

PUBLIC VERSION

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

FINDINGS AND RECOMMENDATIONS

Matter: **Royalea’L Aviation Consultants**
 Under Solicitation DTFAAC-04-A-00010

Docket No.: **04-ODRA-00304C**

Appearances:

For the Protester, Royalea’L Aviation Consultants: René González, President

For the FAA Mike Monroney Aeronautical Center: Linda Modestino, Esq., Office of
Center Counsel

I. Introduction

On June 1, 2004, Royalea’L Aviation Consultants (“Royalea’L”) filed the current Protest (“Current Protest”) with the FAA Office of Dispute Resolution for Acquisition (“ODRA”) alleging that the FAA Mike Monroney Aeronautical Center (“Center”) improperly excluded Royalea’L from competing for a contract under Solicitation DTFAAC-04-A-00010 (“the Solicitation” or “SIR”). The Solicitation sought aviation safety inspector related training and course development. In earlier protests filed with the ODRA related to this acquisition, Royalea’L alleged that the Center had not allowed sufficient time for bid submission, failed to compete the requirement in accordance with the SIR and improperly extended the contract of the incumbent. Those earlier protests were withdrawn. In the instant Protest, Royalea’L challenges the evaluation of its proposal, as well as the overall conduct of the acquisition.

As is discussed below, the ODRA finds that Royalea'L has standing to protest the award. The ODRA further concludes that: (1) the Royalea'L proposal was unacceptable for award because at least one of the technical evaluation factors found to be unacceptable by the Evaluation Team was not the subject of a deviation request by Royalea'L and was rationally determined to be incapable of correction; and (2) Royalea'L has failed to meet its burden of proving bias on the part of the Product Team. Finally, the ODRA finds that although the record in this case reflects that the acquisition was flawed, Royalea'L failed to demonstrate that it was prejudiced as a result of the Center's actions. Accordingly, the ODRA recommends that the Protest be denied.

II. Findings of Fact

A. Background

1. The Transportation Safety Institute ("TSI") is located at Oklahoma City, Oklahoma, and serves as the primary source of transportation safety and security training on domestic and international levels for Federal, State, and local government agencies and industry. The TSI is responsible for conducting International Civil Aviation Organization ("ICAO") Endorsed Training with FAA Inspectors acting as instructors (TSI Associate Staff) for the TRAINAIR courses. The Flight Standards Service International Program and Policy Office (AFS-50) has overall responsibility for ICAO endorsed training. AR, Tab 5, p. 6.
2. The Solicitation supports the need of TSI for expert technical services in providing Model Civil Aviation Regulations Training. This training contemplates the use of specially qualified individuals with subject matter expertise and experience who can provide the necessary course material and instruction. AR, Tab 5, p. 6.
3. On September 9, 2003, the Center issued an Internet Announcement of SIR 04-R-00010, seeking proposals to satisfy the requirement for TRAINAIR and TRAIN-THE-TRAINER Course Instruction and Course Development. The SIR established

September 15, 2003, as the due date for proposals thereby allowing four business days for their preparation and submission. Agency Response (“AR”), Tab 1.

B. First Protest

4. On September 14, 2003, Royalea’L filed a protest (the “First Protest”), challenging the amount of time allowed for the preparation and submission of initial proposals. Pursuant to informal alternative dispute resolution (“ADR”) efforts by the parties, the Center addressed the issues raised in the First Protest, and Royalea’L voluntarily withdrew the protest on October 2, 2003. *See Protest of Royalea’L*, FAA Order No. ODRA-03-273.

C. The Solicitation

5. On September 24, 2003, a new SIR was advertised with a closing date of October 7, 2003. AR, Tab 5. All terms, conditions and provisions of the previous SIR were unchanged, with the exception of those pertaining to travel costs, and the price schedule that was revised to add estimated dollars for travel costs. AR, Tab 5.
6. The SIR provides for a base year period and three option years, on a firm-fixed-price basis. AR, Tab 5, pp. 2-5.
7. The scope of work (“SOW”) states that the contractor shall provide the necessary subject matter expertise to develop, deliver, instruct, evaluate, revise materials and make recommendations for the ICAO TRAINAIR course “Government Aviation Safety Inspector – Operations,” Course 23000, as well as develop follow-on courses for the FAA TRAINAIR training program. AR, Tab 5, p. 6. The SOW further provides:

The contractor shall assist with the technical part of the job tasks analysis validation and the technical evaluation of the course design guides, course objectives; lesson plans, supporting visuals, evaluation instruments (end-of course and post-course evaluations

of the ASI and cadre instructors, train-the-trainer instructors, etc., student guides, instructor guides, testing and hands-on exercises. Technical information for these courses will be collected from the FAA and other sources. The contractor shall deliver draft and final materials electronically and in hard copy to AFS-50 in the FAA format. The contractor shall work with the course sponsor AFS-50, the International students, and will be highly interactive with the Instructional Systems Design (analyze, design, develop, implement, and evaluate) for the course materials and course changes, again focusing on the technical Ops ASI [Operations Aviation Safety Inspector] specialty that his knowledge and skills are required to ensure the International students can perform based on the Model Regulations and Laws.

