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Washington, DC 20548

Comptroller General  
of the United States

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## Decision

**Matter of:** DynCorp International LLC

**File:** B-411465; B-411465.2

**Date:** August 4, 2015

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CPT Kelly L. Sledgister, Michael J. Kraycinovich, Esq., and Andrew M. Telschow, Esq., Department of the Army, for the agency.

Evan D. Wesser, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest challenging the agency's technical and cost realism evaluations is denied where, notwithstanding apparent errors, the protester fails to demonstrate competitive prejudice because it does not demonstrate that, but for the alleged errors, it would have had a substantial possibility of receiving the award.
2. Protest alleging that the agency failed to conduct meaningful discussions by not informing the protester that its proposed labor hours appeared to be overstated is denied where the agency had no obligation to raise the matter because it did not find that the proposed hours were so high so as to be unreasonable, unrealistic, or render the protester's proposal ineligible for award.
3. Protest challenging the agency's past performance evaluation and affirmative responsibility determination for failing to consider pending litigation involving the awardee is denied where the record demonstrates that the agency reasonably considered the information in accordance with the terms of the solicitation and applicable procurement regulations.

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## DECISION

DynCorp International LLC, of Fort Worth, Texas, protests the award of a task order to Kellogg Brown & Root Services, Inc. (KBR), of Houston, Texas, under request for proposals (RFP) No. W52P1J-14-R-0086, which was issued by the Department of the Army under the Logistics Civil Augmentation Program (LOGCAP IV) contract, for support services for U.S. military installations located in the Arabian Peninsula. DynCorp argues that the Army unreasonably evaluated offerors' proposals under the technical/management and cost/price evaluation factors, failed to engage in meaningful and equal discussions, and failed to reasonably consider pending False Claims Act (FCA) litigation in evaluating the awardee's past performance and responsibility.

We deny the protest.

## BACKGROUND

On August 19, 2014, the Army issued this task order RFP for support services at eight locations in the Arabian Peninsula to the three LOGCAP IV indefinite-delivery, indefinite-quantity (ID/IQ) contract holders, DynCorp, KBR, and Fluor Intercontinental, Inc. RFP at 1; Performance Work Statement (PWS) at 4; id., Tech. exh. A-1, Required Services Matrix.<sup>1</sup> DynCorp is the incumbent contractor for these requirements at seven of the locations. See Protest (Apr. 27, 2015) at 26; Hearing Transcript (Tr.) at 102:4-6.<sup>2</sup> The RFP contemplated the award of a cost-plus-fixed-fee task order with a 1-year base period and three 1-year options. RFP at 15-19. The RFP instructed offerors to submit their respective proposals in four volumes.

In volume 1, introduction folder, offerors were to include their respective certifications and other required documentation. Id. at 54. In volume 2, description of technical/management approach, offerors were required, in no more than 30 pages, to address their respective technical and management approaches to accomplishing the PWS's requirements. Id. The RFP instructed offerors to ensure that any resource information included in the technical/management proposal was consistent with the resource information included in the accompanying pricing template. Id.

In volume 3, cost/price, offerors were required to prepare and submit, among other information, pricing information on the pricing template. Id. The RFP provided that

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<sup>1</sup> References herein to the RFP are to the version conformed through amendment No. 9.

<sup>2</sup> On July 9, 2015, our Office conducted a hearing to receive the testimony of several agency officials involved in the procurement.

the agency's evaluation of resources (i.e., hours) would be based on the summary cost information contained in the consolidated basis of estimate (CBOE) of the pricing template. Id. at 55. The RFP further provided that in the event of a discrepancy between the types and quantities of resources presented in the various sections of an offeror's proposal, the information presented in the CBOE would control. Id. at 53. In volume 4, basis of estimate (BOE), offerors were required to provide a detailed BOE for the summary of labor hours included in the CBOE. Id. at 55. The RFP instructed that the BOEs would not be evaluated, but would be used as needed for clarification by the evaluation teams. Id.

For purposes of award, the Army was to evaluate proposals under the following three evaluation criteria: (1) technical/management approach; (2) past performance; and (3) cost/price.<sup>3</sup> Id. at 57-59. Under the technical/management evaluation factor, the agency was to evaluate the feasibility of an offeror's technical/management approach to accomplishing the requirements of the PWS, including consideration of both the technical/management proposal and the pricing template. Id. at 57. Under the past performance evaluation factor, the agency was to assess recent and relevant LOGCAP IV orders performed by the contractor. Id. at 58. A LOGCAP IV order was relevant and recent if it: (1) was of similar size, scope, and complexity to the functions required by the PWS; and (2) (i) was awarded or commenced within 3 years prior the RFP's closing date; (ii) was completed within 3 years of the RFP's closing date; or (iii) is on-going. Id.<sup>4</sup> Under the cost/price evaluation factor, the agency was to evaluate proposed costs for reasonableness and realism, and to determine whether the offeror's proposal reflected an understanding of the RFP's requirements, and whether the cost proposal was consistent with the unique methods of performance described in the offerors' technical/management proposal. Id. at 58.

Award was to be made on a best value basis, with the technical/management factor being more important than past performance, past performance being more important than cost/price, and the non-cost/price factors, when combined, being significantly more important than cost/price. Id. at 57, 59. The RFP stated a proposal would be rated technically unacceptable and would be "unawardable" if the proposal did "not meet requirements and contains one or more deficiencies." Id. at 57.

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<sup>3</sup> Although the evaluation factor was titled "cost/price," all of the fixed price contract line items were eliminated through amendments to the RFP. See RFP at 12-13; Tr. at 31:18-22.

<sup>4</sup> Offerors were not required to submit a separate past performance volume with their proposals; rather, the Army was to conduct a risk assessment concerning the offerors' recent and relevant past performance on earlier task orders under the LOGCAP IV contract. RFP at 55-56.

All three LOGCAP IV contractors submitted proposals in response to the RFP. The Army determined that although each offeror's initial proposal contained deficiencies, all three of the proposals should be included in the competitive range. Agency Report (AR), Tab 30-1, Competitive Range Determination (Oct. 7, 2014), at 1.

