

Office of Dispute Resolution for Acquisition

Federal Aviation Administration

Washington, D.C.

FINDINGS AND RECOMMENDATIONS

Matter: Protest of J. SCHOUTEN CONSTRUCTION, INC.

Under Solicitation DTFA08-98-R-03206

Docket: 98-ODRA-00064

Appearances:

For the Protester: Jerold A. Schouten, President, J. Schouten Construction, Inc.

For the Agency: Bradford Talamon, Esq., Office of the Assistant Chief Counsel,

Western Pacific Region.

I. Introduction

J. Schouten Construction, Inc. ("JSC") protests the Federal Aviation Administration's ("FAA") award of a contract for the construction of an ARSR-4 radar tower at Ajo, Arizona ("the Project"). JSC was one of ten firms responding to a Screening Information Request ("SIR") issued by the FAA's Western Pacific Region ("Region"). The SIR sought background information from companies interested in competing for the Project.

Based on a "best value" review of the information provided in response to the SIR, the contracting officer excluded JSC and another firm from those selected to receive copies of the specifications and drawings necessary to compete in the second phase of the acquisition. JSC claims that: (1) it was irrational to exclude competitors at that stage of the acquisition; (2) the contracting officer's evaluation of its SIR response lacked a rational basis; and (3) the contracting officer inconsistently applied the award criteria among the offerors. JSC demanded a stay of contract performance and the reopening of the procurement to permit it to compete. For the reasons discussed below, the Office of Dispute Resolution for Acquisition, ("ODRA"), recommends that the protest be sustained.

II. Findings of Fact

On November 12, 1997, The Region advertised solicitation DTFA08-98-R-03206 in the Commerce Business Daily. The SIR sought background information on contractors interested in competing for the construction of a remote radar site near Ajo, Arizona. The Project consisted of a two story equipment building, radar tower foundation, fuel tanks, and related mechanical and demolition work preparatory to the installation of the actual radar by another contractor. A similar announcement was made on the Internet on November 14. Tabs (1) and (2).

The announcements contemplated that the acquisition would be completed in two phases. First, all interested offerors would submit background information on their respective companies. Prices would not be solicited at this point. The contracting officer ("CO"), would then "downselect" or exclude from further competition those deemed to be the least competitive. In the second phase, the remaining firms would receive specification and drawing packages, submit proposals, and be rated to determine the overall "best value" to the government, including price.

The Commerce Business Daily and the Internet announcements identified four factors that the Region would consider in identifying the "best value" for both "downselection" and award purposes. They were:

- (1) Specialized Experience of the Firm. Firms shall illustrate the scope of the effort, its complexity, how schedules were implemented and how objectives were met.

(2) Past Performance on FAA and other contracts with respect to cost control, quality of work, and compliance with performance schedules. (3) Capacity and Capability of firm to accomplish the work. The firm shall submit a complete resume. Firm shall provide recent experience and technical knowledge of project personnel. Firm shall provide current workload, total number of on-going projects, their construction value and percentage of completion. (4) Financial Capacity/Bonding Information. Firm shall provide working capital, banking and credit references. The SIR must be received at the designated office no later than **December 8, 1997**.

(Emphasis in original) Both announcements also established a mandatory site visit for offerors on December 2. Tabs (1) and (2).

At the December 2 site visit, all attendees were provided with a two-page SIR document that reiterated the four technical factors, and gave a slightly refined definition of the elements of each factor. For example, under "Specialized Experience," the December 2 document requested more specific information on offerors' "critical path methodology," "conformance to specs" and "standards of workmanship." The second page of that document requested information on ten specific aspects of each offeror, and provided a signature block.

See Tab (3).

Ten contractors, including JSC, submitted responses to the SIR by the December 8 due date. A team consisting of the contracting officer and two engineers from the Region's Airways Facilities division evaluated each submittal. Ratings were assigned to each factor of the offeror's submission, defined as follows:

Excellent- The contractor's performance exceeds requirements by a substantial margin providing additional value to the government. There are virtually no areas for improvement.

Very Good- The contractor's performance exceeds requirements. There may be several areas for improvement, but these areas are more than offset by lower (sic) rated performance in other areas.

Good- The contractor's performance meets all requirements.

Marginal- The contractor's performance fails to meet all requirements. There are areas of good or better performance but these are more than offset by lower rated performance in other areas.

