

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

**PUBLIC VERSION OF
FINDINGS AND RECOMMENDATIONS**

Matter: Protest of IBEX Group, Inc.
Under Solicitation Nos. DTFA01-02-R-031130

Docket No.: 03-ODRA-00275

Appearances:

For the Protester: IBEX Group, Inc.: Eric J. Marcotte, Esq., Winston & Strawn

For the FAA Headquarters Product Team: Maureen Cummings-Spickler, Esq. and
William R. Sheehan, Esq.

For the Intervenors: SERCO Management Services, Inc.: Ross Dembling, Esq., Holland
and Knight, LLP; and MacAulay Brown, Inc.: Kevin P. Connelly,
Esq., Seyfarth Shaw.

I. Introduction

On June 3, 2003, IBEX Group Inc. (“IBEX”) filed this Protest (“the Protest”) in which it challenges the re-evaluation process conducted by the FAA Product Team (“Product Team”). The re-evaluation was performed pursuant to an Order dated May 2, 2003, issued by the FAA Administrator in the *Consolidated Protests of Consecutive Weather, Eye Weather, Windsor Enterprises and IBEX Group, Inc.*, Odra Docket Nos. 02-ODRA-00250, 00251, 00252 and 00254 (Consolidated) (“the Original Protest”). The Original Protest by IBEX (under Odra Docket No. 02-ODRA-00254) involved the Product Team’s awards of weather observation services contracts for four site groups – Site Groups 13, 14, 15 and 16 – to two IBEX competitors, SERCO Management Services Inc. (“SERCO”) and MacAulay Brown, Inc. (“MAB”). The mandated re-evaluation

resulted in SERCO and MAB retaining their respective awards. Both SERCO and MAB timely filed notices of intervention in the instant Protest.

For the reasons discussed herein, the ODRA concludes that IBEX has failed to sustain its burden of establishing that the Product Team's re-evaluation process lacked a rational basis, was arbitrary and capricious, or reflected an abuse of discretion. The ODRA further finds that: (1) the Product Team's conduct of the re-evaluation was consistent with the ODRA's Findings and Recommendations in the Original Protest and fully in compliance with the FAA Acquisition Management System ("AMS") and the Administrator's May 2, 2003 Order; (2) the Product Team's decision to retain its contracts with SERCO and MAB is supported by substantial evidence in the record. The ODRA therefore recommends that the Administrator deny the current IBEX Protest in its entirety.

II. Findings of Fact

1. The Original Protest involved four separate protests filed by disappointed offerors under two companion solicitations for weather observation services contracts issued by the Product Team. The first solicitation had been restricted to small businesses entities (the "Restricted Solicitation") and encompassed twelve different groupings of sites (Site Groups 1 through 12). The second, open to all potential competitors (the "Unrestricted Solicitation"), encompassed four other site groups (Site Groups 13 through 16). The four Original Protests, under ODRA Docket Nos. 02-ODRA-00250, 00251, 00252 and 00254, were consolidated by the ODRA for purposes of adjudication. IBEX's Original Protest, ODRA Docket No. 02-ODRA-00254, contested the Product Team's awards under the Unrestricted Solicitation, of Site Groups 13 and 15 to SERCO and Site Groups 14 and 16 to MAB. In addition to challenging Product Team findings of "weakness" with respect to specific technical factors and sub-elements, the IBEX protest put forth the following argument regarding an alleged failure by the Product Team to engage in meaningful discussions:

C. The FAA Failed To Engage In Meaningful Discussions With IBEX

As explained above, the FAA downgraded IBEX's technical proposal on the basis of alleged "conflicts" and "inconsistencies" contained in IBEX's staffing plan and target schedules. The FAA then relied on the same allegations to assign IBEX's an overall risk rating of [Deleted]. Similarly, the TEP contains numerous assertions that IBEX's proposal lacked information or failed to provide details requested. As discussed above, these allegations are simply without merit.

