



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Kongdan Kumnan Restaurant/Good Food Service

File: B-276846.2

Date: February 23, 1998

John E. Gagliano, Esq., Cohen, Gettings, Dunham & Davis, P.C., for the protester. Col. Nicholas P. Retson, Maj. Jonathan C. Guden, and Maj. Nathanael Causey, Department of the Army, for the agency. Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected protester's proposal for failure to establish local (Korean) source status as required by solicitation, where claimed local status was based on United States firm's consulting agreement with local Korean company, and agency reasonably determined that agreement showed U.S. firm, not Korean company, would have control and principal responsibility for performance of the contract.

DECISION

Kongdan Kumnan Restaurant/Good Food Service (KKR/GFS) protests the rejection of its proposal, under the Department of the Army request for proposals (RFP) No. DAJB03-96-R-0098, for food service operations at Army dining facilities in the Republic of Korea (ROK).

We deny the protest.

The RFP contemplated the award of a fixed-price contract to the lowest-priced, technically acceptable offeror for a base year, with four 1-year options. Section L of the RFP, relating to the local source requirement, provided:

All sources may submit a proposal, however, the ROK-US SOFA prohibits the U.S. from granting invited Contractor status if a fair and reasonable, technically acceptable offer is received from a responsible local source. Should this occur, the Government would then consider for award only those offerors that have shown authorization and capability to compete and perform as a local source. Any U. S. Contractor with capacity to qualify as a local source must submit such documentation in the initial proposal. If a U.S. contractor provides such documentation in the initial proposal, it may submit a price proposal as an invited contractor and as a local contractor.

Several local source proposals were received, so the contracting officer set aside all proposals from U.S. firms and did not consider them further. Since KKR/GFS' proposal cover sheet indicated that it was submitted by "Kongdan Kumnan Restaurant and Good Food Service, Inc. (consultant)," the contracting officer initially believed the proposal was from a local source. However, after evaluating the proposal, the Army suspected collusion between KKR/GFS and another offeror, and thus requested it to withdraw the offer. The protester refused and filed a protest with our Office (B-276846), challenging the Army's position. The contracting officer ultimately agreed to retain KKR/GFS in the competition, and the firm withdrew its protest.

Three proposals, including KKR/GFS', were included in the competitive range. In reevaluating KKR/GFS' proposal, the agency identified several deficiencies. KKR/GFS attached to its proposal a "consulting services agreement," executed on March 5, 1997, for purposes of this solicitation, in which GFS, a U.S. company based in Maryland, with extensive experience in providing food services to U.S. federal agencies, was named "consultant," while KKR, a local Korean company engaged in the food service and restaurant business, was named "client." During oral discussions with KKR/GFS, the agency pointed out the deficiencies in the proposal, including its failure to show the offeror's status as a local source, and confusion and inconsistencies with regard to the relationship between KKR and GFS. KKR/GFS submitted with its revised proposal an amended "consulting agreement" between GFS and KKR. This agreement stated that the two companies would perform the contract under the name of "KKR/GFS," that the consultant would have "full authority on all matters pertaining to this contract including but not limited to Managing, Operating and Administering the dining facilities," and would be responsible for "[a]ll invoicing and finance operations," while the Kongdan Kumnan Restaurant would provide an "understanding of Korean Law as well as recruitment of a labor force as needed to support this contact."

It appeared to the contracting officer from the terms of this agreement that the KKR/GFS revised proposal failed to establish local source status. He therefore requested a legal review by the Chief Counsel to the Korea Contracting Command (CCK). After reviewing the consulting agreement, the CCK determined that, while the Korean restaurant is apparently an established local firm, the KKR/GFS proposal was not submitted by a local source, since the U.S. firm appeared to be using KKR to obtain local contractor status, while having complete authority over and responsibility for performing essentially the entire contract. Subsequently, the International Affairs Division, Office of the Judge Advocate, U.S. Forces Korea and Eighth U.S. Army, which is responsible for interpreting Korean law for all U.S. military forces within Korea, not only concurred that the offeror was not a local source, but also found that, since the consulting agreement gave the consultant virtually total control over the KKR/GFS relationship, this potentially would be viewed as the U.S. firm being in violation of Korean law and subject to criminal penalties for improperly operating a business in Korea. Based on these legal

opinions, the contracting officer concluded that the KKR/GFS revised proposal did not establish local source status and eliminated it from further consideration. On November 7, award was made to Kumbo Products Co. Ltd. as the offeror submitting the lowest-priced, technically acceptable proposal.

KKR/GFS argues that its proposal was from a local source, and therefore was rejected improperly, since KKR was the prime contractor under the consulting agreement, and had obtained all the requisite Korean business licenses and authority to perform the work required in the solicitation, and GFS was only KKR's consultant. KKR/GFS seems to assert that KKR, not GFS "would have a substantial role in the performance of the contract," as KKR would (1) supply the local labor necessary to fulfill the contract; (2) ensure that the contractor is in compliance with Korean law; and (3) control the "financial fruits" of the contract, since government payments under the contract would be deposited directly into KKR's bank accounts, from which GFS would merely be paid consulting fees.¹

