

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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of Grayhawk Construction, Inc.**
 Pursuant to Solicitation DTFANM-09-C-00025

Docket No.: **08-ODRA-00475**

Appearances:

For the Protester, Grayhawk Construction, Inc.: Davis Kerr, President

For the FAA Northwest Mountain Region: Karen Huber, Esq.

For the Intervenor, Performance Abatement Services: W. Kirk Baker

I. Introduction

On November 26, 2008, Grayhawk Construction, Inc. (“Grayhawk”) filed a bid protest (“Protest”) with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) against a contract award for all work associated with the replacement of a roof over an air traffic control room, including demolition and asbestos removal in the space and adjacent areas. By letter of December 1, 2008, the ODRA directed Grayhawk to state the legal grounds for the Protest and provide copies of all relevant documents in accordance with the ODRA’s Procedural Regulations set forth in 14 C.F.R. Part 17. By letter of December 4, 2008, Grayhawk supplemented its initial Protest filing and provided further clarification as to the basis for its Protest (“Clarified Protest”). The Clarified Protest challenges a contract award made by the Northwest Mountain Region (“Region”) under Solicitation No. DTFANM-09-C-00025 (“Solicitation”) to Performance Abatement Services (“PAS”). The Clarified Protest

challenges the Region's determination that Grayhawk's proposal was unacceptable. The Clarified Protest also challenges the Region's failure to extend the due date for offers and answer questions posed by Grayhawk regarding the specifications. *Clarified Protest* at 1-3. ,

For the reasons discussed below, the ODRA recommends that the Clarified Protest be dismissed in part and denied in part. The record and applicable law demonstrate that the Region's evaluation of Grayhawk's technical proposal had a rational basis, was not arbitrary or capricious, or an abuse of discretion. Moreover, to the extent Grayhawk challenges the Region's refusal to extend the due date for proposals and answer questions regarding Solicitation terms that Grayhawk viewed as defective, these grounds of the Clarified Protest are dismissed as untimely.

II. Findings of Fact

1. On August 18, 2008, the Region issued the Solicitation, which sought competitive proposals for a roof replacement, demolition and asbestos removal services at the Seattle Air Route Traffic Control Center ("ARTCC") in Auburn, Washington. Agency Response ("AR"), Tab 1.
2. The Solicitation was amended twice. The First Amendment, issued on August 19, 2008, provided for a mandatory site visit scheduled for September 2, 2008. *AR*, Tab 3. The Amendment also extended the due date for proposals to September 16, 2008. *Id.* The Second Amendment, issued on September 10, 2008, answered a series of questions posed by potential offerors regarding the asbestos abatement, but did not extend the due date for offers. *AR*, Tab 4.
3. Section B003 of the Solicitation provided that potential bidders "desiring an interpretation or clarification of the specifications, drawings, contract terms and conditions, etc., must request in writing at least two (2) calendar days prior to the date for receipt of proposals." *AR*, Tab 1, page B-1.

4. The Solicitation Specifications indicated that the work to be performed was in a critical area of the Air Traffic Control Center and required the contractor to “have had 5 years experience working in ‘data centers’ or other similar critical facilities.” *AR*, Tab 1, Specifications 01000-2. The Specifications also provided that: “Any discrepancies between the drawings and specifications and the existing conditions shall be referred to the CO [Contracting Officer] for adjustment before any work affected is performed.” *Id.* at 01000-3.

5. Section M001 of the Solicitation set forth the evaluation factors for award, stating in part:

The Government will make award to the responsible offeror whose proposal conforms to the solicitation terms and conditions, and represents the best value to the Government. The Government reserves the right to award on initial offers without discussions or to conduct one-on-one discussions with one or more offerors to clarify issues relating to scope, pricing and responsibility.

AR, Tab 1, page M-1.

6. Section M002 of the Solicitation set forth the evaluation criteria as follows:

Prospective offerors are required to submit a business proposal as discussed herein. Proposals shall be evaluated as either “acceptable” or “not acceptable” on the basis of the following criteria. These factors are more important than price.

- I. Knowledge and experience and past performance of asbestos abatement.
- II. Management approach, abilities, and resources.