However, even if it is assumed that some of these criticisms were accurate, the FAA's failure to seek clarification was clearly unreasonable and prejudicial to IBEX. Even where a solicitation states that no discussions are to be conducted prior to award, the discretion of the Contracting Officer to refrain from holding discussions is not unfettered. See *Southwest Marine; American Systems Engineering Corporation*, B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56; *Facilities Management Company, Inc.*, B-259731.2, May 23, 1995, 95-1 CPD ¶ 274; *The Jonathan Corporation; Metro Machine Corporation*, B-251698.3, B-251698.4, May 17, 1993, 93-2 CPD ¶ 174. The exercise of the discretion not to seek clarifications is reviewable to ensure that it was reasonably based under the particular circumstances of the procurement. *Id.*

Under the AMS, communication throughout the entire procurement process is strongly encouraged. AMS § 3.2.2.3.1.2.2. In fact, the AMS took steps to remove some of the perceived barriers inherent in the Federal Acquisition Regulation that inhibited agencies from communicating with offerors. The AMS does not distinguish between "clarifications" and "discussions" or mandate communications with all offerors or require the submission of new best and final offers. *Id.* Here, a few very simple questions could have cleared up any confusion regarding IBEX's proposed staffing plans and schedules. Similarly, had FAA asked IBEX about the alleged omissions of information, IBEX could have directed FAA to the portions of its proposal where the information was presented. The FAA's failure to take these modest steps was irrational and inconsistent with the policies contained in the AMS.

2. The ODRA Director served as the adjudicating Dispute Resolution Officer (“DRO”) and prepared Findings and Recommendations for the Administrator on behalf of the ODRA with respect to the consolidated protests. In those Findings and Recommendations, the DRO recommended that the IBEX Original Protest under ODRA Docket No. 02-ODRA-00254 be sustained in part, on the basis that the Product Team’s assignment of certain (but not all) “weaknesses” to IBEX as part of its evaluation of IBEX’s technical proposal had been in error and without a rational basis. In connection with some of those “weaknesses” and the IBEX argument regarding a lack of meaningful discussions, the ODRA, in its Findings and Recommendations, observed that, had the Product Team engaged in minimal discussions as to those particular “weaknesses,” in the form of requests for clarification, the Product Team’s improper conclusions regarding those items may well have been averted:

. . . the ODRA agrees not only that the Product Team misunderstood and improperly downgraded the IBEX proposal for such things as alleged inconsistencies in the staffing schedules and plans, for the reasons previously enunciated, but that the Product Team might well have avoided its incorrect conclusions had it engaged in the same kinds of communications that apparently it did engage in with IBEX’s competitors in connection with the same or similar issues – communications that were in accord with AMS §3.2.2.3.1.2.2 and that were permitted by the instant Solicitation.

ODRA Findings and Recommendations at 143.

3. The ODRA, in its Findings and Recommendations, further recommended that the Administrator direct the Product Team to conduct a re-evaluation as to three of the four site groups at issue in the IBEX Original Protest – Site Groups 13, 14, and 15, since the ODRA was unable to determine, based on the record, that correction of the Product Team’s evaluation errors would not affect the source selection decisions for those three Site Groups.

4. With respect to the fourth site group, Site Group 16, the ODRA found that IBEX was without standing to challenge the award to SERCO, since, even if the ODRA were to have sustained all of the challenges raised by IBEX with respect to the Product Team's evaluation, the solicitation's evaluation criteria would have required that the award be made to SERCO. More particularly, the ODRA found that, even if all challenged "weaknesses" were removed and even if IBEX were to be given maximum credit for the technical factors at issue, there still would be too great a differential between the [Deleted] of the two competitors in comparison with the [Deleted] difference between their respective [Deleted] for Site Group 16. Thus, the ODRA recommended that the IBEX Protest be dismissed as to Site Group 16 for lack of standing.
5. The Administrator, by FAA Order No. 03-ODRA-256, dated May 2, 2003, adopted the ODRA's Findings and Recommendations, dismissed the IBEX protest as to Site Group 16 for lack of standing and directed the Product Team to conduct a re-evaluation as to Site Groups 13, 14 and 15 consistent with the ODRA Findings and Recommendations. Under the Order, the Product Team was directed to submit a report on the results of its re-evaluation to the Administrator via the ODRA within thirty (30) days of the Administrator's Order.
6. By letter to the ODRA dated June 2, 2003, the Product Team provided its re-evaluation report. In it, the Product Team noted that, for purposes of the mandated re-evaluation, three of four evaluators were replaced with new personnel "to avoid any allegation of bias." See Supplemental Integrated Service Team Report at 1. As to the re-evaluation of Site Groups 13, 14 and 15, the Product Team's letter advised that, although the re-evaluation resulted in IBEX's total weighted technical score [Deleted], the IBEX proposal still did not "represent the best value to the FAA" for the three site groups. Accordingly, the Product Team's Source Selection Official ("SSO") determined to retain the previously awarded contracts with SERCO and MAB for Site Groups 13, 14 and 15:

