



## Decision

**Matter of:** Kuwait Leaders General Trading & Contracting Company

**File:** B-401015.2

**Date:** May 21, 2009

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GAO, participated in the preparation of the decision.

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### DIGEST

Agency properly excluded protester from competition where, although firm's ineligibility may not have been clear from solicitation, agency had statutory authority to limit competition and executed determination and finding citing that authority, making it clear that it intended to limit competition in a manner that excluded protester; GAO will not recommend that agency undertake useless act of amending solicitation to make clear that protester is ineligible to compete.

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### DECISION

Kuwait Leaders General Trading and Contracting Co. (KLG) protests the determination by the Department of the Army, Joint Contracting Command-Iraq/Afghanistan, that KLG is ineligible to compete under request for proposals (RFP) No. W90U3Z-09-R-0003, for the temporary installation and maintenance of tents, generators, and other support equipment to house military personnel arriving for duty in Iraq.

We deny the protest.

The solicitation, issued February 17, 2009, sought proposals for extra tent housing and life-support equipment at Camp Bucca, Iraq, to support a military "relief in place" (RIP), where approximately 1,600 military personnel rotate into Iraq to replace units that have completed their military duties in Iraq. During an RIP, the incoming and outgoing personnel are simultaneously on the base, creating the need for the extra housing.

During the course of the procurement, the agency determined to limit competition as provided for under the National Defense Authorization Act for Fiscal Year 2008, Public Law (Pub. L.) 110-181. As relevant here, section 886 of this act states that, for products or services to be acquired in support of military operations or stability operations in Iraq or Afghanistan, the Secretary of Defense may determine that “it is in the national security interest of the United States to limit competition, use procedures other than competitive procedures, or provide a preference” because such limitation, procedure, or preference “is necessary to provide a stable source of jobs in Iraq or Afghanistan” and “will not adversely affect military operations or stability operations in Iraq or Afghanistan . . . .” *Id.* at § 886(a) and (b)(2).

In this regard, the Secretary of Defense is authorized to conduct a procurement in which, among other things, “procedures other than competitive procedures are used to award a contract to a particular source or sources from Iraq or Afghanistan.” (Emphasis added.) *Id.* at § 886(a)(2). A source is defined as being “from” Iraq or Afghanistan if it “is located in Iraq or Afghanistan” and “offers products or services that are from Iraq or Afghanistan.” *Id.* at § 886(c)(3).<sup>1</sup> The regulations implementing these provisions, found at Defense Federal Acquisition Regulation Supplement (DFARS) §§ 225-7703-1(a)(2) and (a)(3), allow for the use of “procedures other than competitive procedures to award a contract to a particular source or sources from Iraq or Afghanistan.” *Id.* at § 225-7703-1(a)(3). A written determination must be executed before competition may be limited. *Id.* at § 225-7703-2.

On January 29, 2009, the Army prepared a determination and finding (D&F) to support its decision to meet the requirement through limited competition. The D&F states that the acquisition will be conducted under section 886 and that “other than competitive procedures” will be used “to award a contract to a particular source or sources from Iraq or Afghanistan.” Agency Request for Dismissal, encl. 7, D&F, at 1. The D&F also states, among other things, that using the described procedures is necessary to provide a stable source of jobs in Iraq, lists Iraqi sources that expressed interest in the solicitation, and states that, to implement the limited competition, the solicitation will contain DFARS § 252-225-7026, Acquisition Restricted to Products or Services from Iraq or Afghanistan. *Id.* at 1. The solicitation, issued on February 17, contained this clause, which states that “the contractor shall provide only products or services from Iraq” (as defined in section 886(c)(1) and (2)). RFP at 41.

