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United States Government Accountability Office  
Washington, DC 20548

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## Decision

**Matter of:** CIGNA Government Services, LLC

**File:** B-401062.2; B-401062.3

**Date:** May 6, 2009

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Thomas P. Humphrey, Esq., Shauna E. Alonge, Esq., John E. McCarthy, Jr., Esq., Peter Eyre, Esq., Sujata Sidhu, Esq., and Adelia R. Cliffe, Esq., Crowell & Moring LLP, for the protester.

Paul F. Khoury, Esq., Lindsay L. Turner, Esq., Dorthula H. Powell-Woodson, Esq., Brian Walsh, Esq., Daniel P. Graham, Esq., John W. Burd, Esq., Kathryn Bucher, Esq., and Baron A. Avery, Esq., Wiley Rein LLP, for Highmark Medicare Services, Inc., the intervenor.

Krystal Jordan, Esq., and Douglas Kornreich, Esq., Department of Health and Human Services, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Agency failed to conduct meaningful discussions where, after discussions had concluded, it determined that certain of the protester's proposed costs, which were set forth in the protester's initial and final revised proposals, were understated in comparison with those proposed by other offerors, and the agency adjusted the most probable cost estimate associated with the protester's costs upwards rather than reopening discussions to allow the protester an opportunity to address the issue.

2. Agency's consideration of the awardee's proposed subcontractor's past performance in its evaluation of the awardee's proposal under the solicitation's past performance factor was not reasonable where the solicitation provided for the consideration of the past performance of "significant" or "critical" subcontractors, and the record does not evidence that the subcontractor could properly be considered "critical" or "significant," given that the costs associated with the subcontractor's performance total [DELETED] percent of the total costs associated with the awardee's performance of the contract.

3. The agency's evaluation of the protester's proposal and source selection for one of the awards contemplated under the solicitation cannot be considered reasonable where the protester, in response to the same solicitation but for a different award,

submitted another proposal that did not materially differ from the proposal at issue here, the proposal at issue here received less favorable ratings, and no attempt was made by the source selection board or the source selection authority during the simultaneous source selections to understand why the ratings differed.

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## **DECISION**

CIGNA Government Services, LLC, of Nashville, Tennessee, protests the award of a contract to Highmark Medicare Services, Inc., of Camp Hill, Pennsylvania, under request for proposals (RFP) No. RFP-CMS-2007-0013, issued by the Center for Medicare and Medicaid Services, Department of Health and Human Services (HHS), to obtain a Medicare Administrative Contractor (MAC) to provide certain health insurance benefit administrative services. CIGNA argues that the agency failed to conduct meaningful discussions with it, and that the agency's evaluation of proposals and selection of Highmark's proposal for award were unreasonable.

We sustain the protest.

The RFP, issued August 31, 2007, provided for the award of four cost-plus-award-fee contracts, each with a base period of 1 year with four 1-year options, for four geographic areas, or "jurisdictions," in the United States for MAC services.<sup>1</sup> In performing the contracts, the MACs will, among other things, "receive and control Medicare claims from institutional and professional providers (including home health agencies and hospices), suppliers, and beneficiaries" within their respective jurisdictions, and "will perform standard or required editing on these claims to determine whether the claims are complete and should be paid." RFP, attach. J-1, at 1. The MACs will also "calculate Medicare payment amounts and arrange for remittance of these payments to the appropriate party," "enroll new providers," operate a "Provider Customer Service Program . . . that educates providers about the Medicare program and responds to provider telephone and written inquiries," respond "to complex inquiries from Beneficiary Contact Centers," and "make coverage decisions for new procedures and devices in local areas." *Id.* at 2. This protest concerns the award of a contract to Highmark for Jurisdiction 15, which includes the administration of Medicare Part A and Part B services for Kentucky and Ohio, as well as the administration of Home, Health and Hospice (HH&H) services for Colorado, Delaware, the District of Columbia, Iowa, Kansas, Maryland, Missouri, Montana, Nebraska, North Dakota, Pennsylvania, South Dakota, Utah, Virginia, West Virginia, and Wyoming. Agency Report (AR) at 2.

