

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

ACS STATE AND LOCAL SOLUTIONS, INC)
) CAB No. P-0740
Under RFP No: POFA-2006-R-0066)

For the Protester, ACS State and Local Solutions, Inc.: William W. Thompson, Esq., Michael A. Branca, Esq., Peckar, Abramson, Bastianelli & Kelley. For the Intervenor, Richard J. Conway, Esq., Robert J. Moss, Esq., Dickstein Shapiro, LLP. For the District of Columbia Government: Howard Schwartz, Esq., Jon Kulish, Esq., Assistant Attorneys General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

Filing ID 14390514

ACS State and Local Solutions, Inc., (“ACS”) filed a pre-award protest and a supplemental protest of a contract award to American Traffic Solutions, Inc. (“ATS”) to provide support, maintenance, and improvements to the District’s existing Automated Traffic Safety Enforcement Systems (“ATSE”) which consist of red light cameras, and fixed and mobile speed radar camera systems. ACS alleges that the District failed to properly evaluate its proposal and ATS’s proposal, that ACS was the only offeror that could meet the requirements of the solicitation’s scope of work, that ATS should not have received a higher technical evaluation than ACS who was the incumbent contractor, that the District’s technical evaluation was unreasonable and arbitrary and not in accordance with the evaluation criteria set forth in the solicitation, and that the District failed to properly evaluate the price evaluation factor. The District argues that the protests are untimely, that the District properly evaluated the proposals under both the technical and price criteria, and that the contracting officer correctly determined that ATS’s higher priced proposal was the most advantageous to the District. We conclude that the protests were timely filed and that the contracting officer violated no law, regulation, or terms of the solicitation in awarding the contract to ATS. Accordingly, we deny ACS’s protests.

BACKGROUND

The District has operated an automated traffic safety enforcement program, using contracted services since 1999, and seeks to continue the current program and expand as new technologies and program initiatives become available. The District's Office of Contracting and Procurement issued the Request for Proposals ("RFP") on February 28, 2006, requiring the prospective contractor to provide support and maintenance for the existing ATSE. The RFP set forth a contract base term of two years with the possibility of three one-year options. The RFP describes the ATSE system, but the RFP does not indicate the manufacturer of the hardware used in that system. According to the protest, the current ATSE equipment was manufactured by a company named Gatsometer B.V. ("Gatsometer"), based in the Netherlands. The RFP sets forth the performance goals of the ATSE system, and the minimum standards for hardware availability and usage. The RFP also set forth the functional requirements for all of the hardware and software in the ATSE.

One component of the RFP required fixed-price proposals for the operation, support, and maintenance of the existing ATSE system, and another component invited offerors to submit proposals for system process improvements, including a “conversion plan for any existing equipment to more current technology for automated traffic safety enforcement” (RFP C.1.1.1 – C.1.1.2), under a cost-reimbursable pricing structure.

The RFP in section C.3.7 contemplated under the conversion plan the installation of new red light cameras, fixed radar units, and new mobile units with the agreement of the District. The RFP required the contractor to agree with the District on the cost of the new installation prior to performing work on the new installation. The RFP also set forth requirements for the printing of both red light and speeding violations, as well as requirements for transmitting data between the contractor and the District.

The District substantially revised the technical portion of the original RFP through Amendment No. A0007, issued May 5, 2006. The amended RFP did not change introductory sections B.1 and B.2 which provide:

B.1 The Government of the District of Columbia, Office of Contracting and Procurement, on behalf of Metropolitan Police Department (MPD), is seeking [offerors] to provide support and maintenance for the existing Automated Traffic Safety Enforcement (ATSE) System. Also, [offerors] shall, in their respective proposals, make recommendations to the District for process improvements.

B.2 The District contemplates award of a multiyear contract with a base period of two (2) years from date of award and three one-year options, and has two separate components: (a) a firm fixed price component with payment based on a monthly fixed rate, and (b) a cost reimbursement component.

The remainder of section B contains the price schedules for the various contract line items:

B.3 PRICE SCHEDULE FIRM-FIXED PRICE-Based Period

	<u>Item Description</u>	<u>Mthly fixed rate</u>	<u>Total/24mts</u>
CLIN 0001	Provide all Resources to Operate the ATSE System (Reference: Sec.C.3)	_____	_____

B.4 COST SCHEDULE-COST REIMBURSEMENT FOR DIRECT COST AS FOLLOWS:

	<u>Item Description</u>	<u>Not-to-exceed Total/24mts</u>
CLIN 0002	Equipment Repair and/or Replace (Reference: Sec.C.3.1.2.11)	_____
CLIN 0003	Public Information & Education Campaign (Reference: Sec.C.3.10.2)	_____

