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

FINDINGS AND RECOMMENDATIONS

Matter: Protest of PHT Aerospace LLC
Under Solicitation No. 693KA7-18-R-00010

Docket No.: 20-ODRA-00874

Appearances:

| | |
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| For PHT Aerospace LLC: | Matthew P. Dolan, Esq. of Meyner and Landis LLP |
| | Nicolas Antaki, Esq. of Ajax Law Group |
| For the FAA Product Team: | Amrana Ali, Esq. |

On April 27, 2020, PHT Aerospace, Inc. (“PHT”) filed a protest challenging the results of a re-evaluation ordered by the Federal Aviation Administration (“FAA”) Administrator in a prior protest.^{1, 2} *Protest* at 1;³ *see also Protest of PHT Aerospace, Inc.*, 19-ODRA-00861; FAA Order No. ODRA-20-868. In the prior protest, the Office of Dispute Resolution for Acquisition (“ODRA”) recommended

¹ The ODRA assumes familiarity with the Findings and Recommendations in the previous protest.

² Pursuant to a Delegation of authority dated March 19, 2014, the ODRA Director may execute final decisions on behalf of the Administrator in protests involving procurements valued at less than \$20,000,000. Under that authority, the Director and Chief Administrative Judge of the ODRA signed the final agency order. ODRA-20-868.

³ On April 27, 2020, PHT filed its challenge to the Administrator-ordered corrective action. Subsequently, on May 1, 2020, PHT filed an amended protest with the ODRA to conform to the requirements of 14 C.F.R. § 17.15(b). For consistency, the ODRA, unless otherwise stated, refers to the May 1, 2020 filing.

PUBLIC VERSION

sustaining PHT's challenge to an award to Merlin VME Sales, Inc. ("Merlin") for the design and production of Cluster Map Memory ("CMM") Circuit Card Assembly ("CCA") boards for the Airport Surveillance Radar – Model 9 ("ASR-9") potentially worth over \$1,225,000.⁴ *Protest of PHT Aerospace, supra*. The ODRA found that Merlin failed to self-certify its status as a small business as required by the solicitation. *Id.* Consequently, the final order required the Product Team to terminate for convenience the contract with Merlin, and to make a new award from among the remaining offerors. *Id.*

Upon re-evaluation, the Product Team declined to make an award in light of performance risks assessed against all remaining offerors. *Agency Response* ("AR") Tab 16 at 6. PHT argues that this decision impermissibly deviated from the Administrator's Order. *Protest* at 1-2. The ODRA recommends denying the new protest because the decision of the Product Team is consistent with both the Administrator's Order and the terms of the underlying solicitation, and further, is supported by a rational basis.

I. STANDARD OF REVIEW

A protester, as the party seeking relief, bears the burden of proof and must demonstrate by the preponderance of the evidence that the challenged decision lacks a rational basis, is arbitrary, capricious, or an abuse of discretion, or is inconsistent with the Acquisition Management System ("AMS") or the underlying solicitation. 14 C.F.R. § 17.21(m) (2020); *see also* 5 U.S.C. § 556(d), *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627 (citing *Protest of Adsystech, Inc.*, 09-ODRA-00508).

⁴ The highest priced offer was in the amount of \$1,225,706.02. AR Tab 15 at 2.

PUBLIC VERSION

II. DISCUSSION

PHT challenges the Product Team’s decision to make no award under the CMM CCA solicitation as lacking a rational basis. *Protest* at 1. PHT first argues that the no-award decision was outside the scope of the Administrator’s Order. *Id.* Next, it alleges that the decision contradicted previous statements of urgency by the FAA to deploy the circuit boards in the ASR-9s. *Comments* at 3.⁵ PHT suggests that this is tantamount to bad faith. *Id.* The ODRA, however, finds that PHT fails to meet its burden as to either argument. *Id.*

A. The Product Team’s decision is consistent with the Administrator’s Order, the solicitation, and is supported by a rational basis.

The Administrator directed that “the Product Team make a new award from among the remaining offerors.” *Protest of PHT Aerospace, supra*. PHT argues that this language required the Product Team to award the contract only from among the remaining four offerors. *Protest* at 1-2. Conversely, the Product Team observes that, “[t]he Administrator’s Order was not issued in a vacuum, it was within the context and framing of the [solicitation].” *AR* at 8. As counsel for the Product Team points out, “PHT’s view of the Administrator’s Order to make a new award from among the remaining offerors would modify the express terms . . . of the [solicitation] by removing the possibility of the Product Team to make no award.” *AR* at 7. The ODRA agrees with the Product Team.