The solicitation stated that the agency would award a contract for each jurisdiction to the offeror submitting the proposal determined to provide the best value to the

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<sup>1</sup> The agency has divided the United States into 15 separate jurisdictions for the purposes of acquiring and providing these services, with this RFP pertaining to Jurisdictions 6, 11, 14, and 15.

government, considering the evaluation factors of technical understanding (30 percent), personnel (25 percent), implementation (20 percent), past performance (15 percent), and information security plan (10 percent).<sup>2</sup> RFP at 139, 142. The solicitation added that the non-cost evaluation factors, “when combined, are more important than cost or price,” and that “cost reasonableness and realism will be considered.” RFP at 138. The solicitation further advised that “[o]fferors who propose on more than one jurisdiction will be evaluated independently on each jurisdiction,” and that “[i]f, after the evaluation of each jurisdiction under this solicitation an offeror is the potential winner of more than one jurisdiction, [the agency] will assess the associated risks with awarding one offeror multiple jurisdictions.” RFP at 139.

The RFP included detailed proposal preparation instructions, requesting the submission of a technical proposal consisting of sections addressing, among other things, the technical understanding, personnel, implementation, past performance, and information security plan factors, as well as a business proposal addressing, in essence, the offeror’s proposed costs for performing the contract. RFP at 123-33. The solicitation added that the agency “reserve[d] the right to award without holding discussions.” RFP at 138.

The agency received proposals from five offerors for Jurisdiction 15 and four proposals, including CIGNA’s and Highmark’s, were included in the competitive range. Three rounds of discussions were conducted, and final proposal revisions (FPR) were requested and received. The final evaluation results were as follows:<sup>3</sup>

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<sup>2</sup> Each of the evaluation factors, with the exception of the information security plan factor, was comprised of specified subfactors.

<sup>3</sup> The proposals were assigned an adjectival rating as well as a risk rating under each evaluation subfactor, factor (except cost), and overall. The possible adjectival ratings were “outstanding,” “very good,” “good,” “marginal,” and “poor.” AR, Tab 6, Competitive Range Technical Evaluation Report, at 18. Risk was defined as “the likelihood that the Government will be negatively impacted by the offeror’s failure to meet the negotiated business, technical, management, and schedule performance and cost,” and the possible risk ratings were “low,” “medium,” and “high.” RFP at 138; AR, Tab 6, Competitive Range Technical Evaluation Report, at 17.

	<b>CIGNA</b>	<b>Highmark</b>
<b>Technical Understanding-</b>	<b>Good/Low Risk</b>	<b>Very Good/Low Risk</b>
-Program Management	Very Good/Low Risk	Very Good/Low Risk
-Claims Processing	Very Good/Low Risk	Very Good/Low Risk
-Provider Customer Service Program	Good/Low Risk	Very Good/Low Risk
-Audit and Reimbursement	Good/Low Risk	Good/Low Risk
-Provider Enrollment	Good/Low Risk	Good/Low Risk
-Fraud and Abuse	Good/Low Risk	Good/Low Risk
<b>Personnel</b>	<b>Good/Low Risk</b>	<b>Good/Low Risk</b>
-Key Personnel	Good/Low Risk	Good/Low Risk
-Staffing Plan	Good/Low Risk	Good/Low Risk
<b>Implementation</b>	<b>Good/Low Risk</b>	<b>Very Good/Low Risk</b>
-Jurisdiction Implementation Project Management Approach	Good/Low Risk	Very Good/Low Risk
-Jurisdiction Implementation Project Plan	Good/Low Risk	Good/Low Risk
-Implementation Personnel	Good/Low Risk	Very Good/Low Risk
-Implementation Risk Management Plan	Good/Low Risk	Good/Low Risk
<b>Past Performance</b>	<b>Good/Low Risk</b>	<b>Very Good/Low Risk</b>
-Quality of Service	Good/Low Risk	Very Good/Low Risk
-Cost Control	Good/Low Risk	Very Good/Low Risk
-Timeliness of Performance	Good/Low Risk	Good/Low Risk
-Business Relations	Good/Low Risk	Very Good/Low Risk
<b>Information Security Plan</b>	<b>Good/Low Risk</b>	<b>Very Good/Low Risk</b>
<b>Overall</b>	<b>Good/Low Risk</b>	<b>Very Good/Low Risk</b>
<b>Proposed Costs</b>	<b>\$223.1 Million</b>	<b>\$255 Million</b>
<b>Most Probable Costs</b>	<b>\$234.9 Million</b>	<b>\$255.7 Million</b>

Agency Report (AR), Tab 33, Contracting Officer Award Recommendation, at 3, 18.

