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

FINDINGS AND RECOMMENDATIONS

Matter: Protest of Leader Communications, Inc.
Under Solicitation No. DTFAWA-13-R-00014

Docket No.: 14-ODRA-00705

Appearances:

For the Protester: Steven J. Koprince, Esq.
of Petefish, Immel, Heeb &
Hird, LLP

For the Intervener: Holly A. Roth, Esq.
of Kelley Drye & Warren
LLP

For the FAA Product Team: Viola Pando, Esq.

I. INTRODUCTION

This matter arises from a bid protest (“Protest”) filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) by Leader Communications, Inc. (“LCI”) under Solicitation DTFAWA-13-R-00014 (“Solicitation”). The Protest was docketed as 14-ODRA-00705, and challenges the award of a contract to Tetra Tech AMT (“Tetra Tech”). The contract is to provide operational and administrative support services for the Office of Security and Hazardous Materials (“ASH”¹). *Agency Response (“AR”)* Tab 1 at 13.

¹ “ASH” is the internal FAA routing symbol.

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The Solicitation provides for the evaluation of two technical factors with accompanying sub-factors and sub-elements and price. The award of the contract is to be made on a best value basis, which means that “technical factors are significantly more important than price.” *AR* Tab 1 at 106. If technical scores are close, price becomes “relatively more important.” *Id.* The Source Selection Evaluation Board (“SSEB”) evaluated the proposals of LCI and Tetra Tech and recommended award be made to Tetra Tech on the basis that the technical scores were close, and Tetra Tech had the lower offered price of \$65,031,526.00. *AR* Tab 10 at 20-21. The Source Selection Official (“SSO”) following the recommendation of the SSEB awarded to Tetra Tech.

In its initial Protest, LCI asserts that the Product Team: (1) erred by adding an \$11 million Contract Line Item Number (“CLIN”) to the Solicitation without notifying the offerors and giving them an opportunity to submit revisions to the proposals in accordance with the requirements of the Acquisition Management System (“AMS”), *Protest* at 10; (2) misevaluated multiple technical sub-factors resulting in an erroneously lower technical score, *id.* at 14-20; and (3) failed to evaluate Tetra Tech’s proposed prices for cost realism in accordance with the requirements of the Solicitation. *Id.* at 20.

On July 15, 2014, LCI filed a Supplemental Protest with the ODRA alleging disparate treatment between itself and Tetra Tech with respect to the evaluation of Technical Approach Sub-Factor 9. *Supplemental Protest* at 4.² On September 3, 2014, the Product Team filed its Agency Response with accompanying exhibits. On September 17, 2014, both LCI and Tetra Tech filed their Comments and the record closed for decision.

For the reasons set forth below, the ODRA recommends that the Protest be sustained in part and denied in part.

II. DISCUSSION

² On July 29, 2014, LCI filed a Second Supplemental Protest alleging that “Tetra Tech failed to propose the mandatory estimated labor categories and hours required by the [Solicitation].” *Second Supplemental Protest* at 1. LCI withdrew its Second Supplemental Protest after receiving the Agency Response. *LCI Comments* at 28-29.

A. Burden and Standard of Proof on the Merits

The protester bears the burden of proof, and must demonstrate by substantial evidence that the challenged decision failed in a prejudicial manner to comply with the Acquisition Management System ("AMS"). *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627. Under the AMS, source selection decisions must be supported by a "rational basis." *Id.* (citing *AMS Policy* § 3.2.2.3.1.2.5). Where the record demonstrates that a decision has a rational basis and is not arbitrary, capricious or an abuse of discretion, and is consistent with the AMS, the evaluation plan, and the award criteria set forth in the underlying solicitation, the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials. *Id.*

B. Challenges to Technical Evaluation Factor 1

Technical Factor 1 encompasses nine sub-factors worth a total of 60 points. *AR* Tab 1 at 111.³ LCI challenges the evaluation of Sub-Factors 2, 3, 4, 5, 8 and 9. For the reasons discussed herein, the ODRA recommends that these challenges be sustained.

