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## Decision

**Matter of:** TriCenturion, Inc.; SafeGuard Services, LLC

**File:** B-406032; B-406032.2; B-406032.3; B-406032.4

**Date:** January 25, 2012

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### DIGEST

1. Challenge to the cost realism evaluation of the awardee's proposed labor costs is sustained where the record does not demonstrate that the agency's evaluation was reasonable.
2. Challenge to the evaluation of a protester's technical evaluation is sustained where the agency does not meaningfully respond to the majority of the protester's arguments.
3. Challenge to the evaluation of the awardee's past performance is sustained where the record provided by the agency does not explain how it evaluated the relevance of offerors' past performance, or whether its proposed subcontractors merited consideration under the terms of the solicitation.
4. Protest that the award was tainted by organizational conflicts of interest is denied where the record shows that the agency reasonably concluded that the potential areas of concern were adequately mitigated.

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## DECISION

TriCenturion, Inc., of Columbia, South Carolina, and SafeGuard Services, LLC, of Plano, Texas, protest the award of a contract to Cahaba Safeguard Administrators, LLC, of Birmingham, Alabama, under request for proposals (RFP) No. RFP-CMS-2009-0014, issued by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), for zone program integrity contractor (ZPIC) services. The protesters argue that the agency failed to reasonably evaluate the offerors' proposed costs, technical proposals, and past performance, and also failed to reasonably address organizational conflicts of interest (OCI) concerning the awardee. In addition, TriCenturion argues that the agency did not provide it with meaningful discussions.

We sustain the protests.

## BACKGROUND

As part of federal Medicare and Medicaid contracting reform, CMS intends to award contracts to entities referred to as ZPICs, which are to perform program integrity functions for Medicare Parts A, B, C, and D;<sup>1</sup> Durable Medical Equipment Prosthetics, and Orthotics Supplier (DMEPOS); Home Health and Hospice (HH+H); and the Medicare-Medicaid Data Matching Program (a partnership between Medicaid and Medicare designed to enhance collaboration between the two programs to reduce fraud, waste, and abuse). RFP § B.1; Contracting Officer (CO) Statement at 1. CMS has established seven geographic zones under the program, and intends to have one ZPIC serving each zone. According to CMS, the mission of the ZPIC program is to promote the integrity of the Medicare and Medicaid programs by accomplishing the following objectives:

- Identify, stop and prevent Medicare and Medicaid fraud, waste and abuse and refer instances of potential fraud, waste and abuse to the appropriate law enforcement agencies.

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<sup>1</sup> Medicare part A provides hospital care coverage; Medicare part B provides medical care insurance coverage; and Medicare part D provides prescription drug coverage. Medicare part C is known as the "Medicare Advantage Plan," and is a health plan offered by Medicare-approved private insurers who offer the same coverage as Medicare parts A and B, with the addition of other benefits such as vision, hearing, dental, and/or health and wellness program, and the prescription drug benefits under Medicare part D. See Medicare Benefits website, available at: <http://www.medicare.gov/navigation/medicare-basics/medicare-benefits/medicare-benefits-overview.aspx>.

- Decrease the submission of abusive and fraudulent Medicare and Medicaid claims.
- Recommend appropriate administrative action (e.g., payment suspension recommendations and [civil money penalties]) to CMS as necessary in accordance with Medicare and Medicaid laws and regulations, etc., to ensure that appropriate and accurate payments for services are made, which are consistent with all Medicare and Medicaid rules and regulations.
- Coordinate potential fraud, waste and abuse [investigations] with appropriate Medicare & Medicaid Entities.

RFP, Statement of Work (SOW), at 11; CO Statement at 1.

CMS issued the RFP on June 12, 2009, seeking proposals for the award of ZPIC contracts in zones 3 and 6. This protest concerns the award of ZPIC zone 6, which covers the following states: Pennsylvania, Massachusetts, New Jersey, Connecticut, Rhode Island, New Hampshire, Delaware, District of Columbia, Maine, Maryland, New York, and Vermont. The RFP anticipated award of an indefinite-quantity/ indefinite-delivery contract with fixed-price and cost-reimbursement task orders, for a base period of 1 year with four 1-year options. The RFP stated that the two task orders would be placed at the time of award: task order 0001 for audit services concerning Medicare parts A, B, DMEPOS, and HH+H; and task order 0002 for the Medicare-Medicaid Data Matching Program. The RFP advised that the agency “may award a future task order for Part C and D.” RFP § L.

The technical evaluation score was based on the following non-price factors: technical understanding and approach (which had 12 subfactors, identified below); coordination and communication (which had 2 subfactors, identified below); key/essential personnel and staffing; security; ISO/quality assurance and improvement; past performance; small business utilization; and subcontracting approach. Each of the factors and subfactors also identified a number of sub-criteria, which were called “bullets” in the agency’s evaluation. As described in further detail below, each of the evaluation factors was assigned a point score for a total of 3,330 possible points (with the exception of subcontracting approach, which was a pass/fail criterion). RFP § M.2.A. The business evaluation factor stated that the agency would consider the reasonableness and the realism of the offerors’ proposed cost/price. For purposes of award, the agency’s cost evaluation was based on the offerors’ evaluated costs for the two task orders. All evaluation factors other than cost or price, when combined, were “significantly more important than cost or price.” RFP § M.1.a.

As relevant here, the RFP stated that CMS would review each offeror’s conflict of interest submission and “make a determination if the Offeror meets the [conflict of interest] requirements.” RFP § M.3; see also id. § H.2. The RFP advised offerors that

“CMS will not enter into a contract with an entity that CMS determines has, or has the potential for, an unresolved [OCI] unless CMS determines that the risk can be sufficiently mitigated.” RFP § M.3.A.

CMS received proposals from TriCenturion, SafeGuard, and Cahaba by the initial closing date of July 20, 2009. The agency evaluated each offeror’s proposal and oral presentation, and conducted discussions. Following discussions, in early 2011, the agency requested final proposal revisions (FPR).<sup>2</sup>

The agency evaluated the offerors’ FPRs and revised the cost evaluation and technical ratings. The final technical ratings and cost evaluations were as follows:<sup>3</sup>

	TRICENTURION	SAFEGUARD	CAHABA
<b>Technical Understanding and Approach (1,800)</b>	<b>1150</b>	<b>999</b>	<b>1116</b>
Technical Understanding (200)	138 (VG)	119 (S)	119 (S)
Potential Fraud Investigations (200)	135 (VG)	110 (S)	130 (VG)
Case Referrals to Law Enforcement (200)	114 (S)	100 (S)	100 (S)
Administrative Actions/ Intermediate Sanctions (200)	136 (VG)	100 (S)	121 (VG)
Law Enforcement Requests (150)	94 (VG)	84 (S)	94 (VG)
Information Technology (IT)/Data Analysis (250)	167 (VG)	125 (S)	181 (VG)
Medical Review for Benefit Integrity (100)	67 (VG)	50 (S)	62 (VG)
High Risk Areas (150)	98 (VG)	90 (S)	75 (S)
Transition, Risk Analysis and Mitigation Plan (150)	87 (S)	104 (VG)	75 (S)

<sup>2</sup> SGS submitted its FPR by the closing date. However, one of SafeGuard’s proposed subcontractors failed to submit its revised business proposal in electronic format by the closing date, as required. As a result of the late delivery of the subcontractor’s revised business proposal, CMS rejected SGS’s proposal as late. SafeGuard filed a protest with our Office on March 21, 2011, challenging the rejection. On June 28, we sustained SafeGuard’s protest because the record showed that CMS rejected its proposal without determining whether it was acceptable without the subcontractor’s revised business proposal. SafeGuard Servs., LLC, B-404910, June 28, 2011, 2011 CPD ¶ 132 at 5.

