

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

_____)	
Protest of)	
Astornet Technologies, Inc.)	Docket No. 08-ODRA-00469
_____)	

DECISION ON DISMISSAL OF PROTEST

I. INTRODUCTION

This matter currently is before the Office of Dispute Resolution for Acquisition (“ODRA”) for consideration of whether the bid protest (“Protest”) filed by Astornet Technologies, Inc. (“Astornet”) should be dismissed summarily pursuant to the ODRA Procedural Regulation at 14 C.F.R. §17.19. After reviewing the briefs filed by Astornet and by the Program Office, the ODRA concludes that the Astornet Protest, which seeks to challenge a task order issued by the Program Office to Security First Consulting, Inc. (“Security First”), fails to state a claim upon which a relief can be granted. Therefore, the ODRA recommends that the Astornet Protest be dismissed summarily.

II. FACTUAL BACKGROUND

Astornet’s Protest was filed with the ODRA on October 7, 2008. Astornet’s filing stated that it “hereby protests a non-competitive award of ATO Security Documentation work for deployed navigation equipment related to the Security Certification and Authorization Package (“SCAP”) on behalf of the FAA Navigation Systems program office.” *Protest* at 1. Astornet’s Protest goes on to allege that it had been told about a “forthcoming solicitation for the SCAP services work”, but that it “received no information or opportunity to compete for the SCAP ATO Security Documentation work.” *Id.* Astornet

further alleges that counsel for the Program Office informed Astornet on October 3, 2008 that the “program office had non-competitively awarded the SCAP services work to an incumbent vendor with an existing contract with the FAA.” *Id.* Astornet requests that: “As a remedy, the FAA should be directed to cease unfair dealings with Astornet, compensate Astornet for its loss by offering a significant 8(a) non-competitive opportunity in the area of systems engineering, software development, security testing or certification documentation.” *Id.* at 2.

An initial telephone scheduling conference was held in the Protest on October 14, 2008. In a status conference memorandum dated October 15, 2008 (“Memorandum”) it was noted that “Astornet does not know which contract award it is challenging but believes, based on information Mr. Haddad allegedly received from [Program Office counsel] Ms. O’Malley, that the program office promised to give Astornet certain work but instead awarded work on a non-competitive basis to another company.” *See Memorandum* at 1. Ms. O’Malley clarified that she told Mr. Haddad that in August of 2007 certain information security work was awarded on a non-competitive, sole source basis to a section 8(a) contractor, Security First Consulting. Ms. O’Malley further stated that under that contract additional work was recently tasked to the same contractor in 2008. *Id.* In the Memorandum, the ODRA noted that during the conference “it further was clarified that Astornet’s Protest does not raise any protestable issue regarding the award to Security First Consulting. Rather, the Protest alleges, without support, that the Program Office was under an obligation to award the work Astornet. Astornet has raised similar issues in a separate Contract Dispute that is pending at the ODRA.” *Id.*

During the conference the ODRA noted its authority under the Procedural Regulation to dismiss a bid Protest if it is untimely or fails to state a claim upon which relief can be granted and directed that Astornet show cause why the Protest should not be dismissed. *Id.* at 2. Astornet filed its response to the show cause directive on October 21, 2008 (“Astornet Response”). The Astornet Response repeats its Protest allegations that the “FAA improperly awarded the requirements to Security First Consulting” and that “Astornet should have been invited to compete for the requirements.” *Astornet Response*

at 1. The Astornet Response goes on to cite to provisions of the Competition In Contracting Act of 1984 (“CICA”), *10 U.S.C. § 2304(a)(1)(A)*, in support of its Protest. Astornet also cites to a recent decision issued by the Government Accountability Office (“GAO”) with respect to challenges to delivery and tasks orders under CICA. *See Colliers International*, B-400173, 2008 CPD ¶ 147, 2008 WL 3904559 (Comp.Gen.). Astornet goes on to note that it has requested discovery, which it alleges is necessary to determine whether the award of the task order was in violation of CICA. *See Astornet Response* at 1-2. Finally, Astornet’s Response notes that the Protest has alleged that the Program Office has refused to allow Astornet to compete for the task order. *Id.* at 2.

In accordance with the established briefing schedule, the FAA Program Office filed a Response to the Astornet Response (“Program Office Response”). The Program Office Response includes the following as its “STATEMENT OF FACTS”:

- 1) Contract DTFAWA-07-C-0052 was awarded to Security First Consulting, Inc. August 10, 2007. *Exhibit 1.*
- 2) The contract is a time and material (“T&M”) contract with a ceiling of \$784,554.00 and a period of performance of twelve months from the award date. *Exhibit 1.*
- 3) Elisa Brown, Contracting Officer for the FAA, awarded this contract and has administered it since its inception. *Exhibit 2.*
- 4) Modification 004, issued on July 25, 2008, extended the Security First Consulting contract period of performance from August 13, 2008, to September 30, 2008, pursuant to AMS Clause 3.2.4-34, Option to Extend Services. *Exhibit 3.*
- 5) Walter Kwiatek was made aware that funds were available to perform a SCAP on the Integrated Control Monitoring Equipment System (“ICM System” or “ICMS”) in early August 2008. *Exhibit 4.*
- 6) The Contracting Officer received purchase requisition WA-08-06299 identifying the need for “ICMS SCAP on contract DTRFAWA-07-C-00052” on August 13, 2008. *Exhibits 2 and 5.*
- 7) The Contracting Officer reviewed the PR for issuance on the contract. *Exhibit 2.*
- 8) The work currently being protested is the ICM System SCAP derived from PR WA-08-06299 and funded in Modification 005. *Exhibit 6.*

See Program Office Response at 1. The Program Office Response goes on to argue that:
(1) Congress granted the FAA authority to establish a separate acquisition system which

is governed by the FAA's Acquisition Management System ("AMS") and not by the CICA; (2) the task order issued to Security First is within the scope of the preexisting contract between the FAA and Contractor; and (3) the Program Office was not under any legal obligation to compete the services awarded under the task order, to notify Astornet, or to provide an opportunity for Astornet to bid on that work. *See Program Office Response* at 1-5.

