

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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of Deloitte Consulting LLP**
 Under Solicitation No. HSTS02-08-R-TTC133

Docket No.: **08-TSA-036**

Appearances:

For the Protester: Deloitte Consulting LLP
 William W. Goodrich, Jr., Esq., Lisa K. Miller, Esq.,
 and Richard J. Webber, Esq. of Arent Fox LLP

For the TSA: Robin Redfield, Esq., Office of Chief Counsel

I. INTRODUCTION

This bid protest (“Protest”), filed by Deloitte Consulting LLP (“Deloitte”) with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”), challenges a contract award to Accenture National Security Solutions (“Accenture”) under Solicitation No. HSTS02-08-R-TTC133 (“Solicitation”) issued by the Transportation Security Administration (“TSA”). The Solicitation involves a contract (“Contract”) for implementation and business support services for the Secure Flight Program.

For the reasons set forth below, the ODRA finds that: (1) the TSA improperly deviated from the stated evaluation criteria in Section M, Factor 7 of the Solicitation; and (2) the deviation clearly prejudiced Deloitte. Therefore, the ODRA recommends that the Protest be sustained.

II. FINDINGS OF FACT

1. On March 11, 2008, the Office of Transportation Threat Assessment and Credentialing (“TTAC”) at the TSA issued a Request for Proposals (“RFP”) for contractor Implementation and Business Operations (“IBO”) support services to aid in the establishment of connectivity and operations between domestic air carriers, international air carriers, general aviation, and the TSA for the Secure Flight Program (“Secure Flight”). *See TSA Opposition to the Protest (“Opposition”), Attach. 1, [DELETED] Declaration at ¶ 9.*
2. The RFP was for an indefinite delivery/indefinite quantity (“ID/IQ”) contract with Cost Plus Fixed Fee (“CPFF”) and Firm Fixed Price (“FFP”) task orders for a period of one-year plus four option years. *See Agency Record (“AR”), RFP at 30.*
3. The Secure Flight Program is a threat assessment program under the TTAC. *See AR, Tab 3, Statement of Objectives (“SOO”) at 34.*
4. TTAC is responsible for conducting name-based security threat assessments, background checks, and credentialing services for transportation industry workers and domestic airline passengers. *Id.*
5. TTAC also is responsible for the development, implementation, operation, and maintenance of transportation-related vetting services and support programs aimed at protecting the U.S. transportation infrastructure from the threat of terrorism. *Id.*
6. Secure Flight matches the names of individual passengers with those on the Terrorist Screening Database (“Watch List”). *Id.* Currently, the

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airlines' have sole responsibility for matching the names of passengers to the Watch List. *Id.*

7. Secure Flight is comprised of seven functional areas: Operations; Change Management and Business Architecture; Policy and Planning; Program Management Office; Office of Administration; Systems Development; and Data Center. *Id.* at 35. Operations; Change Management and Business Architecture; and Policy and Planning. *Id.*
8. Section B of the RFP describes contract pricing. *Id.* at 30-32. Two contract types are set forth in section B: FFP and CPFF. *Id.* at 30-31.
9. Section B.4 Labor Rate Tables, requires offerors "to propose all labor rates associated with IBO services at the primary work location of Annapolis Junction MD as well as offsite rates for work performed at the contractor's facility." A table is provided "for reference only", which includes the labor rates for the base year and option periods 1 through 3. *Id.* at 32.
10. In accordance with Section M of the RFP, award was to be made based on best value. *Id.* at 82. Best value is defined as the "offer that results in the most advantageous acquisition decision for the Government as determined by an integrated assessment and trade-off analysis among non-price factors." *Id.* Section M of the RFP establishes the evaluation factors. *Id.* at 82-89. Section M-3 establishes the relative order of importance of the factors and states:

The factors that will be used to evaluate all proposals are as follows:

