

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

FINDINGS AND RECOMMENDATIONS

Matter: Protest of Perera Construction, Inc.
Under Solicitation No. DTFAWP-09-R-02087

Docket No.: 09-ODRA-00507

Appearances:

For the Protester: Scott Sampson,
Business Development Manager,
Perera Construction, Inc.

For the FAA Program Office: Don Bobertz, Esq.

I. INTRODUCTION

This bid protest (“Protest”), filed by Perera Construction, Inc. (“Perera”) with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”), challenges a determination by the contracting officer (“CO”) to eliminate Perera from a two-phased acquisition process. Solicitation No. DTFAWP-09-R-02087 (“Solicitation”) seeks to establish a Qualified Vendor List (“QVL”) for a contract to build an Air Traffic Control Tower (“ATCT”) and Base Building at the Oakland International Airport and at the Palm Springs International Airport (“Contract”). Offerors that meet the requirements would be selected for the QVL, and, subsequently, be given copies of the Request for Offers (“RFO”) for further competition.

For the reasons set forth below, the ODRA finds that Perera did not comply with the explicit requirement of the Solicitation to provide the FAA with either a certified Earned Value Management System (“EVMS”) or proof of a plan for an EVMS. Therefore, the ODRA recommends that the Protest be denied.

II. FINDINGS OF FACT

1. The Western-Pacific Region (“Region”) issued Screening Information Request (“SIR” or “Solicitation”) number DTFAWP-09-R-02087, dated September 11, 2009. *Supplemental Agency Response (SAR)*, Exhibit 9 at 1.

2. The SIR states:

The purpose of the SIR is to establish a Qualified Vendors List (QVL) that will be used to identify qualified prime contractors that are interested in submitting offers for a new Air Traffic Control Tower (ATCT) and Base Building at the Oakland International Airport (OAK) located in Oakland, CA and a new ATCT and Base Building at the Palm Springs International Airport (PSP) located in Palm Springs, CA.

Id.

3. The SIR transmitted the following documents: Cover Letter; Explanation of SIR Process and Definition Qualifications; Identification of Subcontractors for Electrical & Mechanical; Qualifications and Reference Matrix (“QARM”) with Instructions; Specifications and Drawings; and applicable Acquisition Management System (“AMS”) Clauses & Provisions. *Id.*
4. Responses to the SIR were due no later than 1:00 PM (PDT) on October 15, 2009. *Id.*

5. Attachment 1 to the SIR states:

The purpose of this SIR is to identify a pool of qualified vendors that have teamed with qualified electrical and mechanical subcontractors to propose for the projects. The qualified primes will be placed on the Qualified Vendors List (QVL). Request for Offer (RFO) packages will be sent “only” to the prime contractors named on the QVL.

Id.; Attachment 1 at 1.

6. Attachment 2 to the SIR required the identification of subcontractors. *Id.*, Attachment 2.

7. Attachment 3 to the SIR states:

The purposes of the attached Qualifications and Reference Matrix (QARM) are as follows:

1. Determine the qualifications of the prime contractor and their electrical and mechanical subcontractors.
2. Obtain reference contact information for confirmation.
3. Establish a Qualified Vendors List.

Id., Attachment 3 at 1.

8. The SIR describes the methodology to be used to evaluate the SIR responses and establish the QVL as follows:

Review for Responsiveness to SIR:

Each offeror’s SIR submittal will be reviewed to determine if they are responsive. That is, have they submitted all items required by the SIR and is the information complete?

The review will include the following:

1. Did the Contracting Officer receive all required items prior to the stated deadline and were they in the proper format?

2. Did the submittal contain a cover letter?

- a. Did the offeror state the projects in which they were interested?
- b. If the offeror stated exceptions, were they acceptable?
- c. Did the offer make a statement affirming that the submittal was current, complete and correct?
- d. Was the cover letter signed by a person of authority?

3. Did the offeror identify their proposed electrical and mechanical subcontractors?

- a. Was the information complete and in the required format? (See SIR Attachment No. 2.)

4. Did the offeror (prime contractor) submit at least 5 QARMs?

- a. Were all 5 QARMs submitted in the format requested?
- b. Was the information complete? (See SIR Attachment No. 3.)
- c. Were the QARMs legible?

5. Did the offeror (prime contractor) submit at least 5 QARMs for each of the subcontractors listed on SIR Attachment No. 2?

- a. Were all the QARMs submitted in the format requested?
- b. Was the information complete?
- c. Were all QARMs legible?

