.18 and H.3 contained various OCI-related provisions to which offerors were required to respond. These RFP sections first reminded offerors that, to be eligible for award, an offeror must be "free, to the greatest extent possible, of all conflicts of interest," then identified specific information that offerors

were required to submit with their proposals,¹⁹ and finally, provided that “[f]ailure to submit the required information may deem an offeror’s proposal to be non-responsive to the solicitation.” RFP at 137.

CIGNA does not assert that Palmetto’s FRP failed to include any of the required information, including a proposed mitigation strategy to address the Palmetto/UCI-MA OCI. Rather, CIGNA asserts that, because the contracting officer questioned the sufficiency of that strategy, she had effectively determined that the proposal was non-responsive, thus mandating that discussions be conducted with Palmetto prior to award. We disagree.

In Cahaba Safeguard Adm’rs, LLC, B-401842.2, Jan. 25, 2010, 2010 CPD ¶ 39, this Office addressed a protester’s similar assertions based on similar facts. There, we stated that, where an agency conducts exchanges with an offeror regarding the offeror’s plan to mitigate identified conflicts of interest, such exchanges do not constitute discussions, and do not trigger the requirement to hold discussions with other offerors. Id. at 10; see also Overlook Sys. Technologies, Inc., supra at 19-21.

In Cahaba, we further explained that the FAR contains specific requirements with which a contracting officer must comply in situations where award may be withheld from an apparent successful offeror due to an existing OCI. Specifically, the FAR states:

The contracting officer shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated. Before determining to withhold award based on conflict of interest considerations, the contracting officer shall notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond.

FAR § 9.504(e). We concluded that FAR § 9.504(e) clearly contemplates a review after evaluations are completed, and an agency’s compliance with those requirements does not trigger a requirement to reopen discussions with all offerors. Cahaba Safeguard Adm’rs, LLC, supra, at 10.

Here, the record is clear that the contracting officer’s post-FRP communications with Palmetto were done in compliance with FAR § 9.504(e). In this regard, the

¹⁹ The information to be included in offerors’ proposal included: identification of all other Medicare contracts held by the contractor or its affiliates; identification of all relationships that the contractor, itself, had determined could create OCIs; a description of applicable mitigation strategies regarding contractor-identified OCIs; and a certification as to the truth, completeness, and accuracy of the information submitted. RFP at 41.

record further establishes that, although the contracting officer was concerned about the adequacy of Palmetto's proposed mitigation strategy, she ultimately concluded that the Palmetto/UCI-MA OCI was not significant; further, the alternative avoidance/mitigation strategies discussed by Palmetto in its response to the agency's April 29, 2010 letter were not implemented. Finally, notwithstanding her determination that the OCI was not significant, the contracting officer sought and obtained an OCI waiver, pursuant to the express authority provided by FAR § 9.503. On these facts, we find no basis to conclude that the agency engaged in post-FRP discussions with Palmetto and/or that the agency was obligated to conduct further discussions with other offerors. CIGNA's protest to the contrary is denied.

Evaluation of Proposals Under Other Evaluation Factors

In addition to the specific arguments discussed above, CIGNA's various protest submissions challenge the agency's evaluation of Palmetto's and CIGNA's proposals under virtually every other evaluation factor and subfactor. CIGNA further asserts that the agency's determination of technical equality was unreasonable and that the agency treated CIGNA unfairly under various evaluation factors and subfactors. The agency responds that its various evaluation judgments were reasonable and consistent with the solicitation's stated criteria, and that both offerors were evaluated fairly, pursuant to the provisions of the solicitation and applicable law and regulation.

The evaluation of technical proposals, including the determination of the relative merits of proposals, is primarily a matter of the contracting agency's discretion, since the agency is responsible for defining its needs and the best method of accommodating them. Federal Envtl. Servs., Inc., B-260289, B-260490, May 24, 1995, 95-1 CPD ¶ 261 at 3. In reviewing an agency's evaluation, we will not reevaluate the proposals, but will examine the record of the evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria as well as with procurement law and regulation. Id. A protester's mere disagreement with a procuring agency's judgment is insufficient to establish that the agency acted unreasonably. See Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5.

As an example of CIGNA's various complaints regarding the agency's evaluation, CIGNA challenges the agency's past performance evaluation as "unreasonable and prejudicially unequal," complaining that:

[the agency] repeatedly saved Palmetto from any evaluative consequence by (i) disregarding recent and relevant adverse past performance information, (ii) assigning ratings that do not reflect the evaluation narratives (i.e. that downplay the gravity of concerns about Palmetto and its subcontractor's past performance), and (iii) not according any impact to identified significant weaknesses.

CIGNA's Fifth Protest, July 9, 2010, at 57.

