Public Version

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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of Mechanical Retrofit Solutions Incorporated Pursuant to Solicitation No. DTFASO-07-R-00012**

Docket No.: **07-ODRA-00402**

Appearances:

For the Protester, T. W. Ruskin, President

For the Intervenor, A. Greg Pitts, Vice President

For the Agency: Robert B. Dixon, Esq., Counsel for the Federal Aviation Administration Southern Region

I. Introduction

On March 8, 2007, Mechanical Retrofit Solutions Incorporated ("MRSI" or "the Protester") filed the above-captioned protest ("Protest") at the Federal Aviation Administration ("FAA") Office of Dispute Resolution for Acquisition ("ODRA"). The Protest challenges the award by the FAA Southern Region's Acquisitions Branch ("Acquisitions Branch") of a contract for the replacement of three deteriorating cooling towers located at the Large Terminal Radar Approach Control A80 facility in Atlanta ("the Atlanta TRACON") to Comfort Engineers Incorporated ("CEI" or "the Awardee"). MRSI contends that: (1) the contract award to CEI was based on the consideration of unstated evaluation criteria in the form of a nonresponsibility determination; and (2) the Contracting Officer improperly failed to investigate and discuss concerns about MRSI's ability to perform the work. As explained below, the ODRA denies MRSI's Protest but recommends that MRSI's principal be compensated for technical services he performed by at the request of the Project Engineer for the Eastern Service Area Technical Operations Program Office's ("Program Office").

II. Findings of Fact

1. The Atlanta TRACON requirement was first identified in 2004, when the Program Office discovered that each cooling tower's ceramic "gel-coat" was failing to "adhere to the glass reinforced polyester structural walls and other glass fiber reinforced components" of the tower structure. *See Agency Response, Affidavit of Charles Earnheart* ("*Affidavit of Charles Earnheart"*) at 1. As a result of this "delamination" and deterioration, water began to seep into each tower structure's glass fibers, causing a "degradation of the bond between the plastic and the glass;" as a result, the fan rings at the top of the cooling towers began showing "stress cracks and chunks of fiberglass [began] falling from the tower[s]." *See Agency Response, Contract File ("Contract File")* at 52. If left unrepaired, these defects "eventually [will] result in complete structural failure" of the towers. *Id.*

2. In the Spring of 2006, the Program Office tasked a [DELETED] Corporation contract employee to serve as the project engineer ("Project Engineer") for this requirement, and directed him to perform an "independent search . . . to determine if a possible repair option" might be available. *See Affidavit of Charles Earnheart* dated March 21, 2007, at 1. During this work, the Project Engineer contacted Mr. T. W. Ruskin—the designated "local representative" for SPX Cooling Technologies ("SPX"), which had purchased the original manufacturer of the Atlanta TRACON cooling towers, Ceramic Cooling Tower Company ("CCT"). *Id.* The Project Engineer asked Mr. Ruskin whether "replacement parts for the deteriorating structural walls of the existing cooling towers" could be procured. *Id.*

3. In the Summer of 2006, Mr. Ruskin advised the Project Engineer that spare parts "were not available" because SPX no longer manufactured ceramic cooling towers. *Id.* Mr. Ruskin also explained that after CCT was purchased, the original ceramic cooling tower operations, including "all manufacturing capability," were "closed down and the physical assets sold." *Id.*

4. The record shows that on July 5, 2006, Mr. Ruskin took "pictures . . . of the peeling issues" caused by the structural deterioration of the Atlanta TRACON cooling towers. *See Agency Response, Mr. Ruskin's e-mail to the Project Engineer* dated July 5, 2006.

5. Based on the information and photos provided by Mr. Ruskin, the Project Engineer and the Program Office "determined that a complete replacement of the cooling towers was the only option." *Id.*

6. Because SPX manufactured two types of stainless steel cooling towers appropriate for the Atlanta TRACON, the Project Engineer asked Mr. Ruskin to review that site and to "furnish . . . suitable technical data and budget pricing . . . for the cooling towers in order to develop a government estimate and a Statement of Work for the project." *Id.* at 2; s*ee also Agency Response, Mr. Ruskin's e-mail to Project Engineer* dated July 6, 2006.

7. In response to this request from the Project Engineer, a company owned by Mr. Ruskin—Applied Thermal Resources ("ATR")—submitted a proposal to the Project Engineer on August 2, 2006 which offered "[DELETED] replacement" of the deteriorating Atlanta TRACON cooling towers for [DELETED]. *See Affidavit of Charles Earnheart* at 2; *see also Agency Response, ATR Proposal for "Replacement of 3 Ceramic Cooling Towers"* dated August 2, 2006. Mr. Ruskin

subsequently submitted revised versions of the ATR proposal—including new "attachments"—to the Project Engineer on August 3, 2006 and August 14, 2006. *See Agency Response, E-mails from Mr. Ruskin to the Project Engineer* dated August 3, 2006 and August 14, 2006.