CLIN 0004 V Street Facility Lease Expense
(Reference: Sec.C.3.18)

Total Not-to-Exceed Amount

Section C of the RFP contains the statement of work for the support and maintenance of the ATSE system. The reference in CLIN 2 to “Equipment Repair and/or Replace” refers to section C.3.1.2.11, which makes clear that the contractor is to repair *or replace* inoperable ATSE equipment. Although ACS mentions only the “repair” aspect (ACS’s Response to Agency Report and Supplemental Protest, at 6), the solicitation nowhere limits the awardee only to repairing the existing equipment. Replacement is an option and the solicitation does not limit replacement to a specific manufacturer of the equipment components. A fair reading of the solicitation shows that the contractor would be required to maintain an operable system and meet all of the functional requirements of the equipment and system, regardless of the manufacturer. The requirement to repair or replace inoperable equipment can also be found in other sections, including sections C.3.2.10 (mobile radar units) and C.3.3.11 (red light camera units). Some relevant portions of section C read as follows:

SECTION C: SPECIFICATION/WORK STATEMENT

C.1 SCOPE:

C.1.1 The Government of the District of Columbia Office of Contracting and Procurement, on behalf of the Metropolitan Police Department (MPD), is seeking offerors to provide support and maintenance for the existing Automated Traffic Safety Enforcement (ATSE) System. Also, offerors shall, in their respective proposal, make recommendations to the District for process improvements.

C.1.1.1 Offerors are invited to submit a proposal that will provide support and maintenance for the existing ATSE system equipment. This RFP provides offerors with the relevant characteristics of the existing equipment, and the service and maintenance requirements for the ATSE system. This information will enable all offerors to respond in a format that makes for a fair comparison and ensures that the proposed solution meets the current system requirements.

C.1.1.2 Offerors shall make recommendations in their respective proposals based upon their expertise, for process improvements and best practices that could be implemented by the District in support of its ATSE system. To that end, offerors are requested to submit a conversion plan for any existing equipment to more current technology for automated traffic safety enforcement. Offerors are encouraged to provide alternatives and options that may create operational efficiencies, cost savings, service improvements, or enforcement improvements by the District. All suggestions and alternative solutions provided in the proposal will be considered, by the District, during proposal evaluation, but only after the offeror has first responded with a proposal to provide the ATSE system in accordance with the requirements set forth herein. Separate pricing must be provided by the offeror for this part of the proposal in accordance with Section L.22.1 through L.22.3.

c.2 BACKGROUND

C.2.1 The District of Columbia (hereinafter “the District”), Metropolitan Police Department (MPD), seeks to continue operating an automated Traffic Safety Enforcement (ATSE) System, which will deter motorists from running the red light and from exceeding the posted speed limits, and when unsuccessful in deterring, record and cite the registered owners of motor vehicles which fail to comply with traffic light signals and posted speed limits. The District has operated an automated traffic safety enforcement program, using contracted services since 1999, and seeks to continue the current program and expand as new technologies and program initiatives become available.

C.2.1.1 The ATSE system includes all automated red light and radar equipment system required for the enforcement of red light running and speeding violations in the District of Columbia. The ATSE system shall send images of red light running and speeding violations, and the actual violation information to a processing application for the generation of a citation. The citation will be validated by the District, for issuance of a ticket.

C.3 REQUIREMENTS

C.3.1 The contractor shall operate, maintain and service existing hardware and system which include, at a minimum all computer interfaces, software, cameras, flash units, violation detection devices (i.e., loops), and wirings.

C.3.1.2.11 The contractor shall be responsible for routine and preventive maintenance of the ten (10) fixed pole radar units. Inoperable equipment shall be repaired or replaced by the contractor, at contractor expense, within forty-eight (48) hours after the District determines the equipment to be inoperable. Should it be determined that the damage is caused due to negligence by the District’s staff or vehicular accidents, the cost for repair or replacement shall be agreed upon as a reimbursable expense to the contractor.

C.3.2 MOBILE RADAR UNITS

The District’s ATSE system currently includes a total of twelve (12) mobile radar units. Ten (10) mobile radar units are police interceptors and two (2) units are vans. Six (6) of the police interceptors are equipped with cameras that take images using 35mm film, and four (4) of the police interceptors and the two (2) van are equipped with digital cameras.

C.3.2.10 The contractor shall be responsible for routine and preventive maintenance of the mobile radar equipment. Inoperable equipment (as determined by the District) shall be repaired or replaced by the next shift change by the contractor, at contractor’s expense. Should it be determined that damage is caused due to negligence by the District’s staff or vehicular accidents, the cost for repair or replacement shall be agreed upon by the District, and submitted by the contractor as a reimbursable expense.

