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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of All Weather, Inc.**
 Under Solicitation No. DTFAGL-04-R-34339

Docket No.: **04-ODRA-00294**

Appearances:

For the Protester: All Weather, Inc.: Donald J. Walsh, Esq., Scaldara & Potler, LLP

For the FAA Great Lakes Region: Lynne Adams-Whitaker, Esq.

For the Intervenors: Systems Atlanta, Inc.: Brian A. Rindt, Esq., Attorney at Law

I. Introduction

On January 16, 2004, All Weather, Inc. (“AWI”) filed the instant protest (“Protest”) with the FAA’s Office of Dispute Resolution for Acquisition (“ODRA”), challenging an award by the FAA Great Lakes Region (“Region”) of a contract pursuant to Solicitation Number DTFAGL-04-R-34339 (“the Solicitation”). The Solicitation concerned the acquisition by the Region of a Data Display System (“DDS”) for a new Air Traffic Control Tower (“ATCT”) located in Columbus, Ohio. The successful offeror, Systems Atlanta, Inc. (“SAI”), intervened in the Protest as an interested party.

AWI’s Protest initially alleged that: (1) AWI’s offer wrongfully had been rejected as “non-responsive”; (2) SAI’s offer was not compliant with the Solicitation’s requirements; and (3) the Region failed to complete a best-value analysis in making its award decision. AWI further amplified and supplemented its grounds of protest in Comments filed on

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February 24, 2004 (“Supplemental Protest”). AWI’s Supplemental Protest alleged that the Region had engaged in disparate treatment of AWI and SAI; and that SAI had offered Government Furnished Equipment (“GFE”), developmental software, *i.e.*, software that had not been in use in the National Airspace System (“NAS”) prior to the date specified in the Solicitation. Essentially, the Supplemental Protest claimed that the Region had allowed SAI to deviate from the requirements of the Solicitation.

For the reasons discussed herein, the ODRA concludes that: (1) AWI had standing to protest; and (2) the Region’s decisions to reject AWI’s offer as non-responsive and make award to SAI had a rational basis, were not arbitrary or capricious or an abuse of discretion and are supported by substantial evidence. The ODRA therefore recommends that AWI’s Protest be denied in its entirety.¹

II. Findings of Fact

1. On August 28, 2003, the Region published a Screening Information Request for qualified vendors (“SIR”) on the Internet related to the planned acquisition of a DDS for the Columbus ATCT. *See* Agency Response (“AR”) at 1. The SIR contemplated the purchase and installation of 28 DDS Operational User Workstations, including hardware and software. *See* AR, Exhibit 1.

2. The SIR documents set forth a number of requirements including, among other things, the following:

Due to schedule constraints associated with this procurement, this Data Display System cannot utilize developmental software. The System software provided must be in operational use within the National Airspace System (NAS) of the FAA prior to August 29, 2003.

See AR Exhibit 1, Page 2.

¹ The Protest requested, among other things, that contracting activities and performance be stayed during pendency of the Protest. Following briefings by the parties, the ODRA issued a written Decision on February 4, 2004, denying the stay request.

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3. The Statement of Work (“SOW”) had been provided to the offerors with the original SIR. *See* AR at 3.

4. The Solicitation contemplated that the procurement would be conducted in a two-phase process. In the first phase, *i.e.*, the “Prequalification Phase,” offerors were required to provide technical proposals. In the second phase, *i.e.*, the “Pricing Phase,” prices were to be solicited from sources that the Region deemed technically qualified to compete for the award. *See* AR, Exhibit 1. The Solicitation did not contemplate that offerors would materially alter their technical proposals during the Pricing Phase.

5. Section M of the Solicitation document notified offerors that an award would be made to the responsive offeror whose technical proposal and cost proposal offered the best value to the Government. Offerors further were notified that the Agency reserved the right to accept an offer other than the lowest price offer. AR, Exhibit 23.

6. The Prequalification Phase technical proposals originally were due to be submitted by September 12, 2003. The eventual awardee, SAI, and one other company not a party to this Protest, timely submitted technical proposals. *See* AR at 2. Protestor, AWI, sought and received an extension of time until the close of business, October 7, 2003 to submit its technical proposal. *See* AR, Exhibit 8.

7. In granting the requested extension of time to AWI, the Contracting Officer advised AWI that its initial submission: “did not specifically address many of the requirements as listed in the Internet announcement. In order to be considered for the current requirement for Columbus, I need you to address each element of the specification.” *See* AR, Exhibit 8.

