

FAA Office of Dispute Resolution

Report of the Special Master in the Protest of Weather Experts, Inc., under Solicitation DTFA11-96-R-00159.

Docket Number 96-ODR-0013

Appearances

For the Protestor: Richard J. Carlson and Robert Riekkola, Weather Experts, Inc., and Katrina Grider, Esquire.

For the FAA: Kevin O'Hara, Contracting Officer, and Dwight Williams, Esquire.

For the Interested Parties: Timothy Breiding, Weather Experts, Inc., and Sam Zalman Gadanski, Esquire; Robert Davis, Condor Reliability; Frank Tooke, Weather Observations, Inc.; Sherry Avena, Model Classrooms, Inc.

Special Master: Donald P. Arnavas, Esquire.

Summary

This procurement was conducted under the Acquisition Management System (AMS) initiated by the Federal Aviation Administration (FAA) in April of 1996. Proposals were solicited, evaluated and awarded on a "Best Value" basis, and not, as was the case with the FAA's Northwest Mountain Weather Observation Solicitations prior to the introduction of the AMS, on the basis of price alone. Award was made to Midwest Weather, Inc (Midwest). Midwest commenced its performance under the contract on October 1, 1996.

The Protestor, Weather Experts, Inc. (Experts), filed its protest on October 10, 1996. The FAA filed an initial response to the protest and then filed additional comments on January 2, 1997 (Attachment A) and on January 10, 1997 (Attachment B). Experts supplemented its protest with filings on December 24, 1996 (Attachment C), and on January 10, 1997 (Attachment D). Experts also furnished two letters dealing with the confidentiality of its proprietary information and with its settlement efforts (Attachment E). In addition, the FAA, the Protestor, the Interested Parties and the Special Master engaged in a lengthy telephone conference discussion of the protest on December 17, 1997. A second telephone conference discussion between the

Protestor, the FAA and the Special Master was held on January 14, 1997.

Experts contends that as the low offeror, it should have received contract award and argues that the FAA acted erroneously in finding that Midwest, the second low offeror, represented the best value to the FAA even though Midwest's price over the three year life of the contract was \$73,164 higher than Experts' price.

The Special Master concludes that the FAA's decision to make award of the contract to other than the low bidder was not arbitrary, capricious or an abuse of discretion, and that it had a rational basis. Accordingly, the Special Master recommends that the Administrator deny Experts' protest.

Findings of Fact

Solicitation & Award

1. The subject solicitation was for the performance of weather observation services at Sea Tac and at Boeing field in Seattle. It was issued by the FAA's Northwest Mountain Region on August 9, 1996 (Tab 1--note that all "Tab" references are to the Special Master's protest file).
2. The Solicitation contemplated award of a firm fixed price contract for a one-year base period and two one-year option periods, commencing on October 1, 1996 and ending on September 30, 1999 (pg B-1, Tab 1).
3. The Solicitation informed all the offerors that it was the FAA's objective to insure that ". . . the highest possible quality data is available to the aviation users" (App A, pg 1, Tab 1).
4. Both airports involved in the solicitation have been designated as Level "A" airports because of their high volume of arrivals and departures (App A, pg 2, Tab 1).
5. Clause 1H-003 entitled, "Exemption from Service Contract Act Coverage" discussed an exemption (frequently termed the "sole charge exemption") to the requirement that minimum wages be paid to all covered "service employees". The Clause is based upon 29 CFR § 541.1 and it provided that the definition of "service employee" does not:

• • . . . include persons employed in a bona fide executive, administrative or professional capacity . . . To qualify for this exemption the individual must;

1. Have management as his/her primary duty.

• • 2. Customarily and regularly direct the work of at least 2 other employees.

3. Have full authority to hire and fire employees.

4. Customarily and regularly exercise discretionary powers.

5. Devote not more than 20% of his/her time to activities that are not directly and closely related to management.

• • 6. Be paid on a salary or fee basis of not less than \$155 per week.

Please note that ALL these conditions must be met before an exemption from the Service Contract Act can be claimed or utilized.

