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## Decision

**Matter of:** Wisconsin Physicians Service Insurance Corporation

**File:** B-401068.14; B-401068.15

**Date:** January 16, 2013

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### DIGEST

1. Agency reasonably considered protester's adverse past performance related to information system security requirements, along with awardee's commendable past performance regarding those requirements, in determining that awardee's past performance was superior to protester's, and agency reasonably considered that superiority in making award.
2. Agency reasonably concluded that awardee's proposal reflected a superior technical understanding of the contract requirements, where agency reasonably found that awardee's proposal included innovations to address the contract's unique requirements and that protester's proposal failed to recognize the complexity of the solicitation's requirements.
3. Protest challenging agency's cost realism evaluation is denied where record establishes that agency's realism determinations were reasonable, including agency's determination to upwardly adjust protester's proposed cost/price where protester's proposal failed to establish a basis for substantially reducing protester's historical costs.

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## **DECISION**

Wisconsin Physicians Service Insurance Corporation (WPS), of Madison, Wisconsin, protests the award of a contract to National Government Services, Inc. (NGS), of Indianapolis, Indiana, under request for proposals (RFP) No. RFP-CMS-2007-0013, issued by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), to obtain Medicare administrative contractor services. WPS challenges the agency's evaluation and source selection decision with regard to the offerors' past performance, the offerors' technical understanding of the contract requirements, and the cost realism of the offerors' proposals.

We deny the protest.

## **BACKGROUND**

At the outset, we note that this is CMS's third attempt to implement the statutory requirements for award of the contract at issue. Specifically, CMS first published the solicitation at issue in August 2007, seeking proposals to perform a cost-plus-award-fee contract as the Medicare Administrative Contractor (MAC)<sup>1</sup> in a geographic area identified as "jurisdiction 6" (J6) for a 1-year base period and four 1-year option periods.<sup>2</sup> Following the selection of an awardee in 2009, protests

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<sup>1</sup> 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 (for example, hospitals and nursing facilities) under Part A of the Medicare program, and carriers were responsible for processing Medicare claims from professional providers (for example, physicians and diagnostic laboratories) under Part B of the Medicare program. Prior contracts for performance of fiscal intermediary and/or carrier services are frequently referred to as "legacy" contracts.

<sup>2</sup> The statement of work (SOW) for J6 includes Part A and Part B Medicare workload for the states of Illinois, Minnesota, and Wisconsin, as well as home, health and hospice (HH&H) workload for Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Michigan, Minnesota, Nevada, New Jersey, New York, Northern Mariana Islands, Oregon, Puerto Rico, U.S. Virgin Islands, Wisconsin, and Washington. Agency Report (AR), Tab A.3, RFP amend. 7, at 2; Contracting Officer's Statement at 1. HH&H requirements are unique, and CMS has assigned HH&H workload to only four jurisdictions--jurisdictions 6, 11, 14 and 15. AR, Tab A.4, Statement of Work, at 20.

were filed challenging that selection decision. Thereafter, the agency cancelled the award, amended the solicitation,<sup>3</sup> and sought new proposals.

As amended, the solicitation provided for contract award to the offeror whose proposal offered the best value to the government after considering two evaluation factors: offeror capability<sup>4</sup> and cost/price.<sup>5</sup> RFP amend. 7, at 127-33. Proposals were evaluated under the non-cost/price factor and subfactors by assignment of the following ratings: green, yellow and red.<sup>6</sup> With regard to evaluation of cost/price, the solicitation provided that proposals would be evaluated for reasonableness and realism, but would not be assigned adjectival ratings.<sup>7</sup>

Initial proposals responding to the amended solicitation were submitted in July 2010; thereafter, discussions were conducted and final proposal revisions (FPR) were submitted. On September 30, 2011, the agency selected NGS for award; WPS filed a protest challenging that award in October 2011. In January 2012, the agency again advised this Office that it was taking corrective action, elaborating that it would either reevaluate proposals on the basis of the

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<sup>3</sup> In June and July 2010, the agency issued RFP amendment Nos. 7, 8, and 9, substantially revising various sections of the solicitation including sections L and M.

<sup>4</sup> The offeror capability factor was divided into two subfactors: past performance and technical understanding. The solicitation further provided that the agency would consider the following aspects under each subfactor: customer service, financial management, operational excellence, and innovations and technology. RFP amend. 7, at 131-32.

<sup>5</sup> The solicitation provided that offeror capability was more important than cost/price. Id. at 127.

<sup>6</sup> With regard to evaluation of past performance, the agency identified past performance for each offeror that was considered beneficial, adverse, and/or decisively adverse prior to assigning an adjectival rating. A green rating reflected consistent quality service, a yellow rating reflected an acceptable level of service, and a red rating reflected habitual unacceptable performance. AR, Tab 2.A, Source Selection Decision (SSD) at 5-10. With regard to evaluation of technical understanding, the agency identified strengths, weaknesses, significant weaknesses, and/or deficiencies in each offeror's proposal prior to assigning an adjectival rating. A green rating reflected the agency's assessment of a high expectation of successful performance; a yellow rating reflected the agency's assessment of a fair expectation of successful performance; and a red rating reflected an assessment of a low expectation of successful performance. Id.

<sup>7</sup> The evaluated cost/price for the base year was added to the cost/price of the four, one-year options, to calculate a total evaluated cost/price. RFP amend. 7, at 128.

existing record or reopen the procurement and request proposal revisions. Email from CMS to GAO, Jan. 25, 2012.