8. AWI submitted its technical proposal on October 2, 2003. The AWI proposal indicated that AWI proposed to provide an ACE-IDS Data Display System, including

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software that was already in use in the National Airspace System, as required by the SIR. The AWI cover letter accompanying its technical proposal stated that:

AWI, with its ACE-IDS, combines the hardware design and validation with IDS 5 Software to create a Data Display System that meets the expectations today, and the ability to grow to tomorrow's requirements.

AR at Exhibit 9.

9. The Region evaluated the technical submissions of AWI, SAI and the third offeror on November 11, 2003 and determined that the technical submissions of AWI and SAI satisfied the technical criteria set forth in the SIR. The Agency rejected the technical submission of the third offeror, and on November 20, 2003, forwarded complete Solicitation packages to AWI and SAI. *See* AR at 3, Exhibits 13, 14.

10. AWI and SAI were required in the Pricing Phase of the competition to submit pricing on two contract line items by December 10, 2003. The two items specified were: (1) the DDS; and (2) freight charges. *See* AR at 3, Exhibit 15. The pricing proposals were due by December 10, 2003.

11. SAI submitted its pricing proposal on December 9, 2003, including requested documents regarding pricing, costs, delivery schedule, and related documentation. Although it offered additional, non-required options, the SAI pricing proposal did not constitute an alternative technical proposal or materially alter SAI's Prequalification Phase technical proposal. *See* AR, Exhibits 20, 23.

12. By contrast, AWI's pricing proposal, which was dated December 9, 2003, proposed three new and different technical options, together with separate pricing for each of the three technical options. *See* AR, Exhibit 21. It is undisputed that AWI's pricing proposal did not contemplate the supply by AWI to the Region of the IDS software that had been identified in AWI's original technical proposal during the Prequalification Phase. Rather, Option 1 of AWI's pricing proposal contemplated that the IDS software would be

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supplied by the Region as Government Furnished Equipment (“GFE”).” *See* AR, Exhibit 21.

13. It also is undisputed that the AWI pricing proposal included two additional technical options that had not been proposed by AWI to the Region during the Prequalification Phase.

14. The Region reviewed the pricing proposals of SAI and AWI, and in a recommendation document dated December 11, 2003. The Region’s Mr. Fred Rasche indicated that:

Each proposal was evaluated with respect to compliance with the procurement criteria listed on the published Columbus, OH, Data Display System Procurement Specification.

See AR, Exhibit 23.

15. The recommendation document further found that: “the system proposed by System Atlanta meets all requirements.” *See* AR, Exhibit 23.

16. With respect to the price submission of AWI, the recommendation document stated:

The initial system proposed by All Weather, Inc. met all systems requirements. In the final submission, All Weather has proposed three options. All three of these options differ significantly from the original system proposed to the extent that none of the three options now meets the published requirements. The reasons are as follows: Option 1: no longer meets the requirements due to the fact that software is not provided. Option 2 & 3: no longer meets the requirements due to the fact that the software is no longer currently operational in the NAS as required. Software is developmental software from the FAA’s perspective. Not acceptable per the published requirements. The proposed is “UDS” software which is not in use by FAA Air Traffic at any location.

AR Exhibit 23.

17. The recommendation document concluded as follows:

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Request System Atlanta's system be selected and purchased. The cost is 2% over the original estimate. The cost of \$459,000 still represents a fair value to the Government. Similar systems such as ACE-IDS have been purchased at over \$1 Million.

Id.

18. On December 16, 2003, the Contracting Officer's written Award Determination, after repeating the requirements set forth in the SIR and the Solicitation, noted that:

During the Prequalification segment of this acquisition, All Weather indicated they could meet our technical requirements. Technical Item # 14 states: "The Data Display System cannot utilize developmental software" and "software provided must be in operational use within the National Airspace System (NAS) of the FAA prior to August 29, 2003." All of their documentation submitted by All Weather for Prequalification indicated that they would use IDS Software. This software is acceptable to the FAA and has extensive current use in the NAS. All Weather never mentioned utilizing UDS Software in their Prequalification package.

While All Weather states in their proposal that UDS is not developmental software, they do not provide evidence or any documentation that shows where UDS is in current use in the NAS. Additionally, All Weather did not submit UDS Software for evaluation during the Prequalification stage of the procurement. Therefore, Option II is not responsive to the Solicitation requirements and cannot be considered.

