

# Board of Contract Appeals

General Services Administration

Washington, D.C. 20405

## OPINION ISSUED UNDER PROTECTIVE ORDER

Recommendation: May 23, 1997

GSBCA 14151-FAA

DCT, INCORPORATED,

Protester,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent,

and

FOUR WINDS SERVICES, INCORPORATED,

Intervenor.

David Tollman and Cheryl Bernardi of DCT Incorporated, McAlester, OK, appearing for Protester.

A. L. Haizlip, Office of the Aeronautical Center Counsel, Federal Aviation Administration, Oklahoma City, OK, counsel for Respondent.

Roberta Carver, President & CEO, and Dennis Carson, General Manager of Four Winds Services, Incorporated, Altus, OK, appearing for Intervenor.

**BORWICK**, Board Judge.

On December 17, 1996, DCT Incorporated (DCT) filed a protest with the Federal Aviation Administration's (FAA's) Office of Dispute Resolution (ODR). DCT challenged the FAA's award of a facilities operation and maintenance contract for the Mike Monroney Aeronautical Center (MMAC) to Four Winds Services, Incorporated (Four Winds). On March 6, 1997, DCT filed an addendum to its ~supplemental protest. The ODR allowed Four Winds to intervene in the protest.

On April 14, 1997, the ODR, pursuant to a memorandum of understanding between the General Services Administration and the FAA, referred the protest to this Board of Contract Appeals for appointment of a Board Judge to serve as a special master. The special master is to issue a recommendation, consisting of findings of fact and conclusions of law to the ODR. The standard of review is whether the decision of the FAA had a rational basis and is neither arbitrary and capricious nor an abuse of discretion. The Board Judge received the protest file on April 17. The goal for issuing the recommendation was May 27, 1997.

The record of this protest consists of DCT's protest submissions of December 17, 1996 and March 6, 1997, the protest file submitted by the FAA, supplemental protest files submitted by DCT and Four Winds, and statements of position submitted by the parties to the protest. As reflected in the Board's order of April 30, 1997, DCT withdrew certain employee affidavits from the record together with allegations it made in a letter of March 13, 1997. These materials are not part of the protest record. In addition, the Board convened a telephonic protest conference on May 20, at which the parties agreed to furnish the Board Judge additional materials related to the issues of protest.

As refined in the protest submissions and the parties' statements of position, DCT raises the following chief issues.

DCT maintains Four Winds is an affiliate of JWK International Corporation (JWK)--Four Winds' subcontractor--in that Four Winds and JWK are sharing employees to engage in and carry out a specific business venture for joint profit. DCT urges that the affiliate relationship renders Four Winds ineligible to participate in this procurement that was set-aside solely for small businesses. DCT claims that the FAA did not receive the required financial capacity documentation from Four Winds, either in response to the screening information request (SIR) or the request for offers (RFO), and that Four Winds is thereby ineligible for award. DCT maintains that Four Winds submitted an unrealistically low-priced offer and did not understand the contract requirements. DCT complains that the agency gained an

unfair competitive advantage by holding "discussions" with one offeror--Four Winds--and not with DCT. Last, DCT maintains that Four Winds should have been disqualified because it proposed another subcontractor--FKW Incorporated (FKW)--which was tainted by another vendor's earlier disqualification.

The Board Judge recommends denial of the protest. The Board Judge concludes the contracting officer acted reasonably in accepting Four Winds' small business certification. There is no evidence that JWK is an affiliate of Four Winds, as "affiliate" is defined either by the FAA's Acquisition Management System (AMS) or by the Small Business Administration (SBA) regulations which are incorporated by reference in the FAA certification clause. The Board Judge concludes that the contracting officer rationally determined that all required

financial documentation was obtained. The Board Judge concludes that in holding communications with only Four Winds, the Integrated Product Team (IPT) followed the principles of the AMS. The Board Judge concludes that the IPT rationally determined Four Winds to be the offeror that presented the best value to the Government in this acquisition. The Board Judge concludes that Four Winds was not disqualified by its use of FKW as a subcontractor.

### Findings of Fact

#### Screening information request

On June 28, 1996, the FAA issued the SIR for a contemplated facilities operation and maintenance contract at the MMAC, located near Oklahoma City and off-site facilities leased to support the MMAC. The performance time for the contemplated contract was one year followed by four one-year option periods. DCT's Supplemental Protest File, Exhibit 4 at 10007. The SIR estimated the total cost to be between twenty-five and thirty-five million dollars. Id. The purpose of the SIR was to receive submittals, not exceeding twenty pages, from potential offerors and to make a downselect of not more than ten companies determined to be most qualified and, therefore, most likely to receive a contract award. FAA Protest File, Exhibit IIB at 20.