³ Section M.2 "Screening and Evaluation Process" states:

FACTOR 1 – Technical Approach (60 Points)

* * *

(a) The Prime Vendor's Technical Approach provided in Volume I, Part 2 of the proposal will be evaluated using the following sub-factors. Each sub-factor represents a major task area in the Statement of Work.

Sub-Factor 1 – TASK 1 – Executive Support (4 points)

Sub-Factor 2 – TASK 2 – Security Program Support Services (5 points)

Sub-Factor 3 – TASK 3 – Other ASH Program Support (4 points)

Sub-Factor 4 – TASK 4 – HSPD-12 Program Support for FAA (13 points)

Sub-Factor 5 – TASK 5 – PIV Card Services for Other Agencies (3 points)

Sub-Factor 6 – TASK 6 – FICAM Support (4 points)

Sub-Factor 7 – TASK 7 – Web Systems Operations Support (4 points)

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i. Sub-Factor 8

LCI asserts that the Product Team “erred by assigning LCI a score of 9.1 (Satisfactory) on Technical Sub-factor 8,” rather than being awarded an “Excellent.” *Protest* at 14. Based on concessions from the Product Team, discussed below, the ODRA finds that LCI has demonstrated that the TET’s evaluation lacked a rational basis.

The Product Team “concedes that the Technical Team (TET) failed to adhere to the specific criteria of the SIR in its evaluation of LCI’s proposal relative to sub-factor 8.” *AR* at 8. In fact, the TET Lead “concur[s] that the narrative supports the score of ‘Excellent’ or 1.0 for the sub-factor.” *AR* Tab 17, *Declaration of Technical Evaluation Team Lead* (“*TET Lead Declaration*”), dated September 3, 2014 at ¶ 7. He acknowledges that “[h]ad LCI been awarded a 1.0 with a weighted factor of 13, the score would have changed from 9.1 to 13.0.” *Id.* The Source Selection Official (“SSO”) agrees that “[b]ecause the TET did not address any weakness for LCI under Sub-Factor 8 the appropriate consensus score should have been ‘Excellent.’” *AR* Tab 14; *Declaration of the SSO* (“*SSO Declaration*”), dated September 3, 2014 at ¶ 2. Thus, substantial evidence in the record supports a finding that the Product Team’s score for Sub-Factor 8 lacks a rational basis.

ii. Sub-Factor 9

LCI asserts three grounds for its position that the Product Team “erred by assigning LCI a score of 8.0 (Satisfactory) under Technical Sub-Factor 9.” *Protest* at 15. LCI argues that the Product Team erred by: (1) applying an unstated evaluation criterion to LCI’s proposal in finding a weakness for the lack of [REDACTED], which was not a part of the Solicitation or the Questions and Answers following it, *id.* (quoting *AR* Tab 11 at 2); (2)

Sub-Factor 8 – TASK 8 – Application Development/Maintenance Support (13 points)
Sub-Factor 9 – TASK 9 – Classified Systems Support (10 points)

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finding that LCI's proposal "did not reflect development experience with [REDACTED]" when it did meet this requirement, *id.* (quoting *AR* Tab 11 at 2); and (3) "improperly assign[ing] Tetra Tech [REDACTED] sub-factor where LCI was assigned [a] weaknesses." *Supplemental Protest* at 4.

With respect to the first ground, the ODRA finds that LCI improperly received a weakness. The Solicitation demonstrates that [REDACTED] is not among the requirements. *See generally AR* Tab 1. The Product Team concedes as much stating that "LCI correctly states that [REDACTED] was not listed in the SIR criteria for Sub factor 9." *AR* at 12. Although the TET Lead now states in a declaration that the [REDACTED] issue "did not detract from LCI's score," *AR* Tab 17, *TET Lead Declaration* at ¶ 7, the contemporaneous record shows to the contrary that LCI was clearly assessed a weakness under Sub-Factor 9 for lack of [REDACTED] capability. *AR* Tab 11 at 2. Because the ODRA recommends sustaining the Protest with regard to the evaluation of Sub-Factor 9 on this ground, it need not reach the remaining two grounds.

