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Decision

Matter of: Kellogg Brown & Root, Inc.

File: B-291769, B-291769.2

Date: March 24, 2003

Michael R. Charness, Esq., and Robert J. Rothwell, Esq., Vinson & Elkins, for the protester.

Captain Anissa N. Parekh, Raymond M. Saunders, Esq., and Matthew Bowman, Esq., Department of the Army, for the agency.

Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably eliminated protester's proposal from consideration on the basis of the proposal's failure to propose adequate staffing levels to perform multiple solicitation requirements and the proposal's unacceptable phase-in plan reflecting an intent to begin contract performance with a majority of employees who were not completely trained and certified to perform all contract requirements.

DECISION

Kellogg Brown & Root, Inc. (KBR) protests the Department of the Army's determination that KBR's proposal failed to meet the requirements contained in request for proposals (RFP) No. DABT23-02-R-0008 to perform unit-level maintenance and support functions for vehicles used to conduct training and instructional missions at Ft. Knox, Kentucky. KBR challenges the agency's determination that KBR's proposed staffing levels were inadequate and that KBR's phase-in plan failed to comply with the solicitation requirements.

We deny the protest.

BACKGROUND

On May 22, 2002, pursuant to the provisions of Office of Management and Budget (OMB) Circular A-76, the agency issued solicitation No. DABT23-02-R-0008, seeking proposals to perform operator- and organizational-level maintenance and support

functions for the 16th Cavalry Regiment and the 1st Armor Training Brigade at Ft. Knox, Kentucky.¹ The solicitation was issued to select a private sector proposal to compete with the agency's most efficient organization (MEO) under the A-76 cost comparison process.²

The solicitation contemplated award of a cost-plus-award-fee contract for a base period and four 1-year option periods, and advised offerors that selection would be made on the basis of the technically acceptable proposal offering the lowest proposed cost/price deemed realistic. Agency Report, Tab D, at 54. As amended, the solicitation provided for evaluation of proposals under the following primary factors: technical, past performance, management, and cost/price. Agency Report, Tab D, at 55. Under the technical evaluation factor, the solicitation listed various subfactors, including staffing plan and technical approach,³ stated that these two subfactors were the "most important," and provided that if a proposal was rated "marginal" or "unacceptable" under either of these subfactors the entire proposal would be considered unacceptable.⁴ Agency Report, Tab D, RFP at 54, 55. The solicitation also advised offerors that "[i]t is the Government's intention to award without discussions." Agency Report, Tab D, RFP, at 44.

¹ The requirements at issue here involve providing maintenance for more than 800 Army vehicles, including tanks, trucks, personnel carriers, fighting vehicles, and high mobility multipurpose wheeled vehicles (HMMWV) used by students/trainees during training exercises at Ft. Knox.

² The procedures for determining whether the government should perform an activity in-house, or have the activity performed by a contractor are set forth in OMB Circular A-76, and that Circular's Revised Supplemental Handbook (March 1996).

³ Regarding an offeror's staffing plan, the solicitation stated that a proposal would be evaluated to determine if it "provide[s] a clear and easily understood staffing plan that provides sufficient detail to determine that the offeror can provide a sufficiently skilled and adequate work force (including any cross-utilization of personnel proposed) to perform all the requirements." Agency Report, Tab D, RFP, at 55. Regarding an offeror's technical approach, the solicitation stated that each proposal would be evaluated to determine if it "provide[s] an adequate description of each functional area including the identification of major work processes, process interfaces, and the outputs of these processes," and "ensure[s] efficient, quality and timely performance." Id.

⁴ The solicitation defined a "marginal" rating as applicable to "any proposal that contains significant weaknesses," and an "unacceptable" rating as applicable to "any proposal that contains major weaknesses which prohibit successful contract performance and/or could only become eligible for award if it were substantially revised." Agency Report, Tab D, at 54.

Three offerors, including KBR, submitted proposals by the October 30, 2002 closing date; these proposals were thereafter evaluated against the stated factors. No discussions were conducted with any offeror. In summarizing its proposed staffing plan, KBR's proposal stated:

All equipment items identified in the PWS [performance work statement] . . . were researched, using the Army MARC [manpower requirements criteria] database to derive the total hours it should take Army personnel to complete maintenance functions.⁵ We then applied an adjustment factor (based on performance metrics derived from performing similar work by a skilled contractor workforce) to the Army labor hour standards

Agency Report, Tab F, KBR Proposal, at D-24.

