

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

<u>Protest of Raytheon Technical Services Company</u>	)	
	)	
	)	ODRA Docket No.
	)	02-ODRA-00210
	)	
<u>Under FAA Solicitation No. DTFA01-01-R-TSSC-III</u>	)	

**FINDINGS AND RECOMMENDATIONS ON REQUEST FOR  
RECONSIDERATION OF THE MERITS AND FOR CLARIFICATION**

**I. INTRODUCTION**

Protester, Raytheon Technical Services Company (“Raytheon”) filed its request for Reconsideration and Clarification (“Request”) with the FAA Office of Dispute Resolution for Acquisition (“ODRA”) via telecopy at the close of business on Friday, April 5, 2002. The Request seeks reconsideration and clarification of the Administrator’s Order dated March 29, 2002 (“Order”), which incorporated and adopted the ODRA’s Findings and Recommendations (“F&R”) in the above-captioned Protest. The Order sustained the Protest in part and directed that the FAA Product Team take specified corrective action.

More specifically, the Request seeks reconsideration of the F&R regarding three weaknesses assigned to Raytheon in the evaluation conducted by the FAA Product Team’s Technical Sub-team (“Technical Team”). In addition, Raytheon requests clarification of the methodology to be used for: (1) the Technical Team’s re-evaluation; and (2) the comparison calculation regarding Raytheon’s probable costs and those of the awardee, Parsons Infrastructure & Technology Group, Inc. (“Parsons”). Both the FAA Product Team and Parsons have opposed the Request. For the reasons set forth herein, the ODRA does not modify its F&R and does not recommend that the Administrator reconsider the Order. However, in terms of the request for clarification, the ODRA hereby provides further discussion regarding re-evaluation methodologies.

## II. DISCUSSION

### A. THE STANDARD FOR RECONSIDERATION

As was noted in our F&R on Raytheon's earlier Request for Reconsideration of the Remedy in this Protest, where a party seeks reconsideration of an Administrator's final decision, the ODRA reviews and makes recommendations to the FAA Administrator. *See Protest of Raytheon Technical Services Company*, 02-ODRA-000210, Findings and Recommendations on Motion for Reconsideration of Remedy, FAA Order Number ODRA-02-210, (April 10, 2002). In reviewing such reconsideration requests, the ODRA will examine whether the moving party has demonstrated either: (1) clear errors of fact or law in the underlying decision; or (2) previously unavailable information warranting a reversal or modification of the decision. *Id.*

Such requests are not reviewed as a routine matter and mere disagreement with the underlying decision or restatement of previously rejected arguments does not provide grounds for reconsideration. *See Protest of Consecutive Weather*, 99-ODRA-00112, Recommendation Regarding Reconsideration Request, Order Number ODRA-99-124, July 13, 1999. In the instant case, Raytheon's Request does not purport to identify any previously unavailable information. It does, however, assert that errors of fact were made with respect to the three assignments of weakness under Scenario I. Thus, the Request will be reviewed to determine whether the alleged factual errors mandate a modification or reversal. *See Protest of Camber Corporation and Information Systems and Networks Corporation (Consolidated)*, 98-ODRA-00079 and 98-ODRA-00080, Findings and Recommendations on Motion on for Reconsideration, Order Number ODRA-99-123, (July 23, 1999).

## **B. THE THREE CHALLENGED RAYTHEON WEAKNESSES**

As is further discussed in the F&R, all of the offerors (Raytheon, Parsons and two others) were graded by the Technical Team on their proposed responses to three Technical Scenarios. The Technical Scenarios were designed as a test of the offerors. F&R, Findings 24 and 57. The Protest had claimed, among other things, that the Technical Team had improperly assigned weaknesses to Raytheon, for three items, namely: [Deleted]; [Deleted]; and [Deleted]. The ODRA concluded that the Team's assignments of weakness in each of these three instances had been proper. *See* F&R at 91, 92 and 94. The Administrator's Order adopted the ODRA's conclusions regarding the weaknesses, and Raytheon's Request now seeks reconsideration of those conclusions. Each of the three findings of weakness is discussed below.

