

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

FINDINGS AND RECOMMENDATIONS

**Matter: Protest of Data Transformation Corporation
Under Solicitation No. DTFWA-15-R-000126**

Docket No.: 15-ODRA-00731

Appearances:

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

For the FAA Program Office: Caroline Schleh, Esq.

I. INTRODUCTION

Solicitation DTFAWA-15-R-00126 (“Solicitation” or “SIR”) sought proposals for the Direct User Access Terminal Services (“DUATS II”) Contract, which provides internet-based weather information and flight plan processing services for pilots on behalf of the Federal Aviation Administration (“FAA”). Data Transformation Corporation (“DTC”) protests the award of the Contract to Lockheed Martin Corporation (“Lockheed”). DTC is the incumbent under the predecessor DUATS contract, and has provided DUATS services to the FAA since 1989. *Protest* at 3.

The SIR for DUATS II was issued to the public on October 21, 2014. Product Team Response (“R”), Tab 4 § A at 1. At the same time the SIR was issued, the FAA announced its strategy for future acquisitions of flight services, and its intent that the DUATS II Contract eventually would be “subsumed” by a new competitive Flight

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Service Station contract that is anticipated to be awarded in Fiscal Year 2017. R. Tab 3 at 1-2. The FAA states that: “In the interim, the FAA requires current internet-based automated flight service functions ... to continue until the functionality is provided solely under the new competitive FSS contract.” *Id.* The announcement goes on to inform the public of the FAA’s intent to conduct a limited competition for DUATS II between three incumbent service providers, Computer Sciences Corporation (“CSC”), DTC and Lockheed, on the basis that all three had operational internet-based automated pre-flight flight service systems able to meet the DUATS II requirements, were compliant with FAA security requirements, and could be operational on March 17, 2015. R. Tab 50, ¶¶ 10, 12, at 2. When the announcement was made, CSC and DTC held contracts for DUATS systems and Lockheed held the Automated Flight Service Station (“AFSS”) system contract. R. Tab 50, ¶¶ 2-3, 10 and 12.¹

DTC challenges the evaluation of Lockheed’s technical proposal alleging that: (1) Lockheed submitted an alternate proposal that was prohibited under the terms of the SIR; (2) the Product Team improperly relaxed the SIR requirements by not requiring Lockheed to comply with all of the technical requirements; and (3) the Product Team conducted improper communications with Lockheed; thereby giving it an unfair competitive advantage. *Protest* at 9-13.² For the reasons set forth in the discussion below, the Office of Dispute Resolution for Acquisition (“ODRA”) recommends that the Protest be denied in its entirety.

¹ Proposals were submitted in November of 2014 and evaluated during the months of December 2014 through April 2015. R. Tab 7, L.5.1 at 6; R. Tabs 38 and 39. On April 30, 2015, the Source Selection Official selected Lockheed and CSC for award on April 30, 2015, as the lowest price technically acceptable offerors. R. Tab 43. The contracting officer awarded contracts to CSC and Lockheed on May 12, 2015, R. Tab 50, ¶ 36, at 5, and notified Lockheed, CSC, and DTC of the award the same day. R. Tab 44; R. Tab 45; R. Tab 50, ¶ 37, at 5.

² DTC’s comments, filed on September 17, 2015, withdrew allegations contained in the original protest relating to the evaluation of Lockheed’s price. *Comments* at 2. Specifically, DTC withdrew the grounds that (1) Lockheed’s proposal should have been excluded from award as technically unacceptable for failing to meet the requirement in the SIR to provide pricing for the base and option years, *Protest* at 8-9; (2) the SIR requirements were improperly relaxed by evaluating Lockheed’s proposal, which only included pricing for one year, *Protest* at 9-10; (3) the low-price of Lockheed’s proposal demonstrated that it did not understand the SIR requirements, *Protest* at 10-11; and (4) the Product Team should have excluded Lockheed’s proposal from award because its price was too low, *Protest* at 11. *Comments* at 2.

