

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

Protest of)
)
Columbus Technologies and Services, Inc.) Docket No. 10-ODRA-00514
)
Pursuant to Solicitation DTFACT-09-R-00023)

DECISION ON REQUEST FOR RECONSIDERATION

I. INTRODUCTION

This matter currently is before the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on a Request for Reconsideration (“Reconsideration Request”) filed by the Intervenor, Advanced Science and Technologies, Inc. (“AS&T”) on June 2, 2010. The Reconsideration Request arises from a final agency Order (“Final Order”) issued on May 19, 2010 in this Protest. The Final Order, which adopted and incorporated the ODRA’s Findings and Recommendations (“F&R”), sustained the Protest in part. Specifically, the ODRA F&R recommended that Columbus’ Protest be sustained in part based on: (1) the Center’s deviation from the stated evaluation criteria in evaluating Corporate Experience/Past Performance; and (2) communications regarding technical aspects of AS&T’s proposal in a manner contrary to the AMS and the SIR. *See Protest of Columbus Technologies and Services, Inc.*, 09-ODRA-00514.

In the Reconsideration Request, AS&T asserts that the F&R demonstrated two clear errors of fact or law, in that: (1) the ODRA did not recognize that a change in the overtime pricing method by the Center established a rational basis for requesting technical revisions; and (2) the ODRA’s determination that the Center’s technical discussions were not permitted because “AS&T’s technical proposal was not unclear, unsubstantiated, or deficient, is not supported by and is contrary to applicable precedent.” *Reconsideration*

Request at 1-2. AS&T requests that the ODRA reconsider its F&R and “reverse that portion of the F&R that determined that the Center was not permitted to engage in technical discussion or accept a substituted personnel resume and directs the reinstatement of scores for Factor 3 as were determined prior to final offers.” *Id.* For the reasons discussed herein, the ODRA denies the Reconsideration Request and will not recommend that the Administrator reconsider the Final Order.

II. FACTUAL BACKGROUND

Detailed findings relevant to the Reconsideration Request at issue here are fully set forth in the F&R, and are incorporated herein. *See F&R, Finding of Fact Numbers (“FF”) 1 through 56 at 2-24.* The parties’ positions in the underlying Protest and the ODRA’s analysis also are set forth in detail under Sections B and C of the F&R. *Id.* at 25-37. Familiarity with the F&R is presumed.

In the portion of the F&R relevant to the present Reconsideration Request, the ODRA found that the Center had no rational basis consistent with the Technical Evaluation Plan (“TEP”) to allow offerors to address the technical evaluation results.¹ *F&R* at 35. Noting that the Center had not identified any aspect of AS&T’s technical proposal to be unclear, unsubstantiated or deficient as required by the TEP (*see FF 24*), the ODRA found the Center’s communications in this case had allowed AS&T an unjustified opportunity to substitute key personnel to increase its technical rating for Factor 3; thereby giving it an unfair competitive advantage. *F&R* at 38. The remedy recommended by the ODRA, and incorporated in the Final Order, included the following corrective actions: (1)

¹ Although not material to the present Decision, the F&R also describes how the Center improperly gave consideration and weight in the Post Negotiation Memorandum to indirect references in AS&T’s proposal to the corporate experience and past performance of another company, known as Atlantic Sciences and Technology (“Atlantic”). The ODRA found that the Center failed to distinguish AS&T as a separate entity from Atlantic for purposes of the technical evaluation, and as a result, improperly credited AS&T in its evaluation with the corporate experience and past performance of Atlantic. *F&R* at 28. The ODRA further found that contrary to the SIR, the Center relied upon the experience of “key players” who had worked for both Atlantic and AS&T as partial justification for the award. *Id.* at 30. The ODRA stated that, based on the existing record, it could not determine how this factor would have been rated if the Center had based its evaluation solely on the contracts identified in AS&T’s proposal, without any consideration of Atlantic and its “key players.” *Id.* at 30-31. These matters, provided here for background only, are not at issue in AS&T’s Request for Reconsideration.

