



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Cygnus Corporation

File: B-275957; B-275957.2

Date: April 23, 1997

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Michael Colvin, Department of Health & Human Services, for the agency. Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The presence of vested marital property rights of a government employee in the assets or income of an offeror controlled by the employee's spouse does not, by itself, establish that the government employee possesses substantial ownership or control of the offeror such that the matter constitutes a conflict of interest precluding a contract award to the offeror.
2. Contracting agency may properly consider the experience of a firm's personnel in evaluating its organizational experience even where the solicitation defines the factor being evaluated in terms of corporate experience.
3. While an offeror's misrepresentation concerning personnel that materially influences an agency's consideration of its proposal generally provides a basis for proposal rejection or termination of a contract award based upon the proposal, where protest that awardee misrepresented experience of principals is not supported by the record, agency's award is not objectionable.

DECISION

Cygnus Corporation, the incumbent contractor, protests the award of a level-of-effort, cost reimbursement contract to Palladian Partners, Inc. under request for proposals (RFP) No. N02-BC-66212-82, issued by the National Cancer Institute (NCI), National Institutes of Health (NIH), Department of Health & Human Services, as a total small business set-aside for technical support services for the Division of Basic Sciences (DBS), a component of NCI. Cygnus principally alleges that a

conflict of interest precluded award by the agency to Palladian; that Palladian made material and prejudicial misrepresentations in its proposal; and that both offerors' technical and cost proposals were miscalculated.

We deny the protest.

BACKGROUND

The RFP, issued July 10, 1996, and as amended, contemplated the award of the cost-plus-fixed-fee contract for a base period with 4 option years. The technical support services to be furnished by the successful contractor to DBS include furnishing all skilled personnel, facilities, equipment, and supplies, except as otherwise specified, for editorial services (administrative support for the preparation of scientific manuscripts and research documents for publication), annual report preparation, arranging conferences, meetings and workshops, miscellaneous general support, and records management.

The RFP required the submission of separate technical and business proposals. The RFP specifically reserved to the agency the right to "make an award [based on] the best advantage of the [g]overnment, cost and other factors considered." The RFP stated that the technical proposals would receive "paramount consideration"; however, the RFP also stated that "[i]n the event that the technical evaluation reveals that two or more offerors are approximately equal in technical capability, then cost may become a significant factor in determining [award]." The RFP listed the following major technical evaluation factors: (1) technical approach (35 points); (2) related experience of company (35 points); and (3) personnel (program manager (15 points) and other personnel (15 points)).¹

Concerning cost, the RFP required the offerors to submit a "Breakdown of Proposed Estimated Cost (Plus Fee) and Labor Hours." For each separate cost estimate, the offerors were required to provide a breakdown by cost elements, including direct labor, fringe benefits, indirect costs, fee, and other costs.² "Other Direct Costs" (defined in the RFP as materials/supply, travel, consultants, postage, reproduction

¹Thus, the maximum number of possible technical points attainable was 100 points. In addition to the evaluation criteria listed above, the RFP contained a mandatory qualification criterion that the contractor be located within 60 minutes ground transportation travel time from the agency for "fast turnaround" requirements. Both Cygnus and Palladian met this criterion.

²The RFP also provided for evaluation of each offeror's "Total Compensation Plan" (salary and fringe benefits of professional employees) to ensure that this compensation reflected a "sound management approach and an understanding of the requirements to be performed."

communications, honoraria and other such costs) were "normalized" in the RFP at a total "assum[ed]" total cost of \$614,477. Costs were to be evaluated for fairness and reasonableness.

The agency received 12 proposals by the closing date, including proposals from Cygnus and Palladian. The agency convened a technical evaluation panel (TEP) which evaluated the technical proposals received. Based on this evaluation of initial proposals, the agency made a competitive range determination which included only the three top-ranked offerors. The initial evaluation results concerning these firms were as follows:

Offeror	Technical Score	Total Price	Adjectival Rating
Palladian	94.8	\$1.8 million	Acceptable
Cygnus	[Deleted]	[Deleted]	Acceptable
Offeror A	[Deleted]	[Deleted]	Acceptable ³

The TEP, in its evaluation of initial proposals--upon which, as stated previously, the competitive range determination was made--found that Cygnus had submitted an excellent proposal. The TEP noted that Cygnus was the incumbent and had "demonstrated a full and clear understanding of the DBS and NCI mission and of services required by this contract." The TEP also noted that "Cygnus has an excellent understanding of DBS services [and has] experience with many biomedical support services [resulting in excellent experience]. The TEP also found Cygnus's project manager to be excellent with "good capabilities in managing costs and tasks and show[ing] signs of flexibility in management of tasks of varying degrees." The TEP noted relatively few "weaknesses" in Cygnus's otherwise excellent and detailed proposal: [Deleted].