6. Did the offeror return the FAA's CDs (2 ea) with preliminary drawings and specifications?

If the answer to any of the above questions is found to be “no,” the offeror will be deemed “non-responsive” and be eliminated from further consideration.

Evaluation of Qualifications:

- The minimum qualifications for the prime contractor and subcontractors for electrical and mechanical are listed on Attachment No. 1 to this SIR. Only firms deemed qualified will be allowed to submit an offer for the projects.
- The prime contractor must submit the names of his proposed electrical and mechanical subcontractors using Attachment No. 2 to this SIR.
- The prime contractor and his proposed electrical and mechanical subcontractors must each submit QARMs in accordance with Attachment No. 3 to this SIR. References listed on the QARMs may be contacted to confirm the listed information.
- There is no scoring involved with qualifications, it is merely “pass/fail.” If it can be confirmed that the prime contractor and their electrical and mechanical subcontractors have the qualifications as described on Attachment No. 1 to this SIR, they will be deemed qualified. If it cannot be confirmed that they have the required qualifications, they will be deemed unqualified and eliminated from further consideration.
- *If a subcontractor is deemed unqualified, the prime contractor is also deemed unqualified regardless of the prime contractor’s stand alone qualifications. The prime contractor*

subcontractors are considered "a team".

- If the prime contractor or his subcontractors are deemed qualified and then later it is discovered that incorrect information was submitted, the prime contractor may be eliminated from consideration at that time. Only qualified prime contractors on the QVL will be sent the RFO package.

Id., Attachment 5 at 1-3 (emphasis in original).

9. Issuance of RFO:

The RFO for the Oakland project will be issued out of the FAA's office in the Los Angeles area and the RFO for the Palm Springs project will be issued out of the FAA's office in Seattle. Separate FAA Contracting Officers will be responsible for the contents of each RFO. Therefore the exact criteria for award may differ; however, the award criteria for each project will be clearly explained in Section M of each RFO.

Id. at 3.

10. Attachment 6, AMS Clauses Applicable to this SIR, includes:

1.13-1 Notice of Earned Value Management System (EVMS) (March 2006)

The offeror's (you/your) response to this screening information request (SIR) must include proof of a certified EVMS or provide a plan (the plan) to implement a certified system that complies with the EVMS criteria (the criteria) stated in subparagraph (b) of clause 1.13-2, "EVMS." You must submit the following as part of your proposal for Contracting Officer (CO) approval

(a) Documentation demonstrating that your EVMS has been American National Standard ANSI/EIA 748 certified and EVM surveillance documentation demonstrating that you have maintained an American National Standard ANSI/EIA 748 compliant EVMS at the time this SIR is issued; or

(b) The plan that explains how your EVMS will be certified for each guideline of the American National Standard ANSI/EIA 748 Standard.

(c) Names of subcontractors. If you have not yet identified subcontractors, you must identify any part of the work you intend to award to subcontractors. The CO must approve the subcontractors before you sign contracts with them.

Id., Attachment 6 at 4.

11. Attachment 6, AMS Clauses Applicable to this SIR, also includes:

1.13-2 Earned Value Management System (February 2009)

(a) The Earned Value Management System (EVMS) is a management tool that provides for integrating technical, cost and schedule information about contract performance. This information enables the FAA (we) and contractor program managers to manage contracts more effectively. Industry standard American National Standard ANSI/EIA - 748-A specifies the EVMS criteria that are incorporated by reference into this clause.

(b) The Contractor (you/your) must use an EVMS complying with American National Standard ANSI/EIA-748-A that the FAA Contracting Officer (CO) or the contracting officer from another federal agency certified before contract award. If you do not have a certified EVMS in place at the time of award, you must provide the CO with your plan to create an EVMS that complies with American National Standard ANSI/EIA-748-A before award and implement the system within 90 days after award.

(c) Approved subcontractor EVM plans:

(1) The CO must approve subcontractor EVMS plans before they begin work. The CO has approved the following subcontractor EVMS systems. . . .

(2) You must require subcontractors listed in the contract and subject to EVMS certification to comply with this clause, paragraphs (a) and (b).

(d) You must submit a Contract Performance Report prepared under [Contracting Officer to insert reference to location of the applicable DID DI-MGMT-81466A that specifies the contract's reporting requirements. The CO may request customized earned value management reports].

(e) You must obtain approval for EVMS system revisions consistent with the EVM system change process approved with the EVM certification or similar agreement, i.e., EVM Advance Agreement, with the controlling certification approval or acceptance party.

