

Office of Dispute Resolution for Acquisition

Federal Aviation Administration

Washington, D.C.

FINDINGS AND RECOMMENDATION

**Matter: Protests of Midwest Weather, Inc.
Under Solicitation DTFA07-98-R-03373 and**

Solicitation DTFA07-98-R-03364

Docket: 98-ODRA-00087 and 98-ODRA-00088 (Consolidated)

Appearances:

For the Protester: Sam Zalman Gdanski, Esq. and Jeffrey Gdanski, Esq., Offices of Sam Zalman Gdanski, Attorney at Law

For the Agency: William K. Tolar, Esq., Attorney, Southwest Region

Midwest Weather, Inc. ("Midwest") submitted protests to the Office of Dispute Resolution for Acquisition ("ODRA") relating to two awards under Solicitations DTFA07-98-R-03373 and DTFA07-98-R-03364, both of which were issued by the FAA's Southwest Region for weather observation services. The Protester alleges that the two awardees, Condor Reliability Services, Inc. ("Condor") and Metro Monitoring Services, Inc. ("Metro Monitoring") had violated and were intending to violate the Service Contract Act, 41 U.S.C. §§ 351-358 (1994) (the "SCA") and that they, therefore, ought not have received the awards. The Director of the ODRA consolidated the protests for adjudication and assigned Richard C. Walters as the Dispute Resolution Officer ("DRO").

The issues raised by Midwest in these protests are the same as those advanced in *Midwest Weather, Inc.*, 98-ODRA-00070, which was summarily dismissed by the FAA Administrator on the recommendation of the ODRA. In *Midwest Weather, supra.*, the protest was dismissed, because (1) it is the United States Department of Labor ("DOL"), not the FAA, that is responsible for enforcing compliance with the SCA; and (2) the Protester sought to challenge the FAA's alleged failure to confirm such compliance in the context of a Contracting Officer's ("CO's") pre-award determination of contractor responsibility. As the ODRA pointed out in its Findings and Recommendations in

Midwest Weather, supra., the ODRA will not, absent unusual circumstances (which were not present in that case), review affirmative responsibility determinations. [1] The instant protests are indistinguishable from that earlier protest. Here, too, Midwest seeks to challenge CO responsibility determinations on the basis of alleged SCA violations, where the DOL had not notified the FAA of such violations. Like the earlier case, neither of the procurements here were to be based on "best value" and neither involved "past performance" as a source selection evaluation factor. Moreover, there is no allegation here that the solicitations set forth definitive responsibility criteria regarding SCA compliance which were not applied.

As we stated in the earlier Midwest matter, the adjudication of alleged SCA violations is properly the subject of a DOL proceeding and ought not be accomplished in the context of a bid protest before the ODRA. Here, Midwest appears to have notified the CO of alleged SCA violations in advance of award. It argues that, before proceeding with award, the CO was obligated, as part of the affirmative responsibility determination process, to ascertain from the DOL whether violations had, in fact, occurred. During a Preliminary Conference with the ODRA on August 19, 1998, Midwest represented (without specifics) that some violation(s) of the SCA had been found for Metro Monitoring, one of the two awardees, but indicated that the DOL had yet to determine such alleged violation(s) to have been wilful and the proper basis for a debarment from federal contracting. Even accepting the truth of these allegations, Midwest has failed to establish that such circumstances would automatically have required the CO to find Metro Monitoring "non-responsible."

To the contrary, with regard to a CO's determination of responsibility/non-responsibility, the FAA's Acquisition Management System ("AMS") states: "The CO is given great discretion in making this determination." AMS §3.2.2.2. It is well within a CO's discretion in the context of making a responsibility determination to choose not to investigate, on her own, competitors' bald allegations regarding SCA violations, in the absence of an official DOL notice regarding such violations. [2]

Although, as a matter of prudence and in the exercise of their broad discretion in this area, COs may wish to make reasonable inquiry into such allegations, there is no basis for requiring such inquiries as a matter of legal obligation, or to state that a decision not to make such inquiry constitutes a clear abuse of the COs discretion under the AMS. In the present case, the May 19, 1998 letter -- appended to Midwest's protest of August 7, 1998 -- the letter by which Midwest provided the CO with notice of alleged violations by Condor, enclosed not merely a single sheet of data on that one contractor, but, we are advised, a significant volume of material, approximately 1 inch thick, regarding alleged "irregularities" of many "weather contractors." The letter did not cite to any actual findings by the DOL, nor did it advise that the DOL was moving to debar any of the companies in question. For the CO to have decided to leave such matters strictly to the DOL under such circumstances was not irrational, arbitrary or capricious and could hardly be said to have been an abuse of her discretion.

The Protester herein has been advised that the ODRA views the current protests as frivolous and an abuse of the FAA Dispute Resolution Process. The Protester ignored the ODRA's suggestion that it withdraw the protests voluntarily. Under the circumstances, and for the reasons set forth in the decision in *Midwest Weather, supra.*, the ODRA

recommends that the current protests be dismissed summarily and with prejudice, pursuant to Section 3.9.3.2.3.3 of the FAA Acquisition Management System.

_____/s/_____
Richard C. Walters
Dispute Resolution Officer
For the Office of Dispute Resolution for Acquisition

APPROVED:

_____/s/_____
Anthony N. Palladino, Director
Office of Dispute Resolution for Acquisition

[1] In contrast with affirmative determinations of responsibility, the standard of review traditionally applied to reviewing CO determinations of "non-responsibility" is that they are not ordinarily questioned, in the absence of a showing of a lack of a *reasonable basis* for such determinations. *See Colonial Baking Co.*, Comp. Gen. Dec. B-185305, 76-2 CPD ¶59 (July 20, 1976), and cases cited therein. The ODRA has yet to address such a case.

[2] We also note, without ruling on the issue, that traditionally a CO also has the discretion to find an offeror "non-responsible" under appropriate circumstances, even in the absence of DOL proceedings to establish SCA violations and even where the DOL does not recommend debarment. *See Comp. Gen. Dec.*

B-175845, 1973 U.S. Comp. Gen. LEXIS 1975 (March 9, 1973) (GAO refused to "substitute its judgment for that of " a NASA CO who found a contractor "non-responsible," relying on a stipulation which the contractor had entered into with the DOL as to SCA violations, a stipulation which provided for the contractor's payment of specified wages, fringe benefits and liquidated damages, and which resulted in DOL withdrawing its earlier recommendation of debarment for such violations).