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**Comptroller General
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**United States Government Accountability Office
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Decision

Matter of: Kellogg Brown & Root Services, Inc.

File: B-400614.3

Date: February 10, 2009

Thomas C. Papson, Esq., David Kasanow, Esq., Jason A. Carey, Esq., and Matthew T. Crosby, Esq., McKenna Long & Aldridge LLP, for the protester.

David P. Metzger, Esq., and Kara L. Daniels, Esq., Arnold & Porter, LLP, for DynCorp International, the intervenor.

Bridget A. Stengel, Esq., and Vera Meza, Esq., Department of the Army, 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.

DIGEST

Agency reasonably determined that the protester's proposal, submitted in response to a competitive solicitation for a task order for combat support services issued under an indefinite-delivery/indefinite-quantity contract, was unacceptable, and reasonably excluded the proposal from the task order competition, where the proposal included an assumption regarding the agency's provision of force protection to contractor employees that, considered most favorably to the protester, rendered the proposal ambiguous with regard to its acceptance of the solicitation's material provisions regarding force protection.

DECISION

Kellogg Brown & Root Services, Inc. (KBR) protests the rejection of its proposal as unacceptable under request for proposals (RFP) No. W52P1J-08-R-0130, issued by the Department of the Army, for the award of a task order for the Kuwait Area of Responsibility (AOR) under the Logistics Civil Augmentation Program (LOGCAP) IV contracts.

We deny the protest.

The Army awarded three indefinite-delivery/indefinite-quantity contracts under the LOGCAP IV solicitation for LOGCAP Combat Support and Combat Support Services augmentation on a global basis to Fluor Intercontinental, Inc., DynCorp International, and KBR. The LOGCAP IV solicitation advised offerors that multiple

task orders would be issued, and that solicitations for these task orders would be competed among the LOGCAP IV contractors, which would be required to submit a proposal for every task order solicitation issued.

On August 27, 2008, the agency issued to the three LOGCAP IV contractors this task order RFP for LOGCAP services for the Kuwait AOR. RFP at 1. The RFP stated that the agency expected “to make one task order award” on a cost-plus-award-fee basis to the offeror whose proposal was determined to provide the best value to the Government, based upon the evaluation factors, listed in descending order of importance, of technical/management approach, past performance, and cost/price. RFP at 4, 23-24. The solicitation added that “[t]his is a best value competition under the provisions of FAR [Federal Acquisition Regulation §] 16.505,” which pertains to the placement and award of task orders. RFP at 23. The RFP included a detailed performance work statement (PWS) as well as detailed instructions for the preparation of proposals. The RFP advised the contractors that the agency intended to award a contract under the RFP without conducting discussions, and that the offerors’ initial proposals should therefore contain the offerors’ best terms from a management, technical, past performance, and cost/price standpoint. RFP, amend. 5, at 15.

The RFP PWS (at 5) addressed contractor security as follows:

Contractor Security. The government will provide U.S. Military force protection and security for contractor personnel on site [in accordance with] Chapter 6, Field Manual (FM) 3-100.21, applicable Theater Anti-Terrorism/Force Protection guidelines, Defense Federal Acquisition Regulation Supplement (DFARS) [§] 252.225-7040(c)(1)(i), and section H19 of the basic contract.

In turn, chapter 6 of Army Field Manual 3-100.21 provides detailed guidance regarding “force protection” to be provided to contractors.¹ Specifically, chapter 6 of the manual defines “force protection” in part as “actions taken to prevent or mitigate hostile actions against [Department of Defense] personnel, resources, facilities and critical information.” AR, Tab 4, Army Field Manual 3-100.21, ch. 6, at 6-1. Chapter 6 continues by explaining that while the “character” of force protection “may change in different situations . . . the process remains the same: an understanding of the threat and the development of a system of indications and warnings that will facilitate a proactive, predictive response to enemy and terrorist action.” *Id.* Chapter 6 of the manual adds that “the Army’s policy has become that when contractors are deployed in support of Army operations/weapon systems, they will be provided force protection commensurate with that provided [Army civilian]

¹ Army Field Manual 3-100.21 is entitled “Contractors on the Battlefield,” and chapter 6 of this manual is entitled “Force Protection.”

personnel.” Id. It further provides that decisions regarding appropriate force protection to be provided participating contractors are made by the combatant commander.² Id. at 6-2.