C.3.3 RED LIGHT CAMERA UNITS

The District's ATSE system currently includes forty-nine (49) red light camera units. Thirty-nine (39) of the units take images using 35mm film, and ten (10) takes images using a digital camera unit.

- C.3.3.11 The contractor shall be responsible for routine and preventive maintenance of the red light equipment. Inoperable equipment shall be repaired or replaced by the contractor, at contractor's expense within forty-eight (48) hours after the District determines the equipment to be inoperable. Should it be determined that damage is caused due to negligence by the District's staff or vehicular accidents, the cost for repair or replacement shall be agree upon by the District, and submitted by the contractor as a reimbursable expense.

Section G of the solicitation provides additional information concerning the requirements and confirms that the contractor is to repair *or replace* inoperable ATSE equipment:

- G9.5.2 There are a total of Seventy-one (71) camera units in the red light camera, mobile radar unit and fixed pole radar unit. Twenty-Five (25) are digital camera units and forty-six (46) take images using 35mm film.

Of the twenty-five (25) digital camera units in the system, Nine (9) are on fixed pole radar units, Six (6) are on mobile radar units (which consist of four (4) police interceptors and two (2) vans, and Ten (10) are for the red light camera units.

a. If a digital camera unit fails to operate for a period of longer than two (2) calendar days due to the District's determination of contractor causes, the monthly invoice will be reduced by the District, by an amount calculated by dividing the monthly fee by the number of camera units being serviced from the third calendar day and each day thereafter until the camera is replaced or becomes operational.

b. If the forty-six (46) cameras which take images using 35mm film fails to operate for a period of longer than two (2) calendar days due to the District's determination of contractor causes, the monthly invoice will be reduced by the District, by an amount calculated by dividing the monthly fee by the number of camera units being serviced from the third calendar day and each day thereafter until the camera is replaced or becomes operational.

- G9.5.3 If any other components of the camera system such as a pole, (Ref: c.3.3.1) camera housing unit, (Ref: C.3.3.2), flash unit, (Ref: c.3.3.4), digital induction loop detectors, (Ref: C.3.3.5), and the electrical connections (Ref: C.3.3.6) fail to operate for any reason determined by the District to be within the contractor's control, for a period longer than fourteen (14) calendar days, the monthly invoice shall be reduced on a pro-rata basis on the fifteenth calendar day the unit is out of service and every calendar day thereafter until the entire camera unit is replaced or operational. (Ref: G.9.5.2 for calculation example).

The District specified the content it expected in the technical proposals which would be the basis for the evaluations of each offeror's technical approach. ACS alleges errors by the District in evaluating its project plan and downgrading its score because of deficiencies identified by the contracting officer and the technical panel regarding its plan. Section L provides in relevant part:

L.25.1 TECHNICAL PROPOSAL

L.25.1.1 Technical Approach

(a) Offeror's shall provide a Project Plan in the form of a bar chart that details how it proposes to meet all technical requirements as stated in Sections C.3 through C.16, including a Work Breakdown Structure, staff assignments, start and finish dates, and milestones. Offerors shall also provide a narrative or graphic presentation tied to the Project Plan that fully describes each milestone and details how the milestones will be met, and interdependencies with other milestones, risk management plan and contingency plan to ensure implementation of automated traffic safety enforcement services by September 1, 2006.

(b) Offerors shall provide a Management Plan detailing its organization structure and project organization, where the Offeror will be located, financial and accounting controls, quality assurance plan, production control plan, and the notice management plan.

(i) The Management Plan should describe the means by which Offerors will control and monitor work to ensure that system hardware maintained for users remains operational during regular working hours, the user experience with system applications remains positive, user requests are answered timely and successfully, the automated traffic safety enforcement system and its ancillary applications remain fully operational during regular working hours, and system modifications are made in accordance with user requirements and required timeframe.

(ii) The Management Plan shall describe the means by which requests for system changes or assigned tasks or work orders will be received and the means by which they will be monitored and tracked.

(iii) Offerors proposals shall be responsive to the requirements and be sufficiently clear and efficient and submitted in a timely manner. Offerors should not simply repeat RFP requirements but rather detail fully how the Offeror's proposed system and services, with necessary modifications will meet the stated requirements.

