

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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of L. Washington & Associates, Inc.**
 Under Solicitation No. DTFA05-02-R-01162

Docket No.: **02-ODRA-00232**

Appearances:

For the Protester, L. Washington & Associates, Inc.: Lawrence J. Sklute, Esq., Sklute & Associates

For the FAA Eastern Region: Brendan Kelly, Esq.

I. Introduction

On July 12, 2002, L. Washington & Associates, Inc. (“LWA”) filed this Protest of a contract award made by the FAA Eastern Region (“Region”). The contract, for armed guard security services at the FAA’s Air Traffic Control Tower in Pittsburgh, Pennsylvania, was awarded to the Wackenhut Corporation (“Wackenhut”). The Protest alleges that the Region failed to follow the stated evaluation criteria of the Solicitation. *See* Protest at 6. More specifically, LWA alleges the Region: failed to consider LWA’s expertise; employed an unstated evaluation criterion; altered the source selection scheme; and conducted an unreasonable cost/technical tradeoff in reaching its award decision.

As is more fully discussed below, the Office of Dispute Resolution for Acquisition (“ODRA”) finds that LWA has failed to meet its burden of proof with respect to the above grounds of protest. Although the Region’s written award justification was not completed until after the Protest was filed, the justification and the award decision are

supported by substantial evidence in the contemporaneous record. Moreover, LWA has failed to demonstrate that it was prejudiced as a result of the Region's conduct of the acquisition process. The ODRA therefore recommends that the Protest be denied.

II. Findings of Fact

1. On April 22, 2002, the Region published its Request for Information ("RFI") for armed guard services at the FAA's Air Traffic Control Tower in Pittsburgh, Pennsylvania. *See* Agency Response at Tab 1. The RFI identified a four-month base contract period to begin on June 1, 2002, and continue through September 30, 2002, and called for four one-year renewal options. The RFI was listed as a set-aside for companies located within 100 miles of the facility who have provided security guard services for a continuous period of at least the prior five years. Interested parties were instructed to request a copy of the Solicitation. *Id.*

2. Section M of the Solicitation identified the basis on which of the contract would be awarded, as follows:

Evaluation of proposals to this SIR will rely heavily on the Past Performance and then the proposal submitted. Award shall be made to the responsible offeror whose proposal conforms to the terms and conditions of the statement of work/specifications and which represent the greatest value to the Government. This is a "Best Value" procurement, therefore, past performance and expertise are more important than cost/price. Those offerors, whose proposals are determined to be unacceptable, shall be eliminated from consideration for award. The Government reserves the right to award on initial offers without discussions or to conduct one on one discussions with one or more offerors. The Government is seeking offers that provide the best combination of quality and price in order to select the greatest value or "best buy" offer. Therefore, award may be made to other than the lowest offer.

See Agency Response, Tab 2, Solicitation Section M, page 64.

3. The same Section of the Solicitation also stated:

Award will be based on the following evaluation factors in descending order of importance. Contractors who receive an evaluation score of 70% or less will not be considered for award.

KEY DISCRIMINATORS

KD001

1. Quality of Product or Service – compliance with contract requirements – technical excellence.
2. Timeliness of Performance – reliable – responsive to technical direction – accuracy and timeliness of submitting reports.
3. Customer Satisfaction – satisfaction of end users with contractors' service.
4. Key Personnel – level of expertise – track record of principle [sic] individuals selected to manage and perform key aspects of work.

KD002

Financial Capability and/or ability to obtain line of credit.

Id.

4. The Region received a total of eleven offers in response to the RFI and the Solicitation. Of those, a total of six offers, including those of LWA and Wackenhut, were considered for award. *See* Agency Response, Tab 5, Evaluation Summary. Of the six offers considered, four were eliminated based on pricing deemed to be outside of the competitive range. *See* Agency Report, Evaluation Summary at 3. This down-selection resulted in LWA and Wackenhut being the only offerors evaluated for possible award in the final selection stage. *Id.*

5. The Region submitted an Agency Response in reply to the Protest. The Agency Response included the complete Wackenhut proposal ("Wackenhut Proposal") as well as the LWA proposal ("LWA Proposal"). The Wackenhut Proposal, in addition to the standard required representations, certifications, and other information, included specific detailed information concerning "Past Performances on Similar Projects"; "Financial

Capability”; and “Key Personnel”. *See* Wackenhut Proposal at Sections 3, 4, and 5, Agency Response, Tab 4.

