

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

FINDINGS AND RECOMMENDATIONS ON REQUEST TO DISMISS

Matter: **Jacobs Technology, Inc.**

Pursuant to Solicitation No. 693KA9-20-R-00005

Docket No.: 21-ODRA-00884

Appearances:

For the Protester: Brian Waagner, Esq., Steven Neely, Esq.,
 Julia Banega, Esq., and Maya Desai, Esq.
 of Husch Blackwell, LLP

For the FAA Product Team: R. Bennett Sargent, Esq. and
 R. Jason Miller, Esq.

For the Intervenor: Shelly L. Ewald, Esq., Robert Shaia, Esq.,
 and Zahra Abrams, Esq.
 of Watt, Tieder, Hoffar and Fitzgerald LLP

This matter arises from an initial and two supplemental protests (hereinafter “the Protest”) filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) by Jacobs Technology, Inc. (“Jacobs”). The Protest challenges an award to Leidos, Inc. (“Leidos”) under Solicitation No. 693KA9-20-R-00005 (“Solicitation” or “SIR”) for the National Airspace System Integration Support Contract, Version IV (“NISC IV”). NISC IV provides the FAA with a broad range of critical professional, technical, program, and planning support services for the National Airspace System.¹ The contract has a potential

¹ FAA Reply at 20, attached SIR § C.1.1.1.

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duration of ten years and its estimated value exceeds \$1.75 billion.² Leidos, as the awardee of the contract, intervened in the Protest as a matter of right.³

After an extended but unsuccessful mediation effort by the parties, the ODRA commenced the adjudication process on April 19, 2021, and scheduled a due date for the Product Team response. On that same day, however, the Product Team filed a Notice of Voluntary Corrective Action (“Notice”) and requested that the Protest be dismissed without prejudice as moot.⁴ In accordance with the ODRA Procedural Regulation, the ODRA provided Jacobs and Leidos with the opportunity to respond to the Product Team’s dismissal request.⁵ Jacobs opposed the Product Team’s request, and Leidos supported it.⁶

For the reasons discussed below, the ODRA finds that the corrective action promised by the Product Team adequately addresses Jacobs’s protest allegations so as to render the Protest moot. The ODRA thus recommends granting the Product Team’s request that Jacobs’ Protest be dismissed without prejudice.

I. Standard of Review

In reviewing a request to dismiss a protest, “the ODRA shall consider any material facts in dispute, in a light most favorable to the party against whom the dismissal or summary decision would operate and draw all factual inferences in favor of the non-moving party.”⁷ The Product Team does not dispute the fact that there are “multiple issues” in the evaluation and that corrective action is “in the

² FAA Reply, attached SIR § B.3; Protest, Exhibit 1.

³ ODRA Initial Status Conference Memorandum, dated January 25, 2021.

⁴ Notice at 2.

⁵ 14 C.F.R. § 17.31(e) (2021).

⁶ Jacobs Opposition at 1; Leidos Response at 2-4. Jacobs subsequently filed a second supplemental protest against the corrective action “out of an abundance of caution.” Second Supplemental Protest at 1. Pursuant to ODRA’s direction, the Product Team also filed a Reply to Jacobs’ Opposition.

⁷ 14 C.F.R. § 17.31(c) (2021).

best interests of the Agency.”⁸ The ODRA therefore reviews the Product Team’s request in that light.

II. Background

Jacobs’ Protest alleges that the FAA Product Team’s evaluation of the proposals was unreasonable, disparate, and prejudicial as to the evaluation factors of risk, management, functional capability, and cost.⁹ The Protest further alleges that the evaluators failed to conduct fair and meaningful communications with offerors and take into account Leidos’ organizational conflicts of interest (“OCI”).¹⁰

A. Product Team’s Notice of Corrective Action

Immediately upon the commencement of adjudication, the Product Team filed its Notice of Corrective Action identifying specific actions it would take regarding the “multiple” protest issues.¹¹ These actions are:

1. The Product Team will reconvene its Management Evaluation Team (“MET”), Functional Evaluation Team (“FET”), and Cost Evaluation Team (“CET”) to re-evaluate proposals and findings made in connection therewith and will produce new or amended MET, FET, and CET reports based upon the results of said re-evaluation.
2. The Product Team will appoint a new Risk Evaluation Team (“RET”) to evaluate proposals and make findings in connection therewith, and will produce a new RET report based upon the results of said evaluation and findings.
3. The Integrated Service Team (“IST”) will then review the new or amended MET, FET, RET, and CET reports and compile a new or amended report to the Source Selection Evaluation Board (“SSEB”) containing a best-value recommendation.

⁸ Notice at 1.

⁹ Protest at 9, 22, and 25; Supplemental Protest at 4, 8, and 11.

¹⁰ Protest at 27-28; Supplemental Protest at 15-18.

¹¹ Notice at 1.

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4. The SSEB will then review the new or amended IST report and prepare a new or amended report to the Source Selection Official (“SSO”) containing a best-value recommendation.

