

PUBLIC VERSION

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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of Global Systems Technologies, Inc.**
 Under Solicitation No. DTFACT-03-R-00005

Docket No.: **04-ODRA-00307**

Appearances:

For the Protester, Global Systems Technologies, Inc.: Scott DeRosa, Controller/Contracts

For the FAA William J. Hughes Technical Center: Diane Cherinchak-Loughrin, Esq.,
Office of Center Counsel

I. Introduction

On June 10, 2004, Global Systems Technologies, Inc. (“GST”) filed this Protest (“Protest”) with the FAA Office of Dispute Resolution for Acquisition (“ODRA”) challenging the failure of the FAA William J. Hughes Technical Center (“Center”) to award GST a contract under Solicitation DTFACT-03-R-00005 (“the Solicitation”). The Solicitation, issued by the Center under the Multiple Award Support Services (MASS) procurement vehicle contemplated multiple contract awards in four separate competitive categories. The GST Protest (the second of two such protests – the first having been filed by DMS Technologies under ODRA Docket No. 04-ODRA-00306) involves the Center’s decision not to award GST a contract under the Moderately Small Business category (100 employees or fewer). As explained below, the ODRA finds that the Center had a rational basis for its decision not to award GST a contract and therefore recommends that the Protest be denied.

II. Findings of Fact

1. The Center created a Multiple Award Support Services (MASS) procurement vehicle in December 2000, under which the Center solicits, evaluates and awards multiple indefinite delivery/indefinite quantity (ID/IQ) contracts. The MASS vehicle was established initially to support the Center's Test and Evaluation ("T&E") Service Area. T&E Service Area contracts under the MASS vehicle were to be awarded to contractors in three competitive categories: Full and Open competition; traditional Small Business (service businesses having 500 or fewer employees); and Small and Economically Disadvantaged Business ("SEDB") (*i.e.*, companies that qualify as Small Business Act (SBA) Section 8(a) contractors). Agency Product Team Response ("AR"), page 1.
2. Subsequently, the Center established a second service area under the MASS vehicle, the Engineering Support Services Area ("ESSA"). For ESSA related procurements, awards were to be made in each of the three competitive categories as were established for the T&E Service Area, plus a fourth category, Moderately Small Business ("MSB"), *i.e.*, service businesses having 100 or fewer employees. *Id.*
3. On December 12, 2002, the Center issued the instant Solicitation – Screening Information Request (SIR) No. DTFATC-03-R-00005 – under the MASS procurement vehicle, stating an intention to award ten year contracts in each of the four ESSA competitive categories. The Solicitation called for the following in terms of minimum and maximum obligations in each of the four categories:

	Full and Open	Small Business	MSB	SEDB 8(a)
Minimum Obligation	\$20,000.00	\$10K	\$10K	\$10K
Maximum Obligation	3 million hours	3M hours	1M hours	500K hours

Id.

4. In terms of award evaluation, the Solicitation stated that the specified technical evaluation factors would be more important than cost/price. It provided for two technical factors, Factor 1, "Technical Experience of the Prime Contractor," and Factor 2, "Management Approach." Factor 1 had three equally rated sub-factors: (a) Offeror's Performance-Based Organization Experience; (b) Breadth of Knowledge of MASS ESSA Labor Categories Relative to Domains and NAS System & Other Relevant Projects; and (c) Depth of Knowledge by Samples of Contracts Supported. Factor 2, in turn, likewise had three equally rated sub-factors: (a) Subcontractor Management; (b) Employee Retention, Training, Recruiting and Maintaining Currency; and (c) Conflict of Interest Mitigation. A third technical factor, "Past Performance," was to be afforded no independent weight, but was to be used in order to validate Factor 1. AR, Tab 1, SIR, Section M.2.
5. The Center Product Team developed an Evaluation Plan for the instant ESSA MSB competition. The Evaluation Plan called for evaluation of contractor proposals, using for evaluation of the technical factors and sub-factors adjectival ratings of "Excellent," "Good," "Satisfactory," "Marginal," and "Poor." The Plan expressly permitted the Technical Evaluation Team (TET) to add modifiers (high or low – *i.e.*, pluses or minuses) to a rating, "if deemed appropriate." AR, Tab 3, Evaluation Plan, page 9.
6. Under the Solicitation, awards in the Full and Open category had been made from July through September 2003. Awards in the Small Business category were made from September 2003 through March 2004. All SEDB 8(a) awards were made in January 2004. *Id.*