Unsatisfactory- The contractor's performance fails to meet requirements by a substantial margin. There are very few areas of good performance and these are more than offset by lower rated performance in other areas.

Tab (4)

Upon completing the evaluation, the team drafted a summarized report and a matrix, depicting each company's score, by evaluator, under the four technical factors. JSC was rated (with notational comments), as follows:

Specialized Experience: Good (small projects), Marginal, Good (Too general)

Past Performance: Marginal, Marginal, Marginal (didn't specify)

Capacity/Capability: Marginal, Marginal, Marginal (too general)

Financial Capacity/Bonding Info: Marginal, Marginal (lack of explanation)

See Tab (5).

The evaluation team ranked JSC tenth of the ten responses received, and the CO determined to "downselect" JSC and one other firm from the second phase of the acquisition. A third company was disqualified from further participation for failing to attend the mandatory site visit. Of the seven firms eligible to compete in phase two, only five submitted offers by the due date of January 22, 1998. Tab (6).

Meanwhile, on December 23, 1997, the contracting officer notified JSC that it had been "downselected," and would not be considered further. Tab (7). On several occasions thereafter, JSC contacted the CO in an attempt to obtain a debriefing on the reasons for its downselection, but the CO was unable to schedule a meeting. Tab (8). On January 22, 1988, JSC faxed a request for a written debriefing and posed specific questions. Tab (9). Finally, on January 26, 1998, JSC reached the CO by telephone and renewed its request for a debriefing. Although the conversation lasted for over an hour, JSC believed that the CO completely failed to address its main concerns. Tab (8). The following day, JSC filed the instant protest with ODRA.

ODRA assigned the protest to a Dispute Resolution Officer ("DRO"), who conducted an initial teleconference with the parties on February 6. The DRO explained various avenues of alternative dispute resolution ("ADR") that might be pursued. By the end of the teleconference, however, it was apparent that the parties could not reconcile their differences, and the DRO established a schedule for discovery, briefing, and decision under the ODRA's default adjudication process.

The agency furnished its protest report with relevant documentation to the ODRA on February 18. On February 26, the DRO received a request from counsel recently retained by JSC for access to certain documentation in the contracting officer's file. Counsel sought copies of all offerors' SIR responses, evaluation worksheets, and relevant correspondence, for purposes of determining whether the evaluations were rationally conducted. Counsel had previously been admitted to a protective order issued by the ODRA. Accordingly, on March 16, documentation responsive to JSC's request was produced to counsel. On March 30, JSC submitted its rebuttal to the agency report. Tab (10).

After reviewing all the material submitted by both parties, the DRO determined that the record was ambiguous as to the precise reason for JSC's "downselection." Specifically, the technical evaluation contained language that suggested that the protester's *capacity* was the reason for rejection, while other parts of the same document implied that that JSC's *past performance* was decisive. The ODRA considered this distinction important, and accordingly, on March 31, the DRO requested both parties to provide any further information that would clarify the issue. Tab (11). On April 6, JSC responded through Tab (12).

III. Issues Presented

This protest presents three issues: (1) whether the Region acted rationally in structuring a procurement where certain offerors who were on a qualified vendors list would be "downselected" at a preliminary stage, before they received specification packages and submitted proposals; (2) whether JSC provided credible evidence of bias on the part of evaluators or the contracting officer; and, (3) whether the contracting officer's "downselection" of JSC was rational.

IV. Analysis

In making a recommendation concerning all substantive protest issues, ODRA 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. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S. Ct. 814, (1971).

While each of the protester's allegations is addressed below, it should be noted as a preliminary matter that the "downselection" in question was conducted on a "best value" basis. The point of the first phase of the acquisition was not to separate "acceptable" from "unacceptable" offerors, but to rank the companies to identify the most competitive among them. Thus, the protester's comments about being "responsive," "qualified" or "acceptable" miss the point. The issue was not whether JSC was qualified, acceptable, or unacceptable, but how it compared with the other offerors. In fact, JSC was not rated "unacceptable" in any factor. Rather, it was ultimately "downselected" because it was deemed non-competitive.

1. Rationality of "downselecting" at the SIR stage.

JSC's first argument is that it was irrational to conduct an acquisition whereby certain offerors are eliminated based solely on their responses to a Screening Information Request, before they have a chance to submit an offer on the actual specifications. For example, JSC questions how it can address such aspects as *cashflow* and *management* when it has not received the specification package and therefore does not know exactly what the job entails. Tab (8),

page 2.

