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

FINDINGS AND RECOMMENDATIONS

**Matter: Protest of Encentric, Inc.
Under Solicitation No. DTFAWA-17-R-00024**

Docket No.: 17-ODRA-00792

Appearances:

For Encentric, Inc.: Hilary S. Cairnie, Esq.
of Pepper Hamilton, LLP

For Tetra Tech AMT, Inc.:
Holly A. Roth, Esq.
Elizabeth Leavy, Esq.
Molly Campbell, Esq.
of Reed Smith, LLP

For the FAA Product Team: R. Jason Miller, Esq. and
Mary-Caitlin Ray, Esq.

I. INTRODUCTION

This matter arises from Encentric, Inc.’s (“Encentric”) Protest filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) pursuant to Solicitation No. DTFAWA-17-R-00024 (“Solicitation”). The Solicitation seeks operational and administrative support services for the Office of Security and Hazardous Materials (“ASH”¹).

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

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Encentric challenges the elimination of its proposal from further consideration by the Product Team. Specifically, it alleges that: (1) the Product Team misapplied the Financial Resources Factor, which requires the offeror to demonstrate possession of an available line of credit of at least \$7 million from a financial institution; (2) the language at issue in the Solicitation is latently ambiguous; and (3) the Product Team seeks to circumvent the small business requirements of the Solicitation by eliminating it and Leader Communications, Inc. (“LCI”)², another small business offeror, from further competition. *Protest* at 3-4; *Comments* at 4-5. On May 26, 2017, Encentric filed a Supplemental Protest (“First Supplemental Protest”) alleging disparate treatment in the evaluation of the Financial Resources Factor between it and LCI. *First Supplemental Protest* at 1-2. On May 31, 2017, Encentric then filed another Supplemental Protest (“Second Supplemental Protest”) alleging, on the same underlying facts, that: (1) the Product Team improperly waived, as to LCI, a requirement under the Financial Resources Factor to enumerate the unused portions of its line of credit, and (2) the Solicitation did not provide a minimum threshold to meet the Financial Resources evaluation factor. *Second Supplemental Protest* at 2.

The Agency Response (“AR”) was filed on May 23, 2017, the Supplemental Agency Response (“SAR”) on June 14, 2017, and Protester’s Comments on June 21, 2017. On July 7, 2017, the ODRA admitted Tetra Tech AMT, Inc. (“Tetra Tech”), the awardee of the contract, as an intervener in the Protest. On July 25, 2017, Tetra Tech filed its Comments.

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

² LCI is not a party to this proceeding, and its evaluation is not part of the administrative record. The instant matter only relates to the elimination of Encentric’s proposal.

II. DISCUSSION

A. Standard of Review

The Protester 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 Alutiiq Pacific LLC*, 12-ODRA-00627. Consistent with the Administrative Procedures Act, 5 U.S.C. §§ 554 and 556, which applies to ODRA adjudications, the phrase “substantial evidence” means that the ODRA considers whether the preponderance of the evidence supports the challenged Agency action. Where the record demonstrates that the challenged decision has a rational basis and is not arbitrary, capricious or an abuse of discretion, and is consistent with the AMS and the underlying solicitation, the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials. 14 C.F.R. § 17.19(m) (2016); *Protest of Potter Electric Co.*, 13-ODRA-00657.

B. The Agency’s Definitive Responsibility Determination

AMS Policy § 3.2.2.7.2 requires the Contracting Officer to make an “affirmative determination of responsibility” before awarding a contract. The mere act of signing the contract satisfies this requirement. *AMS Policy* § 3.2.2.2. The ODRA has recognized that the Product Team may depart from “routine AMS-responsibility criteria,” and elect to use “definitive responsibility” factors as part of the evaluation process. *Protests of IBEX Weather Services*, 13-ODRA-00641 and 13-ODRA-00644 (Consolidated).

The present Product Team’s responsibility determination, as in the case of *IBEX Weather Services*, 13-ODRA-00641 and 13-ODRA-00644 (Consolidated), *supra*, involves the evaluation of an offeror’s financial capability based on information submitted as part of its proposal. Specifically, among the requirements for Minimum Capability Qualification in the instant Solicitation, Section M.4.1 provided that the “FAA will evaluate whether the offeror provided proof of [an] *available line of credit* in the form of a certified letter of

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credit from a financial institution in the amount of at least \$7 million.” AR Tab 1 at M-4 (emphasis added). To that end, Section L, in relevant part, required that “Prime Vendors *must* demonstrate a line of credit of at least \$7 million by submitting a certified letter of credit from a financial institution showing *available lines of credit*.”³ AR Tab 4 at 3 (emphasis added).