On February 17, 2012, the agency once again requested submission of offerors' proposals. On March 13, proposals were submitted by three offerors, including WPS and NGS.<sup>8</sup> Thereafter, the agency's technical evaluation panel (TEP) reviewed the submissions, and discussions were conducted with the offerors. Among other things, the agency noted that WPS's proposal appeared to materially understate the level of effort (or, alternatively, appeared to overstate WPS's projected productivity), associated with performing the J6 claims processing requirements--specifically with regard to the solicitation's part A requirements which included the HH&H workload. AR, Tab 14.F, Technical Cost Analysis Review and Discussion Tracking, at 25-28. Consistent with that assessment, the agency advised WPS that its proposed level of effort for these requirements appeared to be unreasonable, particularly in light of WPS's performance under its jurisdiction 5 (J5) MAC contract.<sup>9</sup> Accordingly, the agency provided WPS with the following discussion question:

WPS's proposed level of effort for [claims processing] appears unreasonable. To determine the reasonableness of WPS' proposed level of effort, the Government compared WPS's historic level of effort charged [for claims processing] on the Jurisdiction 5 contract for the time period of [deleted] through [deleted] to WPS's proposed level of effort for this contract. . . . [F]or the J6 proposal, WPS would . . . process [deleted] more claims than its history.

Although WPS proposes an increase over its historic hours . . . the hours appeared to be insufficient when the Government compared hours at the labor category level. The Government found that WPS has reduced level of effort for [specified labor categories].

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<sup>8</sup> The proposal of the third offeror is not relevant to resolution of WPS's protest and is not further discussed in this decision.

<sup>9</sup> WPS has been the J5 MAC contractor since September 2007. The record establishes that WPS's productivity under the J5 contract was [deleted] claims per day. AR, Tab 6.A.4, WPS Discussion Questions/Responses, at 33. In evaluating WPS's initial proposal, the agency calculated WPS's proposed J6 productivity to be [deleted] claims per day. Technical Cost Analysis Review and Discussion Tracking, at 27. In response, WPS increased its proposed staffing, but acknowledged that, even with increased staffing, its J6 proposal reflected productivity of [deleted] claims per day--[deleted] its historic productivity. WPS Discussion Questions/Responses, at 33.

. . . . .

In addition to the reduction in hours for these labor categories from WPS's history, WPS's proposed productivity appears unreasonable based on history.

. . . . .

Please provide a detailed rationale to support WPS's proposed level of effort in this proposal. The rationale should include a discussion regarding the reduction in hours for the labor categories identified above. Further the rationale should provide sufficient data to support WPS's proposed productivity in this proposal, inclusive of the exact formula and historic data used to calculate WPS's historic productivity.

WPS Discussion Questions/Responses, at 31-32.

In responding to the agency's concerns, WPS stated, in part:

**Different Provider Mix.** The mix of provider types and corresponding bill types in J5 are more complex than those in the J6 provider mix. . . .

While Home Health services present some unique challenges, most reason codes result in a Return to Provider or rejection action if the claim is not payable. Because of these major shifts in the mix of provider types and bill types, it is difficult to compare productivity rates in an accurate manner between the J5 and J6 contracts. Clearly, the "average claim" in J6 will be less complex than that in J5.

Id. at 34.

As noted above, HH&H claims are unique to jurisdiction 6. Further, HH&H providers account for a substantial portion of J6 facilities, and CMS views the particular HH&H requirements in J6 as presenting unusual challenges--including a high propensity for fraud.<sup>10</sup> RFP amend. 7, at 90-103; SSD at 34-35. Accordingly, CMS did not agree with WPS's conclusion that, in the aggregate, J6 claims "will be

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<sup>10</sup> In August 2012, the Department of Health and Human Services (HHS), Office of Inspector General (OIG) published a report criticizing the billing practices related to home health agencies (HHA), concluding that eighty percent of HHAs with questionable billing were located in four states--including California and Michigan, which are part of the J6 workload. *Inappropriate and Questionable Billing By Medicare Home Health Agencies*, OEI-04-11-00240 (Aug. 2012).

less complex” than J5 claims. Technical Cost Analysis Review and Discussion Tracking at 26. Further, the agency viewed WPS’s statement in that regard as an indication that WPS failed to fully understand the J6 contract requirements, including the unique complexities associated with the HH&H workload.

Final revised proposals were submitted on July 25, 2012. In summary, these proposals were evaluated as follows:

	<b>WPS</b>	<b>NGS</b>
<b>Past Performance</b>	Green	Green
<b>Technical Understanding</b>	Green	Green
<b>Overall Offeror Capability</b>	Green	Green
<b>Evaluated Cost/Price<sup>11</sup></b>	\$326.8 million	\$330.1 million

SSD at 2.