(pg H-2, Tab 1)

6. The foregoing paraphrase of the sole charge exemption requirements is incomplete in that it did not inform the offerors that § 541.114 (which exempts 20% owners from the 20% limitation on nonexempt work), and Section 541.119 (which provides that high salaried executives--those earning no less than \$250 per week--meet all six requirements set forth above) may also be the basis for a sole charge exemption.

(29 CFR 541, Attachments C & D)

7. The Solicitation further required, in Clause 5.5, that the winning contractor ". . . assign one employee as a supervisor/station manager who is to be employed as such on a full-time permanent basis . . . The contractor may perform these supervisory duties provided he/she complies with the provisions of this paragraph" (Amendment 0001, Tab 2).

Another Solicitation clause entitled, "Key Personnel And/Or Facilities", is directed at (1) all designated supervisors, and (2) any "on-call" or off site personnel. The clause requires that prior to removing, replacing or diverting any of the individuals described above, the contractor must give advance, written notice and justification to the Contracting Officer. The clause prohibits any diversions of these personnel without the Contracting Officer's prior, written consent (pg I-2, Tab 1).

8. Section M discussed the evaluation factors for award of a contract and put the offerors on notice that they were involved in a best value procurement.

Clause M-001 stated, in part, that:

- • The Government will make award to the responsible offeror whose proposal conforms to the solicitation terms and conditions, is technically acceptable, and represents the best value to the Government.

and that:

- • Upon determination of technically acceptable offers, the Government will evaluate the Pricing Proposal, Management Proposal, Delivery Schedule and Past Performance References received to determine which technically acceptable offer represents the best value to the Government. . . that offer found to represent the best value to the Government and determined to be fair and reasonable, will receive award for the required services (pg M-1, Tab 1).

9. The FAA's Integrated Product Team (IPT) is charged by the AMS with responsibility ". . . for the proper and efficient conduct of the source selection process" (AMS Sec. 3.2.2.3.2.2)

10. The IPT's Evaluation Report dated September 16, 1996, shows that five proposals were received in response to the subject solicitation. The three low offerors were:

• • Weather Experts \$ [* * * *]

Midwest Weather \$ 1,029,600

Condor Reliability.... \$ [* * * *]

The Evaluation Report made the following comments with respect to Experts' use of the Service Contract Act's (SCA) "sole charge exemption":

• • The proposal was examined in light of the relevant sections of the SCA and it was the opinion of FAA counsel that the proposal was within the legal requirements. We agreed to accept the legality for purposes of the evaluation. The plan specified the individuals that were eligible for exemption and stated that they would be designated as supervisors for the two sites. Neither was named to a specific site as required. We also noted that as an essential part of the exemption the individuals would be primarily involved in management duties for the Weather Experts Corporation while simultaneously responsible for daily operations of the weather observation facility. This dilution of responsibilities was not considered desirable.

(Tab 6)

11. The IPT's Report as it related to Experts also noted that the:

• • -National Weather Service had been contacted and expressed concern [* * * *]. Other references stated that [* * * * *]. FAA Great Lakes regional office was contacted and described similar experiences . . .

(Tab 6)

12. Based upon the foregoing discussion, the IPT stated that it:

• • judged the apparent savings to be more apparent than real. . . It was the opinion of the IPT that Weather Experts was unlikely to perform as proposed. The business plan contained an element of risk that was not accordingly offset by past performance.

(Tab 6)

13. The IPT then concluded that:

• • It is the recommendation of the IPT and it is the decision of the Source Selection Official to select Midwest Weather for award of the Seattle area contract based upon the evaluation criteria, past performance and best value to the Government
. . .

(Tab 6)

The Parties' Contentions And Responses

The Parties have been given ample opportunity to fully state their positions. Both sides, as already noted, have filed several papers with the Special Master, and have further argued their positions during two lengthy telephone conferences.

Experts' Position

Experts' initial protest asserted that ". . . (1) critical decisions made by the IPT were based primarily on assumptions. And (2) hearsay was considered as fact and deemed disparaging".

These issues relate to Experts' proposed use of the sole charge exemption discussed above (FOF 5 and 6) and to the stability (or lack thereof) of its staffing. Experts' protest complains that the IPT was unduly concerned with whether Experts had the ". . . ability to act as supervisor(s) at the proposed weather observation sites and manage Weather Experts, Inc.", and criticizes the IPT because it concluded, without any discussions, that Experts' two principals, ". . . were incapable of performing two separate tasks i.e., management and supervision".

