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

Protest of)
)
Northrop Grumman Systems Corporation) Docket No. 06-ODRA-00384
)
Solicitation No DTFAWA-06-R-120906)

**DECISION ON MOTION FOR PARTIAL DISMISSAL
AND LIMITATION ON DISCOVERY**

This matter currently is before the Office of Dispute Resolution for Acquisition (“ODRA”) on a motion for partial dismissal and for a limitation on discovery (“Motion”) filed by the Intervenor, Raytheon Company (“Raytheon”). The FAA Program Office (“Program Office”) has joined in the Motion, which is opposed by the protestor, Northrop Grumman Systems Corporation (“Northrop”). Northrop’s protest (“Protest”) challenges the award of a contract to Raytheon for the design, production, testing and implementation of a service life extension program for the FAA Long Range Radar System (“LRR/SLEP”). Raytheon’s Motion challenges one of several grounds raised by Northrop’s Protest. The subject ground alleges that the Program Office improperly waived a delivery schedule requirement of the Solicitation in favor of Raytheon and failed to notify other offerors and allow them to revise their proposals. *See* Northrop Protest at 18, 19. For the reasons set forth below, the ODRA grants the Raytheon Motion pursuant to the ODRA Procedural Rules at 14 C.F.R. § 17.19(a)(2) and 17.19(c)(3); dismisses the subject protest ground;¹ and further limits discovery as discussed herein.

¹ The Dismissal pertains only to that portion of the Northrop Protest alleging a waiver of the Solicitation requirement. The Dismissal does not pertain to any other grounds of the Protest, including the challenge to the scoring of the delivery schedule proffered by Northrop in its offer.

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I. FACTUAL BACKGROUND

The Protest includes several grounds directed at: the evaluation of the Northrop proposal; the conduct of the evaluation in general; and the ultimate best-value determination made in favor of Raytheon. More specifically, the Northrop Protest alleges: a mis-evaluation of Northrop's technical proposal resulting from an inaccurate finding of omission of information (*See* Protest at 14 – 16); mis-evaluation of the Northrop proposal regarding the delivery schedule and waiver of the Solicitation's delivery schedule requirements in favor of Raytheon (*See* Protest at 17 – 21); mis-evaluation of the Northrop proposal resulting from alleged application of undisclosed evaluation criteria (*See* Protest at 21, 22); mis-evaluation of Northrop's technical and cost/price proposal related to a solid state polarizer (*See* Protest at 23 – 27); and an allegedly flawed source selection decision resulting from the above referenced alleged errors (*See* Protest at 27 – 30).

On September 7, 2006, as part of its comments on Northrop's request for a suspension of the procurement,² Raytheon submitted this Motion requesting that the ODRA:

summarily dismiss Northrop's Protest allegation requiring the FAA's evaluation of the offerors' schedules because, contrary to Northrop's arguments, the Solicitation expressly invites offerors to submit revisions to the provided schedule. Raytheon further requests that ODRA limit Northrop's discovery in this protest to documentation relevant to the remaining Northrop protest grounds, *i.e.*, documentation concerning the Agency's evaluation of Northrop's proposal.

Raytheon Motion at 1. Raytheon's Motion further alleges that:

the plain terms of the Solicitation evidence that Northrop's scheduling arguments fail as a matter of fact. Northrop premised its argument on the faulty contention that the Solicitation requires offerors to adhere to the Section F.6 Schedule. But the plain terms of the Solicitation contemplate and invite offerors to submit revised scheduling dates. (Solicitation at Section L 17.1.4.)

Motion at 8.

² Northrop's request for suspension was denied in an ODRA Decision dated September 14, 2006.

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As a final matter, the Raytheon Motion goes on to state, in support of its discovery limitation request, that Northrop's document requests "are overly broad and not reasonably calculated to lead to the discovery of admissible evidence." Motion at 9. Raytheon emphasizes that the grounds of the Northrop Protest, other than the ground that is the subject of the Motion, relate purely to the Agency's evaluation of the Northrop proposal and that the request for discovery regarding Raytheon's proposal is unjustified and inconsistent with the ODRA Procedural Rules regarding limited and focused discovery. *See* Motion at 9, 10.

