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## Decision

**Matter of:** Noridian Administrative Services, LLC

**File:** B-407355; B-407355.3

**Date:** December 21, 2012

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### DIGEST

1. Protest that contracting agency unreasonably downgraded protester's technical proposal and upwardly adjusted protester's proposed costs in the cost realism evaluation is denied where the record shows that the agency reasonably declined to accept one of the protester's proposed innovations, upon which its technical proposal and proposed costs were based.

2. Agency is not required to consider past performance information that it has reasonably determined to be an unreliable measure of the offerors' actual performance.

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### DECISION

Noridian Administrative Services, LLC, of Fargo, North Dakota, protests the award of a contract to CGS Administrators, LLC, of Nashville, Tennessee, under request for proposals (RFP) No. RFP-CMS-2011-0006 by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), for a durable medical equipment (DME) Medicare administrative contractor (MAC) in

jurisdiction C.<sup>1</sup> The protester contends that the agency improperly downgraded its technical proposal, unreasonably evaluated its cost proposal, and failed to consider certain past performance information that the protester contends should have been included in the review.

We deny the protest.

The award challenged here concerns the DME MAC contract to provide fee-for-service health insurance benefit administration services, including Medicare claims processing and payment services for DME, prosthetics, orthotics, and supplies in jurisdiction C. RFP at 7. The Medicare Prescription Drug, Improvement, and Modernization Act of 2003, 42 U.S.C. § 1395kk-1 (2006), requires CMS to use competitive procedures, pursuant to the Federal Acquisition Regulation (FAR), to obtain Medicare claims processing services to be provided by MACs.

The RFP, issued on November 30, 2010, contemplated the award of a cost-plus award-fee contract for a 4-month implementation period, an 8-month operational base period, and four 1-year options. The solicitation stated that the agency would award a contract to the offeror submitting the proposal determined to provide the best value to the government giving primary consideration to the technical quality of the proposals in the evaluation process. RFP at 117.

Technical proposals were to be evaluated based upon the factors of past performance and technical understanding. Id. at 118. Past performance would be evaluated based on an offeror's demonstrated ability to successfully meet the requirements of the statement of work, under contracts of similar nature, scope, and complexity as the MAC contract. RFP, amend. 4, at 24. Technical understanding would be evaluated based on an "[o]fferor's proposed approach under Tab C (inclusive of all sub-tabs) and its oral presentation." Id. at 26. The criteria contained in Tab C were as follows: (1) program management, (2) personnel, (3) innovations, (4) medical review strategy, (5) technical scenarios, and (6) jurisdiction implementation project management plan. Id. at 18-22. With regard to both the past performance and technical understanding evaluations, the following four aspects would be considered: (1) customer service, (2) financial management, (3) operational excellence, and (4) innovations and technology. Id. at 24-27.

The solicitation stated that the non-cost evaluation factors, "when combined, are significantly more important than cost or price," and that "cost reasonableness and realism will be considered." RFP at 117. In this regard, the agency's cost realism

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<sup>1</sup> The DME MAC contract in jurisdiction C covers Alabama, Arkansas, Colorado, Florida, Georgia, Louisiana, Mississippi, New Mexico, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, U.S. Virgin Islands, Virginia, and West Virginia.

analysis would determine whether the estimated proposed cost elements are realistic for the work to be performed, reflect a clear understanding of the requirement and are consistent with the unique methods of performance and materials described in the offeror's technical proposal. Id.

Five offerors submitted proposals by the January 21, 2011 closing date, including Noridian and CGS. Contracting Officer's (CO) Statement at 3. After evaluation of initial proposals, on March 16, 2012, the agency established a competitive range consisting of only Noridian's and CGS's proposals. Id. at 4. The contracting officer conducted a total of seven rounds of discussions with CGS and eight rounds of discussions with Noridian. Id. at 5.

Both offerors submitted their final revised proposals by the June 15 deadline. The final revised proposals were evaluated as follows:<sup>2</sup>

Offeror	Offeror Capability		Proposed Cost	Probable Cost
	Past Performance	Technical Understanding		
Noridian	Green	Yellow	\$ [DELETED]	\$177,428,040
CGS	Green	Green	\$ [DELETED]	\$177,047,596

AR, Tab 30, Source Selection Memorandum, at 29.

Based upon the technical evaluation panel's (TEP) and business evaluation panel's (BEP) evaluations, as well as her own independent analysis and comparative assessment, the source selection authority concluded that CGS's highest technically-rated, lowest evaluated-cost proposal represented the best value to the government. Id. at 31. Upon learning of the resulting August 31 award of the contract to CGS, and after receiving a debriefing, Noridian filed this protest.