II. Standard of Review

As the protester, DTC bears the burden of proof and must demonstrate by substantial evidence that the challenged decision lacked a rational basis; was arbitrary, capricious or an abuse of discretion; or otherwise failed in a prejudicial manner to comply with the Acquisition Management System (“AMS”). *Protest of CACI, Inc.-Federal*, Docket No. 15-ODRA-00733; 14 C.F.R. § 17.21(m) (2015). Consistent with sections 554 and 556 of the Administrative Procedure Act, 5 U.S.C. §§ 551- 559, 701-706 (2012 & Supp. II 2014), which apply to ODRA adjudications, "the phrase 'substantial evidence' means that the ODRA weighs whether the preponderance of the evidence supports the challenged Agency action." *Protest of Bionetics Corp.*, Docket No. 14-ODRA-00696. Moreover, "the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials," when the record shows that the challenged decision has a rational basis; is not arbitrary, capricious, or an abuse of discretion; and is consistent with the AMS and the underlying solicitation. *Protest of Potter Electric Co.*, Docket No. 13-ODRA-00657.

III. Lockheed’s Proposed Use of [DELETED]

As would be expected by the FAA’s decision to limit the competition to the three incumbent providers of flight services, both DTC and Lockheed’s proposals leveraged [DELETED] to propose solutions that would satisfy the requirements of the DUATS II SIR.³ In pertinent part, Lockheed's proposal contemplated the use of [DELETED], noting that it was “positioned to provide DUATS II services” and “100% DUATS II requirements compliance at the start of program.” R. Tab 16, at 1. Further, Lockheed’s proposal recognized that “the DUATS II requirements are separate and distinct from the [DELETED]” as well as the need to be managed separately in both performance and cost.” *Id.* at 64. Recognizing the overlap of the DUATS II and [DELETED] on its

³ DTC’s technical proposal expressly states: [DELETED]. R. Tab 23 at 5; *see also* R. Tab 37 at 3.

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proposed system, the Lockheed proposal also addressed the possibility that the [DELETED] performance period could cease, and in that event, committed to continue to provide DUATS II services through the contractual period of performance at the prices proposed. R. Tab 18, at 11.⁴

DTC contends that Lockheed's proposal to use [DELETED] "[DELETED] to satisfy the DUATS II requirements should have been excluded as an alternate proposal" under the express terms of the SIR. *Protest* at 12-13; *Comments* at 2. In support of its contention, DTC points to the SIR language that expressly states: "[n]o alternative proposals will be accepted." R. Tab 4, § L.4.3, at 4. DTC also relies on a SIR statement of work provision that required the DUATS II contractor to "provide *all* hardware, software, and documentation required to operate, maintain, and support the DUATS II internet/web-based service." *Comments* at 2; R. Tab 4, § C.3.1.1 (emphasis added). DTC contends that because there was [DELETED], Lockheed's proposal should have been considered an alternative proposal that was ineligible for award. *Comments* at 3. DTC's contentions are without merit.

A. The Requirements of the DUATS II SIR

First, from the beginning of the acquisition, the announced strategy for DUATS II expressly contemplated the use of existing systems of three incumbent providers of flight services. R. Tab 3, at 1-2. Towards this end, the FAA limited the competition for DUATS II to those offerors who were determined to: (1) have operational internet-based automated pre-flight flight service systems able to meet the DUATS II requirements; (2) be compliant with FAA security requirements; and (3) be operational by March 17, 2015. R. Tab 4; R. Tab 50 ¶ 10.⁵ The record does not show any challenges were filed relative

⁴ Lockheed's AFSS services are due to expire in the next 42 months, while the DUATS II period of performance is 60 months. R. Tab 4, § B.6 and R. Tab 7, § L.8.1.

⁵ According to the Contracting Officer, the FAA decided not to conduct pre-award testing as part of the evaluation process since it was limiting the competition among three incumbent service providers with operational NAS systems. In this regard, he states: "As the Contracting Officer on the DUATS and

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to the FAA's announced decision to limit the competition to service providers who already possessed systems able to meet DUATS II requirements; nor the stated intent to treat the DUATS II acquisition as an "interim" contract until subsuming it into a new competitive Flight Service Station contract.

