



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Cygnus Corporation

File: B-275181

Date: January 29, 1997

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Terrence J. Tychan and Michael Colvin, Department of Health and Human Services, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. New and independent grounds of protest included in a protester's comments on the agency report must independently meet the timeliness requirements of the General Accounting Office's Bid Protest Regulations; extensions of time for filing comments do not waive the timeliness requirements.
2. Protester's contentions that the awardee failed to advise the agency that its project director would not be available at the start of contract performance and used an improper "bait and switch" practice by allowing other employees to substitute for the proposed project director in the first 3 weeks of contract performance is denied where the record shows that the proposal clearly advised the agency that the project director was a contingent hire; the awardee did, in fact, hire the proposed project director as promised; and the project director began work within 3 weeks of contract award.
3. Allegation that agency evaluation of protester's best and final offer (BAFO) was unreasonable is sustained where the record as a whole supports the conclusion that the agency did not meaningfully evaluate certain key material in the BAFO.

DECISION

Cygnus Corporation protests the award of a contract to Caliber Associates, Inc. under request for proposals (RFP) No. 105-96-1648, issued by the Department of Health and Human Services for the operation and management of the National

Adoption Information Clearinghouse. Cygnus argues that the agency conducted an unreasonable evaluation of the proposals and improperly selected Caliber for award.

We sustain the protest.

BACKGROUND

As stated above, the RFP here sought a contractor to operate the National Adoption Information Clearinghouse, which provides information to the public on the subject of infant adoption and the adoption of children with special needs. The RFP, reserved for small business participation, anticipated award of a cost-plus-fixed-fee contract for a base year with two 1-year options to the offeror whose proposal was determined most advantageous to the government.

Section M-1 of the RFP advised potential offerors that the quality of the technical proposal and the past performance of the offeror would be more important than proposed costs. As set forth below, section M-2 identified five technical evaluation subfactors and the following allocation of points among the subfactors:

1. Understanding of the Statement of Work	15 points
2. Quality of Technical Approach	30 points
3. Corporate Experience	15 points
4. Staff Qualifications	20 points
5. Adequacy of Manpower, Resources, and Management Plan	<u>20 points</u>
TOTAL	100 points

All but one of these subfactors included as many as seven evaluation criteria, which will be discussed, as relevant, in greater detail below. The criteria were not scored separately.

With respect to past performance, the RFP advised that this factor would not be scored, but would be influential in determining the relative merits of an offeror's proposal; with respect to proposed costs, the RFP advised that the government would review the costs for realism and evaluate offers based on the total evaluated costs for the base period and both option years.

Six proposals were received by the closing date of July 9, 1996. Upon review by a technical evaluation panel, three of the proposals were evaluated as technically unacceptable, while the remaining three proposals--including those submitted by Cygnus and Caliber--were evaluated as acceptable and were included in the competitive range. Both oral and written discussions were held with the competitive range offerors, and best and final offers (BAFO) were received on

September 20. Upon evaluation of each offeror's BAFO, the evaluation panel revised the scores given initially. The resulting initial and BAFO scores, as well as evaluated costs, are set forth below:

OFFEROR	ORIGINAL TECHNICAL SCORE	BAFO TECHNICAL SCORE	TOTAL EVALUATED COSTS
Caliber	[deleted]	[deleted]	[deleted]
Cygnus	[deleted]	[deleted]	[deleted]
Company A	[deleted]	[deleted]	[deleted]

Based on the results of the initial and BAFO evaluations, the contract specialist prepared a Summary of Negotiations Memorandum recommending award to Caliber.¹ The memorandum states:

"The [t]echnical [s]core of Caliber [deleted] represents a [deleted] point advantage over Cygnus [deleted] and a [deleted] point advantage over [Company A] [deleted]. It is my opinion that the higher score assigned to the technical proposal and the resulting point differential between Caliber and the other two offerors justifies the higher costs of the Caliber proposal over the three year period."

