Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of Brand Consulting Group, Inc.**
Under Solicitation No. DTFAWA-12-C-00031

Docket No.: **12-ODRA-00598**

Appearances:

For the Protester:	Mr. Leigh Andrew Brand of Brand Consulting Group, Inc.
For the FAA Program Office:	Gregory C. Carter, Esq.
For the Intervenor:	Mr. Brett Byall of ABS Quality Evaluations

I. Introduction

On April 13, 2012, Brand Consulting Group, Inc. ("Brand") filed its initial post-award bid protest ("Initial Protest") with the Federal Aviation Administration ("FAA") Office of Dispute Resolution for Acquisition ("ODRA"). The Initial Protest challenges the award of a contract by the FAA Product Team ("Product Team") to ABS Quality Evaluations ("ABS") for Aviation Safety Program Office ("AVS") Registrar Services pursuant to Solicitation DTFAWA-12-C-00031 ("Solicitation"). Under the Solicitation, the Product Team sought to procure services to audit the AVS Quality Management System ("QMS") for conformance with the International Organization for Standardization's ("ISO") 9001:2008 quality standard to achieve ISO Recertification. *AR* Tab 01, § C.2. *Finding of Fact* ("FF") 2, *infra*. The ISO's Quality Standard provides an internationally recognized method for organizations to demonstrate provisions of quality services to customers. *AR*

Tab 01, § C.1. AVS desired to complete the ISO Recertification process in an effort to develop a QMS that will enable the FAA to improve its safety oversight. *Id*.

The Initial Protest challenges the award to ABS on the grounds that: (1) the FAA failed to provide Brand with a timely debriefing; (2) the awardee, ABS, did not meet the accreditation certification requirements; and (3) the ABS price was not based on "accredited sampling plan requirements for a multi-site organization" as evidenced by too low a price. *Initial Protest* at 2-3. ABS timely intervened in the Protest in accordance with the ODRA Procedural Regulations at 14 C.F.R. §17.15(f).

On April 16, 2012, Brand filed a letter providing additional information in support of its Initial Protest, based on a written debriefing Brand received from the Product Team on April 13, 2012 ("First Supplemental Protest"). In the First Supplemental Protest, Brand questioned: (1) the evaluation finding that Brand's proposal did not meet a mandatory solicitation requirement; (2) the accreditation status of the awardee; and (3) the adequacy of the debriefing information received.

Brand also filed a supplemental protest on April 19, 2012 ("Second Supplemental Protest") alleging an "inherent conflict of interest." Specifically, Brand asserted that the award decision was "unduly influenced" by the fact that the Office of Acquisition Policy and Contracting Acquisition Quality Assurance Group had been issued a certificate of ISO 9001 registration by the awardee. The ODRA consolidated the First and Second Supplemental Protests with the Initial Protest Filing of April 13th and refers to them collectively herein as "the Protest."

For the reasons set forth below, the ODRA recommends that the Protest be denied in part and dismissed in part. The portion of the Protest challenging Brand's disqualification must be denied because Brand's proposal failed to meet a mandatory requirement in the Solicitation resulting in Brand's being found ineligible for award. Inasmuch as it properly was excluded from the competition, Brand lacks standing to raise the remaining grounds of the Protest, as it is not an interested party "whose direct economic interest has

been or would be affected by the award." 14 C.F.R. §17.3(m). The remaining grounds of the Protest therefore must be dismissed.

II. Findings of Fact

1. The Solicitation was issued on February 3, 2012, and was subsequently amended twice on February 15, 2012. *AR* Tab 14, at 3; *AR* Tabs 03, 04. It contemplates an award of a Firm fixed Price contract. *AR* Tab 01, § I, Clause 3.2.4-1. The period of contract performance consists of a base period of twelve months and two one-year options. *AR* Tab 01, § F.1.

2. The Solicitation was issued to support AVS's goal of completing the ISO 9001:2008 Recertification Audit as part of its effort to develop and establish a QMS which will allow the "total organization to continually manage change" that improves safety management and oversight of the Nation's aviation system. *AR* Tab 01, § C.1.