The technical management evaluation team (TMET) was tasked with evaluating both the feasibility and realism of the offerors' proposed staffing. See Tr. at 72:4-19. For evaluation purposes, the TMET evaluated offerors' proposed work breakdown structures (WBSs), which aligned to tasks set forth in the PWS. Id. at 52:10-17. The TMET first grouped the primary WBSs into three functional groups: (1) Combat Support Services (WBS 05.00); (2) Airfield Operations & Management Services (WBS 07.03); and (3) Central Receiving & Shipping Point and Theater Transportation Mission (WBS 06.50, 07.00). Id. at 52:18-53:6; AR, Tab 16-2, KBR Resource Findings (Mar. 25, 2015), at 2-3. The TMET then compared the three functional groups to the independent cost estimate (ICE).<sup>5</sup> If the proposed hours for a functional group were at or exceeded the hours for the same group in the ICE, the TMET did not evaluate any variances among the individual WBSs within the functional group and found the proposed hours to be reasonable and realistic. See Tr. at 52:18-53:6; 76:9-77:3.

If the proposed hours for any of the WBS functional groups were above the ICE, the TMET consulted the offeror's technical/management proposal to determine whether the offeror's general proposed approach reasonably supported hours in excess of the ICE. Id. at 58:16-59:1; 60:7-16. If the proposed hours for any of the WBS functional groups were below the ICE, the TMET conducted an analysis of the individual WBSs in the group. Id. at 52:18-53:6; 53:15-54:4. In conducting its variance analyses of the individual WBSs, the TMET did not consider, with a single exception involving Fluor, the offerors' detailed BOEs; rather, the analysis was limited only to the high-level general approach in the technical/management proposals and high-level summary of productive labor hours in the CBOEs. See id. at 57:2-58:5.

To evaluate variances for individual WBSs where an offeror's proposed hours were below the ICE, the TMET determined minimum numbers of hours for WBSs based on the RFP's requirements and the TMET's experience with similar services. Id. at 59:10-22; 68:19-69:1; 77:16-78:7. For some WBSs, the minimum acceptable staffing level was a range of hours, based on potential variables which could affect

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<sup>5</sup> The Army retained a third party contractor to prepare the ICE, which was comprised of a cost narrative, a populated pricing template, a detailed BOE, and other supporting documentation. See AR, Tab 17-2, Independent Cost Estimate (Oct. 7, 2014), at 1. The TMET did not evaluate the underlying BOE on which the ICE was based. See Tr. at 89:11-21.

the work, and in other instances it was a minimum number of productive labor hours equating to a set number of full time equivalents to perform the requirements. See, e.g., AR, Tab 16-2c, KBR Resource Findings – Airfield Operations & Management Services (Mar. 25, 2015), at 1-2; Tab 38-1, KBR Material Handling Equipment Working Paper, at 1. If an offeror’s proposed hours were below the TMET’s revised minimum acceptable staffing level for a particular WBS, the TMET reviewed the offeror’s technical/management proposal for that WBS to determine if there was something unique to justify a lower number of proposed hours. See, e.g., Tr. at 69:2-9. If the TMET did not determine that the offeror’s approach justified a departure from the TMET’s minimum acceptable staffing level, the agency would issue an evaluation notice to the offeror identifying a weakness or deficiency as part of discussions. Id.

The Army issued multiple rounds of evaluation notices and received two interim revised proposals from offerors. See AR, Tab 19-1, Task Order Deciding Official (TODO) Decision Brief (Mar. 25, 2015), at 4-6. Following the conclusion of discussions, the agency received final proposal revisions on March 3, 2015. Id. at 6. The final evaluation ratings for the three offerors were as follows:

	<b>KBR</b>	<b>Fluor</b>	<b>DynCorp</b>
Technical/Management	Good	Good	Good
Past Performance	Low Risk	Low Risk	Low Risk
Total Evaluated Cost	\$36,974,421	\$40,784,583	\$148,074,928

AR, Tab 19, Task Order Award Decision (Apr. 16, 2015), at 1.

The ICE and offerors’ final total hours proposed to perform the core tasks of the PWS were as follows:

	<b>ICE</b>	<b>KBR</b>	<b>Fluor</b>	<b>DynCorp</b>
WBS 05.00 – Combat Support Services	135,854	[DELETED]	[DELETED]	[DELETED]
WBS 07.03 – Airfield Operations & Management Services	213,192	[DELETED]	[DELETED]	[DELETED]
WBS 06.50, 07.00 – Central Receiving & Shipping Point & Theater Transportation Mission	345,762	[DELETED]	[DELETED]	[DELETED]
<b>Total</b>	694,808	[DELETED]	[DELETED]	[DELETED]

AR, Tab 16-1, DynCorp Resource Findings (Mar. 25, 2015), at 2-3; Tab 16-2, KBR Resource Findings (Mar. 25, 2015), at 2-3; Tab 16-3, Fluor Resource Findings (Mar. 25, 2015), at 2-3.<sup>6</sup>

The Army's final evaluation determined that none of the proposals contained any weaknesses or deficiencies, and each included unique strengths. AR, Tab 16, TMET Report (Mar. 25, 2015), at 6-11. The agency identified three strengths in both KBR's and DynCorp's proposals. Id. at 8-11. As relevant here, the Army identified distinctive strengths for KBR and DynCorp based on their unique proposed technical/management approaches. With regard to KBR, the agency evaluated a strength based on KBR's [DELETED], which in turn would reduce KBR's footprint in the Arabian Peninsula. Id. at 8. In contrast, the TMET assessed DynCorp a strength for its [DELETED], which would minimize the risk of service interruption and enhance its ability to respond to multiple, simultaneous performance requirements [DELETED]. Id. at 10.