8. Following the ATR proposal submissions, the Project Engineer engaged in detailed technical discussions with Mr. Ruskin, and invited him to mail two copies of a revised ATR proposal. *See Project Engineer's e-mails to Mr. Ruskin* dated August 4, 2006, August 7, 2006, and August 8, 2006. After reviewing the revised ATR proposal, the Project Engineer directed Mr. Ruskin to contact him to "go over" the submission—a discussion which the Project Engineer described as "[n]othing serious, just a little clarification." *See Agency Response, Project Engineer's 7:14 a.m. e-mail to Mr. Ruskin* dated August 14, 2006. Following these discussions, Mr. Ruskin submitted another revised ATR proposal. *See Agency Response, Mr. Ruskin's 2:34 p.m. e-mail to the Project Engineer* dated August 14, 2006.

9. On August 23, 2006, Mr. Ruskin asked the Project Engineer whether the Program Office had "asked any other contractors to provide . . . a price based on [ATR's submitted] turn-key proposal." *See Agency Response, Mr. Ruskin's e-mail to the Project Engineer* dated August 23, 2006.

10. On October 10, 2006, Mr. Ruskin was directed by the Project Engineer to have SPX, the successor manufacturer who purchased the Ceramic Cooling Tower Company, confirm the unavailability of replacement parts for the ceramic cooling towers. *See Agency Response, Mr. Ruskin's e-mail to SPX* dated October 10, 2006. By letter dated that same day, SPX advised the Program Office's Terminal Programs Manager ("Terminal Programs Manager") that the ceramic tower equipment and products were no longer available—and consequently, replacement parts were "unlikely" to be found. *See Agency Response, Letter to Project Engineer from SPX* dated October 10, 2006.

11. In October 2006, the Terminal Programs Manager asked the Project Engineer to research whether SPX could be held liable for the cost of repairing or replacing the deteriorating Atlanta TRACON ceramic cooling towers—by virtue of the fact that SPX had [DELETED]—including the CCT warranty issued for the Atlanta TRACON. *See Agency Response, Project Engineer's e-mail to Mr. Ruskin* dated October 26, 2006 *(citing Terminal Programs Manager's e-mail to the Project Engineer therein).* According to the Project Engineer's e-mail, the Terminal Programs Manager had advised that determining whether SPX was liable under the earlier CCT warranty was necessary because otherwise the Program Office could not "justify requesting funding" to replace the deteriorating cooling towers. *Id.*

12. In early November 2006, Mr. Ruskin advised the Project Engineer and the Terminal Programs Manager that no applicable warranty coverage for the Atlanta TRACON cooling towers existed. *See Agency Response, Mr. Ruskin's E-mail to the Project Engineer* dated November 2, 2006*; SPX Letter to the Terminal Programs Manager* dated November 5, 2006.

13. On November 16, 2006, Mr. Ruskin asked the Project Engineer about the status of the cooling tower replacement--*e.g.*., "is the goal still to try and get the work done this winter?" *See Agency Response, Mr. Ruskin's e-mail to the Project Engineer* dated November 16, 2007. Mr. Ruskin also advised the Project Engineer that he had "been corresponding . . . on replacement components" and requested a meeting with the Project Engineer "to talk about other services." *Id.*

14. On December 4, 2006, Mr. Ruskin submitted another ATR proposal to the Project Engineer which specified a cooling tower solution [DELETED]. *See E-mail from Mr. Ruskin to Project Engineer* dated December 4, 2006.

15. On December 5, 2006, Mr. Ruskin submitted another ATR proposal with a "specification" for a [DELETED] which was described by Mr. Ruskin as "similar to what" he had quoted in the earlier ATR proposal submission. *See Mr. Ruskin's 8:54 a.m. and 4:58 p.m e-mails to Project Engineer* dated December 5, 2006.

16. Mr. Ruskin further advised the Project Engineer that if the ATR proposal was "successful," the resulting "contract will actually have to be issued to [MRSI] at the same address, fax, etc." used by ATR—which Mr. Ruskin distinguished from MRSI as "just a sales representative company selling products." *See Agency Response, Mr. Ruskin's 1:58 p.m. e-mail to Project Engineer* dated December 5, 2006.

