

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

FINDINGS AND RECOMMENDATIONS

Matter: Protest of Diamond Antenna & Microwave Corporation
Under Solicitation No. DTFAAC-11-R-04926

Docket No.: 11-ODRA-00583

Appearances:

For the Protester: Jonathan D. Shaffer, Esq.
Smith Pachter McWhorter PLC

For the Intervener: Mr. Mark C. Federico
Kevlin Corporation

For the FAA Aeronautical Center: Linda Modestino, Esq.

I. Introduction

Diamond Antenna & Microwave Corporation (“Diamond”) filed the instant bid protest (“Protest”) with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on July 6, 2011. The Protest challenges a single source contract awarded pursuant to Solicitation No. DTFAAC-11-R-04926 (“Contract”) by the FAA Mike Monroney Aeronautical Center (“Center”) to Kevlin Corporation (“Kevlin”) for one rotary coupler as used in the ARSR-4 radars (“Rotary Coupler”). The ARSR-4 radar is used for air traffic control in the en route areas controlling aircraft at high altitudes flying between Terminal Radar Approach Controls (“TRACON”). *Agency Response* (“AR”) Tab 10, *Affidavit of Darren Jerome, dated July 11, 2011*. Rotary couplers facilitate the movement of radar signals from the rotating antenna to the stationary antenna base. *Id.* Modified ARSR-4 rotary couplers were acquired under

another contract awarded to Kevlin in order to relocate slip rings to make them field replaceable. *Id.* There are 44 rotary couplers currently installed in the ARSR-4 radars, and the FAA has an additional seven spare couplers in a storage depot. *Id.* The FAA Logistics Center is acquiring the additional Rotary Coupler in order to increase the depot spares from seven to eight due to increased demand, and to maintain 95 percent availability of serviceable spares. *Id.*

Diamond Antenna asserts that: (1) The single source award lacks a rational basis because Diamond can manufacture the Rotary Coupler without any Kevlin proprietary hardware; (2) a prior single source award to Kevlin for the modified rotary joints lacked a rational basis and was otherwise improper; and (3) the single sourcing of rotary couplers by the FAA, generally, “reveals a systematic FAA acquisition flaw.” *Protest* at 3. For the reasons set forth below, the ODRA finds that the Center’s single source justification to award the Contract for the Rotary Coupler to Kevlin has a rational basis and is not otherwise arbitrary, capricious or an abuse of discretion. Therefore, the ODRA recommends that the Protest be denied.

II. Findings of Fact

1. On April 28, 2011, a Purchase Request by the FAA Logistics Center was issued for the acquisition of one modified ARSR-4 depot spare Rotary Coupler (P/N 17001/NSN 5985-01-547-2366). *AR* Tab 1.
2. The Center published a market survey (“Market Survey”) on May 9, 2011 on the FAA Contract Opportunities website with a closing date for responses of May 17, 2011. *AR* Tab 2.
3. The Market Survey stated:

The FAA does not have specifications or drawings. Contractor must have access to the original equipment manufacturer’s (OEM) specifications and drawings.

Potential sources must provide documentation to the FAA showing proof for rights to use the data from the OEM. Statements that data will be obtained or that specifications or drawings will be developed are not acceptable.

Id. (emphasis added).

4. On May 16, 2011, Diamond responded by email to the Market Survey (“Diamond Response”). AR Tab 3 at 1. The Diamond Response broadly states that:

Diamond has access to the *level of OEM drawings and documents* that allow Diamond to build the ARSR-4 rotary joint.

Note that there is nothing inside this equipment that cannot be reproduced to meet all specifications. There are no special metals, seals, etc. . . . that are not commercially available. Diamond Antenna and Microwave has done this type of work many times before.

Id. at 4 (emphasis added).

5. The Diamond Response, however, did not provide documentation to the FAA showing proof of rights to use the data from the OEM. *See Findings of Fact (“FF”) 3-4, above.*
6. In an email to the Contracting Officer dated June 6, 2011, the FAA System Engineer who evaluated the Diamond Response stated that:

As I understand, the inductosyn modification is proprietary to Kevlin. I do not believe it would be viable option to have another company re-engineer the rotary coupler. It would require extensive test and evaluation time before accepting. It would create issues with configuration management and logistics if all parts were not interchangeable with the Kevlin Rotary Coupler.

AR Tab 4 at 3.

7. The System Engineer's analysis was conveyed to Diamond in an email from the Contracting Officer dated June 10, 2011. *Id.* at 1.
8. A single source justification for "one modified ARSR-4 Rotary Coupler" at an estimated purchase price of \$[DELETED] was issued on June 14, 2011. The stated rationale was that:

Kevlin Corporation has proprietary data rights for the design and fabrication of the ASRS-4 [sic] type rotary coupler, as well as the modification The cost and time associated with re-engineering, designing and prototype testing of a new replacement rotary coupler would not be cost effective nor would it meet mission requirements without causing excessive delay to this program.

AR Tab 5 at 1-2.