AR, Tab 5, p. 8.

8. Section L of the SIR set forth instructions, conditions and notices to offerors. Although the minimum qualification criteria is comprehensive in scope, the numerous individual criterions are narrowly prescribed:

(a) Education:

(1) Contractor personnel must hold at least a bachelors degree from an accredited 4-year University or College or equivalent experience. Preferably with college hours in educational courses, i.e., adult learning theories, educational principals, instructional systems design, etc. Proposals must include copies of diplomas and class transcripts for personnel employed on the subject project.

(2) Contractor must have a minimum of 120 hours of active classroom instruction within the last year.

(3) Must be a General Aviation Operations Aviation Safety Inspector with at least three years experience as an inspector, and retired within no more than three years for currency.

(4) Must have successfully competed the applicable inspectors' and train-the-trainers' course for ICAO. Must demonstrate their affiliation with a professional ASI organization and show currency with that organization.

(5) Five year's experience as an operations or airworthiness instructor, as applicable. (Required)

(6) Successfully completed the applicable inspectors' and "train-the-trainers" course/Standard Training Packages. (Required)

(7) Four-year degree from an accredited education institution. (Desired)

- (8) Successfully graduated from the FAA Basic Instructor Training Course. (Required)
- (9) Completed and have proof of successfully completing the required FAA Flight Standards Inspector (Operations) Training Courses; i.e., String and Technical Courses. (Required)
- (10) Completed and have proof of writing and communication skills. To include experience in writing and directing of the FAA videotape's which will be used for instruction. (Required)
- (11) Skilled in the use of computers as a result of extensive course development and course delivery experience. (Required)
- (12) Successfully certified as an FAA flight instructor. (Required)
- (13) Successfully certified as an FAA ground instructor. (Required)
- (14) Hold/or held an FAA airline transport pilot certificate rating; preferably with a single and multi-engine landing rating and possibly helicopter and guider rating justified. (Required)
- (15) Experienced Principle Ops Inspector in certification procedures for Part 121, 135, 141 and justified each parts experience. (Required)
- (16) Updated Visa/Passports are required due to international travel requirements of this position. (Required)
- (17) Provide on-the-job training in all applicable areas and should conduct two complete on-the-job training cycles. (Required)
- (18) Currency of technical background must be maintained through recurrent training available so that instructor/course developer keep pace with regulatory changes and developments in their technical areas or justify how currency is maintained. (Desired)¹
- (19) Accessibility to an up-to-date library and reference or experience must be justified in writing. (Desired)
- (20) Comply with a formal instructor evaluation system in place. (Required)
- (21) Systems should include direct observation of instructors by training management staff. (Required)
- (22) Instructor will be evaluated on a yearly basis. (Required)
- (23) Training Centre/CAA agrees to grant ICAO access to instructor evaluation reports on a confidential basis during follow-assessments. (Required)

¹ Although the designation of this factor, along with many others, as "Desired" conflicts with the characterization of all these criteria as "minimum qualifications," and is inconsistent with the specified evaluation scheme of technically acceptable/low price, these patent inconsistencies were not challenged prior to the due date for proposal submission. 14 C.F.R. § 17.15(a)(1). Qualitative distinctions based on preferences are not properly considered in the context of such an evaluation of minimum technical acceptability (*i.e.*, as opposed to a "best value" procurement evaluation).

(24) Review trainee records including performance on mastery tests. (Required) Mastery tests will evaluate participants performance in each task that is involved in the five-phase air operator certification process. Participants must successfully complete the mastery test for each of the 17 modules. Criteria for successfully completing each module is specified in each module's terminal objective (criteria is at least 70% or more for each module mastery test). Criteria for successful completion of follow-on courses will be similar. Contractor must have the ability to develop mastery tests based on ICAO TRAINAIR course development methodology. (Required)

(25) Skilled in the use of the model aviation regulations, model directive, and model advisory pamphlet technical guidance materials. (Desired)

(26) Skilled in the use of the model aviation regulations, model directive, and model advisory pamphlet technical guidance materials. (Desired)

(27) Skilled in the development and delivery of TRAINAIR government aviation safety inspector module plans. (Desired)

(28) Knowledgeable about the application of ISO 9000 to aviation systems. (Desired)

(b) Experience.