Summary of Negotiations Memorandum, Sept. 26, 1996, at 4. The record does not contain a separate source selection decision, or any other explanation of the agency's tradeoff decision.

The performance period for the incumbent contractor, Cygnus, expired on September 29, and award was made to Caliber on September 30. This protest followed.

¹Under the past performance evaluation factor, Cygnus and Caliber were viewed as essentially equal, and the issue played no role in the selection decision. Cygnus initially challenged the evaluation of past performance, but later withdrew its claim.

EVALUATION OF PROPOSALS

Cygnus argues that the agency's evaluation of proposals was unreasonable in several areas. While many of Cygnus's claims are either untimely² or challenge evaluation assessments that can only be described as de minimis,³ the discussion below details Cygnus's two principal arguments. First, Cygnus claims that the agency gave Caliber unreasonable credit given the unavailability of its project director in the initial weeks of contract performance. Second, with respect to its own evaluation, Cygnus argues that the agency unreasonably evaluated its proposal under the quality of technical approach subfactor. Our review of these contentions is discussed below.

Caliber's Project Director

Cygnus argues that Caliber's proposal improperly failed to advise the agency that its project director would not be available at the start of contract performance, and that Caliber used an improper "bait and switch" tactic because other--presumably less qualified--employees were substituted for the project director from the time Caliber began performance until the project director was hired. Cygnus also argues that because the project director was not immediately available, the agency's favorable evaluation of Caliber was unreasonable.⁴

²Cygnus received the agency report on this protest on November 15, 1996, and filed its comments on December 4--19 days later. While Cygnus received permission to file its comments later than the 10 calendar days required by section 21.3(i) of our Bid Protest Regulations, 61 Fed. Reg. 39039, 39044 (1996) (to be codified at 4 C.F.R. § 21.3(i)), the granting of such an extension does not waive the timeliness requirements for filing bid protests. Keci Corp.--Recon., B-255193.2, May 25, 1994, 94-1 CPD ¶ 323. Thus, new issues raised in Cygnus's comments are not timely under section 21.2(a)(2) of our rules, 61 Fed. Reg. supra at 39043 (to be codified at 4 C.F.R. § 21.2(a)(2)).

³For example, Cygnus asks our Office to sustain this protest on the basis that it was wrongly assessed a weakness under the corporate experience evaluation subfactor, worth 15 points. Under this subfactor, Cygnus received scores of 15, 15, and 14, from the three agency evaluators, but was also assessed a minor weakness by one of the evaluators who awarded Cygnus a perfect score. Given that Cygnus received a perfect score from the evaluator who noted the weakness, it was clearly not prejudiced by the assessment, and we will not consider it further.

⁴In its comments on the agency report, Cygnus also argues that Caliber improperly failed to identify its key personnel in accordance with the requirements of the RFP. (continued...)

We find that the record does not support a conclusion that Caliber misled the agency, or that it engaged in "bait and switch" practices. All of Caliber's proposed personnel were current employees, with the exception of its proposed project director, who was a contingent hire. Caliber's proposal explained that if selected for award, it would hire its proposed project director within 2 weeks of the award date. In addition, Caliber included in its proposal a copy of the letter by which the proposed project director accepted Caliber's contingent offer of employment. When Caliber learned of its award, it did, in fact, hire its proposed project director, who then relocated to the Washington, D.C. area and has been working on this contract since October 21. Cygnus does not allege that any other Caliber employee failed to show up as promised.

