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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Cygnus Corporation, Inc.

File: B-292649.3; B-292649.4

Date: December 30, 2003

Hilary S. Cairnie, Esq., and Melissa M. Nichols, Esq., Vorys, Sater, Seymour & Pease, for the protester.

Harvey G. Sherzer, Esq., Scott Arnold, Esq., Tara M. Newmyer, Esq., and Justin A. Chiarodo, Esq., Dickstein, Shapiro, Morin & Oshinsky, for The Hill Group, an intervenor.

Michael Colvin, Department of Health & Human Services, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Discussions with protester were not meaningful, and protest therefore is sustained, where agency (1) failed to advise protester of significant weaknesses in its proposal, and (2) conducted misleading discussions concerning other weaknesses or deficiencies by advising protester prior to submission of final proposal revisions that agreement had been achieved as to all technical and cost issues raised during negotiations when in fact the agency's concerns had not been resolved.

DECISION

Cygnus Corporation protests the Department of Health and Human Services, National Institute of Health's (NIH), award of a contract to The Hill Group (THG), under request for proposals (RFP) No. RFP-NIH-NIDDK-02-02, for support services for the National Institute of Diabetes and Digestive and Kidney Diseases (NIDDK). Cygnus challenges the evaluation of proposals and asserts that the agency failed to conduct meaningful discussions.

We sustain the protest.

The RFP, issued February 21, 2002, contemplated award of a cost-reimbursement contract, with a period of 7 years, for support of NIDDK-sponsored scientific meetings, conferences and workshops, meetings of NIDDK strategic planning groups, and meetings of interagency coordinating committees coordinated and

managed by NIDDK. In particular, the contractor will be required to furnish pre-meeting support, travel support, administrative and on-site support, post-meeting support, documentation, communication services, and technical writing services. In addition, the contractor will be required to maintain the National Minority Research Investigator Communication Network and provide website development support with respect to NIDDK's site on the World Wide Web.

Award was to be made to the responsible contractor whose offer was determined to provide the best overall value to the government. The best value proposal was to be determined based on cost and the technical evaluation factors, including past performance and the following scored technical evaluation criteria and subcriteria: (1) personnel capabilities, including subcriteria for project manager (worth 20 of 100 possible overall technical evaluation points), computer/database specialist (13 points), conference manager (12 points), graphics designer (10 points), and writer/editor (10 points); and (2) organizational capability, including subcriteria for understanding the scope of work (15 points), organizational experience and capability (10 points), and facilities and equipment (10 points). The RFP provided that past performance was not to be scored, but indicated that past performance would be "highly influential" in determining the relative merits of the proposals. Overall, the technical proposal was to receive "paramount consideration" in the selection of the contractor, and all evaluation factors other than cost were, when combined, significantly more important than cost. RFP § M.

Initial proposals were received from eight offerors, including THG and Cygnus. THG's initial proposal, with a proposed cost of \$[DELETED], received a technical score of 88 and was found to be acceptable. Cygnus's initial proposal, with a proposed cost of \$[DELETED], received a technical score of 85 and also was found to be acceptable. The proposals of THG, Cygnus and two other offerors were considered to be "relatively technically equal" and were included in the competitive range. Source Selection Decision (SSD) at 2-3, 28.

NIH opened technical and cost discussions with offerors in the competitive range by letters dated October 9, 2002. Based upon offerors' responses to the October 9 letters, NIH, on December 2 and January 28, 2003, requested additional cost information. The NIH contracting officer, project officer and contract specialist conducted site visits from February 10 to February 13 in which they met offerors' key personnel and toured offerors' facilities. After then conducting oral discussions with offerors, NIH, by letters dated March 26 and March 27, requested final proposal revisions (FPR) to be submitted by April 3. Subsequently, on April 30, as a result of a delay in the expected award date, NIH afforded offerors an opportunity to submit a second FPR.

Based upon its evaluation of the FPRs, NIH determined that THG's offer was technically superior overall. Specifically, the SSD explained that while, as a result of negotiations, all offerors were "qualified," THG's proposal was superior to Cygnus's under several of the technical subcriteria and with respect to past performance.