17. On December 8, 2006, the Project Engineer issued an electrical "[g]rounding spec" to Mr. Ruskin, who was scheduled to visit the Atlanta TRACON with his electrician. *See Agency Response, E-mail correspondence issued 9:04 a.m; 1:26 p.m.; 2:40 p.m.; and 3:52 p.m. between the Project Engineer and Mr. Ruskin* on December 8, 2006.

18. Upon learning that Mr. Ruskin's on-site trip had been successfully scheduled—and that Mr. Ruskin had obtained permission to bring his crane subcontractor—the Project Engineer e-mailed his "[t]hanks" to Mr. Ruskin "for handling all this" for the Program Office. *See Agency Response, Project Engineer's 5:58 a.m. e-mail to Mr. Ruskin* dated December 11, 2006. In this regard, the record shows that the purpose of Mr. Ruskin's site visit was to ensure that the submitted ATR proposal was revised to reflect various items identified by the Project Engineer, including a price for replacement of [the] existing grounding system for the towers" as well as a "separate price to provide new disconnected switches." *See Agency Response, Mr. Ruskin's e-mail to Project Engineer* dated December 18, 2006.

19. On December 18, 2006, the FAA authorized funding for the Atlanta TRACON cooling tower construction. *See Contract File* at 48-49. The Project Engineer was designated one of two "primary points of contract for monitoring" the cooling tower project. *Id.* at 48.

20. On December 19, 2006, the Project Engineer issued an e-mail request to the Contracting Officer that "the standard front end boiler plate that could be issued for a proposal" be sent to Mr. Ruskin at the e-mail address of ATR, whom the Project Engineer identified as the Program Office's "potential contractor." *See Agency Response, Project Engineer's e-mail to Acquisitions Branch Contracting Officer ("Contracting Officer")* dated December 19, 2006. The Project Engineer advised the Contracting Officer "that a contract must be awarded as soon as possible since there was a very small window [within which] to replace the cooling towers before the summer heat set in," *Agency Response, Legal Brief (hereinafter "Legal Brief")* at 1, and also "recommended a single-source award" to MRSI. *Id.; Protester's Comments, Project Engineer's e-mail to Contracting Officer* dated December 19, 2006.

21. Recognizing the Acquisition Management System's ("AMS") "preference for competition," the Acquisitions Branch reports that, notwithstanding the Project Engineer's request for a single-source contract award to MRSI, the Contracting Officer decided to compete the requirement among three firms, including MRSI. *See Legal Brief* at 1; *see also Single Source Justification, Contract File* at 41-42. In this regard, although recommending MRSI for a single source award, the Program Office had also "identified . . . two other vendors who appeared to have the capability to perform the work." *See Summary of Award Decision, Contract File* at 3-4.

22. On December 20, 2006, Mr. Ruskin sent an e-mail to the Project Engineer advising that the "[c]orrect name and address is [MRSI]." Mr. Ruskin further advised that MRSI's identified mailing address is the "[s]ame as [ATR]." *See Agency Response, Mr. Ruskin's e-mail to the Contracting Officer* dated December 20, 2006.

23. On January 11, 2007, the Acquisitions Branch issued an "Initial Request for Offers" ("Initial RFO") to three firms—including ATR, and the Intervenor—which explained that:

> [o]bviously, [the Program Office] do[es] not have much time available to obtain adequate competition for this requirement. Given that, we have targeted this request for offers to your firms on the assumption that there is a good chance that you will be able and willing to prepare a price quote. Given the criticality of time, we ask that you prepare an offer . . . and send it by reply email to all parties by no later than Thursday, January 18. [The Program Office] will consider offers we receive, [and] then determine whether it will be in the FAA's best interest to negotiate further, ask for best and final offers from one or more firms, or take other action to proceed to contract award in as short a time as possible.

See Agency Response, Acquisitions Branch Manager e-mail to vendors dated January 11, 2007.

24. The Project Engineer reports that "Mr. Ruskin's proposal"—which had been submitted to the Project Engineer on August 14, 2006 for [DELETED]—"was used as a guide to develop a Statement of Work ("SOW") for the replacement of the deteriorating cooling towers." *See Affidavit of Charles Earnheart* at 2. Once completed, the SOW "was emailed back to Mr.Ruskin and to [the] two other Contractors" including CEI. *Id.* The three offerors were directed to submit a

"price quote" for the complete replacement of the three cooling towers that serve the Atlanta TRACON; in addition, the SOW further specified that the cooling tower construction was to be performed in three phases, and completed no more than "seventy-five (75) calendar days after receiving the Region's Notice-to-Proceed"—or May 15, 2007. *Id.* at 2.

