

II. Redflex submitted a responsive offer and was a responsible offeror.

Each party has expended considerable effort to convince me its interpretation of the FCC laws and regulations pertaining to certification of radar is correct and the other's is wrong. Each party also seeks to convince me that certain radar devices meet all legal requirements while others do not. I find no need to resolve the technical dispute between ATS and Redflex. Additionally, many of ATS' protest allegations surround performance of contract L7-027 which is not the subject of this protest. Those issues were raised in a separate protest filed by ATS regarding L7-027. A Procurement Officer's Decision was issued in response to that protest.

The issues here are: 1) Whether the proposal failed in any material respect to comply with the RFP requirements (responsiveness); and 2) Whether Redflex has the capability to perform the contract requirements and the integrity and reliability to assure good faith performance (responsibility). The questions concerning the FCC certification of individual components is only relevant insofar as it would impact these two issues. A detailed technical analysis is not necessary to make the determinations that are required to decide the protest.

A) Timeliness of Protest

Redflex alleges that ATS' protest regarding responsiveness and responsibility as it relates to past performance is untimely because it knew, or should have known, prior to August 4, 2008, of the grounds for a protest. I do not agree with Redflex' position because the ATS protest is related to the contents of Redflex' proposal which ATS could not have known until after the file was made available on July 24, 2008. Therefore, ATS' protest on this issue is timely.

B) Redflex was a responsive offeror.

Under A.R.S. §41-2531(15), a responsive bidder is defined as follows:

"Responsive bidder means a person who submits a bid which conforms in all material respects to the invitation for bids."

The offer submitted by Redflex conformed to the RFP. ATS' only evidence to support its position is an allegation that Redflex cannot obtain the equipment it proposed. (*See Reply, Page 6.*) To the contrary, neither Redflex nor ATS specified exact manufacturer or model numbers for each piece of equipment to be deployed as part of their respective mobile and fixed systems. Instead, each proposed a "trademarked" system, "Axxis" for ATS and "Redflexred" and Redflexspeed" for Redflex.

Similarly, ATS stated in its proposal that it would obtain certification of its system if awarded the contract. (*See ATS Proposal, Page 25.*) Therefore, using ATS' argument, ATS itself

would not have been deemed responsive. ATS cannot merely argue that the DPS should determine Redflex non-responsive based solely on the unfounded speculation that the Redflex system will use non-FCC certified equipment. Since no equipment, inclusive of Radar units, has yet been deployed under contract L8-022, ATS' argument cannot be supported. Redflex' future performance is a contract administration matter, not a responsiveness issue.¹

ATS has not proven that Redflex failed to provide DPS with a responsive offer to the RFP. No deficiency in the Redflex or ATS proposal was noted by DPS during evaluation, nor has my review indicated that Redflex was non-responsive. Therefore, the argument that Redflex was non-responsive to this RFP is unfounded.

C) Redflex was a responsible offeror.

Under A.R.S. §41-2531(14), a responsible bidder or offeror is defined as follows:

"Responsible bidder or offeror means a person who has the capability to perform the contract requirements and the integrity and reliability which will assure good faith performance."

ATS alleges that Redflex was not responsible at the time of contract L8-022 because: 1) It had and will use equipment that is not FCC certified; 2) It misled DPS by saying its equipment was IACP certified; 3) It was not responsible because Redflex was not aware its equipment needed to be FCC certified; and 4) Redflex' lack of FCC certified equipment placed liability on the agency.

A determination of responsibility is based on a number of factors as outlined in R2-7-B313. A determination of responsibility does not indicate that an offeror is perfect. ATS argues that the contract administration issue addressed in DPS contract L7-027 with Redflex makes Redflex non-responsive on contract L8-022 and future contracts. ATS has only speculated that Redflex "*will*" (emphasis added) be providing a radar unit system that is not FCC certified, thereby violating federal law. (See *Protest, Page 5.*) The evaluation committee correctly determined that Redflex is responsible.

Additionally, ATS had its own fair share of "negative" or less than positive reference comments made by other Arizona entities (See *Evaluation Report, Section 6.3.3*). DPS did not utilize these poor references to deem ATS non-responsive to this RFP. If ATS believes Redflex' past contract performance issues on L07-027 should have deemed them non-responsive, then by their own interpretation, DPS should have deemed ATS equally non-responsive to this RFP based on multiple negative reference comments received by the agency based on ATS' performance issues on other contracts.² Were DPS to use the standard that ATS contends should

¹ Since the AGD-340 is now properly certified by the FCC, this allegation is moot.

² Some examples include Mesa Police Department stating that ATS did not initially identify driver image quality problems which necessitated "standing" biweekly meetings between ATS and Mesa officials until resolution was put into place, along with ATS staff transposing numbers during the vendor review process. Another ATS customer, Scottsdale Police Department, found out as a result of a malfunctioning system that ATS was not meeting the "Speedboarding" accuracy verification schedule it agreed to in its contract, plus ATS was unaware until Scottsdale

be used, any offeror with past performance issues would be deemed non-responsible, thus rendering even ATS a non-responsible offeror in this solicitation process. While past performance is one of several considerations reviewed as part of determining an offeror's responsibility, Redflex' performance under L7-027 does not render it non-responsible for purposes of this award.

As to the contention that Redflex intentionally misled DPS on the FCC certification requirement, Redflex' Response stated that it was an oversight that its equipment was not FCC certified. ATS' allegation has not been substantiated. (*See Response, Exhibit 2.*) I find no reason to believe Redflex intended to deceive DPS on contract L7-027.

ATS further contends Redflex will not be able to acquire a legal device while Redflex assures DPS that it will. (*See Reply, Page 5-6 and Response, Page 6.*) ATS' arguments as to future performance amount to speculation and such issues will be addressed through contract administration. ATS' arguments are without merit and therefore denied.

ATS also argues that if Redflex was unaware it needed to have FCC certified equipment for this contract, then DPS should consider Redflex "unreliable" because it should have known of this requirement given its long-term experience in the photo enforcement industry. It would not have been unreasonable for Redflex to assume that a manufacturer would have obtained necessary authorizations. Regardless of whether Redflex knew of the FCC certification issues at the time it submitted its offer, once it became aware, it expeditiously agreed to obtain FCC certification on equipment to be used under L7-027. Therefore, this issue is now moot in addition to not affecting responsibility.

ATS also argues that DPS will incur liability because Redflex' equipment used under L7-027 lacked FCC certification and that citations issued by Redflex with non-FCC certified equipment will "likely be challenged successfully in Court." The FCC certification is not related to the accuracy or reliability of the speed measurement performed by the equipment, but rather is a certification that the equipment in use does not interfere with other radio frequency devices. In its August 7, 2008, letter to DPS regarding contract L7-027, Redflex provided DPS with copies of Certificates of Calibration from R.H.F., Inc. which it states were for speed enforcement vehicles and external tuning fork speed verification tests that were being performed before and after each deployment, thereby establishing that the equipment was fully functional and accurate throughout its use. (*See Response, Exhibit 1.*) No equipment has yet to be deployed under L8-022, and Redflex now has FCC certified equipment it states will be used to provide services under L8-022. ATS' argument that DPS will incur liability is speculative and without merit. I conclude that Redflex is and was a responsible offeror.

II. New legislation did not substantially change contract requirements

A) Timeliness of protest

notified them of an equipment malfunction which resulted in citations being issued in error from one of the intersection systems. (*See Evaluation Report, Section 6.3.3.*)