



April 21, 2021

BY EMAIL AND CERTIFIED MAIL

Daniel Strouse, Esq.
Cordatis LLP
1101 Arlington Blvd.
Arlington, VA 22209
Email: dstrouse@cordatislaw.com

Re: Supplier Disagreement Resolution No. SDR-21-CS-003

Dear Mr. Strouse:

This letter responds to your business disagreement submitted on December 17, 2020 on behalf of American K-9 Detection Services, LLC ("AMK9") to the Supplier Disagreement Resolution Official (the "SDRO") concerning Solicitation No. 2B-20-A-0087 (the "Solicitation") for Third-Party Canine Mail Screening ("3PK9-C") with Real-Time X-Ray Analysis and Interpretation ("Alarm Resolution").

Background

The United States Postal Service (the "Postal Service" or "USPS") issued the Solicitation for the 3PK9-C and Alarm Resolution on September 21, 2020, with a due date of October 5, 2020. Between September 21 and October 5, 2020, the Postal Service issued six (6) Amendments to the Solicitation via email. The Solicitation sought one or more suppliers to provide the following:

1. The services of a TSA-approved Third-Party Canine-Cargo (3PK9-C teams) explosive detection canine team to screen Priority Mail and mail weighing 16 ounces or greater transported on domestic and international passenger commercial air carriers on a nationwide basis.
2. Alarm Resolution protocols for instances when a canine alerts to a mail piece. The Postal Service required a combined comprehensive improvised explosive device (IED) screening, detection, analysis and interpretation solution which includes technology used in conjunction with Postal Service or air transportation offerors' (air carriers) owned x-ray screening machines to facilitate remote alarm resolution analysis by FBI Hazardous Device School (HDS) or Naval School Explosive Ordinance Disposal (NAVSCOLEOD) certified bomb technicians.

See Solicitation, Statement of Work ("SOW"), § 1.2. These services had been previously provided by TSA; however, the Postal Service is now providing both services going forward. In addition, the Solicitation stated that offerors' proposals would be evaluated based on the following evaluation factors:

- Evaluation Factor 1 - Capability (Explosive Detection Canine Service)
- Evaluation Factor 2 - Capability (Alarm Resolution)
- Evaluation Factor 3 - Past Performance

See Solicitation, Attachment - Evaluation Factors, p.1. The evaluation factors were listed in descending order of importance. See Solicitation, Instructions and Evaluation Criteria, p.5. The Postal Service also stated that: "USPS is more concerned with making an award or awards based on a superior technical proposal than with awarding at the lowest price. The Offeror's technical proposal and the corresponding evaluation factors are therefore more important than price. However, USPS will not make an award or awards for a significantly higher price for minor or marginal increases in performance." *Id.*

On October 5, 2020, the closing date for proposals, AMK9 submitted a proposal to the contracting officer (CO) in response to the Solicitation for both the 3PK9-C and Alarm Resolution scopes of work. After thorough review, the Technical Evaluation Team ("TET") determined that AMK9's [REDACTED] of the seven (7) proposals received. Ultimately, the CO concluded that AMK9 did not provide the best value to the Postal Service for the Solicitation.

On November 9, 2020, the Postal Service awarded a single contract to Michael Stapleton Associates, Ltd., d/b/a MSA Security ("MSA") for both of the Solicitation's scopes of work (the "3P-K9 Contract"). AMK9 received a debriefing on November 18, 2020, and thereafter submitted an initial business disagreement to the CO on November 27, 2020. The CO timely rendered a written resolution to AMK9's initial business disagreement, which was sent to you on December 7, 2020. You timely lodged this SDRO disagreement (the "SDRO Disagreement") on behalf of AMK9 on December 17, 2020.