7. Under the MSB category, proposals were received from twenty-two offerors. The Product Team states that, based on the Technical Evaluation Team's ("TET's") application of the above adjectival ratings, the TET assigned the following ratings to 22 offerors as follows [names of all offerors except GST and the five awardees deleted, and price shown only for GST]:

Offeror	Factor I.a	Factor I.b	Factor I.c.	Factor II.a	Factor II.b	Factor II.c	Overall Price
ATC	G	G	G	G-	G	G+	
ECS	G-	G	G+	S+	S	G-	
JTA	G	G	G-	G-	S-	G-	
AE	G	G+	G+	S	S	M+	
	G+	G-	G	G	S+	P+	
JSA	S+	G+	G+	S	G	M-	
	S-	G-	G-	G	G-	S+	
GST	G+	S+	S+	S	S+	M+	\$73,267,655
	S+	S	S+	G-	G	M+	
	S	S	S+	G+	G	M	
	S-	S-	S-	G-	G-	G-	
	S+	S+	S+	S+	M+	M	
	S	S+	S	S+	S-	M+	
	G-	M	M	S	S+	S	
	S-	M+	M+	S	S	M+	
	M+	M+	S	S-	S	M	
Offeror	Factor I.a	Factor I.b	Factor I.c.	Factor II.a	Factor II.b	Factor II.c	Overall Price

¹ [Deleted] failed to provide fully burdened rates for all labor categories and was eliminated from further consideration.

	M	M+	M+	M	G-	S	
	S	S-	S-	P+	S	P	
	M+	P+	S-	M	M+	G	
	M+	M-	M	S	G-	P	
	M	M+	M+	M-	P+	P	
	P	P	P	P	M-	P+	

AR, page 3.

8. Solicitation Section M.1 provided the following in terms of the numbers of contracts to be awarded under the MSB category:

While no maximum number of contracts to be awarded has been set, the Government will keep the number of awards to a reasonable amount to ensure adequate competition and available sources for delivery orders throughout the procurement's ten (10) year life, and ensuring that winning contractors have the opportunity for receiving a meaningful level of work.

AR, Tab 1, Solicitation, Section M.1, page 71.

9. Based on this provision, the Center states, it determined to limit further consideration to the five technically highest rated offerors, as being most likely to receive awards. As the above table indicates, among the 22 offerors, the TET had ranked GST as eighth. Accordingly, GST was eliminated from further consideration and no discussions were conducted with GST as they were with the top five. On March 30, 2004, the Center states, its Contracting Officer ("CO") requested revised technical and price proposals from the five "identified superior offerors." Revised proposals were submitted by each of the five and, upon review, the CO, serving as the Source Selection Official ("SSO"), awarded each a contract. AR, page 4.

10. On that same date, March 30, 2004, the seventeen offerors who were eliminated, including GST, were notified of their elimination by separate letters from the Center's CO. GST, upon receipt of its letter, requested a formal debriefing, and such a debriefing was provided to GST on June 3, 2004. At that debriefing, according to the Center, GST was furnished with redacted copies of the SSO's award determination (AR, Tab 6) and TET Evaluation Report with respect to the GST proposal (AR, Tab 5), and the CO/SSO provided GST with an explanation for excluding GST from further consideration. AR, page 4.
11. The instant Protest was filed with the ODRA on June 10, 2004. In it, GST complains in general terms of its exclusion from further consideration under the instant Solicitation and about the Center's decision not to engage in discussions with GST. GST argues that the awards were based on an improper evaluation:

We feel that the evaluation of proposals process was not done in a way where there was a clear-cut and measurable basis of award. The awards were made based on an indistinct line of acceptability of the proposals. The Contracting Officer indicated that there had to be a cut off point and they determined it to be the five contractors that they chose. In the Source Selection Official Briefing and Award Recommendation, on page seven (7) paragraph 1 it states, "The Contracting Officer and Contract Specialist analyzed the proposals and could not find a technical separation for those who could be provided an award based on initial proposals. However, the Contracting Officer and Contract Specialist did find two distinct grouping of offerors: those who would be likely to receive a contract award and those who would not be likely to receive an award." The problems are:

1. They indicated they could not find a technical separation in the initial proposals yet made a decision who would be likely and unlikely awarded a contract. This is inconsistent. If given the opportunity to address the concerns about our proposal either orally or in writing we could have and would have increased our rating significantly, thereby making us one of the contractors likely to receive an award.

