

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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of B&M Lawn Maintenance, Inc.**
 Under Solicitation No, DTFASW-03-R-03141

Docket No.: **03-ODRA-00271**

Appearances:

For the Protester, B&M Lawn Maintenance, Inc.: Bill Smyth, Owner

For the FAA Southwest Region Product Team: William K. Tolar, Esq., Office of
Regional Counsel

I. Introduction

On April 29, 2003, B&M Lawn Maintenance, Inc. (“B&M”) filed this Protest (“the Protest”) in which it challenges the award by the FAA Southwest Region Product Team (“Product Team”) of a contract to Early Bird Grounds Maintenance (“Early Bird”) under Solicitation No. DTFASW-03-R-03141 for groundskeeping services at the FAA Air Route Traffic Control Center in Albuquerque, New Mexico (the “Solicitation”). For the reasons discussed herein, the ODRA concludes that the evaluation and source selection was not completed in accordance with the Solicitation’s stated evaluation criteria and thus the award lacked a rational basis. The ODRA therefore recommends that the Protest be sustained. As a remedy, the ODRA recommends that the Region be directed not to exercise its renewal option.

II. Findings of Fact

1. The Product Team issued the Solicitation on February 14, 2003 for groundskeeping services at the FAA Air Route Traffic Control Center (“ARTCC”) in Albuquerque, New Mexico. The Solicitation contemplated a contract for a base year and four annual renewal options, for a total of five years. Amendment Number 1 to the Solicitation was issued on March 5, 2003, in order to expand the scope of work (“SOW”) under the contract to require the contractor to be responsible for planting and maintaining seasonal flowers in specified planting beds. Amendment Number 1 did not change the original time and date set for receipt of offers.
2. The Agency received only two offers under the Solicitation, those of Early Bird and B&M. Since neither Early Bird nor B&M Lawn submitted offers precisely in accordance with Schedule B of the Solicitation (*see* AR, Tabs 2 and 3), the Contracting Officer requested each contractor to review the Solicitation and provide a revised Schedule B, and both complied with that request.
3. The Solicitation called for an award to be made “to the responsible offeror whose submittal conforms to the SIR/RFP and is most advantageous to the Government considering cost or price and other factors, if applicable, specified elsewhere....” Agency Response (“AR”), Tab 1, Solicitation Section L, ¶3.2.2.3-19, CONTRACT AWARD (APRIL 1996) (DEVIATION), paragraph (a). Solicitation Section M, Evaluation Factors for Award, paragraph FAA-M.2, Evaluation Criteria and Basis for Award, expressly required “evaluation” of an offeror’s “performance under existing and prior contracts for similar services”:

FAA-M.2 EVALUATION CRITERIA AND BASIS FOR AWARD

You will be **evaluated** on performance under existing and prior contracts for similar services. Performance information will be used to determine responsibility. The government will focus on information that demonstrates quality of performance relative to the size and complexity of the procurement under consideration.

The contract resulting from this solicitation will be awarded to the responsible, responsive offeror whose offer, conforming to the solicitation, is determined **most advantageous to the Government.**

* * *

(Emphasis added).

4. Early Bird submitted a substantially lower price than that offered by B&M – \$201,472.44 for the five year contract total, including all options, versus \$243,295.66 offered by B&M. AR, Tab 4, Abstract of Offers. AR, Tab 4, Abstract of Offers. The Product Team awarded Early Bird the Albuquerque ARTCC groundskeeping contract on April 21, 2003 and notified B&M of the award on the same date. AR, page 2.
5. On April 29, 2003, B&M filed the instant Protest with the ODRA by letter dated April 27, 2003. The Protest grounds were further identified/clarified during a telephonic status conference conducted by the ODRA Dispute Resolution Officer (“DRO”) for Protest adjudication on June 20, 2003:

In response to Mr. Walters’ [the ODRA DRO’s] inquiry as to whether the parties had any preliminary questions they wished to explore, Mr. Tolar [the Region’s counsel] asked whether it would be possible to better define the grounds of protest. From the discussion which ensued, it appears that B&M has raised two issues/grounds in its protest. First, it alleges that the incumbent/awardee had an unfair advantage over B&M by reason of purported knowledge (from its experience as incumbent) that the Region would waive several requirements within the scope of work, and that, as a result, that firm was able to submit a significantly lower price proposal than it otherwise would have submitted – and conversely, that B&M would have won the award, had it known such requirements would be waived and been allowed to bid accordingly. Second, B&M appears to be alleging that the Region deviated from “best value” Solicitation evaluation and award criteria, when it made the award to the incumbent/awardee on a “low bid” basis.