(f) You must participate in FAA EVM Surveillance and provide access to all pertinent records and data requested by the CO so the we can verify that your EVMS complies with the criteria specified in subparagraph (b) at the time of award and throughout contract performance consistent with the FAA EVMS Guide.

Id. at 5.

12. On September 28, 2009, the CO issued Amendment 1 to the SIR containing Questions and Answers (“Q&A”), which states, in relevant part:

Q-4. [W]ith regard to Attachment #6. It states on page 4 that “The offeror’s (you/your) response to this screening information request (SIR) must include proof of a certified EVMS or provide a plan (the plan) to implement a certified system that complies with the EVMS criteria (the criteria) stated in subparagraph (b) of clause 1.13-2 “EVMS”. You must submit the following as part of your proposal for Contracting Officer (CO) approval:” and it then states what you can submit. I am assuming that this requirement is not submitted with the SIR, but rather during the next phase (RFO).

A-4. We regret that this was not originally included as a SIR requirement, it should have been; therefore, in accordance with AMS clauses 1.13-1 and 1.13-2 (see SIR Attachment No. 6) you are required to submit in your SIR response proof of a certified EVMS or provide a plan that complies with the EVMS criteria. *Failure to submit the EVMS documents will cause your SIR response to be*

deemed non-responsive and you will be eliminated from further consideration. Your certification or EVMS plan must be deemed acceptable by the CO. You will have an opportunity to correct minor inequities in your EVMS plan; however, it must be deemed acceptable for your firm to be placed on the QVL. (Also see Exhibit No. 3 “Additions” within this SIR Amendment.)

SAR, SIR Amendment 1, Exhibit 2 at 2 (emphasis in original).

13. On October 3, 2009, FAA issued Amendment No. 2 containing additional Q&A about the SIR. It states, in relevant part:

Q-1. Attachment No. 6, Page 5, paragraph 1.13-2(c)(1) requires Contracting Officer input for approved subcontractors and 1.13-2(c)(2)(d) requires reference to location of the applicable DID DI-MGMT-81466A. Are these applicable to the SIR or should this be something done after the award phase? If so, do subs need to submit an EVMS plan for approval at this time also?

A-1. You (the prime contractor) must submit with your SIR response proof of your EVMS certification or your plan to implement a certified system that complies with EVMS criteria. Only your electrical and mechanical subcontractors need to be identified in your SIR response. Subcontractors are not required to submit EVMS information with your SIR response. Final approval of EVMS submittal will be during the RFO phase of this solicitation.

SAR, SIR Amendment 2, Exhibit 2 at 1.

14. On October 7, 2009, Perera acknowledged receipt of Amendments 1 and 2. *Agency Response (“AR”)*, Exhibits 5 and 6.
15. On October 15, 2009, Perera submitted its response to the SIR, which included: a cover letter, identification of electrical and mechanical

16. On November 30, 2009, the CO James L. Travers sent a letter to Scott Sampson of Perera notifying him that:

. . . . Your SIR submittal has been evaluated and unfortunately found to be ‘non-responsive,’ therefore your firm will be eliminated from further consideration.

An Earned Value Management System (EVMS) is considered by the FAA to be an essential element of the Oakland and Palm Springs projects. The original SIR stated in part: “The offeror’s (you/your) response to the screening information request (SIR) must include proof of a certified EVMS or provide a plan (the plan) to implement a certified system that complies with the EVMS criteria (the criteria)”

In SIR Amendment No. 1 it was further stated: “Failure to submit the EVMS documents will cause your SIR response to be deemed non-responsive and you will be eliminated from further consideration.” EVMS requirements were reiterated again in SIR Amendment No. 2. We regret that your SIR submittal did not contain the required EVMS information.

Protest, Exhibit 2.

17. On December 2, 2009, the CO sent a follow up letter stating:

The letter notified you that your firm had been deemed “non-responsive” and therefore eliminated from further consideration. We regret that we forgot to mention your right to request a “debrief.” . . . The Contracting Officer (CO) will also answer your specific questions if you submit them in detail to the e-mail address listed below. Your debrief request and questions must be submitted no later than December 4, 2009. The CO will contact you shortly thereafter to schedule your debrief.

In accordance with SIR Attachment No. 6, AMS CLAUSES AND PROVISIONS APPLICABLE TO THIS

SIR, clause 3.9.1-3 Protest (November 2002), you have a right to protest the CO's decision (see attached).