At the hearing conducted by GAO in connection with this protest,⁶ a KBR representative testified that KBR applied two separate adjustments to the MARC database. First, KBR reduced its version of the MARC database by approximately 30 percent.⁷ Thereafter, KBR applied a second [deleted] reduction, decreasing the MARC data by [deleted]. Hearing Transcript (Tr.), Feb. 21, 2003, at 7-9. KBR's proposal did not disclose the magnitude of the second "adjustment factor," nor did it provide any explanation tying the [deleted] staffing reduction to any particular

⁵ The MARC database is maintained by the Army and identifies the maintenance requirements for military vehicles, breaks down those requirements into individual elements, and lists a standard amount of time necessary to perform each element.

⁶ In resolving this protest, GAO conducted a hearing, over the course of 3 separate days, during which testimony was provided by the agency's contracting officer, the source selection evaluation board (SSEB) chair, the senior maintenance representative on the SSEB, the agency official who performed an independent review of the MEO, and three KBR representatives.

⁷ It became clear during the GAO hearing that KBR and the agency relied on differing--though reconcilable--versions of the MARC database. In short, KBR relied on an older version that included time spent by uniformed service members performing activities unique to their military status (for example, standing formation or performing guard duty); that version stated that the time required to perform each element had been increased by a factor of 1.4 to reflect the service members' uniquely military activities and that, to be applicable to civilians, the data should be reduced to eliminate this factor. In evaluating KBR's proposal, the Army relied on a more recent version of the MARC database that already incorporated this reduction. The parties do not dispute that, following KBR's reduction of the data to reflect the 1.4 factor, the two versions were not materially different. Id.

contract performance approach. Rather, KBR's representative testified that merely changing the status of personnel from that of government employees to that of contractor employees constituted an adequate basis for assuming increased efficiency ranging from [deleted] to [deleted]. Tr., Feb. 21, 2003, at 9-10.

Overall, the agency evaluated KBR's proposal as "unacceptable" based on various factors, including an "unacceptable" rating for KBR's proposed staffing plan, a "marginal" rating for its proposed technical approach, and an "unacceptable" rating for its proposed phase-in plan.⁸ Agency Report, Tab S, at 1-4. In evaluating KBR's proposed staffing plan as "unacceptable," the agency concluded:

KBR's proposal was [deleted] short of the MARC data estimate. KBR failed to demonstrate how it would achieve adequate efficiencies to compensate for this lack of manpower.

Agency Report, Tab G, SSEB Recommendation, at 2.

More specifically, the agency identified various PWS requirements for which KBR had proposed inadequate staffing, including requirements to "road march" vehicles to and from training sites;⁹ requirements to inspect and clean vehicles following completion of training exercises; and requirements to perform operator-level or "10-level" maintenance.¹⁰ Agency Report, Tab S, at 1-18, 33. Additionally, KBR's

⁸ Under the technical evaluation factor, KBR's proposal also received an "unacceptable" rating for its preventative maintenance plan and "marginal" ratings under the technical subfactors for evaluation of recovery services, maintenance, and transportation. Under the primary factor for evaluation of management, KBR's proposal received "marginal" ratings under subfactors for evaluation of cost control and work quality. Under the primary factor for evaluation of past performance, the solicitation established two subfactors—similar past experience and past performance; KBR's proposal received a "marginal" rating under the past performance subfactor. Agency Report, Tab S.

⁹ The term "road march" means that a vehicle is driven under its own power rather than loaded onto a flatbed trailer and hauled by another vehicle.

¹⁰ The Army explains that there are four levels of maintenance: operator-level, organizational-level, direct support, and general support. Operator-level maintenance is the least complex; general support maintenance is the most complex. The technical manual for operator-level maintenance ends with the digits "-10"; the technical manuals for organizational-level, direct support and general support maintenance end with the digits "-20," "-30," and "-40," respectively. Accordingly, the various levels of maintenance are frequently referred to as "10-level," "20-level," "30-level," and "40-level."

proposed phase-in plan was rated as unacceptable based, in part, on its failure to provide fully trained and certified employees at the beginning of contract performance.

Based on its overall evaluation of KBR's proposal, the agency eliminated the proposal from the competition, advising KBR of this action by letter dated December 2, 2002.¹¹ This protest followed.