3. The Solicitation sought services from external third party auditors to audit the AVS QMS for conformance to the ISO 9001 Quality Systems Standard to achieve ISO Recertification. *AR* Tab 01, § C.2.

4. The audit services involved were to be carried out in accordance with the latest revision of ISO 1901 or its replacement. *AR* Tab 01, § C.3.2. The services are to be performed in various AVS office locations in Washington, D.C., as well as in 9 regional offices across the United States. *AR* Tab 01, *Attachment A.*

5. Section L of the SIR set forth instructions, conditions, and notices to the Offerors with respect to the preparation of proposals. In pertinent part, it contains a subsection that sets forth mandatory performance criteria as follows:

L.11.1 Factor I – Mandatory Performance Criteria

Each prospective offeror must meet, and provide evidence of the following mandatory performance criteria in order to be further considered:

1. The Contractor must be, and provide evidence of being an ISO 9000:2008 Registrar accredited through the U.S. accreditation body for Quality Management Systems as administered by the American National Standards Institute and the American Society for Quality (ANSI-ASQ) National Accreditation Board (ANAB). The offeror must be an accredited registrar without a lapse in accreditation or certification for the past ten (10) years (since 2001). The offeror-contractor must be a U.S. based company. The scope of this accreditation shall include the North American Industry Classification System (NAICS) code 921190, "Other General Government Support." The contractor will describe a plan and approach to recertifying the AVS QMS.

2. The offeror-contractor must have, and provide evidence of a published Internet directory of registered companies that have achieved registration and/or certification to ISO 9001:2008 under their auspices …

AR Tab 01, § L.11.1 (underline in original).

6. The award criteria, Section M.2., provided:

M.2. Basis for Award

FAA will select for contract award the proposal that provides the best value to the agency. Best value is defined as the offer that presents the most advantageous solution to the FAA's requirement. In making this determination, the technical evaluation will be more important than the price . . .
The FAA reserves the right to award a contract(s) immediately following the evaluation of the initial offer, and may not require discussions or negotiations. Therefore, it is critical that the initial offer be fully responsive to this SIR and that it contains the Offeror's best terms.

AR Tab 01, § M.2.

7. With respect to the technical evaluation of Factor 1, Mandatory Performance Criteria, the Solicitation provides:

   1) Mandatory Performance Criteria (Factor 1)

   > The FAA will evaluate the proposal response documentation against the credentials provided in response to the Criteria. *Offerors whose proposal response documentation evidence does not meet the specifications may be removed from further consideration for award*.

AR Tab 01, § M.3(1) (emphasis added).

8. On February 21, 2012, Brand submitted its proposal in response to the Solicitation. *AR* Tab 14, ¶ 11. Brand's proposal states that it "intends to provide these services [DELETED]" and "Brand Consulting Group, Inc. will function [DELETED]." *AR* Tab 07, p. 6.

9. Brand's technical proposal further addressed the Solicitation's mandatory requirement of being an accredited registrar as follows:

   [DELETED]

   AR Tab 07, p. 8.

10. Brand's proposal also includes a copy of [DELETED]. Brand also includes a copy of [DELETED]. The scope of Brand's registration, however, is for "[DELETED]." [DELETED]. *AR* Tab 07, pp. 46.

11. With respect to key personnel under the contract, Brand's proposal states that the "[DELETED]," and he will be "[DELETED]." *AR* Tab 07, pp. 14-15. The proposal also indicates that [DELETED]. *Id*.

12. The Source Selection Evaluation Team then conducted its evaluation and prepared evaluation reports for consideration by the Source Selection Official in making an award decision. *AR* Tab 14, ¶¶ 13-15.

13. Specifically with respect to Brand's proposal, the Technical Evaluation Report states:

    [DELETED]

    AR Tab 10, pp. 2; *AR* Tab 15, ¶ 2.

14. The technical evaluation documents show that after failing to meet the mandatory evaluation criteria, Brand was not further evaluated or scored by the Technical Evaluation Team. *AR* Tab 10, at 1-2.