Technical factors included in Amendment No. A0007 are substantially more detailed than the generic technical factors found in the original solicitation:

M.4.1 TECHNICAL FACTORS

M.4.1.1 TECHNICAL APPROACH 0-40 POINTS

M.4.1.1.1 Offeror's proposal will be ranked on its ability to demonstrate how its proposed Project Plan will meet all technical requirements. Offeror has presented a detailed Project Plan, including a work structure breakdown, staffing plan and milestone schedule that demonstrates the Offeror's ability to meet the requirements stated in Sections C. **(0-20 points)**

M.4.1.1.2 Offeror's proposal will be evaluated and ranked on the quality of their Management Plan and how the plan details its organization structure, project organization and other required information under Section C. **(0-5 points)**

M.4.1.1.3 Offeror's proposal will be evaluated and ranked on the comprehensiveness and quality of its Management Plan. Offeror has provided an organization structure, project organization, and quality control plan detailing how the Offeror will effectively and efficiently control and monitor ongoing operation of the automated traffic safety enforcement support services. **(0-15 points)**

M.4.1.2 OFFEROR'S EXPERIENCE AND PAST PERFORMANCE 0-15POINTS

M.4.1.2.1 Past experience in providing automated traffic safety enforcement systems

Offeror's proposal will be evaluated and ranked on their ability to demonstrate its past experience providing automated traffic safety enforcement system processing systems similar to that defined in Section C to include imaging (Please reference Sections C.3.4.1), reporting (Please reference Section F), and interface with other systems (Please reference Section C.3.12.1). **(0-5 points)**

M.4.1.2.2 Past Performance

Offerors' will be evaluated and ranked on the quality of its past performance from responses obtained from its references, and its experience in providing similar services within a timeline similar to the timeline required in this RFP. **(0-10 points)**

M.4.1.3 QUALITY AND RETENTION OF PERSONNEL 0-10 POINTS

M.4.1.3.1 Experience with automated traffic safety enforcement system and managing high-volume, production-oriented operations on a similar basis as described in this RFP.

Offeror's proposal will be evaluated and ranked based on its ability to demonstrate its key personnel and management experience with automated traffic safety enforcement system services or related experience. Offeror's proposals will also be evaluated and ranked on the level of experience in managing high-volume, production-oriented operations and extent of project management experience of key personnel including knowledge of system applications and services. **(0-5 points)**

M.4.1.3.2 Ability to retain employees

Offeror's proposal will be evaluated and ranked on their ability to demonstrate the retainage of employees, ensure low turnover and ability to retain qualified personnel. **(0-5 points)**

M.4.1.4 SYSTEMS PERFORMANCE IMPROVEMENT

0-5 POINTS

Offeror's proposal will be evaluated and ranked on their ability to demonstrate operational improvements and cost savings derived from the systems enhancements to the exiting automated traffic safety enforcement system.

In a meeting on March 13, 2006, ACS informed the District that ACS was the exclusive agent for the existing Gatsometer ATSE equipment, and that the District would need to protect Gatsometer's proprietary information, intellectual property, and trade secrets, which included Gatsometer's software, instructions, and operations manuals. According to the protest, the District informed the offerors that the District had no control over the software for the system. By Amendment A0010 dated May 22, 2006, the District informed prospective offerors that the contractor would be required to maintain the ATSE system, in spite of any exclusive distributorship that ACS may have with Gatsometer. According to ACS, Gatsometer informed the District in May, 2006, that ACS was the exclusive partner of Gatsometer in the United States and that their relationship would be continuing. (Protest, Ex. 5). Gatsometer further advised the District that it would not support any contractors other than ACS with "spare parts, training, intellectual property, equipment manuals or software." (*Id.*). The District's contract specialist, Darlene Harkins, had a telephone conversation with Andrew Noble of Gatsometer on May 19, 2006, in which Noble advised Harkins that Gatsometer would consider agreeing to work with a contractor other than ACS for the maintenance of the District's ATSE system so long as the new contractor was not a manufacturer of competing camera equipment. (AR Exs. 34; 33, ¶ 10). In a subsequent telephone conversation with Noble on July 24, 2006, Harkins attempted to confirm Gatsometer's willingness to deal with a contractor other than ACS but Harkins states that Noble this time said Gatsometer would not deal with any contractor but ACS as its United States representative. (AR Ex. 34).

ATS, ACS, and two other offerors, submitted proposals to the District by the May 24, 2006, proposal due date. ACS points out that its proposal details how it will maintain the existing ATSE equipment and that it is uniquely positioned to do the work, being both the incumbent contractor and the only firm in the United States authorized by Gatsometer (the cameras are actually manufactured by a firm called Robot), to maintain Gatsometer equipment.

ATS proposed not only to maintain the existing ATSE system but also to upgrade the ATSE equipment by initially replacing the Gatsometer software with its own software, and replacing 5 ATSE systems with its own Axis systems. ATS also proposed as part of its process improvements to replace all of the existing Gatsometer equipment with its own Axis equipment.

