

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

REDACTED DECISION

July 17, 1997

FAA Docket No. 97-ODR-00025

(GSBCA 14214-FAA)

AVIATION SAFETY TECHNOLOGIES, INC.,

and

CLIMATRONICS CORPORATION

v.

FEDERAL AVIATION ADMINISTRATION,

and

TELEDYNE CONTROLS.

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for Aviation Safety Technologies, Inc.

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Before Board Judge DeGraff, acting as Special Master to Office of Dispute Resolution for Acquisition, Federal Aviation Administration.

Aviation Safety Technologies, Inc. (ASTI) filed this protest on January 14, 1997, challenging the decision of the Federal Aviation Administration (FAA) to award a contract to Teledyne Controls (Teledyne). Although the FAA's Office of Dispute Resolution permitted Teledyne and another vendor, Climatronics Corporation (Climatronics), to participate in the protest as interested parties, they decided not to take an active part in the process.

Pursuant to the terms of an interagency agreement, on June 5, 1997, the FAA asked the General Services Board of Contract Appeals to make available a Board judge to act as a Special Master in this protest. Under the Special Master's authorization, the parties conducted limited discovery and submitted statements of position on July 7, 1997. The parties assembled the record in this matter and submitted it to the Special Master on July 8, 1997.

Findings of Fact

In 1996, the FAA decided to procure an in-service upgrade to sustain its Low Level Wind Shear Alert System (LLWAS). LLWAS measures wind speed and direction at remote sensor station sites located around airport terminals. The remote sensor data is fed to a master station which generates warnings when it detects wind shear or microburst conditions. The goal of the procurement was to upgrade parts of the existing LLWAS by acquiring upgrades, spares, documentation, software, installation, engineering services, and in-service transition services. The FAA anticipated that it could meet its goal by acquiring commercial, off the shelf (COTS)-based systems and that little or no development work would be needed. 631-33. **[All citations are to pages contained in the record.]**

Screening Information Request 1

As part of its procurement process, on July 9, 1996, the FAA issued screening information request 1 (SIR 1), which solicited information from vendors that wished to participate in the LLWAS procurement. In SIR 1, the FAA explained that it could communicate with all, some, or none of the vendors at any stage in the procurement process, and that it intended to make a preliminary screening decision based upon vendors' responses to SIR 1 and based upon any communications it had with vendors. The FAA explained that it would issue a second SIR (SIR 2) to the vendors that had a good chance of being awarded the contract, and that SIR 2 would contain a request for offers in the form of a model contract. 631; 634.

The FAA's technical requirements for LLWAS were grouped into basic requirements and two sets of optional requirements. The FAA required all vendors to address the basic requirements in response to SIR 1. In responding to the basic requirements, vendors were supposed to explain their assumptions about the FAA's requirements and to explain and substantiate their proposed means of meeting those requirements. The FAA explained that responses to the

basic requirements had to comply with a performance schedule set out by the FAA and could not exceed a \$10 million cost cap. 633-34.

The FAA told vendors that it would award a contract to the vendor that would provide the best value to the Government. In addition, the FAA explained that it would evaluate responses to SIR 1 in order to measure technical merit, vendor capability, and cost/price. Technical merit was more important to the FAA than was vendor capability or cost/price, and vendor capability was more important than cost/price. 638.

In evaluating technical merit, the FAA said that it would give equal weight to four factors: 1) the vendor's understanding of the FAA's technical requirements, 2) the completeness of the vendor's proposed solution, including the likelihood that the proposed solution would achieve all LLWAS objectives, 3) the effectiveness of the proposed solution in meeting LLWAS requirements, and 4) the degree to which the solution displayed inventiveness, adaptability, technical affordability, and overall value to the Government. 638-39.

In evaluating vendor capability, the FAA said that it would look at two factors, ability portfolio and past performance. Ability portfolio was more important than past performance. The FAA described these factors as follows:

Ability Portfolio – Vendor demonstration of abilities, including adequate program control methods, adequate resources to fully perform all engineering, test, production and field implementation phases of the contract, and the planned ability to perform this contract on schedule and budget. This includes access to an adequate, stable, experienced, and motivated work force with a full range of expertise and complete facilities and equipment to do the job.

Past Performance – Vendor demonstration of adequate personnel experience and corporate experience in providing similar equipment to Government or industry, including a satisfactory performance record on similar, or related work, and a satisfactory record of integrity and business ethics.

639.

In evaluating cost/price, the FAA said that it would consider two equally important factors. First, the FAA would look at the total anticipated contract cost and the vendor's cost realism. Second, the FAA would look at the vendor's ability to meet budgetary limits during the life of the contract, including an assessment of life cycle cost risk. 639.

The FAA developed a proposal evaluation plan to use in reviewing vendor responses to the LLWAS SIRs. The evaluation plan explained that some members of a special evaluation team (SET) would evaluate vendor responses, the source selection official (SSO) would decide which vendor would receive the LLWAS contract, and the contracting officer (CO) would award the contract. The SET was "expected to apply sound judgment in determining appropriate variations and adaptations necessary to meet unique and unexpected situations," provided that the SET did not depart from the evaluation plan and the SIR. For SIR 1, the evaluation plan explained that technical merit and vendor capability criteria would be numerically scored, while the cost/price criteria would be evaluated, but not scored. All scores were to be between zero and ten points and a difference of two or more points between vendor scores would be considered a significant difference. The SET was to prepare an initial evaluation report with back-up data and was to present that report to the SSO. 625-30.