The record reflects that the source selection board (SSB) and source selection authority (SSA) met with the contracting officers from three of the four jurisdictions to which this RFP pertained, as well as the contracting officers from two other jurisdictions that were competed under another RFP, with the contracting officers “present[ing] their award recommendations.” AR, Tab 35, SSA and SSB Award Decision Memorandum, at 1. The SSB and SSA “review[ed] and discuss[ed] the

Contracting Officers' award recommendations," with the SSA making "the final award determinations after considering the information in the individual resource binders for each Jurisdiction, hearing presentations from the Contracting Officers and Technical and Past Performance Panel Chairpersons for each jurisdiction, and after three separate closed sessions with the [SSB] . . . to consider the risk of award of multiple jurisdictions to a single entity." *Id.* at 1, 5. The SSA's award decision memorandum encompasses five jurisdictions, including Jurisdiction 11 and Jurisdiction 15. The SSA accepted the recommendation of the Jurisdiction 15 contracting officer and determined that Highmark's proposal for Jurisdiction 15 represented the best value to the government, and after requesting and receiving a debriefing, CIGNA filed this protest.

CIGNA first argues that the agency failed to conduct meaningful discussions with it regarding its proposed costs. In this regard, the record reflects that the agency upwardly adjusted CIGNA's proposed costs, as set forth in CIGNA's FPR, based primarily on the agency's "analysis of the FPR output mail and postage [that] revealed that [CIGNA] significantly understated these costs when compared with the costs proposed by the other [Jurisdiction 15] offerors," and determination that CIGNA's costs here were thus "unrealistically low." AR, Tab 33, Contracting Officer Award Recommendation, at 26-27. Specifically, the record reflects that during its evaluation of the offerors' FPRs, the agency noted that while CIGNA's proposed printing and postage costs totaled \$[DELETED], the printing and postage costs proposed by the other three competitive range offerors ranged from \$[DELETED] to \$[DELETED]. *Id.* The agency states that it reviewed CIGNA's FPR to "determine whether [CIGNA] proposed a unique technology or a special process accounting for printing and postage cost significantly lower than other [Jurisdiction 15] offerors." *Id.* at 27. The agency concluded that CIGNA had not proposed any technology or process that would account for CIGNA's lower proposed printing and postage costs, and because of this upwardly adjusted CIGNA's "print and postage costs" by \$[DELETED], and CIGNA's total evaluated costs, including an adjustment to CIGNA's general and administrative costs as a result of the printing and postage cost adjustment, by \$[DELETED]. *Id.* at 25, 27.

CIGNA points out that while the agency conducted three rounds of discussions with the competitive range offerors, the only issue regarding CIGNA's approach to printing and postage costs raised by the agency concerned CIGNA's initial failure "to include HH&H claims volume in calculating the proposed costs for Internet/Communications and Output Mail Postage," which CIGNA corrected in its FPR. Protester's Comments at 11; see AR, Tab 17, CIGNA Discussion Questions and Responses (Sept. 30, 2008), at 101. As noted by CIGNA, the record shows that the agency did not raise any other concerns during discussions regarding CIGNA's proposed printing and postage costs.

The Federal Acquisition Regulation (FAR) requires that where an agency undertakes discussions with offerors, the contracting officer shall discuss with each firm being

considered for award deficiencies and significant weaknesses identified in the firm's proposal. FAR § 15.306(d)(3). Discussions must be meaningful, equitable, and not misleading. Cygnus Corp., Inc., B-292649.3; B-292649.4, Dec. 30, 2003, 2004 CPD ¶ 162 at 4; Lockheed Martin Corp., B-293679, May 27, 2004 CPD ¶ 115 at 7. Discussions cannot be meaningful unless they lead an offeror into those weaknesses, excesses or deficiencies in its proposal that must be addressed in order for the proposal to have a reasonable chance of being selected for contract award. Cygnus Corp., Inc., *supra*; Lockheed Martin Corp., *supra*.

The agency does not argue that it raised its concerns regarding CIGNA's proposed printing and postage costs during its discussions with the protester, acknowledging that, as reflected in the record, the "discrepancy" between the printing and postage costs proposed by the other competitive range offerors and CIGNA "was only identified after the submission of FPRs, when each offeror's proposed costs were compared with one another." AR at 45 n.7; Agency Supp. Report at 11. Rather, the agency contends that its "cost adjustment to [CIGNA's] proposal was minor," in that "it increased [CIGNA's] total evaluated cost by [DELETED]% and reduced the cost difference between [CIGNA] and [Highmark] from [DELETED]% to [DELETED]%. Agency Supp. Report at 17. The agency continues here by arguing that because the adjustment was "minor," the "adjustment was not the equivalent of a 'significant weakness,' nor did it concern 'an aspect[] of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award," and thus the agency's concerns here did not have to be raised with CIGNA during discussions. Agency Supp. Report at 17 (quoting FAR § 15.306(d)(3)).

