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## Decision

**Matter of:** B&B Medical Services, Inc.

**File:** B-414471.7; B-414471.8; B-414471.9

**Date:** July 24, 2023

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William M. Jack, Esq., and Ken M. Kanzawa, Esq., Kelley Drye & Warren LLP, and Richard L. Moorhouse, Esq., Greenberg Traurig LLP, for the protester. John E. McCarthy, Jr., Esq., and Issac D. Schabes, Esq., Crowell & Moring LLP, for Apria Healthcare, LLC, the intervenor. Daniel J. McFeely, Esq., Department of Veterans Affairs, for the agency. Uri R. Yoo, Esq., and Alexander O. Levine, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest that estimated quantities in a solicitation did not accurately reflect agency's needs is denied where agency reasonably derived estimates from historical and current usage data and where protester has not demonstrated prejudice from any inaccuracies.
  2. Protest that agency failed to consider effect of corporate transaction involving the stock purchase of an entity at least three corporate levels above awardee is denied where agency considered the transaction and reasonably determined that it did not affect awardee's responsibility or the evaluation of awardee's proposal.
  3. Protest that awardee misrepresented the availability and qualifications of key personnel is denied where solicitation did not require identification of key personnel and the record reflects that the awardee's identification of personnel had no effect on the agency's evaluation.
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### DECISION

B&B Medical Services, Inc., of Oklahoma City, Oklahoma, protests the award of six related contracts to Apria Healthcare, LLC under request for proposals (RFP) No. VA261-15-R-0042, issued by the Department of Veterans Affairs (VA) for in-home oxygen and ventilator services. The protester argues that the solicitation did not properly reflect the agency's requirements, the agency failed to consider a corporate transaction relevant to its evaluation of the awardee's responsibility and technical

capability, the awardee misrepresented the availability of key personnel, and the agency's best-value tradeoff decision was unreasonable.

We deny the protest.

## BACKGROUND

On February 19, 2016, the agency issued the original version of the RFP, seeking in-home oxygen and in-home ventilator services for the VA's Veteran Integrated Service Network (VISN) 21 region.<sup>1</sup> The agency amended the solicitation 22 times between its original issuance on February 19, 2016 and January 8, 2021.<sup>2</sup> Contracting Officer's Statement (COS) at 3; see Agency Report (AR), Exhs. 3 and 4, Amendments to the RFP. The final version of the RFP's base text--including the instructions to offerors, evaluation factors for award, and performance work statement--was contained in amendment A00021. AR, Exh. 4, RFP at 576-635.<sup>3</sup> The final version of attachment 1 to the RFP--an "item schedule" spreadsheet of relevance to this protest--was issued with amendment A00022. AR, Exh. 7, RFP attach. 1.

The RFP explained that VISN 21 is divided into six geographic areas of responsibility, each under the jurisdiction of a different VA Medical Center: Central California, Palo Alto, San Francisco, Northern California, Pacific Islands, and Sierra Nevada. RFP at 609-610. Offerors were free to propose for some or all of the geographic areas, and the agency intended to award a separate fixed-price, indefinite-delivery, indefinite-quantity contract for each geographic area. *Id.* at 610. The RFP anticipated that the awarded contracts would have a 1-year base period and up to four 1-year options periods. AR, Exh. 7, RFP attach. 1.

The RFP established that the awards would be made on a best-value tradeoff basis, considering three evaluation factors, listed in descending order of importance: experience, price, and service-disabled veteran-owned small business/veteran-owned

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<sup>1</sup> The VA is divided into 18 VISN regions, numbered VISN 1 through VISN 23 (with some numbers skipped). VISN 21 is the "Sierra Pacific Network," covering portions of California, portions of Nevada, Hawaii, and other Pacific islands. See Veteran's Integrated Services Networks, <https://www.va.gov/HEALTH/visns.asp> (last accessed July 11, 2023).

<sup>2</sup> Between March 2017 and March 2020, the agency made three award decisions, each of which was protested to our Office. In response to each timely protest, the agency took corrective action by revising the RFP or by making a new award decision. *B&B Medical Servs., Inc.*, B-414471.2, B-414471.3, Apr. 14, 2017 (unpublished decision); *Apria Healthcare, LLC*, B-414471.4, Aug. 28, 2018 (unpublished decision); *Apria Healthcare, LLC*, B-414471.5, Jun. 17, 2020 (unpublished decision).

<sup>3</sup> All page citations to agency report documents are to the Adobe PDF page numbers. Citations to the RFP, exclusive of attachments, are to the conformed text of amendment A00021. RFP at 576-635.

small business (SDVOSB/VOSB) status. *Id.* at 579. The non-price factors, when combined, were more important than price. *Id.*

The experience factor would be used to assess offerors' experience providing in-home oxygen and in-home ventilator services. *Id.* In this regard, offerors were instructed to provide a narrative describing their experience in these areas, and to list reference contracts as evidence of their experience. *Id.* at 576-577. The SDVOSB/VOSB factor would be used to assess whether the offeror was itself a SDVOSB or VOSB, and whether the offeror proposed to use SDVOSB/VOSB concerns as subcontractors. *Id.* at 579.