### **1. The [Deleted] Weakness**

Raytheon seeks reconsideration of the single weakness assigned to it related to: (1) [Deleted]; and (2) the [Deleted]. Raytheon challenges the [Deleted] weakness as "factually wrong." *See* Request at 2. Raytheon urges in this regard that, although the Technical Team concluded that Raytheon's Proposal had not [Deleted], in fact, [Deleted]. Request at 2. Raytheon points to its Hearing Exhibit Number 1 at Tab 4, page II-A-10, -12 as identifying the process it planned to follow.

During the course of the Hearing in this matter, testimony was elicited from the Technical Team Lead during cross-examination by counsel for Raytheon, as follows:

Q In [Deleted] that they provided, RTSC laid out the [Deleted], correct?

A Not with sufficient detail, but they [Deleted] but with insufficient details.

Hearing Transcript at 664-665.

The Technical Team Lead's testimony in this regard, *i.e.*, that Raytheon's Proposal provided "insufficient details," was un rebutted. The Protester's own witnesses did not in any way explain or describe why the procedures that had been identified by Raytheon should be viewed as sufficient and why it was irrational for the Technical Team to have expected additional detail. Nor was the Technical Team Lead asked on cross-examination to explain what additional details should have been provided, or why he believed that the procedures identified by Raytheon were not sufficient. Moreover, the Technical Team Lead's testimony is consistent with the Technical Team finding that: "There was work identified in their [Raytheon's] Proposal that was not adequately developed by the Offeror." F&R, Finding 39, quoting from Agency Report, Tab 14, Technical Team Report, pages 14-15.

Based on the record, the ODRA could not find that the assignment of a weakness, in part for Raytheon's failure to sufficiently [Deleted], was irrational, arbitrary, or capricious. Thus, the ODRA's original F&R in this regard noted that Raytheon had failed to meet its burden of proof. There is no basis to now conclude that the F&R were clearly wrong in this regard.

This weakness assigned to Raytheon also encompasses its [Deleted]. Raytheon argues that "this alleged weakness was asserted by only one evaluator and was simply a misreading of RTSC's Scenario I response." Request at 3. Raytheon asserts that, although the weakness was based on its alleged failure to provide for [Deleted], it had in fact done so. Raytheon points to Protester's Hearing Exhibit Number 1, Tab 5, Figure A.1-2, page II-A-8-10 in support of its position.

There is no dispute that the referenced [Deleted] does not include [Deleted]. Raytheon notes, however, that the [Deleted] does include [Deleted] and that on page II-A-10 of its Proposal, it specifically mentions [Deleted] as part of the [Deleted].

At the hearing in this matter, on direct examination by counsel for the FAA Product Team, the Technical Team Lead testified as follows:

Q What is the [Deleted]?

A The [Deleted] was the [Deleted].

Q What is that?

A Which was not required for an established CAT II ILS Project, that it was something that the Raytheon Proposal included within their scenario. It was not a part of the assignment, it was not a part of the scenario requirements. It was some extras that they threw into their scenario.

Q Is it part of an ILS, [Deleted]?

A It is required to [Deleted], but it is not an ILS.

Hearing Transcript at 512, 513.

The Technical Team Lead also testified during cross-examination by counsel for Raytheon as follows:

Q You also gave Raytheon ... a weakness related to the [Deleted]?

A Related to the [Deleted].

Q But it is your view that the [Deleted] is an [Deleted] that is not part of a CAT II ILS?

A [Deleted].

Hearing Transcript at 670, 671.

The above testimony and the record reflect that: (1) [Deleted] was not part of the scenario requirements but was an extra added by Raytheon; (2) [Deleted] is “a separate [Deleted]”; and (3) the [Deleted] is not [Deleted] but rather was [Deleted]. In the ODRA’s view, since Raytheon chose to provide a separate extra item of this type, it was not irrational for the Technical Team to have expected Raytheon to provide [Deleted]

specific information [Deleted]. The record does not support a conclusion that the ODRA's original F&R in this regard were clearly wrong.

### 3. [Deleted]

Raytheon's Request seeks reconsideration of a weakness assigned to it by the Technical Team for certain [Deleted], in particular the [Deleted]. The underlying Technical Team Report indicated in this regard that:

A weakness was found in that the offeror specified [Deleted] for this CAT II ILS that is [Deleted]. The Proposal specifies [Deleted].