(1) The contractor must possess verifiable experience in analyzing, designing, developing, implementing, instructing, evaluating, and gathering information pertaining to training at technical training institutions in the subjects of ICAO and International Training to support educationally sound decisions and recommendations for course improvement that will be addressed in the final report.

(2) Each firm submitting proposals must have continuously in the business of providing educational evaluation services for a minimum of three (3) years within the past five (5) years at the time of proposal submission and shall provide verifiable evidence of the same.

(3) Five years of active classroom instruction within the last year with the FAA and assigned to Transportation Safety Institute developing and delivering standardized training packages under TRAINAIR instructional systems design development guidelines. (Required)²

(4) Affiliated with professional aviation safety organizations. (Desired)

(5) Three years practical training experience as a classroom and flight instructor in Industry. (Desired)

² The confusing requirement of "[f]ive years of active classroom instruction within the last year" likewise was not challenged prior to the due date for proposal submission. 14 C.F.R. § 17.15(a)(1).

- (6) Knowledgeable and participated in an FAA aviation safety inspector inspection of two pre-IASA assessments of ICAO member States. (Desired)
- (7) Experience in monitoring the participants progress through the use of hands-on/oral question and answer exercises. (Desired)
- (8) Clarifies subject matter information that is not clear to the participants, which must be clarified prior to presentation of new materials. (Desired)
- (9) Provides documentation and record-keeping support for courses and classes in accordance with TSI requirements. (Desired)
- (10) Ensures that all materials necessary for conducting the class are available and properly laid out in the classroom prior to the class conduct. (Desired)
- (11) Provide instructional/classroom support for other members of the instructor cadre as needed to ensure successful delivery of the course. (Desired)

AR, Tab 5, Clause L.1 Qualification Criteria, pp. 28-30.

9. The SIR instructs offerors that:

The technical proposal must be specific and in sufficient detail to enable an evaluation team to make a thorough evaluation to determine if the proposed services meet the requirements of the Government and to determine that the offeror has a thorough understanding of the requirement.

(b) Offerors are advised to submit proposals, which are clear and comprehensive without additional explanation or information. Additional information may be requested from offerors whose proposals are considered to be reasonably susceptible to being made acceptable; however, the Government reserves the right to award a contract based on initial offers received, without discussions or negotiations.

(c) The technical proposal must provide information to address all the information specified in Section L.1, Qualification Criteria.

AR, Tab 5, Clause L.4, Preparation of Technical Proposals, p. 30 (emphasis in original).

10. The SIR also notifies offerors that:

[T]he terms and conditions of this SIR shall be changed only through formal amendments(s) issued by the Contracting Officer. If an offeror takes issue with the terms and conditions contained herein, the offeror shall submit a Request for Modification of Terms and Conditions under separate attachment to their proposal. This request should be in offeror's format, on offeror's letterhead, signed by an officer of the company with authority to bind the offeror. The request must include documentation that fully highlights the offeror's proposed changes and must be specific as to the exact term(s) or condition(s) to which the exception(s) are being taken. These changes shall not be binding on the FAA until fully agreed to by both the FAA and the offeror and incorporated into the document prior to contract award.

AR, Tab 5, Clause L.5, Request For Modification of Contract Terms and Conditions, p. 30-31.

11. The SIR identifies the evaluation factors for award as follows:

- (a) Technical Evaluation:
 - (1) SIR and award documents will be evaluated on the basis of acceptable/unacceptable based on the offeror's submission of required documentation.³
 - (2) All proposals must be submitted in accordance with Section L, and must conform to all the terms and conditions of the solicitation. Failure to conform to all requirements expressed may be cause for rejection without further evaluation or discussion.
 - (3) Additional information may be requested from offerors whose proposals the Government considers reasonably susceptible to being made acceptable. The information may clarify or supplement, but not basically change the proposal as submitted. The Government reserves the right to award a contract based on initial offers received, without discussions or negotiations. For this reason, each initial offer should be submitted on the most favorable terms.
- (b) Price Evaluation:

Contract award will be made to the technically acceptable responsible contractor offering the lowest price.

³ Although the only "documentation" specifically identified by the SIR to be submitted for purposes of the technical evaluation are "copies of diplomas and class transcripts," in performing the evaluation of proposals, the Center appears to equate the term "documentation" to "information." Again, this seeming ambiguity was not challenged prior to the due date for proposal submission. 14 C.F.R. § 17.15(a)(1).

AR, Tab 5, SIR Section M.1 Evaluation of Proposals.