The RFP stated that price would be evaluated for reasonableness. RFP at 579. Offerors were directed to submit price proposals using attachment 1 to the RFP, "Item Schedule." *Id.* at 577. This attachment was a Microsoft Excel workbook consisting of separate worksheets for each of the six geographic areas within VISN 21. AR, Exh. 7, RFP attach. 1. These worksheets contained a list of products and services potentially required under the contract, along with "estimated annual quantities" of each item for the base year and each option year. *Id.* The contractor was asked to enter a unit price for each line item. A total price for each geographic area was then automatically calculated based on the contractor's proposed unit prices and the government-provided estimated quantities. *Id.*

Proposals were due on January 18, 2021. COS at 3. The agency received four proposals, including proposals from Apria and B&B. The agency convened a technical evaluation board (TEB) to evaluate proposals. AR, Exh. 23, TEB Report. For the experience factor, the TEB assigned both Apria's and B&B's proposals a rating of good.<sup>4</sup> *Id.* at 13, 24. The TEB assessed significant strengths to both proposals because the offerors demonstrated extensive experience providing similar services to VA medical centers, and because the offerors demonstrated that they had obtained and maintained accreditation by The Joint Commission (TJC).<sup>5</sup> *Id.*

On March 30, 2022, the agency awarded contracts for all six geographic areas to Apria. Protest at 6. B&B protested this award decision with our Office, and alleged (among other arguments) that the agency had failed to reasonably consider the effect of a recent corporate transaction on Apria's responsibility and ability to perform. Prior Protest Pleading, B-414471.6, Apr. 11, 2022 at 11-17. Our Office dismissed B&B's protest after the agency stated that it would take corrective action by reevaluating

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<sup>4</sup> The possible adjectival ratings, in descending order of merit, were: good, satisfactory, marginal, and unsatisfactory. AR, Exh. 22, Source Selection Plan at 7.

<sup>5</sup> The Joint Commission is an independent standards-setting and accrediting body that evaluates more than 22,000 health care organizations and programs in the United States. See <https://www.jointcommission.org/about-us/facts-about-the-joint-commission/history-of-the-joint-commission/> (last visited July 13, 2023).

proposals and making a new award decision. *B&B Medical Servs., Inc.*, B-414471.6, Apr. 29, 2022 at 1 (unpublished decision).

On April 7, 2023, the agency again made award to Apria for all six geographic areas. In making this award decision, the source selection authority (SSA) performed and documented an independent review of each proposal and of the TEB’s findings. AR, Exh. 21, Source Selection Decision (SSD) at 24. Like the TEB, the SSA rated both Apria’s and B&B’s proposals as good under the experience factor, and identified both offerors’ experience and TJC accreditation as significant strengths. *Id.* at 13-16, 19-20. The SSA assigned both B&B’s and Apria’s proposals a rating of “some credit” under the SDVOSB/VOSB status factor,<sup>6</sup> finding that both offerors (neither of which was an SDVOSB or VOSB itself) proposed to subcontract certain work to SDVOSB concerns. *Id.* at 16, 20. The final technical ratings and prices of Apria and B&B were as follows:

	<b>B&amp;B</b>	<b>APRIA</b>
<b>EXPERIENCE</b>	Good	Good
<b>SDVOSB/VOSB STATUS</b>	Some Credit	Some Credit
<b>PRICE</b>		
<b>Central California</b>	\$2,431,299	\$2,199,807
<b>Palo Alto</b>	\$3,096,706	\$2,965,459
<b>San Francisco</b>	\$2,923,051	\$2,702,769
<b>Northern California</b>	\$2,738,741	\$2,676,544
<b>Pacific Islands</b>	\$2,910,290	\$2,825,859
<b>Sierra Nevada</b>	\$12,560,275	\$12,053,872

*Id.* at 21-24. Notably, Apria’s proposed price was less than B&B’s proposed price for all six geographic areas.

The SSA then performed and documented six tradeoff decisions, one for each geographic area. *Id.* at 24-41. These six tradeoff decisions contained identical comparisons between the proposals of B&B and Apria under the non-price factors. *Id.* Specifically, for the experience evaluation factor, the SSA determined that the two proposals “offer[ed] approximately equal benefit to the [g]overnment.” *Id.* at 26-27. For the SDVOSB/VOSB status factor, despite the equal adjectival ratings, the SSA determined that B&B presented a greater benefit to the government because B&B proposed to subcontract a larger percentage of its total contract to SDVOSB concerns. *Id.* at 27.

For each of the six geographic areas, the SSA determined--with a similar explanation--that B&B’s advantage under the SDVOSB/VOSB status factor did not warrant the payment of B&B’s higher price. In reaching this determination, the SSA noted that Apria proposed to subcontract [DELETED] percent of its contract to SDVOSB concerns,

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<sup>6</sup> The possible ratings were full credit, partial credit, some credit, and no credit. AR, Exh. 22, Source Selection Plan at 8.

which exceeded the VA's goal for SDVOSB participation, and that this provided a benefit to the government. *Id.* The SSA concluded that the "additional incremental value" from B&B's higher SDVOSB subcontracting percentage did not justify B&B's price premium, and that Apria's proposal therefore presented a better value to the government. *Id.* Each of the SSA's six tradeoff decisions contained similar language explaining this determination. See *id.* (Northern California), *id.* at 30 (San Francisco), at 33 (Central California), at 35-36 (Palo Alto), at 38 (Pacific Islands), at 41 (Sierra Nevada). Ultimately, the SSA determined that Apria's proposal represented the best value to the government for all six geographic areas. *Id.* at 76.

