

FAA Office Of Dispute Resolution

Report of the Special Master in the Protest of Weather Data Services, Inc.

under Solicitation DTFA11-96-R-00156.

Docket Number 96-ODR-00010

Appearances

For the Protester: Jeffrey A. Short, President, and Martin S. Bachman, Vice President, Weather Data Services, Inc.

For the FAA: Kevin O'Hara, Contracting Officer, and Dwight Williams, Esquire.

For the Interested Parties: John Patten, President, Met-Tech, Inc.; Robert A. Davis, Condor Reliability Services, Inc.; and Timothy Breiding, Midwest Weather.

Special Master: Donald P. Arnavas, Esquire.

Summary

This procurement was conducted under the Acquisition Management System (AMS) initiated by the Federal Aviation Administration (FAA) in April of 1996. Proposals were solicited, evaluated and awarded on a "Best Value" basis and not, as had previously been the case with the FAA's Northwest Mountain Weather Observation Solicitations, on the basis of price alone.

The Protestor, Weather Data Services, Inc. (WDS), filed its protest on September 26, 1996. The FAA filed its initial response to the protest on October 8, 1996. The parties' contentions were supplemented several times; conference calls with all the parties were held on October 9, 1996 and on December 12, 1996 and additional position papers were filed by WDS on December 16, 1996 and January 7, 1997 and by the FAA on January 3, 1997.

WDS contends that as the low offeror, it should have received contract award and that the FAA acted erroneously in finding that the second low offeror Met-Tech Inc.(MT) represented the best value to the FAA despite its somewhat higher price.

The Special Master concludes that the FAA's decision to make award to other than the low offeror was not arbitrary, capricious, or an abuse of discretion and

that it had a rational basis. Accordingly, the Special Master recommends that the Administrator deny WDS's protest.

Findings Of Fact

Solicitation & Award

1. The subject solicitation was issued by the FAA's Northwest Mountain Region on August 9, 1996. It contemplated award of a contract for the performance of weather observation services at seven locations in Montana. The work to be performed over a one-year base period and two one-year option periods.

The solicitation informed all the offerors, in paragraph 1.2, that its objective was to provide weather observation data, ". . . in such a manner that the highest possible quality data is available to the aviation users".

At paragraph 5.1, the Solicitation cautioned that all contract personnel shall be contractor certified by the NWS. It then provided that:

Uncertified contract personnel and personnel not possessing an NWS regional certification may take observations in a training capacity only under the immediate, direct supervision of a certified observer who shall be responsible for the observation (emphasis in original).

(Protest File (PF)-tab 1).

2. Section M of the Solicitation entitled "Evaluation Factors For Award" provided, in part, that:

"The Government will make award to the responsible offeror whose proposal conforms to the solicitation terms and conditions, is technically acceptable, and represents the best value to the Government".

Section M lists two major evaluation factors--Management Proposal and Past Performance and Experience, and then states that:

". . . the Government will evaluate the Pricing Proposal, Management Proposal, Delivery Schedule, and Past Performance References received to determine which technically acceptable offer represents the best value to the Government . . ."

- (PF-Sec M, tab 1)

3. Twelve offerors were solicited by the FAA and six proposals were received. All six proposals were determined to be "technically acceptable." The three lowest priced evaluated offers were as follows:

• • WDS-----\$[* * * *].

MT-----\$[* * * *].

Condor Reliability--\$[* * * *].

The FAA's Integrated Product Team (IPT) concluded that, ". . . the three lowest priced offers, differing by approximately 3.5` of the total evaluated amount, were statistically close enough to be equally considered for award". (IPT Summary, PF-tab 5).

4. After completing its review the IPT recommended that award be made to MT, ". . . based upon the evaluation criteria, past performance and best value to the Government . . ." (PF-tab 5).

5. Award was made to MT in accordance with the IPT's recommendation on September 17, 1996. MT commenced its performance on October 1, 1996. (PF-tab 1).