D. Submission of Proposals

12. By the closing date of October 7, 2004, four proposals were submitted in response to the SIR, including those of Royalea'L and International Aviation Safety Standards ("IASS"). AR, Tab 13. At that time, IASS was performing essentially the same services under a purchase order, DTFAAC-03-P-00488, issued by the requiring organization on October 1, 2002. AR, Tab 5, Affidavit of Carolyn Engelke, Contracting Officer, and Tab 15.

13. The proposal of Royalea'L identified five (5) evaluation items from which it requested an exception pursuant to the Request For Modification of Contract Terms and Conditions Clause identified above in Finding of Fact ("FF") No. 10.

14. The Royalea'L proposal requested an exemption from minimum qualification L.1.a.2, stating that the "Contractor must have a minimum of 120 hours of active classroom instruction within the last year" on the following basis:

[DELETED]

AR, Tab 6, Royalea'L Request for Modification.

15. The Royalea'L proposal also requested an exemption from minimum qualification L.1.a.3, stating that the contractor be "[r]etired within no more than three years for currency" on the following basis:

[DELETED]

AR, Tab 6, Royalea'L Request for Modification.

16. The Royalea’L proposal further requested an exemption from minimum qualifications L.1.a.4 and L.1.a.6, requiring successful completion of Train-the-Trainer Course on the following basis:

[DELETED]

AR, Tab 6, Royalea’L Request for Modification.

17. Finally, the Royalea’L proposal requested an exemption from minimum qualification L.1.b.3, requiring “[f]ive years of Active classroom instruction within the last year with the FAA **and other Aviation authority** assigned to TSI...” (emphasis in original request) on the following basis:

[DELETED]

AR, Tab 6, Royalea’L Request for Modification.

E. Evaluation of Proposals

18. The evaluation plan identified twenty-nine (29) items under the educational criteria, and eleven (11) items under the experience criteria, to be evaluated as acceptable or unacceptable, for a total of forty (40) items. On December 19, 2003, the Evaluation Team Chairperson transmitted the results of the final evaluation to the Contracting Officer. The results state that the proposal of IASS was the only acceptable proposal with [DELETED] items evaluated as acceptable and [DELETED] items evaluated as unacceptable, *i.e.*, IASS failed to (1) provide an official college transcript and (2) document on the job training cycles. The Evaluation Team determined that these two items were capable of correction by IASS. The Royalea’L proposal was found to be unacceptable with [DELETED] items and [DELETED] items; however, the Evaluation Team deemed these [DELETED] items to be incapable of correction by Royalea’L. AR, p. 6 and Tab 9.

19. According to the Center, “[f]urther actions on the SIR were delayed through the holiday season of 2003 and during implementation of a new Acquisition and Accounting System within the FAA (PRISM/DELHI).” AR, p. 6.
20. The Center explained that during this period of proposal evaluation, the original purchase order with IASS, *see* FF 12, was extended four times.

Because of the importance of the services to the requirement organization ... these extensions were necessary to ensure that there was no break in their delivery. The order was issued as a single source and was supported by a justification for such. The solicitation for follow-on services was issued using a competitive acquisition strategy but no information was present at the time these extensions were issued to firmly establish as fact that a competitive market existed for the provision of these services. Consequently the extensions were supported by the single source justification underlying the award of the basic order and were in fact necessary to maintain continuity of services until a follow-on award could be made.

AR, Tab 15, Affidavit of [DELETED], Team Coordinator, dated July 2, 2004.

21. By letter, dated February 23, 2004, the Contracting Officer sought further clarification from IASS regarding the [DELETED] items evaluated as unacceptable by the Evaluation Team. AR, Tab 9. IASS submitted the requested clarifying information on March 7, 2004, and, pursuant to a re-evaluation of those items by the Team, IASS’ proposal was evaluated as acceptable on all counts. AR, Tab 9 and 10.

F. Second Protest

22. On April 30, 2004, Royalea'L filed another protest (the "Second Protest"), docketed as 04-ODRA-00300, on the basis that the FAA had failed to make an award under the Solicitation and had improperly issued five extensions to IASS to satisfy its needs for on-going course development of TRAINAIR programs. Protest letter, dated April 29, 2004 (04-ODRA-00300).

23. Specifically, the Second Protest alleges (1) that "unknown persons in the Administration/contracting division have rendered and continues [sic] to render preferential treatment to the incumbent" and (2) "internal conspiracy" to prevent another company from obtaining the contract. As evidence, the Second Protest points to the fact that the Center originally met this requirement by awarding a sole source contract to IASS and alleges that, despite the expiration of the contractually provided extension period, has continued to extend the IASS contract improperly pursuant to AMS Clause 3.2.4-34, Option to Extend Services.⁴ This clause states in part:

The Government may require continued performance of any service within the limits and at the rates specified in the contract The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months.

Second Protest, Attachment, Analysis, p. 1.