Eight vendors, including ASTI, Teledyne, and Climatronics, responded to SIR 1. 155. The SET members who were evaluators prepared individual score sheets for each vendor

that responded to SIR 1. 170-257; 380-467. One member of the SET was designated as the SET facilitator and did not score any of the SIR responses. The SET facilitator collected the individual score sheets and calculated a final, weighted consensus SET score. 649; 4386; 15022. Each of the four technical merit factors was given a weight of ten percent, the ability portfolio factor was given a weight of twenty percent, and the past performance factor was given a weight of twelve percent. Final weighted scores were derived by applying the factor weights to the scores of the evaluators. 169; 379.

For the basic requirements, ASTI received a score of [Deleted] for each of the four technical merit factors and a score of [Deleted] for each of the two vendor capability factors. ASTI's final weighted score was [Deleted]. 169. For the basic requirements, Teledyne received a score of eight for one technical merit factor (understanding), seven for each of the other three technical merit factors, seven for the ability portfolio factor, and eight for the past performance factor. Teledyne's final weighted score was seventy-three. 379.

The SET's initial evaluation report is dated August 8, 1996. The SET reported the scores for each offeror. ASTI was within the \$10 million cost cap for fulfilling only the basic requirement and Teledyne was not. Teledyne, however, proposed a slightly lower cost than did ASTI for fulfilling both the basic plus two option requirements. 155-68.

According to the SET's initial evaluation report, ASTI's strengths were that it had the best software design, which was "well tailored and matched to [the] LLWAS Sustainment need." Also, ASTI had the "[d]eep understanding of the FAA requirement and knowledge of [one LLWAS configuration]." Among the weaknesses noted by the SET was the fact that ASTI was a "[s]mall and new company (1995) with large program risk - they must grow quickly to perform this effort." Also, the SET believed that the depth and breadth of ASTI's personnel resources were weaknesses, because half of the people proposed by ASTI were not

currently under contract. 157. Among other comments made by the SET were these:

We note that ASTI is a small and new company and some [principal] personnel of the company . . . were in the employ of Lockheed Martin during the preparation of this SIR response. Half of the proposed key personnel still do not yet work for ASTI. Many holes exist in the technical specialties such as field installation. Little depth and breadth of personnel are available. Only one test engineer is available for instance. Good past performance by some of the ASTI personnel on the LLWAS to [terminal doppler weather radar] interface was noted along with less than good past experience with some others. We are concerned that ASTI may be overextended in the performance of other on-going contracts Personnel offered also seem slightly light in desired work experience and educational background The [design, test and evaluation] task lacks detail and may indicate a lack of understanding of the FAA test methodology.

161-62.

Teledyne's strengths were that it had the best ability portfolio. The SET noted that Teledyne was a "[l]arge company with the most resources." The SET commented that Teledyne had the best all around system with no major weaknesses, consisting of a good hardware design with COTS software modules and a good overall grasp of the complete system. Teledyne's weaknesses were that it exceeded the \$10 million cost cap for the basic requirements, had the least familiarity with LLWAS, and was not as "far along in the process" as ASTI. 157. Among other comments made by the SET were these:

Teledyne is a big business with a system integration approach of COTS components that was

well adapted to LLWAS Sustainment needs
Teledyne has a great ability portfolio and deep
personnel resources

166.

The SET decided that Climatronics, ASTI, and Teledyne were most likely to receive award and recommended that they receive SIR 2. 158.

On August 13, 1996, the CO sent Climatronics, ASTI, and Teledyne letters informing them that they were among the vendors most likely to receive award and that they would be issued a second SIR. 1161-72; 4380. The CO sent the vendors their evaluation results and told them what the FAA's concerns were and the areas that could benefit from clarification. In addition to telling ASTI what the FAA liked about its response to SIR 1, the CO told ASTI that the FAA had three main concerns about the response. The first concern was this:

Ability Portfolio - We note that yours is a small and new company which may need to grow quickly to perform this effort. Your standing reserves of personnel, the breadth of expertise and on-demand availability seem to present a significant program risk. Half of your key personnel were not under contract during the preparation of the SIR #1 response. You have demonstrated good engineering capability, however, you will need a staff of production, test, logistics, field support, administrative and other specialty personnel resources during the life of the contract which were not fully evident in your response. Please ensure you express how you will reduce this programmatic risk and show that your resources would not become overextended during each phase of the work.

1170.

The FAA identified several areas that could benefit from clarification by ASTI, including these:

The software development plan was viewed as lacking appropriate Government interaction and tailoring.

Government often must operate differently with small businesses as compared to large business. We wish to have more visibility into early warning of potential, performance problems and company financial status indicators which would highlight projected company health.

1172.

Although no response to the August 13, 1996 letters was required, the vendors spoke with the FAA about the issues raised in the FAA's letters, and Teledyne provided further documentation to substantiate the maturity of its proposed solution. 1749-2091; 2099-101; 4387. In late October 1996, after ASTI submitted its response to SIR 2 (discussed below), ASTI submitted additional written information to the FAA in response to the issues raised in the FAA's August 13, 1996 letter. 4038-147.

