

Office of Dispute Resolution for Acquisition

Federal Aviation Administration

Washington, D.C.

FINDINGS AND RECOMMENDATION

Matter: Protest of WEATHER EXPERTS, INC.,

under Solicitation DTFA11-97-R-001145.

Docket: 97-ODRA-00040

Appearances:

For the Protester: Richard Carlson, Weather Experts, Inc.

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

I. Introduction

Weather Experts, Inc., ("Experts") protests a solicitation issued by the FAA's Northwest Mountain Region for weather observation services at Portland, Oregon. The Protester identifies three alleged defects in the Solicitation. First, Experts contends that the Solicitation improperly employs a "best value" award scheme for services that would more properly be acquired on the basis of low price. Second, the Protester claims that the technical evaluation factor of "past Performance/Experience is too vague and subjective. Third, Experts asserts that the contracting office failed to adequately answer one of its pre-bid questions related to the applicability of the Service Contract Act, and that the company cannot fairly compete until the issue is clarified. For the reasons explained below, the Office of Dispute Resolution for Acquisition, (ODRA) recommends that the protest be sustained.

All references are to the protest file, Tabs (1) through (15).

II. Findings of Fact

Solicitation DTFA11-97-R-00145 was issued by the FAA's Northwest Mountain Region on April 7, 1997. The solicitation sought the acquisition of weather observation services on a fixed-price basis at the Portland, Oregon and Colorado Springs Airports for an initial period of four months, plus two option years. Under AMS Section 3.9.3.2.1.6, the Agency proceeded to contract award while the instant protest was pending. Experts never submitted an offer as it contends it was precluded from doing so for the reasons stated in this protest. The contract is now in the base year of performance. The labor categories required for those services are covered by the Service Contract Act (SCA), 41 U.S.C. 351 et seq., and thus the solicitation contained wage determinations issued by the U.S. Department of Labor for the Portland and Colorado Springs areas. Tab (1). The Wage Determinations provided minimum rates for direct labor and fringe benefits such as holiday, vacation, health & welfare, and overtime.

The solicitation also contained a clause in Section "H," which reads as follows:

H-003 EXEMPTIONS FROM SERVICE CONTRACT ACT COVERAGE:

No claimed exemption from Service Contract Act coverage based on the Sole Charge Exemption for Bona Fide executives will be accepted on this solicitation. All hours of performance designated in the statement of work in Section C must be accounted for in the offeror's price proposal and must be reflected in actual performance during the term of the contract.

Tab (1)

Section "M" of the solicitation, which contained the award scheme, stated, in its entirety:

M-001 EVALUATION FACTORS FOR AWARD

The Government will make award to the responsible offeror whose proposal conforms to the solicitation terms and conditions, is technically acceptable, and represents the best value to the Government. Award will not be made on the basis of price alone. Key discriminators listed below shall be evaluated by the IPT. Failure of any factor to be determined acceptable shall result in the entire offer being rejected as technically unacceptable. Technically unacceptable offers shall not be considered further for award:

KEY DISCRIMINATORS:

1. Past Performance and Experience
2. Management Proposal
3. Price

After determination of responsive offers, the Government will evaluate the Management Proposal, Delivery Schedule, Selected Past Performance References and Pricing Proposal to determine which offer received represents the best value to the Government. Past Performance and Management Proposal are significantly more important than price.

The option period pricing will be evaluated to determine that it is not unbalanced, and to determine that option period pricing is fair and reasonable.

Government reserves the right to require further submittals or to make award without discussion.

The "IPT" referred to in the first paragraph above was the "Integrated Product Team," comprised of the contracting officer (CO) and other technical personnel who established the requirement, evaluated offers, and made an award decision.

On April 10, Experts submitted a list of ten questions to the CO, covering issues such as whether part time employees were disfavored, inquiring how past performance would be judged, and questioning the Region's authority for soliciting these services on a "best value" basis. Experts also asked the following:

The solicitation states that the sole charge exemption does not apply, what about the legal exemption of owners of 20% of a corporation which has been upheld on numerous occasions by the US Department of Labor, will you recognize this exemption? If not on what basis in contract law?

Tab (2).

On April 12, Experts forwarded another set of twelve questions to the CO, virtually identical to the questions asked two days earlier. The same question relating to 20% ownership was restated. Tab (3).

On April 16, the CO issued Amendment 0002, which incorporated several new clauses and addressed the specific questions posed by Experts. With respect to the 20% owner question, the CO responded:

Proposals based on the sole charge exemption are not being solicited under this action and will not be considered technically acceptable.

Tab (4).

On April 23, Experts filed the instant protest with the Office of Dispute Resolution for Acquisition. Tab (5). The protest questioned the Agency's authority to use "best value" procedures for weather observation services, complained about the vagueness of the award criteria, and asserted that the Government's answer to the 20% owner question was nonresponsive. The protest concluded by requesting that the solicitation be "reissued in a manner better suited to the type of procurement for these services." Although both the Colorado Springs and Portland sites were covered by the same solicitation, Experts filed separate protests and ODRA assigned separate docket numbers. The issues in each case were identical.

The ODRA assigned a Dispute Resolution Officer, (DRO), to review the cases, contact the parties, explore settlement possibilities, and issue decisions, if necessary. The DRO conducted teleconferences with the parties to establish basic facts and understandings, and on June 9, the Agency submitted its report to ODRA. Tab (6).

On June 30, the Agency motioned ODRA to reassign the cases to another DRO, alleging that the assigned officer could not fairly evaluate the Government's position. Tab (7). On July 2, the Acting Director of the ODRA denied the motion. Tab (8). Shortly thereafter,

the parties notified ODRA that they wished to conduct Alternative Dispute Resolution, (ADR), procedures, rather than having the cases decided under ODRA's default adjudicative process. Tab (9). ODRA agreed to let the cases proceed on that basis.

Both the Protester and the CO engaged in numerous discussions, offers, and counteroffers over the ensuing months. The DRO remained in contact, requested periodic updates, and was told on several occasions that settlement was imminent. See Tab (10). In fact, the Protester provided a response to the Agency's June 9 report to the DRO as a means of keeping ODRA updated on the state of negotiations. Tab (11). Both parties acknowledged that the issues involved policy considerations affecting a broad range of future contracts, and they requested time to resolve those issues. In January 1998, the Colorado Springs site was recompeted, and Experts withdrew its protest against that site. Finally, on March 5, 1998, the DRO informed the parties that the Portland protest had been in ADR for an unacceptable amount of time and that ODRA would take the case under its default adjudication procedures unless the parties could represent that settlement was imminent. The parties indicated that they were at an impasse, and thus ODRA took the case for decision.

III. Issues Presented

This protest presents three issues, as follows:

1. Whether the Agency demonstrated a rational basis for procuring weather observation services on a "best value" basis;
2. Whether the solicitation's evaluation factor of *Past Performance/Experience* was adequately clear so as to permit fair competition; and
3. Whether the Protester was prejudiced by the adequacy of the Agency's response to its Service Contract question.

IV. Analysis

In making a recommendation concerning all substantive protest issues, the FAA's Office of Dispute Resolution will apply the standard of review applicable under the Administrative Procedure Act, 5 U.S.C. 706. Agency actions will be upheld so long as they have a rational basis, are neither arbitrary, capricious, nor an abuse of discretion, and are supported by substantial evidence. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S. Ct. 814, (1971).

A. *The rationality of "best value" contracting for weather observation services.*

Experts' first contention is that there simply is no rational basis for using "best value" rather than "low price" in awarding weather observation contracts. The term "best value" means that the Agency will consider technical factors as well as price, and that award may be made to a contractor submitting a higher priced offer. Experts' argument here is that the services in question are relatively "low tech," "low skilled," and that the product, (the recorded observations), are "entirely uniform." In the Protester's view, there are no meaningful differences in work product among minimally competent companies that would warrant competition on anything other than low price. Tabs (5) and (11).

This argument is unpersuasive given that the solicitation and Amendment 0001 made clear that the "best value" criteria were not directed at the work product itself, but rather at the way in which the company would *manage* the contract. In the context of weather observation services, *management* focuses on how the employees are scheduled, paid, rotated, and supervised, rather than the observations they actually produce. The very nature of *Past Performance/Experience*, and *Management Plan* demonstrate that the Government was concerned about contract administration, and was willing to pay a premium for a firm that would perform with minimal administrative burden over the three year term of the contract. To the extent that there was any doubt about this, Amendment A0002 defined what the Agency considered to be its definition of "administrative burden." See Tab (4), answer to question # 6.

Agencies traditionally have been accorded wide latitude in determining when to use "best value" techniques rather than "low price." Israel Aircraft Industries, 97-1 CPD 41, Lloyd-Lamont Design, Inc, 96-1 CPD 71. Under the FAA's Acquisition Management System, (AMS), that discretion has been expanded. The very section cited by Protester, AMS 3.1, is replete with references to "best value" being the preferred way to define, solicit, and procure goods and services. For example, AMS 3.1.1, *Introduction*, states that... "The FAA procurement system emphasizes competition, selects the vendor with the best value...." Section 3.2.2.3.1.2.3 states: "The evaluation methodology should be set up to allow for maximum flexibility in selecting the offeror(s) providing the best value...." Nor is this policy limited, as the Protester suggests, to high dollar value or "high tech" acquisitions. AMS 3.2.2.5.4 specifically states that commercial or simplified purchases should also be based on "best value" to the FAA.

In sum, the Agency's use of "best value" contracting in this manner for weather observation services is entirely consistent with AMS policy and completely rational. The Protester's argument here is meritless.

B. The appropriateness of "Past Performance" as an evaluation criteria.

Protester's argument is that one of the solicitation's selection factors, *Experience/past performance*, is completely subjective and overly vague. The Protester voices its concern that offerors will be arbitrarily downgraded for prior disputes they may have had with the Agency, even if the underlying fault was not the contractors'.

Historically, *Experience* and *past performance* have been two of the more common evaluation factors employed by agencies. See H. F. Henderson Industries, 97-1 CPD 27. Under the AMS, consideration of *past performance* is mandated for noncommercial and complex procurements, 3.2.2.2, (fourth paragraph), while a "satisfactory performance record" is required for all contractors, 3.2.2.2, (sixth paragraph). The Agency was completely justified in using this factor.

To the extent that Experts complains that there may be a degree of subjectivity involved in rating *past performance*, prior law serves as a guide. Contracting officers and technical evaluation personnel were always empowered to pass judgment on past performance, subject only to limits of rationality in what was considered or excluded. International Business Systems, Inc., 97-1 CPD 114. Even then, it was recognized that "an agency's evaluation of past performance may be based upon the procuring agency's reasonable perception of inadequate prior performance, regardless of the contractor's disagreement with the agency's interpretation of the facts." Continental Service Company, 97-1 CPD 9.

Under the AMS, contracting officials must be accorded at least the same degree of discretion. A blanket assertion that they cannot possibly be objective in evaluating past performance is unsustainable. If, after the evaluation, the Protester believes that its past performance has been irrationally scored, it may seek review by the CO or this office. However, we cannot say as a general proposition that *past performance* is an inappropriate evaluation factor or that the selection team is unfit to evaluate it.

C. The adequacy of the Agency's response to Weather Expert's questions.

As a preliminary matter related to this issue, Experts has demanded to know what basis the Agency has for "not recognizing" the regulatory "20% exception." (29 CFR 541.114). Tab (11). ODR believes that this misstates the issue. The Agency did not "refuse to recognize," the law; it supplemented it. The Service Contract Act is essentially a prevailing wage law, mandating *minimum* rates with defined exceptions. The SIR in question attempted to establish a *higher* standard by prohibiting certain of those exceptions. It did so, because its prior experience with those exceptions evidenced problems in contract administration. See Tab (6). This constitutes setting a *higher* standard than the minimum required by the SCA, not "ignoring" the law. The Protester has cited no authority in support of its argument, and we are aware of none. Under AMS

Sections 3.1 and 3.2, there is no question that the FAA may set higher standards for its requirements than those minimally required by the SCA.

The Protester's main contention concerning the SCA relates to Part 541 of 29 CFR, which delineates several "executive" exceptions to the Act's wage requirements. Subpart 541.113 defines an exception for an employee who is in "sole charge" of an independent establishment or branch; subpart 541.114 exempts employees who own at least 20% of their own business. Experts' bidding strategy traditionally incorporated use of the "20% ownership" exception, but the company was unsure whether clause H-003 precluded its use in this acquisition, since the clause used the term "sole charge." Accordingly, it sought clarification, Tab (3), in response to which the Agency issued Amendment A0002. The problem is that A0002 also spoke in terms of "sole charge," (subpart 113), and never explicitly said whether use of "20% ownership," (subpart 114) was precluded. The Protester claims that, because its question was never answered, it was effectively precluded from submitting an offer.

The Agency responds that H-003 warned:

"No claimed exemption from the Service Contract Act coverage based on the Sole Charge Exemption *for Bona Fide executives* will be accepted..." (Emphasis supplied.)

It then argues that the phrase "*for Bona Fide executives*" was taken straight from the general title of Part 541, which encompasses both subparts 113 and 114. Accordingly, the Agency concedes that while the answer could have been more carefully drafted, the Protester knew or should have known that the FAA intended to preclude use of all the "executive" exceptions under Part 541.

In reviewing the record on this issue, ODRA noted that the Protester and the contracting officer had previously engaged in significant discussion and correspondence on the use of subsections 113 and 114. Specifically, Experts had complained in an earlier matter before this office about the Northwest Mountain Region's apparent confusion regarding those two subparts. Because of that history, ODRA sought clarification of the record by both parties on whether any of their prior dealings affected the Protester's actual understanding of the CO's intent in A0002. On March 16, ODRA faxed a letter to both parties asking that they address the following question:

Whether, on the basis of discussions or other prior courses of dealing, the Protester knew or reasonably should have known that, for purposes of this procurement, the FAA was interpreting the "sole charge" exception as encompassing the "20% ownership" exception as it related to Clause H-003.

Tab (12)

The parties supplemented the record in response to this question with Tabs (13) and (14) and (15). The arguments are as follows:

The Agency asserts that notwithstanding A0002's use of the term "sole charge," the Protester should have known that it was intended to encompass "20% owner," as well as the other exceptions under Part 541. In support of this, the FAA cites to a January 1997 letter from Experts generated in a prior protest in which Experts complains of the Region's apparent inability to distinguish between the two sections. The FAA argues that, given that letter and the course of prior dealings, the Protester had or should have had an understanding of the Agency's all-encompassing intent behind the term "sole charge." In other words, notwithstanding the ambiguous wording of A0002, Experts knew that *all* the "executive" exceptions of 541 were disallowed.

The Protester, on the other hand, cites the same letter and argues that it was precisely because of the prior confusion on this point that it needed clarification, which it never received. Experts asserts that the use of the "20% ownership" exception was critical to its bidding strategy, that it needed a straightforward answer, and that it never got one. The Protester argues that A0002 was totally nonresponsive to the question posed, and that the company could not possibly divine what the true intent behind H-003 was in the instant procurement.

In our view, because of the earlier confusion on the difference between the two exceptions, Experts reasonably asked whether H-003 precluded use of the "20% ownership" exception in the instant procurement. The Protester never received a direct answer to that question. The Government's response that H-003 precluded "sole charge" was ambiguous enough that the Protester justifiably refused to assume the risk of using that exception. While there is some history between the parties on this issue, there simply is not enough in the record to impute to Experts in this acquisition that it should have known that the CO construed "sole charge" as encompassing all the exceptions in Part 541, for purposes of this procurement including the so called "20% ownership" exception.

V. Conclusion

For the reasons explained above, ODRA believes that the Agency demonstrated a rational basis for procuring weather observation services by "best value" acquisition where the focus was on matters of contract administration, rather than merely "work product." Likewise, the Agency may use *Past Performance and Experience* as an evaluation factor and rely on the CO and other technical personnel to rationally evaluate that performance and experience. Finally, we find that the CO's response to the Protester's questions was ambiguous to such a degree that Experts was precluded from formulating an offer. Accordingly, we recommend that the protest be sustained.

In terms of remedy, ODRA recommends that the Agency recompile this acquisition when the base period of performance ends. The solicitation should precisely identify and define SCA exceptions, if any, and a competition on that basis should be conducted.

William R. Sheehan, Dispute Resolution Officer
For the Office of Dispute Resolution for Acquisition