The SIR requested submittals from interested vendors addressing the following evaluation criteria: (1) management organizations and qualifications and (2) past performance and experience. The management organizations and qualifications criterion had two subelements: (a) concepts for successful project management and (b) qualification of project managers. The past performance and experience criterion had two sub-elements: (a) a request for background information on the company describing length of time in business, principal owners and geographic location of home office, and (b) an "etc." category. FAA Protest File, Exhibit IIB at 20-21. Interested vendors were also to provide information requested in category 3--Appendix D--Business Declaration, and documentation that the vendor had an acceptable accounting system for cost reimbursable type contracts. Id. at 21. The SIR also included a section to be completed entitled "Financial Capacity" (category 4), but with no further description of the information desired. Id.

#### Responses to Screening Information Request

Four Winds submitted a response to the SIR. In its response, Four Winds stated that it was a certified 8(a) small disadvantaged business, incorporated in Oklahoma. Given the size of the maintenance effort for the MMAC maintenance contract, Four Winds elected to use JWK as a subcontractor. Four Winds stated that as a certified small business "it would take the lead as the Prime Contractor, with JWK providing a vital role as a subcontractor." FAA Protest File, Exhibit IIC(1) at 28. Four Winds stated that "this team approach fosters a spirit of

partnering at all levels and will package the very best that both companies have to offer. . . " Id.

In its response to the SIR, Four Winds described its accounting system as the [\* \* \*]. Four Winds explained that [\* \* \*] was not an officially approved by the Defense Contract Audit Administration, but, in its opinion, it was an acceptable accounting system. Four Winds explained that it had been subject to two audits (technical and financial) by the Defense Logistics Agency and that both audits had been successfully completed. FAA Protest File, Exhibit IIC(1) at 46. In the section entitled "Financial Capacity," Four Winds stated that it had sufficient financial capital to cover all operating expenses on a cash basis. It stated that its banking institution promised that its line of credit would be increased proportionately to accommodate Four Winds' needs for capitalizing this project. It also represented that JWK would meet immediate fiscal requirements such as payroll. Id.

In its response to the SIR downselect, Four Winds listed [\* \* \*] instances of past performance, including one FAA contract, and three Department of the Air Force contracts, plus references for each contract. FAA Protest File, Exhibit IIC(1) at 38-41.

DCT also submitted a response to the SIR. In its response, DCT stated that it had been audited by [\* \* \*] and that its accounting system "has been found acceptable." FAA Protest File, Exhibit IIC(2) at 61. For the section entitled financial capacity, DCT submitted a narrative statement of that capacity and reproduced its income statement and balance sheet. Id.

Southway Services, Inc. (SWS) submitted a response to the SIR as well. SWS did not name FKW as a proposed subcontractor on the MMAC maintenance contract. FAA Protest File, Exhibit IIC(3). SWS had a verbal agreement to become a potential subcontractor contingent on SWS surviving the SIR downselect process. Since SWS was not selected as one of the surviving companies, the contingency did not mature. DCT Supplemental Protest File, Exhibit 23 at 10113.

#### Downselection process

On July 18, 1996, the FAA cost analyst determined that "everyone's accounting system is adequate or subject to be made acceptable to DCAA based on statements made by the contractors."

FAA Protest File, Exhibit IID(2) at 71. He also determined he needed financial statements from numerous offerors, including DCT and Four Winds, documents from the bank to support the financial underwriting of the project for Four Winds (he requested the same documentation from other responding vendors), and

documentation from JWR substantiating its financial support of Four Winds' contract effort. Id.

On July 22, 1996, the IPT issued its results of the downselect SIR evaluation. For the first evaluation criterion, the IPT ranked Four Winds first and DCT second. For the second criterion, IPT ranked DCT first with Four Winds tied for second with another offeror. In the third category, business declaration form, all vendors were ranked acceptable. The IPT found all company accounting systems adequate, and for the fourth category, financial capacity, each vendor was ranked "unable to determine at this time." FAA Protest File, Exhibit IID(1) at 68.

The FAA checked three of the four references Four Winds had submitted; these references provided the Technical Evaluation Team (TET) with enough favorable information to allow Four Winds to be determined acceptable. FAA Supplemental Submission, Enclosure A (Statement of Mr. Kenneth E. Doerksen)(Undated). On August 1, 1996, the TET recommended to the contracting officer that three vendors, including DCT and Four Winds, be deemed technically acceptable and in accordance with the requirements identified in the SIR. The TET downselected SWS because its submission showed no operations and maintenance experience. FAA Protest File, Exhibit IID(3) at 76.

