Office of Dispute Resolution for Acquisition

Federal Aviation Administration

Washington, D.C.

FINDINGS AND RECOMMENDATION

Matter: Protest of Metro Monitoring Services, Inc. Under Solicitation

DTFA 11-97-R-00145

Docket: 97-ODRA-00047

Appearances:

For the Protester: Mark M. Hathaway, Esq., Mark M. Hathaway, Inc.

For the Agency: Karen Davis Huber, Esq., Attorney, Northwest Mountain Region

I. Introduction

Metro Monitoring Services, Inc. ("Metro") has protested the award by the FAA Northwest Mountain Region ("Agency") of a contract for weather observation services. The Agency has filed a Motion to Dismiss the protest on two separate, independent bases, namely that: (1) Metro is not an "interested party" and thus has no standing to maintain a protest before the Office of Dispute Resolution for Acquisition ("ODRA") for the procurement at issue; and (2) even if it were an "interested party," Metro's protest concerns a non-protestable matter of post-award contract administration. In my view, the Agency's position is correct in both regards. I therefore recommend that the protest be dismissed on both independent grounds.

II. Findings of Fact

A. Background

The Agency issued a Screening Information Request ("SIR") under Solicitation DTFA 11-97-R-00145, for weather observation services at the Portland, Oregon Airport. The SIR called for evaluation on a "best value" basis, and specified comparative evaluation with three discriminating factors: (1) past performance and experience; (2) the offeror's management proposal; and (3) price under the offeror's cost proposal. The first two factors (past performance and the management proposal) were to be given significantly more weight than the third (price). Eight proposals were received in response to the solicitation – from Condor Reliability Services, Inc. ("Condor"), Ibex Group, Inc. ("Ibex"), Vero Technical Support ("Vero"), Weather Data Services, Midwest Weather, Inc., Weather Observation, Inc., and Advance Management Technology, Inc. ("AMTI"), and the Protester, Metro.

A memorandum of the IPT Evaluation Meeting dated May 15, 1997, reflects, *inter alia*, the following evaluations as to past performance and the management proposals of the offerors:

Offeror	Past Performance	Management Proposal
Condor Reliability Services, Inc.	"Good"	"Very Good" [1]
Ibex Group, Inc.	"Good"	"Very Good"
Weather Observation, Inc.	"Good"	"Good"
AMTI	"Good"	"Good"
Vero Technical Support	"Satisfactory"	"Good"[2]
Midwest Weather, Inc.	"Good"	"Adequate"[3]
Metro Monitoring, Services, Inc.	"Satisfactory"	"Adequate"
Weather Data Services	"Good"	"Barely Adequate"

[Footnotes appear at end of decision]

As can be seen from the above table, Metro's was not among the higher rated proposals in terms of either the past performance or management elements. As to cost proposals, Metro had submitted the third lowest price:

Vero Technical Support $377,782

Condor Reliability Services, Inc. $378,944

Metro Monitoring Services, Inc. $379,685

Ibex Group, Inc. $379,964

Weather Data Services $384,303

Midwest Weather, Inc. $385,275

Weather Observation, Inc. $406,346

Advance Management Technology, Inc. $606,142

Award was subsequently made to Condor Reliability Services, Inc. ("Condor"), which had ranked first, in terms of its overall proposal. Metro's proposal, the Agency has stated, ranked fifth overall, with Ibex and Vero ranking second and third, respectively. The record submitted to the ODRA is unclear as to which of the other firms received the fourth ranking overall.

B. <u>The Protest and Succeeding Events</u>

Metro filed a protest against the award to Condor, by its letter dated June 30, 1997. In that letter, Metro stated the following as the substance of the protest:

> "Statement of the Protest: Per debriefing of proposal on Solicitation DTFA 11-97-R-00145 – Weather Observations, Portland, Oregon – the proposal of awardee was determined to be the best value to the government because the type and years of

> experience of awardee's proposed supervisor was evaluated as being of greater value than that of Metro Monitoring Services, Inc.'s proposed supervisor. Awardee, however, did not employ its proposed supervisor as required but rather employed Metro Monitoring Services, Inc.'s proposed supervisor."