6. Although the Product Team notified the incumbent/awardee, Early Bird, of the Protest pursuant to the ODRA Procedural Rules, Early Bird did not intervene as an interested party.
7. The Product Team and B&M attempted to resolve the Protest over an extended period by means of alternative dispute resolution (“ADR”) with the assistance of Marie A. Collins, Esq., an ODRA DRO who served as an ADR Neutral, but were unsuccessful in their efforts. Accordingly, the matter was adjudicated under the ODRA’s Default Adjudicative Process, with the ODRA’s Richard C. Walters, Esq. serving as DRO for purposes of adjudication. The Product Team filed its Agency Response to the Protest with the ODRA on July 3, 2003, and B&M submitted its Comments with respect to the Agency Response on July 21, 2003, whereupon the record closed.

III. Discussion

A. The Allegation of Unfair Advantage in Favor of Early Bird

In its Protest, B&M alleges that, under the incumbent contract, a variety of grounds maintenance requirements had effectively been waived, and provides photographs along with its Protest letter purportedly showing Early Bird’s failures to comply with such requirements. B&M states that, prior to submitting its own proposal for the instant procurement, it had drawn the Region’s attention to Early Bird’s failures but was advised that it must nevertheless include in its own price proposal amounts for the items in question. B&M indicates that it did include such items within its pricing and contends that, because Early Bird knew these requirements would continue to be overlooked, it was able to reduce its price proposal for the instant procurement to an amount substantially below its incumbent contract price. Further, B&M appears to argue, had it been able to bid the contract on the same basis as Early Bird, it would have submitted an even lower price and thus would have been in a position for contract award. *See* Protest, pages 1 and 2.

As to these contentions, B&M has failed to sustain its burden of demonstrating a clear and unequivocal waiver of requirements on the part of the Region. *Compare Protest of Danka Office Imaging Company*, 98-ODRA-00099 (“Networking” requirement for copying machines was found to have been waived for the awardee.) Furthermore, the record is devoid of any evidence that Early Bird, in devising its offer for the instant procurement, omitted pricing for the items in question.

In terms of the incumbent/existing contract, whether or not the Region actually overlooked Early Bird’s purported failures would be a matter of post-award contract administration, something the ODRA does not ordinarily take into consideration in the context of a bid protest. *See Protest of Rocky Mountain Tours, Inc.*, 01-ODRA-00183. Moreover, in terms of the prospective contract, B&M’s assumption regarding continued waiver is sheer speculation. Thus, the ODRA finds the first ground of B&M’s Protest to be without legal merit.

B. The Allegation Regarding Deviation from Specified Evaluation Criteria

Where a Product Team deviates from stated evaluation criteria in its evaluation and award process, the resulting award has been found to lack a rational basis. Under such circumstances, the ODRA has recommended that the protest be sustained and corrective action be taken. *E.g., Protest of Information Systems & Networks Corporation*, 98-ODRA-00095.

As noted in the findings above, in the present case, in terms of evaluation criteria, Solicitation Section M provided:

FAA-M.2 EVALUATION CRITERIA AND BASIS FOR AWARD

You will be **evaluated** on performance under existing and prior contracts for similar services. Performance information will be used to determine responsibility. The government will focus on information that demonstrates

quality of performance relative to the size and complexity of the procurement under consideration.

The contract resulting from this solicitation will be awarded to the responsible, responsive offeror whose offer, conforming to the solicitation, is determined **most advantageous to the Government**.