Second, the record shows that the DUATS II SIR clearly and plainly states its requirements for services in terms of function and performance, as well as meeting outcomes described in the specifications. R. Tab 4 §§ B and C. Section B.1 of the SIR provides that "[t]he contractor must furnish all things not specifically identified as government furnished Information (GFI) *necessary for, or incident to, the performance and provision of services*" in accordance with the scope of work in SIR Section C.1. R. Tab 4 § B.1 (emphasis added). SIR Section C.3.1 describes the general requirements that the "contractor must *deliver the services required by this contract*" which entail program management, system engineering, quality assurance, configuration management, safety risk management, testing, and security. R. Tab 4 § C.3.1 (emphasis added). With respect to system components, Section C.3.1.1 requires the contractor to "provide all hardware, software, and documentation required to operate, maintain, and support the DUATS II internet/web-based services" and to "provide a DUATS II web-site to meet the requirements of the DUATS II Specification, FAA-E-2901D (DRAFT), provided as Attachment J-1." R. Tab 4 § C.3.1.1. Attachment J-1 details the functional and performance requirements for DUATS II. R. Tab 4, Attachment J-1.

Consistent with the SIR provisions, the technical evaluation team ("TET") viewed the acquisition as one for services: "One of the primary goals of the solicitation was to acquire a service (not a system) that meets the functional requirements necessary to provide the DUATS II services to the general-aviation community." R. Tab 49, ¶3, at 2. The SIR requirements "described what functions the contractor needed to perform, not how to perform them." *Id.* The Product Team explained:

AFSS contracts, I had direct knowledge of each Offeror's performance providing internet-based automated pre-flight services [and] ... record of successful performance. R. Tab 50 ¶¶15, 16.

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For instance, ““The DUATS II contractor must retain data” is an example of a functional requirement. The offeror simply must provide a function: ‘retain data.’ The offeror is allowed to propose any technological approach to meet this requirement.” *Id.* In other words, each offeror had to demonstrate in its proposal what its technical approach would do to deliver the DUATS II services, *but the SIR did not require the offerors to construct their technical solutions in a certain manner to meet the functional requirements. See R. Tab 4, §§ C.1.1, C.3.1.2, at 1, 2. This allowed all offerors flexibility in the way in which they could meet the DUATS II technical requirements. R. Tab 49, ¶ 3, at 2.*

R. at 9 (emphasis added).

There is no indication in the record that the DUATS II specification is intended to be a “design specification” requiring offerors to propose a system that meets a specified standard of design in a certain way, and precluding them from substituting their own design preferences. *See* Procurement Guidance T3.2.2.8.A.2.a.2. DTC’s contentions that Lockheed failed to comply with a requirement in the SIR to provide an independent stand-alone DUATS II system is unsupported by the record. *See Comments* at 3; *Protest* at 4. DTC attempts to read into the SIR an additional restriction that the resources proposed must be dedicated solely and exclusively to the DUATS II program. *Id.* In this regard, DTC’s interpretation of the specification is unsupported by the plain language of the SIR. *Protest of Exelis, Inc.*, 15-ODRA-00727; R. at 9 and *Comments* at 2-3, *citing Saxon Export, B-253441, 1993 WL 342242 (Comp. Gen. Sept. 7, 199)* (Protester unreasonably construed general section of the solicitation to support its interpretation regarding the non-acceptability of an alternative proposal).

B. Incorporation of Special Section H Clause

DTC also contends that language in Appendix B of the Source Selection Evaluation Board (“SSEB”) Report demonstrates that Lockheed submitted an alternative proposal to the extent that it recommends that if Lockheed is selected for award, the Product Team incorporate a special Section H clause in the contract to ensure that Lockheed waives its right to make claims for additional costs should [DELETED] expire during the DUATS II period of performance. *Comments* at 2; R. Tab 39 at 13. The record shows that the

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price evaluation team made this recommendation in the context of assessing the performance risk of Lockheed's proposal that could result from a potential expiration of Lockheed's concurrent [DELETED]. In this regard, the price evaluation team determined that such circumstances would not present a substantial financial hardship to Lockheed since it had sufficient financial resources to bear the risks of its proposed prices. *Id.* at 12-13. This recommendation, which was intended to mitigate potential price risks for the FAA during contract performance, is not evidence that Lockheed's proposal failed to meet the SIR requirements.

C. Disparity Between Independent Cost Estimate and Lockheed's Proposed Pricing

DTC further contends that the large disparity between the Independent Cost Estimate ("IGCE") and Lockheed's proposed pricing proves that Lockheed submitted an alternative proposal. *Comments* at 4. The record clearly demonstrates that the price evaluation team took into account possible reasons for the disparity including: (1) [DELETED]; and (2) the legacy contracts were competed under a best value award method, while DUATS II uses a low price, technically acceptable award method. R. Tab 39, at 8, 10; *id.* at 13-14. Those considerations clearly provide a rational basis for the price evaluation team's determination that the most significant cause of the disparity was Lockheed's "concurrent contractual relationship with the FAA for basically the same services." R. Tab 1; R. Tab 39 at 14; *see Protest of Exelis, Inc.*, 15-ODRA-00727, at 13.