Initial Contentions & Responses

_6. WDS raised several different grounds of protest. First, WDS referred to a variety of irregularities in the manner in which the FAA evaluated its past performance. Second, it contended that an FAA employee and MT's President, both, improperly affected WDS's technical evaluation. Third, WDS alleged that MT's negative past performance reports were not fully considered during the FAA's evaluation. Next, it charged that the FAA unfairly equated "mere investigations" by the Department of Labor with negative references. And finally, WDS claimed that two incidents that occurred after the selection of MT were unfairly included in WDS's evaluation. (WDS Ltr-October 11, 1996).

7. In its Agency Report the FAA denied each of WDS's grounds of protest. It claimed that its past performance evaluations were all conducted in compliance with the terms of the Solicitation. It said that neither the FAA employee nor MT's President had any input in WDS's evaluation. It stated that MT's past performance was properly reviewed and evaluated and that the Department of Labor's comments were properly considered. And, the FAA said that the two post award incidents were considered only to the extent that it was proper to consider them. (Agency Report-October 8, 1996).

Latest Contentions and Responses

_8. Both the FAA and WDS supplemented their pleadings with additional papers submitted at the request of the Special Master.

9. The WDS submission, dated December 16, 1996, (Attachment A hereto), discusses in greater detail several of the Protestor's previous contentions. For example, WDS reviews, at length, the question of the sufficiency of the credentials of one employees with respect to METAR/TAF training. WDS suggests that the "problem" with respect to this individual's certification, ". . . was that the certificate was lost in the paper work shuffle between regions".

WDS, while not denying that they occurred, also seeks to minimize the significance of two incidents of excessive errors in its performance at Cut Bank Station, by noting that they involve only one station over a two month period and are thus not "excessive" when considered in the full context of running 4 locations for 42 months and one location for 15 months -- a total of 183 performance months.

WDS finally makes a blanket allegation that, ". . . many of the Agency's documents were fabricated after the fact and back-dated to cover themselves after they learned of our protest". And that this was done, ". . . to make the Agency's case look stronger".

(Attachment A)

The WDS submission, dated January 7, 1997, (Attachment B hereto), once again questions whether WDS made time card errors at either Elko or Lovelock, Nevada, and reiterates its contention that its employee had not worked without temporary certificate coverage. Its remaining comments simply underscore the fact that WDS disagrees with the manner in which the FAA conducted this procurement and contribute nothing substantive to the discussion.

(Attachment B)

10. The FAA's supplemental submission, dated January 2, 1997, (Attachment C hereto), provides greater detail on several issues of interest to the Special Master.

For instance, the FAA had been requested to provide more information concerning the extent to which the references submitted by WDS and the other offerors were contacted to verify their past performance. In response to this query, the FAA indicated that it did not initially communicate with the specific references that were furnished by the individual offerors but instead contacted a number of sources that cumulatively possessed extensive information regarding the past performance of "all responding vendors." These were (1) The contracting office that oversees all weather contracting for the NWS Western Region (this office awarded the bulk of the contracts cited by the offerors), (2) the chief meteorologist for the NOAA Western Region who also functions as the COTR for weather observation contracts in the western third of the country, (3) the FAA contracting officers in charge of weather observation contracts for the

Western Pacific Region and for the Great Lakes Region, and (4) the contracting officer and contract administrator for the FAA Southern Region. In addition, the FAA notes that the primary Weather Observation contracting officer for the Northwest Mountain Region was a member of the IPT and was thus able to furnish relevant information regarding the past performance of WDS.

The foregoing sources were initially contacted by telephone and were later requested, in writing, to furnish references with respect to all the offerors. The FAA notes that, "this method gave us a practical method of obtaining consolidated reference information without the burden of contacting the many individual offices cited by the offerors". Finally, the FAA notes that after this process had been completed only the, "proposal considered most eligible for award was subjected to individual scrutiny and selected random checks of the submitted references".