In *IBEX Weather Services*, the ODRA sustained the protest, in part, because the awardee submitted a letter that “was merely the bank’s expression of interest and required further instruments to put into effect.” 13-ODRA-00641 and 13-ODRA-00644 (Consolidated), *supra*. In its proposal, Encentric stated that it had [REDACTED] effectively support execution of the ASH II contract.” AR Tab 15 at 3. In support, Encentric provided copies of letters from [REDACTED]. *Id.* at 4-6. In its letter, [REDACTED]. *Id.* at 4 (emphasis added). The letter is further described as one [REDACTED] followed by qualifying language similar to the letter of credit in *IBEX Weather Services*.⁴ In contrast to the letter [REDACTED], the letter [REDACTED] states that Encentric [REDACTED] available under a line of credit in the amount of [REDACTED] required under the Solicitation. AR Tab 15 at 6.

Based on Encentric’s submission, the Product Team gave [REDACTED].” AR Tab 20 (emphasis in original). The Contracting Officer further declares that she made the

³ Encentric argues that the language in Sections L and M of the Solicitation are latently ambiguous, and, thus, should be interpreted against the drafter (i.e., the Product Team). *Protest* at 18-20. It is well established in the ODRA that “[w]hen interpreting the language in a Solicitation, the ODRA first looks to the plain meaning of the text.” *Protest of Deloitte Consulting, LLP*, 08-TSA-36; *see also Agency Response* at 4 citing *Protest of Johnson Controls Security Systems, LLC*, 05-ODRA-00360. In the instant case, a plain reading of the phrase “available line of credit” in Sections L and M means that the line of credit must be in the possession of the offeror contemporaneously with the submission of the bid. *See* 13-ODRA-00641 and 13-ODRA-00644 (Consolidated), *supra* (the lender’s expression of interest requiring the execution of additional documents did not satisfy the requirement to “[p]rovide documentation [to] show the offeror’s ability to cover payroll . . .”). The ODRA rejects Encentric’s reading of the Solicitation, which would add the qualifying language of “upon becoming the prime vendor selected for award.” *Protest* at 17. Nowhere is this concept found in the clauses at issue. Accordingly, the ODRA finds that the language is unambiguous, and that the offeror was required to submit proof of an “available line of credit” at the time it submitted its bid. AR Tab 1 at M-4.

⁴ *Compare* AR Tab 15 at 4 (“This letter of financial capability . . . is subject to final due diligence and approval [REDACTED], and execution of appropriate documents.”) *with* 13-ODRA-00641 and 13-ODRA-00644 (Consolidated), *supra* (“[T]he terms under consideration and stated in the letter did not guarantee full access . . . , but instead had limitations based on 75% of amounts approved for payment by the U.S. Government.”).

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determination to eliminate Encentric from further competition based on the stated criteria in the Solicitation. *Declaration of the Contracting Officer*, dated April 27, 2017 at ¶ 2. The ODRA finds that the Product Team had a rational basis to determine that Encentric did not meet the responsibility requirement for an available line of credit in the amount of \$7 million, and its subsequent elimination from further consideration.

C. Disparate Treatment

Encentric asserts that the Product Team disparately treated offerors in its evaluation of requirements for Minimum Capability Qualification under the Financial Resources Factor. According to Encentric, the Product Team accepted LCI's similarly worded letter from its financial institution. *First Supplemental Protest* at 1-2; *see also* AR Tabs 20 and 22. As discussed in Section II.B of these Findings and Recommendations, Encentric provided a letter [REDACTED] to support initial performance of the contract. AR Tab 15 at 4-6. Encentric also included in its proposal a letter [REDACTED]. *Id.* In its proposal, LCI provided a letter from [REDACTED]. AR Tab 17.

Encentric argues that the language in the [REDACTED] letter does not satisfy the requirements of Sections L and M of the Solicitation. *Protest* at 3. However, a plain reading of the letter demonstrates that LCI does [REDACTED] that will meet the minimum requirement of \$7 million for initial performance as required by the Solicitation. In stark contrast, Encentric's bank, [REDACTED], only offers a [REDACTED]. *Compare* AR Tab 17 *with* AR Tab 15 at 4-6.

