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Decision

Matter of: Health Net Federal Services, LLC

File: B-401652.3; B-401652.5

Date: November 4, 2009

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Gerald A. Wesley, Esq., Hattie Russell DuBois, Esq., Michael E. Jonasson, Esq., Rhonda L. Bershok, Esq., and Dennis Dyke, Esq., Office of TRICARE Management Activity, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where the agency credited the awardee with past performance of its parent and corporate affiliates, yet record did not establish which entities were involved with performing the prior contracts submitted by the awardee, nor did it establish the roles that the various entities would have in awardee's performance of the contract.
2. Agency's past performance evaluation of the awardee was flawed where the record shows that, although it gave awardee the highest past performance rating, agency failed, as contemplated by the solicitation, to consider the fact that awardee's past performance references were very small in relation to the size of the contract to be awarded.
3. Price realism evaluation was flawed where it did not reasonably consider whether the awardee's staffing, as related to its price/cost proposal, reflected a lack of understanding of the agency's technical requirements or presented technical risk.
4. Agency failed to consider risk associated with awardee's proposed plan to hire large percentages of the incumbent workforce, which the agency considered to be a

beneficial approach, where the agency did not consider awardee's ability to hire the incumbent workforce with lower compensation rates.

5. Protest challenging agency evaluation of protester's proposal in procurement for TRICARE managed health care support services is sustained where the record shows that the agency did not consider the network provider discounts associated with protester's existing TRICARE network, in accordance with the solicitation.

6. Protest that awardee's use of a former high-level government employee in preparing its proposal created an appearance of impropriety based on the unfair competitive advantage stemming from the individual's access to non-public proprietary and source selection sensitive information is sustained where the contracting officer never considered the matter--because the awardee did not bring it to his attention--and the record shows that the individual had access to non-public proprietary information concerning the protester's performance of the incumbent contract, which appears relevant to the challenged procurement.

DECISION

Health Net Federal Services, LLC of Rancho Cordova, California, protests the award of a contract to Aetna Government Health Plans, LLC (AGHP) of Hartford, Connecticut, under request for proposals (RFP) No. H94002-07-R-0007, issued by the Department of Defense TRICARE Management Activity (TMA) for T-3 TRICARE managed health care support services for the North Region.¹ Health Net, the incumbent contractor, challenges TMA's technical and price evaluations, conduct of discussions, and source selection decision, and argues that AGHP should be excluded from the competition based on an alleged unfair competitive advantage stemming from AGHP's hiring a former TMA employee (the TMA Chief of Staff) to prepare AGHP's proposal.

We sustain the protest.

BACKGROUND

TRICARE is a managed health care program implemented by the Department of Defense (DOD) for active-duty and retired members of the uniformed services, their dependents, and survivors. TRICARE is an integrated network, which combines resources of the Military Health System's direct medical care services, largely through government-operated military treatment facilities (MTF), and a network of civilian health care providers operating under managed care support (MCS)

¹ Our Office issued a separate decision addressing a protest challenging TMA's award of the South Region contract. Humana Military Healthcare Services, B-401652.2, et al., October 28, 2009.

contracts. TMA is the DOD field activity which is responsible for awarding and managing these contracts.

Currently, there are approximately 9.2 million beneficiaries using the TRICARE program, which is divided into three regions (North, South, and West). The North region, which is the subject of this protest, covers approximately 2.9 million TRICARE beneficiaries.² Under TRICARE, eligible beneficiaries have three health care options: TRICARE Standard (a standard fee-for-service plan), TRICARE Extra (a network of preferred providers for Standard plan beneficiaries), and TRICARE Prime (a health maintenance organization (HMO)-type plan, in which enrollees are required to use MTFs or network providers or pay higher out-of-network co-payments).

On June 12, 2007, TMA issued a draft RFP for the third generation of MCS contracts, referred to as T-3. The final RFP was issued on March 24, 2008, contemplating the award of contracts (one for each region--North, South, and West) with a base transition-in period, plus five 1-year option periods of actual health care delivery, and a 270-day transition-out option period. RFP at 26. In describing the requirements, the T-3 solicitation set forth five objectives: (1) optimization of the delivery of health care services in the direct military-provided health care system for all military health system beneficiaries; (2) beneficiary satisfaction at the highest level possible throughout the period of performance through delivery of world-class health care and customer friendly program services; (3) attainment of "best value health care" as defined in the TRICARE Operations Manual; (4) provision of fully operational services and systems at the start of health care delivery and minimal disruption to beneficiaries and MTFs; and (5) full and real time access to contractor maintained data to support the DOD's financial planning, health systems planning, medical resource management, clinical management, clinical research, and contract administration activities. RFP at 12.

According to the RFP, a prime contractor could not receive an award for more than one of the three contract regions. The agency was to select "the proposal representing the best value (which will include the risk associated with the proposal) to the Government . . . consistent with furnishing high quality health care in a manner that protects the fiscal and other interests of the United States." RFP at 102. In this regard, the RFP set forth three evaluation factors: (1) technical approach;

² The North Region covers care for beneficiaries residing in the following areas: Connecticut, Delaware, the District of Columbia, Illinois, Indiana, Iowa (Rock Island Arsenal area only), Kentucky (except the Fort Campbell area), Maine, Maryland, Massachusetts, Michigan, Missouri (St. Louis area only), New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin.

(2) past performance; and (3) price/cost. Technical approach was the most important factor, past performance was second, and price/cost was the least important factor. The technical approach and past performance factors, when combined, were significantly more important than the price/cost factor. RFP at 103.

Under the technical approach factor, the RFP identified the following evaluation subfactors, which were equal in terms of importance: (1) network development and maintenance; (2) referral management; (3) medical management; (4) enrollment; (5) beneficiary satisfaction/customer service; (6) claims processing; and (7) management functions. RFP at 102-03.

Regarding the evaluation of technical approach, the RFP provided that “[p]roposals will be evaluated on the basis of how well an offeror’s proposed approach adequately describes their procedures, methods, and delivery of services that meet or exceed the Government’s minimum requirements. . . . The Government will consider offers that commit to higher performance standard(s) or requirements, if the offeror clearly describes the added benefit to the Government.” RFP at 103. As part of the evaluation, the seven technical subfactors were to be assigned individual merit ratings, as well as a risk rating.

TMA employed the following rating scheme for the purpose of evaluating technical merit:

Blue (Exceptional) – Exceeds minimum requirements in a manner beneficial to the Government; has no weaknesses. The offer has exceeded some requirements and is at least acceptable in all other requirements. Where exceeded, it must be documented by a strength(s) that is of clear benefit to the Government.

Green (Acceptable) – Meets minimum requirements. Any requirements exceeded in the offer are offset by one or more weaknesses. Weaknesses are readily correctable.

Yellow (Marginal) – Fails to meet minimum requirements and contains significant weaknesses. The offer is correctable without a major proposal revision.

Red (Unacceptable) – Fails to meet minimum requirements and contains significant weaknesses that are not correctable without a major proposal revision.

Agency Report (AR) Tab 86, Source Selection Evaluation Guide (SSEG), at 11-12.³

As it relates to the protest, the SSEG defined a strength to mean “an aspect of an offeror’s proposal that exceeds specified requirements and is a clear benefit to the Government.” Id. at 10. According to the SSEG, a strength was only to be assigned “when the offeror has proposed to exceed a minimum performance requirement and contractor performance at the proposed higher level is a clear benefit to the government and/or the offeror proposes a superior method or process which results in a clear benefit to the Government,” and a clear benefit to the government was defined to include, among other things, “cost savings.” Id.

A weakness was defined by the SSEG to mean “a flaw in the proposal that increases the risk of unsuccessful contract performance.” Id. According to the SSEG, a weakness should be assigned when there is “a flaw or discrepancy in the offeror’s proposal that may contribute to or result in failure to meet a minimum requirement.” Id.

As noted above, the RFP provided that TMA would also evaluate each of the subfactors for proposal risk. This aspect of the evaluation was to include an assessment of “the potential for disruption of schedule, increased cost, degradation of performance, the need for increased Government resources/oversight to monitor and manage risk, and the likelihood of unsuccessful contract performance.” RFP at 106. According to the RFP, the risk evaluation would assess the offeror’s proposed approach, method, or process of completing tasks, and “the demonstrated experience in performing tasks (including experience in performing a proposed approach, method, or process).” Id.

Regarding past performance, the RFP specified that the agency would “determine how well an offeror has performed in the past on similar relevant work and then assess a performance confidence rating relative to the offeror’s ability to successfully perform the requirements of this solicitation.” RFP at 106. The RFP instructed offerors to provide a narrative describing their relevant past performance, and to submit their five largest relevant contracts concluded within the past 3 years. RFP at 96. These requirements also applied to first tier subcontractors. Offerors were further required to submit completed past performance questionnaires for each of the five contracts identified. For offerors and any first tier subcontractors without any relevant past performance information, the RFP indicated that the agency would consider relevant information of a “parent organization or consortium member,” considering “the amount of involvement the parent organization or consortium member will have in the daily operations of the offeror.” RFP at 106.

³ The record reflects that TMA’s evaluators followed the SSEG’s provisions in performing their evaluation and that the SSEG played a significant and integral role in the agency’s selection decision.

In evaluating the past performance information submitted by offerors, TMA contemplated examining the “degree to which the work performed is relevant to the T-3 contract, and to determine how well the work was done.” AR, Tab 86, SSEG, at 13. In considering the degree of relevance, the SSEG indicated that TMA would consider how closely related an offeror’s performance history was to the proposed functions and complexities under this solicitation, whether the work was recent, and the magnitude of the effort in terms of size. According to the SSEG, “[r]elevance would increase as the size of the historical efforts increase.” Id. at 15. In addition, the relevance of first tier subcontractors’ past performance was to be based on those tasks/functions the subcontractor was proposed to perform under the RFP. TMA used the following rating scale in assessing relevance:

Relevant- Past/present performance effort is similar in functions/complexities, involves much of the same scope/magnitude of effort, is recent and includes performance in critical areas that this solicitation requires.