In performing her independent review of offerors’ proposals, the source selection authority (SSA) concluded that NGS’s proposal was superior to WPS’s under the offeror capability evaluation factor. Specifically, the SSA concluded that particular aspects of NGS’s proposal reflected a superior technical understanding of the contract requirements, noting that WPS’s assertion regarding the relative complexity of claims in J6 indicated that WPS “does not fully understand” the complexities of the J6 requirements. SSD at 34. The SSA elaborated as follows:

I took into consideration that NGS is the current contractor handling the HH&H workload for 13 states (including the challenging states of California and Michigan, both of which have a high propensity for fraud) and 5 territories which encompass J6. In addition, NGS’s “forward thinking” regarding HH&H by offering the government two (2) innovations, [deleted] and [deleted] are both very beneficial.<sup>[12]</sup> This “forward thinking” demonstrates NGS’s superior knowledge and understanding of the complexities and issues such as high fraud and abuse, which accompany this workload. In addition, NGS proposed a [deleted] to address the distinct differences in HH&H claims and the

<sup>11</sup> In evaluating most probable costs, the agency upwardly adjusted both NGS’s and WPS’s proposed costs by a little more than \$[deleted] million. Specifically, WPS’s cost/price was adjusted by \$[deleted] million and NGS’s cost/price was adjusted by \$[deleted] million. SSD at 2.

<sup>12</sup> NGS proposed pilot programs to (1) [deleted], and (2) [deleted]. AR, Tab 11.a, NGS FPR, Vol. I, at 42-45.

unique needs of the HH&H practitioners. WPS' proposed approach, [deleted], received a strength but as the SSA, I am very concerned that the TEP, TCA [technical cost analyst] and CMS SME [subject matter expert] believe that WPS does not fully understand the complexities of the HH&H and FQHC [federally qualified health center] workloads. WPS's assumption that the claims workload in J5 is more difficult than the claims workload in J6 caused some concern to the evaluation team, with which I concur.

NGS's HH&H solution and its prerequisite knowledge of this workload offered the TEP and SSA a level of confidence that NGS will be able to accomplish the effective management of this workload as a MAC which is superior to the solution offered by . . . WPS.

SSD at 34-35.

In addition, the SSA noted that the TEP had identified various aspects of WPS's past performance that were adverse--including "System Security Evaluations (Section 912) – FY 2010."<sup>13</sup> SSD at 13; AR, Tab 14.A, TEP Report at 34. Specifically, the TEP referenced the section 912 audit findings in concluding that WPS's nonconformance with system security requirements "may have put the Medicare program at risk," elaborating that WPS's adverse past performance "could have a negative effect on the Offeror's ability to perform efficiently and protect the confidentiality, integrity and availability of Medicare FFS [fee for service] data and could result in the need for increased Government oversight and monitoring." TEP Report, at 34. The SSA further noted that, in contrast, NGS had not had any section 912 high-risk ratings with regard to its most recent audit, that NGS was the only MAC contractor for which this was true, and concluded that "NGS's performance in this area is superior to that of any other Medicare contractor."<sup>14</sup>

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<sup>13</sup> Section 912 of the MMA requires annual evaluation, testing and reporting of contractors' systems security programs to ensure that they meet certain information security requirements. The record shows that, in performing the required audit of WPS for fiscal year 2010, the security controls auditor identified [deleted] high risk findings and [deleted] medium risk findings; this was above the national average. TEP Report, at 34.

<sup>14</sup> The SSA elaborated:

It is important to note that starting in 2010, the depth of Section 912 System Security Evaluation testing was expanded over previous years to include additional focus on technical security controls. . . . As the SSA for this procurement, I thought it was very commendable for a contractor to have no high-risk findings in 2011 after the more stringent requirements were put into place in 2010. . . . Therefore, it is

(continued...)

SSD at 24. Accordingly, the SSA concluded that NGS's proposal was superior to WPS's with regard to past performance.<sup>15</sup> SSD at 56.

Thereafter, the SSA performed a cost/technical tradeoff between WPS's slightly lower cost/price<sup>16</sup> and NGS's evaluated superiority with regard to the more heavily weighted non-cost/price evaluation factors, concluding that:

NGS's total probable cost of performance is \$3,344,236 more than WPS's total probable cost of performance. NGS's superior past performance in the area of Section 912 Security Evaluations is a benefit to CMS in that NGS does not require additional help with correcting high risk security areas. Failure to achieve security requirements puts the agency at risk and is very labor intensive for CMS to bring contractors in compliance with non-compliant issues. In addition, NGS's superior technical approach with regards to HH&H which promotes its ability to pay HH&H claims accurately and reliably circumventing program integrity issues that are unique to the HH&H workload, and its forward thinking by offering a [deleted] and innovations regarding this workload that will potentially prevent fraud, collectively provides a superior approach than that of WPS.

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(...continued)

noteworthy and valuable to CMS that NGS was the only Medicare Contractor to have no high-risk findings in its 2011 Section 912 Evaluation.

SSD at 28.

<sup>15</sup> The agency's evaluation also identified adverse past performance for WPS with regard to WPS's quality assurance surveillance plan (QASP) Medicare secondary payer metrics in the J5 contract. The evaluation record notes that WPS's performance in this regard was below the national average for the first part of the performance period and lacked accuracy in the referral of MSP (Medicare secondary payer) claims. SSD at 13; TEP Report, at 33-34. Additionally, the agency's past performance evaluation of WPS reflected two major non-conformances with regard to WPS's part A legacy workload and one major non-conformance with regard to WPS's part B legacy workload; these non-conformances were corrected in subsequent periods. TEP Report, at 33-34; Contracting Officer's Statement, Nov. 7, 2012, at 7. Finally, the agency's past performance evaluation of WPS recognized multiple beneficial aspects of WPS's past performance. TEP Report, at 29-33.

<sup>16</sup> As noted above, NGS's evaluated cost/price was approximately 1 percent higher than WPS's evaluated cost/price.

