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**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

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## Decision

**Matter of:** Kellogg Brown & Root Services, Inc.

**File:** B-400787.2; B-400861

**Date:** February 23, 2009

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William A. Roberts, III, Esq., and Richard B. O’Keeffe, Esq., Wiley Rein LLP, for Fluor Intercontinental, Inc., an intervenor.  
Major Walter R. Dukes, Terrence Edwards, Esq., and Vera Meza, Esq., Department of the Army, for the agency.  
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

Agency’s disqualification of the protester from further participation in two task order competitions for combat support services issued under an indefinite-delivery/indefinite-quantity contract was reasonable, where an employee of the protester improperly accessed source selection sensitive and proprietary information, and the protester, in response to a request from the agency that the employee be isolated from the two open task order competitions for which the improperly accessed proprietary information would be competitively useful, refused to do so.

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### **DECISION**

Kellogg Brown & Root Services, Inc. (KBR) of Houston, Texas, protests its disqualification from further participation under request for proposals (RFP) issued by the Department of the Army, for the award of task orders under the Logistics Civil Augmentation Program (LOGCAP) IV contracts, for the operation and maintenance of the Udairi airfield in Kuwait (RFP No. W52P1J-08-R-0126), and for various combat support services related to Test, Measurement and Diagnostic Equipment (TMDE) repair and calibration (RFP No. W52P1J-08-R-0189).

We deny the protests.

The Army awarded three indefinite-delivery/indefinite-quantity contracts under the LOGCAP IV solicitation for LOGCAP Combat Support and Combat Support Services augmentation on a global basis to Fluor Intercontinental, Inc., DynCorp

International, and KBR. The LOGCAP IV solicitation advised offerors that multiple task orders would be issued, and that solicitations for these task orders would be competed among the LOGCAP IV contractors, which would be required to submit a proposal for every task order solicitation issued.

The agency issued to the three LOGCAP IV contractors task order RFP -0126 on September 24 and RFP -0189 on September 30. The RFPs stated that the agency expected “to make one task order award” under each solicitation on a cost-plus-award-fee basis to the offeror whose proposal was determined to provide the best value to the Government, based upon the evaluation factors, listed in descending order of importance, of technical/management approach, past performance, and cost/price. RFP -0126 at 2, 11, 22-23; RFP -0189 at 2, 11, 22-23. Each solicitation added that “[t]his is a best value competition under the provisions of FAR [Federal Acquisition Regulation §] 16.505,” which pertains to the placement and award of task orders. RFP -0126 at 22; RFP -0189 at 22.

The record reflects that at 6:35 p.m. on September 23, 2008 (prior to the issuance of these RFPs), the cognizant contracting officer sent an e-mail entitled “Past Performance Clarification” to KBR’s LOGCAP IV contracts manager and to KBR’s LOGCAP IV program manager. The intent of this e-mail was to “communicate adverse past performance information to KBR, and provide that company with an opportunity to comment.” Agency Report (AR), Tab 7, Agency Memorandum for Record by Army’s LOGCAP Contracting Chief (Oct. 28, 2008), at 1. However, the contracting officer inadvertently attached to this e-mail a file entitled “Cost Price Evaluation Summary Document,” which contained source selection sensitive information as well as proprietary information of KBR, Fluor, and DynCorp. The record evidences that this summary included relatively detailed information regarding, for example, the labor, material, equipment, and subcontract costs, as well as award fees and fixed fees proposed by KBR, Fluor, and DynCorp, for the performance of another LOGCAP IV task order.<sup>1</sup> AR, Tab 7, Cost Price Evaluation Summary. The summary, in addition to including information regarding the relevant independent government cost estimate, also included information regarding KBR’s, Fluor’s, and DynCorp’s proposed general and administrative costs, indirect costs, and labor hours for U.S. citizens/expatriates, host country nationals, and third country nationals. Id. The cost price summary further included the narrative agency analysis of the offerors’ proposed cost elements.

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<sup>1</sup> The record reflects that the proprietary and source selection sensitive information in the e-mail attachment “Cost Price Evaluation Summary” pertained to LOGCAP IV task order solicitation W52P1J-08-R-0192, concerning LOGCAP IV services to be provided in Afghanistan. AR at 1; Tab 8, Contracting Officer Letter to KBR (Nov. 7, 2008), at 1.