Somewhat Relevant- Past/present performance effort involves some of the key relevance factors, but not all, that this solicitation requires. For example, the past performance effort is similar in functions, but not at the same scope/magnitude.

Not Relevant- Past/present performance effort involves little or none of the key relevance factors that this solicitation requires.

Id.

The SSEG provided that, after assessing the degree to which the past performance information was relevant, TMA would perform a qualitative assessment of the offeror’s past performance information, identifying any positive or negative findings and assign a performance rating using the following rating scheme:

Exceptional- Performance met contract requirements and exceeded some. Where requirements were exceeded, the result was a significant benefit to the other contracting party. Contractual performance was accomplished with few, if any, minor problems. Any corrective actions taken by the contractor were prompt and effective.

Satisfactory- Performance met contract requirements. Contractual performance was accomplished with few, if any, minor problems. Any corrective actions taken by the contractor were prompt and effective.

Marginal- Performance met most contractual requirements. Contractual performance reflects problem(s) for which the contractor did not perform (or has not yet performed) corrective actions, or

corrective actions were only marginally effective, or not fully implemented.

Unsatisfactory- Performance failed to meet most contractual requirements. Contractual performance contains serious problems for which the contractor's corrective actions, if any, were incorrect or ineffective.

AR, Tab 86, SSEG, at 15-16.

The final step in the past performance evaluation involved the assignment of an overall confidence rating for each offeror using the following ratings:

High Confidence -- Based on the offeror's performance record, no doubt exists that the offeror will successfully perform the required effort.

Confidence -- Based on the offeror's performance record, little doubt exists that the offeror will successfully perform the required effort.

Little Confidence -- Based on the offeror's performance record, doubt exists that the offeror will successfully perform the required effort. Changes to the offeror's existing processes may be necessary in order to achieve contract requirements.

No Confidence -- Based on the offeror's performance record, significant doubt exists that the offeror will successfully perform the required effort.

Not Favorable and Not Unfavorable -- No performance record identifiable.

AR, Tab 86, SSEG, at 19.

With regard to price/cost, the RFP contemplated the award of a contract comprised of both cost-reimbursement and fixed-price contract line item numbers (CLIN) as follows:

CLIN 0001	Transition In
CLIN X001 & X002	Underwritten Health Care Cost
CLIN X003 & X004	Underwritten Health Care Fixed Fee
CLIN X005	Disease Management Cost
CLIN X006	Disease Management Fixed Fee
CLIN X007	Electronic Claims Processing

CLIN X008	Paper Claims Processing
CLIN X009	Per Member Per Month (PMPM) ⁴
CLIN X010	TRICARE Service Centers (TSC) ⁵
CLIN 9001	Transition Out
CLIN 9002	Transition Out Fixed Fee

AR, Tab 12, Price Evaluation Report, at 3.

The CLINs were to be used as the basis for calculating the total evaluated price for each offeror.⁶ With the exception of CLINs X001, X002, and X005, which concerned costs for underwritten health care and disease management, the RFP provided that TMA would evaluate the CLINs for price and cost reasonableness and perform realism analyses in accordance with Federal Acquisition Regulation (FAR) § 15.404-1(d). For the underwritten health care and disease management CLINs, which were cost-reimbursable items, TMA provided cost estimates that offerors were required to use as “plug numbers” and were not to be adjusted or evaluated. With the exception of Transition Out, CLIN 9001, all other CLINs were fixed-price (*i.e.*, transition in, electronic claims processing, paper claims processing, PMPM, and TSC). The RFP also indicated that the results of the realism evaluations “may be used in the performance risk assessments.” RFP at 107.

For the purpose of evaluating the price/cost factor, offerors were instructed to submit price and cost information, to include, among other information, forward pricing rate agreements or proposals, total cost summaries with cost element build-ups by CLIN, proposal estimating assumptions and pricing considerations, a “consolidated project manning summary” segregating, by direct labor category, the direct labor hours with a display of hours by CLIN, and direct and indirect labor rates. RFP at 97-98.

On June 30, 2008, TMA received timely proposals from Health Net and AGHP for the North Region contract. TMA’s evaluation and selection process began with the establishment of three evaluation teams: the technical evaluation team (TET), which evaluated technical proposals; the performance assessment group (PAG), which

⁴ The PMPM CLIN X009 was in essence a catch-all fixed-price line item, designed to include any proposed costs not otherwise identified under a separate CLIN. RFP at 106.

⁵ TRICARE Service Centers are facilities operated by the MSC contractor which allow beneficiaries to obtain walk-in customer service support in connection with their benefits under the TRICARE health program.

⁶ The total evaluated price did not include any of the award fee CLINs. Contracting Officer’s (CO) Statement at 20.

evaluated offerors' past performance information; and the price/cost team, which analyzed the price/cost proposals. The teams' findings were then submitted to the Source Selection Evaluation Board (SSEB) Chairperson, who prepared an evaluation report and best value award recommendation for consideration by the source selection authority (SSA). The SSA, with advice from a source selection advisory council (SSAC), made the final best value award decision.

Health Net's and AGHP's final technical ratings, after a round of discussions, were as follows:

Technical Approach						
<u>Subfactor</u>	<u>AGHP</u>			<u>Health Net</u>		
	<u>Technical Merit</u>	<u>Proposal Risk</u>	<u>Strengths</u>	<u>Technical Merit</u>	<u>Proposal Risk</u>	<u>Strengths</u>
Network Development & Maintenance	Blue	Low	[Deleted]	[Deleted]	[Deleted]	[Deleted]
Referral Mgmt.	Blue	Low	[Deleted]	[Deleted]	[Deleted]	[Deleted]
Medical Mgmt.	Blue	Low	[Deleted]	[Deleted]	[Deleted]	[Deleted]
Enrollment	Green	Low	[Deleted]	[Deleted]	[Deleted]	[Deleted]
Beneficiary Satisfaction/ Customer Service	Blue	Low	[Deleted]	[Deleted]	[Deleted]	[Deleted]
Claims Processing	Blue	Low	[Deleted]	[Deleted]	[Deleted]	[Deleted]
Management Functions	Blue	Low	[Deleted]	[Deleted]	[Deleted]	[Deleted]

AR, Tab 6, Source Selection Decision Document, at 3.

[Deleted]. In this regard, the record reflects that both Health Net and AGHP submitted past performance information regarding five contracts, together with five contracts for each of their first tier subcontractors. As a general matter, the PAG report indicates that in order for a particular past performance contract reference to be evaluated as "Relevant," the population served under the contract had to be at least 2.175 million beneficiaries, which is 75% of 2.9 million, the total beneficiary population for the North Region. AR, Tab 10, Final PAG Report for AGHP, at 2, 5; Tab 11, Final PAG Report for Health Net, at 2, 6, 9.

The PAG's evaluation of AGHP's past performance is summarized in the following table:

AGHP	<u>Period of Performance</u>	<u>Number of Beneficiaries Covered</u>	<u>Relevance Rating</u>	<u>Performance Rating</u>
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]

AR, Tab 10, PAG Final Report for AGHP, at 2.

The PAG also evaluated the past performance information submitted by AGHP for its first tier subcontractor, Wisconsin Physicians Services (WPS), which [Deleted]. TMA's evaluation of WPS's past performance information is summarized as follows:

WPS	<u>Period of Performance</u>	<u>Number of Beneficiaries Covered</u>	<u>Relevance Rating</u>	<u>Performance Rating</u>
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]

AR, Tab 10, PAG Final Report for AGHP, at 5.

The following table summarizes the PAG's consideration of Health Net's past performance information:

Health Net	<u>Period of Performance</u>	<u>Number of Beneficiaries Covered</u>	<u>Relevance Rating</u>	<u>Performance Rating</u>
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]

AR, Tab 11, PAG Final Report for Health Net, at 2.

Health Net also submitted past performance information for [Deleted], PGBA, LLC, which resulted in the following evaluation summary by the PAG:

PGBA, LLC	<u>Period of Performance</u>	<u>Number of Beneficiaries Covered</u>	<u>Relevance Rating</u>	<u>Performance Rating</u>
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]

AR, Tab 11, PAG Final Report for Health Net, at 9.

Health Net also provided information for a second first tier subcontractor, UnitedHealth Military & Veterans Services (UMVS), [Deleted]. The PAG's evaluation reflects the following:

UMVS	<u>Period of Performance</u>	<u>Number of Beneficiaries Covered</u>	<u>Relevance Rating</u>	<u>Performance Rating</u>
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]
[Deleted]	[Deleted]	[Deleted]	[Deleted]	[Deleted]

AR, Tab 11, PAG Final Report for Health Net, at 6.

Regarding the third evaluation factor, price/cost, TMA assessed Health Net's and AGHP's proposals for reasonableness and realism. Health Net's final total evaluated price was [Deleted], while AGHP's final total evaluated price was \$16,608,038,690. Stripping out the plug numbers, the price differential between the two offerors was large, with AGHP's price significantly below the price proposed by Health Net. Specifically, Health Net's price/cost was [Deleted] and AGHP's was \$1,083,643,320, a difference of approximately [Deleted]. Most of the price differential was attributable to the PMPM CLIN, which accounted for [Deleted] of the difference. AR, Tab 12, Price Evaluation Report, at 7. TMA's price/cost Chairperson determined that, with respect to the PMPM CLIN, the price differential was attributable to [Deleted] main factors--[Deleted] the fact that AGHP had proposed fewer direct full-time-equivalent (FTE) employees. Regarding the latter point, the PMPM direct FTE differential was as follows:

PMPM FTEs	AGHP	Health Net	Difference
Option Year 1	[Deleted]	[Deleted]	[Deleted]
Option Year 2	[Deleted]	[Deleted]	[Deleted]
Option Year 3	[Deleted]	[Deleted]	[Deleted]
Option Year 4	[Deleted]	[Deleted]	[Deleted]
Option Year 5	[Deleted]	[Deleted]	[Deleted]

AR, Tab 12, Price Evaluation Report, at 8.