24. The Second Protest further points out that on May 28, 2003, the sole source contract to IASS was revised to incorporate specific changes to the Requirements, Qualifications, and Experience Sections of the contract. These changes required the following from the contractor:⁵

⁴ IASS' performance period under the initial purchase order expired on September 30, 2003. Purchase Order Revisions were issued to extend IASS' performance period from October 1, 2003 through March 31, 2004. AR, Tab 15. *See also* FF 20, *supra*.

⁵ The Second Protest argues that these particular requirements were not incorporated into the contract because they articulated the minimum needs of the Center, but rather because they provided the incumbent with a competitive advantage vis a vis other potential service providers. Second Protest, Analysis, p. 5.

- b) 2.6.1 Three years experience as Ops or A/W instructor (Required)
- c) 2.6.2 Successfully completed applicable inspector and train-the-trainer course. (Required)
- d) 2.6.3 Four year degree with accredited education institution. (Desired)

Section 2.7, Experience:

- a. 2.7.1 120 hours of active classroom instruction within the last year (Required)
- b. 2.7.2 Affiliated with professional aviation safety organization. (Desired)

25. The Second Protest further asserts, as evidence of bias and “conspiracy,” that on August 26, 2003, the Center issued Revision 3 of the IASS contract that provided for the reimbursement of travel expenses associated with a meeting, scheduled for September 28, 2003 through October 3, 2003, which was beyond the September 30, 2003 expiration date of the IASS contract. Second Protest, Attachment I.O.P. #18a, 18b. Royalea’L alleges that this fact, combined with the initial SIR’s unreasonably short due date of September 15, 2004 for preparing and submitting proposals, is further evidence of the Center’s intent to provide preferential treatment to IASS and to place the other competitors at a disadvantage. Second Protest, Attachment, Analysis, p. 6 and I.O.P. #19.

26. On May 7, 2004, the Center awarded the contract to IASS in the amount of \$133,000.00, which was the estimated not-to-exceed amount for the 1-year base contract period. AR, Tab 12.

Notably, the Royalea’L proposal was found to be unacceptable with respect to [DELETED] of these qualifying areas.

27. By letter, dated May 26, 2004, the Center debriefed Royalea'L on the results of the evaluation. The Center concluded that the Royalea'L proposal was not technically acceptable. The letter further stated that of the four offers submitted in response to the SIR, only one, IASS, was found to be acceptable. Although the debriefing letter addresses only [DELETE] of the [DELETE] items found unacceptable, the handwritten Final Evaluation Forms for Royalea'L indicate that [DELETED] also was rated unacceptable by the Evaluation Team. AR, Tab 9.

G. The Current Protest

28. By letter, dated May 30, 2004, Royalea'L filed with the ODRA a request for a summary decision on the Second Protest. The request asserted that the totality of facts outlined in the Second Protest demonstrated actions contrary to the following sections of the FAA Acquisition Management System ("AMS"):

AMS 3.2.1.2 Policy, 3.2.1.2.1 Market Analysis, 3.2.1.2.2 Procurement Plan, 3.2.1.3.4 Small Business, 3.2.1.3.8 Single Source Approval, 3.2.1.3.9 Pre-Release of Documents, 3.2.2.2 Policy, 3.2.2.4 Single-Selection, 3.2.2.4.1 Single Source Procurement Process, 3.2.2.4.1 Emergencies, 3.2.2.5.2 Sourcing Determination, and 3.2.5.2 Policy: "FAA business shall be conducted.... Above reproach..., with complete impartiality and with preferential treatment for none."

29. The letter also protests the award of the contract to IASS and the evaluation's conclusion that the Royalea'L proposal was not technically acceptable. Royalea'L challenges all the factors rated unacceptable that were identified in the debriefing letter. The letter contends that the FAA acted in an arbitrary and capricious manner in applying the principles of the AMS so as to disqualify its proposal purposefully, and that the award to IASS was made in retaliation for Royalea'L's filing of the Second Protest. AR, Tab 14, Royalea'L Letter, dated May 30, 2004.

30. The ODRA considered the May 30, 2004 request to be a follow-on protest, docketing it as 04-ODRA-00304 (the Current Protest), and consolidated it with the protest docketed as 04-ODRA-00300 (the Second Protest).
31. On June 23, 2004, Royalea'L voluntarily withdrew the Second Protest with the understanding that the specific allegations and facts contained in the Second Protest pertaining to bias and "conspiracy" were incorporated into the Current Protest and addressed by the Center in its response. Royalea'L Letter, dated June 23, 2004. On June 25, 2004, the ODRA issued a dismissal order with respect to the Second Protest, but expressly found that the allegations of fact underlying the Second Protest "may be relevant to the Royalea'L Subsequent Protest," and incorporated them into the record of the Current Protest. FAA Order No. ODRA-04-293.
32. The Center filed the Agency Response on July 7, 2004 and Royalea'L filed its Comments on July 20, 2004, after which the record in the Current Protest was closed.

