

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

**FINDINGS AND RECOMMENDATIONS**

**Matter: Protests of Siemens Building Technologies, Inc.**

**Under Solicitation Nos. DTFA06-99-R-50006 (Raleigh-Durham Airport) and DTFA06-99-R-50005 (Tampa Airport)**

**Docket Nos.: 99-ODRA-00127 and 99-ODRA-00131 (Consolidated)**

*Appearances:*

For Siemens Building Technologies, Inc.: Larry N. Knight, Project Manager

For the FAA Southern Region: Roberto E. Maldonado, Esq., Office of the Regional Counsel

**INTRODUCTION**

This matter involves protests by Siemens Building Technologies, Inc. ("Siemens") against the selection of Interstate Alarm Services LLC ("Interstate") as a subcontractor under the contracts awarded to James S. Lavold, Inc. ("JSL") pursuant to Solicitation Nos. DTFA06-99-R-50005 (Tampa Airport, Tampa, Florida) and DTFA06-99-R-50006 (Raleigh-Durham Airport, Raleigh, North Carolina). The contracts, which were awarded by the FAA's Southern Region ("Region"), involve Air Traffic Control Tower fire protection and life safety modifications, including new fire alarm systems to be provided by Interstate. Siemens alleges that Interstate does not meet the minimum qualifications set forth in the project specifications and thus was improperly approved as a subcontractor by the Region.

In response to the protests, the Region filed a "Motion to Dismiss Protests Due to Lack of Standing" on June 18, 1999. The Region asserts that Siemens participated in the underlying procurements merely as a subcontractor to an unsuccessful offeror and thus lacks standing under §3.9.3.2.1.3 of the Acquisition Management System ("AMS") to maintain the protests. Siemens does not deny that it participated in the subject

procurements only as a subcontractor. Siemens contends, however, that the extent of the FAA's involvement in selecting the subcontractor confers upon Siemens the status of an "interested party". For the reasons set forth herein, the ODR finds that Siemens lacks standing and recommends that its Protests be dismissed summarily.

### **FACTUAL BACKGROUND**

Solicitation Nos. DTFA06-99-R-50006 and DTFA06-99-R-50005 were issued on December 16, 1999. Both solicitations contemplated awards based on firm, fixed prices. Agency Report Exhibit 2, pages 1 and 27; Agency Report Exhibit 8, pages 1 and 27. Site meetings were conducted in Raleigh-Durham on January 27, 1999, and in Tampa on January 28, 1999. Representatives from Siemens attended these site meetings and subsequently attended a February 1, 1999 meeting, at which the solicitations were amended to clarify the contract drawings and address questions. Agency Report, Exhibits 3 and 9; Siemens' Response to the Region's Motion to Dismiss.

Three offers were received in response to each solicitation on February 5, 1999. As to each project, two offers were received from D&N Construction Services, Inc. ("D&N") and one offer was received from JSL. Siemens did not submit an offer to the Region, but rather submitted pricing and other information to D&N, in anticipation of being selected as a subcontractor. Affidavit of Brenda J. Sullivan, paragraph 3; Affidavit of David L. Patrick, paragraph 2. The solicitations contained no requirements that proposed subcontractors be identified and approved prior to award. Agency Report Exhibit 2, pages 3 (Standard Form 2A, Bid Evaluation Information), 28 and 30; Agency Report Exhibit 8, pages 3 (Standard Form 2A, Bid Evaluation Information), 28 and 30.

The FAA awarded the contract for the Raleigh-Durham project to JSL on February 12, 1999, and awarded the contract for the Tampa project to JSL on February 16, 1999. Affidavit of Brenda J. Sullivan, paragraph 2. For both projects, JSL selected Interstate to propose as its subcontractor for installing and providing fire alarm services. On March 3, 1999, the FAA, by letter, requested that JSL provide information verifying that Interstate meets the qualifications set forth in the contract specifications regarding installation of the fire alarm system. Agency Report Exhibit 5; Affidavit of Brenda J. Sullivan, paragraph 2. Pursuant to the terms of the contract, the prime's selection of a subcontractor after contract award was to be subject to the approval of the FAA. Agency Report Exhibits 2 and 8, page 21; Agency Report Exhibit 5, §1.5.2.2. On May 18, 1999, Siemens filed the subject protests alleging that the proposed subcontractor, Interstate, did not meet the contract's qualification requirements.

### **DISCUSSION**

The AMS sets forth Agency-wide policy and guidance, which governs all aspects of FAA acquisitions. Under the AMS, subcontractors are not considered eligible to protest *under any circumstance*, as they are expressly excluded from the definition of interested parties. AMS § 3.9.3.2.1.3, entitled "Who May Protest", states:

Only interested parties may file a protest relating to a SIR or contract award. An *Interested Party* is one who:

1. Prior to the closing date for responding to a SIR, is an actual or prospective participant in the procurement, ***excluding prospective subcontractors***; or
2. After the closing date for responding to a SIR, is an actual participant who would be next in line for award under the SIR's selection criteria if the protest is successful. An actual participant who is not in line for award under the SIR's selection criteria is ineligible to protest unless that party's complaint alleges specific improper actions or inactions by the agency that caused the party to be other than in line for award. ***Proposed subcontractors are not eligible to protest.*** (Emphasis added).

