

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. DTFA05-02-R-01162

Docket No.: 02-ODRA-00228

Appearances:

For the Protester, L. Washington & Associates, Inc.: Lawrence J. Sklute, Sklute & Associates

For the FAA Eastern Region: Zachary Berman, Regional Counsel

I. Introduction

L. Washington & Associates, Inc. (“Washington”) filed the instant protest (“Protest”) with the Office of Dispute Resolution for Acquisition (“ODRA”) on June 10, 2002. Washington supplemented its Protest by a letter from counsel dated June 21, 2002 (“Supplemental Protest”).¹

The Protest concerns the acquisition of security guard services for the Air Traffic Control Tower in Pittsburgh, Pennsylvania (“Solicitation”). Washington alleges that, pursuant to the HUBZone Act of 1997, Title VI of Public Law 105-135, 15 U.S.C. §657(a) (“Act”), it was entitled to a ten percent price evaluation preference and should have been awarded the contract.

¹ The Supplemental Protest amplifies the original Protest but states no additional grounds.

As is more fully discussed below, the Act in question is incorporated in the Small Business Act, 15 U.S.C. §631, which is inapplicable to the FAA. The ODRA therefore recommends that the Protest be dismissed summarily as lacking a basis in law.

II. Findings of Fact

The FAA Eastern Region issued the Solicitation, which called for award to be made on a best value basis. Both Washington and the eventual awardee, Wackenhut Security (“Wackenhut”) submitted offers.

On June 6, 2002, representatives of Washington and the Region discussed the award. In their conversation, Washington stated its view that the Act is applicable and that Washington should have been awarded the contract. A series of e-mail messages between the Region and Washington were exchanged on June 9 and 10, 2002. In the last of those messages, a representative of the Region informed Washington:

The Contracting Officer is not in today but, please be advised that under the Authority of the Federal Aviation Administration Acquisition Management System (“AMS”), April 1, 1996, FAA is exempt from the Small Business Act. Additionally, price was only one consideration in the award of the Contract.

See E-mail message of Nadine Fontano, June 10, 2002, Attachment to Protest.

Washington filed its Protest with the ODRA by telecopy on June 10, 2002. The sole allegation of Washington’s Protest is:

The Federal Aviation Administration’s evaluation of offers resulting in award to Wackenhut Security was flawed, because the Agency failed to give L. Washington & Associates, Inc., a price evaluation preference based on its status as a HUBZone-Certified firm.... L. Washington & Associates should have been granted a price evaluation preference of 10 (ten) percent and thus awarded the contract.

See Supplemental Protest at 1 - 2.

In a letter dated June 24, 2002, the ODRA informed counsel for Washington that it appeared the Act on which the Protest relies is not applicable to the FAA. Washington was given until July 1, 2002, either to voluntarily withdraw the Protest or to show cause why it should not be dismissed. Washington did not respond to the directive.

III. Discussion

Washington's Protest acknowledges that Congress exempted the FAA from the Small Business Act by Public Law 104-50 in 1995. It asserts, however, that the exemption was superseded by enactment of the HUBZone Act in 1997. Thus, according to Washington, "Public Law 104-50's exemption of the FAA from the Small Business Act does not include the HUBZone program – it did not exist at the time [the] exemption was created." Supplemental Protest at 2.

What Washington ignores, however, is that Congress reiterated the FAA's exemption from the Small Business Act in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, enacted on April 5, 2000 ("the 2000 Act"). *See* Public Law 106-181, Title VII, §704, 114 Stat. 157 (codified at 49 U.S.C. §40110(d)(2)(D) (2002)). Thus, we need not decide for purposes of this case whether the HUBZone Act -- which was itself an amendment to the Small Business Act -- constituted an exception, albeit short-lived, to the exemption specifically granted the FAA by Congress from the Small Business Act in 1995. Even if we accepted that argument, it would be of no help to Washington, because the 2000 Act fully exempted the FAA from the Small Business Act -- including the then-adopted HUBZone Act.²

² The 2000 Act mandates that "reasonable opportunities to be awarded contracts shall be provided to small business concerns...." The Agency has developed a small business utilization policy and program as part of its AMS. However, neither the 2000 Act nor the AMS mandate that the Agency's procurement personnel apply a price differential preference when evaluating competing proposals.

