

Recommendation of the Office of Dispute Resolution

In the Protest of DCT Incorporated

Pursuant to award under Solicitation No. DTFA11-97-R-00104

96-ODR-00015

Appearances:

For the Protester: David Tolman, DCT Inc.

For the FAA: Dwight Williams, Esq., FAA Northwest Mountain Region

For the Interested Party: Ronald Roybal, President, The Roybal Corporation

I. Introduction

On October 11, 1996, DCT Incorporated protested to the FAA's Office of Dispute Resolution, (ODR), the award of a facilities maintenance contract under solicitation DTFA11-97-R-00104. The contract had been awarded by the FAA's Northwest Mountain Region to Roybal Corporation for the facility management of several FAA owned buildings at the new Denver International Airport. DCT was notified of the award to Roybal Corporation on October 10, 1996.

DCT contends that the award criteria were improperly changed during the procurement to favor Roybal, and that Roybal lacks the management capabilities, experience, and financial wherewithal to perform the contract. The protester also contends that there is evidence to suggest that its price was revealed to Roybal prior to submission of final offers. DCT requests that the FAA terminate the contract with Roybal and direct the award to itself. The protester has also requested contract suspension pending resolution of this protest. For the reasons explained below, we recommend denial of the protest.

All document references are to the attached list of exhibits, Tabs (1) through (17). As the contracting office has already prepared a tabulated document file, we will refer to the Tabs as indexed in that volume, with the addition of Tab (17), which was submitted to our office.

II. Findings of Fact

On July 29, 1996, The FAA's Northwest Mountain Region office issued a Screening Information Request (SIR) to obtain basic capability information from offerors interested in providing facility management services at the FAA's Terminal Radar Approach Control (TRACON) and Technical Operations Center (TOC) at the Denver International Airport. Offerors were requested to respond by submitting information bearing on their Management Capability, Past Performance, and Financial Capability to the contracting office. Tab (1).

Four firms, including DCT and Roybal, responded to the SIR. All four were determined to be technically qualified to perform the work. Tab (13).

On September 5, 1996, the Request For Offers containing the Statement of Work and all related clauses was issued by the contracting office to each of the four previously qualified firms. Tab (15). The RFO covered an array of services ranging from operational and preventative maintenance, to security, snow removal, pest control, and janitorial services. Tab (3), pages B-1 to B-6.

The solicitation's award scheme was spelled out at page M-1, which read as follows:

1. EVALUATION FACTORS FOR AWARD

- • The FAA will award to that offeror presenting a technically acceptable offer representing the best value to the FAA, on the basis of an evaluation of the required submitted information. The key discriminators listed below shall be rated either acceptable or unacceptable. Failure of any discriminator to be determined acceptable shall result in the offeror being rejected as technically unacceptable. Technically unacceptable offerors shall not be considered further for this requirement:

Management Capability

Past Performance

Financial Capability

It is anticipated that only one contract shall result from this Request for Offers. Offerors who do not submit pricing for all services at all facilities shall not be considered for award of a contract. In the event that it is considered to be of greatest value to the Government to award more than one contract, there shall result no more than two contracts, and these would be divided by facility as follows:

(1) TRACON, ATCT and Base Building Facilities; and

(2) TOC facility

In this case, each of the two contractors shall be required to provide a FACILITY MANAGER for their facility(ies). No other divisions shall be considered, including divisions by types of services.

Tab (3), page M-1

While Section "M" provided no trade-off scheme to advise offerors what the relative value of technical and price factors were, Section "L-3" did state that, with respect to the technical proposals:

...Performance information will be used...as an evaluation factor against which offeror's relative rankings will be compared to assure best value to the government.

- • [Tab (8)]

Only DCT and Roybal responded to the RFO by its closing date of September 18, 1996. Both companies submitted proposals containing information responsive to the Management Capability, Past Performance, and Financial capability factors listed in section "M." After evaluating this information, the contracting officer determined that they were both "equally capable of performing the contract." The proposed pricing for the base quantity and all option years was:

DCT: [* * * * *]

- • Roybal: \$6,849,043.65

[Tab (13), page two]

On October 1, 1996, both companies were solicited for Best and Final Offers. The letter sent to DCT, on that date, addressed several areas of technical concern, but was primarily concerned with pricing. It stated, in pertinent part:

Your proposal is considered in the competitive range with other offers, however some items are priced considerably higher than the Government Estimate and past historical data.

