

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

Protest of)
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CDW Government LLC) Docket No. 11-ODRA-00575
)
Pursuant to Solicitation DTFAWA-10-R-00024)

DECISION ON SUMMARY DISMISSAL MOTIONS

On May 10, 2011, CDW Government LLC (“CDW-G”) filed the instant bid protest (“Protest”) with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”). CDW-G challenges the award of an indefinite delivery, indefinite quantity (“IDIQ”) contract (“Contract”) to GTSI Corporation (“GTSI”) by the FAA Product Team (“Product Team”). The award was the second made pursuant to Solicitation DTFAWA-09-R-00024 (“Solicitation”). *Protest* at 1. The Contract is for “information technology products and support services in connection with the FAA’s Strategic Acquisition of Various Equipment and Supplies (“SAVES”) [P]rogram.” *Product Team Motion to Dismiss* at 1. CDW-G asserts that: (1) the Solicitation’s evaluation criteria, which gave more weight to price than to technical was unreasonable; (2) the original price evaluation is not applicable; (3) technical capability should be ranked higher than price; (4) since CDW-G received the [REDACTED], it is “most deserving of an award”; and (5) it is “CDW-G’s right to receive an award.” *Protest* at 4-6.

On May 27, 2011, the Product Team filed a Motion to Dismiss asserting that CDW-G did not file its Protest in accordance with the timelines established in the ODRA Procedural Regulations, 14 C.F.R. §17.15, and, on June 3, 2011, intervener GTSI filed its own Motion to Dismiss for lack of timeliness (“Motions”). On June 20, 2011, intervener Iron

Bow filed a Response in support of the Motions that the Protest was not timely filed with the ODRA. *Iron Bow Response to the Motions to Dismiss*. On June 20, 2011, CDW-G filed its Response to the Motions. On July 5, 2011, the ODRA forwarded a letter to the Product Team directing it to supplement its motion with evidence of the dates of awards and debriefings. The Product Team supplemented its filing on July 7, 2011 (“Product Team Supplemental Filing”).

For the reasons discussed below, the ODRA concludes that CDW-G’s Protest of the second award to GTSI was timely filed in accordance with the ODRA Procedural Regulations, 14 C.F.R. §17.15, only to the extent that it challenges the best value determination that resulted in an award to GTSI based on the stated evaluation criteria. To the extent the Protest also challenges the stated evaluation criteria of the Solicitation, it is untimely and, therefore, is dismissed in part.

I. FACTUAL BACKGROUND

The Product Team issued the Solicitation on May 10, 2010. The Solicitation set July 8, 2010 as the date for receipt of proposals. *Protest*, Exhibit 2 at 1. The Solicitation expressly contemplated making one or more contract awards. *Protest*, Exhibit 40 at L-1 and Exhibit 43 at M-2. Section L.2.1 of the Solicitation identifying contract type, states, in relevant part:

The Federal Aviation Administration contemplates award, in accordance with its FAA Acquisition Management System (AMS), of *one or more Indefinite Delivery / Indefinite Quantity (ID/IQ) contracts* to purchase Information Technology (IT) hardware for the Headquarters, regional offices and field facilities. . .

Protest, Exhibit 40 at L-1 (emphasis added).

The Solicitation also incorporated by reference AMS Clause 3.2.4-25, Single or Multiple Awards (April 1996). *Id.* AMS Clause 3.2.4-25 states:

The FAA may elect to award a single delivery order contract or task order contract or to award multiple delivery order contracts or task order contracts for the same or similar supplies or services to two or more sources.

The prescription to the Clause also states that it “[m]ust be used in SIRs for indefinite quantity contracts that may result in multiple contract awards.” Finally, Section M.1.2 of the Solicitation states that “[t]he FAA reserves the right to award one or more contracts, if it is in the best interest of the FAA.” *Protest*, Exhibit 43 at M-2.

The Solicitation also established the evaluation scheme for making awards. Section M.1.1, Award Selection, provides:

. . . This source selection will be based on a best value trade-off approach. Accordingly, award will be made to the responsible and technically acceptable Offeror whose proposal provides the greatest overall value to the FAA. This best-value determination will be accomplished by comparing the value of the differences in the technical factors for competing offers, based on their strengths, weaknesses, and risks, with differences in their price offered to the FAA. In making this comparison, the FAA does not intend to make an award to an Offeror who proposes a significantly higher overall price to achieve slightly superior technical approach. Award will be made to the Offeror whose proposal is determined to represent the best value to the FAA.

