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

Protest of	)	
	)	
Diversified Management Systems, Inc.	)	Docket No. 13-ODRA-00636
	)	
<u>Pursuant to Solicitation DTFAWA-12-C-00031</u>	)	

**SUPPLEMENTAL FINDINGS AND RECOMMENDATIONS
ON RECONSIDERATION**

I. Introduction

This matter currently is before the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on a Motion for Reconsideration (“Motion”). The Motion arises from a bid protest (“Protest”) filed with the ODRA by Diversified Management Solutions, Inc. (“DMS” or “Protester”), docketed as 13-ODRA-00636. The Protest challenged the intended award of a contract (“Contract”) for Contract Weather Observation (“CWO”) Services to ATS Meteorology USA, Inc. (“ATS”) under Solicitation DTFAWA-12-R-08591 (“Solicitation”). The Solicitation sought “to acquire the services of weather observer personnel who will provide augmentation and/or back up to the Automated Observing Systems, and to take manual observations as necessary” in 17 geographical areas, sub-divided into 17 intended contract awards set aside for small businesses and Section 8(a) businesses. *Findings and Recommendations* (“F&R”) at Finding of Fact (“FF”) 2 and FF 11-12. The DMS Protest challenged the planned award of Group 11 on the grounds that ATS is affiliated with its proposed subcontractor, Control Systems Research, Inc. (“CSR”), and therefore was ineligible for award as a small business under the Solicitation. *Protest.*

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After an adjudication process and in full consideration of the administrative record, the ODRA found that: (1) managerial Senior Weather Observers ATS proposed were to be hired from CSR; (2) ATS relies heavily on CSR's IT infrastructure; and (3) ATS relies on CSR's quality control processes. *F&R* at 47-48. Thus, the ODRA found ATS to be affiliated with CSR under the ostensible subcontractor rule, and recommended that the Protest be sustained. *Id.* The Administrator adopted the Findings and Recommendations of the ODRA, and a Final Agency Order was issued on September 13, 2013.¹

ATS filed its Motion on September 20, 2013. ATS asserts that the "determination that CSR is an 'ostensible subcontractor' of ATS is based upon a fundamental and clear error of fact." *Motion* at 2. In its Opposition to the Motion for Reconsideration ("Opposition"), DMS asserts that "[t]he Findings and Recommendations . . . carefully analyze the relationship between ATS and its ostensible subcontractor CSR for expertise, IT infrastructure, quality control systems, training, and management." *Opposition* at 3. The FAA CWO Product Team has taken no position on the Motion. As discussed below, the ODRA makes supplemental findings and recommends that the Administrator decline to reverse the Order of September 13, 2013.

II. Discussion

The standard of review for reconsideration of a decision is established in the ODRA Procedural Rules and ODRA precedent. The standard for reconsideration is:

The ODRA will not entertain requests for reconsideration as a routine matter, or where such requests evidence mere disagreement with a decision or restatements of previous arguments. A party seeking reconsideration must demonstrate either clear errors of fact or law in the underlying decision or previously unavailable evidence that warrants reversal or modification of the decision.

¹ Familiarity with the underlying Findings and Recommendations and the Administrator's Final Agency Order is assumed.

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14 C.F.R. §17.47 (2012); *Protest of Brand Consulting Group, Inc.*, 12-ODRA-00598 (Decision on Reconsideration, May 8, 2012); *see also Protest of Columbus Technologies and Services, Inc.*, 09-ODRA-00514 (Decision on Request for Reconsideration, dated July 9, 2010); *Protest of HyperNet Solutions, Inc.*, 07-ODRA-00416 (Decision on Reconsideration, dated January 25, 2008). Consistent with the ODRA's charge to maintain an efficient dispute resolution process, this Office will not entertain reconsideration requests that are based simply on mere disagreement with a previous decision. *Protest of Maximus, Inc.*, 04-TSA-009 (Decision Denying Motion for Reconsideration, dated November 29, 2004).