*See* F&R, Finding 39 at 24, quoting from the Technical Team Report, Agency Report, Tab 14, pages 14-15.

Raytheon contends that "this alleged weakness has been mischaracterized." *See* Request at 3. Raytheon goes on to assert that it had not "specified" the [Deleted] in question, but rather had stated an "assumption" about [Deleted]. *Id.*, at 3-4. Raytheon contends that the "assumption" [Deleted] is based on information provided by [Deleted], advanced as evidence that [Deleted]. Although the [Deleted] was submitted by Raytheon at the hearing, the only evidence in the record regarding the context, meaning, or applicability [Deleted] is that of the Technical Team Lead, who testified that he believed the [Deleted] pertained to [Deleted]. In the F&R, the ODRA noted as to this issue:

Raytheon failed to rebut testimony of the Team Lead that the [Deleted] involved had not been [Deleted].

*See* F&R at 92.

The Technical Team Lead testified that, at the time of the evaluation, the [Deleted] had not been [Deleted]. This [Deleted] status, he indicated, would not have been altered by the [Deleted]. *See* Hearing Transcript at 541, 594. Because [Deleted], the Team Lead viewed the [Deleted] as at most applying to [Deleted]. *Id.*, at 594.

The Technical Team Lead had also testified that the weakness in question was based, not merely on the [Deleted], but more generally on a lack of understanding regarding [Deleted]. He stated in this regard that, even if [Deleted] were ignored, assignment of a weakness would have occurred for this more general failing. Hearing Transcript at 594-595. The original finding of weakness is consistent with this testimony and reads as follows:

The proposal demonstrates a *lack of understanding of the* [Deleted] Protester’s Hearing Exhibit 16, page 15 of 33 (emphasis added). The quoted finding had been prepared by the Technical Team Lead.<sup>1</sup>

The ODRA found, based on its review of the record, that the [Deleted] was irrelevant and that there was no basis to support a finding that the Team’s assignment of a weakness in this instance was deficient. *Id.*, Finding 32. Raytheon’s Request presents no basis for concluding that the ODRA’s prior conclusion on this issue was clearly wrong.

#### 4. [Deleted] Issue

Raytheon’s Request seeks reconsideration of the ODRA F&R, which upheld the weakness assigned to its Scenario I response related to [Deleted]. In that response, Raytheon stated an assumption that the [Deleted]. More specifically, the assumption was that “[Deleted].” *See* F&R at 94, quoting from Raytheon Proposal, Volume II, page II – A-29. The Technical Team Report noted that Raytheon’s Proposal, while identifying the [Deleted], “did not address [Deleted].” *See* F&R, Finding 39, quoting from Agency Report, Tab 14, Technical Team Report, pages 14-15.

Raytheon’s Request restates the very same argument it had made earlier, *i.e.*, “having assumed [Deleted], the omission of statements about [Deleted] cannot rationally be considered a weakness. Presumably the Technical Evaluators should know [Deleted].”

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<sup>1</sup> Raytheon’s Request focuses only on the [Deleted]. It does not challenge, nor did it previously rebut the Technical Team Lead’s above-referenced testimony that, notwithstanding the [Deleted] issue, a weakness would have been assigned to Raytheon because of its lack of understanding regarding [Deleted].

Raytheon Request at 5. Raytheon's Request argues that because its "assumption" regarding the [Deleted] was not wrong, it could not rationally be ascribed a weakness.

It was not enough for Raytheon to say [Deleted]. Request at 5. This was, after all, a test of Raytheon's capabilities and approach to the work. Therefore, it was not irrational for the Team to assign a weakness based on Raytheon's failure to specifically state how it would approach the problem that it had identified, even if that approach would be [Deleted] because [Deleted]. Raytheon's Request has failed to demonstrate that the ODRA's original F&R were "clearly wrong" in concluding that the Team had a rational basis for assigning a weakness for this item.

## **B. DISCUSSION OF TECHNICAL AND COST METHODOLOGIES**

### **1. Technical Evaluation – Qualitative Assessments**

Raytheon requests a clarification of the remedy with respect to the method to be used by the Technical Team in conducting its re-evaluation. Specifically, Raytheon requests that the Technical Team be instructed to "make *qualitative* assessments of the strengths and weaknesses so that trivial or minor weaknesses do not offset substantial strengths." (Emphasis added). Request at 6. The Product Team argues that Raytheon's request simply seeks to impose a new remedy on the Product Team, by substituting a new evaluation methodology, and that Raytheon's treatment of the facts evinces only disagreement. Product Team Opposition at 10. Parsons also contends that "Raytheon's 'clarification' request . . . is merely a thinly veiled request for reconsideration that fails to meet the ODRA standard of review." Parsons' Opposition at 4.