In sum, DTC has not demonstrated that Lockheed's proposal offered functions or performance outcomes that were neither specified in, nor in compliance with, the SIR's requirements. Thus, the record of the evaluation supports as rational the Product Team's conclusion that Lockheed's proposal was not an alternative proposal.

IV. The Technical Evaluation of Lockheed's Proposal

DTC asserts the Product Team improperly relaxed the SIR requirements by not requiring Lockheed to comply with all of the technical requirements and the evidence proffered in

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support thereof consists of statements allegedly made by FAA officials during DTC's debriefing on June 4, 2015. *Protest at 10, citing Declaration of Terri C. Thrash Protest Exhibit B, ¶10(a) and (b).*⁶ Notwithstanding DTC's hearsay allegations, the record demonstrates the technical evaluation was based on whether the proposals fully substantiated their approach, demonstrated an understanding of the requirements and showed how the approach would comply with the SIR requirements. R. Tab 7, § L.7.1; R. Tab 4, § M.4.1; R. Tab 49, ¶¶ 5-7; R. Tab 38, § 1.4.

With respect to the proposed system architecture and design, the SIR instructed offerors to "include a description of the system architecture, component/subsystem relationships and system operation, plus any support subsystems that form a part of the overall proposed system architecture." R. Tab 7 § L.7.2.4. It also directed offerors to provide confirmation that all the requirements in the functional and performance specifications of Attachment J-1 are currently available, or will be available, in the proposed system by the effective date of the contract. *Id.*

According to the Contracting Officer: "[DELETED]." R. Tab 50 ¶ 27. In this regard, the SIR provided that proposals did not have to demonstrate full compliance with the functional requirements to be found acceptable, but only needed to list all those "not currently available in the proposed system" and to "adequately describe the effort and schedule to incorporate the requirements into the proposed system in sufficient detail to demonstrate full compliance by the effective date of the contract." R. Tab 4, § M.4.1.1.2.

DTC has not demonstrated the TET unfairly relaxed the SIR requirements with respect to its evaluation of Lockheed's proposal. R. Tab 38, § 3.1.b, at 10-11. Rather, the record reflects a rational basis for the technically acceptable rating of Lockheed's proposal and its evaluation was consistent with the SIR's evaluation criteria and the AMS. *Id.*; R. Tab

⁶ According to the Contracting Officer, he did not recall any member of the Product Team stating at the debriefing that the FAA "was unsure" of Lockheed's ability to handle all of the transactions required; or that the FAA's evaluation assumed that it was not necessary to meet each of the required transactions. R. Tab 50, ¶¶44, 45. Likewise, the TET Team Lead states he has no recollection of anyone making these statements during the debriefing or at any other time. R. Tab 49, ¶ 9, at 3-4.

49 ¶¶ 5, 7; R. Tab 38 § 1.4. Thus, the ODRA recommends denying this aspect of the Protest.

V. Communications Between Lockheed and the Product Team

DTC asserts that the Product Team had impermissible communications with Lockheed, *Protest* at 13; *Comments* at 6, and such communications with Lockheed gave it an unfair competitive advantage by relaxing the requirements to allow it to use [DELETED].⁷ *Comments* at 6-7. The record shows that during proposal evaluations, the Product Team submitted five clarification requests to Lockheed during the course of the source-selection process to gain a better understanding of certain aspects of its proposal; two requested clarifications of the technical proposal, R. Tab 31, and three requested clarifications of the price proposal, R. Tab 32; R. Tab 34. The ODRA does not find any competitive advantage accrued to Lockheed in connection with its communications with the FAA.

Under the FAA's AMS, the purpose of communications is to ensure there are mutual understandings between the FAA and the offerors about all aspects of the procurement. AMS § 3.2.2.3.1.2.2. The SIR informs offerors that the "FAA reserves the right to communicate with any individual offeror, or all competing offerors, as the situation warrants. Communications with one or more offerors did not require communications with all offerors. Any information obtained during communications may be used to clarify, substantiate, and validate information provided in offerors' proposals." R. Tab 4, § M.3.4, at 2; R. Tab 7, § L.4.6.