When reviewing a challenge to an administrator-ordered corrective action, “the ODRA looks to see if the actions have a rational basis supported in the record, and are consistent with the Final Agency Order.” *Protest of Evolver, Inc.*, 10-ODRA-00523. In this case, the solicitation explicitly provided that, “[t]he FAA reserves the right to not make an award if such action is in its best interest.” *AR* Tab 1 at § M.2.

⁵ PHT initially raised this issue in its April 27, 2020 filing with the ODRA.

PUBLIC VERSION

The CCA procurement called for a best value determination for award based on technical, past performance, and price tradeoffs. *Id.* In this scheme, “the lowest price or the highest rated Offeror may not necessarily provide the best value to the FAA.” *Id.*

The record demonstrates that the Source Selection Evaluation Team (“SSET”) reconvened to conduct a new best value determination. *AR* Tab 16 at 1. The SSET found flaws with all of the remaining offerors. *Id.* at 2-6. The one offeror lacked a “comprehensive understanding of the [solicitation] requirements, and critical design details required for their proposed transistor-transistor logic use.” *Id.* at 2. With respect to the remaining three, the evaluators raised concerns with prices “significantly higher” than the independent government cost estimate (“IGCE”). *Id.* at 4-6. The SSET found them all to be “significantly higher than the IGCE” and “unreasonable.” *Id.* Indeed, [REDACTED]

Consistent with the final order, the SSET conducted the best value trade-off based on the original evaluation findings made in June 2019. *AR* Tabs 8, 9, and 10; *Protest of PHT Aerospace, supra*. The SSET issued the original price evaluation report, which found PHT’s offer unreasonable, on June 11, 2019. *AR* Tab 10. Important to the issue here, PHT did not challenge the evaluation of its price during the initial protest. *See generally PHT Protest and Supplemental Protest*, 19-ODRA-00868. Nor did PHT dispute their findings in this case. *See generally Protest*. Thus, based on the SSET recommendation in the re-evaluation, the Source Selection Official (“SSO”) determined that “[m]aking an award to any of the remaining four offerors [was] not in the best interest of the FAA.” *AR* Tab 16 at 6.

Accordingly, the ODRA finds that the Product Team had a rational basis consistent with the Administrator’s Order and the requirements of the solicitation to not award a contract, and recommends denying this ground of protest.

PUBLIC VERSION

B. The record shows no evidence of bad faith or urgent requirements that compelled an award.

PHT hinted that the Product Team acted in bad faith by failing to award a contract,⁶ and charges more directly that it failed to account for the urgency of this procurement. *Comments* at 3. PHT relies primarily on selected excerpts of the solicitation, but these are insufficient to establish either bad faith or that the actions were contrary to the terms of the solicitation.

The solicitation must be read and interpreted as a whole. *Protest of Apptis, Inc.*, 10-ODRA-00557. It is true that several portions of the solicitation note certain logistical problems facing the agency that prompted it to advertise the requirement. It states that the inventory of spare parts for the CMM CCA, which is “an integral component” of the ASR-9, are “insufficient to sustain operational readiness.” *AR* Tab 1 at 2. Further, the procurement was supposed to acquire a sufficient number of circuit boards for “operation readiness” starting next year, 2021. *Id.* It also states that inventories will soon be “depleted” because, as a legacy system, the boards are at the end of their life-cycle. *Id.* These statements, however, do not stand for the proposition that a contract would be awarded regardless of cost. To the contrary, the solicitation also explained that the FAA would measure price reasonableness, and it included the express statement that the “FAA reserves the right to not make an award if such action is in its best interest.” *AR* Tab 1 at §§ M-8, M.7.1, M-1, and M.2. Thus, the ODRA does not accept the notion that operational urgency was a paramount feature of this acquisition and that price considerations were unimportant.

The ODRA does not find that the award decision failed to consider the agency’s needs. The SSO, who also served as the contracting officer and Price Evaluation Team Lead, expressly acknowledged that by not awarding a contract,

⁶ PHT Letter of April 27, 2020, at 2.

PUBLIC VERSION

“the Product Team can consider alternative solutions or acquisition strategies.” *AR* Tabs 11 at i and 12 at 6. Evidence to the contrary is not in the record.

This record also does not prove that the Product Team acted in bad faith. Indeed, the Product Team demonstrated a rational basis for its decision not to award a contract to not only PHT, but to any of the other remaining offerors. PHT submitted no evidence to show otherwise. Thus, the ODRA recommends denying this ground of protest.

PHT has not shown bad faith nor that the no-award decision is contrary to the terms of the solicitation. These aspects of the protest should be denied.

III. CONCLUSION

Based on the foregoing, the ODRA recommends denying the protest in its entirety.

-S-

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