6. On the basis of the proposals, the Region’s Contracting Officer awarded the contract to Wackenhut. The Contracting Officer documented his award decision in an Evaluation Summary dated August 1, 2002, *i.e.*, after the award had been made and the Protest in this case had been filed. The Evaluation Summary was supplied to the ODRA and to counsel for the protester on that same date via Federal Express.

7. The Evaluation Summary includes a discussion of the Wackenhut offer as follows:

[Deleted]

Evaluation Summary at 3.

8. The Evaluation Summary discussed the LWA offer as follows:

[Deleted]

Evaluation Summary at 3.

9. The rationale for the award decision was set forth as follows:

Based on the Past Performances, and monetary offers of the above two companies, Wackenhut was awarded the contract. The contract was awarded in the amount of \$1,848,246.40 as a result of further negotiations (Contracting Officer asked for Best and Final Offer – original price was \$[Deleted]).

Evaluation Summary at 3.

10. Wackenhut’s Proposal dated May 10, 2002, includes detailed information responsive to the specified Solicitation criteria. The discussion of Wackenhut set forth in

the Contracting Officer's Evaluation Summary in this case is consistent with the factual information provided in the Wackenhut Proposal.¹

11. The Protest does not challenge the "[Deleted]" ratings given to Wackenhut in the evaluation for past performance and capability.

12. The Protest admits that Wackenhut offered a lower price than did LWA. *See* Protest at 3.

13. LWA's Protest raised the following: (1) the Contracting Officer failed to properly evaluate LWA's expertise; (2) the Contracting Officer improperly utilized an unstated evaluation criterion, namely, the requirement of a security clearance; (3) the Contracting Officer altered the evaluation scheme set forth in the Solicitation by elevating price above the past performance and expertise factors; and (4) the Contracting Officer made an unreasonable cost/technical trade-off in the award decision. *See* Protest at 6.

14. The Region filed its Agency Response on the deadline date established by the ODRA, *i.e.*, September 5, 2002, but only after the close of business. The Agency Response therefore was deemed to have been filed on September 6, 2002. In light of the late filing, the Protester was allowed an additional day to file its Comments to the Agency Response.

15. In its Agency Response, the Region asserts that LWA's Protest is without merit in that: (1) LWA's expertise was given appropriate consideration, *i.e.*, that LWA was down-selected to one of two finalists for award; (2) LWA did not receive the award because "past performance and a [Deleted] lower dollar amount offered by Wackenhut dictated a decision of the Contracting Officer." *See* Agency Response at 2. In support of

¹ For the reasons to be discussed in Section III below, it is unnecessary for the ODRA to reach the question of whether LWA's offer was properly evaluated by the Region and whether its "[Deleted]" for past performance was justified.

its position, the Region asserts that “past performance was an essential part of the decision regarding which company would be awarded the Contract.” *Id.*

16. The Region notes, and the Wackenhut Proposal supports that: “Wackenhut had an abundance of contracts with the FAA and other federal agencies and has, in the past, performed excellent work for the FAA.” Finally, the response notes that LWA’s price “was over \$[Deleted] more than was offered by Wackenhut.” Agency Response at 2.

17. The Agency Response further indicates that the Region had received information that [Deleted] “clearly, complying with security requirements is relevant in the area of past performance.” *Id.*

18. The Region disputes that pricing was elevated above past performance in the evaluation. It notes that “once it was determined that Wackenhut was superior to L. Washington regarding past performance, it is obvious that based on the vast difference in the amount of the offers, that the contract would be awarded to Wackenhut.” *Id.* at 3.

19. Finally, counsel for the Region notes:

The undersigned has made clear to the ODRA and counsel for L. Washington that the Evaluation Summary of the Contracting Officer was written after the contract award. Although it is the norm for an Evaluation Summary to be written prior to contract award, the Contracting Officer, as well as the other Contracting Officers in the Region, have been under a tremendous workload because of changes and additions needed as a result of mission requirements since September 11, 2001. The Contracting Officers in the Region have been reminded of the importance of documenting their justifications for contract awards prior to awarding the contract.