On September 15, 2006, Northrop filed its Opposition to the Motion ("Opposition") in which it asserts that the Raytheon Motion is based on an interpretation of the Solicitation that is unreasonable and inconsistent with the FAA's Acquisition Management System ("AMS"). *See* Opposition at 2 -7. Northrop's Protest initially contended that by accepting and evaluating Raytheon's alternate delivery schedule, the Program Office "improperly waived the RFO's delivery schedule" requirements, and that the Program Office's acceptance of Raytheon's proposed alternate Delivery Schedule "constitutes patently unequal treatment" since Northrop's submission adhered to the Delivery Schedule terms in Section F. *See* Protest at 19. Northrop's Opposition continues to interpret the Solicitation as requiring the Program Office to only accept proposed Delivery Schedules exactly consistent with the terms in Section F of the Solicitation. *See* Opposition at 1-8.

According to Northrop, because § F.6 of the Solicitation uses the verb "shall,"—i.e., "the offeror **shall deliver . . . and perform in accordance with**" the Solicitation (emphasis added), the Program Office was precluded from considering any proposed Delivery Schedule that deviated from the terms in Section F. *Id.* at 3. Northrop also maintains that to the extent language in the Solicitation's Section L.17.1.4 suggests that alternative delivery schedules could be submitted for consideration, AMS Section 3.2.2.3.1.2.4, entitled "Changes in Requirements", mandates that the Program Office notify all offerors of any decision to accept an alternative delivery schedule, and provide each offeror with an opportunity to submit a revised delivery schedule. *Id.* at 5. Northrop also contends

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that, notwithstanding the outcome of the Motion, the discovery limitation sought by Raytheon is unjustified because other grounds of the Northrop Protest relate to the Program Office's evaluation of the Raytheon proposal. *See Id.* at 8.

On September 13, 2006, counsel for the Program Office filed a statement that, among other things, joined in the Raytheon Motion. ("Program Office Filing"). The Program Office Filing alleges that several sections of the Solicitation support a finding that "the offerors were not precluded from proposing delivery schedules different from that stated in Section F.6 of the SIR." *See* Program Office Filing at 1, 2. The Program Office goes on to cite specifically to Solicitation Sections L.17.1, L.17.1.4 and L.17.1.5 in support of its position, and states that "the Solicitation's intent that offerors could propose an alternative delivery schedule other than what was stated in Section F.6 of the SIR was clear on its face [i]t was up to the offeror to make a technical tactical business decision and chose either to propose to the delivery schedule as stated in Section F.6 or to propose a revised delivery schedule." *Id.* at 2. The Program Office notes that the "Offerors were also put on notice that 'the Government reserved the right to accept or reject those revisions, with or without discussions prior to contract award.' *See* Section L.17.1.4" *Id.* With respect to the discovery portion of the Raytheon Motion, the Program Office asserts that the ODRA Procedural Rules prescribe discovery that is narrowly focused and limited to information relevant to the Protest allegations. *Id.* at 3, *citing to* 14 C.F.R. §17.37(f).

In accordance with the briefing schedule, Raytheon filed its Reply to the Northrop Opposition to the Raytheon Motion on September 20, 2006. ("Raytheon Reply"). In its Reply, Raytheon reiterates its arguments that: (1) there was no waiver of the Solicitation requirements because the express terms of the Solicitation allowed the Program Office to accept proposed changed delivery deadlines without discussions (*See* Raytheon Reply at 2, 3); and (2) that, assuming the dismissal of the subject Protest ground, there is no basis for permitting discovery beyond documents that are relevant to the evaluation of Northrop's proposal (*Id.* at 4, 5). Raytheon further asserts that any attempt to challenge the terms of the Solicitation with respect to revised delivery deadlines would be untimely. *Id.* at 3, *n.* 1. The Reply also cites to Program Office responses to offeror questions as

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confirming that each offeror expressly was permitted to provide its own contractor delivery deadlines. *Id.* at 3, *citing to Solicitation Clarifications* dated February 24, 2006.

The Program Office Reply to the Opposition emphasizes that “[t]he FAA made no changes with respect to the delivery schedule.” Program Office Reply at 1. The Program Office goes on to reference several sections of Section L of the Solicitation as supportive of its position and cites to specific answers that it provided to vendor questions concerning the scheduling. *Id.* at 4, 5.