The problem with this argument is that the Acquisition Management System ("AMS"), encourages contracting officers to make precisely this sort of judgement, where possible. AMS Section 3.2.2.3.1.2.1, (June 1997), identifies three categories of Screening Information Requests. In this acquisition, the CO chose the second, *Screening Information*, the purpose of which is described as:

Screening information allows the FAA to determine which offeror(s) are most likely to receive the award, and ultimately which offeror(s) will provide the FAA with the best value. The screening information requested in the SIR should focus on information that directly relates to the key discriminators of the procurement.

See page 3-12 of the AMS, (June 1997)

The section goes on to list fourteen examples of information that may be solicited in performing such a screening. Among them are: *capability statements*, *performance*, *experience*, and *financial condition information*, all of which relate directly to the criteria used in the instant SIR. Here, the Region employed the criteria that the AMS envisioned in winnowing down the field of competition at the earliest phase of the procurement.

Critical to this analysis is distinguishing the function of a Screening Information Request from the traditional "competitive range" determination under Federal Acquisition Regulation 15.609(a). Under the FAR, the CO was to include in the competitive range all offerors who stood a *reasonable chance* for award. *Cinvac, Inc*, B-243366, July 15, 1991, 91-2 CPD 57. Even then, the agency was granted considerable discretion, with the only admonition being to err on the side of inclusion. *Aviate L.L.C*, B-275058, April 14, 1997, 97-1 CPD 162. In contrast, under AMS Section 3.2.2.3.1.2, the purpose of the SIR is to "determine which offerors are *most likely* to receive the award and ultimately which offeror(s) will provide the FAA with the best value." (Emphasis supplied). The distinction between "*reasonable chance*" and "*most likely*" is significant; under the AMS, the CO is clearly given broad authority to make judgements about ultimate success before encouraging participants to expend further time and effort.

In sum, ODRA finds that the contracting officer acted rationally and consistent with the AMS by employing a "downselect" scheme in the screening phase of this procurement.

2. Bias of contracting officials

JSC contends that the CO was biased against it. The protest paraphrases a lengthy excerpt from a December 4, 1997 telephone conversation between the parties in which the CO is characterized as terse and unresponsive to questions posed by JSC. The protester also claims that the CO made a comment at the December 2 site visit about having "no intention of making more than five sets of drawing packages." This comment is cited as evidence of intent on the part of the CO to "find something/anything to disqualify some bidders to get down to 5."

In reviewing such allegations of bias on the part of evaluators and decision-making officials, ODRA believes the appropriate standard of review is that adopted by other fora which have confronted the same issue. Because government officials are presumed to act in good faith, we do not attribute unfair or prejudicial motives to them on the basis of inference or supposition. California Environmental Engineering, B-274807, January 3, 1997, 97-1 CPD 99. Where a protester alleges bias on the part of government officials, the protester must provide credible evidence clearly demonstrating a prejudice against the protester or for the awardee and that the agency's bias translated into action that unfairly affected the protester's competitive position. Advanced Sciences, Inc, B-259569, July 3, 1995, 95-2 CPD 52, Ameriko Maintenance Co.,

B-253274, August 25, 1993, 93-2 CPD 121.

Against this standard, JSC has offered two pieces of evidence: an alleged terse telephone conversation, and an allegation that the CO was looking for reasons "to get rid of people." Taking the last allegation first, the CO vehemently denies having made any such statement. In fact, the agency report provides copies of printing receipts, dated November 21, 1997, showing that 15 specification and drawing packages were prepared in anticipation of heavy competition on this procurement. Tab (13).

With respect to the December 4 telephone conversation, the paraphrased excerpts, even if accurate, simply fail to meet the standard explained above. While the CO may have been short in her discussion with JSC, that fact standing alone does not evidence prejudice against it or in favor of another contractor. The protester has not satisfied its burden on the issue of bias.

3. Rationality of "downselecting " JSC.

JSC states that it was "shocked" to learn that a company with its qualifications was downselected, citing an extensive performance record on FAA projects over two generations. Its SIR response itemized 80 FAA construction projects it has been involved in since 1990, with no default terminations, liquidated damages, or bond defaults being incurred. JSC contends that there simply was no way that the company should have received scores as low as those assigned. In support of this, the protester's rebuttal identifies multiple instances where other offerors demonstrated less FAA experience, fewer employees, less related experience, lower bonding amounts, and smaller job sizes, yet received much higher scores.

