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

## FINDINGS AND RECOMMENDATIONS

**Matter:** **Protest of Rocky Mountain Tours, Inc.**
**Under Solicitation No. DTFA02-00-R-13264A**

**Docket No.:** **01-ODRA-00183**

*Appearances:*

For the Protester, Rocky Mountain Tours, Inc.: Diane Simmons/Ketterling, Owner/President

For Intervenor, Regency Limousine Service, Inc.: Wilburn L. Williamson, Esq., Wilburn L. Williamson, P.C.

For the Agency Product Team: A.L. Haizlip, Esq., Office of Center Counsel, FAA Mike Monroney Aeronautical Center, Oklahoma City, Oklahoma

### I. Introduction

This Protest by Rocky Mountain Tours, Inc. ("RMT") challenges a contract award made to Regency Limousine Service, Inc. ("Regency") under a solicitation issued by the FAA Mike Monroney Aeronautical Center, Oklahoma City, Oklahoma ("Center" – also referred to as "MMAC"), Solicitation No. DTFA02-00-R-13264A ("Solicitation"), for shuttle, trailer and van services for FAA students attending the FAA Academy. The contract is for a base year, and two subsequent one-year renewal options. The Solicitation called for award based on the lowest price for a technically acceptable offer. RMT raises several alleged grounds of Protest. The Center, in addition to providing rebuttal for the various grounds, contends that the Protest should be dismissed for lack of standing, in that, as the third low acceptable bidder, RMT would not have been in line for an award in any event.

The Dispute Resolution Officer declines to recommend dismissal of the protest, but, for the reasons enunciated below, recommends that the instant Protest be denied.

## II. Findings of Fact

1. On August 29, 2000, the Center issued a Screening Information Request ("SIR"), Solicitation No. DTFA02-00-R-13264 for shuttle, trailer, and van services for FAA students attending the FAA Academy. Agency Report ("AR"), Tab 1. This procurement was advertised on the FAA's web page and was stated as a total set-aside for small business enterprises. AR, Tab 2. RMT, the incumbent transportation service contractor, submitted an offer in response to the SIR, and had been advised that it was the low participant on that procurement. AR, FAA Legal Analysis, page 1; Protest, page 1, paragraph 1.

2. During the months of September and October 2000, the FAA requiring organization determined that its requirements had changed, due to reduced student levels at the Academy, and so notified the Contracting Officer. AR, Tab 3.

3. On or about January 30, 2001, the Contracting Officer amended the SIR, issuing the instant Solicitation (No. DTFA02-00-R-13264A), and publishing same on the FAA web page on or about February 2, 2001. AR, Tabs 5 and 6. The Solicitation called for proposals for a base year and two option years, with the submission of proposed unit and extended prices, based on the following Government estimates:

AR Tab 4, Section B, Schedule of Supplies and Services. The contract was to be a requirements-type contract, and service was to be furnished based on delivery or task orders. In terms of transportation vehicles, the primary vehicle to be used is a late model (1997 or newer) full-sized passenger van with a minimum seating capacity of 8-15 passengers. AR, Tab 4, page 6, ¶C.3, GENERAL REQUIREMENTS, subparagraph a. Under the Solicitation, a "trip" is defined as either: (1) one-way incoming from

designated student housing locations to the Center facility (6500 S. MacArthur Boulevard, Oklahoma City, OK); or (2) one-way outgoing from the Center facility to the student housing facilities. AR, Tab 4, page 5, ¶C.2, DEFINITIONS. A "trailer" is, in turn, defined as "a vehicle added to a route to 'trail' behind the normal route transportation vehicle." The Solicitation (at paragraph C.3(l)) contemplated the provision of supplemental large capacity vehicles (having a seating capacity of 25 to 40 passengers), on a special advance order basis, with reimbursement to the contractor based on "cost plus a fixed fee," referencing "Section B, Supplies/Services." However, the Schedule of Supplies and Services under Solicitation Section B had no bid item for large capacity vehicles. Accordingly, by Amendment A001 to the Solicitation, the following bid item was added to the pricing schedule in Section B:

> LARGE CAPACITY VEHICLES
> At cost plus fixed fee of $_____ per day.

AR, Tab 6, page 2.

4. The Solicitation called for award to the lowest priced technically acceptable, responsible offeror. AR, Tab 4, Solicitation, Section M, ¶M.1.

