

**PUBLIC VERSION**

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

**FINDINGS AND RECOMMENDATIONS**

**Matter:** **Protest of Patriot Taxiway Industries, Inc.**  
**Under Solicitation No. DTFAWA-17-R-0037**

**Docket No.:** **18-ODRA-00832**

*Appearances:*

For the Protester: Jon W. van Horne, Esq.,  
For the FAA Program Office: Jessica E. Jones, Esq.  
For the Intervener: Donald Walsh, Esq.  
of Wright, Constable & Skeen, LLLP

Patriot Taxiway Industries, Inc. (“Patriot”) filed a protest on March 30, 2018 (“Initial Protest”) with the Federal Aviation Administration’s (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”). The Protest challenged an FAA Headquarters’ Product Team (“Product Team”) decision to eliminate Patriot from consideration for award under solicitation number DTAAWA-17-R-0037 (“Solicitation” or “SIR”) for a Remote Radio Control System (“RRCS”). *Initial Protest* at 2. Among other things, Patriot questioned its elimination from award consideration based on its “Marginal” rating for the most significant evaluation factor, i.e., the Operations Capabilities Test (“OCT”). *Initial Protest* at 1. As a remedy, Patriot requested that its proposal be considered for award. *Initial Protest* at 2. The awardee, All Weather, Inc. (“AWI”), timely intervened in the Initial Protest.

After the Product Team’s voluntary production of unredacted documents on April 10, 2018, Patriot filed a Supplemental Protest on April 19, 2018, in which it objected to “the evaluation of its labor rates” and “the evaluation of its proposal as arbitrary and not based on the criteria of the solicitation.” *Supplemental Protest* at 2.

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The ODRA commenced the adjudication on May 7, 2018. The FAA Product Team filed its Agency Response to the Initial Protest and Supplemental Protest on May 21, 2018, and the Protester and Intervener filed their Comments on May 29, 2018. In its Comments, Patriot withdrew “its Supplemental Protest submitted on April 29 [sic], 2018.” *Patriot Comments* at 1.

Patriot’s Comments included a second supplemental protest (“Second Supplemental Protest”) based on documents submitted with the Agency Response. *Second Supplemental Protest* at 1. The Product Team filed a Supplemental Agency Response on June 12, 2018, and AWI and Patriot filed Supplemental Comments on June 18, 2018 and June 19, 2018, respectively.

The ODRA recommends that Patriot’s Initial and Second Supplemental Protests be denied for the reasons set forth below. The Supplemental Protest should be dismissed.

### **I. STANDARD OF REVIEW**

The ODRA Procedural Rules provide that protests which are not timely filed within the timeframes set forth in 14 CFR § 17.15(a) shall be dismissed. *Protest of Water & Energy Systems Technology, Inc.*, 06-ODRA-00373. With respect to a timely filed protest, the protester bears the burden of proof and must demonstrate by substantial evidence (i.e., by the preponderance of the evidence) that the challenged actions of the Product Team failed in a prejudicial manner to comply with the Acquisition Management System (“AMS”). *Protest of Science Applications International Corporation*, 17-ODRA-00813. In accordance with the Administrative Procedures Act, 5 U.S.C. §§ 554 and 556, which applies to ODRA adjudications, the term “substantial evidence” means that the ODRA considers whether the preponderance of the evidence demonstrates that the challenged decision has a rational basis and is not arbitrary, capricious, or an abuse of discretion, and is consistent with the AMS. 14 C.F.R. § 17.19(m) (2017); *Protest of Hughey & Phillips, LLC*, 17-ODRA-00789. Additionally, a protester must demonstrate prejudice, i.e., but for the improper actions of the Product Team, it would have had a substantial chance of receiving the award. *Protest of Optical Scientific Inc.*, 06-ODRA-00365; *Protest of En Route Computer Solutions*, 02-ODRA-00220.

## **II. PARTIES' POSITIONS**

### **A. Patriot**

Patriot's Initial Protest challenged its elimination from the competition, contending that its test scores should have been "Outstanding," "given what Patriot personnel observed during the stages of the OCT held in June 2017, for which Patriot personnel were present." *Initial Protest* at 1. The Initial Protest also asserted that the Product Team provided no explanation for Patriot's OCT rating or "why the evaluation of the OCT results required nine months" to complete. *Id.* at 1-2.