Agency Response at 2, 3.

20. LWA, through counsel, filed its Comments to the Agency Response on September 12, 2002. The Comments argue that:

ODRA may not accept the Contracting Officer's litigation statement of the Contracting Officer, Mr. Glenn McCarthy. The document entitled "Evaluation Summary" had been prepared after award with the direction of Regional Counsel in response to the Protest of July 2002 and the information contained in that document concerning LWA's past performance was obtained after the Contracting Officer had already made his decision to award the contract to Wackenhut.

LWA Comments at 2.² LWA argues that:

ODRA must sustain the Protest, holding, at a minimum, that the Contracting Officer's source selection decision is arbitrary, capricious, and abuse of discretion.

LWA Comments at 2.

21. The Comments also repeat the arguments in the Protest that the Region: failed to follow the stated evaluation criteria; utilized an unstated evaluation criterion, *i.e.*, security clearances; and performed a faulty past performance evaluation. Finally, LWA alleges that the award decision violated the provisions of the Administrative Procedure Act, 5 U.S.C. §706. Comments at 9.

22. Following submission of the Protester's Comments, the record in this matter was closed.

² There is no support in the record for the allegation that the past performance information was obtained after award.

III. Discussion

A. The Region’s Decision To Award The Contract To Wackenhut Is Supported By Substantial Evidence In The Record And Has Not Been Shown To Have Lacked A Rational Basis Or Otherwise To Have Been Arbitrary, Capricious, Or An Abuse Of Discretion.

Under the ODRA’s Procedural Regulations, 14 C.F.R. Part 17, and the Acquisition Management System (“AMS”), the ODRA reviews bid protests to determine whether the Agency actions complained of have a rational basis, are neither arbitrary, capricious nor an abuse of discretion and are supported by substantial evidence. *Protest of Jones Grading and Excavating, Inc.*, 02-ODRA-00229. It is well established that, within the context of a “best-value” procurement, the ODRA will not substitute its judgment for that of a Product Team, so long as the Team’s source selection decision is consistent with the FAA’s AMS and the specified evaluation criteria and is supported by the record. A protester seeking to overturn an Agency action has the burden of proof. *See Protest of Information Systems and Networks Corporation*, 99-ODRA-00116.

1. The “[Deleted]” Past Performance And Capability Ratings of Wackenhut are Supported by the Contemporaneous Record and Have Not Been Challenged by LWA.

In this best-value procurement, Section M of the Solicitation specifically noted that the evaluation would “rely heavily on past performance and then the proposal submitted.” *See Finding 2.* Section M further identified aspects of past performance that would be utilized as “key discriminators”. *See Finding 3.*

The Wackenhut Proposal – in particular Sections 3, 4, and 5 – provides substantial evidence supporting a rating of “[Deleted]” for Wackenhut’s past performance and financial capability; and is consistent with the Contracting Officer’s rating and selection of Wackenhut. Significantly, LWA’s Protest has not challenged the past performance and capability ratings of Wackenhut. *See Finding 11.*

2. It Is Undisputed That Wackenhut Offered A Lower Price Than LWA.

Section M of the Solicitation makes clear that “this is a ‘best value’ procurement, therefore, past performance and expertise are more important than cost/price.” *See* Finding of Fact 2. Thus, the relative costs proposed by the offerors was a secondary factor that the Contracting Officer was required to utilize in making the award decision. The fact that Wackenhut offered a lower price in its proposal than did LWA is confirmed by: (1) the Wackenhut Proposal; (2) the LWA Proposal; (3) the Evaluation Summary of the Contracting Officer; and (4) the Protest itself, which admits “LWA’s offer amounts to \$[Deleted]. The Awardee’s offer amounts to approximately 1.8 million.” *See* Protest at 3.

3. The Post-Protest Written Evaluation

LWA places great emphasis on the undisputed fact that the Region’s Contracting Officer in this case had failed to document and justify his award decision contemporaneously:

The Contracting Officer admits that he did not prepare an explanation of his decision to award the contract to Wackenhut at the time he made the award decision. As such, ODRA must sustain the Protest holding, at a minimum, that the Contracting Officer’s source selection decision is arbitrary, capricious and an abuse of discretion.

