

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

Protest of)
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Advanced Sciences & Technologies, LLC) Docket No. 10-ODRA-00536
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Pursuant to Solicitation DTFAC-09-R-00023)
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DECISION ON REQUEST FOR RECONSIDERATION

I. INTRODUCTION

This matter currently is before the Federal Aviation Administration ("FAA") Office of Dispute Resolution for Acquisition ("ODRA") on a Request for Reconsideration ("Request") filed by the Protester, Advanced Sciences and Technologies, LLC ("AS&T") on October 6, 2010. The Request arises from a Final Agency Order ("Final Order") issued on September 24, 2010 by the FAA Administrator in this Protest ("AS&T Protest"). The Final Order adopted and incorporated the ODRA's Findings and Recommendations ("F&R"), denying and dismissing AS&T's Protest allegations, which challenged the result of mandated corrective action taken by the William J. Hughes Technical Center ("Center") pursuant to the *Protest of Columbus Technologies and Services, Inc.*, 09-ODRA-00514 ("Columbus Protest").

In its Request, AS&T asserts that the ODRA's F&R demonstrated three clear errors of fact or law. The first alleged error is that the F&R "overlooks and ... omits from consideration" an erroneous statement made by the Technical Evaluation Team ("TET") in the original Post-Negotiation Memorandum, dated December 22, 2009, that the requirements for the Senior Systems Analyst ("SSA") position "have not changed or been relaxed for the follow-on." *Request* at 2. The second alleged error is that the ODRA's conclusion that the TET "did not automatically assign a score of 'good' for Key Personnel" overlooks the TET's own statements and is contrary to the F&R in the Columbus Protest. *Id.* The third alleged error is that the

ODRA ignores the Center's failure to deny the foregoing assertions regarding the TET's erroneous statement and automatic assignment of a score of "Good" in its Agency Report. *Id.* Based on these alleged errors, AS&T requests the ODRA to recommend that the FAA Administrator's Final Order in the AS&T Protest be vacated and AS&T's Protest be sustained. *Id.* at 9.

The awardee, Columbus Technologies and Services, Inc. ("Columbus"), filed its Response to the Request ("Response") on October 18, 2010, arguing that the Request should be denied, as it presents no previously unavailable information to contradict the ODRA's conclusions; and the F&R contains no clear error of fact or law. *Columbus Response* at 3-4. The Product Team did not brief this matter, but notified the ODRA on October 19, 2010 that it joins in the Columbus Response. *Product Team Letter*, dated October 19, 2010.

On October 21, 2010, AS&T filed a Reply to the Response ("Reply"). In its Reply, AS&T simply recites the applicable standard for reconsideration, and repeats the arguments set forth in its Request. AS&T further contends that the failure of the Product Team to address the issue of whether the SSA score was based on an erroneous assumption indisputably establishes that AS&T's contentions in that regard are meritorious, and that the TET evaluated the Key Personnel Factor in a manner inconsistent with the award criteria. *Reply* at 3 *citing F&R* at 16. For the reasons discussed herein, the ODRA denies AS&T's Reconsideration Request and will not recommend that the Administrator reconsider the Final Order.

II. FINDINGS OF FACT

A. The Columbus Protest

1. The Columbus Protest involved a successful challenge to the award of the subject contract to AS&T. *See Protest of Columbus Technologies and Services, Inc.*, 09-ODRA-00514. Specifically, in the Columbus Protest, the Administrator adopted the ODRA F&R and recommended that the Protest be sustained in part based on: (1) the Center's deviation from the stated evaluation criteria in evaluating Corporate Experience/Past Performance; and (2) communications regarding technical aspects of

AS&T's proposal in a manner contrary to the AMS and the Solicitation ("SIR"). *Id.* AS&T participated in that protest as an intervenor. By Final Order, dated May 19, 2010, the Administrator required the Technical Center to re-evaluate the proposals of AS&T and Columbus. *Id.* In pertinent part, the Center was directed to reinstate the results of its original technical evaluation for AS&T for Factors 1, 3 and 4, and to re-evaluate Factor 2. *Id.*