NGS's cost premium of \$668,847 per year (\$3,344,236/5) is minimal when compared to the overall cost of the contract and worth the additional potential benefits realized by the superior technical approach offered by NGS.<sup>17</sup>

SSD at 59.

On September 28, the agency advised WPS that NGS's proposal had been selected for award. This protest followed.

## DISCUSSION

WPS protests the agency's evaluation and source selection decision with regard to the offerors' past performance, the offerors' technical understanding of the contract requirements, and the cost realism of the offerors' proposals. As discussed below, we find no merit in WPS's various allegations.<sup>18</sup>

### Past Performance

In challenging the agency's evaluation of past performance, WPS first complains that the agency improperly considered WPS's prior failures to comply with the section 912 system security requirements. In this regard, WPS asserts that the agency merely "counted up" the [deleted] high risk findings and failed to consider their "significance or context," asserting that "the majority of the findings related to documentation errors that did not jeopardize CMS data or WPS networks." Protest at 11-14. WPS also protests that the agency failed to properly consider what it describes as WPS's "corrective action," its "trend of improvement," and its "commitment to improve in systems security." Id. Further, WPS asserts that the agency's focus on WPS's adverse past performance regarding the section 912 system security requirements constituted application of an "unstated evaluation criterion," asserting that the agency's consideration of this matter was "wholly

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<sup>17</sup> The SSA also compared the offerors' respective fee structures--noting that NGS offered a [deleted] percent base fee and [deleted] percent award fee, while WPS offered a [deleted] percent base fee and [deleted] percent award fee--concluding "[t]his means NGS bears a greater risk than [WPS] by ensuring itself of a [deleted] [percent] fee, and having the [deleted] [percent] depend on successful performance." SSD at 59. The SSA elaborated, "[i]f NGS does not perform over and above the contract requirements, then NGS will not receive award fee," further noting that "NGS' base fee (dollar amount) is the lowest of all Offerors." SSD at 59.

<sup>18</sup> In its various protest submissions, WPS has raised multiple arguments that are in addition to, or variations of, the specific arguments discussed below. We have considered all of WPS's arguments and find no basis to sustain its protest.

unreasonable.” Protest at 13; WPS Comments/Supp. Protest at 41. Finally, WPS attempts to avoid responsibility for the system security issues by asserting that “a large number of the findings related to a WPS subcontractor.” Protest at 12.

The evaluation of past performance, including assessments of relevance and significance of an offeror’s performance history, is a matter of agency discretion which we will not disturb unless those assessments are unreasonable. Yang Enter., Inc.; Santa Barbara Applied Research, Inc., B-294605.4 et al., Apr. 1, 2005, 2005 CPD ¶ 65 at 5-7; Acepex Mgmt. Corp., B-283080 et al., Oct. 4, 1999, 99-2 CPD ¶ 77 at 3, 5; TPL, Inc., B-297136.10, B-297136.11, June 29, 2006, 2006 CPD ¶ 104 at 12. While consideration of past performance trends and corrective actions is generally appropriate, an agency is not required to ignore instances of negative past performance, The Bionetics Corp., B-405145, B-405145.2, Sept. 2, 2011, 2011 CPD ¶ 173 at 7-8; further, a prime contractor is generally responsible for the prior performance of its subcontractors. ViaSat, Inc., B-291152, B-291152.2, Nov. 26, 2002, 2002 CPD ¶ 211 at 8; Neal R. Gross & Co., Inc., B-275066, Jan. 17, 1997, 97-1 CPD ¶ 30 at 4. Finally, in a best value procurement, a source selection official must determine whether one proposal’s superiority under non-cost/price factors warrants a higher cost. Remington Arms Co., Inc., B-297374, B-297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 15; Chenega Technical Prods., LLC, B-295451.5, June 22, 2005, 2005 CPD ¶ 123 at 8. Proposals with the same adjectival ratings are not necessarily equal, and an agency may properly consider specific advantages that make one proposal more valuable than another. Id. at 6-7. In this regard, a single advantage, even under a lower-weighted factor, may properly be relied upon as a key discriminator for purposes of a source selection decision. Smiths Detection, Inc.; American Science and Eng’g, Inc., B-402168.4 et al., Feb. 9, 2011, 2011 CPD ¶ 39 at 16; DPK Consulting, B-404042, B-404042.2, Dec. 29, 2010, 2011 CPD ¶ 12 at 13.

Here, nothing in WPS’s various protest submissions challenge the accuracy or validity of the agency’s determination that WPS previously failed to comply with multiple aspects of the section 912 system security requirements. Further, the agency’s contemporaneous evaluation documentation establishes that it specifically considered, among other things, the following high-risk findings regarding WPS’s section 912 audit:

[deleted]

AR, Tab 14.B, TEP Report, attach. 5, at 25.

Although WPS expresses its opinion that its various prior failures did not actually result in harm to CMS’s data or WPS’s network, WPS’s opinion merely reflects its disagreement with the agency’s judgment as to the significance of WPS’s adverse past performance. As noted above, in addition to any actual prior harm, the agency was concerned about the potential for future harm, as well as the requirement that

CMS would have to engage in labor-intensive monitoring and oversight efforts in order to bring WPS into compliance. TEP Report, at 34; SSD at 59. On this record, WPS's views regarding the significance of its adverse prior performance provides no basis for sustaining the protest.

