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

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## Decision

**Matter of:** JCB Inc.

**File:** B-404946.4

**Date:** September 16, 2011

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Christian B. Nagel, Esq. and Timothy P. Aiken, Esq., Fluet Huber & Hoang, PLLC, for the protester.

David F. Barton, Esq. and Elizabeth Haws Connally, Esq., The Gardner Law Firm, for Kalmar RT Center LLC, an intervenor.

Wade L. Brown, Esq., and Tara Yaldou, Esq., Department of the Army, for the agency. Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest of the contracting agency's determination of awardee's eligibility for award is denied where the record reasonably supports the agency's determination.
  2. Protest that the contracting agency's evaluation contradicted the terms of the solicitation is denied where the record demonstrates that agency's evaluation was in accord with the solicitation.
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### DECISION

JCB Inc., of Pooler, Georgia, protests the award of a contract to Kalmar RT Center LLC, of Cibolo, Texas, by the Department of the Army, under request for proposals (RFP) No. W56HZV-10-R-0018, for light capability rough terrain forklifts (LCRTF).

We deny the protest.

The RFP, issued on July 7, 2010, provided for the award of a fixed-price, five-year requirements contract for LCRTF production and related services, and data. The RFP specified that award would be made to the offeror that:

- a. Represents the best value to the Government, and
- b. Submits a proposal that meets all the material requirements of this solicitation, and
- c. Meets all the responsibility criteria in M.3.7.

RFP, at M.3.6. With regard to the best value evaluation criteria, the RFP stated that the agency would consider the following evaluation factors: technical, price, and small business participation. Id. at M.1(e). The technical factor was further divided into the following three equally-weighted subfactors: (1) beach operations; (2) helicopter lift; and (3) pallet handling operations. Id. at M.4.2. The RFP advised that in determining best value to the government, technical was the most important factor and was more important than price, which was significantly more important than small business participation. Id. The importance of price, however, would increase as the non-price factors were determined to be closer in merit. Id. at M.3.4.

The RFP closed on August 26, 2010. Four offerors, including JCB and Kalmar, were determined to be within the competitive range. Discussions were opened on October 13, 2010, and closed on January 18, 2011. The Army then made award to Kalmar on March 17, and several other offerors, including JCB, subsequently protested. In response, the Army agreed to take corrective action consisting of reevaluating the proposals and making a new best-value decision. Our Office therefore dismissed the protest on April 21. Following the reevaluation, on May 19, JCB was notified that its proposal had not been selected for award and that Kalmar remained the awardee. JCB then requested a debriefing concerning the Army's reevaluation, which it received on May 31. This protest followed.

In its protest, JCB alleges that the Army did not adequately evaluate Kalmar's eligibility for award, and improperly awarded Kalmar extra credit for exceeding the RFP's minimum requirements in contravention of the RFP's stated evaluation scheme. In addition, JCB challenges several aspects of the terms of the RFP. As discussed below, the protester's evaluation challenges are without merit, and its solicitation challenges are untimely.

The evaluation of proposals is a matter within the agency's discretion. IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 7, 13. In reviewing a protest against an agency's evaluation of proposals, our Office will not reevaluate proposals but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with applicable procurement statutes and regulations. Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. A protester's mere disagreement with the agency's judgment in its determination of the relative merit of competing proposals does not establish that the evaluation was unreasonable. VT Griffin Servs., Inc., B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4.

With respect to JCB's argument that the agency inadequately evaluated Kalmar's eligibility for award, JCB does not allege that the agency erred in its evaluation of Kalmar's proposal against any of the RFP's stated evaluation factors. Rather, JCB maintains the agency was required to ensure that Kalmar's proposal met all of the performance requirements established by the scope of work and the purchase description, citing the provision of section M.3.6, providing that offerors must submit

proposals meeting “all the material requirements of the solicitation.” RFP, at M.3.6(b). In this regard, JCB maintains that the agency failed to reasonably consider the risk that Kalmar may not be able to meet the extensive post-award logistics and supportability requirements of the scope of work, set forth in section C.5 of the RFP. JCB alleges that Kalmar’s proposal presented a clear performance risk with respect to this performance requirement due to the fact that Kalmar proposed to build a new LCRTF configuration, rather than modify an existing commercial telehandler forklift.