25. Except for the work's technical description and several "standard contract clauses," no other evaluation terms or selection criteria were specified in the Initial RFO. The original closing date identified for the receipt of each vendor's price quote was subsequently extended by one calendar day—to January 18, 2007. *See Agency Response, Acquisition Branch Manager's e-mail to three vendors* dated January 17, 2007.

26. On that date, two vendors—MRSI and the Intervenor—responded with "price quotes" and proposals. *See Agency Response, Mr. Ruskin's e--mail to Acquisitions Branch Manager* dated January 18, 2007. The third offeror did not compete.

27. On January 19, 2007, the Acquisitions Branch Manager issued another e-mail to the three originally solicited vendors advising that each could "amend" their submitted offer in light of the following new "offer evaluation criteria" that were announced as follows:

> The FAA intends to consider offers for technical merit and price in reaching a contract award decision. Technical merit includes ability and resources available to ensure completion of the work by May 15, 2007 and technical innovations or methods of accomplishing the work that are advantageous to the Government. We will weigh price against technical merit to determine which offer provides the best value to the government.

See Agency Response, Acquisitions Branch Manager's e-mail to vendors dated January 19, 2007.

28. The Acquisitions Branch Manager's e-mail further emphasized that these newly announced offer criteria" were not expected to "require additional time for bid preparation" but encouraged each offeror to "advise without delay, however, whether [the offerors] do indeed require addition time to amend [each] offer in consideration of the above. *Id.* Later that same day, CEI submitted a proposal. *See Contract File* at 63-71.

29. On January 22, 2007, the Contracting Officer issued an "official solicitation package" ("Final Solicitation") to CEI and MRSI which replaced the Initial RFO. *See Contract File* at 18-33. The cover letter accompanying MRSI's Final Solicitation advised that its "completed package is needed immediately," and that the prior "bid bond requirement is hereby waived." *See Contract File* at 17.

30. The Final Solicitation also identified "REQUIRED DOCUMENTS" that each offeror was to submit with its proposal including a "Business Declaration," a "Performance Bond" and a separate "Payment Bond." *See Agency Response, Final Solicitation* at 11; *Protester's Supplemental Comments, Contracting Officer's e-mail to Mr. Ruskin* dated January 25, 2007.

31. On January 23, 2007, the Contracting Office issued several questions to MRSI which sought clarification on: (1) whether the cost of MRSI's [DELETED] was included in its proposed price; (2) how much the cost of MRSI's [DELETED]; (3) details regarding MRSI's reported [DELETED]; and (4) confirmation that MRSI's prices "should reflect a Firm Fixed-Price amount without the benefit of the FAA providing any Government Furnished Material." *See Contracting Officer's e-mail to Mr. Ruskin* dated January 23, 2007.

32. On January 23, 2007, the Project Engineer issued an e-mail to the Acquisitions Branch Manager and Contracting Officer which advised:

> Both CEI and MRS[I] have proposed the same end product in accordance with the SOW. The only major difference is the price in the proposal, a difference of [DELETED]. Recommendation: Award the contract to MRS.

See Contract File at 83.

33. In an email dated January 24, 2007, MRSI asked the Contracting Officer several questions about the project—including "the amount of insurance required for this project;" "the 5 year warranty" requirement; certain questions about "new wiring and conduits" that were to be supplied, and "permits" required for the project. *See Contract File* at 76-79.

34. In an e-mail dated January 25, 2007, Mr. Ruskin asked the Contracting Officer whether its proposal could be "emailed in a pdf format." *Protester's Comments on Suspension Request*[1] *("Protester's Suspension Comments"), Mr. Ruskin's e-mail to the Contracting Officer* dated January 25, 2007. In that same e-mail, Mr. Ruskin also requested confirmation of his "understanding" that a bid bond was not required under the Final Solicitation, and that the "payment and performance bond documents" specified therein were not required until after award. *See Protester's Suspension Comments, Mr. Ruskin's e-mail to the Contracting Officer* dated January 24, 2007. In a reply e-mail issued that same day, the Contracting Officer confirmed that all offer documents were to be e-mailed, and that "the rest of your correspondence" regarding the bond submissions "is correct." *Id.*

[1] In its Protest, MRSI requested that the ODRA suspend CEI's contract award for the duration of the Protest. On March 5, 2007, following the receipt of Comments from both the FAA and MRSI, the ODRA denied MRSI's Suspension Request. On March 7, 2007, MRSI subsequently requested reconsideration of that decision. The issuance of these Findings and Recommendations, together with a Final Order, renders MRSI's suspension request moot.

