

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

FINDINGS AND RECOMMENDATIONS ON THE FINAL REMEDY

Matter: Protest of Apptis, Inc.

Under Solicitation No. DTFAWA-09-R-SE2020-SIR2FO

Docket No.: 10-ODRA-00557

Appearances:

For the Protester: J. Scott Hommer, III, Esq., Rebecca E. Pearson, Esq., Paul A. Debolt, Esq., James Y. Boland, Esq., Brendan M. Lill, Esq., Mona S.K. Haar, Esq., and Justin J. Wortman, Esq. of Venable LLP

For the FAA Program Office: Carlos L. Siso, Esq.

For the Intervener: Thomas P. Barletta, Esq., Peter L. Wellington, Esq., and Michael J. Navarre, Esq. of Steptoe & Johnson, LLP

I. Introduction

On May 13, 2011, the Administrator (“Administrator”) of the Federal Aviation Administration (“FAA”) issued FAA Order Number ODRA-11-585 (“Initial Order”). The Initial Order adopted the Findings and Recommendations (“Initial F&R”) of the Office of Dispute Resolution for Acquisition (“ODRA”) on the dispositive question of whether the FAA’s Product Team properly awarded the second of two contracts under Solicitation DTFAWA-09-R-SE2020-SIR2FO (“Solicitation”). Specifically, Apptis Inc. (“Apptis”) protested that the award of a contract to TASC, Inc. (“TASC”) after previously awarding a contract to Booz Allen Hamilton (“BAH”) was in error because the Solicitation did not authorize multiple awards. In sustaining the Protest, the Initial

Order limited further contracting activity under the contract awarded to TASC (“TASC Contract”), and directed the Parties to provide briefs on the appropriate final remedy. Familiarity with the Initial Order and the Initial F&R is presumed.

The Parties filed a “Joint Submission in Response to FAA Order Number ODRA-11-585” (“Joint Submission”). As summarized in the Parties’ introduction:

As a result of an ADR [alternative dispute resolution] process, the Parties have agreed to request that, at this juncture, the FAA Administrator exercise his broad discretion under the AMS and affirm the award of the TASC Contract in order to provide an appropriate remedy in Apptis’ protest. In connection with that agreement, Apptis and TASC have also reached a settlement under which Apptis and TASC have agreed to [DELETED]. The Product Team will [DELETED].

Joint Submission at 2. Thus, the Parties jointly ask the ODRA to recommend that the Administrator not require the termination of the TASC contract, but rather permit a remedy that Apptis seeks and is agreeable to the other Parties. For the reasons discussed herein, the ODRA recommends that the Administrator accept the Parties’ jointly proposed remedy.

II. Additional Findings of Fact

The Findings of Fact from the Initial F&R, numbered from one to twenty-two, are incorporated herein by reference. Based on the Joint Submission and other sources, as cited below, the ODRA makes the following additional Findings of Fact:

23. Four task orders have been issued under the TASC Contract. *Joint Submission*, Exh. C, *Carter Decl.* ¶ 2.
24. Task Order 0001 involves contract administration activities and is valued at approximately [DELETED]. *Joint Submission*, Exh. C, *Carter Decl.* ¶ 3.
25. Task Order 0002 supports the System Wide Information Management (“SWIM”) Program Office as that office makes investment decision and program plans.

- Joint Submission*, Exh. C, *Carter Decl.* ¶ 4. The first work product under the task order must be presented in November 2011, and the task order continues until December 2, 2012. *Id.* The estimated cost of performance is [DELETED]. *Id.*
26. Task Order 0003 also supports the SWIM Program Office. *Joint Submission*, Exh. C, *Carter Decl.* ¶ 5. Under Task Order 0003, TASC provides strategic consulting services regarding communication to internal and external parties interested in the work of the SWIM Program Office. *Id.* The task order continues until December 2, 2012, and the estimated cost of performance is [DELETED]. *Id.*
27. Task Order 0004 primarily supports the FAA’s Service Engineering Integration Group in four areas. *Joint Submission*, Exh. C, *Carter Decl.* ¶ 6. First, TASC assists in developing an “enterprise-level release management” (“ERM”) process for implementation of NextGen. *Id.* Second, TASC is providing “recommendations [DELETED] to ensure an effective ERMN and systems integration workflow.” *Id.* Third, TASC is providing a [DELETED] that will give the FAA the ability to monitor the implementation of NextGen. *Id.* Finally, under this task order, TASC assists in the development and implementation of “[DELETED].” *Id.* The task order expires on October 18, 2015, and has an estimated cost of [DELETED]. *Id.*
28. Consistent with the Initial Order, additional Task Orders have not been issued under the TASC Contract. *Joint Submission*, Exh. A., *Sicard Decl.* ¶ 5.
29. According to an estimate by the SE-2020 Program Manager, which is based on the costs incurred in the evaluation efforts under the Solicitation, the FAA would incur an additional [DELETED] to conduct a new competition. *Joint Submission*, Exh. A., *Sicard Decl.* ¶ 26.
30. Amending the Solicitation to provide for revised proposals, followed by further reevaluation, would require the services of in-house and contract-support

