

REDACTED VERSION

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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of J.A. Jones Management Services
Under Solicitation No. DTFA03-99-R-COMS**

Docket No.: **99-ODRA-00140**

Appearances:

For Protester, J.A. Jones Management Services: Douglas L. Patin, Esq., and Peter J. Skalaban, Jr., Esq., Spriggs & Hollingsworth

For the Intervenor, Wackenhut Services, Inc.: Richard J. Webber, Esq., Arent Fox Kintner Plotkin & Kahn, PLLC

For the Agency Product Team: Kenneth S. Dobis, Esq.

I. Introduction

This Protest involves an award made to Wackenhut Services, Inc., (“Wackenhut”) pursuant to Solicitation No. DTFA03-99-R-COMS (“Solicitation”) for the facility operations and management services contract at the FAA’s William J. Hughes Technical Center (“Center”) in Atlantic City, New Jersey. The Protester, J.A. Jones Management Services (“Jones”), was the incumbent contractor, and an unsuccessful offeror on the Solicitation. The Solicitation involved a base contract period of one year, commencing on October 1, 1999, and four one-year options. The Solicitation calls for award to the lowest priced, technically acceptable offeror.

The original Protest initially alleged that (1) Wackenhut failed to satisfy the Solicitation's past performance requirements; (2) Wackenhut improperly submitted misleading, non-responsive information concerning key technical personnel; (3) Wackenhut's offer was improperly unbalanced; (4) Wackenhut proposed and intends to cross-utilize key personnel in violation of the Solicitation or as part of an improper "bait-and-switch"; and (5) the Center improperly amended the minimum threshold for technical understanding.¹ As a remedy, Jones requested termination of the awarded contract and a directed award or recompetition. On October 4, 1999, Jones filed a supplemental protest ("First Supplemental Protest") alleging that Wackenhut should have been disqualified from the competition, because it had received a failing grade from each Technical Evaluation Board ("Board") member.

The original Protest and First Supplemental Protest, as refined in Comments filed by Jones on October 13, 1999, allege: (A) Wackenhut was required to be "automatically disqualified" pursuant to the Solicitation because it was failed by the Board and the Contracting Officer had no rational basis for overriding the Board's determination²; (B) Wackenhut failed to meet the Solicitation's past performance/experience requirements because it had not provided qualifying references from three separate contracts involving facilities maintenance services; (C) Wackenhut proposed to improperly cross-utilize key Central Utilities Plant ("CUP") employees in violation of the Solicitation; and (D) Wackenhut lacked authority to proffer the resumes of Jones employees in its proposal.³

On October 14, 1999, Jones filed a second supplemental protest ("Second Supplemental Protest") alleging that Wackenhut should have been disqualified for failure to propose a candidate who satisfied the requirements of the Solicitation. Jones asserts that

¹ On September 23, 1999, the Center filed a Motion for Summary Disposition on timeliness grounds with respect to Jones' fifth Protest allegation. The Motion was rendered moot by Jones' subsequent withdrawal of the Protest allegation in question.

² Specifically, Jones argued that the contracting officer lacked a basis for overruling the Board's determinations that (1) Wackenhut did not understand the snow removal requirement and (2) Wackenhut's electrical engineer lacked the required experience. Comments, page 9 – 11.

³ The Jones Comments withdrew the earlier allegations that (1) the Solicitation was improperly amended, and (2) the FAA should have disqualified Wackenhut under the Solicitation's unbalanced bid clause.

Wackenhut should have been disqualified because the resume of the individual proposed by Wackenhut did not reflect a certification specified by the Solicitation.

For the reasons set forth herein, the ODRA recommends that Jones' Original, First Supplemental and Second Supplemental Protests be denied. As is more fully discussed herein: (1) the Contracting Officer's decision, to override a non-unanimous Technical Evaluation Board Report on the acceptability of Wackenhut's proposal, was consistent with his authority under the Acquisition Management System ("AMS") and rationally based; (2) the conclusion that Wackenhut met the Solicitation's past performance experience requirements was supported by substantial evidence and not irrational; (3) the record does not support Jones' allegation that Wackenhut improperly proposed cross utilization of CUP operators; (4) Wackenhut's proffer of Jones employees in its proposal was not improper; and (5) the Environmental Specialist proposed by Wackenhut satisfied the Solicitation requirements, because the Solicitation permitted the evidence of certification to be provided within ten (10) calendar days after award; and the Solicitation did not clearly inform offerors that failure to provide evidence of certification with the offers would disqualify them from consideration.

II. Findings of Fact

1. The Solicitation was issued on December 17, 1998 by the Center's Contracts Branch, ACT-51A. Agency Report ("AR"), Tab 1, Solicitation (4/8/99 version). The Solicitation was the subject of twelve amendments. A version of the Solicitation incorporating Amendments 1 through 6 was issued on April 8, 1999. All references herein to the Solicitation are to the April 8, 1999 version and its amendments.

2. The Center's requirements, as stated in the Solicitation include, *inter alia*, the following specific tasks:

Facilities Help Desk
Plumbing
Site Utilities
Heating, Ventilation, and Air Conditioning
Fire Detection and Fire Protection
Electrical
Elevators
Interior/Exterior
Central Utility Plant (CUP) Operation
Water Treatment Plant (WTP) Operation
Equipment Maintenance
Automated Security and Radio Communications Maintenance
Material handling Operation
Environmental Compliance
Roads and Grounds
Snow Removal
Pest Control
Mobile Record Keeping

AR, Tab 1, Solicitation, page 3.

3. The Solicitation contemplated a firm fixed price for labor hours and a cost plus fixed fee arrangement for other orders. AR, Tab 1, Solicitation, page 41. Award was to be made to the responsible, low priced offeror deemed acceptable in each of the technical areas evaluated. AR, Tab 1, Solicitation, page 50.

Personnel Qualifications

4. Clause C.2 of the Solicitation set forth, *inter alia*, the following personnel qualifications:

The Contractor is required to provide personnel having the following minimum levels of experience. The specialized experience included as a part of the required qualifications shall have been obtained in the fields of endeavor and for the labor categories listed below:

Electrical Engineer - A graduate of an accredited engineering college, must be licensed (any state) and have a minimum of ten (10) years experience in operation and management of high-

voltage utility or large industrial electrical systems including generation. This experience shall include design and cost estimating; system fault and load current computation; coordination, maintenance and calibration of utility electrical systems; use of test equipment commonly used in installation, and maintenance of utility electrical systems; analysis of faults and troubleshooting of high voltage utility systems....

Environmental Specialist - Must have a license. (Reference Attachment 2, Section 4, 4.5.1.1)⁴

Fire Inspector – Each proposed inspector must have a license.

Manager/Supervisory – Each proposed supervisor must have a minimum of 10 years direct experience in facilities management work, with 3 years minimum experience as a manager or supervisor.

Operators, Water Plant and Central Utilities Plant....

Access Control, Security Surveillance and Electronic Specialist(s)

Corporate Manager

Contract Manager....

