

PUBLIC VERSION

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

FINDINGS AND RECOMMENDATION

Matter: **Protest of Water & Energy Systems Technology, Inc.**
 Pursuant to Solicitation No. DTFANM-06-R-00016

Docket No.: **06-ODRA-00373**

Appearances:

For the Protester: Joseph C. Rust, Esq.

For the Agency: Karen Davis Huber, Esq.
 Counsel for the FAA’s Northwest Mountain Regional Office

For the Intervenor: Rick L. Rose, Esq.

I. INTRODUCTION

This bid protest was filed by Water & Energy Systems Technology, Inc. (“WEST”) with the FAA Office of Dispute Resolution for Acquisition (“ODRA”) on May 19, 2006. The Protest challenges the award of a contract by the FAA Northwest Mountain Region (“Region”) for the provision of water treatment services at the Air Route Traffic Control Center Facility in Salt Lake City, Utah (“Facility”). For the reasons set forth below, the ODRA finds WEST’s Protest to be meritless and recommends that the Protest be denied in its entirety.¹

¹ WEST’s Protest had also challenged the terms of the Solicitation. That portion of the Protest was dismissed by the ODRA as untimely in a Decision dated June 16, 2006.

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II. FINDINGS OF FACT

1. On January 31, 2006, the Region issued a Request for Offers to provide water treatment services at the Facility (“Solicitation”). The Solicitation required that offers be received by the Region no later than February 15, 2006. *See* Agency Response (“AR”) Tab D. Offers were to include, among other things, unit prices as well as total prices for a number of water treatment chemicals.
2. On February 2, 2006, the Region issued Solicitation Amendment No. 1 specifying that a particular active ingredient be included in the algaecide component of the chemicals in order to control a particular type of bacteria. AR Tab 3.
3. On February 10, 2006, Power Engineering Company, Inc. (“Power”), the incumbent, eventual awardee and intervener in the Protest, submitted its initial offer. The Power Initial Offer was dated February 8, 2006. *See* AR Tab F. The Power Initial Offer set forth total estimated costs as follows:
 - Base year – (DELETED)
 - Option Year One - (DELETED)
 - Option Year Two - (DELETED)
4. The Power Initial Offer provided, among other things, the unit prices for the water treatment chemicals to be supplied, including a unit price for 3,200 pounds of algaecide at a unit price of (DELETED)and a total price of (DELETED).
5. WEST submitted its Initial Offer on February 13, 2006. *See* AR Tab G. The WEST Initial Offer set forth total estimated costs as follows:
 - Base Year - (DELETED)
 - Option Year One - (DELETED)
 - Option Year Two - (DELETED)The WEST Initial Offer included unit prices and quantities for the chemicals to be supplied, including 450 pounds of algaecide at a unit price of (DELETED)and a total price of (DELETED).

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6. A Senior Contracting Specialist, who is an employee of a company working for the Region, reviewed the offers of WEST and Power, which were the only offers received in response to the Solicitation. *See* AR Tabs H and W. It was determined by the Contract Specialist and by the Contracting Officer the Power Initial Offer and the WEST Initial Offer specified differing quantities of treatment chemicals. The Solicitation should be amended to request that the offerors base their respective offers on historical data regarding the amount of chemical usage for water treatment at the Facility. In that regard, the affidavit of Contracting Officer Michael R. Todd states:

When the initial proposals came in, the two offerors were determined to be technically qualified to perform the work. However, the Protester, WEST, had not proposed the brand or concentration of algaecide requested in the Request for Proposals, and it had proposed far less than the requested quantity. Since the two offerors had proposed vastly different quantities of algaecide, I asked John to ensure that we could compare “apples to apples” by issuing another amendment requesting the offerors to propose the same quantities of the same strength of algaecide.

See AR Tab X.

7. The Contracting Officer’s affidavit is corroborated by two e-mails forwarded by the Contracting Specialist to the Contracting Officer and the Environmental Support Service Supervisor at the Facility. *See* AR Tab H. The Region initially did its own calculation based on historical usage, applying the needed prices that had been provided in their initial proposals by Power and WEST. The Contracting Specialist independently determined that given historical usage, Power would be the low bidder. However, in a later e-mail of the same date, the Contracting Specialist indicated that, after conferring with the Contracting Officer, “it has been decided to amend the Solicitation and have both parties re-bid based on historical quantity usage of chemicals.” AR Tab 8.
8. On February 28, 2006, the Region issued Amendment No. 2 to the Solicitation. *See* AR Tab J. Amendment 2 included revised specifications in

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which “chemical quantities had been readjusted to reflect a more accurate annual consumption.” *Id.* Amendment 2 established a due date for revised offers from Power and WEST of March 3, 2006. *See* AR Tab K.