Notwithstanding JCB’s suggestion to the contrary, offerors were not required to submit detailed information explaining how they would meet the post-award requirements of the scope of work set forth in section C of the RFP. Rather, the RFP’s instructions merely required offerors to submit “[a]n affirmative statement that the Offeror proposes to meet all the requirements of the Scope of Work in Section C and the Purchase Description,” which Kalmar provided. RFP at L.3.3. Nor did the specific evaluation factors established by the RFP provide for consideration of how offerors would address the requirements established under section C of the RFP. For the purpose of evaluating proposals, and making the best value decision, the RFP required offerors to provide detailed information, to include substantiating information, explaining how they would meet certain specific requirements of the Purchase Description. Since Kalmar affirmatively proposed to meet the post-award requirements in section C, and no further evaluation of the advantages or disadvantages presented by each offeror in relation to the scope of work was provided for in the RFP, we have no basis to conclude that the agency’s evaluation was inconsistent with the terms of the RFP, as the protester has alleged.

To the extent JCB questions Kalmar’s actual ability to meet the prospective requirements of the scope of work, such an argument concerns the matter of Kalmar’s responsibility. Our Office does not, however, review affirmative determinations of responsibility, except where the protest alleges that definitive responsibility criteria in the RFP have not been met or identifies evidence of a type not presented in this protest. 4 C.F.R. § 21.5(c) (2010); MD Helicopters, Inc.; AgustaWestland, Inc., B-298502 et al., Oct. 23, 2006, 2006 CPD ¶ 164 at n.40.

In any event, the record reflects that the source selection authority (SSA) thoroughly analyzed Kalmar’s ability to perform under the responsibility criteria, and found that:

The proposed contractor is an industry leader in the material handling equipment manufacturing industry. Though the offeror does not have an item of this size within their standard commercial line, the offeror produces the much larger and more complex RTCH [Rough Terrain Container Handler] vehicle. Review of PPIRS [Past Performance Information Retrieval System] showed no derogatory information with respect to delivery or quality. In addition, the proposed contractor has five production facilities in Cibolo, TX and has proven the ability to produce the much larger RTCH. As such, there is little doubt the offeror has both the ability and capability to

produce the proposed LCRTF with the delivery and quality requirements of the proposed contract.

Responsibility Determination at 2. Based on this record, we have no basis to conclude that the agency failed to adequately review Kalmar's eligibility for award under the RFP.

JCB next alleges that the agency improperly awarded Kalmar's proposal extra credit for exceeding the minimum requirements of the purchase description, in contravention of the RFP's statement that "[t]he Government will not assign credit for any aspect of the proposal that exceeds the minimum requirements in the [purchase description]." RFP at M.1(a). In support of its allegation, JCB points to Kalmar's evaluation results for the "height requirement" of the pallet handling operations subfactor, and the longitudinal grading requirement of the beach operations subfactor.

With regard to the "height requirement," JCB objects to the SSA's determination that "[t]he Kalmar proposal is rated EXCELLENT and considered to be very low risk . . . a strength of Kalmar's proposal is that the height of the cab is shown as [DELETED] resulting in a door opening clearance of [DELETED] in an 8 foot ISO Container." Source Selection Decision Document (SSDD) at 9. JCB argues that this determination indicates that Kalmar's proposal was given more credit for exceeding the "height requirement" by a larger margin than JCB's proposal, which specified an [DELETED] inch cab and received a "good" rating under the pallet handling operations subfactor. However, our review of the record reveals that there was no "height requirement" set forth in the purchase description requirements relevant to the pallet handling evaluation subfactor. Rather, the relevant section of the purchase description required that offerors' proposed LCRTF "shall be able to load and remove standard 40 inch by 48 inch cargo pallets, stacked 2 high, from the 40-inch end, side by side inside an 8 foot tall, 20 or 40 foot long ISO container." Purchase Description at 3.3.15.1. In light of the actual requirement, it is clear that Kalmar was not provided with extra credit for proposing a LCRTF that exceeded a height requirement of the RFP. Instead, the SSA determined that lower height of the cab of Kalmar's proposed LCRTF lowered the risk that the LCRTF would not meet the minimum requirement to load and remove standard cargo pallets in the manner prescribed in the purchase description.

