

PUBLIC VERSION

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

Protest of)
)
Diakon Solutions, LLC) Docket No. 15-ODRA-00747
)
Pursuant to Solicitation CS-15-088)

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 Diakon Solutions, LLC (“Diakon”). The Request challenges the FAA Administrator’s Final Order of January 12, 2016, which adopted and incorporated the ODRA’s Findings and Recommendations (“F&R”).¹ Diakon asserts that the ODRA erred in finding that Questions and Answers (“Q&A”) issued by the Contracting Officer did not amend the Solicitation to require letters of intent for key personnel from all offerors. *Request* at 1. Diakon argues that the ODRA misrelied on Acquisition Management System (“AMS”) Procurement Guidance T3.2.2(7)(c), which authorizes the Contracting Officer to make amendments to the Solicitation. *Id.* at 1-2. For the reasons discussed below, the ODRA denies Diakon’s Request as meritless, and will not recommend that the Administrator reconsider the Final Order.

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

PUBLIC VERSION

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 regulation 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.*

In the instant case, Diakon’s Request fails to demonstrate a clear error of law or fact, and cites to no previously unavailable evidence. Rather, Diakon resurrects an argument raised in its prior filings. Relying on AMS § 3.2.2.3.1.2.4, Changes in Requirements, Diakon asserts that a formal amendment to the Solicitation is not required for a Q&A to be binding on all offerors.² Diakon argues that the informal Q&A conducted by the Contracting Officer required all offerors to provide letters of intent for key personnel including those individuals currently employed by the offeror or its subcontractors. This is precisely the argument it put forth in its Protest filings. *Compare Request at 2 with Protester Comments at 3, fn. 1.*

In rejecting this argument, the ODRA found that a formal amendment did not occur, i.e., that the record demonstrated that the Q&A’s were not incorporated into the Solicitation. In the absence of a formal modification, the clear, unambiguous terms of the Solicitation control over the Q&A, particularly where, as here, there is no prejudice to the protester. Diakon’s mere disagreement with the ODRA’s interpretation of the AMS, does not provide a basis for reconsideration. *Protest of Brand Consulting Group, Inc., 12-ODRA-*

² Diakon’s reliance on AMS § 3.2.2.3.1.2.4, Changes in Requirements is misplaced. That provision states, in relevant part, that “after release of a [Solicitation], it is determined that there has been a change in the FAA’s requirement(s), all offerors competing at that stage should be advised of the change(s) and afforded an opportunity to update their submittals accordingly.” AMS § 3.2.2.3.1.2.4. The issue in the instant case is not whether the Contracting Officer properly informed the offerors of a change in the requirements, but whether a change had been made.

PUBLIC VERSION

00598 (Decision on Request for Reconsideration, dated May 8, 2012). Even assuming the Contracting Officer's erroneous answer in the Q&A was deemed to have modified the Solicitation, there was no competitive harm, i.e., there was no prejudice to Diakon.

Diakon's assertion that the F&R contravenes a decision by the Government Accountability Office ("GAO") in *Energy Engineering & Consulting Services, LLC*, B-407352 (Dec. 21, 2012), is unavailing. *Request* at 3. As counsel for Diakon admits, the ODRA is not bound by decisions of the GAO. *Request* at 3; *Protest of International Services, Inc.*, 02-ODRA-00224. The GAO cited decision did not involve an AMS acquisition, and is not binding nor persuasive authority with respect to the FAA ODRA's interpretation of the Agency's unique acquisition system.

Diakon also asserts that the F&R nullifies the Contracting Officer's waiver of the requirement for the Program Manager to possess Project Management Professional ("PMP") certification. *Request* at 3, Exhibit 1. The ODRA finds that this argument could have been raised during the adjudication, and as such cannot provide a basis for reconsideration. *Protest of Leader Communications, Inc.*, 15-ODRA-00721 (Decision on Request for Reconsideration, dated April 21, 2015) (arguments that could have and should have been raised in Comments cannot provide a basis for reconsideration.).

III. CONCLUSION

Diakon's Request constitutes an attempt to reargue positions taken in the underlying Protest, fails to demonstrate a clear error of law or fact and is not supported by previously unavailable evidence. The Request therefore 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:

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

Issued February 29, 2016