<sup>3</sup> The agency evaluated each offeror’s proposal under the sub-criteria for the factors and subfactors, and assigned a rating of excellent (E), very good (VG), satisfactory (S), poor (P), and unsatisfactory (U). AR, Tabs 31, 32, 33, Offeror Technical Evaluations, at 2.

Public Relations (50)	38 (VG)	41 (VG)	47 (E)
Audits (75)	38 (S)	38 (S)	56 (VG)
Cost Report Audit, Settlement and Reimbursement (75)	38 (S)	38 (S)	56 (VG)
<b>Coordination and Communication (600)</b>	<b>350</b>	<b>333</b>	<b>336</b>
ZPIC Coordination and Communication (200)	117 (S)	100 (S)	125 (VG)
Coordination and Communication with Stakeholders/Partners (400)	233 (S)	233 (S)	211 (S)
<b>Key/Essential Personnel and Staffing (200)</b>	<b>100 (S)</b>	<b>100 (S)</b>	<b>100 (S)</b>
<b>Security (100)</b>	<b>50 (S)</b>	<b>50 (S)</b>	<b>50 (S)</b>
<b>ISO/Quality Assurance and Improvement (100)</b>	<b>60 (S)</b>	<b>50 (S)</b>	<b>55 (S)</b>
<b>Past Performance (400)</b>	<b>289 (VG)</b>	<b>316 (VG)</b>	<b>345 (E)</b>
<b>Small Business Utilization (100)</b>	<b>54 (S)</b>	<b>50</b>	<b>50 (S)</b>
<b>Subcontracting Approach (Pass/Fail)</b>	<b>Pass</b>	<b>Pass</b>	<b>Pass</b>
<b>TOTAL SCORE (3,300)</b>	<b>2,053 (VG)</b>	<b>1,898 (S)</b>	<b>2,052 (VG)</b>
<b>PROPOSED COST</b>	<b>\$132.4M</b>	[deleted]	<b>\$91.7M</b>
<b>EVALUATED COST</b>	<b>\$132.4M</b>	<b>\$118.7M</b>	<b>\$91.7M</b>

Agency Report (AR), Tab 10a, Source Selection Decision (SSD), at 2-3, 5.<sup>4</sup>

The Contracting Officer (CO), who served as the source selection authority for the procurement, concluded that TriCenturion’s and Cahaba’s proposals were equal in technical merit, and that “[o]ne proposal was not deemed to be superior over the other.” *Id.* at 5-6. The CO considered the strengths and weaknesses of each offeror’s proposal, and concluded that, in addition to Cahaba’s status as one of the two most highly-technically rated offerors, none of the strengths offered by the other higher-cost offerors merited award as compared to Cahaba. *Id.* at 17; AR at 2.

CMS advised TriCenturion and SafeGuard that Cahaba had been selected for award, and provided debriefings to each offeror on October 13. These protests followed.

## DISCUSSION

TriCenturion and SafeGuard argue that CMS’s evaluation of the offerors’ cost and technical proposals, including past performance, was flawed. Because of a largely

<sup>4</sup> The SSD incorrectly calculated the number of points assigned to TriCenturion (the total of the scores listed in the chart in the SSD should be 2,053, rather than 2,050) and to SafeGuard (the total of the scores listed in the chart in the SSD should be 1,898, rather than 1,897). The chart above lists the correct scores.

deficient record, which does not document or support the agency's conclusions, we are unable to determine that the evaluations were reasonable, and therefore sustain the protests. TriCenturion also argues that the agency failed to conduct meaningful discussions, and both protesters' argue that the agency failed to reasonably evaluate OCIs arising from the award to Cahaba. We deny these protest grounds.<sup>5</sup>

#### Cost Realism Evaluation

TriCenturion and SafeGuard argue that CMS did not perform a reasonable evaluation of Cahaba's proposed costs with regard to the number of proposed full-time equivalent (FTE) staff. SafeGuard additionally argues that CMS did not reasonably evaluate Cahaba's proposed other direct costs (ODC). Also, both protesters argue that the agency unreasonably failed to make downward adjustments to their proposed costs in the cost evaluation, based on the protesters' individual technical approaches. We sustain the protesters' arguments concerning the evaluation of Cahaba's proposed FTEs, primarily due to an inadequate record; we deny the other arguments.

When an agency evaluates a proposal for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. Federal Acquisition Regulation (FAR) §§ 15.305(a)(1); 15.404-1(d); Palmetto GBA, LLC, B-298962, B-298962.2, Jan. 16, 2007, 2007 CPD ¶ 25 at 7. Consequently, the agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed. FAR § 15.404-1(d)(1). An agency is not required to conduct an in-depth cost analysis, see FAR § 15.404-1(c), or to verify each and every item in assessing cost realism; rather, the evaluation requires the exercise of informed judgment by the contracting agency. Cascade Gen., Inc., B-283872, Jan. 18, 2000, 2000 CPD ¶ 14 at 8. Further, an agency's cost realism analysis need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate and provide some measure of confidence that the rates proposed are reasonable and realistic in view of other cost information reasonably available to the agency as of the time of its evaluation. See SGT, Inc., B-294722.4, July 28, 2005, 2005 CPD ¶ 151 at 7. Our review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonably based and not arbitrary. Jacobs COGEMA, LLC, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16 at 26.

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<sup>5</sup> The protesters raised numerous other collateral arguments concerning the evaluation of the offerors' proposals and the OCIs relating to Cahaba. We have reviewed all issues raised in the protests and find that, aside from the issues discussed herein, none provides a basis to sustain the protest.

### Evaluation of Cahaba's Proposed FTEs

As set forth in detail below, TriCenturion and SafeGuard primarily argue that CMS's evaluation of Cahaba's significantly lower levels of proposed FTEs and hours was unreasonable. In particular, the protesters point to the disparities between Cahaba's proposal, their proposals, and the independent government cost estimate (IGCE). The protesters also argue that the record provided by the agency fails to explain how the agency evaluated the offerors' proposed costs.

As discussed above, CMS evaluated offerors based on their proposed costs for task orders 0001 and 0002. The agency's cost realism evaluation provided the following summary of the offerors' proposed costs, labor hours, and FTEs for these task orders, as well as the agency's IGCE:

#### Task Order 0001:

	<b>TRICENTURION</b>	<b>SAFEGUARD</b>	<b>CAHABA</b>	<b>IGCE</b>
Proposed Costs	[deleted]	[deleted]	\$48.1M	[deleted]
Hours	[deleted]	[deleted]	[deleted]	[deleted]
FTEs	[deleted]	[deleted]	[deleted]	[deleted]

#### Task Order 0002

	<b>TRICENTURION</b>	<b>SAFEGUARD</b>	<b>CAHABA</b>	<b>IGCE</b>
Proposed Costs	[deleted]	[deleted]	\$43.6M	[deleted]
Hours	[deleted]	[deleted]	[deleted]	[deleted]
FTEs	[deleted]	[deleted]	[deleted]	[deleted]

AR, Tab 13e, FPR Cost Realism Evaluation, at 5.

As the tables above show, Cahaba's proposed hours and FTEs for task order 0001 are well below those of the other offerors. In addition, while Cahaba's FTEs for task order 0001 are relatively close to those in the IGCE, its proposed costs for providing those FTEs are significantly lower than the IGCE's estimated costs. The protesters target similar discrepancies in the results for task order 0002. Despite the disparities in these estimates, CMS made no adjustments to TriCenturion's and Cahaba's proposed costs for the two task orders, and an upward adjustment of only \$[deleted] to SafeGuard's proposed costs for task order 0002. *Id.* at 7.

