

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

FINDINGS AND RECOMMENDATIONS

Matter: Protest of Delta Marketing Group, Inc.
Pursuant to Purchase Request Nos. 07-51504/07-51499/07-55242
Docket Nos.: 07-ODRA-00406

Appearances:

For the Protester, Delta Marketing Group, Inc.: Mr. Michael Hankerson

For the FAA Mike Monroney Aeronautical Center: A.L. Haizlip, Esq.

I. INTRODUCTION

Delta Marketing Group, Inc. (“Delta”) is a disappointed bidder in a procurement conducted by the Federal Aviation Administration (“FAA”) Mike Monroney Aeronautical Center (“Center”) for the replacement of Sun Microsystems computer equipment owned by the FAA (“Sun Microsystems Equipment”). Delta’s Protest (“Protest”) alleges that: (1) the Center’s Solicitation specified incorrect or incomplete parts for the Equipment and; (2) Center personnel “exhibited extreme bias against our company and used the price from our quote that included five additional parts as our ‘best and final offer’.” Delta Protest at 1.

For the reasons set forth below, the Office of Dispute Resolution for Acquisition (“ODRA”) concludes that, to the extent Delta challenges the terms of the Solicitation, its Protest is untimely. Further, the ODRA concludes that Delta’s allegation of bias on the part of FAA contracting personnel is wholly unsupported in the record. The ODRA finds that the FAA contracting personnel did not in any way improperly prevent Delta from competing in the Procurement; rather, the contracting personnel took affirmative steps to ensure that Delta and the other interested offerors had a full and fair opportunity to

compete for the award. The ODRA concludes that the award decision had a rational basis and was not arbitrary, capricious or an abuse of discretion. The ODRA therefore recommends that this Protest be dismissed in part as untimely and that the remainder be denied as meritless.

II. FINDINGS OF FACT

1. The FAA owns certain Sun Microsystems Equipment located at and operated by the Center's Logistics Center. Agency Response ("AR") at 1. These computers were purchased from Raytheon Corporation, which uses parts numbers that are different from the assigned Sun Microsystems numbers for the Equipment. AR at 1, Tab 13.
2. In January of 2007, an engineer at the Center contacted Delta and discussed replacement parts for the Sun Microsystems Equipment. Protest at 1. The Center engineer conferred with Delta "to discuss various P/NS, configuration options, and a rough order of magnitude on preliminary pricing." Protest at 1; AR at 2, Tab 13.
3. On February 13, 2007, Delta forwarded an e-mail to the FAA engineer setting forth preliminary pricing and listing "additional parts" that Delta proposed to provide. AR at 2, Tab 2. The Delta proposal was forwarded by the engineer to a Contracting Officer's Technical Representative ("COTR"). *Id.*
4. On February 27, 2007, the Contracting Officer issued a Request for Quotes ("RFQ") to four potential offerors, including Delta. AR, Tab 13. The RFQ listed Purchase Request Numbers 07-51499; 07-55242; and 07-51504. Protest at 1; AR at 3, Tab 3. The RFQ requested that potential offerors quote "Best and Final" prices for only the equipment listed, which did not include the "additional parts" which had been included in Delta's February 13, 2007 Proposal. *Id.*

5. On or about February 28, 2007, Delta resubmitted to the Contracting Officer's Technical Representative ("COTR") the same Proposal it had made on February 13, 2007. Protest at 1; AR at 3, Tab 13.
6. On the same date, the COTR advised Delta by email to "quote on just the [Part Numbers] requested ...". AR, Tab 3.
7. In another e-mail issued February 28, 2007, the Contracting Officer further responded to Delta as follows:

I am asking for a bid on the part number(s) [Part/Ns] I have a requirement for ...if any of the part numbers I have requested a quote for turns out to be an invalid or incorrect part number, I will ask for clarification from the requisitioner and pass that information on to all that have been solicited. I do not know what transpired between your company and our engineer, but I do know that all must be given the opportunity to bid on a correct and valid part number.

AR, Tab 4.

