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

FINDINGS AND RECOMMENDATIONS

**Matter: Protest of Leader Communications, Inc.
Under Solicitation No. DTFWA-13-R-00014**

Docket No.: 14-ODRA-00721

Appearances:

For the Protester: Steven J. Koprince, Esq.
of Petefish, Immel, Heeb &
Hird, LLP

For the Intervener: Holly A. Roth, Esq.
of Kelley Drye & Warren
LLP

For the FAA Integrated Services Team: Gregory Carter, Esq. and
Viola Pando, Esq.

I. INTRODUCTION

This matter arises from a pre-award bid protest (“Protest”) filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) by Leader Communications, Inc. (“LCI”) pursuant to a corrective action undertaken by the Integrated Services Team (“IST”) under Solicitation DTFAWA-13-R-00014 (“Solicitation”). The corrective action was mandated by the FAA Administrator’s Final Order of November 14, 2014 (“Order”), which adopted and incorporated the ODRA’s Findings and Recommendations (“F&R”) in the prior case docketed as 14-ODRA-00705

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("Initial Protest").¹ Tetra Tech AMT ("Tetra Tech"), the awardee of the initial contract, intervened in these proceedings.² The contract is to provide operational and administrative support services for the Office of Security and Hazardous Materials ("ASH").³ *Agency Response* ("AR") Tab 1 at 13.

LCI challenges Amendment 5, which responded to the Administrator's Order by revising Section B of the Solicitation to add two new Contract Line Item Numbers ("CLIN"). AR Tab 4. New CLIN 0010 consists of \$11,090,255 in other direct costs ("ODC") related to DOT PIV cards and related equipment required to issue those cards. New CLIN 0011 consists of ODCs related to travel. *Id.* LCI asserts that the IST's interpretation of the Order "unreasonably restricts the ability of offerors to submit revised price proposals." *Protest* at 1. LCI requests that the Administrator, acting through the ODRA, direct the IST to allow LCI to revise its cost proposal to reflect "changed market conditions and/or errors in their initial pricing." *Id.* at 10.

For the reasons set forth below, the ODRA recommends that the Protest be sustained.

II. DISCUSSION

A. Burden and Standard of Proof

The protester bears the burden of proof, and must demonstrate by substantial evidence that the challenged decision failed in a prejudicial manner to comply with the Acquisition Management System ("AMS"). *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627. In protests such as this one, the ODRA looks to whether the challenged action has a rational basis and is consistent with the AMS and the corrective action mandated by the

¹ Familiarity with the F&R is assumed for purposes of this decision.

² Tetra Tech filed a Motion to Dismiss the Protest for failure to state a claim and untimeliness. The IST did not join in the Motion. As discussed herein, the ODRA recommends that the Protest be sustained on its merits. The ODRA finds the Protest to state a timely challenge to Amendment 5 to the Solicitation. 14 C.F.R. § 17.15(a)(2). The ODRA therefore denies the Motion as meritless.

³ "ASH" is the internal FAA routing symbol.

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Administrator's Final Order in the predecessor case. *Protest of Camber Corporation*, 98-ODRA-00102. Where the record demonstrates that a decision has a rational basis, is not arbitrary, capricious or an abuse of discretion, and is consistent with the AMS, the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials. *Protest of Alutiiq Pacific LLC*, *supra*.

B. Amendment 5 to the Solicitation

On December 15, 2014, the IST issued Amendment 5 to the Solicitation. AR Tab 4. Amendment 5 revised Section B of the original Solicitation to add two additional CLINs for ODCs related to PIV cards and travel. *Id.* LCI sought clarification from the IST as to the scope of offerors' revisions to their cost proposals. On December 30, 2014, the IST issued a series of written responses to offerors' questions. The relevant portion states:

The FAA assumes that because the ODCs are simply estimates given by the FAA that do not enter into the vendors' determination of profit/fee, the addition of the \$11,090,255 ODC estimate should not require vendors to alter their original cost/price proposals. Each revision to the proposals must be directly and reasonably related to the \$11 million ODCs. The Offeror must demonstrate how the relationship exists for each revision it makes to the cost/technical proposals. This standard will be strictly applied.

AR Tab 7 at 1-2. On December 30, 2014, LCI sent the Contracting Officer an email seeking further clarification. On January 8, 2015, the IST responded:

. . . The only revisions to the pricing proposal will be those (elements/items/CLINs/whatever) directly affected by Amendment 5. Any revision should be accompanied by a justification based on the amendment. Revisions not directly related to Amendment 5 are not permitted.

AR Tab 8 at 1.

LCI asserts that the IST's issuance and interpretation of Amendment 5 is unreasonable.