In answering these protests, CMS argues that it did not rely solely on the IGCE and that it evaluated each offeror's proposal on the basis of its own technical approach.

See Supp. CO Statement (Dec. 8, 2011) at 13.<sup>6</sup> The agency states that the evaluators used the IGCE as a “starting point” for the cost realism evaluations, but did not rely on it to conclude whether an offeror’s proposed costs were realistic. Id. For these reasons, the agency contends that direct comparisons of the differences between the offerors’ proposed costs, or between an offeror’s proposed costs and the IGCE, do not demonstrate that the evaluations were unreasonable.

We agree with the agency that a cost realism evaluation must consider the unique technical approaches proposed by each offeror, and that, to the extent that an agency concludes that an offeror’s proposed costs are realistic for its technical approach, such an evaluation may be reasonable despite differences as compared to other offerors or a government estimate. See FAR § 15.404-1(c)(1); Systems Techs., Inc., B-404985, B-404985.2, July 20, 2011, 2011 CPD ¶ 170 at 5. Here, however, neither the contemporaneous record provided by CMS,<sup>7</sup> nor the testimony provided by agency witnesses,<sup>8</sup> demonstrates how the agency evaluated the offerors’ technical approaches for purposes of cost realism. We discuss the deficiencies in the record below.

The agency’s discussion questions requested that Cahaba address the agency’s concern that it had proposed “understated/low” FTEs in several areas.<sup>9</sup> AR, Tab 8.a.2, Cahaba FPR Cost Discussions, at 5, 15-17. For example, the agency advised Cahaba that “[y]ou are encouraged to re-evaluate and make adjustments with rationale or provide an explanation why you believe [the] proposed FTEs/hours are sufficient as proposed” for six labor categories. Id., at 5. The discussion questions, however, do not show how the agency evaluated the proposed labor

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<sup>6</sup> CMS stated that it had concerns regarding the validity of the IGCE, particularly with regard to task order 2, which the agency found was “miscalculated and overstated.” AR, Tab 13e, Cost Realism Evaluation, at 1-4.

<sup>7</sup> The record produced by CMS in response to these protests consisted of: (1) the discussion questions provided to the offerors in September 2011, and the requests for FPRs; (2) the technical evaluation panel (TEP) reports on the offerors’ FPRs; (3) the business proposal analyses prepared by TEP members for each offeror for task orders 1 and 2; (4) the cost realism analysis prepared by the CO; and (5) spreadsheets prepared by the CO detailing the cost realism evaluation and adjustments for each offeror.

<sup>8</sup> Our Office conducted a hearing on January 10, 2012, to further develop certain protest issues, at which the CO, the TEP chair, and a TEP evaluator provided testimony.

<sup>9</sup> CMS also identified certain FTEs that may be “overstated/high.” E.g., AR, Tab 8.a.2, Cahaba FPR Cost Discussions, at 5.



categories and FTEs; they merely express the agency's concern regarding the proposed level. The record thus does not demonstrate how the agency concluded that the proposed FTEs identified during discussions may be too low, or why the agency concluded that the FTEs not identified during discussions were realistic.

Next, the agency prepared business proposal review (BPR) memos concerning each offeror's proposed costs for the two task orders. For Cahaba, the BPR memo for task order 0001 was prepared by the TEP chair, and the BPR memo for task order 0002 was prepared by a different TEP evaluator. See AR, Tab 14a2, Cahaba FPR BPR Task Order 0001; Tab 14a3, Cahaba FPR BPR Task Order 0002. Both of the BPR memos recommended to the CO that Cahaba's proposed costs for its FPR be accepted as reasonable and realistic.

For task order 0001, the agency concluded that "[t]he offeror's proposed staffing for the transition period is in accordance with the IGCE and [is] deemed reasonable to perform the SOW activities." AR, Tab 14a2, Cahaba FPR BPR Task Order 0001, at 1. The BPR memo, however, does not address how the agency evaluated any of the labor categories or FTEs, or what information the TEP chair relied upon, apart from the IGCE.

For task order 0002, the agency noted that Cahaba "significantly increased" its proposed staffing for the transition period in its revised FPR, and that the agency "finds the level of staffing appropriate." AR, Tab 14a3, Cahaba FPR BPR Task Order 0002, at 1. The agency also noted that although Cahaba's proposed staffing was "significantly lower than the IGCE," the "level of staffing [was] appropriate for the approach proposed by [Cahaba]." Id. Here too, the BPR memo does not discuss how the TEP evaluator assessed Cahaba's technical approach, or any specific findings or technical details upon which the agency relied.

During a hearing conducted by our Office to further develop the record, both the TEP chair and TEP evaluator provided testimony concerning their evaluations. Each witness, however, provided only general statements concerning their evaluations of Cahaba's proposed FTEs.

For example, the TEP chair explained that the TEP's evaluation of Cahaba's technical proposal identified numerous strengths based on the awardee's "Digital Ecosystem," which the TEP chair understood to be the awardee's approach to integrating various analytical approaches and systems to improve effectiveness and efficiency in the investigation work required for the SOW. See Hearing Transcript (Tr.) at 13:8-14:9, 16:16-18:21. In effect, the TEP chair stated that the agency understood Cahaba's Digital Ecosystem to be the primary basis for its technical approach. Tr. at 101:6-19.

With regard to the BPR review, however, the TEP chair acknowledged that the documentation did not address Cahaba's Digital Ecosystem, or any other specific aspects of Cahaba's technical approach. Tr. at 80:8-81:3; 82:2-14. Moreover, the TEP

chair's testimony made only general reference to Cahaba's technical approach, and did not explain how she applied her understanding of the awardee's technical approach to her evaluation of its proposed FTE levels. See, e.g., Tr. at 61:5-14. Similarly, the TEP evaluator who prepared the BPR memo for task order 0002 stated in only the most general terms that her review of Cahaba's proposed costs was based on the awardee's technical approach. See, e.g., Tr. 227:17-228:20; 240:11-241:6.

Both witnesses stated that they believed that there were additional documents that either provided more details concerning their evaluations, or would have aided their recollections during the hearing. For example, the TEP chair stated that she could not recall specific details about her analysis of Cahaba's proposed FTEs, but suggested that she might have been able to do so with the aid of "draft reports" that were not provided by the agency during course of this protest. Tr. at 62:21-63:4; 84:15-18; 100:2-7.

When asked to describe how she evaluated Cahaba's proposed FTEs, the TEP evaluator asked whether she should explain the entire process of her evaluation, or just the document provided by the agency; in this regard, she noted that the document provided "is the second revision of the document." Tr. at 226:18-22. The TEP evaluator later confirmed that the BPR memo for task order 0002 produced by the agency was a "revision of the last one," and that prior versions of the documents contained details regarding the evaluation that were not produced by the agency. Tr. at 237:3-238:21. The TEP evaluator also explained that she prepared a "spreadsheet that compared the labor categories [and] the costs . . . associated with [Cahaba's approach] to see if it comes out to be a reasonable kind of ballpark with the approach." Tr. at 227:18-22; see also Tr. at 231:5-13. This documentation was also not provided by the agency during the course of this protest.

The next piece of documentation cited by CMS was the cost realism evaluation prepared by the CO, which provided a narrative of her evaluation of the realism of the offerors' proposed costs. The CO also prepared spreadsheets documenting the offerors' proposed costs and any cost realism adjustments. As discussed above, the CO's cost realism evaluation accepted Cahaba's proposed costs and made no adjustments. AR, Tab 13a, Cahaba FPR Cost Realism Spreadsheet; Tab 13e, Cost Realism Evaluation, at 4.

