

For the reasons set forth herein, after reviewing the submissions of Kinematica and the Program Office, the ODRA concludes that Kinematica has failed to establish that the Program Office's estimate of the contract value lacked a rational basis. However, the sole rationale of the Program Office, for its decision not to proceed with a noncompetitive procurement from Kinematica, was based on an incorrect interpretation of Acquisition Management System ("AMS") Section 3.1.6.5 and was not consistent with FAA small business policy. The ODRA therefore recommends that the Kinematica Protest be sustained in part and that the Program Office be directed to take corrective action as described herein.

II. FINDINGS OF FACT

1. On November 9, 2005, the Program Office published a Market Survey entitled "Host Interface Device (HID)/National Airspace System (NAS) Local Area Network (LAN) (HNL) Support". The Market Survey indicated that: "Enroute Program Operations has a requirement to provide maintenance and sustainment of the Host Interface Device ... as well as transition support to Enroute Automation Modernization ("ERAM")." Market Survey at 1.
2. The Market Survey also reflected a decision that:

The FAA will review all information submitted by certified 8(a) socially and economically, disadvantaged business ("SEDB's") and other small businesses ... to determine whether a SEDB 8(a) or small business set aside is appropriate.

Id.

3. The Market Survey stated that:

Interested parties must provide a complete vendor capability's statement (contractor's format) and submit a business declaration form (attached). The NAICS Code for

this acquisition is 541330 and business size standard is \$4,000,000.

The Market Survey went on to describe the capabilities required. *See* Market Survey at 2.

4. On November 28, 2005, Kinematica submitted its Response (“Kinematica Response”) to the Market Survey. The Kinematica Response indicated that Kinematica is a Small Business Administration certified Section 8(a) woman-owned, socially and economically disadvantaged business “operating under the business size standard of \$4,000,000 and within the 541330 NAICS Code” Kinematica Response at 1. The Kinematica Response went on to outline Kinematica’s experience and interest in accomplishing the work.
5. On December 5, 2005, the Contracting Office forwarded an e-mail to Kinematica stating:

Thank you for your interest in responding to the HID/NAS/LAN Engineering and Support Services Survey. The Market Survey conducted resulted in no reasonable expectation of obtaining offers from two (2) or more responsible GSA FSS SEDB’s (8)(a) or small businesses and therefore was determined not appropriate for a GSA FSS SEDB 8(a) or small business set aside. Should you have any questions, please feel free to contact me.

See Exhibit 2 to the Kinematica Protest.

6. Following a series of e-mail communications, the principal for Kinematica spoke with the Contracting Officer on December 8, 2005. In this regard, the Protest asserts that that in a December 8, 2005 conversation with Kinematica’s principal, the Contracting Officer advised that Kinematica’s Response to the Market Survey:

[W]as not being considered any further, because Kinematica/SunHillo Corporate Team Response was the only submission received. Further, [the Contracting Officer] stated that the Kinematica/SunHillo Corporate Team Submission was not being dismissed due to an evaluation of our technical capability to perform the Contract. But, rather because of a lack of a second submission and therefore, the lack of competition.

Kinematica Protest at 2. The principal of Kinematica further indicated that the Contracting Officer told her during the same conversation “that the HNL Support Contract as identified in posting ID4470 will be performed under an existing contract vehicle order, which would include the incumbent team ...” Id.

7. Thereafter, on December 15, 2005, Kinematica filed the instant Protest with the ODRA, “seeking the opportunity to fairly bid on the HNL Support Contract as advertised in posting ID4470.” Protest at 2.

III. DISCUSSION

In its Protest, Kinematica contends that the Program Office should have proceeded with the acquisition process and allowed Kinematica to submit a bid even though no company other than Kinematica had responded to the Market Survey. *See* Kinematica Protest at 2. Kinematica asserts that the Program Office erred in estimating the potential value of the Contract at greater than \$3 million. In Kinematica’s view, Section 3.6.1.3.5 of the AMS did not prohibit the Program Office from continuing the procurement process with Kinematica following Kinematica’s submission of a Response to the Market Survey because, in Kinematica’s view, the potential value of the Contract is just under \$3 million.

For its part, the Program Office contends that prior to releasing to its Market Survey, it had formulated an independent government cost estimate of \$4 million for the work involved. *See* Agency Response at 2. The Program Office further points out that:

As the work effort required is identical to the existing work effort, the estimate was derived based on current program funding and expenditures. Funding requests have been submitted and the expected budget for this work in FY 06 and FY 07 is \$3.8 million.

