

I. FINDINGS OF FACT

1. On March 3, 2014, the original date established for the submission of proposals, the Federal Government was closed due to inclement weather. As a result of the closure, the submission deadline was extended to 3:00 P.M., March 4, 2014. AR Tab 13.
2. On March 4, 2014, the Washington, D.C. area offices of the Federal Government operated on a two-hour delayed opening basis. *Protest* at 2. It is undisputed that CGH filed its proposal pursuant to the Solicitation (“First Proposal”) with the Product Team on that date after the 3:00 P.M. deadline.¹ *Protest* at 3; AR Tabs 14 and 15.²
3. By letters dated March 5, 2014 and March 14, 2014, the Contracting Officer (“CO”) notified CGH that its First Proposal was submitted after the deadline for receipt of proposals and would not be evaluated for award. AR Tabs 16 and 18.
4. On March 14, 2014, CGH resubmitted its proposal (“Second Proposal”) with the following technical revisions:

[REDACTED]

CGH did not revise its price proposal. AR Tab 19.

5. By letter dated March 18, 2014, the Contracting Officer rejected CGH’s Second Proposal. AR Tab 20.
6. CGH filed this Protest with the ODRA on March 20, 2014, asserting that the

¹ While CGH asserts in its Protest, without citation to any legal authority, that it believed that the delayed opening of the Government caused the corresponding deadline to move two hours later (i.e. to 5:00 P.M.), CGH does not dispute that its proposal was filed late. *Protest* at 3.

² These facts as alleged by CGH in its Protest are not in dispute.

agency is required by AMS Clause 3.2.2.3-14 to consider its Second Proposal. The CGH Protest did not challenge the rejection on timeliness grounds of CGH's First Proposal.

II. DISCUSSION

A. Standard of Review

The protester bears the burden of proof, and must demonstrate by substantial evidence that the challenged decision failed in a prejudicial manner to comply with the Acquisition Management System ("AMS"). *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627 citing *Protest of Adsytech, Inc.*, 09-ODRA-00508. Consistent with the Administrative Procedure Act, 5 U.S.C. §§ 554 and 556, which applies to ODRA adjudications, the phrase "substantial evidence" means that the ODRA weighs whether the preponderance of the evidence shows a lack of a rational basis. *Id.* Under the AMS, source selection decisions must be supported by a "rational basis." *Id.* citing *AMS Policy* § 3.2.2.3.1.2.5. Where the record demonstrates that a decision has a rational basis and is not arbitrary, capricious or an abuse of discretion, and is consistent with the AMS, the evaluation plan, and the award criteria set forth in the underlying solicitation, the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials. *Id.*

B. Interpretation of AMS Clause 3.2.2.3-14

CGH asserts that its Second Proposal on March 14, 2014 constituted, not a late proposal, but rather a "modified proposal," which the Contracting Officer was required to consider under the requirements of AMS Clause 3.2.2.3-14 ("Clause"). *Protest* at 3. The Product Team asserts that the Clause "does not allow an offeror to cure a late delivery of a proposal by submitting a new proposal with a unilateral statement that the new proposal has terms that are more favorable" to the FAA. *Agency Response* at 12. In its Comments, CGH counters that the Product Team "conflates timeliness of a protest and acceptability of a proposal." *Comments* at 4. The ODRA finds that the Clause contemplates a "late modification" to an "otherwise acceptable" proposal whose terms are "more favorable to the FAA." However, on the facts of this case, CGH's Second Proposal

does not constitute a “late modification” within the meaning of the Clause.

When interpreting the language of a clause, the ODRA first looks to the plain meaning of the text. *Protest of Deloitte Consulting, LLP*, 08-TSA-036; *See also Protest of Informatica of America, Inc.*, 99-ODRA-00144 (Preliminary Findings and Interlocutory Order). The language in question “must [also] be given that meaning that would be derived from the contract by a reasonable intelligent person acquainted with the contemporaneous circumstances.” *Protest of Apptis, Inc.*, 10-ODRA-00557 quoting *Hol-Gar Mfg. Corp. v. United States*, 169 Ct.Cl. 384, 388, 351 F.2d 972, 975 (1965).