OCI Investigation Background

At the time of proposal submission, AMK9 had also submitted a pre-award business disagreement to the CO, raising in part the organization conflict of interest ("OCI") issue (Unequal Access to Information) that it continues to raise in this post-award disagreement. As a result, the CO performed an investigation of the purported OCI and concluded that no OCI existed. AMK9 appealed the CO's decision to this SDRO, which upheld the CO's decision that MSA did not have an OCI.¹ AMK9 appealed that decision to the U.S. Court of Federal Claims. On March 8, 2021, the court stayed the case and remanded the OCI claim to the CO for further investigation. See *American K-9 Detection Servs., LLC v. United States*, No. 20-1614, 2021 WL 1086225, at *25 (Fed. Cl. Mar. 19, 2021). On April 5, 2021, in accordance with the court's March 8 Order, the CO furnished the entire supplemental OCI investigation to the court, which was likewise furnished to the SDRO on April 8.

The Disagreement

In your December 17, 2020 letter, you state that the basis for AMK9's disagreement to the SDRO is as follows:

1. USPS used an unstated evaluation factor to assign AMK9 risk for its purportedly [REDACTED];
2. USPS unreasonably concluded that AMK9's alarm resolution process [REDACTED];
3. USPS ignored portions of AMK9's proposal to conclude that AMK9 did not provide [REDACTED] approach;

¹ See Supplier Disagreement Resolution No. SDR-21-CS-001, at <https://about.usps.com/suppliers/disagreement-decisions/sdr-21-cs-001.pdf>.

4. USPS unreasonably downgraded AMK9 for purported [REDACTED];
5. USPS failed to consider the Organizational Conflict of Interest of MSA; and
6. USPS did not conduct a reasonable tradeoff analysis and AMK9 is prejudiced by USPS's actions.

I will address each basis for your SDRO disagreement separately below.

Discussion

1. USPS properly assessed weaknesses against AMK9.

For its first challenge to the award, AMK9 asserts that the TET improperly assessed certain weaknesses to AMK9's proposal, thereby resulting in it being [REDACTED] of the seven (7) proposals received. See SDRO Disagreement, pp.6-16. In doing so, AMK9 challenges only four (4) of the several weaknesses assessed against it. I will address these challenged weaknesses further below.

However, I must also note the fact that AMK9 has already admitted to the SDRO that its [REDACTED]. Specifically, in a pre-award disagreement to the SDRO, AMK9 argued that the inclusion of both 3PK9-C and Alarm Resolution services in the Solicitation unfairly advantaged MSA technically because MSA was the only offeror who could provide those services.² Upon information and belief, AMK9 has continued to assert those allegations to the Court of Federal Claims in its appeal of the pre-award disagreement. See *American K-9 Detection Servs., LLC v. United States*, No. 20-1614, 2021 WL 1086225 (Fed. Cl. Mar. 19, 2021). Therefore, although I will address below the challenged technical weaknesses below, I nevertheless find that, by AMK9's own statements, its technical proposal was properly ranked lower than MSA's technical proposal.

A. The TET properly assessed AMK9 with multiple weaknesses for Evaluation Factor 1.

For the first evaluation factor, Capability (Explosive Detection Canines ("EDC")), the Solicitation stated that offerors' proposals would be evaluated as follows:

The offeror must demonstrate its current capability to meet the requirements in the SOW. The Postal Service will evaluate the offeror's ability to provide canine handler resources adequate to perform the work as outlined with the SOW and relevant attachments; its ability to meet the required or proposed delivery schedules; and the ability to obtain the necessary certifications and security badges required at each location....

The offeror's demonstrated capability of the following factors will be considered in the aggregate in reaching an overall rating for this evaluation factor[:] ...Offeror's demonstrated responsiveness to the attached Roll-out Schedule.

² See Supplier Disagreement Resolution No. SDR-21-CS-001, at <https://about.usps.com/suppliers/disagreement-decisions/sdr-21-cs-001.pdf>. I also addressed the fact that AMK9 had not disclosed to the SDRO that it had actually submitted a proposal that included the provision of Alarm Resolution services – services that AMK9 argued only MSA could provide to USPS.

See Solicitation, Attachment - Evaluation Factors, p.1. The TET assessed multiple weaknesses to AMK9's proposal in its evaluation of Factor 1, including the fact that AMK9 [REDACTED]. However, AMK9 has only objected to the following two (2) weaknesses assessed by the TET:

- [REDACTED]; and
- [REDACTED]

I will address each of these weaknesses below.

i. **AMK9 was properly assigned a weakness for** [REDACTED].

