



## I. FINDINGS OF FACT

### A. The Solicitation

1. The Region issued the subject Solicitation on February 15, 2012 for certain electrical conduit and switch vault construction work<sup>2</sup> related to a larger project for the construction of a new Air Traffic Control Tower at McCarran International Airport. *Agency Response* (“AR”), Tab A at 1.
  
2. The Solicitation states that it is set aside for small business and requires offerors to certify their status on a Business Declaration form that is contained in Section K. It further provides that the applicable North American Industry Classification System (NAICS) code for the project is 238210, Electrical Contractors and Other Wiring Installation Contractors. *AR*, Tab A at 3.
  
3. Section C of the Solicitation contains a statement of work (“SOW”) that states, in part:

The work covered under this specification includes the installation of new conduits and switch vaults for secondary power at the new ATCT at McCarran International Airport in Las Vegas, Nevada.

The contractor is required to furnish all labor, materials (except Government furnished), services, equipment, insurance, bonds, security notifications, licenses, permits, and fees in accordance with applicable federal, state and local regulatory requirements to complete the specified work. Any miscellaneous labor, equipment and/or materials not specifically detailed or specified, but required to complete the project, shall be provided as an integral part of the work.

*AR*, Tab A at 5.<sup>3</sup>
  
4. Additionally, Section C001 directs offerors to download a copy of the technical specifications, “VOLUME II SOW & Dwgs” from the FAA Contract Opportunities website: <http://faaco.faa.gov/>. *AR*, Tab A at 5. “Volume II Specifications and

---

<sup>2</sup> The estimated value of the work at issue is between \$100,000 and \$200,000. *AR*, Tab A at 4.

<sup>3</sup> Section H005 of the SIR also states: “This project is conceived as a fast-tracked project. The desire is to begin the project with Notice to Proceed approximately two weeks after award. Contractor should consider the requirements of gathering required materials, acquiring needed insurance and bonding, making necessary submittals, etc. within that framework.” The SIR contemplated a target completion date of April 16, 2013 for the work. *AR*, Tab A at 11.

Drawings” also is identified as Attachment #1 in SIR Part III, Section J. AR, Tab A at 28.

5. The SOW in Attachment #1 describes the work as requiring the extension of a new electrical feeder and indicates that the “new feeder wires will be installed by Nevada Energy (NVE) in an existing duck [sic] bank infrastructure.” It states further that: “Most of the infrastructure (underground conduits and manholes) is already in-place. The work under this scope will generally consist of excavating and exposing existing duct banks to locate conduits so that switch vaults can be installed at each end per the design drawings.” AR, Tab A at 28 (SIR Part III, Section J, Attachment #1).
  
6. The exact nature of the work is specified in Attachment #1 of the SOW as consisting of providing traffic control, trench plates, barricades and temporary fencing; removing existing landscape rock and protecting irrigation systems and plants; exposing existing concrete and probing empty conduits to determine their locations; installing switch vaults; excavating and tying in conduits to a manhole with the support of Nevada Energy; connecting the manhole to the new switch vault with concrete encased conduit; shoring and backfilling trenches; and redistributing landscape rock to return area to original condition. *Id.*
  
7. The SIR incorporates various clauses and provisions by reference, including 3.6.1-1 Notice of Total Small Business Set-Aside (January 2010), which provides in part:
  - (a) Definition. Small business concern, as used in this clause, means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the North American Industry Classification System (NAICS) standards in this Screening Information Request (SIR) at the time of submission of offer.
  
  - (b) General.
    - (1) Information and/or offers are requested only from small business concerns. Information and/or offers received from concerns that are not small business concerns shall be considered nonresponsive and will be rejected.
    - (2) Any award resulting from this SIR will be made to a small business

concern.

\*\*\*

AR, Tab A at 12-13, Clause 3.1-1 Clauses and Provisions Incorporated by Reference (July 2011).

8. Also incorporated by reference into the SIR is clause 3.6.1-3, Utilization of Small, Small Disadvantaged and Women-Owned, and Service-Disabled Veteran Owned Small Business Concerns (March 2009), which provides:

(a) It is the policy of the Federal Aviation Administration that small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals shall be provided reasonable opportunities to participate in performing contracts it lets, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.

(b) The Contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with efficient contract performance. The Contractor further agrees to cooperate in any studies or surveys as may be conducted by the FAA as may be necessary to determine the extent of the Contractor's compliance with this clause.