Alternate Contract Manager....

PM/WO System Administrator....

Estimator....

The above personnel are designated as “key personnel” pursuant to Clause 3.8.2-17 in Section H.

AR, Tab 1, Solicitation, pages 4 - 5.

5. Section 13 of the Statement of Work (Attachment II of the Solicitation) states, with respect to evidence of certification and licensing of environmental personnel, as follows:

⁴ Section 13 of Attachment II contains the certification requirements for the Environmental Specialist. Statement of Work Section 4, 4.5.1.1, actually pertains to licensed fire inspectors.

The Contractor shall comply with any environmental and hazardous waste handling licensing, certification, and qualification requirements of the state of New Jersey, including any Federal and Local requirements. All work shall be performed by personnel specifically qualified and trained to work with hazardous wastes. Evidence of all required licenses, as well as documentation of the qualifications of personnel, shall be provided to the COTR within ten (10) calendar days of the Contract award.

§13.1 Scope of Work. (Emphasis added)

The Contractor shall provide a certified Hazardous Material Specialist. Certification requirements for this position shall be for a Senior Level (a baccalaureate degree in a related field plus 3 years of appropriate experience, OR, eleven (11) years of related experience without a baccalaureate degree) as specified by the Institute of Hazardous Materials Management (IHMM). IHMM can be contacted for the current certification requirements, etc. at: IHMM, 11900 Parklawn Drive, Rockville, Maryland, 20852, tel. 301-984-8969, fax 1516, Email:ihmm@cyclenet.com, Internet: <http://www.ihmm.org>. The Hazardous Material Specialist shall be responsible for the overall management and coordination of the work requirements of this Statement of Work and other operations involving hazardous materials as directed by the COTR.

§13.5.1.1, *as amended by Amendment 4, dated January 27, 1999.*
AR, Tab 1. (Emphasis added)

6. The Solicitation also contained clause 3.8.2-17, Key Personnel and Facilities (July 1996), which stated:

- (a) The personnel and/or facilities as specified below are considered essential to the work being performed hereunder and may, with the consent of the contracting parties, be changed from time to time during the course of the contract.
- (b) Prior to removing, replacing, or diverting any of the specified personnel and/or facilities, the Contractor shall notify in writing, and receive consent from, the Contracting Officer reasonably in advance of the action and shall submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on this contract.

AR, Tab 1, Solicitation, pages 25 - 26.

Proposal Preparation

7. Solicitation section L.3 required that offerors' technical proposals include information/documentation in sufficient detail to clearly identify the offeror's qualifications. Such information was to include past performance and relevant experience (to include prior corporate experience, success meeting goals, emergency preparedness, quality control, experience with environmental/safety regulations); technical understanding of the FAA Technical Center's needs (to include understanding of scope, key technical personnel, preventative maintenance/work order administration); and business management information (to include organizational structure/staffing key management personnel, acquisition system, phase-in procedures, and warranty and inventory control). AR, Tab 1, Solicitation, pages 45 and 46. A rating of unacceptable in any of the categories or subcategories rendered a proposal ineligible for award. AR, Tab 1, Solicitation, page 51.

Past Performance and Relevant Experience Information

8. With respect to past performance and relevant experience, offerors were required to provide references from:

At least three qualified sources that have employed the offeror's services. For a source to qualify, the services provided by the offeror must meet the following criteria:

- a) They must have involved *facilities maintenance*,
- b) They must have been of similar size (over 60 employees *and/or* over \$5 million per year), and
- c) They must have performed the services within the past ten years.

AR, Tab 1, Solicitation, page 46 (emphasis added).

9. With respect to the past performance references, the TEP states "[a]ny proposal not providing three qualified references will automatically be disqualified from further consideration." AR, Tab 1, Solicitation, page 46.

10. With respect to prior experience with facility maintenance contracts, the Solicitation identified the required background information to include experience on facility maintenance contracts for office buildings, computer labs, R&D facilities, industrial facilities, or site work. AR, Tab 1, Solicitation, page 46.

Demonstration of Technical Understanding of the FAA Technical Center's Needs

11. Section 2 of Section L.3 of the Solicitation, entitled “Technical Understanding of FAATC Needs,” is divided into three subsections.⁵ Subsection 1, entitled “Understanding of scope and complexity of work” provides:

The offeror shall provide evidence that they recognize the scope of services required to be provided under the proposed contract. The offeror shall demonstrate work control strategies, interaction of organizational elements, and technical approach methods to accomplish the requirements for each of the 17 Statements of Work (SOW) attached. Any offeror who receives a failing grade in any one area will automatically be disqualified. Furthermore, any offeror failing to achieve a passing grade for 13 of the 17 areas will be disqualified.

Subsection 2, entitled “Key technical personnel,” provides:

The offeror shall provide resumes/licenses/certifications of key technical personnel. Each submission shall address educational background and relevant experience for the specified positions. Minimum requirements are defined as having appropriate bachelor degrees and/or licenses or minimum experience specified in clause C.2. The key technical positions [include] ... Environmental Specialist – Per the requirements of clause C.2

AR, Tab 1, Solicitation, page 47. In contrast with the provisions of the first subsection, no “disqualification” language is contained in Subsection 2.

Business Management Information

12. Under clause L.3, Section 3, entitled “Business Management Proposal,” offerors were required to provide all pertinent business management information in each of the areas specified below. Section 3 stated that “[f]ailure to meet the

⁵ Although this section advised offerors that “[f]ailure to achieve a passing grade in any one of the six areas will result in automatic disqualification”, only three areas were listed. The third subsection is not relevant to these protests.

requirements detailed in any one area will result in automatic disqualification."

The subject areas included:

1. Organizational structure and staffing plan. The offeror shall:

- a. Indicate planned workforce, which may include some of the existing workforce. Include a proposed assignment of key personnel and lines of responsibility.
- b. Describe the type and amount of staffing to support the proposed method of operation.
- c. Explain in detail the mix of skill levels and skill types proposed to meet the specifications.
- d. Indicate method, if any, to be employed in cross-utilizing assigned personnel.
- e. Provide an organizational chart showing the staffing for each section as shown in the statement of work.
- f. Demonstrate an ability to meet initial and long term staffing requirements.
- g. Describe, in detail, corporate support and resources available.

2. Key Management Personnel. The offeror shall provide resumes/licenses/certifications of key management and administrative personnel. Each submission shall address educational background and relevant experience for the specified positions. Minimum requirements are defined as having appropriate bachelor degrees and/or licenses or minimum experience as defined in clause C.2, **and** three (3) years of direct experience in the designated field. The key management and administration positions are:

Corporate Manager - Per requirements of clause C.2

Contract Manager - Per requirements of clause C.2

Alternate Contract Manager - Per requirements of clause C.2

PM/WO System Administrator - Per requirements of clause C.2

Estimator - Per requirements of clause C.2

AR, Tab 1, Solicitation, page 47 - 48 (boldface emphasis in original).