Any proposal determined to be “not acceptable” in any evaluated area, criteria, or sub-element thereof, shall render the offer proposal to be unacceptable and therefore rejected from further consideration. The government may reject any and all proposals and waive informalities or irregularities in proposals. One-on-one discussions may be held, at the option of the Government, with one

or more offerors, as determined necessary by the Contracting Officer, to clarify proposals, resolve issues and omissions, etc.

AR, Tab 1, page M-1.

7. Section M003 of the Solicitation provided:

It is required that a prospective offeror submit business profile information. This information will be evaluated by the selection official or the proposal review team. If this information has been submitted on previous projects, please make note when submitting your offer. Submit any updated profile information to the Contracting Officer. Failure to provide past performance information may lead to the rejection of the offeror's proposal without discussions with the offeror. All submitted technical information, experience, past performance, qualifications of key personnel, names of subcontractors, etc., shall be considered proprietary data and shall be utilized for evaluation purposes only and kept confidential.

Id.

8. Section M004 of the Solicitation provides criteria for the evaluation of the business proposal. In pertinent part, it states:

Criteria #2: Management approach, abilities, and resources.

Discuss your management approach, abilities and resources to complete this project timely. Provide specifics on managing the project.

AR, Tab 1, page M-2.

9. Solicitation Section L001, entitled "Required Offer Submittals," states: "Prospective offerors must submit a complete business proposal that shall encompass, but not necessarily be limited to, the content set forth herein." AR, Tab 1, page L-1.

10. Solicitation Section L001 further stated:

IMPORTANT: The offeror is advised that the Government reserves the right to award the contract without discussions. The offeror should ensure (1) that the submissions required are complete and accurate and (2) that the proposal represents the best pricing available. Failure to submit required information may result in your proposal being rejected.

AR, Tab 1, page L-2.

11. The Contracting Officer was present during the site visit for offerors conducted by on Tuesday, September 2, 2008 and a representative from Grayhawk was in attendance. AR, Tab 13, *Affidavit of Kevin O'Hara*, ¶ 3. The Contracting Officer recalled that during the site visit someone was asking questions about overspray. *Id.*
12. Following the site visit, the Region issued the Second Amendment to the Solicitation on September 10, 2008. According to the Contracting Officer, the Second Amendment “answered a series of questions by potential offerors about the asbestos abatement, such as ‘does the owner expect all material including equipment within the attic spaces and ceiling to be disposed of as asbestos contaminated materials?’ (the answer was ‘yes’) and ‘what has to be abated in the M1 room attic, just overspray?’ (the answer was ‘all asbestos, included the contaminated mechanical units, must be abated.’).” *Id.* at ¶ 4 (emphasis in original).
13. On Thursday, September 11, 2008, Grayhawk submitted to the Region a list of questions about the Solicitation. AR, Tab 13 at ¶ 5. According to the Contracting Officer, the questions dealt with technical matters, which needed to be addressed by the project engineer. The Project Engineer, however, was scheduled to be out of the office on Friday, September 12, 2008. Given that the proposals were due the following Tuesday, the Contracting Officer decided that there would not be enough time to issue a third amendment answering Grayhawk’s questions. *Id.*

14. The Region informed Grayhawk that it should submit its proposal by the Solicitation due date of Tuesday, September 16, 2008, and that the proposal deadline would not be extended. *Id.*
15. The Region received responses from seven offerors, including Grayhawk and the awardee/intervenor, PAS. *AR*, Tab 10.
16. Grayhawk submitted a proposal in response to the Solicitation on September 16, 2008. *AR*, Tab 13, *Affidavit of Kevin O'Hara* at ¶ 6. The Contracting Officer removed Grayhawk's proposal from the envelope in which it had been delivered and made two copies of the technical section of the proposal, but did not review its contents. *Id.* He returned Grayhawk's original proposal to its original envelope, and provided copies of the technical proposal to the evaluation team. *Id.* It was the evaluation team and not the Contracting Officer that noticed that Grayhawk had not submitted a business plan. *Id.*
17. Grayhawk's proposal in response to the Solicitation consisted of 18 pages, including its "SF-1442, acknowledgement of amendments, completed Sections B and K, a cover letter, some project profiles, and two resumes," but no business/management plan or profile. *Id.* The cover letter transmitting the proposal does not reference a "business plan" but only "project profiles." *AR*, Tab 13, *Affidavit of Kevin O'Hara*, Exhibit 1; *see also Affidavit of Marc Nagel* at ¶ 6. There was no indication that any pages or attachments were unintentionally missing from the Grayhawk proposal.
18. When the technical evaluators attempted to evaluate Grayhawk's proposal on the criterion of management approach, abilities, and resources, they discovered that Grayhawk's proposal lacked a description of its management approach. *AR*, Tab 14, *Affidavit of Marc Nagel* at ¶ 3. Moreover, the information contained in the technical proposal (resumes and past performance information) was insufficient to

evaluate Grayhawk's management approach, abilities and resources and thus this criterion was not evaluated. *Id.*