iii. Sub-Factors 2, 3, 4, and 5

LCI asserts that the Product Team improperly evaluated its proposal under Factor 1, Sub-Factors 2, 3, 4, and 5. *Protest* at 19. The Product Team argues that LCI's allegations amount to mere disagreement with the findings of the TET. *AR* at 22. With respect to Factor 1, Sub-Factors 2, 3, 4, and 5, the ODRA finds the documentation of the TET's evaluation of LCI's proposal to be inadequate. *AR* Tab 11 at 1. The TET Lead provides rationales for the scores LCI received. *TET Lead Declaration* ¶¶ 7-8. However, these findings are not found in the contemporaneous evaluation record. *Compare TET Lead Declaration* ¶¶ 7-8 with *AR* Tab 11 at 1 and *AR* Tab 11 at 2-3. The AMS requires "appropriate file documentation to support business decisions." *AMS Policy* § 3.1.3. With respect to the evaluation report, the AMS provides that "[t]he service organization shall document the results of the evaluation, including recommendations, if applicable." *AMS Policy* § 3.2.2.3.1.2.3; *see also AMS Guidance*, T.3.2.2, Appendix B, "Source Selection Guide," at 1.7 b ("[I]t is critical that evaluation findings be supported with

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narrative statements. Ratings alone are not conclusive data on which to make a source selection decision.”); *Arctic Elevator, LLC, supra*. The ODRA therefore recommends that the Protest be sustained with respect to this portion of the evaluation process, and the Product Team be directed to re-evaluate and adequately document its evaluation findings with respect to Sub-Factors 2, 3, 4 and 5 as part of the corrective action recommended herein.

C. Challenges to Technical Evaluation Factor 2

Technical Factor 2 is divided into two sub-factors, delineated as critical or non-critical, worth 20 points each. *AR* Tab 1 at 114.⁴ LCI challenges the evaluation of Factor 2, Sub-Factor 2, Sub-Elements 5, 6, and 9. For the reasons discussed herein, the ODRA recommends denying the challenges to Sub-Elements 5 and 9, and sustaining the challenge to 6.

⁴ The Protester does not challenge the technical evaluation under Section M.2, Factor 2, Sub-Factor 1. The Challenge involves only Sub-Factor 2 of Factor 2, “Non-Critical Knowledge,” which states:

Sub-Factor 2 – Non-Critical Knowledge & Experience (20 Points)

Each sub-element below is worth 2 points. The Prime Vendor must address all items within a sub-element to receive the 2 points available for that sub-element. Partial scores shall not be given for a sub-element.

Dependent upon that stipulated below, the Offeror must demonstrate either its knowledge of or experience with the following items:

1. Demonstrated experience in PIV Card issuance
2. Demonstrated experience with Siteminder Authentication Server
3. Demonstrated experience with Card Management Systems, and PKI
4. Demonstrated experience in application development with .NET Technologies
5. Demonstrated experience in Personnel and Facility Security Tracking Systems
6. Demonstrated experience with Physical Access Control System and Logical Access Control System implementation and integration
7. Demonstrated experience in Security Servicing Element (SSE) Functions
8. Demonstrated experience in AMS Life-Cycle and JRC Investment Process.
9. Demonstrated experience in Policy Development for Federal Security Programs
10. Demonstrated experience in Procurement and Financial Management Support.(Delphi, PRISM, PCPS, Purchase Cards, AITS)

i. Sub-Element 5

LCI asserts that the Product Team “improperly assigned no points” under Sub-Element 5, and the evaluation deviated from the requirements of the [Solicitation] and “relied upon unstated evaluation criteria.” *Protest* at 16. The Product Team argues that LCI’s allegations amount to mere disagreement with the findings of the TET. *AR* at 15.