13. The Solicitation provided that award would be made to the responsible, low priced offeror deemed acceptable in each of the technical areas listed in Clause M.2, Evaluation Criteria and the Basis For Award. Clause M.2 generally states that a "rating of unacceptable in any of the categories or subcategories renders the proposal ineligible for award." The "categories" and "subcategories" referenced are:

- (1) Past Performance and Relevant Experience
Includes prior corporate experience, success meeting goals, emergency preparedness, quality control, experience with environmental/safety regulations.
- (2) Technical Understanding of FAATC Needs
Understanding of scope, key technical personnel, preventative maintenance/work order administration.
- (3) Business Management Proposal
Organizational structure/staffing key management personnel, acquisition system, phase-in procedures, warranty control, inventory control.

AR, Tab 1, Solicitation, page 50 - 51.

14. Amendment 3 to the Solicitation, effective January 19, 1999, applies, *inter alia*, to the Environmental Specialist position and states that:

All key personnel resumes/qualifications are required with your proposal submittal. These requirements are listed in Clause L.3 SUBMISSION OF PROPOSALS. Failure to provide the required proposal submission information may render your proposal ineligible for award.

AR, Tab 1, Amendment 3, page 2 (emphasis added).

15. Solicitation Amendment 7, effective April 8, 1999, added Clause H.5, Nondisplacement of Qualified Workers which, among other things, required the contractor, in good faith, to offer those employees engaged in the performance of building services (other than managerial and supervisory employees) under the

predecessor contract, a right of first refusal to employment under the contract, in the positions for which the employees are qualified. This clause also identifies, by name and date of employment, all of the incumbent Contractor's service employees engaged in the performance of building services. AR, Tab 1.

The Technical Evaluation Plan

16. The technical evaluation plan ("TEP"), dated April 16, 1999, was approved by the Board prior to the scoring of any proposals. The TEP tracks the Solicitation's sections L and M, and identifies the following areas for evaluation: Past Performance and Relevant Experience; Technical Understanding of FAATC Needs; and Business Management Proposal. AR, Tab 2, pages 1 and 4.

17. The evaluation area entitled "Facilities Management Past Performance and Relevant Experience", was designed to confirm that the offeror has the necessary experience and capability for successful performance of the size and scope of the contract. With respect to the evaluation area entitled "Technical Understanding of FAATC Needs", the TEP instructs Board members to ascertain whether offerors understood the FAATC's by expressing whether they proposed specific means and measures to satisfy the contract specifications. With respect to the evaluation area entitled "Business Management Proposal", proposals were to be evaluated based on their provision of an organizational structure, staffing plan, and key personnel qualifications; as well as demonstrating an understanding of and ability to implement the acquisition process, phase-in procedures, and warranty and inventory control. AR, Tab 2, pages 1-3.

18. The "Facilities Management Past Performance and Relevant Experience" Section of the TEP states: "Any proposal not providing three qualified references will automatically be disqualified from further consideration." In the "Understanding of scope and complexity of work" sub-section of the "Technical Understanding of FAATC Needs" Section, the TEP states: "Any offeror who receives a failing grade from *each Board member* in any one area will automatically be disqualified." The "Business Management Proposal" Section of

the TEP states: "Failure to meet the requirements detailed in *any one area* will result in automatic disqualification." Finally, with respect to the "Final Evaluation", the TEP states: "Any offeror receiving a failing grade in any area of the evaluation *by each Board member* will be disqualified from further consideration." AR, Tab 2 (emphasis added).

Initial Evaluation of Proposals
("Pre-Negotiation Objectives" and June 2, 1999 Final Evaluation Report
Documents)

19. The first evaluation performed by the Board resulted in finding two of the three offerors -- namely, Jones and Wackenhut -- technically unacceptable. Jones had failed to provide the names, resumes, and background information for proposed technical key personnel and each Board member failed them in this area. Wackenhut had failed in four areas. First, it failed to provide copies of evaluations from references proving success at meeting schedules and objectives. Second, Wackenhut failed to provide copies of evaluations from references demonstrating experience with quality control under the past performance and relevant experience area. Third, Wackenhut received a failing grade from each Board member under Section 15 - Snow Removal, because it failed to provide a clear understanding of the required snow removal effort. Wackenhut stated it would use Government Furnished Equipment to perform snow removal. Finally, Wackenhut failed to provide proof of licensing information for its mechanical and electrical engineers. AR, Tab 3, June 2, 1999 Final Evaluation Report, page 2.

20. In its proposal, Wackenhut had included resumes of incumbent Central Utilities Plant operators employed by Jones. Wackenhut had obtained the resumes of the employees from Local 68 of the International Union of Operating Engineers, the Union representing them under a Collective Bargaining Agreement incorporated in the Solicitation. The Union did not contact the operators about supplying their resumes to Wackenhut; nor did the Union obtain the express

permission of the operators to provide the resumes. Wackenhut did not contact the operators directly to obtain their permission to use the resumes in its proposal.⁶ See Stipulation, dated October 22, 1999.

21. The Contracting Officer determined that award could not be made at a fair and reasonable price to the sole technically acceptable offeror, and that the deficiencies of the Jones and Wackenhut proposals could be corrected through a round of discussions. AR, Tab 3, Pre Negotiation Objectives, pages 1-4.

22. The Contracting Officer decided to conduct a round of discussions with all offerors, wherein they would be informed, among other things, that cross utilization of key personnel was not permitted; and that clause L.3, Submission of Proposals, section 2 entitled "Technical Understanding of FAATC Needs," subsection 1, "understanding of scope and complexity of work" was being *corrected to reflect the technical evaluation plan*. As "corrected", that subsection stated that "[a]ny offeror who receives a failing grade from each Board member in any one area will automatically be disqualified." AR, Pre Negotiation Objectives Tab 3, page 4 (emphasis added). That correction was communicated to offerors in the Center's July 2, 1999 letters requesting BAFOs. AR, Tab 4.

Discussions

23. By letter dated July 2, 1999, the Contracting Officer advised both Jones and Wackenhut that there would be no cross-utilization of key personnel and that under the "scope and complexity of work" sub-section of the "Technical Understanding of FAATC Needs" Section, pertaining to automatic disqualification, would state "[a]ny offeror who receives a failing grade from each Board member in any one area will automatically be disqualified." The letter

⁶ Jones' management had advised the central utilities Plant operators that providing a resume to another company for inclusion in that other company's proposal could result in the termination of their employment.

further stated that "[t]his change reflects what is stated in the technical evaluation plan and accurately reflects how each offeror was evaluated." AR, Tab 4.

24. As for deficiencies, Jones was advised that its technical proposal was unacceptable because it failed to provide the names, resumes, and background information for all proposed key technical personnel, and that, if it did not provide resumes that conformed to the Solicitation requirements, its proposal would be found technically unacceptable and ineligible for award. AR, Tab 4.