In this regard, Experts stated:

- • Surprisingly, the fact that Messrs. [* * *] and [* * * *] have successfully managed and supervised since 1989 was completely ignored. As indicated in our proposal, Weather Experts, Inc. has engaged in this style of management at several sites, most notably John F. Kennedy and LaGuardia Airports in New York, and we have always performed at or above established industry standards. This was overlooked. To infer our corporate responsibilities would interfere with supervisory duties is baseless.

Finally, Experts is critical of the fact that the IPT never discussed these perceived problems with Experts during the evaluation period. As Experts' protest put it, ". . . we believe clarity would have been easily achieved . . . if they had followed the guidelines of the FAAMS and communicated with this firm on matters which they considered unclear". (Tab 9)

Experts' second written filing detailed the rather circuitous route of the varying interpretations given the sole charge exemption by different offices of the Department of Labor. Experts also reiterates its criticism of the IPT for not conferring with it during the evaluation period and questions the reliability of two of the references that the IPT obtained during the course of its deliberations (Attachment C).

The third letter submitted by Experts once more discussed its view of the sole charge exemption. Experts pointed to additional sections of the CFR (§ 541.114 and § 541.119) that modify the six eligibility requirements of 29 CFR 541.1 for determining whether a sole charge exemption, in fact, exists but were not identified in the solicitation (FOF 6). 29 CFR § 541.114 (a) provides, in pertinent part, that, "an exemption from the percentage limitation on nonexempt work is provided in § 541.1(e) for an employee who owns at least a 20percent interest in the enterprise in which he is employed". Experts then concluded that, contrary to the FAA's representations in Clause 1H-003 (FOF 5):

- • . . . if a person is a 20% owner of a corporation, [* * * * *], the amount of time

that the owner spends in the management of the firm is not a factor.

Experts' third letter also reiterated that it did not, under prior contracts, engage in [* * * *] tactics. In response to two references that asserted that Experts used these tactics on contracts at [* * * *] and at [* * *], Experts (during a conference call on January 14, 1997) explained (1) that the personnel change at [* * * *] was necessitated by the death in a fire of a key company employee and that, in any event, no claim was made by Experts at this site, and (2) the personnel change at [* * * *] was unanticipated and caused by the supervisor's inability to adjust to working at that location. With respect to the instant contract, Experts asserted that its two designated supervisors would have been able to work precisely as it had proposed and that no changes in their assignments had been contemplated (the FAA, during the January 14th conference call, indicated that it had acted under the assumption that one of Expert's supervisors was already committed on a full-time basis to another contract and that this would have created a conflict with his ability to work under the instant contract -- Experts emphatically stated that the FAA's assumption was incorrect).

In Summary, Experts contended that when a personnel change was made:

- • it was due to the legitimate needs of the corporation most especially, having to adjust to the inconsistencies of the D.O.L. interpretations in the matter and our companies decisions to comply with whatever interpretation seemed more aptly to apply at the time.

Finally, the letter stated that Experts only submitted claims for additional monies ". . . when a new D.O.L. wage determination was issued".

(Attachment D)

The FAA's Position

The Contracting Officer's Statement summarized the FAA's problems with Experts' proposal as follows:

- • The management proposal was considered less desirable than that of other more conventional plans due to the use of corporate officers as site supervisors. The pricing proposal submitted was also deemed less advantageous to the Government because it may not result in an expected firm price throughout the term of the contract.

With respect to the sole charge exemption, the Statement noted that Solicitation Clause 5.5 required a permanent full-time supervisor at the job site and that one of the conditions necessary for attaining sole charge exemption status limited the supervisor's activities not directly and closely related to management to not more than 20% (as already discussed, this second limitation was not applicable in Experts' case).