The TODO concurred with the TMET's evaluation findings for all three offerors. AR, Tab 19, Task Order Award Decision (Apr. 16, 2015), at 2. With respect to KBR, the TODO recognized KBR's unique approach to [DELETED]. Id. at 6. The TODO also recognized DynCorp's unique approach to [DELETED]. Id. at 7. The TODO determined that "[w]hen looking at both approaches, there is no doubt that both approaches could be executed successfully." Id. In making her tradeoff, the TODO concluded that she identified "no reason to support paying a price premium of 300.5% to award to DynCorp." Id. In addition to the tradeoff between KBR and DynCorp, the TODO also conducted a tradeoff between KBR and Fluor, finding KBR to present a better value to the government, and a tradeoff between Fluor and

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<sup>6</sup> The productive labor hour figures presented to the TODO included proposed hours for WBSs not captured in the above-identified three core WBS functional groups. Nonetheless, those figures similarly reflected the different staffing approaches proposed by the three offerors:

	ICE	KBR	Fluor	DynCorp
Total Productive Hours	769,412	[DELETED]	[DELETED]	[DELETED]

AR, Tab 19-1, TODO Decision Brief (Mar. 25, 2015), at 53. The figures presented to the TODO were used to calculate the total evaluated cost for each offeror, cited above. See AR, Tab 17-1, Cost/Price Report (Mar. 19, 2015), at 3-4. DynCorp does not challenge the agency's evaluation of the proposed hours for the tasks not included in three core WBS functional groups.

DynCorp, finding Fluor to represent a better value to the government. Id. at 7-8. This timely protest followed.<sup>7</sup>

## DISCUSSION

DynCorp raises three primary challenges to the Army's evaluation of the offerors' proposals and the award to KBR. First, the protester argues that the agency's evaluation of KBR's proposed staffing, which was below the ICE and significantly below the labor hours proposed by DynCorp, the incumbent, was unreasonable. Second, DynCorp argues that the Army failed to engage in meaningful discussions by failing to advise DynCorp that its proposed labor hours were significantly higher than the ICE and those proposed by the other two offerors. Third, the protester contends that the agency unreasonably failed to consider pending FCA litigation in evaluating KBR's past performance and responsibility.<sup>8</sup> For the following reasons, we find no basis to sustain DynCorp's protest.

The task order competition here was conducted among LOGCAP IV ID/IQ contract holders pursuant to Federal Acquisition Regulation (FAR) part 16. In reviewing protests of awards in a task order competition, we do not reevaluate proposals but examine the record to determine whether the evaluation and source selection decision are reasonable and consistent with the solicitation's evaluation criteria and applicable procurement laws and regulations. Diamond Info. Sys., LLC, B-410372.2, B-410372.3, Mar. 27, 2015, 2015 CPD ¶ 122 at 7; Harris IT Servs. Corp., B-406067, Jan. 27, 2012, 2012 CPD ¶ 57 at 5.

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<sup>7</sup> The awarded value of the task order at issue exceeds \$10 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award ID/IQ contracts. 10 U.S.C. § 2304(e)(1)(B).

<sup>8</sup> DynCorp raises other collateral issues. Although we have reviewed all of the protester's arguments, we find no basis to sustain the protest. For example, DynCorp argues that its proposal warranted the highest rating of "outstanding," instead of the assigned rating of "good," under the technical/management factor because the proposal was evaluated as having three strengths and no weaknesses. See Protest (Apr. 27, 2015) at 19. We find no basis to sustain the protest on this ground. A protester's disagreement with the agency's judgment, without more, is not sufficient to establish that an agency acted unreasonably. STG, Inc., B-405101.3 et al., Jan. 12, 2012, 2012 CPD ¶ 48 at 7. Furthermore, there is no requirement that an agency award the highest possible rating, or the maximum point score, under an evaluation factor simply because the proposal contains strengths and/or is not evaluated as having any weaknesses. Wyle Labs., Inc., B-407784, Feb. 19, 2013, 2013 CPD ¶ 63 at 6.

## Cost Realism--Evaluation of Proposed Labor Hours

DynCorp challenges the Army's evaluation of KBR's proposed labor hours, arguing that the agency's evaluation of the feasibility of KBR's proposal under the technical/management evaluation factor and cost realism evaluation were unreasonable, contrary to the terms of the RFP, and not adequately documented. The protester challenges the agency's finding that KBR's proposed labor hours were realistic under eight WBSs, five under the Airfield Operations & Management Services WBS functional group and three under the Central Receiving & Shipping Point and Theater Transportation Mission WBS functional group. See DynCorp Comments (June 8, 2015) at 6-28, 31-34. The protester effectively argues that the TMET unreasonably relied solely on offerors' high-level technical/management proposals and summary CBOEs as compared against the ICE or the TMET's revised minimum acceptable staffing levels, without due consideration of the offerors' unique, underlying approaches. See id. at 16-18. As a result, DynCorp argues that KBR's proposal should have been assessed several deficiencies or weaknesses, and/or its proposed costs adjusted significantly upward. Based on the record and the testimony received during a hearing conducted by our Office, we agree that the agency's evaluation was flawed in several respects, but ultimately we do not agree that the protester was prejudiced by the errors.

Our Office has explained that when an agency evaluates a proposal for the award of a cost-reimbursement contract or task order, an offeror's costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR § 15.305(a)(1); Exelis Sys. Corp., B-407673 et al., Jan. 22, 2013, 2013 CPD ¶ 54 at 7 (considering FAR part 15 cost realism standards in a FAR part 16 task order procurement); CGI Fed. Inc., B-403570 et al., Nov. 5, 2010, 2011 CPD ¶ 32 at 5 n.1 (same). Consequently, an agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed. FAR § 15.404-1(d)(1); Solers Inc., B-409079, B-409079.2, Jan. 27, 2014, 2014 CPD ¶ 74 at 4. An agency's cost realism analysis requires the exercise of informed judgment, and we review an agency's judgment in this area only to see that the cost realism analysis was reasonably based and not arbitrary. Information Ventures, Inc., B-297276.2 et al., Mar. 1, 2006, 2006 CPD ¶ 45 at 7. The analysis need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate and provide some measure of confidence that the agency's conclusions about the most probable costs under an offeror's proposal are reasonable and realistic in view of other cost information reasonably available to the agency at the time of its evaluation. Id.