reinstatement of the results of the original technical evaluation for AS&T for Factors 1, 3 and 4, and reevaluation of Factor 2, Corporate Experience/Past Performance, in strict accordance with the stated evaluation criteria, without considering the experience of Atlantic or its principals; (2) preparation of a New Post Negotiation Memorandum incorporating the results of the reevaluation of AS&T's technical proposal; (3) direction to perform a new cost/technical tradeoff analysis with respect to AS&T and Columbus only, which takes into account the revised pricing submitted by AS&T and Columbus in response to the November 5, 2009 letter; and (4) direction to make an award recommendation based on the information contained in the New Post Negotiation Memorandum. *Id.* at 39.

III. DISCUSSION

A. The Standard of Review

The standard of review employed by the ODRA where parties seek reconsideration is well established. *See Protest of Maximus, Inc.*, 04-TSA-009, *Decision Denying Motion for Reconsideration*, dated November 29, 2004; *Protest of Raytheon Technical Services Company*, ODRA Docket No. 02-ODRA-00210, *Findings and Recommendations on Motion on Protester's Request for Reconsideration*, dated April 10, 2002; *Protest of Consecutive Weather*, 99-ODRA-00112, *Recommendation Regarding Reconsideration Request* dated July 13, 1999; *Consolidated Protests of Camber Corporation and Information Systems and Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080, *Decision on Motion for Reconsideration*, dated July 23, 1999. Specifically, to prevail on reconsideration, the requesting party must demonstrate: (1) clear errors of fact or law in the underlying F&R; or (2) previously unavailable information that would warrant reversal or modification. *Protest of HyperNet Solutions, Inc.*, 07-ODRA-00416.²

² “Specifically, the moving party must show: (1) the occurrence of an intervening change in the controlling law; (2) the availability of previously unavailable evidence; or (3) the necessity of allowing the motion to prevent manifest injustice.” *Matthews v. United States*, 73 Fed.Cl. 524, 526 (2006) (citing *Griswold v. United States*, 61 Fed.Cl. 458, 460-61 (2004)). A request for consideration must identify “the errors of law or fact on which the previous order was based.” *Obasohan v. United States AG*, 479 F.3d 785 (2007) (quoting *Assa'ad v. United States AG*, 332 F.3d 1321, 1341 (11th Cir. 2003)). A mistake of law is further

Consistent with its charge to implement an efficient dispute resolution process, the ODRA “will not entertain [reconsideration] requests as a routine matter,” and will not “consider [reconsideration] requests that demonstrate mere disagreement with a decision or simply restate a previous argument” raised during the prior protest litigation. *Id.* Consequently, attempts to either re-litigate previously adjudicated issues, or introduce new legal arguments based on the original administrative record do not provide a basis for reconsideration. *See Protest of Raytheon Technical Services Company*, 02-ODRA-00210, *Findings and Recommendations on Request for Consideration of the Merits and for Clarification* dated April 22, 2002.

B. The Center Lacked a Rational Basis to Conduct Communications Regarding Technical Factors

The F&R explained that communications are used to ensure mutual understandings between the Product Team and the offeror, but must be conducted so that they do not afford any offeror an unfair competitive advantage, and further, must be consistent with AMS principles that promote sound business judgment, fairness and integrity. *F&R* at 31-32. The F&R upheld the Center’s decision to communicate equally with the remaining offerors in order to obtain standardized price proposals that would enable fair comparisons of the cost proposals vis-à-vis overtime and travel. *See id.* at 32-35. The ODRA also found, however, that “[t]he record in this case does not support the Center’s position that it had a rational basis to conduct communications with AS&T regarding the technical factors.” *Id.* at 37. The Reconsideration Request’s challenges to this second conclusion are discussed below.

1. Standardizing the Price Formats in Section B Did Not Justify Opening Technical Discussions

AS&T argues in its first asserted error that changing the price spreadsheet used for Section B of the Solicitation justified opening discussions regarding the technical proposals. *See*

defined as “an abuse of discretion.” *Id.* (quoting *United States v. Hoffer*, 129 F.3d 1196, 1200 (11th Cir. 1997)).