- • Keeping in mind that this is a competitive acquisition, at this point in the process we are dealing only with firms who have been determined to be technically qualified. Based on this premise, the selection of a contractor for award of a contract is highly dependent upon the lowest reasonably and responsibly priced offer. In order to remain competitive, it may be necessary for you to take a look at some of your pricing. Past history and our government estimate indicate that your prices run considerably high for the following items:

[* * * * *]

Do not limit your review of pricing to these items...

[Tab (8)]

Both companies responded with BAFOs by the October 7 closing date. The offers were examined for completeness and accuracy between unit prices and total prices.

The pricing was as follows:

Roybal: \$5,517,235.01

• • DCT: [* * * * *]

[Tab (13)]

The contracting officer determined that the Roybal offer was the best value to the agency under the terms of the RFO, and award was made to that company on October 10, 1996. DCT was informed of the award by letter of October 11, this protest to ODR followed later the same day. Tabs (13), (11) and (12).

III. Issues Presented

1. Was the contracting officer's decision to award the contract on the basis of lowest price rationally based.
2. Has the protester demonstrated evidence of fraud or disclosure of the protester's pricing.
3. Was the contracting officer's responsibility determination rationally based.

IV. Analysis

1. The award basis. The thrust of DCT's protest is that the agency converted what had originally been described as a "best value" procurement into an award based on low price. In fact, Section M-1 of the September 5 RFO did state that the FAA would award to the "offeror presenting a technically acceptable offer representing the best value to the FAA, on the basis of an evaluation of the required submitted information." Combined with the language in Section "L-3," it clearly intended a scheme whereby the agency could have awarded the contract to a higher priced offeror if it believed that the technical superiority warranted the higher price. The FAA, however, was not required to do so unless it determined that there were meaningful technical distinctions among the offerors. After evaluation of initial offers, it appeared that the competitors were of relatively equal ability, and at that point, the contracting officer explicitly informed the protester that he now intended to focus exclusively on price.

We believe that the October 1, 1996 letter to DCT, Tab (8), was decisive on this point. It stated unequivocally in separate paragraphs that, after review of initial proposals, the government considered the offerors to be equally capable of performing the work, and that award would now be based on low price. It then went on to detail the areas where DCT's price was deemed to be "considerably high." In light of this notification, we believe that the protester should not be permitted post-award to complain that the evaluation criteria were changed, or that the award scheme was not followed.

It should be noted for the record that there is some divergence between the agency and the protester as to whether the award criteria were in fact changed, or whether the shift in emphasis from technical considerations to price was still within the ambit of the RFO's "best value" scheme. The agency has cited GAO precedent under the Federal Acquisition Regulation discussing instances where price may legitimately become the deciding factor in a "best value" scheme when the offerors are deemed to be in technical parity. While we think the facts indicate that the award scheme was not changed, we should reemphasize that our focus here is on the fundamental fairness and rationality of the award decision.

Our review indicates that the BAFO stage emphasis on price was within the scope of clause M-1. That clause alerted offerors that pricing would be weighed against the three technical factors, and it followed that price would become more important as technical abilities converged. What is critical to this analysis is that by the October 1, 1996 request for BAFO's, the government made abundantly clear that there were several offerors of relatively equal technical competence in the running, and that it thus intended to award to the low priced offer. We believe that after receipt of that letter, no one could reasonably claim to have been misled as to the basis for award. Because the agency's intent was clear and the protester had an opportunity to respond accordingly, we think that there was no unfairness to DCT and the award was rationally based, since the contracting officer could presume that the BAFOs he received would represent the best of a competitive field.

The protester has also alleged that the shift in emphasis from technical factors to price was done specifically to favor Roybal. The contracting officer denies this, emphasizing that after submission of initial proposals, he had legitimate concerns that both offers were high by the government estimate. Tab (13). He also points out that DCT's allegations are self-contradictory on this point. As of initial proposals, DCT was the low offeror; emphasizing price at that point was an advantage to DCT, not Roybal.

While the contracting officer expected both offerors to lower their prices in their BAFO, he had no reason to believe that Roybal would displace DCT, especially given the level of detail in the October 1 letter to DCT concerning its pricing in specific areas. Based on these facts, we find no basis to support the allegation that the actions taken in conjunction with the BAFO were done for the purpose of favoring Roybal.