9. In determining the quantities of chemicals specified in Amendment 2, the Region utilized invoices from the contracting office files. *See* AR Tabs J and X.
10. Power submitted its Revised Offer on March 1, 2006. *See* AR Tab L. The Power Revised Offer utilized the quantities specified in Solicitation Amendment 2. Its unit prices for the chemicals involved did not change from those provided in its Original Offer. Power’s total estimated costs stated in its Revised Offer were as follows:

- Base year - (DELETED)
- Option Year One - (DELETED)
- Option Year Two - (DELETED)

See AR Tab N.

11. WEST submitted its revised offer on March 2, 2006. *See* AR Tab M. The WEST offer specified quantities of chemicals conforming to Solicitation Amendment 2, at estimated costs as follows:

- Base Year - (DELETED)
- Option Year One - (DELETED)
- Option Year Two - (DELETED)

AR Tab M.

12. The Region completed a comparison of the two revised offers. *See* AR Tab N. That analysis revealed that the total price proposed by Power Engineering of (DELETED) was (DELETED) less expensive than the WEST total revised price of (DELETED). *Id.*

13. The Contracting Officer made the final decision to award to Power Engineering. *See* AR Tab X. In that regard, the Contracting Officer stated:

I evaluated the final proposals received from the two offerors and made the decision to award to Power Engineering, which had the lowest price. Both offerors were well qualified, but price was the determining factor. I do not recall having any discussions with either offeror on this Contract. *Id.*

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Both the Contracting Specialist and the Environmental Support Supervisor at the Facility concurred in the award decision. *See* AR Tab O.

14. Award of the Contract was not made immediately because of a need to obtain funding. *See* AR Tab O. Contract award was made to Power on April 7, 2006, one day after funding had been approved. *See* AR Tabs Q and R.
15. The letter was misplaced by the Contracting Specialist and was not mailed until May 16, 2006. *See* Affidavit of Contracting Specialist at AR Tab X.

I signed the notification to the unsuccessful offeror on May 1, advising that the award was made to Power Engineering. It was not mailed out of this office until May 16. John misplaced the letter for roughly two weeks before actually mailing it out. While that was a regrettable error, it is understandable, given our unusually heavy workload. I have no reason to believe that John had any bias against the Protester, nor was he in a position to affect the outcome of this Solicitation.

16. WEST filed its Protest with the ODRA on May 18, 2006.

III. DISCUSSION

WEST's original Protest consisted of a one page letter stating the following:

This letter serves formal notification that Water & Energy Systems Technology, Inc. (A Small Woman Owned Business) protests the award of the contract to Power Engineering Company for the above solicitation under provision 3.9.1-2.

We believe that the facts of the award need to be examined including but not limited to the handling of the original bid submissions that were due on February 15, 2006. After that date an amended solicitation was received and was then due on March 3, 2006. The award was finally made two months later. The history of this contract is such that we have serious concerns as to whether our original bid or its content was provided Power Engineering by FAA personnel.

We have had several discussions with Mr. John Knobel that have not proven satisfactory in demonstrating that our concerns are not true. We phoned Mr. Knobel several times to determine the status of the bid and only after the first of May were we informed that it had been awarded to

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Power Engineering. We told him that that it was our intent to protest this award.

Despite the fact, that we are now in possession of a letter dated May 1, 2006 stating that the contract has been awarded to Power Engineering, we have attached the envelope showing the cancellation date of May 16, 2006. We received this notification today, May 18, 2006, in our office.

We believe that this protest must be taken seriously and answered responsibly. Thank you for your immediate attention.

Protest Letter at 1. The Protest letter included a copy of a May 1, 2006 letter from the Region informing WEST that the contract had been awarded to Power. Region Letter of May 1, 2006. As is more fully discussed in the ODRA's Decision of June 16, 2006, partially granting and partially denying the Region's Motion to Dismiss the WEST Protest as untimely, the Region's Letter of May 1, 2006 was not mailed until May 16, 2006, and was not received by WEST until May 18, 2006.

WEST's Supplementary Protest letter, in addition to making an untimely challenge to the terms of the Solicitation, challenged the Region's conduct of the bidding process stating:

Based upon the fact that the last three bids for this Facility have produced similar results, WEST Inc., expressed great concern that our pricing if provided to a competitor would allow price adjustment by the competitor on the addendum.

See WEST Supplementary Protest Letter at 1. In its Decision of June 16, 2006, the ODRA concluded that this ground of the WEST Protest was timely. *See* ODRA Decision of June 16, 2006 at 7, 8.²

² On June 20, 2006, West forwarded a letter to the ODRA by regular mail setting forth a Second Supplemental Protest. The Second Supplemental Protest, which was received by the ODRA on June 29, 2006, is based on documentation West had received on June 16, 2006 from the Region. Specifically, the documentation consisted of spreadsheets prepared by the Region that compared the West and Power proposals, before and after the revision of the quantities set forth in Solicitation Amendment 2. *See* Region's June 16, 2006 Letter, with attached Agency Exhibit 3 in Support of Agency Motion to Dismiss. West baldly asserts that the Region purposefully amended the chemical quantities in order to skew the competition in favor of Power Engineering. Under the ODRA Procedural Regulations, 14 C.F.R. §17.15(a)(3)(i), such a protest was required to be filed not later than seven business days after the date the protester knew or should have known of the grounds for the protest. Under the Regulations, protests are deemed "filed" when *received* by the ODRA. *See* 14 C.F.R. §17.7(a). In this case, the Second Supplemental Protest is untimely because it was received by the ODRA on June 29, 2006, more than seven business days after the protester knew of the grounds of its protest, i.e., more than seven business days after June 16, 2006. Moreover, as is more fully discussed below, the Region's decision to amend the Solicitation