The agency received proposals from Fluor, DynCorp, and KBR. The agency found during its evaluation of KBR’s proposal that KBR included a “Proposal Assumptions” section, setting forth a list of 17 “ground-rules and assumptions [KBR used] to develop the cost proposal.”³ AR, Tab 13, KBR Proposal, Proposal Narrative, at 3. One of the “ground-rules and assumptions” concerned “force protection,” and stated as follows:

The U.S. Government will provide necessary force protection and security for KBR personnel. This includes, but is not limited to, the security at the KBR work site and movement throughout the Area of Operations, to include between work sites, living/messing areas and ingress/egress to the Area of Operation. It is assumed soldiers will be positioned in over watch of the site and where KBR personnel encounter a hostile threat, it is further assumed U.S. Army personnel will intervene without delay.

Id. at 4.

After reviewing KBR’s proposal, the agency determined that “[t]he terms of KBR’s assumption impose specific force protection requirements on the military, the determination of which rests solely with the Government.” AR, Tab 9, Decision by Task Order Determining Official to Remove KBR from Consideration for Award (Oct. 29, 2008), at 2. The agency concluded that because KBR’s force protection assumption was inconsistent with the force protection terms set forth in the RFP,

² As set forth above, the RFP also incorporated section H19 of the basic LOGCAP IV contracts, and DFARS § 252.225-7040(c)(1)(i). In this regard, section H19 states that “[w]hile performing duties [in accordance with] the terms and conditions of the contract, the Service Theater Commander will provide force protection to contractor employees commensurate with that given to Service/Agency . . . civilians in the operations area unless otherwise stated in each task order.” AR, Tab 9, Decision by Task Order Determining Official to Remove KBR from Consideration for Award (Oct. 29, 2008), at 2. Section 252.225-040(c)(1) of the DFARS, entitled “Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States,” requires that the combatant commander develop a security plan for the protection of contractor personnel, and for the contracting officer to include in the contract the level of protection to be provided to contractor personnel.

³ The RFP did not solicit such ground-rules and assumptions by the contractors beyond those established in the RFP. RFP at 16.

KBR's proposal was "unacceptable" and "has been removed from consideration for award of the subject task order." Id. This protest followed.

KBR argues that the agency's determination that its proposal was unacceptable was unreasonable. The protester first argues that its force protection "assumption is consistent with the terms of the RFP," and "merely describes certain circumstances KBR anticipates may occur during the course of performance and states KBR's understanding of the manner in which the Army would respond." Protest at 10. The protester continues here by providing a lengthy explanation as to why, in its view, the force protection assumption set forth in its proposal "was nothing more than a brief encapsulation of those solicitation provisions" pertaining to force protection. Protester's Comments at 14. The protester argues that "[n]owhere does the Assumption state or suggest that KBR would determine what constitutes 'necessary force protection,'" and that "[i]t is clear to KBR . . . that a contractor cannot issue orders to the military regarding the deployment of military forces for force protection." Protester's Comments at 3, 17.

The protester further argues that the Army's determination that KBR's force protection assumption rendered its proposal unacceptable was unreasonable because "[n]owhere in KBR's proposal is there any explicit or implicit statement by KBR that its performance is contingent upon the [force protection assumption]," and that the "assumption can have no effect on the cost that KBR would ultimately charge to the Army" because of other RFP provisions that require Army approval under "stringently defined conditions" before the contractor can incur force protection costs. Protest at 11. The protester also points out that it "included a nearly identical assumption in its proposal for this same work under the LOGCAP III proposal, and the solicitation and task order for this work under the LOGCAP III contract contains similar force protection provisions." Id. at 11 n.1.