Concerning Palladian, the TEP found as follows:

"[Palladian has] extended the 'average technical approach['] by making advances in technology with web based interactions. [Palladian] show[s] extreme capability to perform all tasks even though the company is new. Palladian presented strong proposals from each of its subcontractors which are proposed. The proposal is highly evolved and motivated [and has a] [g]ood understanding of the biomedical missions of the DBS and NCI. [The project manager] has worked with

³The fourth ranked offeror had a technical score of [deleted] with a cost of [deleted]. We will henceforth limit our discussion to the proposals submitted by Cygnus and Palladian.

one of the key players from Base 10 [a firm identified in Palladian's proposal] in a previous company [while employed by Cygnus⁴], so working relationship has already been established. Technical proposal was complete and excellent."

The TEP also found that Palladian listed nine references, as well as its work performance "sources." The TEP specifically noted that "[a]lthough most of [Palladian's] experience comes from other companies, the core personnel have worked together as a team for many years [and] have direct experience with biomedical projects in the incumbent contract." The TEP also found that the firm's program manager was very highly qualified and that the key personnel had "excellent credentials and a large amount of biomedical support experience." The TEP questioned (as "weaknesses") whether Base 10 would be available as a "subcontractor" since there appeared to be lack of "clarity of Base [10] in the administrative structure" and whether multiple subcontractors would be "troublesome." Finally, the TEP noted that Palladian "is [a new company] and may take a bit of time to work out experience with ASI [a firm also identified in Palladian's proposal] and personnel in a new company structure."

In the ensuing competitive range discussions, the agency provided the following in writing to Cygnus:

[Deleted]

Following oral discussions, which with Cygnus were limited to the matters set forth above, the agency received BAFOs. These BAFOs were not scored but were "review[ed by] the Contract Specialist and TEP Chairperson [who] saw no changes in the BAFO which affected the initial evaluation."⁵ Proposed costs in the BAFOs, as received by the agency, were \$1.8 million from Palladian and [deleted] from Cygnus. The agency selected Palladian for award because that firm had "received the highest average technical score from the TEP and submitted the lowest cost BAFO." The agency also states, and the protester does not dispute, that the agency had also determined to award the contract to Palladian, based primarily or

⁴The principals of Palladian are former employees of Cygnus.

⁵According to the protester, the contracting officer informed the firm at the debriefing that technical rescoring of BAFOs was not required since the discussion questions were related to areas which the TEP knew the firms either understood or were capable of performing so that the original scoring had already taken these factors into account. The agency states that "[i]t should be readily apparent to an outside observer that the [discussion questions] were relatively minor and, consequently, unlikely to have a major impact on the relative standing of offerors."

exclusively on the original evaluation scoring, because Palladian had submitted the [deleted].⁶ This protest followed.

ALLEGED CONFLICT OF INTEREST

Cygnus contends that NCI, a component of NIH, improperly awarded the contract to Palladian because that firm is effectively controlled by an NIH official through a substantial and material financial interest in the firm. Cygnus states that Mrs. Marion Millhouse Barker is the co-president and co-owner of Palladian and that Cygnus has recently discovered that she is married to an NIH official, Dr. Jeffrey Barker, who was one of four guarantors of a line of credit submitted with Palladian's proposal that was secured by an indemnity deed of trust on real estate (Dr. and Mrs. Barker's house/private residence).⁷ According to the protester, Dr. Barker "resides in one of Palladian's offices" (his own house) which he risks losing, will financially benefit from the income and a share of the profits of Palladian, as well as the increased value of Palladian, and that Dr. Barker's "legally cognizable financial interests [under Maryland marital property law] in income and profits (which will likely exceed \$100,000), provides compelling evidence of control over Palladian to constitute an actual conflict of interest or at a minimum the appearance of a conflict." Further, the protester states that absent the requisite financial resources, including Dr. Barker's guaranty, Palladian is not a responsible offeror and is not a "viable business."⁸ Finally, Cygnus complains that NCI failed to

⁶The contracting officer states that "[a]fter review of BAFOs all offerors in the competitive range were determined to be technically equal [and] therefore, cost became the determining factor in compliance with the RFP." The protester states that "to make a determination of technical equivalency based upon initial proposals and in advance of receiving responses to technical questions" was improper without properly and thoroughly reviewing and evaluating [the protester's] BAFO and properly increasing its score because it submitted a "perfect BAFO." According to the protester, since "the [a]gency determined that Cygnus and Palladian were technically equal and then conducted oral and written negotiations [with subsequent BAFOs,] it was obligated [to] rescore proposals in those instances where Cygnus addressed and resolved the basis of any weakness assigned by the [g]overnment."