With respect to the non-applicability of the CICA, counsel for the Program Office points out that Congress mandated the FAA to create its own acquisition system and that the "FAA is exempt from most acquisition laws applicable to the rest of the federal government and to CICA." *See Program Office Response* at 2; 49 U.S.C. § 40110(d). The Program Office Response goes on to demonstrate that the task order work given to Security First is within the scope of the underlying contract. *See Program Office Response* at 3-4.

Finally, the Program Office notes with respect to the allegation of the requirement that Astornet be notified and provided an opportunity to compete for the task order, that "the Agency is under no obligation to compete services that are already under contract. Even if it was, the ICM System SCAP was for work below the dollar threshold requiring announcement." *Id.* at 5. The Program's Office Response is supported by declarations of the Contracting Officer and Agency Program Office Personnel, as well as copies of the pertinent contract documents.

III. DISCUSSION

The ODRA Procedural Regulation specifically provides that "either upon motion by a party or on its own initiative, the ODRA may, at any time, exercise its discretion to: (1) recommend to the Administrator, dismissal or the issuance of a summary dismissal with respect to the entire Protest." *See* 14 C.F.R. § 17.19(c). As the ODRA has noted on several occasions, "under the procedural regulation, a Protest is subject to dismissal if it is untimely, without basis of fact or law, or fails to state a claim upon relief may be had."

See Protest of CNI Aviation, LLC, 07-ODRA-00428. It also is well established that a dismissal of the entire Protest is a Final Agency Order and that “prior to recommending or entering either a dismissal or a summary decision, either in whole or in part, the ODRA shall afford all parties against whom the dismissal or summary decision is to be entered, the opportunity to respond to the proposed dismissal or summary decision.” *Id.* at 6, *citing* 14 C.F.R. § 17.19(b).

As the ODRA has previously ruled, the Protest is defective if it fails to allege facts which if proven would constitute improper conduct on the part of procurement officials or a violation of the AMS by the Agency.” *Protest of BEL-AIR Electric Construction, Inc.*, 98-ODRA-00084. In this case, Astornet has failed to allege any facts, which if proven, would establish either a violation of the AMS or improper conduct by Program Office officials. As was correctly pointed out by Program Office counsel, CICA, which primarily is relied upon by Astornet in its Response as the legal basis of its Protest, was made inapplicable to the FAA by Congress. *See 49 U.S.C. § 49110 (d)(2)*. Thus, the CICA-based decision of the GAO cited by Astornet does not support the viability of a bid protest challenging the award of a task order under the FAA’s Acquisition Management System. As the ODRA previously has ruled, the decisions of the GAO may be relied on as persuasive authority only where such decisions are not incompatible with the AMS. *Protest of Northrop Grumman Corporation*, 00-ODRA-00159, Decision on Motion to Dismiss, dated August 17, 2000, at F.N. 3.

Nor has Astornet alleged that the task order in question was outside the scope of the original Contract awarded to Security First. In that regard, the ODRA finds no basis in the record that would support such an allegation. Rather, the undisputed evidence before the ODRA supports a finding that the award of the task order involved clearly was within the scope of the underlying 2007 Contract between the FAA and Security First Consulting. *See Program Office Response* at 1-4. That being the case, the AMS did not require that the Program Office publically announce the award of the task order to Security First or provide any other contractor such as Astornet with an opportunity to compete for the task order work. Moreover, even if the award was not made by task order

under an existing contract, the dollar value of the work involved was below the established dollar value public announcement threshold. *Id at 5.*

With respect to the Astornet Protest allegations challenging the conduct of Program Office contracting personnel, such allegations do not meet Astornet's burden of alleging facts in support of what amounts to a claim of bad faith on the part of Agency contracting officials related to the award of the task order. It is well established that a presumption of good faith attaches to the official actions of government officials. *See Contract Dispute of Dynamic Security Concepts, Inc., 05-ODRA-00346.* It similarly is well established that a claim of bad faith against a government official requires that the claimant allege facts which, if proven, would provide clear and convincing evidence to overcome the presumption. *Id.*

The allegations of Astornet's Protest, which the ODRA accepts as true for purposes of this Decision, fall woefully short of alleging facts that could establish bad faith or any other improper conduct by Program Office personnel. Astornet essentially alleges that the Program Office was required to compete the task order work awarded to Security First Consulting and that Program Office contracting personnel improperly refused to provide Astornet an opportunity to compete for the work. *See Protest at 1-2.* Allegations that Program Office representatives refused to communicate with Astornet and failed to inform Astornet about the award of the task order work, *see Protest at 1,* simply do not present a basis for barring the Program Office's award of in-scope work to Security First by task order in accordance with the AMS. Even assuming, for the purposes of argument, that the Program Office was under a general contractual obligation to award contract work to Astornet and failed to do so, as has been alleged by Astornet in a separate Contract Dispute docketed as ODRA Case Number 08-ODRA-00466, that allegation would be properly prosecuted as a breach of contract claim, rather than as a protest of the task order.¹

¹ Nothing in this Decision precludes Astornet from pursuing its pending Contract Dispute at the ODRA.

IV Conclusion

The ODRA concludes that Astornet's Protest fails to state a claim upon which relief can be granted and that the allegations of its Protest, even if proven, would not provide a basis for overturning the award to Security First Consulting. The ODRA therefore recommends that Astornet's Protest be dismissed summarily with prejudice.

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For Acquisition