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Decision

Matter of: Kellogg Brown & Root Services, Inc.

File: B-298694; B-298694.2; B-298694.3

Date: November 16, 2006

James J. McCullough, Esq., Steven A. Alerding, Esq., and Deneen J. Melander, Esq., Fried, Frank, Harris, Shriver & Jacobson LLP, for the protester.

Richard L. Moorhouse, Esq., David T. Hickey, Esq., and Dorn C. McGrath III, Esq., Greenberg Traurig LLP, for Atlantic Contingency Constructors, LLC; William A. Roberts III, Esq., and Richard B. O’Keeffe Jr., Esq., Wiley Rein & Fielding LLP, for Fluor International, Inc.; and J. Alex Ward, Esq., Edward Jackson, Esq., and Kristen G. Schulz, Esq., Jenner & Block LLP, for URS-IAP, LLC, the intervenors.

Richard Welsh, Esq., Naval Facilities Engineering Command, for the agency.

Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency did not perform a reasonable cost realism evaluation when it deleted a certain element of cost from awardee’s proposed indirect costs because other offerors accounted for this element as a direct cost; this evaluation did not result in a reasonable assessment of the probable cost of performing the contract associated with the awardee’s proposal, given that the adjustment was inconsistent with Cost Accounting Standards 401 and 402 and the firm’s cost accounting practices, to which the firm was obligated to adhere in performing the contract.

2. Protest of evaluation of protester’s proposed contingency plan is sustained where the protester provided detailed arguments why the evaluation was unreasonable, which were consistent with the record, and the agency did not explain why the evaluation was reasonable in light of those arguments.

DECISION

Kellogg Brown & Root Services, Inc. (KBR) protests the award by the Department of the Navy of three global contingency construction contracts under request for proposals (RFP) No. N62470-06-R-6002 to Atlantic Contingency Constructors, LLC (ACC), Fluor International, Inc. (Fluor), and URS-IAP, LLC (URS). KBR contends that the agency misevaluated proposals under technical and cost factors.

We sustain the protest.

BACKGROUND

This acquisition is for construction and related engineering services in response to global natural disasters, humanitarian assistance, conflict, or projects with similar characteristics. Agency Report (AR), Tab 23, Source Selection Board (SSB) Report, at 3. The RFP contemplated award of up to three cost-plus-award-fee, indefinite-delivery/indefinite-quantity (ID/IQ) contracts for a base year with four 1-year options. Award was to be made without discussions unless discussions were otherwise determined to be necessary. Id. at 68.

The solicitation provided for award on a “best value” basis, considering corporate experience, past performance, contingency plan, management approach, small business utilization, and cost. The non-cost factors were of equal importance and together were more important than the cost factor. The past performance factor consisted of two subfactors listed in descending order of importance—past performance and safety. The management approach factor consisted of two equally rated subfactors—organization, home office support, and key personnel; and accounting and management systems and procedures. The small business utilization factor consisted of two equally rated subfactors—past performance in small business utilization, and participation of small business concerns for this program. Id.

For the cost factor, offerors were required to submit a completed “cost model.” This cost model, which was provided with the RFP, consisted of a spreadsheet for each year of the contract. In the cost model, offerors did not propose estimated direct costs, but instead the agency used fixed “plug” numbers for all of the direct costs (including “other direct costs”) to be incurred under the contract. The total direct costs in the cost model were \$186 million per year and \$930 million for the 5-year contract period. For each contract year, offerors were to insert in the spreadsheet their rates, allocation bases, and totals for the indirect cost items of labor overhead, fringes, overhead, general and administrative (G&A), cost of facilities capital, and proposed award fee. The results for each yearly spreadsheet, including the plug numbers for direct costs, were summed to develop a total overall cost for each proposal. The cost model required offerors to “apply indirect rates in accordance with their established accounting system.”¹ Offerors were also required to submit with their cost proposal the “[r]ate structure, allocation base, and other supporting rationale” for their proposed indirect costs. RFP amend. 3, Cost Model. The cost proposal instructions in the RFP required the offerors to provide specific support for the proposed indirect costs and stated:

¹ The RFP stated that the offeror’s proposed indirect rates would serve as maximum ceiling rates during the life of the contract. RFP at 66.

The proposal must completely identify all indirect costs that are known, including a list of labor categories that are charged as indirect costs. The proposal must also provide a list [of] the types of costs that are charged as Other Direct Costs. These costs are needed so the Government can conduct an equitable cost evaluation.

RFP at 66. These instructions were the subject of a question and answer included in Amendment No. 3 to the RFP, which read as follows:

Q11 -- Please explain the requirement to identify labor categories that are charged as indirect costs. Should the Offeror provide a representative sample or a detailed list of every labor category that charges to overhead pools?