15. In a memorandum to the Contracting Officer dated March 21, 2012, the Source Selection Official rendered her decision to award the contract to ABS. *AR* Tab 12. The next day, the Contracting Officer notified Brand via letter that Brand did not receive the award. *Initial Protest*, Exhibit 1.

16. Brand filed the Initial Protest with the ODRA on April 13, 2012. On that same day, Brand received a written a debriefing, and filed a Supplemental Protest on April 16, 2012. *First Supplemental Protest* at 1. Brand filed a Second Supplemental Protest on April 19, 2012. *Second Supplemental Protest* at 1.

III. Burden and Standard of Proof

As the Protester in this matter, Brand bears the burden of proof, and must demonstrate by substantial evidence (i.e., by the preponderance of the evidence), that the challenged actions by the designated evaluation and source selection officials failed in a prejudicial manner to comply with the Acquisition Management System ("AMS"). *Protest of Adsystech, Inc.*, 09-ODRA-00508. Under the AMS, source selection decisions must be supported by a "rational basis" and must not be arbitrary, capricious or an abuse of discretion. *AMS Policy* §§ 3.2.2.3.1.2.5. The ODRA will not substitute its judgment for that of the "designated evaluation and source selection officials as long as the record

demonstrates that their decisions had a rational basis, were consistent otherwise with the AMS, the evaluation plan, and the award criteria set forth in the underlying solicitation." *Adsystech, supra* (citing *Protest of Ribeiro Construction Company, Inc.*, 08-TSA-031).

IV. Discussion

Of all the protest grounds asserted by Brand, the ODRA reaches the merits of only one, as it is dispositive of the entire Protest. That allegation concerns Brand's challenge to its disqualification based on the evaluation finding that its proposal did not meet a mandatory solicitation requirement.

It is well established in ODRA precedent that an offeror's failure to meet mandatory requirements renders a proposal ineligible for award. *Protest of Royalea'L Aviation Consultants*, 04-ODRA-00304C. The protestor bears the responsibility for the contents and completeness of the information contained in its proposal, including its ability to meet the Solicitation's mandatory requirements. *Protest of International Services, Inc.*, 02-ODRA-00224; *Protest of Aydin Displays, Inc.*, 11-ODRA-00578. "Any deviation" from the mandatory requirements laid out in a Solicitation could render a protestor ineligible for award "regardless of the merit[s]" of the protestor's complaint. *Protest of Royalea'L Aviation Consultants*, 04-ODRA-00304C. Thus, an offeror who submits a proposal that does not conform to the solicitation requirements assumes the risk that the offer will be found nonresponsive or technically unacceptable. *Protest of Aydin Displays, Inc., supra* (citing *Cannon U.S.A., Inc.*, B-249521, December 02, 1992).[1]

The record here contains substantial evidence in support of the evaluation finding that Brand properly was found to be ineligible for award. The Solicitation contains an express mandatory provision requiring the offeror to be an accredited registrar. The Solicitation also clearly states, "The offeror must be an accredited registrar." FF 5.

[1] Although not bound by the precedents of the Government Accountability Office or the Court of Federal Claims, the ODRA will consider those decisions as persuasive when the underlying procurement regulations or policies in question are similar. *See e.g., Protest of International Services, Inc.*, 02-ODRA-00224.

Further, the Solicitation provides that "Offerors whose proposal response documentation evidence does not meet the specifications may be removed from further consideration for award." FF 7.

Brand's proposal, rather than stating [DELETED], actually confirms that [DELETED]. Further no evidence in the record suggests that Brand is [DELETED].[2] *AR* Tab 07. Rather, the proposal indicates that Brand is [DELETED], and that its proposal relies on [DELETED], to satisfy the stated mandatory requirement of being a registrar. FF 10. The fact that Brand's [DELETED] does not meet the express requirement of the solicitation. FFs 8-10.