5. The Solicitation, Section L, Paragraph L.2, in terms of technical acceptability, specified qualification criteria, including the following:

* * *

> (b) Each firm submitting proposals must have continuously been in the business of operating a business of public transportation of a size at least similar to the requirements hereunder for at (sic) a period of at least two years during the past five years. Offerors must provide contract numbers, company names and addresses, points of contact, and phone numbers of at least three entities for whom like services have been performed during this period.

* * *

AR, Tab 4, page 32, Section L, ¶L.2, QUALIFICATION CRITERIA (JAN 1997).

6. The Center received three proposals by the date and time specified in the Solicitation, *i.e.*, 3:30 p.m. local time on February 28, 2001. These were from RMT, Regency and Airport Express, Inc. AR, Tab 10; Supplemental Response[1], Tabs A-C. The proposals indicated that each of the offerors has been in the transportation business for at least two of the past five years, that each possesses the kinds of equipment called for in the Solicitation, and that the volume of passengers that each has handled has been similar to the volume contemplated by the above-described Government estimates for the instant procurement. After responding to various requests for clarification, each was found to be technically acceptable. AR, Tabs 1, 7 and 14 (and Attachment D thereto, Speed Memorandum – Reply Message from Teresa Rogers, AMA-100C to Randy Cramer, Contracting Officer, dated April 3, 2001). Regency provided the lowest priced offer as follows, for the base year and each of the two option years:

| **Item** | **Daily Route Trips** | **No. of Days** | **Estimated Annual Requirement** | **Unit Price** | **Amount** |
|---|---|---|---|---|---|
| Transportation Vehicle | 15 | 251 | 3,765 | $37.95 | $142,881.75 |
| Trailer Vehicle | 2 | 10 | 20 | $1.00 | $20.00 |
| Transportation Vehicle (Midnight Run) | 3 | 251 | 753 | $37.95 | $28,576.35 |

LARGE CAPACITY VEHICLES
At cost plus fixed fee of $50.00 per day.

AR, Tab 10, pages 2-4. According to the Center, Airport Express, Inc. supplied the next lowest price, and RMT provided the highest priced offer, which was approximately $250,000 higher than that of Regency. AR, FAA Legal Analysis, page 3. Thus, on April 16, 2001, the Center awarded Contract No. DTFA02-01-D-08214 to Regency, in the amount of $171,478.10 for the base year. AR, Tab 10.

[1] *See* Finding 13 below.

7. On April 24, 2001, RMT timely filed its Protest of the award with the ODRA. The Protest, which is forwarded by RMT letter to the ODRA dated April 20, 2001 and set out in an accompanying letter of April 19, 2001 to the Contracting Officer, enumerates its protest grounds, in the following paragraphs, which RMT hand-numbered as "1" through "6":

> 1. We were advised by a member of MMAC Management that our company was the low participant on the original Invitation to Bid. Shortly after this event and prior to the award of Contract, the "needs of the Government" changed. The change to the bid paperwork was basically the removal of the need for shuttles which did not materially change the operating expense, therefore the bids should not have changed and the re-bid was unnecessary. During this time we had a disgruntled employee working for us who gained access to our bidding figures during the absence of the owner at one time. We have information that this ex-employee is involved with the above referenced participant [*i.e.*, Regency]. Upon opening the last bids there appears a complete change in the complexion of the above participant's figures. We have a strong suspicion of possible misconduct of the ex-employee which effected the outcome of the bids. We feel that in all fairness that the 2nd bids should be thrown out and the contract be awarded to Rocky Mountain Tours based on the lowest and most consistent bid.
>
> 2. During the term of the last contract MMAC received an 11 page letter containing multiple unsubstantiated allegations of Rocky Mountain Tours using unsafe vehicles on the FAA Contract. Upon receipt of this document Rocky Mountain Tours was ordered by a member of MMAC Management not to bring the subject vehicles on the facility until they were inspected. This mandate covered most all of our vehicles. To be able to continue the contract we made an investment of $80,000.00 in near new 15 passenger vans. Those vans are being used on the contract as of this date. In the month of November, 2000 an inspection of the subject vehicles was conducted by Troop S of the Oklahoma Highway Patrol. During this inspection of all the subject vehicles, not one vehicle was found to have an "Out of Service Violation" or any Safety Violation according to DOT Regulations. In consideration of the above we feel the reaction to the disgruntled employee's letter containing many false allegations was too severe and it was unnecessary for us to expend the $80,000 for additional equipment. We feel that in light of the above some special consideration should be given our company.