A11 -- The information helps us to identify significant cost areas where an adjustment between direct and indirect may be necessary to make the prices more comparable. All labor categories should be included.

Eight proposals were submitted in response to the RFP. A technical evaluation board (TEB) evaluated the technical proposals under the non-cost factors, and assigned adjectival ratings to proposals under each of the factors and subfactors. As relevant here, the TET ranked the proposals of the awardees and the protester as follows: Fluor--second, URS--third, ACC--fourth, and KBR--[REDACTED]. AR, Tab 21, TEB Report, app. A.

The cost evaluation board (CEB) evaluated proposals under the cost factor. Based on the CEB's cost analysis and various audits by the Defense Contract Audit Agency (DCAA), a variety of probable cost adjustments were made to the offerors' proposed indirect costs.

For example, with regard to KBR's cost proposal, "DCAA noted differences between the contractor's proposed indirect rates and the contractor's current forward pricing rate recommendations and/or DCAA audited rates," which indicated to DCAA that KBR's proposed indirect rates were overstated. AR, Tab 22, CEB Report, at 22. The CEB adopted DCAA's recommendations regarding the estimated overstatement of KBR's indirect rates and lowered KBR's evaluated cost by [REDACTED]. *Id.* at 24.

The CEB also determined that, based on its review, there were two areas in which one or more of the offerors differed in their accounting charging practices--program management office (PMO) and fringe benefit costs. However, the CEB was not able to confirm that it had completely identified all areas where accounting treatments by the various offerors of certain costs differed. *Id.* at 9. The CEB noted that while

ACC and another offeror² (not an awardee or KBR) treat PMO costs as indirect costs in accordance with their established cost accounting practices, all other offerors treated these costs as direct costs. “[T]o be consistent with the direct treatment of PMO costs by the majority of the offerors,” the CEB “reclassified” the PMO costs from indirect costs and removed them from the G&A rate cost pool, which reduced ACC’s evaluated cost by \$19,122,930.³ *Id.* at 17.

With regard to total evaluated cost, the CEB ranked the awardees and protester as follows: ACC--first (lowest), KBR--[REDACTED], Fluor--third, and URS--fifth. AR, Tab 22, CEB Report, at 32.

The TEB and CEB reported their results to the SSB, which adopted the findings of both boards. The relevant ratings for the four proposals at issue in this protest were reported as follows:

	KBR	ACC	URS	Fluor
Technical	[REDACTED]	Good	Good	Excellent
Corporate Experience	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Past Performance	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Past Performance	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Safety	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Contingency Response Plan	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Management Approach	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Organization, Home Office Support, and Key Personnel	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Accounting and Management Systems and Procedures	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Small Business Utilization	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Past Performance in Small Business Utilization	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Participation of Small Business Concerns for this Program	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Evaluated Cost	[REDACTED]	\$1,033,644,690	\$1,060,231,026	\$1,045,099,517

AR, Tab 23, SSB Report, at 7-8; Tab 21, TEB Report, app. A.

The SSB performed a comparative analysis of proposals based on each factor and subfactor, and assessed overall rankings to the relevant proposals as follows:

² This other offeror accounted for fringe benefits differently from the other offerors.

³ Because direct costs were pre-determined plug numbers in the cost model, no adjustments were made to ACC’s or any other offeror’s direct costs.

Fluor--first, URS--second, and ACC--third. The SSB did not specifically compare KBR's proposal to ACC's, since ACC's proposal was rated higher technically and was determined to be of lower cost, but did compare KBR's proposal to URS's and Fluor's. The SSB noted KBR's "excellent" corporate experience relative to Fluor and URS, but noted that KBR's past performance was inferior, primarily due to "significant weaknesses" noted in the performance of [REDACTED] where KBR received [REDACTED] ratings. AR, Tab 23, SSB Report, at 17, 29. KBR's contingency plan was found to be less "comprehensive," "much more general," and "relied on [KBR's] previous experience to demonstrate the plan to respond to contingency requirements rather than providing a detailed contingency response plan." *Id.* at 18, 29-30. KBR's proposal was also rated inferior to Fluor's and URS's under the management factor because, according to the agency, the proposal provided less detail in certain areas, [REDACTED] of KBR's accounting and management systems were found by DCAA to be [REDACTED] and DCAA found [REDACTED] associated with KBR's CAS disclosure statements. *Id.* at 19, 30. Under the small business utilization factor, the SSB found "no advantage" to Fluor's proposal over KBR's, but found that URS's proposal was superior to KBR's due to advantages under the past performance in utilizing the small business program subfactor. *Id.* at 20, 31. The SSB determined that the technical superiority of Fluor's and URS's proposals were worth the additional evaluated cost as compared to KBR's proposal. *Id.*

The source selection authority adopted the findings of the SSB, and made award to Fluor, URS, and ACC. These protests followed.