Although the letter cited as the "legal basis" for the protest "FAA Acquisition Management System Clauses 3.91-2 and 3.91-3" and alleged that the "award" did not "comply with DTFA 11-97-R-00145," the letter does not identify any specific action on the part of the Agency which violated the AMS or other applicable law. As to the remedy, Metro requested that the contract be terminated and awarded instead to Metro, "***if* next in line for award."** Otherwise, Metro suggested that the contract be "rebid."

C. <u>The Motion To Dismiss And Protester Response</u>

FAA Counsel, by letter to the ODRA of March 10, 1998, filed a Motion to Dismiss, contending that: (1) Metro had no standing to file a protest as an "interested party," since it was not "next in line for award"; and (2) the Agency action being complained of had occurred after award and was a matter of contract administration, not ordinarily protestable before the ODRA. The action complained of is the Agency's permitting Condor to substitute a different supervisor for the one Condor had originally proposed. Coincidentally, the substituted supervisor is the person that Metro had itself proposed to use.

Metro's response to this motion urges that, although, technically, it was not "next in line for award," the AMS does not restrict the term "interested party" to those whose proposals place them immediately in a position to be awarded the contract. Metro further argues that the protested Government action in this case was the award itself, and not any matter of post-award contract administration. For the reasons explained below, I find Metro's arguments unpersuasive and legally without support.

III. Discussion

A. <u>Metro Is Not An "Interested Party"</u>

Section 3.9.3.2.1.3 of the AMS provides that only "interested parties" are permitted to protest an SIR or contract award. That section defines an "interested party" as follows:

> "An *Interested Party* is one who:
>
> * * *
>
> After the closing date for responding to a SIR, is an actual participant who would be next in line for award under the SIR's selection criteria if the protest is successful. An actual participant who is not in line for award under the SIR's selection criteria is ineligible to protest unless that party's complaint alleges specific improper actions or inactions by the agency that caused the party to be other than in line for award. . . . "

Appendix C to the AMS, in turn, defines "Protester" in the following manner:

> "[A] prospective offeror whose direct economic interest would be affected by the award or failure to award an FAA contract, or an actual offeror with a reasonable chance to receive award of an FAA contract."

As the above factual background indicates, Metro had not been in line for award. Its price proposal was ranked third and its overall ranking was fifth of the eight proposals received. Its protest did not "allege specific improper actions or inactions by the agency that caused the party to be other than in line for award." Indeed, it did not allege any actions or inactions by the FAA whatsoever. Rather, it stated that: (1) the Agency had indicated that Metro's proposal had been ranked lower overall to Condor based on the relative ratings given to the supervisors being proposed by the two companies; and (2) Metro discovered that the awardee was actually using on the contract as its supervisor the individual whom Metro had offered, in lieu of the individual whom Condor had originally proposed.

For the reasons explained below, I conclude that there was no Government impropriety in this regard. Even assuming *arguendo* that impropriety could be established and that the Administrator could sustain Metro's protest, and viewing all facts in a light most favorable to the Protester, Metro cannot show that it would stand a "reasonable chance to receive award" in this case. Even eliminating Condor, Metro would have to show that, by correcting for this alleged impropriety, Metro's proposal would displace the higher ranked proposals of both Ibex and Vero. This would not be possible, since the purported "bait and switch" impropriety raised by Metro's protest had absolutely nothing to do with the Agency's evaluation of those other two offerors. Thus, the Agency's contention that Metro does not qualify as an "interested party" is well taken.