We disagree. In this regard, we first reject the agency's contention that its concerns with CIGNA's proposed printing and postage costs, and the resultant upward adjustment to CIGNA's proposed costs, were "minor" or otherwise concerned matters that did not have to be raised with CIGNA in order for discussions to be meaningful. As set forth above, the agency's upward adjustment constituted, by the agency's own calculations, an \$[DELETED] or [DELETED] percent increase to CIGNA's proposed costs, which caused the cost advantage associated with CIGNA's proposal to be reduced from [DELETED] percent to [DELETED] percent. We simply fail to see, and do not believe that the agency has adequately explained, why an upward adjustment to CIGNA's proposed costs of [DELETED] percent can reasonably be characterized as "minor" or otherwise inconsequential under the circumstances here. Additionally, we note that the agency has not pointed to anything in the contemporaneous record of the evaluation and source selection stating or otherwise providing that the failure to raise this issue with CIGNA during discussions was due to the agency's view that the cost adjustment was "minor." As such, we give little weight to the agency's assertions crafted in the heat of litigation that the agency's upward cost adjustment to CIGNA's proposal would have been and should be considered "minor," and thus was not required to be raised during discussions. Novex Enters., B-297660; B-297660.2, Mar. 6, 2006, 2006 CPD ¶ 51 at 4;

Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. In the context of the trade-off actually made here, we cannot conclude that this adjustment was “minor.”

Although the agency correctly points out that an agency has no duty to reopen discussions to allow an offeror to address proposal defects or significant weaknesses first introduced in the offeror’s response to discussions or in a post-discussion proposal revision, Honeywell Tech. Solutions, Inc., B-400771; B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 10, such was not the case here. That is, the agency does not claim, and there is nothing in the record to indicate, that the discrepancy between CIGNA’s proposed printing and postage costs and the other offerors’ proposed printing and postage costs was different in any material way between the offerors’ initial proposals and FPRs. In other words, the aspect of CIGNA’s cost proposal that caused the agency concern was present in CIGNA’s initial proposal. The fact that the agency did not realize until after discussions had concluded and the agency had received FPRs that CIGNA’s proposed printing and mailing costs were substantially lower than the costs proposed for these same services by the other offerors, and thus, in the agency’s view, were understated, does not relieve the agency of its obligation to conduct meaningful discussions. Al Long Ford, B-297807, Apr. 12, 2006, 2006 CPD ¶ 68 at 8. Where, as here, an agency, after discussions are completed, identifies a concern pertaining to the proposal as it was prior to discussions that would have had to be raised if it had been identified before discussions were held, the agency is required to reopen discussions in order to raise its concern with the relevant offeror. Id.

We are also unpersuaded by the agency’s argument that there is no reasonable possibility of prejudice stemming from the agency’s failure to raise its concerns with CIGNA’s proposed printing and postage costs during discussions. Specifically, the agency has argued during the course of this protest that it would have selected Highmark’s higher-rated (very good/low risk overall) proposal over CIGNA’s lower-rated (good/low risk overall) proposal regardless whether the price advantage associated with CIGNA’s proposal totaled [DELETED] percent or [DELETED] percent. The agency further argues that CIGNA was not prejudiced by the agency’s failure to conduct meaningful discussions because, as argued by the agency during the course of this protest, CIGNA has “identified no information that it would have communicated to the agency in discussions that was not already in its proposal” in support of the reasonableness of its proposed printing and postage costs. Agency Supp. Report at 17. The agency concludes that the information and arguments CIGNA has provided in its protest in support of its printing and postage costs were essentially included in CIGNA’s initial proposal, and thus were, in the agency’s view, “already communicated to, considered by, and rejected by the agency.” Id.

Competitive prejudice is an element of a viable protest, and our Office will not sustain a protest where no prejudice is evident. Nonetheless, to establish prejudice, a protester is not required to show that, but for the alleged error, the protester would

have undoubtedly been awarded the contract. Rather, it is enough that the record contains evidence reflecting a reasonable possibility that, but for the agency's actions, the protester would have had a substantial chance of receiving the award. Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 9.

Notwithstanding the agency's arguments to the contrary, there is nothing in the contemporaneous record providing that the agency's selection of Highmark would have been made if CIGNA's proposal had presented a [DELETED] percent, rather than [DELETED] percent, cost advantage. We again give little weight to the assertion made by agency counsel during the course of the protest that the selection of Highmark's proposal would have been made regardless of whether CIGNA's proposal presented an [DELETED] percent or [DELETED] percent cost advantage. Novex Enters., supra.