Notwithstanding these provisions, Siemens contends that even though it was a prospective subcontractor, it behaved very much like a prime contractor with respect to these procurements. *See* Siemens' Response to the Region's Motion to Dismiss (Chronology) at 3. Siemens highlights the fact that it stayed in close contact with the contracting officer regarding the project status, made arrangements to attend the site visits, and participated in a meeting that resulted in amendments to the solicitations. We view Siemens' participation in these pre-bid activities to amount to nothing more than what is expected from any conscientious vendor or supplier, *i.e.*, learning as much about a particular job in order to submit competitive and accurate pricing.<sup>1</sup>

Because the AMS does not contemplate protests by subcontractors under any circumstances, and since Siemens admits that its only participation in these procurements was as a potential subcontractor to an unsuccessful bidder, the ODRA concludes that these protests must be dismissed for lack of standing.<sup>2</sup> This result is consistent with those of other bid protest forums who hold prospective or potential subcontractors are not considered "interested parties" eligible to protest a Federal procurement. *Phoenix Engineering, Inc. et al., v. MK-Ferguson of Oak Ridge Company, et al.*, 966 F.2d 1513, 1526 (6th Cir. 1992), *citing US West Communications Servs. v. United States*, 940 F.2d 622 (Fed. Cir. 1991).

We note that General Accounting Office ("GAO") decisions recognize subcontractors as interested parties under certain circumstances. Several years ago, the GAO held that it would consider protests of the awards of subcontracts where it is shown that the Federal Government has so directly or actively participated in the selection of the **subcontractor** that the net effect of the Government participation was to cause or control the rejection or selection of a potential **subcontractor**; or has imposed such conditions on the contractor as to significantly limit the sources to which subcontracts could have been awarded. However, that standard, as enunciated in *Optimum Systems, Inc.*, 54 Comp. Gen 767 (1975), 75-1 CPD ¶ 166, is no longer applied at GAO. In *FL Aerospace Corporation*, B-231414, June 21, 1988; 88-1 CPD ¶ 594, the GAO explained that:

Under CICA, however, which gives our Office jurisdiction to decide protests involving solicitations and awards by federal agencies, the government's alleged control of the subcontractor selection is not dispositive in terms of whether we will review a subcontractor protest. *See Rohde & Schwarz-Polard, Inc.--Reconsideration*, B-219108.2, July 8, 1985, 85-2 CPD ¶ 33. We have interpreted our CICA jurisdiction to include protests of subcontract solicitations and awards only when the subcontract is "by or for the government." 4 C.F.R. § 21.3(m) (10) (1988). Basically, a subcontract is considered to be by or for the government when the prime contractor principally provides large-scale management services to the government and, as a result, generally has an ongoing purchasing responsibility. In effect, the prime contractor essentially acts as a middleman or conduit between the government and the subcontractor. *American Nuclear Corp.*, B-228028, Nov. 23, 1987, 87-2 CPD ¶ 503.... Except in these limited circumstances, where the prime contractor basically is acting as the government's agent, a subcontract awarded by a government contractor in the course of performing a prime contract generally is not considered to be "by or for" the government. *See Techniarts Engineering*, B-230263, Mar. 30, 1988, 88-1 CPD ¶ 323.

Inasmuch as the instant protests involve a contract under the AMS, GAO precedent is not controlling. However, even if these procurements had been conducted under CICA, Siemens would not meet the GAO's definition of "interested party," since the protested procurements do not fall within the category of "large-scale management services" by a contractor acting "by or for" the government.

Furthermore, it is clear that any subcontractor approval by the Region occurred only after the contracts had been awarded to JSL. It is well established that allegations concerning the qualifications of an awardee's proposed subcontractor cannot form the basis of a protest, where there was no requirement that the proposed subcontractor be identified and approved prior to award. *Delta Elevator Service Corporation*, B-208252, March 23, 1983, 83-1 CPD ¶299; *citing Challenge Equipment Corporation*, B-193511, December 29, 1978, 78-2 CPD ¶442; *Tenavision, Inc.*, B-208857, September 21, 1982, 82-2 CPD ¶256 (approval of subcontractors after award involves a matter of contract administration, which the GAO does not review). Similarly, the ODRA has stated that it will not review matters of post-award contract administration in the context of a protest. *See Washington Consulting Group, Inc.*, 97-ODRA-00059 (ODRA Decision dated February 18, 1998).

## **RECOMMENDATION**

AMS § 3.9.3.2.3.3 provides that when a protest has no basis in fact or law, a summary decision may be issued as the recommendation to the FAA Administrator. Accordingly, inasmuch as Siemens lacks standing as a protester under the AMS, the ODRA recommends that the consolidated protests be dismissed summarily with prejudice.

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

**APPROVED:**

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

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FOOTNOTES:

<sup>1</sup> Standard Form 2A itself seeks the quantity, model numbers, and unit prices of various fire alarm system devices proposed in the base bid. The Form indicates that the provision of such information is intended to facilitate Owner requested "concept changes," including additions and deletions of devices. Agency Report, Exhibit 2, pages 3 – 5; Agency Report, Exhibit 8, pages 3 – 5. We therefore do not view an FAA request for a price breakdown here to have been either outside the "normal 'Prime Contractor-Subcontractor' format", or evidence that the Region actively participated in the selection of the fire alarm subcontractor.

<sup>2</sup> The regulations governing the ODR, which became effective on June 28, 1999, for disputes filed on or after that date also incorporate the AMS definition of "interested party" in 14 C.F.R. §17.3(k). Section 17.3(k) expressly states that proposed subcontractors are not "interested parties" and are not eligible to submit protests.