III. Discussion

Under the FAA's Acquisition Management System ("AMS"), where a contract award decision has a rational basis and is neither arbitrary, capricious, nor an abuse of discretion and is supported by substantial evidence, the ODRA will not recommend that the decision be overturned. *Protest of IBEX Group Inc.*, 03-ODRA-00275; *Protest of Computer Associates Inc.*, 00-ODRA-00173; *Protest of Information Systems and Networks Corporation*, 98-ODRA-00095 and 99-ODRA-00116, *affirmed* 230 F.3d 52 (DC Cir. 1999). The Protester bears the burden of proof under this standard. *See Protest of L. Washington & Associates, Inc.*, 02-ODRA-00232; *Protest of Glock, Inc.*, 03-TSA-003. Finally, the Protester must demonstrate that it was prejudiced by the Product Team's actions. *Protest of L. Washington & Associates, Inc.*, 02-ODRA-00232.

A. The Evaluation The Royalea’L Request For Exemptions Was Deficient And Royalea’L Has Standing To Protest

In its proposal, Royalea’L complied with express SIR instructions in submitting a formal request for modifications of the SIR terms and conditions. The Royalea’L proposal included a separate attachment highlighting the proposed exceptions. FFs 13-17. The evaluators granted one requested deviation,⁶ and rejected the remaining four. In doing so, however, the evaluators failed to state reasons for all but one of the rejections, indicating only that Royalea’L failed to meet the particular requirements and **“this did not change the Evaluation Team’s rating of Unacceptable.”** AR, Tab 10 (emphasis in original).⁷ Such conclusory statements do not reflect fair consideration of the Royalea’L deviation request and do not provide a basis for the rejection. Having invited and received a request for deviations, the Center was required to have a basis for, and not act arbitrarily or capriciously in, responding or failing to respond to the request. *See Weather Experts, Inc.*, 97-ODR00013, wherein the ODRA found irrational the rejection of a proposal, stating:

If the subject was not even open for discussion, it certainly should have been noted in the SIR. Failing either mention in the SIR, or discussions, the award decision is flawed, because the agency’s decisional criterion is not apparent.

In this case, the record contains no adequate explanation of, or reasoning behind, the rejections of the exemption requests. As noted above, the SIR induced Royalea’L to propose deviations from the six minimum qualifications requirements. Insomuch as the ODRA finds no basis in the record for the rejection of the proposed deviations, the Center’s argument that Royalea’L lacks standing to protest, based on its ratings for those requirements, is without merit.

⁶ In this regard, the Agency Response incorrectly fails to recognize the acceptance of the Royalea’L deviation request pertaining to [DELETED]. AR, Tabs 9 (Final Evaluation Checklist) and Tab 10 (Note for the Record).

⁷ Only one evaluation comment concerning a requested deviation from the minimum qualification of [DELETED] attempted to provide an explanation. That comment indicated that Royalea’L’s “[e]xperience was not FAA.” AR, Tab 9. This explanation, however, is inadequate, since it does not indicate why [DELETED] experience would not be acceptable. *See* alternative qualifications proposed in FF 17.

B. The Record Does Not Contain “Well Nigh Irrefragable” Proof of Biased, Conspiratorial Or Retaliatory Actions

In the Second Protest and Current Protest, Royalea’L alleges that the award to IASS was the result of biased, conspiratorial and retaliatory actions on the part of the procurement officials, FFs 23-25, 28-29. Royalea’L asserts that such actions contravene AMS policy, which provides “FAA business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none.” See AMS Section 3.2.5.2, Contractor Ethical Guidelines Policy.

It is a well-established principle of procurement law that a presumption of regularity and good faith attaches to the actions of government officials. See *Protest of Raytheon Technical Services Company*, 02-ODRA-00210 (Findings and Recommendations on Request for Reconsideration of Remedy); *Protest of Computer Associates International, Inc.*, 00-ODRA-00173 (and cases cited therein). A party alleging bad faith on the part of the Government must ordinarily come forward with “well nigh irrefragable” proof in order to rebut the presumption of good faith attached to the actions of Government officials. See *Protests of Camber Corporation and Information Systems & Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated), Final Redacted Findings and Recommendations at 48-49. Exactly what constitutes “well nigh irrefragable” proof was discussed by the Federal Circuit Court of Appeals in *Am-Pro Protective Agency, Inc. v. U.S.*, 281 F.3d 1234 (C.A. Fed. 2002):