The ODRA finds that LCI has not met its burden with regard to demonstrating that the TET’s evaluation lacked a rational basis. LCI does not point to any portions of its proposal to support that it did indeed meet the requirements of the Solicitation. LCI merely states that it “provided exactly what the SIR required: demonstrated experience with Personnel and Facility Tracking Systems.” *LCI Comments* at 14. It is well established that argument of counsel does not constitute competent evidence, and the ODRA will not substitute its judgment for that of the designated source selection evaluators and officials in the absence of substantial evidence. *Protest of Systems Atlanta, Inc.*, 10-ODRA-00530. The ODRA finds that LCI’s assertions amount to unsupported mere disagreement with the findings of the TET.

ii. Sub-Element 6

LCI asserts that the Product Team miscalculated Sub-Element 6 in finding that LCI’s proposal did not demonstrate experience with Physical Access Control Systems (“PACS”). *Protest* at 17. The Product Team counters that LCI’s allegations amount to mere disagreement with the findings of the TET. *AR* at 18. A review of the record demonstrates that LCI has met its burden with regard to demonstrating that the TET’s evaluation lacked a rational basis.

Sub-Element 6 requires offerors to show “[d]emonstrated experience with Physical Access Control System and Logical Access Control System implementation and integration.” *AR* Tab 1 at 114. The evaluation provides only the conclusory statement

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without support that LCI's proposal "did not reflect experience with Physical Access Control Systems (PACS)." *AR* Tab 11 at 2- 3. LCI points to Section [REDACTED] of LCI's proposal, titled [REDACTED] *Id.* citing proposal at 118-199. LCI also points to Section [REDACTED] of its proposal and asserts that its score for this sub-element should have reflected two additional points. *Id.* at 17-18.

In a declaration, the TET Lead provides a *post hoc* rationalization that "LCI's response to the sub-element reflected [REDACTED] which does not reflect experience with implementation and integration of a Physical Access Control System (PACS)." *TET Lead Declaration* at ¶ 7. As noted previously, "[t]he ODRA ... is not precluded from considering post-protest explanations that provide a detailed rationale for the contemporaneous conclusions as such explanations can simply fill in previously unrecorded details." *Artic Elevator Company, LLC*, 12-ODRA-00629. In the instant case, however, the TET Lead attempts to provide a rationale in support of a contemporaneous finding that was not made. Thus, the ODRA gives the statement of the TET Lead little weight, and finds that the Product Team's finding for Sub-Element 6 is arbitrary and lacks a rational basis.

iii. Sub-Element 9

LCI asserts that the Product Team "improperly assigned no points to LCI under Non-Critical Knowledge and Experience Sub-element 9 by finding "LCI's proposal 'listed experience in only one policy development area [REDACTED] and did not reflect experience in other Federal Security program areas.'" *Protest* at 18 (citing LCI Evaluation at 2). The Product Team asserts that LCI's allegations amount to mere disagreement with the findings of the TET. *AR* at 20. A review of the record demonstrates that LCI has not met its burden with regard to demonstrating that the TET's evaluation lacked a rational basis.

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Sub-Element 9 requires offerors to show “[d]emonstrated experience in Policy Development for Federal Security Programs.” AR Tab 1 at 114 (emphasis added). LCI points to [REDACTED] which states, in relevant parts:

[REDACTED]

Protest at 18 (citing LCI Proposal at 121); *but see* LCI Proposal at 135 (actual location of quoted material). However, the Evaluation Report provides: “The offeror’s proposal . . . did not reflect experience in *other* Federal Security program areas. Further, the proposal . . . reflected experience with implementing policies and not the development of policies.” AR Tab 11 at 2- 3 (emphasis added).

The TET Lead states, consistent with the contemporaneous record, that “LCI’s discussion of Policy Development for Federal Security Programs reflected implementation and analysis of existing security programs or efforts, and not **policy development** for security programs.” *TET Lead Declaration* at ¶ 7 (emphasis in original). The proposal is consistent with the evaluation findings that while LCI addresses development of security programs, it also emphasizes its experience with implementation. Thus, the ODRA finds that LCI’s assertions amount to mere disagreement with the findings of the TET. *Protest of Systems Atlanta, Inc., supra*.

