

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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of Simerly Enterprises Pursuant to Solicitation DTFA09-02-R-22017**

Docket No.: **01-ODRA-00208**

Appearances:

For the Protester: Kay S. Simerly, Owner, Simerly Enterprises

For the Intervenor: Darrin LeDoux, Spectrum Services

For the Agency Product Team: Mary Ellen Loftus, Esq., FAA Central Region

I. INTRODUCTION

Simerly Enterprises (“Simerly”) filed this bid protest (“Protest”) with the FAA Office of Dispute Resolution for Acquisition (“ODRA”) on December 19, 2001. The Protest challenges the award of a weather observation services contract for Wichita, Kansas to Spectrum Services^{1[1]} (“Spectrum”). Simerly claims that as the alleged low offeror it should have been awarded the contract and that its proposal was excluded improperly from consideration.

^{1[1]} Spectrum sought and was granted the right to participate in this Protest as an Intervenor.

As is discussed herein, the ODRA finds that the Contracting Officer's refusal to consider Simerly's Proposal had a rational basis and was not arbitrary, capricious or an abuse of discretion. Simerly had falsely certified in its Proposal that it had not had any contracts terminated for default by any federal agency within the prior 3 years. At the time of making the certification, Simerly was aware, but failed to disclose that the FAA's Southwest Region had terminated a contract with Simerly for default on October 9, 2001. The ODRA therefore recommends that the Protest be denied.

II. FINDINGS OF FACT

1. On November 20, 2001, the FAA's Central Region solicited proposals for a weather observation services contract for Wichita, Kansas ("Solicitation"). The Solicitation called for a contract base-period of 9 months *i.e.*, from January 1, 2002 through September 30, 2002, and included two 1-year renewal options and a third option for an additional 6 months.

2. The Contract was designated as a small business set-aside and was to be awarded on a firm, fixed price basis. *See* Solicitation Section 3.2.4-1.

3. The Solicitation called for the contract to be awarded "to the responsible offeror whose submittal conforming to the SIR will, at the discretion of the source selection official, be the best value to the FAA considering the technical, cost/price, and other criteria in the SIR." *See* Solicitation Section 3.2.2.3-19(a). The same section of the Solicitation reserved to the Agency the right to: "(1) reject any or all submittals if such action is in the public interest, (2) accept other than the lowest cost price submittal, and (3) waive informalities and minor irregularities in offers received."

4. The Region received a total of five proposals, including one from Simerly. Simerly's Proposal offered the lowest total price. The second lowest offeror was the awardee, Spectrum. Agency Report at 3.

5. Section L.1 of the Solicitation entitled "Required Submissions" informed offerors that "any information which cannot be verified and/or is incorrect, will receive no credit

in the associated evaluation factor in Section M, Evaluation Factors for Award. Offeror is responsible for submitting complete and accurate information.”

6. Solicitation Section L.1(A) entitled “Past Performance” required at Subsection (1) that offerors:

submit a list of the last five contracts completed during the past three years and all contracts and subcontracts currently in process. Contracts listed may include those entered into by the federal government, agencies of state and local governments and commercial customers. Offerors that are newly formed entities, without prior contracts, should list contracts and subcontracts as required above for all key personnel.

7. Simerly’s Proposal dated November 30, 2001, responded to the Past Performance portion of Section L, as follows:

The only contract completed during the past 3 years was: Department of Transportation Federal Aviation Administration, Contract Number DTFA07-99-C-02037, contract value \$164,241.36 per year for federal contract weather observation station, Contracting Officer Joanne Sneed, NISC Contractor, Senior Program Analyst, Air Traffic Requirement Branch, ASW-510D/NISC, Fort Worth, Texas 76192, Phone Number (817) 222-5578.

8. Simerly's Proposal also included a number of representations, certifications and other statements required by Solicitation Section K, Part 4. Solicitation Section 3.2.2.7-7(a)(1)(ii), entitled "Certification regarding debarment, suspension, proposed debarment and other responsibility matters (April 1996)," require a certification as follows:

(1) the offeror certifies to the best of its knowledge and belief, that . . .(ii) the offeror has has not within a 3-year period proceeding this offer, had one or more contracts terminated for default by any Federal agency.

