

Office of Dispute Resolution for Acquisition

Federal Aviation Administration

Washington, D.C.

FINDINGS AND RECOMMENDATION

Matter: Protest of Consecutive Weather

Pursuant to Solicitation DTFA06-99-R-30004

Docket: ODRA Docket 99-ODRA-00112

Appearances:

For the Protester, Consecutive Weather: Dean Haney, Owner

For the FAA Southern Region: William G. Nelmes, Office of Regional Counsel

I. Introduction

This protest of Consecutive Weather ("Consecutive"), filed with the FAA's Office of Dispute Resolution for Acquisition ("ODRA"), relates to an acquisition of weather observation services for seven sites by the FAA's Southern Region (hereinafter the "Region"), under Solicitation No. DTFA06-99-R-30004. Consecutive challenges the Region's failure to award any of the sites to it, notwithstanding that it had submitted low price offers for four of the seven sites. For the reasons set forth herein, the ODRA concludes that the Region had a rational basis for determining that Consecutive was technically unacceptable as an offeror and for its decision not to consider Consecutive's price proposals for the sites in question. Accordingly, the ODRA recommends that the protest be denied.

II. Findings of Fact

1. On December 2, 1998, the Region issued Solicitation No. DTFA06-99-R-30004 (the "Solicitation") for the acquisition of weather observation services for seven sites. In terms

of proposal evaluation, Part IV, Section M of the Solicitation identified three Key Technical Discriminators ("KDs"), and component factors and sub-factors as follows [1]:

KD001 PAST PERFORMANCE

Factor A: Quality of Service/Customer Satisfaction

Sub-Factors:

1. Responsiveness
2. Compliance with contract requirements
3. Cooperation
4. Quality of Work
5. Technical Expertise

Factor B: Business Practices – Compliance with Federal,
State and Local Laws

KD002 MANAGEMENT PLAN

Factor A: Key Personnel – Owner/Employees Level of Expertise

Factor B: Staffing Plan/Schedule

Schedule of employees to include supervisor, full-time, part-time employees, holiday and emergency coverage

KD003 FINANCIAL CAPABILITY

KD004 PRICE

Lowest, fair and reasonable price from a technically acceptable offeror.

Agency Response ("AR"), Bates Numbers 000 and 001.

2. Under the Solicitation's evaluation scheme, offers would be assigned ratings of "excellent," "satisfactory" or "poor" for KD001 through KD003. KD factors A and B were to be rated equally, and the subfactors likewise were to be rated equally. *Id.*

Solicitation Part IV, Section M, Paragraph 1, Basis for Award, indicated that the award ultimately would be made on the basis of low price to any technically acceptable proposal. Thus, for purposes of determining the awardee, offers having "satisfactory" ratings would be considered "technically equal" to those having "excellent" ratings. So long as a "satisfactory" rating were achieved for each factor of each of the three technical KDs, an offeror's price proposal would be taken into account. At that stage, award would be based solely on KD004, the lowest, fair and reasonable price. Price proposals would not be considered for any offeror with a "poor" rating for any of the three technical KDs or for any KD factor. Solicitation Section M reads, in this regard:

1. BASIS FOR AWARD

The Government may make award to the responsible offeror whose proposal conforms to the solicitation terms and conditions, is technically acceptable, and proposes the lowest fair and reasonable price.

As a minimum, an offeror is determined to be technically acceptable by receiving a rating of at least satisfactory in all technical key discriminator and factors. A poor rating received in any key discriminator or factor will determine the offeror to be unacceptable for further consideration in the downselect process. Once all [offers are] rated technically, those receiving an excellent or satisfactory rating will be determined to be technically equal and will continue to be rated based on the propose[d] prices. The lowest, fair and reasonable price will then become the final determining factor for award.

3. This evaluation scheme was mandated by FAA Headquarters in August, 1998 for use in connection with weather observation acquisitions nationwide and was to replace previous regionally-developed schemes for such acquisitions. AR, page 1, note 1.