COST EVALUATION

KBR protests the cost evaluation of ACC's proposal, contending that the agency was not permitted to "reclassify" ACC's PMO costs because this would be inconsistent with ACC's established cost accounting practices. KBR notes that if this adjustment had not been made, KBR's evaluated cost would have been lower than ACC's. KBR also protests that it was unreasonable for the agency to make the particular adjustment to ACC's costs, where it is apparent that there were other instances where the offerors treated costs differently for accounting purposes that were not accounted for in the cost evaluation.

When an agency evaluates proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated cost of contract performance is not considered controlling since, regardless of the costs proposed by an offeror, the government is bound to pay the contractor its actual and allowable costs. Metro Mach. Corp., B-297879.2, May 3, 2006, 2006 CPD ¶ 80 at 9. As a result, a cost realism analysis is required to determine the extent to which an offeror's proposed costs represent the offeror's likely costs in performing the contract under the offeror's technical approach, assuming reasonable economy and efficiency. Federal Acquisition Regulation (FAR) §§ 15.305(a)(1), 15.404-1(d)(1), (2); The Futures Group

Int'l, B-281274.2, Mar. 3, 1999, 2000 CPD ¶ 147 at 3. A cost realism analysis involves independently reviewing and evaluating specific elements of each offeror's cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with the methods of performance and materials described in the offeror's proposal. FAR § 15.404-1(d)(1); Advanced Commc'n Sys., Inc., B-283650 et al., Dec. 16, 1999, 2000 CPD ¶ 3 at 5. Based on the results of the cost realism analysis, an offeror's proposed costs should be adjusted when appropriate. FAR § 15.404-1(d)(2)(ii). The evaluation of competing cost proposals requires the exercise of informed judgment by the contracting agency; we review an agency's judgment in this area only to see that the agency's cost realism evaluation was reasonably based and not arbitrary. Metro Mach. Corp., supra.

The agency contends that it conducted a proper cost realism analysis of the cost proposals. It acknowledges that ACC was "required by its approved cost accounting systems" to include PMO costs as indirect costs, but asserts that since all but one other offeror proposed these costs as direct costs, the reclassification was necessary so that the agency could be "consistent in its evaluation." Supplemental Agency Report (SAR) at 3.

The agency's cost realism analysis of ACC's proposal was not reasonable. As the agency admits, ACC's cost accounting practices specifically require that ACC include PMO costs as indirect costs. In fact, ACC's cost proposal, including a G&A rate that included PMO costs, was consistent with the RFP's cost model instructions requiring offerors to "apply indirect rates in accordance with their established accounting system." RFP amend. 3, attach. 2, Cost Model.

CAS 401--which is applicable to ACC--requires a contractor's practices in estimating costs for a proposal to be consistent with cost accounting practices used by the contractor in accumulating and reporting costs. 48 C.F.R. § 9904.401-20 (2005). This requirement is imposed because "[c]onsistency in the application of cost accounting practices is necessary to enhance the likelihood that comparable transactions are treated alike," so that, among other things, there is "financial control over costs during contract performance." Id. More significantly, CAS 402--also applicable to ACC--states:

All costs incurred for the same purpose, in like circumstances, are either direct costs only or indirect costs only with respect to final cost objectives. No final cost objective shall have allocated to it as an indirect cost any cost, if other costs incurred for the same purpose, in like circumstances, have been included as a direct cost of that or any other final cost objective. Further, no final cost objective shall have allocated to it as a direct cost any cost, if other costs incurred for the same purpose, in like circumstances, have been included in any

indirect cost pool to be allocated to that or any other final cost objective.

48 C.F.R. § 9904.402-40. Because of these requirements, ACC was and will be required to account for its costs in a manner consistent with its established accounting practices during the course of this contract performance. General Research Corp., B-241569, Feb. 19, 1991, 91-1 CPD ¶ 183 at 9; CACI, Inc.--Fed., B-216516, 84-2 CPD ¶ 542 at 10-13. Consequently, in determining ACC's evaluated probable cost for performing this contract, the agency could not reclassify costs that ACC treats as indirect costs in its accounting system as direct costs. See General Research Corp., *supra*; CACI, Inc.--Fed., *supra*.