Simerly completed the form for this certification by handwriting an “X” in the bracket indicating that Simerly had not been terminated for default within the prior 3-year period on any Federal contract. Agency Report, Exhibit 3.

9. Simerly does not dispute that it made the above referenced certification. *See* Simerly Comments to Agency Report, at pages 1 and 2. Simerly further admits that it had received a letter dated October 12, 2001, (“Default Letter”) from the Southwest Region informing Simerly that its contract with the Region was terminated for default. *See* Exhibit B to Simerly Comments to Agency Report.

10. In the Default Letter, which was forwarded by Certified Mail, Return Receipt Requested on October 12, 2001, under the heading “TERMINATION FOR DEFAULT”. The Contracting Officer plainly stated:

Pursuant to your telephone conversation, October 9, 2001, in which you informed the Agency that “your intentions are not to perform the Contract,” the subject CPA referenced is completely terminated under Acquisition Management System Clause 3.1.0.6-4 Default (fixed-price supply and service), effective immediately.

11. Kay S. Simerly, the owner of Simerly Enterprises contends that:

I did not falsely represent to Ms. Sharon Calabro in Central Region, the fact that I had a termination for default against me. As far as I was concerned, this Contract never commenced officially as my responsibility and in fact, since information was knowingly withheld from me, I was not allowed to make an informed decision to accept the Albuquerque, New Mexico contract.

Simerly Comments at 2.

12. Ms. Simerly also states:

I was, at that time, in dispute with the Southwest Region concerning a contract that had been misrepresented to me as a five-year contract for Albuquerque, New Mexico. To the best of my knowledge and belief, I had not defaulted on this Contract, even though Southwest Region had sent me a letter dated October 12, 2001 (Exhibit B) stating otherwise. Simerly Comments at 1, 2.

13. Section 3.2.2.7-7 of the Solicitation also states:

CERTIFICATION CONCERNS A MATTER WITHIN THE JURISDICTION OF AN AGENCY OF THE UNITED STATES AND THE MAKING OF A FALSE, FICTIOUS, OR FRAUDULENT CERTIFICATION MAY RENDER THE MAKER SUBJECT TO PROSECUTION UNDER SECTION 1001, TITLE 18, UNITED STATES CODE.

14. After reviewing the Simerly Proposal, the Contracting Officer determined that Simerly had not made the required submission regarding its federal contracting experience. The Contracting Officer thereafter spoke with Ms. Simerly who referred her to the FAA Southwest Region for more information on Simerly's contracting experience. *See* letter of December 13, 2001 from Contracting Officer to Simerly, Agency Report, Exhibit 7. Upon contacting the Region, the Contracting Officer:

learned that you (Simerly) did have another contract with Southwest Region but it was terminated for default on October 9, 2001. You did not mention anything about the defaulted contract with the FAA at the Albuquerque, New Mexico site.

The Solicitation requires offerors to submit complete and accurate information. Based on the above, your Proposal was not considered for award.

Id.

15. The December 13, 2001, letter further informed Simerly that the contract award had been made to Spectrum. On December 19, 2001, Simerly filed the instant Protest.

III. DISCUSSION

The ODRA bid protest process applies the standard of review of the Administrative Procedure Act, 5 U.S.C. § 706 (“APA”). Accordingly, the ODRA consistently has held that its review concerns “whether the Agency’s decision was legally permissible, reasoned, and factually supported.” *Protest of Washington Consulting Group Inc.*, 97-ODRA-00059, quoting *Delbert Wheeler Construction, Inc. v. United States*, 39 Fed. Cl. 239, 247 (1997). The ODRA may not substitute its judgment for that of Agency personnel and Agency actions are upheld if they have a rational basis, are not arbitrary, capricious nor abuse of discretion and are supported by substantial evidence. See *Protest of J.A. Jones*, 99-ODRA-00139; *Protest of Camber Corporation and Information Systems and Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated).