2. In many procurements there is a scoring system and there is a cut-off of acceptability based on the number of points a contractor receives in the evaluation. There was no specific scoring system used to award these contracts.
3. Our price was within the acceptable range. Under the Technical Experience (factor 1), Scores [sic] were High Good for Performance-Based Experience, High Satisfactory for the Breadth of Knowledge of MASS ESSA Labor Categories, and High Satisfactory for Depth of Knowledge by samples of contracts supported. The areas where we received the two lowest ratings, high marginal for Conflict of Interest Mitigation and satisfactory for Subcontractor Management were areas, which if given the opportunity could have been easily addressed. The areas which truly indicated whether one had the experience and ability to perform in a similar contract environment and the likelihood of being successful in the contract, we had a more than acceptable proposal.
4. Federal Acquisition Regulation (FAR) §15.306(c) allows an agency to establish a competitive range consisting of only the most highly-rated proposals.
5. Based on the following clause in the FAA AMS Policy, the evaluation method did not allow for maximum flexibility in selecting the offerors providing the best value:

* * *

- *Communications with offerors during the evaluation may help clarify submittals, allow a fuller understanding of the offeror submittals, and provide a more comprehensive evaluation.*

Protest, pages 1-2 (emphasis in original).

12. Thereafter, on July 7, 2004, the Center filed its Product Team Response. In it, the Center stresses that the procurement was a “best value” procurement, one in which a “cut-off of acceptability” based on the number of points received

would not have been appropriate. Under this “best value” procurement, the Center states, it was “not to separate ‘acceptable’ from ‘unacceptable’ offers, but to rank the offerors to identify the most competitive among them.” In this regard, the Center asserts: “that is exactly what was done” AR, page 9. The Center explains that it limited discussions to the top 5 rated offerors, those having an average adjectival rating of “Good” or above for Technical Factor I, and provides the following observation regarding its decision to limit awards to those 5 firms:

With these final five awards under ESSA, the FAA has guaranteed itself a high degree of competition for a delivery order [DORFO] to provide for specific engineering support services. For a full and open competition, as many as twenty-one offerors can compete [5 full and open + 8 small businesses + 5 MSBs + 3 SEDB 8(a)s]; for a small business set-aside, as many as sixteen offerors can participate [8 small businesses + 5 MSBs + 3 SEDB 8(a)s]; and, for a DORFO set aside for MSBs, eight companies can submit proposals [5 MSBs + 3 SEDB 8(a)s] No MSB can compete in any DORFO set aside for the three SEDB 8(a) companies.

AR, page 7. As to GST’s complaint about the Center decision not to engage in further discussions with GST, the Center rejects the notion that such discussions were mandatory or even appropriate for GST or other offerors that were not considered among those likely to receive an award:

GST also alleges that AMS 3.2.2.3.1.2.3 was not followed. That section states that “Communications with offerors during the evaluation may help clarify submittals, allow a fuller understanding of the offeror submittals, and provide a more comprehensive evaluation.” It should be noted that this language is discretionary but, moreover, in the instant procurement, the Product Team did communicate with the five offerors that survived the downselection decision to do exactly what was stated above. There was no requirement to communicate with all twenty-two of the offerors in order to allow each to improve their technical ratings.

Id., pages 8-9.

13. By letter to the ODRA dated July 15, 2004, GST submitted Comments with respect to the Product Team Response. The Comments took issue with the Product Team's assertions and put forth, *inter alia*, the following arguments:

I point to their [the Center's] analysis on Page 6, the agency provides detail as to how they decided which proposals would be awarded a contract based on initial proposals. The discussion was revolving around those contractors, which had a "good" or better score in Factor I. It seems that this could have and should have been a part of the Source Selection Official Briefing and Award Recommendations. Nowhere in the document does it mention that the selection was based on Factor I having an overall good or better evaluation factor rating. No one on the agency team discuss this during the debriefing.