In addition to our conclusion that Caliber's proposal fully and accurately disclosed its plans with regard to its proposed project director, our review of this solicitation reveals nothing that requires all of an offeror's employees to be available at the start of contract performance. Cygnus contends that this requirement is implied by the orientation meeting described in the RFP's statement of work (SOW) at subtask 1.1. SOW at 8. However, subtask 1.1 requires only that the contractor plan an initial 1-day orientation meeting within 1 week of contract award. The provision does not require the presence of any specific employee at this meeting, and the provision cannot be read to require that the project director must be available from the first day of performance.⁵

Cygnus's claim that Caliber engaged in "bait and switch" tactics likewise is without merit. "Bait and switch" practices are usually alleged when an offeror's proposal is favorably evaluated on the basis of personnel that it does not expect to use during performance. This practice has an adverse effect on the integrity of the competitive procurement system and provides a basis for rejection of that offeror. Ralph G. Moore & Assocs., B-270686; B-270686.2, Feb. 28, 1996, 96-1 CPD ¶ 118 at 3. Here, we see nothing misleading about Caliber's approach, and nothing that required the agency to downgrade its evaluation of Caliber. The proposal clearly advised the

⁴(...continued)

While Caliber and the agency disagree with Cygnus's view of the RFP's requirements, this is another issue Cygnus failed to raise in a timely manner.

⁵In fact, even Caliber's proposed implementation of subtask 1.1 does not firmly promise that the project director will be present for the initial orientation meeting. Instead, page II-7 of Caliber's proposal states that "[i]t is anticipated that key staff from Caliber--the Principal in Charge and Project Director--will convene a meeting with [key agency personnel] for the orientation meeting." The record shows that while the orientation meeting did take place, another employee substituted for the proposed project director.

agency that Caliber's proposed project director was a contingent hire and might not be available immediately. Because the agency was late in completing its evaluation, there was no remaining time between contract award and the time for performance to commence. In fact, even if the project director had been hired within 2 weeks of award, exactly as promised, Caliber would still have begun performance without its project director. Finally, to the extent that Caliber's project director began working 3 weeks after contract award, rather than the 2 weeks promised, we see no basis in the record to conclude that the delay is anything but de minimis.

Evaluation of Cygnus's Proposal under Quality of Technical Approach Subfactor

Cygnus argues that the evaluation of its proposal under the quality of technical approach subfactor was unreasonable because the agency evaluation materials fail to reflect that Cygnus added key information with respect to this subfactor in its BAFO. Based on our review of the record, and for the reasons set forth below, we agree.

As explained above, the quality of technical approach subfactor was weighted more heavily (30 points) than any of the other technical evaluation subfactors. Section M-2 of the RFP identified three elements under this subfactor. The third element--referred to by the parties here as evaluation subfactor 2.c.--required "[a]n indication of the problems that might be encountered in the implementation of the project and a description of how these will be resolved." Cygnus failed to include this information in its initial proposal.

In its review of Cygnus's initial proposal, the technical evaluation panel awarded the proposal [deleted] of 30 available points under the quality of technical approach subfactor, and noted only one weakness. The weakness noted was that Cygnus had failed to provide a discussion of potential problems and solutions as required by subfactor 2.c. The agency report submitted in response to this protest explains that this omission resulted in "the main deduction" from Cygnus's score. Attachment to Letter from Terrence J. Tychan, Nov. 15, 1996, at 2. The record also shows that the agency initially considered including a discussion question for Cygnus asking it to provide this information, but deleted the question after concluding that it would result in "technical leveling."⁶

⁶Cygnus did not challenge the agency's decision not to raise this matter during discussions in its initial protest or in its comments. Instead, its comments include a one-sentence aside in the section where Cygnus argues that the agency did not evaluate the information in its BAFO, merely noting that the agency did not mention this issue during discussions. Cygnus Comments, Dec. 4, 1996, at 12. (Another unclear remark is included in the Comments at 22.) If either remark was intended (continued...)

In its comments on the agency report, Cygnus conceded that its initial proposal did not include a response to evaluation subfactor 2.c. Cygnus Comments, supra at 11. Cygnus explained, however, that even though the agency did not ask about the omission, Cygnus realized its error and included a discussion of these issues in its BAFO. Id. at 12. According to Cygnus, the agency improperly failed to evaluate the additional information.⁷

Our review of the evaluation record shows the following events upon receipt of Cygnus's BAFO. First, in a memorandum to the file written immediately after receipt of the materials, the contract specialist states:

"I have just reviewed Cygnus's [BAFO]. The first portion of their proposal is titled '[BAFO] Technical Considerations.' During this 'discussion,' Cygnus addresses subjects which were not a part of either the technical questions nor the negotiations. Cygnus has given a lot of detail regarding subjects that were not addressed nor requested either in the technical questions from the [technical evaluation panel] nor during negotiations on cost matters."

