

Office of Dispute Resolution for Acquisition

Federal Aviation Administration

Washington, D.C.

FINDINGS AND RECOMMENDATION

**Matter: Protest of Midwest Weather, Inc.
Under Solicitation DTFA 14-98-R-33946**

Docket: 98-ODRA-00070

Appearances:

For the Protester: Sam Zalman Gdanski, Esq.

For the Agency: Lynne Adams-Whitaker, Esq., Attorney, Great Lakes Region

I. Introduction

Midwest Weather, Inc. ("Midwest") submitted a protest to the Office of Dispute Resolution for Acquisition ("ODRA") relating to awards under Solicitation DTFA14-98-R-33946 issued by the FAA's Great Lakes Region. For the reasons set forth below, the ODRA recommends that the protest be dismissed summarily.

II. Findings of Fact

By letter dated March 30, 1998, Midwest protested the award by the FAA Great Lakes Region ("Agency") of contracts for weather observation services at four sites under Solicitation DTFA14-98-R-33946. Of the two sites (Madison, Wisconsin and Muskegon, Michigan) were awarded to Weather One, Inc. ("Weather One"); and two other sites (Moline and Rockford, Illinois) were awarded to Precision Weather, Inc. ("Precision"). The protest alleges prior and prospective violations of the Service Contract Act,

41 U.S.C. §§351-358 (1994)("SCA") by both awardees and contends that the awards ought not have been made to either company. Midwest contends that such alleged

violations "reflect[ed] poorly on the awardee's [sic] past performance," and implies thereby that the Agency was required to evaluate past performance in connection with source selection and that it failed, in connection with past performance evaluation, to take into account "serious Department of Labor violations."

In response to the protest, the ODRA designated a Dispute Resolution Officer ("DRO") for the protest. The DRO conducted a Preliminary Conference with the parties' representatives via telephone on April 15, 1998. During the Preliminary Conference, it was established that the procurement was conducted on a low offer basis among offerors from a Qualified Vendors' List ("QVL") who had "clean" records under the SCA. The procurement did not involve evaluation of past performance as part of a "best value" analysis. Thus, any evaluation of SCA violations would involve either a pre-award responsibility determination or a matter of post-award contract administration. The DRO explained to the parties that the ODRA would not exercise jurisdiction over such issues in the context of a bid protest, absent unusual circumstances that did not appear to be present in this case. He further advised Midwest's counsel that the ODRA is not charged with responsibility for enforcement of the SCA and other labor laws. Such matters properly are under the cognizance of the Department of Labor ("DOL").

The Contracting Officer stated during the course of the Preliminary Conference that she had contacted the DOL and had been told that there were no known SCA violations by either awardee. The DRO therefore asked counsel for the protester to either (1) provide a statement to the ODRA showing cause why the protest should not be dismissed, or (2) withdraw the protest.

By letter of its counsel dated April 21, 1998, Midwest acknowledges that the procurement did not involve past performance evaluation, but nevertheless contends that, because Midwest had "notified" the Contracting Officer of the alleged SCA "violations on past contracts," the Contracting Officer, purportedly as part of her pre-award responsibility determination, "should have determined that they [the awardees] would attempt to violate the terms of the contract, and are incapable of performing the contract satisfactorily." On this basis (and presumably because it was otherwise in line for award), Midwest argues, it should have received the awards for the four sites instead of Weather One and Precision.

The April 21, 1998 letter concludes by stating:

"However, if this protest is not sustained, we request that the contracting officer investigate these violations and if the awardees of the solicitation continue to violate the Labor Laws, we respectfully request that the option years on the contract not be exercised."

Protester has not provided any evidence to support its bald allegations of SCA violations. The only evidence on this point in the record was presented by the Contracting Officer during the Preliminary Conference. That evidence is that there have been no findings by the DOL regarding SCA violations on the part of either of the two awardees.

III. Discussion

Section 3.9.3.2.3.3 of the AMS provides, in pertinent part, as follows:

"Summary Dismissals

When a Dispute Resolution Officer or Special Master determines that a protest . . . is frivolous or has no basis in fact or law, a summary decision may be issued as the recommendation to the FAA Administrator. . . ."

The record in this case does not reveal any improper Agency action related to the awards to either Weather One or Precision. Thus, there does not appear to be any basis in fact for the instant protest. It is the protester that must bear the burden of affirmatively proving its case. Mere allegations are never adequate to sustain such a burden. *E.g., Siska Construction Company, Inc.*, B-217593 (June 26, 1985), 85-1 CPD ¶724.

Furthermore, there does not appear to be any legal basis for seeking relief from the ODRA in this matter. As had been explained by the DRO, the ODRA will not ordinarily delve into matters of responsibility, absent extraordinary circumstances that are not present here. *See Washington Consulting Group*, 97-ODRA-00059 (Interlocutory Decision of the ODRA). The DOL was, in fact, contacted prior to the award and reported that none of the offerors on the Region's QVL, including the two awardees, had been found to be in violation of the SCA. As has long been recognized, matters of establishing labor act violations are within the sole purview of the DOL, and sanctions are not to be imposed on contractors for alleged violations before the DOL has made its determination regarding them. The award of the four contract sites to Weather One and Precision after receiving a "clean" report from the DOL clearly was rational, notwithstanding any unsupported "notification" by Midwest of alleged SCA violations by its competitors.

When reviewing the record, a rational basis for Agency action is all that needs be established, in order for the ODRA to deny a protest. *See* AMS Section 3.9.3.2.3.2.

Finally, any decision by the Contracting Officer to investigate the two awardees and not to exercise subsequent year options in the event SCA violations are discovered would clearly be a matter of post-award contract administration. As with issues of bidder "responsibility," the ODRA, will not, except in limited circumstances, review or insinuate itself into matters of contract administration in the context of a bid protest. *Metro Monitoring, Inc.*, 97-ODRA-00058.

IV. Conclusion and Recommendation

For the reasons set forth above, the ODRA finds that the protest is wholly without factual or legal basis and is frivolous. Accordingly, pursuant to AMS Section 3.9.3.2.3.3, the ODRA recommends that the protest be dismissed summarily and with prejudice.

Richard C. Walters

Dispute Resolution Officer

For the Office of Dispute Resolution for Acquisition