The CO testified during the hearing that she did not independently evaluate the realism of Cahaba's proposed FTEs, and instead relied on the judgments of the TEP in concluding that Cahaba's proposed level of FTEs was realistic. Tr. at 292:22-293:7. The CO generally understood that the TEP members' recommendations concerning the adequacy of the proposed FTEs were based on their technical expertise and review of Cahaba's technical proposal. Tr. at 309:12-311:3. The CO acknowledged, however, that she did not know specific details concerning how the TEP chair or TEP evaluator made their judgments concerning any particular labor category or FTE level. See Tr. at 313:12-314:5.

The CO's cost realism evaluation stated that "the TEP first considered each offeror's unique technical approach . . . [and] made an assessment regarding the reasonableness of proposed staffing in terms of labor categories, FTEs and hours." AR, Tab 13e, Cost Realism Evaluation, at 4. Aside from this statement, the cost realism evaluation did not cite any specific aspects of Cahaba's technical approach, or explain how the TEP conducted its evaluation of the offerors' proposed FTEs.

The cost realism spreadsheets contained notes regarding the offerors' evaluated costs. With regard to Cahaba, the spreadsheet notes stated as follows:

No adjustments in proposed labor hours[,] as proposed hours have been approved . . . based on the effort proposed by [Cahaba]. The hours are reasonable to perform the SOW requirements. [Cahaba's] approach to performing the SOW tasks includes their Digital Ecosystem. The Digital Ecosystem provides for more streamlined processes, such as better coordination/communication across Medicare lines . . . and Task Orders; higher integration between investigations, data analysis and medical review and direct, quick access to information for stakeholders. Based on [Cahaba's] approach, CMS is confident that they can perform the work with the proposed staffing.

AR, Tab 13a, Cahaba FPR Cost Realism Spreadsheet, at 2.<sup>10</sup> This reference to Cahaba's Digital Ecosystem is the only mention of a specific technical approach in CMS's evaluation of Cahaba's proposed costs. As discussed above, the TEP chair explained that the Digital Ecosystem was, in essence, the overall technical approach proposed by Cahaba to perform the SOW. Tr. at 101:6-19. As also discussed above, however, the BPR analyses did not explain how the agency applied its understanding of Cahaba's technical approach in its evaluation of the awardee's proposed FTEs. Similarly, the TEP chair and TEP evaluator were not able to explain in their testimony how any particular aspect of Cahaba's technical approach was considered in the BPR analyses.

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<sup>10</sup> During the course of the hearing, the CO testified that this statement was added to the cost spreadsheets at the request of CMS counsel, who advised that the existing documentation did not adequately address "how the proposed hours are reviewed and determined acceptable." Tr. at 305:4-21; 307:5-9; see AR, Tab 15, Email from CMS Counsel to CO (Sept. 29, 2011). This statement was intended to reflect that the TEP evaluators relied on Cahaba's technical approach, *i.e.*, its Digital Ecosystem, in making their evaluation of the adequacy of Cahaba's proposed costs. Tr. at 308:14-309:11. As discussed above, however, the BPR memos and the witnesses' testimony did not provide meaningful details concerning their evaluations.

For the reasons discussed above, we find that neither the contemporaneous record nor the hearing testimony provide a basis for our Office to conclude that CMS's cost realism evaluation was reasonable. Specifically, to the extent that the CO relied on the judgment of the TEP members in concluding that Cahaba's proposed FTEs were realistic, the record does not show how they reached their judgments or whether they were reasonable.

We specifically note here that our conclusions are based on the inadequacies of the contemporaneous record, as produced by CMS. CMS was provided multiple opportunities to ensure that the record was complete. Where, as here, a protester requests specific documents, the agency is required to provide 5 days before the agency report due date a list of the documents it intends to provide. Bid Protest Regulations, 4 C.F.R. § 21.3(c) (2011).<sup>11</sup> As permitted by our regulations, TriCenturion and SafeGuard objected to the scope CMS's proposed list of documents. See id. In particular, the protesters objected to the agency's statement that it would not produce "drafts prepared and superseded before the evaluation of proposals commenced." Agency Response to Document Requests (Nov. 10, 2011) at 3.

During a conference call to resolve the disputes, our Office advised that the agency's intention to produce only "final" documents was an acceptable approach, provided that the documents were complete, reflected the evaluation of the relevant issues, and represented the documents reviewed or relied upon by the selection authority. In particular, the GAO attorney assigned to the protest advised the agency that the documents produced had to "stand on their own," that is, fully reflect the agency's analyses and evaluations. In addition, GAO provided the agency and the other parties an opportunity before the hearing to submit additional documents for the purpose of establishing a clear record for the hearing, and for the ultimate resolution of the protests. GAO Confirmation of Hearing Notice (Dec. 27, 2011) at 3.

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<sup>11</sup> In relevant part, our regulation states as follows:

At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall respond to the request for documents in writing. The agency's response shall, at a minimum, identify whether the requested documents exist, which of the requested documents or portions thereof the agency intends to produce, which of the requested documents or portions thereof the agency intends to withhold, and the basis for not producing any of the requested documents or portions thereof.

4 C.F.R. § 21.3(c).

Despite these opportunities, CMS failed to provide an adequate and complete record. That is, the record failed to reflect the analysis that the agency claims that it performed concerning Cahaba's proposed labor costs. Moreover, as discussed above, the agency's witnesses testified during the hearing that their recollections might have been aided by referring to additional relevant documents that the agency did not produce.

Our Office's ability to meet its statutory obligation to resolve protests within 100 days depends, in large part, on an agency's prompt production of the relevant records concerning the procurements, as required by our rules. 4 C.F.R. § 21.3(d). In addition to producing all relevant documents, agencies must, as discussed above, advise protesters of the documents that will be produced in response to specific document requests. Upon receipt of the agency's proposed document production, protesters are permitted to respond or object to the intended scope of production. Id. § 21.3(c). In the event of an objection, our Office will decide whether the proposed scope of production satisfies the agency's obligation to provide all relevant documents.

Where an agency represents that it will produce all relevant documents, and that the documents will fully reflect the agency's analyses and evaluations, we will generally accept the agency's representations, based on a presumption of good faith. We also expect, however, that agencies will complete the record if, during the course of a protest, it becomes apparent that the record is not complete.

Where an agency fails to document its evaluation, or fails to retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for GAO to conclude that the agency had a reasonable basis for the source selection decision. Systems Research & Applications Corp.; Booz Allen Hamilton, Inc., B-299818 et al. Sept. 6, 2007, 2008 CPD ¶ 28 at 12. This principle applies with equal force where, as here, an agency elects not to provide relevant documents. As discussed above, we find CMS's production of documents in response to these protests to be insufficient to support its evaluation conclusions.

In sum, based on the inadequate and, apparently incomplete, contemporaneous record provided by the agency, and on the lack of meaningful testimony in a hearing called for the purpose of addressing gaps in the agency's documentation, we cannot conclude that CMS's evaluation of the offerors' proposed costs was reasonable. See National City Bank of Indiana, B-287608.3, Aug. 7, 2002, 2002 CPD ¶ 190 at 14. (agency failed to reasonably explain their basis for accepting as realistic the awardee's proposed staffing levels). Based on this record, we sustain the protesters' challenges to the adequacy of CMS's evaluation of Cahaba's proposed staffing levels.<sup>12</sup>

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<sup>12</sup> SafeGuard also contended that CMS's adjustment of its proposed costs concerning the information analyst position was unreasonable. See AR, Tab 14b3, SafeGuard  
(continued...)