(c) The terms "small disadvantaged business, and small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business concern.

(1) Which is at least 51 percent unconditionally owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is unconditionally owned by one or more socially and economically disadvantaged individuals; and

(2) Whose management and daily business operations are controlled by one or more of such individuals.

\*\*\*

\*\*\*

\*\*\*

\*\*\*

(e) The term "service-disabled veteran owned small business concern" shall mean a small business that is 51% owned and controlled by a service-disabled veteran(s).

(f) Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as a small business concern, a small disadvantaged business concern, a small business concern owned and controlled by socially and economically disadvantaged individuals, a small business concern owned and controlled by women or a service-disabled veteran owned small business concern.

*Id.*

9. The SIR requires the prime contractor to perform with its “own organization, work equivalent to at least 15 percent of the total amount of work under the contract on the site” in clause 3.2.2.3-41 Performing Work (July 2004). *AR*, Tab A at 13.
10. The SIR in Section L002 instructs offerors to submit a technical proposal demonstrating its experience and past performance, and qualifications of key personnel, as well as at least three past performance customer satisfaction survey forms completed by a third-party reference. *AR*, Tab A at 39.
11. Section M001 sets forth the method of award as follows: “The Government will make award to the responsible offeror whose proposal conforms to the solicitation terms and conditions, and represents **the Lowest Priced Technically Acceptable Offer**” and that it “is seeking the lowest price of the various ‘acceptable’ technical proposals, based upon responses to this RFO.” *AR*, Tab A at 40 (emphasis in original). This section further states that proposals will be technically evaluated as either “Acceptable” or “Unacceptable” based on criteria in SIR Section M003. *Id.*
12. SIR Section M003 sets forth the technical evaluation criteria for experience and past

performance as follows:

**Criterion #1. Experience & Past Performance**

- > Successful completion of at least one (1) electrical construction project with an electrical component similar to those required in the Statement of Work within the last 3 years as the prime contractor *or as a major subcontractor*; **AND**
- > Demonstrated experience working with Clark County Department of Aviation and Nevada Energy.

**Standard for Evaluation:** The standard is met when:

- > The offeror has successfully performed services similar to the requirements of this solicitation. To be considered similar the contracts must have involved providing services *similar* to all services required in the Statement of Work.

**AND**

- > The past performance on similar contracts was satisfactory or better. To be considered satisfactory, the contractor must have satisfactory responses from references.

AR, Tab A at 41 (italicized emphasis added).

13. SIR Section M003 sets forth the technical evaluation criteria for qualifications of key personnel as follows:

**Criterion #2. Qualifications of key personnel**

- > **Project Manager** – At least 3 years’ experience in this position, with at least one (1) electrical power project similar to the one outlined in the project Statement of Work as the Project Manager; **AND**
- > **Superintendent** – At least 3 years’ experience in this position, with at least one (1) electrical power project similar to the one outlined in the project Statement of Work as the Superintendent.

**Standard for Evaluation:** This standard is met when:

- > The key personnel’s’ [sic] resumes reflect related experience as it pertains to this contract.

AR, Tab A at 42.

## B. Proposal Submission, Evaluation, and Award

14. Proposals in response to the SIR were submitted by February 28, 2013. *AR*, Tab A at 1.
15. Wadley's proposal indicated that it is a Service-Disabled Veteran Owned Small Business (SDVOSB) and had a teaming agreement with TAB Contractors, purportedly with the Mentor Protégé Program.<sup>4</sup> *AR*, Tab B. Wadley's proposal also identified significant experience involving various aspects of construction, particularly in the area of site preparation (excavation, transportation, delivery and installation of concrete and other building materials, and related landscaping and facility improvements). *Id.* Wadley's proposal provided numerous examples of past projects it performed as a prime contractor and as a subcontractor relative to site work, asphalt and gravel services, installation of switches and facility improvement. *Id.*
16. Wadley's proposal included a customer satisfaction survey form submitted by TAB Contractors on behalf of Wadley for a contract for services similar to the SIR's SOW and which rated Wadley's performance as satisfactory or better. Specifically, that survey concerned Wadley's performance as a subcontractor on a contract for the reconstruction of a taxiway, gate, and inner ramp at the same location as the instant project, McCarran International Airport. *Region's letter*, dated July 16, 2013, Attachment at 9.
17. Moreover, the survey for the McCarran International Airport subcontract project indicates that the work had several similarities to the work at issue in this protest. *See Id.* It included, among other things, "demolition of asphalt and concrete pavement, miscellaneous concrete structures and airfield electrical facilities; excavation, including removal of aggregate base material; placement of approximately 238,000

