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

FINDINGS AND RECOMMENDATIONS

Matter: **Protests of Tetra Tech AMT and Leader Communications, Inc.**
Under Solicitation No. DTFAWA-13-R-00014

Docket No.: **16-ODRA-00760 and 16-ODRA-00768 (Consolidated)**

Appearances:

For Leader Communications, Inc.:	Steven J. Koprince, Esq. of Koprince Law LLC
For Tetra Tech AMT, Inc.:	Holly A. Roth, Esq. of Reed Smith
For the FAA Product Team:	Jason R. Miller, Esq.

I. INTRODUCTION

This matter arises from Tetra Tech AMT’s (“Tetra Tech”) and Leader Communications, Inc.’s (“LCI”) cross protests (“Protests”) filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) under the above-captioned Solicitation (“Solicitation”). The Solicitation seeks operational and administrative support services for the Office of Security and Hazardous Materials (“ASH”¹).² The Protests are consolidated for decision. The current Tetra Tech Protest

¹ “ASH” is the internal FAA routing symbol for this organization.

² *Agency Response* (“AR”) Tab 1 at 13.

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and LCI Protest are the latest in a series of six protests regarding the same underlying acquisition.

LCI had successfully protested the initial award to Tetra Tech of a one-year contract with options, and subsequently protested the Product Team's interpretation of the Administrator's Order directing a reevaluation of the Tetra Tech and LCI offers.³ Ultimately, the reevaluation affirmed the award to Tetra Tech, and LCI protested the outcome.⁴ In response to that protest, however, the Product Team elected to take voluntary corrective action.⁵ Ultimately, even though LCI was awarded the contract, and then withdrew its protest, the Product Team never executed the contract.⁶ The award to LCI, however, gave rise to the present two protests.

The current Tetra Tech Protest challenges the award to LCI by alleging mistakes in the evaluation of both parties' proposals. In response to the Tetra Tech Protest, the Product Team elected to take another unilateral corrective action. The latest corrective action restarts the acquisition process altogether, with a new market survey, revised solicitation, new offers, and a new award to be made by June 15, 2017.⁷ The Product Team, therefore, has moved to dismiss the Tetra Tech Protest with prejudice as moot.

The LCI Protest arises from the corrective action that now attempts to resolve Tetra Tech's protest. As a result of the earlier corrective action, the Product Team selected LCI for award, but then declined to execute the contract. Instead, as part of the current corrective action, the Product Team decided to exercise the second option year under the current Tetra Tech Contract. LCI filed its current Protest challenging the exercise of the option as lacking a rational basis. LCI also filed a supplemental protest alleging defects in the Product Team's evaluation that led to its decision to undertake a new solicitation in lieu of executing a contract with LCI.

³ ODRA-14-733,14-ODRA-00705 and 15-ODRA-00721.

⁴ 15-ODRA-00753

⁵ *Letter*, dated January 21, 2016.

⁶ ODRA-15-763

⁷ *Id.*

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Protesters bear the burden of proof in bid protests and must demonstrate by substantial evidence that the challenged decision failed in a prejudicial manner to comply with the Acquisition Management System ("AMS").⁸ Where the record demonstrates that the challenged action or decision has a rational basis, is not arbitrary, capricious or an abuse of discretion, and is consistent with the AMS and pertinent Administrator's orders, the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials.⁹

For the reasons discussed herein, the ODRA finds that a rational basis exists for the Product Team's decision to take the current corrective action in lieu of executing a contract with LCI; but that the corrective action plan is deficient. The ODRA therefore recommends that the Administrator direct the Product Team to complete the corrective action in the manner and timeframe recommended herein. Accordingly, the LCI Protest should be sustained in part, and the LCI Supplemental Protest and the Tetra Tech Protest should be dismissed.

II. PROCEDURAL ISSUES OF STANDING, TIMELINESS and MOOTNESS

Both Tetra Tech and the Product Team filed separate Motions to Dismiss the LCI Protest and Supplemental Protest for lack of standing; lack of timeliness; and mootness.¹⁰

LCI's Timeliness. The record demonstrates that LCI filed both its Initial Protest and Supplemental Protest within the seven business days required under the ODRA Procedural Regulations.¹¹ Thus, the ODRA finds that the Protest and Supplemental Protest are timely.¹²

⁸ *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627.

⁹ *Id.*

¹⁰ *Agency Response*, dated August 26, 2016; *Tetra Tech Motion to Dismiss*, dated October 14, 2016.

¹¹ 14 C.F.R. § 17.15(3)(i)

¹² LCI learned of the decision to exercise the second option year under the Tetra Tech contract by letter, dated June 30, 2016, and its grounds under the Supplemental Protest upon receipt of the Agency Response on August 5, 2016. AR Tab 45.