The agency argues that this adjustment was necessary in order to allow for a more "equitable" comparison of the cost proposals. In effect, the agency here has selectively "normalized" the cost elements included in the offerors' indirect cost pools. Normalization is a technique sometimes used within the cost evaluation/adjustment process that involves measuring offerors against the same cost standard or baseline where there are no logical differences in approach or in situations where insufficient information is provided in the proposals. General Research Corp., *supra*. Such a normalization process was improper here because ACC's proposal necessarily accounted for PMO costs as part of its indirect costs, which were required to be accounted for in a like manner under this contract.⁴ Therefore, the agency's "normalization" of PMO costs among the offerors with different accounting systems necessarily resulted in an unreasonable estimate of the offerors' proposed costs for performing this contract. General Research Corp., *supra*, at 5-6, 9. Moreover, the agency has never explained why deleting PMO costs from proposed indirect costs will result in a more equitable comparison of proposals. There is no evidence in the record that the shifting of costs from indirect to direct can result in a number that represents the probable costs of a particular proposal in performing the contract, because there is no indication that the cost model's plug number represents the direct cost approach that will be taken by each contractor.⁵

⁴ Offerors are entitled to establish their own accounting systems consistent with applicable CAS requirements. See CACI, Inc.--Fed., *supra*, at 12.

⁵ The agency asserts that KBR's challenge to the cost evaluation is an untimely challenge to an alleged solicitation defect, given that a solicitation amendment informed offerors that complete indirect and other direct cost information was required because "[t]he information helps us to identify significant cost areas where an adjustment between direct and indirect may be necessary to make the prices more comparable." Agency Brief (Oct. 20, 2006) at 2; see RFP amend. 3, attach. 1, Q&A 11. This advice could not be reasonably construed as providing for a cost evaluation that was inconsistent with CAS and did not compute the actual probable
(continued...)

The agency asserts that because an RFP amendment advised offerors, in response to an offeror's question, that a "standing PMO" would not be funded, offerors were on notice that PMO costs were "within the scope of direct costs fixed by the Navy." Agency Brief (Oct. 20, 2006) at 2; see RFP amend. 3, attach. 1, Q&A 44. The agency posits that its cost evaluation adjustment to account for ACC's different treatment of PMO costs was therefore appropriate in order to allow for an "equitable" comparison of the proposals. This argument is meritless for a variety of reasons. First, the statement that the agency would not fund a "standing PMO" does not suggest that PMO costs were included as direct costs; if anything, it suggests the opposite. Also, as noted above, the agency does not explain how this statement would allow ACC to vary from its established accounting practices with regard to PMO costs. Finally, there is no evidence that any PMO costs were included in the "plug" numbers for direct costs.

The agency argues that KBR was not prejudiced because it was also the beneficiary of a downward cost adjustment in its indirect costs. However, as noted above, the adjustment to KBR's probable costs was to properly account for an apparent overstatement in several of its indirect rates, which is an entirely different proposition than reclassifying costs that had been properly included in indirect cost pools to direct costs.

Finally, as noted by the protester, several of ACC's indirect cost rates are significantly less than those proposed by the other offerors, which KBR suggests evidences that costs which other offerors charged as indirect costs may be charged as direct costs by ACC. KBR contends that given the multiple accounting variances amongst the offerors, the agency's "singling out" of ACC's PMO costs to adjust from indirect costs to direct costs was unreasonable and represented unequal treatment. The agency has offered no substantive response to this KBR contention, which, based on this record, appears to have merit.

In sum, the agency's adjustment to ACC's proposal was unreasonable and prejudiced KBR because it resulted in ACC being evaluated as having a lower cost than KBR, such that no cost/technical tradeoff was performed.

CONTINGENCY PLAN EVALUATION

KBR also contends that the agency miscalculated its proposal and the proposals of URS and ACC under many of the technical factors. In reviewing such protests, our Office does not reevaluate proposals, but instead examines the record to determine whether the agency's judgment was reasonable and in accord with the RFP criteria.

(...continued)
costs of an offeror's proposal as required by FAR § 15.305(a)(1) and § 15.404-1(d)(1), (2).

Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. A protester's mere disagreement with the agency's judgment does not establish that an evaluation was unreasonable. UNICCO Gov't Servs., Inc., B-277658, Nov. 7, 1997, 97-2 CPD ¶ 134 at 7.