As an initial matter, the Army contends that its evaluation was reasonable, in accordance with the terms of the RFP and the FAR's requirements applicable to task order procurements, and adequately documented. The agency argues that FAR § 16.505, which was applicable to this task order procurement, allowed the



agency to “use . . . streamlined procedures,” and that DynCorp’s challenges to the agency’s evaluation improperly seek to “impos[e] the requirements of a formal source selection (FAR 15 not 16) on a process designed for efficiency.” Supp. AR (June 18, 2015) at 1-2. The Army explains that, in its view, FAR § 16.505 permits agencies to utilize “streamlined procedures,” which ostensibly are less stringent than those procedures required in a FAR part 15 procurement. In this regard, the contracting officer testified that FAR § 16.505 required a less stringent cost realism evaluation than would be required under FAR part 15:

[GAO]: Is your testimony that the evaluation of cost realism here would have been the same had [this] been a FAR Part 15 procurement?

[Contracting Officer]: It would have been the same in nature, but certainly not in depth. The FAR Part 15 may have required the agency to go into every single work breakdown structure, WBS, and examine it where under the FAR Part 16 we did not necessarily have to go to that degree.

[GAO]: It is your testimony that the nature and quality of the evaluation here was different that it would have been under a FAR Part 15 procurement?

[Contracting Officer]: Yes.

Tr. at 37:8-21.

The Army’s interpretation of its requirements to evaluate cost in a FAR part 16 task order competition is not consistent with our previous interpretation of FAR § 16.505. Regarding the evaluation of a proposal for a cost-reimbursement task order, the FAR requires that: “[i]f the contract did not establish the price for the supply or service, the contracting officer must establish prices for each order using the policies and methods in subpart 15.4.” FAR § 16.505(b)(3). Our Office has previously found that where a task order solicitation is for the issuance of a cost-reimbursement order, an agency’s evaluation, to be consistent with FAR § 16.505(b)(3), must establish prices for task orders consistent with the policies and methods established in FAR subpart 15.4, which in turn, provides for performing cost realism analyses when awarding a cost-reimbursement contract. CGI Fed. Inc., supra.

We need not resolve, however, whether the agency’s cost evaluation was consistent with the requirements of FAR part 15 and our Office’s decisions

concerning cost realism under the provisions of that section of the FAR.<sup>9</sup> As discussed above, the RFP's instructions regarding proposal volumes 2 through 4 and the Section M evaluation criteria effectively put offerors on notice that the agency's evaluation of whether the resources proposed to perform the work were feasible and realistic would be limited to the high-level information in the offerors' technical/management proposals and CBOEs. See RFP at 53-55. Where a protester fails to challenge an obviously flawed evaluation scheme prior to the time for receipt of initial proposals or quotations, we will consider a post-award challenge to the scheme as untimely. NaphCare, Inc., B-406695, B-406695.2, Aug. 3, 2012, 2012 CPD ¶ 246 at 8-9; Ball Aerospace & Techs. Corp., B-402148, Jan. 25, 2010, 2010 CPD ¶ 37 at 5; Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1). As a result, several of DynCorp's challenges to the evaluation of KBR's costs that are predominately based on the contents of the awardee's BOE--which the RFP said would not be evaluated and was in fact not evaluated--fail to state legally or factually sufficient bases of protest.

We find, however, that several of the protester's challenges to the evaluation of the realism of KBR's proposed costs reflect a failure by the agency to reasonably follow even the limited cost realism evaluation procedures set forth in the RFP. We address certain examples below.

First, in certain instances, the TMET's minimum staffing levels and evaluation of offerors' proposals against those levels appear to be unreasonable and unsupported. For example, under WBS No. 07.03.02, Runway Sweeping, the contractor will be required to "sweep runways, parking pads, taxiways and [forward area refueling point ] areas twice daily at least 90% of the time," and to "perform sweeps within 15 minutes of a reported [foreign object debris] incident." RFP, PWS, Tech. exh. H.1, at 106. The ICE estimated that the tasks would require

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<sup>9</sup> For example, as discussed above, it appears that the Army merely compared the offerors' proposed labor hours to the ICE--whose underlying BOE was not considered by the evaluators--or the TMET's revised minimum acceptable staffing levels. See, e.g., Tr. at 52:18-53:6; 69:2-9; 76:9-77:3. As we have previously held, however, simply comparing various cost elements in a government estimate to offerors' cost elements for the same items does not suffice as a sufficient analysis of cost realism where the agency has not considered the offerors' individual technical approaches or determined whether the offerors' proposals are consistent with the technical and cost parameters that were reflected in the government's estimate. Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 4; Tidewater Constr. Corp., B-278360, Jan. 20, 1998, 98-1 CPD ¶ 103 at 5. By restricting its cost realism evaluation only to offerors' total productive labor hours and summary technical/management proposals, it is questionable that the agency could have evaluated with a reasonable level of confidence the most probable cost of performance of each offerors' unique proposals.

11,157 hours. AR, Tab 16-2c, KBR Resource Findings--Airfield Operations & Management Services (Mar. 25, 2015), at 1. In response to this requirement, KBR proposed [DELETED] hours. Id. Due to the variance between KBR's proposed hours and the ICE, the TMET calculated a revised minimum staffing level based on its independent consideration of the RFP's requirements. Based on the size of the runways and assuming twice daily cleanings 90 percent of the time, the Army calculated a minimum staffing level of 1,245.6 hours. Id.; Tr. at 103:6-10. The Army's evaluation here was not reasonable because, at a minimum, it did not upwardly adjust KBR's hours to at least cover the minimum twice daily sweeping requirement.

Additionally, the agency's calculation also appears to have been based on two material flaws. First, the TMET was unaware of the specifications of the government furnished sweeper. Tr. at 100:10-101:17. The TMET used the specifications of a sweeper that resulted in a more aggressive estimate (15 miles per hour (mph)) than the estimate used by the ICE (2 mph) or by DynCorp, the incumbent ([DELETED] mph). See AR, Tab 16-2c, KBR Resource Findings--Airfield Operations & Management Services (Mar. 25, 2015), at 1; Tab 17-3, ICE CBOE Pricing Template, at CBOE – Labor Tab, Line 380; DynCorp Comments (June 8, 2015) at 14. Neither the record nor the hearing testimony adequately addressed why the 15 mph figure relied upon by the TMET was reasonable. Second, the estimate only covers the twice daily sweeping requirement, without any provision for any additional sweeps that may be required due to foreign object debris-related incidents. Tr. at 103:20-104:15. Although the RFP did not provide any assumptions as to the potential number of foreign object debris-related sweeps the offeror may be required to perform, in light of the fact that this is a cost-reimbursement order where the government will be responsible for any potential cost overruns, we think the agency did not reasonably consider the potential risk to the government based on KBR's failure to propose hours sufficient to cover any foreign object debris-related sweeping. Therefore, we find that the record demonstrates that the agency's evaluation of KBR's proposed staffing for the runway sweeping WBS was unreasonable.

