

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

**FINDINGS AND RECOMMENDATIONS**

**Matter:           Protest of J & S Services, Inc.**  
**Pursuant to Solicitation No. DTFAAL-07-R-00399**

**Docket No.:   07-ODRA-00408**

*Appearances:*

For the Protester: J & S Services, Inc., Mr. Jim Simko

For the FAA Alaskan Region: Glenn H. Brown, Esq., Office of Regional Counsel

**I.       Introduction**

The above Protest by J & S Services Inc. (“J & S”) challenges determinations made by the FAA Alaskan Region (Region”) in connection with Solicitation No. DTFAAL-07-R-00399 (“Solicitation”) for 30-foot Galvanized Self Supporting Towers. An initial protest (Initial Protest”) was filed with the FAA Office of Dispute Resolution for Acquisition (“ODRA”) on March 20, 2007. By agreement of the parties, protest proceedings were suspended from March 28, 2007 to April 24, 2007, pending the outcome of the Region’s voluntary re-solicitation and re-competition effort. The Initial Protest was re-activated and amended (“Amended Protest”) on April 24, 2007, after the re-competition resulted in an award to another company.

The Amended Protest essentially: (1) challenges as improper the initial evaluation of the J & S offer submitted in response to the February 26, 2007 Solicitation; and (2) challenges the award made by the Region pursuant to the April 2, 2007 re-solicitation effort. As a remedy, the Amended Protest seeks only bid and proposal costs. For the reasons discussed herein, the ODRA finds that the Amended Protest is without merit and recommends that it be denied.

## **II. Findings of Fact**

1. The Solicitation was issued on February 26, 2007 and amended on March 6, 2007 (“Amended Solicitation”). Agency Response (“AR”), Tabs F & G.
2. The Amended Solicitation sought bids for two 60-foot galvanized, self-supporting towers for the FAA’s site at Nome, Alaska. The Amended Solicitation also requested, subject to the availability of funds, bids for a third 60-foot tower for Nome and a 30-foot tower for the FAA’s site at Nikolski, Alaska. AR, Tabs F and G.
3. The Region believed, based on a government estimate, that the total cost should have been less than \$82,000. In this regard, the Region explained that the government estimate was developed by taking into account previous similar purchases, including material and shipping costs, and making upward adjustments to approximate increased steel prices and additional costs of shipping to a remote location. AR, Tab B.
4. The Region received two proposals by the March 9, 2007 deadline. AR, Tab A.
5. The Protester’s proposal was close to three times higher in price than the other proposal received by the Region. AR, Tab E.
6. In the initial review of offers, the Region determined that neither offeror had submitted the technical information required by the Solicitation. Upon subsequent review, the Region determined that J & S had indeed submitted the required technical information and that its offer was responsive. Nevertheless, the Region concluded that the price offered by J & S was not fair and reasonable. AR, Tabs A and B.

7. The Region informed the Protester of this determination by e-mail on March 19, 2007. AR, Tab C.

8. After J & S learned that its offer was deemed to be responsive, but that it would not be awarded the contract due to a determination that its price was not fair and reasonable, J & S filed its Initial Protest on March 20, 2007. The Initial Protest challenges the decision not to award J & S the contract, and provides specific reasons justifying its offer price. The J & S price justification relies mainly on its belief that the tower design specified by the Region was “custom in nature” and required special manufacturing efforts. Initial Protest at 1.

9. Specifically, J & S contends in its Initial Protest that:

[b]ecause of the custom work and short lead time, we foresee numerous issues that may come up in the design and production phase. Therefore, we have to build in a higher than normal price to cover the cost of engineering, custom manufacturing, testing and shipping.

*See* Initial Protest at 2. As a remedy, the J & S Initial Protest requests a directed award of the contract “in the best interest of the government.” *Id.*

10. During the initial status conference held on March 28, 2007, counsel for the Region advised the ODRA that the Solicitation was being canceled without making an award and the requirement would be re-solicited. At the suggestion of the ODRA, and with agreement of the parties, the proceedings in this matter were stayed pending the outcome of the re-solicitation. *See* Status Conference Memorandum of March 28, 2007.

11. Subsequently, the Region received an unfavorable report regarding the intended site for the towers at Nome, Alaska. The site required extensive land-stabilization measures. Based on this information, the Region decided not to procure the towers for that location. AR at Tab B.

12. Consequently, the ultimate scope of the Re-solicitation was for one 30-foot tower for the Nikolski, Alaska location. Three offers were received, including one from Protester. Of the three offers, the J & S offer price was close to four times higher than the lowest-priced offer. The contract was awarded to the lowest-priced offer. AR, Tab C.

13. By e-mail, dated April 24, 2007, the Protester re-activated and amended its Initial Protest, asserting in its Amended Protest that:

[A]fter responding to the bid request in an expedited manner and providing all that was requested our bid was erroneously and incorrectly rendered as non-responsive. The end result was the lost of an order which would have produced reasonable profit for our business. To this end I would suggest that our costs including expedited research time, expedited bid preparation, expedited bid execution to be a minimum of \$3,000.