35. That same day, Mr. Ruskin sent the Contracting Officer another e-mail advising that the Central Contractor Registration number (CCR) for MRSI had "been applied for" but not received—and that in the interim, MRSI would use the ATR CCR number. *See Protester's Suspension Comments, Mr. Ruskin's e-mail to Contracting Officer* dated January 25, 2007.

36. Between January 30, 2007 and February 1, 2007, the Contracting Officer issued several "e-mails for clarification" to CEI, including a request for the firm's completed Business Declaration, along with questions about its proposed price. *See Contract File* at 58-61. On February 1, 2007, the Contracting Officer directed CEI to submit its best and final offer ("BAFO") with a price that included the required bonds and a "standard 1 year warranty in lieu of an extended warranty." *See Contract File* at 59.

37. The Acquisitions Branch reports that its "Contracting Officer and Program Office personnel evaluated the two offers" received from CEI and MRSI "in accordance with the criteria stated in Section M" of the Final Solicitation. *See Legal Brief* at 2. Both proposals were rated "at least technically acceptable." *Id.*

38. Because MRSI's proposed price [DELETED] was [DELETED] than CEI's proposed price [DELETED], the Contracting Officer and the Program Office initially "determined that award should be made to MRS[I]." *Id.* However, after reviewing MRSI's submitted Business Declaration, the Contracting Officer found that "even if" MRSI "offered the best price, MRSI could not affirmatively be determined responsible" because:

> the information appearing on MRS[I]'s Business Declaration indicated that it had been in business for [DELETED], had [DELETED] gross receipts [for the past three calendar years], and only had [DELETED] employees.

Id.

39. Unlike MRSI, CEI's submitted Business Declaration showed that it had "been in existence for [DELETED] with [DELETED] employees, and [DELETED] gross receipts for the past three calendar years." *See Agency Response, Summary of Award Decision* dated February 5, 2007 at 1.

40. Shortly thereafter, the Contracting Officer convened a meeting with the Program Office and advised them of his evaluated "concern in awarding this critical deadline contract to . . . . [MRSI], a vendor with limited resources and minimal experience doing work for the FAA, or any other commercial/private entity." *Id.* at 2. The Program Office "unanimously agreed" with the Contracting Officer "that due to the critical certainty of having this work completed by May 15, 2007, it would be in the best interests of the FAA to award this project" to CEI. *Id.* In making this decision, the meeting participants recognized that CEI was "currently working on similar projects in various locations within the Southern Region," and thus had "a proven history of satisfactory performance" with the FAA. *Id.*

41. The Independent Government Cost Estimate ("IGCE") for this requirement was [DELETED]. Since CEI's proposed price of [DELETED] was "only about [DELETED]," the Contracting Officer concluded that CEI's proposed price was "fair and reasonable." *Id.*

42. Under the FAA's Acquisition Management System ("AMS"), where one source is available to satisfy the Agency's requirements within the specified time frame, a single source award is justified. *See AMS* § 3.2.2.4. However, because the AMS favors competition, any decision to award a single source contract must have a documented rational basis. *See Protest of J&J Electronic Systems*, 05-ODRA-00340. Because the elimination of MRSI's proposal meant that the Region "had only one viable offer," the Contracting Officer executed a "Single Source Justification," in accordance with Acquisition Management System § 3.2.2.4, to justify the contract award to CEI. *See Contract File* at 41. In addition to emphasizing that MRSI "is of questionable financial condition, particularly

considering [DELETED] gross receipts for the past three calendar years," the Single Source Justification also explains:

> Failure to award this contract now will result in an unacceptable increase in risk level of [the] failure of the existing cooling towers, with resulting potential failure of electronic equipment at [Atlanta TRACON] which provides air traffic control of Atlanta, Macon, Augusta, and Columbus, Georgia terminal areas.

See Contract File at 42.

43. Immediately following the February 5, 2007 execution of the Single Source Justification, the contract was awarded to CEI. On February 6, 2007, MRSI contacted the Contracting Officer to determine the contract's award status. Following a February 7, 2007 debriefing conducted by the Acquisitions Branch, MRSI filed this Protest at the ODRA on February 12, 2007.