The ODRA F&R, which were adopted by the Administrator, conclude that that the procedure followed by the Technical Team was not irrational, arbitrary or capricious. F&R at 87. The Evaluation Plan specifically instructed the Technical Team to consolidate individual findings into overall strengths, weaknesses, deficiencies, risks, and ambiguities for each factor and to reconcile disparities or record legitimate differences of opinion. *See* F&R, Finding 15. The facts also show that the Technical Team in fact did make qualitative assessments consistent with the Evaluation Plan when it assigned

adjectival scores during the consolidation and reconciliation process. At the hearing, the Technical Team Lead explained as follows:

[Deleted].

Hearing Transcript at 477-479.

On redirect examination, the Technical Team Lead elaborated on the qualitative nature of the Technical Team's consensus discussions, making clear that individual evaluators' findings of strength or weakness would not be considered as part of overall adjectival ratings being assigned to a particular offeror unless the Team as a whole concluded that the item qualified as a "strength" or "weakness" under the Solicitation's definitions of those terms. Hearing Transcript at 957.

Furthermore, the Solicitation contemplated that evaluators identify "discriminators", *i.e.*, qualitative findings regarding elements or findings within a proposal (positive or negative) that would serve to differentiate or distinguish one proposal from another in some fashion deemed significant with regard to the TSSC-III evaluation. Such discriminators were in fact identified within the IST report to the SSO. *See* Finding of Fact 20 and Hearing Transcript at 473.

In sum, the record demonstrates that the evaluation performed by the Technical Team did incorporate qualitative assessments and was not merely a mechanical counting exercise. Thus, the F&R were not "clearly wrong" in concluding that, although individual Scenario findings/ratings may have lacked a rational basis and procedure, the evaluation approach employed by the Technical Team was consistent with the Solicitation and the Evaluation Plan and cannot be said to have been irrational, arbitrary or capricious. *See* F&R at 87. Along these lines, the ODRA's F&R had properly recommended that, in completing the mandated re-evaluation, the Technical Team re-establish an adjectival rating for both Raytheon and Parsons for each technical scenario, "based on the Team's quantitative and *qualitative* evaluation of the remaining strengths and weaknesses." (Emphasis added). F&R at 129.

## 2. Cost Evaluation – Probable Cost Methodology

Raytheon also has requested that the ODRA “clarify that the Cost Team and the Integrated Service Team calculate and evaluate the relative probable cost difference between RTSC and Parsons based on only the variable cost elements, not the common items.” Request at 7.

The ODRA’s F&R contain a specific finding regarding the Cost Team’s acknowledgement of how inclusion of the “common items” in any comparison can be “somewhat misleading.” See Finding 72. The pertinent language of the Cost Team Report was made part of the Integrated Service Team Report to the Source Selection Official. See Agency Report, Tab 14, Integrated Service Team Report, pages 24-25. It is not clear from the record whether and to what extent the Source Selection Official focused on such cautionary language. The ODRA also found, as part of its Findings and Recommendations, that the Source Selection Official, in calculating only a [Deleted]% difference between cost proposals, had not excluded the \$720.8 million in “common items.” See Findings and Recommendations at 59, footnote 10.

The ODRA believes that probable cost comparisons should include consideration of differences among offerors in terms of “variable” costs. At the same time, the ODRA believes that it was not irrational for the Source Selection Official to regard such cost differences in terms of how they may relate to the total estimated amounts to be expended over the ten-year contract period. In order to assure that the Source Selection Official has complete information when making the ultimate source selection decision, the ODRA recommends that the Cost Team and Integrated Service Team make **both** computations for the Source Selection Official, *i.e.*, comparing any difference in probable cost that may exist between Raytheon and Parsons – after adjusting Raytheon’s cost proposal in accordance with the Administrator’s Order – in terms of **both** “variable” and total estimated costs.