Memorandum to File, Sept. 21, 1996, at 2. The evaluation record compiled afterwards shows no adjustment by any evaluator to Cygnus's score under this evaluation subfactor. More importantly, the record shows no contemporaneous consideration of this information and no judgment that the newly supplied information did not warrant an increase to Cygnus's score--even though the omission of this information was the only weakness noted by the agency under the subfactor. Finally, the agency's written summary of its debriefing of Cygnus reflects that the proposal "provided no discussions of potential problems/solutions." Memorandum on Summary of Debriefing, Oct. 18, 1996 at 2.

⁶(...continued)

as a substantive challenge to the agency's action, they were untimely given that Cygnus filed its comments more than 10 days after its receipt of the agency report. Furthermore, even if these remarks were timely, they were too vague and indefinite to raise this issue. We mention this because the protester's final January 15, 1997, reply to the agency's January 7 response to our December 31, 1996, written questions assumes that this issue was timely raised and adequately pleaded. It was not.

⁷In addition to arguing that the agency failed to evaluate the subfactor 2.c. information included in its BAFO, Cygnus also claims in its comments that the agency violated Federal Acquisition Regulation § 15.608 by comparing proposals. Again, this new ground of protest is untimely.

During the course of this protest, our Office prepared written questions for the agency on this matter. Specifically, by letter dated December 31, 1996, and provided to all parties, we asked the agency how this information in Cygnus's BAFO was evaluated, and where the results of the evaluation are reflected in the record. By letter dated January 7, the agency pointed to the evaluation scoresheets that were provided in the record--which, as described above, reflect no consideration of this issue--and submitted a declaration from one of the three evaluators explaining his view of the adequacy of Cygnus's BAFO response in this area. The evaluator's declaration states that the information was considered but was not sufficient to cause a change in score, or a change in the relative standing of the two proposals. In essence, the evaluator explains that the additional information in Cygnus's BAFO was not impressive, and this area of the evaluation "continued to be a weakness." Declaration, January 7, 1997, at 2. Neither the cover letter nor the declaration points to any evidence of contemporaneous consideration of this issue.

In attempting to resolve any conflict between the statement produced by the agency in response to our December 31 letter and the evaluation materials, the comments of the contract specialist, and the agency's summary of debriefing, we do not limit our review to contemporaneous evidence, as the protester urges. See Benchmark Security, Inc., B-247655.2, Feb. 4, 1993, 93-1 CPD ¶ 133 at 7; Hydraudyne Sys. and Eng'g B.V., B-241236; B-241236.2, Jan. 30, 1991, 91-1 CPD ¶ 88 at 4-5. However, while we consider the entire record, including later explanations and arguments, we accord greater weight to contemporaneous evaluation and source selection material than to arguments and documentation prepared in response to protest contentions. DynCorp, 71 Comp. Gen. 129 (1991), 91-2 CPD ¶ 575 at 7, n.13; Southwest Marine, Inc.; American Sys. Eng'g Corp., B-265865.3; B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 10.

The contemporaneous record provided by the agency in response to this protest strongly suggests that the additional information in Cygnus's BAFO addressing problems and solutions required by evaluation subfactor 2.c. was not evaluated by the agency. The agency described the protester's omission of this information from its initial proposal as the cause of "the main deduction" from Cygnus's score. Since it is not disputed that the material submitted with the BAFO was offered to rectify the omission, the information, at a minimum, should have triggered some consideration of its adequacy. Not only is there no basis in the BAFO evaluation materials to support a conclusion that this information was considered, but the comments of the contract specialist before the review, and the memorandum of the debriefing after the review--when viewed in context with the evaluation materials--further support a conclusion that it was not considered.