9. On June 28, 2011, the Center issued a Public Announcement stating its requirement for "one (1) modified Air Route Surveillance Radar (ARSR-4) rotary joint (P/N 17001, NSN: 5985-01-547-2366), manufactured by Kevlin Corporation." AR Tab 6.
10. The Public Announcement further states the Center's intent to award a single source contract because "the inductosyn modification is proprietary to Kevlin." *Id.*
11. In a July 1, 2011 email responding to the Public Announcement, Diamond insisted that "Diamond [did] not need any proprietary drawing to build [the] rotary joint," but provided no documentation or other supporting information to explain its ability to obtain the necessary parts. AR Tab 7.

12. The Contract, in the amount of \$402,000, was awarded to Kevlin. AR Tab 18.
13. On July 6, 2011, Diamond Antenna filed the instant Protest with the ODRA. *Protest*. An extended period of voluntary alternative dispute resolution failed to resolve the matter and adjudication commenced on November 1, 2011.
14. During the adjudication of the Protest, Diamond submitted, with its Comments on the Agency Response, a Declaration from its [DELETED]. The Declaration, dated December 15, 2011, states that the critical component of the modified rotary coupler, the inductosyn transducer, is actually proprietary to [DELETED]. *Declaration of [DELETED]* (“[DELETED] Decl.”) ¶ 3.
15. The Declaration further states that in a July 28, 2011 telephone conversation, [DELETED] was told by a representative of [DELETED], that [DELETED] would sell the same part to Diamond that it had sold to Kevlin. [DELETED] *Decl.* ¶¶ 4-5. There is no indication in the Declaration or elsewhere in the record that this information was provided to the Center prior to the challenged award to Kevlin. The Declaration further indicates that, based on some of the documentation on the ARSR-4 rotary coupler provided to Diamond, it would take six months to complete a modified ARSR-4 design. [DELETED] *Decl.* ¶ 15.

III. Discussion

In accordance with the ODRA Procedural Regulation, 14 C.F.R. Part 17, and the FAA’s Acquisition Management System (“AMS”), the ODRA will not recommend that a bid protest be sustained where the source selection decision has a rational basis, and is not arbitrary, capricious, or an abuse of discretion. *Protest of New Bedford Panoramex*, 07-ODRA-00414. A 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. The AMS allows the FAA to contract with a single source when it is in the Agency's "best interest and the rational basis for the decision is documented." *AMS Policy 3.2.2.4: Single-Source Selection (Revised 1/2010)*.¹ The AMS also states that:

[The] rational basis may be based on actions necessary and important to support FAA's mission, such as emergencies, standardization, and only source available to satisfy a requirement within the time required. . . .

The decision to contract with a single-source may be made as part of overall program planning. The rational basis must be documented and approved as a part of program planning in the implementation strategy and planning document, a procurement plan, or as a separate document. . . .

The CO must document the objective criteria supporting the rational basis for the decision in writing. Examples of information that might be documented include results of market analysis, cost or price data, unique qualifications or performance capability, and past performance. Mere conclusions, without adequate objective supporting data, are insufficient. . .

Id. The AMS Procurement Guidance additionally provides that "[e]xcluding emergencies, there are no predetermined or prescribed conditions for using a single source. Each single source decision stands alone and is based on the circumstances." *AMS Procurement Guidance: A: Single Source Contracting (Added 10/2006): 1: Basis for Single Source (Revised 1/2010)*.² The rational basis for any decision to enter into a single source contract will be subject to close scrutiny by the ODRA. *Protest of J&J Electronic Systems*, 05-ODRA-00340.

With respect to the second and third issues of the Protest, *i.e.*, the challenge to a prior single source award to Kevlin to modify the ARSR-4 rotary joints and the allegation of a "systematic FAA acquisition flaw" in its procurement of rotary couplers generally,

¹ This provision of the AMS was revised in July, 2011. Compare AMS 3.2.2.4 (Revised 1/2010) with AMS 3.2.2.4 (Revised 7/2011). At the time of this single source procurement, the prior version was in effect.

² This provision of the AMS Procurement Guidance was revised in July, 2011. Compare Procurement Guidance T.3.2.2.4 (Revised 1/2010) with Procurement Guidance T.3.2.2.4 (Revised 7/2011). At the time of this single source procurement, the prior version was in effect.

Diamond clarifies in its Comments that “the period to protest that award has already passed. Diamond does not protest that award in this proceeding.” *Comments* at 9. However, Diamond does continue to assert that, when “this sole source procurement [is] viewed in context,” the prior single source award to Kevlin, while not the subject of the instant Protest, demonstrates that the Center “has a history of conducting procurements in an anti-competitive manner that favors incumbent contractors.” *Id.* at 2. Diamond proceeds to argue that “the present procurement rests on an acquisition strategy that provides for continuous sole source awards to Kevlin without regard to the requirements for competition under the AMS.” *Id.* at 3.