The Army provided the solicitation to several firms, but not to the protester because it was aware that KLG is not an Iraqi company, but a Kuwaiti company based in Kuwait. Agency Request for Dismissal, encl. 1, at 1. KLG argues that it should have

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<sup>1</sup> A product is defined as being “from” Iraq or Afghanistan “if it is mined, produced, or manufactured in Iraq or Afghanistan,” and a service is from Iraq or Afghanistan “if it is performed in Iraq or Afghanistan by citizens or permanent resident aliens of Iraq or Afghanistan.” *Id.* at § 886(c)(1) and (2).

been permitted to compete under the RFP. In this regard, KLG cites the language of DFARS § 252-225-7026, included in the solicitation, which requires only that contractors use services or products from Iraq or Afghanistan in the performance of a contract, not that the contractor be an Iraqi company. KLG also contends that the statutory language “a particular source or sources from Iraq” should be read to include firms “operating” in Iraq. Protester’s Supplemental Response to Agency’s Dismissal Request at 1. KLG concludes that, since it “operates” in Iraq and intends to utilize Iraqi products and services, it meets the requirements of DFARS § 252-225-7026, and thus should be permitted to compete. Protester’s Response to Dismissal Request, at 2.

The Army maintains that it was authorized by the act to limit the competition to Iraqi firms, and that the record clearly shows that it intended to do so. In this regard, the Army contends that the plain language of section 886 of Pub. L. 110-181 and DFARS § 225-7703-1(a)(3) authorizes it to limit competition to Iraqi companies, and cites the language in its D&F as establishing its intent to invoke this authority to make award to a source “from Iraq.” Agency Supplemental Dismissal Request, at 3.

We agree with the protester that the language in the solicitation does not expressly exclude non-Iraqi firms from competing; the only provision incorporated in the solicitation to limit competition—DFARS § 252-225-7026—requires that the contractor provide Iraqi products and services, but does not address the origin of the contractor. This conclusion notwithstanding, we find no basis to object to the agency’s actions, since we think the act confers authority to limit competition to Iraqi companies, and the record shows that the agency intended to do so. In this regard, as noted, under the act a source is “from Iraq” if it is “located in Iraq” (and offers products or services from Iraq). The agency interprets this language as referring only to Iraqi companies, and we agree with this interpretation. First, it is consistent not only with the plain language of the act, but also with its underlying purpose—because of its permanent connection to Iraq, an Iraqi company reasonably may be viewed as more likely than a non-Iraqi company to provide a stable source of jobs in Iraq. See Pub. L. 110-181, § 886(a) and (b)(2).<sup>2</sup> Moreover, the protester’s alternative interpretation—that “from Iraq” and “located in Iraq” refer to sources operating in Iraq—is based on a term—“operating”—that does not appear in the act. If this was the intent underlying the act, it easily could have been expressed by use of this term or other similar language. See, e.g., AlliedBarton Sec. Servs. LLC, B-299929 et al., Oct. 9, 2007, 2007 CPD ¶ 175 (the Stafford Act establishes preference for firms “residing or doing business primarily in the area affected . . .”).

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<sup>2</sup> Moreover, our Office gives deference to the interpretation given a statutory provision by an agency charged with the administration of the statute. See HAP Constr., Inc., B-280044, B-280044.2, Sept. 21, 1998, 98-2 CPD ¶ 76 at 5.

Accordingly, we conclude that the agency properly determined that KLG is ineligible to compete because it is not a source from Iraq. Requiring the agency to amend the solicitation to make KLG's exclusion clearer would serve no purpose; KLG would remain ineligible for award. We will not recommend such a useless act. See Arrow Eng'g, Inc., B-215585, Dec. 26, 1984, 84-2 CPD ¶ 702 at 3.

In its response to the agency's dismissal request, KLG asserts that, based on "information and belief," the awardee is actually a Kuwaiti company that is affiliated with a registered Iraqi company and has no Iraqi employees. Protester's Supplemental Response to Agency's Dismissal Request, at 6. In order to have standing to protest a federal procurement, a protester must be an interested party, that is, an actual or prospective offeror whose direct economic interest would be affected by the award of, or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a) (2008). Since, as noted above, KLG was properly determined to be ineligible for award because it is not an Iraqi firm, and because there are other offerors that responded to the RFP with a more direct economic interest in challenging the awardee's eligibility, it is not an interested party for purposes of challenging the award to another offeror.

The protest is denied.

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Acting General Counsel