Against this backdrop, we weigh the post-protest statement of one of the three evaluators who says that "[t]o my knowledge, the other evaluation panel members and I read and evaluated all of Cygnus's [BAFO], including material that was not

submitted in response to direct questions raised in negotiations."⁸ Declaration, supra, at 1. While we have no reason not to believe the evaluator's explanation of his own actions, his statement is not dispositive of the actions of the other evaluators. In our view, even if the materials were reviewed in some cursory fashion, there is no evidence of any meaningful consideration of this issue. In fact, the silence of the evaluation record on the subfactor 2.c. information is in contrast with the BAFO evaluation of an unrelated issue where Cygnus included additional information in response to a discussion question--involving a much less significant weakness--and received an increase in its BAFO score.⁹

Our review of the record as a whole--including the statement submitted during the course of this protest--leads us to conclude that the evaluation of Cygnus's BAFO was unreasonable. We reach this conclusion because we accord more weight to the contemporaneous documents, and because the declaration provided during this protest, at a minimum, does not clearly resolve doubts about how the other evaluators reviewed this issue. We also consider the contrast between the asserted evaluation of this issue and the quality control information raised during discussions. The contrast between these two issues together with the contract specialist's statement and the summary of debriefings prepared afterwards leads us to conclude that the subfactor 2.c. information was not evaluated as the agency now claims.

Finally, we also conclude that Cygnus was prejudiced by the agency's failure to evaluate Cygnus's BAFO. Since Cygnus received [deleted] of 30 available points under the quality of technical approach subfactor, and the omission of the

⁸While the January 7 Declaration does include one paragraph presenting a post-protest review of the information in Cygnus's BAFO by the individual evaluator who submitted the Declaration, the assessment is minimal in nature. In addition, as the document reflects the view of only one evaluator, it does not reflect a measured consideration or consensus among the evaluation panel members about whether Cygnus's BAFO submission was sufficient to address the major weakness identified in its proposal. Thus, it clearly is not an adequate substitute for a thorough consideration of the information by the entire evaluation panel.

⁹Specifically, the record shows that Cygnus was asked during discussions to provide additional information regarding its procedures for quality control. The quality control issue appears to have had a much smaller impact on Cygnus's evaluation than its omission of the subfactor 2.c. information--which the agency described as responsible for the "main deduction" from Cygnus's score. Upon receiving Cygnus's BAFO, one of the evaluators increased Cygnus's score in this area by 1 point. In light of this, the record as a whole leaves the impression that the agency evaluators did not revisit issues which were not raised as discussion questions.

information described above was the only weakness cited under the subfactor, it appears that Cygnus's proposal could receive up to [deleted] additional points if this information is properly considered. If Cygnus's score rises as a result of reviewing this information, we can not assume that the agency would stand by its earlier cost/technical tradeoff, where it elected to pay Caliber's higher costs on the basis of the [deleted] differential between the proposals. Accordingly, we find that Cygnus was prejudiced by the agency's actions, and we sustain its protest. See Lockheed Aeronautical Sys. Co., B-252235.2, Aug. 4, 1993, 93-2 CPD ¶ 80 at 7.

MEANINGFUL DISCUSSIONS

Cygnus argues that the agency failed to hold meaningful discussions with it regarding weaknesses within its proposal. In this regard, in its initial protest filing Cygnus complains that the two written questions and nine oral discussion points raised during negotiations did not inform Cygnus of several of the problems raised during its debriefing. In its comments, Cygnus contends that discussions were not equal because Caliber received more questions than Cygnus, and Cygnus supplements its general challenge to the adequacy of discussions by claiming that every negative evaluation comment on the agency scoresheets should have been raised during discussions.¹⁰

We review the adequacy of agency discussions to ensure that agencies point out weaknesses that, unless corrected, would prevent an offeror from having a reasonable chance for award. Department of the Navy--Recon., 72 Comp. Gen. 221 (1993), 93-1 CPD ¶ 422. There is no requirement that an agency advise an offeror of a minor weakness that is not considered significant, even where the weakness subsequently becomes a determinative factor when two closely ranked proposals are compared. Volmar Const., B-270364; B-270364.2, Mar. 4, 1996, 96-1 CPD ¶ 139. There is also no requirement that offerors be asked the same number of questions. Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63 at 24.