On April 7, the agency notified B&B of the awards made to Apria. AR, Exh. 27, Unsuccessful Offeror Notice. This protest followed.

## DISCUSSION

B&B argues that the solicitation did not accurately reflect the agency's actual requirements, that the agency failed to evaluate the impact of a corporate transaction on Apria's responsibility and experience, and that the awardee misrepresented the license status of its key personnel. For the reasons explained below, we find that none of the protester's arguments provides a basis to sustain the protest.

### Changed Agency Requirements

The protester alleges that the RFP does not accurately reflect the agency's changed needs for in-home oxygen and ventilator services in the VISN 21 network, such that the agency was required to amend the solicitation to inform offerors of its changed requirements. Comments & 2nd Supp. Protest at 9-11. The protester supports this argument by comparing statements in the SSD regarding the anticipated number of patients to be served in each geographic area with the estimated quantities of products and services reflected on attachment 1 to the RFP (the item schedule).

The agency responds that it arrived at the estimated annual quantities reflected in the item schedule through a reasonable process, including review of historical contract demand for each geographic area. Supp. Memorandum of Law at 21. The agency further contends that the protester's argument is legally and factually insufficient because the RFP contains no estimates of patient numbers, and the protester's attempt to "derive" patient numbers is flawed.<sup>7</sup> *Id.* at 23.

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<sup>7</sup> The agency also requests that we dismiss this argument as untimely. We decline to do so. While our Office dismissed a similar argument raised in B&B's original protest, that argument was based on B&B's assertion that service quantities would be impacted by a law enacted in August 2022, the Sergeant First Class Heath Robinson Honoring Our Promise to Address Comprehensive Toxics Act of 2022 (PACT Act), Pub. L. No. 117-678, § 404, 136 Stat. 1759, 1782 (codified at 38 U.S.C. § 1116(a)(2)). See Protest at 18-20. The record reflected that B&B had actual knowledge of the potential

Where estimates are provided in a solicitation, there is no requirement that they be absolutely correct; rather the estimates must be based on the best information available and present a reasonably accurate representation of the agency's anticipated needs. *AeroSage, LLC*, B-416381, Aug. 23, 2018, 2018 CPD ¶ 288 at 11. The information that informs the agency's estimate may include historical data such as quantities from prior purchases. *Id.* at 12.

Here, the record reflects that the agency reasonably derived the estimates included in the RFP and confirmed them prior to making award. In this regard, VA explains that it did not base its estimates for in-home oxygen or ventilator services on the number of patients enrolled because the number of patients enrolled fluctuates each month and because different patients have different care needs and ultimately require different services. AR, Exh. 29, Statement of VA Chief of Prosthetics at 3. Accordingly, VA bases its oxygen and ventilator procurements on the historical consumption of products and services used by patients enrolled for home oxygen and ventilator care. *Id.*

This explanation is reasonable and consistent with the contemporaneous record. Specifically, in March of 2023, the contract specialist and contracting officer communicated with the VISN 21 prosthetics representative<sup>8</sup> and specifically asked whether the estimated quantities included in the final version of the item schedule were still accurate. AR, Exh. 32, VA Emails re Patient Count at 6. The prosthetics representative reported that he reviewed the RFP estimates, reached out to others as needed, and "d[id] not see any need to increase estimated quantities" because the "[n]umbers projected are in line with current patient care." *Id.* at 5.

Against this backdrop, the protester relies on estimates (stated in the SSD) of the estimated average number of oxygen and ventilator patients per month in each

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impact of the PACT Act more than ten days prior to filing its protest. See Protest, attach. 16, email from B&B to Agency. In such circumstances, B&B's protest argument was untimely. See *Peraton, Inc.*, B-416916.11, Feb. 8, 2011, 2011 CPD ¶ 88 at 4-7. We note, at any rate, that the record supports the agency's view that the PACT Act did not cause an increase in patient numbers. AR, Exh. 21, SSDD at 75 ("Since VA began implementing the PACT Act in January 2023, I have not seen an unusual change in demand for in-home oxygen or ventilator services.").

By contrast, the above changed requirements argument--which was first raised in B&B's second supplemental protest--is based on VA estimates of patient numbers first disclosed in the agency report. *Id.* at 14. In such circumstances, we find that B&B did not know of the basis for this protest argument until it received the agency report. Its second supplemental protest--filed not more than 10 days later--is therefore timely. 4 C.F.R. § 21.2(a)(2).