Screening Information Request 2

The FAA issued SIR 2 on September 24, 1996, to Climatronics, ASTI, and Teledyne. SIR 2 was a request for offers to fulfill the LLWAS requirements. The FAA explained that it would evaluate responses to SIR 2 and any subsequent discussions in order to measure the same three criteria as were measured in the SIR 1 responses: technical merit, vendor capability, and cost/price. As did SIR 1, SIR 2 explained that technical merit was more important than vendor capability or cost/price, and vendor capability was

more important than cost/price. 1173-748. SIR 2's explanation of these three criteria is identical to SIR 1's explanation, discussed above. SIR 2 provided:

The [SIR 2] screening decision may be made solely on the basis of your SIR #2 response without discussion. . . . Additional discussion for the purposes of clarifying the offer may or may not be conducted by the Government before a SIR #2 screening decision is reached. Any subsequent discussion after SIR #2 that modifies the offer will be evaluated before reaching a screening decision.

1748. A final source selection decision would be based upon the best value to the Government, and the decision would be made either as a part of or separately from the screening decision. 1748.

The FAA's proposal evaluation plan, discussed above in connection with SIR 1, also addressed SIR 2. The evaluation plan provided, "[t]echnical and capability portions of the responses to SIR #2, if change data was requested, or changes allowed, will be numerically re-scored as needed. SIR #2 cost/price information will be fully evaluated." The SET was to prepare a final evaluation report with extensive back-up data and was to present that report to the SSO. The final evaluation report was to include all the data needed to make an informed decision concerning final source selection. 625-30.

The FAA updated its proposal evaluation plan on October 22, 1996. The updated plan was much the same as the original plan, but the updated plan provided, "Technical and capability portions of the responses to SIR #2, even if no change was made from SIR #1, will be numerically rescored." The updated plan also provided, "The Government may hold communication sessions after receipt of SIR #2. If as a result of discussion, changes are made by the offeror to its proposal, and accepted by the Government, the changes are subjected to re-evaluation." 4018-25.

By October 21, 1996, Teledyne, ASTI, and Climatronics had submitted offers in response to SIR 2. 16; 2102-3175; 3176-4017; 4387. The CO gave the three offers to the SET and directed the SET members to evaluate in accordance with the evaluation plan and the criteria contained in the SIR. During the course of the SET's evaluation, the CO was briefed as to the SET's progress. The CO became concerned that the SET might not be evaluating the vendor capability criterion correctly. Specifically, the CO was concerned that the SET's description of ASTI's weakness in vendor capability was related to business size and financial risk. 4381.

During their discussions, SET members had expressed some concern about ASTI's size as related to its resources and its ability to provide adequate staffing to accomplish the LLWAS development. 15010. They were concerned about whether ASTI had the depth to support technical developments and to take care of each LLWAS function. 15057-58; 15070. One SET member recalled that the issue of financial risk was discussed as it pertained to engineering, test, production, field implementation, and ability to perform on schedule and within budget. 15175-79. A second SET member recalled that, during the SET's discussions, one SET member mentioned that if ASTI were to file for bankruptcy, the FAA would have to "start all over again." 15200; 15206. The second SET member also said that, in her view there was not a business risk of making an award to ASTI, and other SET members shared her opinion. 15208-10. One SET member explained that the business risk he perceived was that ASTI might not have the personnel or the resources to acquire the personnel to complete the contract if a problem developed, and that ASTI's financial strength was relevant only as it affected ASTI's ability to obtain resources. 15018.

The CO advised the SET to evaluate the ASTI offer strictly in accordance with the stated evaluation criteria. The CO explained that he, and not the SET, was to consider ASTI's financial strength. The CO told the SET members that they could consider ASTI's ability to acquire adequate personnel and that this ability could be related to ASTI's financial ability. 4376; 4381; 15013; 15055; 15058. SET members

followed the CO's directions. 15018; 15218 (Meador affidavit).

In late October 1996, SET members prepared individual score sheets for ASTI and Teledyne. 74-154; 297-378. The SET was not able to reach a consensus as to which offeror should be recommended for contract award because Teledyne's and ASTI's scores were fairly close and there were some unresolved questions the SET had about the Teledyne and ASTI offers. The SET decided to have discussions with Teledyne and ASTI. On October 29, 1996, the CO sent fifteen written questions to Teledyne, and on November 1, 1996, the CO sent seventeen written questions to ASTI. The CO told ASTI that the FAA was concerned about the business risk of making an award to ASTI. The CO noted that the LLWAS contract would be a sizeable portion of ASTI's projected business, and asked ASTI what its strategy was for attaining the other business that it expected to attain and how the risk to the FAA could be mitigated if that other business did not materialize. 4; 4034-37; 4148-52. The CO's question was asked on his own behalf, and not on behalf of the SET. 15153. Part of the CO's function was to ensure that award was made to a responsible contractor, and his question was related to ASTI's responsibility. 15154.