D. Cost Realism Challenge

Under the AMS, “[c]ost realism analysis is an objective process of identifying the specific elements of a cost estimate or a proposed price and comparing those elements against reliable and independent means of cost measurement” *AMS Guidance* T3.2.3 (A)(1)(i)(2). The Solicitation states that “[w]hile the competitive nature of the procurement is expected to result in reasonable prices, the FAA will use cost/price and realism analysis to further ensure reasonableness and realism.” AR Tab 1 at 121-22 (emphasis added). LCI asserts that the Product Team did not perform the required cost realism analysis on the proposals, and that LCI was prejudiced because it would have

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shown Tetra Tech's price to be unrealistic. *Protest* at 20. LCI asserts that as a result of the alleged flawed analysis of labor rates, "the Product Team neglected to consider whether Tetra Tech's labor rates were realistic," and that it also "improperly used Tetra Tech's proposed cost – not Tetra Tech's most probable cost – in its award determination." *LCI Comments* at 19-20. The Product Team contends "that a cost realism analysis was performed and Tetra Tech's costs were found to be realistic." *AR* at 25. Thus, the question before the ODRA is whether the evaluators' cost realism analysis had a rational basis and is supported by substantial evidence. *See Protest of Sentel*, 09-ODRA-00512. The Protester "bears the burden of proof to show that no such rational basis exists." *Id.*

The record demonstrates that the Cost/Price Evaluation Team undertook a thorough analysis of the individual cost elements of both offerors' proposed prices. *See AR* Tab 15; *Declaration of the Cost/Price Evaluation Team Lead* ("Cost/Price Lead Declaration"), dated August 15, 2014 at ¶ 5-7. First, the Cost/Price Lead Evaluator states that "reasonableness and cost realism analyses was [sic] performed to indicate the Offerors' understanding of the requirement and its ability to perform under the contract." *Id.* at ¶ 7. As part of the reasonableness and realism analysis, the Cost/Price Evaluation Team also "verified the labor rates proposed by the prime and subcontractors." *Id.* The Cost/Price Lead then discusses in her declaration the overall evaluation, stating that "[t]he team . . . used data from the Offerors' proposals in determining the reasonableness and realism of the proposed direct labor rates and indirect rates. Additionally, the CET analyzed the proposed escalation rates and fees proposed." *Id.* at ¶ 6.

The Cost Evaluation Report states with respect to the evaluation of loaded direct labor rates: "The CET compared [the] calculated average rate for each Offeror to the average Base Year loaded labor rate calculated from the IGCE." *AR* Tab 15 at 15. Further, in her declaration, the Cost/Price Lead states that "[t]he direct labor rates are burdened with the applicable indirect rates, which may include Fringe, Overhead and G&A, depending on the Offerors' pricing structure. The CET compared this calculated average rate for

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each Offeror to the average burdened Base Year labor rate calculated from the IGCE.” *Cost/Price Lead Declaration* at ¶ 7.

LCI argues that comparing each offeror’s average loaded labor rate for the base year with the average loaded labor rate under the IGCE is insufficient because it did not use the unburdened labor rates to show actual cost. *LCI Comments* at 22. LCI quotes the declaration of the Cost/Price Lead, that “[t]he IGCE did not break out the unburdened direct labor rates, so a comparison of the offerors’ unburdened direct labor rates was not done.” *LCI Comments* at 22 quoting *Cost/Price Lead Declaration* at ¶ 7. LCI goes on to assert that “[w]ithout such an evaluation, there was no way for the Product Team to tell whether LCI’s proposed rates were sufficiently high to attract and retain qualified employees.” *LCI Comments* at 23. However, LCI provides no evidence in the form of expert testimony or otherwise to support its assertion that the cost evaluators should have broken out the unburdened direct labor rates in making its cost comparison. The ODRA finds that LCI’s assertion constitutes mere argument of counsel, which is not evidence. *Protest of Systems Atlanta, Inc., supra*.

Finally, LCI asserts that “the Product Team did not use the most probable cost for Tetra Tech in its award decision.” *LCI Comments* at 24 (emphasis in original). However, the Solicitation clearly provides that: “***The Offeror’s price will be evaluated by adding the total proposed amounts for the base period and all of the option periods. The total offered price will be applied as part of the best value determination.***” AR Tab 1 at 121-122 (emphasis added). The ODRA finds that LCI’s argument on this point amounts to a challenge to the terms of the Solicitation and therefore is untimely. 14 C.F.R. § 17.15(a)(1). It is well established that challenges to solicitation terms must be “filed prior to bid opening or the time set for the receipt of initial proposals.” *Id.* The ODRA recommends that the cost realism protest grounds be denied.

