

UNITED STATES DEPARTMENT OF TRANSPORTATION

FEDERAL AVIATION ADMINISTRATION

WASHINGTON, DC

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**DECISION AND ORDER**

**FAA Order Number: ODR-97-28**

**Matter: Protest by JO-JA Construction Limited**

**Site Preparation for ASR-9 Radar at Islip, New York**

**Docket: 97-ODR-00024**

**Served: July 17, 1997**

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**DECISION AND ORDER**

**Appearances:**

For the Protester: Daniel L. Doherty, Esq.

For the Agency: Zachary Berman, Esq., FAA Eastern Region

For the Interested Party, Baig Associates,

**I. Introduction**

On January 13, 1997, Jo-Ja Construction, Ltd., protested to the FAA's Office of Dispute Resolution for Acquisition, (ODR), the award of a contract for radar site preparation services at Islip, New York. Tab (1). Although the solicitation as originally issued contemplated a negotiated procurement, the contracting officer, (CO), inadvertently disclosed the offerors' prices after initial proposals were received. At the same time, the CO suspected that the specifications were unclear as to the requirement for extensive concrete ductwork, because the low offeror, Baig Associates, was significantly under the government estimate. Accordingly, the CO canceled the original solicitation and reissued an amended one on January 10, 1997.

Baig Associates was the low offeror under the new solicitation, and award was made on February 4, 1997. Jo-Ja claims that it was the low, responsive bidder in the initial solicitation, and that when the contracting officer mistakenly disclosed the bid prices, she should have determined Baig's offer to be nonresponsive and awarded to Jo-Ja, rather than canceling and resoliciting. The protester asserts that the contracting officer's acts in this regard were arbitrary and prejudicial, and that Baig's contract should be terminated and award made to Jo-Ja. For the reasons discussed below, the protest is denied.

All document references are to the attached list of exhibits, Tabs (1) through (10).

## **II. Findings of Fact**

On December 16, 1996, the Federal Aviation Administration's Eastern Regional office issued solicitation DTFA05-97-R-50828, for the site preparation of an ASR-9 radar installation at McArthur Airport, in Islip, New York. Under Section 3.2.2.5 of the agency's Acquisition Management System (AMS), the solicitation was advertised in the Commerce Business Daily, and was subsequently issued to four companies that had previously performed similar work for the FAA. Award was to be based on low price. The government estimate for the work was \$1.2M. See Tab (2). Three of the four companies responded with proposals by the due date of January 8, 1997. Their prices were as follows:

Baig Construction: \$798,426.

Jo-Ja Construction: [\* \* \* \*].

GEM Engineering: [\* \* \* \*].

Tab (2)

The contracting officer, (CO), states that she intended that this was to be a negotiated procurement, but that she mistakenly checked a box on the first page of the solicitation indicating that it would be a sealed bid. The document itself is conflicting on this point. The Eastern Region's cover sheet states "*Request for Offer*," yet on the first page of the solicitation, Standard Form 1442, the block for "*sealed bid*, (IFB)," is checked, rather than "*Negotiated*, (RFP)" block. Additionally, the middle character in the solicitation number is an "R", not a "B," which traditionally distinguishes a negotiated procurement from a sealed bid. Nothing else in the document clarifies whether negotiations were in fact intended. See Tab(2). The contracting officer further states that because of that mistaken notation, and because she had been accustomed to working with sealed bids, she revealed the pricing when each of the offerors called in to her on January 8 or 9, 1997. Tab (2), page 2.

The FAA's Construction Manager for the Islip project reviewed the prices and noticed that Baig's price was considerably below the government estimate. He suspected that Baig had not priced the cost of nearly a miles worth of concrete ductwork in the project.

He drew this conclusion because the amount by which Baig's price fell short of the total estimate approximated the estimated cost of the ductwork, and because he knew that Baig had recently completed work on a similar job which did not include ductwork. Tab (2), page 3.