3. In our opinion Regency Limousines does not meet the requirements of Part IV – Section L, of the SIR. In particular: Paragraph L.2, Qualification Criteria. The participant, according to our information, is using experience on a local postal contract to qualify. We have two drivers who have worked this contract for other companies and one employee who participated in biding (sic) for the work and we feel that this type of contract does not meet the criteria of SIZE or SIMILAR to the FAA requirements. The postal contract is generally on a Charter basis and goes to the lowest price they can get at the time. There is not a multiple stop schedule. Basically the job is to load at Norman, OK and take to the airport. We have checked with others and we cannot find any company in town who has run this postal job continuously for 6 weeks, much less two years. Also the postal department usually requires a vehicle of 40 passengers or more before they will even offer the work to a company. Regency, to our knowledge, does not have a vehicle of this size.

4. The participant has submitted two prices that we feel should make his proposal Non-Responsive to the Invitation to Bid:

    1. The price submitted for the Trailer vehicle of $1.00 is below cost. We do not feel that the government should consider a bid of this type.
    2. The "Zero Run" price after all costs are subtracted will be below cost. This could create a problem with trip records to get the income for a trip above cost. To obtain a contract with this type of creative bidding we do not believe is in the Government's best interest.

5. We feel that an improper method of bidding has occurred on Page 7, Item 1 of the SIR, SUPPLEMENTAL LARGE CAPACITY VEHICLES. Our bid quoted specific charges for various vehicles which is the way it should be done. The participant's bid, which drew considerable interest of the evaluation panel, was for $50.00 for a complete day. This type of bid opens up an avenue of severe abuse of pricing by the participant. To wit: the participant can change any amount he wants for coach rental and add a $50.00 fee and it is legal according to this procedure. We do not feel that this procedure is in the best interest of the Government.

6. When the aforementioned disgruntled ex-employee was terminated for cause from Rocky Mountain Tours he made a threat to the company owner: "Whatever I have to do I will cause you to lose the FAA Contract and I will see to it that you do not get it again." We have received information that this ex-employee and possibly one other former employee of Rocky Mountain Tours are employees of the

> participant. In our opinion the participant is in non-compliance of Part I – Section H – Special Requirements of the SIR. In particular H.1 – Qualification of employees – Paragraph (a) (2). The participant has not contacted us as a previous employer. This contract could result in disqualification per H.1 Paragraph (b).

Protest, RMT letter of April 19, 2001, pages 1-2. RMT then summarizes the Protest as follows:

> IN SUMMARY: As brought out in the first section of this protest, we feel that in all fairness that the 2nd bid process should be thrown out for the reasons given. We have 3 year 2000 15 passenger vans for Route work with a backup year 2000 15 passenger van. We are setup and in operation. We have 8 plus years experience of running this particular FAA contract. Our drivers meet or exceed all the requirements of Section C.3, Paragraph e of the General Requirements. "We also have in our employ a highly experienced Supervisor who is the primary driver of Route #1, oversees the maintenance of the vehicles, works directly with Student Services, and prepares and assures the accuracy of the Trip Records. Will also prepare the Monthly Invoices and submit to Student Services. We also have a unit in house equipment with a Handicap Lift. In addition we have large capacity units available.

*Id.*, pages 2-3.

8. Regency, by letter of April 30, 2001, sought to intervene in the Protest as an interested party, and was permitted to do so. *See* AR, Tab 12; ODRA Initial Status Conference Memorandum of April 30, 2001. The parties explored the possibility of utilizing alternative dispute resolution (ADR) to resolve the Protest, but were unable to achieve resolution in that manner. Accordingly, the default adjudicative process was commenced on May 18, 2001, and the ODRA's Richard C. Walters, Esq. was designated the Dispute Resolution Officer ("DRO") for purposes of adjudication.