2. In pertinent part, with respect to the allegations of error set forth in the instant AS&T Request for Reconsideration, the F&R in the Columbus Protest made specific findings of fact based on the administrative record in that case.
3. With respect to the initial evaluation of AS&T's proposal, Finding of Fact 26 in the Columbus Protest F&R states:

The TET Report indicates that the proposal of AS&T received ratings of Excellent for Factors 1 and 2, with every sub factor there under stating "no weaknesses found." AS&T received a rating of Good for Factor 3, however, with one weakness noted: "The Technical Evaluation Team has determined that the Senior System Analyst has not earned a BA or BS degree from an accredited college or university and has been in the job for less than a year. SSA resume is good in meeting the requirements as per the SOW." AS&T received a rating of "Pass" for Factor 4. AR [Agency Response], Tab 3.

4. With respect to the initial evaluation of the Columbus proposal, Finding of Fact 27 in the Columbus Protest F&R states:

The proposal of Columbus received ratings of "Excellent" for all 3 Factors and for every sub factor there under the TET report stated "[n]o weaknesses found." Columbus received a rating of "Pass" for Factor 4. AR, Tab 3.

5. As for the assignment of a "Good" rating to AS&T for Factor 3, Finding of Fact 42 in the Columbus Protest F&R states:

The document attached to the November 5, 2009 letter that was addressed to AS&T contains the overall rating for the factors, along with bulleted descriptions of the strengths found specific to each sub factor. The only factor that received less than the highest rating was Factor 3 which identified one "Weakness" as being:

The Technical Evaluation Team has determined that the Senior System Analyst has not earned a BA or BS degree from an accredited college or university and has been in the job for less than a year. SSA resume is good in meeting the requirements as per the SOW.

AR, Tab 5.

6. With regard to AS&T's initial candidate for the SSA position, Finding of Fact 43 in the Columbus Protest F&R states:

As for this weakness relative to the SSA position, the record indicates that several of the offerors proposed the same candidate who was employed in the SSA position at the time by the incumbent. AR, Tab 7. This particular candidate had been permitted to serve as a replacement for the SSA who left the position in February of 2008, despite her lack of a degree from an accredited college or university. In the SIR for the follow-on contract, the minimum requirements were relaxed pursuant to Amendments 3, 4 and 5; thereby allowing her to qualify for the position. The TET was instructed by the Contract Specialist to give proposals that proposed this particular candidate a score of "Good" AR, Tab 7.

7. In the discussion section of the F&R in the Columbus Protest, the ODRA stated in a footnote that:

The record shows that with respect to AS&T's evaluation for Factor 3, even though the individual proposed for the position of Senior Systems Analyst was currently employed in that position by the incumbent and met the minimum requirements of the SIR for that position, the Technical Evaluation Team gave AS&T a weakness because that individual had not earned a BA or BS degree from an accredited college or university and had been in the job for less than a year. FF [Finding of Fact] 26. This finding comports with the SIR's definition of a "Weakness" as being "a flaw that increases the risk of unsuccessful contract performance," FF 15, and is consistent with the SIR's grading scheme for evaluating proposals. FF 16.

Protest of Columbus, supra, at FN 7.

B. *The Earlier AS&T Request for Reconsideration of the Columbus Protest*

8. Prior to the completion of the remedial action by the Center, AS&T filed a Request for Reconsideration of the Administrator's Final Order in the Columbus Protest on June 2, 2010. AS&T's Reconsideration Request in the Columbus Protest asserted that the F&R demonstrated two clear errors of fact or law, in that: (1) the ODRA did not recognize that a change in the overtime pricing method by the Center established a rational basis for requesting technical revisions; and (2) the ODRA's determination that the Center's technical discussions were not permitted because "AS&T's technical proposal was not unclear, unsubstantiated, or deficient, is not supported by and is contrary to applicable precedent." *Protest of Columbus, supra*, Decision on Request for Reconsideration, dated July 9, 2010 at 1-2. The ODRA denied AS&T's Reconsideration Request and declined to recommend that the Administrator reconsider the Final Order in the Columbus Protest. *Id.* AS&T then filed an appeal of the Administrator's Final Order on July 16, 2010 in the United States Court of Appeals for the Third Circuit, but it was dismissed on November 22, 2010 pursuant to F.R.A.P. 3(a) and LAR Misc. 107.2(b). *Advanced Science and Technologies, Inc. v. Federal Aviation Administration*, Case No. 10-3113