At some point thereafter, Baig's foreman contacted the FAA's Project Manager and inquired as to why the government estimate was so much higher than on the other job it had completed. The Project Manager explained that the extensive concrete ductwork accounted for the difference. Baig's foreman said that Baig's reading of the solicitation indicated that the ductwork was already in existence and that its proposal had not priced the ductwork. Baig's foreman then called the CO and explained the same to her. Tab (2), page 4.

The CO consulted with the Project Manager and the Construction Manager about the specifications and the ductwork. Their conclusion was that the solicitation was ambiguous on the requirement for installing the ductwork, and that Baig might reasonably have interpreted the specification as not requiring the work. They based this conclusion on three facts:

- Part I, Section "B" of the solicitation, (page 2, at paragraph "Q"), was entitled "Installation of control cable(GFM) in the duct system," but did not address the installation of the ductwork itself.
- The most pertinent drawings in the solicitation did not indicate that the ductwork needed to be installed.
- The title of the drawing indicated nothing about ductwork installation.

Tab (2), pages 5 & 6.

The contracting officer initially considered requesting Best And Final Offers from the three offerors, but ultimately decided to cancel the solicitation and resolicit. The reason for resoliciting was to clarify the requirement for the ductwork, and to note that this was a negotiated procurement, not a sealed bid. Tab (2), page 5.

On January 10, a new solicitation was issued to the same three offerors incorporating the changes described above, plus an additional requirement to retrieve a section of steel tower from a location different from what was originally indicated. Tab (2), page 5.

All three offerors responded to the second solicitation by the due date of

January 17, 1997, with prices as follows:

Baig: \$1,224,000.

GEM: [\* \* \* \*].

Jo-Ja [\* \* \* \*].

Tab (2), page 6

On January 21, the contracting office requested a detailed cost breakdown from Baig for the ductwork, and on January 23, the contracting officer's representative conducted negotiations with Baig, during which Baig lowered its price \$3,000 to \$1,221,000. Award was made to Baig on February 4, 1997. Tab (2), page 6.

Jo-Ja submitted its protest to the ODR on January 13, 1997. A teleconference was conducted with the parties, during which the ODR attempted to identify the key facts and issues, and set proposed dates for an agency report and protester response. A summarization of that teleconference was provided to the parties. Tab (3). On

January 29, Jo-Ja requested contract suspension pending the outcome of the protest.

Tab (4).

Jo-Ja responded to the ODR's summarization letter with its proposed changes on February 5. Tab (5). On the same day, Jo-Ja filed a discovery request with the ODR. Tab (6). On February 17, Jo-Ja posed several specific issues to the ODR which it wished to have addressed in the agency's report. Tab (7). Subsequently an agency report (Tab 2) and protester's response Tab(8) were submitted to the ODR.

### **III. Issues presented**

1. Did the contracting officer have a rational basis for concluding that the portion of the specification relating to ductwork was ambiguous and needed to be clarified.
2. Was the contracting officer's decision to cancel and resolicit rationally based.

### **IV Analysis**

In deciding all substantive issues, the FAA will apply the standard of review applicable under the Administrative Procedures Act, 5 U.S.C. 706. Agency actions will be upheld so long as they have a rational basis, supported by substantial evidence and are neither arbitrary, capricious, or an abuse of discretion. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S. Ct. 814, (1971).

As a preliminary matter, the protester has raised the implication that the agency's actions in this procurement were motivated by a bias in favor of Baig Associates. Jo-Ja questions the contracting officer's "conduct and credibility," ( Tab 8, P.2), alludes to the "established working relationship that the FAA had with Baig," (p.4), and claims there were "clandestine and extraordinary efforts simply to ensure a competitive advantage to Baig." (p.12). I interpret these and other statements to be an allegation the contracting officer's actions were a purposeful and improper attempt to "steer" the award to Baig.