The contracting officer assigned a technical evaluation panel with ATSE technical expertise to review the proposals, score them, and transmit a consensus evaluation to her based on the technical criteria set forth in the RFP. The technical panel conducted its evaluation and submitted a consensus report to the contracting officer by letter dated June 5, 2006. The panel concluded that ATS had the best technical proposal but that ACS was rated only 4 points lower than ATS. (AR Ex. 15). The contracting officer conducted her own independent assessment of the proposals, rating ATS's technical proposal higher than ACS's proposal. (AR Exs. 16, 17, 24). Discussions were held on June 12 and June 14 with ACS and ATS followed by a request for best and final offers (BAFOs) which were submitted on June 15 and 16, 2006. (AR Ex. 24). By letter of June 20, 2006, the technical evaluation panel submitted to the contracting officer its consensus evaluation report regarding the proposals as

supplemented by the BAFOs. (AR Exs. 23, 15). The panel raised ATS's consensus ratings for technical approach, experience and past performance, and quality and retention of personnel. The panel did not change its consensus rating for ACS. (AR Exs. 15, 23, 24). The contracting officer's independent assessment of the BAFOs resulted in an increase of 5 points in her rating of ATS under the quality and retention of personnel factor but no change in her rating of the ACS proposal. (AR Exs. 16, 17, 24). After evaluating the proposals as supplemented by the BAFOs, the contracting officer's technical rating summary shows ATS with an 8 point advantage for technical approach, while ATS and ACS had equal numerical ratings for experience and past performance, quality and retention of personnel, and system performance improvements. (AR Ex. 24). The contracting officer submitted affidavits explaining the evaluation and selection process, and her assessment that ATS had the better overall offer, considering the technical and price factors. (AR Exs. 33, 40). We have studied her analysis underlying her determination that ATS can perform the services required by the RFP, and we find that her determination is neither unreasonable nor arbitrary based on a review of the entire record.

The contracting officer prepared a Business Clearance Memorandum, dated June 29, 2006, recommending award of the contract to ATS, memorializing her evaluation of the proposals and her selection decision. She then submitted the contract package to the City Council for approval because the value of the contract exceeded \$1,000,000. The Council approved award of the contract to ATS on July 11, 2006. ACS filed its initial protest on July 25, 2006, alleging technical and price evaluation errors. On August 15, 2006, the District filed a motion to dismiss the protest on the ground that the protester really was asserting a solicitation impropriety and thus the protest was untimely being filed after the closing date for proposals. ACS opposed the motion on the ground that its protest raised issues concerning the evaluation and selection, rather than the terms of the solicitation itself. The Board orally denied the motion to dismiss and directed the District to file its Agency Report addressing the merits. The District filed its Agency Report on November 9, 2006. ACS filed comments on the Agency Report and a supplemental protest on November 22, 2006. ACS states that it based its supplemental protest on facts included in the District's Agency Report and accompanying exhibits. The District responded to the supplemental protest on December 12, 2006. ACS replied to the District's response on December 21, 2006. By Determination and Findings to Proceed ("D&F") dated December 13, 2006, the District determined that it had a compelling need to proceed with contract award, despite the protest. On December 20, 2006, the Chief Procurement Officer ("CPO") signed the Determination and Findings to Proceed with Award pending decision on the protest. On December 27, 2006, ACS timely challenged the D&F to proceed, alleging that the D&F does not provide substantial evidence that supports award to ATS. In addition, ACS asserts that the District has failed to meet its burden of establishing that the award to ATS will further an urgent or compelling need of the District. The District filed its reply to ACS's challenge on January 3, 2007.

DISCUSSION

A. The District's Motion to Dismiss for Untimeliness

The District asserts that ACS knew the grounds of its protests before the proposal due date of May 24, 2006. According to the District, ACS was required to file its protest when the contracting officer refused to amend the solicitation to require the District to award a sole source contract to ACS. Therefore, according to the District, the protest is untimely because it was filed more than 10 days after ACS knew, or should have known, of the grounds for its protest. However, we think the District has

not properly characterized ACS's grounds for protest. ACS simply does not argue in its protest that the solicitation should have been a sole source award to it. Rather, ACS argues that because of its incumbency and its being the exclusive agent for Gatsometer in the United States, it should have received the highest technical evaluation, and thus should have been awarded the contract. Further, there is no evidence that ACS learned of the proposed award to ATS before it received the notice of award on July 11, 2006.

The District argues that ACS's contention that the District improperly evaluated the ATS proposal to the detriment of ACS, is untimely because ACS failed to allege a specific date by which it learned of the facts underlying the allegation, and failed to establish the date and circumstances of its coming to know both about the allegedly improper rating of ATS for the Experience and Past Performance factor and about the adverse action by the District. The protest record adequately demonstrates that ACS first learned of the basis for this protest ground on July 11, 2006. Accordingly, we conclude that ACS timely filed its protests.