III. Parties' Positions

A. MRSI

It is undisputed that this contract was awarded to a higher-priced offeror, and that MRSI was "not awarded the project because" based on its [DELETED] the Contracting Officer determined that MRSI was not a responsible bidder. *Legal Brief* at 1-2. In its Protest, MRSI contends that "none of the[se] items" cited by the Contracting Officer as a basis for rejecting its proposal "[was] a requirement" in this procurement. *Protest* at 3. According to MRSI, "[a]t no time" nor "in any documents is there a mention of company size, experience, revenue, volume or other company data required that would be used as a factor in the determination of the award" under the Final Solicitation—nor was there a specified "rating system" for the procurement. *Id.*

MRSI also argues that "[t]he ability . . . to perform is supported and guaranteed by" the Final Solicitation's "requirement to provide a performance and payment bond" fifteen days after contract award, and further contends that "other than a bond," there is "no other guarantee that an owner can obtain relating to size, volume, [or] revenue." *Id.* at 4.

The Protester also reports that it had explained to the Contracting Officer "in the beginning and throughout the [proposal] process that if the project required a bond, then the contract would have to be issued to [MRSI] and not ATR" since the ATR [DELETED] which precludes the surety agent from securing "all Partners' signatures" necessary to issue the Final Solicitation's required bonds. *Id.* at 3. MRSI further maintains that it should have been determined responsible since it "reside[s] at the same address and use[s] the same resources," as ATR.

B. The Acquisitions Branch

Despite MRSI's objections, the Acquisitions Branch contends that the Contracting Officer reasonably determined that MRSI "could not affirmatively be determined" responsible because the Business Declaration it had submitted "indicated that it had been in business for [DELETED], had [DELETED] gross receipts, and had only [DELETED] employees." *Legal Brief* at 2. The Acquisitions Branch also asserts that while it had authority to permit MRSI to "cure problems related to responsibility," it nevertheless was within the Contracting Officer's "sound discretion" to make a determination of nonresponsibility without further investigation or discussion since MRSI's proposal submission failed to "indicate clearly that the prospective contractor is responsible." *Id.* at 3.

IV. Discussion

1. The Challenged Nonresponsibility Determination

The AMS defines the term "responsibility" to mean that a prospective contractor has: (1) adequate resources to perform the contract, or the ability to obtain them; (2) the ability to comply with the required or proposed performance schedule; (3) a satisfactory record of integrity and business ethics; and (4) the qualifications and eligibility to receive an award. *See AMS, "Policy,"§* 3.2.2.2. Even where, as here, each offeror fully complies with a solicitation's stated technical evaluation criteria, the AMS nevertheless requires the Contracting Officer to "ensure that contracts are awarded only to responsible contractors, and prohibits any contract award absent an affirmative determination of responsibility." *Id.* The AMS also emphasizes that the "Contracting Officer is given great discretion in making this determination," and the AMS squarely places the "burden of proof . . . on the prospective contractor to demonstrate its responsibility" and ability to perform under the terms of a contract. *See AMS Toolbox Procurement Guidance, § T3.2.2.7, Contractor Qualifications,* ¶ 1, *Responsibility Determination of Prospective Contractors*.

The evaluation of a potential contractor's responsibility is not the same as a technical evaluation of that offeror's previous experience. *See Protest of Fisher-Cal Industries et al.,* 98-ODRA-00081 *et al.* Unlike the evaluation of technical acceptability, the determination of responsibility is not performed until after a prospective contractor is selected for award. *Id.* The ODRA will not overturn a contracting officer's non-responsibility determination unless it is demonstrated to be without a rational basis. *See Protest of DCT, Inc.*, 96-ODRA-00015. In this regard, it is well established that

The standard of review to be applied when reviewing a contracting officer's determination of non-responsibility is one of objective—as opposed to subjective—

reasonableness.[2] *See Impresa Construzioni Geom. Domenico Garufi v. U.S.*, 52 Fed. Cl. 421 (2002).

There is ample support in the record for the conclusion that the Contracting Officer's concerns about MRSI's performance risk were reasonable. First, the Business Declaration form submitted by MRSI evidenced obvious performance risks. Not only had MRSI described itself as a [DELETED] corporation comprised solely of a President and [DELETED] employees that had been in business for [DELETED], its submitted Business Declaration showed [DELETED] "year ending" balances or "Gross Receipts" even though the Business Declaration form required these figures "for the last three years." *See Contract File* at 33.