SSD at 28, 31-34. While NIH generally credited THG's [DELETED] with extensive experience, the agency assigned a major weakness to Cygnus's proposal on the basis that its [DELETED], while possessing [DELETED] experience, possessed only [DELETED]. Likewise, while NIH noted under the conference manager subcriterion that Cygnus had proposed a [DELETED], the agency considered it a weakness that Cygnus's team [DELETED]. In contrast, the agency viewed as advantageous the fact that THG's proposed team [DELETED]. NIH concluded under the graphic designer subcriterion that Cygnus's proposed graphics team appeared to be qualified, but nevertheless assigned the proposal a major weakness on account of the fact that Cygnus had not furnished the agency with any samples of the team's graphics work. In contrast, the agency viewed as advantageous the fact that THG's proposed graphics team [DELETED].

As for the proposed writer/editors, the SSD indicates that the agency assigned a weakness to Cygnus's proposal based on the agency's determination that while the proposed writer/editors possessed [DELETED]. SSD at 12. In contrast, the SSD indicates that the agency assigned a strength to THG's proposal on the basis that its proposed writers/editors had NIDDK and NIH experience. SSD at 10-11. (According to the agency report, however, the evaluation in this regard "played no significant part in the selection for award." Agency Supplemental Report, Nov. 17, 2003, at 4.) NIH also found THG's proposal to be superior under the understanding the scope of work subcriterion on the basis that while THG had described a comprehensive approach to performance, Cygnus, although displaying an understanding of the scope of work, had not presented [DELETED]. SSD at 30. In explaining why it also viewed THG's proposal as superior with respect to organizational experience and capability, NIH noted that THG not only possessed extensive experience managing NIDDK conferences, but in addition it had managed a total of approximately [DELETED] meetings with a total of [DELETED] participants in 2002. In contrast, while the SSD noted that Cygnus had "successfully completed" numerous projects for NIDDK and had performed "substantial relevant work related to this contract, including conference management, publications development, and Web design and maintenance," SSD at 17, the SSD also indicated some doubt about Cygnus's experience and capability. Specifically, the SSD indicated that Cygnus had managed approximately [DELETED] meetings with only [DELETED] participants in 2002; according to the SSD, Cygnus lacked the ability to [DELETED]. SSD at 30 and attach. 2. Further, NIH rated THG's past performance as outstanding but Cygnus's as only good.

Although the cost of THG's proposal (\$[DELETED]) was higher than that of the other proposals in the competitive range, the SSD indicated that "[a]ll of the offerors' costs were considered reasonable, except for [DELETED]." SSD at 28. NIH concluded that notwithstanding its higher cost, THG's proposal offered the greatest value to the government on account of the technical advantages associated with the proposal and THG's superior experience. NIH thereupon made award to THG.

DISCUSSIONS

Cygnus asserts that NIH failed to advise it during discussions of perceived weaknesses in its proposal and, where it did raise other matters during discussions, affirmatively misled it into believing that such other matters had been satisfactorily resolved during discussions.

The Federal Acquisition Regulation (FAR) requires that, where an agency undertakes discussions with offerors, at a minimum, the contracting officer shall discuss with each firm being considered for award “deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond.” FAR § 15.306(d)(3). The FAR also encourages contracting officers to discuss other aspects of the firm’s proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal’s potential for award. *Id.* Discussions must be meaningful, equitable, and not misleading. *ACS Gov’t Solutions Group, Inc., B-282098 et al.*, June 2, 1999, 99-1 CPD ¶ 106 at 13-14. Discussions cannot be meaningful unless they lead a firm into those weaknesses, excesses or deficiencies in its quote or proposal that must be addressed in order for it to have a reasonable chance of being selected for contract award. *TDS, Inc.*, B-292674, Nov. 12, 2003, 2003 CPD ¶ __ at 6-7.