AMS Clause 3.2.2.3-14 Late Submissions, Modifications, and Withdrawals of Submittals (July 2004), in relevant part, states:

(a) The FAA (we) will consider an offers [sic] received after the time specified for receipt only if we receive it before making an award and --

(1) The offeror (you) sent it by registered or certified mail not later than the fifth calendar day before the date specified for receiving offers (for example, you must have mailed an offer by the 15th in response to a SIR requiring that we receive offers by the 20th);

(2) You sent it by mail or, if authorized by the SIR, by telegram and we determine that we received it late only because of mishandling by the FAA;

(3) You sent it by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee, not later than 5:00 p.m. in the time zone from which you mailed it, two working days before the date specified for receiving offers. The term 'working days' excludes weekends and U.S. Federal holidays;

(4) You transmitted it electronically by a method the SIR authorized and the Contracting Officer (CO) received it by 5:00 p.m. in the CO's office on the date specified for receiving offers; or

(5) It is the only offer we received.

(b) Any modification you make to your offer for a reason other than the CO's request is subject to subparagraphs (a)(1), (2), and (3).

(c) We will not consider a modification resulting from the CO's request received after the time and date specified in the request. The exception to this is if we received it before we awarded the contract and we received it late only because we mishandled it;

(g) Despite paragraph (a), we will consider a late modification of an otherwise acceptable offer if the modification makes the offer's terms more favorable to the FAA.

Section (a) of the Clause provides the circumstances in which a proposal submitted “after the time specified for receipt” will be accepted. The Clause requires that it be received before award of the contract and meet one of the enumerated circumstances in Subsections (1)-(5), none of which are applicable to the instant case. Section (b) provides that *any modification* to a proposal, other than at the CO’s request, is subject to the exception enumerated in Section (a) of the Clause. It is not disputed that in the instant case, CGH did not file its Second Proposal at the request of the Contracting Officer. Section (c) permits modifications to be submitted at the request of the Contracting Officer at a time of the CO’s choosing with the limited exception of mishandling by the FAA.

In the instant case, CGH relies on the limited exception in Section (g). This Section permits the submission of late modifications to a proposal *after* the deadline for receipt has passed and where the CO has *not* requested a modification. Pursuant to Section (g), a “late modification” will be considered where the proposal is “otherwise acceptable” and “more favorable to the FAA.” The requirements of Section (a) related to timeliness are waived.

CGH is correct that the plain language of Section (g) inasmuch as it requires the CO to consider a late **modification** that is “otherwise acceptable” and “more favorable” to the FAA before rejecting it. Here, however, CGH’s Second Proposal cannot be considered a “modification” since its First Proposal had been rejected as untimely, and was therefore a legal nullity. CGH chose not to protest the rejection of its First Proposal. It is not disputed that CGH’s First Proposal was submitted after the deadline for receipt of proposals. FF 2. The ODR finds that the Second Proposal submitted by CGH on March 14, 2014 was not a late modification to an existing

“otherwise acceptable” proposal. Rather, it was a substitute for the First Proposal that had been correctly rejected by the CO as untimely. Inasmuch as CGH’s First Proposal was not before the Product Team it was not otherwise acceptable and could not be modified by a second filing.

CGH has not met its burden to demonstrate by substantial evidence that the Contracting Officer’s decision failed in a prejudicial manner to comply with AMS Clause 3.2.2.3-14. Moreover, the record demonstrates that the decision by the Contracting Officer to reject CGH’s Second Proposal had a rational basis, was not arbitrary, capricious, or an abuse of discretions and was consistent with the requirements of the AMS. Under the circumstances, the ODRA will not substitute its judgment for that of the CO. *Protest of IBEX Weather Services*, 13-ODRA-00667.

III. CONCLUSION

For the reasons set forth above, the ODRA recommends that the Protest be denied.

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APPROVED:

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