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LCI's Standing. Only an interested party may file a protest with the ODRA.¹³ An interested party is defined as one whose “direct economic interest” will be affected by award or failure to award a contract. The ODRA finds that LCI has standing as an “interested party” because its direct economic interest is affected by the decision to take corrective action and exercise an option allowing Tetra Tech to perform the contract in the interim.¹⁴

*Tetra Tech's Timeliness and Standing.*¹⁵ In response to Tetra Tech's protest alleging mistakes in the evaluation of its and LCI's proposals, the Product Team elected to take unilateral corrective action that restarts the acquisition process.¹⁶ Thus, the ODRA recommends that the Tetra Tech Protest be dismissed with prejudice as moot.¹⁷ The ODRA does not need to reach the issue of Tetra Tech's standing and recommends all other procedural grounds for dismissal be denied.

III. FAA'S BASIS TO TAKE CORRECTIVE ACTION, EXERCISE OF A TIME-LIMITED OPTION AND THE CORRECTIVE ACTION PLAN ITSELF

A. Decision to Take Voluntary Corrective Action Has A Rational Basis

On June 30, 2016, in response to the current Tetra Tech Protest, the Product Team informed the ODRA that it was taking voluntary corrective action.¹⁸ The corrective action is comprehensive. The Product Team is commencing a new acquisition process that will end with a new award determination. Given the history of this procurement, a rational basis exists to begin again. The Contracting Officer concedes there were

¹³ 14 C.F.R. § 17.15(a).

¹⁴ Only an interested party may file a protest with the ODRA. An interested party is defined as one whose “direct economic interest” will be affected by award or failure to award a contract. 14 C.F.R. § 17.3(m).

¹⁵ *LCI Motion to Dismiss*, dated August 15, 2016.

¹⁶ *Notice of Voluntary Corrective Action (Tetra Tech Protest)*, dated June 30, 2016 and *Agency Response to LCI Protest*, dated August 5, 2016 at 5-6.

¹⁷ Inexplicably, the Product Team filed an Opposition to an LCI Motion to Dismiss the Tetra Tech Protest filed on August 15, 2016. *Letter*, dated August 18, 2016; but then reiterated its request to dismiss the Tetra Tech Protest on December 16, 2016. *Letter*, dated December 16, 2016. The ODRA accepts the latter as the Product Team's actual position on the matter.

¹⁸ *Notice of Voluntary Corrective Action*, dated June 30, 2016.

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problems with the evaluation of the offerors.¹⁹ He declares that: (i) these issues are a result of the very “terms of the [solicitation] itself;” (ii) there are too many evaluation factors, sub-factors, and sub-elements to make a clear best value determination; (iii) after so many years, the cost information is outdated; and (iv) “the requirement for certified cost data is more burdensome than necessary for this procurement.”²⁰ The ODRA finds substantial evidence in the record supporting a rational basis for starting over with a completely new procurement.

B. Exercise of a Time-limited Second Option to Tetra Tech as Part of the Corrective Action Has a Rational Basis

The LCI Protest challenges the rational basis of the Product Team’s decision to not execute a contract with LCI, and, instead, exercise the second option on the Tetra Tech Contract. The Contracting Officer declares that upon the filing of the fifth LCI Protest,²¹ the Product Team reconsidered the award.²² “We reexamined the risk of a successful protest and the potential damage of a dual transition and found that exercising the option in the current contract with Tetra Tech AMT is the best option available in order to maintain stability and provide continuity of services to the ASH Program Office.”²³ The need for continuity of services in the midst of a corrective action provides a rational basis for the exercise of the second option. It is incumbent on the Product Team, however, to ensure that the corrective action is completed in a fair and timely manner and in accordance with the AMS.

C. The Corrective Action Plan and Schedule

¹⁹ *Declaration of the Contracting Officer* at ¶ 5.

²⁰ This rationale is echoed by Manager of AIN-10. He declares that “the requirements of the [P]rogram [O]ffice have changed significantly.” *AIN-10 Manager Declaration*, dated August 2, 2016 at ¶ 2. The “technical evaluation factors no longer reflect the work required by ASH.” *Id.* There are some tasks “no longer the responsibility of ASH,” and new standards of investigation have been issued by the Office of Personnel Management and the Director of National Intelligence. *Id.* Finally, ASH is looking to implement 42 recommendations “to improve facility security measures” in light of a “comprehensive security review in October 2014.” *Id.* In other words, too much time has passed for the specification to adequately describe the services that the FAA requires.

²¹ 16-ODRA-00765.

²² *Declaration of Contracting Officer*, dated August 3, 2016 at ¶ 7.