II. DISCUSSION

In considering a Motion for summary judgment or dismissal, the ODRA will view the facts in the light most favorable to the nonmoving party, drawing any inferences in favor of that party, and determine whether there is any basis in fact or law for the subject allegation. *See ODRA Rules at §17.29(b); Dynamic Security Concepts, Inc., 05-ODRA-00346, Decision Denying Motion to Dismiss* dated August 23, 2005. In the current case, Northrop’s allegation that the Program Office waived a Solicitation requirement with respect to Raytheon’s submitted schedule is erroneous both factually and as a matter of law. Although Northrop alleges that the Raytheon proposal deviated from a specific schedule requirement, the ODRA finds that the Raytheon proposal of an alternative schedule expressly was contemplated by the terms of the Solicitation and that the Program Office had discretion to accept or reject Raytheon’s proposed alternative schedule. Nor was the Program Office required by the AMS to notify offerors such as Northrop of its acceptance of the alternative schedule since that acceptance did not constitute a “change” in the Solicitation requirements.

It is undisputed that the Delivery Schedule proposed by Raytheon and accepted by the Program Office differs from the model terms set forth in the Section F delivery schedule provisions. For example, as pointed out by the Protester, the Raytheon delivery schedule proposes [DELETED]. *See Northrop Protest* at 18. It further is undisputed that the Program Office accepted the Raytheon alternate schedule and utilized that schedule in making its source selection decision.

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The following three Solicitation provisions are relevant to a determination of whether the Program Office's acceptance of the Raytheon schedule constituted an improper waiver of a scheduling requirement in favor of Raytheon. The first provision—Solicitation Section F.6—specifies, in relevant part, that: “[t]he contractor shall deliver items . . . and perform services in accordance with the following schedule(s) . . .” See Solicitation Section § F.6. The second relevant solicitation provision—§ L.17.1.4, “Section F Instructions Deliveries or Performance,”—states:

[o]fferors, at their option, may propose changes to the times of delivery and performance specified in [Solicitation] Section F [and] [t]he Government reserves the right to accept or reject proposed revisions, with or without discussion prior to contract award.

Id., § L.17.1.4 at Part IV, Section L of the Solicitation. The Solicitation also incorporates Acquisition Management System (“AMS”) § 3.2.2.3.1.2.4, entitled “Changes in Requirements,” which establishes that:

[i]f 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.

The rules of contract interpretation apply to issues that involve construing the terms of a government solicitation. See *Rotech Healthcare, Inc. v. United States*, 71 Fed.Cl. 393 (2006). In such matters, the plain and unambiguous meaning of the solicitation controls, and all of the solicitation's parts must be read together and harmonized if possible, so that no provisions are rendered meaningless. See *Contract Dispute of Strand Hunt Construction, Inc.*, 99-ODRA-00142; *Contract Dispute of Globe Aviation Services Corporation v. TSA*, 04-TSA-0007. To that end, the ODRA's review of such matters utilizes an “objective” standard—which focuses on the meaning a reasonable person would ascribe to the disputed solicitation terms. See *Contract Dispute of Huntleigh USA Corporation*, 04-TSA-008, *Decision on Motion for Partial Summary Judgment* dated May 30, 2006. Solicitation provisions must be read as a whole and the ODRA will favor an interpretation that gives reasonable meaning to all of the solicitation's terms over one that leaves one or more solicitation provisions useless, meaningless or superfluous, *Id.*; see

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also Mason v. United States, 222 Ct.Cl. 436, 445, 615 F.2d 1343, 1348 (1980). No term of the solicitation will be construed as being in conflict with another, unless no other reasonable interpretation is possible. *See Protest of Johnson Controls Security Systems, 05-ODRA-00360; The Federal Group, Inc. v. United States*, 67 Fed.Cl. 87 (2005). Specific solicitation provisions will take precedence and control over more general ones. *Id.*

Applying these principles, the ODRA concludes that Section F.6 and Section L.17.1.4 of the Solicitation are not inconsistent or ambiguous. Rather, Section L.14.4 expressly modifies the requirement of Section F.6 and permits offerors to propose a delivery schedule that differs from that of Section F.6. Section L.17.1.4 further emphasizes that the Program Office can consider and accept or reject an alternate Delivery Schedule without any further discussions. The meaning of Section L.17.1.4 is plain on its face. The ODRA would be required to read the Section completely out of the Solicitation to accept Northrop's interpretation. Such an approach would be inconsistent with the contract interpretation principles cited above. *See Protest of B&M Lawn Maintenance, Inc.*, 03-ODRA-00271.