The TMET also made assumptions regarding offerors' proposed approaches that were unsupported by their proposals. For example, under WBS No. 07.03.05, Air Traffic Control Tower, the contractor will be required to provide Federal Aviation Administration-certified personnel to operate and maintain air traffic control operations. The contractor must also provide shift leaders, a facility chief, and trainers to qualify controllers. Additionally, the contractor must maintain air traffic control equipment 100 percent of the time and perform record keeping duties. RFP, PWS at 38; Tech. exh. H.1 at 106-07. The ICE estimated 58,855 hours for the air traffic control task, which assumed five controllers per shift, two to monitor radars and three to perform ground control and other tasks. AR, Tab 17-3, ICE CBOE Pricing Template, at CBOE – Labor Tab, Line 399. For the same task, the TMET calculated a minimum acceptable level of 17,520 hours, which equated to two

controllers per shift, one to monitor the airspace of inbound and outbound flights and one to monitor ground traffic. Tr. at 107:21-108:11; 110:10-14. The TMET's minimum staffing level does not appear to include additional hours to cover the other tasks contemplated by the RFP, including training, recordkeeping, and maintenance of equipment.

At the hearing, the TMET Chair testified that the evaluators' calculation of minimum acceptable hours assumed that controllers could perform certain tasks, like training and recordkeeping, simultaneously with performing their air traffic control responsibilities. Id. at 111:10-112:9. Even assuming that these assumptions were reasonable--which is questionable due to the important safety-related functions being performed by the controllers--the TMET also assumed that the RFP's requirement for equipment maintenance would be fulfilled under a different WBS--even though the assumption was not based on anything in the offerors' proposals. See id. at 117:13-119:10. We find that it was unreasonable for the TMET to rely on its own assumptions regarding how an offeror could satisfy the PWS's requirements, as opposed to evaluating how the offeror actually proposed to address the requirements. See also id. at 92:15:93:1 (assuming, based solely on KBR's proposed labor hours, that KBR would use a [DELETED] approach to staff forward area refueling points twenty four hours a day, 7 days a week).

As demonstrated by these illustrative examples, we find that the record shows that at least certain aspects of the agency's evaluation of offerors' staffing under the technical/management and cost/price evaluation factors was not reasonable.

### Cost Realism--Prejudice

Although the record demonstrates that the Army erred in the evaluation of offerors' proposed staffing, our Office is cognizant of the significant cost difference between DynCorp, whose evaluated cost was in excess of \$148 million, and KBR and Fluor, whose evaluated costs were each significantly lower. In this regard, the protester argues that KBR proposed unrealistically low hours in eight discrete WBSs. Even if the protester was correct that KBR's proposal should have been adjusted in these eight areas, it does not appear that the adjustments establish that, but for the alleged errors, the protester would have had a substantial chance for award. For this reason, we conclude that DynCorp's arguments concerning the evaluation of KBR's proposed labor hours fail to demonstrate the possibility of prejudice.<sup>10</sup>

Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice,

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<sup>10</sup> Our finding regarding prejudice here is also based on our conclusions, discussed below, that the remainder of DynCorp's protest grounds lack merit.

and our Office will not sustain the protest, even if deficiencies in the procurement are found. HP Enter. Servs., LLC, B-411205, B-411205.2, June 16, 2015, 2015 CPD ¶ 202 at 6; Booz Allen Hamilton Eng'g Servs., LLC, B-411065, May 1, 2015, 2015 CPD ¶ 138 at 10 n.16; Colonial Storage Co.--Recon., B-253501.8, May 31, 1994, 94-1 CPD ¶ 335 at 2-3.

The protester first argues that it was prejudiced by the agency's technical evaluation because, had the agency properly evaluated KBR's and Fluor's proposals, those offerors should have properly been assigned deficiencies which would have rendered them ineligible for award. See DynCorp Post-Hearing Brief (July 16, 2015) at 23-24. DynCorp also alleges that had the Army conducted a reasonable cost realism evaluation, KBR's proposal should have been upwardly adjusted by at least \$17.6 million, and DynCorp's proposal should have been downwardly adjusted by at least \$12.1 million. See id. at 24-29.<sup>11</sup> DynCorp, for the first time in its post-hearing brief, also suggests that further adjustments may be warranted to KBR's proposal under the Combat Support Services WBS functional group, as the Army failed to conduct a realism evaluation of the individual, constituent WBSs because KBR's proposed hours for the group exceeded the ICE. See id. at 29. In light of these alleged errors, the protester additionally argues that our prior decisions have resolved any questions regarding prejudice in the protester's favor. See id. at 22, 24, 29. Based on the record, we find that DynCorp has failed to establish that it was competitively prejudiced by the alleged errors in the agency's evaluation.

As an initial matter, the deficiencies alleged by DynCorp all pertain to a limited number of instances where the protester alleges KBR's proposed labor hours should have been upwardly adjusted. Since the alleged deficiencies could be rectified by the upward adjustments proposed by the protester, we do not find that DynCorp was competitively prejudiced by the Army not finding KBR's proposal to be technically unacceptable and ineligible for award.