In its Motion, ATS mischaracterizes the Findings and Recommendations when it asserts that the ODRA found only that "ATS intends to hire former CSR managerial Senior Weather Observers at all of the Group 11 sites that are the subject of this size protest, and that ATS and CSR, therefore, are affiliated under the ostensible subcontractor rule." *Motion* at 3. Contrary to the assertion of counsel for ATS, the ODRA made 87 discrete Findings of Fact in its Findings and Recommendations, and considered the administrative record in its entirety in reaching the conclusion that ATS is affiliated with CSR pursuant to the ostensible subcontractor rule. ATS asserts that "CSR was not the incumbent contractor at any of the 8 sites awarded under Group 11." *Id.* (emphasis omitted). Notwithstanding these assertions, ATS does not proffer any new, previously unavailable evidence nor demonstrate any "clear errors of fact or law in the underlying decision...that warrants reversal or modification of the decision." 14 C.F.R. §17.47.

A. ATS Has Not Proffered Any Previously Unavailable Evidence

ATS does not offer any "previously unavailable evidence that warrants reversal or modification" of the Findings and Recommendations. To the contrary, while ATS emphasizes throughout its Motion that its arguments are supported by the administrative record, *Motion* at 3, the ODRA observes that ATS declined the opportunity to make these arguments when it failed to file Comments permitted by the ODRA Procedural Regulations at 14 C.F.R § 17.21(d)-(e) during the adjudication. Thus, it now attempts to

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argue for the first time that facts readily available in the administrative record warrant a finding that ATS and CSR are not affiliated under the ostensible subcontractor rule. In these circumstances, neither reconsideration nor relief is appropriate. *Protest of Brand Consulting Group, Inc., supra*. Filing of a reconsideration motion cannot serve as a substitute for the failure to file comments during the adjudication of the underlying case.

In lieu of submitting new, previously unavailable evidence in support of its Motion, ATS proffers a Declaration from David Macphail (“Macphail Declaration”), the ATS Director of Operations, submitted in a related protest, IBEX Weather Services, Inc., 13-ODRA-00644. *Motion*, Attachment 2. Far from supporting the Reconsideration Motion, the Macphail Declaration actually supports the ODRA’s original findings by stating among other things that “ATS adopted the CSR Quality Assurance Management Plan (QAMP)” and the “same was true with the Training Plan utilized in the ATS proposal.” *Macphail Declaration* at ¶ 7.

The Macphail Declaration further bolsters the ODRA’s finding of affiliation between ATS and CSR. It refers to “questions . . . about the identity of the individual whose handwriting appears in block 14 of the SF-33 submitted by ATS.” *Macphail Declaration* at ¶ 3. Macphail proceeds to declare in reference to “block 14 of the SF-33” that “[b]ased on a recent telephone conversation with Robert Schmidt, CFO/Vice President of CSR, I believe that insertion was made by an individual at CSR.” *Id.* at ¶ 10. Essentially, ATS concedes that its ostensible subcontractor, CSR, was directly involved in, if not responsible for the preparation and execution of the ATS Proposal. Proposal preparation is an indicator of affiliation under the ostensible subcontractor rule. *Size Appeal of ePerience, Inc.*, SBA No. SIZ-4668 (2004).

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B. Supplemental Findings Regarding the Relationship of AST and CSR

In addition to the above, in re-reviewing the record with regard to management issues called out in the Motion, the ODRA finds that it contains additional significant indicia of affiliation and violation of the ostensible subcontractor rule. The ODRA's supplementary findings are set forth in the following numbered paragraphs.

1. The ATS Proposal states that:

The first priority of our FAA CWO site staffing approach will be to hire the incumbent site Senior Weather Observers if they meet the qualifications and performance requirements identified in this proposal and as verified by the Government FAA staff. These individuals will be given the right of first refusal.

AR Tab 6(e)(ii) at 13.

