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

Protest of)
)
Leader Communications, Inc.) Docket No. 15-ODRA-00721
)
Pursuant to Solicitation DTFAWA-13-R-00014)

DECISION ON REQUEST FOR RECONSIDERATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on a request for reconsideration (“Request”) by Tetra Tech AMT (“Tetra Tech”) of the Administrator’s Final Order of March 27, 2015 (“Final Order”). The Final Order adopted and incorporated the ODRA’s Findings and Recommendations (“F&R”).¹ Tetra Tech’s Request asserts that the F&R contained errors of fact and law with respect to the ODRA’s finding that the Integrated Services Team’s (“IST”) refusal to allow revisions to cost proposals violated the Acquisition Management System (“AMS”). *Request* at 4. Specifically, Tetra Tech argues: (1) neither Tetra Tech nor Leader Communications, Inc. (“LCI”) submitted certified cost and pricing data that triggered the requirements of AMS Procurement Guidance T.3.2.3(A)(1)(g)(1), *Request* at 5-6; and (2) the F&R did not identify any other bases to sustain the Protest. *Request* at 6-7. For the reasons discussed below, the ODRA denies Tetra Tech’s Request as meritless, and will not recommend that the Administrator reconsider the Final Order.²

¹ Familiarity with the F&R is assumed for purposes of this decision.

² On April 20, 2015, LCI attempted to file an unscheduled response to the Request. It was not considered for purposes of this Decision, and will not be part of the administrative record.

PUBLIC VERSION

I. DISCUSSION

Tetra Tech's Request fails to demonstrate a clear error of law or fact, and only cites to uncontroverted evidence already in the administrative record. Moreover, Tetra Tech's arguments could have and should have been raised in its Comments.

A. The Standard for Reconsideration

The ODRA Procedural Regulations require that “[a] party seeking reconsideration must demonstrate either clear errors of fact or law in the underlying decision or previously unavailable evidence that warrants reversal or modification of the decision.” 14 C.F.R. § 17.47. That regulation further states that “the ODRA will not entertain requests for reconsideration as a routine matter, or where such requests evidence mere disagreement with a decision or restatements of previous arguments. *Id.*; see also *Protest of Brand Consulting Group, Inc.*, 12-ODRA-00598 (Decision on Request for Reconsideration, dated May 8, 2012). Finally, “attempts to ... introduce new legal arguments based on the original administrative record do not provide a basis for reconsideration.” *Protest of Concur Technologies, Inc.*, 14-ODRA-00708 (Decision on Request for Reconsideration, dated October 21, 2014).

B. Tetra Tech Waived its Opportunity to Respond Substantively to LCI's Cost and Pricing Data Argument

The administrative record in this Protest reveals that LCI plainly and squarely raised legal issues that Tetra Tech reviewed but did not address when it had the opportunity to file Comments in this matter. Tetra Tech's current argument therefore cannot support a reconsideration request.

LCI's Protest specifically challenged the IST's decision not to seek revised cost proposals as violating, among other provisions, AMS Procurement Guidance T.3.2.3(A)(1)(g)(1). *Protest* at 8. That provision relates to the mandatory treatment of certified cost or pricing data that is “inaccurate, incomplete, or not current.” *AMS Procurement Guidance*

PUBLIC VERSION

T.3.2.3(A)(1)(g)(1).³ Although Tetra Tech filed a Motion to Dismiss (“Motion”) asserting that the Protest failed to state a claim and was otherwise untimely, the Motion made no reference to the AMS provision at issue. *See generally Motion*. The ODRA deferred ruling on the Motion, and received the IST’s Agency Response to the Protest. *See generally Agency Response (“AR”)*. As with Tetra Tech’s Motion, the Agency Response did not discuss the cost and pricing provision of the AMS that LCI squarely and plainly had raised in the Protest.

