

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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of JDDA Facility Group**
 Under Solicitation No. DTFACN-11-R-00013

Docket No.: **11-ODRA-00566**

Appearances:

For the Protester, JDDA Facility Group:

Mr. Terry L. Christopher

For the FAA Southwest Region:

William K. Tolar, Esq.

I. Introduction

On August 25, 20008, JDDA Facility Group (“JDDA”) filed a bid protest (“Protest”) with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”). JDDA was the lower priced of two bidders on a contract for janitorial services (“Contract”) at the Air Traffic Control Tower of the Austin-Bergstrom International Airport in Austin, Texas. The Contracting Officer, however, excluded JDDA from the competition on the basis that JDDA had failed to provide sufficient past performance references. The Contract then was awarded to the other bidder (“Awardee”) at a slightly higher price. *See Agency Response (“AR”)* at 3, 4. JDDA alleges that it had provided the required references and that the Contract should have been awarded to it. *See Protest* at 1-3. For the reasons set forth below, the ODRA concludes that the Contracting Officer’s exclusion of JDDA from the competition had a rational basis and was not arbitrary, capricious or an abuse of discretion. The ODRA therefore recommends that the Protest be denied.

II. Findings of Fact

1. On October 20, 2010, the FAA Southwestern Region issued solicitation number DTFACN-11-R-00013 (“Solicitation”). The Solicitation was issued as a small business set aside for purposes of acquiring janitorial services for the Air Traffic Control Tower and Support Center of the Austin-Bergstrom International Airport in Austin, Texas (“Airport”). The performance term of the Solicitation included an 8 month initial period of service with two 1-year renewal options held by the Region. *See AR, Attachment 1, Solicitation.*
2. The Solicitation at Section L specifically required that the offerors provide past performance information as follows:

Offerors will provide proof of successful performance of the type of services requested in the Statement of work. Offerors must provide evidence of three contracts, of the same overall scope as this requirement, that were either completed within the last five years, or that are still being performed. Offerors shall include the contract number, description, customer name, phone number and email address, and total amount of the contract. **Offerors whose past performance cannot be verified will not be eligible for contract award.**

See id. at 31. (emphasis added).

3. Section M of the Solicitation set forth evaluation factors and the basis for contract award as follows:

The Government may award a contract on the basis of initial offers received, without discussion. Therefore, each initial offer should contain the offeror’s best price. Award should be in accordance with clause 3.2.2.3-19, entitled “CONTRACT AWARD” (July 2004)[.]

Contractors must make an offer on ALL items or the entire offer will be rejected as non-responsive. The evaluation of options will not obligate the government to exercise the options. The [G]overnment reserves the right to award any or all options(s).

Only one (1) contract award shall be made as a result of this [S]olicitation. Award will be made to the otherwise responsive and responsible offeror whose offer, including options, results in the lowest aggregate total price. If options are not selected, award will be made to the otherwise responsive offeror whose offer results in the lowest price for the base period.

See id. at 33.

4. Two timely offers were received by the Region in response to the Solicitation. The JDDA offer was the lower of the two by a small margin. The other offer was submitted by the Awardee in the amount of one hundred thousand nine-hundred and sixty dollars (\$100,960). Both JDDA and the Awardee submitted the names of four past performance references. *See AR*, Attachment 6, Award Decision Document.

5. The JDDA references included the following information:

Pharr-San Juan-Alamo Independent School District

Type of Contract: Floor Waxing Project
Address: 601 E Kelly, P.O. Box 1150, Pharr, TX 78577
Point of Contact: Mr. Ray Sanchez, Construction Manager,
rsanchez@psja.k12.tx.us
Phone Number: (956) 739-0125
Date: August 15, 2010
Contract Amount: \$ *****

Bush Intercontinental Airport

Type of Contract: Janitorial Services
Address: P.O. Box 60469, Houston, TX 77205
Contact: Mr. Mario Cediel, VP of Operations, (281) 233-
7624, mcediel@jddaconcession.com 713-851-8867
Date: February 2008 to present
Contract Amount: \$ *****