AMK9 first challenges the TET's assignment of a weakness in Evaluation Factor 1 for having the lowest pass rate for TSA External Quality Control Audits. See SDRO Disagreement, pp.6-9. In fact, the TET assigned AMK9 multiple weaknesses [REDACTED]

[REDACTED]

[REDACTED]

As the TET described in detail, [REDACTED] requirements from the Solicitation. AMK9's lengthy SDRO Disagreement does not contest, or even address, these significant concerns. Rather, AMK9's disagreement only objects to the fact that the TET used AMK9's pass rate for these audits in evaluating its technical proposal.

The Solicitation SOW made clear that all offerors must have "TSA 3PK9-C certifications [and] pass and fail rates...." Solicitation, SOW, Section 3.2.1. Additionally, Amendment 4 to the Solicitation directed each offeror to: "Provide the results of [its] TSA External Quality Control

Audits (TSAs Covert Tests) for Fiscal Year 2020, October 1, 2019 through September 30, 2020. The Postal Service will take the answer to this question into account under Evaluation Factor One.” The TSA External Quality Control Audits assessed K-9 teams pass rates for each offeror. Therefore, it was reasonable to assume that an offerors’ audit pass rate would be considered, especially for comparing offerors’ capabilities, and, as the CO properly determined, AMK9 waived its right to challenge its use in evaluating AMK9’s proposal by not submitting this challenge in a pre-award disagreement.³³ See CO’s Response dated December 7, 2020, p.2.

In an effort to avoid this waiver, AMK9 now attempts to re-term the pass rates used by the TET as “interim pass rates” and re-term the eventual decertification’s of its teams as the “pass rates.” However, AMK9 was aware that USPS would use the “results of [the] TSA External Quality Control Audits,” irrespective of the terminology used, and thus AMK9 cannot now claim surprise over the use of the TET’s use of the audit pass rates. Although I find that the TET reasonably relied on these pass rates in assessing Evaluation Factor 1, I also confirm that AMK9 waived the right to challenge the TET’s usage of these rates (whether designated “interim” or not) by failing to raise the challenge in a pre-award disagreement.

Additionally, AMK9 challenges the fact that the use of TSA External Quality Control audits unfairly penalizes offerors who operate in a TSA-environment, because those that do not would receive a “free pass” on this assessment. See SDRO Disagreement, p.9. That is simply not the case. For instance, MSA operates in a TSA-environment, and received a strength for having the highest pass rate of all offerors. Use of the pass rate could hardly be considered disparate treatment where MSA’s proposal was rated “Excellent” overall and the highest in Evaluation Factor 1. [REDACTED]

Lastly, even if the pass rate was improperly assigned, which it was not, I still find that TET properly assessed a weakness to AMK9’s proposal [REDACTED]

[REDACTED] The CO requested the TSA External Quality Control audit results from every offeror; [REDACTED]

ii. USPS reasonably assigned AMK9 risk for [REDACTED]

AMK9 also argues that the TET improperly assigned it a weakness in Evaluation Factor 1 for the [REDACTED]. See SDRO Disagreement, pp.13-16. Evaluation Factor 1 explicitly

³³ Postal Service regulations make clear that, “[f]or disagreements that concern alleged improprieties in a solicitation, the contracting officer must receive the disagreement before the time set for the receipt of proposals” 39 CFR 601.107(b); see also *Blue & Gold Fleet L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007).

included: "Offeror's demonstrated responsiveness to the...Roll-out Schedule" in its scope. See Solicitation, Instructions and Evaluation Criteria, p.1. Furthermore, in Amendment 4, the Postal Service indicated that it would consider how many teams the offeror currently has operating in a TSA environment under Evaluation Factor 1 as well. See Amendment 4, Clarification Questions from TET, Question 1(a). I would note that, while the TET's final evaluation report did not identify this weakness in Evaluation Factor 1 [REDACTED] and the TET verbally confirmed to the CO that AMK9's weakness on this point should be incorporated into the final Award Recommendation.