With regard to the other aspect of the agency's prejudice argument, based upon our review of the record, including arguments provided by the parties during the course of this protest, we believe that the protester's submissions, provided in support of the protester's argument that, regardless of discussions, the upward adjustment to its proposed printing and postage costs was not reasonably based, include considerable detail as to the protester's proposed approach to these services and how its approach offers certain efficiencies that are not found in the approaches to these services set forth in the other offerors' proposals. This level of detail and analysis was not provided in the protester's proposal as initially submitted. To the extent that the agency is arguing that it would remain unpersuaded had this detail and analysis been provided during discussions, we again note that we accord little weight to such arguments crafted during the heat of litigation. See Novex Enters., supra. Given the agency's clear violation of the FAR discussion requirements, we are not prepared on this record to conclude that the protester was not prejudiced by the agency's failure to conduct meaningful discussions and obtain revised proposals.

In sum, we find that the agency's concerns with CIGNA's proposed printing and postage costs should have been raised with CIGNA during discussions in order for discussions to have been meaningful, and sustain the protest on this basis.<sup>4</sup>

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<sup>4</sup> The protester also argues that the agency failed to conduct meaningful discussions with CIGNA regarding a number of other "weaknesses" that the agency had identified in CIGNA's proposal and which were mentioned in the source selection documentation, but which had not been raised with CIGNA during discussions. The agency's position is that it did not consider these "weaknesses" in CIGNA's proposal to be significant, and that they therefore were not required to be raised by the agency during discussions. While we do not resolve this protest basis, we believe that the agency should be mindful of the protester's arguments here in implementing our recommendation that the agency reopen discussions. In this regard, we point out that FAR § 15.306(d)(3) states that agencies are "encouraged to discuss other aspects (continued...)"



CIGNA also argues that the agency's evaluation of Highmark's proposal as "very good" with "low risk" under the past performance factor was unreasonable. Specifically, CIGNA points out that the contracting officer, in his award recommendation, specifically mentioned as "strengths" various aspects of one of Highmark's subcontractor's past performance in support of Highmark's "very good" with "low risk" ratings under the quality of service, cost control, and business relations subfactors to the past performance factor. AR, Tab 33, Contracting Officer's Award Recommendation, at 9-10. The protester argues that the consideration of this subcontractor's past performance in arriving at an overall rating of "very good" with "low risk" under the past performance factor, and each of these three subfactors, was erroneous. In this regard, while recognizing that the solicitation provided under the past performance factor that "[p]ast performance of significant and/or critical subcontractors will be considered to the extent warranted by the subcontractor's demonstrated involvement in the proposed effort," RFP at 152, the protester contends that this proposed subcontractor cannot reasonably be considered either "significant" or "critical" to the proposed effort, given the subcontractor's experience, the work for which the subcontract was proposed, and the fact that the proposed costs allocated to this subcontractor's efforts on the contract total only \$[DELETED] or approximately [DELETED] percent of Highmark's total proposed cost of \$255 million. Protester's Comments at 88-89; Protester's Supp. Comments at 44-45.

Our Office will examine an agency's evaluation of an offeror's past performance only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merits of an offeror's past performance is a matter within the contracting agency's discretion. Sabreliner Corp., B-290515.2 et al., Aug. 21, 2002, 2003 CPD ¶ 4 at 4.

In explaining the evaluation process, the agency's initial past performance evaluation report states that the agency "examined the subcontractor teaming arrangements for each offeror to ensure that relevant past performance information was being considered for each party in relation to the work proposed for each jurisdiction." AR, Tab 8, Initial Past Performance Evaluation Report, at 2. The report added that "not all subcontractors proposed were evaluated for past performance, only those the [agency] determined are being proposed to perform similar functions and major functions and/or a significant portion of the workload as it relates to the instant acquisition." Id. The report goes on to list, without further explanation, the offerors' subcontractors that the agency had "determined" were "performing similar and major functions and/or a significant portion of the workload." Id. at 3. Two of Highmark's subcontractors, including the one in question here, were included on this

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(...continued)

of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award."

list. This report, as well as the final past performance evaluation report and source selection documentation, describes as “strengths” various aspects of Highmark’s subcontractor’s past performance. Id. at 37-43; AR, Tab 26, Final Past Performance Evaluation Report, at 41-42; Tab 33, Contracting Officer Award Recommendation, at 9-10.

