

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

FINDINGS AND RECOMMENDATIONS

Matter: Protest of Transgroup Express
Pursuant to Solicitation DTFA06-99-R-30014

Docket: 00-ODRA-00157

Appearances:

For the Protester, Transgroup Express: Christopher M. Johnson, Esq.

For the FAA Southern Region: William G. Nelmes, Esq.

INTRODUCTION

Transgroup Express (“Transgroup”) filed a bid protest (“Protest”) with the FAA Office of Dispute Resolution for Acquisition (“ODRA”) on June 12, 2000. The Protest, which was filed prior to contract award, challenged a Solicitation conducted by the FAA Southern Region (“Region”) for emergency relief transportation services under the Federal Response Plan. *See* Declaration of Michael V. Foran at ¶2. The Region has moved to dismiss the Protest as moot, based on the Region’s unilateral cancellation of the Solicitation.¹ Transgroup opposes the Region’s Motion. For the reasons set forth below, the ODRA recommends that the Motion be granted and the Protest be dismissed.

¹ Transgroup had protested an earlier solicitation and contract award for the same requirement. That protest, which was docketed as 00-ODRA-00155, was withdrawn by Transgroup based on the Region’s Agreement to terminate the award and recompute the requirements

FINDINGS AND DISCUSSION

Transgroup raised three issues in this Protest, namely that: (1) the proposed contract is illusory since it allows either party to avoid performance; (2) the evaluation criteria is flawed in that it does not permit the Region to conduct a rational, best value analysis; and (3) the Solicitation improperly permits the Region to waive contract requirements without providing all offerors an opportunity to update their submittals. Pursuant to the ODRA's Alternative Dispute Resolution ("ADR") Program, the parties reached an agreement on June 16, 2000, to explore the resolution of the Protest through ADR. On June 29, 2000, the ODRA conducted a status/scheduling conference at the request of the parties. During the course of that conference, counsel for the Region reported that the Solicitation would be unilaterally cancelled by the Region and that the Region would file a Motion to Dismiss the Protest on Monday, July 3, 2000. Counsel for Transgroup was given to and until the close of business, July 11, 2000 to file any opposition to the Motion. The adjudication process was suspended indefinitely pending the resolution of the Motion to Dismiss.

The Region's Motion asserts that the Protest has been rendered moot by the unilateral cancellation of the Solicitation. Transgroup timely filed its Opposition to the Motion on July 11, 2000. Transgroup takes the position that the unilateral cancellation did not moot the Protest and that Transgroup continues to have standing as an interested party. Transgroup's Opposition revolves around its allegation that it:

wasted thousands of dollars in bid preparation costs in attempting to compete in a procurement which lasted over one year, and was punctuated by a series of missteps of the FAA. The FAA's decision to cancel the entire procurement, rather than taking corrective action, lacks a rational basis. The FAA could have amended RFO; requested another round of offers and received the benefit of a contract that the FAA repeatedly has maintained was necessitated by the need to respond to national emergencies.

See Transgroup Response to Motion to Dismiss Protest at 1.

In its Reply to Transgroup's Opposition, the Region responded to a series of requests for information from the ODRA as follows:

[REQUEST]

The reason(s) for the Region's unilateral decision to cancel the Solicitation in question for the second time:

[RESPONSE]

We have determined that the statement of work (SOW) does not adequately address the needs of all agencies with an interest in this proposed contract. The SOW will be completely re-written to include additional and more clearly defined requirements.

[REQUEST]

Whether and when the Region expects to re-solicit for the requirement:

[RESPONSE]

The FAA Southern Region intends to re-solicit the requirement as soon as the SOW can be re-written and reviewed by all affected agencies. We expect to release the new SIR prior to September 30, 2000.

[REQUEST]

What, if any, corrective action will be taken by the Region with regard to (1) any admitted deficiencies in the cancelled solicitation, and (2) any of the allegations raised by the Protester in the first or second protests that were filed in connection with the requirement:

[RESPONSE]

We are not convinced that the cancelled solicitation contained fatal deficiencies. Based on our review of the SOW in that solicitation, we have determined that it did not adequately define the cooperative needs of DOT, FEMA and other interested agencies. The SOW will be completely re-written to better define DOT's requirement for Emergency Transportation Services. We will consider the protester's concerns in both the first and second

protests when re-writing the solicitation and will incorporate clarifying language where necessary.

[REQUEST]

Whether the Region anticipates that Transgroup will have an opportunity to compete in any re-solicitation for the subject requirement:

[RESPONSE]

The Contracting Officer will ensure that Transgroup receives a copy of any solicitation issued for the revised Emergency Transportation requirement. As the new SOW has not been formulated, we cannot speculate whether or not Transgroup will have the necessary capabilities required to submit an offer or to perform the work as defined in the new solicitation.

[REQUEST]

If the Region does not anticipate re-soliciting, or cannot identify an approximate date for any re-solicitation, provide an explanation of the relevant circumstances:

[RESPONSE]

A specific date cannot be established at this time, since we anticipate a significant re-write of the statement of work and other parts of the solicitation. It is our objective to issue the new SIR for Emergency Transportation Services prior to September 30, 2000.