A summary of the individual score sheets for the basic requirements prepared by the SET facilitator on November 1, 1996, shows that ASTI received a weighted score of [Deleted], based upon the following factor scores:

Technical merit

Understanding [Deleted]

Completeness [Deleted]

Effectiveness [Deleted]

Worth [Deleted]

Vendor Capability

Ability portfolio [Deleted]

Past performance [Deleted]

Teledyne received a weighted score of eighty-three, based upon the following factor scores:

Technical merit

Understanding 8.1

Completeness 7.8

Effectiveness 8.2

Worth 8.4

Vendor Capability

Ability portfolio 8.5

Past performance 8.4

2; 6; 8; 4386. Teledyne's price for the basic requirements and both options was approximately 3.5 percent more than ASTI's price. 3.

Teledyne responded to the SET's questions in writing and by conference call. 4341-75; 4388. ASTI also responded to the questions in writing and by conference call. 4153-185; 4186-280; 4388. A majority of the SET members re-scored ASTI's and Teledyne's offers, using all of the information obtained in the original SIR 2 responses plus the discussion responses. 4; 4389. The SET facilitator did not consider the SIR 2 evaluations complete until the discussion responses were received and the offers were

rescored in order to take into account those responses.
15107-08; 15116.

The SET facilitator was responsible for assisting the SET in resolving differences and reaching a consensus. 15103. The SET facilitator analyzed the SET members' individual scores in order to determine what had changed as a result of the discussions with ASTI and Teledyne. The SET facilitator saw that three evaluators favored Teledyne by just a few points. Three evaluators favored Teledyne by more than just a few points, with the evaluator most in favor of Teledyne giving it an eighteen point advantage over ASTI. One evaluator favored ASTI by just a few points. The scoring of the remaining evaluator (whose office symbol is AML) diverged markedly from the scoring of the other evaluators; he favored ASTI by thirty-eight points. 4-5; 9. This evaluator initially gave ASTI technical merit scores of [Deleted] for SIR 2, and gave Teledyne scores of four and five. 115-17; 337-39. After discussions, when SIR 2 was rescored, the AML evaluator gave ASTI scores of [Deleted] and gave Teledyne scores of two and three. 58-61; 278-81. The AML evaluator is an FAA inventory management specialist and his function is to ensure that a sufficient quantity of spares is procured. 15163.

The SET facilitator believed that the AML evaluator may not have applied the same "yardstick" when he scored Teledyne and ASTI, and believed that he had an apparent bias in the way he applied the ten-point scoring scale. The SET facilitator concluded that the AML evaluator "gamed the system" with his scores. The SET facilitator decided to correct this anomaly by eliminating the AML evaluator's scores. To offset this action, he decided to eliminate the scores of the evaluator who favored Teledyne by the most points; this evaluator is the one who expressed concern during the SET's discussions that ASTI could file for bankruptcy. The SET facilitator concluded that removing these scores would present an unbiased representation of the collective consensus opinion of the SET. The SET facilitator invited the AML evaluator to present a written dissenting opinion explaining his scores, and the AML evaluator supplied copies of his individual evaluation sheets, which contained comments concerning his scores. 5; 10-12.

The SET facilitator prepared the SET's final evaluation report, dated December 5, 1996. The report states that the technical merit score for ASTI was [Deleted] and for Teledyne was 8.56. The technical merit-worth score was [Deleted] for ASTI and 8.65 for Teledyne. The ability portfolio score for ASTI was [Deleted] and for Teledyne was 8.17. The past performance score for ASTI was [Deleted] and for Teledyne was 8.60. The final weighted scores were [Deleted] for ASTI and 60.93 for Teledyne. 15, 17, 21, 23. These are the scores arrived at after discussions, after re-scoring SIR 2, and after eliminating the scores of the evaluators most in favor of ASTI and Teledyne. 13.

The SET noted a number of ASTI strengths. ASTI had a good understanding of the problems involved with LLWAS, its personnel had good recent experience with one LLWAS configuration, and it offered a low cost. The SET also noted a number of ASTI weaknesses. ASTI claimed that it had completed sixty to seventy percent of the design work for its software, but there was no documentation for that software and it had been designed without any Government input or review. There was a lack of documented and verifiable corporate past experience and a lack of adequate personnel depth in test, quality control, implementation, and administration. There was a weakness in the plan for utilizing personnel, excessive job sharing, and doubling and tripling of duties. ASTI's quality system plan was unacceptable and it referenced no quality assurance procedures at all. Its standard company policies and procedures were not complete. There was a lack of understanding of the complexities of dealing with the FAA through some phases of the contract, such as test and field implementation. The SET noted a "[p]erceived weakness" in ASTI's "corporate ability to survive and recover from disruption of cash flow or increase in work scope, should they arise." The SET's report does not state a concern about any specific ASTI financial information. 17-18, 26, 28. The SET members were aware that ASTI was a relatively new company and that most of ASTI's technical employees had been employed by Loral's LLWAS program office before going to work for ASTI. 15070-71.

The SET noted a number of Teledyne strengths. Teledyne received the highest technical score and the FAA liked Teledyne's approach to software and hardware integration. Teledyne had also received the highest vendor capability score. Teledyne had strong corporate ability with excellent in-house facilities and a large, stable, and experienced staff. Teledyne had performed well on a previous FAA contract, the runway visual range (RVR) contract. Teledyne's technical solution was to be adapted from the RVR program and Teledyne could reuse some RVR software modules, which meant that the modules and development tools were fully developed, tested, fielded, documented, and supply-supported. Teledyne was a mature, responsible corporation with policies, procedures, and support departments in place. Teledyne had a strong, complete, realistic work breakdown structure. The SET also noted some Teledyne weaknesses. The SET was concerned about whether there was a second source for some of Teledyne's proposed hardware. Also, Teledyne's price was higher than ASTI's price. 19, 29-30. The evaluators recognized that Teledyne and its personnel did not have any LLWAS experience. The consensus of the evaluators was that the work performed by Teledyne for the RVR contract was similar to the work required for the LLWAS contract. 15028-30; 15036-37; 15077-79; 15082-85; 15170; 15172.