In response to the protest, the agency first argues that CIGNA was not prejudiced by the agency’s allegedly erroneous consideration of Highmark’s subcontractor in its past performance evaluation. Specifically, the agency states here that it “identified numerous strengths and discriminators for [Highmark] under the Past Performance factor that do not involve [the subcontractor],” and “[t]hus, even without the strengths associated with [the subcontractor, the agency] reasonably concluded that [Highmark’s] proposal was superior to [CIGNA’s] under the Past Performance factor.” Agency Supp. Report at 48. With regard to the issue as to whether it properly considered Highmark’s subcontractor’s record of past performance in evaluating Highmark’s proposal under the past performance factor, the agency simply states that the HH&H services, on which Highmark’s subcontractor was proposed to work, “represent a relatively small (3%), yet significant portion of the [Jurisdiction 15] workload,” and that the agency “therefore had every reason to assure itself of [the subcontractor’s] performance abilities.” Id.

Based upon our review of the record, we cannot find reasonable the agency’s determination that Highmark’s subcontractor, whose total efforts on this contract account for [DELETED] percent of Highmark’s total proposed costs, is a “significant” or “critical” subcontractor based upon the subcontractor’s involvement in the proposed effort. As indicated above, the contemporaneous record of the evaluation provides only that the listed subcontractors, including Highmark’s, were “performing similar and major functions and/or a significant portion of the workload,” and fails to provide any analysis or explanation as to why Highmark’s proposed subcontractor was considered either significant or critical. Additionally, in responding to this aspect of the protest, the agency notes only that it considers the services to be performed by Highmark’s proposed subcontractor to be “significant” with no further explanation or analysis.

We also reject the agency’s alternate assertion that CIGNA was not prejudiced by the agency’s consideration of the subcontractor’s past performance in evaluating Highmark’s proposal under the past performance factor as “very good” with “low risk.” In this regard, the agency’s initial and final past performance evaluations, and the contracting officer’s award recommendation, mention the subcontractor’s past performance as an evaluated strength a number of times and in connection with each of the three past performance evaluation subfactors under which Highmark’s proposal was evaluated as “very good.” For example, the contracting officer’s award recommendation notes that, as set forth in Highmark’s proposal, “contracts performed by [the subcontractor] come in under budget,” and then adds that “[e]ffectiveness in forecasting and containing costs while maintaining a high level of

work quality is an added benefit to the Government.”<sup>5</sup> AR, Tab 33, Contracting Officer Award Recommendation, at 35. This was one of two strengths (the other being attributable to Highmark) noted by the contracting officer in support of the “very good” with “low risk” evaluation of Highmark’s proposal under the cost control subfactor to the past performance factor, and as such appears to have been an important favorable consideration in the agency’s evaluation of this aspect of Highmark’s proposal. *Id.* at 34-35. Several positive past performance references with regard to this subcontractor are mentioned under the other two past performance subfactors as well. *Id.* at 34-36. In short, given the numerous positive references to the subcontractor’s past performance by the agency in its contemporaneous evaluation in support of Highmark’s “very good” with “low risk” evaluation rating, we cannot conclude that CIGNA was not prejudiced by the agency’s apparently unwarranted consideration of the subcontractor’s past performance when evaluating Highmark’s past performance. To conclude that Highmark’s proposal could have reasonably been evaluated as “very good” with “low risk” under the past performance factor without consideration of the subcontractor’s past performance would necessitate a reevaluation of Highmark’s proposal by the agency in the heat of litigation, or by our Office, neither of which is appropriate. See Novex Enters., supra.

In sum, the record does not reasonably support the agency’s evaluation of Highmark’s past performance, and we sustain the protest on this basis.

CIGNA also challenges the agency’s evaluation of its proposal under each of the evaluation factors set forth in the RFP. In doing so, CIGNA, in addition to arguing that the agency’s evaluations under these factors were not reasonably based given the contents of CIGNA’s proposal, also protests that agency’s evaluation of its Jurisdiction 15 proposal under certain of the evaluation factors cannot be considered reasonable because the nearly identical proposal it submitted under the same RFP for Jurisdiction 11 received materially different, and more favorable, evaluation ratings, and there is no explanation for the differences in ratings. For example, CIGNA points out that its proposal received a “very good” rating under the technical understanding factor for Jurisdiction 11, in contrast to a “good” rating under the technical understanding factor for Jurisdiction 15. AR, Tab 33, Contracting Officer Award Recommendation, Jurisdiction 15, at 3, 18; Tab 46, Contracting Officer Award Recommendation, Jurisdiction 11, at 6. CIGNA further points out in this regard that under the provider customer service program, audit and reimbursement, and fraud

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<sup>5</sup> Although this example is provided in order to demonstrate the apparent positive effect that the agency’s consideration of the subcontractor’s past performance had on Highmark’s overall past performance rating, it is not apparent from the record, and the agency has failed to explain, how a subcontractor’s ability to contain costs is relevant to the award of a \$255 million contract where the costs attributable to the subcontractor account for [DELETED] percent of that amount.