See Comments at 2.

LWA cites to *Citizens to Preserve Overton Park vs. Volpe*, 401 U.S. 402 (1971), in support of its position. LWA urges that the ODRA may not consider the post award written justification, because the Region failed to document its award decision at the time of making it. *See* LWA Comments at 3, 4.

As the ODRA previously has indicated, post-award explanations may be accepted where they are consistent with contemporaneous documentation, *i.e.*, documentation existing at the time of the Contracting Officer's decision. *See Protest of Enroute Computer Solutions*, 02-ODRA-00220. In *Enroute* we stated:

As a general matter, when faced with *post hoc* justifications, the ODRA accords greater weight to contemporaneous evaluation and source selection material than to arguments and documentation prepared in response to protest contentions. *See AIU North America, Inc.* B-283743, Feb. 16, 2000, 2000 U.S. Comp. Gen. LEXIS 34. The ODRA, however, is not precluded from considering post-protest explanations that provide a detailed rationale for contemporaneous conclusions. Such explanations can simply fill in previously unrecorded details, and can be considered in the ODRA's review of the rationality of selection decisions, so long as those explanations are credible and consistent with the contemporaneous record. *Jason Associates Corp.*, B-278689, March 2, 1998, 1998 U.S. Comp. Gen. LEXIS 61, *citing Northwest Management, Inc.*, B-277503, Oct. 20, 1997, 97-2 CPD ¶ 108 at 4 n. 4.

Id. at Fn. 8

In this case, the Contracting Officer's post-award evaluation summary is supported by pre-award documentation, and unchallenged by the Protestor, on two points that are determinative of this Protest, namely: (1) Wackenhut merited a rating of "[Deleted]" for its past performance and capability and (2) Wackenhut's proposed price was lower than that of LWA.

B. LWA Has Not Demonstrated That It Was Prejudiced In Any Way By The Region's Conduct Of The Acquisition.

A Protester must demonstrate that the Agency actions complained of in a protest were prejudicial to the protester. In this regard, the ODRA previously has stated:

Where Agency actions are found to have been erroneous or lacking a rational basis, the protest will not ordinarily be sustained, unless it has demonstrated that the actions in question have in some way prejudiced or resulted in harm to the Protester. *A&T Systems, Inc. supra*. The ODRA will not sustain a protest unless the Protester demonstrates a reasonable

possibility of prejudice, that is, unless the protester demonstrates that, but for the Agency actions, it would have had a substantial chance of receiving the award.

Protest of Enroute Computer Solutions, 02-ODRA-00220. LWA has failed to establish that it was prejudiced in this case by the Region's conduct of the acquisition.

1. Elevation of LWA's Past Performance Rating from "[Deleted]" To "[Deleted]" Would Not Alter The Award Outcome.

As noted above, the offeror who achieved the highest rating possible on the most important factors, and offered the lowest price, was awarded the contract. Given these undisputed facts, the question of whether the Region properly rated LWA's past performance is immaterial. Assuming, the truth of LWA's accusations that its proposal: (1) was not properly evaluated in the area of expertise; (2) was improperly downgraded because of an alleged security clearance problem; and (3) merited higher ratings for past performance and capability, LWA still could have done no better than achieve the rating of "[Deleted]" achieved by Wackenhut in these areas. In such a scenario, with Wackenhut's and LWA's offers essentially equal in the most important evaluation factor, the next criterion in order of importance, *i.e.*, price, would come into play, and mandate the award to Wackenhut.

2. The Remaining Allegations Of The Protest Are Meritless.

The allegation that the Region made an improper cost/technical tradeoff is both unsupported and unsupportable on the undisputed facts. In fact, no tradeoff was necessary, given that the award was made to the offeror who had achieved the highest possible rating in the most important performance factors and offered the lowest price. LWA'S allegation that price was elevated improperly as part of a tradeoff is thus clearly wrong.

IV. Conclusion and Recommendation

In the final analysis, none of the five grounds of protest raised by LWA has merit because, even if LWA had achieved past performance and capability ratings equal to the unchallenged “[Deleted]” ratings of Wackenhut, LWA nonetheless would lose the competition, because its price was admittedly higher than that offered by the awardee. Accordingly, the ODRA recommends that the Protest be denied.

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