Factor 1 – Past Performance

Factor 2- Staffing and Management Plan

Factor 3- Technical Approach

Factor 4 – Oral Presentation

Factor 5 – Small Business Subcontracting Plan

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Factor 6 – Task Order 01 Technical Proposal

Factor 7 – Cost/Price

Factor 1 is more important than each of the other non-cost/price factors. Factors 2 through 6 are of relatively equal importance. Factors 1,2,3,4 and 6 will be individually rated on an adjectival scale. Factor 5 will be rated on a “Go/No Go” basis. When combined the technical factors are more important than price. Although cost/price will not be rated during the evaluation of the proposals, it may become the determinative factor in the final source selection decision when making the best value “trade-off” determination.

Id. at 82-83.

11. Factor 4 – Oral Presentation, in relevant part, states:

The technical proposals will include oral presentations by offeror’s consisting of their understanding and knowledge of the requirements in the SOO, and their approach and understanding of the requirements in the solution to a hypothetical problem statement.

Id. at 85.

12. Factor 7, Price Reasonableness and Realism, states:

All proposed lifecycle costs (base costs **plus all option costs**) will be evaluated via a Cost & Price Analysis to determine reasonableness and realism. The Government shall evaluate the Offeror’s proposed estimated cost elements to determine that they are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the unique methods of performance and materials described in the offeror’s technical proposal and are reasonable as compared to the Government’s Independent Government Cost Estimate and other Offeror’s proposals.

Id. at 88 (emphasis added).

13. The RFP requested cost information for Task Order 01. *Id.* The offerors were required to provide a CPFF proposal with labor categories and associated rates. *Id.*

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14. Section L of the RFP provided the following instructions to offerors:

L-4 Cost and Price Proposal Requirements

The offeror's cost and price proposal shall contain the proposed hourly rate to the Government for performing the work described in the Statement of Objectives (SOO) as proposed in the offeror's technical proposal. The offeror shall submit sufficient pricing data to establish that the offeror realistically and completely understands the requirements of this solicitation and the SOO. In addition, the offeror shall provide pricing data that details how the offeror arrived at its proposed hourly rate. The offeror shall propose fully burdened fixed labor rates to include all indirect rates and fee for each labor category across the period of performance proposed in accordance with Section B. The Cost and Price Proposal shall include both fixed price rates and cost reimbursement rates and information. Below describes what is required for each contract type.

L-4.4 Cost Proposal for Task Order 01

For Task Order 01, the offeror shall propose a Cost Plus Fixed Fee proposal. The fixed fee will be evaluated for how efficiently it supports the level of effort and complexity of task order 01. All rates proposed must be in accordance with the proposed rates for the IDIQ.

Id. at 80-81.

15. On March 28, 2008, Amendment 02 to the Solicitation was issued. *See AR, Tab 7* at 213-219.

16. The following question and answer relating to cost/price was included in Amendment 002 to the RFP:

Factor 7 within Section M – Price Reasonableness/ and [Sic] Realism refers to “base costs plus all option costs”. [Sic] Can the Government clarify whether they intend to evaluate any costs other than the labor rates provided in Section B.4 for the Base and Option Years and the proposed costs for Task Order 1?

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A. The government will evaluate the total price in accordance with sections B, L and M and will evaluate all requested cost elements to include the labor rates.

Id. at 218.

17. On March 13, 2008, the Source Selection Plan (“SSP”) was approved. *See AR, Tab 1* at 1.
18. The SSP provided that proposals would be evaluated using the following adjectival ratings for Factors 2, 3, 4, and 6:

Outstanding: Proposed approach indicates a complete understanding of the program goals and objectives. Management, resources, schedules, and other aspects essential to successful performance are clearly demonstrated and documented. Response addresses elements of the particular factor and contains exceptional features or innovations that will substantially benefit the program. Major strengths cited and no major weaknesses. No risks or minor risks for which alternatives are identified and considered achievable.

