

FINAL REDACTED VERSION

Office of Dispute Resolution for Acquisition Federal Aviation Administration

Washington, D.C.

FINDINGS AND RECOMMENDATION

Matter: Protest of OPTIMUS Corporation

Under Solicitation No. DTFA01-98-R-13314

Docket: 98-ODRA-00096

Appearances:

For the Protester: Douglas L. Patin, Esq., Spriggs & Hollingsworth

For the FAA Product Team: Richard J. McCarthy, Esq., Office of Chief Counsel

I. Introduction

OPTIMUS Corporation ("OPTIMUS") has submitted a protest to the FAA Office of Dispute Resolution for Acquisition ("ODRA") relating to a Socially and Economically Disadvantaged Business ("SEDB") set aside procurement of Engineering Support Services for the FAA Airways Facilities Office of NAS Operations ("AOP") (hereinafter the "Product Team") under Screening Information Request ("SIR") No. DTFA01-98-R-13314. OPTIMUS has challenged the award of a contract under that SIR to Scientific Consulting & Automated Technological Services, Inc. ("SCATS"). OPTIMUS admittedly failed to adhere to certain instructions of the SIR relating to cost proposal preparation and made a number of errors in its cost proposal. OPTIMUS' proposal was rated slightly higher than that of SCATS, both in terms of technical merit and past performance. Further, OPTIMUS' evaluated probable cost and cost ceiling figures were substantially lower than those of SCATS. Nevertheless, the Product Team, by reason of the errors present in its cost proposal and its failure to follow SIR instructions, regarded OPTIMUS' proposal as posing a significant risk in terms of contract performance and, on that basis, selected SCATS as the awardee. OPTIMUS contends that the Product Team acted improperly and without a rational basis, that it invoked an unspecified evaluation criterion, and that it misled OPTIMUS into believing that discrepancies in its cost proposal would not be considered as major deficiencies. OPTIMUS also challenges the award to SCATS, by reason of an alleged failure to consider financial risk as part of the source selection risk analysis. As explained below, the ODRA finds that the Product Team's actions had a rational basis and were authorized by the terms of the solicitation. Accordingly, the ODRA recommends that the protest be denied.

II. Findings of Fact

A. The Facts Surrounding The Protest

1. The Airway Facilities ("AF") National Airspace System ("NAS") Operations Directorate ("AOP") consists of several divisions, including, *inter alia*, the National Operations Division (AOP-100), the NAS Performance Management Division (AOP-200), and the Automated Operations Systems Division (AOP-

300). On May 13, 1998, the Product Team issued SIR No. DTFA01-98-R-13314 for the instant AOP Engineering Support Services contract. According to the FAA Contracting Officer and Source Selection Official ("SSO") for the procurement, Ms. Melda Dyer, the contract -- which the Product Team decided to award on the basis of a Socially and Economically Disadvantaged Business ("SEDB") set-aside basis -- was to provide support to FAA management and AOP with respect to decision making, planning, automation, data analysis and processes. Agency Report ("AR"), Contracting Officer's Statement in Response to Protest of OPTIMUS Corporation, page 1. SIR Section C included two Statements of Work ("SOWs"). SOW1 specified the labor categories, services and deliverables to be furnished to AOP-100 and AOP-200. SOW2, in turn, specified the labor categories, services, and deliverables to be furnished to AOP-300. AR, Exhibit 1, SIR Section C, pages 7-28. The contract was to be based on a Cost-Plus-Fixed Fee ("CPFF") pricing structure, with work assigned by means of task orders. Award was to be made on the basis of determining "best value," based on the following evaluation factors, as set forth in SIR Section M, Evaluation Factors for Award, as amended:

- Offer acceptability (assent to terms of SIR)
- Offeror capability based on experience and past performance
- Price or most probable cost and fixed fee
- Oral Presentation and written submissions delivered at the time of oral presentation

The oral presentation was to be evaluated based on the following factors:

- Approach to the plan of action
- Approach to the work processes
- Understanding of performance uncertainties and risk
- Approach to risk management

SIR Section M went on to describe the source selection process as follows:

In order to select the winning offeror, the government will rank the offerors by comparing them in pairs, trading off the differences in capability, risk, and price between the members of each pair. If one offeror has both better capability and risk, and lower (evaluated) price, then that offeror will be the better value. If one offeror has the better capability and risk, and the higher price, then the source selection official (SSO) will decide whether the difference in capability and risk is worth the difference in price. If the SSO considers the better capability and lower risk to be worth the higher price, then the more capable, lower risk, higher priced offeror will be the better value. If not, then the SSO will consider the less capable, higher risk, lower priced offeror to be the better value. The SSO will continue to compare offerors in this way until he or she has decided which represents the best value.

