

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

Contract Dispute of)	
)	Docket No. 08-TSA-045
Accenture National Security Services, LLC)	
)	
<u>Pursuant to Solicitation HSTS02-08-02-TTC133)</u>		

**DECISION ON MOTIONS TO DISMISS PROTEST GROUNDS
FOR LACK OF TIMELINESS**

I. INTRODUCTION

This matter arises out of a bid protest (“Protest”) filed at the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on October 15, 2009 by Accenture National Security Services, LLC (“Accenture”). Accenture’s Protest challenges the award by the Transportation Security Administration (“TSA”) of a contract to Deloitte Consulting, LLP (“Deloitte”) for implementation and business operations support services in connection with the Secure Flight Program (“Program”). The matter is currently before the ODRA for consideration of motions filed by the TSA and Deloitte to dismiss three of five grounds of the Protest as untimely (“Motions”). More specifically, the Motions challenge as untimely, Accenture’s protest grounds alleging: (1) a flawed evaluation of Accenture’s technical factors; (2) lack of meaningful discussions with Accenture; and (3) failure by the TSA to conduct a best value analysis.¹ *Accenture Protest* at 1. After reviewing the parties’ submissions regarding the Motions, the ODRA concludes for the reasons stated herein that the three challenged Protest grounds were timely filed by Accenture. The Motions therefore are denied.

¹ In addition to the grounds that are the subject of the Motions, the Protest also challenges the TSA’s failure to conduct a proper cost realism analysis of Deloitte’s option year pricing, and alleges that an improper probable cost analysis was conducted. *Id.*

II. FACTUAL BACKGROUND

The TSA issued the Solicitation in this case on March 11, 2008. The Solicitation was for an indefinite delivery/indefinite quantity contract with cost plus fixed fee, as well as firm fixed price task orders, for a period of one year, with four one-year options (“Contract”). *Id.* at 3, 4. According to the Solicitation, award was to be made on a “best value” basis, which would be “determined by an integrated assessment and trade-off analysis among non-price and price factors.” *Id.* at 4; *citing Solicitation §M-1 at 56.* Under Section M of the Solicitation, the evaluators would review non-price technical factors, including past performance, staffing and management plans with key personnel resumes, technical approach, oral presentations, small business sub-contracting plans and Task Order 1 staffing plans with key personnel resumes. *Id.*; *Solicitation §M-2.*

Both Accenture and Deloitte submitted offers in connection with the Solicitation and on September 3, 2008, the Contract was awarded to Accenture. *Accenture Protest* at 5. Deloitte protested the award decision with the ODRA on September 16, 2008, Docket Number 08-TSA-036 (“Deloitte Protest”). In Findings and Recommendations dated January 16, 2009 (“*ODRA Findings and Recommendations*”), the ODRA recommended that the Deloitte Protest be sustained. The ODRA’s Findings and Recommendations in the Deloitte Protest concluded that TSA had failed to conduct a life cycle cost analysis required by the Solicitation for the option years of the Contract. The ODRA recommended that TSA re-evaluate the Deloitte and Accenture offers on the basis of the stated evaluation criteria and that offerors be provided an opportunity to submit any cost information necessary for the re-evaluation. *ODRA Findings and Recommendations* at 19. In an Order dated March 27, 2009 TSA adopted the ODRA’s Findings and Recommendations and issued an Order sustaining Deloitte’s Protest.

The Solicitation was amended on March 27, 2009 (“Amended Solicitation”) and included a statement that: “the following evaluation factors will not be re-evaluated as part of this [re-evaluation] process and will retain their original rating” *Amended*

Solicitation at 2. The Amended Solicitation went on to identify the following factors that would not be re-evaluated: factor 1, past performance; factor 2, staffing and management plan; factor 3, technical approach; factor 4, oral presentations; factor 5, small business contracting plan; and factor 6, task order 1.

The Amended Solicitation also included the following language:

Evaluation Method

The Government shall utilize the evaluation method described in the solicitation. Since this re-evaluation is based upon the original evaluations conducted in support of solicitation “HSTS02-08-R-TTC133, the original evaluation ratings for factors 1 through 6 and the price/cost evaluation for the Task Order 01 base year will remain unchanged. Award will be based upon consideration of previous evaluations for factors 1 through 6 and a newly evaluated total price.

Amended Solicitation at 4. Accenture and Deloitte’s overall technical ratings [DELETED] as a result of the subsequent re-evaluation and TSA determined that Deloitte’s offer constituted the best value as the total of the base year and option years was approximately [DELETED] than the price offered by Accenture. *Accenture Protest* at 7. Contract award was made to Deloitte on September 11, 2009. *Id.* at 6. A debriefing of Accenture was held on October 7, 2009, and Accenture filed its Protest with the ODRA on October 15, 2009.

III. DISCUSSION

As was noted above, the Motions challenge the timeliness of Accenture’s Protest grounds that allege: flawed evaluation of technical factors; lack of meaningful discussions; and failure to conduct a proper best value analysis. The TSA Motion specifically argues that the grounds of Protest in question constitute challenges to the Amended Solicitation and thus are not timely inasmuch as they were not filed prior to the time set for receipt of offers. *TSA Motion* at 6, 7. In addition, TSA’s Motion alleges that Accenture had actual knowledge of the challenged grounds as of March 27, 2009, *i.e.*, the date that TSA provided Accenture a post-award debriefing that included

information on Accenture's strengths, weaknesses, and the deficiencies of its technical proposal. *Id.* at 8. Finally, TSA's Motion alleges that Accenture was required to file the challenged grounds of protest within 5 business days of its debriefing on March 27, 2009. *Id.* at 8, 9.