Option II is identical to Option III, as far as the UDS Software is concerned. Option III also proposes use of commercial off-the-shelf hardware. Again, All Weather did not submit qualifying documentation for use of COTS Hardware during the Prequalification stage of this procurement. Therefore, Option III must also be considered non-responsive to the Solicitation requirements it cannot be considered.

Option I requires the FAA to supply the approved IDS Software. This Option also is not responsive to the Solicitation requirements, as the Solicitation requires a complete system. Hardware alone does not constitute a complete system. The Solicitation clearly states that the Contractor must supply 28 operational user workstations. This requirements both hardware and software. Not only does the FAA not wish to take on the administrative burden of supplying the software GFE and being responsible for replacements parts and training, a configuration of the hardware must be done with knowledge of the software. By supplying hardware only, the Contractor cannot comply with several of the technical elements of the Solicitation, such as Items 4 – 8.

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By submitting their proposal in such a manner, All Weather has disqualified themselves from this procurement.

AR, Exhibit 23.

19. The Contracting Officer's Award Determination document discusses the SAI cost proposal as follows:

Systems Atlanta proposal utilizes the hardware and software for which they submitted documentation to the FAA under the Prequalification segment of this acquisition. Systems Atlanta's proposal contains a complete system acceptable to the FAA and currently in use within the NAS. Their price is within .013% of the Government estimate. They can meet our required delivery of February 2004. Therefore, award will be made to Systems Atlanta.

AR, Exhibit 23.

20. Inasmuch as the Region concluded that AWI's proposal was not in compliance with the requirements of the Solicitation, it was not considered for award. AR at 4. The Contract was awarded to SAI on December 18, 2003.

21. AWI received a requested debriefing on January 12, 2004 and submitted the instant Protest on January 16, 2004. AR at 4.

22. AWI's Protest alleged that its offer wrongfully had been rejected; that SAI's offer did not comply with requirements of the Solicitation; and that the Region had failed to undertake an analysis to determine the best value to the Government prior to making its award decision. *See* Protest at 2.

23. More specifically, AWI's Protest alleged that "apparently SAI submitted no technical specifications in its proposal and only included certifications, representations and pricing information. Because of this discrepancy, it was impossible to award to SAI." *See* Protest at 4.

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24. AWI further alleged that the Solicitation “did not restrict the use of Government Furnished Equipment (GFE)....” *See* Protest at 4.

25. Finally, AWI alleged that “the only software which was even in use in the NAS was that used as a component of AWI’s ACE-IDS System. SAI’s offer to the Agency must have included this software.” *See* Protest at 7.

26. AWI contended that SAI’s presumed software thus must be deemed “developmental” and not in compliance with the Solicitation and that the software offered by AWI in Options 2 and 3 of its pricing proposal, although also developmental, should be viewed in a similar light to that presumably being offered by SAI. *See* Protest at 7, 8.

27. AWI’s Comments of February 24, 2004, which were viewed by the ODRA as a Supplemental Protest, admitted that “one minor point in the Original Protest was incorrect....” *See* Supplemental Protest at 1.²

28. The Supplemental Protest amplifies and expands allegations made in AWI’s Protest, claiming that the Region had engaged in disparate treatment of AWI and SAI by permitting SAI to deviate from requirements of the Solicitation that were used to find AWI non-responsive. *See* Supplemental Protest at 1.

29. More specifically, the Supplemental Protest alleged:

The Report [Agency Response] has demonstrated that SAI proposed the use of GFE, provided equipment which did not fully comply with the requirements of the SOW, provided equipment which was not in use in the NAS prior to August 29, 2003, and provided software which was developmental which the FAA has been adamant that it wanted to avoid.

Supplemental Protest at 1.

² While the Supplemental Protest is not specific on this point, presumably AWI is referring to the allegation in its Protest that SAI had not submitted a technical proposal. It is clear from the balance of the Supplemental Protest that AWI recognized, after receiving the Agency Response that SAI had in fact submitted a technical proposal during the Prequalification Phase.

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30. The Supplemental Protest goes on to admit that AWI's Pricing Proposal differed from the technical proposal that it had submitted in the Prequalification Phase of the competition:

Among its three Options [in AWI's Pricing Proposal], AWI's December offer proposed the same system as it had previously presented to the FAA, but it relied upon GFE for the software portion of the system.

See Supplemental Protest at 2. It is undisputed in the record that AWI provided no pricing information in Option 1 of its Pricing Proposal for the software that AWI had proposed to provide in its original technical proposal.

