

**Matter: Protest of Selex ES, Inc.
Under Solicitation No. 693KA7-18-R-00009**

Selex protests the Contracting Officer's decision to eliminate Selex from the competition. That decision relied on a SIR provision requiring offerors to submit with their proposal an independent verification of the adequacy of the offeror's accounting system. Selex admits that it did not comply with the SIR instructions, but offers no legal or factual grounds that justify its failure. The ODRA, therefore, recommends denying the Protest in its entirety.

I. The Standard of Review

Selex, as the protester, bears the burden of proof and must demonstrate by substantial evidence that the challenged decision lacked a rational basis, was arbitrary, capricious, 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 (citing *Protest of Adsystech, Inc.*, 09-ODRA-00508). 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 protester fails to demonstrate that the challenged decision lacks a rational basis; is arbitrary, capricious, or an abuse of discretion; or is inconsistent with the AMS and the underlying SIR, the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials. 14 C.F.R. § 17.21(m) (2019); *Protest of Potter Electric Co.*, 13-ODRA-00657.

II. Discussion

The SIR required each offeror to demonstrate responsibility by submitting with its proposal an independent verification that its accounting system has been audited and deemed acceptable for the award of a cost-reimbursement contract. *AR* Tab 8, Amendment 003, SIR § L.8 at L-5-6. Based on this requirement, the Contracting Officer eliminated Selex from the competition. *AR* Tab 20. Selex argues that the determination to exclude it from the competition “is objectively unreasonable.” *Comments* at 9. Selex does not dispute that its proposal lacked the required verification at the time of proposal submission, but contends that its audited financial reports demonstrate the adequacy of its accounting system. *Comments* at 3-4. Selex further argues that, under the AMS, responsibility determinations occur when an offeror is selected for award and not before. *Comments* at 1-2. Selex contends that its elimination from the competition was premature, especially given

its substantive and detailed communications with the Product Team regarding various aspects of its proposal, as well as the time and money it invested preparing for system testing. *Comments* at 1, 3-6; *Exhibits* at 124, 133. Finally, Selex contends that the requirement at issue amounts to a minor irregularity that the Product Team effectively waived. *Comments* at 3-4, 7.

A. The Solicitation Requirements

The SIR clearly stated the need for verification of the adequacy of an offeror's accounting system. Section B of the SIR includes cost reimbursable Contract Line Item Numbers ("CLINs") that are calculated on the basis of Time and Materials ("T&M") and Cost Plus Fixed Fee ("CPFF"). *AR* Tab 5, Amendment 002, SIR § B at B-2.¹ Given that these CLINS would be subject to Cost Accounting Standards, the SIR required offerors to include in their proposals information to demonstrate their responsibility in that regard. *AR* Tab 20 at 1; *AR* Tab 8, Amendment 003, SIR § L.8. at L-5-6.

The SIR also was clear with respect to the nature of the verification required and its placement in the proposal. SIR Section L.16 describes the information as "Required Data for Determination of Responsibility Requirements," and instructed offerors to include it in Section VI of Volume V. *AR* Tab 8, Amendment 003, SIR § L.16 at L-10. In pertinent part, the SIR provided that this data will be used to determine an offeror's responsibility by verifying that its accounting system is adequate for tracking costs under this contract. *Id.* In this regard, the SIR sought substantiating information from either DCAA, DCMA, or a CPA, verifying that its accounting system has been audited and deemed acceptable for the award of a cost-reimbursable contract. *Id.* Moreover, the SIR expressly stated that "[f]ailure to provide the requested information with the proposal submission will eliminate the offeror from consideration for award." *Id.*

¹ The potential period of contract performance is twelve years, consisting of one 4-year base period and five 24-month option periods. *Id.* The potential value of the MSBRS contract is [DELETED]. *AR*, Tab 18.

The SIR further contemplated that proposals would undergo an initial review by the Product Team in order to make a “minimum determination of responsibility,” based on information provided in response to SIR Section L.8. *AR* Tab 8, Amendment 003, SIR § L.23.6 at L-27. Additionally, SIR Section L.23.6 states that the proposal must “clearly” demonstrate that the offeror has met “all the minimum determination of responsibility requirements defined in Section L.8” and if “deemed non-responsible, that offeror will be notified and eliminated from further consideration for award.” *AR* Tab 8, Amendment 003, SIR § L.23.6 at L-27.