Reconsideration Request at 12. The undisputed Findings of Fact show that various offerors treated overtime inconsistently. *See FF* 36. To correct this problem, the Center requested AS&T to “resubmit your price proposal using the corrected Schedule B.” *FF* 39. According to the letters sent to offerors, “The Schedule B included in the SIR did not perform calculations for travel, overtime, etc. The attached spreadsheets include a fixed amount (\$25,000) for travel and formatted cells to determine your proposed overtime.” *Id.* AS&T does not challenge these factual findings based on previously unavailable information. Instead, AS&T argues as its first alleged error that the ODRA failed to recognize that the “change in the pricing method established by the Center and its request for final offers established a rational basis for and required allowing technical revision.” *Reconsideration Request* at 12. AS&T argues that “given that the Center requested final offers and also changed certain aspects of pricing, it was rational to permit any revisions to the technical proposal since bidders might choose to make revisions based upon the changed pricing approach.” *Id.* at 14.

AS&T relies on a case from the General Accountability Office (“GAO”), *Serv-Air, Inc.*, B-258243, Mar. 3, 1995, 95-1 CPD ¶ 125, to establish that changes can be made to any part of a proposal; not just the portion under scrutiny. *Reconsideration Request* at 14. While the FAA is not bound by the decisions of the GAO, the ODRA has held that such decisions may be viewed as persuasive authority insofar as the principles and rules announced in such cases are consistent with the AMS. *See Protest of International Services, Inc.*, 02-ODRA-00224. While the GAO in *Serv-Air, Inc.* states that, in response to discussions, offerors may be permitted to revise aspects of their proposals that were not the subject of discussions, the *Serv-Air, Inc.* Decision held that discussions and proposal revisions were *properly restricted* given concerns regarding the possibility of technical leveling. Specifically, the *Serv-Air, Inc.* Decision finds the restriction of offeror submissions appropriate in part because the subject of the discussions had no bearing on the technical evaluation, or the agency’s assessment of the relative merits of the technical proposals. *Serv-Air, Inc.*, *supra*, citing *American Nucleonics Corp.*, B-193546, Mar. 22, 1979, 79-1 CPD ¶ 197.

AS&T's Reconsideration Request presents no basis for concluding that the ODRA's determination on this issue constituted legal error. Under the circumstances of the instant case, the ODRA found that the Center lacked a rational basis in allowing AS&T to revise its proposal to address non-price-related evaluation results. *F&R* at 35. The record shows that the SIR instructed offerors to prepare their initial offers with the understanding that award may be made without discussions. *FF* 13. The record also shows that there was no aspect of AS&T's proposal that was deficient or in need of clarification or substantiation, as stated under the TEP, and that the Center's rationale for conducting communications, *i.e.*, the lack of a clear winner, was unsupported. *F&R* 34-35; *FFs* 34, 35 and 37. The record further shows that the Center's request for final offers was in the context of resubmitting revised pricing spreadsheets and constituted a discrete correction by the Center which merely was enacted to address an issue of standardization within the SIR requirements regarding pricing. *FF* 39. Moreover, the offerors were asked to resubmit pricing using the corrected Schedule B in the interest of fair and equal treatment of all proposals. *F&R* at 31-32.

Under the circumstances, allowing offerors to make unfettered revisions to their technical proposals ran counter to the AMS principles that state that the purpose of communications is "to ensure there are mutual understandings between the FAA and the offerors" and that "the CO should ensure that such communications do not afford any offeror an unfair competitive advantage." AMS § 3.2.2.3.1.2.2; *See also Columbus Response* at 6. Moreover, communications are defined under the AMS as involving "information essential for understanding and evaluating an offeror's submittal(s) and/or determining the acceptability of an offeror's submittal(s)."