---

<sup>4</sup> Information provided by Potter in its Supplemental Comments, dated July 18, 2013 ("Suppl. Comments"), indicates that Wadley does not have an FAA approved Mentor Protégé Agreement, but rather one with another Federal Agency, and that TAB Contractors is owned by the same parent company that owns Acme Electric, Wadley's electrical subcontractor. *Suppl. Comments* at 9-10.

square yards of new crushed aggregate base course and Portland Cement Concrete pavement; new bituminous pavement; new drainage structures and modifications of existing structures; placement of asphalt millings; cleaning of existing storm drain pipes; CIPP sewer lining; taxiway center line lighting; apron edge lighting; taxiway guidance signs; and electrical vault modifications.” *Id.*

18. The Key Personnel identified in Wadley’s proposal include Wadley’s President/CEO and a Senior Vice President, the former having extensive experience in construction and construction management, and the latter in construction-related quality control and accounting. The proposal also identified as Key Personnel a Project Manager/Quality Control Specialist and a Project Superintendent, both of whom are employees of Wadley and possess specific and substantial experience in electrical work and electrical conduit excavation, as well as onsite and offsite utility installation. The resume of the Project Superintendent identifies work for a project that appears to be the same project that Wadley worked on under its subcontract with TAB Contractors, i.e., reinstalling electrical conduit, cable, lights and signs for new taxiways. *AR*, Tab B. Information submitted by Potter in its Supplemental Comments indicates that Wadley hired the Project Superintendent from TAB Contractors in June of 2012. *Suppl. Comments* at 5.

19. The evaluators unanimously found the proposals of Potter and Wadley both to be technically and otherwise acceptable, although comments by the individual evaluators on their worksheets acknowledged that Potter had more specialized experience as a company performing electrical work while Wadley had greater bonding capacity; thereby presenting less risk to the Region. *AR*, Tab E. In accordance with the SIR’s low price-technically acceptable method of award, the Contracting Officer recommended that award be made to Wadley, on the basis of a price that was almost 20% lower than that of Potter. *AR*, Tab D.

### **C. Procedural History**

20. On March 28, 2013, Potter protested the award to Wadley (“First Potter Protest”), contending *inter alia*, that Wadley was not listed as a small business on the System of Award Management (“SAM”) portal and lacked the designation of NAICS code of 238210, Electrical Contractors and Other Wiring Installation Contractors. *First Potter Protest* at 1. Potter also asserted that Wadley was not licensed by the State of Nevada to perform excavation work of this type. *Id.* The First Potter Protest was docketed as Case No. 13-ODRA-00645.
21. In response to The First Potter Protest, the Region prepared a memorandum explaining the basis for its review of the procurement record. *AR*, Tab F. In its review, the Region reconsidered its technical evaluation of Wadley’s offer and confirmed that it was technically acceptable, noting Wadley’s range of experience as a site preparation and construction management contractor, along with its subcontract with an electrical firm. *Id.* The Region also determined that a majority of the SOW was for site preparation work. *Id.* The Region concluded that Wadley’s past performance and experience referenced in its proposal showed experience working with both the Clark County Airport Authority and Nevada Energy, and satisfied the requirements of Section M of the SIR, notwithstanding the fact that it lacked the particular NAICS code designation set forth in the SIR. *Id.*
22. The Region indicated that it sought information from Wadley regarding its NAICS code designation and confirmed Wadley’s explanation that it had attempted to update and include the proper NAICS code in its profile in SAM prior to bidding, but that the update of its information was delayed due to a security breach in the SAM System. *Id.* The Region also determined that the SIR contained no requirement for a license from the State of Nevada, as this was work on a project for a Federal agency. *Id.*
23. The Region also conducted an expanded small business size determination review of Wadley and Potter based on submissions responding to SBA Form 355 and other information. *AR*, Tab K. Certified information provided by Wadley as part of this effort indicated that Wadley also did business under the name of Impact Sand and

Gravel. *AR* Tab I.<sup>5</sup> The majority owner of Wadley also has approximately 15 small affiliate business entities, and he holds a majority stake in the ownership of many of them. *Id.* The information provided by Wadley indicates that some of these affiliates provide services related to general contracting, transportation, aggregates, accounting and administrative work. *Id.* The total average three year gross receipts for all the affiliates is below the size threshold for the NAICS code designated for this acquisition in the SIR. *Id.*