B. ACS's Challenge to the Determination to Proceed

The contract is for support and maintenance of the existing ATSE. In the D&F, the District asserts that providing for the enforcement of traffic speed regulations is a compelling and urgent requirement of the District government. According to the District, because the current contract could not be extended beyond January 5, 2007, and because the District could not allow the ATSE system to become idle (stating that the system has resulted not only in a reduction of the number of red light violations, but also a significant reduction in the number of deaths associated with motorists illegally entering protected intersections), the CPO determined that it is imperative that the contract be awarded to provide continual operations for the ATSE system. We deny the motion challenging the determination to proceed because the CPO sets forth a compelling need to continue with ATSE services.

C. ACS's Arguments that the District's Selection of ATS was Arbitrary and Unreasonable and Contrary to the Terms of the Solicitation

We now address, pursuant to D.C. Code § 2-309.03(a)(1), the merits of the protest grounds raised by ACS. In the original protest, ACS argues that an award to any offeror other than ACS would violate applicable statutes and regulations as well as the terms of the solicitation. The following introduction from ACS's supplemental protest fairly summarizes its contentions:

The cornerstone of the RFP was the requirement that offerors must demonstrate their ability to support and maintain the existing ATSE. The existing ATSE is the proprietary hardware and software of Gatsometer, and ACS, as the incumbent contractor, is the exclusive licensee of Gatsometer's products in North America. The RFP further provided that, if an offeror first demonstrated its capability to support and maintain the existing ATSE, then and only then would the District consider proposed "process improvements," which were worth up to five points in the overall evaluation scheme (out of total possible score of 112).

The record shows beyond any doubt that the District's technical team and the

Contracting Officer improperly elevated proposed process improvements from a minor potential factor under the RFP's evaluation scheme to the overarching factor in the actual evaluation of proposals. Instead of assigning ATS a low technical score that reflected its clear inability to meet the RFP's requirements to support and maintain the existing ATSE and assigning ACS a correspondingly higher technical score that reflected its demonstrated ability to meet those same requirements, ATS was awarded a higher score because of its promised process improvements. It is simply impossible to reconcile the District's evaluation of the proposals with the RFP's requirements and evaluation criteria.

This fundamental flaw in the procurement process permeated all aspects of the District's evaluation. For example, the RFP assigned the majority of the technical merit points to an offeror's proposal to support and maintain the existing equipment. ACS's vast experience with the Gatsometer equipment, as compared with ATS's complete inexperience with the Gatsometer equipment, reasonably should have resulted in ACS receiving a higher score. However, the District's improper application of the RFP's evaluation criteria resulted in ATS receiving the higher score. Similarly, the administrative record demonstrates that ACS's initially high scores for technical merit were downgraded when the process improvement evaluation factor was improperly injected into the evaluation. Further, whereas the District selected ATS based on its process improvements, the District failed to consider the cost of these improvements in its price and cost analyses. Because of the substantial cost of ATS's process improvements, the true cost to the District of award to ATS was never considered.

(Supplemental Protest, at 2-3). We address in order ACS's refined protest contentions, found in its supplemental protest.

1. Technical Evaluation of ACS's and ATS's Proposals

ACS alleges that the technical evaluations and scoring of ACS's and ATS's proposals were arbitrary and unreasonable based on ACS's vast superiority over ATS in its experience and ability to support and maintain the existing ATSE equipment. ACS repeatedly emphasizes that it is the incumbent contractor and the exclusive representative of Gatsometer's products in North America and thus is the only contractor capable of maintaining the existing ATSE equipment. ACS believes that it was unreasonable for the contracting officer and technical evaluation panel to rate ATS higher by 8 points in the technical approach evaluation factor unless ATS's process improvements were improperly considered under the technical approach factor.

We have carefully reviewed the record and conclude that the contracting officer did not violate law or the terms of the solicitation in rating ATS superior overall to ACS in the technical evaluation factors, including technical approach. The evaluation record prepared by the contracting officer and the technical panel might have been more specific and detailed, but, overall we are satisfied from our review of the record that the contracting officer properly conducted her own independent analysis of the proposals, and we see no unreasonable or arbitrary conduct in her determinations on the technical or cost merits of the competing proposals.