<sup>8</sup> The agency explains that the prosthetics representative is responsible for overseeing the services provided under this contract, and has first-hand knowledge of the types of products and services consumed by patients as well as the number of patients enrolled. AR, Exh. 29, Statement of VA Chief of Prosthetics at 1.

geographic area to allege that the estimated quantities of goods and services listed in the item schedule (such as rented ventilators or oxygen compressors) are inaccurate. However, we credit the agency's explanation that estimates of the average number of monthly patients do not provide a basis to derive an estimated quantity of any particular line item on the item schedule. In this regard, the agency's chief of prosthetics explains that some patients may be prescribed multiple devices, that patients are enrolled and disenrolled from care on an ongoing basis, and that patients are prescribed different items at different times in this care. AR, Exh. 29, Statement of VA Chief of Prosthetics at 2. Accordingly, the estimated patient numbers stated in the SSD do not give our Office a basis to question the estimated quantity of the products and services identified in the item schedule.<sup>9</sup>

In any event, we also find that the protester has not demonstrated competitive prejudice from the alleged errors in the estimated quantities stated in the RFP. In this respect, the protester asserts that, if presented with the opportunity to respond to an RFP with revised estimated quantities, "B&B could have lowered its unit prices and would have revised its proposal to make its pricing more competitive in each of the VISN 21 regions," Protest, attach. 15, Decl. of B&B Chief Strategy Officer at 2. However, B&B provides no specific information regarding what modifications it would have made to its pricing if presented with different estimated quantities. We find that B&B's general assertion does not demonstrate that it could, or would, have reduced its price sufficiently so that its proposal would have had a substantial chance of being selected for award as the best value. See *Online Video Serv., Inc.*, B-403332, Oct. 15, 2010, 2010 CPD ¶ 244 at 2.

This is particularly true since B&B's line item pricing across the geographic areas does not appear related to the estimated quantities provided. For instance, for the line item "[DELETED]," B&B proposed its highest unit price (\$[DELETED] per month) in the geographic area with the highest estimated quantity (130-150 units annually), and two of B&B's three lowest proposed prices were in geographic areas with estimated annual quantities of one or two units. AR, Exh. 25.3.1, B&B Price Proposal. Accordingly, we do not see, and B&B has not identified, a way in which the revisions B&B demands to the RFP would result in its proposal becoming more competitive. We will not sustain a protest unless the protester demonstrates competitive prejudice--that, but for the agency's actions, the protester would have a substantial chance of receiving the award. *Velos, Inc.; OmniComm Sys., Inc.; PercipEnz Technologies, Inc.*, B-400500 *et al.*, Nov. 28, 2008, 2010 CPD ¶ 3 at 12.

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<sup>9</sup> For this reason, we also deny the protester's derivative challenge to the agency's analysis of Apria's unbalanced pricing, which the protester asserts rely on unreasonable estimated quantities. We have also reviewed the protester's remaining challenges to the agency's pricing analysis, and find that they provide no basis to sustain the protest.

## Corporate Transaction Involving Apria, Inc.

The protester also argues that the VA improperly failed to consider the effect of a sale of Apria, Inc., an entity at least three corporate levels above the awardee, which the protester contends renders unreasonable both the agency's affirmative determination of responsibility and the agency's evaluation of the awardee's experience.<sup>10</sup> Protest at 9-16; Comments & 2nd Supp. Protest at 5-9. As discussed below, we find that none of the protester's arguments provide a basis to sustain the protest.

### Background

On March 29, 2022, Owens & Minor, Inc. (O&M) purchased all outstanding stock of Apria, Inc. AR, Ex. 12, Apria, Inc., Security Exchange Commission (SEC) Form 8-K at 2. As the contracting officer has since determined, Apria, Inc. is at least three levels removed from the awardee,<sup>11</sup> Apria Healthcare, LLC, in the chain of corporate ownership.<sup>12</sup> *Id.*; see also Intervenor Comments at 2 (referring to Apria, Inc. as the awardee's "thrice-removed corporate 'great-grandparent'"). The protester asserts that this corporate distance is irrelevant to our analysis, but does not dispute the contracting officer's factual finding.<sup>13</sup> See Comments & 2nd Supp. Protest at 5 n.2; Supp. Comments at 11 n.8.

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<sup>10</sup> The protester originally argued that the agency's affirmative determination of responsibility was unreasonable because the agency failed to consider alleged evidence of prior fraud by Apria. Protest at 13-14. The protester withdrew this allegation, and we do not consider it further. Comments & 2nd Supp. Protest at 2.

<sup>11</sup> The contracting officer noted that a Dun & Bradstreet (D&B) finance analytics report dated May 19, 2022, indicated that, as of August 2019, Apria Healthcare LLC was wholly owned by Apria Healthcare Group Inc., which in turn was owned by Apria Holdings LLC, which in turn was owned by partnerships created by Blackstone Group L.P. AR, Ex. 8, Determination re O&M Purchase and False Claims Act (FCA) Settlement at 7; see AR, Ex. 14, D&B Finance Analytics Report at 18. The contracting officer also noted that while the report lists O&M as the current "ultimate" owner, it does not mention where Apria, Inc. fits into the corporate lineage. *Id.* Based on this report and related SEC filings, the contracting officer determined that "[i]f there is a linkage, according to D&B, Apria Healthcare LLC must be at least three-times-removed from Apria Inc., which means that Apria Healthcare LLC is even further removed from [O&M]." *Id.*

<sup>12</sup> For the avoidance of doubt, we use "Apria" in this decision to refer only to Apria Healthcare, LLC, the awardee. "Apria, Inc." is used to refer to the acquired entity several corporate levels above the awardee.