#### Request for offers

On September 3, 1996, the IPT issued its SIR Request for Offers (RFO). FAA Protest File, Exhibit IIIB at 113. The RFO announced a contemplated cost reimbursement award fee contract for facility operation and maintenance at the MMAC. Id. Main functions include maintenance, repair, operation, and modification of buildings, utility systems, structures, mechanical and electrical equipment systems, water treatment program, security systems, computers, elevators, pest control and fire suppression. Id. at 156 (p. 1. 1) .

The technical score was significantly more important than price. FAA Protest File, Exhibit IIIB at 150 (p. M.I(c)). The technical evaluation criteria consisted of five categories: (1)

Management Plan, (2) Project Personnel, (3) Transition Period, (4) Task Order and Subcontract Management, and (5) Experience and Past Performance. Id. at 151 (p. M.3). The technical scoring was 4--excellent, 3--good, 2--satisfactory, 1--marginal, and 0--unsatisfactory. Id. at 150 (p. M.I(b)(1)). Contract award was to be made on the basis of the "best value to the Government." Id., Exhibit IIIC(1) at 279 (p. M.I(a)). The RFO required offerors to submit their latest financial statements, certified if available. Id., Exhibit IIIC(3) at 286 (p. L.7(c)).

After the FAA amended the RFO, it conducted the procurement as a total small business set aside. FAA Protest File, Exhibit IIIC(1) at 277. The AMS standard clause setting the procurement aside provides in pertinent part: "Information

and/or offers are requested only from small business concerns. Information and/or

offers received from concerns that are not small business concerns shall be considered nonresponsive and will be rejected." AMS Clause 3.6.1-l(b)(l)--Notice of Total Small Business Set-Aside (APRIL 1996). A "small business concern," as used in the clause, means "a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the standard industrial classification size standards in this [SIR]." Id.

As part of their offers, offerors were required to certify whether or not they were small business concerns, in accordance with the previously described clause, and under the criteria in 13 CFR Part 121 and size standards elsewhere stated in the certification. FAA Statement of Position, Enclosure A (p. K.2).

Price and cost were to be evaluated but not numerically scored. The RFO stated that unrealistically low initial or revised submissions, possibly indicating the offeror's failure to comprehend the requirements, may be grounds for elimination from further competition. Price/cost was to be evaluated for completeness, reasonableness, realism, and adequate accounting system. FAA Protest File, Exhibit IIIB at 151 (p. M.3.)

The RFO also incorporated by reference a limitations on subcontracting clause, AMS clause 3.6.1-7. FAA Protest File, Exhibit IIIB at 137. That clause provides that by submission of an offer and execution of a contract, the offeror/contractor agrees that, in performance of a contract for services (except construction), at least fifty percent of the cost of contract performance incurred for personnel shall be expended for employees of the prime contractor. AMS Clause 3.6.1-7 (April, 1996). The formula for calculating labor percentages requires adding allowable overhead to direct labor to obtain a subtotal. To that subtotal, general and administrative (G&A) labor expenses were to be added to determine the total labor cost. Id.

#### Four Winds' proposal

Prior to preparing proposals, Four Winds entered into a memorandum of understanding (MOU) with [\* \*]. Four Winds' Supplemental Protest File, Exhibit A at 11014. The MOU expressed Four Winds' and [\* \*]'s understanding that [\* \* \*] to provide designated services for the MMAC contract effort. Four

Winds [\* \* \*]. Four Winds [\* \* \*].

In its proposal, Four Winds proposed [\* \* \*]. FAA Protest File, Exhibit IIID(2)a at 656 (EXECUTIVE SUMMARY). [\* \* \*] for performance of the work. Id. at 681 (p.

II.1.1.1). Four Winds stated that subject to confirmation by the FAA, it and its subcontractors [\* \* \* \*]. Id. at 684.

[\* \*] cost proposal was submitted [\* \* \* \*] FAA Protest File, Exhibit IIID(2)(b) at 1400.

Mr. Dennis Carson, Four Winds' general manager, states that he received input [\* \* \* \*] areas of work, in addition to their history and experience. Mr. Carson states that this information was included in Four Winds' technical proposal. Mr. Carson and Four Winds president Roberta Carver developed the cost proposal, with the subcontractors submitting their finalized costs to Four Winds. Four Winds' Supplemental Protest File, Exhibit C at 11017 (Statement of Dennis M. Carson (May 4, 1997)).

Four Winds certified that it was both a small business and a disadvantaged business in accordance with the definitions stated in the certifications. FAA Statement of Position, Enclosure A.

Four Winds' proposal stated that [\* \* \* \*]. FAA Protest File, Exhibit IIID(2)(a) at 689 (Figure 1-1). [\* \* \* \*] and [\* \* \* \*]. Id. at 691 (Figure 1-2). [\* \* \* \*]. Id.; Four Winds' Supplemental Protest File, Exhibit D at 11018.