In her report, TMA’s price/cost Chairperson noted in several instances that the TET had concluded that both offerors proposed adequate staffing to perform the contract requirements. The record reflects that the TET’s technical findings in this regard were based on offerors’ total staffing, as identified in their technical proposals, for year 1. In addition, the Chairperson compared average number of direct FTEs proposed by all offerors for all regions. This comparison reflected that [Deleted], that AGHP did not have the fewest number of FTEs, and [Deleted]. *Id.* at 6; AR, Tab 12a, Price/Cost Chairperson Working Papers, at 73.

As part of the price/cost evaluation, the price/cost Chairperson obtained input from the Defense Contract Audit Agency (DCAA) in evaluating, among other items, offerors’ indirect rates and direct labor rates. She did not, however, use the independent government cost estimate for the purpose of assessing reasonableness or realism, concluding that it was not meaningful since it was “significantly higher than the competitive offers received for the T-3 solicitation,” and did not include estimates for FTEs or labor hours. AR, Tab 12, Price Evaluation Report, at 9.

In addition, the price/cost Chairperson evaluated the offerors’ professional employees compensation plan, which offerors were required to submit by the RFP and pursuant to FAR § 52.222-46, Evaluation of Compensation for Professional Employees, to determine if an offeror intended to lower compensation paid to professional employees to the detriment of adequate contract performance. *Id.* at 14.

Ultimately, the Chairperson concluded that the price/cost proposals submitted by Health Net and AGHP were reasonable and realistic, and that performance risk was insignificant.

The findings of the TET, the PAG, and the price/cost Chairperson were forwarded to the SSEB Chairperson, who compared the findings regarding the individual offers and forwarded a recommendation to the SSA for award to AGHP as the best value offeror based on the conclusion that Health Net’s and AGHP’s proposals were [Deleted], with AGHP having a significant price advantage. The SSA concurred with the findings of the various evaluation teams and the SSEB recommendation, and selected AGHP for award. After receiving notice of the award and a debriefing, Health Net filed this protest.

DISCUSSION

Health Net challenges numerous aspects of the agency's evaluation of technical approach, past performance, and price/cost, the conduct of discussions, and the source selection decision. Health Net also alleges that AGHP should be excluded from the competition because it had an unfair competitive advantage due to its unequal access to non-public, competitively useful information, through its hiring of TMA's former Chief of Staff, whom AGHP used to prepare its proposal for the T-3 competition. As discussed below, we sustain the protest with respect to TMA's evaluation under the past performance factor, its realism evaluation of AGHP's price/cost proposal, its failure to consider Health Net's proposed provider network discounts in the final selection decision, and the absence of any consideration by the contracting officer of whether AGHP could or in fact did have an unfair competitive advantage as a consequence of using TMA's former Chief of Staff in the preparation of its T-3 proposal.⁷

Past Performance Evaluation

Health Net contends that TMA's evaluation of AGHP's past performance was fundamentally flawed and that it was not entitled to a "High Confidence" past performance rating. Among other things, Health Net argues that it was unreasonable for TMA to consider contracts performed by entities other than AGHP in evaluating AGHP's past performance. Health Net also maintains that TMA failed to meaningfully consider the limited size of the prior contracts, as reflected by the relatively small beneficiary populations covered by the contracts, when it assigned AGHP the highest past performance rating. We sustain the protest on these grounds.

Where a solicitation requires the evaluation of offerors' past performance, we will examine an agency's evaluation to ensure that it was reasonable and consistent with the solicitation's evaluation criteria. The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 10; Hanley Indus., Inc., B-295318, Feb. 2, 2005, 2005 CPD ¶ 20 at 4. The critical question is whether the evaluation was conducted fairly, reasonably, and in accordance with the solicitation's evaluation scheme. Clean Harbors Env'tl. Servs., Inc., B-296176.2, Dec. 9, 2005, 2005 CPD ¶ 222 at 3.

In its proposal, AGHP indicated that it had not had any active business operations in the past 3 years. AR, Tab 40, at 699. As a consequence, AGHP did not have any relevant past performance of its own under the terms of the RFP, which defined relevant past performance as limited to contracts "concluded within the last three

⁷ Health Net's protest raised numerous other allegations. While we do not address them all in this decision, we have considered them and find that they do not provide a basis to sustain Health Net's protest.

years.” RFP at 103. This lack of relevant experience was acknowledged by the PAG. AT, Tab 10, PAG Final Report for AGHP, at 2.

Lacking relevant past performance of its own, AGHP submitted past performance information for its “team.” According to AGHP, this team “brings together AGHP, a wholly owned subsidiary of Aetna Life Insurance Company; its parent, Aetna Inc.; and their affiliates (collectively referred to as Aetna) for expertise and assistance,” as well as its first-tier subcontractor WPS (which was to be primarily responsible for claims processing). AR, Tab 10, PAG Final Report for AGHP, at 1-2. The PAG and the SSEB indicate that they based their evaluation of AGHP’s past performance on the activities of its parent, its affiliates, and WPS. AR, Tab 8, SSEB Report, at 26; AR, Tab 10, PAG Final Report for AGHP, at 1-2.

An agency properly may attribute the experience or past performance of a parent or affiliated company to an offeror where the firm’s proposal demonstrates that the resources of the parent or affiliate will affect the performance of the offeror. Perini/Jones, Joint Venture, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68 at 4. The relevant consideration is whether the resources of the parent or affiliated company—its workforce, management, facilities or other resources—will be provided or relied upon for contract performance such that the parent or affiliate will have meaningful involvement in contract performance. Ecompex, Inc., B-292865.4 et al., June 18, 2004, 2004 CPD ¶ 149 at 5.

TMA maintains that it reasonably attributed to AGHP the past performance information of its parent corporation and affiliated companies. In this regard, the PAG concluded that “AGHP’s parent organization is sufficiently involved in the daily operations of the offeror that the performance record of the parent reflects the performance of the organization.” AR, Tab 10, PAG Final Report for AGHP, at 9. In reaching this conclusion, the PAG noted:

Aetna states AGHP will be subject to the overall leadership of the Aetna Inc. board of directors. Aetna states AGHP will be operated as a distinct legal entity under the direction of its own board of directors with substantial independent operational flexibility but, as a wholly owned subsidiary, Aetna’s best practices, innovations, information technology capabilities and thought leadership are available to AGHP. Many AGHP staff members will be drawn from other Aetna operations and AGHP and a variety of Aetna corporate staff functions will support the AGHP operations, including [Deleted].

AR, Tab 10, PAG Final Report for AGHP, at 1.

The PAG’s findings in this regard mirror the representations contained in AGHP’s proposal. AR, Tab 40, AGHP Past Performance Proposal, at 688, 700, 706.

The record reflects that for each of the five contracts identified by AGHP for the purpose of evaluating its past performance, AGHP identifies the contract as having been performed generically by “Aetna.” AR, Tab 40, AGHP Past Performance Proposal, at 721, 727, 731, 735, and 741. Elsewhere in its proposal, however, AGHP explains that its ultimate parent is currently Aetna, Inc., and the term “Aetna” is the brand name used for one or more of the Aetna group of subsidiary companies, which include Aetna Life Insurance Company, as well as the following HMO entities that are licensed or otherwise qualified to provide health care coverage in the states that comprise the TRICARE North Region: Aetna Health Inc. (CT), Aetna Health Inc. (ME), Aetna Health Inc. (NY), Aetna Health Inc. (NJ), Aetna Health Inc. (PA, IN, KY, MA & OH), Aetna Health Inc. (DE), Aetna Health Inc. (MD, D.C. & VA), Aetna Health of the Carolinas Inc. (NC & SC), Aetna Health of Illinois Inc. (IL & IN), and Aetna Health Inc. (MI). AR, Tab 40, AGHP Past Performance Proposal, at 707.

The flaw with TMA’s analysis originates in the complex network of corporate entities which comprise the “Aetna brand,” AGHP’s general references to “Aetna’s” role in performing the requirements, and the general references to “Aetna” past performance information. Given the repeated use of the general reference to “Aetna” throughout AGHP’s proposal, the PAG did not know the specific roles, if any, the various Aetna entities would have in performance of the T-3 effort. Nor did the PAG have any insight regarding which specific Aetna entities had performed the contracts referenced in AGHP’s past performance proposal; therefore, the PAG could not know what role, if any, the entities that had performed the prior contracts would have in performance of AGHP’s T-3 contract. Given this lack of information, TMA’s reliance on past performance by “Aetna” in its assessment of AGHP effectively attributed to AGHP the past performance of other Aetna corporate entities based on the mere fact of their corporate affiliation. Absent some more definitive indications of what entities performed what contracts and what roles they would have in performing the T-3 effort, there was no basis for TMA to consider, let alone give credit in the evaluation for, the “generic” Aetna past performance submitted with its proposal.⁸ See Universal Building Maintenance, Inc., B-282456, July 15, 1999, 99-2

⁸ There is some indication in the record that “Aetna, Inc.,” the parent corporation, was the contractor for the [Deleted] contract. See AR, Tab 40, AGHP Past Performance Proposal, at 758 (questionnaire identifying Aetna, Inc. as the contractor). Moreover, it may be reasonable to attribute Aetna, Inc.’s performance under the [Deleted] contract to AGHP based on AGHP’s representation that Aetna corporate staff functions, such as [Deleted], will support AGHP’s operations, provided that the agency can reasonably determine that Aetna, Inc. will be involved in performance under the T-3 contract beyond these high-level corporate activities. While TMA notes that AGHP’s price proposal reflects the contribution of additional resources by Aetna, Inc., see AR, Tab 73, AGHP Cost Proposal, at 1203-08, this information was only included in AGHP’s price proposal; it was not included in its past performance proposal, does not appear to be included in its technical proposal,

(continued...)