B. <u>The Supervisor Substitution Was Not Improper And Involved</u>

<u>A Non-Protestable Matter Of Contract Administration</u>

The record does not reveal any improper Agency action related to the substitution of supervisory personnel. Condor's proposal had initially offered the services of a Government employee (purportedly a highly experienced individual), Ms. Carolyn Southwell, as the project supervisor. The FAA raised questions about Ms. Southwell's availability and intent to leave Government service (through an early retirement "buyout"). Condor then offered, as an alternative for Ms. Southwell, the services of Mr. John Kidwell, an individual whose resume demonstrated that he had significant experience with FAA weather observation service contracts. The Condor proposal stated that one of the two individuals would remain on the Portland project as supervisor for at least 12 months and that, if a replacement was to be made by Condor, it would be with an individual approved by the Government having qualifications equal to or greater than those of Ms. Southwell and Mr. Kidwell. The contention by Metro that the later substitution of Mr. Mike Davis – the supervisor it had proposed – for Mr. Kidwell was "intentional" "bait and switch" tactics on the part of Condor is totally unsupported. Moreover, it is irrelevant in terms of Metro's burden of proving improper action on the part of the Government.

Furthermore, the difference in the Agency's two appraisals of Mr. Davis -- pre-award for Metro and post-award for Condor -- can be attributed to Metro's own failure to adequately detail Mr. Davis' experience as part of its proposal, in contrast with Condor's success in presenting that experience when justifying the personnel substitution. As explained by the Contracting Officer's Statement (Exhibit 3 to the Motion to Dismiss), Metro had listed Mr. Davis as having only six years of weather observation experience. Condor, on the other hand, was able to present evidence of substantially greater depth of

experience for that individual, *i.e.*, nearly 20 years of related experience, putting him on par with Mr. Kidwell.

Metro has asserted that the Government's action in approving the substitution of Mike Davis for John Kidwell had occurred only after and as a result of the protest (*see* Opposition to Motion to Dismiss, page 5), and thus purportedly was not a matter of post-award "contract administration." However, the facts presented by the Agency (and unrefuted by Metro in its Opposition) are that the substitution was permitted by the FAA's COTR five days after contract performance started, when the original supervisor (John Kidwell) could no longer continue on the project as a result of a death in his family. That "action" – which was taken by the COTR clearly as a post-award action in the administration of the contract and not as part of the pre-award evaluation process -- was later ratified and justified in writing by the Contracting Officer in response to the protest. (*See* Exhibit 3 to the Motion to Dismiss).

Unlike the General Accounting Office (GAO) Bid Protest Rules, which expressly exclude contract administration matters from its protest jurisdiction, as being within "the discretion of the contracting agency," *see* 4 C.F.R. Part 21.3(m)(1), the AMS does not preclude the ODRA from reviewing matters of contract administration in connection with "protests concerning SIRs or awards of contracts," AMS §3.9.2. By the same token, even the GAO will consider matters of post-award administration, where the agency's post-award conduct evidences a material flaw in the pre-award evaluation process. For example, in *KPMG Peat Marwick, LLP*, Comp. Gen. Dec. B-259479.2 (May 9, 1995), 95-2 CPD ¶13, the Protester challenged the propriety of certain post-award contract modifications that permitted the awardee to make wholesale changes with respect to staffing. As in the instant case, the Protester there maintained that the awardee had "engaged in a 'bait and switch' of personnel." In *KPMG Peat Marwick*, the agency contested the jurisdiction of the GAO to review its post-award contract modifications which allowed these personnel changes.

