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Decision

Matter of: Kellogg, Brown & Root Services, Inc.–Reconsideration

File: B-309752.8

Date: December 20, 2007

DECISION

Kellogg, Brown & Root Services, Inc. (KBRSI) asks that we reconsider our decision, Contingency Mgmt. Group, LLC; IAP Worldwide Servs., Inc., B-309752 et al., Oct. 5, 2007, 2008 CPD ¶ ___, in which we sustained the protests of the award of contracts to KBRSI, Fluor Intercontinental, Inc., and DynCorp International under request for proposals (RFP) No. W52P1J-06-R-0049, issued by the Army Sustainment Command, Department of the Army, for logistics support on a global basis. In its request for reconsideration, KBRSI complains that in sustaining the protests, our Office failed to find competitive prejudice, improperly relied on information outside of the contemporaneous evaluation and source selection record in determining that the agency misunderstood an aspect of KBRSI's technical proposal, misconstrued a government audit report regarding KBRSI's business systems, and improperly recommended that discussions be reopened.

We deny the request for reconsideration.

The acquisition was for Logistics Civil Augmentation Program (LOGCAP) Combat Support and Combat Service Support (CS/CSS) augmentation on a global basis. RFP at 14-17. The RFP provided for award of up to three indefinite-delivery/indefinite-quantity contracts for a base period of 1 year with nine 1-year options. Award was to be on a “best value” basis, considering management, past performance, technical (scenario), and cost/price. Id. at 99-102. Among the items evaluated was each offeror’s response to a fictional “scenario” that was provided with the RFP. Id. at 94-95. After conducting a comprehensive evaluation, the agency selected Fluor, KBRSI, and DynCorp for award, and two other offerors (Contingency Management Group, LLC, and IAP Worldwide Services, Inc.) protested.

Our Office sustained the protest. We found that the agency’s evaluation of Fluor’s technical proposal was unreasonable and evidenced unequal treatment, given that Fluor’s technical approach contained material that expressly differed from the assumptions set forth in the solicitation’s scenario, and there was nothing in the

contemporaneous evaluation record indicating that the agency considered the proposal's stated assumptions. We also found that the agency misunderstood KBRSI's technical approach to providing equipment, and evaluated this approach in a manner that was inconsistent with its evaluation of another offeror's proposal. We found that the agency miscalculated KBRSI's business systems under the management factor when it failed to adequately consider Defense Contract Audit Agency (DCAA) comments concerning KBRSI's business systems. Finally, we found that the agency did not adequately explain the basis for its evaluation of proposed staffing approaches, specifically what percentage or range of percentages of Host Country Nationals, Third Country Nationals, and Expatriates were acceptable or constituted a weakness or strength in the evaluation.

We recommended that the Army reopen discussions, request and review revised proposals, evaluate those submissions consistent with the terms of the solicitation, and make a new source selection. In the event a proposal or proposals other than KBRSI's, Fluor's, and DynCorp's were found to represent the best value to the government, one or more of the contracts previously awarded should be terminated and a contract be awarded to the successful offeror or offerors in accordance with the terms of the RFP.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.14(a)(2007). The repetition of arguments made during our consideration of the original protest and mere disagreement with our decision do not meet this standard. R.E. Scherrer, Inc.-Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274. As discussed below, KBRSI fails to satisfy the standard for reconsideration.

For example, in its request for reconsideration, KBRSI does not challenge our conclusion that Fluor's proposal contained material that expressly differed from the assumptions set forth in the solicitation's scenario, or our conclusion that there is nothing in the contemporaneous evaluation record indicating that the agency considered the proposal's stated assumptions. In other words, KBRSI has not pointed to any factual or legal error warranting our reconsideration of this aspect of the underlying decision. Instead, KBRSI simply complains that the underlying decision "failed to find competitive prejudice" and that, even if there were prejudice, a reevaluation of Fluor's proposal, as opposed to reopening discussions and requesting and evaluating revised proposals, was all that would be necessary under the circumstances. Reconsideration Request at 3 n.2.

KBRSI's arguments provide no basis to reconsider our decision that offerors were prejudiced by the agency's actions with respect to Fluor's proposal. It is well settled that prejudice is an essential element of every viable protest, McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher,

102 F.3d 1577, 1681 (Fed. Cir. 1996), and although we did not expressly address prejudice in our decision, competitive prejudice is implicit in any decision in which we sustain the protest, and we considered, and found, prejudice here as well. KBRSI's other arguments reflect only mere disagreement with our recommendation for corrective action, which, as noted above, does not meet the standard for reconsideration. We believe that the reopening of discussions and the request for, and the evaluation of, revised proposals, continues to be the appropriate remedy because it will allow the agency to correct a material and prejudicial flaw in its conduct of the procurement by affording it the opportunity to discuss with Fluor its scenario assumptions and, with respect to the other competitive range offerors, it will allow the agency to discuss perceived areas of concern with their proposals. The bottom line is that, as a result of reopening discussions, all offerors will be given a meaningful and equal opportunity to compete. On this record, there is no basis for our Office to reconsider the underlying decision addressing the evaluation of Fluor's proposal.