<sup>13</sup> In this respect, we note that the protester alleges that "Apria Healthcare, LLC, a subsidiary of Apria, Inc., entered into a definitive agreement with O&M . . . in which O&M agreed to acquire Apria." Protest at 10. However, in making this assertion, the



The record shows that the contracting officer was first alerted to the corporate transaction in April 2022, when B&B filed a prior protest of this procurement. AR, Ex. 8, Determination re O&M Purchase and FCA Settlement at 6. In that prior protest, B&B alleged, as it alleges here, that the corporate transaction affected both the awardee's responsibility and its ability to perform the awarded contract. The agency took corrective action and our Office dismissed the protest as academic. *B&B Medical Services, Inc.*, B-414471.6, April 29, 2022 (unpublished decision).

After the dismissal of that protest, the contracting officer conducted a review of the corporate transaction, finding that "a corporate transaction of this type could have an effect upon an offeror's access to resources and ability to perform contracts awarded after the transaction is completed." AR, Ex. 8, Determination re O&M Purchase and FCA Settlement at 9. The record shows that the contracting officer reviewed the information that B&B provided in connection with its prior protest--the same press releases and SEC filings that B&B submits now as a basis of this protest. *Id.* at 7; *compare* AR, Exhs. 10-13, *with* Protest exhs. 5-9. The contracting officer also obtained and reviewed other publicly available information about the transaction, including the agreement and plan of merger between Apria, Inc. and O&M referenced in the SEC filings, as well as a D&B finance analytics report for the awardee dated May 18, 2022. AR, Ex. 8, Determination re O&M Purchase and FCA Settlement at 7-8; *see* AR, Exhs. 9, 14.

In addition, the contracting officer requested and received confirmation from the awardee that Apria will be responsible for the management and delivery of services under this procurement, "including providing the staff, equipment, facilities, and necessary resources to perform the contracted services." AR, Exh. 19, Communications with Apria re Responsibility, Jan. 6, 2023, at 9. Apria also confirmed that it did not anticipate O&M or Apria, Inc. to have any role in performing the services under this procurement. *Id.* Moreover, the awardee affirmed that the transaction "has not resulted in the loss of necessary resources Apria currently uses to provide contracted services" under the incumbent contract, and is not anticipated to "*result in the reduction of resources that Apria needs to perform the work required under this [p]rocurement.*" *Id.* at 10.

#### Affirmative Responsibility

After considering the information discussed above, the contracting officer concluded that the corporate transaction "does not negatively affect Apria Healthcare LLC's responsibility for this procurement concerning the question of the experience, or access to resources, or ability to perform the work required by this procurement." AR, Ex. 8, Determination re O&M Purchase and FCA Settlement at 11. Based on these considerations, the contracting officer determined the awardee to be a responsible

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protester relies on a press release that clearly states that the transaction was between O&M and Apria, Inc., and which does not mention Apria Healthcare, LLC. *Id.*; Protest, exh. 5, Press Release.

offeror. AR, Exh. 20, Determination of Responsibility at 8. The protester challenges this determination.

Our Office generally will not consider a protest challenging an agency's affirmative determination of an offeror's responsibility. 4 C.F.R. § 21.5(c). Absent a definitive responsibility criterion, we will only hear a protest challenging an agency's affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. *The Logistics Company, Inc.*, B-419932.3, May 26, 2022, 2022 CPD ¶ 133 at 8. The information in question must concern very serious matters, for example, potential criminal activity or massive public scandal. *Id.*; *IBM Corp.*, B-415798.2, Feb. 14, 2019, 2019 CPD ¶ 82 at 11. Where the record shows, however, that the contracting officer was aware of the facts or allegations identified by the protester, we will generally not review an allegation that the contracting officer should have found the awardee nonresponsible based on those facts or allegations. See *DynCorp Int'l LLC*, B-411126.4 *et al.*, Dec. 20, 2016, 2017 CPD ¶ 333 at 25.

The protester asserts that the corporate transaction in question introduced "several significant risks and uncertainties associated with Apria's resources." Protest at 12. Based on this assertion, B&B argues that the agency improperly ignored information which would be expected to have a strong bearing on whether the awardee should be found responsible. *Id.* at 9-14. We find no basis to sustain the protest on this ground.

As discussed above, the record reflects that the agency was fully aware of the corporate transaction at issue (and the protester's allegations regarding that transaction), obtained and reviewed the available public information about the transaction, requested and received additional information from the awardee, and considered this information in determining the awardee's responsibility. The protester has not identified any specific information regarding the corporate transaction that the contracting officer failed to consider, and its arguments merely amount to an assertion that the contracting officer should have reached a different conclusion. In these circumstances, we have no basis to question the agency's affirmative responsibility determination. 4 C.F.R. § 21.5(c); *The Logistics Company, Inc.*, *supra* at 9; *DynCorp Int'l LLC*, *supra*.

#### Experience Evaluation

B&B also argues that the agency's alleged failure to consider the effects of the corporate transaction renders unreasonable the agency's evaluation of Apria's proposal under the experience factor. Based on our review of the record, we find no basis to question the agency's evaluation.