The ODRA finds that the Product Team's determination to accept LCI's submission has a rational basis and is not arbitrary, capricious or an abuse of discretion, and is consistent with the AMS and the underlying solicitation. 14 C.F.R. § 17.19(m) (2016); *Protest of Potter Electric Co.*, 13-ODRA-00657. Accordingly, the ODRA finds there was no disparate treatment of offerors.

D. Remaining Grounds of Protest

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Encentric asserts three more grounds of protest in the alternative. First, Encentric argues that the Product Team executed an improper partial waiver of the Financial Resources Factor as to LCI with respect to “portions of [the line of credit] currently unutilized.” *Second Supplemental Protest* at 3 citing AR Tab 4 at 3. The ODRA recognizes an inconsistency in the language between Sections L and M. *Compare* AR Tab 4 at 3 (“Prime Vendors must demonstrate a line of credit of at least \$7 million by submitting a certified letter of credit from a financial institution showing available lines of credit (including what portions of them are currently unutilized).”) with AR Tab 1 at M-4 (“FAA will evaluate whether the offeror provided proof of [an] *available line of credit* in the form of a certified letter of credit from a financial institution in the amount of at least \$7 million.”). The ODRA finds, however, that the differences between the sections constitute a patent ambiguity, and should have been protested prior to the receipt or opening of proposals. 14 C.F.R. § 17.15(a)(1); *see also Protest of Leader Communications, Inc.*, 14-ODRA-00705. Thus, this ground of protest is untimely. *Id.*

Next, Encentric asserts that the Solicitation failed to specify the minimum requirements for demonstrating adequate financial resources. *Second Supplemental Protest* at 6; *Comments* at 6-7 and 18-19. Specifically, the Solicitation “did not adequately or accurately describe the agency’s actual requirements with respect to the financial resources qualification factor.” *Comments* at 6. The ODRA views this as a challenge to the terms of the Solicitation itself. The Procedural Regulations provide that “Protests based upon alleged improprieties in a solicitation or a SIR that are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for the receipt of initial proposals.” 14 C.F.R. § 17.15(1).

Encentric attempts to argue that this ground is timely because of the Product Team’s lack of an evaluation of LCI’s unused lines of credit as required under Section L.12.2.1. *Comments* at 6. Encentric then argues that if the Product Team could pass LCI under Section M.2.1 without the unused portion of the line of credit highlighted, it “did not need this data.” *Id.* at 18. However, as discussed above, the differences between Sections L.12.2.1 and M.2.1 are apparent on the face of the Solicitation itself. *Compare* AR Tab 4

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at 3 with AR Tab 1 at M-4. Further, the Solicitation did not require an actual evaluation of the unused portions of an offeror's line of credit. AR Tab 1 at M-4. Had Encentric wanted clarification of this requirement, the time to file was before the receipt of proposals. Accordingly, the ODRA also finds this ground of protest untimely.

Finally, Encentric asserts that the Product Team's restrictive interpretation of the Solicitation's \$7 million line of credit certification violates the Agency's two-tier evaluation approach to encourage award to a small business. *Protest* at 3-4; *see also Comments* at 4-5 and 19-20. Section M.2.1, Tiered Evaluation provides, in relevant part:

Tier 1 is limited to the evaluation of Small Business proposals. If there are at least two qualified small business offerors found during the Tier 1 Small Business evaluation phase, then the remainder of the large business bids will not be evaluated, and only small business proposals will be evaluated. If one or no small business concerns are qualified based on the evaluation, then the evaluation will proceed to tier two, which includes any qualified small business offerors and Large Business offerors . . .

AR Tab 1 at M-2-M-3. Encentric argues that by eliminating both Encentric and LCI, the Product Team left only one remaining qualified small business offeror, which necessitated a tier two evaluation involving the single large business offeror, Tetra Tech AMT ("Tetra Tech"). *Comments* at 5.

The ODRA finds that Encentric was rationally eliminated from further competition for failing to meet the Minimum Capability Qualification embodied in Section M.4.1 of the Solicitation. *See* Section II.B of these Findings and Recommendations. The Product Team cannot be found to have violated the two-tier evaluation scheme in Section M.2.1 of the Solicitation if, as the ODRA has found, the Product Team correctly eliminated Encentric under Section M.4.1. Thus, the ODRA recommends that this ground of protest be denied as meritless.

III. CONCLUSION

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Based on the foregoing, the ODRA recommends that the protest be denied in its entirety.

-S-

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