and abuse subfactors to the technical understanding factor, its proposal was evaluated as “very good” with regard to Jurisdiction 11, but “good” under these same subfactors with regard to Jurisdiction 15. Id. The protester adds that the evaluation results were more disparate under the provider enrollment subfactor to the technical understanding factor, where its proposal received an “outstanding” rating with regard to Jurisdiction 11, and a “good” rating with regard to Jurisdiction 15. Id. The protester raises similar arguments regarding the evaluation of its proposal under the key personnel subfactor to the personnel factor, pointing out that two individuals, each of whom was proposed for one of the key personnel positions in Jurisdiction 11 as well as Jurisdiction 15, received lower evaluation ratings under Jurisdiction 15. Id.; Protest at 34-35; Protester’s Comments at 69-71.

As mentioned previously, the agency issued a single RFP in response to which offerors could submit proposals for Jurisdictions 6, 11, 14, and/or 15. The record reflects that the agency convened separate evaluation panels for, and assigned separate contracting officers to, each jurisdiction. The agency then had the evaluation results and award recommendations from each jurisdiction presented by the cognizant contracting officers to a single SSB and SSA. The SSA ultimately issued a single source selection statement that provided for the awards under Jurisdiction 6, 8, 10, 11 and 15.<sup>6</sup>

In responding to this aspect of the protest, the agency acknowledges that the evaluation results differ from Jurisdiction 11 to Jurisdiction 15, and does not argue that the proposals CIGNA submitted for Jurisdictions 11 and 15 differed in any material way with regard to the aspects of the evaluation challenged here.<sup>7</sup> Rather,

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<sup>6</sup> The agency explains that Jurisdictions 8, 9 and 10 were competed under RFP CMS-2007-0018, while, as mentioned previously, Jurisdictions 6, 11, 14 and 15 were competed under the RFP here. The agency states it awarded a contract for Jurisdiction 9 on September 12, 2008, and Jurisdiction 14 on November 19, and included Jurisdictions 6, 8, 10, 11, and 15 in a single source selection dated December 11 because all of these jurisdictions “were ready for award” at the same time. Agency E-mail to GAO (Apr. 13, 2009).

<sup>7</sup> The agency references the fact that the solicitation expressly advised that while offerors could “choose to propose on multiple jurisdictions,” they were also “cautioned that each jurisdiction will be evaluated independently,” and argues that because of this, the differing ratings CIGNA’s proposals received under Jurisdictions 11 and 15 are consistent with the terms of the solicitation, and that CIGNA’s protest is thus untimely since in the agency’s view it is essentially a challenge to the terms of the solicitation. AR at 3-4; Agency Supp. Report at 1-2; see RFP at 86; Bid Protest Regulations, 4 C.F.R. 21.2(a)(1) (2008).

The agency’s argument here mischaracterizes CIGNA’s protest. CIGNA is not arguing that the agency’s methodology for the evaluation of proposals as set forth in  
(continued...)

the agency states that it is not unusual or objectionable for different evaluators to reach different conclusions regarding the same proposal. With regard to the actions of the SSB and SSA, the agency, while recognizing “that the same SSA and SSB made the award decisions” for the differing jurisdictions, notes that “neither the SSB nor the SSA reviewed the underlying proposals,” and “[a]s a result, neither the SSB nor the SSA was in a position to reconcile the differences in the independent ratings assigned by the evaluation panels in each jurisdiction.” Agency Supp. Report at 3. The agency concludes that because of this, the Jurisdiction 15 evaluation and source selection should be considered reasonable, given that an SSA may generally rely on the advice and evaluation recommendations of the cognizant agency evaluators, and need not actually read the proposals submitted. Id.

We cannot find, based on the unique circumstances here, that the evaluation of CIGNA’s proposal under Jurisdiction 15 was reasonable or that the SSA adequately fulfilled her responsibilities. In this regard, we agree with the agency that as a general matter, it is not unusual for individual evaluators to reach different conclusions and assign different scores or ratings when evaluating proposals since both objective and subjective judgments are involved, Novel Pharm., Inc., B-255374, Feb. 24, 1994, 94-1 CPD ¶ 149 at 6, and that evaluation ratings under another solicitation are not probative of the alleged unreasonableness of the evaluation ratings under the solicitation at issue given that each procurement stands on its own. Paramatic Filter Corp., B-285288; B-285288.2, Aug. 14, 2000, 2000 CPD ¶ 185 at 7. However, neither of these general propositions justifies the actions of the agency here. That is, this protest does not involve a challenge to a consensus evaluation based solely on the fact that individual evaluators had different views of the proposal during the evaluation process and prior to reaching a consensus. In such protests, our concern is whether the consensus evaluation was reasonable and consistent with the evaluation factors set forth in the solicitation. Here, each set of evaluators reached a consensus regarding essentially the same proposal submitted in response to the same solicitation. However, the consensus reached were materially different, and nothing was done by the common SSB or SSA to either reconcile or understand the differences. This, in our view, stands in contrast to the actions taken by an evaluation team when arriving at a consensus evaluation. Additionally, the