Best value is further defined as being “based on the evaluation of the Offeror’s Business [and] Technical Management Proposal, Price Proposal, and Subcontracting plan.” *Id.* at M-1. Section M.2, Evaluation for Award, also provides:

The rated technical evaluation criteria are slightly less important than price. As relative technical advantages and disadvantages become less distinct, a difference in price between proposals is of increased importance in determining the most advantageous proposal. Conversely, as differences in price become less distinct, differences in relative technical advantages and disadvantages among proposals are of increased importance in the determination.

Id. at M-3-M-4.

The public announcement of the first award under the Solicitation to Iron Bow Technologies, LLC (“Iron Bow”) was posted on the FAA Contracting Opportunities website on December 1, 2010. *Product Team Supplemental Filing*, Exhibit B. A debriefing for CDW-G was held on January 12, 2011. *Id.*, Exhibits D, D(1), and F (Declaration of Tyrone White). The public announcement of the second award under the Solicitation to GTSI was posted on the FAA Contracting Opportunities website on April 29, 2011. *Id.*, Exhibit C. On May 10, 2011, CDW-G filed the instant Protest. *Protest*.

II. DISCUSSION

A. Standard of Review

It is well established that protests must be timely filed with the ODRA pursuant to the requirements of the Procedural Regulations, and that the time limits set forth therein will be strictly enforced. 14 C.F.R. §17.15; *See, e.g., Protests of Hi-Tec Systems, Inc.*, 08-ODRA-00459, -00460, *Decision on Timeliness of Protest Ground*, December 1, 2008. Furthermore, the ODRA cannot extend the time limitations established in the Procedural Regulations. 14 C.F.R. § 17.13(c); *See, e.g., Protest of Boca Systems, Inc.*, 00-ODRA-00158. The ODRA Procedural Regulations also provide that “prior to recommending or entering either a dismissal or a summary decision, either in whole or in part” the ODRA shall afford all parties against whom the decision is to be entered the opportunity to respond. *Id.*

B. Positions of the Parties

CDW-G in its Protest first directly challenges the terms of the Solicitation, asserting that giving greater weight to an offeror’s price over its technical proposal was unreasonable in a multiple award scheme. *Protest* at 4. CDW-G also asserts that the Product Team’s

emphasis on price was unreasonable because, under a multiple award vehicle, the competition for the award of Task Orders ultimately will lead to lower prices post-award because “the market will determine the price.” *Id.* at 4-5. In addition, CDW-G asserts that, under a multiple award scheme, because of the “reduction of importance of (Ceiling) Price, Technical ability should be ranked Higher.” *Id.* Because CDW-G had the [REDACTED], it asserts that it should have been awarded a contract. *Id.* at 6. Consequently, CDW-G finally asserts a “right to receive an award.” *Id.*

In its Motion to Dismiss, the Product Team asserts that CDW-G’s protest grounds amount to untimely challenges to the express terms of the Solicitation, and challenges the first award to Iron Bow. *Product Team Motion for Summary Dismissal* at 1. In its Motion to Dismiss, GTSI also asserts that CDW-G’s Protest amounts to an untimely challenge to the terms of the Solicitation. *GTSI Motion for Summary Dismissal* at 1-2. Finally, in its Response to the Motion, Iron Bow argues in support of the Motions that CDW-G’s Protest is untimely as challenges to the Solicitation’s evaluation scheme. *Iron Bow Response to the Motions to Dismiss* at 1-2.

C. Challenge to the Best Value Determination

CDW-G contends that: (1) since it has the [REDACTED], it is “most deserving of an award”; and (2) it is “CDW-G’s right to receive an award.” *Protest* at 6-7. The Motions argue that these grounds of protest are untimely because CDW-G should have raised these grounds at the time of the first award to Iron Bow, when it knew its evaluation scores. *Product Team Motion to Dismiss* at 7-8; *GTSI Motion to Dismiss* at 2. In its Response to the Motions, CDW-G asserts that, notwithstanding its initial Protest of the evaluation scheme for multiple awards, it is challenging the second award to GTSI made on April 29, 2011, and timely filed with the ODRA on May 10, 2011 within the required seven business days under the Procedural Regulations. *CDW-G Response to the Motions to Dismiss* at 1. CDW-G also contends that there was no basis for CDW-G to protest a potential award to GTSI on December 1, 2010, the time of the first award to Iron Bow, when the second Contract itself was awarded on April 29, 2011. CDW-G states that it

was not until the date of the second award that it knew that the Product Team would award an additional contract to GTSI. *Id.* The ODRA construes these last two grounds of protest as general challenges to the Agency's rational basis for making a second award to GTSI.