NIH’s discussions with Cygnus did not comply with the requirement that discussions be meaningful. As noted above, in explaining why THG’s proposal was superior to Cygnus’s proposal such that, notwithstanding the significantly lower cost of Cygnus’s proposal, THG’s proposal represented the best value to the government, the source selection authority cited a number of weaknesses in Cygnus’s proposal (as well as strengths in THG’s proposal). NIH, however, failed to raise several of these weaknesses during the discussions with Cygnus. Thus, the agency failed to advise Cygnus that the agency viewed as a major weakness (under the single most important technical evaluation subcriterion) the evaluated limited [DELETED]; had assigned a weakness to Cygnus’s proposal on the basis that [DELETED]; and had concluded that Cygnus, although displaying an understanding of the scope of work, had not presented a [DELETED]. At the least, in conducting discussions with Cygnus, the agency was required to discuss the first of these concerns, since the agency indisputably viewed it as major weakness.

Moreover, while NIH did raise other matters of concern during discussions, the record indicates that the agency misled the protester as to the results of those discussions, advising Cygnus that it had successfully addressed the agency’s concerns when this in fact does not appear to have been the case. In this regard, NIH advised Cygnus during discussions of its concern that the proposed leader of Cygnus’s team of meeting planners would [DELETED]. Further, NIH viewed Cygnus’s failure to furnish samples of its graphics designers’ work to be a major weakness, and the agency therefore requested that Cygnus submit such samples. NIH Discussions Letter to Cygnus, Oct. 9, 2002. In response, Cygnus sought to explain its rationale for the specified level of effort for [DELETED]. In addition,

Cygnus furnished [DELETED]. Cygnus Discussions Response, Oct. 24, 2002. NIH also requested and received from Cygnus additional information regarding, and verification of, several elements of Cygnus's proposed costs, and the agency specifically negotiated [DELETED]. See, e.g., NIH Discussion Letters to Cygnus, Oct. 9, 2002, Dec. 2, 2002, and Jan. 28, 2003.

NIH did not find Cygnus's response with respect to the team [DELETED] to be satisfactory, and, according to the agency, it [DELETED]. Further, as noted above, the agency considered the costs negotiated with Cygnus to be [DELETED]. Nevertheless, notwithstanding its continuing concerns with Cygnus's proposal, the agency advised Cygnus in the March 26 request for an FPR that as a result of the oral discussions with it, "in which we negotiated cost issues concerning your proposal," including the [DELETED], a "total estimated cost of \$[DELETED] . . . is considered to be fair and reasonable." NIH Request to Cygnus for FPR, Mar. 26, 2003. NIH further advised Cygnus on March 27 that "[d]iscussions concerning Cygnus Corporation's proposal have concluded. . . . It is understood that these discussions have resulted in agreement of all technical and cost issues raised during negotiations." NIH Request to Cygnus for FPR, Mar. 27, 2003. Likewise, when the agency afforded Cygnus and the other offerors on April 30 an opportunity to submit a second FPR, it advised Cygnus in its letter that "discussions held on March 26, 2003, resulted in agreement of all technical and cost issues raised during negotiations." NIH Request to Cygnus for FPR, Apr. 30, 2003.

Further, these written agency statements to Cygnus apparently were merely a reiteration of the reported position taken by the agency during the preceding February site visit. According to the sworn declarations executed by three Cygnus employees, the NIH representatives conducting the site visit—who included the NIH contracting officer, project officer and contract specialist—indicated when questioned by Cygnus that there were no unresolved concerns with respect to Cygnus's proposal. In this regard, according to the declaration of Cygnus's vice president, when Cygnus, inquiring as to whether [DELETED] it had furnished provided the agency with the information it was seeking, asked if NIH still had questions as to the graphics designers' work samples, the NIH team members reportedly shook their heads in the negative. Likewise, according to the sworn declarations of Cygnus's president and Cygnus's comptroller, when asked whether the agency had any remaining unresolved concerns with Cygnus's proposal, the agency representatives responded in the negative. Cygnus Comments, Nov. 24, 2003, Declarations of Cygnus President, Vice President, and Comptroller.¹

¹ While NIH has submitted declarations from several members of its site visit team generally stating that the "site visit team never declined to discuss Cygnus's approach to the project, nor any aspect of their presentation," see NIH Comments, Dec. 24, 2003, attach. 1, we do not view this general statement as rebutting the specific declarations of Cygnus's corporate officers with respect to inquiring as to whether the agency had unresolved concerns with Cygnus's proposal.

(continued...)

While NIH was not required to advise Cygnus as to the results of the discussions, it was improper for the agency to mislead Cygnus in this regard. In summary, the record clearly establishes that the agency conducted inadequate and misleading discussions with Cygnus.