Similarly, with regard to the longitudinal gradability requirement, the purchase description required that the offeror's proposed LCRTF:

Shall be capable of ascending a 45% grade in forward gear range at a speed of not less than 1.5 miles per hour (mi/hr), on a dry concrete surface free from loose material, with the air conditioning at full cool setting, and all lights on, with and without the rated capacity load [4,000 lbs.], using JP-8 fuel.

Purchase Description at 3.3.10. To demonstrate that its proposed LCRTF would meet this requirement, Kalmar conducted a [DELETED] test using a rated load capacity of [DELETED] pounds. In consideration of this test, the SSA stated that “if during [first article] testing Kalmar’s forklift is unable to meet the speed and/or grade requirements, the [DELETED] could be [DELETED] in order to meet the speed and/or grade requirements without requiring other changes to the forklift.” Source Selection Decision Document, at 13. JCB objects to this statement as providing “extra credit” to Kalmar for [DELETED] the 4,000 pound minimum capacity. However, in the context of the purchase description requirements and the focus of the evaluation on the “probability that the offeror will not meet [purchase description] requirements,” see RFP at M.5.2, M.5.3, M.5.4, it is clear that the SSA was not providing Kalmar with extra credit, but instead concluding that Kalmar’s performance of a test using a [DELETED] rated load mitigated the risk that Kalmar’s proposed LCRFT ultimately would not meet the minimum requirement of the purchase description. Accordingly, we have no basis to conclude that the SSA violated the terms of the RFP in the manner that JCB alleges.

JCB also presents two further arguments that our Office considers to be untimely challenges to the terms of the solicitation. Specifically, JCB objects to the agency’s failure to inform offerors of its intention to waive evaluation of past performance. JCB argues that the agency did not describe its general approach to past performance as required by the Federal Acquisition Regulation (FAR), nor did it offer a documented reason for its waiver. JCB asserts that it devoted a significant amount of time and energy in its proposal highlighting its past performance, yet the information was not considered in the evaluation.

The FAR requires that “[a]ll factors and significant subfactors that will affect contract award and their relative importance shall be stated clearly in the solicitation.” FAR § 15.304(d). The FAR also states that “past performance shall be evaluated in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold,” “[e]xcept as set forth in paragraph (c)(3)(iii) of this section,” which provides that “past performance need not be evaluated if the contracting officer documents the reason past performance is not a appropriate evaluation factor for the acquisition.” FAR § 15.304(c)(3)(i), (iii).

Here, the contracting officer documented reasons why past performance was not an appropriate factor prior to the issuance of the solicitation, and therefore did not include past performance among the evaluation factors for award. See Contracting Officer’s Statement, Attachment 3, Past Performance Evaluation Waiver. While JCB now asserts that past performance should have been among the evaluation factors, the argument is untimely at this juncture. Our Bid Protest Regulations contain strict rules for the timely submission of protests. They specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1). Since it was apparent from the face of the RFP that past

performance was not a stated evaluation factor, JCB was required to raise its concerns in this regard prior to the closing time for the RFP.

Finally, JCB alleges that the agency “failed to ensure consistency among solicitation requirements,” in that requirements for electronic diagnostic systems were not equal between new products and modified commercial products. Specifically, the RFP required offerors to “maximize the use of existing embedded Built-in-Test (BIT)/ Built-in Test Equipment (BITE) diagnostic capabilities and fully document and support embedded system software.” JCB Protest at 7; RFP, Amendment 3, at 2. (Emphasis JCB’s). According to JCB, it was unreasonable to require offerors modifying commercial items containing BIT or BITE systems to use those systems in their LCRTF, while allowing offerors constructing a new product to omit BIT or BITE systems. In JCB’s view this requirement disadvantaged offerors proposing to modify a commercial product that contained BIT or BITE systems. As above, however, because this requirement was apparent upon the issuance of amendment 3, JCB was required to raise any objection to this requirement prior to the closing time established by amendment 3. See 4 C.F.R. § 21.2(a)(1). Accordingly, JCB’s final two arguments are dismissed as untimely challenges to alleged improprieties in the RFP.

The protest is denied.

Lynn H. Gibson  
General Counsel