CPD ¶ 32 (sustaining protest where agency unreasonably based evaluation on past performance of awardee's corporate affiliate and parent company).

In addition to the basic question of whether TMA could properly consider the past performance information submitted by AGHP, Health Net also challenges the agency's substantive findings regarding the information it in fact considered in evaluating the past performance information submitted by AGHP. In this regard, Health Net contends that TMA failed to reasonably take into account the size of the prior contracts submitted by AGHP.

As explained above, the RFP indicated that for the purpose of evaluating past performance, TMA would consider an offeror's performance on "relevant" contracts, which was generally defined to mean contracts "similar" to the T-3 requirements and specifically request offerors to submit their five "largest relevant" contracts. RFP at 96. In its evaluation of relevance, the agency's methodology reflects that the size of the beneficiary population covered by a particular contract was a significant consideration, as evidenced by the fact that to achieve a rating of "relevant," an offeror's contract had to have covered a beneficiary population which was at least 75% the size of the T-3 contract population.

In challenging the agency's evaluation of AGHP's past performance, Health Net highlights the fact that AGHP's contracts involved beneficiary populations that are a small fraction of the size of the beneficiary population covered under the T-3 contract. The record reflects that all but one of AGHP's contracts were for beneficiary populations that are less than 3% the size of the T-3 population, with the one larger contract equal to 11% of the T-3 population.⁹ Given that none of AGHP's contracts were comparable to the T-3 effort in terms of the size of the covered beneficiary population, Health Net contends that it was unreasonable to have assigned AGHP the highest past performance rating of "High Confidence," which was defined as "no doubt exists that the offeror will successfully perform the effort." AR, Tab 86, SSEG, at 19.

TMA explains that AGHP's "High Confidence" rating reasonably reflects an integrated assessment of AGHP's past performance information, which considered the relevance of AGHP's past performance, the qualitative aspects of the performance, as well as the past performance information submitted for AGHP's subcontractor, WPS. Regarding relevance, TMA maintains that it specifically

(...continued)

and was never considered as part of the agency's contemporaneous past performance evaluation.

⁹ As compared to the 2.9 million beneficiary population covered under the T-3 contract, AGHP's contracts reflect the following percentages: [Deleted].

considered the fact that AGHP's contracts were limited in terms of size; however, it also found that the functional aspects of the contracts were similar to the T-3 requirements. AR, Tab 10, Final PAG Report for AGHP. When these considerations were combined, TMA maintains, it reasonably found AGHP's contracts to be "somewhat relevant." Given the "exceptional" ratings in terms of its qualitative performance that AGHP received for these "somewhat relevant" contracts, coupled with the relevant past performance and "exceptional" ratings of AGHP's subcontractor, WPS, TMA argues that it reasonably assigned AGHP a "High Confidence" rating.

While we recognize that the past performance evaluation was not to be based on size alone, TMA's assertion that its integrated assessment of AGHP's past performance information justified giving AGHP the highest past performance rating is unpersuasive. Not one of AGHP's contracts was evaluated as "relevant"; rather, they were all considered to be only "somewhat relevant." Whether it was reasonable to consider some of the contracts even "somewhat" relevant given that their beneficiary populations were a small fraction of the size of the beneficiary population covered by the T-3 contract is itself questionable. At a minimum, absent some further support in the record, it was not reasonable to give AGHP the highest past performance rating in reliance on the "exceptional" performance ratings associated with the prior contracts of such smaller size. On the contrary, the value of the "exceptional" ratings as predictors of AGHP's success on the T-3 contract is inherently diminished by their lack of relevance due to their relatively small size. In this regard, the SSEG implicitly recognized the need to consider size when deciding what weight to give to an offeror's prior contracts; it specifically advised that "[r]elevance will increase as the size of the historical efforts increase" and instructed TMA evaluators to "[g]ive the greatest weight to the information determined to be the most relevant and significant." AR, Tab 86, SSEG, at 15, 18.

Moreover, we conclude that the agency's consideration of the relevant past performance of AGHP's subcontractor, WPS, could not have reasonably justified AGHP's past performance rating. To the extent WPS had "relevant" and "exceptional" past performance, WPS's role in performance was limited to [Deleted] of the many T-3 functional requirements, [Deleted]. This left AGHP, as the prime contractor, responsible for all other T-3 requirements, including [Deleted]. Thus, while AGHP, through WPS, demonstrated relevant experience for [Deleted] under the RFP, a significant portion of the contract was to be in the hands of AGHP, which had only "somewhat relevant" experience.

During a hearing conducted by our Office, the SSA appeared to recognize that AGHP lacked past performance of a magnitude contemplated under the T-3 contract and the concern this created. Specifically, he testified:

THE WITNESS: . . . I saw the four contracts, somewhat relevant, the biggest one being, I believe, [Deleted] [beneficiaries], and it dropped

off to [Deleted]. I also asked the same question of the team, and the SSEB. How can we take somebody with just these five contracts?

Hearing Transcript (Tr.) at 1574-75.

His answer to this concern was that TMA looked at generalized information about “Aetna” by essentially aggregating all of “Aetna’s” commercial activities and thereby concluding that “they” could do the job, notwithstanding the fact that none of the contracts actually submitted for the purpose of evaluating AGHP’s past performance reflected a magnitude comparable to the T-3 contract. Tr. at 1575, 1597, 1609-19. In this regard, the SSA testified that had it not been for Aetna’s other commercial experience, TMA probably would not have assigned AGHP a “High Confidence” rating.

QUESTION: If they didn’t have that [commercial] experience, would you have given them the high confidence rating?

THE WITNESS: Probably not. We had an extensive discussion on that.

Tr. at 1626.

Setting aside the fact that any analysis in this regard was not documented in the contemporaneous record, reliance on such an analysis would have been problematic. Based on the SSA’s testimony, there is no indication that TMA understood which Aetna entities performed any of the “commercial” work considered, there was no information or analysis regarding the magnitude of any of these “commercial” activities or plans, it was not apparent how the work was relevant to the T-3 effort, nor was there any information or analysis regarding how Aetna performed qualitatively in connection with the undefined “commercial” experience.¹⁰ Tr. at 1577, 1617-20. Given the limited information available to the agency in the record, it is difficult to understand how this possibly could have served as a basis for AGHP’s high confidence past performance rating.

In sum, based on the fact that AGHP’s past performance submitted for evaluation was with respect to contracts that were small fractions of the size of the T-3 effort, TMA’s decision to assign AGHP the highest past performance rating of “High Confidence” is not supported by the record. See Continental RPVs, B-292768.2, B-292768.3, Dec. 11, 2003, 2004 CPD ¶ 56 at 12 (finding past performance rating of low risk was not supported where awardee’s contracts were a mere fraction of the size of the contemplated contract).

¹⁰ In its post-hearing brief, TMA seeks to back away from the SSA’s testimony in this regard, contending that the SSA, at various points, indicates TMA’s analysis was based solely on the information reflected in the record.

Price/Cost Realism Evaluation

Health Net challenges TMA's price/cost evaluation in several respects. Among other things, Health Net contends that TMA's price realism evaluation regarding AGHP's proposal was flawed because it failed to reasonably consider AGHP's low staffing for PMPM. Health Net also argues that TMA failed to reasonably consider whether AGHP's proposed employee compensation posed a risk to AGHP's proposed plan to hire large numbers of incumbent employees. We agree.

Price realism is not ordinarily considered in the evaluation of proposals for the award of a fixed-price contract, because these contracts place the risk of loss upon the contractor. However, in light of various negative impacts on both the agency and the contractor that may result from an offeror's overly optimistic proposal, an agency may, as here, expressly provide that a price realism analysis will be applied in order to measure the offeror's understanding of the requirements and/or to assess the risk inherent in an offeror's proposal. See, e.g., Wackenhut Servs., Inc., B-286037, B-286037.2, Nov. 14, 2000, 2001 CPD ¶ 114 at 3; Molina Eng'g, Ltd./Tri-J Indus., Inc. Joint Venture, B-284895, May 22, 2000, 2000 CPD ¶ 86 at 4. Although the FAR identifies permissible price analysis techniques, FAR § 15.404-1, it does not mandate any particular approach; rather, the nature and extent of a price realism analysis, as well as an assessment of potential risk associated with a proposed price, are generally within the sound exercise of the agency's discretion. See Comprehensive Health Servs., Inc., B-310553, Dec. 27, 2007, 2008 CPD ¶ 9 at 8; Legacy Mgmt. Solutions, LLC, B-299981.2, B-299981.4, Oct. 10, 2007, 2007 CPD ¶ 197 at 3. In reviewing protests challenging an agency's evaluation of these matters, our focus is whether the agency acted reasonably and in a way consistent with the solicitation's requirements. See, e.g., Grove Res. Solutions, Inc., B-296228, B-296228.2, July 1, 2005, 2005 CPD ¶ 133 at 4-5.

The record reflects that CLIN X009, PMPM, accounted for [Deleted] of the price differential between AGHP's and Health Net's proposals. TMA's price/cost Chairperson attributed this difference to [Deleted] factors: [Deleted] and FTEs. As noted above, in her report, the price/cost Chairperson noted significant differences in the AGHP and Health Net proposed direct-labor FTE staffing for this CLIN, with AGHP maintaining [Deleted] fewer FTEs than Health Net (a difference of [Deleted]) for the first year, with the difference increasing to [Deleted] FTEs [Deleted] in year 5. AR, Tab 12, Price/Cost Report, at 8.