The contracting officer, “[u]pon viewing the sent message approximately a minute after its transmission . . . realized that he had attached the wrong file,” and “immediately sent a recall instruction through the . . . server.” AR, Tab 7, Memorandum for Record by Army LOGCAP Contracting Chief (Oct. 28, 2008), at 1. The contracting officer then placed a phone call to the KBR LOGCAP IV contracts manager, and “instructed [the KBR LOGCAP IV contracts manager] to immediately delete and destroy all copies of [the contracting officer’s] e-mail addressed to [the KBR LOGCAP IV contracts manager and program manager] subject: Past Performance Clarification and time date stamped 6:35 p.m.” AR, Tab 7, Contracting Officer Confirmation Letter to KBR LOGCAP IV Contracts Manager (Sept. 23, 2008), at 1. Additionally, the record reflects that at 6:40 p.m., the contracting officer sent an e-mail to the KBR LOGCAP IV contracts manager and KBR LOGCAP IV program manager stating “Do not open the subject e-mail I sent you. Shift Delete Immediately.” AR, Tab 3, Contracting Officer’s E-mail to KBR LOGCAP IV Contracts Manager and KBR LOGCAP IV Program Manager (Sept. 23, 2008).

KBR’s LOGCAP IV contracts manager responded later on September 23 by e-mail that he had complied with the contracting officer’s direction to delete the e-mail without opening, saving, downloading, or printing it. AR, Tab 7, Memorandum for Record by Army’s LOGCAP Contracting Chief (Oct. 28, 2008), at 1; KBR LOGCAP IV Contracts Manager’s Initial Statement; KBR LOGCAP IV Contracts Manager’s Affidavit (Oct. 6, 2008). KBR’s LOGCAP IV program manager responded the next morning by e-mail that he too had complied with the contracting officer’s request to delete the e-mail and its attachment without opening, saving, downloading, or printing it. AR, Tab 7, Memorandum for Record by Army’s LOGCAP Contracting Chief (Oct. 28, 2008), at 1; KBR LOGCAP IV Program Manager’s Initial Statement; KBR LOGCAP IV Program Manager’s Affidavit (Oct. 6, 2008) .

The contracting officer next sent a letter to KBR’s LOGCAP IV contracts manager, dated September 23 and transmitted by e-mail on September 24, that confirmed the contracting officer’s telephone conversation with the KBR LOGCAP IV contracts manager, and instructed KBR that it was “critical” that KBR provide written assurance to the agency that the contracting officer’s 6:35 p.m., September 23 e-mail and attachment had been destroyed; that all copies of the e-mail and attachment on any personal computers, servers, or other devices to which the e-mail or attachment may have been forwarded, saved, or downloaded had been deleted; and that any hard copies made of the e-mail and attachment had been destroyed. AR, Tab 7, Contracting Officer Confirmation Letter to KBR LOGCAP IV Contracts Manager (Sept. 23, 2008), at 1. This letter also requested that KBR furnish an affidavit or sworn statement from any KBR employee that had access to the contracting officer’s 6:35 p.m., September 23 e-mail or attachment, stating whether that employee opened, copied, printed, or viewed the e-mail or its attachment, and an affidavit or sworn statement that all copies of the e-mail and attachment had been deleted or destroyed. Id.

KBR's LOGCAP IV contracts manager e-mailed his and KBR's LOGCAP IV program manager's statements to the contracting officer on September 29. The contracts manager's statement provided that he had not opened the contracting officer's 6:35 p.m., September 23 e-mail, and that he had deleted the e-mail and the attachment from his "Blackberry and laptop" computer. AR, Tab 7, KBR LOGCAP IV Contracts Manager's Statement. The contracts manager added in this e-mail that he had requested an electronic search "of all KBR email servers" and the removal of the contracting officer's 6:35 p.m., September 23 e-mail. AR, Tab 7, KBR LOGCAP IV Contracts Manager's E-mail to Contracting Officer (Sept. 29, 2008).