Since Experts proposed to have [* * * * *], its proper use of the sole charge exemption was, in the Contracting Officer's view, "brought into question". In any event, reasoned the Contracting Officer, the IPT had no obligation to award to a offeror simply because its proposal complies with the sole charge exemption criteria. As the Contracting Officer put it:

- • It is the position of the IPT that given the size and complexity of both the airports and the protestor's corporation, that a management plan based on the sole charge management would not represent best value to the Government. The IPT concluded that Midwest Weather's management proposal, which offered two full time supervisors receiving the required Service Contract Act supervisory wages was a superior management proposal.

Finally, the Statement contended that Experts' proposal was lacking in clarity in that; it did not clearly state who would supervise each of the two sites; it said only that Experts would "consider" hiring the incumbent's employees; and it made no mention of vacation pay in its price proposal. With regard to Experts' complaints about the lack of any discussions of the proposal's perceived shortcomings, the Statement noted that:

- • The IPT felt that the proposal was unsatisfactory in ways that were so fundamental that to pursue discussions would be equivalent to allowing Weather Experts to re-propose. As services were required to commence within the month, and as acceptable proposals were on hand, the IPT does not see this as beneficial.

(Tab 10)

The FAA's first submission to the Special Master addresses the checks that it made with respect to Expert's past performance (FOF 10). It indicates that inquiries were made to sources within the FAA, the NWS and NOAA. The protest file contains three responses from references. The first (in an extract from a telephone conversation) notes that Experts had made a claim in the option years of one contract to which the sole charge exemption had been applied, [* * * * *]. This reference also commented that Experts' officers, [* * * * *]. The second reference while noting that Experts was, "certainly technically capable of doing a good job", also said that Experts has used the sole charge exemption to [* * * * *], "particularly at the time of exercising contract options where he has attempted [* * * * *]. This reference also commented that, "this has been less of a problem recently." The third reference (again digested in a telephone extract) said Experts always provided an excellent product and its staff was proactive and very conscientious, but then noted that Experts [* * * * *].

The FAA's use, on page 4 of this submission, of a mathematical hypothetical (which has as its conclusion the fact that Experts' supervisor would be required to work 200 hours per week in order to meet the requirements of the sole charge exemption) is inaccurate to the extent that it fails to mention either of the alternatives (discussed above) under which Experts could also meet the exemption's requirements.

(Attachment A, Tab 10)

The FAA's most recent filing clarified its rationale for making award under this solicitation to other than the low offeror. The FAA stated that Experts' qualification for the sole charge exemption was never a factor in its evaluation, since ". . . we assumed that Weather Experts would be eligible under DOL's regulations to apply the sole charge

exemption as proposed". Rather, says the FAA, it was concerned about the quality of the services that Experts would provide while using the exemption. The FAA provided a number of specific reasons for its decision not to make award to Experts. First, its position that simply because use of the sole charge exemption is permissible does not mean that its use will result in best value to the Government. Secondly, its concern about the, "dilution of managerial responsibility" that Experts' claim of the sole charge exemption would necessarily bring to the job, in that Experts' chief corporate officers would not only serve as site supervisors at Sea Tac and Boeing, ". . . but would also provide corporate oversight at all of Weather Experts numerous other sites". Third, the fact that the Department of Labor's past interpretations of the sole charge exemption have not been consistent, and that this has led to, ". . . many disputes among contractors, their employees and the contracting agencies" which the FAA wanted to avoid, "in this very controversial matter".

The FAA also discussed the extent to which Experts' past history with regard to the sole charge exemption was considered by the IPT. It cited two weather observation contracts (at Grand Forks and at Traverse City) where Experts had claimed the sole charge exemption and after contract award [* * * *](as noted earlier, Experts has recently offered a conflicting version of what occurred at these two sites. The FAA did not contradict Expert's version and we accept that version as being accurate). The FAA stated that what Experts proposed in these two instances was substantially the same as what was proposed by Experts under the subject solicitation. The FAA also cited reports from NOAA and NWS of a similar pattern of conduct by Experts (see also FOF 11). Because of these reports of Experts' past performance pattern, ". . . the IPT was skeptical of its Management Proposal and the credibility of its pricing".