8. Delta did not submit the Best and Final Offer that had been requested in the RFQ. Rather, Delta wrote to the Contracting Officer complaining that "the bids you received from other vendors are NOT for the correct parts." See AR, Tab 4. Delta further requested that the Contracting Officer modify the RFQ to "include the additional parts" that Delta had proposed in its February 13, 2007 Proposal to the FAA engineer. Protest at 1.
9. Although it had a reasonable opportunity to do so, at no time did Delta submit a proposal for only the part numbers that had been requested in the RFQ.
10. Proposals from four companies, including the Delta February 13, 2007 Proposal, were opened and reviewed on March 7, 2007. Only the portion of Delta's Proposal covering the components identified in the RFQ was considered and

evaluated against the proposals of the other three competitors. AR, Tab 6. Ultimately, the Purchase Order was awarded to ELI Systems (“ELI”), as the lowest priced responsive and responsible offeror. AR, Tab 7. On March 8, 2007, the Contracting Officer notified Delta that award had been made to another offeror for a price that was lower than the total price included in the Delta proposal for those parts identified in the RFQ. AR, Tab 8.

11. On March 12, 2007, Delta filed its Protest with the ODRA.

12. The parties attempted to resolve this Protest through the ODRA’s alternative dispute resolution (“ADR”) process but were not successful.

III. THE PARTIES’ POSITIONS

Delta alleges that the award “is not in the best interest of the FAA and not the proper procedure for submitting requests and evaluating bids.” Protest at 1. The Protest requests that “[t]his award be set aside. We would like a new request to be issued with the additional parts. We would like the opportunity to bid on this new request. We would like [the COTR] to be removed from evaluating this request due to her bias against our company.” (Emphasis Added) Protest at 1.

The Center’s Response to the Protest notes that “the agency is responsible for defining its needs and the best method of accommodating them.” AR at 8. The Center further asserts that the contracting personnel fulfilled the simplified purchase requirements of the AMS and clearly identified the Center’s requirements to four potential bidders, including Delta. AR at 9. The Center further points out that although Delta “disagrees with the Agency’s identification and articulation of its requirement ...” such disagreement does not provide a basis for protest. *Id.* The Center’s Response further asserts that Delta elected not to provide a modified Proposal addressing only the RFQ stated parts requirements and did so at its own risk, AR at 10, 11, and has failed to demonstrate that it was prejudiced by any action taken by Center contracting officials. AR at 13, 14. For its part, Delta’s

Comments on the Agency Response deny that Delta elected not to modify its Proposal. Protest at 1; Comments at 1. Rather, Delta merely asserts that “we were not given the chance to modify the proposal.” Delta Comments at 1.

IV. DISCUSSION

A. Standard of Review

It is axiomatic that protests must be timely filed in accordance with the ODRA Procedural Rules and that the time limitations set forth in the Rules will be strictly enforced. *Protest of PCS*, 01-ODRA-00184; *Protest of Aviation Research Group/U.S., Inc.*, 99-ODRA-00141. The ODRA Procedural Rules require that protests based on alleged improprieties in a Solicitation that are apparent prior to the receipt of proposals must be filed prior to the deadline for the proposals. 14 C.F. R. § 17.15(a) (1).

In the context of a timely bid protest, the ODRA will determine, based on substantial evidence in the record, whether the protested actions have a rational basis, constitute an abuse of discretion, or are arbitrary and capricious. *See Protest of Global Systems Technologies, Inc.*, 06-ODRA-00396 and 07-ODRA-00405 (Consolidated); *Protest of Engineering Information Technologies, Inc.*, 06-ODRA-00386, citing *Protest of Computer Associates, Inc.*, 00-ODRA-00173; *Protest of Information Systems and Networks Corporation*, 98-ODRA-00095 and 99-ODRA-00116, affirmed 203 F.3d 52 (D.C. Cir. 1999). The ODRA will not substitute its judgment for that of a contracting official where the action involved satisfies the above-stated test and is consistent with the Acquisition Management System (“AMS”) as well as the Solicitation. *Protest of Engineering Information Technologies, Inc.*, 06-ODRA-00386, citing *Protest of Information Systems and Networks Corporation*, 99-ODRA-00116. The protester bears the burden of proving its allegations and demonstrating that it was prejudiced as a result of the protested action. *Id.* Finally, it is well established that mere disagreement with the outcome of a competition does not satisfy the protester’s burden. *Protest of Engineering*

Information Technologies, Inc., 06-ODRA-00386, citing *Protest of The Dayton Group, Inc.*, 06-ODRA-00385.