The SET recommended award to Teledyne. The SET explained that, even though Teledyne's price was approximately [Deleted] percent higher than ASTI's price, Teledyne's final weighted score for both technical merit and vendor capability was [Deleted] percent higher than ASTI's score. The SET decided that, in exchange for the 3.5 percent higher price, Teledyne offered good past performance on the RVR program with excellent ability to reuse and to adapt RVR software modules, an excellent and documented software development process, a highly rated large manufacturing firm with deep reserves of personnel and excellent in-house facilities, a good balance of independence and planned FAA interaction, a good mix of hardware and software, and an excellent understanding of the proposed work effort. 21.

When the SET members met with the SSO to discuss the final evaluation report, they discussed in detail the dissenting

opinion of the AML evaluator and the removal of the high scores for both offerors. 5; 4389. On December 6, 1996, the SSO chose Teledyne for award. The SSO stated that Teledyne had consistent strengths without any significant weaknesses. The SSO explained that Teledyne had the highest individual and collective technical scores, and the highest scores for vendor ability and past performance. Although Teledyne's price was slightly higher than ASTI's price, the SSO decided that Teledyne presented the lowest cost risk and the highest cost realism. The SSO concluded that Teledyne offered the best value to the Government. 14. On December 17, 1996, the CO awarded the LLWAS contract to Teledyne. 4383.

Debriefing and Protest

On January 7, 1997, the FAA provided ASTI with a debriefing concerning the decision to award a contract to Teledyne. The information the FAA provided to ASTI at the debriefing was taken from the SET's final evaluation report. Among the many comments contained in the SET's report and in the FAA's debriefing notes were these: The FAA told ASTI that it perceived a weakness in ASTI's corporate ability to survive and to recover from disruption of cash flow or increase in work scope. Also, the FAA told ASTI that there was a weakness in technical merit-completeness because ASTI's software design effort was sixty to seventy percent complete and tested, yet no documentation existed. In addition, the FAA told ASTI that there was a weakness in technical merit-understanding because ASTI did not understand the complexities of dealing with the FAA throughout some phases of contract life. 4282-85.

On January 14, 1997, ASTI protested the decision of the FAA to award a contract to Teledyne. 4291-97.

After ASTI filed the protest, the FAA responded to some written questions that ASTI sent to the FAA the day after the debriefing. ASTI asked whether the experience of its personnel was rated as inferior to that of Teledyne's personnel. The FAA responded that ASTI's personnel were not

rated as inferior. Compared with Teledyne, however, ASTI had little corporate experience. ASTI asked whether an offeror's size was an evaluation factor. The FAA responded that capability, not size, was an evaluation factor and that the SET decided that ASTI's ability portfolio was lacking, especially in depth of personnel. ASTI asked why the FAA determined that ASTI did not have experience with FAA procedures. The FAA explained why it thought that ASTI's installation plan was too generalized. In the FAA's view, ASTI expected the FAA to define site installation requirements. Also, the FAA noted that ASTI's plan was to install equipment during regular day working hours. The FAA explained that, because airport usage is highest during daylight hours, ASTI's plan showed a lack of appreciation for airport procedures and air traffic management. ASTI asked why the FAA commented that ASTI seemed to operate in a "constant fire drill mode." The FAA responded that ASTI's SIR 2 response led the FAA to conclude that there were too few personnel assigned to some areas, with the same people receiving multiple assignments and an ad hoc reassignment of people to new tasks as they arose. 4286-90; 4298-307.

Conclusions of Law

According to the FAA's Acquisition Management System (AMS), the decision to choose Teledyne for award is required to have a rational basis. AMS 3.2.2.3.1.2.5.

ASTI's January 14, 1997 protest states three bases for relief, and these were referred by the FAA's Office of Dispute Resolution to the Special Master. On July 3, 1997, ASTI informed the FAA by letter:

Please be advised that [ASTI] intends to address the scoring methodology the FAA employed as an additional sub-issue of its third protest issue, arbitrary and capricious action.

Although this letter does not explain what ASTI intended to add to its protest, ASTI's July 7, 1997 statement of position makes it clear that ASTI is protesting the decision to rescore the SIR 2 responses and the decision to remove the high scores for both offerors.

ASTI's January 14 protest did not contain any suggestion that ASTI objected to the FAA's scoring methods. Because ASTI did not amend its protest to include any new "sub-issue" concerning scoring methods and because an amendment could have been rejected as having been filed late, the Special Master asked the Office of Dispute Resolution whether it was appropriate to address the scoring method issues raised by ASTI in its statement of position. The Office of Dispute Resolution decided that it was appropriate for the Special Master to address the scoring method issues because the FAA anticipated that ASTI would make an argument concerning scoring methods and the FAA addressed the scoring methods issues in its statement of position. ASTI's allegations concerning the FAA's scoring methods are discussed below as part of ASTI's third basis of protest.