Next, regarding WPS's assertions that the agency failed to consider either WPS's "trend of improvement" or the context of WPS's past performance, the record is to the contrary; the record establishes that the agency did, in fact, consider these matters. That is, it is clear that the agency's evaluation recognized and documented positive aspects of WPS's past performance, including its correction of various deficiencies. TEP Report, at 29-34; SSD at 12-13, 30, 32-35, 55-56. Nonetheless, the agency determined that, by comparison, NGS's past performance was superior. SSD at 31-36, 55-59. Specifically, as noted above, the SSA recognized that the section 912 evaluation had been made more rigorous in 2010 and that, following those changes, NGS's audit revealed no high-risk findings-- which the agency considered "commendable" in that NGS was the only MAC contractor for which this was true. SSD at 28. Thus, it is clear that the agency did, in fact, fully consider WPS's past performance, taking note of both its positive and negative aspects in the context of this competition, and reasonably concluded that NGS's past performance was superior.<sup>19</sup> Further, as noted above, a single advantage may properly be relied upon as a key discriminator for source selection purposes, particularly where, as here, other factors such as cost/price are relatively close. Smiths Detection, Inc.; American Science and Eng'g, Inc., supra; DPK Consulting, supra.

Finally, while WPS attempts to absolve itself of responsibility for the section 912 failures by blaming those failures on its prior subcontractor, its attempt is unavailing. As noted above, a prime contractor is responsible for the performance of its subcontractor. ViaSat, Inc., supra; Neal R. Gross & Co., Inc., supra. Here, the fact that WPS may no longer rely on a particular subcontractor it previously selected does not preclude the agency from considering the results of WPS's prior subcontractor selection.

In sum, based on our consideration of the entire record, we find no merit in WPS's various arguments challenging the reasonableness of the agency's evaluation of past performance, the agency's determination that NGS's past performance was

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<sup>19</sup> Although WPS touts various steps it has taken to improve its past performance, we note that WPS's protest expressly acknowledges that, at the time of its 2011 section 912 system security audit, WPS had eliminated only [deleted] of the [deleted] high-risk findings. Protest at 14. Further, as noted above, notwithstanding consideration of a contractor's corrective action, an agency is not required to ignore instances of negative prior past performance. The Bionetics Corp., supra. Nothing in the record provides a basis for concluding that this principle is inapplicable here.

superior to WPS's, or the agency's consideration of such superiority in selecting NGS's slightly higher-priced proposal for award.<sup>20</sup>

#### Technical Understanding

WPS next challenges the agency's evaluation of both offerors' proposals under the technical understanding subfactor. In this regard, WPS complains that the agency erroneously questioned WPS's understanding of the solicitation requirements; improperly credited NGS with a thorough understanding of the requirements; and unreasonably evaluated NGS's proposed staffing plan. As discussed below, we find no merit in these allegations.

WPS first asserts that the agency unreasonably concluded that WPS's proposed level of effort and productivity assumptions reflected WPS's view that the aggregated claims under the J6 statement of work would be less complex than those processed under WPS's J5 contract. In light of WPS's response to the agency's discussion questions set forth above, and repeated below, WPS makes the somewhat startling assertion that: "Nowhere does WPS's productivity assumption assert that the *types of claims* handled in J6 will be less complex than *the types of claims* handled in J5." Supp. Protest, Nov. 19, 2012, at 29 (italics in original). The record is to the contrary.

As discussed above, the agency was concerned with the level of effort and the associated productivity on which WPS's J6 proposal was based, as compared to its historic level of productivity.<sup>21</sup> Accordingly, during discussions, the agency brought

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<sup>20</sup> WPS also complains that the agency failed to properly consider what WPS asserts was negative past performance by NGS in transitioning contract responsibilities pursuant to the award of a MAC contract in jurisdiction 8 (J8). In 2011, WPS was selected for award of the J8 MAC contract, and NGS was the legacy contractor for many of the J8 requirements. WPS attacks NGS's transition activities, alleging that NGS's "errors, inflexibility and unwillingness to work collaboratively [with WPS] resulted in unnecessary chaos, confusion and delays." Protest at 26. The agency responds that implementation of the J8 MAC was similar to other MAC implementations, that CMS was satisfied with the performance of both NGS and WPS during the J8 transition, and that CMS management was never notified of a significant risk of failure while transition was ongoing. See Statement of CMS Director of Medicare Contractor Management Group, Nov. 8, 2012, at 3-4. Based on our review of the record, we find no basis to question the agency's assessments.

<sup>21</sup> As noted above, the record shows that WPS's historic productivity was [deleted] claims per day and WPS acknowledges that its J6 proposal was based on projected productivity of [deleted] claims per day. WPS Discussion Questions/Responses, at 33.

several specific areas of concern to WPS's attention, concluding with the following request:

Please provide a detailed rationale to support WPS's proposed level of effort in this proposal. The rationale should include a discussion regarding the reduction in hours for the labor categories identified above. Further the rationale should provide sufficient data to support WPS's proposed productivity in this proposal, inclusive of the exact formula and historic data used to calculate WPS's historic productivity.

WPS Discussion Questions/Responses, at 32.

WPS's FRP responded to this request, stating:

**Different Provider Mix.** The mix of provider types and corresponding bill types in J5 are more complex than those in the J6 provider mix. . . .