B. The AMS Permits Initial Determinations of Responsibility

Selex challenges the timing of its elimination, given that it was eliminated before the conclusion of proposal evaluation and system testing. *Comments* at 1. Selex relies on AMS Guidance T3.2.2.7 and ODRA cases for the proposition that the responsibility determination is to be “made at the time of award when a prospective offeror is selected.” *Id.* at 1-2, citing *Protest of Mech. Retrofit Solutions, Inc.*, 07-ODRA-00402; and *Protest of Fisher-Cal Indus., Inc.* 98-ODRA-00081. Those authorities, however, do not preclude contracting officials from making an initial responsibility determination in the early stages of the evaluation process. *Protests of IBEX Weather Services*, 13-ODRA-00641 and 13-ODRA-00644 at 65-67 (responsibility determination based on required proposal information established minimum qualifications to compete). In fact, AMS Guidance gives contracting personnel the discretion and authority to adopt different approaches in making responsibility determinations depending on the circumstances, as long as they are consistent with applicable law and AMS policy. AMS Guidance T3.2.2.7 A.1.c.1. Moreover, an initial determination of responsibility in no way prevents contracting officials from making a final determination of responsibility on the basis of a pre- or post-award audit. *Id.* The ODRA, accordingly, recommends that this aspect of the Protest be denied.

C. Selex Relied on an Erroneous Interpretation of the SIR

Prior to the due date for proposal submission, Selex was aware that it could not comply with the SIR requirement of which it now complains, inasmuch as it reports being “surprised” to “learn that an audit was required” when it received the final SIR. *Protest* at 2. Selex decided that it did not have sufficient time to complete such an audit and submitted a proposal on October 19, 2018, without including the required verification as to its accounting system. *Id.*² Selex’s proposal effectively acknowledges its noncompliance with the SIR, stating: “Selex’s accounting system has not been reviewed by the Defense Contract Management Agency (DCMA). However, we are submitting audited financial reports to support the Company’s ability to adequately account for the prospective cost-reimbursement contract.” *AR* Tab 14 at 18. Selex’s reason for doing so was that Section L.8 of the SIR gave the Contracting Officer discretion to request a pre-award audit. *Protest* at 1-2. Since the value of the MSBRS contract is in excess of \$100 million and AMS § 3.2.2.3 requires pre- and post-award audits of contracts of that size, Selex mistakenly assumed that an audit of its proposal would be conducted eventually by the FAA Product Team. *Id.* Selex accordingly concluded that its audited financial reports would serve as an acceptable substitute for the SIR requirements and provide a basis for a minimum determination of responsibility. *Id.* Selex, however, did not confirm the accuracy of this interpretation before the deadline for proposals.³

The ODRA finds that Selex’s interpretation was contrary to the plain language of the SIR. The SIR expressly required submission of third party verification with the

² To the extent this Protest could be viewed as a challenge to the SIR provision requiring proposals to include verification of the adequacy of the offeror’s accounting system, it is untimely. *Protest of Grayhawk Construction, Inc.* 08-ODRA-00475; *Protest of Alaska Weather Operations Services, Inc.* 08-ODRA-00431.

³ The record shows that, prior to the proposal deadline, Selex asked only whether “a summary statement is acceptable to comply with Section L.7 and L.8 as required by Volume 5.” *AR* Tab 3. The FAA answered by clarifying the requirement in L.23.6 in SIR Amendment 002, and advising that “information in the response must contain adequate information to satisfy the requirements of L.7 and L.8.” *AR* Tab 4.

proposal. *See* Part II.A, *supra*. As such, Selex must bear the responsibility for failing to provide a complete and compliant proposal in accordance with the express terms of the SIR. *Protest of Royalea’L Aviation Consultants*, 04-ODRA-00304, citing *Protest of International Services, Inc.*, 02-ODRA-00224. Since Selex knowingly chose not to provide information from a third party verifying the adequacy of its accounting system, it assumed the risk that its proposal would not be considered for award. *Protest of Ridge Contracting, Inc.*, 04-ODRA-00312.

D. Selex’s Elimination had a Rational Basis, Well Grounded in the SIR

The Product Team complied with the terms of the SIR when it conducted its initial review of Selex’s proposal and completed a “Procurement Compliance and Eligibility Checklist.” *AR* Tab 15. They noted on the checklist that Selex’s accounting system had not been reviewed by the DCMA. *Id.* They also noted that Selex planned to submit “audited financial reports to support the Company’s ability to adequately account for the prospective cost-reimbursement contract.” *Id.* The checklist further reflects, however, that:

[Selex] did not provide any substantiating narrative to substantiate that its accounting system is adequate [and] ... none of the submitted financial statements contain any verification letter(s) from [Selex]'s third-party Certified Public Accounting (CPA) firm of an accounting system that has been audited and determined acceptable for the award of a prospective cost-reimbursement contract provided on the letter head of the third-party CPA firm, and certified by a certified public accountant.

AR Tab 15.