11. The FAA's supplemental submission also refers to several other matters in contention as follows:

(a) [* * * *].

(b) As to WDS's criticism for being downgraded for various incidents that occurred after MT had been selected, the FAA states that although a memo regarding these matters was written and dated after the evaluation, the incidents all took place before the evaluation had been completed.

The FAA also commented that, in any event, the two instances of excessive errors that warranted a monetary deduction from WDS's invoice are "very rare" among its contractors and that sanctions of this sort have never previously been used in the Northwest Mountain Region.

(c) The FAA also furnishes additional information regarding WDS's use of an uncertified observer and notes that the primary area of concern here was WDS's failure to monitor its worker's training and certification. The FAA states that:

NWS agreed to issue a 90-day temporary certificate to allow the observer time for the necessary training. He failed to attend this training during the term of the temporary certificate, yet continued to perform observations. Weather Data failed to monitor his training and certification.

- (d) The FAA explains that the reason a notation in the protest file regarding a [* * * *] contains some misinformation was attributable to the inadvertent loss of the original memo and a subsequent mistake in identifying one of the involved investigators.

(e) The FAA also denies that one of its personnel improperly interfered in the procurement on the behalf of MT. The FAA states that this individual played no part in the procurement process.

(Attachment C)

Issues Presented

WDS has raised a number of issues in its papers. Those of substance that remain may be summarized as follows:

(1) That the FAA's review of WDS's past performance was not conducted in a fair manner, in that, not all of WDS's references were checked, undue weight was given to [* * *] and to the negative effect of [* * *], and that incidents that took place after evaluations had been concluded were considered to WDS's detriment;

(2) That the FAA misinterpreted the facts surrounding the certification of one of WDS's weather observers; and

(3) That there were several instances of a lack of good faith on the part of the FAA that place the credibility of the entire evaluation process in doubt.

Conclusions of Law

We note, as a preliminary matter, that we believe a major reason for this protest was the newness in the FAA's Northwest Region of best value procurements. We sympathize with the feelings of a low offeror such as WDS that has grown accustomed to a relatively uncomplicated system of award on the basis of low price alone and is then thrust into the more complex and unfamiliar evaluation procedures that are an integral part of the best value contractor selection scheme, which, as one authority has noted, encompasses, "a source selection where the award decision is based upon a trade-off between the price offered and other features of the proposal such as quality, technical, management and schedule". 6 Nash & Cibinic Report para. 45 (1992).

Nonetheless, all the offerors that responded to the subject solicitation were put on notice, several times, that award would be made on the basis of best value to the Government. And, they were further admonished that in the context of this procurement, "best value to the Government" equated to weather observation data of "the highest possible quality". Thus, our findings and conclusions must be made with these facts in mind.

In reaching our recommended decision we have applied the principles of the FAA's Acquisition Management System (AMS) as well as the standard of review applicable under the Administrative Procedure Act, 5 USC 706. This means that

the FAA's actions will be upheld so long as they have a rational basis, are neither arbitrary or capricious, and are supported by substantial evidence. *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S. Ct. 814 (1971).

WDS's Issues

As noted above, WDS has presented three issues that remain for decision.

(1) Past Performance Review

The IPT did not review each of the references submitted by each of the offerors. Instead it used the system of reference checking that is described in detail above (FOF 10). The IPT's system of communicating with a relatively small number of responsible Government officials that have knowledge of virtually all of the prior contracts of all the offerors and then only conducting random checks of the specific references submitted by the offeror in line for award, is logical, economical, and achieves substantially the same results -- in a more cost and time efficient manner -- that would be attained if each reference submitted by all six of the offerors had been individually contacted. As such, it complies with the IPT's responsibility, as set forth in Sec. 3.2.2.3.2.2 of the AMS to, "ensure an in-depth review and evaluation of each submitted screening document against the FAA requirements and the stated evaluation criteria". While there are certainly situations where an agency's method of reviewing an offeror's references may be properly criticized, see *e.g.*, *Inlingua Schools of Languages*, Comp. Gen. Dec. B-229784 88-1 CPD para. 340, we do not find facts here that would warrant such a conclusion.