While Home Health services present some unique challenges, most reason codes result in a Return to Provider or rejection action if the claim is not payable. Because of these major shifts in the mix of provider types and bill types, it is difficult to compare productivity rates in an accurate manner between the J5 and J6 contracts. Clearly, the "average claim" in J6 will be less complex than that in J5.

Id. at 34.

Based on the above, we find nothing unreasonable in the agency's conclusion that WPS's lower proposed level of effort and higher productivity assumptions for the J6 contract reflected WPS's belief that the aggregated claims WPS would process under the J6 statement of work would be less complex than the aggregated claims that WPS had processed under the J5 contract. Any WPS assertion to the contrary is without merit.

Next, WPS's protest effectively asserts that it was unreasonable for the agency to reject the substance of WPS's assumption that J6 claims would be less complex than J5 claims. In this regard, WPS's multiple protest submissions present various arguments regarding various aspects and variables of the two jurisdictions' workloads, including: the number and type of facilities in each jurisdiction, the number of claims per provider, differing hospital types, the nature of the claims likely

to be submitted, the projected “suspense rate,”<sup>22</sup> whether or not the provider numbers in a given jurisdiction are “legitimate proxies” for the “comparative claim mix,” and other factors. Protest at 27-33; Supp. Protest at 27-36; Supp. Comments at 33-42. In short, WPS’s protest submissions assert that WPS’s assumption regarding the relative complexity of the J6 workload was reasonable and, therefore, the agency’s rejection of WPS’s assumption--along with its determination that WPS failed to fully understand the complexity of the contract requirements--was unreasonable. Based on its various assertions regarding the factors affecting the relative complexity of the J6 workload, WPS maintains that we should sustain its protest. We decline to do so.

In reviewing an agency’s evaluation of proposals and source selection decision, it is not our role to reevaluate submissions; rather, we examine the supporting record to determine whether the decision was reasonable, consistent with the stated evaluation criteria, and adequately documented. Trofholz Techs., Inc., B-404101, Jan. 5, 2011, 2011 CPD ¶ 144 at 3; Johnson Controls World Servs., Inc., B-289942, B-289942.2, May 24, 2002, 2002 CPD ¶ 88 at 6. A protester’s disagreement with the agency’s evaluation judgments, or with the agency’s determination as to the relative merits of competing proposals, does not establish that the evaluation or the source selection decision was unreasonable. Smiths Detection, Inc.; Am. Sci. and Eng’g, Inc., B-402168.4 et al., *supra*, at 6-7; ITW Military GSE, B-403866.3, Dec. 7, 2010, 2010 CPD ¶ 282 at 5.

The record here shows that, in rejecting WPS’s assumption regarding the relative complexity of the J6 requirements, the agency relied on its extensive experience with MAC contracts generally, and considered the same variables that WPS references in support of its position that the J6 requirements are comparatively less complex. While WPS attempts to characterize its various assertions as challenging something other than WPS’s and the agency’s differing views regarding the relative complexity of the J6 requirements, we reject those characterizations. That is, WPS’s various arguments challenging the agency’s evaluation of WPS’s proposal with regard to the technical understanding subfactor reflect its mere disagreement with the agency’s judgment regarding the relative complexity of the J6 requirements, and nothing WPS has presented persuades this Office that the agency’s judgment regarding that ultimate, dispositive issue was unreasonable.

To summarize, our review of the record leads us to conclude that: (1) WPS’s proposed level of effort assumed productivity that was substantially higher than its historic J5 productivity; (2) during discussions, the agency advised WPS that its level of effort and proposed productivity appeared to be unreasonable, requesting

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<sup>22</sup> The “suspense rate” is the percentage of claims which, for any reason, cannot be electronically processed and require manual intervention. Agency Legal Memorandum at 59; RFP amend. 7, append. A, Key Definitions, at 14.

that WPS provide its rationale for its low level of effort and high productivity; (3) WPS responded, stating that it believed the J6 claims processing workload was “less complex” than the J5 workload; (4) the agency rejected WPS’s view regarding the relative complexity of the J6 workload and, accordingly, concluded that WPS did not fully understand the J6 contract requirements; and (5) nothing in the record provides a basis for us to conclude that the agency’s substantive disagreement with WPS regarding the relative complexity of the J6 workload was unreasonable. Accordingly, we have no basis to question the agency’s assessment that WPS failed to fully understand the J6 contract requirements, and WPS’s protest challenging the agency’s evaluation of WPS’s proposal under the technical understanding subfactor is denied.

WPS next protests the agency’s evaluation of NGS’s proposal under the technical understanding subfactor, challenging the conclusion that NGS had “superior knowledge and understanding of the complexities” of the J6 contract requirements. Among other things, WPS complains that, in reaching this conclusion, the agency improperly considered two innovations in NGS’s proposal: (1) [deleted] and (2) [deleted].

As noted above, with regard to the first innovation, NGS proposed [deleted]. NGS FPR, Vol. 1 at 43. While recognizing that “there could be implementation and/or legal issues with aspects of this proposed pilot,” the agency concluded that the proposal demonstrated NGS’s superior understanding of the HH&H issues and had “solid potential to reduce improper payments and integrity issues in high risk states.” TEP Report, at 48. NGS’s second innovation addressed [deleted].<sup>23</sup> NGS proposed to [deleted]. Id.

In challenging the agency’s consideration of NGS’s innovations, WPS complains that NGS’s proposed pilot programs are still in a “nascent developmental stage,” and did not reflect associated costs. Accordingly, WPS maintains that it was unreasonable for the agency to conclude that the innovations were likely to occur. Supp. Protest at 36-40.