5. The Product Team will also appoint a new SSO, who will review the new or amended SSEB report and issue a new best value award decision.¹²

The Product Team further represents that the corrective action will “completely” and “comprehensively address all issues raised within the scope of the Protest.”¹³ The Product Team also commits to completing the corrective action, and notifying the ODRA and all parties of the result, by no later than November 19, 2021.¹⁴

B. Jacobs' Opposition to the Corrective Action

Jacobs opposes the dismissal of the Protest, contending that the proposed corrective action is inadequate because it fails to address protest allegations pertaining to the evaluation of OCI risks, fair and meaningful communications, equal treatment of offerors, and mitigation of potential harm to Jacobs resulting from Leidos’ continued contract performance.¹⁵

III. Discussion

The FAA’s Acquisition Management System (“AMS”) promotes as one of its fundamental principles “the use of discretion, sound business judgment, and flexibility at the lowest levels while maintaining fairness and integrity.”¹⁶ Under the AMS, contracting officers have broad authority to take corrective action if it is necessary to ensure a fair and impartial competition.¹⁷ When contracting officials

¹² Notice at 1-2.

¹³ *Id.* at 2.

¹⁴ *Id.*

¹⁵ Jacobs Opposition at 2-5.

¹⁶ AMS Policy 3.1.3 (September 2020).

¹⁷ *Protest of Computer Associates International, Inc.*, 00-ODRA-00173 (citing *Protest of Fisher-Cal Industries, Inc. and Contract Dispute of Art-Z Graphics*, 98-ODRA-00081 and 98-DRA-00083 (Consolidated)).

provide corrective action in protests pursuant to a settlement agreement, such action is “encouraged and enforced” by the ODRA.¹⁸ However, when contracting officials unilaterally decide to take corrective action early in the adjudication process, the ODRA must review whether that action will moot the protest allegations before it recommends dismissal.¹⁹

A. Corrective action is specific and comprehensive.

The Product Team’s intended corrective action is comprehensive in that the reevaluation of proposals will completely address all of the issues raised within the scope of the protest allegations. These issues, as detailed in Jacobs’ Protest, concern defects in the evaluation process and award determination.²⁰ The Product Team commits to performing a reevaluation that essentially will cover every challenge Jacobs raised regarding the evaluation of its proposal. This includes reevaluating the factors of risk, management and functional capability, and reconsideration of the OCI issues that Jacobs identified in its Protest. Furthermore, the Product Team is replacing the old SSO with a new SSO who will make a new award decision. As required by the AMS, the rational basis for the award will be documented in the procurement record.²¹

The Product Team further commits to completing the corrective action in approximately six months.²² The ODRA finds this timeframe reasonable, given the scope of the reevaluation effort, e.g., reconvening multiple teams of evaluators to reevaluate the proposals, reviewing lengthy and complex proposals, preparing new or amended evaluation reports and analyses, and rendering a new award decision.

¹⁸ *Id.*

¹⁹ *Protests of Tetra Tech AMT and Leader Communications, Inc.*, 16-ODRA-00760 and -00768 (Consolidated).

²⁰ See Protest at 22-24 and Supplemental Protest at 8-10 (Management Evaluation); Protest at 25-26 and Supplemental Protest at 11-14 (Functional Evaluation); Protest at 27 and Supplemental Protest at 16-17 (Clarifications); Protest at 10-21, 27-28 and Supplemental Protest at 4-7, 18 (OCI Evaluation); and Protest at 27 (Best Value Tradeoff and Award Decision).

²¹ AMS Policy 3.2.2.3.1.3 (October 2012).

²² Notice at 2.

B. Reevaluation must be fair and in compliance with the AMS.

Jacobs contends that the corrective action is inadequate because it fails to provide additional evaluation guidance required to “resolve the unequal treatment issues.”²³ Specifically, Jacobs complains that the Product Team does not provide to the original members of the evaluation teams, i.e., the MET, FET, and CET, clarification as to how to apply the evaluation criteria during the reevaluation “to mitigate against their knowledge and familiarity with Leidos.”²⁴ Jacobs also complains that the corrective action fails to provide “additional guidance” to the new members of the RET, i.e., clarifying that they can consider [DELETED].²⁵

No additional evaluator guidance is necessary with regard to alleged unfair treatment. Beyond doubt, the reevaluation must conform to the AMS. As required by the AMS, the reevaluation must be based on the contents of the proposal submissions and the stated evaluation criteria.²⁶ The evaluators must apply the stated evaluation criteria equally to all offerors in the reevaluation.²⁷ Contracting personnel are obligated by the duty of good faith, and the ODRA will not speculate that they will not comply.²⁸ Also, the additional guidance suggested by Jacobs as to the reevaluation of risk would be improper since such a clarification would substantively revise the current language of the solicitation’s evaluation criteria.²⁹ Under the AMS, “the evaluation criteria should not be modified without first

²³ Jacobs Opposition at 5.

²⁴ *Id.*

²⁵ *Id.* at 3, FN 1.

²⁶ AMS Policy 3.2.2.3.1.2.3 (October 2012).