As required under AMS policy,⁴ on November 7, 2018, the FAA then notified Selex that review of its proposal for compliance was continuing and sought clarification

⁴ AMS § 3.2.2.3.1.2.2 (“the purpose of communications is to ensure there are mutual understandings between the FAA and the offerors about all aspects of the procurement, including the offerors’ submittals/proposals.”).

regarding where in the proposal the information required by Sections L.8 and L.23.6 of the SIR was located “so that the FAA can properly make its determination of responsibility in accordance with SIR Section L.8.” *AR* Tab 16.

Selex again provided more non-compliant information when, on the next day, it responded to the Product Team’s clarification request by identifying two large prime contracts for the U.S. Navy and the FAA, as well as a subcontract for a U.S. Air Force contract, to demonstrate its experience with T&M CLINs and reimbursable travel costs. Selex explained:

Through the course of these U.S. Government contracts, Selex EX has applied our same cost accounting system and has never been subjected to a DCMA or DCAA audit and therefore have no statements from these agencies. While we have never had a contract that required an audit of our accounting system, we are confident, it would be deemed acceptable by the DCAA or the DCMA for cost-reimbursable contracts. We are prepared for the FAA to perform or request an audit of our accounting system prior to any potential contract award.

AR Tab 17.⁵ The Product Team found, and the ODR agrees, that this response was inadequate.

Due to the proposal’s “potential non-compliance,” and consistent with the terms of the SIR, on February 26, 2019, the Product Team cancelled Selex’s Operational Capability Demonstration, which had been scheduled for March 25, 2019.” *AR* Tab 19. On March 4, 2019, the Contracting Officer eliminated Selex from the competition. *AR* Tab 20. The next day, he notified Selex that its proposal was noncompliant and therefore ineligible for award. *AR* Tabs 20 and 21.⁶

⁵ The Product Team also made an effort to independently verify the status of Selex’s accounting system with DCAA on November 8, 2018, but was unsuccessful. *AR* Tab 18.

⁶ Protester’s Comments also argue that “in fact” Selex met the SIR’s requirement by providing the requested verification, after its elimination, but prior to award. *Comments* at 9. The record shows that Selex’s CPA submitted a supporting letter on May 21, 2019. *Comments* at 9; *Exhibits* at 134. By submitting this letter, Selex seeks to supplement its proposal with the required information, effectively taking a “second bite at the apple.” See *Protest of Grayhawk Construction, Inc.*, 08-ODRA-00475 at 12. Moreover, the letter does not indicate that an audit was conducted. Rather, it states

The ODRA finds that the Product Team’s decision to eliminate Selex from the competition was proper under the express terms of the SIR. “[A]n initial proposal needs to demonstrate how it meets every stated minimum qualifications requirement.” *Protest of Royalea’L, supra*. A reasonable reading of this language by Selex should not have resulted in its expectation that it would be afforded an additional opportunity to provide information required for a “minimum determination of responsibility,” particularly where the SIR cautions offerors that failure to meet the requirement would be cause for elimination. *Id.*; AR Tab 8, Amendment 003, SIR § L.23.6 at L-27.

E. The SIR Requirement Could Not Be Waived As A Minor Irregularity

The ODRA is unpersuaded by Selex’s arguments that the Product Team should have waived the requirement as a minor irregularity because “only 2 % of the value of the MSBRS contract is CPFF,” and because its waiver would present no risk to the FAA. *Protest* at 1; *Comments* at 9. To relax an express, mandatory SIR requirement in favor of Selex would be contrary to the fundamental principle of government procurement that competitions must be conducted on a fair and equal basis. *Protest of Danka Office Imaging Company*, 98-ODRA-00099. An agency may not solicit offers on one basis and then make an award on a materially different basis. *Id.* Here, the requirement to provide verification of the accounting system was material, as it was expressly required to be eligible for award. Indeed, relaxing or waiving the requirement for Selex could compromise the integrity of the procurement because of the possibility of prejudice to other potential offerors who might have opted not to compete because of the verification requirement. *Danka*,

that, based on a review of information related to the accounting system and reports generated thereby, Selex’s accounting system has “been determined to be adequate for determining cost in accordance with FAR 16.104(i),” which is a provision in the Federal Acquisition Regulation that identifies basic factors to consider in selecting and negotiating contract types. 48 C.F.R. § 16.104.

supra; see also AMS § 3.2.2.3.1.2.4 (all offerors should be notified of a material change in the SIR requirements and allowed to update their proposals accordingly).

III. Conclusion

For the reasons set forth above, the ODRA finds that Selex has failed to demonstrate by substantial evidence that its elimination from the competition lacked a rational basis; was arbitrary, capricious, or an abuse of discretion; or failed to comply with the AMS. The ODRA accordingly recommends that the Protest be denied.

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Marie A. Collins
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FAA Office of Dispute Resolution for Acquisition