First basis of protest

ASTI alleged that the FAA erred by evaluating ASTI's SIR 1 and SIR 2 responses separately, and by giving its SIR 1 response no weight. ASTI said that its response to SIR 2 contained only information that changed after its SIR 1 submittal, and so the FAA should have considered ASTI's response to SIR 2 in combination with its response to SIR 1. ASTI said that it received no credit for the information it submitted in response to SIR 1.

ASTI did not put forward any proposed findings of fact to support this basis of protest, and ASTI did not make any argument related to this basis of protest. This basis of protest is denied for lack of proof.

Second basis of protest

The second basis for ASTI's protest was that the FAA evaluated ASTI's response to SIR 2 using criteria not identified in SIR 2. Using unstated evaluation criteria would violate sections 3.2.2.2, 3.2.2.3.1.2.3, 3.2.2.3.1.2.5, and 3.2.2.3.1.3 of the AMS. In its January 14 protest, ASTI asserted that the FAA used two unstated evaluation criteria.

The first of the unidentified evaluation criteria concerned software development. ASTI alleged that the FAA downgraded ASTI's proposal because its software was so highly developed. ASTI did not put forward any proposed findings of fact to support this ground of protest, and ASTI did not make any argument related to this ground of protest. This ground of protest is denied for lack of proof.

The second of the unidentified evaluation criteria was size. According to ASTI, the FAA downgraded ASTI because it lacked "deep pockets" and could not recover from a cash flow deficit. ASTI alleged that this amounted to using size as an evaluation criterion. In its statement of position, ASTI argues that the SET had no rational basis for downgrading ASTI's SIR 2 response either based upon the possibility that ASTI might file for bankruptcy, or based upon the SET's perception of a weakness in corporate ability to survive a disruption in cash flow or an increase in the scope of work. ASTI says that nothing it submitted to the FAA indicated that ASTI was likely to fail financially. ASTI asserts that its vendor capability score was lower than it should have been, due to the SET's consideration of unstated evaluation criteria concerning ASTI's financial health.

In evaluating vendor capability, the SET members looked at the ability portfolio factor. This factor required the

evaluators to take into account whether a vendor had adequate resources to perform all engineering, test, production, and field implementation phases of the contract; and access to an adequate, stable, experienced, and motivated work force with a full range of expertise.

When the SET evaluators reviewed ASTI's response to SIR 1, they noted that ASTI is a small, new company and would have to grow quickly in order to perform all of the work required by the LLWAS contract. The SET also noted that half of the people proposed by ASTI were not currently under contract, that little depth and breadth of personnel were available, and that ASTI did not have the staff of production, test, logistics, field support, administrative, and other specialty personnel that it needed to perform the contract.

When the SET evaluators reviewed ASTI's response to SIR 2, some SET members were concerned about ASTI's size as it related to ASTI's resources and its ability to provide adequate staffing for LLWAS. The evaluators noted that ASTI's plan for utilizing personnel called for excessive job sharing and doubling and tripling of job duties. They were concerned about whether ASTI had the depth to support technical developments and to take care of all LLWAS functions. The issue of financial risk was discussed as it pertained to engineering, test, production, field implementation, and the ability to perform on schedule and within budget. One SET member mentioned that the FAA would have to begin the LLWAS procurement process again if ASTI were to file for bankruptcy; the SET facilitator later discarded this SET member's scores. Another SET member said that she did not believe that there was a business risk in making an award to ASTI and she believed that other SET members shared her opinion. One SET member stated that ASTI's financial strength was relevant only as it affected ASTI's ability to obtain resources to acquire personnel.

The CO told the SET to evaluate strictly in accordance with the stated evaluation criteria and explained that he would consider ASTI's financial strength. It was appropriate for

the CO to consider financial strength because the AMS required the CO to award a contract to a vendor which had adequate resources (financial, technical, etc.) to perform the contract, or which had the ability to obtain those resources. AMS 3.2.2.2. The SET members followed the CO's direction.

ASTI has not established that the FAA used size or financial strength as an unstated evaluation criterion. The stated evaluation criteria permitted the SET evaluators to consider whether ASTI had adequate resources to perform the LLWAS contract and whether it had access to an adequate, stable work force with a full range of expertise. The evidence establishes that, to the extent that the SET evaluators considered ASTI's size or its financial capabilities, the evaluators were concerned with the stated evaluation criteria. The evaluators were concerned about whether ASTI could adequately staff the contract and with the depth of ASTI's personnel resources. Not all of the evaluators believed that there was any business risk in making an award to ASTI and the scores of the one SET member who was concerned with the possibility that ASTI might declare bankruptcy were discarded by the SET facilitator. The CO told the SET not to consider financial strength and the SET members followed that direction. ASTI did not demonstrate that any evaluator lowered his or her scores due to the evaluator taking into account ASTI's financial strength. This ground of protest is denied.

Third basis of protest

The third basis for ASTI's protest is that the FAA made seven arbitrary and capricious decisions. ASTI's argument concerning the FAA's scoring methods is addressed as the seventh of these decisions.

The first and second decisions

ASTI presents no facts or argument concerning two of the allegedly arbitrary and capricious decisions -- the FAA gave ASTI no credit for a contract it performed after it submitted its response to SIR 2, and the FAA refused to allow ASTI to demonstrate its hardware and software -- and so those two grounds of protest are denied for lack of proof.