⁷ DTC asserts that it had previously understood that the SIR required DUATS II to be a stand-alone system and all costs to operate DUATS II were to be priced as part of DTC's DUATS II proposal. *Comments, Exhibit E, Supplemental Declaration of Terri Thrash*, ¶ 4. DTC argues in its *Comments* that, had it been aware that it could attribute certain DUATS II costs to existing resources, it would have submitted a winning proposal. *Id.* ¶ 5. As discussed previously, the ODRA finds DTC's interpretation that DUATS II could not be inter-dependent with another previously existing system to be unsupported by the plain language of the technical requirements, and inconsistent with the fact that the SIR limited the competition to service providers who already had operational internet-based automated pre-flight flight service systems able to meet the DUATS II requirements. *Protest of Northrup Grumman Systems Corporation, supra; Protest of E&I Systems Inc.*, 99-ODRA-00146.

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The Contracting Officer's exercise of discretion in conducting communications must be consistent with fundamental AMS principles that promote sound business judgment, fairness and integrity. *Protest of Science Applications International Corporation*, 12-ODRA-00606, *citing* AMS § 3.2.2.3.1.2.2. Communications are improper when they provide an offeror with a prejudicial opportunity to provide SIR-required information, correct deficiencies, decrease pricing, rewrite substantial portions of the proposal, or otherwise improve its competitive standing. *Id.* None of these circumstances are present here.

Pursuant to the terms of the [DELETED] contract, Lockheed was required to seek permission to use [DELETED] to the DUATS II requirement. R. Tab 10; R. Tab 50, ¶¶ 20-21, at 3. On November 14, 2014, prior to the proposal submission deadline, Lockheed requested written approval to conduct [DELETED] outside of its existing contract. *Id.* Specifically, Lockheed sought to use the [DELETED] on a non-interference basis to perform the DUATS II contract should it receive the award. *Id.* By letter dated November 19, 2014, the Contracting Officer granted Lockheed "limited approval to use the [DELETED] outside the contract [DELETED] at its own risk strictly for use as part of ... [Lockheed's] response to the DUATS II SIR." *Id.*⁸ The letter further informed Lockheed that the use of [DELETED] in response to the DUATS II SIR did not constitute a waiver or modification of the DUATS II requirements. R. Tab 10.

The communications arose, in part, as a matter of [DELETED] contract administration under clause H.29 relative to the outside use of the [DELETED]. *Id.* The communications did not demonstrate that the Product Team allowed a merger of the AFSS and DUATS II contracts; nor was the Product Team required to amend the SIR regarding this communication, since it did not change or waive the DUATS II requirements. *Protest of Northrop Grumman Systems Corporation*, 06-ODRA-00384 (Decision on Motion for Partial Dismissal, dated September 22, 2006). The FAA has no obligation to structure an acquisition in a manner that neutralizes a competitive advantage

⁸ The Contracting Officer also advised Lockheed that no modification or use of the [DELETED] would be an allowable cost under the [DELETED] contract. *Id.*

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that one vendor may have as a result of its experience on another competitively awarded contract. *Protest of Concur Technologies, Inc.*, 14-ODRA-00708, citing *Protest of Northrop Grumman Corp.*, 00-ODRA-00159 at n.12.

DTC contends the Product Team's communications improperly gave Lockheed the opportunity to provide needed detail to its proposal. *Comments* at 8. The record shows that the FAA sought clarification as to Lockheed's price proposal to determine its reasonableness, and as a result of those requests, it asked that Lockheed provide separate assurance that it would continue its DUATS II performance at the prices proposed even if its [DELETED] contract ended. R. Tabs 32, 34, and 39. In accordance with the AMS, this exchange of information served to ensure, and memorialize, "mutual understandings" between the Product Team and Lockheed relating to Lockheed's proposal. *Protest of Science Applications International Corporation, supra*; AMS § 3.2.2.3.1.2.2.

The Product Team's communications with Lockheed were permissible under the AMS and did not afford Lockheed an unfair competitive advantage either before or after proposals were submitted in response to the SIR. Thus, the ODRA recommends denying this aspect of the Protest.

VI. CONCLUSION

For the reasons discussed herein, the ODRA recommends that the Protest be denied in its entirety.

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Marie A. Collins
Dispute Resolution Officer and
Administrative Judge
FAA Office of Dispute Resolution for Acquisition