As AMK9's SDRO Disagreement concedes, AMK9's technical proposal provided a solution only addressing its current ability to staff Phase 1 of the 3PK9 program. See SDRO Disagreement, p.14. In fact, as the TET noted in its initial evaluation report, AMK9's original technical proposal [REDACTED]. Rather than find AMK9's proposal non-compliant, as was within the CO's discretion, the CO issued clarification questions from the TET to which AMK9 responded with its Phase 2 and Phase 3 mobilization plan. See SDRO Disagreement, p.14. As the TET noted in its evaluation, AMK9 [REDACTED] Therefore, I find that the TET could have assigned AMK9 a weakness, or the CO could have found AMK9's proposal non-compliant, for AMK9's failure to provide this requisite information along with its technical proposal prior to the deadline for bid submissions.

Ultimately, though, when comparing AMK9's proposed solution to that of its competitors which were proposing a full slate of canine teams ready to support all phases of the 3P-K9 program starting on Day 1, the TET determined that AMK9's proposal was not as competitive due to the [REDACTED]. While, through the CO's efforts, AMK9 was eventually able to provide documentation showing that it could meet the minimum rollout schedule requirements, the USPS planned an aggressive rollout schedule and the COVID-19 pandemic generally could have delayed the recruiting, hiring, and training necessary to meet the schedule. Therefore, the TET reasonably assessed AMK9 with this weakness in Evaluation Factor 1.

B. The TET reasonably assessed AMK9 with several weaknesses for Evaluation Factor 2.

For the second evaluation factor, Capability (Alarm Resolution), the Solicitation stated that offerors' proposals would be evaluated as follows:

The Postal Service will evaluate the offeror's technical approach to meeting the requirements of the SOW. Based upon the material presented in the offeror's proposal, the Postal Service will evaluate the offeror's understanding of the requirements of the SOW and the degree to which the offeror's approach represents a detailed and comprehensive approach in terms of accomplishing the contract requirements.

The following will be considered in reaching an overall rating for this evaluation factor;

- Offeror's Alarm Resolution Plan
- Offeror's Management and Staffing Plan for K9's and Handlers
- Offeror's Quality Assurance and Performance Tracking Plans

The TET assessed numerous, significant weaknesses to AMK9's proposal in its evaluation of Factor 2, including the fact that AMK9 "willfully misrepresented its past capabilities." However, AMK9 has only objected to the following two (2) weaknesses:

- [REDACTED]
- [REDACTED]

I will address each of these weaknesses below.

i. **AMK9's alarm resolution process** [REDACTED]

AMK9 objects to the assessment of a weakness in Evaluation Factor 2 [REDACTED] its proposed technical solution required before an image of a potential explosive [REDACTED] to be submitted for review. See SDRO Disagreement, p.10. The TET evaluation stated the following in support of this weakness:

[REDACTED]

These [REDACTED] were observed during the live demonstration and confirmed in AMK9's technical proposal. See AMK9 Technical Proposal, p.10. The basis for AMK9's objection to this weakness boils down to its mischaracterization of [REDACTED]. See SDRO Disagreement, p.10. However, as AMK9's own proposal demonstrates, and the TET viewed, AMK9's [REDACTED]. See SDRO Disagreement, p.10.

The SOW required that offerors have the ability to "immediately request remote imaging assistance" from bomb technicians. See Solicitation, SOW, Section 3.3. Because of the [REDACTED], the TET reasonably determined that AMK9's resolution process was not as efficient as its competitors due to the fact that [REDACTED]. Therefore, I find that the TET reasonably assigned this weakness to AMK9 for Evaluation Factor 2.

ii. The TET reasonably concluded that AMK9's alarm resolution approach did not provide [REDACTED].

AMK9 also objects to the assessment of a weakness in Evaluation Factor 2 for [REDACTED] in its alarm resolution approach. See SDRO Disagreement, pp.12-13. In its response to clarifying questions from the TET, AMK9 referred several times to its bomb technicians as being [REDACTED] at its command center. See AMK9 Responses to Clarification Questions dated October 25, 2020, Q&A No.6. The TET was justifiably concerned that a bomb technician who is [REDACTED] would have greater risk of non-availability.