### Evaluation of Cahaba's Proposed ODCs

Next, SafeGuard argues that CMS did not reasonably evaluate Cahaba's proposed ODCs. Specifically, SafeGuard notes that while it proposed \$[deleted] for ODCs, Cahaba proposed only approximately \$[deleted]. AR, Tab 13e, Cost Realism Evaluation, at 6. The protester contends that the low level of ODCs may indicate that the awardee's proposed costs did not reflect costs for computer resources, which SafeGuard had included in its proposed ODCs.

While neither CMS's contemporaneous evaluation, nor its agency report, was sufficiently detailed to permit resolution of SafeGuard's challenge to the agency's evaluation of Cahaba's ODCs, the issue was adequately addressed during the hearing. In her testimony, the CO stated she understood that Cahaba and SafeGuard proposed different methods for accounting for their ODCs and indirect costs, which made direct comparisons between their ODCs inapposite. Tr. at 379:19-382:1. The relevant costs for the offerors is as follows:

	<b>SAFEGUARD</b>	<b>CAHABA</b>
ODCs	[deleted]	[deleted]
Fringe Benefits	[deleted]	[deleted]
Overhead	[deleted]	[deleted]
G&A	[deleted]	[deleted]
Facilities Capital Cost of Money	[deleted]	[deleted]

AR, Tab 13e, Cost Realism Evaluation, at 5-6.

The CO acknowledged that her cost realism evaluation did not specifically consider the level of costs proposed by Cahaba for computer resources. Tr. at 391:5-21. The CO stated, however, that based on her experience with Cahaba on other contracts, she was familiar with the company's cost accounting methods, and understood that it accounted for some costs that might otherwise be associated with ODCs as part of its overhead cost pool. Tr. at 368:20-369:2. In particular, the CO stated that she understood, at the time she made her cost realism evaluation, that Cahaba's costs for computer resources were included in its indirect costs. Tr. at 389:4-12. Additionally, the CO noted that Cahaba's indirect rates were capped, and that this provided protection for the government against increases in the awardee's indirect costs. Tr. at 374:2-375:6. For these reasons, the CO states that she was not concerned with

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(...continued)

BPR, Task Order 2, at 3. We do not address this issue here, but in light of the deficiencies in the record discussed herein, the agency should consider this issue in taking the corrective action recommended below.

Cahaba's proposed ODCs, and was not concerned that Cahaba did not separately identify its costs for computer resources. Tr. at 374:18-375:6.

During the hearing, the CO also discussed documentation that showed her understanding of Cahaba's accounting methods was reasonable. Specifically, the CO states that Cahaba had provided a copy of its cost accounting disclosure statement, as required by the RFP. Cahaba's disclosure statement states that it accounts for "computer operations" as part of its overhead cost pool. AR, Tab 7a, Cahaba Disclosure Statement, at IV-7; Tr. at 372:13-16. The CO also noted that she requested that the Defense Contract Audit Agency (DCAA) conduct a review of Cahaba's disclosure statement and cost accounting system. Tr. at 378:13-379:5. The DCAA report advised that Cahaba's disclosure statement "adequately describes the contractor's cost accounting practices." Supp. CO Statement, exh. B, DCAA Report (Mar. 17, 2011), at 4. The CO states that she relied on DCAA's findings to inform her judgment as to the adequacy of Cahaba's cost accounting practices. Tr. at 379:6-15.

We think that the record shows that the CO understood the manner in which Cahaba proposed its ODCs and indirect costs, and that her assumption concerning the costs of the awardee's computer resources was also reasonable. On this record, we find no basis to sustain this aspect of the protest.

#### Downward Adjustments to the Protesters' Proposed Costs

Finally, TriCenturion and SafeGuard argue that CMS failed to make downward cost realism adjustments to their proposals, based on the possibility that the government would not incur the costs proposed by the offerors.

As discussed above, the FAR states that a cost realism evaluation must consider the probable cost to the government for each offeror's proposal, and that agencies must evaluate offerors' probable cost by "evaluating specific elements of each offeror's proposed cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed." FAR § 15.404-1(d)(1). The agency must then "adjust[] each offeror's proposed cost, and fee when appropriate, to reflect any additions or reductions in cost elements to realistic levels based on the results of the cost realism analysis." FAR § 15.404-1(d)(2)(ii). We have held that agencies should make downward adjustments to an offeror's evaluated cost where the proposal shows a misunderstanding of the requirements in a manner which would cause the government to incur a lower cost than that identified in the proposal. See Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 3-4. Conversely, we have held that where an offeror's proposed costs reflects its technical approach, the agency need not make a downward adjustment based on the agency's concerns that the proposed level of effort and costs are more than the agency believes is necessary to perform the work. See The S.M. Stoller Corp., B-400937 et al., March 25, 2009, 2009 CPD ¶ 193 at 15; Magellan Health Servs., B-298912, Jan. 5, 2007, 2007 CPD ¶ 81 at 13-14.

SafeGuard argues that because CMS accepted Cahaba's explanation that its Digital Ecosystem would permit it to perform the work in an efficient manner with lower FTEs than the IGCE, the agency should have made a downward adjustment to SafeGuard's proposed costs to reflect savings from its use of a similar technical approach. However, even if SafeGuard and Cahaba proposed similar technical approaches--a point the agency does not concede--there would be no basis here for a downward adjustment. SafeGuard's proposal assumed that its technical approach would require the level of staffing it proposed to implement its technical approach; thus, CMS had no reason to believe that the government would incur lower costs than what the protester proposed.

TriCenturion argues that the CO unreasonably rejected a recommendation by the TEP that the protester's proposed costs should be adjusted downward to reflect a lower number of FTEs than it proposed. See AR, Tab 13c, TriCenturion FPR Cost Realism Evaluation, at Tab TO1/CLINs 0002-0006, TO2/CLIN 0001. In this regard, the TEP concluded that TriCenturion had overstated the required labor in a number of areas. The record shows that CO rejected the recommendation because she concluded that TriCenturion's proposed staffing was based on its proposed technical approach, and that there was no basis to conclude that the protester would perform the work in a different manner than what was proposed. Id.

Here, the differences between the offerors' proposals stemmed from their proposed technical approaches and their assumptions concerning the level of effort required to implement those approaches. On this record, the protesters have provided no basis for our Office to conclude that CMS unreasonably declined to make a downward adjustment in either of these protester's evaluated costs. See The S.M. Stoller Corp., supra; Magellan Health Servs., supra.

#### Evaluation of SafeGuard's Technical Proposal

SafeGuard argues that CMS's evaluation of its technical proposal was unreasonable. In its supplemental protest, SafeGuard identified 15 areas where it contends that the agency's evaluation was based on the following flaws: disparate and unequal treatment of its technical proposal as compared to Cahaba's and TriCenturion's proposals; unreasonable assessment of weaknesses; and an unreasonable failure to recognize strengths for its proposal. SafeGuard Comments (Nov. 28, 2011) at 46-70. These 15 areas concerned the evaluation of SafeGuard's proposal under numerous evaluation factors and subfactors.