B. Delta's Protest of the Solicitation's requirements is not timely.

In this Protest Delta alleges that the Solicitation was incomplete and failed to include several components of the Equipment that Delta contends were needed. Protest at 1. Based on the record, the ODRA concludes that: the non-inclusion of the components in question was evident on the face of the Solicitation, and was the subject of communications between Delta and the Center's contracting officials prior to the deadline for the submission of proposals. Finding of Fact Numbers ("FF Nos.") 5-8. Delta therefore was required to file any protest regarding the non-inclusion of the components prior to the due date for the Best-and-Final Offer requested by the contracting officials in this case. *Protest of PCS, supra*. It failed to do so and therefore its attempt to challenge those terms in this post-award Protest is not timely. Accordingly, to the extent the Protest alleges that the Solicitation was deficient, *i.e.*, that the Solicitation was incomplete or incorrect, it must be dismissed for lack of timeliness. *See Protest of PCS, supra; Protest of Bel-Air Electric Construction, Inc.* 98-ODRA-00084; *Protest of Raisbeck Commercial Air Group, Inc.*, 99-ODRA-00123.

C. There Is No Evidence In The Record To Support Allegations Of Bias On The Part Of The Contracting Officer And There Is No Basis To Support A Finding That The Award Decision Lacked A Rational Basis, Was Arbitrary Or Capricious Or An Abuse Of Discretion.

It is a fundamental principle of government procurement that competitions must be conducted on a fair and equal basis. *See generally Electronic Design, Inc.*, B-0279662.2 et al. Aug. 31, 1998, 98-2 CPD ¶69; *ITT Electron Tech. Div.*, B-242289, Apr. 18, 1991, 91-1 CPD ¶ 383; *See also Client Network Services, Inc.*, B-297994, Apr. 28, 2006, 06-CPD ¶ 79. It similarly is well established under Federal procurement law that a presumption of regularity and good faith attaches to the actions of government officials. Bad faith will not be attributed to contracting officials solely on the basis of inference or

supposition. *See Protest of Optical Scientific, Inc.*, 06-ODRA-00374; *See also Protest of Camber Corp.*, 98-ODRA-00102. A party alleging bad faith or bias on the part of government officials must ordinarily provide “clear and convincing” evidence in order to rebut the presumption of good faith attached to the official actions. *Protest of Royalea’L Aviation Consultants*, 04-ODRA-00304C, at 21, *citing Protest of L. Washington & Associates, Inc.*, 02-ODRA-00232. Delta utterly has failed to meet its burden in this regard, having provided no substantial evidence in support of its bias charge.

Notwithstanding Delta’s unsupported allegations, the ODRA finds that, throughout the stages of the procurement, the Center contracting officials made efforts to provide clear and detailed information about the Center’s requirements. The record further reflects numerous communications about the Center’s requirements with Delta in particular. *See e.g.*, FF Nos. 2, 4, 5 and 7. Furthermore, the Center’s procurement method in this case was consistent with the FAA’s Acquisition Management System (“AMS”) policy favoring fair competition. AMS §3.1.1. The Center’s actions benefited Delta and provided it and the other offerors, a fair opportunity to win the competition. The record here contravenes the contention that Center personnel acted unfairly towards Delta. The Center expressly invited Delta to compete through the RFQ and provided guidance to Delta regarding the Center’s requirements. FF Nos. 6-7. In addition, the Center *chose* to evaluate Delta’s Proposal notwithstanding that Delta had not submitted a Best-and-final offer limited to the Equipment listed on the RFQ. FF No. 10.

In this case, Delta believed rightly or wrongly that it was in a better position than the contracting officials to know what the Agency’s requirements were. When the RFQ did not include components that Delta believed the Agency needed, it chose: (1) not to file a protest to challenge the Agency’s Solicitation terms; and (2) not to submit a Best and Final Offer addressing only those components that the contracting officials had requested. In so doing, or rather not doing so, Delta waived its right to protest the Solicitation terms and risked being found to be a non-responsive offeror. Ultimately, to the Center’s credit, rather than rejecting Delta as non-responsive, it took the extra step of comparing Delta’s prices, for those components the Center required, to the prices offered by the other three

offerors for those components. Unfortunately for Delta, its pricing for the required components was higher than the pricing proposal of the awardee. FF No. 10. As the ODRA previously has said, the offeror, and not the contracting authority, ultimately is responsible for the content of its offer. *Protest of Mechanical Retrofit Solutions, Inc.*, 07-ODRA-00402. In this case, Delta had a fair opportunity to compete for the award in question. It simply lost out to a lower-priced offer.

V. CONCLUSION

The ODRA finds the Center's approach in this case to have a rational basis and to be well within the sound exercise of its discretion. There is no evidence in the record to support a conclusion that the Center acted in an arbitrary, capricious or biased manner; and no support for a conclusion that Delta was in any way prejudiced by the way this procurement was conducted. For the reasons discussed above, the ODRA finds the Protest is untimely in part, as a matter of law, and that the remainder of the Protest is without merit. The ODRA therefore recommends that it be denied.

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