2. The ATS Proposal also states:

Our plan is to create a ready-to-serve site location and workforce during the period after contract award announcement and transition period. To do this, we will recruit and train (as necessary) all incumbent personnel during Transition time with an effective start date of 1 December 2012. Thus, during the period after contract award announcement, we will recruit, hire, orient, train, certify (as appropriate) and transfer clearances (as appropriate). They will leave their incumbent positions at the close of business on the last day of September 2012 and report to work the following day as employees of ATS or its subcontractor CSR.

Id.

3. The ATS Proposal emphasizes the joint management of the contract by the respective presidents of ATS and CSR as follows:

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The ATS / CSR Presidents [REDACTED] shall provide the commitment and resources necessary to assure a quality program is enforced throughout the organization. The corporate philosophy, attention to detail, interface with the customer, and interface with company management and employees start with the President. The President inspires the professionalism and corporate work ethics and attitude.

Id. at 50.

4. “ATS will implement a program-tailored transition plan based upon the lessons-learned by CSR in previous comparable contract transitions.” *Id.* at 82.

5. The ATS Proposal also states with respect to transition:

ATS Meteorology USA Inc. (ATS) will implement a program-tailored transition plan based upon CSR’s lessons-learned in previous comparable contract transitions and proven to work. This plan ensures continuity of performance without disruption to vital weather services and makes the change in management agents transparent to the Government and ATS customers.

Id.

6. The ATS transition plan emphasizes its subcontractor, CSR’s experience as follows:

CSR is experienced in transitioning Government weather contracts, including the FAA. Their experience combined with the experience of ATS’s management team will be used to successfully transition this contract. Figure 11 below illustrates a sampling of some of CSR’s transition experience with CWO contracts.

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7. In the above referenced Figure 11, out of seven examples, five are from CSR.
Id. at 83.

8. ATS also states with respect to its transition plan:

ATS / CSR have formed a Transition Team that is ready to execute its Transition plan immediately upon contract award. As indicated in Table 3, we have identified each individual by name for the Transition team and have defined key roles and responsibilities, so we can start immediately after contract award.

Id. at 86.

9. Key Transition Personnel also are employees of CSR:

- Executive Leadership

[REDACTED] [CSR President, *ATS Proposal* at 50; *see also CSR Response to CO Fact Finding AR Tab 10(i)*]: Responsible for overall management of the contract from a financial stand-point. Provides executive reviews of actual vs budgeted costs and makes necessary changes to ensure effective contract management.

- Security

[REDACTED] [CSR Chief Administrative Officer/Facility Security Officer 2006 - Present, *see CSR Response to CO Fact Finding AR Tab 10(i)*]: Process security paperwork for background checks; enter new employees in VAP; perform initial briefings / training; support Senior Weather Observer. Ensure all employees follow all security procedures.

- QA/Training/Qualifications/Certifying

[REDACTED] [CSR Deputy Program Manager, *see AR Tab 6(a) at 35*]: Provide instruction to Senior Weather Observer; implement programs, SOPs, guidance, train, etc.

AR Tab 6(e)(ii) at 86-87.

10. The ATS Proposal also states that:

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The ATS Transition Team and key management personnel will establish the post-award teleconference immediately after contract award to discuss the transition of awarded sites. The Transition Team will be prepared to execute the transition plan immediately after contract announcement. ATS activities will include: final decisions on management and office staffing, augmentation of personnel resources into the Personnel database, continuation of personnel interviews, staff selection, company training, certification, site work area familiarization, and whether a formal transition period will be required. [REDACTED]

Id. at 89 (emphasis added).

11. The ATS Proposal emphasizes its subcontractor, CSR's experience and management:

CSR has experience in the operating and standing up of new CWO operations and ATS will leverage that experience as the foundation for our program. The ***CSR Management Team has experience*** in standing up new CWO operations at several FAA and other military weather sites. This transition plan has proven to facilitate a smooth transition at both established and new CWO operations. ***CSR's experience*** in managing the startup of new CWO's has provided us with the lessons learned that will smooth out this complex operation of new facility coordination, employee recruitment, badging, certification, and the establishment of an IT infrastructure. The Senior Weather Observers will assist with the local Airport Authority and/or local security officials for employee access.

