

PUBLIC VERSION

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

FINDINGS AND RECOMMENDATIONS

Matter: **MOSA Technology Solutions, LLC**
 Under Solicitation No. 6973GH-18-R-00186

Docket No.: **18-ODRA-00850**

Appearances:

For MOSA Technology Solutions, LLC

Todd R. Overman, Esq.
Sylvia Yi, Esq.
Taylor A. Hillman, Esq.
of Bass, Berry & Sims PLC

For Integrated Biometrics, LLC

Michael J. Navarre, Esq.
Kendall R. Enyard, Esq.
Thomas P. Barletta, Esq.
Caitlin T. Conroy, Esq.
of Steptoe & Johnson

For the FAA Product Team:

Devlan Islas, Esq.

Introduction

This matter arises from a bid protest (“Protest”) filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on November 13, 2018. MOSA Technology Solutions, LLC (“MOSA”) challenges the award of a contract to Integrated Biometrics, LLC (“IB”) for Ten-Print Fingerprint Scanners and Ruggedized Scanners (“Scanners”). The FAA Product Team (“Product Team”) made the award on behalf of Customs and Border Protection (“CBP”) pursuant to Solicitation 6973GH-18-R-00186 (“Solicitation”). *Protest* at 1. MOSA alleges that: (1) the Product Team performed an improper evaluation of the

PUBLIC VERSION

offerors' prices; (2) IB did not satisfy the past performance requirement; (3) IB's scanners did not satisfy the Solicitation's technical requirements; and (4) IB is not a responsible offeror pursuant to AMS 3.2.2.2. *Protest* at 10-14.¹

The Product Team filed its Agency Response² ("AR") and response to MOSA's Motion on December 13, 2018, and the ODRA received Comments from the Protester and Intervener on December 20, 2018. As discussed below, the ODRA finds that the Product Team deviated from the express requirements of the Solicitation in its price evaluation and that the deviation was prejudicial to MOSA. The ODRA further recommends that the contract with IB be terminated, and award be directed to MOSA.

A. Standard of Review

The Protester bears the burden of proof and must demonstrate by substantial evidence that the challenged decision lacked a rational basis, was arbitrary, capricious or an abuse of discretion, or otherwise failed in a prejudicial manner to comply with the Acquisition Management System ("AMS"). *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627. Consistent with the Administrative Procedures Act, 5 U.S.C. §§ 554 and 556, which applies to ODRA adjudications, the phrase "substantial evidence" means that the ODRA considers whether the preponderance of the evidence supports the challenged Agency action. Where the record demonstrates that the challenged decision has a rational basis and is not arbitrary, capricious or an abuse of discretion,

¹ On December 4, 2018, MOSA filed a motion for summary decision ("Motion") alleging that the Product Team admitted it had deviated from the Solicitation's requirements for the evaluation of price. *Motion* at 2-3. MOSA contends that, but for the Product Team's deviation, it would have been the lowest priced, technically acceptable offeror, and received the award. *Id.* at 4. Although MOSA presented the dispositive issue in the form of a motion for summary decision, "the ODRA discourages separate motions in bid protests and encourages such issues to be incorporated into the Agency Response or Comments." *Protest of Thomas Company, Inc.*, 16-ODRA-00781 (citing 14 C.F.R. § 17.19(a)). In the present matter, the record has been fully developed through the Product Team's Agency Response and the Comments from the other parties. The ODRA, therefore, will decide this matter on the full record.

² The Product Team's Agency Response includes a motion to dismiss for lack of standing pursuant to 14 C.F.R. § 17.19(a)(1) ("The protest, or any count or portion of a protest, be dismissed for lack of jurisdiction, timeliness, or standing to pursue the protest."). *AR* at 3. Counsel argues that MOSA is not an interested party because "[t]he Agency evaluation ranked MOSA as the third lowest price in both the price evaluation used by the contracting officer for the award and the alternative considered." *Id.* at 5 citing 14 C.F.R. § 17.15(a). The ODRA summarily denies the motion as meritless. MOSA was the only offeror, other than IB, found technically acceptable. *AR* Tab 6 at 5. Thus, MOSA was next in line for award.