Acknowledging AGHP's lower FTE staffing for PMPM, the price/cost Chairperson noted that the TET had "concluded that Aetna proposed adequate staffing to perform the contract requirements." AR, Tab 12, Price/Cost Report, at 8. The record reflects, however, that the TET was not privy to offerors' proposed staffing by CLIN for either offeror; rather, the TET only reviewed Health Net's and AGHP's staffing for year 1 by "function" in the context of their overall staffing, as identified in each offeror's

technical proposal. Thus, the technical team never in fact specifically reviewed or evaluated Health Net's or AGHP's staffing for the PMPM CLIN, or any other CLIN for that matter. Tr. at 1069, 1092, 1196. Given the TET's lack of information or analysis regarding this matter, to the extent the price/cost Chairperson relied on the TET's staffing assessments for Health Net and AGHP, it did not provide any technical analysis regarding the widely disparate labor allocations between the offerors for the PMPM CLIN. Moreover, the price/cost Chairperson indicated that she lacked a technical understanding of how the offerors would perform the work and did not necessarily know which functions corresponded to the various CLINs. Tr. at 1070.

Evidently, in an effort to assess whether AGHP's staffing was too low for the PMPM CLIN, and thereby reflected a lack of understanding of the technical requirements or created performance risk, the price/cost Chairperson compared all offerors' proposed staffing across all regions. Although unstated, it appears that given her lack of technical understanding, the price/cost Chairperson's rationale for performing this high level comparison across regions was that if Health Net's and AGHP's total staffing, (which the TET had found to be adequate) was in line or out of line with the proposed staffing of other offerors, then, by analogy, one could conclude that Health Net's and AGHP's PMPM staffing was similarly either in line or out of line with other offerors'. Depending on the outcome of this comparison, the price/cost Chairperson would then be able to determine whether the staffing difference was meaningful. Ultimately finding that Health Net had the [Deleted], and AGHP did not have the lowest total staffing, it appears that the price/cost Chairperson concluded that the PMPM staffing differential was likely due to the fact that Health Net's overall approach was based on using higher staffing, and thus while AGHP had lower PMPM staffing, AGHP's staffing was not indicative of a lack of understanding nor would it appear to present technical risk. AR, Tab 12a, Price/Cost Work Papers, at 73.

As an initial matter, we find such a high level comparison of total staffing to be of limited value in analyzing the realism associated with staffing for individual CLINs. Rather, one would expect the TET to have considered the offeror's staffing at the CLIN level to assess whether the proposed staffing was realistic, or reflected a lack of technical understanding or created performance risk based on the specific technical approach of the offeror.¹¹ See FAR § 15.404-1 (realism analysis based on "unique methods of performance and materials described in the offeror's technical proposal"); Hughes STX Corp., B-278466, Feb. 2, 1998, 98-1 CPD ¶ 52 at 8 (sustaining protest where agency failed to consider offeror's technical approach as part of

¹¹ Given that the agency obtained "crosswalks" from offerors, which linked staffing identified in their technical proposals to CLIN staffing for the purpose of assessing realism, the crosswalks should have been provided to the technical evaluators, who were in the best position to identify and assess any lack of understanding or staffing risks.

realism evaluation). Thus, any comparison of offerors' staffing for the purpose of assessing realism is an inherently limited methodology given the requirement to consider each offeror's unique technical approach. In any event, as explained below, the price/cost Chairperson's evaluation was inherently flawed because in performing her high-level comparison of total staffing, she based her comparison on total staffing levels, which were never in fact considered by the TET and therefore had not been assessed for technical capability to meet CLIN requirements. This disconnect severed the link, already tenuous, between the TET's technical findings regarding offerors' overall staffing and the price/cost Chairperson's efforts to gain insight regarding the significant staffing differential for the PMPM CLIN.

The RFP required offerors to submit a staffing chart as part of their technical proposals, showing "all staffing" needed to perform the T-3 requirements. RFP at 102. In their technical proposals, all offerors, for all regions, submitted their total staffing charts, which provided the basis for the TET's technical evaluation. Tr. 1058, 1189-90. Although not required, some offerors, in their technical proposal staffing charts, identified staffing positions as corresponding to "direct" FTEs, and categorized others as "indirect" FTEs. The TET, however, as noted above, based its technical evaluation on total staffing, without regard to whether the FTEs had been identified as "direct" or "indirect."

In her total staffing comparison, however, the price/cost Chairperson admittedly only compared offerors' total proposed "direct" FTEs. This had the effect of carving out significant numbers of FTEs from several offerors' proposals when comparing total staffing. Using an "average direct" FTE analysis, as the Price/Cost Chairperson did, the resulting comparison was as follows:

Offeror	Average Total Direct FTEs
Health Net	[Deleted]
A	[Deleted]
B	[Deleted]
C	[Deleted]
AGHP	[Deleted]
D	[Deleted]
E	[Deleted]

AR, Tab 12a, Price/Cost Working Papers, at 73; Price/Cost Chairperson Declaration, Sept. 10, 2009.

When comparing all offerors' total staffing, including their direct and indirect FTEs, as the TET had evaluated them, a different picture emerges, with Health Net positioned towards the middle, and AGHP second from the bottom:¹²

Offeror	Year 1 Total FTEs
A	[Deleted]
B	[Deleted]
Health Net	[Deleted]
C	[Deleted]
D	[Deleted]
AGHP	[Deleted]
E	[Deleted]

Protester's Filing Regarding FTEs & Price Realism, Sept. 29, 2009, Second Supp. Decl. of Protester's Consultant, at 2.

By focusing her comparison on "average direct" FTEs, the price/cost Chairperson's comparison did not align with the underlying basis for the TET's technical findings, which were based on all staffing, as proposed by the offerors, to include direct and indirect FTEs, and, given her admitted limited ability to make technical evaluations, her analysis could not have provided a reliable substitute for determining AGHP's technical understanding or proposal risk. Moreover, with Health Net towards the middle, and AGHP towards the bottom, of total proposed FTEs, as staffing had been evaluated by the TET, the very premise of TMA's determination that the large difference in PMPM staffing between offerors was merely a reflection of Health Net's generally high staffing approach, is without a basis.

TMA argues that it was proper to consider only direct FTEs since offerors were only asked to submit direct FTE staffing with their price/cost proposals, and because there is great variability in how offerors account for "indirect" staff in building up their prices. TMA explains that, depending on the offerors' various accounting methodologies, some offerors may choose to identify all their staffing as direct FTEs,

¹² Notwithstanding the parties' discussion of "average" FTEs, the appropriate comparison is the offerors' year 1 total staffing, since the record reflects that the TET only considered AGHP's staffing for this year. Tr. at 1189-91. Given that AGHP's staffing in its price/cost proposal reflected a decrease of roughly [Deleted] in staffing after year 1, coupled with the price/cost Chairperson's limited ability to consider the technical impact of such changes, the TET should have been provided with an opportunity to consider this staffing change to determine whether it presented a performance risk. In correcting the realism evaluation based on our decision, the TET should be provided with, and consider, offerors' staffing for all years.

while others may identify indirect FTEs, or not identify indirect staffing at all, rather including it as part of their general and administrative rates. According to TMA, such an evaluation would be comparing “apples-to-oranges.” We find TMA’s arguments to be unpersuasive.

First, TMA in fact required AGHP, and other offerors, to provide a crosswalk of FTEs to specifically address any differences between staffing in their technical and price proposals. The crosswalk submitted by AGHP specifically identifies its total staffing, not merely AGHP’s direct staffing. AR, Tab 73, AGHP Price/Cost Proposal, at 774-778. Moreover, the record reflects that the price proposals for all offerors identified their total staffing, including direct and indirect FTEs. Regarding the second issue, TMA mistakenly highlights different ways that offerors build up their prices as a basis for not knowing how their staffing compared, when a true apples-to-apples comparison in fact existed in the offerors’ “total staffing,” which they were required to identify in their technical proposals. RFP at 95. This staffing, which was to reflect “total staffing” necessary to perform the requirements, was to be identified regardless of how the offeror built up its price and whether it reflected direct or indirect FTEs.

In assessing realism, TMA also failed to reasonably assess whether AGHP’s proposed technical approach of hiring incumbent employees was realistic. In its technical proposal, AGHP clearly indicated that it intended to hire a “high percentage” of the outgoing contractor’s employees, to include “managers” for the purpose of performing certain functions, to include case management, activities at the TSCs, and call center operations. AR, Tab 72, AGHP Final Technical Proposal, at 233, 299-300. Moreover, in its price/cost proposal, AGHP added some greater specificity to its plans, stating that it anticipated hiring [Deleted] of its TSC staff and [Deleted] of the Hampton, Virginia (“Tidewater”) Operations Center staff from the outgoing contractor, Health Net. AGHP had proposed 252.25 FTEs for the TSCs and 288.75 FTEs at the Tidewater Operations Center. AR, Tab 72, AGHP Final Technical Proposal, at 386.

In this regard, the TET Chairperson testified that AGHP’s approach was “to hire outgoing staff from Health Net, particularly in TRICARE service centers and at the [Tidewater Operations Center].” Tr. at 1241. She further explained that the TET believed this to be a “good practice,” and that it reflected “clear advantages,” particularly with respect to customer service activities. Tr. at 1242-43. The record also reflects that AGHP was assigned a rating of “low risk” regarding its approach to the “beneficiary satisfaction/customer service” subfactor.