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Protest at 1. LCI argues that “[t]he [IST’s] restriction is arbitrary, unreasonable and unsupported because it fails to account for the significant passage of time since initial proposals were submitted and fails to allow offerors to correct errors in their initial pricing . . .” *Id.* at 8. Further, amendment 5 allegedly “does not permit the [IST] to accurately determine the likely costs of performance by each offeror.” *Id.* at 9. In support, LCI cites to AMS 3.2.2.5.2, requiring Contracting Officers to procure goods and services at fair and reasonable prices, *id.* at 8, and AMS Procurement Guidance T.3.2.3(A)(1)(i)(2), requiring contractors to submit current, accurate, and complete pricing data to the IST. *Id.*

The record shows that the IST’s actions violated mandatory duties found in the AMS.^{4 5} The AMS requires that where “the [Contracting Officer] learns that any certified cost or pricing data the contractor provided are inaccurate, incomplete, or not current, the contractor *must* be notified immediately to determine if the defective data increase or decrease the contract price [and] [t]he [Contracting Officer] *must* then negotiate using any new data submitted or making allowance for the incorrect data.” *Procurement Guidance* T.3.2.3(A)(1)(g)(1) (emphasis added).⁶ In the instant case, the Vice President of Tetra Tech and the Chief Executive Officer of LCI executed AMS 3.8.2-18 Certification of Data, and submitted it under section K.11 of their proposals. *Supplemental Declaration of the Contracting Officer*, dated March 6, 2015 (“CO

⁴ Citing *Protest of Computer Associates International, Inc.*, 00-ODRA-00173, the IST asserts that the ODRA defers “to the judgment of the contracting officer to devise an appropriate remedy.” *AR* at 3-4. However, that case involved a corrective action pursuant to a settlement agreement entered into by the Protester and the Product Team, not an Administrator’s Final Order. The IST is bound by the directions and parameters of the corrective action mandated by the Administrator, as stated in the Findings and Recommendations of the ODRA.

⁵ The Contracting Officer states that the “Protestor knows the contract award value, and . . . allowing it the ability to fully re-price and re-cost its proposal for reasons unrelated to the post-award amendments would provide it an unfair competitive advantage.” *Declaration of the Contracting Officer*, dated February 23, 2015 (“CO Declaration”) at ¶ 7. However, the ODRA has previously held in this very matter that “[t]he prior disclosure of the awardee’s price does not in and of itself render a subsequent corrective action improper where revised prices are sought.” *Protest of Leader Communications, Inc.*, 14-ODRA-00705 (Decision on Motion for Reconsideration) citing *Matthews Group, Inc.*, B-408003.2, B-408004.2 (June 17, 2013).

⁶ The requirement extends to post-award if the defective data is discovered during performance. *Procurement Guidance* T.3.2.3(A)(1)(g)(2)(2)-(3).

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Supplemental Declaration”), Attachments 1 and 2. Moreover, the Contracting Officer “treated these signed proposal sections as the representation and certification from each offeror that the information and data submitted with the respective offer was current, accurate and complete . . .” *CO Supplemental Declaration* at ¶ 3.

In the instant case, LCI has informed the Contracting Officer that its certified cost or pricing data are inaccurate, incomplete, or not current. *Declaration of Angela Cole*, dated January 9, 2015 (“*Cole Declaration*”) at ¶ 3-4. In a Declaration, Angela Cole, the President of LCI, stated that it discovered mathematical and clerical errors in its cost/price proposal. *Id.* More specifically, she declares that:

[REDACTED]

Id. at ¶ 4. Moreover, the ODRA observes that, notwithstanding the alleged errors, the previously provided pricing cannot be viewed as current or accurate since more than one year has elapsed between initial offers (December 6, 2013) and the instant corrective action. *AR* Tab 1 at 115.

Additionally, with respect to the ODCs at issue here, the ODRA F&R recommended, and the Administrator ordered, that the IST “amend the Solicitation to include the ODCs and *provide offerors with an opportunity to revise their price and technical proposals . . .*” *Protest of Leader Communications, Inc.*, 14-ODRA-00705 (emphasis added). Based on the Final Order, the requirements of the AMS and the lapse in time since the submission of original proposals, the ODRA recommends that the Contracting Officer be directed to request updated cost and price proposals from both offerors and consider such information in completing the previously mandated corrective action.

III. CONCLUSION

For the reasons discussed herein, the ODRA recommends that the Protest be sustained. The IST should be ordered to allow offerors to revise their cost proposals to ensure that

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all information provided reflects current, accurate, and complete cost and pricing data in accordance with the AMS and the Administrator's Order in 14-ODRA-00705.

-S-

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

APPROVED:

-S-

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