⁷The line of credit was also secured by the cash value of Mr. Barker's life insurance policy.

⁸Cygnus states that:

"Mr. Barker may be more likely to become involved during times of stress rather than at the present time where Palladian has just received its first contract award. . . . Should Palladian receive a show
(continued...)"

follow regulations by not submitting this matter to higher authority to determine whether award to Palladian under these circumstances would have been appropriate; Cygnus, from a legal standpoint in support of this protest ground, principally relies on our decision Revet Envtl. & Analytical Labs., Inc., B-221002.2; B-221003.2, July 24, 1986, 86-2 CPD ¶ 102, for its contention that Palladian should have been excluded from the competition.

The contracting officer responds as follows:

"Dr. Barker's relationship with Palladian is limited to serving as one of four guarantors for a line of credit. Marion Barker used the family residence to help secure the line of credit[,] and it was necessary for both husband and wife to sign as guarantors because they co-own the house. . . . Dr. Barker is not an officer or employee of the corporation and does not participate in its operations [or exercise any control over corporation matters]. . . . [While] we were not aware that Dr. Barker was an NIH employee when Palladian was selected for award[,] . . . had we been aware and pursued the issue, we would have found that Dr. Barker is employed by NIH's National Institute of Neurological Disorders and Stroke rather than NCI (the procuring Institute). The NCI contracting and program staff involved in this procurement are not acquainted with Dr. Barker and work in different buildings from him in the Rockville and Bethesda, Maryland area. Dr. Barker has no involvement with the NCI programs for [which] the contract services are being procured and was not involved in developing the contract requirement."⁹

The agency principally relies on our decision, H H & K Builders, Inc., B-238095, Feb. 23, 1990, 90-1 CPD ¶ 219, as authority for its determination that this matter involves a familial relationship which, by itself, is not a sufficient basis to find either an actual conflict of interest or an impermissible appearance of a conflict.

⁸(...continued)

cause letter and be threatened with a termination for default, Mr. Barker may find the temptation great--and possibly irresistible--to contact his compatriots and lunch-room buddies [at] NIH in view of the fact that his home and the cash value of his life insurance are at risk."

⁹The contracting officer states that the NCI and NIH Ethics Offices orally informed her after the fact that "there are no actual or apparent conflicts of interest or any other grounds resulting from Dr. Barker's guarantorship of the line of credit and/or his marriage to Marion Millhouse Barker for excluding Palladian from the competition."

As a general matter, we have recognized that the responsibility for determining whether a firm competing for a contract should be excluded from the competition in order to avoid actual or apparent favoritism or preferential treatment as a result of a conflict of interest rests primarily with the contracting agency. Revet Envtl. & Analytical Labs., Inc., supra at 3. Similarly, we have held that whether or not an agency's established rules of conduct have been violated is a matter of policy for resolution by the agency, not this Office. Big Sky Resource Analysts; Paul Ronaldo and Norman Fortunate, B-224888; B-224888.2, Jan. 5, 1987, 87-1 CPD ¶ 9, at 3. We will uphold the agency's judgment in these matters so long as its determination is reasonable. John Peeples, B-233167, Feb. 21, 1989, 89-1 CPD ¶ 178, at 2.

We think that the agency's determination that the award to Palladian does not involve a conflict of interest warranting excluding Palladian from the competition was reasonable. The record shows that Mrs. Barker has engaged in her own business career for many years, while Dr. Barker is a medical doctor and scientist at the National Institute of Neurological Disorders and Stroke, an institute separate from NCI. In an affidavit filed with our Office, Dr. Barker states that he "was requested to be a guarantor on the line of credit . . . because the bank desired me, as the spouse of one of the two owners of Palladian Partners, Inc., to agree to the use of the Barker family assets as part of the collateral for the line of credit." He further stated that he does not assist in any way in the business of Palladian.