Courts generally recognize three standards of proof: preponderance of the evidence, clear and convincing, and beyond a reasonable doubt. See *Price v. Symsek*, 988 F.2d 1187, 1191 (Fed.Cir.1993). Of the three, we believe that clear and convincing most appropriately describes the burden of proof applicable to the presumption of the government’s good faith. This is so because, for one, the presumption of good faith, as used here, applies only in the situation where a government official allegedly engaged in fraud or in some other quasi-criminal wrongdoing. See *Addington v. Texas*, 441 U.S. 418, 423-24, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (discussing the three burdens of proof outlined above and the situations in which they ordinarily apply). In addition, we believe the clear and convincing

standard most closely approximates the language traditionally used to describe the burden for negating the good faith presumption; namely, the “well-nigh, irrefragable” proof standard Clear and convincing evidence has been described as evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is “*highly probable.*” *Price*, 988 F.2d at 1191 “[W]ell-nigh, irrefragable” proof similarly refers to evidence that “cannot be refuted or disproved; incontrovertible, incontestable, indisputable, irrefutable, undeniable (said of a statement, argument, etc., or the person who advances it.)” Oxford English Dictionary 93 (2d ed.1991) (defining “irrefragable”). As with the clear and convincing standard, the requirement of “well-nigh, irrefragable” proof also sets a high hurdle for a challenger seeking to prove that a government official acted in bad faith.

Absent such proof in this case, the Odra has no basis to conclude that the circumstances and actions highlighted by Royalea’L reflect biased, conspiratorial or retaliatory actions on the part of the procurement officials.

C. The Royalea’L Proposal Was Ineligible For Award Because At Least One Unacceptable Rating Of A Minimum Qualification Requirement Was Rational And Was Not The Subject Of A Deviation Request

To be considered qualified for award, each offeror was required to meet the minimum qualification requirements specified in Section L of the SIR. FF 8. In response to the requirement for successful graduation from the FAA Basic Instructor Training Course, *see* FF 8, Clause L.1.a.8, the Royalea’L proposal simply stated [DELETED] AR, Tab 6.⁸ Royalea’L did not request an exemption from this requirement. The Evaluation Team consequently found no evidence of Basic Instructor Training in the Royalea’L proposal and rated this minimum qualification factor as unacceptable. AR, Tab 9, Typed Copy of Handwritten Final Evaluation Comments, p. 1. The debriefing letter advised Royalea’L that “[n]o documentation was provided to support that anyone listed in the package successfully completed the FAA Basic Instructor Training Course.” AR, Tab 13.

Royalea’L contends that no documentation was requested for this minimum qualification criterion and furthermore that “[DELETED] RSD Instructor, at the FAA Mike Monroney

⁸ In contrast, the proposal of the awardee contained a list of coursework that included [DELETED], among others.

Academy forms part of Royalea'L Consultant group and qualifies under this part." Royalea'L further indicates that [DELETED] qualifications would satisfy this requirement, but that his "resume was not submitted" with the proposal because SIR clause L.1(a) restricts proposal documentation to only "copies of diplomas and class transcripts for personnel employed on subject project." AR, Tab 14, Current Protest, p. 6. This argument is not persuasive.

First, even if Royalea'L viewed the [DELETED] Course identified in its proposal as the equivalent of the Basic Instructor Training Course specified, it failed to request an exemption from this requirement on that basis, or even to indicate as much in its proposal. Presented with a clearly incompatible response, the Evaluation Team had no obligation to conduct further communications with Royalea'L and properly rated that item as unacceptable.

Second, the language in the SIR states "Proposal must include copies of diplomas and class transcripts for personnel employed on subject project." The term "include" does not in any way limit or restrict the offerors' ability to include any documentation necessary to demonstrate satisfaction of the minimum qualifications requirements set forth in the SIR. The Evaluation Team has no reason to know of additional qualifications, unless those qualifications somehow are referenced or implied by the proposal, sufficiently so the Team should know that the proposal merits a request for additional information.

Ultimately, Royalea'L must bear responsibility for the contents and completeness of the information contained in its proposal. *See Protest of International Services, Inc., 02-ODRA-00224.* The SIR instructs offerors to submit a technical proposal that is specific and sufficiently detailed to determine whether the proposal meets the stated requirements. FF 9. The SIR further requests that proposals be clear and comprehensive without additional explanation or information, but in the same paragraph, reserves the right to award a contract based on initial proposals. *Id.* Thus, within the context of an evaluation of technical acceptability, a reasonable reading of this language would be that an initial proposal should not include information that is extraneous, irrelevant or repetitive.