Next, even though WDS attaches much weight to the incidents that may or may not have occurred in [* * *] -- we note that, in any event, this was not a matter of significance to our recommendations. This issue's major import is that it underscores to the FAA the importance of conducting its evaluation duties with care and precise attention to detail.

Nor are we persuaded by WDS's contentions that undue weight was given to simple [* * *] or to the fact that WDS was monetarily penalized for [* * *]. As the FAA noted in its discussion of the Labor investigation matter, the fact that investigations may sometimes turn out to involve trivial situations does not mean that they must be ignored by the evaluators nor does it, ". . . negate the FAA's preference for vendors with superior records". This rationale is entirely consistent with the concept of best value and with the FAA's stated goal under this procurement, to seek the "highest possible quality data". The seriousness of the two instances of [* * *] has already been discussed and was, in our view, appropriate for consideration by the FAA.

Finally, we find that the FAA in its response has satisfactorily established that the incidents considered in WDS's evaluation occurred before any award was

made under this procurement. In any event, even if this were not the case, we know of no provision in the AMS that would prohibit the FAA from considering sufficiently important matters that reflected on an offeror's credentials, even if they took place after evaluations in a given procurement had been officially concluded.

(2) Certifications

We accept the FAA's account of the circumstances surrounding WDS's use of an uncertified observer and we agree that this matter was appropriate for consideration in determining best value to the FAA -- As noted above (FOF 11), the FAA was troubled by the fact that this individual's training (or lack thereof) was not properly monitored, and not (as WDS seems to think) by the dates of his temporary certification.

The Solicitation goes into considerable detail (for nearly two pages) in discussing the requirements for certification of weather observers. WDS was on notice of the importance attached to these procedures by the FAA. The IPT would have been remiss had it not taken this matter into account.

(3) Evaluation Improprieties

WDS has made a number of allegations (improper communications between WT's President and an FAA official; the FAA's fabrication of documents after the fact; the FAA's deliberate delay of WDS's debriefing in order to, "try to come up with justification not to award" a contract to WDS) that if true, would reflect adversely upon the propriety of the FAA's conduct of this entire procurement action.

WDS's allegations are not supported by the record, but instead are based upon supposition and conjecture. They do not approach the high degree of proof necessary to overcome the presumption that Government officials have performed their duties properly. Indeed, as noted in our findings, the Contracting Officer acknowledged that one memo that contained an inadvertent inaccuracy was prepared after the fact, but offered a perfectly acceptable explanation for doing so.

We decline to give any weight to the allegations made by WDS.

(4) Miscellaneous Allegations

WDS has complained that MT has, ". . . not performed a contract of this size and complexity" and thus should, "not have even" been considered for award. We consider this to be a disagreement with the FAA's affirmative finding of MT's responsibility. We believe that the FAA's finding of responsibility on MT's part is supported by substantial evidence and has a rational basis.

WDS also complains that copies of its debriefing were improperly distributed to the interested parties. This matter has no relevance insofar as this protest is concerned. If WDS desires to pursue this matter, it must do so in some other forum.

Finally, WDS in its latest submittal, has requested additional information and documentation from the FAA regarding several aspects of the procurement. We deny these requests as untimely.

Recommendation

For the reasons set forth above, we find that the decision of the FAA to make award to MT had a rational basis and was neither arbitrary or capricious nor an abuse of discretion and that it was supported by substantial evidence. Accordingly, we recommend that the Administrator deny WDS's Protest.

_____/S/_____

Donald P. Arnavas

Special Master

January 9, 1997