

**Recommendation of the Office of Dispute Resolution in the Protest of NanTom
Services, Inc., 96-ODR-00023**

Weather Observation Services at several sites throughout FAA's Southern Region

Appearances:

For the Protester: Theodore M. Bailey, Esq., San Antonio, Texas

For the agency: Richard Gaiser, Esq., FAA Southern Region, Atlanta, Georgia

I. Introduction

On January 3, 1997, NanTom Services, Inc. protested to the FAA's Office of Dispute Resolution, (ODR), a three month extension to weather observation contracts at six sites throughout the Southern Region. Those sites had been solicited competitively in September 1996, but due to delays in obtaining wage determinations from the Department of Labor, (DOL), 90 day interim contracts were issued pending competition for the large, multiyear award. As the ninety-day contracts neared expiration in December 1996, complete wage determination packages had still not been received from DOL, and the contracting officer extended each of the six sites for an additional ninety days. NanTom now claims that it was precluded from competing on the September interim contracts, that it protested at the time, and was promised that it would be solicited for the long-term contract on or about November 15. NanTom claims that the most recent three month extension is a violation of the prior settlement agreement, as well as the agency's Acquisition Management System's policy on competition. For the reasons that follow, we deny the protest.

All document references are to the attached list of exhibits, Tabs (1) through (6).

II. Findings of Fact

In early 1996, the FAA's Southern Region assumed responsibility for contracting out weather observation services at numerous airports throughout the Southeastern United States. Six of those sites had coverage which expired in September 1996. Because such services are subject to the Service Contract Act, the contracting officer applied to the Department of Labor (in March 1996) for the appropriate wage determinations to be incorporated into a large, multiyear solicitation. The wage determinations were received from DOL in July 1996. Tab (1).

At some point between March and May 1996, NanTom was solicited in a Screening Information Request, (SIR), by the FAA. The SIR was issued to elicit information which would determine the company's eligibility for inclusion on a Qualified Vendor's List for future weather observation requirements. NanTom timely completed the information sought by the SIR and returned it to the FAA. Tab (2).

In August 1996, the solicitation package for the six sites was near completion and release for competition, when the contracting officer discovered that the files containing the wage determinations had been lost. Thorough searching by the contracting personnel failed to locate the missing files. At that time, the contracting officer requested new wage determinations from DOL. Because she did not have the applicable wage determinations, the contracting officer included "estimated" determinations for bidding purposes. The CO also inserted a notice that any resultant contract would be modified to reflect the differences between her "estimated" rates and the actual DOL rates. Tab (1).

The contracting officer states that NanTom was solicited, along with other offerors, in the solicitation which was eventually issued on September 13, 1996. Tab (1). NanTom has stated repeatedly that although it provided screening information for the QVL, and although it monitored the FAA's web site at the appropriate location, it never received formal notification that the solicitation had been issued. It was not until September 26 that NanTom finally learned, indirectly from one of its personnel, that the solicitation in which it sought to compete had been issued. Tab (2).

When the contracting officer reviewed the proposals submitted in response to the September 13th solicitation, she noticed that they contained a wide array of proposed labor rates that totally disregarded the "estimated" wage determinations provided. Because of the wide variation in rates, the contracting officer determined that the competition was inadequate to serve as the basis for award of a long term, large value contract. Accordingly, she used the responses to negotiate four 90 day interim contracts and two 90 day interim extensions to maintain coverage at the six sites until the full five-year requirement could be resolicited and competed. Tab (1). Those six interim "fixes" were scheduled to expire by their own terms on December 31, 1996.

On September 27, 1996, NanTom protested to ODR its exclusion from competition. Several communications ensued between ODR, NanTom, and Southern Region, and assurances were made that the large, multiple-site solicitation was yet to be competed and that NanTom would be permitted to participate. Southern Region explained that the six "contracts" that resulted from the September 13 solicitation were only short term interim measures, pending issuance of the main solicitation (estimated to be November 15). On October 10, 1996, ODR reduced that promise to writing, and that same day NanTom withdrew its protest. Tabs (3) and (4).

In December 1996, the wage determinations, which had been requested from DOL in September, were received by the contracting officer by fax. The fax copies were temporarily filed and examined more carefully at a later date. After examining the documents in detail, however, the contracting officer noticed that most of the faxed transmissions had been partially obliterated and were illegible. She called DOL and asked for a retransmittal, but was told that due to the holiday season and the end of the calendar year, the DOL office was short staffed and that some delay could be expected. Tab (1).

Faced with the expiration of the interim contracts, as well as a potential delay from DOL, the contracting officer opted to issue an additional 90 day extension to each of the six interim contracts. Currently she expects the wage determinations to be received and the main solicitation to be issued sooner than March 1, 1997, but states that 90 days was chosen to ensure that there would be enough time to complete the large procurement. She further indicates that this procurement will be fully competitive, and that NanTom will be solicited. Tab (1).