In addition, MRSI submitted a "VENDOR ENTRY" worksheet, required by the FAA for its accounting system, containing a handwritten annotation explaining [DELETED] the form's required Central Contractor Registration ("CCR") database number—even though it had reportedly been in business for [DELETE]. In this regard, the record also shows that MRSI had earlier advised the Contracting Officer via e-mail, without explanation, that it would be using ATR's designated CCR number. *See Finding of Fact ("FF") No. 33, supra.* The CCR is a recognized database recommended by the Small Business Administration and used by contracting officials as the chief source to perform market research and to collect, verify and manage standard contractor business information such as size status, taxpayer identification number, and federal electronic fund transfer data. *See AMS Toolbox Procurement Guidance*, § T3.3.1, *Contract Funding, Financing & Payment*, ¶ 8, *Central Contractor Registration (CCR): see also Central Contractor Registration Handbook* dated March 2007.[3] Because MRSI had not yet [DELETED] registered for the CCR, the Contracting Officer was unable to use this database to ascertain any

[2] While a contracting officer's non-responsibility determination may be challenged, the ODRA ordinarily will not consider challenges against an affirmative determination of responsibility. *See Protest of International Services, Inc.*, 02-ODRA-0024 at Note 1 (*discussing Protest of Washington Consulting Group, Inc.*, 97-ODRA-00059, *Motion to Dismiss*).
[3] The CCR website is available at http://www.ccr.gov.

further details about the Protester's business, resources or performance capability. In this regard, while MRSI's proposal listed [DELETE] "CONSTRUCTION PROJECTS FINISHED OR UNDER CONSTRUCTION," the Contracting Officer's subsequent inquiry with each of the identified references confirmed that none of these projects were performed by MRSI; rather, each had been performed by "other entities engaged in similar lines of business" with which MRSI's principal, Mr. Ruskin "was associated." *Agency Response* at 4. Given: MRSI's [DELETED] business status and unproven performance record; the unexplained circumstances of MRSI's formation; its [DELETED]-employee size; MRSI's reliance on another company's CCR number; the Business Declaration form; and the [DELETED] pertaining to MRSI's business capabilities and assets, the ODRA concludes that the Contracting Officer's evaluated concerns about the Protester's ability to successfully perform the contract were reasonable.

While MRSI contends that its ability to perform was supported by the Final Solicitation's requirement to provide a performance and payment bond, *see Protester's Suspension Request* at 2, the AMS requires that a responsibility determination be based upon information that is "on hand or readily available" and also specifies that "[i]nformation on financial resources and performance capability should be current as of the date of award." *See AMS Procurement Guidance, Responsibility Determination of Prospective Contractors* at §§ 1(b)(1)(a) and 1(f). In this case, the pertinent performance and payment bonds relied upon by MRSI to assert its responsibility were not required under the Final Solicitation until fifteen days after contract award, and therefore do not qualify as currently reliable information that demonstrate MRSI's responsibility. Moreover, both of these post-award bonds only secure a surety's liability for damages, *e.g.*, reprocurement costs, in the event that a contractor defaults on its contract performance; beyond that specific financial indemnity, the bond instruments are inadequate to protect or indemnify the Program Office against the overriding performance risk associated with a contractor whose responsibility or resources are questionable or unproven—*i.e.*, the disruption of air traffic control operations in four Georgia terminal areas that could occur if the

Atlanta TRACON cooling towers were to fail before their replacement is completed. *See United Enterprise & Associations v. U.S.,* 70 Fed. Cl. 1 (2006), n.29 (*bonds do not indemnify against substantial delay and inconvenience*.)

It further is apparent that the 75-day schedule established for this "high priority project" imposed a contract award deadline that precluded the Contracting Officer from further investigating MRSI's responsibility. To that end, the "impact" statement in the Single Source Justification that was executed to explain the basis for proceeding with the CEI award clearly reports that "[t]he cooling towers must be replaced before May 15, 2007, when warm weather conditions will begin to further stress the existing cooling towers," *see Contract File* at 43, and also explains that:

> [f]ailure to award this contract *now* will result in an unacceptable increase in risk level of failure at the existing cooling towers, with resulting potential failure of electronic equipment at [the Atlanta TRACON], which provides air traffic control of Atlanta, Macon, Augusta, and Columbus, Georgia terminal areas.

Id. at 42.

Under these circumstances, involving a "critical deadline contract" that forseeably could impact the operation of an air traffic control facility charged with critical safety functions, the Contracting Officer's decision to proceed with an award to CEI instead of further pursuing evidence of MRSI's responsibility, was reasonable and unobjectionable. In reaching this conclusion, it is worth emphasizing that in contrast to the Protester, CEI's proposal package included [DELETED] Business Declaration which clearly demonstrated that CEI [DELETED], with [DELETED] employees," and that CEI had posted "[DELETED] gross receipts for the past three calendar years." *See Contract File* at 42.

Given the critical information provided to the Contracting Officer and the need to ensure properly working cooling towers at the Atlanta TRACON, the ODRA concludes that no further investigation into MRSI's responsibility was reasonably required. *See Agency Response, Final Solicitation* at 40. Ultimately, offerors—and not the contracting officials—bear the responsibility for the adequacy of their proposal packages. In this case, Mr. Ruskin decided to submit an offer as MRSI, a [DELETED] company with [DELETED] history of successful operation. The Contracting Officer acted properly in finding that he could not determine MRSI to be a responsible company under the circumstances.