Patriot's Second Supplemental Protest alleges that "[d]ocuments provided in the Administrative Record, combined with other oddities of the subject procurement demonstrate that the Product Team had a preferred solution and the conduct of the procurement, intentionally or not, resulted in the selection of that solution" to Patriot's detriment. *Second Supplemental Protest* at 2. As such, Patriot was subject to "significant bid and proposal costs without a reasonable expectation of an equitable evaluation." *Id.*

The Second Supplemental Protest modified Patriot's initial grounds of protest and the requested remedy. *Second Supplemental Protest* at 5. Specifically, Patriot no longer challenges "its elimination from consideration" nor does it seek "any other remedy aimed at overturning the outcome of the procurement." *Id.* Patriot's modified request for a remedy only seeks to recover bid and proposal costs, to include specifically "the preparation of a prototype system and related proposal costs." *Id.*

### **B. Product Team**

The Product Team asserts that Patriot's Initial Protest challenge fails to set forth "any legal grounds, argument, or theory" as to why its proposal evaluation was improper. *Agency Response* at 5. The Product Team further argues that even if the ODRA finds its protest grounds to be legally sufficient, Patriot fails to demonstrate error in the evaluation of its proposal and merely disagrees with the Product Team's judgements. *Id.* at 5-6.

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The Product Team also asserts that Patriot’s Second Supplemental Protest is untimely because: “[t]he only documents produced in the Administrative Record either not originally produced for mediation, publicly available, or in Patriot’s possession prior to the original filing of the protest were the Completed OCT Procedures and the Signed Elimination of Offerors Memo.” *Supplemental Agency Response* at 3; *Agency Response* Tabs 14 and 17. The Product Team asserts that none of the new documents provided in the Agency Response contained new information beyond that which was contained in the unredacted documents produced to Patriot on April 10, 2018 for purposes of mediation. *Id.* at 3. As a result, according to the Product Team, the issues should have been protested no later than April 19, 2018. *Id.*

### III. DISCUSSION

#### A. Marginal OCT Rating

The record shows that the OCT for the RRCS prototype was the most important evaluation factor. *Agency Response* Tab 12, § M.2.3. The OCT covered 178 requirements that the SIR designated as either critical or non-critical. *Agency Response* Tab 12, § M.3.1.1; Tab 5. Of these 178 requirements, the SIR identified 117 of them as critical, i.e., the prototype system needed to meet them in order to provide the most basic and important functions required of an RRCS. *Id.* The OCT evaluation process collected data from the prototype system that was recorded as “PASS,” “FAIL” or “NOT ATTEMPTED” for each requirement. *Agency Response* Tab 5.

After completion of the OCT, overall results were assigned ratings of Outstanding, Good, Acceptable, Marginal and Unacceptable. *Agency Response* Tab 12, § M.3.1.2. The SIR’s descriptions of the ratings expressly provide that an Acceptable rating requires the RRCS product to pass all critical requirements tested as part of the OCT, while the failure an RRCS product to meet one or more of the critical requirements would result in a rating of no greater than Marginal. *Id.* The SIR further provides that a Marginal OCT rating indicates a high risk of unsuccessful product design. *Id.* Additionally, the SIR states that “[i]f at any point during the evaluation process, the FAA concludes that an Offeror does not have a reasonable chance of receiving this award, the FAA may eliminate the Offeror from further consideration for award. *Agency Response* Tab 12, § M.2.1.

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Patriot set up and certified its prototype system for testing on June 14, 2017. *Agency Response* Tab 16. Patriot's prototype system failed 3 of the 117 critical requirements and 6 of the 61 non-critical requirements. *Agency Response* Tabs 14 and 16. The Product Team assigned Patriot a Marginal OCT rating in accordance with the SIR's evaluation criteria. *Agency Response* Tab 12, § M.3.1.2; Tab 16 at 14. The Contracting Officer concluded that Patriot did not have a reasonable chance of award based on its OCT evaluation and notified Patriot that its proposal was eliminated from award consideration pursuant to SIR § M.2.1. *Agency Response* Tab 22.