Our Office requested that CMS provide a response to SafeGuard's supplemental protest arguments. In its supplemental report, however, the agency addressed only three of these arguments, characterizing these responses as examples of why the evaluation of the offerors' proposals was reasonable. See Decl. of TEP Chair at 2-3. CMS argued that its response was adequate, because while "[a] re-evaluation or re-scoring as suggested by [SafeGuard] might result in minor deviations in scoring, and even, possibly, the re-ordering of the technical ranking of the three offerors,"



there was no basis to conclude that there would be a change in the award decision. Supp. AR (Dec. 8, 2011) at 3. In effect, the agency appears to argue that even if SafeGuard's unaddressed arguments alleging unequal and unreasonable evaluation of the offerors' proposals had merit, there would have been no prejudice to SafeGuard because the agency would not have changed its award decision.

We first note that CMS's argument that the award decision would not be changed, even if these unaddressed protest contentions had merit, is a post-hoc argument raised in response to the protest. We generally accord such arguments little or no weight. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

In any case, because CMS elected not to respond to the majority of the protester's arguments concerning the evaluation of its technical proposal, and does not appear to contest the merits of the protester's arguments, we view the agency as having effectively conceded that the evaluation of SafeGuard's technical proposal was not reasonable. See Radiation Oncology Group of WNY, PC, B-310354.2, B-310354.3, Sept. 18, 2008, 2009 CPD ¶ 136 at 6-7; Myers Investigative and Sec. Servs., Inc., B-287949.2, July 27, 2001, 2001 CPD ¶ 129 at 2. Alternatively, to the extent that the agency did not intend to concede this issue, its response does not provide us with a basis to conclude that the evaluation was reasonable, and we sustain the protest on this basis.<sup>13</sup>

#### Past Performance Evaluation

Next, TriCenturion and SafeGuard argue that CMS did not reasonably evaluate the relevance of the offerors' past performance. Additionally, SafeGuard argues that the agency failed to evaluate whether Cahaba's proposed subcontractors met the RFP's threshold requirement for consideration.

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<sup>13</sup> We have reviewed the issues not addressed by CMS, and note that many of them appear to have merit. For example, one argument raised by SafeGuard, and not addressed by the agency, concerns a weakness under the key/essential personnel factor. CMS identified a weakness because the agency found that "[i]t is not indicated if the proposed [medical review (MR)] manager has an active [registered nurse (RN)] license," as required by the RFP. AR, Tab 14b1, SafeGuard FPR Technical Evaluation, at 42. As SafeGuard notes, however, its proposal clearly states that its proposed MR manager holds an RN license. See AR, Tab 7b, SafeGuard FPR, at II-130. Because CMS's response does not address the majority of the protester's arguments, we do not address the three examples cited in the TEP chair's memorandum. As the protester notes, however, the responses consist primarily of general observations of the level of detail provided in Cahaba's technical proposal, and a summary comment that SafeGuard's proposal did not provide the same level of detail.

While, as a general matter, the evaluation of an offeror's past performance is within the discretion of the contracting agency, we will question an agency's evaluation of past performance where it is unreasonable or undocumented. Solers, Inc., B-404032.3, B-404032.4, Apr. 6, 2011, 2011 CPD ¶ 83 at 8. Although an agency is not required to retain every document generated during its evaluation of proposals, the agency's evaluation must be sufficiently documented to allow our Office to review the merits of a protest. Apptis, Inc., B-299457 et al., May 23, 2007, 2008 CPD ¶ 49 at 10. Where an agency fails to document or retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for its source selection decision. Navistar Def., LLC; BAE Sys., Tactical Vehicle Sys. LP, B-401865 et al., Dec. 14, 2009, 2009 CPD ¶ 258 at 13.

Here, the RFP stated that offerors' past performance would be evaluated as follows:

The Government's evaluation will be based on the extent, depth, and quality of past performance within the last two (2) years in performing the same or similar work as anticipated under this contract. Past performance of significant and/or critical subcontractors will be considered to the extent warranted by the subcontractor's demonstrated involvement in the proposed effort.

\* \* \* \* \*

The evaluation of past performance will be based on the extent to which the Offeror has demonstrated, under contracts of a similar nature, scope, and complexity as the ZPIC contract, its ability to successfully meet the requirements of the SOW in this solicitation.

#### RFP § M.2.A.6

The protesters argue that CMS's evaluation does not document how the agency evaluated the relevance of the offerors' past performance references. For this reason, the protesters argue that the past performance rating for Cahaba--which received a rating of excellent, as opposed to very good for the protesters--was not reasonable.

In its response to the protest, CMS does not dispute that the contemporaneous record fails to document the evaluation of relevance. Instead, the agency essentially contends that such documentation was not necessary: "Contrary to the protestor's claims, while not every evaluation or questionnaire has a documented rationale for the relevance rating, many do and many are simply self evident or common sense." Supp. CO Statement (Dec. 8, 2011) at 19. The agency further argues that there was no prejudice to the protesters from the lack of documentation here because:

[E]ven if the Agency made some minor error in their evaluation of one or another subcontractor, the past performance scores for all offerors were very strong. A re-shuffling of the final rankings in this factor would not have made any substantial difference in the final award decision.

Supp. AR (Dec. 8, 2011) at 4.

The record of the agency's evaluation of offerors' past performance consists of score sheets with handwritten notes for each past performance reference. See AR, Tabs 16b, Cahaba Past Performance Evaluations; Tab 16c, SafeGuard Past Performance Evaluations; Tab 16d, TriCenturion Past Performance Evaluations. Each reference contained sections for information such as "Evaluation Period," "Description of Work," "Rational[e] for Assessment," "Relevance Factor Assessed," and "Score []." See id. For the vast majority of Cahaba's past performance references, there was no information provided regarding the "Rational[e] for Assessment."

For Cahaba's own past performance--as opposed to the past performance of its subcontractors--the majority of the references had no information concerning the rationale, while others stated that Cahaba was a program safeguard contractor for CMS, or that Cahaba's reference pertained to "audit" work. For five of Cahaba's eight subcontractors, the references had no explanations for any of the relevance ratings. For the other three subcontractors, the majority of the rationales in the references were blank. See AR, Tab 16b, Cahaba Past Performance Evaluations.

Although the CO contends that the relevance ratings were "self evident or common sense," Supp. CO Statement (Dec. 8, 2011) at 19, we cannot make an independent judgment concerning the relevance of the past performance references. We also do not agree with CMS's position that the offerors' were not prejudiced by any errors that might have been made. In the absence of a basis to evaluate the reasonableness of the past performance evaluations, we cannot conclude, as the agency suggests, that the rankings of the offerors would be unaffected. In this regard, Cahaba received the highest ratings for past performance, and the award decision specifically noted that Cahaba's past performance record, which was rated excellent, was "stronger" than that of TriCenturion and SafeGuard, which were rated very good. AR, Tab 10a, SSD, at 6, 8, 12.

Additionally, SafeGuard argues that the agency considered the past performance of Cahaba's proposed subcontractors without regard to the significance of the subcontractors' proposed roles. As discussed above, the RFP stated that the agency would consider the past performance of proposed subcontractors as follows: "Past performance of significant and/or critical subcontractors will be considered to the extent warranted by the subcontractor's demonstrated involvement in the proposed effort." RFP § M.2.A.6.

In a protest addressing identical solicitation language, our Office concluded that the agency's evaluation of the awardee's past performance was not reasonable where neither the contemporaneous record nor the agency's response to the protest reasonably explained why it considered an awardee's proposed subcontractor to have a "significant and/or critical" role that merited consideration, particularly in light of the small role for which the subcontractor was proposed. See CIGNA Gov't Servs., LLC, B-401062.2, B-401062.3, May 6, 2009, 2010 CPD ¶ 283 at 10-11.