The contracting officer noted in her Business Clearance Memorandum, which memorializes her evaluation and selection determinations, the following ATS proposal strengths: a well-documented response to the technical requirements, the details of the project plan were clear and well presented, extensive experience in automated traffic safety enforcement operations, experience in managing red light camera programs of comparable size and complexity, a readable Gantt chart, a comparable processing plant, contact information regarding other radar contracts, and an acceptable employee retention plan. The contracting officer noted ACS's strengths as follows: currently providing the services to the District as well as to other jurisdictions, responded to the solicitation requirements, submitted a Gantt chart, provided "information on how the equipment operation and maintenance would operate at new contract conception," and offered better process improvements. The following ACS weaknesses were noted: project plan was not detailed, did not demonstrate work structure, and "Gantt chart as well as details of how the operation and maintenance at new contract conception did not provide an additional level of information." While ATS's BAFO provided additional clarification on the experience, quality, and retention of personnel – resulting in an overall increase in ATS's technical score by 5 points, ACS's BAFO was not evaluated as improving its overall technical rating. The contracting officer's assessment is supported by similar analysis found in the technical evaluation panel's consensus findings. In addition, the contracting officer's supplemental declaration provides ample support for her conclusion that ATS could perform the contract services, without assistance from ACS or Gatsometer.

ACS urges that it is unreasonable and arbitrary for the District to have found a technical advantage in ATS's offer to outweigh the 7.7 point cost advantage for ACS, when considering that ACS is the incumbent contractor and exclusive representative of Gatsometer. We agree with the District that the protest record adequately supports sustaining the contracting officer's finding that ATS provided the best technical offer and that ATS could perform as required by the solicitation. Although ACS makes much of Gatsometer's refusal to support any contractor but ACS, ATS provided in its proposal a plan to service the existing ATSE equipment, repair or replace inoperable equipment, and use either its own depot Gatsometer/Robot equipment or its own Axis equipment as required. As the District correctly observes, the solicitation simply does not prohibit an offeror from replacing inoperable equipment with functionally equivalent equipment, even if the equipment manufacturer is different. Moreover, ACS has not persuaded us that the solicitation requires that specific Gatsometer equipment must be retained.

ACS complains that the technical evaluation panel and the contracting officer improperly gave higher ratings to ATS for the technical approach factor based on ATS's plan to replace the existing Gatsometer and Robot equipment with ATS's Axis equipment. In support of its position, ACS argues that it was only proper to consider the technical merit of ATS's proposal to replace the existing equipment with the ATS Axis equipment under the process improvement factor, but not the technical approach factor. We do not agree. As part of its maintenance and support services, ATS, like the other offerors, had to repair *or replace* inoperable equipment under CLIN 2. Quite apart from a consideration of the benefits of a complete retrofit of all equipment under the process improvement factor, it was certainly not contrary to the RFP evaluation factors for the contracting officer and the technical panel to consider technical approach advantage to having the existing older equipment replaced as it became inoperable with what they considered to be more technically capable equipment, from the standpoint not only of performance improvements but also from the standpoint of future maintenance and operational servicing improvements.

ACS argues that neither the contracting officer nor the technical panel adequately documented their evaluation. Although the record might have been better documented with more detailed strengths and weaknesses, we find the documentation adequate to support the evaluations of the proposals under the RFP evaluation factors.

2. ACS's Technical Approach and its Project Plan

ACS argues that the downgrading of its proposal based on its purported failure to include a project plan was arbitrary and unreasonable. ACS points to the evaluation panel note in its consensus report that ACS's "Project plan narrative not provided in support of the Gantt chart." ACS also urges that 4 of the 5 technical evaluators changed their general technical approach assessment of ACS on the basis of improper influence on the part of the panel's chair. ACS stated in its proposal under the project plan section (AR Ex. 13):

ACS is uniquely positioned as the District's existing ATSE vendor. All required field service staff, event processing staff, management team, and all required facilities are in place and operating the District's ATSE program today. With ACS, there are no new activities to schedule nor is a Project Plan required as the program is fully operational today. . . .

In its BAFO, responding to the contracting officer's request for project plan narrative, bar chart, details, work breakdown structure, staff assignments, milestones, and plans, ACS provided additional information as well as a project plan by separate fax apparently after the BAFO submission. However, the contracting officer and the technical panel did not increase their technical approach rating of ACS based on the BAFO submission. The panel noted that the ACS's bar chart was unreadable and that the narrative was the same as that found in the original proposal. The contracting officer noted that the "Gantt chart as well as details of how the operation and maintenance at new contract conception did not provide an additional level of information." (AR Ex. 24). On the other hand, ATS's initial proposal and BAFO were given good ratings for readability and detail. On the record, we see no basis for concluding that the evaluations of ATS and ACS on the project plan rendered the overall technical approach ratings unreasonable or arbitrary.

