

**Recommendation of the Office of Dispute Resolution in the Protest of
NanTom Services Inc.**

Under Solicitation DTFA07-97-R-03283

97-ODR-00028

Appearances:

For the Protester: Theodore Bailey, P.C., San Antonio, Texas

For the Agency: William Tolar, Lynette Word, Office of the Assistant Chief Counsel, FAA Southwest Region, Dallas, Texas.

I. Introduction

On February 5, 1997, NanTom Services Inc. submitted a protest to the FAA's Office of Dispute Resolution, (ODR), against the proposed award of a contract under solicitation DTFA07-97-R-03283, issued by the FAA's Southwest Region office. See Tab (1). That solicitation had been issued on January 27, 1997, for weather observation services at the Monroe Regional Airport, Monroe Louisiana. NanTom claims that although it had qualified to be placed on the Region's "Qualified Vendors List," (QVL), for weather observation services, the Region arbitrarily solicited only several of the vendors from the QVL to compete for this requirement, and that NanTom was not among those selected. For the reasons explained below, ODR believes that the Region's methodology in selecting vendors to compete was arbitrary and contrary to the agency's Acquisition Management System, (AMS), and therefore recommends that the protest be sustained.

II. Facts

On January 27, 1997, the FAA's Southwest Region office issued solicitation DTFA07-97-R-03283 to acquire weather observation services for Monroe Regional Airport, Monroe Louisiana. The solicitation called for a base period of March 16, 1997, through September 30, 1997, with one (1) year option period.

See Tab (2).

The Southwest Region had previously compiled a Qualified Vendor's List (QVL) for weather observation services. At the time of the solicitation's issuance, fourteen companies had qualified for that list, including the protester. Tab (2).

The QVL had been used in November 1996 to solicit offers for six other sites throughout the Region. All fourteen companies were solicited at that time. NanTom offered on three of the six sites. Tab (2).

When the requirement for the Monroe site arrived in the contracting office, the contracting officer and the other members of the Integrated Product Team (IPT) responsible for meeting the requirement determined that, because of the short duration and small dollar value, not all fourteen companies on the QVL would be solicited. The contracting officer knew from historical data that not all of the QVL companies were interested in acquisitions of that size. Tab (2).

At that point, the team determined to randomly draw the names of five of QVL members "from a hat," to be solicited along with the incumbent. The drawing was completely random. The names of all fourteen vendors were written on pieces of paper, of which five were blindly selected. NanTom was not one of the five. Tab (2).

On January 27, 1997, the Region posted the announcement of the Monroe requirement, along with the six QVL companies that had been selected to compete. NanTom states that it did not learn of the announcement until February 3. This protest followed on February 5, 1997. Tab (1).

III. Issue Presented

Did the contracting officer have a rational basis for randomly narrowing the QVL from fourteen to six vendors to compete for this requirement?

IV. Analysis

1. *Timeliness.* The Agency first argues that NanTom's protest is untimely in that the announcement, which was posted on the internet, was made on January 27, 1997, and NanTom, by its own admission, did not see it until February 3, 1997. NanTom submitted its protest to the ODR two days later.

The agency reasons that since AMS section 3.2.1.3.12 announced the FAA policy that all FAA requirements would be listed on the internet, any prudent contractor should have monitored the appropriate site on a daily basis. Its failure to do so thus contravenes the requirement under the solicitation's "Disputes" clause, 3.9.1-3, that all protests must be filed "within 5 business days of the date the protester was aware, or should reasonably have been aware of the agency action."

The ODR does not agree with the agency's position, and believes that the protester exercised the diligence necessary to meet the "reasonably should have been aware" standard of clause 3.9.1-3.

2. "*Ripeness*." As an additional procedural matter, the agency claims that the protest is not "ripe" because NanTom failed to address its concerns to the contracting officer before protesting to the ODR. The short answer to this argument is that while the AMS encourages offerors to resolve disputes at the contracting officer level, neither the AMS nor clause 3.9.1-3 of the solicitation requires them to do so. See page L7 of Tab (3).

3. *The rationality of the "downselect" decision.* The thrust of NanTom's complaint is that there was no reason for the Region to have randomly chosen six of the fourteen QVL members to compete. (Which the agency refers to as a "downselect.") The protester argues that having been prequalified to provide such services, the agency was required to solicit it whenever a requirement arose, and that failure to do so was irrational. In reply, the agency argues that the process employed was fully rational. The ODR disagrees with the protester's first proposition but finds merit in the second. NanTom's status on the QVL did not vest it with any particular "right" to be solicited. Under the facts of this case, however, there was no rational basis for limiting the competition the way the region did. Under the circumstances, various downselecting methodologies could have been rational, but the random selection employed here was not.

This was a small procurement and the agency expected only limited interest. With a six month base period and one option year at one location, the Southwest Region anticipated that a number of the QVL members would not bother to compete. The agency argues that, historically, only about half of the QVL participants demonstrate interest in requirements of this limited scope and dollar value. In support of that point, the Region notes that NanTom itself offered on only half of the similarly small requirements in the November 1996 solicitation.

The ODR believes that this fact supports the protester, rather than the agency. Considering prior experience, some of the weather observation providers were demonstrably not interested in the small jobs. That is precisely why the Southwest Region should have solicited all 14, or "downselected" based on some methodology reasonably calculated to reach the offerors most likely to respond. The fact that NanTom *did* make an offer on three of the six prior small jobs indicates that it *was* interested in small jobs, depending on the site and other factors. This may well have been true of the other eight companies that were omitted, but the agency will never know because the methodology chosen to downselect bore no relation to potential interest. Assuming that the contracting officer is correct in expecting an interest rate of about 50% on jobs of this size, the randomness of this process could well exclude those vendors most likely to participate.

In sum, ODR believes that if expediting this procurement was a concern, the contracting office could have rationally narrowed the QVL based on information it already had, or could easily obtain. For that reason, we urge that the protest be sustained.

V. Conclusion

The ODR recommends that the proper remedy in this case is to recompete the option period. Since contract performance was not suspended, termination of the present contractor's base period would be unduly disruptive of the services being performed. The recompetition should be conducted among all the members of the QVL, or among a subset of the QVL that is selected based on criteria rationally related to the purpose of the reduction.

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For the Office of Dispute Resolution