Saulsbury Electric Co., National Enrichment Facility

Type of Contract: Janitorial Services
Address: 225 HWY, 176 Eunice N.M. 88231
Point of Contact: Ms. Janet Womack, Manager, JWomack@Si-TX.com
Phone Number: (575) 394-6146
Date: February 2010 to present
Contract Amount: \$ *****

United Rentals Inc., National Enrichment Facility

Type of Contract: Janitorial Services
Address: 225 HWY, 125 Eunice N.M. 88231
Point of Contact: Mr. Tory Jennings, Manager, TJennings@ur.com
Phone Number: (512) 529-1813
Date: December 2009 to present
Contract Amount: \$ *****

6. The Independent Government Cost Estimate for the work including the base year and option years was approximately eighty-six thousand dollars (\$86,000). *See AR at 2, fn. 4.* Three of the four JDDA past performance references involve contracts with a much lower value than the estimate for the contract at issue. The Contracting Officer forwarded by email past performance questionnaires to the three references provided by JDDA that had the highest Contract values listed: Pharr-San Juan-Alamo Independent School District; Saulsbury Electric Company; and JDDA Concessions at Bush Intercontinental Airport. *See AR at attachment 3.* Each email stated that JDDA had identified the company as a past performance reference on a particular contract and requested that the company complete and return the past performance questionnaire. In addition, the email to the individual at JDDA Concession.com regarding the Bush Intercontinental Airport included the following question: “Also is this company (JDDA Facility Group) affiliated with your company in anyway? If so, please advise to the relationship.” *See id.*
7. Two of the JDDA references, *i.e.*, Pharr-San Juan-Alamo Independent School District and Saulsbury Electric Co., did not respond to the respective emails from the Contracting Officer. The Contracting Officer therefore made notations on the hard copies of the emails as follows: “no response as of January 19, 2011” and included his initials after the handwritten notes.
8. The Contracting Officer’s questionnaire was returned by JDDA Concessions. In his Award Decision Document the Contracting Officer states that:

Noting the similarity in the reference and offeror’s names, I inquired whether or not the two companies were affiliated in any way. Mr. Cediel of JDDA Concession replied that they were not. However, it appears that there is some relationship between the

companies, as both companies are listed on the JDDA Group website (www.jddagroup.com). Further, the cover letter provided with JDDA Facility Group's offer notifies that they are submitting their offer under their GSA Schedule Contract number (GS-07F-0101U), which is also listed on the JDDA Group website.

See AR, Attachment 6 at 2, Award Decision Document.

9. In the Award Decision Document, the Contracting Officer stated his rationale for excluding JDDA from the competition as follows:

Based on the fact that I only got one response on JDDA Facility Group's past performance, and the responding company appears to be related in some way to the offeror, I'm not comfortable that the company has relevant, independent past performance to indicate that they will be successful in supporting this facility – especially given that the other references were valued at less than 20% of this effort, and there is no past performance working with Federal facilities.

See id.

10. The Award Decision Document went on to describe in detail the experience and past performance references of the incumbent awardee and stated that "Based on the above [past performance] information and my personal knowledge of the company, I find that the [awardee] to be a responsible company and that making the award to them is in the best interest of the Agency." *See id.*
11. The Contracting Officer also determined that the internet address "www.JDDAgroup.com" lists companies that include both JDDA Concessions Management and the Protester, JDDA Facilities Group. *See AR, Attachment 6, Memorandum for the Record, and AR, Attachment 5, JDDA web pages.* One of the pages describes JDDA Facility Group, Inc., as follows:

In 2005, Mr. Terry L. Christopher formed JDDA Facility Group, Inc. to seek business opportunities in facility maintenance and janitorial services with government agencies and the private sector. The firm has been certified by the Small Business Administration as a Small Disadvantaged and Service Disabled Veteran Owned

Business. In addition, the company has been awarded a GSA Schedule Award - Contract Number GS07F0101U....