“Although not the subject of this protest,” Diamond argues, “it is appropriate for the ODRA to counsel [the Center] to seek competition for future rotary coupler work, including future coupler modification efforts.” *Id.* at 9. In seeking relief from the ODRA, Diamond states that “a systematic flaw in the [Center’s] acquisition strategy [] provides an independent basis for sustaining the protest.” *Id.* at 3. Notwithstanding Diamond’s attempt to recast its protest of an altogether distinct and separate single source award to Kevlin as a “systematic flaw,” the ODRA views these issues as one and the same. As argued by the Center, *AR* at 5, and conceded by Diamond, *Comments* at 9, any protest of the prior award is not before the ODRA. Further, this record does not support a finding of anti-competitive behavior based on the single source justification in this case. Thus, the focus of the ODRA’s inquiry remains on Diamond’s first issue, i.e., whether the Center had a rational basis in making a single source award for the spare depot modified Rotary Coupler to Kevlin.

While the Center “concedes that Diamond does manufacturer [sic] and sell ‘versions’ of these (couplers) all over the world,” *AR* at 5-6, it asserts that the single source award is based on “the need for items that are identical in form, function, and operation, under the configuration management (standardization) system.” *AR* at 5. The single source justification states:

Kevlin Corporation has proprietary data rights for the design and fabrication of the ASRS-4 [sic] type rotary coupler, as well as the modification. . . . The cost and time associated with re-engineering,

designing and prototype testing of a new replacement rotary coupler would not be cost effective nor would it meet mission requirements without causing excessive delay to this program.

AR Tab 5 at 1-2. In response, Diamond argues that the Center's single source justification lacks a rational basis. *Comments* at 10.

Protesters in similar circumstances bear the burden of proving that the Center's single source award in this case lacks a rational basis. 14 C.F.R. § 17.37(j); *Protest of Evolver*, 09-ODRA-00495. In *Protest of J&J Electronic Systems*, 05-ODRA-00340, the ODRA denied a protest of a single source award under similar circumstances.³ In that case, the Center purchased two Godfrey Circuit Cards, proprietary to Honeywell Systems, Inc., to be used in the Godfrey Airport Landing System. *Protest of J&J Electronic Systems*, 05-ODRA-00340. The ODRA found that the Center's single source award had a rational basis because "there was no evidence before the Center that J&J could manufacture the Card in time to replenish the Center's shrinking supply." *Id.*

As in *J&J Electronic Systems*, the Diamond Response to the Market Survey failed to demonstrate to the Center that it could provide the required Rotary Coupler. Diamond's proposal broadly stated that "Diamond has access to the *level of OEM drawings and documents* that allow Diamond to build the ARSR-4 rotary joint." AR Tab 3 at 4. However, Diamond did not provide documentation of a right to use OEM data, as expressly had been required by the Market Survey. FFs 3-5. The Market Survey had expressly cautioned offerors that "[s]tatements that data will be obtained or that specifications or drawings will be developed [in the future] are not acceptable."⁴ FF 3. The record also shows that Diamond's response to the Market Survey essentially

³ The Government Accountability Office ("GAO") has also denied protests of sole source awards on the basis of standardization. See, e.g., *Brinkmann Instruments, Inc.*, B-309946, B-309946.2 (October 15, 2007) ("[A]n agency's legitimate need to standardize the equipment it uses may provide a reasonable basis for imposing restrictions on competition."). The ODRA views GAO decisions to be persuasive authority where consistent with AMS Policy. *Protest of International Services, Inc.*, 02-ODRA-00224.

⁴ To the extent Diamond's protest challenges this language of the Market Survey, it is untimely. 14 C.F.R. § 17.15(a)(1)(prior rule published June 18, 1999).

proposed to build the ARSR-4 rotary joint based on available information, FF 4, and that Diamond would need six months to complete a modified ARSR-4 design. FF 15.

Even after the single source announcement, Diamond continued to insist, without providing support, that “Diamond [did] not need any proprietary drawing to build [the] rotary joint.” FF 11. Months after the award, during the adjudication of this Protest, Diamond changed its position, asserting that another company, i.e., [DELETED], would sell it the proprietary inductosyn transducers needed to meet the FAA’s requirements. FF 15. Even accepting this hearsay statement as true, this information was not provided to the Center in Diamond’s response to the Market Survey and in any event was not sufficient to satisfy the documentation requirement of the Market Survey. FFs 3-5.

It is well established that the ODRA will review the single source justification on the basis of the information the Product Team had at the time of its decision. *Protest of J&J Electronic Systems*, 05-ODRA-00340. Ultimately, it is the offeror’s responsibility to make sure that its submission satisfies the express requirements of the Solicitation. *Protest of Team Clean*, 09-ODRA-00499. Given Diamond’s failure to provide the required documentation of its right to use OEM data, the ODRA finds that Diamond has not met its burden to demonstrate that the Center’s single source award for a Rotary Coupler lacks a rational basis or was otherwise arbitrary, capricious, or an abuse of discretion. Diamond’s attempt to submit required supporting information after the award decision, and during the course of the Protest proceedings, cannot provide a basis for attacking the award. *Protest of Aydin Displays, Inc.*, 11-ODRA-00578.⁵

⁵ Nothing in these Findings and Recommendations should be construed as authorizing any future single source awards by the Center of rotary couplers or related equipment.

IV. Conclusion

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

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C. Scott Maravilla
Dispute Resolution Officer and
Administrative Judge

APPROVED:

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