*See Amended Protest at 1.*

14. In response to the Amended Protest, the Region asserts that its determination regarding J & S' price is both reasonable and rationally based, explaining that "[t]he funds allocated on the purchase requisitions were based on recent, similar purchases, and these amounts were validated both by the other bids received in this solicitation as well as the bids received in the re-solicitation for the Nikolski tower." The Region goes on to state "[i]t may well be that the Protester's manufacturer would have to custom engineer these towers, but it is not reasonable for the Agency to pay for such custom engineering when other firms have acceptable designs already prepared." AR at 2.

15. J & S' Comments, filed by e-mail, dated May 15, 2007 state:

I will not go into all the reasons why I think ... [the awardee's] bid . . . . is non-responsive . . . . Certainly I understand each company would have different numbers for these costs, but for comparison and to establish a base for an estimated total they are interesting. The other known and

constant cost is shipping which at \$12,000 (all the way to Nikolski) is substantial and universal. Considering these numbers if in fact ... [the awardee] delivers a tower meeting specifications for \$29,000 I will be the first to congratulate them.

Comments at 1.

16. J & S' Comments also indicate that an engineering company had estimated that the material costs alone of the tower would be "around \$30,000." *Id.*

### **III. Discussion**

In reviewing Agency procurement actions in the context of a bid protest, the ODRA will determine whether, based on substantial evidence in the record, the protested actions have a rational basis, constitute an abuse of discretion, or are arbitrary and capricious. *See Protest of Global System Technologies, Inc.*, 06-ODRA-00396 and 07-ODRA-00407, citing *Protest of Engineering Information Technologies, Inc.*, 06-ODRA-00386. The protester bears the burden of proving its allegations by substantial evidence in the record. *Id.* In addition, it is well established that mere disagreement with the outcome of an evaluation will not satisfy the protester's burden. *Id.*

The record here shows that the Region re-reviewed the protester's offer following its initial determination that the proposal was non-responsive. Finding of Fact Number ("FF No.") 6. Although the Region subsequently determined that J & S' offer was in fact responsive, J & S' price was considered to not be fair and reasonable. *Id.* The Region explained that the basis for this determination was a comparison of the J & S proposal price to the government estimate, which was based on previous similar purchases, including material and shipping costs, adjusted upwards to take into account increased steel prices and the remoteness of the site. FF No. 3.

During the ODRA's initial status conference, which was held within 5 business days of the date its Initial Protest was filed, the Region advised that the requirement would be re-solicited, and that J & S would have another opportunity to compete for the award of the contract. FF No. 10. With respect to the re-solicitation effort, the Region revised the

requirements, reducing the number of towers to be solicited. J & S competed under the revised solicitation and was third in line for award based on price. *Id.*

With respect to the re-solicitation effort, J & S' Comments in effect argue that the awardee's price is non-responsible because it is too low. In this regard, J & S asserts that the contract price inevitably includes a "known and constant" cost of \$12,000 for shipping, as well as tower material costs estimated by an engineering company to be "around \$30,000." FF Nos. 15 and 16. The ODRA views these speculative assertions to amount to mere disagreement with the award decision, and as such they do not satisfy the protester's burden to demonstrate by substantial evidence that the award decision lacked a rational basis or was otherwise improper. 14 C.F.R. §17.37(j).

Even assuming that the subject contract can only be performed at a loss, the ODRA has recognized that there is nothing that precludes a prospective bidder from offering a price or prices that are below cost, and there is no evidence in the record (other than J & S' speculations) that would indicate the awardee cannot perform the contract at the prices it bid. *Protest of Rocky Mountain Tours, Inc.*, Docket No. 01-ODRA-00183. Moreover, the Region has relied in this case on a government estimate that is based on historical costs for similar projects. FF No. 3.

The FAA Acquisition Management System ("AMS") requires that an "affirmative determination of responsibility" be made prior to any contract award. *See* AMS §3.2.2.7.2. The ODRA ordinarily will not question a Contracting Officer's affirmative determination of contractor responsibility, absent fraud or bad faith on the part of the Contracting Officer. *Protest of Rocky Mountain Tours, Inc., supra.*<sup>1</sup> No such evidence has been produced here.

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<sup>1</sup> Also, the Comptroller General, which the ODRA views as persuasive authority, has stated that below-cost pricing is not prohibited and the contractor bears the risk and responsibility of loss under a fixed-price contract. *See Protest of Ben-Mar Enterprises, Inc.*, B-295781, 2005 CPD P ¶ 68, April 7, 2005; *Protest of McDonnell Douglas Corporation*, B- 259694 *et al.*, 95-2 CPD ¶ 51, June 16, 1995.

Here, the Region made award to the lowest-priced, responsible bidder. There is no evidence in the record that the Region's actions in this case lack a rational basis, constitute an abuse of discretion, or are arbitrary and capricious. The J & S offer was simply not competitive from a pricing standpoint. Thus, there is no basis to recommend reimbursement of bid and proposal costs to the protester. Even when a solicitation is cancelled in response to *meritorious* protest allegations, reimbursement of bid and proposal costs is not warranted where the Region takes prompt action. *Protest of Transgroup Express*, 00-ODRA-00157 (and cases cited therein).

#### **IV. Conclusion**

For the reasons set forth above, the ODRA recommends that the Protest be denied.

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Marie A. Collins  
Dispute Resolution Officer  
Office of Dispute Resolution for Acquisition

APPROVED:

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