We also do not think an assumption of prejudice is warranted here because, following multiple rounds of briefing and a hearing, DynCorp has alleged only a discrete number of errors that, even by its own quantification, would not materially change the parties' competitive position. See Ball Aerospace & Techs. Corp., B-402148, Jan. 25, 2010, 2010 CPD ¶ 37 at 6 (finding price evaluation error that

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<sup>11</sup> We rely on DynCorp's \$17.6 million proposed upward adjustment to KBR's proposal for the purposes of analyzing prejudice. Based on the limited scope of these adjustments, we need not conclude whether all of DynCorp's proposed upward adjustments would be warranted. Furthermore, we note that the \$17.6 million figure in the protester's post-hearing brief was less than the \$24.5 million proposed adjustment that it claimed in earlier briefing. See, e.g., DynCorp Comments (June 8, 2015) at 34. Our analysis of competitive prejudice would not be different even using the earlier claimed \$24.5 million figure.

reduced the cost differential between proposals to less than 57% was insufficient to establish prejudice). In this regard, while DynCorp's maximum proposed upward adjustment to KBR's proposal of \$17.6 million would be substantial, in light of the TODO's understanding of the unique approaches and staffing presented by each offeror, we cannot conclude that DynCorp has established that it would have had a substantial chance of receiving the award even with its proposed upward adjustments.

The TODO was briefed on, and understood, the offerors' general overall staffing approaches to perform the requirements. The TODO's award decision clearly recognized the strength of DynCorp's approach to [DELETED], while also recognizing KBR's unique approach to reduce the contractor's footprint by [DELETED]. AR, Tab 19, Task Order Award Decision (Apr. 16, 2015), at 6-8. The TODO was also briefed on the substantially different number of labor hours proposed by each offeror. AR, Tab 19-1, TODO Decision Brief (Mar. 25, 2015), at 53; Tr. at 150:19-151:4. Furthermore, in her tradeoff analysis, the TODO found that DynCorp's proposal was not worth the 300.5 percent price premium as compared to KBR's proposal, or the 263.1 percent price premium as compared to Fluor's proposal, and that Fluor's proposal was not worth the 10.3 percent price premium as compared to KBR's proposal. AR, Tab 19, Task Order Award Decision (Apr. 16, 2015), at 7. In light of the TODO's detailed award decision analysis, we cannot conclude that the TODO would find that DynCorp's proposal would warrant a more than 170 percent premium, even if we agreed with the entirety of DynCorp's proposed adjustments to KBR's proposal.

We also find no merit to DynCorp's speculation that some or all of the WBSs in the Combat Support Services WBS functional group should have been upwardly adjusted for KBR. As discussed above, the TMET divided the core tasks of the PWS into three WBS functional groups. See, e.g., AR, Tab 16-2, KBR Resource Findings (Mar. 25, 2015), at 1. The TMET then compared the total proposed productive labor hours for each WBS functional group to the estimates for the same functional groups in the ICE. Id. If the proposed hours for the functional group were at or exceeded the hours in the ICE, the TMET performed no evaluation of the individual WBSs in the group. Tr. at 52:18-53:6; 76:9-77:3. Even assuming that the protester's argument, which was raised for the first time in DynCorp's post-hearing comments, was timely, KBR's proposed hours for the Combat Support Services WBS functional group exceeded the ICE's estimated hours. AR, Tab 16-2, KBR Resource Findings (Mar. 25, 2015), at 2. DynCorp fails to specifically allege which WBSs are unrealistic or attack the reasonableness of the ICE, and for this reason fails to state a valid basis of protest. See 4 C.F.R. § 21.5(f).

DynCorp's post-hearing brief also suggests that the Army should have made downward adjustments to DynCorp's proposal totaling \$12.1 million so that DynCorp's proposed hours for certain WBSs would be in line with the TMET's minimum staffing levels. See DynCorp's Post-Hearing Br. (July 16, 2015) at 27-29.

We find no merit to this argument. We have held that where an offeror's proposed costs reflect its technical approach, the agency need not make a downward adjustment. Alion Sci. & Tech. Corp., B-410666, Jan. 22, 2015, 2015 CPD ¶ 91 at 9; ManTech SRS Techs., Inc., B-408452, B-408452.2 Sept. 24, 2013, 2013 CPD ¶ 249 at 7-8. Here, the Army did not find that DynCorp misunderstood the requirements in a manner which would cause the government to incur a lower cost than that identified in DynCorp's proposal for these WBSs, and therefore was under no obligation to make such adjustments to the protester's proposal. ManTech SRS Techs., Inc., supra.

In sum, although we find that the agency's evaluation here contained significant flaws, we find no basis to sustain DynCorp's protest because it has failed to establish that, but for the agency's evaluation errors, it would have had a substantial chance of receiving the award. The protester appears to have made an independent business decision to select a heavy staffing approach for this project; DynCorp's proposed hours alone were almost equal to the sum of the hours [DELETED] and [DELETED]. The TODO made a detailed award decision and concluded that DynCorp's approach, while presenting a very low risk of unsuccessful performance, was not worth the sizable cost premium. The protester has only alleged a discrete number of purported errors and, by its own calculations, shows that even if we agreed with all of its challenges, the protester's competitive position would not be materially different. Under these circumstances, we find that DynCorp has failed to establish that it was competitively prejudiced by the alleged errors in the agency's evaluation. We next address DynCorp's other protest grounds.

## Discussions

DynCorp argues that the Army failed to engage in meaningful discussions by not disclosing that the protester's proposed labor hours and costs were a significant weakness or otherwise effectively rendered the protester's proposal ineligible for award. Alternatively, the protester argues that the agency must have engaged in unequal discussions with the other offerors regarding the true nature of the government's requirements based on the wide disparity between DynCorp's proposed costs and those of the other offerors.

The Army responds that DynCorp's proposed hours and costs were not found to be a significant weakness or otherwise rendered the protester's proposal ineligible for award. Rather, the agency argues that DynCorp's proposed hours and costs were found to be realistic and reasonable for the protester's unique technical/management approach, and the proposed hours were in fact evaluated as a unique strength of DynCorp's proposal.

As noted above, this task order procurement was conducted as a competition between LOGCAP IV IDIQ contract holders and, as such, was subject to the

provisions of FAR § 16.505. In this regard, FAR § 16.505 does not establish specific requirements for conducting discussions; nevertheless, when discussions are conducted, they must be fair and reasonable. Companion Data Servs., LLC, B-410022, B-410022.2, Oct. 9, 2014, 2014 CPD ¶ 300 at 12; Hurricane Consulting, Inc., B-404619 et al., Mar. 7, 2011, 2011 CPD ¶ 70 at 6. Where, as here, an agency conducts a task order competition as a negotiated procurement, our analysis regarding fairness will, in large part, reflect the standards applicable to negotiated procurements. Companion Data Servs., LLC, supra.