Id. In addition, the Program Office compared its cost estimate to invoices it had received from the incumbent contractor doing the identical work. It also took into account hardware, travel and other direct costs. Agency Response at 2. Incorporation of these additional components resulted in a updated independent government cost estimate of \$3,784,598. Thereafter, the Program Office concluded that inasmuch as the estimate exceeded \$3 million and AMS Section 3.6.1.3.5 prohibited non-competitive awards to small and economically disadvantaged businesses for work valued at more than \$3 million, it would obtain the services through an existing services contract vehicle.

Since the cost estimate was more than \$3 million, the HNL IST could not contract with Kinematica directly using the agency's Acquisition Management System policy allowing for non-competitive awards to SEDB entities of work anticipated to be \$3 million or less.

Agency Response at 3.

The Program Office contends the actions it took were soundly based on the estimates it received, including a comparison with actual costs incurred under an existing contract for the work, and therefore cannot be said to be arbitrary, capricious or lack a rational basis, and are consistent with the AMS. The Program Office further urges that it was not required to conduct any discussions with the Protester regarding its actions in connection with the government cost estimate. Agency Response at 4.²

² During the pendency of the Protest, the parties participated in an unsuccessful alternative dispute resolution process ("ADR") at the ODRA. In its Comments following the Agency Response, Kinematica improperly included at Attachment 3, a document prepared as part of the ADR process. The ODRA has stricken the document from the record, since it constituted an ADR communication, and has not considered the document in making these Findings and Recommendations.

The ODRA's review in the context of a bid protest involves a determination of whether the Agency action that is the subject of the Protest had a rational basis, was arbitrary or capricious, or constituted an abuse of discretion. *Protest of Raytheon Technical Services Company*, 02-ODRA-00210, citing *Protest of Computer Associates International, Inc.* 00-ODRA-00173. It further is well established that the Protester bears the burden of proof. *See Protest of Information Systems & Networks Corporation*, 99-ODRA-00116. In this case, the issue presented for decision is whether the Program Office's determination that the potential value of the Contract work was approximately \$4 million, satisfies the above referenced rational basis test and whether the decision to not pursue a noncompetitive procurement from the Protester, as the sole company who responded to the Market Survey, was consistent with the FAA's AMS.

For its part, the Protester claims that the potential value of the work did not exceed \$4 million and thus that any requirement of two or more offerors for contracts valued at more than \$3 million is not applicable here. The Protester submits that the Program Office's cost estimate is inaccurate and that the Protester's cost estimate is the correct one. Notwithstanding the fact that the Protester disagrees with the Program Office's estimate, it has not met its burden of establishing that the estimate is irrational or otherwise unsupported. Rather, the record suggests the opposite. The Program Office cost estimate is well documented and is consistent with information obtained by the Program Office from an incumbent contractor who already has been doing similar work for the FAA.

Moreover, it is well established that mere disagreement with the Program Office's decision is not sufficient. *Protest of Raytheon Technical Services Company, supra.* citing *Protest of Universal Systems & Technology, Inc.* 01-ODRA-00179. Here the Protester was required to do more than merely propose an alternative and, in the ODRA's view, merely alleging an alternative cost estimate does not prove that the estimate utilized by the Program Office was irrational.

As is noted above, the ODRA finds the cost estimate relied on by the Program Office in establishing the anticipated total value of the procurement as greater than \$3 million is rationally based and cannot be said to be arbitrary, capricious or to reflect an abuse of discretion. The remaining question concerns whether the decision not to proceed with a noncompetitive procurement based purely on that cost estimate is consistent with AMS policy, and in particular with AMS Section 3.6.1.3.5, which is entitled “Noncompetitive Awards to SEDB 8(a) vendors.” The sole basis stated by the Program Office for not proceeding on a noncompetitive basis is that “the HNL IST could not contract with Kinematica directly using the agency’s AMS policy allowing for noncompetitive awards to SEDB entities of work anticipated to be \$3 million or less. AMS 3.6.1.3.5.” Agency Response at 3. This rationale was originally stated by the Contracting Officer on December 5, 2005, in an e-mail to Kinematica which stated:

The Market Survey conducted resulted in no reasonable expectation of obtaining offers from two (2) or more responsible GSA SSS SEDB’s 8(a) or small businesses and therefore determined not appropriate for a GSA SSS SEDB(8)(a) or small business set aside.

See Finding of Fact 5. Section 3.6.1.3.5 states as follows:

Individual procurements may be noncompetitively awarded to SEDB (8(a)) vendors when the anticipated total value of the procurement (including all options) is \$5 million or below for procurements assigned manufacturing North American Industry Classification System codes and \$3 million or below for all other procurements. Where a procurement exceeds the noncompetitive threshold, the procurement may be awarded on a noncompetitive basis to SEDB (8(a)) vendors if (1) there is not a reasonable expectation that at least two or more SEDB (8(a)) sources will submit offers that are in the Government’s best interest in terms of quality, price and/or delivery; or (2) the award will be made to a concern owned by an Indian tribe or an Alaska Native Corporation.