24. The Region explained that the “choice of the NAICS Code for this project is 238210, Electrical Contractors and Other Wiring Contractors. It was chosen as the code that closest described the overall nature of the work intended in the Scope of Work. The understanding of the Project Team at the time was that this project was a combination of a site-work and electrical project with preparation for connection to the local electrical utility (Nevada Energy) predominating.” *AR*, Tab K. In pertinent part, the Region interpreted the Ostensible Subcontractor Rule to impute the formation of a joint venture between Wadley and its electrical subcontractor on the basis that the subcontractor would be performing the primary and vital requirements of the contract. *Id.* Based on this interpretation, the Region calculated the combined average annual receipts of Wadley and its electrical subcontractor to be in excess of the \$14 Million threshold. *Id.*

25. On April 24, 2013, during the alternative dispute resolution (“ADR”) phase of the First Potter Protest, the Contracting Officer made a determination that Wadley was ineligible for award as a small business. *AR* at 2. Wadley’s contract was terminated for convenience and a contract was awarded to Potter. *Id.*

26. On May 9, 2013, Wadley protested the award to Potter on the basis that the Region’s consideration of Wadley’s size and interpretation of the Ostensible Subcontractor

---

<sup>5</sup>Wadley’s Senior Vice President certified the accuracy of the additional information sought by the Contracting Officer in SBA Form 355, pursuant to 15 U.S.C. §645 and 18 U.S.C. §1001.

Rule was in error.<sup>6</sup> AR at 2.

27. On June 6, 2013, during the ADR phase of the Wadley Protest, the Region again reconsidered whether Wadley was eligible for award as a small business based on the Ostensible Subcontractor Rule. AR, Tab L. In so doing, the Contracting Officer reviewed the application of the Ostensible Subcontractor Rule in the context of a construction contract, and reconsidered “all aspects” of the relationship between Wadley and its electrical subcontractor, what constituted performance of the “primary and vital” portions of the work, and the effect of a mentor-protégé agreement between Wadley and another company. *Id.*
28. Reconsidering his earlier position, the Contracting Officer found Wadley to be eligible for the award on its own merits, noting that: “A. Wadley proposes to perform at least 20% of the labor of the project which is in satisfaction of the 15% minimum required in the Solicitation. B. Wadley is taking 100% responsibility for Management oversight of the project. C. Wadley is providing 100% of Key Personnel for the project, none of whom have any current or past association with the subcontractor.” *Id.* at 1. In addition, the Contracting Officer found that the SOW required a significant amount of site work in preparation for connection to the local electrical utility by Nevada Energy. *Id.* Given this revised assessment of the nature of the work, the Contracting Officer determined that Wadley would not be dependent on its subcontractor to perform a disproportionate amount of the work that was considered to be primary and vital. *Id.* Moreover, the Contracting Officer found no reason to consider the issue of affiliation in connection with a mentor-protégé agreement between Wadley and TAB Contractors since Wadley’s proposal did not indicate that TAB Contractors would be involved in the performance of work under this Contract; nor was there any record of any such mentor-protégé agreement in the FAA’s system. AR, Tab L at 2.

---

<sup>6</sup> The Region voluntarily suspended contract performance during the First Potter Protest and the Wadley Protest; but not during the instant Protest due to impact on the project schedule. Potter’s formal request for suspension of contract performance was adjudicated and denied for failure to demonstrate compelling reasons. *Protest of Potter Electric Company*, 13-ODRA-00657 (Decision on Request for Suspension, dated July 5, 2013).

29. On June 11, 2013, the Region terminated for convenience its contract with Potter, awarded the Contract to Wadley and issued the Notice to Proceed to Wadley. *AR* at 2. The instant Potter Protest followed on June 19, 2013. *Id.*

## **II. DISCUSSION**

### **A. Standard of Review, Burden and Standard of Proof**

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 (citing *Protest of Adsytech, Inc.*, 09-ODRA-00508). Consistent with the Administrative Procedure Act, 5 U.S.C. §§ 554 and 556, which applies to ODRA adjudications, the phrase "substantial evidence" means that the ODRA weighs whether the preponderance of the evidence shows that the challenged Agency action lacks a rational basis. *Id.*

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 and the underlying solicitation, the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials. *Id.* This standard of review also applies to review of decisions to take voluntary corrective action. *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627 (citing *Protest of Communication Technologies, Inc.* ("COMTek"), 03-ODRA-00257 and the *Protest of Computer Assocs. Int'l, Inc.*, 00-ODRA-00173).