4. Offers were received from twelve different weather observation firms. Of those, five were deemed "technically acceptable" under the foregoing described evaluation scheme. CDI's was among the seven offers rejected as "technically unacceptable." Although Consecutive had scored "satisfactory" ratings for KD001, PAST PERFORMANCE, and KD003, FINANCIAL CAPABILITY, it was rated as "poor" for KD002, MANAGEMENT PLAN. More specifically, whereas Consecutive rated "satisfactory" for one of the two KD002 factors, Factor A, "Key Personnel – Owner/Employees Level of Expertise," it scored a "poor" rating for the other factor, Factor B, "Staffing Plan/Schedule." Thus, even though it is undisputed that Consecutive's price proposals were lowest for four of seven sites, those proposals were not considered by the Region, because the Consecutive proposal was deemed "technically unacceptable."

5. The Consecutive technical proposal did not contain a "schedule" or "plan" showing "supervisor, full-time, part-time employees, holiday and emergency coverage" for the various sites being bid, as contemplated by the solicitation. The proposal merely referred generally (with the words "(4) Staffing schedule See above") to information listed by Consecutive regarding the level of expertise of supervisory and non-supervisory personnel and to the following brief statement regarding Consecutive's plan for hiring:

(3) Plan for hiring. All of the above personnel are seeking employment or if currently employed, full time employment, with Consecutive Weather. I also plan on using some existing on site personnel depending on the number of sites awarded. All personnel are currently certified observers so the initial training involved should consist of on site station familiarization. The company Quality Control program will be implemented to ensure continued proficiency.

AR, Exhibit C, Bates Number 025.

6. In performing its evaluation of offers in this instance, the Region utilized a set of Headquarters-mandated "Instructions for Weather Observation Services Program Evaluation Standards," which describe in detail how evaluations of weather observation proposals are to be conducted. Included in those "Instructions" is the following guidance regarding the evaluation of KD002, MANAGEMENT PLAN:

EVALUATION STANDARDS FOR KD002 – MANAGEMENT PLAN

KD002 contains two [factors], Factor A, Key Personnel, and Factor B, Staffing Plan/Schedule. The factors will be rated individually to determine the final scores for the factors. The combined scores for Factors A and B will be used to determine the final rating for this KD.

	Excellent	Satisfactory	Pe
Factor A: Key Personnel – Owner/Employees Level of Expertise Sub-score	20	14	
Factor B: Staffing Plan/Schedule – Sub-score	20	14	
Total Scores for KD002:	40	28	

A. **Key Personnel – Owner/Employees Level of Expertise**

Excellent: (Total score of 15-20).

Contractor has successfully administered Weather Observation Contracts for a minimum of five years and owners/operators are certified weather observers who each have a **minimum** of five years experience.

Satisfactory: (Total score of 14).

Owners/operators are certified weather observers who each have a **minimum** of five years experience. Owners/operators have successfully administered other **service** type contracts, not necessarily weather observations. The company has a good business background with a qualified staff or demonstrates the ability to hire certified weather observers. Owner/operators of a newly formed company are certified weather observers who each have a minimum of five years experience and can meet the other requirements of this standard.

Poor: (Total score of [0-13]).

Owners/operators have no previous knowledge or experience in managing a business or administering service contracts, and no background in the meteorological field.

B. **Staffing Plan/Schedule** (Sample Staffing Schedule attached)

Excellent: (Total score of 15-20).

Staffing plan and schedule demonstrates the company's ability to **exceed** all elements of the requirement by providing more than the required staff of certified Weather Observers.

Satisfactory: (Total score of 14).

Staffing plan and schedule demonstrates the company's ability to **meet** all elements of the requirement by providing an adequate staff of certified Weather Observers. Schedule includes supervisory and holiday hours, vacation, and emergency contingency.

Poor: (Total score of [0-13]).

Company failed to provide a staffing plan or schedule; or failed to provide for supervisory hours, holiday hours, vacation and emergency contingency in the staffing schedule.

AR, Exhibit B, Bates Numbers 008-009.

7. In evaluating KD001, PAST PERFORMANCE, the Region's evaluation team determined that Consecutive was a newly formed company that had only been in business since March, 1998. AR, Exhibit D, Bates Number 033. Inasmuch as it did not have the minimum of five years of company experience in managing weather observation contracts, the most that Consecutive could be assigned under the mandatory evaluation instructions for evaluating KD002, MANAGEMENT PLAN, Factor A, Owner/Employees Level of Expertise, was a "satisfactory" score of 14. AR., pages 5-6, Exhibit D, Bates Number 034. That is the score that each of the three evaluators on the evaluation team gave Consecutive for that factor. AR, Exhibit D, Bates Numbers 034-036.