Good: Proposed approach indicates an understanding of the program goals and objectives. Management, resources, schedules, and other aspects essential to successful performance are clearly demonstrated and documented. Response addresses elements of the particular factor and contains features or innovations that will benefit the program. Strengths cited and no major weaknesses. Minor to moderate risks for which alternatives are identified and considered achievable.

Acceptable: Proposed approach is adequately responsive with no major weaknesses. Offeror demonstrates an understanding of the requirement and has demonstrated adequate technical capability to achieve the proposed approach. Some moderate risks for which alternatives are identified and considered achievable.

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Unacceptable: Proposed approach is not adequately responsive, does not address the specific factor, and/or does not propose to accomplish the work in a manner which can meet the objectives of the program or the risk is too high. Significant risk for which alternatives are not identified or are not considered achievable.

Id. at 12-13.

19. Proposals were to be evaluated by identifying their strengths, weaknesses, and deficiencies, defined as:

Strength: A proposal that appreciably increases the likelihood of successful contract performance, or provides an approach directly related to the requirement that would reasonably be thought to exceed the minimum expectation.

Weakness: A flaw in the proposal that increases the risk of unsuccessful contract performance.

Deficiency: Material failure in a proposal to meet a Government requirement or a combination of significant weaknesses that increases the risk of unsuccessful contract performance to an unacceptable level.

Id. at 13.

20. On April 11, 2008, proposals were received by the TSA. *Opposition, Attach. 1, [DELETED] declaration* at ¶ 9. Initial cost/price evaluations were completed on May 15, 2008 and initial technical evaluations on May 30, 2008. *Id.* at ¶ 11.
21. The Cost Evaluation Team (“CET”) reviewed the fixed price rates for future task orders, and the CPFF proposals for Task Order 01. *See AR, Tab 19* at 1385-1406.

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22. Each member of the CET conducted individual cost evaluations of Deloitte and Accenture. *Id.* The DCAA provided information on Deloitte's and Accenture's proposed cost reimbursable and fixed price rates. *Id.* at 1385-1406.
23. For the evaluation of the CPFF rates, the CET relied on the DCAA-provided information to determine: (1) the reasonableness of the proposed rates, including the direct hourly rate and proposed indirect rates; (2) whether the offerors' proposed rates complied with its disclosed accounting practices; (3) and whether the escalation rates were appropriate. *Id.* at 1363-1384. DCAA also certified that both offerors' accounting systems were adequate for accumulating and billing costs on Government contracts. *Id.* at 1385-1406. The CET also compared the proposed fully burdened rates to those in the independent government cost estimate ("IGCE"). *Id.* at 1369-1384.
24. For the evaluation of the FFP rates, the CET relied on the DCAA-provided information to determine that the FFP rates proposed were consistent with the Solicitation. DCAA also commented on the proposed escalation factors. The CET compared the proposed FFP to those in the IGCE. *Id.*
25. On June 3, 2008, a competitive range determination was made, which identified the proposals of Accenture and Deloitte as within the competitive range. *Opposition, Attach. 1, [DELETED] declaration* at ¶ 9. On June 3, 2008, discussion letters were sent to Accenture and Deloitte identifying weaknesses in their proposals, and revised proposals were received on June 11, 2008. *Id.* On June 30, 2008, the evaluation of the revised proposals was completed. *Id.* at ¶ 13. Both Accenture and Deloitte received technical consensus ratings of [DELETED]. *Id.*
26. The CET commented on the proposals:

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Both Accenture and Deloitte proposed a labor mix and associated costs that were realistic and demonstrated that they understood the requirements and deliverables expected under the contract. Evaluations also included independently reviewing and evaluating the specific elements of each offeror's proposed cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the unique methods of performance and materials described in the offeror's technical proposal. See Attachment 1 for complete cost evaluations. [DELETED]

See AR, Tab 19 at 1366.

