

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

<u>Protest of</u>)	
)	
Adsystem, Inc.)	Docket No. 09-ODRA-00508
)	
<u>Pursuant to Solicitation DTFAWA-07-R-00024</u>)	

DECISION ON REQUEST FOR RECONSIDERATION OF THE REMEDY

This matter currently is before the Office of Dispute Resolution for Acquisition (“ODRA”) on a request (“Request”) of the Protester Adsystem, Inc. (“Adsystem”) for reconsideration of the remedy set forth in Administrator’s Order dated July 16, 2010 (“Order”). In the Order, the Administrator adopted the ODRA’s Findings and Recommendations (“F&R”), partially sustaining Adsystem’s Protest and ordering a recompetition. The Order and the Findings and Recommendations are incorporated by reference herein and familiarity with them is assumed. For the reasons discussed below, the ODRA concludes that Adsystem has failed to allege grounds supporting reconsideration of the remedy. The ODRA therefore will not recommend that the Administrator reconsider the Order and the Request summarily is denied.

I. FACTUAL BACKGROUND

As stated more fully in the Findings and Recommendations, the ODRA recommended partially sustaining the Protest because the Product Team failed to produce records showing a rational basis for the results in both Phase 1 and Phase 2 of the evaluation process. *F&R* (Public Version) at 36-40. As stated therein, “the record does not reveal a rational basis for the evaluation of JTA, Adsystem, or any other offeror.” *Id.* at 40. The ODRA also found that the Contracting Officer improperly deleted the “Limitations on

Subcontracting” clause from the Solicitation with obtaining approval from the Acquisition Executive, as required by the Acquisition Management System (“AMS”). *Id.* at 41.

The ODRA’s Findings and Recommendations included the following recommended remedy:

AMS Policy § 3.9.3.2.2.4 and the ODRA Procedural Regulation give “broad discretion” to the ODRA to recommend remedies. The ODRA therefore recommends: (1) the Solicitation should be reviewed and amended as necessary to ensure that it accurately describes the needs of the FAA; (2) the FAA Acquisition Executive should review the business case for relaxing the requirements of AMS Clause 3.6.1-7, “Limitation on Subcontracting (August 1997),” and determine whether to ratify, disapprove, or otherwise modify the unauthorized deviations found in Amendment 0002; (3) a new competition, not restricted to the original offerors, should be conducted; (4) the Evaluation Plan should be modified as necessary to ensure a prompt and timely evaluation of proposals; (5) if oral presentations are used again, they must be videotaped; and (6) award a new contract. The current contract with JTA should continue only so long as is reasonably necessary to expeditiously complete the recompetition under steps (1) through (6) above. Upon award of the new contract, the current contract with JTA should be terminated for the convenience of the Government.

Additionally, the ODRA recommends appointing a new Contracting Officer and Evaluation Team due to the findings in this case. In particular, the ODRA observes that: (a) it took 20 months to evaluate proposals and award the contract; (b) without good cause or explanation, the Product Team lost substantial documentation that it was obligated to create, retain, and submit in the Agency Response; (c) also without explanation and contrary to the Solicitation and Evaluation Plan, the Product Team failed to videotape the oral presentations that otherwise could be used for a reevaluation; and (d) the CO exceeded her authority by deviating from known mandatory AMS clauses without obtaining the requisite approval from the FAA Acquisition Executive. The new Contracting Officer and Evaluation Team should have no prior involvement with this procurement.

Finally, counsel for the new Product Team should be directed to report back to the Administrator through the ODRA every 90 days regarding the progress and outcome of the recommended action.

F&R (Public Version) at 43-44.

Adsystech disagrees with this remedy. Objecting to the continued performance by the awardee, Jerry Thompson & Associates, Inc. (“JTA”), Adsystech argues that the work should be performed by Adsystech or by contractors under “either of two existing task order contracts, known colloquially as eFAST and SE2020.” *Request* at 2. Adsystech asserts that in the absence of an award to Adsystech, it will lose the key employees it needs for the recompetition. *Id.* at 2.

