

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

**FINDINGS AND RECOMMENDATIONS**

**Matter:**       **Protest of Diakon Solutions, LLC**  
                  **Under Solicitation No. CS-15-088**

**Docket No.:**  **15-ODRA-00747**

*Appearances:*

For the Protester:

Brian S. Gocial, Esq. of  
Blank Rome LLP

For the Intervener:

Anthony Valenti, Esq. of  
McDowell Posternock Apell  
& Detrick, PC

For the FAA Technical Center:

William R. Sheehan, Esq.

**I.       INTRODUCTION**

This matter arises from a bid protest (“Protest”) filed by Diakon Solutions, LLC (“Diakon”) challenging the competitive award of a contract (“Contract”) by the FAA William J. Hughes Technical Center (“Center”) through the Electronic FAA Accelerated and Simplified Tasks (“eFAST”) Program. The Contract provides technical and engineering support services for the Center’s Fire Safety Services Program. *Agency Response* (“AR”) Tab 1 at 1. The Solicitation sought, among other things, key personnel for Computer Programmer positions. *Id.* at 2.

Diakon's Protest challenges the award to C-Far Services, LLC/Technology and Management International, LLC (*hereinafter* "TAMI" or "Awardee"), asserting that TAMI should have been disqualified for failing to provide mandatory information. *Protest* at 5-10.<sup>1</sup> TAMI intervened in the Protest.

## II. JURISDICTION

The underlying Solicitation was issued pursuant to the eFAST Master Ordering Agreement ("MOA"). AR Tab 1. The Solicitation and the MOA, like all FAA acquisitions, are subject to FAA's Acquisition Management System ("AMS"). *Id.*; MOA, dated February 22, 2013.<sup>2</sup> The Office of Dispute Resolution for Acquisition ("ODRA") therefore has jurisdiction to adjudicate the Protest on behalf of the FAA Administrator under 49 U.S.C. § 40110(d)(4) (2012); and 14 C.F.R. § 17.1 (2015).

## III. BURDEN AND STANDARD OF REVIEW

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 AMS. *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627. Under the AMS, source selection decisions must be supported by a "rational basis." *Id.* The ODRA will not substitute its judgment for that of the agency selection officials so long as the record shows that the challenged decision satisfies the above standard, is consistent with the requirements of the AMS and does not deviate from the award and evaluation criteria set forth in the underlying solicitation. *Protest of IBEX Weather Services*, 13-ODRA-00641 and -00644.

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<sup>1</sup> Diakon filed its initial Protest on September 23, 2015. Comments were received from the Protester and Intervener on November 3, 2015. At the direction of the ODRA, Supplemental Submissions were filed by the Center on November 30, 2015, and Supplemental Comments were filed on December 7, 2015.

<sup>2</sup> The full text of the MOA can be found at:  
[http://www.faa.gov/about/office\\_org/headquarters\\_offices/afn/offices/acquisitions/efast/resources/media/eFAST-Master-Ordering-Agreement-2013-DTFWA13A.pdf](http://www.faa.gov/about/office_org/headquarters_offices/afn/offices/acquisitions/efast/resources/media/eFAST-Master-Ordering-Agreement-2013-DTFWA13A.pdf).

#### IV. DISCUSSION

The record demonstrates that the Center received proposals on July 23, 2015 from three companies, including Diakon and the incumbent contractor, TAMI.<sup>3</sup> *AR* at 1; *Supplemental AR* Tab 3 at 3. On the same date, prior to the time deadline for the submission of proposals, the Contracting Officer received an email from TAMI informing her that two of the incumbent key personnel identified in its proposal for the Computer Programmer 3 positions had provided updated resumes in accordance with the Solicitation instructions, but had declined to sign them or provide a letter of intent.<sup>4</sup> *AR* Tab 3 at 1; *see also Chief Operating Officer Declaration* (“*COO Decl.*”) at ¶¶ 11-14. TAMI’s communication also expressed concern that the employees were colluding with a rival offeror. *AR* Tab 3 at 1; *see also COO Decl.* at ¶ 16. Consequently, in its proposal, TAMI attached a “Letter of Assumptions, Conditions, Exceptions,” pursuant to Section 10 of the Solicitation, in lieu of letters of intent. *AR* Tab 3 at 2. In that document, TAMI expressly identified its assumption that the two employees in question would continue their employment if TAMI were the awardee. *Id.*

On September 2, 2015, prior to award, the Contracting Officer requested letters of intent from TAMI for the two Computer Programmer 3 positions. *COO Decl.* at ¶ 21; *see also Supplemental AR* Tab 4 at 2. TAMI provided them on September 4, 2015, and was awarded the contract on September 10, 2015. *COO Decl.* at ¶ 22; *see also Supplemental AR* Tab 1.

For the reasons set forth below, the ODRA recommends that the Protest be denied in its entirety.

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<sup>3</sup> The parties do not dispute that Diakon submitted a timely proposal that the Center evaluated, but did not select. In relation to the Protester, TAMI was lower in price and rated slightly higher in the technical evaluation than Diakon. *Supplemental AR* Tab 3 at 6. Diakon does not challenge the evaluation findings.

<sup>4</sup> Proposals were due to be submitted by 5:00 P.M. Eastern time, and TAMI sent the email to the Contracting Officer at 1:30 P.M. *Compare AR* Tab 1 at 1 with *AR* Tab 3 at 1.

