

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

FINDINGS AND RECOMMENDATIONS

Matter: Protest of L. Washington & Associates, Inc.
Under Solicitation No. DTFA06-03-R-30008

Docket No.: 03-ODRA-00287

Appearances:

For the Protester, L. Washington & Associates, Inc.: Lanxton L. Washington, President

For the FAA Southern Region: William G. Nelmes, Esq., Office of Regional Counsel

For the Intervenor, Allied Protection Services: Steven D. Prather, Vice President

I. Introduction

On December 15, 2003, L. Washington & Associates, Inc. (“LWA”) filed this Protest (“Protest”) with the FAA Office of Dispute Resolution for Acquisition (“ODRA”) challenging a purported award by the FAA Southern Region (“Region”) of a contract pursuant to Solicitation DTFA06-03-R-30008 (“the Solicitation”). It appears that the Solicitation contemplated a multi-year contract for security guard services at the FAA Southern Region Headquarters. In this regard, the Region indicates that the annual value of the contract was less the \$700,000. Agency Response to Protest (“AR”), page 1. The Solicitation had been set aside 100% for Small Business concerns. In light of the Protest, a contract has yet to be executed. The Protest contends that the proposed awardee, Allied Protection Services (“Allied”), is not a bona fide small business and therefore is ineligible for the award. Allied has been permitted to intervene in the Protest proceedings as an interested party. Following an unsuccessful attempt to resolve the matter by means of

consensual alternative dispute resolution (“ADR”), the Region, on February 5, 2004 filed its Agency Response to the Protest. Although both LWA and Allied were afforded an opportunity to submit comments with respect to the Agency Response, neither did so. Accordingly, the record in this matter was closed as of February 12, 2004. As explained below, the ODRA has found that LWA has failed to sustain its burden of proof in this Protest and therefore recommends that it be denied in its entirety.

II. Findings of Fact

1. On or about June 26, 2003, the Region issued the instant Solicitation for a fixed-price contract for armed security guard services at the FAA Southern Region Headquarters. The Solicitation specified that the procurement was to be a 100% Small Business set aside. AR, page 1.
2. A total of 22 proposals were received, of which 18 were determined by the Region’s Contracting Officer to be ineligible for a variety of reasons. *Id.*
3. The Contracting Officer determined that the proposal of Allied represented the “best value” to the Government and announced that an award would be made to Allied. *Id.*
4. It appears that LWA had notice of the proposed award on or before December 11, 2003. In any event, on December 15, 2003, by facsimile letter to the Contracting Officer with copy to the ODRA, LWA provided “written notification” regarding the Protest, together with a copy of an e-mail message to the Contracting Officer dated December 11, 2003. The December 15, 2003 notification reads as follows:

This [is] our written notification of the protest submitted via email on December 11, 2003, regarding the award announced via FEDBIZOP. We have creditable evidence that all the affiliates to include entities in the name of the owner were not considered in the size status of the awardee, ALLIDED [sic] PROTECTION SERVICES INC.

5. The e-mail message dated December 11, 2003, enclosed with the December 15, 2003 Protest facsimile notification letter, reads as follows:

L. Washington & Associates, Inc., an interested party, hereby notifies you that we are filing a protest regarding the award of the above cited solicitation. We know that the size of Allied Protection Services Inc is incorrect and that they have affiliated business minimally in the name of it (sic) owner, Stephen Levine and that they are incorporated in PA, NJ, NC, MS, TN, GA, and FL. (Please consider this notification ad (sic) a hard copy will be sent forthwith.

Lanxton L. Washington

6. On December 16, 2003, Allied notified the ODRA of its desire to participate in the Protest proceedings as an intervenor.
7. On December 17, 2003, the ODRA conducted an initial status conference with the parties by telephone. The ODRA Director notified the parties that he had designated the ODRA's Marie A. Collins to serve as ADR coordinator for the Protest, to discuss ADR options and to offer her services as a potential ADR neutral. Subsequently, with the parties' consent, Ms. Collins engaged in informal ADR with the parties as an ADR neutral in an attempt to obtain an amicable resolution of the Protest.
8. Thereafter, Ms. Collins advised the ODRA Director that informal ADR had been unsuccessful and that a formal ADR process would not likely achieve a resolution of the Protest. Accordingly, by letter dated January 21, 2004, the ODRA Director advised the parties that adjudication would commence immediately. The Region was directed to file and serve its Agency Response, and LWA and Allied were advised that they had the opportunity to file comments on the Agency Response within 5 business days of their receipt of that document. By the ODRA's letter, the parties were also notified that the ODRA Director would serve as the Dispute Resolution Officer for adjudication of the Protest.