Read together, the pertinent Solicitation provisions presented offerors with two options for their required Delivery Schedule submissions. Offerors could submit a Delivery Schedule that was fully consistent with Section F of the Solicitation and be guaranteed acceptance of the schedule by the Program Office, or they could, pursuant to Section L.17.1.4, submit a different Delivery Schedule approach that might or might not be accepted. Here Raytheon opted to submit an alternate delivery schedule, and the Program Office's acceptance of that schedule was authorized under the Solicitation. Given the nature of this contract as one for the design, testing and implementation of a complex radar system, the Solicitation's allowance for the possibility of alternative scheduling is eminently reasonable.

Inasmuch as the Program Office's acceptance of Raytheon's alternative delivery schedule was expressly permitted by Section L.17.1.4, the Solicitation requirements cannot be said to have been changed or waived by the Program Office action. Moreover, all offerors

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had been on notice that alternative schedules could be submitted and might be accepted by the Program Office.³ It should be noted in this regard that Northrop itself proposed what could be viewed as an alternative, albeit [DELETED]. *See* Northrop Protest at 20.

Given the ODRA's conclusion that there was no waiver or change to the Solicitation's requirements, it follows that there was no requirement under the AMS to notify offerors of a change. AMS § 3.2.2.3.1.2.4, by its plain terms, only pertains to instances where the FAA changes a specific requirement. Here, inasmuch as alternative schedules were expressly contemplated and permitted, the Program Office's acceptance of an alternative proposed schedule from Raytheon did not constitute a change in requirements. Stated another way, this Solicitation included an option for an offeror to prepare and for the Program Office to accept an alternative delivery schedule without further discussions. That is precisely what occurred in this case and the Program Office was not required by the pertinent AMS Section to notify other offerors of acceptance of an alternative schedule or to provide them with an opportunity to modify their proposals.

III. CONCLUSION

For the foregoing reasons, the ODRA concludes that the Motion for partial dismissal should be, and it hereby is, granted. The ODRA further concludes that the requested limitation on discovery is appropriate given: (1) the dismissal of a ground of the Protest; and (2) the fact that the evaluation of Raytheon's offer is not at issue in this Protest. The Raytheon proposal and the scoring thereof, are not relevant to the remaining grounds of

³ To the extent Northrop's Protest suggests a fatal ambiguity or inconsistency between the Section F and Section L provisions, its Protest is untimely. Pursuant to the ODRA Procedural Regulations, apparent solicitation improprieties must be protested prior to the closing date for proposals. *See* 14 C.F.R. § 17.15(a). In this case, the two delivery schedule provisions were clearly presented in the Solicitation. It is well established that obvious discrepancies, inconsistencies or differences between solicitation specifications creates a duty on the contractor's part to make further inquiry and seek clarification from the agency. *See Rotech Healthcare, Inc., supra*. Northrop, a seasoned contractor, did not pursue a protest of these provisions prior to bidding. Since Northrop failed to raise any delivery schedule issues prior to the closing date for receipt of initial proposals, it cannot now challenge these solicitation provisions in the context of this post-award bid protest. *See Protest of Bel-Air Electric Construction, Inc., 98-ODRA-00084*.

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this Protest and the Northrop discovery request is not reasonably calculated to lead to the production of evidence relevant to the remaining grounds.⁴

The Program Office is directed to provide documents relevant to the remaining grounds of the Protest in its Agency Response in accordance with the ODRA Procedural Rules, *See* 14 C.F.R. §17.17. With respect to the document requests set forth on page 31 of the Northrop Protest, the Program Office is directed to provide with its Agency Response: the documents requested in Request 1 only with respect to proposals submitted by Northrop; no documents in response to Request 2; all of the documents requested in Request 3; and the source selection decision and cost-technical tradeoff analysis documents described in Request 4.

-S-

Anthony N. Palladino
Director
Office of Dispute Resolution for Acquisition

September 22, 2006

⁴ This is an interlocutory decision. It will become final upon the issuance of the Administrator's Order at the conclusion of the Protest adjudication process.