Id. at 90-91 (emphasis added).

12. The ATS Proposal states with respect to the post transition period:

When the Transition activities are completed, the Transition Organization will cease to exist in a formal sense. ***However, personnel comprising the Transition organization will still support those activities and functions performed during the Transition Phase that will continue as part of on-going operations.***

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Id. at 91 (emphasis added).

The above supplementary findings further support the conclusion that AST is in violation of the ostensible subcontractor rule.

C. ATS has not demonstrated a clear error of law or fact that would warrant reversal or modification

First, ATS mistakenly asserts that “[t]he ODRA decision incorrectly assumes that since CSR was ‘an incumbent’ on CWO contracts that it was the incumbent on the CWO contracts that comprise Group 11.” *Motion* at 3. ATS specifically challenges the ODRA’s finding that “‘all of the managerial Senior Weather Observers ATS proposes are to be hired from CSR.’” *Id.* at 2. ATS also asserts that “[t]he principal factual finding that all of the managerial Senior Weather Observers ATS proposes are to be hired from CSR is without any foundation.” *Id.* at 4. Without any reference to the administrative record or evidentiary support, ATS states that “[a]lthough the contentions raised by ATS in this request are supported by the Agency record, ATS is confident that the Program Office, if asked by ODRA, will confirm the factual accuracy of the contentions raised by ATS in this reconsideration request.” *Id.*, fn. 15.

While not raised previously, ATS now asserts that “[it] hired the incumbent (non-CSR) employees at [REDACTED] of the weather observation sites [and] CSR hired the incumbent (non-CSR) employees at [REDACTED] of the CWO sites incidental to performance of its subcontract with ATS.” *Id.* ATS further asserts that “a review of the resumes of the Senior Weather Observers proposed by ATS clearly indicates the incorrectness of ODRA’s assumption and resulting conclusion.” *Motion* at 3-4. However, ATS concedes that its Proposal was not clear in that, “the incumbent contractors at [REDACTED] were not identified on the resumes submitted by the Senior Weather Observers for each of those sites. . . .” *Motion* at 4. Thus, on this record, only [REDACTED] incumbent Senior Weather Observers in Group 11 are clearly not employed by CSR.

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Regardless, ATS's attempt to argue based on opaque resumes over which incumbent Senior Weather Observers in Group 11 did or did not work for CSR does not mandate reconsideration. As discussed in the Findings and Recommendations, in an analysis of size status under the ostensible subcontractor rule, “all aspects of the relationship between the prime and subcontractor, *including the terms of the Proposal*, agreements between the firms (such as teaming agreements, bonding or financial assistance), and *whether the subcontractor is the incumbent on the predecessor contract*,” will be considered. *F&R* at 42, *citing Size Appeal of SM Resources Corporation, Inc.*, SBA No. SIZ-5338 (2012) (emphasis added). The ODRA emphasized that “[t]he analysis is intensely fact specific, and based on the solicitation *and the proposal at hand*.” *F&R* at 42, *citing Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260, at 6 (2011) (emphasis added).

The analysis is not based on the award or how the contract is ultimately administered. OHA has held that documents created after the final proposal has been submitted may not be used to contradict the offeror's statements in its proposal. *See, e.g., Size Appeal of Onopa Mgmt. Corp.*, SBA No. SIZ-5302, at 16 (2011). Any assertions not consistent with the proposal are irrelevant. *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 16 (2010). In this regard, ATS concedes that the “ODRA correctly notes that ATS in its proposal states ‘that it plans to hire all of the incumbent managerial Senior Weather Observers...’” *Motion* at 4. Even if all of the senior weather observers were not incumbent employees of CSR, the ATS Proposal represented that incumbent senior weather observers at the various sites “will leave their incumbent positions at the close of business on the last day of September 2012 and report to work the following day as employees of ATS or its subcontractor CSR.” *AR Tab (e)(ii)* at 13. There is no indication in the record that any of these managerial personnel previously had been employees of ATS. Thus, the ATS proposal indicates that some portion of the senior weather observers will be CSR employees who will manage local performance under the contract, and that ATS relied on the incumbency status of CSR to meet the requirements of the Solicitation. SBA precedent, as well as the regulations, specifically indicate that

