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## Decision

**Matter of:** A P Logistics, LLC

**File:** B-401600

**Date:** October 14, 2009

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Katherine S. Nucci, Esq., and Timothy Sullivan, Esq., Thompson Coburn LLP, for the protester.

Maj. C. Peter Dungan, Department of the Army, for the agency.

Christina Sklarew, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

In a negotiated procurement that required the submission of a small business subcontracting plan, which was not considered as part of the technical evaluation, protest that the agency did not negotiate the acceptability of the protester's subcontracting plan is denied, where the agency identified its concerns with the protester's plan during discussions and the protester failed to adequately address those concerns in its revised proposal.

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### DECISION

A.P. Logistics, LLC (APL), of Anchorage, Alaska, protests the award of a contract to Agility Defense & Government Services, Inc., of Alexandria, Virginia, under request for proposals (RFP) No. W9124J-09-R-0007, issued by the Department of the Army for storage services for privately-owned vehicles. The Army rejected APL's proposal because it found that APL had not submitted an acceptable small business subcontracting plan. APL complains that the Army was required to negotiate with the protester to correct any perceived weaknesses in its plan.

We deny the protest.

The RFP provided for award of an indefinite-delivery/indefinite-quantity contract on a "best value" basis and identified the following evaluation factors: mission capability, past performance, small business participation, and price. RFP at 52. Offerors were informed that the agency intended to make award without conducting discussions and cautioned offerors that their initial proposals should contain the offeror's best terms from a price and technical standpoint.

Large business offerors, like APL, were instructed to submit small business subcontracting plans with their initial proposal:

Each Large Business Offeror shall provide a Small Business Subcontracting Plan that contains all the elements required by FAR [Federal Acquisition Regulation] Clause 52.219-9. This plan shall be submitted separately from the Small Business Participation information required above, which applies to both Large and Small Businesses. The Subcontracting Plan is not a requirement for evaluation in source selection, but rather, a requirement for award to a Large Business and it will be incorporated into any resultant contract.

RFP at 48.<sup>1</sup> In this regard, offerors were advised that “acceptance of the offeror’s small business participation proposal does not preclude the requirement required in FAR Part 19.702 for submittal and approval of a Subcontracting Plan.”<sup>2</sup> RFP at 52.

The Army received three proposals, including APL’s and Agility’s. Discussions were conducted with all three offerors. With respect to APL’s proposal, the Army identified a number of weaknesses and concerns under each of the evaluation factors, including the small business participation factor. See Agency Report (AR), Tab 8, Army Discussions Letter to APL. Under a separate heading, the Army also identified its concerns with APL’s submitted small business subcontracting plan; among other things, the Army informed APL that its subcontracting plan did not indicate the total amount of the contract that would be subcontracted, did not

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<sup>1</sup> FAR Clause 52.219-9, Alternate II, as relevant here, lists the various types of small business concerns to be addressed (such as veteran-owned, small disadvantaged, and women-owned small businesses) and specifies that the plan be included in and made a part of the resultant contract; that the plan be negotiated within the time specified by the contracting officer; and that any failure to submit and negotiate a subcontracting plan would make the offeror ineligible for award of a contract.

<sup>2</sup> FAR § 19.702(a)(1) provides as follows:

In negotiated acquisitions, each solicitation of offers to perform a contract or contract modification, that individually is expected to exceed \$550,000 (\$1,000,000 for construction) and that has subcontracting possibilities, shall require the apparently successful offeror to submit an acceptable subcontracting plan. If the apparently successful offeror fails to negotiate a subcontracting plan acceptable to the contracting officer within the time limit prescribed by the contracting officer, the offeror will be ineligible for award.

address the types of services/supplies to be subcontracted or include a breakdown of which supplies/services would be planned for subcontracting in the different small business categories, and did not describe the methods used to develop goals and to identify potential sources. Id. at 3-4.

APL submitted a revised proposal, which, among other things, made changes to its small business subcontracting plan. The contracting officer, with the assistance of the Army's small business representative and the Small Business Administration Procurement Center Representative, reviewed APL's revised small business subcontracting plan and found it deficient in five areas. The contracting officer found that APL's plan still did not indicate the total dollar amount of the contract to be subcontracted, did not satisfy all of the Department of Defense's suggested small business and small disadvantaged business subcontracting goals, did not address the types of supplies or services to be subcontracted or provide a breakdown of supplies/services to be subcontracted, and did not describe the methods used to develop the plan's goals. See AR, Tab 10, Individual Subcontractor Plan Checklist and Review, at 3.

The Army evaluated Agility's and APL's revised proposals as follows:

<b>Factor</b>	<b>Agility</b>	<b>APL</b>
Mission Capability	Excellent	Excellent
Past Performance	Low Risk	Low Risk
Small Business Participation	Acceptable	Marginal
Price	\$30,920,441	\$24,504,468

AR, Contracting Officer's Statement, at 2.

The source selection authority (SSA) acknowledged APL's price advantage, but agreed with the contracting officer that APL was ineligible for award because its small business subcontracting plan was unacceptable. AR, Tab 11, Source Selection Decision Document, at 3-4. Award was made to Agility, and this protest followed.

The crux of APL's arguments is that, following discussions and revised proposals, the agency was required to negotiate with APL with respect to its small business subcontracting plan. Citing FAR § 19.702(a)(1), APL contends that the requirement that "the apparently successful offeror" submit an acceptable subcontracting plan indicates that the agency would negotiate a subcontracting plan only after the agency had identified the apparently successful offeror. In APL's view, even though the Army had addressed during discussions the agency's concerns with APL's subcontracting plan, the Army was required to further negotiate with APL after revised proposals, if the firm was identified as "the apparently successful offeror" (which APL contends it would be if it were not found ineligible due to its subcontracting plan). APL, however, does not challenge the agency's determination that its subcontracting plan was unacceptable, nor does it contend that the Army did

not adequately identify the agency's concerns with APL's subcontracting plan during discussions.

We agree with the protester's premise that where, as here, the quality and completeness of the subcontracting plan was not to be evaluated as part of the evaluation of proposals, the subcontracting plan requirement concerns a matter of responsibility, so that "an agency request for an updated subcontracting plan does not constitute discussions or require that revised proposals be solicited from all offerors." See A. B. Dick Co., B-233142, Jan. 31, 1989, 89-1 CPD ¶ 106 at 3-4; cf. Computer Sci. Corp. et al., B-298494.2 et al., May 10, 2007, 2007 CPD ¶ 103 at 10 (agency's exchanges with offerors with respect to their proposed subcontracting plans were discussions, where the solicitation provided for the comparative assessment of the merits of the plans as part of the agency's technical evaluation). Thus, it was within the contracting officer's discretion to negotiate the details of APS's subcontracting plan. Here, however, the Army had already asked APL during both written and oral discussions to provide answers to specific questions concerning the firm's subcontracting plan, and APL had failed to adequately respond to the agency's concerns. We do not agree that the Army was required, in these circumstances, to revisit its nonresponsibility determination by providing APL another opportunity to address the same questions that it had failed to answer during discussions. See Kilgore Flares Co., B-292944 et al., Dec. 24, 2003, 2004 CPD ¶ 8 at 10-11 (agency was not required to continue to discuss the protester's responsibility where protester had provided inadequate response to agency's concerns); Concepts Bldg. Sys., Inc., B-281995, May 13, 1999, 99-1 CPD ¶ 95 at 6-7 (agency not required to engage in further negotiations concerning financial responsibility where protester responded in piecemeal fashion and informational deficiencies remained).

The protest is denied.

Lynn H. Gibson  
Acting General Counsel