²⁷ Also, to the extent Jacobs complains that Leidos has a competitive advantage due to its incumbent status, the Product Team “is not required to structure [a] procurement in a manner that neutralizes a competitive advantage that one vendor may have over another so long as that advantage does not accrue from Government action.” *Protest of Frequentis USA, Inc.*, 19-ODRA-0088866 (citing *Protest of the Bionetics Corporation*, 14-ODRA-00696).

²⁸ *Protest of CGH Technologies, Inc.*, 10-ODRA-00556 at 42-43.

²⁹ FAA Reply, attached SIR § M.8, Risk Evaluation.

notifying offerors competing at that state of the process and allowing such offerors to revise their submissions accordingly.”³⁰

C. Corrective action does not foreclose the possibility of clarifications or proposal revisions.

To the extent that Jacob asserts that the corrective action is inadequate because it does not commit to clarifications or proposal revisions, such arguments are premature.^{31, 32} The determination as to whether to seek clarifications or allow proposal revisions is discretionary on the part of the contracting officials.³³ If the corrective action obligated evaluation officials to take certain actions in advance of the reevaluation of proposals, it effectively would limit their exercise of discretion and prejudge the contents of the proposals.³⁴ Here, the Product Team’s proposed corrective action does not foreclose the possibility of clarifications or proposal revisions, and Jacobs retains the right to protest any defect in the reevaluation and new source selection decision after the corrective action is complete.

Leidos further contends that it would be unfair to allow Jacobs to revise its proposal because it could use the debriefing information to its competitive advantage.³⁵ The ODRA notes that the AMS expressly authorizes the Product Team to disclose certain information to an offeror in a debriefing.³⁶ However, if debriefing information provided Jacobs with a competitive advantage and proposal revisions are allowed, the Product Team must ensure that they are submitted and

³⁰ AMS Policy 3.2.2.3.1.2.3 (October 2012).

³¹ *Raytheon Company*, B- 419393.5, B- 419393.6, 2020 CPD ¶ 410 (citing *Quotient, Inc.*, B-416473.4, B-416473.5, Mar. 12, 2019, 2019 CPD ¶ 106 at 3).

³² While the FAA is not bound by the decisions of the General Accounting Office, 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. *Protests of 36th Avenue Co-Tenancy, International Office Building, JL Office Tower, and SL/JL Calais Office (Consolidated)*, 17-ODRA-00798, -00799, -00800, and -00801.

³³ *Protest of Columbus Technologies and Services, Inc.*, 10-ODRA-00514.

³⁴ *Raytheon Company, supra*.

³⁵ Leidos Response at 3.

³⁶ AMS Policy 3.2.2.3.1.4 (September 2020).

evaluated in a manner that maintains the fairness and integrity of the acquisition process.³⁷

D. Corrective action provides Jacobs with full and fair relief.

Jacobs contends that the corrective action fails to mitigate its potential harm, as it fails to rescind the award to Leidos or suspend performance pending the reevaluation.³⁸ Under the AMS, procurement activity and contract performance ordinarily continues during the pendency of bid protests.³⁹ Jacobs did not request a suspension when it initially filed its Protest, and the ODRA will not recommend one now.⁴⁰

More importantly, the corrective action provides Jacobs with full and fair relief by providing one of the remedies requested in Jacobs' Protest, which was the reevaluation of proposals in accordance with the solicitation and a new award decision.⁴¹ The other requested remedy, a directed award, is one that the ODRA rarely recommends, and only does so after the development of the administrative record and adjudication on the merits.⁴²

E. The Product Team's corrective action renders the protest moot.

The ODRA finds that the Product Team's intended corrective action is: (1) comprehensive and specific in that it promises a reevaluation that takes into account all the issues raised in the protest; (2) of limited duration with a deadline of November 19, 2021; and (3) complete to the extent that it provides Jacobs with the remedy that the ODRA most likely would have recommended if the Protest was

³⁷ AMS Policy 3.1.3 (September 2020).

³⁸ Jacobs Opposition at 1.

³⁹ 14 C.F.R. § 17.13(g) (2021); *Protest of A3 Technology, Inc.*, 21-ODRA-00883 (Decision on Request for Suspension, dated February 4, 2021).

⁴⁰ 14 C.F.R. § 17.15(d) (2021).

⁴¹ Protest at 28-29; Supplemental Protest at 19.

⁴² 14 C.F.R. § 17.19(m) (2021); *Protests of Tetra Tech AMT and Leader Communications, Inc.*, 16-ODRA-00760 and -00768 (Consolidated); *Cf. Protest of Hasler, Inc.* 06-ODRA-00395 (award directed to protester after adjudication on the merits).

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successfully adjudicated. The corrective action will render the Protest moot and thus dismissal of the Protest is appropriate.⁴³

IV. Conclusion

The ODRA recommends granting the Product Team's request to dismiss the Protest without prejudice.

-Signed-

Marie A. Collins
Dispute Resolution Officer and
Administrative Judge

⁴³ *Protest of CGH Technologies, Inc.*, 16-ODRA-00767 (protest dismissed because the corrective action comprehensively and completely addressed protest merits).