Regarding IBEX, the Product Team re-evaluated those portions of IBEX's Technical proposal in accordance with ODRA's Findings and Recommendations. . . . With the new revised total weighted Technical score of [Deleted], based on the re-evaluation in the affected areas, combined with IBEX's score of [Deleted], the total evaluated weighted score for IBEX was determined to be [Deleted]. Based on these findings and the other documents submitted to the SSO, the SSO determined that IBEX's proposal did not represent the best value to the FAA in groups 13, 14 and 15. Again, the SSO determined that Offeror E's [(MacAulay Brown, Inc.'s)] proposal represents the best value to the FAA for groups 13 and 15, and Offeror G's (SERCO's) proposal represents the best value to the FAA for group 14.

FAA Product Team Letter of June 2, 2003, pages 1-2.

7. The Product Team, by letter dated June 2, 2003, furnished to counsel for IBEX a copy of the re-evaluation report, consisting of a Contracting Officer Statement, an SSO Memorandum, a Supplemental Integrated Service Team (IST) Report – Technical Team Supplemental Report and the SSO Briefing. In the June 2, 2003 letter, counsel for the Product Team stated the Team's decision to retain the contracts with MAB and SERCO:

As noted in the attached SSO memorandum decision, the SSO again found clear differentiation between Offeror E's, MacAulay Brown Inc., (MacB's) and IBEX's proposals for groups 13 and 15, and found MacB's proposal to represent the best value to the FAA. With respect to group 14, the SSO again found clear differentiation between Offeror G's (SERCO's) and IBEX's proposals and again found SERCO's proposal to represent the best value to the FAA.

8. By letter dated June 3, 2003, IBEX filed the instant Protest with the ODRA. In it, IBEX raised as its sole ground of protest an argument that, although it did seek clarifications regarding limited aspects of IBEX's proposed "Quality Assurance Plan" and "Leave Coverage," the Product Team improperly refused, as part of the re-evaluation process, to engage in discussions with IBEX regarding all other aspects of its technical proposal that had previously been "cited as the cause of confusion or concern." Protest at 5.

9. In accordance with the ODRA Procedural Rules and pursuant to the ODRA's directive, the Product Team, by letter to the ODRA dated June 23, 2003, filed a Product Team Response. Thereafter, IBEX, SERCO and MAB each submitted Comments with respect to the Product Team Response by letters dated June 30, 2003, whereupon the record in the instant Protest closed.

III. Discussion

A. The Re-Evaluation Was Conducted In Accordance With The ODRA's Findings And Recommendations And The Administrator's Order

As the ODRA noted in its Findings and Recommendations for the Original Protest, where the ODRA finds that the Product Team's award decision has a rational basis and is neither arbitrary, capricious nor an abuse of discretion and is supported by substantial evidence, the ODRA will not recommend that the Administrator overturn the award decision. 14 C.F.R. Part 17; *Protest of Computer Associates, Inc.*, 00-ODRA-00173, citing *Protest of Information Systems and Networks Corporation*, 98-ODRA-00095 and 99-ODRA-00116, *affirmed* 203 F.3d 52 (DC Cir. 1999). Likewise, the ODRA will not substitute its judgment for that of the FAA Product Team in best value procurements, where the Team's source selection decision is rationally based and consistent with the FAA's Acquisition Management System ("AMS") as well as the specified Solicitation evaluation and award criteria. *See Protest of Information Systems and Networks Corporation*, 99-ODRA-00116.

