

UNITED STATES DEPARTMENT OF TRANSPORTATION

FEDERAL AVIATION ADMINISTRATION

WASHINGTON, DC

ORDER

FAA Order Number: ODR-97-25

Matter: Protest by WEATHER EXPERTS, INC. of Award Pursuant to Solicitation No. DTFA11-96-R-00159

Docket: 96-ODR-00013

Served: July 18, 1997

ORDER

Weather Experts, Inc., submitted a protest concerning solicitation DTFA11-96-R-00159. The solicitation called for the provision of weather observation services at two locations in Washington State.

Weather Experts contended that its offered price was significantly below that of the awardee (Midwest Weather), and that the Northwest Mountain Regional Office had proffered no rational explanation as to why its offer was rejected. The Agency responded that the procurement was conducted on a best value basis, and that for several reasons, they believed that the higher priced proposal of another company represented the best value to the FAA.

This case was referred to an independent Special Master for findings of fact, conclusions of law, and a recommended disposition. For purposes of this discussion, I accept the Special Master's findings of fact, as well as his conclusion that the Northwest Mountain Region was not justified in reasoning that Weather Experts would not perform as proposed. I believe those facts and that conclusion are supported by ample evidence in

the record. I differ, however, with his ultimate conclusion concerning the rationality of the award decision.

As I view the record, the issue centers on Weather Experts' use of the Sole Charge Exemption. As the Special Master's opinion (attached) explains, this is a regulatory exemption from the Service Contract Act's wage determinations, applicable to companies that meet certain ownership and management criteria. The solicitation recognized the existence of the exemption, and even attempted to define it. (Though not quite accurately). Nothing in the Screening Information Request (SIR), however, prohibited the use of the exemption, or advised offerors that its use was discouraged, or that proposals incorporating it would be downgraded.

In its proposal, Weather Experts' made use of the exemption. Both owners of the company qualified thereunder, and were thus able to propose themselves as managers exempt from the wage determinations. In the evaluation phase, this became the agency's primary basis for concluding that Weather Experts' proposal presented unacceptable risk, and that a higher priced proposal constituted a better value. Award was made on initial offers.

In its report to the Office of Dispute Resolution for Acquisition (ODR), the agency explains in some detail its concern about the protester's use of the exemption. In response to questions from the ODR, the agency stated that Weather Experts' use of the exemption was so fundamental to its proposal that there was no point in conducting discussions. The agency concluded that to even attempt to address the concerns surrounding the use of the exemption would have necessitated a rewrite of Experts' entire proposal. This would have resulted in an unacceptable delay.

It is my opinion, that after having acknowledged and defined a regulatory exemption in a solicitation, the agency has not presented a rational basis for claiming that the legitimate use thereof is so fundamentally abhorrent that it will not even attempt discussions concerning the issue, but would rather award to a higher priced offeror. If the subject was not even open for discussion, it certainly should have been noted in the SIR. Failing either mention in the SIR, or discussions, the award decision is flawed, because the agency's decisional criterion is not apparent. Furthermore, the agency will never know whether it could have obtained a better value by simply stating what its true requirements were.

The Special Master addressed this by pointing to the fact that Management Approach was a principle factor, and that use of the exemption was logically contained in the concept of "Management." I disagree. While use of the exemption is certainly an aspect of Management Approach, the point here is that the agency, through its own argument, raised the concept to the level of a definitive responsibility criteria.

As previously stated, the agency did raise concerns as to whether the protester would actually perform as proposed. The Special Master found that the agency's conclusions, in this regard, were not supported by substantial evidence, and I agree. However, by

claiming that discussions would have been futile, the agency has essentially stated that any offer proposing usage of the exemption would be strongly disfavored, if not automatically disqualified.

To conduct a competition in which this decisive factor is hidden is not reasonable, especially when the solicitation itself acknowledged the existence and legitimacy of the exemption. If an offeror's use of a permitted exemption was so technically repulsive to the agency, it should have said so in the solicitation, or held discussions, since the otherwise acceptable offer was lower priced.

Conclusion

For the reasons explained above, I find that the agency has failed to demonstrate a rational basis for the award in this case. In fashioning an appropriate remedy, I have considered the fact that the SIR did generate vigorous competition in this acquisition, and the underlying requirement has not changed from that which was solicited. Accordingly, it will not be necessary to conduct a recompetition. Since, however, the agency has emphasized its strong opposition to the use of the sole charge exemption, the agency will reimburse the protester its bid and proposal costs for having been induced to compete.

Pursuant to section 3.9 of the Federal Aviation Administration Acquisition Management System, this protest is granted.

_____/S/_____

BARRY L. VALENTINE

ACTING ADMINISTRATOR

Issued this *15th* day of July 1997