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

Protest of)
)
Leader Communications, Inc.) Docket No. 14-ODRA-00705
)
Pursuant to Solicitation DTFAWA-13-R-00014)

DECISION ON REQUEST FOR RECONSIDERATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on a request for reconsideration (“Request”) by Tetra Tech AMT (“Tetra Tech”) of the Administrator’s Final Order of November 14, 2014, which adopted and incorporated the ODRA’s Findings and Recommendations (“F&R”).¹ Leader Communications, Inc. (“LCI”) opposed the Request (“LCI Opposition”), and the Product Team did not take a position on it.

LCI filed the initial Protest with the ODRA on June 6, 2014, and followed it with two supplemental protests asserting errors by the Product Team in its technical and cost evaluations.² Tetra Tech, the awardee of the contract at issue, filed a timely intervention. In its F&R, the ODRA recommended sustaining the Protest in part, citing: (1) errors in the technical evaluation and scoring of LCI’s proposal, and, (2) a violation of the Acquisition Management System (“AMS”) by the addition of \$11 million to the offerors’ proposed prices in other direct costs (“ODC”) for requirements mistakenly left out of the Solicitation (“ODC Ground”).

¹ Familiarity with the F&R is assumed for purposes of this decision.

² The initial Protest and supplemental protests collectively are referred to herein as the “Protest.”

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Tetra Tech's Request is directed solely at the sustaining of the ODC Ground and the remedy imposed related to it. Tetra Tech asserts that: (1) the ODRA erred in recommending sustaining the ODC Ground because there was no prejudice to LCI and the corrective action to amend the Solicitation and provide offerors with the opportunity to amend their proposals to accord with the AMS is "inappropriate"; and (2) the corrective action provides an unfair competitive advantage to LCI because Tetra Tech's awarded price was disclosed during the debriefing. *Request* at 3-4. Significantly, Tetra Tech does not challenge the ODRA's F&R with respect to the sustaining of the Protest on the basis of multiple errors found in the technical evaluation of LCI's proposal, or the remedy imposed related to those errors.

For the reasons discussed below, the ODRA denies Tetra Tech's Request as meritless, and will not recommend that the Administrator reconsider the Final Order.

II. DISCUSSION

The ODRA Procedural Regulations require that "[a] party seeking reconsideration must demonstrate either clear errors of fact or law in the underlying decision or previously unavailable evidence that warrants reversal or modification of the decision." 14 C.F.R. § 17.47. That provision further states that "the ODRA will not entertain requests for reconsideration as a routine matter, or where such requests evidence mere disagreement with a decision or restatements of previous arguments. *Id.*; see also *Protest of Brand Consulting Group, Inc.*, 12-ODRA-00598 (Decision on Request for Reconsideration, dated May 8, 2012).

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A. The Sustaining of the ODC Ground

Tetra Tech does not submit into the record any new, previously unavailable evidence in support of its Request. Rather, it merely reasserts an argument previously made in its Protest Comments, i.e., that LCI was not prejudiced by the deviation because the same amount was added to the prices of both offerors and did not affect the price differential.³ *Compare Request at 6 with LCI Protest Comments at 16.* As noted above, repetition in a reconsideration request of a previously rejected argument provides no basis for modification of the remedy imposed in this case. *Protest of Concur Technologies, Inc.*, 14-ODRA-00708 (Decision on Reconsideration, dated October 21, 2014). Nor does disagreement with that remedy support reconsideration. *Id.*

Tetra Tech further asserts that the ODRA failed to make a finding of prejudice in its F&R. *Request at 5-6.* Notwithstanding Tetra Tech's assertions, the ODRA found, in the "Prejudice" Section of the Findings and Recommendations, that the Product Team arbitrarily and capriciously added \$11 million to the offerors' prices without providing the offerors the opportunity to amend their proposals, in direct contravention of the requirements of AMS 3.2.2.3.1.2.4. The ODRA discussed the issue along with the discussion of the other unchallenged bases for sustaining the protest in concluding that the Product Team's actions were prejudicial. *F&R at 14-15.*⁴

Tetra Tech's assertion that the corrective action regarding the ODC Ground was unjustified is baseless, and amounts to a mere repetition of Tetra Tech's previous argument and mere disagreement with the ODRA's application of the AMS and its

³ With respect to the ODC Ground, Tetra Tech in its Comments merely stated, without citation to the record, that: "[T]he FAA simply forgot to include a plug number for the FFP ODCs of \$11,090.25. Neither LCI nor Tetra Tech would have any ability to change this number and the FAA's addition of the amount to both offerors' cost proposal [sic] did not prejudice LCI." *LCI Protest Comments at 16.*

⁴ Tetra Tech cites to a GAO decision involving a protest of unilateral corrective action based on a single limited evaluation error. *Request at 8* citing *Security Consultants Group, Inc.*, B-293344.2 (Comp. Gen. 2004). That decision is distinguishable from the instant case, which involves multiple evaluation defects and an express finding of prejudice.

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Procedural Rules. As such, it identifies no clear errors of fact or law and provides no basis for reconsideration. *Protest of Concur Technologies, Inc., supra.*

B. The ODC Remedy

It is well established that the ODRA has broad authority to recommend and the FAA Administrator to impose corrective action deemed necessary to protect the integrity of FAA acquisitions and ensure fair competition. 14 C.F.R. §§ 1723(a) and (b). Tetra Tech asserts, however, that the ordered corrective action unfairly benefits LCI because “LCI now has information that it would not have had regarding Tetra Tech’s cost proposal if the FAA had amended the SIR prior to proposal submission.” *Request* at 8.

The prior disclosure of the awardee’s price does not in and of itself render a subsequent corrective action improper where revised prices are sought. *Matthews Group, Inc., B-408003.2, B-408004.2* (June 17, 2013) (“[T]he possibility that [a] contract may not have been awarded based on the most advantageous proposal has a more harmful effect on the integrity of the competitive procurement system than does the possibility that the original awardee, whose price has been properly disclosed, will be at a disadvantage in the reopened competition.”). Tetra Tech would have the FAA Administrator direct the Product Team to correct the admitted technical evaluation flaws, and ignore the significant ODC-related error that occurred in the cost evaluation. *See, e.g., Protest of Arctic Elevator, LLC, 12-ODRA-00629.* Moreover, Tetra Tech’s argument here amounts to mere disagreement with the remedy and cannot support a reconsideration request. *Protest of Concur Technologies, Inc., supra.*

The remedy imposed by the FAA Administrator in this case is consistent with the AMS and ODRA case law, as well as both fully justified and necessary to protect the integrity of the underlying procurement.

III. CONCLUSION

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Tetra Tech's Request fails to demonstrate a clear error of law or fact and is unsupported by new evidence. Accordingly, the Request is denied and the ODRA will not recommend that the Administrator reconsider the Final Order.

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C. Scott Maravilla
Dispute Resolution Officer and
Administrative Judge
FAA Office of Dispute Resolution for Acquisition

APPROVED:

-S-

Anthony N. Palladino
Director and
Administrative Judge
FAA Office of Dispute Resolution for Acquisition