Health Net argues that, notwithstanding AGHP’s proposed plan to hire “high percentages” of Health Net’s employees and the advantages accompanying such an approach, TMA never in fact considered whether AGHP’s approach in this regard was realistic because it never compared AGHP’s proposed compensation to the compensation that Health Net is providing. According to Health Net, had TMA done

such a comparison, TMA would have realized that AGHP's proposed compensation was significantly lower than Health Net's, thereby undermining AGHP's ability to achieve its plan to capture the incumbent workforce.¹³

In its defense, TMA maintains that there is nothing to suggest that AGHP would not simply pay the difference. Because AGHP has demonstrated a willingness to absorb large costs in other areas, TMA argues "it cannot logically be argued that AGHP would not pay a few dollars more per hour to a handful of employees if that is what it took to perform the contract." TMA's Second Agency Report, at 84. This argument, however, fundamentally misunderstands the nature of a fixed-price contract. If AGHP's technical approach of hiring the incumbent workforce proves more costly than anticipated, AGHP, because it bears the risk, has two options: either pay more to hire these individuals, and thereby take less profit than anticipated, or simply hire non-incumbents at a lower rate. The latter of the two options, however, would not achieve the advantages associated with AGHP's proposed approach. A proper realism evaluation alerts agencies to those aspects of an offeror's technical proposal which do not appear to be feasible based on what the offeror has indicated in its price proposal. As a consequence, on the record here, we find that TMA failed to consider the realism of AGHP's proposed approach based on hiring the incumbent workforce. Cf. Magellan Health Servs., B-298912, Jan. 5, 2007, 2007 CPD ¶ 81 at 16-17 (sustaining protest challenging agency's cost realism evaluation where the agency failed to reasonably adjust awardee's costs based on its proposed approach to capture the incumbent workforce).

Network Provider Discounts

Health Net, the North Region incumbent contractor, asserts that TMA's technical evaluation unreasonably failed to account for the advantages offered by its established TRICARE network of providers, particularly given its record of obtaining significant network provider discounts from members of its network. In this regard, Health Net's initial and final proposals indicated that it had obtained an average overall network provider discount of [Deleted] for its TRICARE network in the North Region. Specifically, its final proposal included the follow statement:

Health Net will deliver prior to start of health care delivery a network that is [accredited], with providers already educated on the TRICARE program, and discounted at an average level of [Deleted] below TRICARE allowable rates.

¹³ The protester argues, and TMA has not directly refuted, that AGHP's compensation is more than [Deleted] lower than Health Net's generally, and more than [Deleted] lower than Health Net's at the TSCs. While the intervenor contends that the magnitude of the differential is overstated, this disagreement is immaterial since the agency failed to perform any analysis in the first instance.

AR, Tab 79, Health Net Final Proposal, at 107.

Health Net further indicated in its proposal that the discounts “will not expire through the full term of the T-3 contract.” Id. at 105. According to Health Net’s proposal, the estimated savings from the average [Deleted] network provider discounts it had obtained from its existing network totaled approximately [Deleted] over the potential life of the contract. Id. at 320.

In addition, Health Net proposed, in its final proposal, [Deleted]. [Deleted].

The TET’s Subfactor Report for Network Development and Maintenance indicates that the TET found Health Net’s proposal to [Deleted] to be a strength. This strength was based on the fact that Health Net’s [Deleted], and provided “a potential cost savings . . . of [Deleted].” AR, Tab 20, TET Final Health Net Report for Subfactor 1, at 8. According to the TET, the “cost savings,” combined with increased beneficiary satisfaction and continuity of care, exceeded minimum requirements and constituted “a clear benefit to the government.” Id.

The record reflects that the TET did not, however, refer to any costs savings that would result from the overall average network provider discount of [Deleted] available from Health Net’s existing network providers [Deleted] specifically, the [Deleted] estimated by Health Net. Rather, the TET simply concluded that Health Net’s proposed “existing network discounts” did not exceed minimum requirements, but rather was one part of a method to meet the agency’s requirements. Id. at 3.

As a consequence, TMA did not consider the potential health care cost savings from Health Net’s proposal to provide discounts [Deleted], notwithstanding the fact that it awarded a strength based in part on the fact that Health Net proposed to retain network providers [Deleted], which would result in health care savings from available network provider discounts. We conclude that TMA’s evaluation did not adequately account for the network provider discounts associated with Health Net’s existing TRICARE network.

The RFP generally provided that “[t]he Government will consider offers that commit to higher performance standard(s) or requirements, if the offeror clearly describes the added benefit to the Government.” RFP at 103. Although the SSEG provided that “cost savings” could provide a benefit to the government warranting assignment of a strength, AR, Tab 86, SSEG, at 10, TMA asserts that these provisions are somehow limited by the solicitation’s instructions to offerors, which provided as follows:

The Government has provided the estimated Underwritten Health Care Cost for Option Periods 1-5 for each region in Attachment L-10. Offerors shall propose in Section B the applicable region’s Government

estimate. The offeror will not propose their own estimated cost for any Option Period.

RFP at 98. Likewise, the RFP instructed offerors to use TMA's estimate for Disease Management Cost in the schedule B prices/costs. RFP at 99. However, while these provisions instructed offerors that they were required to use the Underwritten Health Care Cost and Disease Management Cost estimates in their schedule B pricing, nothing in these provisions, or elsewhere in the RFP, stated that an offeror could not receive credit in the technical evaluation for aspects of its technical approach reasonably likely to result in cost savings to the government, whether or not in the area of health care costs.

TMA asserts that, in its June 13, 2008, response to offeror Question No. 159, it advised offerors that cost benefits would not be considered. That question asked whether the "price impact or cost savings of [proposed] enhancements [will] be measured or evaluated." The agency's answer was as follows:

The Government will consider offeror's proposed elements that exceed requirements as a part of the best value tradeoff between technical and price/cost. Price impacts will be not be calculated, measured or separately evaluated from the total evaluated price by the Government.

Question and Answer No. 159, June 13, 2008. We do not agree with the agency's reading of this language. Rather, we think that, reasonably read, the agency's answer to Question 159 was limited to disclaiming any impact from proposed enhancements on the evaluated price calculation. We find nothing in the language that can be read as stating that cost savings from proposed technical enhancements would not be considered in the technical evaluation. In fact, by its reference to consideration in the best value tradeoff, the agency's answer reasonably could be read as providing that the agency would consider the full benefit of proposed enhancements, including cost benefits, in the tradeoff.

Further, to the extent that there was any uncertainty as to this aspect of the evaluation approach, subsequent amendment of the solicitation and the evaluation itself indicated that the cost benefits from proposed features such as Health Net's network provider discounts would be considered. In this regard, the instructions accompanying the agency's December 22, 2008 request for final proposal revisions instructed offerors as follows:

Offerors who offer elements that are claimed to exceed minimum requirements should describe and demonstrate its benefit, monetary or otherwise, to the Government. In that regard, anticipated cost savings, including notional dollar amounts, may be presented in the technical proposal to assist the evaluators in determining the benefit to the Government of an offered element which exceeds requirements. However, actual cost/price information, including management

reductions, must not be included in the technical proposal. Assertions regarding cost savings will be considered only in the technical evaluation, and will not impact the total evaluated price. These assertions should be fully demonstrated.

AR, Tab 89, Communications with Offeror, at 30. These instructions clearly stated that cost savings derived from proposed technical elements would be considered in the evaluation. Since they were disseminated in writing to all offerors and were signed by the contracting officer, they constituted an amendment to the RFP. SelectTech Bering Straits Solutions JV; Croop-LaFrance, Inc., B-400964 et al., Apr. 6, 2009, 2009 CPD ¶ 100 at 5; Proteccion Total/Magnum Sec., S.A., B-278129.4, May 12, 1998, 98-1 CPD ¶ 137 at 3.

Furthermore, the actions of the evaluators expressly recognize that potential savings from offered technical features were significant to the evaluation as reflected by TMA's consideration of Health Net's network discounts in connection with [Deleted].

The record is clear that TMA did not adequately account for the network provider discounts associated with Health Net's existing TRICARE network. First, the technical evaluation and resulting best value analysis failed to acknowledge the significant potential cost benefit from Health Net's record of obtaining an average overall network provider discount of [Deleted] for its TRICARE network [Deleted], estimated by Health Net to total [Deleted]. In this regard, while the solicitation required offerors to furnish a compliant network, and indeed included contract incentives encouraging network provider discounts through provisions for sharing resulting savings when the discounts exceeded 2%, RFP at 48, as TMA recognizes, nothing in the solicitation required offerors to propose a network that offered any particular level of provider discount. Thus, Health Net's proposal of an existing network offering [Deleted] network provider discounts exceeded the solicitation requirements, and should have been considered.¹⁴

Unfair Competitive Advantage

Health Net argues that the award to AGHP has been irreparably tainted by AGHP's unfair competitive advantage due to its hiring—and using to prepare its T-3 proposal—a former “top-level” government employee with access to inside, non-public source selection information and contractor proprietary information. Health Net's

¹⁴ TMA suggests that it was not appropriate to consider the magnitude of the discounts because Health Net did not guarantee them. Nothing in the RFP, however, required offerors to guarantee their discounts. Moreover, this position is inconsistent with TMA's awarding Health Net a strength for the cost benefits (nonguaranteed) of proposing [Deleted].

allegations are based on the activities, and associated access to information, of the former Chief of Staff to the Director and Deputy Director of TMA, who allegedly had access to non-public source selection sensitive information about the T-3 procurement, relevant non-public propriety information with respect to Health Net's performance of its incumbent contract for the North Region (T-Nex), and relevant non-public, source selection sensitive and propriety information of the two principal claims processing subcontractors that were proposed by Health Net and AGHP, resulting from the former employee's duties as the source selection authority in the award of the TRICARE Dual Eligibility Fiscal Intermediary Contract (TDEFIC).