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<sup>2</sup> For the past performance and technical understanding evaluation, the agency's descriptions of the adjectival ratings were as follows: green, yellow, and red. As relevant here, a green past performance rating meant that an offeror's past performance collectively demonstrates that the contractor consistently provides quality service and delivers benefits to the Government. For technical understanding, a green rating meant that the proposal has little potential to cause disruption of schedule, increased cost, or degradation of performance, while a yellow rating shows moderate potential for disruption. AR, Tab 10, Technical Evaluation Panel Report, at 6, 9.

## DISCUSSION

In its protest, Noridian raises numerous arguments with regard to CMS's technical, cost, and past performance evaluations. Although we do not specifically address all of Noridian's arguments, we have fully considered all of them and find that they afford no basis on which to sustain the protest.

### Technical Evaluation of Noridian's [DELETED] Innovation

Noridian contends that the agency improperly downgraded its proposal based on its offered innovation to replace paper MSNs with [DELETED]. Noridian contends that this misvaluation was based upon a mistaken belief that current Medicare beneficiaries would not accept [DELETED]. In response, the agency asserts that it reasonably chose not to accept Noridian's proposed [DELETED] innovation, which deviated from the statement of work requirements of providing paper MSNs to beneficiaries.

The evaluation of proposals, including the determination of the relative merits of proposals, is primarily a matter within the contracting agency's discretion, since the agency is responsible for defining its needs and the best method of accommodating them. Highmark Medicare Servs., Inc., et al., B-401062.5 et al., Oct. 29, 2010, 2010 CPD ¶ 285 at 12. 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.

Here, the relevant RFP statement of work section required:

#### 1.3.1 Generate and Deliver Standard Paper RAs [Remittance Advice] (SPRs) and Medicare Summary Notices (MSNs)

The Contractor shall perform all ongoing activities associated in support of the beneficiary MSN and the supplier SPR as specified in IOM Pub 100-04, Chapter 22. These activities include, but are not limited to ongoing supplier and beneficiary education efforts for the MSN and SPR, achieving maximum postage savings associated with mailing the MSN and SPR.

RFP, attach. J-01, Statement of Work, at 80. The solicitation also provided instructions for offerors proposing innovations in their proposals:

The Offeror shall identify its proposed innovations and/or process improvements proposed for the contract. Innovation can be defined as including, but is not limited to, the originality, soundness and feasibility of ideas or processes as they relate to the way in which the Offeror's organization will manage the entire project.

\* \* \*

The Offeror shall fully discuss what each proposed innovation will do, when the innovations and/or process improvements will be in place, and what the overall benefit is to the Government. Benefits to the Government may be operational cost savings, improved customer service, and reductions to improper payments. Where applicable, the Offeror shall crosswalk identified benefits to the line items/functional areas of its cost proposal templates and/or its proposed labor rationale.

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(2) If the Offeror has proposed innovations and/or process improvements that are not part of its current operations, the Offeror shall provide a schedule that provides the timeline for completing/implementing the proposed innovations and/or process improvements. This "schedule" shall include the start date, end date and any major milestones leading up to the implementation of an innovation. CMS is **not** requiring a complete thorough project schedule, although CMS may ask discussion questions to test the offerors thoroughness of planning. These "schedules" shall count towards the page count limit. In addition, the Offeror shall discuss the research performed to support the stated benefits for the proposed innovations and/or process improvements. Research may be internal investigation the Offeror performed on its operations and/or research conducted externally on similar operational systems. Finally, the Offeror shall provide a contingency plan for proposed innovations and/or process improvements in the event that there is a delay in the Offeror's implementation.

AR, amend. 4, at 20-21.

As relevant here, during discussions the contracting officer requested basis of estimate information specific to [DELETED] costs from both offerors. CO's Statement at 6. In response to the agency's request, Noridian proposed an innovation, involving the use of [DELETED], which it had not previously provided in its initial or revised technical approach or business proposal assumptions, to

replace paper MSNs and reduce [DELETED] costs.<sup>3</sup> Id. Noridian's proposal provided:

[DELETED]

Agency Report (AR), Tab 19, Noridian Discussion Response (May 4, 2012), at 2-3.

During verbal discussions on June 1, the contracting officer provided Noridian with the agency's concerns regarding its proposed use of [DELETED]. The contracting officer also informed Noridian that CMS's approval of its [DELETED] was highly unlikely within the timeframes proposed by Noridian, particularly on the heels of an unsuccessful [DELETED]. Finally, the agency cautioned that since CMS does not have convincing evidence that [DELETED] are beneficial to the government, by means of CMS's [DELETED]<sup>4</sup>, if Noridian intended to continue to propose [DELETED] as an efficiency in its final proposal revision for the jurisdiction C contract, Noridian's technical approach must offer a comprehensive and innovative solution to significantly [DELETED] assumed in its business proposal. CO's Statement at 7-8; AR, Tab 28, Record of Verbal Discussions with CMS (June 1, 2012), at 2-3.