DISCUSSION

KBR initially protests that the agency unreasonably eliminated KBR's proposal from consideration, arguing that the agency's evaluation of KBR's staffing plan reflected only a "mechanical comparison" of KBR's proposed staffing to the MARC data and the agency's independent government estimate (IGE).¹² KBR's Post-Hearing Comments (Mar. 10, 2003) at 2. The record is to the contrary.¹³

¹¹ With regard to the other two proposals, the agency evaluated one as acceptable and one as unacceptable. The cost of the technically acceptable proposal was subsequently compared to the cost of the MEO, leading to the agency's decision to retain performance of the services in-house.

¹² The agency retained a consultant to prepare an IGE for this procurement. The overall staffing requirements in the IGE were similar, though somewhat higher, than the staffing reflected in the MARC database since there are certain requirements for this procurement that were not included in the MARC database.

¹³ With its protest, KBR requested production of the government's MEO. The agency objected to our Office's consideration of the MEO, questioning the relevance of that document since, pursuant to A-76 procedures, KBR's proposal was not compared to the MEO. After considering the matter, we requested that the agency provide a copy of the MEO as part of the protest record, noting that the A-76 cost comparison had already been completed and the MEO had been, in effect, selected as the "awardee." The agency complied with this request. In advising the agency that we intended to consider the MEO, we explained that our Office would be concerned if the MEO's staffing approach was substantially similar to the staffing plan in KBR's proposal. Based on our review of the record, we find significant differences between the MEO staffing and KBR's proposed staffing. Overall, the MEO's staffing level is more than [deleted] percent higher than that proposed by KBR. Specifically, KBR's own staffing expert concludes that the MEO reflects annual staffing levels of 490,369 hours per year, while KBR's proposal offered only [deleted] hours per year. KBR Post Hearing Comments, Mar. 10, 2003, attach. A, at 8. As discussed in more detail below, we also found significant differences with regard to the staffing levels associated with specific PWS requirements.

As noted above, the agency did, in fact, perform a bottom-line comparison of KBR's total proposed staffing to the staffing requirements reflected in the MARC data and IGE, concluding that KBR's proposed staffing was approximately [deleted] that reflected in those benchmarks. However, the agency's evaluation did not end with those comparisons. Rather, the agency further reviewed KBR's proposed staffing levels with regard to particular PWS requirements to determine which portions of the PWS KBR had understaffed. As noted above, the agency concluded that KBR had failed to provide adequate staffing to ensure timely delivery of equipment to training sites; to perform required inspection and cleaning of vehicles; and to perform operator-level or "10-level" maintenance.

Regarding delivery of equipment to training sites, the PWS stated: "All track vehicles must either be loaded for transport to the training site . . . or road marched to and from the training site." PWS ¶ 5.3.6. Further, the PWS requires the contractor to provide replacement vehicles in situations where vehicles become inoperable, and that such replacement vehicles must be on site within 6 hours after notification. PWS ¶ 5.4.3.1.

KBR's proposal was based on the assumption that heavy equipment transport (HET) vehicles [deleted]. The agency evaluated this approach to contract performance as unacceptable, noting that HETs are not always available to perform this task, and that they are virtually never available on the short notice necessary to comply with the solicitation's 6-hour replacement requirement. Agency Report, Tab S, at 33.

KBR offers no explanation regarding its failure to provide for road marching of vehicles, responding simply that "[t]here is nothing in the mandatory requirements [of the solicitation] that require[s] the contractor to road march vehicles." KBR Post-Hearing Comments, Mar. 10, 2003, at 15. Based on this assertion, KBR maintains that it was unreasonable for the agency to downgrade its proposal for failing to propose staffing to perform this activity. We disagree.

In reviewing an agency's evaluation, GAO will not reevaluate offerors' proposals, but rather will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and with procurement statutes and regulations. Encorp-Samcrete Joint Venture, B-284171, B-284171.2, Mar. 2, 2000, 2000 CPD ¶ 55 at 4. The offeror has the burden of submitting an adequately written proposal, and mere disagreement with the agency's judgment is insufficient to establish that the agency acted unreasonably. PEMCO World Air Servs., B-284240.3 et al., Mar. 27, 2000, 2000 CPD ¶ 71 at 15.