Their discussion as well as their documentation references a distinct grouping of offerors based on who would and would not be likely to receive a contract award. This distinction they used could have easily been those with a satisfactory + or better rating and that would have included GST and above. This would have added two more companies to the potential award pool. This would have also allowed for two more companies to be included in the section of the SIR AMS 3.2.2.3.1.2.3 which would have allowed for further conversations. * * * We strongly believe that such an opportunity would have provided the clarification needed to put us into the same grouping as the five awardees. If one was to have a better than satisfactory (S+) or better evaluation, then it would seem that there is a reasonable assumption that the contractor would be able to perform the services to that [sic] satisfaction to [sic] agency. Also, there is a reasonable assumption that anyone with a better than satisfactory (S+) or better evaluation, would likely receive a contract reward [sic]. This coupled with the fact that our pricing was competitive and in some cases had labor rates lower (but still in the competitive range) than some of the winning proposals.

They could have made the cut-off point at a better than satisfactory (S+) or better evaluation, and still ensured that winning contractors have the opportunity for receiving a meaningful level of work. This would have only added two additional potential contractors.

Comments, pages 1-2.

14. The ODRA, by letter dated July 15, 2004, advised the parties that, with the filing of GST's Comments, the administrative record was closed. Neither party had requested a hearing or other further proceedings.²

III. Discussion

In acquisitions under the FAA's Acquisition Management System ("AMS"), where a contract award decision has a rational basis and is neither arbitrary, capricious, nor an abuse of discretion and is supported by substantial evidence, the ODRA will not recommend that the decision be overturned. *Protest of IBEX Group Inc.*, 03-ODRA-00275; *Protest of Computer Associates Inc.*, 00-ODRA-00173; *Protest of Information Systems and Networks Corporation*, 98-ODRA-00095 and 99-ODRA-00116, *affirmed* 230 F.3d 52 (DC Cir. 1999). The Protester bears the burden of proof under this standard. *See Protest of L. Washington & Associates, Inc.*, 02-ODRA-00232; *Protest of Glock, Inc.*, 03-TSA-003.

In the present case, the ODRA finds that the Product Team's decision had a rational basis. In deciding to perform a "downselect" for purposes of further discussions and ultimate award – a "downselect" limited to the top five offerors whose offers were rated with an average Technical Factor I score of "Good" or better – the Product Team performed a balancing of its need for adequate competition against the desire to provide each awardee with the prospect of a reasonable amount of work over the contract's 10-year life, precisely as contemplated by the terms of the Solicitation. *See* Finding of Fact 8, above. GST's arguments urging that the cut-off should have been at an average score of "Satisfactory Plus" (S+) rather than "Good," in order to include itself and one other potential competitor amounts to no more than "mere disagreement" with the Product Team's decision. Under such circumstances, based on a wealth of prior ODRA

² Although GST's Comments contain a series of questions and observations that may indicate an impression on GST's part that some form of further discovery or investigation would be available, GST did not seek voluntary discovery (*see* ODRA Procedural Rules, 14 C.F.R. §§17.3(i) and 17.37(f)), either as part of the Protest letter, during the course of an ODRA status conference, or at any time afterwards except as noted, by implication in the context of its final Comments, and the ODRA itself does not conduct investigations, but merely adjudicates matters based on evidence provided by the parties.

precedent, the ODRA will not recommend that the decision be overturned. *Protest of Universal Systems & Technology, Inc.*, 01-ODRA-00179; *Protest of Crown Consulting, Inc.*, 01-ODRA-00181; *Consolidated Protests of Consecutive Weather, Eye Weather, Windsor Enterprises and IBEX Group, Inc.*, 03-ODRA-250, *et al.*; *Protest of IBEX Group, Inc.*, 03-ODRA-00275; and *Protest of Glock, Inc.*, 03-TSA-003. Accordingly, the ODRA finds GST's Protest to be without merit.

IV. Recommendation

For the foregoing reasons, the ODRA recommends that the Protest be denied.

Richard C. Walters
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

APPROVED:

Anthony N. Palladino
Dispute Resolution Officer and Director
FAA Office of Dispute Resolution for Acquisition