19. As the technical evaluation team was unable to complete the technical evaluation of Grayhawk's proposal, it was rated "not acceptable." *AR*, Tabs 8, 9 13 and 14. In contrast, the awardee's proposal contained a business plan that included, among other things, detailed staffing information. *Id.*
20. According to the Region, information concerning the offeror's management approach, abilities and resources is "critical" and of a "sensitive" nature, as the work is being performed in "an active air traffic control environment, and thus, the Region must be able to verify that an offeror "can properly manage and supervise" the project. *AR*, Tab 13, *Affidavit of Kevin O'Hara at ¶ 2*; Tab 14, *Affidavit of Marc Nagel at ¶ 3*. In this regard, the Contracting Officer explained:

A management proposal detailing management's approach to conducting the work, and the offeror's abilities and resources to complete the work is essential in a procurement of this nature. I would expect to see a complete management proposal specific to the work which would identify the numbers, identities, roles and responsibilities of assigned personnel, both those at the site and in the office. This information is not generally included in resumes, and is not included in the resumes provided by Grayhawk. As part of the management proposal, I would also expect to see details of how the offeror would manage the project and the resources to be dedicated to the project (e.g., they might propose to conduct weekly meetings, perhaps provide a planned schedule, provide staffing details for a project superintendent or engineer or manager on site as well as off site).

AR, Tab 13, *Affidavit of Kevin O'Hara at ¶ 2*.

21. The Region awarded the contract to Performance Abatement Services in the amount of \$2,373,862 on the basis of best value. *AR*, Tabs 10 and 13.

22. Grayhawk received a debriefing by telephone on November 20, 2008. According to the Contracting Officer, Grayhawk's representatives told him they had submitted a business plan and faxed a one-page business profile to him. He further indicated that, had Grayhawk's business profile been submitted to the Region by the proposal deadline, its proposal would have been considered by the evaluation team, but even so, they had serious concerns about Grayhawk's pricing. *AR, Tab 13, Affidavit of Kevin O'Hara, ¶ 8.*
23. On November 26, 2008, Grayhawk filed the Protest and on December 4, 2008, submitted a more detailed statement of its grounds for protest in its Clarified Protest.
24. Although the parties entered into an Alternative Dispute Resolution ("ADR") Agreement on December 12, 2008, in a good faith attempt to resolve the Protest with the assistance of an ADR neutral mediator, the effort ultimately proved unsuccessful and the adjudication commenced on February 3, 2009.
25. The Region filed its Agency Report on February 18, 2009 and the Intervenor/Awardee filed its Comments on February 24, 2009.
26. The ODRA did not receive any Comments on the Agency Response from the Protester by the due date of February 27, 2009, and closed the administrative record on that day. Although on March 3, 2009, the ODRA received from Grayhawk a "Reply to the Intervenor's Comments" the ODRA viewed this filing as untimely and further declined to consider it in the preparation of these Findings and Recommendations, since the ODRA Procedural Regulations do not contemplate replies by protesters to comments filed by intervenors.

III. Discussion

A. *Grayhawk's Allegation that the Region Improperly Failed to Respond to its Questions is Untimely.*

It is well established in ODRA caselaw and regulation that protests must be timely filed in order to be considered by the ODRA and that the time limits for the filing of protests will be strictly enforced. *See Protest of Galaxy Scientific Corporation*, 01-ODRA-00193; *Protest of Boca Systems, Inc.*, 00-ODRA-00158; *Protest of Raisbeck Commercial Air Group, Inc.*, 99-ODRA-00123; *Protest of Aviation Research Group/US, Inc.*, 99-ODRA-00141.