9. The Center filed an Agency Response with respect to the Protest, including documents previously transmitted in conjunction with the ADR effort, as well as a Legal Analysis, on June 7, 2001. The Agency Response, in addition to offering rebuttal for the various grounds of protest, sought dismissal of the Protest for alleged lack of standing on the part of RMT, since, as third low offeror, it would not be in line for award, even if its Protest

against RMT were sustained. Thereafter, by undated letter filed with the ODRA via facsimile on June 11, 2001, RMT provided comments with respect to the Agency Response, including the Center's request regarding dismissal. The letter provides the following RMT interpretation of the above-quoted Solicitation provision regarding Qualification Criteria (*see* Finding 5, above):

> We at Rocky Mountain Tours understand the majority of the statement of the FAA's Legal analysis document by Mr. Haizilip (sic), however, we still disagree and take exception to the FAA's interpretation the (sic) Qualification Criteria, Page 8. We read it, as do others, to mean that an offeror must have been in business and have performed under a contract for a period of 2 years in the last 5 years. This contract(s) must have been of a size at least similar to the requirements of the FAA contract being bid on. Although the word continuously is not used in this phrase several people we have shown this to including a lawyer and two other bus company owners read it to mean a "2 year contract" not a P.O. every other week or so. In fact the two bus companies declined to bid on this SIR when it originally came out because they did not feel they qualified due to the "2 year contract" requirement. Also we take exception to the determination that a one vehicle P.O. every week or so can qualify as "of a size at least similar to the requirements" as called for in L.2.

10. In addition, the RMT letter filed on June 11, 2001 raises what appears to be a supplemental ground of protest, namely, that Regency purportedly failed to provide the required contract references:

> [A]ccording to information contained on Page 2 of 3 of Attachment E [to the Agency Response] it does not appear that the L.2 requirements of disclosing Contract Numbers, and all other information on 3 different entities was met. Only one person with the U.S. Postal Service was contacted for information on Regency Limousine Service, Inc.

This assertion by RMT is factually inaccurate. Although the award decision document (AR, Tab 8) only mentions a contact with the Postal Service, Regency's proposal provides three references: (1) United States Postal Service Technical Training Center; (2) Oklahoma Events; and (3) Hitachi Corporation. Supplemental Response[2], Attachment B, Regency Technical Proposal, pp. 1-2.

11. In the Agency Response, FAA Legal Analysis at page 8, Center counsel states:

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[2] *See* Finding 13 below.

> The protester suggests that purchase orders placed under a basis (sic) ordering agreement do not qualify an offeror under Section L.2. The protester suggests that only scheduled mass transit type contracts can qualify an offeror.

In its letter filed June 11, 2001, RMT responds to this statement:

> We take exception to the statement in the next to last paragraph on Page 8 of the Analysis and the last sentence. We did not make this suggestion. We were told and led to believe that only operators with set schedule requirements would be eligible, not necessarily a large mass transit type operator. * * * [W]e had been led to believe that the requirements of L.2 were put in the SIR to keep "mom and pop" operations such as Regency and Airport Express out of the mix. We expected the FAA Technical Team to pick up on this. Had we known that these two offerors were present and this had been conducted as Part of FAR Part 15 (Page 15 of the Contracting with DOT handbook) we would have objected at that time. Due to lack of information our actions were not inopposite (sic) to fundamental contracting principles.

Finally, as to the Center's request that the Protest be dismissed for alleged lack of standing, RMT's letter implies that RMT should have been in line for an award in this case, since, in its view, Airport Express did not qualify under the criteria established in Solicitation paragraph L.2:

> We feel that we had every right to protest "out of order" as the second low offeror [*i.e.*, Airport Express] was no more qualified than the low offeror if the requirement of L.2 are interpreted as we and others see them.

12. Regency provided no comments on the Agency Response.

13. The DRO, by letter to the parties dated June 11, 2001, noted that RMT, in its comments, had asserted that Airport Express would not have qualified for an award under the experience requirements of the Solicitation. The DRO directed the Center to provide a Supplemental Response addressing this point. Such a Supplemental Response was provided to the ODRA on June 20 and June 21, 2001. In the Supplemental Response, the Center points out that the procurement was to be a total small business set-aside and, accordingly, rejects RMT's assertion regarding the elimination of "mom and pop" businesses from competition. As to the argument that purchases issued under basic ordering agreements cannot qualify as a "contract" for purposes of Solicitation paragraph L.2, the Center asserts that RMT's interpretation would "have the effect of limiting

competition for this requirement set aside for small business to – the protester." Supplemental Response at page 4. The Center provided for the ODRA's review and consideration, as exhibits to the Supplemental Response, the technical proposals and evaluations for each of the offerors. *See* Supplemental Response, Attachments A-C.