See Declaration of Michael Foran at ¶7. On July 24, 2000, Transgroup filed a Surreply to the Region's Reply to Transgroup's Opposition to the Motion to Dismiss. In its Surreply, Transgroup stated that:

the issue is whether FAA cancelled the procurement in response to the issues raised in Transgroup's Protest or, in the alternative, in response to issues external to the Protest. The disposition of that issue will determine whether Transgroup can recover its bid preparation costs.

See Transgroup Surreply at 1.

Transgroup's Opposition to the Motion to Dismiss essentially argues that because Transgroup had standing to pursue its Protest, the Protest is not moot as a result of the unilateral cancellation of the Solicitation. *See* Transgroup Opposition at 4. Transgroup further alleges that it:

has suffered economic injury as a result of the FAA's conduct in this procurement. If the FAA is allowed to simply walk away from this procurement, Transgroup would have wasted thousands of dollars in bid preparation costs attempting to compete in a procurement which was flawed by the FAA's own missteps.

See Transgroup at 4-5. Additionally, Transgroup attacks the Region's decision to cancel the Solicitation as lacking a rational basis. *See* Transgroup Opposition at 5. Transgroup in making this argument relies on its allegation that: "assuming the FAA really had an emergency need for the services, it had over a year to develop a legal method to procure them." Opposition at 5. Transgroup argues that rather than canceling the Solicitation, the Region should have amended the RFO and asks that the Region be directed to file an Agency report, or in the alternative that the Protest be sustained based on the existing record. Opposition at 6.

Transgroup provides no authority or authoritative argument to support the concept that the Region does not have authority to unilaterally cancel a Solicitation. Rather, citing to an early decision in *JO-JA Construction Limited*, 96-ODRA-00024, Transgroup attempts to argue that a decision to cancel must have a rational basis and that in this case the FAA: "now is not even going to attempt to take corrective action." Opposition at 5. In fact, the Affidavit of Contracting Officer filed in support of the Region's Reply includes an express statement of intention to take corrective action, *i.e.*, to better define the agencies' requirements and, where necessary, clarify solicitation language so as to address the concerns expressed in Transgroup's first and second protests. Affidavit of Michael Foran at ¶7. Contrary to Transgroup's unsupported allegation, the Region's Reply

expressly indicates that the Region is not abandoning the acquisition of emergency services. Region Reply at 2; Affidavit of Michael Foran at ¶7. Finally, the Region asserts that:

the Agency has cancelled the present Solicitation for an undeniable sound reason – to re-do the Solicitation in order to accurately cover the FAA and other Federal agencies’ needs for emergency transportation services. Once the Agency realized that those needs were not adequately met by the original, now cancelled Solicitation, it would have been irrational not to cancel and re-work it.

Reply at 3.

As the ODRA has previously ruled, decisions of the Comptroller General do not constitute binding authority in bid protests filed pursuant to the FAA’s Acquisition Management System (“AMS”). *Camber Corporation and Information Systems & Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080. Nonetheless, in appropriate cases, where consideration of such precedent is not inconsistent with the AMS or the ODRA procedural rules, the ODRA will treat Comptroller General decisions as persuasive authority on particular issues.

In the matter of *Quantech, Inc.*, Comp. Gen. Dec. B-278380.3 (June 17, 1998), a protester requested that the General Accounting Office (“GAO”) reinstate a protest and issue a decision on the merits after an agency had cancelled the underlying solicitation. In *Quantech*, the solicitation had been cancelled unilaterally shortly after the protest was filed. The protester in *Quantech* also sought reimbursement of its proposal preparation and protest costs on the basis that the cancellation would mean that the agency would not complete the corrective action. The GAO declined the request to reopen the protest and denied the request for bid and proposal costs. In another recent case, *FCS Construction Services, Inc.*, Comp. Gen. Dec. B-283726.2 (January 3, 2000), the GAO denied a

protest of the cancellation of a solicitation. In that case, the GAO concluded that bid and proposal costs would not be awarded because:

the agency took corrective action one month before the date in which it was required to file the Agency Report in our Office. Where, as here, corrective action is taken prior to the protest report due date, we regard such action as reasonably prompt and declined to consider Protester's request and we recommend reimbursement of protest costs.

Id., at 9.

In the instant case, the Region has chosen to unilaterally take early corrective action, *i.e.*, prior to the filing of its agency report. The Region also has stated that in taking that corrective action, it will consider the issues raised in the Protest.² There is no basis on which we can conclude that the Region is acting in bad faith, or that it will not in fact take additional corrective action. There being no evidence of bad faith on the part of the Region, and there being a clear, stated plan for a continuation with a revised solicitation in the near future, Transgroup's statement that "the FAA is not even going to attempt to take corrective action" amounts to unsupported speculation. In any event, as a recipient of the revised solicitation, Transgroup will be in a position to protest any perceived deficiencies. Finally, the record provides no basis on which the ODRA could conclude that, in the absence of a dismissal, a contract should and would be awarded to Transgroup.

CONCLUSION AND RECOMMENDATION

For the reasons stated above, the ODRA finds that the Protest has been mooted as a result of the Region's unilateral cancellation of the Solicitation. The ODRA therefore recommends that the Protest be dismissed on that basis.

² The AMS favors early resolution of procurement disputes. *See* AMS §3.9.3. Voluntary corrective action is one form of early resolution that can benefit both the Agency and its contractors or potential contractors.

/s/

Anthony N. Palladino

Associate Chief Counsel and Director

FAA Office of Dispute Resolution for Acquisition