Among other things, CIGNA asserts that the past performance evaluation panel was unreasonable in its assessment of Palmetto's prior performance of the MAC contract in jurisdiction 1,²⁰ and that, here, the SSA's decision improperly referenced the award fee determination related to the jurisdiction 1 contract as support for the conclusion that Palmetto's past performance had "exceed[ed] MAC statement of work performance requirements." See AR, Tab 29, SSA's Decision Memorandum, at 4. CIGNA maintains that, in actuality, the referenced award fee determination should have been viewed as reflecting Palmetto's "fail[ure] to meet expectations." CIGNA's Fifth Protest, July 9, 2010, at 68. In raising this argument, CIGNA notes that the fee determining official responsible for the jurisdiction 1 MAC substantially reduced the performance evaluation board's initial award fee recommendation, and criticized certain aspects of Palmetto's prior performance, concluding that much of Palmetto's performance of the jurisdiction 1 contract "was not exceptional . . . it was merely acceptable." See AR, Tab 19, Performance Evaluation Board Report, at 2. The record shows that the fee determining official ultimately awarded Palmetto an award fee consisting of only [deleted] percent of the total available amount. Id.

The agency responds that an award fee of any amount reflects contractor performance that "exceed[s] certain aspects of the basic requirements of the contract," or performance "over and above what is expected." Tr. at 194, 323. Accordingly, the agency maintains that it was proper and appropriate for the SSA to reference the, albeit lower than initially recommended, award fee as a basis for concluding that Palmetto's past performance of that contract exceeded requirements. We agree, concluding that CIGNA's assertions that the agency's past performance evaluation was flawed with regard to its consideration of Palmetto's

²⁰ Palmetto was awarded the MAC contract for jurisdiction 1 in 2007.

jurisdiction 1 contract performance reflects CIGNA's mere disagreement with the agency's judgment.²¹

By way of another example of CIGNA's various challenges to the agency's specific evaluation assessments, CIGNA asserts that the evaluation of Palmetto's proposal under the personnel evaluation factor was flawed. In this regard CIGNA asserts that the agency was required to reject Palmetto's proposal on the basis that its proposed [deleted] received [deleted] degree from Bob Jones University. CIGNA's Fifth Protest, July 9, 2010, at 44-52. CIGNA's argument in this regard refers to section [deleted] of the solicitation's SOW, quoting a subparagraph of that section that states: "[deleted] shall possess [deleted] degree from an accredited four-year college or university." RFP at 215. CIGNA maintains that Bob Jones University does not qualify as an accredited educational institution,²² and thus the agency was required to reject Palmetto's proposal. CIGNA's Fifth Protest, July 9, 2010, at 43-52.

The agency responds that CIGNA's protest misrepresents the solicitation requirements, pointing out that CIGNA's protest selectively quotes from the SOW and omits an immediately preceding provision that states: "Unless otherwise approved by the Contracting Officer, the key personnel noted below shall possess the following minimum . . . educational requirements." RFP at 214 (underlining added). The agency further points out that section M.3 of the RFP, under the heading "Personnel Evaluation Criteria," expressly advised offerors that "[t]he offeror's proposal will be evaluated on the degree to which the technical qualifications of the proposed key personnel meet and/or exceed the skill and

²¹ By way of another example regarding the past performance evaluation, CIGNA challenges the evaluation of Palmetto's proposal with regard to comprehensive error rate testing (CERT) rates that Palmetto has experienced under another Medicare contract, noting that, in one of four areas being serviced under that contract, Palmetto's CERT rate was 4.7 percent, while the contract goal was 3.8 percent. CIGNA's Fifth Protest, July 9, 2010, at 78-80. Accordingly, CIGNA asserts that the agency was obligated to assess a weakness or deficiency to Palmetto's performance. In responding to this matter, the agency notes that Palmetto's CERT rates for three of the four areas being serviced were substantially lower than the 3.8 percent goal and that it considered Palmetto's overall CERT rate performance, including the areas in which Palmetto's performance was more favorable than the stated goal, in determining that assessment of a weakness was not warranted. We find no basis to question the agency's judgment in this regard and conclude that CIGNA's assertions to the contrary reflect mere disagreement with that judgment.

²² CIGNA asserts that the University has "publicly spurned accreditation" and that "the United States did not even recognize Bob Jones University as an 'educational institution' under applicable tax law at any point during [deleted's] attendance." CIGNA's Fifth Protest, July 9, 2010, at 49, 51.

experience requirements in the SOW.” RFP at 151 (underlining added). Accordingly, the agency maintains that, contrary to CIGNA’s assertions, the educational requirements did not constitute minimum mandatory requirements; rather, the very section of the solicitation on which CIGNA relies for its assertions expressly advised offerors that the contracting officer could approve alternative educational requirements. Consistent with this advice to the offerors, the agency maintains that it considers the educational qualifications of Palmetto’s [deleted] to comply with the provisions of the solicitation. We find no basis to question the reasonableness of the agency’s judgment in this regard, nor its determination that the proposal complied with the solicitation’s stated provisions.

In summary, we have reviewed all of CIGNA’s assertions concerning alleged errors in the agency’s evaluation, CIGNA’s assertion that the agency’s determination of technical equality was unreasonable, and CIGNA’s assertion that the agency generally treated CIGNA unfairly, and find no merit in its allegations.²³

The protests are denied.

Lynn H. Gibson
Acting General Counsel

²³ CIGNA’s various protest submissions have also raised arguments in addition to, or variations of, the arguments specifically discussed above, including challenges to the agency’s cost/price evaluation, the agency’s best value determination, and the timing of the agency’s various assessments and determinations. We have considered all of CIGNA’s protest allegations and find no basis to sustain its protests.