personnel to produce cost, technical, and other evaluations, and would cost an estimated [DELETED]. *AR* Tab 13, *Carter Decl.* ¶ 7.

31. Transitioning the work currently being performed under Task Orders 0001 through 0004 would entail some disruption and delay, and the work has been described as critical to “advancing NextGen.” *Joint Submission*, Exh. A., *Sicard Decl.* ¶ 14 and 25.

III. Discussion

The Initial F&R, adopted by the Administrator, required the Parties to address the remedy in this Protest in light of the standards found at 14 C.F.R. § 17.21 of the ODRA Procedural Regulation. That regulation states in part:

(b) In determining the appropriate recommendation, the Office of Dispute Resolution for Acquisition should consider the circumstances surrounding the procurement or proposed procurement including, but not limited to: the nature of the procurement deficiency; the degree of prejudice to other parties or to the integrity of the acquisition system; the good faith of the parties; the extent of performance completed; the cost of any proposed remedy to the FAA; the urgency of the procurement; and the impact of the recommendation on the FAA.

14 C.F.R. § 17.21(b). The Parties collectively represent that their negotiated remedy effectively addresses the considerations found in this regulatory standard. Notwithstanding that the negotiated remedy under consideration is acceptable to the Parties, the ODRA must independently assess it under the regulatory standard and exercise its broad discretion to recommend a remedy to the FAA Administrator. *Initial Order*, at 1-2; 14 C.F.R. § 17.21(a).

A. The Nature of the Procurement Deficiency and the Degree of Prejudice

The Initial F&R analyzed the procurement deficiency and the resulting prejudice. *See Initial F&R* at 11-23, and 23-27, respectively. To summarize that analysis, the ODRA found that the Product Team failed to comply with several provisions of the Solicitation

representing that the FAA would make only one award. *Id.* at 12-17. The ODRA also found that the Product Team did not obtain advance approval from the Acquisition Executive to deviate from applicable requirements governing multiple awards found in the Acquisition Management System (“AMS”). *Id.* at 18-21. These failings prejudiced Apptis, which relied to its detriment on the single-award provisions of the Solicitation when it developed its proposal strategy. *Id.* at 23-24. Of particular concern was the fact that Apptis was denied the opportunity to create a strong proposal “in a few key areas ... [to] win work requiring greater skill and higher margins.” *Id.* at 24 (citing *Protest Exh. B., Chan Decl.* ¶ 4).

The Parties’ negotiated remedy sufficiently corrects the harm caused by the procurement deficiencies. Most importantly, the negotiated remedy will trigger contractual contingencies that give Apptis an opportunity to [DELETED]. Although Apptis’ opportunity [DELETED] lies in [DELETED] rather than with direct awards from the FAA, Apptis itself apparently is satisfied that the [DELETED] TASC offers will compensate for the prejudice incurred. This creative approach rests in the contractual powers of the Parties rather than the remedial powers of the ODRA, and has a distinct, market-based measure value that objectively represents what an actual buyer (TASC) would pay, and what an actual seller (Apptis) would accept. The negotiated remedy, therefore, is sufficient to correct the procurement deficiency by alleviating the harm to Apptis.

B. The Good Faith of the Parties

The good faith of the Parties has not been raised as an issue in this Protest and was not addressed in the Initial F&R. *Initial F&R, passim.* Instead, the second award and thereby this Protest arose due to the unexpectedly high demand for systems engineering support services under the SE-2020 support contracts. *Initial F&R* at FF 16. As a result of this unexpected demand and other factors, a small business set aside contract awarded to another entity had reached capacity. *Id.* These matters do not raise questions about the good faith of the Parties in the award of the TASC Contract.