The evaluation of proposals is a matter within the discretion of the contracting agency, and in reviewing protests against allegedly improper evaluations, it is not our role to reevaluate proposals. Rather, our Office examines the record to determine whether the agency's judgment was reasonable, in accord with the evaluation factors set forth in the solicitation, and whether the agency treated offerors equally in its evaluation of their respective proposals and did not disparately evaluate proposals with respect to the same requirements. Contingency Mgmt. Group, LLC; IAP Worldwide Servs., Inc., B-309752 et al., Oct. 5, 2007, 2008 CPD ¶ 83 at 10. A protester's mere disagreement with the agency's judgment does not render the evaluation unreasonable. Landoll Corp., B-291381 et al., Dec. 23, 2002, 2003 CPD ¶ 40 at 8.

The agency explains that "there is perhaps no more crucial issue in a contract for the provision of services on the battlefield, than the level of force protection to be provided by the military to the contractor." Contracting Officer's Statement at 7. The agency's overriding concern with KBR's force protection assumption was that

“the entire assumption implies that KBR will be the one determining what ‘necessary force protection’ it will require.” AR at 4; see Contracting Officer’s Statement at 4; AR, Tab 9, Decision by Task Order Determining Official to Remove KBR from Consideration for Award (Oct. 29, 2008), at 2. The agency explains that this is in direct conflict with the provisions of the applicable contract clauses, and, as incorporated by reference, chapter 6 of Army Field Manual 3-100.21 and the “Applicable Theater Anti-Terrorism/Force Protection Guidelines,” which provide that determinations as to whether force protection is needed and at what level rest with the combatant commander and are to be made in accordance with those publications. AR at 4-5; Contracting Officer’s Statement at 4-5;

The agency also points to several specific clauses in KBR’s assumption that cause the agency concern. For example, the second sentence of KBR’s force protection assumption states that the provision of “necessary” force protection “includes, but is not limited to, the security at the KBR work site and movement throughout the Area of Operations, to include between work sites, living/messing areas and ingress/egress to the Area of Operation.” See AR, Tab 13, KBR Proposal, Proposal Narrative, at 3. The agency argues that the requirement that force protection be provided to KBR personnel “between work sites, living/messing areas and ingress/egress to the Area of Operation” is “an overt augmentation of the solicitation provisions.” Contracting Officer’s Statement at 5. The agency adds that, in its view, KBR’s force protection assumption, through the use of the phrase “includes, but is not limited to,” in describing the force protection to be provided, “establishes a minimum level of force protection to be provided by the military, and then goes on to subject the Government to indeterminate responsibility for the provision of force protection.” Id.

The agency also argues that the last sentence of KBR’s force protection assumption, which states that “[i]t is assumed soldiers will be positioned in over watch of the site and where KBR personnel encounter a hostile threat, it is further assumed that U.S. Army personnel will intervene without delay,” constitutes an “augmentation of the force protection provisions of the solicitation.” Contracting Officer’s Statement at 6; see AR, Tab 13, KBR Proposal, Proposal Narrative, at 3. In this regard, the agency contends that KBR’s assumption that “soldiers will intervene without delay’ imposes a requirement that impinges upon the combatant commander’s latitude in determining the appropriate course of action in hostile circumstances.” Id. at 6.

Finally, with regard to KBR’s argument that its force protection assumption should not cause the agency concern because “KBR included a nearly identical assumption in its proposal for this same work under the LOGCAP III proposal, and the solicitation and task order for this work under the LOGCAP III contract contains similar force protection provisions,” see Protest at 11 n.1., the agency notes that “force protection has been a contentious issue” under that contract. Contracting Officer’s Statement at 8; see AR at 7. The agency specifically states here, and the protester does not argue otherwise, that KBR has requested “reimbursement for

costs of force protection, and when denied KBR submitted a claim of \$19 [million].” AR at 7.