E. Addition of the \$11 Million CLIN

LCI asserts that by upwardly adjusting the prices of both offerors through the addition of

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an \$11 million CLIN not included in the Solicitation, the Product Team deviated from the requirements of AMS 3.2.2.3.1.2.4 regarding Changes in Requirements. *Protest* at 10. The Product Team counters that the “addition of the \$11 million CLIN for other direct costs was required to purchase equipment and materials unique to the ASH contract for which the offerors could not change the amount or price.” *AR* at 5.

AMS 3.2.2.3.1.2.4, in relevant part, requires: “If, after release of a SIR, it is determined that there has been a change in the FAA's requirement(s), all offerors competing at that stage should be advised of the change(s) and afforded an opportunity to update their submittals accordingly.” In the instant case, it is undisputed that at a certain point in the evaluation process, but before award, the Product Team became aware that Other Direct Costs (“ODC”) related to Tasks 1-4 were not included in the Solicitation. *AR* Tab 18, Memorandum to the File from the Contracting Officer, dated May 21, 2014; *Cost/Price Lead Declaration*, at ¶ 7; and *AR* Tab 16, *Declaration of the Contracting Officer Representative (“COR”) (“COR Declaration”)*, dated September 3, 2014 at ¶ 5. The Product Team concedes that this was an error on their part. The COR testifies that “the Contracting Officer used a 6 year old [Solicitation] from the existing contract as a template and framework to build the new [Solicitation].” *COR Declaration* at ¶ 5. The Cost/Price Lead states in her declaration that “[t]he CET indentified [sic] that the IGCE included Material [ODCs] in Tasks 1 through 4 in the amount of \$11,090,255, but the SIR only prescribed labor hours and labor categories for Task 1 through 4. . . .” *Cost/Price Lead Declaration* at ¶ 7.

The Product Team argues that it “was not required to amend the [Solicitation] to notify offerors of the additional ODCs because they did not change the material requirements of the contract.” *AR* at 7. However, the COR declares that a large part of the requirements left out of the Solicitation included maintaining and operating the systems needed to issue personnel DOT PIV Cards; internal investigation systems; and the Card Management System software. *COR Declaration* at ¶ 4.

The Product Team relies on a Memorandum by the Contracting Officer in support of its

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position that the ODCs were not material and were a fixed cost. *AR* at 6-7. In the Memorandum, the Contracting Officer states that “the ODCs were not a number the offerors could change in any way because the FAA would make the purchase regardless of who was awarded the contract.” *AR* Tab 18, *Memorandum to the File from the Contracting Officer*, dated May 21, 2014. In support of the Memorandum, the Product Teams proffers the testimony of the COR. He states that the “evaluation process was well under way” when the error was discovered. *COR Declaration* at ¶ 6. The COR also says that “[t]he Contracting Officer . . . determined that the addition of the ODCs would not affect the results of either Technical or Cost analysis.” *Id.* Further, “[t]he contract [sic] officer determined that he could add a CLIN for the difference in ODCs to preserve that ceiling.” *Id.* The COR does not provide any statement as to why the Contracting Officer came to this conclusion. Nor is there any indication of why a declaration by the Contracting Officer on this point was not provided.

The ODRA finds the COR’s testimony to constitute hearsay evidence regarding the Contracting Officer’s determination. Hearsay is admissible in an administrative adjudication, but the weight to be accorded it is determined by the adjudicator. *Protest of Antenna Products Corporation*, 11-ODRA-00580. In the instant case, the ODRA gives no weight to the COR’s testimony. Significantly, the Contracting Officer provided his own declaration in this proceeding but offered no testimony on this issue. In addition, the record does not contain any other supporting evidence. The ODRA finds that LCI has met its burden of demonstrating that the Product Team deviated from the requirements of the AMS in not amending the Solicitation to account for the additional ODCs.