These are serious allegations, which, if true would constitute misconduct on the part of the contracting office. When faced with similar accusations 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 must be supported by "well nigh irrefragable proof" to overcome the presumption that public officials act conscientiously and in good faith. In this case, the protester has offered nothing but innuendo that the contracting office gave favorable treatment to Baig, based on the events that transpired. No evidence or motive has been proffered on the contrary, Jo-Ja admits that it recently completed a similar ASR-9 project in Albany that was awarded by the same contracting officer. No explanation is given to explain this apparent contradiction.

I find no basis to any argument that the contracting officer was biased. I have no reason to discount her statements that she intended this to be a negotiated procurement, that she mistakenly revealed the prices, or that she personally believed the specifications were ambiguous.

It is my view that the evidence supports a conclusion that by January 10, 1997, the contracting officer was faced with a dilemma attributable to two facts: 1) the initial prices had been mistakenly disclosed when in fact discussions and Best and Final Offers were intended, and, 2) the low offeror's price was almost certainly mistaken with respect to the need for installation of significant concrete ductwork. Under these facts, the contracting officer was confronted with the question of how to proceed, being mindful of both the integrity of the system and the need to meet the requirement. Several options were available, and the agency has categorized them into six alternative approaches. See pages 7 & 8 of Tab (2). There may well have been other possibilities, but the issue for decision is whether the approach chosen was rational, given all attendant circumstances.

*1. The specification's ambiguity concerning ductwork installation.*

I believe the starting point in assessing the rationality of the CO's action is the fact that, by January 9, 1997, she believed the specifications were ambiguous and that the ambiguity may have been the source of Baig's mistakenly low offer. Because she concluded that the specifications were unclear about the ductwork, she did not want to take corrective action relating to the inadvertent disclosure that would disqualify Baig from further participation. The contracting officer did not want to lose the advantage of Baig's low pricing because of a discrepancy that may have been the government's fault. In contrast, Jo-Ja's entire protest is premised on the contention that Baig's mistake was its own doing, and that the only permissible option for the CO at that point was to disqualify Baig and award to the lower of the two remaining offerors.

For the reasons discussed below, I find that the decision to retain Baig in the procurement was rational, and that of the several approaches that would have accomplished this, cancellation and resolicitation was most fair to all participants.

The central issue is whether the CO's conclusion about the specification's ambiguity was rational. Jo-Ja asserts that the ductwork requirement was clear, and that Baig's misinterpretation provided no basis for any sort of corrective action. On this point, I believe that it is necessary to examine the original solicitation in detail, as well as any other factors which bore on the determination. Accordingly, several clarifications and explanations are required:

The "solicitation" at issue, DTFA05-97-50828, dated December 16, 1996, was actually comprised of four parts:

The *solicitation* itself, which was comprised only of the government Standard Form 1442 cover sheet. [The remaining 136 pages of the solicitation were contained as attachments to specification booklet]. Tab (9)

The *specifications*, which were contained in a bound, blue booklet totaling 407 pages, of which the first 261 addressed the actual construction work to be done. [The remaining 136 pages, which were listed as "attachments" in the blue book, were actually the remainder of the solicitation, as they contained the schedule, representations, certifications, and various other clauses]. Tab (2)

Various *attachments* to the specifications. Attachment #3 is a 21 page guidance, labeled: FAA-C-1391b, dated January 25, 1991, entitled "*Installation and splicing of underground cables.*" Tab (2)

The *drawings*, 24 of them, each approximately 2' x 3', depicting various aspects of the job site. Tab (9)

The "ductwork," or "ductway," which is the center of this dispute, is a concrete conduit, 16 inches square, running underground about 1 mile from the new radar site to the main terminal area. The conduit has four, 4-inch PVC pipes encased within it to carry the electrical cables to and from the radar building. The ductwork parallels the main runway for most of its length, crossing under several taxiways and other paved surfaces as it approaches the terminal. See Tab (9), drawing #11 of 24.

The solicitation itself, (form 1442 plus the last 136 pages of the bluebook), sheds no light on the ductwork issue. It is concerned primarily with contracting issues such as price, schedule, certifications, and award. See Tab (2). Likewise, large portions of the specification and the drawings are irrelevant to this issue because they concern themselves with the details of the radar site and building. The most pertinent portions from each are: Section "B" of the specifications, (pages 2 & 3), drawing #11, and attachment #3, as these either mention or depict the ductwork.