The only contemporaneous documentation providing insight to the agency's scoring analysis is the technical evaluation. Tab (14). This is an undated, unsigned, four-page document describing "pro's" and "con's" of each of the ten offerors. It concludes with a sequential ranking of the ten companies, and general comments. JSC is addressed in a single paragraph as follows:

This contractor has done quite a bit of work for the FAA in the past. They have primarily done Navaid's work for 452. They are small (20 employees) and tend to do small projects. In their list of recent contracts, only a few exceed \$100K and then only a couple exceed \$500k. So, I think that this project is too big for them. Also, in talking with several people in 452, the FAA has been unhappy with their work in the past.

From this language, it appears that a primary concern of the evaluation team was JSC's *capacity*, since the company's experience was mostly in smaller projects. This comment is rationally related to the stated evaluation criteria, and substantiated by a review of JSC's SIR submission. For example, while JSC cited numerous FAA projects in the past seven years, most were in fact under \$100K, and only three exceeded \$500K. The final comment, however, indicates that negative *past performance* was also a consideration that affected the evaluation. Nothing further in that paragraph expands on the extent to which past performance played a role. Nor is there any identification of the references, the projects they were referring to, or the basis of the alleged "unhappiness." Standing alone, this paragraph is ambiguous as to the impact of negative *past performance* on JSC's "downselection."

The last page of the same technical evaluation, however, contains comments that must be read in conjunction with the paragraph cited above. Under a heading entitled "Remarks," the unspecified author listed five general comments, the last of which states:

Past Performance with FAA- I asked around the office here in an attempt to locate anyone who has worked with these contractors. Based on comments that I have gotten from the other engineers, I have ranked some otherwise qualified contractors near the bottom of my list, namely (Company X) and Schouten.

See Tab (14)

While this comment also fails to provide any identification of the individuals, the projects, or the problems involved, it does clearly indicate that these anonymous references were a *deciding* factor in JSC's "downselection." Based on the record, we interpret the use of the term "otherwise qualified" as meaning that JSC would not have been "downselected" *except* for those unidentified negative references. The comment cited compels the conclusion that the unidentified negative references decisively impacted the scoring.

The significance of these references is a concern because the agency's policy is to afford offerors a chance to address such references where they will have a "significant" impact on offerors. AMS Toolbox section T3.2.2 states, in pertinent part:

Disclosure of negative Information. If the IPT receives negative information that will have a significant impact on the likelihood of an award to an offeror, the IPT should disclose the information and provide an opportunity to respond.

While the referenced Toolbox section does not state a mandatory policy, the failure to permit JSC to address negative information here was irrational for two reasons. First, the impact was not merely "significant," it was decisive. JSC was "downselected" solely because of the engineer's comment. Secondly, the reference here was totally anonymous and unspecific. We are forced to conclude that an "otherwise qualified" offeror was summarily rejected on the basis of unidentified, and possibly unidentifiable, references on unidentified projects for unknown reasons. The guidance in Toolbox T3.2.2 was designed to prevent precisely this type of casual past performance reference.

V. Conclusion and Recommendations

For the reasons discussed above, ODRA recommends a finding that the Region acted rationally in structuring this acquisition in such a way that offerors could be "downselected" at an initial stage, based on their SIR submissions. We also recommend a finding that the protester has not demonstrated any bias on the part of contracting officials. Lastly, we recommend a finding that the Agency acted irrationally in rejecting the protester solely on the basis of unidentified, unsubstantiated, negative references. We recommend that the protest be sustained on that basis.

The Agency has informed the ODRA that while award has not yet been made, it is imminent, pending resolution of some final environmental concerns. The Agency also points out that the completion date of the project is crucial because the site must be ready for the follow-on contractor in four months. Further, the Agency states that after final offers were submitted, but prior to award, the CO released the pricing submitted by all five offerors. The ODRA does not know why the pricing was released, but that fact, combined with the urgency noted above, precludes a recompetition in this acquisition. Accordingly, we recommend that JSC be reimbursed any reasonable bid and proposal costs that it incurred in preparing its response to the SIR. The ODRA also recommends that the Agency identify and afford JSC an opportunity to address any negative prior references that may affect the company's ability to compete in future procurements.

William R. Sheehan

Dispute Resolution Officer

For the Office of Dispute Resolution for Acquisition