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In its Agency Response to the Protest, dated June 22, 2006, counsel for the Region asserts that: (1) the Protester's allegations of disclosure of its pricing to Power are baseless; (2) there is no evidence that WEST's offer was mishandled by the Region; and (3) the process followed by the Region and the ultimate decision to make award to Power were rational and supported by substantial evidence. *See* AR at 2 – 5. The Region points out that no evidence has been submitted in support of the WEST allegations that its pricing was disclosed. AR at 2. Moreover, the Region's Response includes sworn affidavits from the Contracting Officer, the Contract Specialist, and a representative of the Facility stating that there was no disclosure to Power. Additionally, Power itself provided a letter dated March 24, 2006, saying that it had received no information on WEST's bid from the FAA.

Under the ODRA's Procedural Regulations, 14 C.F.R. Part 17, and the Acquisition Management System ("AMS"), the ODRA reviews bid protests to determine whether the Agency actions complained of have a rational basis, are neither arbitrary, capricious nor an abuse of discretion and are supported by substantial evidence. *Protest of L. Washington & Associates*, 02-ODRA-00232. A protester seeking to overturn an Agency action has the burden of proof. *Id.* In this case, WEST has failed in any way to contradict the evidence presented by the Region, stating only its "concerns" stemming from the fact that the bidding process took longer than it thought reasonable and that the last three competitions for the contract had resulted in awards to Power. *See* WEST Comments at 2.

Moreover, the sequence of events here does not support WEST's contention. Power's Initial Offer, which included unit prices for chemicals to be provided, was submitted **prior** to the submission of the WEST offer. Even after the Region issued Amendment 2 to request Revised Offers based on historical quantities of chemicals used, the unit prices of the Power offer did not change and its Revised Offer was submitted **prior** to the Revised Offer of WEST. There simply is no basis to support WEST's allegation that the

to reflect historical chemical usage and to consider revised offers had a rational basis and was prudent under the circumstances.

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Region divulged WEST's pricing to Power and that Power utilized that information to win the competition.

Similarly, there is no basis for Protester's allegation that the bidding process was mishandled by the Region in a way that was detrimental to WEST. WEST chiefly cites to the delay that occurred between the submission of offers and the award decision. As the Region explained and supported in its Agency Response, the delay that occurred was attributable solely to the need to obtain funding for the contract. *See* AR Tabs W and X. Further it is clear from the record that once funding was obtained, *i.e.*, on April 6, 2006, the award proceeded promptly and was made on April 7, 2006. *See* AR Tabs Q and R. As the Region correctly points out "there is nothing irregular or unusual about funds becoming available two months after issuance of a Solicitation." AR at 4. The record reflects that the Region diligently pursued obtaining funding and acted promptly once funding was confirmed.

Finally, with respect to the decision to make award to Power, the Region correctly points out that, notwithstanding that the award was to be made on a "best value" basis, where bidders are determined to be essentially equal in capability an award decision based on the lower price cannot be said to be irrational.

In its Comments, counsel for the Protester seems to suggest that the Region should have made award based on the original offers and not issued Amendments 1 and 2 prior to making award. Counsel notes that WEST's price in the Initial Offers was actually lower than that of Power. This argument, however, ignores the fact that the Initial Offers were based on quantities that were not consistent with historical chemical usage for the treatment process. The contemporaneous record reflects that having analyzed the Initial Offer in the context of such usage, the Region took action that allowed it to make a fair comparison of the two offerors. In the ODR's view, the Region acted prudently and properly both in utilizing historical quantities and in providing the additional information to the two offerors and allowing them to modify their offers accordingly. The process utilized by the Region protected both the Agency and the offerors.

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The ODRA finds no basis in the record for concluding that the Region, its employees or contractor acted improperly with respect to the bidding or award process in this case in any way that reflected bias against WEST or that prejudiced WEST. The fact that the Region admittedly did not promptly notify WEST of the award to Power was not prejudicial to WEST inasmuch as the lack of prompt notification did not affect the award decision or WEST's ability to timely challenge the decision by filing this Protest.³

IV. CONCLUSION

For the reasons set forth above, the ODRA finds WEST's Protest to be without merit and recommends that it be denied in its entirety.

-S-

Anthony N. Palladino
Director
FAA Office of Dispute Resolution for Acquisition

July 3, 2006

³The ODRA recommends that the Region take steps to ensure that in the future all qualified offerors are promptly informed of the outcomes of the Region's bidding processes.