(Attachment B)

Issues Presented

In determining whether the IPT's decision to make award to Midwest on the basis of best value to the FAA, had a rational basis and was supported by substantial evidence, a number of issues must be considered:

- (1) Did the Solicitation properly advise Experts of the criteria for use of the sole charge exemption.
- (2) Was Experts' proposal fairly evaluated in accordance with the Solicitation's stated evaluation criteria.
- (3) Was the IPT's conclusion that Experts, "was unlikely to perform as proposed", reasonable and supported by substantial evidence.
- (4) Did the IPT's decision not to engage in discussions with Experts have a rational basis.
- (5) Was the IPT's conclusion that Experts', "management proposal was considered less desirable than that of other more conventional plans due to the use of corporate officers as site supervisors", reasonable and supported by substantial evidence.

Conclusions Of Law

In reaching our recommended decision we have applied the principles of the AMS as well as the standard of review applicable under the Administrative Procedure Act, 5 U.S.C. 706. Thus, we will uphold the actions undertaken by the FAA so long as they have a rational basis, are neither arbitrary nor capricious, and are supported by substantial evidence. Citizens To Preserve Overton Park, Inc. v. Volpe. 401 U.S. 814 (1971).

The issues set forth above will be considered in turn.

(1) The sole charge exemption

As noted above (FOF 5&6) clause 1H-003 which purportedly set forth the factors necessary for qualification under the sole charge exemption, was incomplete since it did not advise the offerors of two additional methods of qualification under the sole charge exemption. To this extent the solicitation was wanting. However, since Experts was not prejudiced by the absence of reference to the additional methods (on the contrary, Experts chose one of the two missing methods as its justification for use of the sole charge exemption and discussed the entire exemption procedure several times and in considerable detail), we do not consider this factor material to its protest.

(2) The IPT's adherence to the evaluation criteria

Section M of the Solicitation sets forth the evaluation criteria to be used by the IPT in determining which offer presented the best value to the FAA (FOF 8). The evaluation scheme contemplated that once a proposal was found technically acceptable (after review of an offeror's management proposal and past performance and experience) the IPT would evaluate pricing, management, schedule and references, and then decide which technically acceptable proposal offered best value to the FAA. We are satisfied that since Experts was put on notice, through Section M, that its management proposal would play a key role in the entire evaluation process and since Experts considered itself quite knowledgeable with respect to the sole charge exemption (see, e.g., Attachment C where Experts states, "We have learned our lessons about the Service Contract Act and especially the sole charge exemption only through great hardship and expense"), that the IPT's reliance on its lack of confidence in a proposal bottomed on the sole charge exemption, was reasonable and fair even though not explicitly named as an evaluation factor.

However, we suggest in future procurements of this nature that it would be prudent for the FAA to include in the Solicitation some language indicating (if this is the case) the low esteem in which it holds the practice of supervisors acting in dual management/worker roles and the fact that proposing the use of this procedure could be a factor in determining whether that proposal offers the FAA its best value.

- • (3) Reasonableness of the IPT's conclusions regarding

Expert's performance as proposed

The IPT indicated that it believed it unlikely that Expert would perform as proposed ("the IPT was skeptical of its management proposal and the credibility of its pricing") and the Contracting Officer took substantially the same position when he criticized Experts' offer, "because it may not result in an expected firm price throughout the term of the contract". In each instance the negative reactions regarding Experts' credibility was partially based on adverse past performance references that, as discussed above, have been largely discredited by Experts. In

essence, Experts has vigorously made two points which we accept as accurate. First, Experts has never deliberately set out to circumvent the sole charge exemption rules--when it has prepared a proposal relying on the exemption it has done so in good faith. Second, Experts, as a matter of course, submits claims when an SCA wage determination entitles it to do so, or when a Department of Labor interpretation varies the application of the sole charge exemption in a given situation. In other words, while it may submit more claims than comparable contractors they are not frivolous claims but ones with some substance.

Moreover, to the extent that the IPT's lacks confidence in the stability of Experts' staff (as noted above, one reference stated that while Experts always provided an excellent product, it rarely followed its staffing plan--"you almost always get what you want, but rarely from who you expect") the contract provides safeguards that, through strict FAA monitoring, could obviate or at least minimize staffing changes that are unnecessary or excessive. The contract contains one clause that requires the contractor to assign a full-time permanent supervisor to each job site and another clause that prohibits any change of the personnel filling this supervisory role without the prior written consent of the Contracting Officer (FOF 7).