27. Based on the recommendation of the Technical Evaluation Team ("TET") and the CET, the Source Selection Official ("SSO") awarded the contract to Accenture. The SSO stated:

Accenture and Deloitte received identical ratings of [DELETED] in the technical factors Past Performance, Staffing and Management Plan. In the technical factor for Oral Presentations, Deloitte received a rating of [DELETED] while Accenture received a lower rating of [DELETED]. Despite the fact that Deloitte was rated higher for the single factor "Oral Presentations", the Technical Evaluation Team determined that the technical merit of the proposals submitted by each offeror were relatively equal and both offerors received an overall consensus rating of [DELETED]. In accordance with Paragraph M-4 of the solicitation, non-price factors are more important than price; however, in cases where a determination of technical equality has been made, the key discriminator becomes price. Deloitte proposed an overall price of [DELETED] for Task Order 01 while Accenture proposed an overall price of [DELETED] for Task Order 01. The delta between the two proposals was [DELETED]. It was determined by the Technical Evaluation Team that despite the fact that Deloitte received a rating of [DELETED] for the factor "Oral Presentations" that, in and of itself, would not justify paying a higher price given the

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similar level of technical competence available at the lower cost proposed by Accenture.

See AR, Tab 23 at 1477-78.

28. On September 10, 2008, TSA provided a post-award debriefing to Deloitte. *See Opposition, Attach. 1, [DELETED] Declaration* at ¶ 20.
29. On September 12, 2008, Deloitte submitted questions to the Contracting Officer, which were answered on September 16, 2008. *See AR, Tab 26* at 1605-08.
30. On September 16, 2008, Deloitte filed this Protest with the FAA ODRA. *See Protest of Deloitte Consulting LLP (“Protest”)*.
31. On October 31, 2008, Deloitte filed a Supplemental Protest. *See Comments of Protester Deloitte Consulting LLP on the TSA’s Response to the Protest and Supplemental Grounds of Protest (“Supplemental Protest”)*.

III. DISCUSSION

A. Standard of Review

Pursuant to the ODRA Procedural Regulations, 14 CFR Part 17 and the FAA Acquisition Management System (AMS), the ODRA will not recommend that a post-award bid protest be sustained where the contract award decision has a rational basis and is neither arbitrary, capricious, nor an abuse of discretion, and is supported by substantial evidence. *See Protest of IBEX Group, Inc., 03-ODRA-00275*. In a “best value” acquisition, the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials as long as the record demonstrates that the Agency decision was consistent with the AMS and the evaluation and award criteria set forth in the Solicitation. *See Protest of PCS, 01-ODRA-00184*. An offeror’s mere disagreement with the evaluation and source selection officials’ decision is insufficient to establish that

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the Agency acted irrationally. *See Protest of En Route Computer Solutions*, 02-ODRA-00220. Finally, the Protester must demonstrate that prejudice resulted from the challenged action. *See Protest of Emerging Engineering Excellence Joint Venture*, 08-ODRA-00467.

B. TSA Failed to Follow Its Own Evaluation Criteria

Failure to follow stated evaluation criteria constitutes an “impermissible ‘departure’ from the Solicitation.” *See Protest of HyperNet Solutions, Inc.*, 07-ODRA-00416 and 07-ODRA-00418 (Consolidated for Decision); AMS § 3.2.2.3.1.2.3. If the Agency’s evaluation and source selection process deviate from the stated evaluation criteria set forth in the underlying Solicitation, the award lacks a rational basis and the Protest will be sustained where the failure results in prejudice to the Protester. *See Protest of B&M Lawn Maintenance, Inc.*, 03-ODRA-00271. In this Protest, TSA has admitted to not following the evaluation criteria set forth in Section M, Factor 7 of the Solicitation, which requires “[a]ll proposed lifecycle costs (base costs plus all option costs) be evaluated. . . .” TSA submitted a declaration from the contracting officer, [DELETED], who had “primary responsibility” for the Solicitation. *See Opposition, Attach. 1*, [DELETED] Declaration at ¶ 1. In the declaration, the contracting officer states:

Despite the language in the RFP, TSA was not intending to, nor did it evaluate lifecycle costs because the RFP did not provide specific information regarding the scope of work in future years nor suggest or request data from the offerors about labor hours associated with a future scope of work.