See id.

12. The Contract was awarded to the Awardee on or about January 12, 2011. *See id.*, Attachment 5 at 6.

13. JDDA filed its bid protest with the ODRA on March 1, 2011.

III. Discussion

A. Standard of Review

It is well established that, in the context of adjudicating bid protests, the ODRA will not overturn or recommend that the Administrator overturn procurement actions that comport with the AMS, have a rational basis, are neither arbitrary, capricious, nor an abuse of discretion, and are supported by substantial evidence. *See Protest of Hi-Tec Systems, Inc.*, ODRA Docket No. 08-ODRA-00459 and -00460 (Decision on Motion to Dismiss, December 1, 2008), *citing Protests of Air Transport Association, et al.*, 08-ODRA-00452, -00453, -00454, -00455, -00456, -00457, -00461, and -00462. In reviewing challenged procurement actions, it also is well established that the ODRA will not substitute its judgment for properly supported judgments of contracting officials exercised consistent with the requirements of the AMS. *See id.*, *citing Protest of Northrop Grumman Systems Corporation*, 06-ODRA-0038. Moreover, a protester's mere disagreement with an Agency action or decision does not, by itself, provide a sufficient basis for sustaining a bid protest. *See Protests of Air Transport Association, supra.*, *citing Protest of En Route Computer Solutions*, 02-ODRA-0220. Finally, in order to prevail, a protester bears the burden of demonstrating that the challenged action was prejudicial to it. *See Protest of Emerging Engineering Excellence Joint Venture*, 08-ODRA-00467.

B. The Exclusion of JDDA from the Competition

JDDA's Protest is grounded on its assertion that it was improperly excluded from the competition for the Contract. Mr. Terry L Christopher, the President of JDDA Facility Group, Inc., whose signature appears on the Protest Letter states in that letter that "[M]y firm believes that [the Contracting Officer] should have offered us the award based being [sic] the lowest bid. We should not have been eliminated from the award process because of [the Contracting Officer's] apparent lack of communication." *See Protest* at 3. Essentially, JDDA contends that there was insufficient communication by the Contracting Officer; that JDDA did provide references; that those references attempted to respond to the Contracting Officer's inquiries; and that JDDA "had followed up with all references to confirm." *See id.* at 2. Notwithstanding this representation, the record is devoid of any documents or any other competent evidence to support the allegation that the key references in question responded to the Contracting Officer's emails requesting information. Nor have affidavits been provided by the Protester on this point.

JDDA also contends that it is not affiliated with the company that the Contracting Officer attempted to contact relative to the janitorial services at the Bush Intercontinental Airport. *See Protest* at 1; *JDDA Comments* at 2. Notwithstanding these assertions, the ODRA notes that the record reflects that the Contracting Officer contacted the specific individual who had been identified by JDDA itself in its proposal at the email address listed in the JDDA proposal for that individual. *See Finding of Fact ("FF")* at 6, 8. That individual was identified by JDDA by name and as "VP of Operations" and his email address ended with "@JDDAConcession.com." *See id.*

Furthermore, JDDA states that: "My firm has a contract at the Bush Intercontinental Airport under JDDA/SSP Concession Management. An agreement was made with JDDA/SSP Concession Management to post my firm on their site for marketing purposes only to seek opportunities for JDDA Facility Group to grow." *See Comments* at 1. Notwithstanding that JDDA had in its proposal listed him as the reference contact, JDDA contends that it was inappropriate for the Contracting Officer to attempt to contact the

person it had identified. *See Comments at 2.* Additionally, JDDA contends that it “asked [the Contracting Officer] to have his email account checked because our references may had [sic] the same problems with his email account when they responded to his request.” *See JDDA Protest at 2.*

In its Agency Response, the Region points out that reasonable attempts were made to contact JDDA’s references even though three of them involved contracts not of comparable size and scope to the Contract in question and two of those references did not respond. There is no evidence in the record that these references attempted to respond to the Contracting Officer’s inquiry. *See AR at 2, 3.*