Under the contingency plan factor (which was equal in weight to the other non-cost factors), the RFP stated that the evaluation would "consider[] the effectiveness of the offeror's contingency response plan to perform work for this contract," and advised offerors that the government was seeking "approaches that maximize quality, result in optimal use of resources, are cost effective, and are highly responsive to the interests of the Navy and its customers." RFP at 61. Offerors were instructed to provide the following information in their proposals:

1. Address plan to minimize response time between the award of a task order and the mobilization to the site. Include a discussion on coordination of subcontractor for quick response.
2. Address plan to obtain materials, equipment, and workforce globally, including areas with limited/constrained resources.
3. Address plan to provide design and engineering services, including incidental support services.
4. Address plan to control and monitor costs for both the prime and subcontractors. Specifically describe cost control measures that will be employed to monitor subcontractor costs in a contingency environment.

Id.

KBR asserts with regard to the contingency plan factor that the agency overlooked a number of strengths, and assessed a number of weaknesses that were unreasonable. The agency responded in cursory fashion that KBR's proposal was "more general" and provided "limited details," and contended that the protester's arguments reflect only "mere disagreement" with the agency. AR at 17; SAR at 9.

Our review of the record shows more than "mere disagreement." In its protest filing, KBR provided citations to its proposal showing where in KBR's proposal the firm addressed each of the areas identified in the RFP for this factor, and showing where it addressed items the agency stated were weaknesses. KBR also made detailed arguments why its proposal was deserving of strengths or significant strengths, including pointing out where other offerors received similar strengths. See, e.g., KBR's Protest at 14-23. The agency has failed to respond to these specific allegations. Moreover, the TEB report contains only one short statement that "KBR's only support for their [contingency] response plan was to reference past projects and provided a general overview of their plans for contingency response," and

identified the following unelaborated weakness in KBR's proposal under the contingency plan factor:

Very limited detail provided on existing resources and how these resources will be coordinated. Contractor mainly used past contracts to show responses. Very limited detail provided for subcontractor agreements, pre-positioned materials, equipment or people.

AR, Tab 21, TEB Report, at 74-75.

Our review of the record does not show that KBR's contingency plan is more limited or general than the awardees' plans. Although URS proposed a plan that was approximately twice as long as the other offerors', KBR, Fluor, and ACC all provided contingency plans of similar length. From our review, it is not apparent that the level of detail in any of the plans is significantly different. Notwithstanding KBR's specific protest contentions, the agency has failed to provide any specific examples of where the plans are dissimilar, and none are apparent from the record. All offerors appear to have addressed the requirements of the RFP and all offerors cited past projects as examples to demonstrate how their plan would successfully be implemented. Although KBR perhaps cited a few more examples than the other offerors, the agency has not explained why this is a weakness and not a strength, given that the examples appear to demonstrate that the proposed contingency plan has been implemented successfully. Given that the record does not, on its face, support the agency's ratings, and the agency has otherwise failed to explain the difference in ratings, we sustain the protest on this ground.

OTHER TECHNICAL EVALUATION CONTENTIONS

KBR also asserts that the agency misevaluated its proposal under the past performance, management approach, and small business utilization factors; and that the agency misevaluated URS's and ACC's proposals under the corporate experience, past performance, and management approach factors. Based on our review of the record, we find the protester's allegations to be without merit with the exception of the following protest grounds, to which the agency has not adequately responded: (1) for various task orders, the agency failed to consider favorable past performance that was in its possession, and considered only unfavorable performance without considering (or explaining the inconsistencies with) more favorable performance reports; (2) KBR's proposal was entitled to numerous strengths and was undeserving of weaknesses under the organization, home office support, and key personnel subfactor of the management approach factor; (3) KBR's proposal was entitled to a higher rating under the small business utilization factor; and (4) the agency misevaluated URS under the corporate experience factor by considering the performance of subcontractors when, according to KBR, it is "unlikely" that the subcontractors will perform the work. It is unclear from the record, and the agency's cursory response to the allegations, whether the agency's

evaluation is reasonable under these factors. Although we do not sustain the protest on these grounds, given our recommendation below, the agency should consider the protester's arguments identified above in performing its reevaluation.

We recommend that the agency reevaluate proposals under the technical and cost factors, conduct discussions if determined necessary, and make a new source selection decision.⁶ If based on this new evaluation, the agency determines that one or more of the awardees are no longer in line for award, the agency should terminate the awardees' contracts and make awards consistent with the new selection decision. We also recommend that KBR be reimbursed the costs of filing and pursuing its protest, including reasonable attorney's fees. 4 C.F.R. § 21.6(d) (2006). In accordance with section 21.8(f)(1) of our Bid Protest Regulations, KBR must file its certified claim for costs, detailing the time expended and costs incurred, directly with the agency within 60 days of receipt of this decision.

The protest is sustained.

Gary L. Kepplinger
General Counsel

⁶ The agency may want to review its cost model to ensure that it accurately reflects probable costs and is not inconsistent with CAS.