31. AWI's Supplemental Protest tacitly admits that Options 2 and 3 of its Pricing Proposal did not meet the technical requirements of the Solicitation. It claims however, that the software offered by SAI also did not meet the requirement of the Solicitation:

As the FAA claimed in its Report and in the SOW, it was not interested in developmental software in this procurement. It wanted a system which was "in operational use within the National Airspace System (NAS) of the FAA prior to August 29, 2003." Despite these apparent requirements and the chastising which the FAA gave to AWI for offering software in two of its three Options which did not meet these requirements, this is exactly what SAI offered in its Proposal.

See Supplemental Protest at 2.

32. The Supplemental Protest goes on to allege that because SAI indicated that it would not be providing an interface that was allegedly required by the Solicitation, SAI's technical proposal was not compliant with the Solicitation. *See* Supplemental Protest at 3.

33. The Supplemental Protest also appears to challenge the terms of the Solicitation as unclear. *See* Supplemental Protest at 7 and 10.³

³ To the extent that the Supplemental Protest challenges the terms of the Solicitation, it is untimely under the ODRA Procedural Regulations, 14 C.F.R. §17.15(a)(1).

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34. The Supplemental Protest repeats AWI's earlier allegation that "nowhere does the SIR prohibit the use of GFE." *See* Supplemental Protest at 9. The Supplemental Protest goes on, however, to take issue with the Agency's position regarding the integration of the software and to claim that "[t]he use of Government property does not make the Proposal technically incompatible, it only makes its costs and analysis different." *See* Supplemental Protest at 10.

35. AWI also alleges that the award decision was faulty, because the Region failed to perform a best-value analysis and based its award purely on the fact that SAI's price was close to the Government's estimate. *See* Supplemental Protest at 11.

36. The Region's response to the Protest included a Motion to Dismiss without a hearing.⁴

37. The Region's Agency Response is centered on its position that "AWI's Proposal was non-responsive due to the fact that the options submitted by AWI in the pricing phase did not meet the basic requirements in the SIR and did not match the AWI Technical Proposal that was determined to be acceptable in the Prequalification phase." *See* AR at 4. The Agency Response goes on to note that "the ACE-IDS System proposed by AWI during the Prequalification phase specifically included the IDS 5 Software. AWI did not propose the use of GFE or UDS during the Prequalification phase." AR at 4.

38. The Agency Response further notes:

[D]uring the pricing phase, AWI chose not to submit pricing information on the ACE-IDS system, even though the FAA had determined its compliance with the SIR and the fact the pricing for that system had been requested. Instead, AWI submitted three totally new options, none of which matched the ACE-IDS System proposed in the pre-qualification stage.

AR at 4.

⁴ AWI originally had requested a hearing. In its Supplemental Protest, AWI retracted its request for a hearing as unnecessary. *See* Supplemental Protest at 12. AWI did not subsequently renew its request for a hearing, and the ODRA finds that there is no basis or need for a hearing in this case.

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39. The Agency Response specifically addressed the reasons why each of the three options presented by AWI during the pricing phase were not responsive or compliant with the SIR. Essentially, Option 1 did not include the IDS 5 Software that had been included in AWI's technical proposal, or software of any other kind. Rather, it proposed that the FAA obtain the software as Government Furnished Equipment. AR at 5.

40. With respect to Options 2 and 3, the Agency Response notes that the software proposed to be used by AWI with these options "was not proposed during the pre-qualification phase by AWI nor was that the type of proposed software accepted by the FAA." *See* AR at 5. The Region went on to state that:

Furthermore, both options proposed to employ UDS Software which was not in operational use within the FAA NAS, prior to August 29, 2003, as required by SOW Paragraph 14.

41. The Agency Response further provided the rationale for why the Region did not wish to obtain the necessary software as GFE:

The FAA most definitely did not want to shoulder the administrative burden of supplying the software GFE, being responsible for replacing parts and training. Moreover, configuration and integration of the software must be done with knowledge of the software. By supplying the hardware only, the contractor could not have complied with several technical elements of the solicitation. By allowing GFE, the FAA would then be left with the additional burden of a second procurement for the software, and possibly a third procurement to integrate the hardware and software. The FAA wanted a single successful vender because it wanted to avoid those problems.

AR at 7.

42. The Agency Response further pointed out, and AWI later admitted in its Supplemental Protest (*see* Finding of Fact 22, above), that:

SAI did in fact submit a technical proposal, on required data submitted September 12, 2003 which was the original date for submittal of technical proposals.... It was evaluated and found acceptable. No further technical information was required to be submitted during the pricing step of the

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procurement. Therefore, when SAI sent in their price proposal, a technical package did not accompany it as there was not a requirement that it do so.