Furthermore, AMK9's proposal demonstrated that, in the event the bomb technician was not available, AMK9 had a [REDACTED]. This also justifiably caused the TET concern that the SOW timing requirements may not be met. While AMK9 asserts that its discussion responses clarified these points, I have reviewed AMK9's response to Clarification Question No. 6, and find that the TET reasonably determined that AMK9 did not adequately demonstrate either [REDACTED] here, it was given two opportunities to do so. The TET could reasonably conclude that its technical proposal lacked [REDACTED]. I therefore find that the TET properly assessed this weakness to AMK9 for Evaluation Factor 2.

2. The CO properly investigated and resolved the purported MSA Organization Conflict of Interest.

A. Organizational Conflicts of Interest Generally

Similar to its pre-award disagreement, AMK9 alleges that [REDACTED], an employee of MSA, had an "organizational conflict of interest." See SDRO Disagreement, p.17. Generally, an OCI exists when the nature of the work to be performed under a contract may give an offeror or supplier an unfair competitive advantage and when an offeror or supplier has other interests that may impair its objectivity or ability to render impartial assistance or advice or to provide objectivity in performing the contract work. See USPS Supplying Principles & Practices ("SPs &Ps"), 7-15.2. Thus, there are generally 3 categories of OCIs: 1) Unequal Access to Information; 2) Biased Ground Rules; and 3) Impaired Objectivity.

The Postal Service prohibits these OCIs through Clause 1-7: Organizational Conflicts of Interest, which was incorporated into the Solicitation here. In the event that the CO determines that there may be the potential for an OCI, the CO should "consult with assigned counsel and obtain the assistance of appropriate technical specialists to consider the potential to avoid, neutralize or mitigate the organizational conflict of interest." See SPs & Ps, 7-15.2.1. If, as AMK9 has done here, an offeror objects to the CO's conclusion that an OCI does not exist or can be successfully mitigated, a disappointed offeror must identify "hard facts" to support its objections. See *PAI Corp. v. United States*, 614 F.3d 1347, 1352 (Fed. Cir. 2010). "[A] mere inference or suspicion of an actual or apparent conflict is not enough." *Id.*

B. MSA did not gain an unfair advantage due to unequal access to Solicitation-related Information.

AMK9 asserts that MSA had an Unequal Access to Information OCI because its employee, [REDACTED], "developed the 3PK9 program" and "had access to source selection

requirements information that MSA could use in drafting its proposal, including the Mail Amendment and other information." See SDRO Disagreement, p.17. Since AMK9 asserts, without factual support, that the CO "failed to consider" MSA's purported OCI, I will address the CO's actions in response to the OCI. See SDRO Disagreement, p.16. After AMK9 raised the OCI issue to the CO in a pre-award bid protest, the CO consulted with his assigned counsel concerning the allegations and discussed the Mail Amendment with the USPIS. The Mail Amendment was a document created and controlled by the TSA that regulated entities with the authority to handle mail screening. The Mail Amendment was strictly under the control of the TSA. As the CO had not been provided with the Mail Amendment by TSA or otherwise during the procurement, he attempted to gain insight into what the Mail Amendment was and what type of information was contained in it. Upon review, the CO concluded that the Solicitation's SOW provided the key details that offerors would need in order to compete equally under the Solicitation.

Furthermore, the CO had the USPIS contact TSA in an attempt to obtain release of the Mail Amendment to all offerors. On October 15, 2021, TSA responded that it would "only provide the mail amendment to the CCSF-K9 providers who will be carrying out the procedures of the amendment."⁴ On October 8, 2020, the CO additionally wrote to MSA to obtain details of [REDACTED] involvement at TSA and the pilot program, as discussed above. After this investigation, the CO correctly concluded that MSA did not have an OCI nor an unfair advantage in the competition.

Following the remand by the U.S. Court of Federal Claims, the CO obtained significant additional information that confirmed the conclusion of his first investigation. This included multiple correspondences and telephone interviews with MSA and TSA regarding the role [REDACTED] played at TSA and in the pilot and the scope of the Mail Amendment. [REDACTED] also provided a declaration in support of his statements to the CO. Throughout this extensive investigation, no evidence of an improper OCI was discovered.