Our protest decisions regarding matters of corporate status and restructuring are highly fact-specific, and turn largely on the individual circumstances of the proposed transactions and timing. *Lockheed Martin Integrated Sys., Inc.--Recon.*, B-410189.7, Aug. 10, 2017, 2017 CPD ¶ 258 at 5; *IBM U.S. Fed., a division of IBM Corp.*; *Presidio Networked Sols., Inc.*, B-409806 *et al.*, Aug. 15, 2014, 2014 CPD ¶ 241 at 22. We have

noted that where a corporate acquisition or restructuring does not appear likely to have a significant impact on cost, or a technical impact on contract performance, and the offering entity remains intact and retains the same resources reflected in its proposal, the subsequent acquisition of that offeror does not render the agency's evaluation and award decision improper. *PAE Aviation & Technical Servs, LLC*, B-417704.7, B-417704.8, June 8, 2021, 2021 CPD ¶ 293 at 13; *Enterprise Servs., LLC, et al.*, B-415368.2 *et al.*, Jan. 4, 2018, 2018 CPD ¶ 44 at 19.

As identified above, the only non-price evaluation factors identified in the RFP were experience and SDVOSB/VOSB status. RFP at 579. The solicitation provided that proposals would be evaluated under the experience factor "to assess the Offeror's experience providing contracted in-home oxygen services and contracted in-home ventilator services to patients in their place of residence." *Id.* Consistent with this, both the TEB and the SSA evaluated Apria's experience on the basis of 21 prior contracts Apria submitted, finding that Apria's experience represented a significant strength. AR, Ex. 23, TEB Report at 13; AR, Ex. 21, SSD at 13.

The contracting officer concluded that the corporate transaction was not relevant to the evaluation of Apria's proposal under the experience factor "because it does not affect the determination as to whether [Apria]'s proposal demonstrates prior experience providing contracted in-home oxygen services and in-home ventilator services to patients in their place of residence." AR, Ex. 8, Determination re O&M Purchase and FCA Settlement at 8. The contracting officer also noted that Apria itself had performed all of the prior contracts identified in Apria's proposal, and that there was no evidence that any entity other than Apria would be performing under the awarded contracts. *Id.* at 8-9. We find this assessment to be consistent with the RFP's evaluation criteria, and see nothing unreasonable in the contracting officer's determination that the sale of Apria, Inc. did not affect the evaluation of the awardee under this factor.

We also find that the protester's reliance on our decision in *FCi Fed., Inc.*, B-408558.7, B-408557.8, Aug. 5, 2015, 2015 CPD ¶ 245, and *Wyle Laboratories, Inc.*, B-408112.2, Dec. 27, 2013, 2014 CPD ¶ 16, to be inapposite. In each of these protests, the awardee itself was acquired by another entity before award, and the awardee's proposal relied, in material respects, on the resources and support of its former parent entity. See *FCi Fed., Inc.*, *supra* at 7; *Wyle Laboratories, Inc.*, *supra* at 8. For example, the record in *FCi Fed., Inc.* showed that the awardee's proposal relied on its parent and grandparent entities for its management capability, corporate resources, corporate experience, past performance, and financial resources. *FCi Fed., Inc.*, *supra*. As a result, our Office sustained the protest of the award, finding that sale of the awardee "materially and significantly altered the approach to contract performance as set forth in" the awardee's proposal. *Id.* at 5. Here, as noted above, the record does not indicate that Apria's proposal relied in any way on Apria, Inc. or O&M.

The protester's reliance on our decision in *Vertex Aerospace, LLC*, B-420073, B-420073.2, Nov. 23, 2021, 2022 CPD ¶ 5, is likewise misplaced. We sustained the protest in *Vertex Aerospace* because the agency's contemporaneous evaluation record and source selection documentation did not reference the recent acquisition of the

awardee by another entity or its potential effect, if any, on performance. *Id.* at 9-11. Here, in contrast, the contracting officer thoroughly documented his consideration of the corporate transaction and its effect on the evaluation of the awardee's proposal in multiple contemporaneous evaluation documents, including the source selection decision document. See AR, Ex. 8, Determination re O&M Purchase and FCA Settlement at 8-9; Ex. 21, SSD at 76; see *generally*, Ex. 20, Determination of Responsibility.

In sum, our review of the record shows that the agency properly considered the effect of the stock sale of Apria, Inc. on the evaluation of the awardee's proposal, sufficiently documented this consideration, and reasonably concluded that the transaction had "no bearing" on the awardee's evaluation under the experience factor. We find that the protester's assertions to the contrary amount to no more than disagreement with the agency's reasoned evaluation conclusions, and thus do not provide a basis to sustain the protest. See *Unisys Corp.*, B-406326 *et al.*, Apr. 18, 2012, 2012 CPD ¶ 153 at 8.

#### Material Misrepresentation Regarding Personnel

The protester next argues that a significant percentage of the "key personnel" identified in Apria's proposal were unavailable at the time of the proposal, later became unavailable, or were unable to perform the contract because of expired licenses. Here, the protester relies on spreadsheets that Apria submitted with its proposal listing certain "key personnel" at various locations, and copies of licenses for those personnel that Apria included in its proposal, some of which were expired. See, AR, Exhs. 24.3.1 through 24.3.55, Apria proposal, personnel lists and licenses. The protester also relies on publicly-available data such as LinkedIn pages, to argue that some of the proposed personnel were unavailable. See, *e.g.*, Comments & 2nd Supp. Protest, exh. B, LinkedIn profiles.