With respect to the affiliation question, the Region points out that “it was rational for the Contracting Officer to conclude, based upon the independent, verifiable, information set forth on the JDDA Group of Companies’ website that the past performance information provided by JDDA Concessions Management came from an interested, affiliated, party and was therefore suspect.” *See AR at 5.* Finally, the Region points out that:

JDDA Facility Group has failed to provide any facts or evidence to substantiate its position. It has provided no evidence other than self-serving statements to support its position that there were problems with the FAA electronic mail system that interfered with its references ability to contact the FAA. Nor has it provided any evidence other than self-serving statements to support its position that it is not affiliated with the JDDA Group of Companies when the independent, verifiable information on the JDDA Group of Companies website list both JDDA Concessions Management, JDDA Facility Group, and JDDA Facility Group’s President Terry L. Christopher by name.

See id. at 7.

In its Comments, JDDA attempts to argue that it has no relationship to JDDA Concessions. *See Comments at 1-3.* However, aside from the similarity of names, JDDA itself admits that it has an agreement with JDD/SSP Concession Management for the janitorial services at Bush Intercontinental Airport. *See Comments at 1 and Attachment.*

It does not dispute the fact that it is included as one of the companies listed on the JDDA Group of Companies' website along with Concession Management. Finally, although the Contracting Officer specifically requested that the individual identified by JDDA as its reference explain any affiliation of the two companies, there is nothing in the record to indicate that the respondent gave an adequate explanation.

It is a well established principle of procurement law that an offeror bears the ultimate responsibility for fully and clearly responding to each and every requirement of the Solicitation. *See, e.g., Protest of Team Clean, Inc., 09-ODRA-00499.* In this case, JDDA could and should have taken the initiative to explain the relationship or, in JDDA's view, lack of relationship with the company it used as a reference. Moreover, even its current explanation does not clearly eliminate the relationship of JDDA to the other entities that share portions of its name, and with which it undeniably has an ongoing relationship of some kind.

Ultimately, JDDA, not the Contracting Officer, is responsible for JDDA's exclusion from the competition. The Contracting Officer acted properly in questioning the relationship of the companies and acted rationally in concluding that the only reference he received regarding JDDA was not reliable because of a relationship between the two companies. Furthermore, the Contracting Officer acted rationally in making inquiries of two additional companies identified as past performance references by JDDA, even though those companies' contracts with JDDA were smaller in scope than the Contract at issue.

The evidence in record is that those other companies did not respond to the Contracting Officer. While JDDA challenges that fact, it has provided no evidence to support that any attempt was made by either of the two companies to contact the Contracting Officer in response to his inquiry. Ultimately, it is the offeror's responsibility to ensure that its references are responsive to the Agency's legitimate request for past performance information. The Contracting Officer, under these circumstances, was required to do no more than he did. There is no obligation for a contracting officer to inquire further into a small business' representation of its qualifications and eligibility, provided that there is "a

rational connection between the facts of the situation and the procurement official's action or decision.” *See id.* It is well established that the ODRA will not substitute its judgment for that of the procurement officials if the challenged decision complies with the AMS, has a rational basis, and is not arbitrary, capricious, or an abuse of discretion. *See id.*, citing *Protest of L. Washington & Associates, Inc.*, 02-ODRA-00232.

Based on the information available to the Contracting Officer at the time he made his decision, the ODRA concludes that the Contracting Officer's decision to exclude JDDA from the competition and make an award to the awardee was consistent with the AMS and the Solicitation, rational, not arbitrary capricious or an abuse of discretion.

IV. Conclusion and Recommendation

The ODRA finds that the Contracting Officer's decision to exclude JDDA from the competition and award the Contract to the other competitor complied with the AMS, had a rational basis, and was neither arbitrary, capricious, nor an abuse of discretion, and was supported by substantial evidence. The ODRA therefore recommends that the Protest of JDDA be denied in its entirety.

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