AR at 7, 8. The Agency Response also responded to of miscellaneous points raised by AWI. *See* AR at 8, 9, and 10.

43. Finally, the Agency Response alleged that AWI lacked standing to bring the Protest and its Protest should therefore be dismissed, inasmuch as AWI was a disqualified bidder who lacked the necessary economic interest to protest. *See* AR at 11.

44. Awardee, SAI, filed its Comments on February 9, 2004 (“SAI Comments”). The SAI Comments included a description of the technical proposal submitted by SAI and the assertion that its technical proposal complied with all material requirements of the Solicitation. *See* SAI Comments at 2. The SAI Comments further confirmed that:

The IDS5 software product suite was designed and developed by SAI at company expense under its independent research and development (IR&D) program. The IDS5 software is marketed and licensed as a Non-developmental item (NDI).

Id., page 2. The SAI Comments further point out that the Solicitation required that software not be developmental in nature and be operational within in the NAS. *Id.*

45. On March 5, 2004, the Region filed a Supplemental Response (“Agency Supplemental Response”) to the Supplemental Protest. In it, among other things, the Region responded to three issues that had been identified by the ODRA, including whether SAI had been permitted to: (1) specify Government Furnished Equipment; (2) offer developmental software; and (3) offer software that was not in use in the NAS prior to the specified date.

46. The Agency Supplemental Response analogized the instant procurement of a DDS system to the purchase of a new car and compared the software portion of the system to the engine of the car. *See* Agency Supplemental Response at 2. The Region reiterated that the “engine” of the system, *i.e.*, the software, was expressly required to be supplied by the contractor and that the software had to be non-developmental, *i.e.*, of the type that

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had been in use by the Agency as of the date specified in the Solicitation. *See* Agency Supplemental Response at 2, 3.

47. The Agency Supplemental Response completes the analogy by indicating that the offer made by the AWI in the Prequalification Phase satisfied the Region's requirements for the purchase of the "car," including the "engine"; but that, in the Pricing Phase, AWI asked the Agency "to choose between taking a car without an engine **OR** either of two cars with developmental solar-powered engines." *See* Agency Supplemental Response at 2, 3 (emphasis in original).

48. With respect to the GFE issues, the Agency Supplemental Response points out that there is a fundamental difference between the GFE substituted in Option 1 of AWI's Pricing Proposal and the GFE that was proposed as an option within SAI's proposal. *See* Agency Supplemental Response at 3. The GFE included in SAI's technical proposal was optional interface software not required by the Solicitation and not necessary in order for the DDS System to operate. *See* Agency Supplemental Response at 4. As the Region explained:

AWI claims SAI offered V-OID (virtual operational interface display) as GFE. SAI's mention of GFE, during the technical phase, was in connection with V-OID but it was ignored, by the FAA, and no pricing was submitted for it during the pricing phase.

Id. at 5, 6.

49. By contrast, the GFE software offered by AWI was the very software needed in order for the DDS to operate. Agency Supplemental Response at 4.

50. With respect the developmental software issue, the Agency Supplemental Response points out that, whereas, "the SIR did not preclude the use of the developmental **equipment**, it **did** preclude the use of **developmental system software**." *See* Agency Supplemental Response at 5; SIR at Paragraph 14 (emphasis in original).

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51. The Region further points out that the system software offered by SAI was not developmental, in that it was in use within the NAS by the specified date.⁵ The UDS Software offered in Options 2 and 3 of the AWI Pricing Proposal, however, **“is developmental software, in that it is not in use anywhere in the NAS as required by the SIR.”** *See* Agency Supplemental Response at 6 (emphasis in original).

52. The Region also asserts that:

The SIR intentionally did not specify a particular operating system since OSs on computers change frequently. The SIR likewise did not specify the make or model of computer to be used nor the amount of memory or speed of processor. The responsibility for these decisions was left to the vendor and engineers to work out.

See Agency Supplemental Response at 7.

53. The Region states that it did not perform a best-value analysis with respect to AWI, because “[t]he Agency believed that it would have served no purpose to review AWI’s performance record once it had been determined to be non-responsive to the Solicitation requirements.” *See* Agency Supplemental Response at 8.

54. A second set of Comments was filed by SAI (“SAI’s Second Response”). SAI’s Second Response confirms that SAI did not propose GFE software as part of its technical approach to meeting the Agency Solicitation requirements. *See* SAI’s Second Response at 1. SAI further takes issue with the allegation that it was permitted to offer “developmental software.” *See* SAI Second Response at 2.