TECHNICAL EVALUATION

In addition to NIH's failure to conduct meaningful discussions, our review of the record confirms that the agency relied in part on erroneous information concerning the relative merits of the proposals. For example, as discussed above, in explaining why it viewed THG's proposal as superior with respect to organizational experience and capability, NIH noted that while THG had managed approximately [DELETED] meetings with a total of [DELETED] participants in 2002, and the agency estimated that there would be 53 annual meetings with a total 5,473 participants under the contemplated contract, Cygnus had managed approximately [DELETED] meetings with only [DELETED] participants in 2002. SSD at 30 and attach. 2. As noted by Cygnus, however, the information in its proposal is not consistent with the agency's conclusion that only [DELETED] participants attended meetings managed by Cygnus in 2002. On the contrary, Cygnus's proposal indicated that Cygnus's work under a current 5-year, \$7.95 million contract with the Agency for Healthcare Research and Quality includes planning and managing approximately [DELETED] conferences annually, with the meetings described in its technical proposal as "[DELETED]," and in its business plan as "[DELETED]." Cygnus Technical Proposal at 3-11, Business Plan at 4. In addition, Cygnus's proposal referred to recent meetings it had managed under the Agency for Healthcare Research and Quality contract in which the reported number of participants exceeded 2,000. Cygnus Technical Proposal at 3-11 to 3-14, 4-9. Thus, it was clear from Cygnus's proposal that the number of participants in meetings managed by Cygnus significantly exceeded that assumed by the agency.²

PREJUDICE

We conclude that Cygnus was prejudiced by NIH's actions because it is possible that, when considered in conjunction with the correction of the errors in the technical evaluation, Cygnus's proposal could have been improved enough through further discussions to become the best value offer. In this regard, where we find an

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² According to Cygnus, in 2002, it in fact managed over [DELETED] meetings with an estimated total of over [DELETED] participants. Cygnus Comments, Nov. 24, 2003, at 36.

impropriety in the conduct of discussions, we will resolve any doubts concerning the prejudicial effect of the agency's actions in favor of the protester; a reasonable possibility of prejudice is a sufficient basis for sustaining the protest. International Resources Grp., B-286663, Jan. 31, 2001, 2001 CPD ¶ 35 at 6; National Med. Staffing, Inc., B-259402, B-259402.2, Mar. 24, 1995, 95-1 CPD ¶ 163 at 4. Here, Cygnus has explained how it could have revised its technical proposal so as to address the agency's concerns. For example, Cygnus has explained how it would have proposed [DELETED]; and ensured by several means that samples of the work of its graphics designers were made available to the agency. Further, Cygnus had indicated a willingness to [DELETED] its proposed [DELETED] team leader would devote to the contract in the event that the agency was not convinced by Cygnus's staffing rationale in this regard. In addition, there is no basis for concluding that had it been advised by the agency that its proposed costs were "[DELETED]," Cygnus would not have [DELETED]. Cygnus Comments, Dec. 22, 2003; Cygnus Comments, Nov. 24, 2003, at 46-47, Declarations of Cygnus Vice President and Senior Meeting Manager; Cygnus Discussion Response, Oct. 24, 2003, at 2.

CONCLUSION

We sustain the protest on the basis that NIH's discussions with Cygnus were misleading and otherwise inadequate, and its evaluation of Cygnus's proposal was unreasonable. We recommend that NIH reopen discussions with offerors in the competitive range, and then request revised proposals.³ In the event that its evaluation of revised proposals results in the determination that an offer other than THG's represents the best value, the agency should terminate THG's contract for convenience. We also recommend that the agency reimburse Cygnus the reasonable costs of filing and pursuing the protest, including attorney's fees. 4 C.F.R. § 21.8(d)(1) (2003). Cygnus's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1) (2003).

The protest is sustained.

Anthony H. Gamboa
General Counsel

³ Since the record indicates that the [DELETED] specified in THG's FPR in fact had left THG's employ prior to submission of the FPR, THG Comments, Dec. 22, 2003, the reopened discussions with THG should include establishing who will replace [DELETED] in that position under the contemplated contract.