Many of the criticisms raised during Cygnus's debriefing, or listed on the evaluator's scoresheets, involve only the most minor of weaknesses that need not have been

¹⁰Cygnus's listing of every less than favorable comment written by the evaluators during their review--coupled with an assertion that each of these comments reflects a weakness that had to be raised during discussions--is an ineffective surrogate for a substantive analysis of the adequacy of discussions. Ann Riley & Assocs., B-271741.2, Aug. 7, 1996, 97-1 CPD ¶ ____ at 9. As discussed above, the majority of these comments reflect minor weaknesses in the proposal.

pointed out during discussions.¹¹ Our general review of the record leads us to conclude that the questions asked of Cygnus were related to more substantive concerns. In short, we have reviewed each of Cygnus's challenges in this area and conclude that they do not separately, or in toto, provide a basis for concluding that discussions here were improper.

RECOMMENDATION AND CONCLUSION

We conclude that the agency's evaluation of Cygnus's subfactor 2.c. information--which was omitted from its initial proposal, but added in its BAFO--was unreasonable. Given that the omitted information was the subject of the agency's "main deduction" from Cygnus's score, and that Cygnus's decision to provide the information did not result in either an increase in the score, or a verifiable determination not to increase the score, we recommend that the agency reevaluate Cygnus's BAFO reflecting its view of the adequacy of the added information.

In addition, although not challenged by Cygnus in this protest, the best value determination and resulting selection decision in this record are not adequately justified or documented. While agencies routinely make cost/technical tradeoffs in deciding between competing proposals, the propriety of such a tradeoff decision turns not on the difference in the technical scores or ratings per se, but on whether the selection official's judgment concerning the significance of that difference was reasonable and adequately justified in light of the RFP evaluation scheme. DynCorp, supra. at 6. Here, there is no explanation as to why Caliber's higher point score reflected technical superiority or what the elements of that superiority were--the Summary of Negotiations Memorandum prepared by the contract specialist does not go beyond a bare comparison of the two technical scores in justifying selection of the offeror with higher proposed costs.¹² Accordingly, regardless of whether Cygnus's point score changes, the agency should prepare a more substantive statement of its determination.

¹¹For example, as described in note 3 supra, one of the evaluators who gave Cygnus a perfect score under the corporate experience subfactor cited as a weakness his view that the proposal included too much information related to this issue. Cygnus now argues that the agency failed to hold meaningful discussions because it failed to apprise Cygnus of this perceived weakness.

¹²For the record, we also note that the Summary of Negotiations Memorandum prepared by the contract specialist contains the agency's only statement justifying its award decision. We recommend that the agency consider requiring preparation of a source selection document in future cases, especially where agency personnel are making cost/technical tradeoffs and other types of best value determinations.

If, at the conclusion of the agency's reevaluation of Cygnus's BAFO, the revised best value determination shows that Cygnus's proposal, and not Caliber's, represents the best value to the agency, the agency should terminate Caliber's contract and award to Cygnus. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. Bid Protest Regulations, § 21.8(d), 61 Fed. Reg. supra at 39046 (to be codified at 4 C.F.R. § 21.8(d)). The protester should submit its certified claim for protest costs directly to the agency within 60 days of receipt of this decision. Bid Protest Regulations, § 21.8(f)(1), 61 Fed. Reg. supra (to be codified at 4 C.F.R. § 21.8(f)(1)).

The protest is sustained

Comptroller General
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