Accordingly, because of the inaccuracy of several key past performance references of Experts' work and in view of what we consider adequate contractual provisions specifically designed to control excessive staffing changes, we conclude that the IPT's misgivings about the likelihood of Experts' performing as proposed were neither reasonable nor supported by substantial evidence.

(4) The IPT's failure to engage in discussions with Experts

The Solicitation, in clause M-001, gives the FAA the right to, ". . . make award without discussion", and the AMS (at Section 3.2.2.3.1.2.3) similarly provides that, "award on initial offers to other than the low cost or price offer is allowed". Obviously, this discretionary right must be exercised in a reasonable manner, something which Experts has repeatedly contended, was not the case here. As Experts put it in its protest, ". . . we believe that clarity would have been easily achieved . . . if they had followed the FAAMS and communicated with this firm on matters which they considered unclear".

The FAA, in discussing the lack of clarity in Experts' proposal, referred to three matters, which we consider rather trivial, -- Experts did not clearly state who would supervise each of the two sites; Experts' proposal said only that it would "consider" hiring the incumbent's employees; Experts' proposal did not mention vacation pay. However, we must not forget that the IPT had another very basic problem with Experts' offer -- the fact that Experts proposed to have its supervisors assume a dual role at each of the two job sites.

All of the foregoing "problems" were characterized by the IPT as being ". . . so fundamental that to pursue discussions would be equivalent to allowing Weather Experts to re-propose't. We agree. While the three minor issues obviously could have been resolved by a telephone conversation, the matter of the IPT's misgivings regarding the manner in which Experts proposed to perform went to the core of its proposal and would, indeed, have necessitated a change in the fundamental approach that Experts took to the project.

Accordingly, we find that the IPT's decision not to engage in discussions with Experts was reasonable and was supported by substantial evidence.

(5) Was the IPT's ultimate conclusion regarding the merits of Expert's proposal reasonable and supported by substantial evidence

The main reason for the IPT's decision to award a contract to Midwest, despite the \$75,000 price advantage offered by Experts, was that Experts' proposed that its supervisory personnel would be involved in management duties while at the same time also being responsible for the daily conduct of weather observation operations. The IPT determined that this, "dilution of responsibilities", was not as good a value to the FAA as Midwest's slightly higher cost proposal, "which offered two full-time supervisors receiving the required Service Contract Act supervisory wages".

In examining the reasonableness of the IPT's decision, we may not substitute our judgment for that of the selection officials; even if we were to disagree with the wisdom of the IPT's choice. See, e.g., *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976). The question presented is whether the IPT's

award decision was reasonable and supported by substantial evidence in light of the Solicitation's evaluation scheme. *TRW, Inc.*, 68 Comp. Gen. Para. 512. We believe that it was. Note that neither the problems experienced by the IPT in its reference checks nor the failure of the Solicitation to explain the sole charge exemption as clearly as it could have, had any impact on the manner in which Experts set forth its fundamental performance plan--and this is precisely where the IPT properly exercised its discretion to determine which offeror offered best value to the FAA. As one authority put it, the best value selection scheme involves, " . . . a source selection where the award decision is based upon a trade-off between the price offered and other features of the proposal such as quality, technical, management and schedule. 6 *Nash-Cibinic Report* 45 (1992). This is the exercise in which the IPT engaged when it reasonably chose Midwest's offer over Experts'. The IPT's approach and its conclusion were rational and had a substantial basis.

(6) Other Matters

Both parties have devoted much attention to Experts' contention that certain information which it considers proprietary has been improperly released by the FAA to the interested parties in this protest. This is a subject that has no relevance insofar as the merits of Experts' protest is concerned. Experts should seek relief in some other forum.

Recommendation

For the reasons set forth above, we find that the decision of the FAA to make award to Midwest Weather, Inc., had a rational basis, and was neither arbitrary or capricious nor an abuse of discretion and that it was supported by substantial evidence. Accordingly, we recommend that the Administrator deny Weather Experts, Inc.'s Protest.

_____/S/_____

Donald P. Arnavas

Special Master

January 17, 1997