Finally, I also reviewed the pilot program Mail Amendment (which I understand was almost identical to the final Mail Amendment), the Postal Service's award recommendation, and the TET's evaluation report, and I cannot find any harm that resulted from any offeror's lack of access to the Mail Amendment. The evaluation team did not use the Mail Amendment to evaluate AMK9's proposal, or the proposal of any other offeror. As discussed further above, the several weaknesses identified in AMK9's proposal were not requirements of the Mail Amendment. Therefore, even if MSA had unequal access to the Mail Amendment, the access provided it no unfair advantage.

AMK9's Disagreement does not offer any facts that would contradict the findings of the CO's thorough analysis. As AMK9 had not shown any "hard facts" in support of its contention that MSA and [REDACTED] had an Unequal Access to Information OCI, and all evidence before me demonstrates that the CO acted reasonably in identifying and determining that an OCI did not exist for the 3P-K9 Solicitation, I must reject AMK9's OCI challenge to the award.

3. USPS conducted a reasonable tradeoff analysis and AMK9 suffered no prejudice.

For its final challenge, AMK9 asserts that the USPS did not conduct a reasonable tradeoff analysis. See SDRO Disagreement, pp. 17-18. However, as the foregoing demonstrates, the TET

⁴ AMK9 additionally asserts that the TSA's decision to prohibit the Postal Service from sharing the Mail Amendment with offerors necessarily means that the CO believed that the Mail Amendment provided prospective offerors with a competitive advantage. See SDRO Disagreement, p.17. I simply do not follow this logic.

conducted a thorough and well-reasoned analysis of AMK9's technical proposal and reasonably concluded that the several weaknesses therein resulted in AMK9 being [REDACTED]. The TET assessed weaknesses to AMK9 for each evaluation factor, and several significant weaknesses in Evaluation Factor 2 (Alarm Resolution). In fact, as noted above, AMK9's pre-award disagreement to the SDRO admitted that AMK9 [REDACTED]. Furthermore, even assuming that these limited weaknesses that AMK9 challenged were improperly assessed and removed from the TET's evaluation, AMK9 still had several other significant weaknesses in its technical proposal, including the TET's [REDACTED], which reasonably could have resulted in it being technically ranked lower than other offerors.

As technical factors were considered more important than price in the best value determination, I find that the CO could have reasonably concluded that AMK9 did not provide the best value to the Postal Service and [REDACTED]. I also find that the CO's award of the contract to MSA was reasonable where MSA's technical proposal was deemed Excellent by the TET and was ranked 1st overall – well-above AMK9, who was [REDACTED]. Therefore, I also find that AMK9 suffered no prejudice from the CO's decision to award the 3P-K9 Contract to MSA.

4. Stay of Award

AMK9's Disagreement also requests the additional relief of a stay of performance of the Contract during the pendency of its Disagreement. See SDRO Disagreement, p.18. However, a stay of performance is not warranted in this instance. As demonstrated herein, the Postal Service performed a thorough and well-reasoned analysis of all proposals and reasonably determined that an award of the Contract to AMK9 would not present the best value to the Postal Service. AMK9 was not able to raise any valid objections to the TET's assessment of any weaknesses that resulted in it being [REDACTED]. Furthermore, the Postal Service thoroughly evaluated the purported OCI related to MSA and properly concluded that no OCI existed. Therefore, AMK9's request for a stay of performance of the Contract is denied.

SDRO Decision

I have reviewed the matter and conclude that AMK9 has not raised any valid challenges to the Award. The Postal Service properly evaluated AMK9's proposal and reasonably determined that AMK9 did not provide the best value for the Contract. The CO also properly investigated AMK9's concerns regarding a potential OCI and concluded that the awardee did not have an OCI. Therefore, it is my decision to deny AMK9's business disagreement. In accordance with 39 C.F.R. § 601.108(g), this is my final and binding resolution of this matter.

Sincerely,

E-SIGNED by Nicholas.G Faiola
on 2021-04-21 15:01:23 CDT

Nicholas Faiola
Supplier Disagreement Resolution Official

cc: Jeremy Baker, Contracting Officer