AR, Exhibit 1, Section M.1, page 87; AR, Exhibit 15, Attachment 1.

2. Section L.8 of the SIR addressed generally the consequence of an offeror's failure to adhere to the SIR's written proposal instructions:

The FAA may interpret any failure to follow proposal instructions as indicative of the quality of support that would be given to FAA after award.

AR, Exhibit 1, Section L.8, page 80.

3. Specifically as to the instructions for the cost proposal, the SIR, at Section L.10, indicates that the Product Team might consider an offeror's failure to follow written proposal instructions as part of its evaluation of the services that might be expected of an offeror under an awarded contract:

The FAA reserves the right to consider an offeror's or proposed subcontractor's failure to follow the cost proposal preparation instructions indicative of the firm's ability to perform the work required under the contract.

AR, Exhibit 1, Section L.10, page 81.

4. This reservation of right was repeated in the SIR in Section M.2, Cost Evaluation:

The FAA reserves the right to consider an offeror's or proposed subcontractor's failure to follow the cost proposal preparation instructions indicative of the firm's ability to perform the work required under the contract.

AR, Exhibit 1, Section M.2, page 88.

5. The SIR requested proposals on the AOP Engineering Support Services contract by June 8, 1998. OPTIMUS, SCATS and six other firms submitted proposals. Included on the OPTIMUS Team were three prospective subcontractors, CGH Technologies, Inc. ("CGH"), Operational Technologies Services, Inc. ("OTS"), and Litton/PRC, Inc. ("PRC"). *See* AR, Exhibit 11, page 4 of 10.

6. The Product Team's Cost Proposal Evaluation Plan, AR, Exhibit 2, Appendix D, provided for the following steps to be performed in assessing the cost proposal:

- The evaluator(s) of the cost proposals will perform a preliminary review of each proposal to determine whether it is grossly deficient. A cost proposal is grossly deficient if it was not prepared in compliance with the instructions in L.10 of the SIR and would essentially have to be rewritten to be acceptable. If the evaluators conclude that a proposal is grossly deficient, they will issue a report describing the deficiency.
- The evaluator(s) will determine whether offerors adhered to the SIR instructions to a) assume contract performance will begin on September 1, 1998, b) propose the quantities of hours in L.10(c)(2) [sic] escalate the direct labor rates by 3.5 percent per year for years two through five, d) propose the government estimates of travel and other direct costs, and e) propose administrative labor, if applicable.
- The evaluator(s) will attempt to verify the proposed direct labor and indirect expense rates by contacting Defense Contract Audit Agency. They may use other means, including obtaining and evaluating additional data from offerors.
- The evaluator(s) will compare each offeror's direct labor and indirect expense rates to those of the other offerors.
- The evaluator(s) will perform a price analysis to determine the reasonableness of each offeror's proposed total price. The likely price analysis techniques will be comparisons of the total prices to one another and to the independent government cost estimate.

- If the evaluator(s) conclude that an offeror significantly understated or overstated the costs for any element of cost, they will adjust the proposed price accordingly. They will explain, and provide the calculation of, any adjustment to a proposed price.
- The evaluator(s) will develop questions for offerors regarding their cost proposals. The contracting officer will determine which questions, if any to ask the offerors. The evaluator(s) will, if the contracting officer requests, participate in discussions with one or more offerors concerning their cost proposals. The contracting officer will control all such discussions.
- The evaluator(s) will prepare a report that summarizes their findings and presents the "most probable cost to the government" for each offeror. The "most probable cost to the government" is the proposed price as adjusted to account for any apparent overstatement or understatement. The report will also present an evaluated price at ceiling rates for each offeror. This price will be the same as the "most probable cost to the government" except that it will reflect the proposed indirect expense ceilings.