The KBR LOGCAP IV program manager's statement provided that he had "opened" the contracting officer's 6:35 p.m., September 23 e-mail and the attachment on his "Blackberry," but that he "could not make sense out of what the attachment was about due to everything being jumbled due to the small screen size of the Blackberry." AR, Tab 7, KBR LOGCAP IV Program Manager's Statement. The program manager continued by stating that he closed the contracting officer's 6:35 p.m., September 23 e-mail and its attachment, and then saw another e-mail from the contracting officer asking that the previous e-mail and attachment be deleted. The program manager's statement provided that he did not, however, take any further action at this time. Rather, the program manager stated that the next morning, when he arrived at his office, he noticed that "there was a call light on my phone." The telephone message was from the contracting officer, and the program manager stated that, as instructed by the message, he deleted the contracting officer's 6:35 p.m., September 23 e-mail from his laptop computer, and then sent the contracting officer an e-mail stating that he had deleted the e-mail. Id.

KBR's LOGCAP IV program manager's statement continued by explaining that later that day he remembered that the contracting officer's 6:35 p.m., September 23 e-mail and attachment remained on the program manager's Blackberry. The program manager's statement reports that he forwarded the contracting officer's 6:35 p.m., September 23 e-mail and attachment to his "laptop because [he] was curious as to what [the contracting officer] had sent out." AR, Tab 7, KBR LOGCAP IV Program Manager's Statement. The program manager stated that he opened the contracting officer's 6:35 p.m., September 23 e-mail and attachment, but shortly thereafter "had second thoughts about reading the document and did not read it." Id. The program manager continued by stating that he then closed the attachment and deleted it, and that while he recalls that "the attachment was a cost analysis of some contract," he knows nothing else concerning the contents of the attachment and that he had "gained no information or data which could give KBR or anyone any kind of competitive advantage." Id.

After receiving and reviewing the statements of the KBR LOGCAP IV contracts manager and program manager, the contracting officer contacted the KBR LOGCAP IV contracts manager, and informed him that the statements needed to be resubmitted because they were not "sworn" as requested, and that given the "content

of the statements,” it was “necessary to obtain a more detailed account of events relating to this matter.” AR, Tab 7, Contracting Officer Letter to KBR LOGCAP IV Contracts Manager, at 1. The contracting officer’s letter (at 1) also stated:

Further, based on the information contained in [the KBR LOGCAP IV program manager’s] statement it appears necessary that measures be taken to isolate him from the LOGCAP IV program until this matter has been resolved with the affected parties. Despite having read the contracting officer’s explicit direction not to read and to delete the e-mail containing proprietary information, [the KBR LOGCAP IV program manager] proceeded to open the document.

Please provide me with your plan to mitigate the potential competitive harm associated with [the KBR LOGCAP IV program manager’s] viewing of the document in question.

The KBR LOGCAP IV contracts manager responded by providing, along with a cover letter dated October 7, affidavits executed by the KBR LOGCAP IV contracts manager and program manager. AR, Tab 7, KBR LOGCAP IV Contracts Manager’s and Program Manager’s Affidavits (Oct. 6, 2008). With minor exception, the affidavits essentially confirmed the events described in the statements previously submitted by KBR. However, the KBR LOGCAP IV contracts manager’s cover letter accompanying the affidavits noted that “the statements certify that the e-mail erroneously sent by you was not read” by either the contracts manager or program manager, that they deleted the e-mail from their computers and Blackberries “without saving, forwarding or downloading it,” and that because of this, “KBR categorically denies any assertion that KBR enjoys a competitive advantage owing to the ‘viewing’ of your erroneously sent e-mail by any KBR employee.” AR, Tab 7, KBR LOGCAP IV Contracts Manager Letter to Contracting Officer (Oct. 6, 2008). The letter added here that “[a]s was made clear in the statements submitted to you on September 29, 2008, neither of the intended recipients read the offending message nor its attached contents,” and that “[t]herefore, neither has anything more than a cursory knowledge about the message or its contents, so there is no potential competitive harm posed by the message you erroneously sent.” *Id.* The next day the KBR LOGCAP IV contracts manager notified the contracting officer by letter with an attached affidavit that the “e-mail errantly sent to KBR personnel on September 23<sup>rd</sup> titled (Subject: Past Performance Clarification) has been properly deleted from Blackberries, computers and email servers.” AR, Tab 7, KBR LOGCAP IV Contracts Manager Letter to Contracting Officer (Oct. 7, 2008).