Similarly, the negotiated remedy does not raise questions regarding whether the Parties are acting in good faith. Rather, it is the result of arms-length negotiations between well-represented entities, and facilitated by an ODRA neutral, who had no role in the administrative adjudication of this Protest. The ODRA accepts the representations of counsel that the Parties are acting in good faith. *See Joint Submission* at 17.

C. The Extent of Performance

The extent of performance under an incorrectly awarded contract becomes an issue, for example, if a takeover by another contractor of that work is impractical. *See Protest of Informatica of America, Inc.*, 99-ODRA-00144; *accord, Matter of Bush Painting, Inc. – Claim for Costs*, B-239904, -239904.3, 91-2 CPD ¶ 159 (August 16, 1991).

The record demonstrates that the FAA Product Team has awarded TASC four task orders with a combined estimated value of approximately [DELETED]. FF 24 - 28. The first task order pertains to contract management, but the three remaining involve specific engineering efforts that will end in December 2012 at the earliest (task orders 0002 and 0003) and October 2015 at the latest. *Id.* The Joint Submission does not ascribe impracticality to potential take-over scenarios, but the ODRA recognizes as a practical matter that keeping the TASC Contract in place avoids whatever disruption or delays that would occur in the work. *Joint Submission, passim; see also* FF 31. Thus, the negotiated remedy has been represented to not only benefit Apptis and TASC, but also to be in the FAA's interest. *Joint Submission* at 2.

D. The Cost of the Remedy

Unlike other federal agencies, the FAA is not subject to automatic stays of contract performance when a Protest is filed. *Compare* 31 U.S.C. 3553 *with* 14 C.F.R. § 17.17(a). The risk of incurring transition or other expenses in the event of a successful protest “falls squarely on the Government.” *Protest of Raytheon Technical Services Co.*, 02-ODRA-00210 (Findings and Recommendations on Protester's Request for Reconsideration of Remedy). Nevertheless, remedies that provide full relief while minimizing the expense to the public will be favored over more costly alternatives.

The cost of the negotiated remedy is minimal when compared to the alternatives. According to estimates by the SE-2020 Program Manager, and based on costs incurred in the evaluation efforts under the Solicitation, the FAA would incur an additional [DELETED] to conduct a new competition. FF 29. Simply amending the Solicitation to provide for revised proposals would require an expenditure of [DELETED] to produce both cost and technical evaluations. FF 30.

By comparison, allowing the award to TASC to remain in place entirely avoids costs for reevaluation and possible transition of the four current task orders to another contractor. In this regard, the negotiated remedy has advantages over the more costly alternatives.

E. The Urgency of the Procurement and Impact on the FAA

The urgency of performance is important to the question of whether the ODRA should recommend termination of an erroneously awarded contract. Termination for convenience is not an appropriate remedy when, for example, the work must be completed urgently. *See e.g., Protest of J. Schouten Construction, Inc.*, 98-ODRA-00064. Even in the absence of urgent or compelling circumstances, a sufficient remedy that reduces any negative effects on the mission and business of the FAA will be preferred over more disruptive remedies.

The first task order pertains to contract management, but the three remaining involve specific engineering efforts that will end in December 2012 at the earliest (task orders 0002 and 0003) and October 2015 at the latest. FF 24 - 28. The Joint Submission does not describe the effort under these task orders as “urgent,” but nevertheless, any curtailment of performance inarguably would cause some degree of disruption to performance of the work supporting the FAA mission. FF 31. The remedy negotiated by the Parties does not require termination of the TASC contract and thereby avoids any adverse impact with regard to those task orders.

F. Other Considerations

The considerations stated in 14 C.F.R. 17.21(b) are not exhaustive, and other considerations may be appropriate on a case-by-case basis. *See* 14 C.F.R. 17.21(b) (stating, “including, but not limited to”). In this particular Protest, the ODRA will consider the nature and effect of the negotiated remedy.

1. The Effect of the Remedy

Five offerors provided proposals in response to the Solicitation. *See Protest of Apptis, Inc.*, 10-ODRA-00535 (“*Apptis I*”) at FF 34-36. As noted previously, BAH received the first contract awarded under the Solicitation, and TASC received a second contract. The remaining unsuccessful offerors included the Protester, Apptis, as well as BAE Systems Technology Solutions & Services, Inc. (“BAE”), and Science Applications International Corporation (“SAIC”). The ODRA finds that the negotiated remedy has no effect, positive or negative, on BAE, SAIC, and BAH.