14. Regency, by its counsel, filed comments on the Supplemental Response. In them, Regency, in addition to endorsing the Center's arguments, notes that RMT had tacitly admitted in its June 11, 2001 letter to the ODRA that the legal positions expressed in the Center's Legal Analysis regarding all of the enumerated protest grounds were correct. Regency implies that RMT had effectively withdrawn all such grounds, with but a single exception: RMT still challenges the Center's interpretation of the language of the above-quoted provision of Solicitation Section L, Paragraph L.2, Qualification Criteria (*see* Finding 5 above) and the Center's acceptance of Regency as meeting the qualification standard set out in that paragraph:

> The FAA dealt with the issues raised by Protester in a fair and even-handed manner and it would be redundant for Regency to submit essentially the same arguments and/or positions to the issues as already presented by Mr. Haizlip on behalf of the FAA. Suffice to say, Regency adopts the positions advanced by Mr. Haizlip as its own and urges that the Protest is without legal merit and should be dismissed.
>
> Of even more importance perhaps is the tacit admission of the Protester in its comments as contained in its letter of June 11 to Mr. Walters, wherein, after acknowledging receipt of "xxx the copy of the FAA's position on our protest by Mr. A. Lester Haizlip, the FAA Senior Counsel at the Mike Monroney Aeronautical Center", the Protester concedes:
>
> > "We at Rocky Mountain Tours understand the majority of the statement of the FAA's Legal [A]nalysis document by Mr. Haizlip, however, we still disagree and take exception to the FAA's interpretation [of] the Qualification Criteria, Page 8". (Emphasis added).

15. With regard to the language of Section L, Paragraph L.2, Regency states:

> The unvarnished facts are that Regency has been engaged in the business of public transportation, as a for-hire motor carrier of passengers, in the State of Oklahoma, on a continuing basis, for over ten (10) years – and on a much larger scale than Protester. It holds operating licenses issued to it by both the Oklahoma Corporation Commission, authorizing intrastate

> operations, and the Federal Motor Carrier Safety Administration, authorizing interstate operations.
>
> Reference to its "Technical Proposal" will establish that it has been providing public transportation services, on a continuing basis, for years, to some of the most outstanding corporate citizens in Oklahoma. These include such concerns as United States Postal Service Technical Training Center, Oklahoma Events, Hitachi Corporations (sic), Renaissance Hotel, and Marriott Hotel. Request information was furnished regarding all these concerns.
>
> Regency is particularly proud of the service which it provided the United States Postal Service Technical Training Center, over a five year period, involving the transportation of some 125,000 students between the Training Center and Will Rogers World Airport.
>
> * * *
>
> Regency meets the experience requirements of Section L.2 under any rational interpretation of the language. . . .

Regency Comments on Supplemental Response, dated June 25, 2001, at pages 3-4. Regency concludes its comments by representing to the ODRA that RMT's Certificate of Incorporation in the State of Oklahoma was revoked on March 23, 2001. On that basis, Regency asserts, RMT would have no standing to maintain the instant protest. *Id.* at page 6.

16. RMT was permitted until Monday, July 2, 2001 to furnish the ODRA with its own additional comments addressed to the Center's Supplemental Response. However, it elected not to provide such additional comments. Accordingly, the Protest record closed as of July 2, 2001.

## III. Discussion

In the context of resolving bid protests, the ODRA will not recommend that the Administrator or her delegee overturn Agency actions, so long as they have a rational basis, are neither arbitrary, capricious, nor an abuse of discretion, and are supported by substantial evidence. *Protest of Computer Associates International, Inc.,* 00-ODRA-00173, citing *Protests of Information Systems & Networks Corporation,* 98-ODRA-

00095 and 99-ODRA-00116, *aff'd* 203 F.3d 52 (D.C. Cir. 1999); and *Protests of Camber Corporation and Information Systems & Networks, Inc.*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated). In the present case, RMT has failed to sustain its burden of demonstrating arbitrary and capricious Agency action or the lack of a rational basis for the decision to award to Regency.

In terms of the Center's request that the matter be dismissed for lack of standing, it is undisputed that RMT's price proposal was the highest of the three offerors. Under the ODRA Procedural Regulations[3], a protest may only be brought by an "interested party." 14 C.F.R. §17.15(a). The term "interested party" is defined as follows:

> An interested party, in the context of a bid protest, is one whose direct economic interest has been or would be affected by the award or failure to award an FAA contract.