The sole issue to be determined in this case is whether, in light of Simerly’s failure to identify a recent default termination of a Simerly contract with the FAA’s Southwest Region, the Contracting Officer for the Central Region in this instance acted properly in refusing to consider the Simerly Proposal. In this case, the termination for default undisputedly was a matter of record as of the time of the submission of Simerly’s Proposal to the Central Region. Moreover, it is clear that the Solicitation in question unambiguously required Simerly to identify all such terminations as part of the certifications contained in its Proposal. Finally, it is undisputed that Simerly was aware of the termination at the time it submitted its Proposal.

Simerly contends, however, that the termination for default by the FAA’s Southwest Region was improper. It is clear that Simerly disagrees with the Southwest Region’s position that Simerly had defaulted on the Albuquerque Contract: “I had not defaulted on this Contract even though the Southwest Region had sent me a letter dated October 12, 2001 (Exhibit B) stating otherwise.” Simerly Comments at 1, 2. Ms. Simerly explains her position, as follows:

As far as I was concerned, this Contract never commenced officially as my responsibility and in fact, since information was knowingly withheld from me, I was not allowed to make an informed decision to accept the Albuquerque, New Mexico Contract... This Contract never got to the point where I could perform contractual obligations.

Simerly Comments at 2. Essentially, Simerly appears to argue that, since the company never commenced performance on the Contract in Albuquerque, it could not have been in default.^{2[2]}

The question of whether the Southwest Region's Termination for Default of Simerly's Albuquerque, New Mexico Contract was justified is entirely irrelevant to the issue presented in this Protest. The Solicitation had placed Simerly and all other offerors on notice that the certifications required were material matters of bidder responsibility, and that false certifications may result in criminal prosecutions. The materiality of the information omitted by Simerly is further confirmed by the fact that both the terminated contract and the Contract to be awarded under the Solicitation involved weather observation services, *i.e.*, an aviation safety-related function.

As the ODRA has previously held, material misrepresentations by offerors undermine the integrity of the acquisition system, to the detriment of the Agency and other offerors. *See Protest of Camber Corporation and Information Systems and Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated). In the ODRA's view, undisputed evidence establishes that Ms. Simerly made a material misrepresentation in failing to inform the Central Region of the termination for default by the Southwest Region and in affirmatively certifying that her firm had not been the subject of a default termination. The fact that it disagreed with the basis for the default termination did not

^{2[2]} On January 14, 2002, Simerly Enterprises filed a contract dispute with the ODRA challenging the FAA Southwest Region's Termination for Default of the Albuquerque, New Mexico Contract. That matter is being adjudicated separately. The decision in the Instant case does not in any way purport to determine whether the Southwest Region's Termination for Default of the Simerly for weather observations services at Albuquerque, New Mexico was wrongful.

excuse Simerly from the clear obligation to divulge the fact of the termination within its Proposal³[3]

The ODRA concludes that under these circumstances the Contracting Officer was justified in rejecting Simerly's Proposal based on a false certification. Indeed, in the ODRA's view the Contracting Officer would have been remiss had she blindly accepted Simerly's Proposal knowing that it contained such a material misrepresentation. There is absolutely no support in the record for a conclusion that the Contracting Officer's actions lacked a rational basis or were arbitrary or capricious.

IV. CONCLUSION AND RECOMMENDATION

Substantial evidence in the record strongly supports a finding that the Contracting Officer acted properly and in conformance with her responsibilities in rejecting Simerly's Proposal. Accordingly, the ODRA recommends that the Protest be denied.

–

/s/ Anthony N. Palladino
Associate Chief Counsel and Director,
Office of Dispute Resolution for Acquisition

³[3] Simerly would have been better served if it had identified the termination in its certification and provided an explanation indicating that it would be challenging the termination. The Solicitation provides in this regard at Section 3.2.2.7-7(c) that such information "will not necessarily result in withholding of an award under this SIR. However, the certification will be considered in connection with a determination of the offerors responsibility."