### **B. Positions of the Parties**

Potter's Protest alleges that Wadley did not meet the contract requirements because the subcontractor it "hired to perform the work is a large business," and Wadley is unable to do "Nevada Energy work" without unduly relying on its subcontractor to complete the project. *Protest* at 1. The Protest further alleges that Wadley, "at the time of bid, was not qualified under

the NAICS Code ‘238210 Electrical Contractors and Other Wiring Installation Contractors’ listed on the SAM Website,” and that it only has a B-2 Electrical License for residential and small commercial work, rather than the “qualifying C-2 Electrical License in the State of Nevada.” *Id.* The Protest finally questions whether Wadley teamed with a large business solely for the purpose of being awarded the contract. *Id.* As a remedy, Potter requests that the award to Wadley be reversed and made to a qualified contractor. *Id.* at 2.

The Region’s Response to the Protest argues that Wadley was evaluated to be the lowest priced technically acceptable offeror, and that Wadley was not unduly reliant on its subcontractor to perform the “primary and vital” work of the contract, which involved a significant amount of site work, as well as some electrical-related work. *AR* at 2-3. The Region states that “Wadley’s bid indicates that it intended to perform 20% of the project, which exceeds the SIR’s requirement of 15%” and that even if its subcontractor performed the remainder of the work, “the ostensible subcontractor rule would not be violated because Wadley is providing the key personnel and managing the contract.” *AR* at 2. The Region also argues that the purpose of the contract is to extend a new electrical feeder into an existing duct bank infrastructure, and that Nevada Energy will be installing the new feeder wires, and thus an electrical license is not required of the contractor. *Id.* at 3. As for Wadley’s qualification under the NAICS Code 238210, the Region states that a NAICS code on the SAM website does not need to be exact, but only align closely with the nature of the contract work, and furthermore the SAM website currently reflects the identical code with respect to Wadley. *Id.*

Wadley, in its Comments, asserts that it is qualified to perform the work. *Comments* at 3. Wadley further asserts that it is entitled to use a large subcontractor, and is not reliant on its subcontractor for past performance. *Comments* at 2. Wadley argues that a contractor need not be certified in SAM under a particular NAICS code in order to be eligible for award, or have an electrical license. *Comments* at 3. Also, echoing the arguments of the Region, Wadley asserts that the chief electrical work will be performed by Nevada Energy as opposed to the preparatory work that is required under the contract, and further, given the nature of the preparatory work, the contractor does not require an electrical license. *Comments* at 4.

Potter's Comments and Supplemental Comments both assert that Wadley lacks the required past experience working with the Clark County Department of Aviation and Nevada Energy and that Wadley failed to demonstrate completion of at least one electrical construction project similar to the instant statement of work. *Suppl. Comments* at 1. Potter contends that it "CLEARLY was more qualified to do this project" and "Wadley therefore should have not been awarded this contract." *Suppl. Comments* at 2. Potter also argues that Wadley improperly relied on the qualifications of its electrical subcontractor, Acme Electric ("Acme"), and as a consequence should be considered to be a "joint venture" and ineligible for award. *Suppl. Comments* at 2. Potter also asserts that Wadley lacks an adequate number of qualified personnel to perform the contract and thus must be unduly reliant on its subcontractor or other "affiliated companies" to perform the contract. *Suppl. Comments* at 6. Potter further asserts that an ostensible subcontractor relationship exists between Wadley and Acme because one of Wadley's key personnel, its Project Superintendent, was once an employee of TAB Contractors, and TAB Contractors is owned by the same parent company that owns Acme. *Id.* Potter further contends that the Contracting Officer failed to properly consider the relationship between TAB Contractors and Wadley, which was evidenced by one of the Customer Satisfaction Surveys, as well as the fact that Wadley has a mentor-protégé teaming agreement with TAB Contractors. *Suppl. Comments* at 6.