The first sentence of the Section clearly contemplates noncompetitive awards to SEDB 8(a) vendors in situations where the total value of the procurement is \$5 million or below for contracts involving NAIC Manufacturing Codes, and below \$3 million for all other procurements. Thus, the first sentence of the Section stated the general rule that awards

may not be noncompetitively made to SEDB 8(a) Vendors of contracts valued at greater than the dollar figures given. The second sentence of the Section, however, states a clear exception to that rule, and expressly permits awards above the dollar thresholds on a noncompetitive basis to SEDB 8(a) Vendors under two specific circumstances. The second exception to the dollar limitation for noncompetitive awards is where an award is being made “to a concern owned by an Indian tribe or Alaskan native corporation.” That exception does not appear to be applicable here. The first exception, however, states that where “there is not a reasonable expectation that at least two or more SEDB 8(a) sources will submit offers that are in the Government’s best interest in terms of quality, price and/or delivery ...” an award may be made on a noncompetitive basis to a qualified vendor of a contract valued above the threshold.

In this case the Government completed a Market Survey and obtained a response from only one SEDB 8(a) source *i.e.*, Kinematica. Thus, the Program Office could not have had a reasonable expectation that at least two or more eligible SEDB 8(a)’s would submit offers in response to a Solicitation. The Program Office, therefore, retained the discretion to proceed under AMS Section 3.6.1.3.5 with a noncompetitive procurement of the services from Kinematica. The Program Office, however, appears to have not been aware of, or to have ignored this exception to the maximum dollar value provision of Section 3.6.1.3.5. Based on the record, it appears that once the Program Office determined that the potential value of the contract exceeded \$3 million it believed, wrongly, that it had no authority to proceed further with a potential noncompetitive procurement from Kinematica. There is no indication in the record that the Program Office at any time considered whether under the circumstances, proceeding with a noncompetitive sourcing of services from Kinematica would have been in the “Government’s best interest in terms of quality, price and/or delivery.” The statements made in the Contracting Officer’s e-mail of December 5, 2005 and in the Agency Response filed with the ODRA, to the effect that the Program Office was *prohibited* by Section 3.6.1.3.5 from proceeding on a noncompetitive basis with Kinematica, are incorrect.

It is the stated policy of the FAA:

to provide obtainable and reasonable opportunities for small businesses owned and controlled by socially and economically disadvantaged individuals to participate in contracts awarded by the FAA

See AMS Section 3.6.1.3.1. In this case the contract work in question previously had been awarded to and accomplished by a small economically disadvantaged business as a result of a set aside acquisition. *See* Agency Response at 1. That incumbent SEDB, subsequently was bought out by a large company and therefore “no longer qualifies as an SEDB company.” *Id.*

Moreover, as counsel for the Program Office points out:

Agency guidance requires that any requirement that had been procured through an SEDB set-aside acquisition must obtain approval from the FAA Small Business Development Staff before reprocurement outside the SEDB set-aside acquisition process, *See* AMS Toolbox, T3.6.1(A)(1)(e). The practical interpretation of that Section is that once a set of requirements have been met the SEDB Acquisition process (“whether competitive or non-competitive, recompetition of those requirements should be limited to the SEDB acquisition process unless unusual circumstances dictate another approach.”³

Agency Response at 1. Given the clear policy of the AMS favoring the provision of “obtainable and reasonable opportunities” for SEDBs to have contract opportunities with the Agency and given that the Program Office incorrectly interpreted Section 3.6.1.3.5, its decision cannot be said to have been consistent with the AMS. The net effect of the approach used by the Program Office was to convert what had been a set aside contract to a non-set aside and to non-competitively place the work with a non-SEDB company without giving an interested SEDB entity, *i.e.*, Kinematica, an opportunity to compete for what previously had been set aside work.

³ There is no indication in the record that the Program Office obtained the referenced approval.

IV. CONCLUSION

For the reasons discussed above, the ODRA recommends that the bid protest of Kinematica, Inc. be sustained in part that and the Program Office be directed to: (1) consider whether proceeding with a noncompetitive procurement of the services from Kinematica is in the Agency's interest in accordance with AMS Policy and AMS §3.6.1.3.5; (2) take appropriate action based on the outcome of its deliberation; and (3) report to the Administrator, through the ODRA, of the outcome of the mandated action within 30 days of the date of the Administrator's Order. Current contract performance would continue pending the completion of the corrective action.

-S-

Anthony N. Palladino
Associate Chief Counsel and Director
FAA Office of Dispute Resolution for Acquisition