14 C.F.R. §17.3(k). This definition purposefully was patterned after the definition contained in the General Accounting Office ("GAO") Bid Protest Regulations.[4] The GAO consistently has held that, where a protester fails to demonstrate that it would be in line for an award, even were its protest to be sustained, the protest must be dismissed, since it would thus "lack the direct economic interest necessary to be an interested party under General Accounting Office's Bid Protest Regulations." *E.g., DTH Management, JV,* Comp. Gen. Dec. B-283239, 99-2 CPD ¶68 (October 6, 1999); *see also Protest of*

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[3] The guidance regarding "Who May Protest" under former AMS §3.9.3.2.1.3, cited by the Center (AR, Legal Analysis, pages 9-10), has been superseded by the ODRA Procedural Regulations and is no longer part of the AMS.

[4] In publishing the final ODRA Procedural Regulations, the FAA, in response to a comment provided by the American Bar Association (ABA) Public Contract Law Section, had the following to say:

**Definition of "Interested Party"**

The ABA recommends that §17.3(k) incorporate the same definition of "interested party" as is contained in the GAO bid protest regulations.

FAA Response: The FAA agrees. The definition of "interested party" in §17.3(k) has been modified to incorporate language based upon the definition of "protester" in Appendix C to the AMS. That language was patterned after the GAO's definition of "interested party."

*Metro Monitoring Services,* 97-ODRA-00047 (Protester, ranked fifth of eight offerors, had no reasonable chance of receiving an award, even if his protest were sustained. Accordingly, the protest was summarily dismissed.).

In the present case, however, RMT contends that it has standing to protest, since neither Regency nor Airport Express, Inc. properly qualified under Solicitation paragraph L.2, Qualification Criteria. Were its position on this issue to be sustained, RMT would be in line for an award. Accordingly, the matter should not be dismissed for lack of standing. *See Protest of Boca Systems, Inc.,* 96-ODRA-00008 (A motion to dismiss for lack of standing was denied, where the ODRA found that protester would be in line for award, if the protest allegations were sustained.).

By the same token, the record does not support RMT's position on paragraph L.2 or those relating to any of the other grounds enumerated in its Protest. These grounds are addressed below in the order in which they were presented by RMT in the above-quoted letter of April 19, 2001 to the Contracting Officer.

**A. The Disgruntled Former Employee**

As an initial matter, the ODRA does not agree with the Center's implication that the allegation that a disgruntled former RMT employee may improperly have taken and disclosed to Regency RMT bidding information is strictly a private matter, *i.e.*, that the ODRA would not be the "appropriate forum" to address such an allegation. *See* AR, Legal Analysis, page 5. RMT's protest raises the possibility of a violation of the Procurement Integrity Act, 41 U.S.C. §423. The FAA Acquisition Management System ("AMS") expressly has been made subject to that Act. *See* Section 307 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, approved April 5, 2000, and AMS §3.1.8. Thus, the ODRA, as the Agency's exclusive forum for resolution of bid protests and contract disputes, 14 C.F.R. Part 17, is authorized to address potential Procurement Integrity Act violations in the context of resolving a bid protest, and, were it (as delegee of the "head of the agency") to determine, "based on a preponderance of the evidence, that the contractor or someone acting for the contractor

has engaged in conduct constituting" such a violation, the ODRA could recommend rescission of the contract award. *See* 41 U.S.C. §423(e)(3)(A)(ii)(II); *see also* 14 C.F.R. §17.21 (ODRA has broad discretion in terms of recommending protest remedies.).

Nevertheless, in the present instance, RMT has failed to put forth any evidence that would establish that a Procurement Integrity Act violation actually occurred. Rather, the record reflects only a bald, unsupported allegation regarding RMT's "strong suspicion of possible misconduct." Further, RMT has failed to demonstrate that its protest was timely filed under the provisions of the ODRA Procedural Regulations[5]. The Center's contention that "the protester knew of this alleged office intrusion long before it ever filed its protest" (AR, Legal Analysis, page 5) was not challenged by RMT in its comments on the Agency Response or otherwise. On the basis of the record in this case, the ODRA would have no justification for "throwing out" the "2nd bids" – *i.e.*, setting aside the award to Regency, as RMT has requested.[6]

### B. The Allegation Regarding "Unsafe Vehicles"

RMT's statements regarding its treatment under its prior contract are irrelevant to the resolution of the instant protest. As the Center notes, performance under that contract would only bear on the evaluation of technical acceptability. The current procurement was to be awarded on the basis of the lowest priced technically acceptable offer, and, in this case, all three offerors, including RMT, were found to have been technically acceptable, notwithstanding any previous (and now resolved) questions concerning RMT's equipment.