### **C. Discussion**

By law the FAA is exempted from the normal small business contracting rules for Government procurements. 49 U.S.C. § 40110(d)(2)(D) (2006). Therefore, Small Business Administration ("SBA") rules, regulations, and decisions are not considered binding on the FAA, but may be viewed as persuasive authority, as long as they do not conflict with the principles of the AMS. *See Protest of Alutiiq Pacific LLC*, 12-ODRA-00627 (citing *Protest of HyperNet Solutions Inc.*, 07-ODRA-00416); *see also* 49 U.S.C. § 40110(d)(4) (stating that all bid protests and contract disputes shall be resolved through the authority of the FAA Administrator). Moreover, as a matter of AMS policy, the FAA is required to "implement and aggressively strive to provide small businesses and small businesses owned and controlled by socially and economically

disadvantaged individuals attainable and reasonable opportunities to participate as prime contractors and subcontractors. AMS §3.6.1.2. Ensuring FAA-wide implementation and accomplishment of these small business program objectives is the responsibility of the FAA Office of Small Business Utilization. *Id.* This responsibility includes, among other, ensuring that source criteria used to select firms for award is fair, consistent and does not limit opportunities for small businesses. *Id.*; Procurement Guidance, T3.6.1.A.2 “Small Business Development Program.”

### **1. Wadley’s Qualifications**

The ODRA finds that the Contracting Officer’s ultimate determination that Wadley met the requirements of the SIR and was qualified for award is supported by substantial evidence in the record and is not irrational. Under the express terms of the SIR, an offeror could satisfy the technical evaluation criteria for experience and past performance by demonstrating the successful completion of at least one project with “an electrical component *similar to those required in the SOW,*” as the prime contractor or *as a major subcontractor.* *FF 12* (emphasis added).

The record contains numerous examples of past projects performed by Wadley as a prime contractor and a subcontractor performing site work, asphalt and gravel services, installation of switches, and facility improvement. *See FF 15-17.* This type of work is similar to the work requirements set forth in the SIR’s SOW. *See FF 5-6.* As for specific experience with electrical-related work, the record contains Wadley’s customer satisfaction survey (“Survey”) that concerns a contract for services with an electrical component and which rates Wadley’s performance as a subcontractor on that project as satisfactory or better. *FF 16.* Specifically, that Survey concerned a contract for the reconstruction of a taxiway, gate, and inner ramp at McCarran International Airport, i.e., the same airport involved in the work to be performed on the SIR that is the subject of this Protest. *Id.* Moreover, the Survey for the McCarran International Airport subcontract project indicates that the work was similar in a number of respects to that at issue in this Protest. *FF 17.* It included, among other things, “demolition of asphalt and concrete pavement, miscellaneous concrete structures and airfield electrical facilities; excavation, including removal of aggregate base material; placement of approximately 238,000 square yards of new

crushed aggregate base course and Portland Cement Concrete pavement; new bituminous pavement; new drainage structures and modifications of existing structures; placement of asphalt millings; cleaning of existing storm drain pipes; CIPP sewer lining; taxiway center line lighting; apron edge lighting; taxiway guidance signs; and electrical vault modifications.” *Id.*

By comparison, the instant SOW states: “The work under this scope will generally consist of excavating and exposing existing duct banks to locate conduits so that switch vaults can be installed at each end per the design drawings” and includes “providing traffic control, trench plates, barricades and temporary fencing; removing existing landscape rack and protecting irrigation systems and plants; exposing existing concrete and probing empty conduits to determine their locations; installing switch vaults; excavating and tying in conduits to a manhole with the support of Nevada Energy; connecting the manhole to the new switch vault with concrete encased conduit; shoring and backfilling trenches; and redistributing landscape rock to return area to original condition. *FF* 5-6. Based on the record, Potter has not shown that it was irrational for the Contracting Officer to view Wadley as having the required experience working with the Clark County Department of Aviation and Nevada Energy, given the nature and location of the work performed by Wadley under its subcontract at the McCarran International Airport project.<sup>7</sup>

It may be the case, as Potter alleges and the Region appears to concede, that Potter is more qualified than Wadley in electrical work. *See FF* 11. The evaluation scheme set forth in the SIR, however, required only that Wadley meet the qualifications requirements set forth in the SIR and propose the lowest price in order to receive the award. It did not matter for purposes of award whether Potter was *more qualified* than Wadley.

As for Potter’s allegations that Wadley was not qualified because it did not possess the appropriate NAICS code or a Nevada State license for electrical work, these allegations are not persuasive. The Region notes that an electrical license is not required in the State of Nevada for the performance of electrical work that is done exclusively by an authorized representative of the United States. *AR* at 3 (citing NRS 624.031). Additionally, as noted by Wadley in its

---

<sup>7</sup> To the extent that Potter is challenging as improper the use of an offeror’s experience as a subcontractor to meet technical qualifications requirements of the SIR, that would be a challenge to the terms of the SIR and would have to be raised before bids were due. It would not be timely raised in this Post-award Protest.