3. The District's Evaluation pursuant to the RFP Evaluation Criteria

ACS points to four facts as proving that the District evaluated and scored ACS's and ATS's proposals inconsistently with the evaluation and selection criteria in the RFP. ACS asserts that the District improperly considered system process improvements in ATS's proposal (conversion of the Gatsometer equipment to ATS Axis equipment) when evaluating ATS's and ACS's proposals under the technical approach factor. We do not believe that ACS properly distinguishes between ATS's maintenance and service proposal, which includes some initial ATS equipment replacement and ATS's system process improvement proposal to replace all Gatsometer equipment. ACS urges that the technical approach factor meant considering the quality and comprehensiveness of the offeror's proposal to support and maintain the existing equipment. But, as discussed earlier, maintaining and servicing existing equipment, as defined in the RFP, is not limited to maintaining and servicing indefinitely the Gatsometer equipment. The RFP contemplated a contractor maintaining and servicing not only the initial Gatsometer equipment, but also newer equipment that a contractor could put in

operation to replace inoperable Gatsometer equipment. Also, ATS proposed some initial replacements of Gatsometer equipment with ATS equipment as part of its fixed-price proposal. We agree with ATS that perceived technical advantages with ATS's maintenance upgrades could properly be considered under the technical approach factor, and not as part of its systems performance improvement proposal. We see no basis for concluding that the District improperly evaluated the proposals on criteria differing from those stated in the RFP.

4. Whether the District should have rejected ATS's Proposal

Continuing its earlier argument, ACS argues that the District should have rejected ATS's proposal due to ATS's alleged failure to propose a plan to support and maintain the existing ATSE equipment. We do not find error in the contracting officer's determination that ATS is capable of supporting and maintaining the existing ATSE equipment. ATS's proposal indicates that ATS has access to spare parts needed to repair the District's existing equipment, whether from its own sources or from decommissioning some of the Gatsometer equipment as part of an initial replacement. Further, as described earlier, the solicitation does not prohibit a contractor from replacing inoperable existing equipment with new equipment from another manufacturer. The contracting officer carefully considered ATS's ability to fulfill the RFP requirements, concluding that ATS was capable of maintaining the ATSE equipment. We see no legal basis for rejecting that conclusion.

5. The District's Cost Analysis and Price Evaluations

ACS argues that the District cost analysis and price evaluations were defective because the District failed to consider the proposed price for ATS's process improvements and therefore the true cost to the District of an award to ATS. ACS starts with the premise that the ATS proposal contemplated a complete conversion of all Gatsometer equipment to ATS equipment, and concludes that the District should have included the process improvements pricing in ATS's proposal in arriving at an evaluated price for ATS's proposal. The problem with ACS's argument is that it ignores that some initial replacements were included in the ATS's fixed price proposal and replacement of inoperable equipment (not due to negligence by the District's staff or vehicular accidents) would also be covered by ATS's fixed-price proposal. (*See* AR Ex. 40 ¶ 12). The District properly evaluated the price by excluding the cost-reimbursable items under ATS's process improvement recommendations. Accordingly, we deny this basis of the protest.

6. District's RFP Price Evaluation to include Option Year Prices

ACS asserts that the District's failure to include option year pricing in the price evaluation caused the overall evaluation differential to change from 7 points in favor of ACS to 8 points in favor of ACS, resulting in a tie between ACS and ATS when computing the overall technical plus price evaluation scores. The District admits that the price evaluation incorrectly omitted option year prices but that the corrected price evaluation score shows ACS with 7.7 points, leaving ATS an overall score of 0.3 points more than ACS. The contracting officer states that the change in pricing would not change her overall assessment that the recommended award to ATS was the most advantageous to and in the best interest of the District. (*See* AR Ex. 40 ¶ 10-11). We see no legal error in the contracting officer's conclusion.

7. Evaluation of ATS's Experience and Past Performance

ACS argues that because ATS has no experience in maintaining and operating Gatsometer equipment, the contracting officer's evaluation of ACS and ATS and equivalent scoring of both proposals was arbitrary and irrational. ACS argues that ATS has "virtually no experience in maintaining and operating ATSE systems." ACS asserts that the two ATS employees formerly employed by ACS had no direct involvement with the District's ATSE program. The contracting officer points out that ATS has supported other state and municipal photo enforcement programs which initially had Gatsometer equipment, that ATS had a business relationship with a company that supplied spare parts for Gatsometer equipment, and that it had certified Robot camera technicians on its team to operate, maintain, and service the existing cameras. (AR Ex. 40). Based on the information provided to the District during the proposal phase, we conclude that ACS has not shown that the evaluation of experience and past performance was unreasonable or arbitrary.

CONCLUSION

For the reasons discussed above, we deny ACS's initial and supplemental protests.

SO ORDERED.

DATED: April 6, 2007

/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge

CONCURRING:

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge