

UNITED STATES DEPARTMENT OF TRANSPORTATION

FEDERAL AVIATION ADMINISTRATION

WASHINGTON, DC

DECISION AND ORDER

FAA Order Number: ODR-97-30

Matter: Protest by NANTOM SERVICES INCORPORATED of Award Pursuant to Solicitation No. DTFA14-97-R-33886

Docket: 97-ODR-00030

Served: July 17, 1997

DECISION AND ORDER

Appearances:

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

For the Agency: Lynne Adams-Whitaker, Esq, Great Lakes Regional Office

I. Introduction

On February 14, 1997, NanTom Services, Inc., submitted a protest to the FAA's Office of Dispute Resolution (ODR) against the Agency's proposed award under solicitation DTFA14-97-33886. See Tab (1). That solicitation had been issued by the Great Lakes Regional Office, to procure weather observation services at some eighteen sites throughout the midwest. NanTom alleges that although it received a copy of the original solicitation and Amendment 0001 to that solicitation, the agency led it to believe that the closing date would be extended indefinitely, pending issuance of a subsequent amendment. The protester claims that it never received the following amendment, and that it did not learn until February 12, 1997, that the solicitation closed on January 31, 1997. NanTom asserts that it was improperly excluded from the competition, and demands that the contracting office be directed to allow it to participate. For the reasons discussed below, I am denying the protest.

II. Findings of Fact

Solicitation DTFA14-97-R-33886 was issued on January 13, 1997, by the FAA's Great Lakes Regional Office in Des Plaines, Illinois. The solicitation called for the provision of weather observation services at 18 airports throughout various states in the midwest. Although the Regional Office had been in the process of compiling a Qualified Vendors List (QVL) for such services, the compilation was not yet complete. Thus, the solicitation

was sent to all the firms that had expressed any interest in the QVL. The requirement was also advertised in the Commerce Business Daily. The solicitation's closing date was set as January 24. See Tab (2).

The contracting officer received numerous calls from interested vendors concerning the solicitation's Statement of Work. Many calls related to concerns centered on staffing requirements and pay and benefit issues resulting from the application of the Service Contract Act. Accordingly, on January 23, the contracting officer issued Amendment A0001. The Amendment noted that the concerns had been raised, and would be addressed in a subsequent Amendment, to be issued by January 27, 1997. A0001 also reestablished the closing date for January 31. See Tab (3).

A0002 was issued on January 27, 1997, and incorporated changes and clarifications to the operating hours of several different sites; it also added two sites, and provided other information about Wage Determinations and prohibited practices. Nothing in A0002 changed the previously scheduled close date of January 31. Tab (4).

NanTom states that it never received A0002. Tab (1). The contracting officer states she attempted to send A0002 to the same fax number that NanTom had provided for A0001. Tab (5). No further evidence has been provided by either party supporting whether the document was successfully transmitted, or if not, what the cause of the problem was.

The solicitation closed on January 31, with 17 firms responding. On February 12, NanTom called the contracting officer inquiring about A0002, and was told that the solicitation had closed twelve days earlier. NanTom told the contracting officer that it was not aware of the closing date, and requested that it be permitted to submit an offer. The contracting officer declined, and this protest to ODR followed on February 14, 1997.

III. Issues Presented

1. Is the protest timely filed.
2. Has the protester provided adequate evidence of Agency bias against it.
3. Was the protester improperly excluded from participation in the procurement.

IV. Analysis

1. *Timeliness.* The agency asserts that the protest is untimely because it was not filed within five days of the date on which it knew or should have known the basis for its complaint, as required by clause 3.9.1-3. NanTom responds that it had no idea the solicitation had closed until February 12, when it called the contracting officer, and that it had not been able to reach her before that. There are conflicting statements from the parties as to the contracting officer's availability and NanTom's attempts to reach her. The file contains no other evidence of exactly what attempts were made or why they were unsuccessful. Accordingly, I cannot conclude from the record whether the protester knew, or could have known of the problem prior to February 12, and as such, I accept the filing of February 14 as timely.

Agency bias. NanTom's protest alleges that when it complained to the contracting officer on February 12, she made a statement to the effect that "they are a tight knit group up here and you are not part of the group." I can only interpret this as an allegation that the contracting officer was somehow biased against NanTom, and took some purposeful action to preclude the company from competing. Such an allegation, if true, would be a violation of the FAA's Acquisition Management System, and possibly constitute criminal misconduct as well.