In reviewing an evaluation, we will examine the agency's conclusions to ensure that they are reasonable. See Comarco, Inc., B-249697.2, Jan. 26, 1993, 93-1 CPD ¶ 65 at 4. Here, we conclude that the agency reasonably rejected the KKR/GFS proposal on the basis that it did not show that the offeror was a local source. Rather, as the agency found, we think the available information supported the conclusion that, based on contract responsibilities and control under the consulting agreement, GFS would in reality be the prime contractor. The evidence in this regard was extensive. First, while the offer included references to KKR/GFS, it also referred to Good Food Service, Inc., and Good Food Service/KKR as the offeror or contractor. Further, the offer included the following indications that it actually was being submitted by GFS: (1) all offeror information in the proposal pertained solely to GFS--the listing of prior contracts, place of incorporation (the District of Columbia), and business address for remittance of payments; (2) in the sections covering independent price determination certification, claims and requests for contract adjustment or relief, and individuals authorized to negotiate on behalf of the offeror, only officers or employees of GFS were listed; (3) the letters of intent submitted by GFS' proposed employees state that "Good Food Service, Inc. is offering" the employment and that "[t]his offer is contingent upon Good Food Service, Inc. becoming the successful bidder" under the solicitation; (4) the letter of credit and various debt instruments submitted all show the corporate credit and liabilities of GFS or its president;

¹In its December 29 comments on the agency report, KKR/GFS argues that the local source issue is only another attempt by the Army to improperly eliminate its proposal from the competition. To the extent that the protester means that the Army is biased against it, this is an untimely allegation, since KKR/GFS knew of this argument when it filed its November 17 protest, but failed to raise it within 10 days of this date. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1997); OHM Remediation Servs. Corp., B-274644 et al., Dec. 23, 1996, 97-1 CPD ¶ 4 at 9.

(5) only the general manager of GFS signed the certificate of procurement integrity; and (6) the offer and amendments were signed only by GFS' president, as "contractor/offeree."

These indicia are reinforced by the absence in the proposal or consulting agreement of any information to the contrary, and the fact that the consulting agreement actually supports the interpretation that GFS is the contracting entity. In this regard, notwithstanding the protester's argument that the consulting agreement establishes KKR as the prime contractor, the agreement in fact contains no such representation; it refers to KKR as the "client," not as the prime contractor or offeror. Further, although the agreement provides that KKR would be responsible for supplying the local labor force and ensuring that the contractor is in compliance with Korean law, the agreement otherwise appears to vest in GFS complete control of and responsibility for contract performance, by virtue of the statement that GFS has "full authority on all matters pertaining to this contract," including managing, operating and administering the dining facilities, and responsibility for all invoicing and finance operations. We also see nothing supporting GFS' contention that KKR would be in complete control of the "financial fruits" of the contract, and that payments under the contract would be deposited directly into KKR's local Korean bank accounts. Indeed, the proposal supports the opposite conclusion. Specifically, as discussed above, the proposal cover sheet, signed by the president of GFS, indicates only the business address of GFS as the address for remittance under the contract, and the section in the RFP requesting the name, address, and account number of the bank authorized for delivery of checks due under the contract was left blank, in which circumstance the RFP provided that checks would be mailed to the contractor's address listed on the proposal's cover sheet--that is, GFS'.

We conclude that the agency reasonably determined that the information in the KKR/GFS proposal did not establish the offeror's local source status, and therefore properly eliminated the proposal from the competition.²

KKR/GFS raises other arguments which we find to be without merit. First, KKR/GFS argues that the Army improperly failed to notify it any time prior to award that the KKR/GFS proposal failed to show the offeror qualified as a local source. However, the record shows that KKR/GFS acknowledged to the Army that

²Although we need not decide the issue here, we note that the ambiguity in the KKR/GFS proposal also raises a question as to whether the identity of the offering entity was sufficiently established in the proposal. Ambiguity as to the offeror/contractor renders an offer technically unacceptable, since there is no party that is clearly bound to perform the obligations of the contract. See Sunrise Int'l Group, Inc.; Eagle III Knoxville, Inc., B-252735, B-252735.2, July 27, 1993, 93-2 CPD ¶ 58 at 2-3; Dick Enters., Inc., B-259686.2, June 21, 1995, 95-1 CPD ¶ 286 at 2, recon. denied, B-259686.3, Nov. 16, 1995, 95-2 CPD ¶ 223.

the agency raised this deficiency with KKR/GFS during discussions. Specifically, KKR/GFS, in its electronic mail message to the Army summarizing the contents of the discussions, stated as follows: "Issue #1: Clarification on local source status, i.e., consultant, subcontractor, Joint Venture, etc." Second, KKR/GFS argues that the agency either does not know or failed to try to learn that KKR and GFS were informed by the Korean authorities that their business arrangement was acceptable. However, the KKR/GFS proposal did not include any such information; an offeror bears the burden of submitting an adequately written proposal including all relevant information, and such information cannot be submitted after the fact to establish that the agency's evaluation was unreasonable. See Wyle Labs., Inc., B-260815.2, Sept. 11, 1995, 95-2 CPD ¶ 187 at 5. Finally, KKR/GFS argues that award to Kumbo is improper, because the firm failed to meet the RFP requirement for offerors to have at least 2 years of food service experience. Even if we sustained the protest on this ground, the other competitive range offeror, not KKR/GFS, would be in line for award. Under these circumstances, KKR/GFS is not an interested party eligible to protest on this ground. 4 C.F.R. § 21.0(a); Monopole, S.A., B-252745, July 23, 1993, 93-2 CPD ¶ 51 at 7 n.3.

The protest is denied.

The Comptroller General
of the United States