KBR has not offered any basis for its apparent assumption that HETs [deleted]. Accordingly, on this record, including the specific PWS provision putting offerors on notice of the need to road march vehicles, we find no basis to question the agency's

downgrading of KBR's proposal for failing to propose staffing to perform that activity.¹⁴

The agency also downgraded KBR's proposal for failing to propose staff to clean equipment being returned from training exercises and to perform 10-level maintenance. With regard to cleaning, the PWS stated: "The Contractor shall inspect, test, repair, and clean as required returned dispatched equipment prior to re-issue." PWS ¶ 5.3.6.3. With regard to operator or 10-level maintenance, the PWS stated: "The Contractor shall perform Operator (unless specified otherwise herein)¹⁵ and Organizational-level preventative maintenance . . . on each of the equipment systems listed in Technical Exhibit 5.B" PWS ¶ 5.2.2. Additionally, the PWS explained, "the intent of PM [preventative maintenance] is to provide Level 10 and Level 20 routine maintenance services to identify and correct equipment faults that prevent normal safe operational readiness or may cause injury to Contractor or Government personnel or further damage to the equipment."¹⁶ PWS ¶ 5.4.1.1.

The agency evaluated KBR's proposed staffing plan as deficient in that it contained virtually no staffing to clean equipment being returned from training exercises, and

¹⁴ In reviewing the record on this issue, we compared the number of hours in KBR's proposal associated with the requirements of PWS ¶ 5.3 to the MEO staffing plan for that portion of the PWS. We found that the MEO reflected a total of [deleted] direct productive hours to perform the requirements of this PWS paragraph, while KBR's proposal offered only [deleted]. MEO, Table 16; KBR Post-Hearing Comments, attach. A. Assuming a total of 1,900 productive hours per full time equivalent (FTE) staff member per year, the MEO reflects slightly more than [deleted] FTEs to perform these requirements, while KBR's proposal reflects just under [deleted] FTEs. Similarly, with regard to PWS ¶ C.5.5, which also includes requirements for transportation and recovery services, the MEO reflects [deleted] direct productive hours (or approximately [deleted] FTEs), while KBR's proposal included only [deleted] hours (or approximately [deleted] FTEs). Id.

¹⁵ The solicitation provided that the 16th Cavalry Regiment would be responsible for performing operator level maintenance for certain HMMWVs that were dispatched to that unit on a long-term basis.

¹⁶ The agency evaluator who served as the senior maintenance representative on the SSEB explained that 10-level maintenance involves determining if basic vehicle components are in need of maintenance or repair, and includes checking for appropriate fluid levels, changing tires, and fixing a track on a tank; he stated that there are 114 specific 10-level "checks" for M1A1 tanks, and 54 "checks" for HMMWVs, and that virtually all of these checks are performed either before or after vehicle operation. Tr., Feb. 25, 2003, at 7.

similarly contained virtually no staffing to perform 10-level maintenance. Agency Report, Tab I, at 3. Again, KBR does not dispute the agency's assessment regarding its lack of proposed staffing for these activities, stating "it was not KBR's responsibility to wash the equipment," Protest (Dec. 12, 2002) at 7, and similarly acknowledging "KBR did not propose staffing for certain preventative maintenance, safety and reliability inspections, 10 level maintenance and 'pre-turn-in' activities when the equipment was out in the field." Id. at 6.

In both instances, KBR asserts that the Army—not the contractor—is responsible for performing the activities at issue. In maintaining that the RFP did not require KBR to propose staffing to wash vehicles or perform 10-level maintenance, KBR references various Army manuals and regulations that direct equipment operators to clean their own vehicles and to perform their own 10-level maintenance. The agency responds that, notwithstanding the Army directives, the PWS, as quoted above, explicitly made the contractor responsible for performing these activities because multiple students/trainees "operate" a given piece of equipment during a training exercise; accordingly, the PWS contemplates contractor responsibility for these activities to ensure that the equipment is properly maintained.¹⁷