C. *The AS&T Protest*

9. The Center's re-evaluation pursuant to the Administrator's Order in the Columbus Protest resulted in a determination by the Center to award the Contract to Columbus and terminate AS&T's Contract for the convenience of the Government. *Protest of AS&T*, 10-ODRA-00536 at 10, *FF* 21. AS&T subsequently filed a Protest on August 9, 2010, alleging that the new cost/technical tradeoff analysis and award to Columbus lacked a rational basis and was arbitrary, capricious, constituted an abuse of discretion and/or was not supported by substantial evidence with respect to its original technical evaluation of Factor 3 - Key Personnel as "Good." *AS&T Initial Protest* at 3. AS&T's Protest further asserted that the Center's original scoring of Columbus' proposal as "Excellent" for Factor 1 - Program Management Plan, which considered as a subfactor employee recruitment/retention, was arbitrary, capricious and lacked a rational basis, given the quality of the employee benefits package offered by Columbus. *AS&T Supplemental Protest* at 3-4.

10. On September 24, 2010, the FAA Administrator adopted the F&R prepared by the ODRA in the Protest of AS&T in Order No. 10-553. With respect to the allegation concerning the technical evaluation of Factor 3 Key Personnel, the ODRA found that the Center's technical evaluation of Factor 3 had a rational basis and was supported by substantial evidence; and was not arbitrary, capricious, or an abuse of discretion. *Protest of AS&T*, 09-ODRA-00536. With respect to AS&T's latter allegation with respect to Factor 1, Program Management Plan, the ODRA found that AS&T's challenge against the Center's original technical evaluation of Columbus' proposal was untimely. *Id.*
11. In the F&R in the AS&T Protest, the ODRA expressly incorporated by reference the parties' positions in the predecessor Columbus Protest, along with the detailed findings of fact, which were set forth in the Columbus Protest F&R adopted by the FAA Administrator in Order Number ODRA-10-541. *Protest of AS&T, supra*, at 3.
12. With respect to the minimum requirements for the SSA position, Finding of Fact 5 in the AS&T Protest states:

Amendment 5, issued on August 26, 2009, amended the qualifications for the Senior Systems Analyst, stating "[i]n paragraph C.2.2.3, the words 'of which 3 years must be in Aviation systems' is hereby deleted." *Columbus Protest, FF 21*. The final version of the Senior Systems Analyst qualifications read as follows:

Qualification Requirements: Position requires a minimum of a Bachelor's Degree in Computer Science or related field from an accredited institution and a minimum of five (5) years experience in systems analysis and design. Experience for Task 2 includes but System Analysis and System Administration.

In the absence of the required undergraduate degree, a successful candidate for the position can substitute eight (8) years experience in addition to the five (5) years experience, for a total of 13 years experience.

Columbus Protest, FF 21.

13. Finding of Fact 14 in the AS&T Protest states in regard to AS&T's evaluation of Factor 3 and its SSA candidate's experience:

The TET was instructed by the Contract Specialist to give offerors proposing this particular candidate a score of "Good" and offerors being considered for award would have the opportunity to submit another candidate when submitting final offers. *Columbus Protest, FF 43*. Specifically, the administrative record in the Columbus Protest shows that:

During the original proposal evaluation, the TET questioned the qualifications of a candidate proposed for the SSA position under several of the proposals. Specifically, it was questionable whether the candidate proposed ... had the **requisite number of years of experience (13) sans Bachelors' degree**. ... The Contracting Officer and the COTR under the current contract had both given their "approval" for this individual to serve as a replacement for the SSA who left the position Because the government "accepted" this individual as a replacement for the SSA position under the current contract ... the TET was instructed ... **to give the proposed candidate a score of "good"** for all proposals for which she was proposed as the SSA.

Columbus Protest AR, Tab 7, page 2 (emphasis added).