Here, SafeGuard contends that the work proposed by Cahaba for several of its subcontractors was small, and should not have been viewed as "significant and/or critical." Our review of the record shows that three of Cahaba's six proposed subcontractors for task orders 0001 and 0002, ALPS Services, Inc., Kelly & Associates, LLC, and J. Michael Hardin & Associates, were each proposed to perform less than [deleted] percent of the total work for these task orders. The other three subcontractors proposed for the task orders, ViPS, Inc., Vista Sciences Corp., and Health Management Systems, Inc., were each proposed to perform approximately [deleted] percent of the work. See AR, Tab 13a, Cahaba FPR Cost Realism Spreadsheets. Cahaba also proposed three additional subcontractors that were not proposed to perform work under task orders 0001 and 0002, but whose past performance records were evaluated by CMS. See AR, Tab 16b, Cahaba Past Performance References.

CMS acknowledges that it did not consider the costs or percentage of work for which an offeror's subcontractor was proposed, and states that "CMS considered all of the subcontractors for Cahaba, SGS and TriCenturion to play a significant/critical role, regardless of the dollar value." Supp. CO Statement (Dec. 8, 2011) at 17. The agency also explains that because offerors were required to propose costs for task orders 0001 and 0002, there were no costs for the proposed subcontractors who would perform work only in the event other task orders were issued. Id. at 18. While it appears that the agency is correct in asserting that an evaluation based on the percentage of costs represented by the proposed effort of each subcontractor may not have been possible under the terms of the solicitation, neither the contemporaneous record, nor the agency's response to the protest, explains whether or how it considered that a proposed subcontractor was "significant and/or critical."

In sum, we conclude that neither the record provided by the agency nor its response to the protest, permit our Office to conclude that the evaluation of the offerors' past performance was reasonable, and sustain the protest on this basis.

#### Discussions with TriCenturion

Next, TriCenturion argues that CMS did not provide an opportunity for meaningful discussions. Specifically, the protester contends that the agency identified 16 minor weaknesses in its proposal, but did not raise these issues during discussions. We find no merit to this argument.

The FAR requires agencies to conduct discussions with offerors in the competitive range concerning, “at a minimum . . . deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond.” FAR § 15.306(d)(3). When an agency engages in discussions with an offeror, the discussions must be “meaningful,” that is, sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision in a manner to materially enhance the offeror’s potential for receiving the award. FAR § 15.306(d); Bank of Am., B-287608, B-287608.2, July 26, 2001, 2001 CPD ¶ 137 at 10-11. As our Office has consistently held, agencies are not required to afford offerors all-encompassing discussions or to discuss every aspect of a proposal that receives less than the maximum score, and are not required to advise an offeror of a minor weakness that is not considered significant. Apptis Inc., B-403249; B-403249.3, Sept, 30, 2010, 2010 CPD ¶ 237 at 4. In determining whether a concern identified by an agency was a weakness, significant weakness, or deficiency, our Office does not rely solely on the label or term used by the agency, but instead looks also to the context of the evaluation. Raytheon Co., B-404998 July 25, 2011, 2011 CPD ¶ 232 at 6.

TriCenturion argues that although the agency labeled the weaknesses as “minor,” they reflected more serious concerns that should have been raised during discussions. The agency counters, and we agree, that the concerns reflected in the record were minor, correctable weaknesses. For example, TriCenturion contends that CMS cited a weakness based on the protester’s “perceived misunderstanding regarding Parts C & D overpayments,” and that this weakness indicates a serious concern regarding its technical approach. TriCenturion’s Comments (Nov. 28, 2011) at 19. In fact, the full text of the agency’s evaluation stated as follows:

Although the offeror provided a good overall understanding of Part C & D administrative actions there was minor weakness associated with a perceived misunderstanding regarding Part C & D overpayments. This issue can be easily addressed and will not hinder the offeror’s ability to perform the SOW requirements.

AR, Tab 14c1, TriCenturion FPR Evaluation, at 15. In light of CMS’s view that this issue was “easily addressed” and that it would not hinder performance, we think that it was reasonably classified as a “minor weakness” that did not require discussions. We conclude that none of the arguments raised by the protester here demonstrate that the agency failed to provide an opportunity for meaningful discussions.<sup>14</sup>

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<sup>14</sup> TriCenturion also argues that CMS treated it unequally in discussions as compared to Cahaba. TriCenturion Supp. Comments (Dec. 15, 2011) at 18-19. Although the protester was provided the full record of CMS’s discussions with all parties in the agency report on November 18, 2011, the protester did not allege or identify examples of unequal treatment within 10 days of receiving this information, as required by our Bid Protest Regulations. See 4 C.F.R. § 21.2(a)(2); TriCenturion

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## Organizational Conflicts of Interest

TriCenturion and SafeGuard each argue that the award to Cahaba was tainted by OCIs arising from Cahaba's status as a wholly-owned subsidiary of Blue Cross/Blue Shield of Alabama (BCBSAL), and specifically from BCBSAL's provision of Medicare part C and D services to its customers. For the reasons discussed below, we conclude that CMS reasonably evaluated the potential conflicts posed by award to Cahaba, and concluded that the potential conflict was reasonably mitigated.

The FAR requires that contracting officers avoid, neutralize or mitigate potential significant OCIs so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504(a), 9.505. The responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting agency. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12.

The protesters' arguments here concern the category described in FAR subpart 9.5 and the decisions of our Office as arising from impaired objectivity. An impaired objectivity OCI exists where a firm's work under one government contract could entail its evaluating itself. FAR § 9.505-4; Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 13. The concern in such "impaired objectivity" situations is that a firm's ability to render impartial advice to the government will be undermined by its relationship to the product or service being evaluated. PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7.

In reviewing bid protests that challenge an agency's conflict of interest determinations, the Court of Appeals for the Federal Circuit has mandated application of the "arbitrary and capricious" standard established pursuant to the Administrative Procedures Act. See Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1381 (Fed. Cir. 2009). To demonstrate that an agency's OCI determination is arbitrary or capricious, a protester must identify "hard facts" that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011); PAI Corp. v. United States, 614 F.3d 1347, 1352 (Fed. Cir. 2010). In Axiom, the Court of Appeals noted that "the FAR recognizes that the identification of OCIs, and the evaluation of mitigation proposals are fact-specific

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Comments (Nov. 28, 2011) at 16-19. Instead, the protester first raised this issue in its December 15 comments. We therefore dismiss this aspect of the protester's argument as untimely.

inquiries that require the exercise of considerable discretion.” Axiom Res. Mgmt., Inc., 564 F.3d at 1382. The standard of review employed by this Office in reviewing a contracting officer’s OCI determination mirrors the standard required by Axiom. In this regard, we review the reasonableness of the CO’s investigation and, where an agency has given meaningful consideration to whether an OCI exists, will not substitute our judgment for the agency’s, absent clear evidence that the agency’s conclusion is unreasonable. See Enterprise Info. Servs., Inc., B-405152 et al., Sept. 2, 2011, 2011 CPD ¶ 174 at 8.

TriCenturion and SafeGuard argue that Cahaba’s ownership by BCBSAL creates a potential conflict in the event that CMS issues Cahaba a task order to perform audits of Medicare parts C or D, which involve prescription drug benefits. The protesters contend that a conflict would arise because BCBSAL: (1) is a provider of Medicare part C and D services, (2) has an ownership stake in Prime Therapeutics, a company that provides pharmacy-related services, (3) has relationships with pharmacies, and (4) competes with other providers of Medicare part C and D services in zone 6.