²³ *Id.*

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A Product Team’s discretion to undertake corrective action is not absolute.²⁴ In its filings, the Product Team proposed a procurement schedule that sought to make a new award by June 15, 2017.²⁵ By letter dated December 15, 2016, the ODRA directed the Product Team to file a detailed report on the status of the corrective action including addressing the milestones provided in the Agency’s plan. Counsel for the Product Team replied that the schedule had slipped by two months due to the current adjudications.²⁶ The revised schedule is now: public release of the solicitation by [REDACTED] and award decision by [REDACTED].²⁷ This proposed schedule strains credulity for two intertwined reasons.

First, the ODRA rejects the premise underlying the Product Team’s rationale for delaying the new competition. Counsel for the Product Team asserts that “it has not been able to focus its limited resources” because of “extended litigation” before the ODRA.²⁸ Assuming counsel means “extended litigation” in this matter, the ODRA disagrees because several months have elapsed since the last litigation event involving the Program Office, i.e., the September 20, 2016 depositions of the Contracting Officer and the AIN-10 Manager. The only other filings have been those of Counsel not requiring Product Team involvement.

Second, delaying the award decision until [REDACTED], well beyond the expiration of Tetra Tech’s original contract, will likely perpetuate the prejudice to LCI that was found

²⁴ *Protest of Alutiq Pacific LLC, supra.*

²⁵ In its Agency Response of August 5, 2016, the Product Team states that:

[It] has already begun a new tiered competitive acquisition to meet its requirements. The new Solicitation will reflect ASH’s updated requirements, and the new evaluation team will be substantially different from that under the subject solicitation. The Product Team currently projects release of a request for market-survey information on August 30, 2016; completion of a full draft of the Solicitation on October 30, 2016; public release of the Solicitation on February 1, 2017; receipt of proposals by March 1, 2017; and issuance of an award decision on June 15, 2017.

Agency Response to LCI Protest, dated August 5, 2016 at 5-6 (internal citations omitted).

²⁶ *Letter*, dated December 16, 2016.

²⁷ *Id.*

²⁸ *Letter*, dated December 16, 2016.

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in earlier protests of this procurement process. More specifically, the proposed schedule would require the third non-competitive extension of the contract award to Tetra Tech, should such services still be required. In light of the two Administrator-directed corrective actions and the two unilateral corrective action decisions by the Product Team, it is critical to the integrity of the AMS that a fairly conducted competition be completed in a timely manner. To continue with yet another contract extension to Tetra Tech in the absence of a fairly conducted competition would be inconsistent with the single-source selection policies of the AMS.²⁹

Accordingly, the ODRA recommends sustaining the LCI Protest for inadequacy of the Product Team's revised corrective action schedule.

III. CONCLUSION

AMS Policy § 3.9.3.2.2.4 and the ODRA Procedural Regulation, 14 C.F.R. § 17.23(a), provide "broad discretion" to the ODRA to recommend remedies. In this matter, it recommends the following:

- Given the comprehensiveness of the corrective action plan, the ODRA recommends dismissal of both the Tetra Tech Protest and the LCI Supplemental Protest to the extent they challenge the prior evaluations of their offers;
- To the extent LCI is challenging the corrective action schedule, the ODRA recommends that it be sustained; and
- To ensure timely completion of the corrective action, as well as continuity of services, the ODRA further recommends that:
 - (1) the current option year contract be permitted to continue for a limited period, i.e., until timely completion of the current recompetition pursuant to the schedule set forth herein, including any necessary transition period;
 - (2) the Administrator direct the Product Team to award a new contract

²⁹ See generally AMS Policy 3.2.1.3.7, 3.2.2.2, and 3.2.2.4.

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before the end of the current option year, i.e., June 23, 2017;³⁰

- (3) a new source selection team be appointed and, to avoid any appearance of impropriety, none of its members be former employees of Tetra Tech.³¹
- The Product Team be required to file progress reports with the Administrator through the ODRA every 30 days until the new award is made and any transition of the work is completed.

-S-

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

³⁰ The Product Team may only award a bridge contract as necessary to guarantee continuity of services during transition to a new vendor, if necessary, and then only with leave from the Administrator, through the ODRA, for good cause shown.

³¹ Although LCI has not raised it as an issue, the record shows that at least seven ASH employees are former employees of Tetra Tech including the AIN-10 Manager and the Contracting Officer's Representative. Dep. Tr. 66: 6-9; 30:15-16; and 31: 13-19. While there is no evidence suggesting or hinting at a violation of the Office of Government Ethics Regulations, 5 C.F.R. Part 2635, given the history of this matter, and the Product's Teams candid acknowledgment that it is unlikely to timely complete its corrective action, we believe it is prudent to require the appointment of a new source selection team.