14. Finding of Fact 15 in the AS&T Protest states in regard to Columbus' evaluation of Factor 3 and its SSA candidate's experience:

In the original technical evaluation, the proposal of Columbus received ratings of "Excellent" for all 3 Factors and a rating of "Pass" for Factor 4. For every sub factor, the TET report stated "[n]o weaknesses found" and gave Columbus a "strength" for what it perceived to be an "extensive Employee Benefit Program" under Factor 1, Program Management Plan. *Columbus Protest, FF 2; Columbus Protest AR, Tab 3*. With respect to Factor 3, Key Personnel, the TET graded Columbus as "Excellent" noting as strengths the fact that (1) the Program Manager resume meets and exceeds the statement of work ("SOW") requirements and has 20 years of program management experience; and (2) the Senior Systems Analyst resume also meets and exceeds the SOW requirements, noting an MS in computer Science and 9 years in Systems Analysis and Design. *Id.*

15. As for the re-evaluation of AS&T and Columbus' proposals mandated by the FAA Administrator, Finding of Fact 27 in the AS&T Protest states:

The SSO provided a Declaration, which was attached to the Product Team Agency Response, in order to provide more complete documentation of the source selection decision. *Initial Protest AR*, Tab 3, *Spampinato Decl.* ¶ 16. The SSO states:

17. I decided that corrective action was required to fully document the decision I made that the Columbus proposal represented the best value to the Government consistent with SIR DTFACT-09-R-00023 and the Administrator's Order, ODRA-I0-5441.

18. I understood that the four evaluation factors were listed in decreasing order of importance, that the final factor, Transition Plan, was "Pass/Fail and that the least important of the scored factors was "Key Personnel." Specifically, I understood that "Program Management Plan" was more important than "Corporate Experience/Past Performance", and that "Corporate Experience/Past Performance" was more important than "Key Personnel."

19. I understood that the significant difference between the two technical proposals was in the quality of the "Key Personnel" proposed for the contract.

20. I understood that the scores awarded to each offeror for this factor represented the Tech Team's evaluation of both the "Program Manager" and the "Senior Systems Analyst" and that AS&T received a score of "Good" for this factor and Columbus received a score of "Excellent."

21. I determined that the qualitative difference between the technical proposals of AS&T and Columbus, I considered as a whole, and the specific qualitative differences between the key personnel offered by AS&T and Columbus, justified the additional cost of the technically superior proposal.

Id.

16. On October 6, 2010, the subject Request for Reconsideration was filed by AS&T in connection with the FAA Administrator's Final Order in the AS&T Protest.

III. DISCUSSION

A. *The Standard of Review*

The standard of review employed by the ODRA where parties seek reconsideration is well established. Specifically, to prevail on reconsideration the requesting party must demonstrate: (1) clear errors of fact or law in the underlying F&R; or (2) previously unavailable information that would warrant reversal or modification. *See Protest of Columbus*, 10-ODRA-00514, *Decision Denying Motion for Reconsideration*; *Protest of Maximus, Inc.*, 04-TSA-009, *Decision Denying Motion for Reconsideration*, dated November 29, 2004; *Protest of Raytheon Technical Services Company*, 02-ODRA-00210, *Findings and Recommendations on Motion on Protester's Request for Reconsideration*, dated April 10, 2002; *Protest of Consecutive Weather*, 99-ODRA-00112, *Recommendation Regarding Reconsideration Request*, dated July 13, 1999; *Consolidated Protests of Camber Corporation and Information Systems and Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080, *Decision on Motion for Reconsideration*, dated July 23, 1999.

Consistent with its charge to implement an efficient dispute resolution process, the ODRA “will not entertain [reconsideration] requests as a routine matter,” and will not “consider [reconsideration] requests that demonstrate mere disagreement with a decision or simply restat[e] a previous argument” raised during the prior protest litigation. *Id.* Consequently, attempts to either re-litigate previously adjudicated issues, or introduce new legal arguments based on the original administrative record do not provide a basis for reconsideration. *See Protest of Columbus*, 10-ODRA-00514.