### A. REQUIREMENTS OF THE SOLICITATION REGARDING LETTERS OF INTENT

Diakon chiefly asserts that TAMI failed to meet a mandatory requirement of the Solicitation by not providing letters of intent from two key personnel at the time of proposal submission. *Protest* at 5-6. Diakon further alleges that it was an abuse of discretion for the Contracting Officer to allow TAMI to provide the letters after proposal submission, and prior to award. *Id.* Notwithstanding Diakon's allegations, the record shows that the relevant portion of the Solicitation only requires letters of intent for key personnel "that are not yet employed by the prime contractor or its subcontractor(s)" in order to verify "that those personnel will be available for employment within two weeks of contract award." AR Tab 1 at 2. This language plainly indicates that TAMI, the incumbent contractor was not required to provide letters of intent from its current employees who were performing the work involved. *Protest of Deloitte Consulting*, 08-TSA-36 (Plain meaning controls interpretation of unambiguous solicitation provisions).

Diakon contends, however, that during a Question and Answer ("Q&A") session, the Contracting Officer amended the Solicitation to make the requirement for letters of intent apply to *all* offerors, including the incumbent contractor, TAMI. *Comments* at 3, fn. 1. Specifically, Diakon claims that the amendment occurred as the result of the Contracting Officer's response to a question posed by Diakon. The response stated that "Letters of [Intent] **are** required for all key resumes, even if they are current employees."<sup>5</sup> AR Tab 2 at 1 (bold in original). Under the AMS, the Contracting Officer is responsible for issuing amendments to solicitations. *AMS Procurement Guidance* T3.2.2 (7)(c). The record shows, however, that the Q&A's were not incorporated into the Solicitation as an amendment. *Id.*

Notwithstanding the Contracting Officer's erroneous response, the ODRA finds no merit in Diakon's claim that the Solicitation required the incumbent contractor to include letters of intent for key personnel in its proposal. It follows that the Contracting Officer's acceptance of TAMI's proposal did not constitute an abuse of discretion.

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<sup>5</sup> The Contracting Officer's response was incorrect, as it was contrary to the plain language of the Solicitation.

## B. ALLEGED MISREPRESENTATION OF THE AVAILABILITY OF KEY PERSONNEL

Diakon also asserts that TAMI misrepresented the availability of the key personnel in question. *Protest* at 6-7. Diakon’s argument is based on the fact that Diakon had submitted the names of the incumbent TAMI employees for the Computer Programmer 3 positions, accompanied by an “Exclusive Letter of Intent” executed by each one of those individuals. *AR Tab 3* at 3-4. The Exclusive Letters of Intent granted “exclusive permission” to Diakon to submit their resumes, with the sole exception being “if my current employer [TAMI] requests my assistance in responding to this solicitation . . . I may offer my assistance.”<sup>6</sup> *Id.* Pursuant to this exception, the employees in question provided TAMI with updated resumes in accordance with the Solicitation instructions, but declined to sign them or initially provide a letter of intent. *AR Tab 3* at 1; *see also COO Decl.* at ¶¶ 11-14. Rather than guarantee the availability of these employees, TAMI attached a “Letter of Assumptions, Conditions, Exceptions.” *AR Tab 3* at 2. TAMI expressly identified in its assumption that the two employees in question would continue their employment if TAMI were the awardee. *Id.*

In addition, prior to award of the contract, these same employees executed letters of intent to continue to work for TAMI. *COO Decl.* at ¶ 22; *see also Supplemental AR Tab 1*. Significantly, “neither employee indicated or even suggested [to TAMI] that they would be resigning or terminating their employment.” *COO Decl.* at ¶ 14. Both had been employed as contractors with the Center’s Fire Safety Division for ten years. *COO Decl.* at ¶ 4. To date, they remain employed with TAMI and are performing under the awarded contract. *COO Decl.* at ¶ 23. Accordingly, there was no misrepresentation by TAMI. The ODRA therefore finds this allegation to be meritless.

## C. ALLEGED DEVIATION FROM EVALUATION CRITERIA

Diakon asserts that the Center deviated from the Solicitation’s evaluation criteria by considering

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<sup>6</sup> TAMI asserts that “Diakon intended to limit competition and compromise the integrity of the contract award process.” *TAMI Comments* at 2. TAMI cites to an “attempt to interfere with the existing employment relationship and duties of incumbent employees owed to their current employer, TAMI . . .” *Id.* In light of the findings and conclusions herein, the ODRA need not address this issue.

key personnel letters of intent that were not included in TAMI's initial proposal. *Protest* at 7-8. Diakon points to Section 11.2 of the Solicitation, which states:

A proposal which fails to address the requirement of the solicitation and which the FAA considers grossly deficient to the extent that correction would involve significant and major rewriting of the proposal, will be eliminated from the competition.

*AR* Tab 1 at 8. As discussed above, however, TAMI was under no obligation to submit letters of intent for its currently employed key personnel doing work under the incumbent contract. TAMI's Proposal could not be considered "grossly deficient" for not submitting documentation that was not required by the Solicitation.

#### D. ALLEGED IMPROPER COMMUNICATIONS

Finally, Diakon asserts that the Contracting Officer's communications with TAMI afforded it an "unfair competitive advantage." *Protest* at 8. AMS Policy § 3.2.2.3.1.2.2 provides that "communications with all potential offerors should take place throughout the source selection process," and "communications with one offeror do not necessitate communications with other offerors." Communications are proper, so long as they do not allow an otherwise deficient proposal to be substantially rewritten or supplemented. *Protest of CGH Technologies, Inc.* 10-ODRA-00556. In the instant case, the Contracting Officer's communications with TAMI regarding the submission of letters of intent for the Computer Programmer 3 positions were consistent with the Solicitation and in accordance with AMS Policy. As such, they did not provide TAMI with a competitive advantage; nor did they prejudice Diakon in any way.

## **V. CONCLUSION**

Diakon has failed to demonstrate that the protested actions and award lacked a rational basis, or was otherwise arbitrary, capricious or an abuse of discretion. The ODRA therefore recommends that the Protest be denied in its entirety.

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

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