The issue of whether personnel identified in an offeror's proposal in fact perform under the subsequently-awarded contract is generally a matter of contract administration that our Office does not review. See Bid Protest Regulations, 4 C.F.R. § 21.5(a); *Future-Tec Mgmt. Sys., Inc.*; *Computer & Hi-Tech Mgmt., Inc.*, B-283793.5, B-283793.6, Mar. 20, 2000, 2000 CPD ¶ 59 at 20. Nonetheless, our Office will consider allegations that an offeror proposed personnel that it did not have a reasonable basis to expect to provide during contract performance in order to obtain a more favorable evaluation, as such a material misrepresentation has an adverse effect on the integrity of the competitive procurement system. *Ryan Assocs., Inc.*, B-274194 *et al.*, Nov. 26, 1996, 97-1 CPD ¶ 2 at 8. Our decisions frequently refer to such circumstances as a "bait and switch." *Id.* In order to establish an impermissible "bait and switch," a protester must show: (1) that the awardee either knowingly or negligently represented that it would rely on specific personnel that it did not have a reasonable basis to expect to furnish during contract performance, (2) that the misrepresentation was relied on by the agency, and (3) that the agency's reliance on the misrepresentation had a material effect on the evaluation results. *CACI Techs., Inc.*, B-408858, B-408858.2, Dec. 5, 2013, 2013 CPD ¶ 283 at 4; *ACS Gov't Servs., Inc.*, B-293014, Jan. 20, 2004, 2004 CPD ¶ 18 at 4, 9.

Here, the protester has not demonstrated that the VA relied on any alleged misrepresentations in Apria's proposal regarding personnel, let alone in a manner that had a material effect on the evaluation results.

As a starting point, we note that the RFP did not require the submission of names or information regarding key personnel.<sup>14</sup> See RFP at 576-77. The protester argues that "it is immaterial whether the proposed key personnel were explicitly required by the RFP or were identified as key personnel by an offeror." Supp. Comments at 5 (*citing Gen. Revenue Corp. et al.*, B-414220.2 et al., Mar. 27, 2017, 2017 CPD ¶ 106 at 22 and *Patricio Enters. Inc.*, B-412738, B-412738.2, May 26, 2016, 2016 CPD ¶ 145 at 13-14). However, in the decisions the protester cites, it was clear that the awardees' proposals meaningfully relied on the individuals identified in the proposals who were alleged to be unavailable. In *Gen. Revenue Corp.*, for instance, the awardees "presented the individuals in question as important parts of [the awardees'] management approaches." *Gen. Revenue Corp.*, *supra* at 22. In *Patricio Enterprises*, the awardee's proposal stated that its technical approach was based, in part, on its ability to provide specific individuals at the start of performance. *Patricio Enters.*, *supra* at 13. By contrast, here, the protester has not identified--nor could we locate--any discussion in Apria's proposal of how Apria intended to rely on the personnel in question. In fact, other than their inclusion on spreadsheets listing their names, Apria's proposal does not appear to reference these personnel at all. See, AR, Exhs. 24.1.1 through 24.1.7, Apria Proposal.

Further, in both *Gen. Revenue Corp.* and *Patricio*, the record reflected that the agency's favorable evaluation of the awardee relied upon the personnel in question. *Gen. Revenue Corp.*, *supra* at 23, *Patricio*, *supra* at 13. Here, by contrast, there is no indication that the agency relied in any way on the personnel identified in Apria's proposal. In this regard, as discussed above, the only non-price evaluation factors were experience and SDVOSB/VOSB status. In evaluating Apria's experience, both the TEB and the SSA referred only to the contracts Apria identified. Neither the TEB report nor the SSD give any indication that the agency even read--let alone relied on--Apria's list of personnel. See AR, Exh. 23, TEB Report at 13-23; AR, Exh. 21, SSD at 13-16.

Relatedly, the protester contends that the identification of unavailable or unlicensed personnel in Apria's proposal represents a performance risk, which should have negatively impacted the agency's evaluation of Apria's technical proposal and its

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<sup>14</sup> Apria's inclusion of this information in its proposal appears to have been due to Apria not modifying its proposal after amendments to the RFP. In this regard, the original RFP included a technical capability evaluation factor, with a subfactor for staff qualifications. AR, Exh. 2, Original RFP at 88. Offerors were instructed to include resumes, licenses, and other documentation of staff qualification for certain key personnel in volume 6 of their proposals, entitled "other required documents." AR, Exh. 3, RFP Amend. A00011 at 898. However, both the technical capability factor and the instruction to identify key personnel and document their qualifications were removed from the final RFP. RFP at 576-577.

responsibility. In this respect, the RFP--as the protester correctly points out--requires that certain tasks be performed by individuals with applicable licenses. See, e.g., RFP at 615 (“[i]nitial setup(s) . . . shall be performed by a certified respiratory therapist . . . or registered respiratory therapist . . . that is licensed in accordance with the governing standards of where the services are to be provided.”).