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the RFP was inappropriate or unreasonable; that is, CIGNA does not argue that the agency’s evaluation of its proposals was unreasonable simply because proposals were evaluated independently of each other as provided by the solicitation. Rather, CIGNA’s protest challenges the reasonableness of the results of the evaluation and source selection. The fact that in doing so CIGNA points, as support for its allegations, to the differing evaluations of the same basic proposal by the Jurisdiction 11 and Jurisdiction 15 evaluators, and the acceptance of those evaluations by a common SSB and SSA, does not change the nature of CIGNA’s protest.

general proposition that each acquisition stands on its own is simply inapplicable to this situation, which involves the same solicitation, proposals that were materially the same, and the same SSB and SSA.

With regard to the SSA's duties, again, while the agency is correct that an SSA may generally rely on reports and analyses prepared by others and need not actually read the proposals, see Pan Am World Servs., Inc., et al., B-231840 et al., Nov. 7, 1988, 88-2 CPD ¶ 446 at 22, the ultimate source selection decision must represent the SSA's independent judgment. FAR § 15.308; University Research Corp., B-294358 et al., Oct. 28, 2004, 2004 CPD ¶ 217 at 8. That is, the FAR as well as our bid protest decisions recognize that while an SSA may rely on the views of others in making a source selection, this does not allow an SSA to abrogate his or her responsibility to exercise independent judgment. Applied here, the fact that the SSA relied upon the views of the Jurisdiction 11 and Jurisdiction 15 contracting officers does not support a conclusion that a source selection, made without an adequate understanding of the proposals submitted and agency's evaluation, is unobjectionable, or that the SSA's ultimate source selections, and determinations upon which they were made, are beyond review.

Our views here are not meant to provide that anything short of the assignment of the same ratings under each of the evaluation factors and subfactors to CIGNA's proposal under Jurisdiction 11 and 15 would be considered unreasonable. However, we believe it was incumbent upon the SSB and SSA, when confronted with the differing evaluation results of essentially the same proposal, submitted by the same offeror under the same solicitation, to seek some sort of explanation, or otherwise arrive at an understanding, as to why this was the case, especially where there were significant rating differences in the respective evaluations. In our view, such an understanding was necessary for intelligent decision making, and absent such an understanding by the SSA, we cannot find either the underlying evaluation of CIGNA's proposal or the ultimate source selection reasonable. We sustain the protest on this basis.<sup>8</sup>

We recommend that the agency reopen discussions, request and review revised proposals, evaluate those submissions consistent with the terms of the solicitation,

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<sup>8</sup> The agency further contends that the evaluations should nevertheless be considered reasonable as "the same evaluators reviewed all competing proposals for a given jurisdiction, ensuring that the subjective judgments of any one set of evaluators were applied equally and consistently to all proposals for a given award." Agency Supp. Report at 5. Again, while that may be the case, and may constitute a reasonable way of handling the differing evaluation results, such that the differing evaluation results with regard to CIGNA's Jurisdiction 11 and 15 proposals may be considered reasonable, the contemporaneous record provides no such explanation.

and make a new source selection.<sup>9</sup> In the event a proposal other than Highmark's is found to represent the best value to the government, the contract awarded to Highmark should be terminated and a contract should be awarded to the offeror whose proposal is determined to represent the best value in accordance with the terms of the RFP. We also recommend that the agency reimburse CIGNA the cost of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). CIGNA's certified claim for costs, detailing the time expended and costs incurred, must be submitted directly to HHS within 60 days of receiving this decision. 4 C.F.R. § 21.8 (f)(1).

The protest is sustained.

Daniel I. Gordon  
Acting General Counsel

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<sup>9</sup> CIGNA raises a number of other issues in its protest concerning the reasonableness of the evaluation and the ultimate source selection. While not sustaining the protest on these issues, we nevertheless believe that the agency should be cognizant of and consider these issues as it implements the recommended corrective action.