Even assuming that the Army directives on which KBR relies require the student/trainee "operators" of the dispatched equipment to clean their own vehicles and perform their own 10-level maintenance, KBR does not explain how these affirmative obligations negate the clear PWS requirements that the contractor will also perform these activities. In light of the specific PWS provisions that the contractor must clean equipment and perform 10-level maintenance, along with the clearly disclosed training mission at issue, KBR's purported interpretation, which effectively eliminates various PWS provisions, is not reasonable.¹⁸ At best, we view KBR's asserted reliance on the Army directives as creating a patent solicitation ambiguity which KBR could challenge only prior to submitting its proposal. See 4 C.F.R. § 21.2(a)(1) (2003); Bank of Am., B-287608, B-287608.2, July 26, 2001, 2001 CPD ¶ 137. Our rule that protests of obvious solicitation ambiguities must be filed prior to submission of proposals is intended to facilitate clarification of legitimate questions prior to proposal preparation. Since KBR sought no clarification of this matter prior to submitting its proposal, it may not now assert that

¹⁷ The agency's senior maintenance representative on the SSEB testified that students/trainees using the equipment at issue here "don't have the expertise to find what's wrong all the time." Tr., Feb. 25, 2003, at 4.

¹⁸ We find KBR's assertions regarding its interpretation of the PWS requirements particularly unreasonable in light of the fact that KBR is currently performing the Directorate of Base Operations (DBOS) contract at Ft. Knox. As the incumbent DBOS contractor at Ft. Knox, KBR is clearly familiar with the training activities being performed there.

the only legally permissible interpretation is its own. Id. On this record we find no basis to question the agency's conclusion that KBR's proposal was deficient for failing to propose staff to wash vehicles and to perform 10-level maintenance.

Finally, the agency evaluated KBR's proposed phase-in plan as unacceptable. In this regard, the PWS stated: "To ensure smooth transition to Contractor performance and to prevent possible decreases in productivity, the Government will provide a 90-calendar-day transition period prior to the contract start date. During the Phase-In period, the Contractor shall prepare to assume full responsibility for all areas of operation in accordance with the terms and conditions of this contract." PWS ¶ 1.4.1. The PWS further provided that "the Contractor shall furnish employees who are fully qualified, have current certifications; and meet the minimum experience levels, educational requirements, and skill levels described in [PWS] paragraph C.1.5.5."¹⁹ PWS ¶ 1.5.4.

In evaluating KBR's phase-in plan as unacceptable, the agency stated:

KBR has not planned adequate time to train their workforce prior to contract start. They propose using [deleted] following the contract start date to conduct all new employee orientation and issue tools and equipment to their employees.

Agency Report, Tab S, at 34.

KBR does not dispute that its proposed phase-in plan contemplates waiting until after commencement of contract performance to obtain various training and certifications for most of its employees. Specifically, KBR states that it intended for training activities to "**begin**" (the bold is KBR's) at contract commencement, and that KBR "proposed various training and certification plans [lasting] from [deleted]." Protest (Dec. 12, 2002) at 3. Consistent with its explanation that a substantial portion of employee training would not occur until after the contract start date, a KBR representative acknowledged that approximately [deleted] of KBR's proposed employees (over [deleted] percent of its total staff) would not come onboard until the first day of contract performance and that "most" of these [deleted] employees would require subsequent training and Army certification before they would be qualified to [deleted]. Tr., Feb. 25, 2003, at 60-61; Agency Report, Tab F, KBR Proposal, at B-9. On this record, we find no basis to question the agency's evaluation of KBR's proposed phase-in plan as unacceptable.

¹⁹ PWS ¶ 1.5.5, identifies various required qualification requirements including, among other things, "Contractor Personnel Qualified to Operate Equipment." This PWS paragraph requires that contractor employees have applicable operational instruction and driver testing.

In summary, as noted above, the solicitation required that an offeror's proposed staffing plan must "provide sufficient detail to determine that the offeror can provide a sufficiently skilled and adequate work force" and, similarly, that an offeror must provide an "adequate description" of its proposed technical approach." Agency Report, Tab D, RFP, at 55. Additionally, the solicitation required that the proposed phase-in plan must "ensure smooth transition" and provide for fully qualified personnel at commencement of contract performance. Agency Report, Tab N, PWS ¶¶ 1.4.1, 1.5.4. Based on our review of the record, it is clear that KBR's proposal failed to comply with these requirements. Overall, based on the multiple deficiencies and significant weaknesses identified in KBR's proposal, as discussed above, along with KBR's failure to adequately explain how it would successfully perform all of the contract requirements, we find nothing unreasonable in the agency's determination to exclude KBR from consideration.

The protest is denied.

Anthony H. Gamboa
General Counsel