8. For the second factor of KD002, MANAGEMENT PLAN, *i.e.*, Factor B, Staffing Plan/Schedule, Consecutive's proposal lacked any staffing schedule showing deployment of personnel to each of the seven sites being bid, or anything else addressing the issues of supervisory hours, vacations, holiday or emergency contingencies. Consecutive was given a "poor" rating and assigned a score of 10 by each of the three members of the evaluation team. *Id.* One member noted: "Staffing plan is lacking." The other two concluded that Consecutive's proposal indicated an insufficiency of personnel. *Id.*

9. Each of the five weather observation firms proposals that were found "technically acceptable" included in their proposals the kind of staffing schedules contemplated by the Solicitation and detailed information specifically addressing the issues of supervisory hours, vacations, holiday and emergency contingencies. AR, Exhibit F, Bates Numbers 044-099.

10. Contracts for the seven sites were ultimately awarded to two of the five firms found "technically acceptable," The IBEX Group, Inc. and Midwest Weather. AR, Introduction. On January 4, 1999, the Region conducted a post-award debriefing with Consecutive. By

letter dated January 6, 1999 (received by the ODRA on January 11, 1999), Consecutive filed a timely protest with the ODRA.

11. After a serious yet unsuccessful attempt to resolve the protest via ADR, the matter was assigned to a Dispute Resolution Officer, Richard C. Walters, for resolution under the ODRA's default adjudicative process. The Region filed its Agency Response with the ODRA on March 1, 1999. Consecutive provided timely Comments on the Agency Response, by letter dated March 8, 1999, whereupon the record in this matter was closed.

III. Discussion

Although both parties have addressed the scoring of the other two KDs and associated factors and sub-factors, none of that discussion is relevant to the issue at hand, since, but for the evaluation of KD002, MANAGEMENT PLAN, Consecutive's proposal would have qualified as "technically acceptable" and it would have been eligible for an award of four sites. As to KD002, Consecutive's argument is two-fold. First, it challenges as irrational the evaluation team's assignment of a score of only 14 points for KD002, Factor A, Owner/Employees Level of Expertise. Consecutive points to the many years of weather observation experience its principals have had both as FAA employees and elsewhere. This experience, it urges, should have earned Consecutive a "highly satisfactory" score and 4 additional points for Factor A -- or a total of 18 points for that factor. Consecutive Comments, pages 2-3. Purportedly, the additional points for Factor A would have compensated for the shortfall it experienced in the score Consecutive received for Factor B and brought Consecutive up to an overall "satisfactory" score for KD002 of 28. Because the mandatory evaluation scheme and instructions promulgated by FAA Headquarters would not permit the additional years of "in-depth" expertise Consecutive says it had (a combined "111 years of weather experience and 48 years of weather management experience") to be taken into account, Consecutive posits, the scheme is not "rational" or "valid." *Id.*

Second, Consecutive challenges the score of 10 points for KD002, Factor B. Consecutive contends that, because, in its proposal, it identified nine certified weather observers and indicated that it would hire incumbent personnel as needed, depending on the number of sites awarded to it, there was no possibility of any staffing insufficiency. In addition, Consecutive asserts that its proposal "showed the number of Supervisor[s], full-time and part time employees at each site as well as the number of holiday and vacation hours," that "the key to emergency contingency coverage is having adequate staffing," and that the staffing it provided in its pricing proposal for each site would be "more than adequate coverage for contingencies."

In evaluating the merits of any bid protest, the ODRA will not substitute its judgment for that of Agency officials and will not recommend to the Administrator that Agency actions be overturned, provided such actions are not arbitrary, capricious, an abuse of discretion or undertaken without a rational basis. *Helicopter Adventures, Inc.*, 99-ODRA-

00107, citing *Protest of Camber Corporation*, 98-ODRA-00102. The issue presented here, therefore, is whether the Region had a rational basis in concluding that Consecutive was technically unacceptable, in accordance with the evaluation criteria enumerated in the Solicitation, such that its price proposals for the sites in question were not to be considered.