From its review of the re-evaluation report documentation, the ODRA finds that the Product Team complied fully with the Administrator's Order of May 2, 2003. The re-evaluation was entirely consistent with that Order and with the ODRA's Findings and Recommendations. More particularly, all of the "weaknesses" that had been improperly assigned were eliminated, and the Product Team re-evaluated the technical areas in question in a manner that conformed to the Solicitation's evaluation criteria and to the Evaluation Plan that the Product Team had earlier formulated. The revised technical

scores in those areas were not demonstrated by IBEX to have been irrational, arbitrary and capricious or to reflect an abuse of discretion. *See Protest of Computer Associates, Inc., supra.* The SSO's best value determination similarly had a rational basis and was fully consistent with the Solicitation evaluation and source selection criteria.

The instant Protest amounts to nothing more than "mere disagreement" with the results of the re-evaluation. *See Protest of Raytheon Technical Services Company, 02-ODRA-00210, quoting Protest of Universal Systems and Technology, Inc., 01-ODRA-00179.*

B. IBEX Misapplies The ODRA Findings In The Original Protest Pertaining To Lack Of Discussions

In the Original Protest, IBEX challenged as lacking a rational basis, the Product Team's failure to engage in meaningful discussions. The ODRA found merit in IBEX's argument. *See Findings of Fact 2, above.* In the present Protest, however, IBEX misperceives the scope and significance of the ODRA's findings and attempts to misapply prior findings in the context of the directed re-evaluation. As indicated in the ODRA Findings and Recommendations in the Original Protest, although the AMS does not mandate discussions and, to the contrary, permits awards without any discussions, it encourages "communications" throughout the procurement process. *See AMS §3.2.2.3.1.2.2.*

As indicated in those ODRA's Findings and Recommendations, IBEX's Original Protest contention regarding a lack of discussions concerned technical elements which the ODRA found were improperly assigned weaknesses by the Product Team's evaluators for purported "inconsistencies," namely, the Staffing Plan and Sample Schedules under Technical Subfactor A, Sub-element a, and the Leave Schedules under Technical Subfactor A, Sub-element b. In this regard, the ODRA Findings and Recommendations quoted the following language from the IBEX Original Protest:

As explained above, the FAA downgraded IBEX's technical proposal on the basis of alleged "conflicts" and "inconsistencies" contained in IBEX's staffing plan and target schedules. The FAA then relied on the same

allegations to assign IBEX an overall risk rating of [Deleted]. Similarly, the TEP contains numerous assertions that IBEX's proposal lacked information or failed to provide details requested. As discussed above, these allegations are simply without merit.

However, even if it is assumed that some of these criticisms were accurate, the FAA's failure to seek clarification was clearly unreasonable and prejudicial to IBEX. Even where a solicitation states that no discussions are to be conducted prior to award, the discretion of the Contracting Officer to refrain from holding discussions is not unfettered. See *Southwest Marine; American Systems Engineering Corporation*, B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56; *Facilities Management Company, Inc.*, B-259731.2, May 23, 1995, 95-1 CPD ¶ 274; *The Jonathan Corporation; Metro Machine Corporation*, B-251698.3, B-251698.4, May 17, 1993, 93-2 CPD ¶ 174. The exercise of the discretion not to seek clarifications is reviewable to ensure that it was reasonably based under the particular circumstances of the procurement. *Id.*

Under the AMS, communication throughout the entire procurement process is strongly encouraged. AMS § 3.2.2.3.1.2.2. In fact, the AMS took steps to remove some of the perceived barriers inherent in the Federal Acquisition Regulation that inhibited agencies from communicating with offerors. The AMS does not distinguish between "clarifications" and "discussions" or mandate communications with all offerors or require the submission of new best and final offers. *Id.* Here, a few very simple questions could have cleared up any confusion regarding IBEX's proposed staffing plans and schedules. Similarly, had FAA asked IBEX about the alleged omissions of information, IBEX could have directed FAA to the portions of its proposal where the information was presented. The FAA's failure to take these modest steps was irrational and inconsistent with the policies contained in the AMS.