By letter dated October 23 to KBR’s LOGCAP IV contracts manager, the agency noted that the contracting officer had “requested that KBR provide a plan to mitigate the potential competitive harm associated with [the KBR LOGCAP IV program manager’s] viewing of the document in question.” Protest, exh. G, Contracting Officer’s Letter to KBR LOGCAP IV Contracts Manager (Oct. 23, 2008). This letter noted that KBR’s response “was silent on this matter,” and requested that KBR

provide “[a] certified statement of what actions it has taken to isolate [the KBR LOGCAP IV program manager] from the LOGCAP IV program, specifically the Udairi Airfield and TMDE proposal development process,” and “[a] certified statement specifically addressing its intended actions to mitigate the potential competitive harm to future task order competitions associated with [the KBR LOGCAP IV program manager’s] viewing of the document in question.” Id.

KBR responded to the agency’s request the following day, stating that it “has provided a comprehensive response to this issue in full compliance” with the contracting officer’s instructions. AR, Tab 7, KBR LOGCAP IV Contracts Manager Letter to Agency (Oct. 24, 2008), at 1. KBR’s response continued by providing, with regard to KBR’s LOGCAP IV program manager, that “his statement evidences the uncontroverted fact that he read neither the e-mail in question, nor its attachment, and gained no knowledge from their contents.” Id. KBR added that in its view “maintaining the integrity of the procurement process does not call for [the KBR LOGCAP IV program manager’s] isolation from the program,” and that “[i]solating [the KBR LOGCAP IV program manager] from participation in the LOGCAP IV program could only be viewed as a punitive act.” Id. at 2. KBR’s response concluded that “[g]iven the facts as we see them and as fully presented to you, certified statements to the effect you requested are uncalled for.” Id.

The agency considered the information provided by KBR, as well as its own records, in analyzing the impact of the release of the information contained in the contracting officer’s 6:35 p.m., September 23 e-mail and attachment to KBR’s LOGCAP IV contracts manager and program manager. The agency found that the competitive process under the solicitation for the LOGCAP IV task order for which the e-mail attachment’s cost/price evaluation summary had been prepared could not have been harmed, given that award under that solicitation had been made without discussions, and KBR thus had not had an opportunity to revise its proposal after the cost/price evaluation summary had been disclosed through the e-mail and attachment. AR, Tab 7, Memorandum for Record by Army’s LOGCAP Contracting Chief (Oct. 28, 2008), at 3. The agency also determined that the information in the cost/price evaluation summary pertaining to the agency’s evaluation method was “no more descriptive than what could be released in a post award debriefing,” and therefore would “not have a harmful effect on future competitions.” Id.

However, the agency also found that the “potential release of proprietary information poses the potential for harm in the competitive process under future LOGCAP IV task order competitions, including those for Udairi Airfield and TMDE.” Id. at 3. Specifically, the agency found that the information contained in the cost/price evaluation summary e-mail attachment “could be used to improve a contractor’s understanding of its competitors’ strategy and approach,” given that the “[i]nformation provided included fee structure, overhead rates, hours and average labor rates” broken down by U.S. citizens/expatriates, host country nationals, and third country nationals. Id. at 4.

The agency noted that although it found the KBR LOGCAP IV contracts manager's statements indicating that he had not gained access to the information in the 6:35 p.m., September 23 e-mail and attachment "credible and convincing," the account of events provided by the KBR LOGCAP IV program manager was cause for concern. Id. The agency noted that it was unable to reconcile the KBR LOGCAP IV program manager's actions, that is, transmitting the 6:35 p.m., September 23 e-mail and attachment from his Blackberry to his laptop and opening it, despite the contracting officer's clear direction to delete the e-mail and attachment and despite the fact that the program manager had already informed the contracting officer that he had deleted the e-mail and attachment, with the program manager's assertion that he had closed the e-mail and attachment without reading it. Id. The contracting officer determined that, given the record as a whole, the information set forth in the 6:35 p.m., September 23 e-mail and attachment may have been compromised, and that "[a]t the very least, an appearance exists that proprietary information was compromised, causing harm to the integrity of the procurement process." Id. The contracting officer concluded that because of the KBR program manager's "integral role as the LOGCAP IV program manager," and because "KBR did not take steps to isolate [the KBR LOGCAP IV program manager] from the ongoing LOGCAP IV task order competition process," it was "necessary that KBR be excluded from consideration for award" of the Udairi Airfield and TMDE task orders, both "of which were open during the period of 24 September through 22 October 2008." Id.