On January 3, 1997, NanTom protested the 90 day extension to ODR. Tab (2). Several communications ensued, including a teleconference between ODR, NanTom, and Southern Region. On January 15, ODR issued a memorandum clarifying its view of the issues and asking for any additional government response by January 27, and any protester reply by February 5, 1997. Tab (5). On that same day, the protester posed additional questions for the contracting officer to answer. Tab (6). The contracting officer responded with a memo of January 22, 1997. Tab (1). The protester's reply is contained in Tab (7).

III. Issue Presented

Did the contracting officer have a rational basis for extending the six contracts noncompetitively for three months pending completion of the large, competitive solicitation.

IV. Analysis

In deciding all substantive protest issues, the FAA's Office of Dispute Resolution will apply the standard of review applicable under the Administrative Procedures Act, 5 U.S.C. 706. Agency actions will be upheld so long as they have a rational basis, supported by substantial evidence and are not arbitrary, capricious, or an abuse of discretion. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, (1971).

It should be noted at the outset that the procurement actions at issue here are the 90 day extensions issued in December 1996. As described above, those extensions were in addition to the 90 day interim or "bridge" contracts awarded in September 1996 (pending the main, five year, multi-site solicitation). We should also note that the September bridge contracts were in fact the result of the competition that was conducted in September, albeit without NanTom's participation. While the contracting officer insists that NanTom was solicited along with the other offerors, we will accept, for the purposes of this case, that the solicitation somehow failed to reach the protester. The essence of NanTom's protest is a complaint that the extensions themselves should have been competed, or that the main contract should have been broken up and competed as to the sites where the wage determinations were available. The protester is frustrated at the delay in getting the large solicitation issued, and claims that the FAA has an obligation under the general

competition guidelines of the Acquisition Management System, as well as the agency's prior settlement agreement, to compete all its known requirements

We agree that the AMS encourages competition, wherever practical, in agency procurements. Section 3.1.3 states that, as a *fundamental principle*, the system "encourages competition as the preferred method of contracting." NanTom is incorrect, however, in interpreting the AMS as requiring full and open competition in all situations. To an even greater degree than prior law, the AMS recognizes that there are circumstances where noncompetitive procedures are needed, whether because of time constraints, or otherwise. For example, Section 3.2.1.3.8 recognizes that there are instances where single source awards are appropriate, and it leaves that decision up to the discretion of the Integrated Product Team and the contracting officer. In the present case, the contracting officer determined that a short term, single source, extension was appropriate, because the time needed to compete the extension would have been self-defeating. Under the circumstances, we cannot say that the decision was irrational. In late December 1996, it became apparent that the necessary documentation for the competitive solicitation might be a few weeks late. Requiring a separate competition for that requirement (which, by itself, would have taken several weeks) would have been unreasonable. This is reinforced by the fact that the original 90 day contracts, made in September 1996, were in fact competitive, even if NanTom was inadvertently excluded.

Likewise, we think the contracting officer acted reasonably in declining NanTom's suggestion to break up the procurement and solicit the sites for which the wage determinations were available. The several sites in question were grouped together for logistical reasons, and for reasons of efficiency. Dissolving this arrangement simply to avoid a several week interim "bridge" was not required. See Iowa-Illinois Cleaning Company, 95-1 CPD 272, Border Maintenance Services, Inc. 95-1 CPD 287.

As an additional matter, NanTom, through its briefs and questions, has focused on the timeliness of the contracting officer's application for wage determinations, and the follow-up, if any, that was made when the documents were received in an illegible condition. NanTom emphasizes that, notwithstanding the implementation of a new procurement system for the FAA, the agency is still bound by the Service Contract Act and its implementing regulations. In essence, the protester has suggested that the agency has failed to comply with the Service Contract Act.

NanTom is correct with respect to the applicability of the Service Contract Act. The contracting officer did, however, recognize her responsibility and did in fact apply to DOL for the wage determinations in March 1996, several months before the anticipated release date of the solicitation. Had it not been for the loss of those files, the main solicitation would have been issued in September. The delay in replacing the lost wage determinations necessitated the first 90 day "fix," which was competitive. When the wage determinations were finally received in December, the illegibility of large portions was not noticed for several days, at which point DOL warned that, due to end-of-the year staffing limitations, there may be further delay in retransmitting them. We think that the facts demonstrate that the contracting officer recognized and carried out her responsibilities in implementing the Service Contract Act.

As a final matter, NanTom emphasized that its prior protest resulted in a settlement, in which Southern Region agreed to compete the requirement and to allow NanTom to participate. As explained above,

nothing has changed in that regard except for a delay due to the wage determinations. A large, multiyear, six-site, competitive solicitation is imminent. The delay, while regrettable, is not unreasonable, and thus does not violate that agreement.

V. Conclusion

For the reasons discussed above, we believe that the contracting officer's actions in making the "bridge" modifications were rationally based. Neither the AMS nor the prior settlement agreement have been violated. The Service Contracting Act has been complied with. It is the recommendation of the ODR that the protest be denied.

William R. Sheehan

For the Office of Dispute Resolution