Id. at ¶ 17 (emphasis added).

Notwithstanding the above-referenced admission, TSA’s position is that it was not required to evaluate all lifecycle costs of all option years under Section M, Factor 7. *See Opposition* at 26. Rather, TSA argues that Section M merely requires that “[a]ll proposed lifecycle costs (base costs plus all option costs) will be evaluated via a Cost & Price Analysis to determine reasonableness and realism,” and, because only cost

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information was requested for Task Order 01 (the base year) and not the options, TSA complied with the requirements of the SIR by evaluating only the proposed costs under Task Order 01. *Id.* at 28-29 (emphasis in original). In other words, despite the language in Section M requiring the evaluation of all options, Sections L and M read together only required TSA to evaluate the base year. In that regard, TSA states:

Consistent with this evaluation scheme, TSA evaluated the cost proposals with respect to Task Order 01 for cost realism and reasonableness. For Task Order 01, offerors were required to propose contractor and subcontractor labor categories, with associated hours, labor rates, total costs for each labor category, ODCs, and fee. Because offerors were only required to provide level of effort information for the base year identified under Task Order 01, TSA did not evaluate lifecycle option year costs for Task Order 01. Under Section M, Factor 7, only ‘proposed’ lifecycle costs were to be evaluated.

Id. at 29. TSA further asserts that the acquisition contemplated using: (1) a cost plus fixed fee for Task Order 01 covering the certain requirements for the services for implementing Secure Flight with respect to domestic airlines, and (2) fixed price labor rates for future task orders not associated with any specific requirements at the time of evaluation. *Id.* at 27.

1. Plain Meaning of the Solicitation’s Language

Regardless of the contracting officer’s admission that the evaluation and source selection officials did not follow Section M, Factor 7, TSA’s arguments still fail because they contravene the plain language in the Solicitation. When interpreting the language in a Solicitation, the ODRA first looks to the plain meaning of the text. *See Protest of Informatica of America, Inc.*, 99-ODRA-00144 (Preliminary Findings and Interlocutory Order); *see also Contract Dispute of Astornet Technologies, Inc.*, 08-ODRA-00466 (“It is axiomatic that the clear and express terms of a contract control the rights and obligation of the parties.”); *Enron Fed. Solutions, Inc. v. United States*, 80 Fed.Cl. 382, 393 (2008) (contract interpretation “start[s] with the plain meaning of the Contract’s text.”). Section M, Factor 7, of the Solicitation clearly states that “[a]ll proposed lifecycle costs (base

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costs plus all option costs) will be evaluated via a Cost & Price Analysis to determine reasonableness and realism.” An objective interpretation of Section M, Factor 7, based on the plain meaning of the language in the Solicitation is that TSA was required to evaluate the lifecycle costs for the entire contract, base year and all option years, to determine the “reasonableness and realism” of the offerors’ prices and make award based on those cumulative prices. Section M, Factor 7 clearly states that TSA will evaluate “base costs plus all option costs.” To accept TSA’s argument would require that the ODRA read out of the contract specific language and essentially re-write Section M, Factor 7 to provide that only the costs of the base year, as set forth in Task Order 01, will be evaluated. The ODRA concludes that TSA was required by the terms of its own Solicitation to evaluate “base costs plus all option costs”, *i.e.* costs for the base year and for all of the option years.

In the alternative, TSA also argues that the cost evaluation, despite not evaluating the options, was rationally based. *See Opposition* at 30. TSA argues that it “conduct[ed] a realism analysis and then a price analysis on the offeror’s total cost evaluated price for Task Order 01 by comparing the proposals to each other and to the IGCE.” *Id.* at 31-32. TSA states:

TSA completed a Realism & Reasonableness analysis, which considered the proposed costs and their relation to the technical approach. This included a cost realism analysis to determine what the Government should realistically expect to pay for the proposed effort, the offeror’s understanding of the work, and the offeror’s ability to perform under the contract requirements. TSA also looked at whether the specific labor categories and hours proposed were appropriate for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the unique methods of performance and materials described in the offeror’s technical proposal.