Recognizing the potential significance of LCI’s legal issue relating to certified cost or pricing data, the ODRA directed the IST to notify it, “with citation to the record where applicable, whether certified cost or pricing data was provided by the offerors.” *ODRA Letter* of March 2, 2015. The IST response to the ODRA March 2 Letter did not assert that certified cost and pricing data had not been submitted, or that the pertinent provision of the AMS Guidance was inapplicable. Rather, on March 6, 2015, the IST provided the ODRA, without briefing, a declaration from the Contracting Officer (“Declaration”) that affirmatively answered, that he “treated these signed proposal sections as the representation and certification from each offeror that the information and data submitted with the respective offer was current, accurate and complete . . .” *Declaration* at ¶ 3.

Tetra Tech did not rebut the Contracting Officer’s sworn Declaration, or otherwise contest applicability of the AMS provision at issue.⁴ Specifically, by letter dated March 11, 2015, Tetra Tech stated that it had “reviewed the arguments set forth in the FAA’s Agency Response” and declined to file further Comments beyond its Motion. LCI, on the other hand, used its comment opportunity to again address the requirements of AMS Procurement Guidance T.3.2.3(A)(1)(g)(1). *LCI Comments* at 5. Tetra Tech did not file a

³ This provision requires that where “the [Contracting Officer] learns that any certified cost or pricing data the contractor provided are inaccurate, incomplete, or not current, the contractor must be notified immediately to determine if the defective data increase or decrease the contract price [and] [t]he [Contracting Officer] must then negotiate using any new data submitted or making allowance for the incorrect data.” *AMS Procurement Guidance* T.3.2.3(A)(1)(g)(1).

⁴ Consistent with normal ODRA practice, Tetra Tech had the opportunity to respond with “Comments” to both the Protest and the submissions by the IST. 14 C.F.R. § 17.21(e) (2014).

PUBLIC VERSION

request for a sur-reply. Now for the first time, Tetra Tech’s Request challenges both the application of AMS Procurement Guidance T.3.2.3(A)(1)(g)(1) and the factual statements of the Contracting Officer regarding his reliance on LCI’s certification. *Request* at 6.

Under the circumstances, reconsideration in this matter is inappropriate under both the ODRA standards cited above (*see supra* Part II.A), and persuasive precedent from the Government Accountability Office (“GAO”). The GAO has held that “where a party raises in its reconsideration request an argument that it could have raised, but did not, at the time of the protest, the argument does not provide a basis for reconsideration” *Tony Western – Reconsideration*, B-241169.3, May 21, 1991 *citing* *AUTOFLEX, Inc. – Reconsideration*, B-240012.2, November 7, 1990.⁵ The GAO further reasoned that “piecemeal presentation of issues . . . could disrupt the procurement process indefinitely.” *Id.* The GAO’s articulation is particularly apropos in the context of this case. The ODRA denies Tetra Tech’s first basis for reconsideration.

C. Tetra Tech’s Request Ignores the Plain Language of the ODRA’s Findings and Recommendations.

Tetra Tech’s second assertion is that the F&R does not state other grounds to sustain the Protest. *Request* at 6-7. To the contrary, the F&R issued in this Protest plainly stated that “[b]ased on the *Final Order* [in 14-ODRA-00705], the requirements of the AMS and the *lapse in time since the submission of original proposals*, the ODRA recommends that the Contracting Officer be directed to request updated cost and price proposals from both offerors . . .” *Protest of Leader Communications, Inc.*, 15-ODRA-00721 (emphasis added). Thus, the ODRA stated two other reasons to sustain LCI’s second protest: (1) the prior Final Order from the Administrator mandated an opportunity to revise cost proposals; and, (2) the extraordinary lapse in time from when original cost proposals were submitted to when the expected corrective action would occur. Tetra Tech’s Request essentially asks the ODRA to modify the remedy in two Final Orders by the

⁵ The ODRA views GAO decisions to be persuasive authority where consistent with AMS Policy. *Protest of International Services, Inc.*, 02-ODRA-00224.

PUBLIC VERSION

Administrator. The ODRA declines to do so and denies Tetra Tech's second basis as meritless.

III. CONCLUSION

Tetra Tech's Request fails to demonstrate a clear error of law or fact and is unsupported by new, previously unavailable evidence. Accordingly, the Request is denied and the ODRA will not recommend that the Administrator reconsider the Final Order.

-S-

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

April 21, 2015