25. Wackenhut also was notified that its technical proposal was unacceptable, because it failed to provide the requisite information under the "Past Performance and Relevant Experience" and "Technical Understanding of FAATC Needs and Key Technical Personnel" sections of Clause L.3. Specifically, Wackenhut was advised that it did not provide copies of evaluations from its referenced customers in the subcategories "Success meeting schedules and contract objectives" and "Experience with Quality Control." Wackenhut further was advised that in the "Technical Understanding of FAATC Needs" area, it received a failing grade from each Board member for Section 15 - Snow Removal for failing to provide a clear understanding of the required snow removal effort, and incorrectly assuming that it would use Government Furnished Equipment to perform snow removal, when there was none. Finally, Wackenhut was advised that it failed to provide proof of licensing information for its proposed engineers. AR, Tab 4.

26. On July 7, 1999, responding to a question posed by Jones, the Contracting Officer notified all remaining offerors of clarifications to the Solicitation requirement, including: (1) that the Government required individual resumes and licenses from each of the Central Utilities Plant Operators; and (2) that cross utilization of key personnel was not authorized except for the positions of Corporate Manager, Alternate Contract Manager, and Manager/Supervisors. Attached to the notification were substituted the Solicitation pages that incorporated the "clarification." AR, Tab 4.

Evaluation of Best and Final Offers

27. The Contract Specialist used the contract references set forth in Wackenhut's BAFO to make a responsibility determination.

28. Best and Final Offers (BAFO) were received on July 15, 1999, and the Board completed its evaluation on July 26, 1999, incorporating the results in its Best and Final Offer Evaluation Report ("Report"). AR, Tab 5.

29. The Board found all three offerors acceptable under the evaluation factor of "Past Performance and Relevant Experience." The Board did not contact references of the offerors. Hearing Transcript page 115, lines 7-14 ("115/7-14")

30. With respect to Wackenhut, the Board found its BAFO submission for the past performance and relevant experience evaluation factor to be acceptable. 116/3 – 11. In looking at the contracts listed by Wackenhut, the evaluators looked for evidence of facilities maintenance work and for a value of Five Million Dollars or more than 60 employees. 116-117/22-3; 136/15-22; 140/16-19.

31. Wackenhut's proposal included four references. The first reference was 2.2 billion dollar contract for Joint Base Operations and Support at the John F. Kennedy Space Center. AR, Tab 12, May 20, 1998 proposal, page 10. This contract "includes infrastructure management, operations, maintenance, engineering, custodial, grounds and light construction support" covering several thousand acres and includes well over 100 buildings that account for more than 5 million square feet of occupied space. AR, Tab 12, May 20, 1999 Proposal, page 14. The second contract was for management and operational support for the U.S. Department of Energy, Albuquerque, NM, in the amount of 58.6 million dollars for five years. It included the following responsibilities: operating and maintaining 25 buildings, including computer labs, distance learning studios and

lab, classrooms, administrative and office spaces, television production studio, satellite uplink, physical training center, cafeteria, live fire shoot house, fully equipped armory, lounge and facilities maintenance and repair center, and fire alarm and suppression systems maintenance. 117/12 – 120/6. The second contract also involved a workforce of well over 100 individuals.⁷ 120/15-20. The third reference was for the George W. Hill Correctional Facility, Delaware County Prison. It listed a dollar value of 14 million dollars per year. The operating budget included the operations of the facility, correctional officers, food service, administration, and facilities maintenance. The third reference also indicated a total of 61 employees dedicated to facilities maintenance for that contract.⁸ Of those 61 employees, 44 consisted of skilled and unskilled labor from the inmate population who were paid an hourly wage. 120-121/21-17; 141/9-20. The Board decided that inmate labor could be considered as meeting the requisite number of “employees” involved in the facilities maintenance work. 122 – 123/19 – 8.

32. Wackenhut’s fourth reference was a Texas Department of Criminal Justice Contract with a value of just over 3 million dollars per year. The work force to maintain the facilities included 36 full-time facilities maintenance employees, as well as over 150 skilled and unskilled inmate workers.⁹ 122/1 – 18.

33. Under the "Technical Understanding of FAATC Needs" evaluation factor, the Board found the Protester, Jones, to be technically acceptable and the Awardee, Wackenhut, to be technically unacceptable¹⁰. The Board’s Report purported to fail Wackenhut in two areas, namely: Understanding of Scope and Complexity of Work of the required snow removal effort; and failure to propose

⁷ AR, Tab 12, May 20, 1998 proposal, pages 11, and 16-17.

⁸ AR, Tab 12, May 20, 1998 Proposal, pages 12 and 19.

⁹ AR, Tab 12, May 20, 1999 Proposal, pages 20-21.

¹⁰ A third offeror, whose proposed price was higher than those of Jones and Wackenhut, was also found technically acceptable.

an electrical engineer with the necessary experience to qualify, *i.e.*, ten years of relevant experience. AR, Tab 5.

34. The BAFO scoring sheets used by the members of the Board (other than Evaluator “F”) reflect the following negative scores and comments with respect to Wackenhut’s snow removal and the electrical engineer:

Technical Understanding of FAATC's Needs, Understanding Scope and Complexity of Work - Sec. 15 - Snow Removal	Fail - does not understand mechanics of snow removal at technical center and did not understand technical approach to snow removal; Fail - plans to use government equipment; Did not indicate understanding of scope and complexity of work; Fail - did not appear to understand scope and complexity of work; Fail - only changed "government-owned equipment" to "contractor owned equipment", no added data provided to convey understanding of contract requirements and FAATC needs; Fail - did not provide understanding on scope of services, work control strategies and interaction of organizational elements; Fail - no comment; Fail - re GFE, changed words, still working off list, no evidence of commitment from any vendor, did not demonstrate work control requirements, technical approach, interaction of organizational elements per technical evaluation plan;
Technical Understanding of FAATC's Needs, Key Technical Personnel (Electrical Engineer)	Fail - no practical experience for electrical contractor. No demonstration of 10 years experience; Fail - does not have PE license/ no 10 years experience, copies of license evidence missing; Fail - did not indicate 10 years experience in facilities management; Fail - did not see on resume specific design experience on HV power distribution systems (site), building (e.g. computer labs), electrical systems, backup generators and UPS systems etc., also second page of resume has overlapping jobs/dates; Fail - electrical engineer did not provide 10 years of relevant experience required; Fail - no comment; Fail - not much relevant recent hands on experience as per technical evaluation plan requirement (10 years), virtually all experience in management.

35. In contrast with the scores of the other seven Board members, Evaluator F gave Wackenhut a passing score for snow removal, commenting, "I think this was addressed adequately". Evaluator F also gave Wackenhut a passing score for the electrical engineer. AR, Tab 5.

36. Specifically, with respect to snow removal, the Solicitation states that the offeror must provide evidence that it recognizes the scope of services required,

and must demonstrate work control strategies, interaction of organizational elements, and technical approach methods to accomplish the snow removal requirements. AR, Tab 1, Solicitation, page 47.