AS&T's position therefore is unsupported by new evidence, and fails to show a clear error of law or fact. Indeed, the record contains no support for the proposition that the need to reformat Schedule B using spreadsheets somehow justifies an invitation to revise AS&T's technical proposal for a key position. AS&T's argument on this point constitutes mere disagreement with the *F&R* and the restatement of a previous argument. As such, The

Reconsideration Request does not provide a basis for the ODRA to recommend that the Administrator reconsider his Order under AS&T's first alleged error.

2. The F&R is Consistent with the AMS and Precedent

AS&T's second assertion of error seeks reconsideration of the ODRA conclusion that AS&T's substitution of a Key Personnel resume was not appropriate under the AMS and SIR requirements. AS&T argues that the ODRA's decision establishes the precedent that a proposal must be in some way "unclear, unsubstantiated, or deficient in order to permit technical discussion." *Reconsideration Request* at 16-17. AS&T claims that this runs contrary to established case law in *Consolidated Protests of Consecutive Weather, Eye Weather, Windsor Enterprises, and IBEX Group, Inc.*, 02-ODRA-00250, 0251, 252, and 264, and serves to limit discussions to those offerors who submit deficient proposals or who are "outside the competitive or satisfactory or acceptable range." *Id.*

AS&T further argues that the ODRA's determination that a definitional "weakness" under the SIR does not meet the standard for technical discussions under the TEP and eliminates the Center's ability to have meaningful discussions regarding proposals. *Id.* at 17-19. AS&T then concludes that ODRA has created a standard where technical discussion is unavailable to those offerors who are most likely to be awarded contracts, as any technical discussion henceforth would necessarily be restricted to those between the agency and offerors who submit deficient or unacceptable proposals. *Id.* at 20. Alternatively, in its Reply to the Columbus Response ("Reply"), AS&T asserts that the Key Personnel resume weakness is of such a significant nature as to impact its scoring, thereby warranting discussion. *Reply* at 6.

As AS&T necessarily acknowledges in its Request, "[an] agency must have a rational basis in the conduct of communications...." *Reconsideration Request* at 18 (quoting *Protest of IBEX Group, Inc.* 03-ODRA-00275) (emphasis added in Request). Furthermore, as the ODRA further emphasized in the F&R, communications are not for the purpose of

allowing substantial supplementation that is unfairly prejudicial to other offerors.³ *F&R* at 36 (citing *Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490 *et. al.*). Here, AS&T knew of the SIR requirements and had ample opportunity to submit a Key Personnel resume with its initial proposal that would warrant a score of Excellent. AS&T simply chose to submit a resume deserving a score of Good under the TEP and SIR requirements. *F&R* at 13. In fact, there was no area of AS&T’s proposal that was deficient, or in need of clarification or substantiation under the TEP. The ODRA made it clear under the facts of this case that the Center’s discussion with AS&T was unjustified and effectively conferred an improper competitive advantage to AS&T in a manner not congruent with the AMS or SIR requirements. *Id.* at 38. To afford AS&T another chance to select and submit an improved resume constituted an unfair “second bite at the apple.” *Id.* at 36. Accordingly, AS&T’s claim of an error of law regarding this issue is without merit.⁴

IV. CONCLUSION

For the reasons stated herein, the ODRA denies the Reconsideration Request and will not recommend that the Administrator reconsider the Final Order in this case.

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³ AS&T maintains that the ODRA effectively substituted its judgment for that of the agency by including dicta in a footnote in which the ODRA suggests other mechanisms by which to improve proposals (which would have permitted technical revisions). *Reconsideration Request* at 15. The footnote, which indicates that there is nothing wrong with the FAA’s goal of seeking to improve proposals, must be read in the context of the facts of the decision, which determined that the manner in which the FAA sought to improve proposals in this case was unfairly prejudicial. *See Combat Sys’s Dev. Assocs. Joint Venture*, B-255920 (1995) (dicta does not provide a proper basis for requesting reconsideration).

⁴ AS&T further contends that the ODRA decision is counter to existing law and the principle of meaningful discussion. *Reconsideration Request* at 18. Recognizing no rational basis supported the decision to open communications regarding the technical proposals, arguments pertaining to “meaningful discussions” are irrelevant.