Noridian incorporated its proposed [DELETED] innovation into its final proposal revision and provided explanations as to why this innovation should be accepted. AR, Tab 8, Noridian Final Proposal Revision, vol. I, Technical Proposal, Tab C.3, Innovations, at 4-6. In this regard, Noridian's final proposal revision assumed a decrease in [DELETED] costs each year of the contract due to increased [DELETED] with beneficiaries through [DELETED]. Id. These reductions in Noridian's proposed [DELETED] costs were based on the assumption that the [DELETED]. AR, Noridian Final Proposal Revision, vol. IIB, Business Proposal, Tab F.1, J24-Proposal Assumptions, No. 42.

The agency's final evaluation of Noridian's technical proposal resulted in a weakness for its proposed [DELETED] process innovation whereby a Medicare beneficiary would receive an [DELETED]. In this regard, the TEP noted that Noridian's technical approach to implementing its proposed [DELETED] initiative suggested that Noridian "does not fully understand and/or it has not sufficiently considered in its technical approach (1) the dynamics of the current and near-future (two-to-five years) beneficiary community and (2) the multifaceted and complex elements that must be met before implementation and during contract

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<sup>3</sup> The record reflects that while Noridian's initial and revised technical proposal did not mention the use of [DELETED], the cost savings associated with the use of [DELETED] were incorporated into Noridian's April 2012 revised business proposal. CO's Statement at 7.

<sup>4</sup> The [DELETED]. CO Statement at 7.

performance.” AR, Tab 10, Final Technical Evaluation Report, at 18. While the TEP agreed with Noridian that as the [DELETED]. Id. The TEP concluded that Noridian’s [DELETED] process “does not seem reasonable when considering the current or near-future beneficiary community.” Id. In summary, the TEP analysis stated:

Noridian’s aggressive approach and assumptions to implementing its proposed [DELETED] process demonstrates a lack of technical understanding of the current and near-future (within the next 5 years) beneficiary community proposal and the complexities of implementation. As such unrealized projections of the [DELETED] process may require some amount of Government monitoring to prevent negative impacts on timeliness of service, or contract cost control. This may cause the Offeror to perform the work less effectively or at a lower level of quality, and potentially higher costs.

Id. at 20.

The source selection authority adopted the TEP’s findings and noted that Noridian’s proposal “did not consider [DELETED].” AR, Tab 30, Source Selection Memorandum, at 20. The source selection authority also determined that despite discussions of the [DELETED], and did not propose, as suggested in discussions, a viable or comprehensive approach to [DELETED]. Id. at 21. Thus, the SSA concurred with the TEP’s assignment of a weakness. Id.

Based upon this record, we find that the agency’s assessment of a weakness in Noridian’s technical proposal to be reasonable and consistent with the evaluation criteria. As indicated, the solicitation’s statement of work called for the use of paper MSNs. RFP, attach. J-01, Statement of Work, at 80. While the solicitation also permitted offerors to propose innovations, offerors were required to fully discuss what each proposed innovation will do, when the innovations and/or process improvements will be in place, and what the overall benefit is to the government. AR, amend. 4, at 20-21. In addition, the solicitation required offerors, who had not implemented the proposed innovation into their current operations, to discuss the research performed to support the stated benefits for the proposed innovations and/or process improvements. Id.

During its evaluation, the agency thoroughly reviewed Noridian’s proposal and engaged in discussions with Noridian to advise that the agency was very skeptical about Noridian’s proposed [DELETED] innovation. The agency clearly warned Noridian that it needed to provide a comprehensive and innovative solution to [DELETED].

After receipt of Noridian’s final proposal revision, the agency found that Noridian had failed to adequately justify its [DELETED] innovation and assigned a weakness

to Noridian's technical proposal. In this regard, the agency found that while Noridian provided further arguments, its response did not, for example, demonstrate how it would do [DELETED]. Supp. AR at 3. We also agree with CMS's observation that Noridian's response was based on the assumption that CMS would ultimately [DELETED]. However, as noted by the agency, Noridian did not [DELETED] in the event CMS did not accept this innovation and continues to require paper MSNs in accordance with the solicitation. Supp. AR at 7.

