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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of CEMSol, LLC**
 Under Solicitation No. DTFAWA-14-R-18678

Docket No.: **16-ODRA-00762**

Appearances:

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| For the Protester: | Mr. David Cirulli, Vice President of CEMSol, LLC |
| For the FAA Product Team: | Rachel M. Farrer, Esq. |
| For the Intervenor: | Adam S. Deckinger, Esq. of The Boeing Company and Andrew J. Crowder, Esq. of Perkins Coie LLP |

I. INTRODUCTION

On April 1, 2016, CEMSol LLC (“CEMSol”) filed a Protest (“Protest”) with the Office of Dispute Resolution for Acquisition (“ODRA”) against the award of a contract to The Boeing Company (“Boeing”) pursuant to Solicitation DTFAWA-14-R-18678 (“Contract”). *Protest* at 1. The Contract provides Central Reporting and Datalink Monitoring Support Services in support of the development of future Air Navigation Systems 1/A. *Agency Response* (“AR”) Tab 3. As the Awardee, Boeing intervened in the Protest as a matter of right. 14 C.F.R. § 17.15(g).

CEMSol, a *pro se* litigant, challenges the award to Boeing, alleging that the Product Team made errors in the evaluation of CEMSol’s proposal with respect to Technical and

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Risk Factors, and that it was “not permitted to compete on price.” *Protest* at 2-4; *see also* 4-20.¹ The Protest further contends that the best value determination to award to the higher priced offeror was flawed. *Id.*

In an interlocutory decision issued on April 28, 2016, the ODRA granted in part a dispositive motion filed by the Product Team, dismissing as untimely CEMSol’s allegations that pertained to the application of the evaluation criteria and assignment of technical weaknesses and risks to CEMSol’s proposal (“Untimely Grounds”). *Protest of CEMSol, LLC*, 16-ODRA-00762, *Decision on Motion to Dismiss for Untimeliness*, dated April 28, 2016 (“Interlocutory Decision”) at 5.² The ODRA found that CEMSol knew or should have known of the Untimely Grounds but failed to file a protest within five business days as required by 14 C.F.R. § 17.15(a)(ii). *Id.* The ODRA denied the Product Team’s motion with respect to CEMSol’s other ground of protest challenging the best value determination contained in the Supplemental Award Decision (“Surviving Ground”). *Id.* at 5; *Protest* at 3-4; *CEMSol Response* at 1. The Surviving Ground of protest is the subject of these Findings and Recommendations, and for the reasons set forth below, ODRA recommends that it be denied in its entirety.

II. Standard of Review

As the Protester, CEMSol bears the burden of proof and must demonstrate by substantial evidence that the challenged decision lacks a rational basis; is arbitrary, capricious or an abuse of discretion; or otherwise fails in a prejudicial manner to comply with the Acquisition Management System (“AMS”). *Protest of Data Transformation Corporation*, 15-ODRA-00731; 14 C.F.R. § 17.21(m) (2016). Consistent with the Administrative Procedure Act, which applies to ODRA adjudications, “the phrase

¹ Similar to other forums, the ODRA will read the pleadings of a pro se party “liberally and interpret them to raise the strongest arguments they suggest.” *Protest of CDW Government LLC*, 11-ODRA-00575 (Decision on Motion for Reconsideration, August 17, 2011, *citing McPherson v. Coombe*, 174 F.3d 276, 280 (2nd Cir. 1999).

² The ODRA’s Interlocutory Decision addressed the issue of timeliness at length and familiarity with it is presumed.

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'substantial evidence' means that the ODRA weighs whether the preponderance of the evidence supports the challenged Agency action." 5 U.S.C. §§ 551- 559,701-706 (2012 & Supp. II 2014).

III. Discussion

In Comments filed on June 17, 2016, CEMSol relies on arguments that were previously dismissed by the ODRA as untimely. *ODRA Interlocutory Decision, supra*. Specifically, CEMSol argues that the Source Selection Official's ("SSO") determination of best value was flawed because the analysis supporting her award decision relied on incorrect ratings for the most significant technical sub factors and related risks. *Comments* at 2. The ODRA finds no basis to reconsider its decision regarding the Untimely Grounds of protest, and such arguments cannot support CEMSol's challenge against the Surviving Ground.

The record shows that the Solicitation provides for award to be made on the basis of best value, i.e., to the "proposal that presents the most advantageous solution to the FAA, based on the evaluation of the technical, past performance, price risk and other factors specified in the ... [Solicitation]." *AR* Tab 3, § M.2.1. It also provides that the best value determination does not require award to be made to the lowest priced offeror. *Id.*

The Supplemental Award Decision Memorandum reflects the basis for the Source SSO's assessment of best value based on the proposals' technical scores, risk ratings and price. *AR* Tab 10 at 2. With respect to the Technical Factor, the SSO considered the fact that Boeing was rated overall as "Good" and assigned an overall risk rating of "Low;" while CEMSol was rated overall as "[DELETED]" and assigned an overall risk rating of "[DELETED]." *Id.* In addition, the record shows that the SSO assessed price with respect to each proposal, expressly noting that while the lowest priced proposal was that of the CEMSol, Boeing's price was reasonable and low risk. *Id.* The SSO then compared the evaluation of the CEMSol proposal to that of Boeing's to make a best value determination. *AR* Tab 10 at 2. The SSO's trade-off analysis notes that CEMSol's

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proposal “demonstrated [DELETED].” *AR* Tab 10 at 2.

The ODRA finds that CEMSol has not met its burden of proof in this case. CEMSol’s Comments do not indicate that the SSO relied on information not contained in the evaluation record, or otherwise failed to comply with the AMS or the terms of the Solicitation, including the definition of best value and the relative importance of the sub factors. *AR* Tab 10 at 1. On this record, the ODRA has no basis to find that the best value determination to award to the higher priced offeror was irrational. *Protest* at 2-4. Rather, the ODRA concludes that the award decision is supported by substantial evidence, was not arbitrary or capricious and did not constitute an abuse of discretion.

V. CONCLUSION

For the reasons set forth above, the ODRA recommends that the Surviving Ground of protest be denied in its entirety.

-S-

Marie A. Collins
Dispute Resolution Officer and
Administrative Judge
FAA Office of Dispute Resolution for Acquisition