The presence of vested marital property rights of a government employee in the assets or income of an offeror controlled by the employee's spouse does not, by itself, establish that the government employee possesses substantial ownership or control of the offeror, see B-167036, Feb. 18, 1970, and there is no evidence in the record to show any control here by Dr. Barker over the corporation's affairs. In this regard, the record shows only that each spouse has had separate and independent careers. Accordingly, the fact that Dr. Barker financially assisted his wife by personally guaranteeing a line of credit with a deed of trust on his own home does not provide a basis for a finding of a conflict of interest.

We note that in Revet, relied upon by the protester, the government employee was president of the bidding corporation, was the sole incorporator of the corporation, was listed in the corporation's articles of incorporation as president, treasurer and member of the Board of Directors, and owned all of its stock. The government employee then transferred all assets to his wife and resigned from the corporation. The agency excluded the company from the competition because the circumstances demonstrated the appearance of a conflict of interest. We upheld the exclusion as reasonable.

We think Revet is inapposite. There has been no showing that Dr. Barker was ever in control of or even associated with his wife's business; his financial involvement

now reflects no more than what a spouse reasonably could be expected to do under the circumstances. We therefore find this protest ground to be without merit.

ALLEGED MISEVALUATION OF PALLADIAN'S COMPANY EXPERIENCE

Cygnus alleges that the agency misevaluated proposals under the criteria concerning "related experience of company" and "personnel," both of which were contained in section M of the RFP. The former criterion, among other things, required evaluation of the "experience of the company in work that is related to the proposed work" and required offerors to "provide examples of documents and materials that have been prepared by their organization in the recent past on related projects." The latter criterion required evaluation of "the qualifications of personnel," including the program manager and other personnel. Cygnus complains that the agency substituted individual personnel experience for company experience in the evaluation of Palladian's proposal that resulted in double counting (under two separate criteria) the personnel resources proposed by Palladian. Cygnus also questions whether Palladian, a newly formed company, has any "related experience" as a viable and functional corporate entity.

The record shows that on July 24, 1996, the agency issued amendment No. 001, which contained questions from offerors and the agency's responses, including the following:

"16. Under the evaluation criteri[on], 'Related Experience of the Company,' can the related experience of the company's staff be considered along with the related contract experience of the organization? Newer companies may have experienced staff who have worked on related contracts, but the 'company' may not necessarily have a long history of related contract experience. . . . Would the [g]overnment consider amending the criteria to also consider the related contract experience of key staff?

"Yes, related experience of the company's staff can be considered along with the related contract experience of the organization, however, evidence must be provided showing that the company works efficiently as a unit. The [g]overnment feels that emphasis on historical data is important for the immediate function of the contract upon award. The criteria will not be revised."

We agree with the agency that this amendment reasonably put offerors on notice that staff experience would be considered under the company experience criterion. Moreover, a contracting agency may properly consider the experience of a firm's personnel in evaluating its organizational experience even where the solicitation

defines the factor in terms of corporate experience. Scipar, Inc., B-220645, Feb. 11, 1986, 86-1 CPD ¶ 153, at 10; Energy and Resource Consultants, Inc., B-205636, Sept. 22, 1982, 82-2 CPD ¶ 258, at 3. The agency, as previously stated, found as follows:

"Although most of [Palladian's] experience comes from other companies, the core personnel has worked together as a team for many years. The company, as comprised of [its] proposed personnel, has direct experience with biomedical projects in the incumbent contract. The write-up of relevant experience of staff is impressive and fulfills the RFP requirement."

Based on the RFP amendment and our precedents, we have no legal basis to object to the agency's evaluation of Palladian's staff as fulfilling company experience requirements. Indeed, under the terms of the RFP, as amended, "double counting" of personnel experience was reasonable.

ALLEGED MISREPRESENTATIONS IN PALLADIAN'S PROPOSAL

Cygnus alleges that Palladian's proposal contains numerous misrepresentations which are material and were relied upon by the agency in favorably evaluating Palladian's proposal. Specifically, Cygnus states that Palladian misrepresented the experience of its two principals, Marion Millhouse Barker and Cate Timmerman Freeza, former Cygnus employees, with respect to their responsibilities on the predecessor contract and on other contracts, as well as their respective responsibilities to Cygnus. Cygnus further states that "[a]t a minimum, Palladian has overstated in numerous places in its proposal the qualifications and/or experience of various individuals which it proposed to work on the contract." We give two examples of Cygnus's allegations contained in a table submitted with its comments:

"Palladian Misrepresentation

"1. Proven project staff commitment and experience in meeting the quick turnaround requirements of this contract.