For its part, Deloitte's Motion asserts that:

to the extent that Accenture seeks a re-evaluation of its proposal under Factors 2 (Staffing and Management Plan), 3 (Technical Approach), 4 (Oral Presentations), and 6 (Task Order 01), the protest clearly challenges TSA's March 27, 2009 Request for Additional Cost Information.... Because Accenture failed to Protest these aspects of the March 27, 2009 request for additional cost information prior to the next closing date, i.e., April 27, 2009, to that extent the Protest is untimely under 14 C.F.R. § 17.15(a)(2) and must be dismissed for lack of jurisdiction.

Deloitte Motion at 6. Deloitte goes on to argue:

Accenture was on express notice that there would be no change in the evaluation results for factors 1 through 6, and that portion of factor 7 that addressed cost/price for the base year effort (Task Order 01). From this, offerors could only conclude that the non-price factors would not be re-evaluated and that there would be no discussions concerning matters bearing upon the factors that Accenture now seeks to revisit.... To this extent Accenture's protest comprises an attack on an alleged impropriety 'subsequently incorporated into this solicitation.'

Id. at 7, 8.

Accenture filed its opposition to the Motions on October 25, 2009 ("Opposition"). Accenture's Opposition asserts that the subject grounds do not constitute challenges to the evaluation process established in the March 27, 2009 Letter; *Opposition* at 1-4.; and that the protest grounds were in fact filed timely within 5 business days of the post-award debriefing on October 7, 2009. *Id.* at 4-6.

A. The Challenged Protest Grounds are in the Nature of Post-Award Challenges to the Outcome of a Competition.

As discussed above, the Motions attempt to characterize the subject grounds as untimely challenges to the evaluation scheme for the second round of the procurement. *TSA*

Motion at 5; *Deloitte Motion* at 2. The Motions contend that inasmuch as the evaluation scheme for the re-evaluation was set out specifically in the March 27, 2009 Letter expressly informing the parties that the TSA would not re-evaluate technical factors 1 through 6, the challenged Protest grounds are untimely. *TSA Motion* at 6; *Deloitte Motion* at 6.

Essentially, the Motions attempt to incorrectly characterize the nature of the challenges of the three subject protest grounds of the Accenture Protest. Notwithstanding TSA's and Deloitte's assertions, it is clear from a plain reading of Accenture's Protest that it is not contending that the TSA should have re-evaluated Accenture's technical ratings as part of the second round of the procurement. Rather, as Accenture correctly asserts "the basis for grounds C, D, and E of Accenture's Protest is that TSA reached an erroneous conclusion regarding Accenture's technical ratings in the first round of procurement, and not that [the] TSA should have re-evaluated the offerors' technical proposals during its evaluation of its Accenture's and Deloitte's option year pricing in the second round." *Accenture Opposition* at 2. While the Motions may have been well founded had Accenture sought in the current Protest to challenge the re-evaluation scheme set forth in the March 27, 2008 Letter of TSA, such is not the case here.

B. Accenture's Protest was Timely Filed within 5 Business Days of its October 7, 2009 Debriefing.

TSA additionally contends that the Protest grounds in question were not filed in accordance with 14 C.F.R. § 17.15. In response, Accenture argues that any earlier protest by Accenture would have been premature and that "requiring Accenture to file a Protest before the September 11 award would have amounted to a defensive Protest and would not have provided a meaningful remedy." *Accenture Opposition* at 5. Accenture further contends in this regard that:

Filing a protest within seven or five days of the March 27 Letter, as TSA contends was required, would have resulted in an advisory opinion that may or may not have been relevant, or even necessary, until TSA made its final award determination.

Id.

The timeliness rules for the filing of Protests at the ODRA are well established in the ODRA Procedural Regulations as follows:

For Protests other than those related to alleged solicitation improprieties, the Protest must be filed on the later of the following two dates: (i) Not later than seven (7) business days after the date the protester knew or should have known of the grounds for the protest; or (ii) If the protester has requested a post-award debriefing from the FAA Product Team, not later than five (5) business days after the date in which the Product Team holds that debriefing.

See 14 C.F.R. §17.15. In this case it is undisputed that the final award Decision that is the subject of Accenture's Protest was made on September 11, 2009; that the post-award debriefing of Accenture was held on October 7, 2009; and that Accenture filed its Protest 5 business days later, *i.e.*, on October 15, 2009.

As was discussed above, the ODRA construes the subject grounds as in the nature of post-award challenges to the outcome of the competition. Any filing of the grounds prior to the completion of the re-evaluation process would have been both premature and speculative. Accenture remained in contention for the award until the completion of the re-evaluation, including the cost-technical tradeoff process. Until that process was completed and an award decision made, Accenture and any similarly situated party could not have made the required showing of prejudice. *Protest of Evolver, Inc.*, 09-ODRA-00495. That is particularly true in this case since Accenture had won the competition the first time around with the scores that the TSA had announced it would not be re-evaluating.

The FAA dispute resolution process under the Acquisition Management System ("AMS") is designed to be streamlined and efficient in nature. It would be contrary to that design to require the filing of precautionary and potentially unnecessary protests of the type that the Motions assert Accenture should have filed earlier in this case. Under

the circumstances here, Accenture was not required by the ODRA Procedural Regulations to file the challenged grounds of its Protest until after a final award decision had been made. Accenture timely filed its challenge within 5 business days of its debriefing regarding the award decision and the three challenged protest grounds therefore are timely.

IV. CONCLUSION

For the reasons discussed herein the ODRA concludes that the three subject grounds of protest were timely filed. The Motions therefore are denied.

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Office of Dispute Resolution for
Acquisition
Dated: December 8, 2009