Although Patriot maintains that it should have received an Outstanding OCT rating, it fails to demonstrate based on the record that: (1) the OCT test procedures deviated from those stated in the SIR; (2) the OCT test results were erroneous; (3) the evaluation criteria was not followed; or (4) its Marginal OCT rating was otherwise improper. It is well established that mere disagreement with an Agency action or decision does not, by itself, provide a sufficient basis for sustaining a bid protest. *Protest of Science Applications International Corporation, supra* (citing *Protest of Carahsoft Technologies Corporation and Avue Technologies Corporation*, 08-TSA-034). Moreover, where the record demonstrates that the decision has a rational basis and was not arbitrary, capricious or an abuse of discretion, and was otherwise consistent with the AMS, the evaluation plan, and the award criteria set forth in the underlying solicitation, the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials. *Protest of Science Applications International Corporation, supra* (citing *Protest of Adsystem, Inc.*, 09-ODRA-00508).

### **B. Competing the RRCS Requirement**

In support of its contention that "the procurement should have been conducted as sole source, saving everyone the time and expense," Patriot relies on the following allegations:

- The SIR's "very abbreviated time frame for delivery of a fully functional prototype, challenged unsuccessfully by at least one offeror." *Second Supplemental Protest* at 3-4.
- The SIR requirement "for power to be measured in watts rather than db." *Id.*
- The "surreptitious interrogation of Patriot's radio vendor by an FAA consultant raising questions never actually raised directly with Patriot." *Second Supplemental Protest* at 4, citing Exhibit A.

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- An October 31, 2017 memorandum that documents the fact that, with exception of the awardee, all offerors were eliminated on the basis of failing to pass critical requirements during the OCT. *Second Supplemental Protest* at 4; *Agency Response* Tab 17.

With respect to the last bulleted item, Patriot contends that this “singular document ... precipitated Patriot’s re-evaluation of the events of the procurement.” *Id.* Specifically, Patriot argues that the information contained in the October 31, 2017 memorandum, which was contained in the Agency Response received on May 22, 2018, makes Patriot’s filing of the Second Supplemental Protest timely. *Id.* at 2. According to Patriot, this document “caused Patriot to reevaluate a number of circumstances which individually might not justify a protest, [but if] ... viewed as a whole, created a picture of a procurement with an unintentional or intentional predetermined result.” *Patriot Supplemental Comments* at 1-2.

The applicable timeliness rules for filing ODRA protests are found in 14 C.F.R § 17.15 (a), as follows:

- (1) Protests based upon alleged improprieties in a solicitation or a SIR that are apparent prior to ... the time set for receipt of initial proposals shall be filed prior to ... the time set for the receipt of initial proposals.

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- (3) For protests other than those related to alleged solicitation improprieties, the protest must be filed on the later of the following two dates:

- (i) Not later than seven (7) business days after the date the protester knew or should have known of the grounds for the protest ....

The record shows that the individual allegations relative to provisions set forth in the SIR, i.e., the abbreviated timeframe for delivering a fully functional prototype; the requirement for power to be measured in watts rather than decibels; and the OCT test procedures, would have been apparent to Patriot on the face of the SIR. *Agency Response* Tabs 1-12. As such, these grounds of protest should have been known to Patriot and filed prior to the proposal submission deadline in order to be timely. 14 C.F.R § 17.15 (a)(1). The record also shows that during proposal preparation, Patriot struggled to find a vendor who could supply a radio that satisfied all of the solicitation requirements, but there is no indication that it raised any such concerns with the contracting officials. *Second Supplemental Protest*, Exhibit C, *Declaration of Kevin McDermott*, dated May 29, 2018, ¶¶ 2-6; *Contracting Officer Declaration*, dated June 12, 2018 at ¶ 2.

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The record further contains correspondence between Patriot and the Contracting Officer, detailing the incident involving contact between the FAA's consultant and Patriot's radio supplier, and the actions taken by the Product Team to address the situation. *Second Supplemental Protest*, Exhibits A and B. These letters show that Patriot knew or should have known of the alleged "surreptitious interrogation of Patriot's radio vendor" by the FAA consultant as early as May 19, 2017. *Id.* Under the ODRA Procedural Rules, Patriot was required to file any protest based on this incident no later than seven (7) business days thereafter to be timely. 14 C.F.R. § 17.15 (a)(3)(i).