One of the guiding principles established by the decisions of the courts and our Office is the obligation of contracting agencies to avoid even the appearance of impropriety in government procurements. See FAR § 3.101-1. In this regard, where a firm may have gained an unfair competitive advantage through its hiring of a former government official, the firm can be disqualified from a competition based on the appearance of impropriety which is created by this situation, that is, even if no actual impropriety can be shown, so long as the determination of an unfair competitive advantage is based on facts and not mere innuendo or suspicion.¹⁵ NKF Eng'g, Inc. v. U.S., 805 F.2d 372 (Fed. Cir. 1986) (overturning lower court's holding that appearance of impropriety, alone, is not a sufficient basis to disqualify an offeror, and finding that agency reasonably decided to disqualify offeror based on the appearance of impropriety where the offeror had hired a former government employee with knowledge of contractor proprietary information and source selection sensitive information); Holmes & Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., B-235906; B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379, aff'd, Brown Assocs. Mgmt. Servs., Inc.--Recon., B-235906.3, Mar. 16, 1990, 90-1 CPD ¶ 299 (where former agency employee who had access to source selection information left the agency and went to work for a contractor and prepared the contractor's proposal, the likelihood of an unfair competitive advantage warranted corrective action to protect the integrity of process, despite the good faith

¹⁵ The unfair competitive advantage analysis stemming from a firm's use of a former government employee is virtually indistinguishable from the concerns and considerations that arise in protests where there is an allegation that a firm has gained an unfair competitive advantage arising from its unequal access to information as a result of an organizational conflict of interest. See generally FAR § 9.505 (general rules regarding organizational conflicts of interest). In these cases, an unfair competitive advantage is presumed to arise where an offeror possesses competitively useful non-public information that would assist that offeror in obtaining the contract, without the need for an inquiry as to whether that information was actually utilized by the awardee in the preparation of its proposal. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 18-19 n.16.

behavior of all parties). Cf. The Jones/Hill Joint Venture, B-286194.4 et al., Dec. 5, 2001, 2001 CPD ¶ 194 (agency improperly failed to recognize, in the context of an A-76 competition, appearance of impropriety created where government employee, with knowledge of relevant non-public information, was later assigned to assist in-house competitor with preparation of its most efficient organization).

Whether the appearance of impropriety based on an alleged unfair competitive advantage exists, depends on the circumstances in each case and ultimately, the responsibility for determining whether to continue to allow an offeror to compete in the face of such an alleged impropriety is a matter for the contracting agency, which will not be disturbed unless it shown to be unreasonable. See PRC, Inc., B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115 at 17. Here, the agency acknowledges that the contracting officer, who would be responsible for making such a determination, has not in fact investigated or considered the allegations in this case. TMA's Post Hearing Comments at 21-22. Rather, TMA maintains that the facts do not suggest an unfair competitive advantage based on AGHP's hiring of TMA's former Chief of Staff. As discussed below, we find that Health Net has established a prima facie case, that is, facts sufficient to warrant a review and resolution of the matter by the contracting officer.

As a general matter, in determining whether an offeror obtained an unfair competitive advantage in hiring a former government official based on the individual's knowledge of non-public information, our Office has considered a variety of factors, including whether the individual had access to non-public information that was not otherwise available to the protester, or non-public proprietary information of the protester, and whether the non-public information was competitively useful. See, e.g., The Jones/Hill Joint Venture, supra (sustaining protest where individual had access to source selection sensitive information); Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63 (denying protest where allegation that individual had access to protester's proprietary information was unsupported); ITT Fed. Servs. Corp., B-253740.2, May 27, 1994, 94-2 CPD ¶ 30 (denying protest where record reflected that individual had access to source selection sensitive information, which had been released to all offerors); Holmes & Narver Servs., Inc./Morrison-Knudson Servs., Inc., et al., supra (sustaining protest where individual had access to source selection sensitive information).

As noted above, while the disqualification of an offeror need not be based on actual impropriety, it must be based on more than mere innuendo or suspicion. NFK Eng'g, Inc., supra; Holmes & Narver Servs., Inc./Morrison-Knudson Servs., Inc., et al., supra. Thus, a person's familiarity with the type of work required resulting from the person's prior position in the government is not, by itself, evidence of an unfair competitive advantage. See PRC, Inc., supra, at 19. Rather, there must be "hard facts" establishing the person's access to non-public information, which could provide a firm with an unfair competitive advantage. Compare Guardian Technologies Int'l, B-270213 et al., Feb. 20, 1996, 96-1 CPD ¶ 104 (sufficient evidence

of access to competitively sensitive inside information) with PRC, Inc., supra (insufficient evidence of access to sensitive inside information, which could have provided awardee with a competitive advantage).

Before we turn to the specifics of Health Net's allegations, we will address the arguments by TMA and the intervenor that Health Net's protest allegations regarding AGHP's use of a former government employee in the preparation of its proposal are procedurally barred. According to TMA and AGHP, Health Net's allegations essentially allege violations of statutory procurement integrity provisions, codified at 41 U.S.C. § 423 (2006). In support of this contention, they cite our decision in Honeywell Tech. Solutions, Inc., B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49, and argue that Health Net was required to comply with the special notice requirements of 41 U.S.C. § 423(g), but failed to do so. TMA and AGHP, in a related argument, argue that the issue was considered by the agency's ethics officer at various points, who provided the former TMA official with several "clean letters," including a letter specifically addressing his work on AGHP's T-3 proposal.

The statutory procurement integrity provisions at issue prohibit any present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States, with respect to a federal agency procurement, from "knowingly" disclosing contractor bid or proposal information or source selection information before the award of a federal agency procurement contract to which the information relates. 41 U.S.C. § 423(a). The provisions also contain a 1-year post-employment compensation ban. 41 U.S.C. § 423(d). Both our Bid Protest Regulations and the statutory procurement integrity provisions require--as a condition precedent to our considering the matter--that a protester have reported the alleged violation to the contracting agency within 14 days after first becoming aware of the information or facts giving rise to the alleged violation. 41 U.S.C. § 423(g); 4 C.F.R. § 21.5(d).

The fundamental flaw with TMA's and AGHP's position is the notion that Health Net's allegations are coextensive with the statutory procurement integrity provisions. They are not. Health Net has not alleged that the former TMA official "knowingly" disclosed to AGHP contractor bid or proposal information or source selection information, or that the official was subject to the 1-year compensation ban based on his duties related to the T-3 procurement. In fact, Health Net has not alleged any violation of the statutory procurement integrity provisions. Rather, Health Net's challenges are predicated on an alleged unfair competitive advantage stemming from the individual's inside knowledge. As discussed above, the appearance of impropriety stemming from the use of an individual with inside information can provide a valid basis of protest. Moreover, this basis of protest is entirely independent of the specific procurement integrity provisions, which focus on specific prohibited actions by government officials. The focus on prohibited actions is the very crux of the difference, since allegations dealing with apparent unfair competitive advantages do not necessarily turn on prohibited behavior, and,

as noted above, arise without regard to the good faith behavior of all parties. Holmes & Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., supra. Because protests of apparent improprieties are separate and distinct from those based on alleged violations of the statutory procurement integrity provisions, the special procurement integrity notice provisions are not implicated by Health Net's protest.¹⁶

Contrary to TMA's and AGHP's argument, our decision in Honeywell Tech. Solutions, Inc., supra, does not require a different conclusion. In Honeywell, our Office held that protest allegations predicated on alleged violations of the statutory procurement integrity provisions were barred where the protester failed to abide by the 14-day notice requirement noted above. Unlike Health Net, the protester in Honeywell expressly relied on alleged violations of the procurement integrity provisions codified at 41 U.S.C. § 423 as the basis of its protest. To the extent the decision discusses allegations of an "unfair competitive advantage," it is in connection with the prejudice arising from the alleged procurement integrity violations, since, as the decision notes, an unfair competitive advantage is a necessary element of a procurement integrity allegation since it relates to the resulting prejudice.

TMA and AGHP also argue that the matter was specifically addressed by TMA's ethics advisor, who provided the former TMA official with several "clean letters" regarding any limitations on his work for AGHP, and that the agency should be able to reasonably rely on these letters. By its own terms, however, the final letter provided by the agency ethics advisor expressly recognizes that the referenced "clean letters" only pertain to the statutory procurement integrity provisions and do not bear on the contracting officer's independent authority to safeguard the integrity of the procurement process. Specifically, the ethics opinion letter, in addressing the various procurement integrity statutory provisions, advises as follows:

You now are employed by [AGHP] and you also ask that I confirm that you can work with [AGHP] on the domestic and overseas TRICARE proposal. As I indicated in my [prior] opinion it would not violate the above ethical proscriptions as long as you did not use the non-public DOD information in your possession to further your own private interests, or those of an employer such as [AGHP]. However, I note in this regard that the contracting officer has authority independent of these ethical proscriptions to safeguard the integrity of the procurement process. See generally FAR 3.104 and 9.505 in this regard.

¹⁶ This is consistent with our Office's case law, which reflects various instances of protesters advancing arguments of unfair competitive advantage involving an awardee's employment of a former government employee without any indication that they met the special notice requirements. See, e.g., Proteccion Total/Magnum Security, S.A., supra.

Prospective offerors should contact the contracting officer if they have questions as to whether their planned use of any of these employees is a source of concern to him/her and articulate to that contracting officer the compliance efforts they are making to assure that use of such individuals would not constitute an unfair competitive advantage. This will enable the contracting officer to make a determination whether the planned utilization of the former employee is appropriate and/or potentially provides an unfair competitive advantage so as to damage the integrity of the acquisition process.

AR, Tab 97, E-Mail from TMA Ethics Advisor to Former TMA Chief of Staff, at 17.