* * *

(Emphasis added). The ODRA finds such language ambiguous, *i.e.*, the language could give rise to more than one reasonable interpretation. On the one hand, as the Product Team urges, such language could be read reasonably as calling for an award based solely on cost, with past performance being taken into consideration only in conjunction with a post-selection determination of offeror responsibility. On the other hand, as B&M indicates, the language does expressly call for past performance to be “evaluated” and this could be read reasonably as meaning that past performance was to be treated as an evaluation and source selection factor¹ as well as a post-selection responsibility consideration. Moreover, the second paragraph of Clause FAA-M.2, in speaking of an offer “most advantageous to the Government” and not expressly calling for award to the low cost, responsible offeror, serves to reinforce the reasonableness of B&M’s interpretation.

The ODRA further finds that this ambiguity was not patent, such that it would obligate a prospective offeror to make a pre-bid inquiry. *Cf.*, *Lockheed Martin IR Imaging Systems, Inc. v. Secretary of the Army*, 108 F.3d 319, 1997 U.S. App. LEXIS 3829; *Fortec Constructors v. United States*, 760 F.2d 1288, 1291; *Newsom v. United States*, 230 Ct. Cl. 301, 676 F.2d 647, 649-50 (Ct. Cl. 1982). Under the rule of *contra proferentum*, language that is not patently or “facially” ambiguous and that gives rise to differing reasonable interpretations is to be read against its drafter, *i.e.*, the Government:

If some substantive provision of a government-drawn agreement is fairly susceptible of a certain construction and the contractor actually and reasonably so construes it, in the course of bidding or

¹ Although the FAA Acquisition Management System (AMS) mandates the use of past performance as an evaluation factor in selection decisions for all complex and noncommercial source selections, AMS §3.2.2.2, it does not preclude the use of past performance as an evaluation factor in other procurements.

performance, that is the interpretation which will be adopted If the [government] chafes under the continued application of this check, it can obtain a looser rein by a more meticulous writing² of its contracts [or solicitations]....

Protest of E&I Systems, Inc., 99-ODRA-00146, citing *Lockheed Martin IR Imaging Systems, Inc.*, *supra*.

In defense of B&M's second Protest ground, the Product Team places heavy reliance on the Findings and Recommendations of General Services Administration Board of Contract Appeals (GSBCA) Administrative Judge Allan H. Goodman, acting as an ODRA Special Master in the *Protest of Cooper Construction, Inc.*, 96-ODRA-00054. The *Cooper* case is plainly distinguishable from the instant situation. There, the protester, confused by the absence of technical criteria in the face of a solicitation that spoke in terms of "best value," had, in fact, made a pre-bid inquiry and had been told specifically that the award would be based solely on price. Judge Goodman found that the Agency's clarification of its intent based on that pre-bid inquiry had been adequate in terms of putting a reasonable prospective offeror on notice that award would be made to the lowest priced responsible offeror. Here, there was no duty of pre-bid inquiry, no actual pre-bid inquiry, and no pre-bid clarification that put B&M on notice that award would be solely on the basis of low price.

The Product Team clearly did not consider past performance as an evaluation and source selection criterion and did not perform an evaluation of past performance of either offeror in that context. Thus, in making its award decision in this case, the Product Team deviated from the Solicitation Section M evaluation criteria as reasonably interpreted by B&M. Under such circumstances, it must be said that the award decision lacked a rational basis. *Protest of Information Systems & Networks Corporation*, 98-ODRA-00095. In short, the second ground of B&M's Protest should be sustained and appropriate corrective action taken.

² The Product Team itself concedes that Solicitation Section M "might have been drafted differently." AR, page 7.

IV. Conclusion and Recommendations

For the reasons enunciated above, the ODRA finds that the evaluation and source selection process was not accomplished in accordance with a reasonable interpretation of the Solicitation's evaluation criteria. Accordingly, the ODRA recommends that the second ground of B&M's Protest be sustained. B&M has suggested as a remedy that the Region not exercise its renewal option in September 2003. The ODRA views this to be an appropriate remedy in this case and therefore recommends that the Region be directed not to exercise that option.

Richard C. Walters
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

Approved:

Anthony N. Palladino
Associate Chief Counsel and Director
Office of Dispute Resolution for Acquisition