F. Prejudice

The ODRA will recommend sustaining a Protest where, but for the Product Team’s inappropriate action or inaction, the protester would have had a substantial chance of receiving an award. *Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490. As discussed above, the Product Team concedes that its erroneous evaluation of Sub-Factor 8 for Technical Approach would have raised LCI’s overall score above Tetra

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Tech's overall score. *See supra* Part B.i. LCI has demonstrated to the ODRA that several other errors exist as well,⁵ opening the possibility of an even higher overall score than Tetra Tech's.

The record clearly establishes that source selection is to be made on a best value basis. *AR* Tab 1 at 106. Thus, with a higher technical score than Tetra Tech, based on the reevaluation of multiple technical factors, LCI would have a substantial chance of award under the best value determination where technical is more important than price. In addition, the ODRA finds that the addition of \$11 million in ODCs without providing offerors an opportunity to revise proposals violated the AMS. *Protest of Enterprise Engineering Services, LLC, supra*. As the ODRA stated in *Adsystech, supra* and *Arctic Elevator LLC, supra*, "Without a doubt, the remedial actions arising out of this Protest must conform to the requirements of the AMS, and the best interests of the FAA will not be served by perpetuating the unauthorized deviation from the AMS."

III. CONCLUSION

For the reasons discussed herein, the ODRA recommends that the Protest be sustained in part and denied in part. Pursuant to 14 C.F.R. § 17.23(a), the "ODRA has broad discretion to recommend and impose protest remedies that are consistent with the AMS and applicable law." This may include directing the Product Team to amend the Solicitation and require a re-evaluation. *Id.* at § 17.23(a)(1) and (4). In determining the appropriate remedy, the ODRA considers "the circumstances surrounding the procurement." *Id.* at § 17.23(b). As a remedy here, the ODRA recommends that the Product Team: (1) re-evaluate and adequately document Factor 1, Sub-Factors 2, 3, 4, 5, 8 and 9 and Factor 2, Sub-Factor 2, Sub-Element 9 of the Technical Approach; (2) amend the Solicitation to include the ODCs and provide offerors with an opportunity to revise their price and technical proposals in accordance with these Findings and

⁵ Factor 1, Sub-Factors 2, 3, 4, 5, 8, and 9; and Factor 2, Sub-Element 9.

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Recommendations⁶; and (3) make a new award determination.

Additionally, the ODRA recommends that the Product Team be directed to immediately develop a schedule for completing the corrective action and submit the schedule to the ODRA. The Product Team should also be directed to report to the Administrator through the ODRA every 30 calendar days on the status of the corrective action and upon its completion. The services being provided by Tetra Tech should, consistent with the needs of the Agency, continue pending completion of the re-evaluation process. The Product Team should take additional corrective action, as necessary, depending on the outcome of the re-evaluation, the new award determination, and the Agency's needs. Finally, the ODRA recommends that a new SSO be appointed to make the new award determination consistent with these Findings and Recommendations.⁷

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

⁶ With respect to the ODC issue, the ODRA observes that the Product Team admits to errors in the procurement process that were discovered prior to the SSEB's award recommendation. *AR* Tab 18; *Cost/Price Lead Declaration*, at ¶ 7; and *COR Declaration* at ¶ 5. The Product Team failed to take corrective action at that time, and its non-action is not supported by a rational basis in the record. *See, supra*, Section II.E.

⁷ Consistent with 14 C.F.R. § 17.23(a)(8), the ODRA may recommend "[a]ny other remedy consistent with the AMS that is appropriate under the circumstances." In the instant case, the current SSO has stated that, even if LCI had a higher technical score than Tetra Tech due to the TET's erroneous scoring of Sub-Factor 8, he would not change his award decision. *SSO Declaration* at ¶ 3. In arriving at this conclusion, the SSO deviates from the requirements of the AMS. AMS 3.2.2.3.1.2.5 requires that "[t]o ensure the integrity of the FAA competitive source selection process, all SSO decisions should be based on the evaluation criteria established in the SIR and have a rational basis." The AMS also requires the SSO to make his or her decision "based on a review of the service organization's evaluation report." *Id.*; *see also* AMS 3.2.2.3.1.3 ("In making the selection decision, the SSO may accept or reject the service organization's recommendations provided there is a rational basis.").

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APPROVED:

-S-

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