Thus, this letter, and the prior letters for that matter, do not in any way clear the former TMA official to participate in the preparation of AGHP's T-3 proposal. Rather, the letter expressly recognizes that the individual's work on AGHP's proposal could present concerns associated with the integrity of the procurement process, which should be addressed by the contracting officer. Of course, the matter was never raised with the contracting officer, thereby depriving him of an opportunity to address any such concerns in advance of the competition.¹⁷

Turning to the specific allegations raised by Health Net in its protest, the record reflects that the individual in question was the Chief of Staff at TMA from early 2005 until March 2007 when he left this position to become the SSA for the TDEFIC contract through August 2007. A draft of the T-3 RFP was issued on June 12, 2007, the former Chief of Staff began working at AGHP on November 19, 2007, and the very next day, he began working on "certain projects" related to AGHP's T-3 proposal. See Tr. at 201. The final RFP was issued on March 24, 2008. The former Chief of Staff was in fact a member of AGHP's proposal preparation team, principally responsible for working to address subfactor 5, beneficiary satisfaction/customer service.¹⁸ The record also demonstrates that the former TMA official continued to

¹⁷ We believe that this letter appropriately recognizes the benefit to having such matters addressed early in the process by the contracting officer. Such action would afford the contracting officer an opportunity to address any problems before they arise, when it is still possible to avoid or mitigate even the appearance of impropriety. FAR § 3.101-1; cf. FAR § 9.505.

¹⁸ AGHP maintains that the former Chief of Staff's role in connection with proposal preparation was limited in large measure to subfactor 5 and that he was not involved in proposal pricing. The record reflects that there were no specific procedures established by AGHP, e.g., a firewall, to limit the individual's participation in other aspects of proposal preparation and that insight regarding the scope of his involvement may have been limited by AGHP's general policy of destroying documents in connection with the preparation of its proposal. However, e-mail documents produced from the individual's e-mail account while with AGHP suggest

(continued...)

have access to his TMA e-mail account, and in fact accessed that account on at least three occasions, after he began working for AGHP. AR, Tab 207, Former TMA Chief of Staff E-mails, at 63-65.

A 2005 Field Grade Officer Performance Report describes the duties, tasks, and responsibilities of the Chief of Staff as follows:

Chief of Staff in key senior Joint officer billet in support of the TMA Chief Operating Officer and Office of the Assistant Secretary of Defense (Health Affairs) with executive management and oversight of all DOD health policies, programs, and activities with a Defense Health Program budget of \$31B for 70 hospitals, 461 clinics, and 132,000 medical personnel. Provides oversight and coordination of interactions with five Chief Functionals (Flags/SES) & 425 staff, Health Affairs, three Military [Surgeon Generals] and Services, CONUS and OCONUS Regional Directors, the three civilian TRICARE Contractors, and senior Federal medical and line commanders.

AR, Tab 97, Former TMA Chief of Staff Post Government Ethics Questionnaire, at 7.¹⁹

In his role as Chief of Staff, the individual in question attended at least four meetings among high level DOD and TMA officials who were members of what was referred to as the T-3 Executive Council (TEC).²⁰ Although it was not possible to recreate the specific conversations that took place during the meetings, it is apparent, from the documents produced by TMA in connection with these meetings and testimony, that

(...continued)

that he had at least some role in the preparation of aspects of AGHP's T-3 proposal other than for subfactor 5. See, e.g., AGHP E-mails at 00622 (input regarding subfactor 7); AGHP E-mails at 00550, 00555, 00567 (discussing TSC staffing as it related to subfactor 7 and possible TSC pricing); AGHP E-mails at 0000626-656 (reviewing AGHP's proposal with respect to subfactor 3, Medical Management, and subfactor 4, Enrollment).

¹⁹ At the hearing, the former Chief of Staff suggested that this performance report somewhat exaggerated the true nature of his duties and responsibilities as TMA's Chief of Staff. Tr. 284-85.

²⁰ At the hearing, the former Chief of Staff's recollection of these meetings was limited. For the most part, he could not recall whether he in fact attended the meetings, what they were about, nor did he believe that he received any "read aheads" in connection with these meetings. See, e.g., Tr. at 36. The documentary evidence in the record, largely based on the former Chief of Staff's own emails, which were ultimately produced by TMA, reflect that he did in fact attend the meetings, and received advance documents pertaining to these meetings.

the role of the TEC was to develop the government's policy and goals for the T-3 procurement, which served to guide the T-3 procurement. Tr. 550-51. The record reflects that the former Chief of Staff received briefings and position papers in advance of these meetings, which identified problems and weaknesses in the current TRICARE managed contractor system, discussed particular approaches and options for resolving the concerns, and debated the pros and cons and impacts of particular approaches. See Tr. 470-71; AR, Tab 178, Jan. 12, 2006 Meeting; AR, Tab 203, Mar. 9, 2006 Meeting; AR, Tab 176, Apr. 13, 2006 Meeting; AR, Tab 204, Dec. 14, 2006 Meeting.

With regard to the first meeting, the record reflects, the former Chief of Staff received detailed briefings and position papers in advance of this meeting. AR, Tab 205, Former Chief of Staff Emails, 377-420. The position paper associated with this meeting, which is identified as "procurement sensitive," contains non-public price and cost information about the operation of TSCs by all of the incumbent contractors, including Health Net's TSC total price. Health Net maintains that such information is particularly sensitive given that the T-3 Solicitation included a fixed-price CLIN for the TSCs. In connection with another meeting, the record reflects that the Chief of Staff effectively learned the TSC staffing levels for the incumbent contract, T-Nex, where the briefing slides in connection with that meeting identified numbers of visits by beneficiaries per FTE and the numbers of beneficiary visits was public information. AR, Tab 205, Former Chief of Staff Emails, 641; Tr. 554-55.

The record also reflects that the former Chief of Staff "had access to monthly performance reviews of Health Net regarding T-Nex." 2nd Declaration of Former Chief of Staff, Sept. 16, 2009, at ¶ 9.²¹ In one such monthly report, there is information regarding Health Net's "enhancement" of the performance standards, i.e., where Health Net had committed to performing above the T-Nex RFP's minimum requirements, as well as the enhancements of the other incumbent contractors. AR, Tab 205, Former Chief of Staff Emails, at 483-513. Health Net maintains that these enhancements are non-public proprietary information; there has been no demonstration to the contrary.

Because the record shows that the former government employee, at a minimum, did in fact have access to Health Net's non-public propriety information regarding its performance of the T-Nex contract, which would appear to be relevant to the T-3 procurement,²² and therefore competitively useful information, Health Net has

²¹ The record reflects that the agency produced only two of these monthly reports.

²² This would be in contrast to Health Net's assertions that the former Chief of Staff also had access to Health Net's non-public proprietary information regarding T-Nex requirements for "clearly legible reports," which would not be relevant to T-3 given that T-3 did not include an analogous requirement.

established a prima facie case that an appearance of an impropriety was created as a result of AGHP's use of the former government employee in question for the purpose of preparing its proposal.²³ Moreover, we note that the information attributed to the former TMA Chief of Staff was contained in his TMA e-mail account, which, as noted above, he continued to have access to after he began working for AGHP. We therefore sustain the protest to the extent the contracting officer has not, as the agency recognizes, reviewed the matter²⁴ consistent with his obligation under FAR § 3.101-1 as established by the decisions of the courts and our Office, and therefore has not had an opportunity to make any determinations or findings regarding Health Net's allegations in this regard.

CONCLUSION AND RECOMMENDATION

As discussed above, we find a number of errors in the TMA's conduct of this procurement, including the failure to reasonably evaluate the awardee's past performance information; to perform a reasonable price/cost realism assessment, as provided for in the RFP; and to consider, as part of the technical evaluation or best value selection decision, the cost savings associated with the protester's proposed network provider discounts. We also sustain the protest based on the absence of any consideration by the contracting officer, in furtherance of the agency's obligation to avoid even the appearance of impropriety in government procurement, of the issues stemming from the awardee's use of a high-level former TMA employee in the preparation of its proposal, where the record demonstrates that this individual had access to the protester's non-public proprietary information.

²³ During the development of the protest, there was also much discussion of the impact of the former Chief of Staff's activities as SSA for the TDEFIC contract, and whether his admitted access to extensive non-public proprietary information of the two claims processing subcontractors proposed by Health Net and AGHP was information that would have been competitively useful in the context of the T-3 procurement. We believe this matter should be fully addressed as part of any review and consideration by the contracting officer.

²⁴ While our Office held a hearing in this case and developed an extensive record, it is evident that other information would be material in assessing Health Net's allegations. For example, it would be useful to conduct interviews with key individuals within TMA who presumably would have direct knowledge of his activities and what information he had access to, as well as a broader search for documents. Regarding the latter point, as noted above, TMA only produced two of the monthly performance reports. Moreover, testimony at the hearing suggests that TMA's search for documents may have been limited based on incorrect assumptions regarding how information was transmitted to the TMA Directorate, which is where the former Chief of Staff performed his duties. Tr. 486-88.

We think that the above errors were prejudicial, notwithstanding AGHP's significant price advantage, since correction of the evaluation errors could substantially alter the relative competitive position of the offerors, and given that the non-price evaluation factors were "significantly" more important than the price/cost factor. In addition, the agency's investigation and decision regarding the alleged unfair competitive advantage could lead TMA to exclude AGHP from the competition, thereby leaving Health Net as the only viable awardee.

With respect to the evaluation improprieties noted above, we recommend that TMA conduct a new evaluation of the offerors' proposals, hold further discussions if it deems necessary, and make a new source selection decision, consistent with this decision. Regarding the alleged unfair competitive advantage, we recommend that the contracting officer perform a thorough review regarding the scope of the former TMA employee's access to non-public proprietary information and source selection sensitive information which could have afforded the awardee a competitive advantage in the preparation of its T-3 proposal. The CO then should determine what actions, if any, should be taken to address the appearance of impropriety, if any, stemming from that individual's participation in the preparation of the awardee's T-3 proposal. We also recommend that Health Net be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Health Net should submit its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
Acting General Counsel