37. The Statement of Work (“SOW”) provides that a detailed Snow Removal and Ice Control Plan shall be submitted by the successful offeror after award, and must include the following:

- a. Mission Support: Set priorities.
- b. Snow & Ice Committee: Appoint members, set responsibilities.
- c. Personnel: Establish training, set responsibilities.
- d. Equipment: Inventory, usage.
- e. Materials & Parts: Availability
- f. Snow Control Center: Establish procedures, appoint supervisor.
- g. Work Hours: Shift schedules, alerting procedures, how and where to report.
- h. Ground Safety: Traffic regulations on base roads, safety precautions, vehicle and equipment.
- i. Communication Procedures: Use of radios.
- j. Environmental: Cooperate with the Government’s Environmental department for the proper use of abrasives and ice removal chemicals.
- k. Inspections: Set methods and coordination of inspections.

Solicitation, Attachment II, SOW § 15.5.2.1.

38. Evaluator F signed the Board’s Evaluation Report, dated July 26, 1999, which stated that the Board had unanimously determined Wackenhut to be *technically unacceptable*, even though Evaluator F’s July 22, 1999 Scoring Sheet *passed Wackenhut on all the evaluation factors*, including both Section 15 - Snow Removal and the qualifications of the electrical engineer. AR, Tab 5.

39. On August 5, 1999, the Contracting Officer determined award would be made to the Protestor, Jones, for a total amount of [Deleted], inclusive of options. Jones was determined to be the low price, technically acceptable offeror, because Wackenhut, who had bid a lower price than Jones, had been disqualified by the Board’s “unanimous” Report. The only other remaining technically acceptable offeror had bid [Deleted] higher price than Jones. The Contract Specialist

notified Congress of the Center's intent to make award to the Protester, Jones. AR, Tab 6.

40. The Contract Specialist prepared a contract award document for Jones and forwarded it for legal review. Acting on advice from the Center Counsel's Office, the Contract Specialist requested the scoring sheets that supported the Technical Evaluation Report. She then reviewed the scoring sheets to make sure they were in accordance with the TEP plan and the Report. 6/2-25.

41. Upon reviewing the scoring sheets, she determined they were not consistent with the Report, noting that the Report stated that every evaluator had failed Wackenhut on its electrical engineer and snow removal submissions, even though the scoring sheets of Evaluator F indicated Wackenhut "acceptable" in both areas.¹¹ The Board Chairperson explained the discrepancy by stating that Evaluator F had agreed with the Board's disqualification of Wackenhut at the time the Report was signed. 7/4 – 15. Evaluator F, he testified, had indicated agreement with the Board's findings and signed the final report finding Wackenhut unacceptable. 41/1-4; 109/5 – 16.¹² The Board Chairperson was satisfied that Evaluator F had also agreed to change his individual scoring sheets in accordance with the Board's evaluation of Wackenhut. 111 – 112/11 – 3. There is no evidence Evaluator F's scoring sheet was changed.

42. The Contract Specialist independently reviewed the proposals against the evaluation plan requirements and determined that Wackenhut's electrical engineer

¹¹ As is discussed in Section III.A, herein, Evaluator F ultimately rated Wackenhut's proposal acceptable with respect to snow removal and its electrical engineer. Therefore, Wackenhut was not automatically disqualified because the July 2, 1999 amendment of the Solicitation required an unacceptable rating from *all* the evaluators in order to automatically disqualify an offeror. 13/9-14; AR, Tab 4, FAA Letter to Offerors requesting BAFOs, dated July 2, 1999.

¹² Evaluator F testified that he signed the Report without reviewing it. 59/13 – 24. Moreover, he testified that the Chairperson of the Board only presented him with page 3 of the Final Evaluation Report when his signature was requested. Evaluator F testified further that, regardless of his signature on the Final Evaluation Report finding Wackenhut unacceptable, at no time after BAFOs did he deviate from his original conclusion that Wackenhut's proposal *was acceptable*. 99 – 102/10 – 8.

and snow removal submissions met the requirements of the TEP. 10/7 – 23. During review of the selection decision, the Contract Specialist noticed that the remarks on certain of the individual evaluation sheets were not consistent with the technical evaluation plan. Specifically, some of the evaluators found Wackenhut unacceptable, because it had not submitted a plan for snow removal. Neither the technical evaluation plan nor the Solicitation required that a snow removal plan be submitted with an offeror's proposal. Additionally, one of the scoring sheets, that of Evaluator F, had found Wackenhut technically acceptable in the electrical engineer and snow removal areas. This indicated to her that the Board had not unanimously voted to disqualify Wackenhut. The scoring sheet appeared to contradict the indication in the Board's Report that the decision to reject Wackenhut had been unanimous. Subsequently, she advised the Board that the conclusions reached in its technical evaluation could not be supported under the express terms of the TEP and Solicitation evaluation criteria.

43. The Contract Specialist arranged a meeting with the Board members on August 12, 1999. At the meeting, the Contract Specialist showed the Board Members the inconsistencies between scoring sheets and their final analysis. After discussion among the Board members, the Chairperson advised the Contract Specialist that Evaluator F was not changing his score sheets. 8 – 9/14 – 5. Evaluator F testified that during that meeting he was not persuaded to change his opinion that Wackenhut's proposal was acceptable. 60/21 – 25. Another Board member, Evaluator D, recalled Evaluator F changing his opinion on Wackenhut's proposal from acceptable to unacceptable during the August 12, 1999 meeting. 223/19 – 22. The Board Chairperson also testified that Evaluator F announced at the conclusion of the meeting that Evaluator F would not agree that Wackenhut's proposal was unacceptable. It is undisputed that, at the conclusion of the final Board meeting on August 12, the Board, in a *non-unanimous* vote, found Wackenhut's proposal unacceptable.

44. The Contract Specialist then consulted with the Contracting Officer, who reviewed the Report and Wackenhut's proposal and determined that there was no rational basis for the Board's disqualification of Wackenhut. 10 – 11/24 – 5. The Board informed the Contract Specialist and the Contracting Officer that it stood by its non-unanimous determination of unacceptability. 11/9 – 11. The Contract Specialist then prepared the paperwork for an award to Wackenhut. 11/12 – 17.

45. On August 16, 1999, the FAATC issued Amendment 12 to the Solicitation, which changed the basic performance period to be from August 30, 1999 through September 30, 2000. Offerors were advised of this fact by letters, dated August 16, 1999, and were asked to verify the extended amounts contained in their BAFOs and to submit any revisions by August 23, 1999. AR, Tab 7.

46. On August 31, 1999, a "Supplemental Selection Decision" was prepared, explaining the Contracting Officer's determination that the Board's July 26, 1999 Technical Evaluation Report could not support Wackenhut's unacceptable rating. AR, Tab 8.

47. In the Supplemental Selection Decision, the Contracting Officer determined that award would be made to Wackenhut for a total amount of [Deleted], inclusive of options. Wackenhut was determined to be the responsible, low priced offeror deemed acceptable in each of the Solicitation's technical areas. AR, Tab 9.