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subcontractor incumbency is an indication of affiliation. 13 C.F.R. § 121.104(h)(4); *Size Appeal of SM Resources Corporation, Inc.*, SBA No. SIZ-5338 (2012).

Next, ATS asserts that “[t]he incidental findings of ODRA pertaining to ATS’ reliance on CSR’s existing IT infrastructure, quality assurance and training plans, do not alone or collectively support an ostensible subcontractor finding.” *Motion* at 4-5. The ATS assertions in this regard amount to nothing more than an attempt to re-argue the underlying case, which is not a basis for reconsideration. 14 C.F.R. §17.47; *Protest of Brand Consulting Group, Inc., supra*. Counsel for ATS incorrectly assumes that these findings of the ODRA are “incidental” to its ostensible subcontractor analysis. Indeed, notwithstanding the challenged finding with regard to the hiring of incumbent managerial personnel, these unchallenged findings related to IT infrastructure, quality assurance, and training plans - coupled with AST’s reliance on CSR - as outlined in the original F&R as well as in the Supplemental Findings above, justify a finding of undue reliance on the ostensible subcontractor.

The alleged factual error that is the basis for the Motion is inconsequential when viewed in the context of the other overwhelming evidence in the record that supports the conclusion of a violation of the ostensible subcontractor rule. Indeed, as Supplemental Findings of Fact 1-12 show, CSR’s managerial responsibilities far exceeded the control at individual sites. Instead, the proposal shows CSR’s control over many areas of contract administration both during and after contract transition. Even if the referenced use of the word “all” in a single sentence in the original F&R was not clearly substantiated, it does not warrant reversal or modification of the Decision. Accordingly, the ODRA finds that ATS does not “demonstrate either clear errors of fact or law in the underlying” Findings and Recommendations that would warrant modification of the Decision. 14 C.F.R. §17.47.

III. Conclusion

The ODRA, for all the reasons discussed above, recommends that the Administrator² adopt the foregoing Supplemental Findings and Recommendations and decline to reverse the Order of September 13, 2013.

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

APPROVED:

-S-

Anthony N. Palladino
Director and Administrative Judge
Office of Dispute Resolution for Acquisition

² ATS asserts, relying on a 2002 decision in the *Protest of Raytheon Technical Services Company*, 02-ODRA-00210, quoting from *Recommendation Regarding Reconsideration Request in Protest of Consecutive Weather*, 99-ODRA-00112 that “the ODRA cannot itself decide a request to reconsider a Final Agency Decision by the Administrator.” *Id.* at 1, 2. The cases relied on by ATS have been superseded both by ODRA Procedural Regulations and by ODRA case precedent. The current ODRA Procedural Regulations, which are in effect for cases filed on or after October 7, 2011, contain a “Reconsideration” provision at Section 17.47. That Section provides that the ODRA will consider timely filed reconsideration requests. *Id.*; see also *Protest of Brand Consulting Group, Inc.*, *Decision on Reconsideration Request* dated May 8, 2012; and *Protest of Columbus Technologies and Services, Inc.* 10-ODRA-00514, *Decision on Request for Reconsideration* dated July 9, 2010. A decision to modify or reverse a Final Agency Order of the Administrator requires a final Administrator’s decision made on the ODRA’s recommendation. The ODRA, however, initially reviews all reconsideration requests and can issue a decision denying a request. *Id.* In the instant case, because the ODRA is making supplementary findings, an Administrator’s Order is being requested.