The agency informed KBR of its determination in this regard by letter dated November 7, and these protests followed.<sup>2</sup> AR, Tab 8, Contracting Officer Determination of Actions Required under the Procurement Integrity Act and Federal Acquisition Regulation (FAR) § 3.104 (Nov. 7, 2008).

KBR argues that its disqualification from consideration for award of the Udairi Airfield or TMDE task orders by the agency was improper. KBR primarily argues that because the agency did not specifically find that KBR had "obtained an unfair competitive advantage" as the result of its LOGCAP IV program manager's actions, the agency was precluded from disqualifying KBR from these task order competitions. Protests at 11; see Protester's Comments at 15. The protester contends in this regard that the statements and affidavits of KBR's LOGCAP IV contracts manager and program manager "demonstrate that no one from KBR reviewed, retained or used the competition sensitive information," and there is thus a

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<sup>2</sup> On the same day that KBR filed these protests, it informed the agency "in direct response to your letter of November 7," that KBR had instructed its LOGCAP IV program manager that he "would have no involvement with, and take no part in, any of KBR's LOGCAP IV competitive efforts," nor would he "engage in consultation on, or provide input or guidance relating to, any facet of KBR's efforts under the LOGCAP IV competitive process." AR, Tab 9, KBR LOGCAP IV Contract Manager's Letter to Agency (Nov. 17, 2008).

“complete lack of evidence” to support the agency’s conclusion that competitively sensitive information may have been compromised, or that “an appearance exists that proprietary information was compromised, causing harm to the integrity of the procurement process.” Protester’s Comments at 15-16; see AR, Tab 7, Memorandum for Record by Army’s LOGCAP Contracting Chief (Oct. 28, 2008), at 4. The protester adds that in any event, the agency “improperly imposed the most severe sanction of exclusion from the TMDE and Udairi Task Order competitions without consideration of whether other less drastic remedies were practicable or sufficient.” Protester’s Comments at 19.

Our Office has recognized that, in meeting their responsibility to safeguard the interests of the government in its contractual relationships, contracting officers are granted wide latitude to exercise business judgment, FAR § 1.602-2, and may impose a variety of restrictions, not explicitly provided for in the regulations, where the needs of the agency or the nature of the procurement dictates the use of those restrictions. Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126 at 5, aff’d, B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435 at 4. For example, a contracting officer may protect the integrity of the procurement system by disqualifying an offeror from the competition where the firm may have obtained an unfair competitive advantage, even if no actual impropriety can be shown, so long as the determination is based on facts and not mere innuendo or suspicion. NKF Eng’g, Inc., B-220007, Dec. 9, 1985, 85-2 CPD ¶ 638 at 5; NKF Eng’g, Inc. v. United States, 805 F.2d 372, 376-77 (Fed. Cir. 1986); Compliance Corp., supra; Compliance Corp. v. United States, 22 Cl. Ct. 193, 199-204 (1990), aff’d, 960 F.2d 157 (Fed. Cir. 1992). It is our view that, wherever an offeror has improperly obtained proprietary proposal information during the course of a procurement, the integrity of the procurement is at risk, and an agency’s decision to disqualify the firm is generally reasonable, absent unusual circumstances. See Compliance Corp., supra (disqualification of offeror reasonable where based on its improperly obtaining or attempting to obtain competitor’s proprietary information); NKF Eng’g, Inc., supra, at 6 (disqualification not unreasonable where there was “mere possibility” that offeror did not obtain an advantage from source selection information).