Section "B," the schedule of work to be performed, breaks the entire project down into 19 subcategories, paragraphs "A" through "S," ranging from site clearance, to installation of fences, air conditioning, and construction of foundations. Each of these paragraphs begins

with a verb such as "construct," "perform," "remove," or "install." Of all these paragraphs, only "Q" pertains to the duct system, and it states only:

**Q. Installation of control cable (GFM) in duct system.**

See page 3 of specification booklet, Tab (9)

Nothing else in the entire 261 pages of the specification sheds further light on whether the ductwork itself is to be fabricated by the contractor. Whereas every other paragraph of the schedule requiring construction uses the term "*construct*," paragraph "Q" indicates only "*installation*" of the cabling. A reasonable reading of this document alone would not necessarily lead to the understanding that the ductwork itself needed to be constructed. On the contrary, the conspicuous lack of word "*construct*" suggests that the ductwork is already in existence, and that the paragraph deals only installing cable in the ductway.

This contrasts with drawing #11 and attachment #3. There are several indications on the drawing which more strongly suggest that the ductwork construction is required. They are:

In four locations, "existing ductbank" is noted under taxiways and cross runways. The implication is that the remainder must be built.

Notes #1, 3, 4, and 5 mention "existing duct bank."

Note #6 requires installation of a pullwire- this could only be installed as the duct bank itself is constructed.

Note #7 allows that handholes may be precast, suggesting that the duct bank into which they provide access must also be fabricated.

With respect to attachment #3, it does in fact, as the protester alleges, go into significant detail about how ductbanks and cable ways are to be fabricated and situated. The problem with this attachment, however, is that, like much of the specification, it is generic to any ASR-9 construction site. While its inclusion suggests that duct work may be required somewhere in the project, the attachment itself does not necessarily cure the lack of reference to "*construction*" in the schedule, paragraph "Q."

In sum, I find that a reasonable reading of the entire solicitation package would conclude that drawing # 11, in conjunction with attachment #3, strongly suggest that construction of the ductbank is necessary, but that the specification schedule, section "B," does not. On the whole, the positive indications in the drawing and the attachment outweigh the apparent lack thereof in the specification, and we believe that a careful reading of the whole package would most likely suggest that construction was necessary. The issue, however, is not whether construction of the ductbank was *more likely* required than not; rather, the issue is whether the contracting officer had a reasonable basis to conclude that her solicitation, as a whole, was ambiguous on this point.

Because of the discrepancy between the drawing and the specification, I believe that the contracting officer had a rational basis for questioning the clarity of the overall package. The rationality of that belief was strengthened when she sought the opinion of her in-house technical support. She states that after the initial offers were received, she consulted with the Construction Manager, Mr. Henn, and the Project Engineer,

Mr. Argyros. Tab (2), pages 3 & 4. Both concurred that the specifications may in fact have been unclear as to the need to install the concrete encased ductbank and associated handholes. For a concrete structure nearly a mile long, which comprises a significant percentage of the cost of the entire job, there was no clear indication in the schedule that the contractor was required to actually construct it.

I believe that the engineers' concurrence in the ambiguity of the solicitation reinforced the rationality of the CO's determination on this point. A fair reading of the specifications and drawings could lead to the conclusion that construction of the ductbank was not required. Because this was a fixed price procurement, and because specification ambiguities could be resolved against the agency in the performance stage, the CO was justified in looking closely at possible defects in her solicitation. To have ignored this issue would have raised the potential for a major claim after award. The importance of gaining competition on a clarified specification outweighed any potential prejudice or inconvenience to the offerors.

When both of the in-house technical personnel conceded that a reasonable person could interpret the specs as not requiring the ductwork, the CO had a strong basis for adopting an corrective approach which did not exclude Baig.