PUBLIC VERSION

and is consistent with the AMS and the underlying solicitation, the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials. 14 C.F.R. § 17.19(m) (2018); *Protest of Potter Electric Co.*, 13-ODRA-00657.

B. Price Evaluation

The procurement at issue contemplates award to the offeror “judged, based on the evaluation factors, to represent the lowest priced, technically acceptable offer.” *AR* Tab 1 at 51. It is undisputed that MOSA’s and IB’s proposals were the only two found technically acceptable. *AR* Tab 3 at 5. MOSA argues, “the Solicitation language required the Agency to take the sum of all CLINs to calculate the TEP, and the Agency failed to follow the stated evaluation criteria” to the prejudice of MOSA. *Motion* at 3. The Product Team counters that “[t]he contracting officer rationally evaluated the price by including the base items and the actual options that could be exercised under CLIN 0003.” *AR* at 7.

When interpreting the language in a Solicitation, the ODRA first looks to the plain meaning of the text. *Protest of Deloitte Consulting, LLP*, 08-TSA-036. In *Deloitte*, the ODRA recommended sustaining the protest where the Transportation Security Administration’s (“TSA”) price evaluation deviated from the explicit language of section M of the Solicitation. *Id.* Specifically, the Solicitation required the TSA to evaluate “[a]ll proposed lifecycle costs (base costs plus all option costs).” *Id.* The TSA Administrator, through the ODRA, sustained the protest because the Contracting Officer only compared the base years. *Id.*

As with the solicitation language in *Deloitte*, Section M of the Solicitation at issue here is plain and unambiguous. It explicitly provides that “[t]he Government *will* evaluate the Total Evaluated Price [] for each [Contract Line Item Number] CLIN of all offerors.” *AR* Tab 1 at 55 (emphasis added). The definition of Total Evaluated Price (“TEP”) is “the sum of the Total Price for each CLIN (including Option periods).” *Id.* at 56. “The Total Price for each CLIN is calculated as the product of the Quantity and Unit Price.” *Id.* The following chart illustrates the CLIN structure:

PUBLIC VERSION

CLIN	Description	Estimated Quantity	Unit	Unit Price	Total Estimated Amount
00001	Ten-Print Fingerprint Scanner with Vendor's Initial Length of Warranty (in Months)	4,650	Each	\$__	\$__
00002	Ten-Print Fingerprint Scanner Ruggedized with Vendor's Initial Length of Warranty (in Months)	130	Each	\$__	\$__
00003	Option Line Item: Extended Warranty Beyond Initial Period				
	Ten-Print Fingerprint Scanner	12	Months	\$__	\$__
	Ten-Print Fingerprint Scanner	24	Months	\$__	\$__
	Ten-Print Fingerprint Scanner Ruggedized	12	Months	\$__	\$__
	Ten-Print Fingerprint Scanner Ruggedized	24	Months	\$__	\$__

AR Tab 1 at 3-4.

The Protest concerns CLIN 00003, and specifically how the pricing of the four optional warranties was to be evaluated. The Contracting Officer, who also served as the Source Selection Official, testified that he evaluated “the total price for the basic requirement together with the options selected to be exercise at the time of award.” *CO Affidavit* at ¶ 5. However, the Contracting Officer did not take the sum total of all CLINs into account when calculating the TEP. AR Tab 3 at 6. Rather than add all of the offered prices in the CLINs to arrive at the TEP, as required by Solicitation Section M, the Contracting Officer compared CLIN 0003 prices for the extended warranties at the 12 and 24-month periods *separately* as opposed to comparing them in their entirety. *Id.* He then used only the 12-month warranty period to find that “the low price offeror across all CLINs was Integrated Biometrics with a total price of [REDACTED] with an option exercised at award for a 12 month extended warranty.” *Id.*