Id. at 30. TSA states that, based on the cost information provided for Task Order 01, the CET found:

Deloitte and Accenture provided sufficient detailed information for TSA to determine that the proposed fully loaded CPPF labor rates contained the necessary components, and that the fee and escalation rates were

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reasonable. TSA also concluded that each offeror's costs were realistic and demonstrated an understanding of the statement of work requirements for the type and level of work to be accomplished, and were not out-of-line with the Independent Government Cost Estimate (IGCE). Consequently, no adjustment to the offerors' proposed costs was required.

See Opposition at 31, quoting Attach. 1, [DELETED] Declaration at ¶ 23. TSA attempts to argue that Section M only requires TSA to “conduct a ‘Cost & Price Analysis to determine reasonableness and realism.’” *Id.* at 32. TSA implies that Section M, Factor 7 required the evaluation and source selection officials to evaluate only the cost reasonableness. *Id.* at 31 (internal citations omitted). To the extent TSA's argument that the cost evaluation was rationally based also implies that the price evaluation was distinctly separate from the cost evaluation, this approach also contravenes the plain language in the Solicitation, which must be read as a whole. Section L refers to the evaluation of cost and price throughout. *See AR, Tab 3* at 80-81. TSA's argument creates an illogical reading of the Solicitation in which the cost realism and reasonableness of the base year and all option years would be evaluated, but only the price of Task Order 01 would be taken into account for contract award. As will be discussed, this serves to illustrate a potential ambiguity in the Solicitation with regard to the evaluation of the option years and price.

While the drafters of the Solicitation may have had a different intent, as the contracting officer's declaration suggests, *see Opposition, Attach. 1, [DELETED] Declaration at ¶ 17*, the plain language of the Solicitation and not the subjective intent of the drafters controls the question. *See Protest of Informatica of America, Inc., supra.* Thus, based on the plain language of Section M, Factor 7 in the Solicitation, TSA was required to evaluate the costs of the base year and all option years for contract award. By its own admission, TSA failed to evaluate the option years pursuant to Section M, Factor 7 and, therefore, TSA's award to Accenture lacks a rational basis.

2. Ambiguity in the Solicitation Language

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TSA's arguments, at best, illustrate a latent ambiguity in the Solicitation with regard to the evaluation of the option years and cost, which would be interpreted against the drafter, *i.e.* the Agency. *See Protest of B&M Lawn Maintenance, Inc., supra.* Under the rule of *contra proferentum*, latently ambiguous language must be read against the drafter. *Id.* The ODRA has stated:

If some substantive provision of a government-drawn agreement is fairly susceptible of a certain construction and the contractor actually and reasonably so construes it, in the course of bidding or performance, that the interpretation which will be adopted If the [government] chafes under the continued application of this check, it can obtain a looser rein by a more meticulous writing of its contracts [or solicitations]

Protest of E&I Systems, Inc., 99-ODRA-00146.

Whenever an ambiguity exists in a solicitation, the issue becomes whether such ambiguity gives rise to multiple reasonable interpretations, or is patently ambiguous such as to create an obligation on the part of the offeror to make an inquiry as to its meaning. *See Protest of B&M Lawn Maintenance, Inc., supra; see also Protest of E & I Systems, Inc., supra* (“If a patent ambiguity exists, the rules of government contracting place the obligation of inquiry upon the offeror or contractor.”). In this Protest, TSA's argument demonstrates a latent ambiguity in the Solicitation. In quoting Section M, Factor 7, TSA emphasizes that “[a]ll *proposed* lifecycle costs (base costs plus all option costs) will be evaluated” *See Opposition* at 28 (emphasis in original). TSA argues that it was not required to evaluate all lifecycle costs including the base year and all option years under Section M, Factor 7, “only ‘proposed’ lifecycle costs.” *Id.* at 29. The only lifecycle costs, which offerors were required to submit pursuant to Section L of the Solicitation were base year costs under Task Order 01. *Id.*