Rather, an initial proposal needs to demonstrate how it meets every stated minimum qualifications requirement, and any deviation from the stated minimum qualifications should be addressed in a request for exemption. Moreover, a reasonable reading of this language should not result in an expectation on the part of offerors that they will be afforded additional opportunities to demonstrate compliance with the minimum qualifications requirements, particularly where the SIR cautions offerors that “[f]ailure to conform to all requirements expressed may be cause for rejection without further evaluation or discussion.” FF 11.

In sum, the ODRA finds that, under the SIR’s minimum qualifications requirements and stated evaluation scheme, Royalea’L failed to meet at least one of the minimum qualification requirements for which it did not seek an exemption, and the Team’s determination that this deficiency was not capable of correction had a rational basis.

D. Although The Competition Was Flawed, The Evaluation Team’s Errors Were Not Prejudicial To Royalea’L

The Royalea’L Protest asserts that the Center failed to comply with various sections of the AMS.⁹ FF 28. The ODRA finds that the procurement process was inadequate in that it did not provide reasonable access to competition for firms interested in obtaining contracts, and compromised the AMS preference for competition among two or more sources. *See* AMS § 3.2.2.2 Source Selection Policy.¹⁰

The AMS source selection process generally contemplates some meaningful exchange between procurement officials and potential offerors with respect to proposed

⁹ One of the AMS Sections Royalea’L alleges was violated by the Center is AMS §3.2.1.3.4 pertaining to Small Business and Socially and Economically Disadvantaged Business; however, there is no indication in the record that this procurement was set aside for, or provided any competitive advantage to, businesses who qualified as such.

¹⁰ This particularly is true with respect to the timeframe established for announcement of the SIR, review of the SIR requirements by potential offerors and preparation of proposals. The Center provided no explanation for the compressed period of time between the SIR announcement and the submission of proposals. Moreover, contract coverage did not appear to be an urgent concern for the Center, since the August 26, 2003 revision of the IASS purchase order, indicates that the Center anticipated an extension even before the SIR was announced. FF 25.

acquisitions.¹¹ Although the record in this case does not discuss how the SIR's minimum qualification requirements were developed, it is clear that the SIR contemplated giving offerors the opportunity to propose deviations from the contract's terms and conditions, including deviations from the minimum qualifications requirements. FF 10. Without fair consideration by the Center of proposed deviations, this opportunity did not serve as a satisfactory substitute for the "requirements analysis" component of procurement planning, but rather only served to induce offerors to propose a deviation rather than exercise their right to protest the SIR requirements in accordance with 14 C.F.R. §17.15(a)(1).¹²

Nevertheless, as discussed in Section C above, the Royalea'L proposal failed to demonstrate successful graduation from the FAA Basic Instructor Training Course. Neither did Royalea'L timely challenge this requirement, or any other term of the solicitation prior to submission of initial offers, or request a deviation from this mandatory requirement. Thus, regardless of the merit of its other complaints, Royalea'L was ineligible for award. For this reason, Royalea'L cannot demonstrate the requisite prejudice or harm necessary to sustain its protest, *i.e.*, that, but for the Center's complained of faulty actions, it would have had a substantial chance of award. In this regard, 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. *A&T Systems, Inc. supra*. 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.

¹¹ For example, procurement planning activities described in AMS §§3.2.1.2.1 Market Analysis and 3.2.1.3.9 Pre-Release of Documents provide FAA procurement officials with the opportunity to evaluate, review and refine the procurement process so as to assure sound judgments and decision making, as well as maintain the fairness and integrity of the system. *See* AMS §3.1.3 Fundamental Principles and §3.2.1.2 Procurement Planning Policy.

¹² *See also* Footnotes 1-3, 5.

Protest of L. Washington & Associates, Inc., 02-ODRA-00232, citing *Protest of Enroute Computer Solutions*, 02-ODRA-00220. Here, the Center's flawed conduct of this acquisition did not cause the Royalea'L proposal to be ineligible for award. Thus, as a matter of law, the Royalea'L Protest must be denied.

IV. Recommendation

For the foregoing reasons, the ODRA recommends that the Current Protest of Royalea'L be denied.

Signed _____

Marie Collins
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

APPROVED:

Signed _____

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

Supplementary Statement Of The ODRA Director

The Protester in this case has raised serious questions concerning the process followed by the Center in this acquisition. While the ODRA finds merit in some of these allegations (*see* Discussion in Section D), the Protest cannot be sustained because Royalea'L, under the circumstances here, cannot demonstrate that, but for the Center's actions, it would have been eligible for an award. The Center should review and revise the procedures used in this acquisition, and take such action as is appropriate. Prior to the conclusion of the current base year of the contract, it would be appropriate to conduct a re-competition for this requirement using a process that ensures adequate and fair access to competition.

Signed

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