However, solicitation provisions that require the contractor to obtain all licenses, permits, or certifications needed to perform the contract, establish performance requirements that do not have to be met prior to award; consequently, whether the awardee ultimately satisfies this requirement is a matter of contract administration which our Office will not review. *Dentrust Dental Int’l, Inc.*, B-419054.2, B-419054.3, Apr. 6, 2021, 2021 CPD ¶ 164 at 3 n.1. Accordingly, our Office has consistently found that, unless a solicitation requires offerors to demonstrate in their proposals that they possess required licenses, or provides that licensure will be an evaluation factor, we will not sustain a protest that alleges that the awardee did not possess required licenses at the time of proposal submission. See, e.g., *Blackhawk Medical Transportation Inc. d/b/a Vandenberg Ambulance*, B-419465.2, B-419465.3, May 3, 2021, 2021 CPD ¶ 193 at 6 (licenses to operate ambulances); *AGMA Security Serv., Inc.*, B-419443, Feb. 19, 2021, 2021 CPD ¶ 104 at 6-7 (license to provide security services). Here, the solicitation did not require offerors to prove that they employed personnel with the appropriate licenses, and did not state that such licenses would be evaluated. Accordingly, this argument provides no basis to sustain the protest.

#### Best-Value Tradeoff Decision

Finally, B&B argues that the agency’s trade-off decisions were improper because the agency unreasonably compared the relative merits of B&B’s and Apria’s proposals under the non-price factors.

In reviewing a protest challenging an agency’s evaluation of proposals, our Office will not reevaluate proposals nor substitute our judgment for that of the agency regarding a proposal’s relative merits, as the evaluation of proposals is a matter within the agency’s discretion. *Peraton, Inc.*, B-417088, B-417088.2, Feb. 6, 2019, 2019 CPD ¶ 190 at 5; *Del-Jen Educ. & Training Grp./Fluor Fed. Sols. LLC*, B-406897.3, May 28, 2014, 2014 CPD ¶ 166 at 8. Rather, we will review the record to determine whether the agency’s evaluation was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations, and adequately documented. *Management Sys. Int’l, Inc.*, B-409415, B-409415.2, Apr. 2, 2014, 2014 CPD ¶ 117 at 5. A protester’s disagreement with the agency’s evaluation judgments, without more, is insufficient to establish that an evaluation was improper or lacked a reasonable basis. *Wolverine Tube Inc. d/b/a Wolverine Indus.*, B-418339.4, B-418339.5, July 26, 2022, 2022 CPD ¶ 219 at 4-5.

With respect to the experience factor, B&B argues that the agency should have found its proposal more advantageous in part because B&B has “**more** years of experience providing in-home oxygen and ventilator services.” Comments & 2nd Supp. Protest at 16. Here, “more” means that B&B’s proposal demonstrated 17 years of experience,

while Apria's proposal demonstrated 16. AR, Tab 21, SSD at 28. The protester also argues that it is currently serving "**more than three times as many** in-home oxygen and in-home ventilator patients in VISN 21." Comments & 2nd Supp. Protest at 16. This assertion is incorrect. The record reflects that B&B presently serves [DELETED] in-home oxygen, and [DELETED] in-home ventilator, patients in VISN 21, while Apria serves [DELETED] in-home oxygen, and [DELETED] in-home ventilator, patients in VISN 21. AR, Tab 21, SSD at 19, 26-27. That is, Apria serves more VISN 21 patients than B&B in both categories.<sup>15</sup> On this record, we find the SSA's determination that the two proposals demonstrated approximately equal merit under the experience factor to be reasonable.

Under the SDVOSB/VOSB factor, the protester argues that the agency failed to recognize the additional merit in B&B's proposal to subcontract more work to SDVOSB/VOSB concerns than Apria proposed. However, the record reflects that the SSA repeatedly recognized that B&B's proposal was more advantageous to the government under this factor, but simply concluded that the additional benefit did not justify B&B's price premium. See, e.g., AR, Exh. 21, SSD at 27 ("I have determined that B&B Medical's proposal presents greater benefit to the Government than Apria's proposal because VA has an important interest in increasing the participation of SDVOSB concerns in VA procurements; B&B Medical's proposal demonstrates a stronger showing in this regard."), ("I have determined that the additional incremental value the Government would receive from B&B Medical's proposal regarding VA's agency wide SDVOSB subcontracting goal does not justify the approximately \$62,000 price premium that B&B Medical demands over the price Apria offered to perform the same work."). The protester has not demonstrated that the SSA's judgement in this regard was unreasonable or inconsistent with the RFP.

The protest is denied.

Edda Emmanuelli Perez  
General Counsel

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<sup>15</sup> The protester's claim that it serves "more than three times as many" patients appears to be based on an apples-to-oranges comparison of the total number of patients that B&B serves across all VISN regions to the number of patients Apria serves in VISN 21 alone. See AR, Exh. 21, SSDD at 26-27 (showing that B&B serves "[DELETED] in-home oxygen patients and [DELETED] in-home ventilator patients at a number of VA medical facilities, including one VISN 21 facility" while Apria serves "[DELETED] in-home oxygen and [DELETED] in-home ventilator patients for five VISN 21 facilities").