Comments, the requirement for an electrical license is a matter of contract administration and performance, and as such, is not an issue for review in the context of a bid protest, except as a matter of general responsibility. *Comments* at 3 (citing *Pernix-Serka LP*, B-407656, B-407656.2 (Jan. 18, 2013)).

With respect to the allegations concerning Wadley's NAICS code designation, the consideration of a proposal for award is based on whether it meets the requirements of the solicitation, including whether the offeror qualifies as a small business based on the applicable size standards. See [http://www.naics.com/naicsfiles/Size\\_Standards\\_Table2013.pdf](http://www.naics.com/naicsfiles/Size_Standards_Table2013.pdf). The record shows that Wadley (including its affiliates) meets the applicable size threshold for the NAICS code designated for this procurement. *FF 23*. Moreover, the fact that an offeror does not list a particular designation in SAM does not render it ineligible for award if it is otherwise qualified and eligible under the express terms of the solicitation. See *Wadley Comments* at 3, citing *S4, Inc.*, B-299817, B-299817.2 (August 23, 2007); *Size Appeal of IPKeys Technologies, LLC*, SBA No. SIZ-5353 (2012) (Central Contractor Registration listing of NAICS code is considered irrelevant to consideration of its proposal under the solicitation, as well as subsequent size determination).

## **2. The Ostensible Subcontractor Issue**

Potter's Protest also alleges that Wadley is unduly reliant on its electrical subcontractor to perform the contract and as a consequence should be considered to be a "joint venture" and in violation of the Ostensible Subcontractor Rule. *Protest* at 1. Under the AMS, in order to be eligible for award of a small business set aside contract, the relationship between a contractor and its subcontractors must comport with AMS Guidance T3.6.1.A. 9 which precludes the award of a small business set aside contract to a joint venture that exceeds the size standard specified in the SIR (a joint venture also is defined to include a small business that is unduly reliant on a subcontractor to perform the contract).

The AMS rules in this regard are similar to those promulgated by the SBA regarding the Ostensible Subcontractor Rule.<sup>8</sup> SBA decisions interpreting and applying this rule provide that it

---

<sup>8</sup> Compare 13 C.F.R. Parts 121 and 124 with *AMS Guidance* T3.6.1.A.8 – 9.

is intended to prevent large businesses that are ineligible for award due to their size from unfairly taking contract work away from bona fide small businesses that are qualified and eligible for award, by using a small business as a “front” or a “pass-through.” *Size Appeal of Spiral Solutions & Tech., Inc.*, SBA No. SIZ-5279 (2011). SBA regulations in this regard provide that “a contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes.” 13 C.F.R. §121.103(h)(4). It defines an ostensible subcontractor as a subcontractor “that performs primary and vital requirements of a contract ... or a subcontractor upon which the prime contractor is unusually reliant.” *Id.*

Considerations of whether a prime contractor is unusually reliant on the subcontractor include the following: the terms of the proposal, e.g., contract management, technical responsibilities, and percentage of subcontracted work, agreements between them, e.g., bonding assistance or teaming, and whether the subcontractor is the incumbent contractor and is otherwise ineligible to compete for the contract due to its size. *Id.* However, given the uniqueness of facts and solicitations in every size challenge, ostensible subcontractor decisions must be viewed as instructive rather than binding. *Size Appeal of CWU, Inc.* SBA No. SIZ-5118, 2010 WL 2196619, at \*11 (March. 26, 2010).

In reviewing issues of affiliation, the ODRA has found that determinations of whether an offeror complies with the ostensible subcontractor rule are “intensely fact-specific given that they are based upon the specific solicitation and specific proposal at issue.” *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627 (citing *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 12 (2010)). The question of whether an offeror is unduly reliant on a subcontractor is determined by considering the overall circumstances. *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627 (citing *Alutiiq Educ. & Training*, SBA No. SIZ-5192, at 13). Thus, an ostensible subcontractor relationship will more likely be found when the facts show a subcontractor will exercise substantial control over the project through: (1) the use of the subcontractor’s personnel in key positions, (2) the use of substantial numbers of subcontractor personnel in rank and file positions, and (3) the use of the subcontractor to perform work that is “primary and vital” to contract performance. *Id.*