As noted above, we will not reevaluate proposals; rather, we will review the record to determine if the agency’s evaluation was reasonable, and a protester’s mere disagreement with the agency’s judgments does not establish that the evaluation was unreasonable. Trofholz Techs., Inc., supra; Johnson Controls World Servs., Inc., supra; Smiths Detection, Inc.; Am. Sci. and Eng’g, Inc., supra; ITW Military GSE, supra.

Here, the record reflects that the agency did, in fact, question NGS regarding the feasibility of its proposed innovations and sought information regarding potential

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<sup>23</sup> [deleted]. Legal Memorandum at 63.

costs to the agency. NGS responded by acknowledging that not all of the technology was developed, stated that the agency would not bear any costs for the [deleted], and discussed its view regarding the practical viability of its proposed innovations. NGS FPR, Vol I, at 42-46. The agency noted that NGS had not identified potential agency costs, but concluded that such potential costs appeared to be minimal; further, NGS's proposed cost/price did not take any credit for cost savings associated with the innovations. Ultimately, the SSA concluded that NGS's "forward thinking" innovations were beneficial in that they "demonstrate[d] NGS's superior knowledge and understanding of the complexities and issues such as high fraud and abuse, which accompany this workload," and reflected NGS's ability to provide "ideas to combat the problems." SSD at 34, 58. On this record we find nothing unreasonable in the agency's favorable consideration of NGS's proposed innovations as demonstrating a superior technical understanding of the J6 requirements. WPS's criticisms of the agency's evaluation, again, reflect only disagreement with the agency's judgments regarding the offerors' relative technical understanding of the J6 requirements.<sup>24</sup>

Next, WPS protests the agency's evaluation of NGS's proposed staffing plan. Specifically, NGS asserts that the agency improperly gave NGS credit for proposing recently-severed employees as "experienced" staff,<sup>25</sup> complaining that NGS is unlikely to be successful in re-hiring its former employees.

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<sup>24</sup> In its supplemental comments, following receipt of the agency's response to its supplemental protest, WPS for the first time asserts that NGS's proposal failed to comply with section L solicitation provisions regarding proposed implementation dates. Since this matter was not raised within 10 days of WPS's receipt of the NGS's proposal and the agency's evaluation documentation, the argument regarding proposed implementation dates is not timely. 4 C.F.R. § 21.2(a) (2012). In any event, it is not clear that section M.4 of the solicitation precludes the agency's consideration of innovative ideas in assessing an offeror's technical understanding based on the flaws that WPS has untimely asserted existed in NGS's proposal.

<sup>25</sup> The solicitation indicated that experienced staff was preferred over inexperienced staff, and each offeror was required to identify the portion of its proposed staff that was experienced. Consistent with this requirement, the solicitation contained the following instruction:

The Offeror shall identify each FTE [full time equivalent] as "experienced" or "inexperienced." The "experienced" label should be used for existing staff **or new hires that have experience working in the Medicare Fee-For-Service Program, or equivalent work experience.** [Bolding added.]

AR, Tab 3.B.1, Staffing Matrix Instructions.

As noted above, NGS was not selected for award in the recent competition for the J8 MAC contract. Because NGS had been performing a substantial part of the J8 workload under legacy contracts, NGS was forced to lay off [deleted] employees who were displaced by that award in July and August of 2012. NGS Discussion Questions/Response, at 3-6. NGS's J6 proposal indicated that it intended to re-hire approximately half of these experienced employees upon award.<sup>26</sup> During discussions, the agency questioned NGS regarding this matter. Id. NGS explained that, at the time they were severed, approximately half of the employees had signed letters of interest in being re-hired by NGS if it were awarded the J6 contract. Id. Based on this explanation, the agency accepted NGS's assertion that it would re-hire approximately half of its experienced, prior employees, and gave NGS's proposal credit in that regard.

WPS protests that it was unreasonable for the agency to accept NGS's proposal to re-hire its former employees. More specifically, WPS complains that CMS "improperly equated an employee's mere expression of interest in employment with a binding commitment," asserting that there was no certainty that NGS's former employees "would be willing and available to return to NGS" upon award of the J6 contract. Supp. Protest at 9. Accordingly, WPS maintains that NGS will, in fact, fill those positions with inexperienced new hires, and asserts that the level of risk associated with re-hiring NGS's recently-severed personnel rendered the agency's evaluation unreasonable. We disagree.

Here, the record establishes that NGS fully disclosed its proposed staffing intentions to the agency with regard to re-hiring its experienced employees, listing by name each of the employees that had signed letters of interest.<sup>27</sup> NGS Discussion Questions/Response, at 3-6. Further, NGS advised the agency that it was maintaining communications with its former employees and that, upon award, it would immediately initiate the re-hiring process. Id. In evaluating NGS's response, the agency acknowledged the existence of some risk regarding NGS's success in re-hiring, but noted that "the risk is not as great as if NGS was hiring new inexperienced staff." TEP Report at 46. Ultimately, the agency concluded "there is minimal risk in rehiring the recently severed employees," referring to the letters of interest signed by the former employees. Id. On this record, we do not find the agency's determination to accept NGS' proposed staffing plan, and to give NGS credit for planning to re-hire its experienced, prior employees, to be unreasonable.

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<sup>26</sup> Clearly, all of NGS's previously-severed employees who had performed under NGS's legacy contracts, met the solicitation's definition of "experienced" personnel, noted above.