In terms of KD002, Factor A, the mandatory evaluation scheme and instructions promulgated by FAA Headquarters focused on two distinct elements. To be rated as "excellent" under Factor A, not only was a firm to have principals (owners/operators) with a significant technical background (a **minimum** of five years experience) in weather observation, but the firm itself was to have a minimum of five years of experience in the management of weather observation contracts. A newly formed company whose principals had the requisite technical experience and expertise could still qualify as "satisfactory" under Factor A, but could not receive an "excellent" rating. The ODRA cannot say that it was irrational for the Region (and for FAA Headquarters) to place such weight on the offeror's actual weather observation contract management experience.

Perhaps, where a new firm's principals have the required numbers of years of weather observation contract management experience with other or predecessor firms, a higher than "satisfactory" rating might be in order. That was not the case here, however. Even though Consecutive's Mr. Haney and others clearly had impressive backgrounds in weather observation, including experience in the management of FAA weather observation training programs and the like, none had actually managed weather observation service contracts as contractors for more than one year, let alone five years. Under such circumstances, the ODRA will not recommend that the "satisfactory" rating for Factor A be overturned.

Moreover, regardless of how Factor A might have been treated, the Solicitation made plain that a proposal could be rendered "technically unacceptable" by a "poor" rating being assigned not only to a single KD, but to a single KD factor:

As a minimum, an offeror is determined to be technically acceptable by receiving a rating of at least satisfactory in all technical key discriminator and factors. **A poor rating received in any key discriminator or factor will determine the offeror to be unacceptable for further consideration in the downselect process.** Once all [offers are] rated technically, those receiving an excellent or satisfactory rating will be determined to be technically equal and will continue to be rated based on the propose[d] prices. The lowest, fair and reasonable price will then become the final determining factor for award.

Solicitation, Part IV, Section M, Paragraph 1, Basis for Award (emphasis added). Here, there can be no question that Consecutive merited a "poor" rating for KD002, Factor B. The Solicitation clearly called for proposals to include a schedule/plan of staffing, one that would address the Region's concerns regarding supervisory hours and the adequacy of coverage at each site for holidays, vacations and emergency contingencies. As we have

previously stated, failure to adhere to Solicitation instructions is indicative of how a contractor will manage a contract and may properly be taken into account in the evaluation of its proposal. *E.g., OPTIMUS Corporation, 98-ODRA-00096.* Unlike others here, Consecutive omitted any form of staffing schedule from its proposal. It was not for the Region to have to intuit from the price proposal sheets and other sections of the technical proposal what Consecutive may have had in mind in terms of how holidays, vacations and emergency contingencies were to be handled.

Because of this glaring omission, the Region would have been justified in giving Consecutive a zero (0) score for Factor B. The score of 10 that it did assign, from the ODRA's perspective, was generous. Indeed, that score may well have been influenced by the evaluation team's recognition of the "in-depth" weather observation experience that Mr. Haney and others at Consecutive possess. In any event, in accordance with the express terms of the Solicitation, the "poor" rating Consecutive attained for Factor B was sufficient to disqualify the Consecutive proposal from further consideration for the instant procurement.

Finally, Consecutive argues that the new mandated evaluation scheme and instructions must be viewed as inherently invalid and irrational, where (as Consecutive contends) five of seven firms deemed "technically unacceptable" are "established [weather observation] contractors." Consecutive Comments, page 4. Because the record does not indicate why each of the seven firms was excluded, the ODRA cannot say that the rejections were related to the mandated scheme and instructions, as opposed to how they were applied by the Region. Moreover, even with the exclusion of the seven firms, there still was adequate competition here, with five "technically acceptable" firms vying for the seven weather observation sites.

Conclusion and Recommendation

For the reasons set forth above, the ODRA concludes that the Region had a rational basis for evaluating the Consecutive proposal as "technically unacceptable" and for not considering the price proposals submitted by Consecutive. Accordingly, the ODRA recommends that the Consecutive protest be denied.

_____/s/_____
Richard C. Walters
Dispute Resolution Officer
Office of Dispute Resolution for Acquisition

APPROVED:

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

Footnotes:

[1] Part IV, Section M contains a number of non-relevant clerical/typographical errors. These are corrected here, for the sake of clarity.