The third decision

ASTI alleges that the FAA arbitrarily and capriciously decided to use unstated evaluation criteria, as detailed in ASTI's second basis of protest. The FAA did not use unstated evaluation criteria, as explained above, and so its actions were neither arbitrary nor capricious in this regard. This ground of protest is denied.

The fourth decision

ASTI alleges that its price was substantially lower than Teledyne's price and so it was arbitrary and capricious for the FAA to select Teledyne for award. In both SIR 1 and SIR 2, the FAA explained that it would select the vendor that offered the best value to the Government. The AMS defines "best value" as follows:

Best value is the solution that is the most advantageous to the FAA, based on the evaluation of price and other factors specified by the FAA. This approach provides the opportunity for trade offs between price and other specified factors, and does not require that an award be made to either the offeror submitting the highest rated technical solution, or to the offeror submitting the lowest cost/price, although the ultimate award decision may be made to either of these offerors.

610-11.

Although Teledyne's price was approximately 3.5 percent higher than ASTI's price, the SET and the SSO decided that Teledyne offered offsetting advantages. ASTI does not offer any facts or argument to establish that the advantages identified by the SET and the SSO failed to offset Teledyne's slightly higher price. Even though ASTI's price was somewhat lower than Teledyne's price, ASTI has not established that it was either arbitrary or capricious for the FAA to select Teledyne for award. This ground of protest is denied.

The fifth decision

ASTI alleges that the FAA's decision to downgrade ASTI for having incomplete software documentation was arbitrary and capricious because Teledyne had no software documentation and because ASTI had more COTS software than did Teledyne. ASTI offers no facts to establish either that Teledyne lacked software documentation or that ASTI had more COTS software than did Teledyne. ASTI is correct that the FAA downgraded ASTI for having incomplete software documentation. At the debriefing, the FAA told ASTI that there was a weakness in ASTI's technical merit-completeness factor because ASTI's software design effort was sixty to seventy percent complete and tested, yet no software documentation existed. ASTI says that the FAA's conclusion to downgrade ASTI for its lack of documentation was arbitrary and capricious because it contradicts the FAA's previous statement that it found ASTI's response to SIR 1 to be strong in software design which was well tailored and matched to the LLWAS sustainment need.

The FAA's statement after it reviewed ASTI's SIR 1 response is not contrary to the FAA's decision to downgrade ASTI for its lack of software documentation. After the FAA reviewed ASTI's SIR 1 response, the FAA said that ASTI's software design was strong and well tailored; the FAA did not say

anything about ASTI's software documentation. When the FAA reviewed ASTI's SIR 2 response, it became apparent that ASTI lacked documentation to support its software, and this is why the FAA downgraded ASTI. The FAA's decision to downgrade ASTI for lacking documentation to support its software was neither arbitrary nor capricious. This ground of protest is denied.

The sixth decision

ASTI alleges that the FAA was arbitrary and capricious for giving Teledyne more points for prior experience, even though ASTI's employees possessed vast LLWAS experience and Teledyne's employees had no LLWAS experience. ASTI also alleges that Teledyne had no LLWAS experience.

When the SET evaluators considered the past performance factor, they looked to see whether the offeror had adequate personnel experience and adequate corporate experience in providing similar equipment and a satisfactory performance record for similar or related work. For SIR 2, the SET awarded Teledyne one more point than ASTI for the past performance factor.

After reviewing ASTI's response to SIR 1, the evaluators noted that ASTI's personnel had LLWAS experience, but not all of the personnel proposed by ASTI were under contract to ASTI. The evaluators also noted that ASTI was a new company. After reviewing ASTI's response to SIR 2, the evaluators noted that ASTI's personnel had good recent experience with one LLWAS configuration. The evaluators also noted that there was a lack of documented and verifiable corporate experience. ASTI's quality system plan was unacceptable, and it had no quality assurance procedures at all. Its standard company policies and procedures were not complete.

In contrast to ASTI, Teledyne had strong corporate ability with excellent in-house facilities and a large, stable, and

experienced staff. Teledyne had performed well on the RVR contract. Teledyne was a mature, responsible corporation with policies, procedures, and support departments in place. The evaluators realized that Teledyne and its personnel did not have LLWAS experience. The consensus of the evaluators, however, was that Teledyne's RVR experience was similar to the work that would be required for the LLWAS contract.

The FAA did not write the past performance factor so that only vendors with LLWAS experience were eligible to compete for award, and it did not write the factor so that only the experience of a vendor's personnel would be considered by the evaluators. Instead, the FAA wrote the past performance factor in order to examine corporate experience as well as personnel experience in performing contracts similar to the LLWAS contract. The FAA, for the reasons explained by the SET in its reports, found that ASTI's corporate experience was not as strong as Teledyne's corporate experience. Awarding Teledyne one more point than ASTI for past performance was neither arbitrary nor capricious, given the difference in the corporate experience of the vendors. This ground of protest is denied.

The seventh decision

ASTI says that the FAA acted in an arbitrary and capricious manner because the SET rescored SIR 2 responses in contravention of the terms of the revised proposal evaluation plan. In addition, ASTI says that the FAA's decision to remove scores which widened the gap between Teledyne and ASTI was arbitrary and capricious and contravened the AMS, the evaluation plan, and SIR 2.