The agency concluded that the acceptance of KBR’s proposal would subject “the Government to increased risk of a contractor claim, or refusal to perform in the event of a dispute concerning what constitutes the appropriate level of force protection,” and thus the agency rejected KBR’s proposal as unacceptable. Contracting Officer’s Statement at 8.

Our review of the record provides no basis to find the agency’s evaluation and rejection of KBR’s proposal unreasonable or otherwise objectionable. As explained by the parties and set forth in chapter 6 of Army Field Manual 3-100.21, “[p]rotecting contractors and their employees on the battlefield is the commander’s responsibility,” and “[t]he mission, threat, and location of contractor operations determine the degree of force protection needed.” AR, Tab 4, Army Field Manual 3-100.21, ch. 6, at 6-2. With regard to the agency’s primary concern, we believe that KBR’s force protection assumption is, considered most favorably to the protester, unclear as to who determines what force protection is necessary. That is, although KBR’s assumption does not specifically state that KBR assumes that it will be able to determine or be required to have input in determinations concerning force protection, it nevertheless provides no guidance in this regard, and is thus ambiguous as to whether the assumption is consistent with, or is taking exception to, the RFP’s force protection provisions.⁴ Given that the solicitation provided that force protection would be provided in accordance with, among other things, chapter 6 of Army Field Manual 3-100.21, which provides that the combatant commander determines, based upon the terms of the manual, the force protection needed for contractor personnel, we find the agency’s rejection of KBR’s proposal because of the ambiguity introduced by KBR’s assumption to be unobjectionable.⁵ Nu-Way, Inc., B-296435.5; B-296435.10, Sept. 28, 2005, 2005 CPD ¶ 195 at 5; Rel-Tek Sys. & Design, Inc., B-280463.3, Nov. 25, 1998, 99-1 CPD ¶ 2 at 4.

⁴ The fact that KBR introduced this ambiguity in its cost proposal does not affect the propriety of the agency’s consideration of the assumption as affecting the proposal’s acceptability. See Contingency Mgmt. Group, LLC; IAP Worldwide Servs., Inc., *supra*.

⁵ In light of our finding that the agency’s rejection of KBR’s proposal because of the agency’s more general concern that KBR’s assumption was unclear with regard to who determines the necessary level of force protection required, we need not resolve the agency’s more specific concerns that certain clauses in KBR’s assumption constituted the “overt augmentation of the solicitation provisions” regarding force protection. See Contracting Officer’s Statement at 5.

The protester argues that the agency should have allowed KBR to clarify its proposal with regard to KBR's force protection assumption. Where a solicitation notifies offerors that contract award may be made without discussions, an agency may engage in clarifications that provide offerors with the opportunity to clarify certain aspects of proposals or to resolve minor clerical errors. Discussions, on the other hand, occur when an agency indicates to an offeror significant weaknesses, deficiencies, and other aspects of its proposal that could be altered or explained to enhance materially the proposals potential for award. When an agency conducts discussions with one offeror, it must conduct discussions with all offerors in the competitive range. The "acid test" for determining whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal. When an offeror is given the opportunity to remove an ambiguity from its proposal, especially where the information provided by the offeror is essential for determining the proposal's acceptability, such an exchange constitutes discussions. Nu-Way, Inc. supra, at 6-7.⁶

Here, had the agency communicated with KBR to resolve, considered most favorably to the protester, the ambiguity created by KBR's force protection assumption, such an exchange would have constituted discussions. As there is generally no obligation that a contracting agency conduct discussions where, as here, the RFP specifically instructs offerors of the agency's intent to award a contract on the basis of initial proposals, and given that the protester has not argued and we see nothing in the record to suggest that the agency's decision not to hold discussions with offerors was improper, we find no basis to object to agency's determination here. Id. at 7.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁶ For this task order competition, the agency indicated in the solicitation that exchanges would be in accordance with FAR part 15, RFP at 15, and the agency relied upon decisions interpreting FAR part 15 in defending the protest. Thus, in analyzing the issues relating to the conduct of exchanges here, we have looked to FAR part 15 and the cases interpreting that part.