III. Discussion

In making recommendations concerning substantive protest issues, the ODRA will apply the standard of review under the Administrative Procedure Act, 5 U.S.C. § 706 ("Act"). In accordance with the Act, the courts and the ODRA have consistently held that the review must concern itself with "whether the agency's decision was legally permissible, reasoned, and factually supported." *Protest of Information Systems & Networks Corporation*, 99-ODRA-00116, citing

Washington Consulting Group Inc., 97-ODRA-00059, citing *Delbert Wheeler Construction, Inc. v. United States*, 39 Fed. Cl. 239, 247 (1997). The reviewer may not substitute his or her judgment for that of the agency. *Id.*, citing *Wheeler Construction, supra*; *Latecoere International, Inc. v. United States*, 19 F.3d 1342, 1356 (11th Cir. 1994); *Board of County Commissioners of the County of Adams v. Isaac*, 18 F.3d 1492, 1496-97 (10th Cir. 1994).

Agencies have broad discretion with regard to the evaluation of proposals, since evaluation is "inherently a judgmental process which cannot accommodate itself to absolutes." *Id.*, citing *Wheeler Construction*, 39 Fed. Cl. at 247. Thus, agency actions will generally be upheld, so long as they have a rational basis, are neither arbitrary, capricious, nor an abuse of discretion, and are supported by substantial evidence. *Protests of Information Systems & Networks Corporation*, 98-ODRA-00095 and 99-ODRA-00116, citing *Protests of Camber Corporation and Information Systems & Networks, Inc.*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated).

A. The Contracting Officer's Decision To Override The Technical Evaluation Board's Non-Unanimous Report Was Consistent With His Authority Under The AMS And Rationally Based.

The Protestor asserts that under the terms of the Solicitation, the Contracting Officer retained no discretion to override a unanimous decision of the Board on technical acceptability of an offeror. As is discussed herein, it is not necessary for the ODRA to decide whether, given the language of the Solicitation, the Contracting Officer retained authority to override the Board's disqualification decision, since here, the decision of the Board was not unanimous. Counsel for Jones has conceded that, in the case of a non-unanimous disqualification vote of the Board, the Contracting Officer retains discretion with respect to a final decision on acceptability of a proposal. 235/12 – 25. Moreover, under the AMS, the Contracting Officer generally retains the ultimate responsibility as the Source Selection Official. AMS § 3.2.2.3.2.1.

The Contracting Officer's discretion in this regard is not unlimited, however. The Contracting Officer must act in a manner that is consistent with the requirements and stated evaluation criteria of the Solicitation and must have a rational basis for his or her actions. In this case, the Contracting Officer's review of the Board's disqualification decision resulted from a review by the Contract Specialist of the Board's individual scoring sheets. The Contract Specialist correctly concluded that the individual scoring sheets of Evaluator F were not consistent with the purported unanimous disqualification in the Board's Evaluation Report. The resulting decision to investigate the Board's Report, and ultimately not accept its non-unanimous conclusion with respect to the technical acceptability of Wackenhut's offer, was consistent with the AMS and is supported by substantial evidence.

*1. The Technical Evaluation Board's Decision
To Disqualify Wackenhut Was Not
Unanimous.*

The sworn submissions and testimony at the hearing in this matter present direct contradictions concerning the vote of one of the members of the Board, *i.e.*, Evaluator F. Evaluator F claims that he at no time changed or agreed to change the vote reflected on his evaluation sheet, *i.e.*, that he consistently took the position that Wackenhut's proposal was technically acceptable. It is undisputed that the remaining seven members of the Board voted Wackenhut's proposal unacceptable in two areas, *i.e.*, snow removal and the qualifications of its proffered electrical engineer. The head of the Board, Evaluator L, credibly testified that he met with Evaluator F after receiving the scoring sheets from the Board members. Evaluator L also credibly testified that (1) he provided Evaluator F with a copy of the Board's Final Evaluation Report at the meeting; and (2) at the conclusion of their discussions, Evaluator F signed the Report, agreeing with the Board's conclusion that Wackenhut's proposal was not acceptable. This testimony is corroborated by the fact that Evaluator F did sign the Evaluation Report, which reflected a unanimous vote to disqualify

Wackenhut. Evaluator F's testimony that he signed the Report without reading it, and that he had not been provided with a copy of the Report, but only with the signature page, is not credible. Evaluator F had no reasonable explanation for why he would sign a document listing the names of all the Board members without even questioning what he was signing or asking to review a copy of the Report itself.

Fortunately, it is not necessary to this decision that the ODRA determine whether Evaluator F changed his mind twice on Wackenhut's acceptability, as the evidence suggests, or not at all. Based on the record, including the uncontroverted testimony presented at the October 29, 1999 hearing, the ODRA has found that as of the conclusion of the aforesaid August 12, 1999 meeting, Evaluator's F vote was that Wackenhut's

proposal was technically acceptable. *See* Finding 43, above.¹³ Evaluator F's final position is corroborated by the testimony of Evaluators L, D and F and by the Supplemental Selection Decision. The August 12 meeting, which was the last meeting of the Board on the subject, ended in a non-unanimous Board decision of unacceptability of the Wackenhut proposal. Given that non-unanimous decision, Wackenhut was not automatically disqualified, under the terms of the Solicitation, on the snow removal or electrical engineer issues.

2. *The Board's Evaluation Of Wackenhut's
Electrical Engineer And Snow Removal
Submissions Lacked A Rational Basis.*

Seven of the eight members of the Board found Wackenhut's proposal unacceptable on two grounds, namely that Wackenhut had failed to: (1) proffer an electrical engineer who met the qualification requirements of the Solicitation; and (2) make the snow removal submission required by the Solicitation. The ODRA has reviewed (1) the rationale used by the Board in reaching its decision to disqualify Wackenhut; and (2) the resumes provided by Wackenhut and by Jones for the electrical engineer position. The Board's conclusion that Wackenhut's proposed engineer was unacceptable is inconsistent with the terms of the Solicitation and lacks a rational basis. Wackenhut's proposed engineer, based on the representations of the resume, appears to possess the experience required by the Solicitation.

¹³ Based on the evidence, it appears most likely that Evaluator F initially found Wackenhut's proposal to be technically acceptable, and noted his decision on his individual scoring sheets. Sometime thereafter, he met with Head Evaluator L, who presented him with the Board's Report. Evaluator F signed the Report, agreeing to also change his vote on Wackenhut's proposal to technically unacceptable. However, Evaluator F never changed his scoring sheets. At the conclusion of a second meeting of the Board on August 12, Evaluator F announced that he would not find Wackenhut's proposal technically unacceptable. In effect, Evaluator F indicated on August 12 that he was either maintaining or returning to his original decision, as reflected on his scoring sheets *i.e.*, that Wackenhut's proposal was technically acceptable.

The Board, however, concluded that Wackenhut's engineer did not have the requisite "hands-on" experience of actually running and maintaining an electrical utility operation, even though this specific requirement is not stated in the Solicitation. Moreover, applying the Board's rationale to the resume provided by Jones for the same position would have required that the Board fail Jones in this category as well. The electrical engineer proffered by Jones appears to have had experience that was almost exclusively limited to the construction of new electrical facilities, as opposed to the "hands-on" operation and maintenance of facilities. The Contracting Officer correctly concluded that the vote of the seven members of the evaluation team was inconsistent with the Solicitation on this point.