Protest, Exhibit 3.

18. On December 2, 2009, Scott Sampson, Business Development Manager from Perera filed a one page protest with the ODRA stating:

[T]here is some ambiguity as to whether the EVMS is due at the pre-qualification stage of the submission or as stated in the bid documents – page attachment #6 – Page 5 section 1.13-2 (see attached) – submitted prior to award and to be implemented within 90 days afterwards. (See attached).

Furthermore, due to the fact that no construction drawings exist and no schedule exist, it was Perera's intent to submit the relevant documents prior to award or when actual information is available, current and relevant. This issue is not material to the bid and should be reconsidered.

Protest.

III. DISCUSSION

In accordance with the ODRA Procedural Regulations, 14 C.F.R. Part 17, and the FAA's Acquisition Management System ("AMS"), the ODRA will not recommend that a pre-award bid protest be sustained where a decision by the source selection officials has a rational basis, and is not arbitrary, capricious, or an abuse of discretion. *Protest of New Bedford Panoramex*, 07-ODRA-00414. The Protester bears the burden of proof to demonstrate by substantial evidence that the Agency's decision lacked a rational basis or was otherwise improper. 14 C.F.R. § 17.37(j); *Protest of Evolver*, 09-ODRA-00495.

After reviewing Perera's response to the Solicitation, the CO determined that the submission was "non-responsive" for failure to provide the FAA with either proof of a certified EVMS or a plan to implement one that complies with the FAA's certification requirements. FF 16. In its one page Protest with the ODRA, Perera merely states that "there is some ambiguity as to whether the EVMS is due at the pre-qualification stage of

the submission or as stated in the bid documents. . . submitted prior to award and to be implemented within 90 days afterwards. *Protest* (internal citations omitted).¹ In the Agency Response to the Protest, Counsel for the Region urges that the two Clauses related to EVMS in the initial Solicitation are not inconsistent. The Region states:

Reading the clauses together in a way that gives meaning to both, the reasonable interpretation is that clause 1.13-2 provides some information regarding the schedule for EVMS submission to the FAA (e.g. that the EVMS certification or EVMS implementation plan must *be in place at the time of award*), and that clause 1.13-1 states *what is required in response to the SIR* (e.g. proof of a certified EVMS or the offeror's plan to implement a certified system).

AR at 2 (emphasis in original) (internal citations omitted). The ODRA finds merit in the Region's argument, which is consistent with recognized contract interpretation principles. *See, e.g., Protest of Deloitte*, 08-TSA-036.

Moreover, the ODRA has recognized Q&A in Amendments to a Solicitation as clarifications of solicitation requirements. *Protest of Evolver, supra*. In this case, the Q & A in Amendment 1 unequivocally states:

[I]n accordance with AMS clauses 1.13-1 and 1.13-2 (see SIR Attachment No. 6) you are required to submit in your SIR response proof of a certified EVMS or provide a plan that complies with the EVMS criteria. *Failure to submit the EVMS documents will cause your SIR response to be deemed non-responsive and you will be eliminated from further consideration.* Your certification or EVMS plan must be deemed acceptable by the CO. You will have an opportunity to correct minor inequities in your EVMS plan; however, it must be deemed acceptable for your firm to be placed on the QVL.

FF 12 (emphasis in original). In addition, Amendment 2's Q & A further states:

You (the prime contractor) must submit with your SIR response proof of your EVMS certification or your plan to implement a certified system that complies with EVMS criteria.

¹ Perera did not file any Comments to the Agency Response. The record therefore is devoid of any elaboration by Perera regarding the alleged ambiguity.

FF 13. In the above solicitation documents, the Region clearly placed all potential offerors, including Perera, on notice that any submission that did not address EVMS would be deemed “non-responsive,” and the bidder excluded from the next phase of the competition. It is undisputed in this case that Perera neither filed a protest of the EVMS requirement prior to the submission of its SIR Response nor did it address the EVMS requirement in its Response. The ODRA has held on more than one occasion that ultimately it is the bidder’s responsibility to ensure that its submission strictly conforms to the requirements of the solicitation involved. *See, e.g., Protest of Team Clean, Inc., 09-ODRA-00499.* Under the circumstances here, the ODRA concludes that the Region’s decision to exclude Perera from further competition had a rational basis and cannot be said to have been arbitrary, capricious, or an abuse of discretion.

IV. CONCLUSION AND RECOMMENDATION

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

- S -

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

APPROVED:

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