SAIC has never filed a protest under this Solicitation, and its time to protest has long since passed. Similarly, although BAE filed protests against the award of both the BAH Contract and the TASC Contract, those protests were resolved with the agency and dismissed by FAA Order Number ODRA-11-572. Finally, BAH did not file a protest against the award of the TASC Contract, and its own contract under the Solicitation remains unaffected by either the Initial Order (*see Initial Order*, at 27), or by this remedy. In particular, the BAH Contract is a task order type of indefinite delivery, indefinite quantity contract rather than a requirements contract. *See Initial F&R* at FF 4. Under such contracts, the FAA retains discretion to award task orders under the BAH Contract or to use other proper methods to obtain the services it needs. Accordingly, BAH cannot reasonably or timely assert harm resulting from the remedy negotiated by the Parties to this Protest.

2. The Statutory Mandate Favoring Consensual Resolution of Protests

It is important to delineate the limited nature of the remedy requested in this Protest, and distinguish it from new contractual obligations between TASC and Apptis. The precise remedy proposed, as stated in the concluding section of the Joint Submission, is:

For all of the foregoing reasons, the Parties respectfully submit that the appropriate remedy in the particular circumstances presented here is for the Administrator to confirm the award of the TASC Contract, thereby enabling the settlement agreement between Apptis and TASC, arrived at through the ODRA's ADR process, to become effective. The Parties believe that the jointly proposed remedy is in the best interests of the public and the Parties, and is an appropriate exercise of the broad discretion afforded to the ODRA to fashion protest remedies and of the Administrator's final authority on all FAA acquisition matters.

Joint Submission at 23 (emphasis added). The actual remedy requested, therefore, is merely to allow the TASC Contract to remain in place by not ordering it to be terminated. Allowing the TASC contract to remain in place, in turn, will satisfy contingencies in a separate agreement between Apptis and TASC, under which Apptis hopes to accrue its benefits. The Parties do not ask the Administrator to order the creation of a contractual relationship between Apptis and TASC, and they do not request that the Administrator order the Product Team to [DELETED]. Instead, the corporate parties rely on their own power of contract to fashion the remedy, and the Product Team (through the Contracting Officer) will exercise its discretion under the TASC contract to [DELETED], and will maintain full authority to administer the TASC Contract.

This issuance of an administrative order to fulfill contingency clauses in separate settlement agreements is creative, but nevertheless is consistent with the FAA's unique statutory mandate to create a procurement system that "provides for ... resolution of bid protests ... using consensual alternative dispute resolution techniques to the maximum extent practicable." 49 U.S.C. § 40110(d)(1). Thus, using the ODRA's broad authority to recommend a remedy that, in turn, furthers the consensual resolution of a protest, is entirely appropriate.

Finally, the negotiated remedy has the virtue of simplicity in execution. A final order that does not impose termination for convenience of the TASC Contract, but which allows *contractual* benefits for Apptis, avoids involving the ODRA and the Administrator in ongoing matters of contract [DELETED] administration. If unforeseen circumstances cause difficulties in performance of the contractual obligations, those matters most likely will be the subject of contract disputes or state court actions, respectively, rather than treated as violations of an Order by the Administrator of the FAA.

3. Status of the Solicitation

The Initial Order in this Protest, inter alia, prohibited the Product Team from awarding further full and open competition contracts based on the offers under this Solicitation. The Solicitation continues to be inadequate to support further awards. Accordingly, nothing in these Findings and Recommendations on the Final Remedy should be construed as reversing or otherwise qualifying the findings of fact and conclusions of law found in the Initial F&R. As such, additional awards should remain impermissible under the Solicitation.

IV. Conclusion

The initial Findings and Recommendations in this Protest determined that the Product Team awarded a second contract under the Solicitation without following mandatory procedures stated in the Acquisition Management System. Nothing in these Findings and Recommendations on the Final Remedy alters that conclusion, or authorizes a Product Team, now or in the future, to disregard such requirements. The ODRA finds that the negotiated remedy proposed by the Parties alleviates the prejudicial harm caused by the procurement deficiencies and is in the public interest. Given that the Administrator has previously sustained the Protest, and based on the foregoing consideration of the negotiated remedy, the ODRA recommends as a final remedy that: 1) the limitation on the modifications and awards of additional task orders under the TASC Contract, as

stated in the Initial Order, be lifted; 2) the TASC Contract be permitted to remain in place and administered without special procedures or limitations resulting from this Protest; and 3) no further contracts be awarded under the existing Solicitation.

_____/s/_____
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APPROVED:

_____/s/_____
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Director
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