With respect to snow removal, Jones correctly points out that its snow removal submission was more detailed than that provided by Wackenhut. However, a comparison of the submissions does not provide a proper basis for finding a submission acceptable or unacceptable under the terms of the Solicitation. This is not a best value procurement, and the relative scores of snow removal submissions therefore could not alter the award decision. Additionally, the Solicitation required that a more detailed snow removal plan was to be provided to the Contracting Officer's Technical Representative ("COTR") *after* award. *See* Solicitation Attachment 2, SOW §15.5.2.1. The Solicitation only required the submission of basic elements of a snow removal proposal for technical evaluation purposes. Under the circumstances, the Contracting Officer correctly concluded that the Board's exclusion of Wackenhut's proposal on the basis of its snow removal submission was not consistent with the requirements of the Solicitation.

B. The Conclusion that Wackenhut Met The Solicitation's Past Performance Experience Requirements Was Supported By Substantial Evidence And Was Not Irrational.

In order for an offeror to be considered "qualified" under the Solicitation, references were to be provided demonstrating experience with (1) *facilities*

maintenance work; (2) of similar size to the Solicitation's requirement (over 60 employees and/or over Five Million Dollars per year); (3) performed within the past ten years. AR, Tab 1, Solicitation, page 46. (Emphasis added). The Solicitation's stated reason for evaluating an offeror's past performance was to confirm that the offeror had the necessary experience and capability, in terms of size and scope, for successful performance of the contract. AR, Tab 2, page 1. The Solicitation advised offerors to include detailed information and documentation in their proposals to identify the offerors' qualifications. AR, Tab 1, Solicitation, pages 45 and 46. (Emphasis added). The evaluators relied only on the information and documentation contained in the offeror's proposals, and did not contact any references listed. 115/7 – 114.

It was not irrational for the Board to conclude that Wackenhut's proposal contained sufficient information/documentation to satisfy the past performance requirements under the Solicitation. Wackenhut had submitted four references. The first was for Joint Base Operations and Support at the John F. Kennedy Space Center in the amount of more than Two Billion Dollars, and a performance period from 1998 to 2003, plus option years. The Space Center Contract encompassed "infrastructure management, operations, maintenance, engineering, custodial, grounds and light construction support" covering several thousand acres and more than 5 million square feet of occupied space. The proposal does not specify the dollar value attributable solely to the facilities maintenance services. However, based on the sheer size and scope of the contract, the Board rationally determined that the Space Center Contract included "facilities maintenance services" within the meaning of the Solicitation and satisfied the size requirements stated in the Solicitation. AR, Tab 12, May 20, 1999 Proposal, pages 10 and 14. Indeed, the Protestor does not contest this determination. Jones Comments, page 17, footnote 10.

The second reference identified by Wackenhut involved a management and operational support services contract for the U.S. Department of Energy ("DOE")

facility in Albuquerque, NM. The DOE Contract is valued at 58.6 million dollars and covers the period from July 1, 1995 until June 30, 2000. The services provided under the DOE contract included: operating and maintaining 25 buildings, including computer labs, distance learning studios and lab, classrooms, administrative and office spaces, television production studio, satellite uplink, physical training center, cafeteria, live fire shoot house, fully equipped armory, lounge and facilities maintenance and repair center, and fire alarm and suppression systems maintenance. 117/12 – 120/6. Based on the available information, it was not irrational for the Board to conclude that this contract satisfied the requirements of the Solicitation.

The third reference was for a contract with the George W. Hill Correctional Facility, Delaware County Prison. This Contract is valued at 14 million dollars per year for the period from 1995 through 2003. It encompasses the operation of the facility, food service, administration and facilities maintenance. Sixty-one employees were identified as dedicated to facilities maintenance. Forty-four of them are inmates who are paid an hourly wage. Although the proposal does not specify exactly how much of the contract dollar value is attributable solely to facilities maintenance, it does reflect a total of sixty-one employees dedicated to facilities maintenance. The Board considered the fact that prison inmates were included in the number of employees associated with facilities maintenance, and specifically determined that it would view the inmates as “employees” for purposes of the evaluation. 122 – 123/19 – 8. The fact that forty-four of these employees are prison inmates does not detract from the determination that this reference qualifies under the terms of the Solicitation.

Wackenhut’s fourth reference was the Texas Department of Criminal Justice, for which it provided services under three different contracts over the period of 1989 through 2005. For this effort, Wackenhut identified a total facilities maintenance crew consisting of 36 full-time employees, as well as over 150 skilled and unskilled inmate workers. Although Jones challenges the consolidation of the

three contracts for reference purposes, the ODRA need not resolve this issue, because the first three references identified by Wackenhut satisfy the stated past performance requirements and demonstrate the necessary experience and capability to perform the contract.

C. The Record Does Not Support Jones' Allegation That Wackenhut Improperly Proposed Cross Utilization of Central Utilities Plant Operators.

Jones alleges that Wackenhut improperly proposed cross utilization of CUP operators in violation of the Solicitation requirements and thus should have been disqualified. The Statement of Work at paragraph 8.5.1.2 provides:

A contractor shall provide a minimum of two (2) qualified personnel per shift. The CUP shall be manned at all times. In general the operator shall be responsible for monitoring, filling, draining, venting, lay-up, starting and stopping of CUP equipment.

As counsel for Wackenhut correctly points out, given that the CUP was to be operated by 2 people per shift, 7 days a week for three shifts per day, a total of ten personnel would be required to accommodate vacations, sick leave, etc. Wackenhut's comments further confirmed that Wackenhut was aware of the Solicitation's prohibition against the cross utilization of key personnel and that it had hired and intended to use eleven incumbent employees in the performance of the contract work in question, including the CUP Lead Operator. *See* Wackenhut response and affidavit, dated September 22, 1999. The evidence does not support the allegation that Wackenhut only intended to use 8.4 full time employees in the CUP. Rather, Wackenhut proposed to use 8.4 "*full time equivalents*" or "FTEs." As Wackenhut explained,

The CUP is operated for three shifts per day, seven days per week. Thus, with 21 shifts and two full-time personnel (16 hours per shift), the requirement is for 336 hours per week. Divided by 40 hours (one man week), the result is 8.4 persons. However, because each operator will take vacation, sick leave, etc., over the course of a year, approximately one out of every ten hours has to be covered

by an additional CUP operator. The requirement therefore demands about 9-1/2 *full-time equivalents*, hence 10 personnel.

See Wackenhut Final Written Comments, page 5, footnote 2 (emphasis added). The record is devoid of any evidence that would contradict this calculation or Wackenhut's stated intent.

D. Wackenhut's Proffer Of Jones Employees In Its Proposal Was Not Improper.

Jones asserts that Wackenhut improperly submitted the resumes of certain CUP key personnel without their permission and without determining their availability. In response, the Center and Wackenhut maintain that Wackenhut proposed the personnel in good faith, after obtaining their resumes from the Union representative of the employees involved.