Here, there is no question that the cost/price evaluation summary that was attached to the contacting officer’s 6:35 p.m., September 23 e-mail included information that was source selection sensitive, and information that was proprietary to KBR and its competitors that was relevant to the LOGCAP IV task order competitions. Nor, based on the statement and affidavit of KBR’s LOGCAP IV program manager, is there any question that the program manager, at a minimum, knowingly obtained that source selection sensitive and proprietary information by accessing the 6:35 p.m., September 23 e-mail and attachment; that he did so even though he had been previously advised by the agency that the e-mail and its attachment should be deleted without being viewed; and that he did so after he had in fact advised the agency that he had complied with the direction to delete the e-mail and its



attachment. Accordingly, in our view, the agency's actions were based on facts, rather than mere innuendo, as is asserted by the protester.

We also reject KBR's assertion that the question of whether KBR's program manager improperly gained access to the sensitive information at issue here can be resolved by reliance on the KBR LOGCAP IV program manager's statement that he merely viewed the first page of the cost/price evaluation summary before closing the document, and that he does not remember or retain any source selection sensitive or proprietary information that would be competitively useful to KBR. Since the KBR program manager is the individual whose actions are in question, and KBR is the firm that has been disqualified from the competition, the program manager's self-serving statement that he did not "read" the cost/price evaluation summary, and KBR's self-serving assertion that the program manager does not have anything more than a " cursory knowledge about the message or its contents," cannot, in our view, be accorded controlling weight without some corroborating evidence, in our consideration of whether the agency's disqualification of KBR from the LOGCAP IV task order competitions in question was reasonable. See Computer Tech. Assocs., Inc., B-288622, Nov. 7, 2001, 2001 CPD ¶ 187 at 6; see also AR, Tab 7, KBR LOGCAP IV Program Manager's Statement; KBR LOGCAP IV Contracts Manager's Letter to Contracting Officer (Oct. 6, 2008).

In sum, we find reasonable the agency's determination here that KBR's LOGCAP IV program manager knowingly and improperly obtained access to source selection sensitive and proprietary information, and thus, under the circumstance here, determined that action needed to be taken to protect the integrity of the procurement system. As such, we next turn to KBR's specific assertion that the disqualification of KBR from the Udairi Airfield and TMDE LOGCAP IV task order competitions was unreasonable.

As set forth above, the record reflects that the agency first considered whether any action should be taken with regard to the task order solicitation and competition for which the cost/price evaluation summary was prepared. We note that the agency determined that because proposals had been submitted prior to the cost/price evaluation summary being disclosed to KBR's program manager, and offerors, including KBR, were not provided with an opportunity to revise their proposals, the potential impact on the integrity of that procurement did not merit the disqualification of KBR or the taking of any other action specific to that procurement. Turning to the competitions at issue here, the agency found that since the competitions were open, that is, the Udairi Airfield and TMDE solicitations were issued on September 24 and 30, respectively, with each having the closing date of October 22, the actions of KBR's program manager, which led the agency to conclude that the cost/price evaluation summary either may have been compromised or at least created the appearance that the cost/price evaluation summary was compromised, necessitated that the program manager be isolated from these competitions. Under the circumstances here, we cannot find unreasonable the

contracting officer's request that, in order to preserve the integrity of the procurement system, the KBR program manager be isolated from these competitions. Nor can we find the agency's subsequent determination that KBR be disqualified from these competitions to be unreasonable, in light of KBR's refusal to isolate its program manager from these competitions when requested to do so by the agency. That is, although KBR complains that the agency's disqualification of KBR from these competitions was unduly severe, the record reflects that this action was taken by the agency only after KBR refused the agency's request to isolate the program manager.<sup>3</sup> Given the circumstances, which include KBR's initial refusal to isolate its LOGCAP IV program manager from these open LOGCAP IV task order solicitations, we find the agency's elimination of KBR's proposals from these task order competitions to be reasonable and within the discretion granted to the contracting officer.

The protest is denied.

Gary L. Kepplinger  
General Counsel

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<sup>3</sup> As mentioned previously, since these disqualifications, KBR has acceded to the agency's request that the program manager be isolated from LOGCAP IV task order competitions. The agency has determined that because of this, KBR is able to participate in future LOGCAP IV task order competitions, and that "decision to exclude KBR from just the [TMDE and Udairi Airfield] solicitations limits the effect on KBR of the action taken." AR at 1.