The ODRA does not have discretion to extend the deadlines for the filing of bid protests, which are set forth in 14 C.F.R. Section 17.15(a). In pertinent part, this section states: "Protests based upon alleged improprieties in a solicitation or SIR that are apparent prior to bid opening or the time set for receipt for an initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals." The purpose of the timeframe for filing challenges to solicitation terms is to ensure that protests challenging solicitation terms are filed prior to bid submission rather than after the evaluation and award process has been completed. *Protest of Water & Energy Systems Technology, Inc.*, 06-ODRA-00373. Where it is evident on the face of a solicitation that critical information is lacking that is necessary to prepare a proposal, a protester must raise that ground of protest prior to the due date for offers in order to be timely. *Protest of Delta Marketing Group, Inc.*, 07-ODRA-00406, *citing Protest of PCS*, 01-ODRA-00184.

Grayhawk alleges that it submitted a list of questions on September 11, 2008, but they were never answered. *Clarified Protest* at 2. In this regard, Grayhawk states: "The day prior to bid opening (still not having our questions answered) an email was sent asking if the bid date was going to be extended and [the Contracting Officer's] response was 'Not at this time. I encourage you to submit your best offer tomorrow.'" *Id.* Although Grayhawk believed that the lack of information could have a significant impact on pricing, Grayhawk also was informed that the Contracting Officer would not answer the

questions “because he did not think they were of significant financial impact to the bid pricing.” *Id.* at 2-3. Grayhawk asserts that the Contracting Officer apparently “does not understand the scope, process or historical costs of this work for which he is contracting” and the project “could conceivably cost the taxpayers an additional \$500,000 to over \$1,000,000 depending upon the actual quantities.” *Id.*

The record clearly shows that Grayhawk believed that critical information necessary to prepare its proposal was lacking in the Solicitation and it sought unsuccessfully to obtain this information prior to submitting its proposal on the due date for offers. Finding of Fact Nos. (“FF”) 13 and 14. Grayhawk failed, however, to file its Protest prior to the date for receipt of proposals in accordance with 14 C.F.R. Section 17.15(a). Thus, to the extent that Grayhawk alleges that the Solicitation was deficient, *i.e.*, that the Solicitation was incomplete and the Region improperly refused to extend the due date for offers and answer its questions, that allegation 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., supra.* The Solicitation provisions permitting offerors to submit any questions regarding the specifications at least two days prior to the due date for offers, FF 3, do not stay or extend the Procedural Regulations for timely filing of pre-award protests. *Protest of Water & Energy Systems Technology, Inc., supra.*

B. Standard of Review for Bid Protests on the Merits

It is well established that, in the context of a bid protest, the ODRA will not overturn or recommend that the Administrator overturn procurement actions that comport with the Acquisition Management System (“AMS”), have a rational basis, are neither arbitrary, capricious, nor an abuse of discretion, and are supported by substantial evidence. *Protests of Air Transport Association, et al., 08-ODRA-00452, -00453, -00454, -00455, -00456, -00457, -00461, and -00462.* In reviewing challenged procurement actions, it also is well established that the ODRA will not substitute its judgment for properly supported judgments of contracting officials exercised consistent with the requirements of the AMS. *Id., citing Protest of Northrop Grumman Systems Corporation, 06-ODRA-0038.*

Moreover, a protester's mere disagreement with an Agency action or decision does not, by itself, provide a sufficient basis for sustaining a bid protest. *Protests of Air Transport Association, supra., citing Protest of En Route Computer Solutions, 02-ODRA-0220.*

In any bid protest, the burden of proof in establishing that the Government's award decision lacked a rational basis, was arbitrary or capricious or reflected an abuse of discretion, lies with the Protester. *Protest of Integrity Janitorial Corporation 06-ODRA-00370, citing Protest of Global System Technologies, Inc. 04-ODRA-00307.* The protester also bears the burden of demonstrating that it was prejudiced as a result of the protested action. *Protest of Engineering Information Technologies, Inc., 06-ODRA-00386, citing Protest of Information Systems and Networks Corporation, 99-ODRA-00116.* Finally, it is well established under Federal procurement law that a presumption of regularity and good faith attaches to actions of government officials. *Global Systems Technologies, Inc. 06-ODRA-00396 and 07-ODRA-00405 (Consolidated).*

C. The Region's Evaluation of Grayhawk's Technical Proposal was Proper

Grayhawk asserts that:

We believe the [Management Plan] was submitted with our proposal and it was lost before it reached the evaluation team. The Contracting Officer has stated that he does not believe the document was included in the original submittal. Our feeling is that our cover letter references things in the "Business Plan" (the missing document) and that in our minds that fact a page was missing should have been obvious. All it would have taken at that juncture was a phone call or email and this whole matter would have been avoided.