7. A preliminary review of the OPTIMUS cost proposal was performed in accordance with the Cost Proposal Evaluation Plan. *See* AR, Exhibit 12. The Chair of the Product Team's Cost Evaluation Team for this procurement, Mr. Gary Spiegel, did not conclude that OPTIMUS' cost proposal was so "grossly deficient" as to require "rewriting," since he believed there "probably" was "enough data to create much of the missing information from cost exhibits". By the same token, Mr. Spiegel noted within OPTIMUS' cost proposal and the materials submitted by OPTIMUS' prospective subcontractors a number of significant deficiencies, observed that the proposal required "extensive revision and enhancement" and categorized it as a "borderline case" in terms of acceptability. *Id.*, page 1.

8. In an "Initial Report to Contracting Officers [sic] on Cost Proposals" dated July 1, 1998, Mr. Spiegel made the following observations as to the quality of proposals received in response to the SIR:

In L.10(b) and M.2 of the SIR, we inform offerors that we may consider failure to follow cost proposal preparation instructions indicative of a firm's ability to perform the work under the contract.

In general, the cost proposals were poorly written. I performed a preliminary review of each proposal, as required by the evaluation plan. I concluded that although none was "grossly deficient," some were close.

I will withhold comment on the quality of specific cost proposals until after we have received responses to our questions. You can tell by examining the questions where the offerors and subcontractors appear to have had difficulty following instructions.

AR, Exhibit 13, page 3, ¶10.

9. Thereafter, on July 7, 1998, the Product Team transmitted separate lists of "Questions and Requests" for OPTIMUS and for each of its proposed subcontractors, CGH, OTS, and PRC. These questions were developed in accordance with the Cost Evaluation Plan, AR, Exhibit 2, Appendix D. The list transmitted to OPTIMUS contained, *inter alia*, the following noted errors and deficiencies:

- The Total Cost figure shown on OPTIMUS' Cost Exhibit 1 incorrectly excluded \$[Deleted], the amount for Subcontract/Material General and Administrative Expense ("G&A")
- OPTIMUS' Cost Exhibit 2 listed labor rates as burdened with indirect costs and fee, contrary to the instruction of SIR Section L.10(d)(2), which clearly stated: "All listed rates and costs must be

unburdened. That is, they must reflect salary only and exclude the applicable indirect costs and fee." Also, it appears that Cost Exhibit 2 in OPTIMUS' cost proposal may have included direct labor proposed by OPTIMUS' subcontractors, which labor was to be listed separately by the subcontractors on their own cost exhibits. Accordingly, the Product Team requested: "Please submit a Cost Exhibit 2 with unburdened direct labor rates and costs. It should include only the direct labor proposed by OPTIMUS, not the direct labor proposed by the subcontractors."

- On page 3 of OPTIMUS' Cost Exhibit 3, OPTIMUS indicated that it intended to lease [Deleted] square feet of office space at L'Enfant Plaza for the contract at a rate of \$[Deleted] per square foot. The product of these two figures would be \$[Deleted]. Yet, the cost exhibit listed a cost of only \$[Deleted].

AR, Exhibit 9, pages 8-10.

10. In the questions addressed to OTS, that OPTIMUS subcontractor was asked to provide required responses to two items specified under Sections L.10(f) and (g) of the SIR relating to (1) whether OTS computed its direct labor rates by dividing annual salaries by 2,080 hours, and (2) whether OTS normally directly charges its labor hours and costs for administrative functions such as contract/subcontract administration and contract accounting, *i.e.*, rather than treating such costs as items within OTS' indirect cost pools. *Id.*, pages 11-12.

11. Among the questions for OPTIMUS' second subcontractor, CGH, in addition to a number of requests for clarification, were questions regarding two major failings of the CGH cost proposal. First, in its Cost Exhibit 1, rather than displaying its price to OPTIMUS broken down by individual cost elements (direct labor, labor overhead, G&A, fee, etc.) as clearly required by SIR Section L.10(d)(1) and shown on the format for Cost Exhibit 1 set out in the SIR, *see* AR, Exhibit 1, pages 83 and Attachment J-1, CGH included only total prices by statement of work and contract year. Second, CGH, like OPTIMUS, showed burdened labor rates on its Cost Exhibit 2, rather than unburdened rates, as required by SIR Section L.10(d)(2). AR, Exhibit 9, pages 13-15.

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