Here, the record reflects that the Contracting Officer reconsidered his position as to what constituted the primary and vital requirements of the contract and reversed his earlier decision to award the contract to Potter. *AR*, Tab L. The issue to be decided in this Protest is limited in scope to whether the Contracting Officer's ultimate decision to award the contract to Wadley has a rational basis and is supported by substantial evidence. The ODRA finds that the record contains substantial evidence in support of the Contracting Officer's final determination that Wadley and its electrical subcontractor did not violate the Ostensible Subcontractor Rule. The express language of the SOW is consistent with the Contracting Officer's determination to consider the primary and vital work under the contract to be a combination of preparatory site work and electrical work, and not solely electrical. *FF* 3-6. The record also supports the Contracting Officer's conclusion that Wadley could perform the contract on its own merits. The record shows that the key personnel include Wadley's President/CEO and a Senior Vice President, the former having extensive experience in construction and construction management, and the latter in construction-related quality control and accounting. *FF* 18. The record also shows that Wadley's key personnel include a Project Manager/Quality Control Specialist and a Project Superintendent, both of whom are employees of Wadley and possess specific and substantial experience in electrical work and electrical conduit excavation, as well as onsite and offsite utility installation. *FF* 18.

The record further provides substantial evidence in support of the Contracting Officer's conclusion that Wadley satisfies the SIR requirement that it perform with its "own organization, work equivalent to at least 15 percent of the total amount of work under the contract on the site" based on its proposal to perform at least 20 percent of the labor of the project. *FF* 9, 23 and 28. The fact that Wadley's electrical subcontractor will perform a solicitation requirement does not, by itself, establish an ostensible subcontractor relationship. *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627 (citing *Onopa Mgmt.*, SBA No. SIZ-5302, at 16). Given the facts in the record, the Contracting Officer's conclusion in this regard cannot be viewed as irrational.

Moreover, the Contracting Officer's conclusion that Wadley is taking 100 percent responsibility for Management oversight of the project also is supported by the record. *FF* 28. Wadley's proposal indicates that all of its key personnel are Wadley employees. *FF* 19. The record also

supports the Contracting Officer's conclusion that Wadley is providing 100% of key personnel for the project, none of whom have any current or past association with the electrical subcontractor. *FF 28*. Potter disputes this statement arguing that the Contracting Officer failed to properly consider the relationship between TAB Contractors and Wadley, which was evidenced by one of the Customer Satisfaction Surveys, as well as the fact that Wadley has a mentor-protégé teaming agreement with TAB Contractors, and that Wadley's Project Superintendent was once an employee of TAB Contractors, and TAB Contractors is owned by the parent company that owns Wadley's electrical subcontractor. *Suppl. Comments* at 6.

The evidence in the record is that Acme is serving as a subcontractor to Wadley under this Contract. The record shows that Wadley was a subcontractor to TAB Contractors on a separate project and Wadley may have hired its Project Superintendent from TAB Contractors in June of 2012. *FF 18*. Even if one were to treat Acme and TAB Contractors as one and the same entity due to their common ownership, the record still provides a rational basis for the decision to award the contract to Wadley because Wadley is not unduly reliant on Acme. As discussed above, the Contract encompassed a significant amount of site work in preparation for electrical connections to be made by a third-party utility company, i.e., Nevada Energy. *FF 5-6 and 28*. Thus, it was not irrational for the Contracting Officer to conclude that Wadley's electrical subcontractor would not be performing the primary and vital requirement of the Contract. *See Alutiiq Pacific, supra*, at 16; *Size Appeal of The Patrick Wolffe Group, Inc.*, SBA No. SIZ-5235, at 9-10 (2011) (Consideration of undue reliance to perform the primary and vital requirements depends on the subcontractor's performance in the context of the overall goal of the contract).

### **III. CONCLUSION**

Potter has failed to meet its burden of demonstrating by substantial evidence that the Contracting Officer's final decision to take the voluntary corrective action at issue in this Protest and award the contract to Wadley was irrational, arbitrary and capricious, an abuse of discretion, or otherwise failed to comply with the AMS.<sup>9</sup>

---

<sup>9</sup> Nothing herein constrains or adversely impacts Potter's right to recoup termination-for-convenience costs in accordance with the terms of its contract.

The ODRA therefore recommends that the Protest be denied.

--S--

---

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