Clarified Protest at 1-2.

Although Grayhawk alleges that it included a business plan with its proposal, the record contains two affidavits submitted by the Contracting Officer and the Lead Technical Evaluator certifying to the fact that Grayhawk's proposal did not contain a business plan. FF 17. Moreover, attached as an exhibit to the affidavit of the Contracting Officer was a complete copy of Grayhawk's proposal as submitted. The ODRA reviewed the Grayhawk proposal and finds it does not contain a "business plan" as contemplated by

the Solicitation, or even a reference to a business plan. *See* FF 8. Nor are there gaps in the proposal or any other indication that intended information was missing. FF 17. The ODRA also notes that the Grayhawk’s cover letter transmitting the proposal does not reference a “business plan” but only “project profiles.” *Id.* Thus, the ODRA finds that the weight of the evidence in the record supports a finding that that Grayhawk failed to submit a business plan with its proposal. There is simply no evidence in the record to suggest that the Region somehow “lost” Grayhawk’s business plan after it was received.

Although AMS § 3.2.2.3.1.2.2 encourages communications with offerors throughout the source selection process, the ODRA also has held that “[i]t is not the intent of the AMS to suggest that communications be utilized to allow offerors a ‘second bite of the apple.’” *Protest of Carahsoft Technologies Corporation and Avue Technologies Corporation, 08-TSA-034, citing Consolidated Protests of Consecutive Weather, Eye Weather Windsor Enterprises and IBEX Group, Inc., 02-ODRA-00250, 02-ODRA-00251, 02-ODRA-00252 and 02-ODRA-00254 (Consolidated).* In deciding whether and how to conduct communications with offerors, agency procurement personnel must have a rational basis. *Consolidated Protests of Consecutive Weather, supra.*

As is noted above, here, the record shows nothing in Grayhawk’s original proposal submission supports the argument that Grayhawk originally had intended to submit a “business plan.” FF 17. Allowing Grayhawk to address the business plan information required by the Solicitation after the due date for proposals would in effect have given Grayhawk a “second bite at the apple.” Under these circumstances, the Region was under no obligation to provide Grayhawk with an opportunity to supplement its proposal with what was required information. *Protest of Optical Scientific, Inc., 06-ODRA-00374.* It is a fundamental principle of government procurement that competitions must be conducted on a fair and equal basis. *Protest of Delta Marketing Group, Inc., 07-ODRA-00406.* Ultimately, it is the responsibility of the offeror to fully and accurately respond to a solicitation and to provide information required by the solicitation. *Protest of The Dayton Group, Inc., 06-ODRA-00385, citing Protest of International Services, Inc., 02-ODRA-00224.* Under the AMS, a contracting official has discretion not to provide an

offeror an opportunity to provide missing required proposal information, particularly where a supplement would be unfair and prejudicial to the other offerors who submitted complete proposals. *Protest of IBEX Group, Inc.*, 03-ODRA-00275.

Moreover, the record shows that even if Grayhawk's proposal had been evaluated, the Region had serious concerns regarding its pricing as unrealistic. FF 22. As such, Grayhawk has not or cannot demonstrate that it was prejudiced, *i.e.*, that but for the complained of action, it stood a reasonable chance of award. *Protest of Engineering Information Technologies, Inc. supra.*

IV. Conclusion and Recommendation

For the reasons discussed above, the ODRA recommends that the Protest be dismissed as untimely in part, and that the remainder denied for lack of merit. The ODRA finds that the Region's evaluation of Grayhawk's technical proposal as unacceptable had a rational basis, was consistent with the AMS, and well within the sound exercise of its discretion. There is no evidence in the record to support a conclusion that the Region acted in an arbitrary, capricious or biased manner; and no support for a conclusion that Grayhawk was in any way prejudiced by the way this procurement was conducted.

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APPROVED:

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