Another interpretation according to TSA, discussed previously, is that, following the plain language of Section M, Factor 7, TSA intended to evaluate cost reasonableness and realism for the base year and all option years, but only evaluate Task Order 01 in making its price comparison for award. *Id.* at 31. Based on either reading of the Solicitation

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criteria, TSA argues that the request for Task Order 01 cost in Section L-4.4 makes it clear to offerors that only base year costs would be evaluated under Section M, Factor 7, despite its plain language. The ODRA finds that the inconsistency in the language of the Solicitation, under either reading, did not make it clear to offerors that, despite the plain language in Section M, the conflicting requirements of Section L meant that only base year costs would be evaluated.

Deloitte submitted a declaration from a consultant, Darrell J. Oyer, who conducted an evaluation of the lifecycle costs including the base year and all option years, based on the record in this Protest. *See Comments, Attach., Oyer Declaration*. Mr. Oyer states that the TSA's IGCE contained sufficient information [DELETED], to conduct a lifecycle analysis as required by Section M, Factor 7. *Id.* at ¶ 11. He goes on to state that it is common for agencies to request labor rates, but not hours, when performing a lifecycle cost analysis for the option years. *Id.* at ¶ 12. By TSA's own arguments, there is more than one reasonable interpretation of the requirements set forth in Sections L and M. Even if the language in Section M, Factor 7 could be construed as patently ambiguous, question 23 from an offeror in Amendment 2 to the Solicitation states:

23. Factor 7 within Section M – Price Reasonableness/ and Realism refers to 'base costs plus all option costs'. Can the Government clarify whether they intend to evaluate any costs other than the labor rates provided in Section B.4 for the Base and Option Years and the proposed costs for Task Order 1?

A. The government will evaluate the total price in accordance with sections B, L and M and will evaluate all requested cost elements to include the labor rates.

See AR, Tab 3 at 218. Thus, the offerors did provide an opportunity for TSA to clarify its evaluation of cost under Section M, Factor 7. Regardless, the ODRA finds that the TSA deviated from its own latently ambiguous evaluation criteria, and therefore lacked a rational basis for contract award. Under such circumstances, a protest must be sustained and corrective action taken if the complained of action was prejudicial. *See Consolidated Protests of Diversified Management Solutions, Inc. and Alaska Weather Operations*

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Services, Inc., 08-ODRA-00430 and 08-ODRA-00431 (Consolidated). The remaining issue to be decided is whether Deloitte was prejudiced by TSA's failure to follow the Solicitation's evaluation criteria.

C. The Protester Has Demonstrated Prejudice Resulting From TSA's Failure to Follow the Stated Evaluation Criteria

As was noted above, in order for a protest to be sustained, the Protester must demonstrate that the Agency actions complained of were prejudicial to it. *See Protest of L. Washington & Associates, Inc.*, 02-ODRA-00232. The ODRA has stated:

Where Agency actions are found to have been erroneous or lacking a rational basis, the protest will not ordinarily be sustained, unless it has demonstrated that the actions in question have in some way prejudiced or resulted in harm to the Protester. The ODRA will not sustain a protest unless the Protester demonstrates a reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the Agency actions, it would have had a substantial chance of receiving the award.

See Protest of Enroute Computer Solutions, supra (internal citations omitted). The Protester has the burden of proof and must demonstrate that but for the errors in the source selection process, it had a substantial chance of receiving the award. *See Protest of Optical Scientific Incorporated*, 06-ODRA-00365.