When faced with similar allegations against contracting officials, other fora have adopted a strict standard of proof. See Kalvar v. U.S., 543 F. 2d 1298, Ct. Cl. 1976), and Seaward International, 86- 2 CPD 507. In those cases, the Court of Claims and the General Accounting Office adopted the position that such allegations of

government employee misconduct must be supported by "well nigh irrefragable proof" to overcome the presumption that public officials act consciously and in good faith. In the present case, the contracting officer has submitted a sworn affidavit denying that she ever made such a statement, and NanTom has provided no other substantiation for the allegation. On these facts, I believe that the protester has fallen far short of its burden of proof.

2. *Improper exclusion.* The substance of NanTom's protest is that the contracting officer excluded it from participation by misleading the protester into believing that the closing date had been "suspended" indefinitely and by negligent failing to provide NanTom with a copy of Amendment 0002. The protest itself is somewhat vague on this point, and there is some discrepancy between its original and supplemental submissions. NanTom's February 14 protest states that it received Amendment 00001, "indicating that bid opening was suspended indefinitely..." Tab (1), page 2. As indicated above and in Tab (3), this was patently incorrect; Amendment 0001 changed the closing date from January 24 to January 31. NanTom apparently concedes this point, but claims in its February 17 supplemental protest that "it was NanTom's understanding from the contracting officer that bid opening would not be held until outstanding questions were answered." Tab (6), page 1. No explanation is given to explain the derivation of that "understanding," and the contracting officer denies having made such a statement. See Tab (2).

The record is inconclusive as to whether NanTom received A0002, and if not, why not. The contracting officer states that she attempted to fax the document to the same number that worked for A0001, but the protester insists it never received it. On these facts, I cannot determine whether the transmission was successful, or whether the problem was caused by the government or the protester. My review of the documentation, however, indicates that there was no rational basis for NanTom's belief that the closing date had been "suspended" indefinitely.

My review of Amendment 0001 indicates the opposite of what NanTom alleges. The operative language explains that numerous issues have been raised which will be addressed in a subsequent amendment to be issued four days later. Amendment 0001 *then* reestablishes the closing date to January 31. Additional instructions were also provided to explain how faxed offers were to be submitted.

I believe that the very structure of the Amendment 0001 can only be read as establishing a new closing date of January 31, 1997, *because* of the technical questions which needed to be resolved. The contracting officer promised resolution of those issues in four days, in the same amendment that extended the offerors' response date by 7 days. Based on the plain language of Amendment 0001, I see no reasonable interpretation except that the revised closing date was January 31, which allowed the competitors four days to incorporate the clarifications to be issued on the 27th. Absent evidence of some additional communication between the contracting officer and NanTom, I find no support for the protester's assertion that its "understanding" was that the closing was "suspended" indefinitely. As noted above, nothing submitted by NanTom provides any explanation of that "understanding," and the contracting officer denies that any such information conveyed or intimated. See Tab (2). Under these facts, I can find no basis for NanTom's claim that it was misled. NanTom apparently assumed that the date had somehow been suspended when it did not receive A0002 on the 27th.

V. Conclusion

For the reasons addressed above, I find that there was no basis for the protester's "understanding" that the closing date had been "suspended" indefinitely. On the contrary, Amendment 0001 specifically stated that the new closing date would be January 31 to accommodate the clarifications to be forthcoming in Amendment 0002 on the 27th. Nothing changed that date, and if NanTom never received A0002 on the 27th, it should have inquired of the contracting officer, rather than assuming that the closing date had been suspended indefinitely.

It is my determination that the FAA complied with the Acquisition Management System and all applicable provisions of law. Pursuant to section 3.9 of the FAA Acquisition Management System, this protest is denied.

This is the final agency order in this matter. To the extent that this decision is subject to review, such review shall be sought in accordance with 49 U.S.C. §46110. A petition for review must be filed with the United States Court of Appeals for the District of Columbia Circuit, or in the court of appeals of the United States for the circuit in which the petitioner resides or has its principal place of business. The petition must be filed not later than 60 days after the date that this order is issued.

_____/S/_____

BARRY L. VALENTINE

ACTING ADMINISTRATOR

Issued this *15th* day of July 1997