Moreover, to the extent that Patriot's Second Supplemental Protest claims that the October 31, 2017 Memorandum was the "singular document" that gave it notice of the fact that all offerors were eliminated except for the awardee for failing to pass critical elements of the OCT, the record indicates otherwise. The fact that three of the four offerors who responded to the SIR were eliminated from award consideration based on the OCT evaluation also was information that was contained in the Source Selection Official RRCS Decision Memorandum, dated March 28, 2018 ("SSO Decision"). *Second Supplemental Protest* at 4, citing *Agency Response* Tab 28 at 2; *Agency Response* Tab 23.<sup>1</sup> Notably, Patriot does not dispute that the fact that the documents produced by the Product Team in mediation during April of 2018 included an unredacted copy of the SSO Decision. *Supplemental Agency Response* at 3; *Patriot Supplemental Comments* at 1-2. The ODRA finds that inasmuch as Patriot had the information for over a month before filing its Second Supplemental Protest, it is untimely.

Even assuming timeliness of Patriot's sole source procurement allegation, the record shows that the FAA posted a market survey regarding the RRCS requirement from September 22, 2015 until December 17, 2015, "to determine if adequate competition existed to inform the procurement strategy decision." *Supplemental Agency Response* at 6; *Contracting Officer Declaration*, dated June 12, 2018 at ¶ 4. The record further shows that eleven small businesses and four large businesses responded to the Market Survey, including Patriot, and the FAA ultimately issued the

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<sup>1</sup> Patriot evidently was aware of the SSO Decision, as the Second Supplemental Protest cites to the SSO Decision to show that it "failed to meet 3 critical requirements" and the "[t]wo other offerors failed to meet 50 and 52 critical requirements." *Second Supplemental Protest* at 2, citing *Agency Response* Tab 23. In the ODRA's view, it is not the format of the information, but rather the substance of the information that is critical to the protest deadlines.

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SIR as a small business set-aside procurement based on the industry responses that it received. *Id.* at ¶ 5.<sup>2</sup>

Based on the evidentiary record, the ODRA finds that Patriot has not met its burden of proof that the Product Team’s actions in developing a procurement strategy, seeking industry involvement and comment on the SIR, and deciding to compete the requirement, failed to conform with AMS policy, along with its preference for competition. AMS §§ 3.1.1, 3.1.3, and 3.2.22; *see also Protest of Epoch Concepts LLC*, 17-ODRA-00797.<sup>3</sup> As argued by the Product Team, Patriot voluntarily chose to compete based on the terms of the SIR; thereby making “the business decision that all offerors make with the inherent risk that the contract will be awarded to another vendor.” *Supplemental Agency Response* at 2, 5.<sup>4</sup>

**IV. CONCLUSION**

As discussed above, Patriot has failed to meet its burden of proof to demonstrate by substantial evidence that the challenged actions of the Product Team lack a rational basis and are arbitrary, capricious or an abuse of discretion, or inconsistent with the AMS. The ODRA thus recommends that Patriot’s Initial and Second Supplemental Protests be denied in their entireties. Patriot’s Supplemental Protest, which it withdrew on May 29, 2018, should be dismissed.

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Marie A. Collins  
Dispute Resolution Officer and Administrative Judge  
FAA Office of Dispute Resolution for Acquisition

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<sup>2</sup> *Cf.*, *In the matter of Sun Refining and Marketing Company; Barrett Refining Corporation*, B-239973 (Comp.Gen.), B-23973-2, 90-2 CPD P305, 1990 WL 278576 (A timely protest of restrictive delivery terms resulted in the finding of a *de facto* sole-source where the agency had no reasonable expectation of obtaining competition).

<sup>3</sup> Moreover, the ODRA Regulation imposes a “clear and convincing” standard of proof for allegations of bias and bad faith. 14 CFR § 17.33(m). To the extent that Patriot alleges that the procurement had an “intentional predetermined result,” Patriot fails to prove this allegation even by the lesser preponderance of the evidence standard. *Protests of BWC Enterprises, Inc.*, 17-ODRA-00809.

<sup>4</sup> In this regard, the SIR expressly informed offerors throughout the procurement process that the FAA “is not responsible for, and will not pay or reimburse, any costs incurred by the Offerors in the development or submission of any aspect of their proposals under this SIR, including equipment intended for OCT.” *Agency Response* Tab 2, L.5.0 at p. 153 (Draft SIR); *Agency Response* Tab 12, L.6.0 at 112 (Final SIR).