55. Finally, SAI points out that the Agency had complete information concerning SAI’s past performance:

SAI has provided Data Display Systems to every major airport in the Nation. SAI’s previous contracts with the Great Lakes Region has totaled

⁵ The optional additional software included in SAI’s pricing proposal was not required by the Solicitation, and was never evaluated or included in the contract awarded to SAI. *See* Agency Supplemental Response at 6.

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over \$5 Million. SAI's twenty year history of excellent performance is well known throughout every FAA Region.

See SAI Second Response at 4.

56. On March 10, 2004, AWI filed its own set of Supplemental Comments ("AWI Supplemental Comments") to the Agency Supplemental Response. The AWI Supplemental Comments take issue with and challenge the Agency's technical requirements:

As the FAA's report explains, it did not really need the DDS to actually emulate all the FAA position equipment it identified in the SIR; only some of them are required and this emulation could await future procurements. The FAA also did not really need DDS Software which has been in use in the NAS; it was willing to accept any SAI software regardless of whether this software had been in use in the NAS, whether it was being proposed to be used on compatible hardware in the NAS and regardless of the operating platform on which it had been used.

See AWI Supplemental Comments at 3.

57. The AWI Supplemental Comments go on to attack the ability of the DDS system to function as specified by the Agency. *See AWI Supplemental Comments at 4, 5.*

58. AWI disagrees with the Agency Supplemental Response with respect to its treatment of SAI's offer regarding optional interface software, contending that the Solicitation required that "*all*" of the software within the entire DDS system be operational in the NAS. *See Supplemental Comments at 7 (emphasis in original).*

59. Upon submission of the Supplemental Comments of AWI, the record in this matter closed.

III. Discussion

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The AWI Protest filed on January 16, 2004, and Supplemental Protest filed on February 24, 2004 generally allege that: (1) AWI's offer wrongfully was rejected as "non-responsive" to the requirements of the Solicitation; (2) the Region engaged in disparate treatment of AWI and SAI, allowing SAI to deviate from requirements of the Solicitation; and (3) the Region failed to conduct a "best-value" analysis in deciding to award to the Contract to SAI. *See* Finding of Facts ("F.F.") 22 – 35. The Region responded to the substantive allegations of the Protest and Supplemental Protest, and moved to dismiss both on grounds of lack of standing.

Under the Acquisition Management System ("AMS"), the ODRA Procedural Regulations and ODRA caselaw, the standard of review in bid protests is limited to a determination of whether the challenged Agency action had a rational basis, was neither arbitrary, capricious nor an abuse of discretion and was supported by substantial evidence. *See Protest of L. Washington & Associates*, 03-ODRA-00287; *Protest of Glock, Inc.*, 03-TSA-003; *Protest of IBEX Group Inc.*, 03-ODRA-00275. The Protester bears the burden of proof under the above standard and further must demonstrate that it was prejudiced as a result of the Agency's actions. *See Protest of L. Washington & Associates, Inc., supra*. Finally, in the context of a best-value procurement, the ODRA will not substitute its judgment for that of the source selection officials, who have broad discretion to define the Agency's needs, so long as the source selection decision is rationally based, consistent with the AMS and consistent with the stated evaluation and award criteria. *See IBEX Group, Inc. supra*.

A. AWI Has Standing To Protest

In its Response, the Region urges that the Protest should be dismissed, because AWI, having been rejected as non-responsive to the Solicitation, purportedly lacks standing to pursue a protest. AR at 11. In terms of standing, the ODRA Procedural Rules allow a protest to be filed only by an "interested party," which term is defined as follows:

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An interested party, in the context of a bid protest, is one whose direct economic interest has been or would be affected by the award or failure to award an FAA contract.

14 C.F.R. §17.3(k). The ODRA has held previously that, if a protester is not initially in line for a contract award, but would be were its protest grounds to be sustained, it would have standing to pursue a protest. *See Protest of Rocky Mountain Tours, Inc.*, 01-ODRA-00183, *citing Protest of Boca Systems, Inc.*, 96-ODRA-00008 (A motion to dismiss for lack of standing was denied, where the ODRA found that protester would be in line for award, if the protest allegations were sustained.).