It is an offeror's responsibility to submit an adequately written proposal that establishes its capability and the merits of its proposed technical approach in accordance with the evaluation terms of the solicitation. Carolina Satellite Networks, LLC; Nexagen Networks, Inc., B-405558 et al., Nov. 22, 2011, 2011 CPD ¶ 257 at 4. Noridian acted at its own peril when it chose not to submit the requested information within its proposal. While Noridian may disagree with the agency's assignment of a weakness for its [DELETED] innovation, Noridian's disagreement with the agency's judgment is not a sufficient basis to sustain a protest. FN Mfg., LLC, B-402059.4, B-402059.5, Mar. 22, 2010, 2010 CPD ¶ 104 at 7.

#### Cost Evaluation of Noridian's [DELETED] Innovation

Noridian also asserts that its proposed [DELETED] innovation was adequately supported, and therefore it was unreasonable for CMS to make upward adjustments to CMS's costs based upon this innovation.

When an agency evaluates proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated cost of contract performance is not considered controlling since, regardless of the costs proposed by the offeror, the government is bound to pay the contractor its actual and allowable costs. Metro Machine Corp., B-402567, B-402567.2, June 3, 2010, 2010 CPD ¶ 132 at 6; Honeywell Tech. Solutions, Inc., B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 17; see FAR § 16.301. As a result, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract costs are likely to be under the offeror's unique technical approach, assuming reasonable economy and efficiency. FAR §§ 15.305(a)(1), 15.404-1(d)(1), (2); The Futures Group Int'l, B-281274.2, Mar. 3, 1999, 2000 CPD ¶ 147 at 3. A cost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror's cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with the unique methods of performance and materials described in the offeror's proposal. FAR § 15.404-1(d)(1); Advanced Commc'n Sys., Inc., B-283650 et al., Dec. 16, 1999, 2000 CPD ¶ 3 at 5. Based on the results of the cost realism analysis, an offeror's proposed costs should be adjusted when appropriate. FAR § 15.404-1(d)(2)(ii). The end product of a cost realism analysis is the total estimated cost that the agency realistically expects to pay for the offeror's proposed effort, as



it is the estimated cost and not the offeror's proposed cost that must be the basis of the agency's source selection determination. Magellan Health Servs., B-298912, Jan. 5, 2007, 2007 CPD ¶ 81 at 13 n.13.

We review an agency's judgment in this area only to see that the agency's cost realism evaluation was reasonably based and not arbitrary, and adequately documented. Honeywell Tech. Solutions, Inc., *supra*, at 18; Jacobs COGEMA, LLC, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16 at 26. Here, we find the agency's cost realism analysis to be unobjectionable.

The BEP's evaluation determined that Noridian's proposed [DELETED] costs were unrealistic when considering its proposed technical approach and understanding of the requirements. AR, Tab 11, Final Business Evaluation Panel Report, at 21. In this regard, the BEP concluded that the TEP's assignment of a weakness attributable to Noridian's proposed [DELETED] innovation directly correlated with a [DELETED] costs in Noridian's cost proposal. *Id.* at 24. Thus, the BEP removed all of Noridian's projected [DELETED] cost savings related to its proposed [DELETED] process in [DELETED] because Noridian's proposal failed to support or prove the viability of its proposed innovation. *Id.* at 25.

Once the agency removed all of Noridian's proposed [DELETED] cost savings, the agency used Noridian's proposed base year costs as the foundation for the upward adjustment since Noridian's base year costs excluded the [DELETED] but included all other proposed efficiencies, which the agency accepted. *Id.* The agency's adjustment then annualized the proposed base year costs for [DELETED] and escalated the annual cumulative base year costs by 2 percent, which was applied to each option year. *Id.* This adjustment resulted in a total upward cost realism adjustment of \$[DELETED]. *Id.*

For the reasons discussed above, we find that the agency reasonably determined that Noridian had not adequately supported how the alleged innovation would result in the claimed savings. Specifically, the agency reasonably determined that Noridian had not described an adequate plan for [DELETED]. As the solicitation required offerors to adequately support the adequacy of their proposed costs, and Noridian failed to do so, we find reasonable CMS's decision to base its cost realism evaluation on Noridian's [DELETED] costs for the base year of the contract, which excluded all of Noridian's proposed [DELETED] cost savings.