Adsystech further asserts that JTA and its key subcontractor should be excluded from the subsequent competition required under the Administrator’s Order. *Id.* at 3. Although Adsystech recognizes that the ODRA’s Findings and Recommendations do not find any impropriety by JTA or its key subcontractor, Adsystech seeks an order from the Administrator directing an immediate investigation into the subcontractor so that a contracting officer can decide whether to exclude JTA from the recompetition. *Id.* Finally, Adsystech argues that it should receive the results of this proposed investigation. *Id.*

II. DISCUSSION

It is well established that “consistent with maintaining an efficient dispute resolution process, the ODRA will not entertain [reconsideration] requests as a routine matter and will not ‘consider requests demonstrating mere disagreement with a decision or restatement of a previous argument.’” *Protests of Hi-Tec Systems, Inc.*, 08-ODRA-00459,-00460 (Consolidated), *Decision Denying Reconsideration* dated November 20, 2008, *quoting from Protest of Maximus, Inc.*, 04-TSA-009, *Decision Denying Reconsideration* dated November 29, 2004. “An attempt to either re-litigate previously adjudicated issues or to introduce new legal arguments based on the original administrative record will not provide a basis for reconsideration.” *Id.* at 2.

The allowable bases for reconsideration of decisions in ODRA cases similarly are well established. The requesting party has the burden of demonstrating either: (1) clear errors of material fact or law in the underlying decision; or (2) previously unavailable information that would warrant reversal or modification. *See Protest of Columbus Technologies and Services, Inc.*, 09-ODRA-00514, *Decision Denying Reconsideration* dated July 9, 2010; *Contract Dispute of Hillsborough Veterans Commerce Park*, 08-ODRA-00473, *Decision Denying Reconsideration* dated April 20, 2010; *Protests of Hi-Tec Systems, Inc.*, *supra*; *Protest of Maximus, Inc.*, *supra*; *Protest of Raytheon Technical Services Company*, ODRA Docket No. 02-ODRA-00210, *Findings and Recommendations on Request for Reconsideration of Remedy* dated April 10, 2002.

Here, Adsystech has not attempted to allege either of these two reconsideration bases. Rather, the Request essentially evidences mere disagreement and dissatisfaction with the Order. It seeks to have the protested contract terminated within 30 days, rather than upon completion of the corrective action. *See Request* at 2-3. It also suggests that the services involved be directed to be obtained through another contract vehicle with Adsystech. *Id.* It also seeks to have the Administrator “direct FAA to investigate the allegations surrounding Ascent Consulting without delay, and in time to permit a contracting officer to determine whether exclusion from any recompetition is warranted.” *Id.* at 3.

Essentially, the Request would have the ODRA speculate that the Product Team will not promptly implement the specific corrective action clearly mandated by the Administrator’s Order and direct that the contract work be awarded to Adsystech in the interim, based on that speculation. As was noted in the Decision on Reconsideration in Raytheon, *supra* at 4, “It is a well established principle of procurement law that a presumption of regularity and good faith attaches to the actions of government officials.” In this case a comprehensive remedy has been ordered to be undertaken. There is no basis in the record for the ODRA to conclude that the Administrator’s clear directions will not be promptly carried out by the mandated new Product Team, and the ODRA notes that counsel for the new Product Team also has been “directed to report back to the

Administrator through the ODRA every 90 days regarding the progress and outcome...” of the mandated remedy. *Id.* at 47.*

III. CONCLUSION

Adsystech’s Request completely fails to allege that the Order was based on clear errors of material fact or law; or that previously unavailable evidence exists that would support reconsideration of the remedy set forth in the Order. Rather, the Request merely reiterates earlier arguments and speculates that the ordered remedy will not be promptly and fairly implemented. Neither of these can properly support a reconsideration request. *See Protests of Hi-Tec Systems, Inc., supra; Protest of Raytheon Technical Services Company, supra.* The ODRA therefore will not recommend that the Administrator reconsider the remedy imposed by the Order in this case, and the Request summarily is denied.

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Anthony N. Palladino
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FAA Office of Dispute Resolution
For Acquisition
August 6, 2010

* The ODRA also will not speculate on the speed or outcome of the referral for investigation recommended by the ODRA in footnote 17 of the Findings and Recommendations. *See Request* at 3.