Post-award protests must be filed on the later of the following two dates:

- (i) Not later than seven (7) business days after the date the protester knew or should have known of the grounds for the protest; or
- (ii) If the protester has requested a post-award debriefing from the FAA Product Team, not later than five (5) business days after the date on which the Product Team holds that debriefing.

Id. at §17.15(a)(3). The first public announcement of the award to Iron Bow was made on December 1, 2010, and is not the subject of this Protest. *Product Team Supplemental Filing*, Exhibit B. The record establishes that the public announcement of the award to GTSI, the subject of this Protest, was made on April 29, 2011. *Id.*, Exhibit C. There is nothing in the record to show that a debriefing was held, and CDW-G filed its Protest with the ODRA on May 10, 2011.

While the Protest is not a model of clarity, the ODRA construes it as essentially alleging that CDW-G, not GTSI, was the best value, and, thus, should have received the second award. Such an allegation is timely to the extent that it is based on the stated evaluation criteria of the Solicitation. Until the time of the second award to GTSI, CDW-G could not have established the required showing of prejudice. *Protest of Accenture*, 08-TSA-045, Decision on Motions to Dismiss (December 8, 2009). To find otherwise would be contrary to the AMS by requiring offerors to file speculative protests in order to preserve their rights. *Id.* Under the circumstances here, CDW-G was not required by the ODRA Procedural Regulations to file its challenge to the second award to GTSI until after an award decision had been made. *Id.* The ODRA finds that CDW-G filed its challenge

within seven business days of knowing of the award decision, which was the date of public notice, April 29, 2011.

D. Challenges to the Solicitation Criteria

Pursuant to the Procedural Regulations, protests based on alleged improprieties in a Solicitation must be filed as follows:

(1) Protests based upon alleged improprieties in a solicitation or a SIR that are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for the receipt of initial proposals.

(2) In procurements where proposals are requested, alleged improprieties that do not exist in the initial solicitation, but which are subsequently incorporated into the solicitation, must be protested not later than the next closing time for receipt of proposals following the incorporation;

14 C.F.R. § 17.15(a) (1)-(2); *See, e.g., Protest of Counter Trade Products, Inc.*, 10-ODRA-00539. Notwithstanding CDW-G's contention that the Product Team "deviated from its original course of awarding a single contract to awarding multiple contracts," *CDW-G Response* at 4, the record clearly establishes that the Solicitation expressly contemplated and provided for the award of multiple contracts. *Protest*, Exhibit 40 at L-1 and Exhibit 43 at M-2.

CDW-G argues that the Product Team and GTSI in the Motions "build up a strawman – that alleged improprieties in the [S]olicitation must be protested prior to the time set forth for proposal submissions – and proceed to tearing it down." *Id.* However, as the Product Team correctly points out, the Solicitation "expressly informed offerors that the Agency could make either a single award or multiple awards" and that "the SIR expressly sets forth the evaluation scheme that would be employed by the agency in connection with either a single or multiple awards." *Product Team Motion* at 2–3; *Protest*, Exhibit 40 at L-1 and Exhibit 43 at M-2. Furthermore, the Solicitation's evaluation scheme expressly provided that the best value determination would be based on a weighing of "the rated

technical evaluation criteria [as] slightly less important than price.” *Protest*, Exhibit 43 at M-3-M-4.

Indisputably, CDW-G asserts in its Protest that: (1) the Solicitation’s weighing price more than technical was unreasonable; (2) the original price evaluation is not applicable; and (3) technical capability should be ranked higher than price. *Protest* at 4-6. It also is undisputed that the date for receipt of proposals under the Solicitation was July 8, 2010. *Protest*, Exhibit 2 at 1. The instant Protest was filed on May 10, 2011, ten months later, and well outside the timeframe established in the Procedural Rules. 14 C.F.R. § 17.15(a)(1)-(2). Thus, the ODRA finds that these grounds of protest to be untimely challenges to the terms of the Solicitation. *See* 14 C.F.R. §17.15(1)-(2).

III. CONCLUSION

For the foregoing reasons the ODRA concludes that to the extent CDW-G’s Protest claims that the selection of GTSI for award lacked a rational basis because it failed to apply the stated evaluation criteria to reach a best value determination as to the second award, the Protest is timely. To the extent, however, that the challenge to the award to GTSI is based on CDW-G’s challenge to the evaluation criteria, which elevates technical score over price as the most important factor, it is untimely as grounded on a challenge to the evaluation criteria. Thus, the Motions are granted in part and dismissed in part. The Product Team’s Agency Response to the challenge to the rational basis for the second award decision is due to be filed with the ODRA by the close of business, August 3, 2011; Comments are due to be filed within five business days of receipt of the Agency Response.

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

July 20, 2011