B. *Statement regarding the Requirements for Senior Systems Analyst Position*

AS&T alleges that the F&R “overlooks and ... omits from consideration, the unambiguous and erroneous statement made by the TET” that the requirements for the Senior Systems Analyst position “have not changed or been relaxed for the follow-on.” *Request* at 4, *citing Protest of*

Columbus, AR, Tab 7, page 2. The statement at issue is contained in an exhibit in the Administrative Record of the Columbus Protest and reads as follows:

Because the government accepted this individual as replacement for the SSA position under the current contract *and the requirements for this position have not changed or been relaxed for the follow-on*, the TET was instructed by the *Contracts Specialist* to give the proposed candidate a score of “good” for all proposals for which she was proposed as the SSA.

Id., Post-Negotiation Memorandum, dated December 22, 2009 (emphasis added). AS&T compares the above language with FF 14 of the ODRA’s F&R in the AS&T Protest, wherein the italicized language was deleted and replaced with ellipses. *Request* at 4. Notably, in the Columbus Protest F&R, the ODRA made factual findings to the contrary in FF 43 with respect to the minimum requirements for the SSA position under the predecessor contract *vis a vis* the solicitation at issue, stating: “In the SIR for the follow-on contract, the minimum requirements *were relaxed pursuant to Amendments 3, 4 and 5*; thereby allowing her to qualify for the position.” *See Protest of Columbus, supra* (emphasis added). FF 6.

In the instant Request, AS&T argues that the italicized language omitted from the quote in FF 14 indicates that the TET believed that, with respect to the prior Contract, the requirements for the SSA position had not changed or been relaxed for the subject contract, and they evaluated AS&T’s candidate for that position on that basis. *Request* at 4. AS&T argues that the ODRA’s F&R overlooked this statement and “there can be no doubt that the omitted language clearly and conclusively establishes that the TET and the Contract Specialist were of the belief that the requirements for the SSA were the same as for the prior, existing contract and determined to provide a score of ‘good’ based upon that assumption.” *Id.* at 5.

In the Protest of Columbus, the ODRA did not “overlook” the italicized language at issue, but rather gave it no weight in the Findings of Fact. The evidentiary record did not show that AS&T’s SSA candidate had been evaluated based on a belief that the requirements for the SSA position had not changed or been relaxed. Rather, the record showed that during the evaluation of initial proposals, the TET considered the resume of the SSA to be “good” in meeting the SOW

requirements, explaining that she lacked the requisite degree and had been in the job for less than a year. *FF 5*. The ODRA also found that this particular SSA candidate had been serving in the SSA position under the incumbent contract and the minimum requirements for the follow-on solicitation were relaxed so as to allow her to qualify for, and attempt to continue in, that position. *FF 6*. Moreover, the record in the Columbus Protest, specifically, the Post-Negotiation Memorandum, dated December 22, 2009, shows that the TET considered AS&T's SSA candidate to meet the requirements, but had concerns as to whether she had the necessary years of experience. *FF 13*. These concerns, combined with her lack of degree, resulted in a finding of weakness and increased risk of unsuccessful contract performance, which in turn resulted in an overall rating of "Good" for Factor 3. *Id.*

In contrast, the ODRA found that no weaknesses were assigned with respect to the initial rating of the proposal of Columbus, and its proposal received ratings of "Excellent" for all 3 factors scored. *FF 4*. Specifically, the record in the Protest of Columbus shows, with respect to Factor 3, Key Personnel, the TET noted as strengths the fact that (1) the Program Manager exceeded the SOW requirements and had 20 years of program management experience; and (2) the Senior Systems Analyst resume also exceeded the SOW requirements, and had an MS in computer Science and 9 years in Systems Analysis and Design. *FF 4 and 14*.

Moreover, in the Protest of AS&T challenging the Center's re-evaluation of AS&T and Columbus' proposals, the ODRA found that a second SSO did an independent evaluation and specifically addressed this issue in a declaration, stating that he understood that there was a "significant difference between the two technical proposals was in the quality of the 'Key Personnel' proposed for the contract" and that "the scores awarded to each offeror for this factor represented the Tech Team's evaluation of *both* the 'Program Manager' and the 'Senior Systems Analyst.'" *FF 15* (emphasis added). Noting that AS&T had received a score of "Good" for this factor and Columbus received a score of "Excellent," the second SSO considered as a whole the technical proposals, and the specific qualitative differences between the key personnel offered by AS&T and Columbus, in justifying the additional cost of Columbus' technically superior proposal. *Id.* In the F&R in the Protest of AS&T, the ODRA expressly found that the second SSO's technical analysis and award decision was not irrational, arbitrary, capricious or an abuse

of discretion. *AS&T Protest, supra*, at 19.