In this Protest, the evaluation of cost/price was both inconsistent with the terms of the Solicitation and clearly prejudicial to the Protester. The SSO found that the proposals of Deloitte and Accenture were technically equal and that price would be the determining factor for award. *See Finding of Fact No. 27, citing AR, Tab 23* at 1477-78. Here, Deloitte asserts that "had all lifecycle costs (base costs and option costs) been considered as required by the Solicitation, [DELETED] ... – based upon '[a]ll lifecycle costs (base costs and *all option costs*)' – the SSO undoubtedly would have selected Deloitte for the award." *Id.* at 5 (emphasis in original).

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With regard to the evaluation of the base year and option years, as previously noted, Deloitte submitted a declaration from a consultant, Darrell J. Oyer. *See Comments, Attach., Oyer Declaration.* The TSA IGCE contains [DELETED] for all the options as follows:

Option Year	[DELETED]
1	[DELETED]
2	[DELETED]
3	[DELETED]
4	[DELETED]

See Comments at 4 citing AR Tab 2 at 25-27. [DELETED]. *See Comments, Attach., Oyer Declaration at ¶ 13.* [DELETED] as illustrated in the Table below. *See Comments at 5 citing Oyer Declaration at ¶ 13-18.*

Option Year	Accenture (in dollars)	Deloitte (in dollars)	[DELETED]
1	[DELETED]	[DELETED]	[DELETED]
2	[DELETED]	[DELETED]	[DELETED]
3	[DELETED]	[DELETED]	[DELETED]
4	[DELETED]	[DELETED]	[DELETED]
All	[DELETED]	[DELETED]	[DELETED]

See Comments, Attach., Oyer Declaration at ¶ 18. Mr. Oyer goes on to state:

[DELETED]

Id. at ¶ 19.

TSA argues that Deloitte was not prejudiced by TSA’s failure to follow Section M, Factor 7, and evaluate the costs for the option years. *See Opposition at 34.* In light of Deloitte’s allegation in its Protest that it expected a lifecycle cost analysis to be conducted, the TSA contracting officer reviewed the information submitted by the offerors to determine if such an analysis was possible. *See Opposition, Attach. 1, [DELETED] Declaration at ¶ 26.* The contracting officer states that “TSA assumed [DELETED]” *Id.* at ¶ 27 (emphasis in original). As a result, according to the contracting officer, Accenture remained the lowest cost proposal. *Id.* at ¶ 28. The ODRA does not

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find the contracting officer's assumption-based testimony persuasive in comparison with the thorough analysis of Deloitte's expert. Nor does a second declaration from the contracting officer effectively rebut Mr. Oyer's testimony. *See Response of the TSA to Deloitte's Supplemental Grounds of Protest ("Response"), Attach. 2, [DELETED] Declaration.* The ODRA concludes that Deloitte was prejudiced by TSA's failure to follow section M, Factor 7, because Deloitte has established that the TSA's failure to evaluate the option year pricing in making its selection decision effectively deprived Deloitte of a reasonable opportunity to be awarded the Contract.

Deloitte's Protest also challenges the award on multiple other grounds. *See Protest and Supplemental Protest.* Given the ODRA's conclusion that TSA's evaluation of cost/price under section M, Factor 7 lacked a rational basis and was prejudicial to Deloitte, it is not necessary for the ODRA to reach the remaining issues.

IV. CONCLUSION AND RECOMMENDATION

For the reasons enunciated above, the ODRA recommends that the Protest be sustained. As a remedy, the ODRA recommends that the TSA Program Office be directed to re-evaluate the offers of Deloitte and Accenture utilizing the stated evaluation criteria of the Solicitation, and provide the offerors the opportunity to submit any additional cost information necessary for re-evaluation. If that re-evaluation results in a different best value determination and source selection decision,* the existing contract with Accenture should be terminated and an award made to Deloitte.

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

* It is for TSA to determine best value following the submission of amended proposals and evaluations thereof in a manner consistent with these Findings and Recommendation.

APPROVED:

-S-

Anthony N. Palladino
Associate Chief Counsel and Director
FAA Office of Dispute Resolution for Acquisition