IBEX Original Protest at 21-22.

As to those technical sub-elements, the ODR agreed with IBEX, observing that requests for clarification regarding the perceived "inconsistencies" in the schedules would have been in line with the AMS and might well have enabled the Product Team to avoid its "incorrect conclusions." In any event, as a result of its Original Protest, IBEX was able to provide clarification for such technical sub-elements, and the Product Team's re-evaluation was conducted based on the elimination of the previously assigned

weaknesses for “inconsistencies,” in accordance with the Administrator’s Order and with the ODRA’s rejection of such weaknesses.

IBEX, in its present Protest, generally references “numerous other aspects of IBEX’s proposal that the Product Team had previously cited as the cause of confusion or concern.” The instant Protest is totally lacking in any specifics as to what “other aspects” IBEX has in mind. Perhaps, IBEX may be speaking of those “aspects” of its technical proposal that its Original Protest referred to as having been found lacking in information or detail. *See* IBEX Original Protest at 21-22, quoted above. Both the instant Protest and the Original Protest were unclear as to which “other aspects” required discussion and how it was prejudiced by a lack of discussion.

In any event, the ODRA’s Findings and Recommendations in connection with the Original Protest simply do not support the notion that the AMS mandates or even contemplates discussions where a proposal is perceived as omitting required information or detail. Indeed, the Original Protest Findings and Recommendations made clear that the AMS policy regarding “communications” is not aimed at affording an offeror a “second bite at the apple” – *i.e.*, the opportunity to provide needed detail that is absent from a proposal:

For the proposals of Consecutive and Eye, it appears that the Product Team did not engage in discussions for two reasons. First, the scoring for their proposals indicated that they were not in a “Satisfactory” or “Acceptable” range, such that they would be among the offerors “most likely to receive award.” AMS §3.1.1, “Introduction.” Second, from the discussion in the Agency Responses for Docket Nos. 02-ODRA-00250 and 02-ODRA-00251, it appears that the major thrust of the evaluators’ complaints about those proposals did not revolve merely around perceived conflicts or inconsistencies in their proposals, but rather the complete absence of detail concerning how the Solicitation requirements would be satisfied. For this sort of proposal deficiency, what would have been necessary would not have been simple clarification. Rather, substantial supplementation or rewrite of various aspects of the proposals would have been needed to bring their proposals into line with those “most likely to receive award.” It is not the intent of the AMS to suggest that communications be utilized to allow offerors a “second bite of the apple.”

Thus, neither in the initial evaluation process nor in the recent re-evaluation was it necessary, appropriate or consistent with the AMS and the “ODRA decision” for IBEX to be “given fair opportunity to respond to all identified concerns regarding its proposal.” *See* Protest at 5. To the contrary, as the Product Team correctly observes, granting IBEX’s request for broad-ranging discussions of any and all perceived shortcomings within its technical proposal as part of the re-evaluation process would have been inconsistent with the AMS, since it would have been unfair and prejudicial to SERCO and MAB, who would not have been afforded “the same opportunity to increase their numerical scores and adjectival ratings through similar communication/discussions.” *See* Product Team Opposition at 7; AMS §3.2.2.3.1.2.2 (communication is to be conducted in such a manner that it does “not afford any offeror an unfair competitive advantage”).¹

¹ In its Comments on the Product Team Response for the current Protest, IBEX points to a single instance where SERCO purportedly was allowed to “address a perceived omission in its technical proposal.” In that instance, IBEX explains, SERCO was asked about a reference on page 15 of its technical proposal to a Figure 1.1, a figure which the evaluators indicated to SERCO they were “unable to locate ... in the proposal.” IBEX Comments, page 8, note 7. This request for clarification about an apparent inadvertent omission of something that was clearly referenced in the technical proposal cannot be said to have afforded SERCO a “second bite at the apple.”

IV. Conclusion and Recommendation

For the reasons enunciated above, the ODRA finds that the instant IBEX Protest is without merit. Accordingly, the ODRA recommends that the Protest be denied in its entirety.

/s/

Anthony N. Palladino, Director
FAA Office of Dispute Resolution for Acquisition (AGC-70)