As a result of a Stipulation entered into between Jones and Wackenhut during the course of the adjudication of this Protest, the following facts are undisputed:

- Wackenhut's proposal included resumes of certain CUP employees who were employed by Jones.
- The resumes in question had been obtained from the Union representing the employees pursuant to a collective bargaining agreement.
- Wackenhut had informed the Union representative that it intended to propose employees as part of this proposal.
- Neither Wackenhut nor the Union contacted the employees in question with respect to Wackenhut's submission of the resumes.

See Stipulation of Jones and Wackenhut, dated October 22, 1999. Additionally, it is undisputed that under the Service Contract Act, the employees involved had a right of first refusal for the positions in question in the event Wackenhut obtained the contract. Jones contends, however, that the proffer of Jones' employees was unauthorized and in violation of the Collective Bargaining Agreement.

According to Jones, “the governing collective bargaining agreement (“CBA”) between the Union and Jones prohibited the CUP operators from furnishing information – such as resumes – to a competitor like Wackenhut.” *See* Jones’ Supplementary Comments, page 7.

As counsel for the Technical Center correctly points out, the matter of a potential violation of the CBA with respect to the Union transmitting resumes to Jones’ competitor should more properly be presented outside of a bid protest forum. Moreover, the charge that the provision of resumes was a violation of the CBA is not directly supported by the language of the agreement itself.¹⁴ Section VIII of the CBA, entitled “Discipline and Discharge of Employees” provides *inter alia* that “[a]n employee may be disciplined or discharged for cause, which includes but shall not be limited to ... working for and/or providing information to a competitive company.” Solicitation Attachment III, CBA, Section VIII, paragraph g.

In the ODRA’s view, Jones’ reading of the term “information” as encompassing employees’ resumes, is overly broad. Resumes are the property of the employees and contain their personal information, as opposed to proprietary information of the employer. In addition, the restriction urged by Jones on the ability of the Service Contract Act employees to provide resumes is inconsistent with the right of first refusal guaranteed by the Act and with the preference for competition stated in the AMS.

There is no evidence that either Wackenhut or the Agency acted in anything other than good faith with respect to the employees involved. The CBA, which was made a part of the Solicitation, states that the “Union is the exclusive bargaining agent” for all the union members performing operations and maintenance services at the Technical Center. CBA, Section I. The CBA further states that when the

¹⁴ The Collective Bargaining Agreement was incorporated into the Solicitation in Part II, Section J, Attachment III.

employer requires additional employees, it “shall notify the Union and the Union shall assist the Employer in obtaining qualified and competent employees.” CBA, Section II. As a potential employer of these Union members, Wackenhut obtained the resumes from the collective bargaining agent of the Jones employees, who were already employed at the site and had the right of first refusal by statute to continue in those positions. Further, Wackenhut represented to the Agency its intent to utilize the employees if awarded the contract. Thus, this case is readily distinguished from the situation in *Camber*, 98-ODRA-00079, in which we found that the actions of the awardee had rendered it foreseeable that the personnel proffered would not actually be available.

E. The Solicitation Permitted Offerors To Submit Certification Information For Its Proposed Environmental Specialist After Contract Award.

In the Second Supplemental Protest filed on October 14, 1999, Jones asserts that the Solicitation required the proposal of a properly licensed/certified Environmental Specialist and that there was no evidence in the record supporting Wackenhut’s proposal of such an individual. Jones Supplemental Protest, page 1. Jones further contends that the language pertaining to automatic disqualification under Solicitation clause L.3, “Technical Understanding of FAATC Needs” requires that Wackenhut be disqualified for failing to provide certification evidence in its proposal. In support of its argument, Jones points to clause C.2 which states that the Environmental Specialist “must have a license” and §13.5.1.1. of the SOW, which states “[t]he Contractor shall provide a certified Hazardous Material Specialist. Certification requirements for this position shall be ... as specified by the Institute of Hazardous Materials Management (IHMM).”

Wackenhut responds by asserting that the evaluators reasonably concluded that the individual it proposed was qualified based on his education and experience, which exceeds the requirements for the Master Level of certification. In effect,

Wackenhut contends that the individual it proposed for the environmental specialist was overqualified for the position. *See* Wackenhut's Final Comments, pages 17 – 18. In addition to the proposal of an overqualified individual, Wackenhut points to its stated intent to hire incumbent employees, including the incumbent environmental specialist, who is certified by the IHMM at the Master Level.¹⁵ Wackenhut urges that, given this combination of facts, the agency's evaluation cannot be faulted. *See* Wackenhut's Final Comments, page 19. Counsel for the Center did not specifically address this issue.

Based on a reading of all the pertinent provisions of the Solicitation, the ODRA concludes that, although the awardee clearly was required to "provide" a certified Environmental Specialist, offerors were not clearly notified that failure to provide evidence of that certification in their proposals would result in their automatic, mandatory disqualification. Amendment 3 to the Solicitation, effective January 19, 1999, only states that "[f]ailure to provide the required proposal submission information may render ... [a] proposal ineligible for award." AR, Tab 1, Amendment 3, page 2 (emphasis added).

Furthermore, although Solicitation Clause C.2 states that the Environmental Specialist "must have a license," Section 13 of the SOW, which addresses environmental compliance and hazardous waste removal, unambiguously indicates that the certification for the Environmental Specialist need not be provided until *after* contract award:

The Contractor shall comply with any environmental and hazardous waste handling licensing, certification, and qualification requirements of the state of New Jersey, including any Federal and Local requirements. All work shall be performed by personnel specifically qualified and trained to work with hazardous wastes. Evidence of all required licenses, as well as documentation of the qualifications of personnel, shall be provided to the CTR within ten (10) calendar days of the Contract award."

¹⁵ The incumbent environmental specialist, who had the specified IHMM certification, was given a right of first refusal pursuant to the Service Contract Act, and was subsequently employed by Wackenhut as its environmental specialist.

SOW §13.5.1.1. (Emphasis added).

Jones' contention that the Solicitation required Wackenhut's disqualification is unsupported. The Solicitation does not clearly and unambiguously convey to offerors that they would be disqualified for failure to provide evidence of certification of their proposed Environmental Specialist with their proposal. Accordingly, automatic disqualification of Wackenhut's proposal on these grounds would lack a rational basis. *See Protest of Haworth, Incorporated*, 98-ODRA-00075.¹⁶

IV. Conclusion

For the reasons set forth above, the ODRA recommends that the Original Protest and two Supplemental Protests be denied in their entirety.

/s/

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Office of Dispute Resolution for Acquisition

¹⁶ Had Wackenhut been disqualified on such grounds and protested that disqualification, the ODRA would have been compelled, based on the lack of a clear disqualification notice, to recommend that the protest be sustained. As previously indicated in *Haworth*, offerors must be provided a "clear and unambiguous warning regarding disqualification" before such action can be taken. *Id.*