"Actual Facts [according to the protester]

"The commitment and experience referred to was that of [Cygnus], and not that of any individual employees who performed on behalf of Cygnus.

"2. Excellent editorial staff with experience . . . preparing NCI annual reports.

"Actual Facts [according to the protester]

"The majority of persons involved in preparing NCI annual reports are still with Cygnus. No one individual or subset of people prepared NCI Annual Reports; those reports were prepared by a team of Cygnus employees. It would be inaccurate and misleading to suggest that NCI Annual Reports were prepared by any one person or group other than the entire team that actually prepared such reports."

An offeror's misrepresentation concerning personnel that materially influences an agency's consideration of its proposal generally provides a basis for proposal rejection or termination of a contract award based upon the proposal. Prospect Assocs., Inc., B-260696, July 7, 1995, 95-2 CPD ¶ 53, at 4. A misrepresentation is material where an agency has relied upon the misrepresentation and that misrepresentation likely had a significant impact on the evaluation. Id. at 4-5.

Here, we think the protester's allegation concerns reasonable judgmental disagreements as to the extent of involvement of Palladian's principals in Cygnus's prior work as Cygnus employees. At most, we think Palladian's alleged "misrepresentations" amount to "puffery" and do not, in our view, constitute material misrepresentation. As the agency states, "[i]t is neither surprising nor significant that a former employer would, after the fact, offer a different view of the duties and accomplishments of two former employees, when the former employees have become his direct competitors." We also find it persuasive that Cygnus itself submitted letters of commendation in Appendix C of its technical proposal that the firm previously received for prior work; 5 of the 11 letters were addressed to currently proposed Palladian personnel. In effect, Cygnus's own proposal showed that the proposed Palladian personnel previously performed significant work under the predecessor contract for Cygnus and gained corresponding experience.

MISCELLANEOUS ISSUES

Although we have reviewed the entire record and Cygnus's lengthy submissions, the protester raises other numerous issues which we will discuss only in summary fashion. Cygnus contends that the agency failed to adequately evaluate information contained in Cygnus's BAFO which would have raised its score and ranking. We agree with the agency that the discussion items quoted above concerned minor or relatively minor matters of two excellent proposals. [Deleted]. In response to other items, Cygnus provided certificates of current cost or pricing data and a certificate of procurement integrity. In short, we find reasonable the agency's position that the protester's BAFO did not involve any major changes whatsoever that could have affected its evaluation score. Moreover, the agency states that the BAFOs were in fact reviewed in sufficient detail by competent and qualified personnel. We have no basis to disagree.

Cygnus also alleges that the agency failed to conduct a proper cost realism and reasonableness analysis because, for example, the agency failed to evaluate the cost of Palladian's "high technology approach" (a new Internet web site resulting in a total initial cost of \$20,000). As to this contention, we think the amount is de minimis to the overall cost of the contract; moreover, the protester acknowledges that the government "normalized [in the RFP] the Other Direct Costs [such as the website]," and we think the agency was required to follow this solicitation evaluation scheme which called for the normalization of Other Direct Costs. See, e.g., Quality Sys., Inc., B-235344; B-235344.2, Aug. 31, 1989, 89-2 CPD ¶ 197, at 7.

Cygnus also alleges that various additional evaluation errors (concerning cost and technical issues) were committed by the agency, such as alleged misevaluation of Palladian's indirect rate, unequal treatment of offerors [deleted] and other numerous arguments. NCI has responded to each argument, justifying its actions; the awardee responded as well. We have reviewed the entire record, including all relevant evaluation and award decision documents, and find no merit to these protest grounds.

Finally, the protester alleges that the selection decision was faulty. The agency determined that Palladian was the low offeror [deleted] in order to prevail on this final allegation, Cygnus must show that its proposal was so technically superior to Palladian's proposal that the agency was required to pay a [deleted] to Cygnus based on such technical superiority. We find no such technical superiority from this record. That being so, cost here became the determinative factor when the agency effectively determined that the protester and Palladian were essentially equal technically. Ogilvy, Adams & Rinehart, B-246172.2, Apr. 1, 1992, 92-1 CPD ¶ 332, at 5; Lockheed Corp., B-199741.2, July 31, 1981, 81-2 CPD ¶ 71, at 8-9. Accordingly, the award to Palladian is unobjectionable.

The protest is denied.

Comptroller General
of the United States