Noridian argues that it is unreasonable for the agency to conclude that none of its cost savings would be realized because its adjustment was based upon the contracting officer's flawed interpretation of a [DELETED]. Even if this was the case, the agency decision to remove all of the proposed cost savings of Noridian's insufficiently supported [DELETED] innovation was reasonable since the solicitation's statement of work required paper MSNs and nothing in the solicitation required CMS to accept offerors' proposed innovations. An agency's cost realism

analysis need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate and provide some measure of confidence that the agency's conclusions about the most probable costs under an offeror's proposal are reasonable and realistic in view of the cost information reasonably available to the agency as of the time of its evaluation. Metro Mach. Corp., *supra*. Here, after determining that Noridian had not adequately supported its [DELETED] innovation, the agency adjusted Noridian's cost to reflect its costs had it not proposed a deviation from the solicitation's paper MSN requirement. Although Noridian clearly disagrees with this aspect of the agency's evaluation, we cannot find it to be unreasonable.

### Evaluation of Past Performance

Finally, Noridian contends that the agency failed to consider relevant past performance in the evaluation of proposals. Noridian asserts that the agency did not consider relevant data from the Comprehensive Error Rate Testing Program (CERT Program) and that if this information had been considered its past performance would have been rated superior to CGS's.

The evaluation of an offeror's past performance is a matter of agency discretion, which we will not find improper unless unreasonable or inconsistent with the solicitation's evaluation criteria. Concepts & Strategies, Inc., B-405930, Jan. 12, 2012, 2012 CPD ¶ 47 at 7; National Beef Packing Co., B-296534, Sept. 1, 2005, 2005 CPD ¶ 168 at 4. Further, the evaluation of past performance, by its very nature, is subjective, and we will not substitute our judgment for reasonably based evaluation ratings; an offeror's disagreement with an agency's evaluation judgments does not demonstrate that those judgments are unreasonable. FN Mfg., LLC, *supra*, at 7; MFM Lamey Group, LLC, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10. As detailed below, our review of the record leads us to conclude that CMS's past performance evaluation was unobjectionable.

Here, it is undisputed that the agency did not use DME MAC CERT scores in its evaluation of past performance. Instead, the agency chose to use only A/B (Medicare Part A and B) MAC CERT scores, which resulted in a strength for Noridian. The agency asserts that this determination was reasonable because the DME CERT rate information does not accurately reflect contractor performance since CMS implemented changes to the CERT program in 2009. *See Highmark Medicare Servs., Inc., et al.*, *supra*, at 18 (agency reasonably concluded that due to their unreliability, the 2009 CERT rates should not be used in evaluating the offerors' past performance under this solicitation). For example, the agency references an excerpt from the 2011 CMS report, which explains:

Approximately 91 percent of the [DME] improper payments were due to insufficient documentation errors. Therefore, for most of these improper payment claims, the provider or supplier did not submit a

complete medical record to support that the services or supplies billed were actually provided, provided at the level billed, and/or were medically necessary. In other cases, required documentation elements that are required as a condition of payment or by a specific [local coverage determination] were missing, such as a documented face-to-face physician evaluation within required timeframes or a physician signature on a supplier form that is required to be completed in its entirety.

AR, Tab 34, Medicare Fee-for-Service 2011 Improper Payments Report, at 25. Thus, because most of the errors result from documentation issues that are beyond the contractor's control, CMS has concluded DME MAC CERT rate information does not appear to reflect the actual performance of the DME MACs, and should not be used in procurement evaluations. AR at 9. Based upon the explanation of the agency, we see nothing unreasonable about the determination not to use DME MAC CERT rate data.

Even though the agency chose not to consider the DME MAC CERT rate data, the agency did consider past performance on previous DME MAC contracts, A/B MAC contracts, Legacy Title XVIII (fiscal intermediary and carrier) contracts, other types of Medicare contracts, and non-Medicare work. To make its assessments, the agency used a variety of other data sources: contractor performance assessment reporting system (CPARS)/past performance information retrieval system (PPIRS), Section 912 evaluations (relating to information security requirements for MACs), quality assurance and surveillance plan results, subject matter expert interviews, award fee determinations, and past performance questionnaires. AR, Tab 10, Final Technical Evaluation Report, at 30. Given the reasonableness of the agency's explanations regarding why the DME MAC CERT was unsuitable for use in the evaluation, as well as the well-documented past performance evaluation based on numerous other sources of past performance information, we have no basis to object to the past performance evaluation.

The protest is denied.<sup>5</sup>

Susan A. Poling  
General Counsel

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<sup>5</sup> In its second supplemental protest, Noridian asserts as an alternative argument that the agency engaged in misleading discussions. The agency in its supplemental report addressed Noridian's claims in this regard, and Noridian did not respond to the agency's explanation in its comments. Thus Noridian has abandoned this aspect of its protest. See Symlicity Corp., B-297060, Nov. 8, 2005, 2005 CPD ¶ 203 at 5 n.6. Nonetheless, based upon our review of the record, we conclude that the agency's discussions were not misleading.