Regarding DynCorp's allegation that the Army was required to raise during discussions the protester's high costs and proposed labor hours, we find no merit to this argument. In negotiated procurements pursuant to FAR part 15, we have held that where an offeror's costs are high in comparison to those of its competitors, the agency may, but is not required to, address the matter during discussions. George G. Sharp, Inc., B-408306, Aug. 5, 2013, 2013 CPD ¶ 190 at 4. Accordingly, if an offeror's costs are not so high as to be unreasonable or unacceptable for contract award, the agency may conduct meaningful discussions without advising the offeror that its costs are not competitive. Vigor Shipyards, Inc., B-409635, June 5, 2014, 2014 CPD ¶ 170 at 6 n.5; ManTech SRS Techs., Inc., supra. The Army here did not find DynCorp's proposed hours or costs to be unreasonable or unrealistic. Indeed, far from finding DynCorp's staffing approach to be unreasonable or unrealistic, the Army identified DynCorp's staffing approach, including [DELETED], as a strength. See AR, Tab 19, Task Order Award Decision (Apr. 16, 2015), at 5, 7; Tr. at 107:7-14. Thus, the Army was under no obligation to raise the matter during discussions.

This argument also fails because the protester has failed to demonstrate that it was competitively prejudiced. DynCorp provides no specific information or explanation as to how it would have lowered its costs and hours had the agency raised the matter during discussions. See Protest (Apr. 27, 2015) at 30 (arguing that DynCorp "would have made every effort to achieve reductions" and/or would have provided "further explanation" for its proposed costs). In light of the substantial differences in the offerors' proposed technical/management approaches, labor hours, and costs, DynCorp's general assertion that it would have lowered its proposed labor hours or costs is not sufficient to establish prejudice, that is, to show that DynCorp would have reduced its cost sufficiently that its proposal would have had a substantial chance of being selected for award as the best value. See Triad Logs. Servs. Corp., B-406416.2, June 19, 2012, 2012 CPD ¶ 186 at 2; Online Video Serv., Inc., B-403332, Oct. 15, 2010, 2010 CPD ¶ 244 at 2.

DynCorp also alleges that the Army engaged in disparate treatment by "spoon-feeding" KBR and Fluor during discussions so that those offerors would increase their respective proposed hours until they reached acceptable levels, while not engaging in more extensive discussions with DynCorp to help it improve its competitive position. See DynCorp Comments (June 8, 2015) at 35-36. The Army



argues that it reasonably conducted discussions with offerors that were tailored to each offeror's unique proposal and evaluated concerns. AR at 28.

As discussed above, where, as here, an agency conducts a task order competition as a negotiated procurement, our analysis regarding fairness will, in large part, reflect the standards applicable to negotiated procurements. Companion Data Servs., LLC, *supra*. In conducting exchanges with offerors, agency personnel may not "engage in conduct that . . . [f]avors one offeror over another," FAR § 15.306(e); in particular, agencies may not engage in what amounts to disparate treatment of the competing offerors. Front Line Apparel Grp., B-295989, June 1, 2005, 2005 CPD ¶ 116 at 3-4. Although discussions may not be conducted in a manner that favors one offeror over another, discussions need not be identical among offerors; rather, discussions are to be tailored to each offeror's proposal. FAR § 15.306(d)(1), (e)(1); TransAtlantic Lines, LLC, B-411242, B-411242.2, June 23, 2015, 2015 CPD ¶ 204 at 16. In light of the fact that the agency did not identify any technical weaknesses for DynCorp's proposal after the first round of discussions, while simultaneously identifying unresolved or new concerns in KBR's and Fluor's interim proposals, we see no merit in the protester's argument that discussions with the other offerors were unequal as compared to discussions with the protester. Metropolitan Interpreters & Translators, Inc., B-403912.4 *et al.*, May 31, 2011, 2012 CPD ¶ 130 at 7; Heritage Garden Center, Inc; S.C. Jones Servs., Inc., B-248399.4, Oct. 28, 1992, 92-2 CPD ¶ 290 at 5-6. In sum, we find that the Army did not fail to conduct meaningful discussions, nor did the agency engage in unequal treatment of offerors during discussions. We therefore deny the protest.

#### Past Performance Evaluation & Responsibility Determination

DynCorp also contends that the Army failed to reasonably consider two FCA cases currently pending against KBR as part of the agency's past performance evaluation and responsibility determination.<sup>12</sup> The protester alleges that the agency only perfunctorily considered the two cases, including unreasonably relying on KBR's own representations regarding the cases. DynCorp alleges that had the agency properly considered the two matters, KBR should have properly been found to be non-responsible, and thus ineligible for award, or, at a minimum, to have been found to warrant a higher risk rating under the past performance factor.

With regard to the Army's evaluation of KBR's past performance, DynCorp argues that the RFP's provision that the past performance evaluation would be based on

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<sup>12</sup> See Protest (Apr. 27, 2015), exh. No. 9, Amended Complaint of the United States (Jan. 6, 2014), United States ex rel. Conyers v. Kellogg, Brown & Root, Inc., No. 4:12-CV-04095-SLD-JAG (C.D. Ill.); exh. No. 10, Amended Complaint of the United States (Dec. 21, 2012), United States v. Kellogg Brown & Root Servs., LLC, No. 4:12-CV-04110-SLD-JEH (C.D. Ill.).