The protester also argues that Baig's misinterpretation of this requirement fails to meet the definition of "Mistake" within the meaning of Part 14 of the Federal Acquisition Regulation. Jo-Ja's response to the agency report repeats several times that there was no "compelling basis" to cancel the first bid. I think that the protester's emphasis on the term "mistake" under a FAR Part 14 analysis is misplaced for two reasons: (1) The FAA is not bound by the terms of the FAR, but (2) more importantly, Baig was not seeking correction of its bid. The issue here is not whether Baig had offered proof sufficient to meet the FAR Part 14 test for correction or withdrawal, but whether the contracting officer had sufficient evidence that the specifications were deficient. When her in-house technical support admitted that the spec was unclear on the ductwork requirement, she had a rational basis to correct the problem in a manner that did not disqualify Baig.

## *2. The determination to cancel and resolicit*

Accordingly, on January 10, 1997, the CO was confronted with the need to address both the inadvertent price disclosure, as well as the need to clarify the specification's ductwork requirement. The issue is whether the approach she chose was rational. Since she did not want to exclude Baig, she could have either amended the solicitation, conducted discussions, and requested final offers, or, canceled and resolicited. She chose to do the latter.

In my view, whether she chose to amend or resolicit, the result is the same with respect to this protest, because in either case, Baig would stay in the competition. The essence of Jo-Ja's protest is that Baig should have been deemed nonresponsive and disqualified immediately, and that award should have been made to Jo-Ja. For the reasons stated above, I believe that the CO acted rationally in rejecting that approach, and in deciding to retain Baig in the competition. Once that conclusion is reached, Jo-Ja's protest must fail, because its entire argument is premised on the fact that it was the next low offeror in the initial round. Since canceling and resoliciting gave all participants the greatest opportunity to rethink their proposals around the clarified requirements, I believe that the approach was completely rational.

The protester also argues that the exposure of everyone's initial prices, as well as the government estimate, was prejudicial to Jo-Ja, and tainted the process. This assertion has no merit. The disclosure was admittedly unfortunate and unintentional, in the sense that discussions and revised offers were contemplated. Once it occurred, however, the CO had to take some course of action, and at least all three offerors had the same information. Jo-Ja cannot articulate any reason why it was prejudiced more than the others, or why another had an advantage over Jo-Ja at that point.

To the extent that the protester's argument is that it suffered greater harm because it had the lowest, non-mistaken price in the initial round, the answer is still that everyone had the same information and an equal chance to make whatever changes they wanted in the second proposal. This is borne out by the fact in the final round, Baig's price was some [\* \* \*] below Jo-Ja's initial offer. Obviously, Baig must have focused on factors other than Jo-Ja's initial offer in formulating its revised price. While the disclosure was unfortunate, the corrective action gave everyone an equal chance in the recompetition.

## **V. Conclusion**

For the reasons set forth above, I find that the contracting officer's determination that the specification was ambiguous was rationally based. While various aspects of drawing #11 and attachment #3 make a case for need to construct the ductbank, the lack of reference in schedule "B" to that effect was a sufficient basis for the CO to clarify the requirement. Once that conclusion is reached, Jo-Ja's protest fails because it is premised on the argument that the only permissible action that could have been taken on January 9, 1997, was award to itself on initial offerors. As previously stated I find that the action taken by the CO to rectify the situation was rationally based, and neither arbitrary capricious, or an abuse of discretion.

It is my determination that the FAA complied with the Acquisition Management System and all applicable provisions of law. Pursuant to section 3.9 of the FAA Acquisition Management System, this protest is denied.

This is the final agency order in this matter. To the extent that this decision is subject to review, such review shall be sought in accordance with 49 U.S.C. §46110. A petition for review must be filed with the United States Court of Appeals for the District of Columbia

Circuit, or in the court of appeals of the United States for the circuit in which the petitioner resides or has its principal place of business. The petition must be filed not later than 60 days after the date that this order is issued.

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BARRY L. VALENTINE

ACTING ADMINISTRATOR

Issued this *15th* day of July 1997