<sup>27</sup> The TEP recognized that NGS's previously-severed personnel make up approximately [deleted] percent of NGS's total staffing. TEP Report, at 46.

## Cost Realism

Finally, WPS challenges the agency's cost realism evaluation. As discussed above, the agency upwardly adjusted both WPS's and NGS's proposed costs/prices by approximately \$[deleted] million. WPS challenges various cost realism adjustments the agency made to WPS's proposal, and complains that the agency should have made additional adjustments to NGS's proposal. We have considered all of WPS's cost realism assertions and find no basis to sustain its protest.

By way of example, WPS challenges the agency's upward adjustment of WPS's proposed cost/price related to its customer service program. In this regard, WPS proposed cost savings by significantly decreasing the length of customer service telephone calls to just [deleted] minutes. WPS Discussion Questions/Responses, at 19. WPS's proposal asserted that its projected decrease would be accomplished through [deleted], [deleted],<sup>28</sup> and [deleted]. *Id.* at 20-21. In evaluating WPS's initial proposal, the agency noted that WPS's average customer service call under its J5 contract had been [deleted] minutes during 2011. AR, Tab 13.A.1, Business Evaluation Panel (BEP) Report, at 15. Following discussions with WPS on this matter, CMS upwardly adjusted WPS's proposed costs. WPS protests that the agency's adjustment was improper because it maintains that it has reduced its average call time in recent months and, accordingly, the agency was required to accept the lower costs associated with WPS's projected extension of that purported trend. Protest at 45.

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. 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). An agency's cost realism analysis need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate and provide a 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 at the time of its evaluation. See Metro Mach. Corp., *supra*. We review an agency's judgment in this area only to see that the agency's cost realism evaluation was reasonably based and adequately documented. Honeywell Tech. Solutions, Inc., *supra*; Jacobs COGEMA, LLC, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16 at 26.

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<sup>28</sup> WPS describes [deleted]. AR, Tab 4.a, WPS Initial Proposal, Vol. I, at 34.

Here, the record shows that, during discussions, the agency asked WPS to respond to the following:

WPS has not provided sufficient data to support a reduction of nearly [deleted] minutes to call handle times. . . . Therefore, please provide a detailed rationale to support these proposed call handle times. WPS's rationale should include its Part A J5 MAC historic call handle times for the most recent six months (at a minimum). In addition, the rationale should include data and research conducted to estimate/project savings to this historic handle time in this proposal.

WPS Discussion Questions/Responses, at 20-21.

In response, WPS submitted J5 data for the prior [deleted] months showing that the average call times had actually increased to [deleted] minutes.<sup>29</sup> Id. at 21. WPS also submitted various information discussing its proposed use of [deleted], [deleted], and [deleted], but failed to submit any research, calculations, or quantification of its projected savings.

Based on WPS's explanation that its recent [deleted] activities had "temporarily impacted" its call times in a negative manner, CMS did not consider the [deleted] minute average call time as representative and, therefore, relied on the 2011 call time of [deleted] minutes. BEP Evaluation Report for WPS, at 16. However, CMS rejected WPS's assertion that expanding the pool of personnel capable of handling customer calls [deleted] would have any impact on the length of those calls. Id. at 15. Further CMS noted that, despite its request that WPS provide a "detailed rationale" including "data and research conducted to estimate/project savings," WPS had provided none, nor had it adequately explained how it arrived at any proposed call time reduction. Id. Accordingly, CMS upwardly adjusted WPS's proposed costs to more closely reflect its historic costs.<sup>30</sup> Id.

Based on our review of this record, we do not question the agency's cost realism adjustment. As noted above, the agency specifically requested a "detailed rationale," including "data and research conducted to estimate/project savings." Our review of the record shows that WPS did not comply with this request. Instead, WPS argues that the data it submitted reflected an overall "downward trend," and

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<sup>29</sup> WPS explained that the time had increased due to its [deleted] efforts which "temporarily impacted" average call time. WPS Discussion Questions/Responses, at 21.

<sup>30</sup> In calculating the cost realism adjustment the agency downwardly adjusted the 2011 call time of [deleted] minutes to reflect a [deleted] percent productivity gain per year. BEP Evaluation Report for WPS, at 16.

that the agency was required to accept WPS's projected extension of that "trend." WPS Discussion Questions/Responses, at 21. Even if we accepted WPS's interpretation of the data as reflecting a "downward trend," we find no basis to conclude that the agency was obligated to accept an extension of that "trend" in the absence of the detailed information the agency had requested. While WPS effectively asserts that the burden was on the agency to disprove the realism of its projections, the contrary is true. An offeror is obligated to present an adequately written proposal, including sufficient support for its assumptions. See United Def. LP, B-286925.3, et al., Apr. 9, 2001, 2001 CPD ¶ 75 at 19. On the record here, WPS's protest challenging this aspect of the agency's evaluation is denied. Further, we have considered all of WPS's assertions regarding the cost realism evaluation of the two proposals and find no basis to sustain any of its arguments.

In summary, WPS's protest challenges virtually every aspect of the agency's evaluation and source selection decision and uniformly reflects WPS's dissatisfaction with the agency's judgments and determinations. Nonetheless, in our view, WPS has failed to provide any basis to conclude that the source selection decision was materially flawed.

The protest is denied.

Susan A. Poling  
General Counsel