2. The Work Mr. Ruskin Performed For the Program Office

The ODRA has "broad discretion" to recommend remedies in protests and contract disputes that are "consistent with the FAA's [AMS] and applicable statutes." *See AMS* § 3.94; *ODRA Procedural Rules* 14 C.F.R. § 17.21; *Protest of Hasler, Inc.,* 06-ODRA-00395. Although the Contracting Officer's decision not to award a contract for this requirement to MRSI was justified, it nevertheless is undisputed in this record that: (1) Mr. Ruskin, MRSI's principal, at the request of the Project Engineer provided technical services for which he was not compensated; (2) the Program Office relied on Mr. Ruskin's work to determine its course of action and to develop its technical requirement; and (3) the Program Office invited Mr. Ruskin and his company to compete for this requirement notwithstanding the obvious organizational conflict of interest which Mr. Ruskin's role as a technical consultant had created.

It is a fundamental rule of appropriations law that a federal agency cannot accept "free" or volunteer services absent express statutory authorization. *See* 63 Comp. Gen. 459 (1984).[4] Nevertheless, the record in this case shows that MRSI's principal, Mr. Ruskin, provided technical assistance work—*e.g.,* on-site visits to the Atlanta TRACON facility, photographs, technical research, specification and project analysis,

[4] Several implementing statutes assure that federal agencies do not accept additional gifts or monies from sources other than the Congress. *Id.* For example, absent express statutory authority, government agencies cannot accept "free" products or services from outside sources. *Id.; see also* 31 U.S.C. § 3302.

warranty research and technical proposals—that were "reviewed, and . . . used as a guide" by the Project Engineer "to develop a Statement of Work . . . for the replacement of the deteriorating cooling towers." *See Affidavit of Charles Earnheart* at 2; *see also Findings of Fact ("FF") Nos. 2-6; 8-12; 14-15; and 17-18.* The Project Engineer compiled this technical analysis into the resulting SOW which was "emailed back" to Mr. Ruskin, CEI, and the third offeror for "their comments" and "budget estimates." *See Affidavit of Charles Earnheart, supra.*

The clear policy of the FAA is to avoid awarding contracts to contractors who have unacceptable organizational conflicts of interest ("OCI"), *see Organizational Conflict of Interest,* ¶ 1(a), *Responsibilities Related to* [*OCI*], which the AMS defines as:

> An [OCI] means that because of existing or planned activities, an offeror or contractor is unable or potentially unable to render impartial assistance to the agency, or has an unfair competitive advantage.

Id.

In this case, the technical assistance and information Mr. Ruskin gave the Project Engineer created a disqualifying organizational conflict of interest because Mr. Ruskin's role potentially situated and enabled him to craft "biased ground rules" that "could slant key aspects of a procurement" in his firm's favor, to the unfair disadvantage of competing vendors. *See Potential OCI Situations,* ¶ 2(b). Although the Acquisitions Branch properly opened a competition for this requirement to two additional vendors rather than proceed with a single source award to Mr. Ruskin's company as had been requested by the Program Office, the Project Engineer's improper reliance on and use of Mr. Ruskin's work in the first place must be addressed.

It is well established that where, as here, a benefit has been conferred on the Government in the form of goods or services—which were subsequently accepted—a contractor may recover at least on a *quantum meruit* basis for the value of what was provided. *See United States v. Amdahl Corporation,* 786 F.2d 387 (Fed.Cir.1986);

Healthcare Practice Enhancement Network, Inc., 01-1 BCA ¶ 31,383 (2001). The underlying legal tenet for charging the government with liability in these situations is its retention of benefits—an acceptance that gives rise to an implied-in-fact contract. *Id.* The equitable principles underlying the AMS require Mr. Ruskin to be fairly compensated for the fair market value of the technical services and proposals he performed and provided to the Project Engineer, *see FF Nos. 2-6; 8-12; 14-15; and 17-18,* which were used to define the Government's requirements and create the SOW for the competition. *See Hasler, Inc., supra.*

V. RECOMMENDATION

Based on the foregoing, the ODRA recommends that the Protest be denied. The Program Office is directed, however, to compensate Mr. Ruskin for the fair market value of the technical services he provided to the Project Engineer.

/S/
Behn M. Kelly
Dispute Resolution Officer
Office of Dispute Resolution for Acquisition

APPROVED:

/S/
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