The present case is distinguishable from the case cited by the Region, *Protest of International Services, Inc.*, 02-ODRA-00224. In that case, the automatic disqualification of the protester had been based on its admitted failure to submit a required written certification on a specified Declaration Form. In the present instance, AWI contends that its disqualification was improper because, among other things, the disqualification and rejection was the result of allegedly improper and disparate treatment as between its proposal and that of SAI. Were AWI to prevail on such grounds, it would be in line for an award. Thus, even though, for the reasons discussed below, the ODRA ultimately does not find for AWI on such grounds, the Protest cannot be dismissed for lack of standing.

B. Responsiveness of AWI's Offer

As is discussed in the Findings of Fact, the acquisition was conducted in a two-phase process. *See* F.F. 4. In the initial Prequalification Phase, offerors were required to submit technical proposals for the DDS System. Those offerors whose proposals satisfied the technical requirements were deemed to qualify technically and were allowed to continue into the second, Pricing Phase of the competition. The Solicitation did not contemplate that offerors deemed technically qualified could materially alter their technical proposals during the Pricing Phase. *Id.*

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The technical proposal submitted by AWI during the Prequalification Phase, which the Region found to be technically acceptable, indicated that, as part of AWI's technical approach, AWI would supply an ACE-IDS Data Display System, including software that was in use within the NAS by the dates specified in the SIR. *See* F.F. 8. SAI also proposed to furnish such software and similarly was found to be technically qualified based on its submission during the Prequalification Phase. *See* F.F. 9. As noted in the above findings, a third offeror was determined not to be technically qualified to compete for the award and was not permitted to participate in the Pricing Phase. *See* F.F. 9.

During the Pricing Phase, consistent with the Solicitation, SAI did not materially alter the technical approach that it had proposed during the Prequalification Phase, and provided pricing based on its previously submitted technical proposal.⁶ *See* F.F. 11. AWI's pricing proposal, however, involved three new technical approaches together with separate pricing for each approach. *See* F.F. 12. As was noted in the Findings of Fact, it is undisputed that AWI's Pricing Phase proposal did not contemplate that AWI would itself supply the Region with the IDS Software that AWI had earlier proposed to supply as part of its Prequalification Phase technical proposal. *See* F.F. 12. Instead, AWI's Pricing Phase proposal specified as one option ("Option 1") that software needed to operate the DDS System be supplied by the Government as Government Furnished Equipment, or "GFE".⁷ *Id.* Further, there is no dispute that the two other technical alternatives ("Options 2 and 3") set forth in AWI's Pricing Phase proposal called for AWI to furnish software that had not been included by AWI in its Prequalification Phase proposal. Finally, there is no dispute that the software AWI was proposing to furnish under Options 2 and 3 of its Pricing Phase proposal, unlike the IDS software that it had offered in its Prequalification Phase proposal, did not satisfy the Solicitation requirements, since the Option 2 and 3 software was not in use within the NAS.

⁶ As discussed in F.F. 51 (Note 5), SAI's pricing proposal also offered optional, non-required software, which the Region did not include in its contract award to SAI.

⁷ As noted in the findings, SAI, in its technical proposal, had suggested the use of GFE. However, SAI's GFE proposal concerned interface software not required by the Solicitation and not needed to operate the DDS System. Therefore, SAI's proposal of GFE did not render its offer non-responsive. *See* F.F. 48.

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The record reflects that the Region evaluated the proposals of both SAI and AWI for compliance with the requirements of the Solicitation. *See* F.F. 14. In connection with that evaluation, the Region concluded that SAI's proposal satisfied the requirements of the Solicitation, was reasonably priced, complete and available for a timely delivery to meet the Region's requirements. *See* F.F. 15, 17, and 19.

With respect to AWI, the Region determined that AWI's Pricing Phase proposal, in contrast with its Prequalification Phase proposal, no longer met the Solicitation's requirements. *See* F.F. 16. In this regard, the Region's Contracting Officer, as part of the Award Determination document, reviewed all three of the new AWI technical approach options within AWI's Pricing Phase proposal against the terms of Solicitation and discussed why each of the options was not responsive to the Solicitation and not acceptable to the Region. *See* F.F. 18.

Having reviewed all the submissions by the parties, and the record of the Region's consideration of the SAI and AWI proposals, the ODRA concludes that the Region had a rational basis for determining AWI's price proposal inconsistent with its previous technical proposal and not in compliance with material requirements of the Solicitation. Substantial evidence supports the Region's decision that AWI's offer was non-responsive to the Solicitation and its rejection of AWI's offer on that basis. For the Region to have entertained the AWI proposal in this case would have required the Region to waive express Solicitation requirements in favor of AWI and to SAI's prejudice.