C. *The Assignment of a Score of “Good” for Factor 3 - Key Personnel*

Similarly, AS&T takes issue with the ODRA’s conclusion in the F&R in the Protest of AS&T that: “There is no evidence that the Tech Center automatically assigned a ‘Good’ rating for Factor 3 based upon the SSA candidate; nor that the TET overlooked the qualifications of the Program Manager in assigning the score.” *Request* at 6, *citing F&R* at 17. Again, AS&T points to the language discussed above in the Post-Negotiation Memorandum that “the TET was instructed by the Contracts Specialist to give the proposed candidate a score of ‘good’ for all proposals for which she was proposed as the SSA.” *Id.* AS&T argues that “the SIR did not provide for the scoring of individual Key Personnel positions and instead called for the grading of Key Personnel as an evaluation factor” but that the Contract Specialist directed the TET to assign a score of “Good” in any proposal in which the incumbent SSA candidate appeared. *Request* at 7.

The ODRA found that the TET in fact did not score Factor 3 of AS&T’s proposal in a manner that was automatic, *e.g.*, without thought or reason. *Protest of AS&T, supra*, at 14-17. Rather, the record in the Protest of AS&T contains a clear rationale, consistent with the SIR and evaluation criteria, that supports AS&T’s overall rating of “Good” for that factor. *Id.* Moreover, the ODRA’s conclusion that there is no evidence that the TET “automatically” assigned a score of “Good” is not at odds with factual findings in the Columbus Protest. *FFs* 3, 5 and 6. As discussed above, these factual findings indicate that, although the TET considered the SSA resume to be “good” in meeting the SIR requirements for a Key Personnel position, the resume also presented a weakness. Consequently, the Contract Specialist’s instruction to the TET in this regard was not irrational or inconsistent with the SIR’s evaluation criteria, which would support precluding the assignment of an “Excellent” rating for Factor 3 to any offeror that proposed that particular SSA candidate.

D. The Center's Briefings in Response to AS&T's Protest Allegations

AS&T's third assertion of error is that the "ODRA F&R ignores that the Tech Center did not deny in the Agency Response either that 1) the TET arrived at the score of 'good' for Key Personnel based upon the erroneous belief that the requirements for the SSA had not changed from the prior contract or 2) that the score of 'good' was automatically assigned indicating that both contentions made by AS&T were, in fact the case." *Request* at 2. In other words, AS&T argues that because the Product Team did not dispute these protest assertions, "the only rational conclusion that can be made is that the Product Team concedes that the TET made such errors." *Id.* at 8. In support of this contention, AS&T asserts that where the Center disagreed with AS&T's protest, it disputed the contentions in an affidavit, but "the Tech Center did not even set out to defend the initial scoring of Key Personnel as provided to AS&T." *Id.* AS&T essentially argues that the Center was obligated to demonstrate a rational basis for following a Final Order of the FAA Administrator, asserting that the Center wrongly "relied solely on the contention that the FAA Administrator conclusively established the scoring to be provided for Key Personnel in its Final Order." *Id.*

The FAA Administrator's Final Order in the Protest of Columbus directed the Center to immediately implement the remedy recommended by the ODRA in its F&R which states, in part, "with respect to the technical proposal of AS&T, the Center should reinstate the results of its original technical evaluation for AS&T for Factors 1, 3 and 4, and re-evaluate Factor 2, Corporate Experience/Past Performance" The record shows that this is exactly what the Center did and therefore there is no basis on which to find its actions irrational. Moreover, the ODRA already had determined that the TET's finding of a "Weakness" with respect to AS&T's initial SSA Candidate was consistent with the SIR's definition of a "Weakness" and evaluation criteria. *FF* 7. AS&T's argument in this regard merely constitutes an attempt to re-litigate an issue previously adjudicated in the Protest of Columbus.

In preparing Findings and Recommendations relating to protests, the ODRA considers the administrative record as a whole in determining whether or not the actions in question had a