While acknowledging that it would ordinarily agree with the agency's position, the GAO in *KPMG Peat Marwick* chose to assert its jurisdiction over the matter. The decision is particularly instructive in this regard:

> "Both the agency and the interested party contend that this Office lacks jurisdiction to review these allegations, since they pertain to post-award, or contract administration matters. While our Bid Protest Regulations provide that matters of contract administration are generally not subject to our review, see 4 C.F.R. §21.3(m)(1)(1995), an

> exception to this rule exists, where – as here – the Protester asserts that the agency's post-award conduct constitutes evidence that the underlying procurement and evaluation process were flawed. See Theater Aviation Maintenance Servs., B-233539, Mar. 22, 1989, 89-1 CPD ¶294.
>
> While there has been no showing that Bradson misrepresented the availability of its proposed personnel, **the record shows that the agency awarded the contract to Bradson with the intent to change the contract terms, and then through post-award discussions, improperly permitted the awardee to materially modify its proposal.**
>
> As noted above, Bradson replaced 13 of its proposed 18 key personnel with new candidates and otherwise modified its technical approach, so that it could perform in accordance with ARPA's wishes. The record shows the replacement Bradson personnel were less experienced than the key personnel originally proposed by the awardee. For example, one of the proposed fiscal control personnel with 20 years experience was replaced by a candidate with only 1 month of experience; another program analyst candidate – who graduated in 1982 and had 12 years of DOD experience – was replaced by a 1988 college graduate, who had 6 years of government experience and no DOD experience. At least 6 of the 13 replacement personnel have substantially lower levels of experience, having been in the work force only since 1994; 5 of these personnel had less that 5 months of work experience at the time of contract award." (Emphasis added)

In contrast with its decision in *KPMG Peat Marwick*, the GAO has held that "an agency's evaluation that is based on an offeror's proposed key personnel is not objectionable, even though some are changed after award, when the offeror provided firm letters of commitment and the names were submitted in good faith with the consent of the respective individuals (that is, the offeror was not proposing personnel it had no intention of providing)." *Robocom Systems, Inc.*, Comp. Gen. Dec. B-244974 (December 4, 1991), 91-2 CPD ¶513, *citing Informatics Gen. Corp.*, Comp. Gen. Dec. B-224182 (February 2, 1987), 87-1 CPD ¶105.

The ODRA, like the GAO, will not, except in limited circumstances, not present here, review matters of post-award contract administration in the context of a bid protest. The personnel substitution here does not reflect the same indicia of "bait and switch" tactics

as had been present in *KPMG Peat Marwick*. Mr. Davis was not clearly inferior to Mr. Kidwell, in terms of relevant work experience. Moreover, unlike the situation in *KPMG Peat Marwick*, there is no allegation or evidence that the Agency intended all along to "change the contract terms" and to allow Condor to substitute Mr. Davis for Mr. Kidwell. The record shows instead that the substitution was unanticipated on both sides and was necessitated only by Mr. Kidwell's unfortunate personal loss. Accordingly, the exception to the general rule against reviewing matters of post-award contract administration in a bid protest does not apply in this case. Dismissal of Metro's protest is therefore warranted on this jurisdictional basis.

IV. **Conclusion and Recommendation**

The Protester has failed to establish that it is an "interested party," as that term has been defined by the AMS. It has neither shown that it was next in line for award, nor has it alleged specific improper actions by the Agency that had caused it to be other than next in line for award. Even assuming that everything alleged by Metro is true, it has failed to demonstrate that it would have had a "reasonable chance" to secure an award in the absence of the alleged Government improprieties. In addition, the Government actions that are raised by the protest involve matters of non-protestable post-award contract administration. I therefore recommend that the Administrator grant the Agency's motion and dismiss the instant protest with prejudice.

Anthony N. Palladino

Dispute Resolution Officer and Director

For the Office of Dispute Resolution for Acquisition

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[1] The evaluation is inconsistent in describing Condor's management proposal. Initially, it says that, though "very good," it is "not conducive for a Level A airport." However, later in the narrative, the IPT states of Condor: "After clarification, this offer was considered very favorably and represented the best

value to the government. The corporate and individual levels of experience were commendable and appropriate for a Level A site."

[2] The IPT memorandum qualifies this evaluation, by stating that "there were a few issues that required an explanation from the offeror" and goes on to describe those issues.

[3] The IPT memorandum goes on to say: "On a previous contract, the company’s management technique was deemed less than desirable due to methods of handling full time versus part time employees."