The ODRA further concludes that the Region had a rational basis for awarding the contract to SAI as the only qualified, responsive bidder, based on its technical and pricing proposals and the express terms of the Solicitation. In short, AWI's claim that its offer was wrongfully rejected as non-responsive is completely without merit as is AWI's challenge to the SAI contract award.

C. Alleged Disparate Treatment

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This general ground of AWI's Protest is based on its allegations that SAI was permitted to specify GFE and to offer developmental software that was not in use in the NAS by the date specified in the Solicitation. Essentially, AWI's claims that SAI was permitted to deviate from certain terms of the Solicitation, while AWI was disqualified for not satisfying those same terms.

Notwithstanding AWI's allegations, there was no contemplation, let alone a requirement, in the Solicitation that offerors, during the Pricing Phase of the acquisition, submit technical proposals or substantially modify technical proposals previously submitted during the Prequalification Phase. Thus, AWI's Protest allegation regarding the absence of an SAI technical proposal submission during the Pricing Phase is wholly without merit. *See* F.F. 23.

The allegation that SAI was allowed to propose GFE is specious. The Solicitation clearly required that offerors provide both hardware and approved software necessary to operate the DDS. It is undisputed that, during the Pricing Phase, AWI proposed, as one of three approaches, that the Government provide the software necessary to operate the DDS System, even though AWI had earlier offered to provide this software during the Prequalification Phase. By contrast, SAI only proposed as an option the inclusion of certain GFE interface software. That software was ancillary to the DDS System and not essential to its operation. Moreover, the furnishing of such interface software was never a requirement of the Solicitation. *See* F.F. 48. Accordingly, the Region had a rational basis for concluding that SAI's mention of a GFE option – an option the Region chose not to accept – did not render its offer non-responsive. Based on the record, the ODRA concludes that AWI has not satisfied its burden of establishing that the Region permitted SAI to deviate from the requirements of the Solicitation with respect to proposed GFE. F.F. 48-52.

Finally, there is no support for AWI's contention that SAI was permitted to deviate from the requirements of the Solicitation in terms of proposing developmental software that was not in use in the NAS. Although in its pricing proposal, SAI had suggested as an

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option an upgraded version of the IDS5 software (*i.e.*, Version 1.1 – technically “developmental,” in that it was not the version that had been in use within the NAS), the Region never evaluated that optional software and never included it as part of the awarded contract. *See* Note 5, *supra*. Further, it is undisputed that the software proposed by SAI for operation of the DDS System that was the basis for its contract award was in wide use in the NAS by the required date and that the software to be supplied by AWI under technical Options 2 and 3 of its Pricing Phase proposal was not in use within the NAS. Likewise, it is undisputed that, under its Option 1, AWI would not have provided software of any kind. Had the Region accepted **any** of AWI’s three options, it clearly would have been allowing AWI to deviate from the Solicitation’s requirements. *See* F.F. 2.

D. Best Value Analysis

The Region, properly having found AWI’s proposal non-responsive, was not required to conduct a best-value analysis of that proposal or otherwise to compare AWI’s proposal to that of SAI. Moreover, AWI’s challenge to the Agency’s approach to meeting its needs and suggestion that the Government furnish software for operation of the DDS or allow AWI to use alternatives that did not meet the specific requirements of the Solicitation is untimely and without merit. It is well established that the terms of the Solicitation are challengeable in a pre-award protest and not after a protester participates in the competition and disagrees with the ultimate award decision. *See Protest of PCS*, 01-ODRA-00184. Under the ODRA Procedural Regulations, any challenge to the propriety of a solicitation must be lodged with the ODRA as a protest prior to the date specified for receipt of proposals. 14 C.F.R. §17.15(a)(1). In any event, the ODRA will not second guess the Agency’s acquisition officials as to how the Agency’s technical needs should best be met. *See IBEX Group, Inc., supra*.

Finally, inasmuch as the Region had a rational basis for, and was not arbitrary, capricious or abusing its discretion in rejecting AWI’s non-complaint offer, AWI has not and cannot demonstrate that it was prejudiced by any alleged failure of the Region to evaluate the

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SAI proposal in accordance with the Solicitation. As noted above, substantial evidence in the record supports the rationality of the Region's evaluation of SAI's offer and its decision to make award to SAI in this case.

IV. Conclusion

For the reasons explained above, the ODRA recommends that the Protest be denied in its entirety.

_____/s/_____
Anthony N. Palladino
Dispute Resolution Officer and Director
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