Contrary to RMT's implication, it would not be entitled to "special consideration" in terms of the instant procurement, even if it were entitled to an equitable adjustment under

[5] The ODRA Procedural Regulations, 14 C.F.R. §17.15(a)(3) requires the filing of a protest "[n]ot later than seven (7) business days after the date the protester knew or should have known of the grounds for the protest."

[6] To the extent the first paragraph of RMT's protest challenges the Center's decision to re-solicit based on changed needs, it clearly is untimely. RMT had been aware of the grounds of such a protest substantially more than seven business days before its protest here was filed. *See* 14 C.F.R. §17.15(a)(3)(i).

the prior contract. To the extent that RMT believes the Center improperly handled the prior contract, it may pursue its rights to claim additional compensation, pursuant to the contract's provisions. Thus far, RMT has not filed a contract dispute, and the ODRA is without jurisdiction to adjudicate any controversy relating to the prior contract in the context of this bid protest.

### C. The L.2 Qualifications Criteria

As Regency correctly observes, the " real gravamen" of the current protest revolves around a disagreement relating to the interpretation of the experience and size criteria set forth under Section L, Paragraph L.2 of the Solicitation. *See* Regency Comments on Supplemental Response, pages 2-3. The provision in question reads:

* * *

> (b) Each firm submitting proposals must have continuously been in the business of operating a business of public transportation of a size at least similar to the requirements hereunder for at (sic) a period of at least two years during the past five years. Offerors must provide contract numbers, company names and addresses, points of contact, and phone numbers of at least three entities for whom like services have been performed during this period.

* * *

AR, Tab 4, page 32, Section L, ¶L.2, QUALIFICATION CRITERIA (JAN 1997). Finding 5 above.

The ODRA interprets this language as requiring, as a matter of minimum technical acceptability for the instant small business set-aside procurement: (1) that the offeror demonstrate that it has been operating a public transportation business continuously for at least two of the past five years; and (2) that the "size" of its business during that timeframe be similar to the size necessary to service the FAA's requirements under the prospective contract as they are described under the instant Solicitation. In addition, offerors were to provide contract references for at least three separate entities.

Regarding contract references, the language of L.2 does not restrict the references to any specific types of contracts, and it is clear that both Regency and Airport Express

furnished the required three references. *See* Supplemental Response, Attachment B, pages 1-2; Attachment C, page 2.

Further, the proposals for both of those companies confirm that both have been in the public transportation business continuously for at least two of the past five years. Regency's proposal states that it has "operated a similar business of transportation for at least two years during the last five years . . . ." and indicates that its key personnel all possessed more than 2 years of relevant experience and that "many of [our people] have been with us for more than ten years." Supplemental Response, Attachment B, page 1. Airport Express, in turn, states that it has been in the public transportation business continuously since 1987, *i.e.*, for more than 13 years. *Id.*, Attachment C, page 1.

As to "size" – *i.e.*, the volume of business contemplated, the Solicitation estimates (other than for the trailers) a total of 18 trips per day for regular and midnight runs, using a van holding 8 to 15 passengers. Finding 3. In its protest, RMT states its intent to use 3 vans and 1 "backup" van to accommodate this volume. *See* Finding 7 (SUMMARY). Regency, in its proposal, indicates that it plans to dedicate to the instant FAA contract the "four Ford fifteen-passenger vans" previously used in conjunction with the aforesaid Postal Service work. Supplemental Response, Attachment B, pages 2-3. Airport Express, for its part, states that it began with 10 vehicles in 1987 and currently "operates more than thirty five (35) vans." Although Airport Express does not indicate which of its vans it would use on the FAA contract, it clearly had more than enough equipment available for the work. Thus, RMT has failed to support its "opinion" that its competitors fail to satisfy the qualifications criteria of the Solicitation.

### D. The "Too Low" Prices

RMT, in its Protest, points to two prices contained in Regency's proposal that purportedly will create problems for Regency and/or the Center and that supposedly render Regency's proposal "Non-Responsive":

> 1. The price submitted for the Trailer vehicle of $1.00 is below cost. We do not feel that the government should consider a bid of this type.
> 2. The "Zero Run" price after all costs are subtracted will be below cost. This could create a problem with trip records to get the income for a trip above cost. To obtain a contract with this type of creative bidding we do not believe is in the Government's best interest.