Next, KBRSI's requests reconsideration of our decision that the agency misunderstood KBRSI's technical approach to providing equipment and evaluated this approach in a manner that was inconsistent with its evaluation of another offeror. Reconsideration Request at 10-18. In our decision, we pointed to language in KBRSI's proposal, where KBRSI described [DELETED] as an "in-country vendor" that could "immediately provide" KBRSI with the heavy equipment required, adding that the use of "rental equipment that was available locally . . . eliminate[d] the need to ocean freight the heavy equipment." *Id.* at 14; KBRSI TEP at CS-94; KBRSI Cost/Price Volume at 792. In our view, the fact that [DELETED] planned to obtain the equipment from a source within Sierra Leone was confirmed by a written statement from KBRSI's counsel, made during the course of our consideration of the protests, that "[i]t is KBR[SI]'s position, as stated in KBR[SI]'s proposal, that the equipment IS available locally." KBRSI's Counsel's E-mail (Aug. 28, 2007). Again, since the evaluation and rating of KBRSI's proposal under the technical evaluation factor as "good" overall was, at least in part, predicated on the agency's apparent misunderstanding of this aspect of KBRSI's technical approach (that is, the agency believed that [DELETED] would acquire the heavy equipment from outside Sierra Leone), we could not find the evaluation reasonable. Decision at 14.

KBRSI objects to our referral to a written statement of its counsel during the development of this protest, arguing that the statement was not part of the contemporaneous evaluation and source selection record, and therefore should not have been considered. Reconsideration Request at 13-14, 16-17. KBRSI points to nothing that would preclude our consideration of this statement as it relates to the client's proposal.¹ Furthermore, based on a reasonable reading of KBRSI's technical

¹ In appropriate circumstances, we also consider, for example, protest hearing testimony and declarations and affidavits filed with protest submissions, none of (continued...)

and cost proposal and after giving reasonable consideration to the contemporaneous evaluation and source selection record, we concluded that [DELETED], KBRSI's proposed supplier of heavy equipment, planned to acquire these items for lease to KBRSI from a source inside, not outside, of Sierra Leone. Thus, the statement of KBRSI's counsel was not the primary basis for our conclusion; rather, this statement merely served to confirm our view of the documents in the contemporaneous record.

KBRSI also disagrees with the merits of the underlying decision, pointing in great detail to, among other things, sections of its technical and cost proposal to support its position that [DELETED] was not acquiring the heavy equipment locally, but was going to use sources outside of Sierra Leone to acquire these items. Reconsideration Request at 13-18. However, as stated previously, under our Regulations, to obtain reconsideration, the requesting party must show that our prior decision may contain either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. §21.14(a) (emphasis added). Information not previously considered means information that was not available to one of the parties, in this case KBRSI, when the initial protest was filed. Failure to make all arguments or to submit all information available during the course of the initial protest undermines the goals of our bid protest forum—to produce fair and equitable decisions based on consideration of the arguments of all parties on a fully developed record—and cannot justify reconsideration of our prior decision. See, e.g., Brooks Towers, Inc.--Recon., B-255944.3, Dec. 29, 1994, 95-1 CPD ¶ 4 at 3; U.A. Anderson Constr. Co.--Recon., B-244711.2, Jan. 23, 1992, 92-1 CPD ¶ 106 at 2. Here, KBRSI's methodical "walks through" of the contents of its technical and cost proposal to show that [DELETED] would be acquiring heavy equipment from sources outside of Sierra Leone (rather than using local, in-country sources), in addition to being information KBRSI could have submitted during consideration of the protest, does not alter our view of the record and thus does not provide a basis for reconsideration.

KBRSI also complains that our underlying decision failed to address prejudice, maintaining that given the differential in costs/prices between its proposal and the proposals of CMG and IAP, the protesters were not prejudiced by any alleged flaw in the agency's evaluation of its technical proposal regarding the [DELETED] matter. Reconsideration Request at 10-13. Notwithstanding the differential in costs/prices between the proposal of KBRSI and the proposals of CMG and IAP, we continue to conclude that the protesters were prejudiced by the above-described evaluation flaws regarding the RFP's technical scenario. In this regard, the contemporaneous evaluation and source selection record showed that, not only did the agency have concerns with KBRSI's technical proposal being less than clear in terms of where

(...continued)

which are part of an agency's contemporaneous evaluation and source selection record.

[DELETED] would acquire heavy equipment for use by KBRSI, a matter that should have been resolved during discussions, but also, that the agency did not equally evaluate proposals against the same standard. Because of these problems, we did not know, and we would not speculate, how a reasonable and equal evaluation of the proposals would have affected the ultimate source selection decision. In such circumstances, we resolve any doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. See, e.g., Creative Info. Tech., Inc., B-293073.10, Mar. 16, 2005, 2005 CPD ¶ 110 at 9; Cygnus Corp., Inc., B-292649.3, B-292649.4, Dec. 30, 2003, 2004 CPD ¶ 162 at 7; Department of Energy-Recon.; Sprint Communications Co.--Recon., B-250516.4, B-250516.5, Aug. 20, 1993, 93-2 CPD ¶ 111 at 6; IRT Corp., B-246991, Apr. 22, 1992, 92-1 CPD ¶ 378 at 6. For these reasons, and in order to remedy the described evaluation flaws identified in our decision, we recommended reopening discussions and evaluating revised proposals, a recommendation that KBRSI disagrees with, but has not shown to be unreasonable.

KBRSI also challenges our conclusion that the agency misevaluated KBRSI's business systems under the management factor when it failed to adequately consider DCAA comments concerning KBRSI's business systems, and asserts that CMG and IAP were not prejudiced by the agency's failure to explain what percentages of host country nationals would be considered acceptable or characterized as a strength or weakness. Reconsideration Request at 3-10. We again conclude that KBRSI's position on reconsideration constitutes mere disagreement with the underlying decision.

In sum, we conclude that KBRSI has failed to articulate any error of fact or law, or to point to any information not previously considered, that would warrant reconsideration of the underlying decision.

The request for reconsideration is denied.

Gary L. Kepplinger
General Counsel