“recent and relevant contracts gathered under earlier orders under the LOGCAP IV contracts,” RFP at 50 (emphasis added), meant that the LOGCAP III orders giving rise to the FCA cases were relevant because they were likely gathered under previous LOGCAP IV past performance evaluations. See DynCorp Comments (June 8, 2015) at 42-44. The Army responds that the evaluation was consistent with the RFP’s stated evaluation terms, which limited recent and relevant past performance to LOGCAP IV orders, rather than evaluations of LOGCAP III orders that may have been conducted under prior LOGCAP IV competitions. The agency also argues the protester’s post-award challenge that the agency should have considered LOGCAP III orders is an untimely challenge to the RFP’s terms. AR at 29-32. Even assuming that DynCorp’s protest is timely, we find that the agency’s evaluation was reasonable and consistent with the RFP’s terms.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. TransAtlantic Lines, LLC, supra. The RFP stated that the Army would conduct a risk assessment concerning the offerors’ “recent and relevant past performance history on earlier task orders under the LOGCAP IV contract.” RFP at 56 (emphasis added). Although DynCorp is correct that the RFP states that the past performance evaluation would consider information “gathered under earlier orders under the LOGCAP IV contracts,” the protester’s emphasis on this part of the sentence ignores the preceding modifying text which states, “as it relates to recent and relevant contracts.” Id. at 56, 58. In this regard, the RFP, consistent with the text on page 50 of the RFP, states that “recent and relevant LOGCAP IV contracts” include those that were awarded, commenced, or completed within 3 years prior to the closing date of the solicitation or which are on-going. Id. We find that the agency’s interpretation of the solicitation, which focused on recent and relevant LOGCAP IV orders, is reasonable; conversely, DynCorp’s attempt to stretch the significance of the single word “gathered” to include LOGCAP III orders awarded and/or completed outside of the RFP’s recency timeframe is not reasonable. Because the protester has failed to show that the alleged FCA violations occurred under task orders falling within the RFP’s time period for “recent” past performance or arising under orders falling within the RFP’s definition for “relevant” past performance, there was nothing improper about the agency’s decision not to consider these issues in the past performance evaluation. Asset Mgmt. Real Estate, LLC, et al., B-407214.5 et al., Jan. 24, 2014, 2014 CPD ¶ 57 at 13; American Apparel, Inc., B-407399.2, Apr. 30, 2013, 2013 CPD ¶ 113 at 5.

With regard to the DynCorp’s challenge to KBR’s responsibility, we find no basis to review the contracting officer’s affirmative determination of responsibility for the awardee. The FAR provides that a purchase or award may not be made unless the contracting officer makes an affirmative determination of responsibility. FAR § 9.103(b). In most cases, responsibility is determined based on the standards set

forth in FAR § 9.104-1, and involves subjective business judgments that are within the broad discretion of the contracting activities. Reyna-Capital Joint Venture, B-408541, Nov. 1, 2013, 2013 CPD ¶ 253 at 2. For example, the contracting officer must consider, among other factors, whether the putative awardee has “a satisfactory record of integrity and business ethics.” FAR § 9.104-1(d). Our Office generally will not consider a protest challenging an agency’s affirmative determination of an offeror’s responsibility. 4 C.F.R. § 21.5(c). We will, however, review a challenge to an agency’s affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. Id.; FCi Fed., Inc., B-408558.4 et al., Oct. 20, 2014, 2014 CPD ¶ 308 at 7.

Relying on our recent decision in FCI Federal, Inc., DynCorp alleges that the agency failed to reasonably consider the impact of the two pending FCA cases against KBR, and argues that these cases demonstrate that KBR lacks the requisite satisfactory record of integrity and business ethics to justify an affirmative responsibility determination. See Protest (Apr. 27, 2012) at 32-34. Specifically, the protester argues that the contracting officer here failed to review copies of the complaints filed by the United States in the two FCA cases and “relied exclusively on KBR’s general, self-serving reports to the Army Suspension and Debarment Office (“SDO”) about [the Department of Justice’s] fraud claims against KBR and failed to consider any other information about those claims.” DynCorp Comments (June 8, 2015) at 39.

The Army contends that its affirmative responsibility determination reasonably considered the pending FCA litigation within the broader context of the totality of KBR’s present responsibility. See AR at 37-38. We agree. The Army here convened a team that was responsible for researching and collecting data regarding the LOGCAP IV contractors. See AR, Tab 18-2, Contracting Officer’s Responsibility Determination (Apr. 17, 2015), at 1. The team prepared a Contractor Responsibility Report analyzing KBR’s present responsibility under each of the FAR § 9.104-1 factors and documenting the team’s review of various source materials, including a Defense Contract Management Agency (DCMA) pre-award survey and business system reviews. See AR, Tab 18-1, Contractor Responsibility Report (Apr. 2, 2015).

Regarding KBR’s record of integrity and business ethics, the team found that a September 19, 2014, DCMA pre-award survey, which was prepared after the Department of Justice’s filing of complaints in the two FCA cases, concluded that KBR’s record during the timeframe of the survey was satisfactory and reflected no areas of concern, and that KBR was proactive in this area. Id. at 3. The team also found that KBR has enhanced its government compliance program, including requiring [DELETED] for all employees, increasing, and making voluntary disclosures to the Army SDO. Id. at 4.

The contracting officer prepared and executed a memorandum adopting the Contractor Responsibility Report and making his own affirmative responsibility determination for KBR. AR, Tab 18-2, Contracting Officer's Responsibility Determination (Apr. 17, 2015). The contracting officer represented that he reviewed KBR's most recent quarterly report to the Army SDO, which in part addressed the two FCA cases relied upon by the protester. Id. at 3. The contracting officer also represented that he had personal knowledge regarding litigation involving KBR arising from the LOGCAP III contract based on his previous role as the contracting officer of record for LOGCAP III matters, and specifically his role as the contracting officer for KBR's LOGCAP III closeout activities task order. See AR at 36-37 n.5.

Regarding the matters relating to KBR's government contracting in Iraq and other theaters, the contracting officer determined that KBR's cooperation with investigating government agencies and voluntary quarterly disclosures to the Army SDO were positive factors bearing on KBR's present responsibility. AR, Tab 18-2, Contracting Officer's Responsibility Determination (Apr. 17, 2015), at 3. The contracting officer also considered that, notwithstanding KBR's voluntary disclosures to the Army SDO dating back to 2007, KBR has not been suspended or debarred and that KBR continues to vigorously defend itself against the pending litigation. Id. The contracting officer, factoring in these matters and "[g]iven the totality of the information made available" to him, determined that KBR was presently responsible. Id.

On this record, we find that the contracting officer was aware of and reasonably considered the pending litigation relied upon by the protester. For this reason, there is no basis for our Office to review the contracting officer's affirmative determination of KBR's responsibility.

The protest is denied.

Susan A. Poling  
General Counsel