Finding 7. Although it is clear what RMT is referring to in terms of the Trailer vehicle price, the term "Zero Run" price is not explained. In any event, with respect to both items, RMT's concern appears to relate not to bid *responsiveness*, but rather to whether Regency will be able to perform at the prices offered – *i.e.*, to its *responsibility* as a contractor for the instant contract.

There is nothing that precludes a prospective bidder from offering a price or prices that are below cost, and there is no evidence in the record (other than RMT's unsupported arguments) that would indicate Regency cannot perform the contract at the prices it bid, *e.g.,* that its financial capacity is so limited that the bidding structure offered will throw it into bankruptcy. The AMS requires that an "affirmative determination of responsibility" be made prior to any contract award. AMS §3.2.2.7.2. The ODRA ordinarily will not question a Contracting Officer's affirmative determination of contractor responsibility, absent fraud or bad faith on the part of the Contracting Officer, or other unusual circumstances not present in this case. *See Protest of Washington Consulting Group, Inc.,* 97-ODRA-00059 (Decision of February 18, 1998 on Motion to Dismiss) at footnote 2. Accordingly, this protest ground is without basis and must be rejected.

**E. The Bid for Supplemental Large Capacity Vehicles**

In its Protest, RMT contends:

> 7. We feel that an improper method of bidding has occurred on Page 7, Item 1 of the SIR, SUPPLEMENTAL LARGE CAPACITY VEHICLES. Our bid quoted specific charges for various vehicles which is the way it should be done. The participant's bid, which drew considerable interest of the evaluation panel, was for $50.00 for a complete day. This type of bid opens up an avenue of severe abuse of pricing by the participant. To wit: the participant can change any amount he wants for coach rental and add a $50.00 fee and it is legal according to this procedure. We do not feel that this procedure is in the best interest of the Government.

Regency's bid for supplemental large capacity vehicles followed the pricing format prescribed by Amendment A001 to the Solicitation. *See* Findings 3 and 6.[7] The contention that this specified pricing method may not be "in the best interest of the Government" is, in essence, a protest related to an alleged impropriety in the Solicitation, and, as such, was required to have been raised prior to the scheduled date for receipt of proposals. This aspect of the Protest is clearly untimely. *See* 14 C.F.R. §17.15(a)(1).

**F. Failure to Contact Previous Employer**

In its final enumerated protest ground, RMT, in addition to alluding again to the possible animus of the aforesaid disgruntled former employee, urges that Regency ought be disqualified from bidding, because it purportedly failed to contact RMT, the previous employer of that individual. In this regard, RMT alludes to Solicitation Section H, Paragraph H.1, which reads, in pertinent part, as follows:

> H.1 QUALIFICATION OF EMPLOYEES

[7] RMT's pricing proposal was not made part of the record. If RMT priced this item as described in the Protest, it would have deviated from the pricing methodology called for in the Solicitation and, thus, RMT's proposal technically could have been considered "non-responsive".

> (a) The contractor is responsible for identifying and providing qualified and acceptable personnel in performance of the contract. To meet this requirement, the contractor shall perform routine employee screening prior to employees actually commencing work at any Federal Aviation Administration (FAA) facility designated by the contract. This screening shall at a minimum consist of:
>
> (1) The contractor shall obtain a criminal history report . . . .
>
> (2) Contractor shall contact prospective employee's previous employer for employment history.
>
> * * *

AR, Tab 4, Solicitation, page 11, ¶H.2. This provision is a clause that was to be among various clauses that would be incorporated into the eventual contract.[8] Its employee screening requirements were to be performed as part of contract performance, *i.e.*, after the contract was awarded to the successful offeror and, more specifically, "prior to employees actually commencing work." Individual offerors were *not* required to undertake such screening as part of the bidding process, and nothing in the clause even suggests that an offeror would be disqualified from an award for failure to satisfy its requirements. Even if Regency has since failed to adhere to this requirement, as a matter of post-award contract administration, such alleged failure cannot be reviewed in the context of a bid protest. As noted in our decision on a motion to dismiss in the *Protest of Washington Consulting Group, Inc.*, 97-ODRA-00059: "This Office simply does not address matters of post-award contract administration in the context of bid protests . . . ." *Id.*, footnote 2. Accordingly, this protest ground is likewise entirely without merit.

[8] The Product Team, in this case, chose to utilize a multi-purpose form, Solicitation, Offer and Award, that contained all provisions relating both to Solicitation instructions, as well as to contract performance.

## IV. Conclusion

For the reasons set forth above, it is recommended that the instant 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