As a related matter, DCT also suggests that there was no need for discussions and BAFOs at all, and that award should have been made from initial offers. We disagree. The procurement was issued as an RFO, which, by definition, contemplated that there

were aspects of the requirement that might well require negotiation and revised offers. As explained above and in Tab (13), the reason for discussions and BAFOs was the high prices of the initial offers. As the October 1, 1996 letter makes clear, the contracting officer considered the initial prices unreasonable by historical standards and by the government estimate. He was entirely justified in requesting BAFOs.

2. Disclosure of DCT's prices. The protester's December 16, 1996 response to the contracting officer's report alleges that Roybal's BAFO pricing "was similar" to its own. Because Roybal displaced it as the low offeror in the BAFO round, DCT "is convinced that the Roybal Corporation had access to our price at BAFO." DCT also ties this into a statement allegedly made by the contracting officer in July 96, that the forthcoming contract had been "promised" to Roybal. The allegation is that someone in the contracting office purposely disclosed DCT's initial offer to Roybal to ensure that Roybal was the low offeror in the BAFO round.

These are serious allegations, which, if true, would probably constitute criminal misconduct. When faced with similar allegations against contracting officials, other fora have adopted a strict standard of proof. See Kalvar v. U. S., 543 F. 2d 1298, (Ct. Cl. 1976), and Seaward International, 86-2 CPD 507. In those cases, the Court of Claims and the General Accounting Office adopted the position that such allegations of government employee misconduct must be supported by "well nigh irrefragable proof" to overcome the presumption that public officials act conscientiously and in good faith. In the present case, the allegations are founded on two points: (1) that the contracting officer made a statement in the presolicitation phase about the contract "being promised to Roybal," and (2) the fact that Roybal's BAFO pricing was suspiciously lower than DCT's initial offer.

The agency strongly denies that any such statement was ever made. In its supplementary report of January 23, 1997, Tab (17), the Northwest Mountain Region explains that in the Fall of 1995, Roybal, which was then the incumbent at the Roslyn facility, expressed interest in obtaining the FAA's Denver facilities management services on a sole-source basis under Section 8(a) of the Small Business Act. The contracting officer discussed this possibility with the agency's Small and Disadvantaged Business Utilization Specialist, but never pursued it further. Later, in June 96, when the contracting officer determined to compete this requirement, he had a conversation with DCT personnel in which they also inquired about a possible 8(a) set-aside, and it was at that time that he mentioned that Roybal had earlier requested the same thing.

Whether the protester misinterpreted this statement, or whether the parties remain irreconcilable on what was actually stated, this reference to "Promising the contract to Roybal" falls short of the high burden of proof required by Kalvar and Seaward. Roybal's displacement of DCT likewise falls far short of this standard.

3. Responsibility. DCT alleges that Roybal has limited facilities management experience, and that Roybal has been forced to subcontract large portions of the effort. The protester also went so far as to obtain a Dunn & Bradstreet report on Roybal, which it claims shows a low credit rating and at one point describes Roybal's financial position as being

"unbalanced." DCT cites these facts as proof that the agency made a mistake and that Roybal will fail in performance.

This is essentially a responsibility argument. Other fora have, as a matter of policy, stated that they do not review challenges to an affirmative responsibility determination, 4 CFR 21.5 (c) (1996), Carter Chevrolet Agency, 96-1 CPD 210. Similarly, under the AMS, the Administrator will generally not question a contracting officer's determination that an awardee is responsible to perform a contract. In this case, however, the agency report has already addressed these points in some detail. The following points have been noted:

The contracting officer had already ordered and considered a Dunn & Bradstreet report. The "CC4" rating meant only that the firm had a net worth between \$75,000 and \$125,000, not that it had encountered any specific problems. As to subcontracting, the only areas of performance being subcontracted are elevator maintenance, pest control, and water treatment, areas representing only a small portion of the contract, and which are usually subcontracted. As of the date of the agency report, the contracting officer also reports that Roybal is performing satisfactorily, with no problems noted.

- • Under these facts, we cannot say that the affirmative responsibility determination was irrational. The contracting officer considered key aspects of the proposal, and undertook independent investigation to gauge Roybal's standing.

V. Conclusion

For the reasons discussed above, we believe that the award was made in accordance with the solicitation's criteria and was rationally based. We further believe that there is totally insufficient evidence to support allegations of bias or price disclosure by the contracting office. Finally, we note that a responsibility determination was conducted, and it was rationally based. Accordingly, we recommend that the protest be denied.

William R. Sheehan

For the Office of Dispute Resolution