The CO prepared a memorandum documenting potential OCIs concerning Cahaba. As relevant here, the CO noted that BCBSAL “acquired 16.78% investment interest in Prime Therapeutics LLC (Prime) in 2010,” and holds one of the 10 seats on Prime Therapeutics’ board of directors. AR, Tab 12a, OCI Memorandum, at 11. The CO found that potential OCIs could arise because “BCBSAL contracted with Prime to provide Pharmacy Benefit Manager (PBM) services for BCBSAL’s members/subscribers.” Id. The CO also found that Prime Therapeutics “offers pharmacy services, Medicare Part D administration, and other consulting services,” and that specifically “provides PBM services to various customer plans, and it provides Medicare Part D rebate and formulary services to one customer in Zone 6.” Id.

During exchanges with Cahaba concerning this subject, Cahaba stated that the risk of a conflict arising based on BCBSAL’s ownership stake in Prime Therapeutics was “negligible” because Prime Therapeutics has only one customer in zone 6. Id. at 12. Cahaba also proposed several mitigation strategies, including [deleted]. Id. The CO concluded that the proposed mitigation was not acceptable, in part because of the additional resources required of CMS to monitor the proposed mitigation, and that “[t]his conflict remains unmitigated.” Id.

CMS asked Cahaba to address the potential OCI arising from BCBSAL’s ownership stake in Prime Therapeutics, and advised that “failure to avoid, neutralize or mitigate a conflict of interest may result in the award of this contract to another offeror.” AR, Tab 12b, Letter from CMS to Cahaba (September 28, 2011), at 3.

In response, Cahaba advised CMS that BCBSAL had agreed to divest itself of Cahaba upon notice that CMS intended to issue a task order for Medicare parts C or D. AR, Tab 12c, Letter from Cahaba to CMS, Sept. 29, 2011, at 1. Cahaba’s proposed mitigation approach provided a timeline with five milestones from the date of CMS’s announcement of its intent to issue a task order: (1) within [deleted]: establish the

terms of sale, obtain approval of BCBSAL's Board of Directors, and issue a formal announcement of the intent to sell Cahaba; (2) within [deleted]: identify and vet prospective buyers, conduct industry research of prospective buyers, and conduct OCI analyses; (3) within [deleted]: agree on terms of sale with buyer; (4) within [deleted]: execute the sale and complete all required corporate actions and approvals; and (5) within [deleted]: execute state corporate documents and novate required leases. Id. at 2-3. In addition, Cahaba provided the following "contingency plan" in the event that the milestones are not met:

If BCBSAL cannot identify a buyer within the timeline listed above, BCBSAL shall [deleted].

Id. at 3-4. Cahaba's response also included a letter from the BCBSAL Senior Vice President and Chief Financial Officer stating that the parent company "is in agreement with the mitigation plan being proposed by Cahaba . . . related to any future Part C or Part D task order for the above-mentioned solicitations [zones 3 and 6]." AR, Tab 12d, Letter from BCBSAL to CMS (Sept. 29, 2011), at 1.

The CO concluded that Cahaba's proposed mitigation plan was acceptable.<sup>15</sup> AR, Tab 12a, OCI Memorandum, at 27. The CO found that Cahaba's proposed [deleted] schedule for divestiture was reasonable and realistic. In this regard, the CO noted that CMS expected that it could take between 7-8 months from announcement of the agency's intent to issue the task order to develop an SOW, obtain funding approval, negotiate the task order with Cahaba, and to complete the transition of the work from the incumbent. Id. at 26-27.

The CO also stated that, in the event the divestiture could not be achieved within the proposed [deleted] time frame, and CMS required the services from Cahaba at that time, the cognizant head of the CMS contracting activity (HCA) "will authorize a waiver of the Prime Therapeutics conflict during the time that the contingency plan is in place." Id. at 27. The FAR provides that an HCA may "waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest." FAR § 9.503. Here, the OCI memorandum included a statement from the HCA, which stated as follows:

With regard to the mitigation strategy for the OCI caused by BCBSAL's ownership in Prime Therapeutics, should it be necessary to afford [Cahaba] additional time, in excess of the [deleted] proposed, to

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<sup>15</sup> The agency argues that the divestiture plan addresses not only Prime Therapeutics, but the protesters' other OCI arguments as well. CO Statement at 5; Supp. CO Statement (Dec. 8, 2011) at 8-9. Because the protesters' other arguments concern conflicts arising from Medicare part C/D coverage, we agree that the divestiture plan addresses these concerns.



finalize the sale of [Cahaba] and should CMS require [Cahaba] to begin work on a Part C and/or Part D task order, the HCA will authorize a waiver in accordance with FAR 9.503 while the contractor's contingency plan is being finalized. The waiver would be in affect only until such time as the sale of [Cahaba] is completed. Once the sale of [Cahaba] is completed, the waiver would no longer be necessary and the conflict would be fully mitigated.

AR, Tab 22d, OCI Memorandum, at 28.

The protesters argue that the CO unreasonably accepted the divestiture plan because it did not provide adequate details to address the OCI. In particular, the protesters contend that the plan lacks specificity because it does not identify a potential buyer or sales terms. The protesters cite two decisions in which our Office sustained protests of awards for ZPIC zones 1 and 2, based on what the protesters contend were similar OCI concerns and divestiture plans to those at issue here. See C2C Solutions, Inc., B-401106.5, Jan. 25, 2010, 2010 CPD ¶ 38; Cahaba Safeguard Adm'rs, LLC, B-401842.2, Jan. 25, 2010, 2010 CPD ¶ 39. As relevant here, we concluded in both protests that the CO failed to evaluate the awardee's proposed mitigation approach of divestiture, in part because the proposed plans lacked any meaningful detail. In this regard, the record in the C2C Solutions and Cahaba decisions shows that the CO's OCI analysis merely observed that "[t]he other mitigation strategy, total divestiture of [the awardee], includes some uncertainties as to the particulars of the divestiture that are and cannot be known at this time." C2C Solutions, Inc., *supra*, at 5; Cahaba Safeguard Adm'rs, LLC, *supra*, at 6. In light of the lack of any meaningful details to support the divestiture plans, we sustained both protests.

In contrast to C2C Solutions and Cahaba, however, Cahaba's mitigation plan here provided specific details and milestones. As discussed above, the awardee stated that BCBSAL would, upon notice of the agency's intent to begin the process of issuing a task order for Medicare parts C and D, commence the necessary steps to divest itself of Cahaba. The mitigation plan included five milestones, which the agency evaluated and concluded were reasonable. Additionally, as the intervenor notes, the lack of a specific price or buyer was not unreasonable, as there was no timeframe for a possible parts C and D task order at the time of the award. On this record, we conclude that the CO acted within the reasonable exercise of her discretion in concluding that Cahaba's proposed mitigation plan adequately addressed the OCI concerning BCBSAL's ownership of Cahaba and its 17 percent stake in Prime Therapeutics. On this record, we find no basis to sustain the OCI arguments.

## CONCLUSION AND RECOMMENDATION

For the reasons discussed above, we conclude that CMS's evaluation of the offerors' cost, technical and past performance proposals was unreasonable. We recommend that CMS reevaluate the offerors' cost, technical and past performance proposals,

consistent with our decision, conduct discussions and obtain revised proposals if appropriate, and make a new selection decision. We also recommend that the agency adequately document its evaluation and selection decision. We further recommend that TriCenturion and SafeGuard be reimbursed the costs of filing and pursuing their protests, including reasonable attorney's fees, with regard to the cost and past performance issues, and that SafeGuard also be reimbursed regarding the technical evaluation issues. 4 C.F.R. § 21.8(d)(1). The protesters should submit their certified claims for costs, detailing the time expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

Lynn H. Gibson  
General Counsel