9. The Region submitted an Agency Response containing a Certificate of Service signed by the Region's Counsel, dated January 30, 2004, certifying that the document was tendered for overnight delivery to the ODRA, LWA and Allied. The address for the ODRA listed in the Certificate was incorrect. More specifically, the Agency Response was addressed to the ODRA's former office at the Department of Transportation Headquarters building, 400 7th Street, S.W., Room 8332, Washington, D.C. 20590. The addresses listed for LWA and Allied appear to have been correct, *i.e.*, they were the addresses previously furnished to the Region and the ODRA in this matter. Based on the Region's Certificate of Service, LWA and Allied would have received their copies of the Agency Response on January 31, 2004.

10. The ODRA ultimately received the Agency Response on February 5, 2004. In the Agency Response, the Region argues that its Contracting Officer reasonably accepted Allied's small business certification and that LWA failed to demonstrate that Allied has affiliates that would render it unqualified to be deemed a "small business." AR, pages 2-4. In the latter regard, the Region alludes to certain allegations made to the Region by LWA about specific companies that LWA had claimed were affiliated to Allied by reason of their common ownership by Allied's owner, Mr. Stephen M. Levine. These assertions were not made within the facsimile Protest letter or accompanying December 11, 2003 e-mail message. In the Agency Response, the Region reports that there were three companies identified by LWA as purported affiliates of Allied – Crime Control, Inc.; Central Metro, LLC; and Stephen Levine & Associates – that of the three, one (Crime Control, Inc.) had no relationship whatsoever to Allied, that the "Stephen M. Levine" who is listed as that company's vice president is not the same Stephen M. Levine who owns Allied. As to the other two entities, the Region agrees that they are affiliated with Allied, but asserts that, the total annual gross receipts for the three companies still does not exceed the maximum annual gross receipt figure

specified for the applicable NAICS code – Code 561612, “Security Guards and Patrol Services.” More specifically, the Region contends, the total gross receipts for all three firms, just over \$7 million, is still well below the \$10.5 maximum specified for NAICS code 561612. Accordingly, notwithstanding the affiliation, the Region maintains, Allied was not disqualified as a “small business” concern for purposes of the instant procurement and remains eligible for an award. In support of this contention, the Agency Response provides financial and other data for the three entities. This data (AR, Exhibits 4, 5 and 6) appears to confirm that, of the three entities, only Allied is an operating entity and that Central Metro LLC was established only to hold real property that had been acquired by Allied ultimately to house its operations. There is no evidence to the contrary in the record.

11. Neither LWA nor Allied filed comments with the ODRA on the Agency Response within the 5 business day timeframe mandated by the ODRA’s letter of January 21, 2004 or contemplated by the ODRA’s Procedural Regulations (*see* 14 C.F.R. §17.37(c)), or thereafter. Nor did either party seek an extension of time or permission to file after the deadline. Accordingly, by letter dated February 12, 2004, the ODRA notified the parties that the record in this matter was closed.

III. Discussion

In acquisitions under the FAA’s Acquisition Management System (“AMS”), where a contract award decision has a rational basis and is neither arbitrary, capricious, nor an abuse of discretion and is supported by substantial evidence, the ODRA will not recommend that the decision be overturned. *Protest of IBEX Group Inc.*, 03-ODRA-00275; *Protest of Computer Associates Inc.*, 00-ODRA-00173; *Protest of Information Systems and Networks Corporation*, 98-ODRA-00095 and 99-ODRA-00116, *affirmed* 230 F.3d 52 (DC Cir. 1999). The Protester bears the burden of proof under this standard.

See Protest of L. Washington & Associates, Inc., 02-ODRA-00232; *Protest of Glock, Inc.*, 03-TSA-003.

In the present case, Allied, as part of its proposal in response to the Solicitation, certified in writing that it qualified as a small business entity for purposes of the instant procurement. AR, Exhibit 1, page 6-2. In the Protest, LWA alleges that the proposed awardee, Allied, is not a small business entity by reason of supposed affiliations through Allied's owner, Mr. Stephen Levine. This assertion is put forward by LWA in summary fashion (*see* Findings of Fact 4 and 5 above) and is not accompanied by any form of evidence to support the assertion. The record in this case is devoid of any evidence that would establish that Allied's certification was false or that the Region's reliance on that certification lacked a rational basis or was arbitrary or capricious. In short, LWA utterly has failed to sustain its burden of proof. Under such circumstances, the Protest must be denied. *See Protest of DCT, Inc.*, 96-ODRA-00019.

IV. Recommendation

For the foregoing reasons, the ODRA recommends that the Protest be denied in its entirety.

_____/s/_____
Anthony N. Palladino
Dispute Resolution Officer and Director
FAA Office of Dispute Resolution for Acquisition