Rescoring the proposals after discussions did not violate the revised evaluation plan. This conclusion is supported by the language of the plan itself, by SIR 2, and by the AMS. The revised evaluation plan said that if a vendor made changes to its offer as the result of discussions, the FAA

would reevaluate the offer, but the plan did not say that this was the only circumstance in which the FAA could reevaluate an offer. SIR 2 said that the FAA would evaluate responses to SIR 2 and any discussions in order to measure the three evaluation criteria. The SIR provision is consistent with the AMS, which specifically permits the FAA to utilize information obtained from discussions in the evaluation of an offer. AMS 3.2.2.3.1.2.2; 3.2.2.3.1.2.3. There is no reason to read the revised evaluation plan to say that the FAA could evaluate responses to discussions only if discussions caused a vendor to change its proposal, because this is not what the plan says and because this would read the plan as being inconsistent with SIR 2 and as limiting the FAA in a way not required by the AMS. This ground of protest is denied.

Removing the scores of two evaluators did not contravene either the AMS, the evaluation plan, or SIR 2. When the SET facilitator reviewed the individual evaluators' scores, he discovered that the scores of one evaluator were grossly out of line with the scores of all of the other evaluators. The SET facilitator believed that the evaluator had an apparent bias in the way he applied the ten-point scoring scale and that he "gamed the system" by giving ASTI perfect scores and by giving Teledyne low scores. Neither the AMS nor SIR 2 told the SET facilitator what to do in these circumstances. The evaluation plan said that the SET was expected to use sound judgment in order to meet unique and unexpected situations, and the circumstances that arose were both unique and unexpected. The SET facilitator decided to discard the aberrant scores of the one evaluator who was most in favor of ASTI, to offset this action by eliminating the scores of the evaluator who was most in favor of Teledyne, and to invite the evaluator who heavily favored ASTI to present his views in writing. The SET facilitator's actions were fully disclosed to the SSO by the SET. The SET facilitator took the actions that he did in order to present an unbiased representation of the collective consensus opinion of the SET to the SSO. The SET facilitator's actions were reasonable, and did not conflict with the AMS, the evaluation plan, or SIR 2. This ground of protest is denied.

Several Miscellaneous Matters

In its statement of position, ASTI raises four miscellaneous matters as part of its proposed findings of fact. ASTI does not develop any of these facts in the legal discussion portion of its statement of position and none of these facts, discussed below, provides a basis for ASTI's protest.

First, ASTI alleges in its proposed finding of fact 25 that the members of the SET could choose which areas of the offers they wished to evaluate and that there was no written standard for the evaluators' qualifications. ASTI does not explain how these facts made any difference in the outcome of the procurement. ASTI does not show that any evaluator lacked the qualifications to evaluate offers or that any evaluator's choice of areas to evaluate was inappropriate.

Second, ASTI alleges in its proposed findings of fact 12 and 39 that the FAA reached a conclusion after reviewing ASTI's response to SIR 2 that was contrary to a conclusion the FAA reached after reviewing ASTI's response to SIR 1. At the debriefing, the FAA stated that it downgraded ASTI for technical merit-understanding because ASTI did not understand the complexities of dealing with the FAA throughout some phases of the contract. After the debriefing, in response to ASTI's questions, the FAA supported its debriefing statement by giving ASTI two examples related to ASTI's plan to install the LLWAS upgrade. ASTI says that the FAA's debriefing statement is contrary to the comment the FAA made after reviewing ASTI's response to SIR 1, that ASTI's response demonstrated a deep understanding of the FAA requirements with both theoretical and practical knowledge of LLWAS. The FAA's comments are not contradictory. Having knowledge of LLWAS is not the same as having knowledge of how to work with the FAA to perform the contract.

Third, ASTI alleges in its proposed finding of fact 41 that the FAA downgraded ASTI for technical merit-worth because its radio had not yet been certified by the Federal Communications Commission. ASTI says that its score should have been downgraded no more than Teledyne's score, because Teledyne's radio had not been certified. ASTI's score for technical merit-worth was [Deleted]points less than Teledyne's score, and Teledyne did not receive a perfect score. ASTI does not establish how much either its score or Teledyne's score was lowered due to the lack of certification. ASTI did not establish that the manner in which the FAA treated ASTI was any different from the manner in which the FAA treated Teledyne.

Fourth, ASTI alleges in its proposed findings of fact 44 and 45 that Teledyne did not meet all of the requirements of SIR 2. ASTI says that the FAA told Teledyne that the ability to disable archiving was not acceptable and Teledyne responded that archiving could not be disabled. ASTI's proposed facts do not establish that Teledyne failed to meet a SIR 2 requirement. In fact, based upon the facts as proposed by ASTI, Teledyne's response appears to satisfy the FAA's concern.

Summary

The FAA pointed out several times during the course of this protest that both ASTI and Teledyne presented very good offers, but only one company could win the award. The FAA identified differences between the ASTI and Teledyne offers and decided to award a contract to Teledyne. ASTI has not established that the FAA's decision lacks a rational basis.

Recommendation

For the reasons set forth above, I recommend that the Administrator deny the protest.

_____/s/_____

MARTHA H. DeGRAFF

Board Judge