In support of the evaluation method used, the Contracting Officer erroneously relies on Solicitation Clause 3.2.4-30. *CO Affidavit* at ¶ 5 citing AMS Clause 3.2.4-30, Evaluation of Options Exercised at Time of Contract Award (April 1996). The Clause provides that “[e]xcept when it is determined not to be in the Government's best interests, the Government will evaluate the total price for the basic requirement together *with any option(s) exercised at the time of award.*” AMS Clause 3.2.4-30 (emphasis added). The Contracting Officer states that the 12-

PUBLIC VERSION

month extended warranty option under CLIN 0003 “could be exercised at the time of award.” *CO Affidavit* at ¶ 6.

Consistent with fundamental rules of contract interpretation, the ODRA first seeks to harmonize all provisions in the Solicitation. *See Contract Dispute of Strand Hunt Construction*, 99-ODRA-00142. The ODRA will not accept an interpretation that renders an otherwise unambiguous clause, ambiguous. *Id.* The two provisions at issue are harmonious. CLIN 0003 prices include the option to purchase extended warranties for 12-months consistent with the requirements of Section M and Clause 3.2.4-30. *Compare* Clause 3.2.4-30 *with* AR Tab 1 at 55-56. CLIN 0003 also allows the Government the option to exercise an extended warranty for 24-months. These options, however, do not obviate the Section M requirement to evaluate and make award based on the TEP, i.e., “the sum of the Total Price for each CLIN (including Option periods).” AR at 56. Thus, the ODRA finds that the Product Team deviated from the requirements of the Solicitation in evaluating the TEP.

C. Prejudice

A Protester must demonstrate prejudice before the ODRA will recommend sustaining a protest. *See, e.g., Protest of L. Washington & Associates, Inc.*, 02-ODRA-00232. The Protester bears the burden of proof to show that but for the errors in the source selection process, it had a substantial chance of receiving the award. *Protest of Optical Scientific Incorporated*, 06-ODRA-00365. If the explicit requirement of making award to the offeror with the TEP had been followed, MOSA would have been the lowest priced offeror at [REDACTED], as compared with IB’s price of [REDACTED] for IB. *See* AR Tab 3 at 6. The ODRA therefore finds that the price evaluation was inconsistent with the plain language of the Solicitation and was prejudicial.

D. Recommendation

The ODRA Procedural Regulations grant the ODRA “broad discretion to recommend and impose protest remedies that are consistent with the AMS and applicable law.” 14 C.F.R. § 17.23 (2018). The enumerated list of possible remedies includes the ability to “[d]irect an award to the protester.” *Id.* at § 17.23(a)(6). A directed award is an appropriate remedy where the

PUBLIC VERSION

ultimate awardee is ascertainable. *Protest of Sentel Corporation*, 09-ODRA-00512. In *Sentel*, the ODRA directed award to the Protester because the awardee was ineligible, and Sentel Corporation had a far superior technical rating with much less risk than the remaining offerors. *Id.*

The instant case is even stronger. Whereas *Sentel* dealt with a best value determination, the present matter is a low-priced, technically acceptable procurement with only two technically acceptable offers, i.e. MOSA and IB. *Compare Protest of Sentel Corporation*, 09-ODRA-00512 with AR Tab 3 at 5-6. Given that MOSA's TEP – when properly evaluated – is lower than IB's TEP, the ODRA recommends that IB's contract be terminated for convenience and that MOSA be awarded the contract for the remaining requirements.

E. Conclusion

For the reasons discussed above, the ODRA recommends that the Protest be sustained, that the contract with IB be terminated, and award directed to MOSA.³

-S-

C. Scott Maravilla
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

³ The remaining challenges to IB's technical evaluation are moot.