Brand essentially admits in the Supplemental Protest that it did not comply with the mandatory requirement:

> The Debrief indicates that Brand's proposal was not considered among bidders because Brand failed to meet the "mandatory criteria". [sic] The Debrief also states, *"Brand's offer failed the mandatory criteria in accordance to Section M.3 1) Mandatory Performance Criteria (Factor 1) as they did not [DELETED]. This agency specified that the Offeror, to be considered a prime contractor with the agency, must be a registrar.* [DELETED]*."* In fact, there is no statement in the RFP that the "Offeror" and the "prime contractor" must be one in the same. Had such a statement existed, Brand would have protested this requirement at the time the RFP was issued. Of greater importance is that Brand provided clear evidence in the form of [DELETED].

Supplemental Protest at 1-2 (emphasis in original).

Brand's argument that the RFP "Offeror" and "prime contractor" do not need to be "one and the same" is without merit. *Supplemental Protest* at 1–2. When a government agency solicits offers, the agency has privity solely with the Offeror, i.e., the contractor. *See Radix II, Incorporated*, B-209476, March 01, 1983; *Matter of Valor Construction Management, LLC*, B-405365, October 24, 2011 (noting the government has a legitimate interest in limiting privity to contractors because such limited privity reduces the risk of

[2] Brand's failure to meet the registrar status requirement caused Brand [DELETED]. FF 13 (stating Brand's "[DELETED]").

inadequate contractual performance). While Brand refers to [DELETED] as its "partner," the record plainly shows that Brand was the offeror-contractor and [DELETED] was its subcontractor. FF 8. Any ability on the part of Brand's [DELETED] to provide [DELETED] simply does not satisfy the accreditation requirement. FF 5.

The record shows that Brand, in fact, was ineligible for award and was properly excluded in accordance with the express terms of the Solicitation. FF 5, 7. The Technical Evaluation Team's determination of ineligibility is based solidly on the contents of Brand's own proposal. FFs 8-10. As explained in the Technical Evaluation Report, the "use of an [DELETED] would add unnecessary layer[s] of communications and management that translates into greater costs, poor communications, and slower performance" when implementing the contract's requirements. FF 13. There is no basis on which the ODRA could conclude that this assessment is irrational, arbitrary or capricious.

Based on the above, the ODRA finds that the determination that Brand was ineligible for award for failure to comply with the terms of the Solicitation was consistent with the AMS, and the evaluation and award criteria set forth in the SIR. *Protest of CGH Technologies, Inc., supra*. The ODRA further finds that the disqualification of Brand's proposal for failing to satisfy a mandatory requirement had a rational basis, and was not arbitrary, capricious or an abuse of discretion. *Protest of Royalea'L Aviation Consultants, supra*. Thus, to the extent Brand is challenging its exclusion from the competition, this aspect of the Protest is denied.

Under the ODRA Procedural Regulations, only an "interested party" has the standing to file a protest. 14 C.F.R. § 17.15(a)(2012). In the context of a bid protest, an interested party "is one whose direct economic interest has been or would be affected by the award or failure to award an FAA Contract." *Id.* at § 17.3(m). Based on this definition, the ODRA has concluded that an interested party must be "an actual offeror in a post-award protest, which had a 'substantial chance' for award, but for the alleged acquisition

errors." *Protest of Sentel Corporation*, 09-ODRA-00512; *Protest of Ribeiro Construction Company, Inc., supra*; *Protest of Rocky Mountain Tours, Inc.*, 01-ODRA-00183. A protester whose proposal fails to meet mandatory solicitation requirements is not an "interested party" with standing to protest. *Protest of CGH Technologies, Inc*., *supra*; *Protest of Royalea'L Aviation Consultants, supra*. Due to Brand's ineligibility for award for failure to comply with the mandatory solicitation requirements, it is not an "interested party" with requisite standing to maintain further grounds of protest. 14 C.F.R. §§ 17.3(m) and 17.15(a)(2012); *Protest of CGH Technologies, Inc*., *supra; Protest of Rocky Mountain Tours, Inc., supra*. Given this conclusion, the ODRA need not reach the merits of Brand's allegations challenging the FAA's contract award to ABS, as that portion of its Protest must be dismissed for lack of standing.

V. CONCLUSION

For the reasons set forth above, the ODRA recommends that the Protest be denied in part and dismissed in part.

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Marie A. Collins
Dispute Resolution Officer and
Administrative Judge
FAA Office of Dispute Resolution for Acquisition