The breakdown of work between prime and subcontractors in Four Winds, proposal is as follows: Four Winds would provide [\* \* \* \*]. FAA Protest File, Exhibit IIID(2)(A) at 841-48.

A sign-in sheet for an MMAC facilities maintenance contract pre-proposal conference on September 17, 1996, shows [\* \* \* \*]. Under the heading "Company" he signed in as "Four Winds Services. Under the heading "Title/Organization" he put "Div. Mgr." DCT Supplemental Protest File, Exhibit 1 at 10004. At a personnel conference for another procurement, a sign-in sheet shows him signing in as a representative of JWK. Id., Exhibit 2 at 10005.

The Four Winds payroll manager states that (1) at no time has [\* \* \*] ever been employed by Four Winds, and no money has been paid by Four Winds to [\* \* \*]; (2) no moneys have ever been received from [\* \* \* \*] for the MMAC contractual effort or any other contract; (3) no phone calls have ever been received at Four Winds asking for [\* \* \*]; and (4) she knows of no affiliation of Four Winds with any other company. FAA Statement of Position, Exhibit F.

#### Initial proposal evaluation

The TET scored Four Winds' technical proposal at 3.59 out of five. Four Winds' commitment [\* \* \* \*] was considered a significant strength. The TET identified two areas of concern: Four Winds' [\* \* \*] for the support work order crew and the [\* \* \*] lacked specialized experience. FAA Protest File, Exhibit IIIE(1) at 1511. The

TET rated DCT at 3.17. The TET determined that DCT's proposed project manager, one assistant project manager and the quality control specialist had little or no specialized experience. Another deficiency was DCT's lack of experience with cost reimbursement or incentive contracts. Id.

The Pricing Team noted that one of DCT's subcontractors had proposed no labor escalation during the life of the contract and the option years. FAA Protest File, Exhibit IIIE(2)(a)(1) at 1458.

Four Winds' initial cost proposal totaled [\* \* \*]. FAA Protest File, Exhibit IIID(2)(b) at 1331 (Cost Proposal Summary). In conducting the analysis of Four Winds' cost proposal, the Pricing Team found a major problem with Four Winds' initial proposal in that two subcontractors, [\* \* \*], proposed to perform a total of [\* \* \*] of the total labor effort as measured by the proposed direct labor and associated indirect costs. Id., Exhibit IIIE(2)(a)(1) at 1550. The Pricing Team also noted that while Four Winds had submitted a letter from the [\* \* \*] stating the bank would entertain any future financing needs, no financial statements were submitted by the contractor and [\* \*] had submitted no financial capability documentation. Id.

#### Communications and proposal amendments

On November 7, 1996, the IPT met to consider communications with offerors. The IPT considered having communications with all offerors, the two offerors with the highest technical scores, or only the offeror with the highest technical score and the lowest price. FAA Protest File, Exhibit IIIF(1) at 1627. The IPT referred to paragraph 3.2.3.1.2.2 of the FAA's AMS, which provides that communications with one offeror do not necessitate communications with other offerors, since communications will be offeror specific. Based on the evaluation criteria of the RFO making the technical evaluation significantly more important than price, and Four Winds' technical score, which was [\* \*] percent higher than DCT's, the IPT determined to conduct communications with Four Winds only. If FAA and Four Winds were "unable to come to agreement," the IPT determined that communications would then move to DCT. Id.

On November 8, the Price Team forwarded to the contracting officer pricing issues for communications. The Pricing Team identified concerns about the hourly rates being less than the wages currently paid and determined this to be a matter of performance risk. FAA Protest File, Exhibit IIIE(2)(b)(5) at 1623. That same day, the FAA forwarded a partial list of communication items to Four Winds. FAA advised Four Winds that proof of Four Winds' financial capacity needed to be submitted to the FAA for review. Four Winds' proposal, including its proposed subcontractors, reflected that the prime contractor was proposing [\* \*m \*m \*]. FAA requested that Four Winds address that issue. Four Winds needed to provide proposed salary schedules for the base year and all option years. In terms of risk evaluation, [\* \* \*]. FAA requested an opportunity to discuss its concerns and advised Four Winds that its comments and revisions would be



requested. Id., Exhibit IIIF(2) at 1630. The Pricing Team had similar comments on subcontractors JWK and FKW. Id. at 1631-32.

These items were discussed by telephone conference on November 13. FAA Protest File, Exhibit IIIF(3) at 1634. As a result of the these communications, [\* \* \*] provided its statements of income and retained earnings and its statement of cash flows. Id., Exhibit IIIF(5)(b) at 1689-90. [\* \*] revised its labor rates to [\* \* \* \*]. Id. at 1665. Four Winds submitted a revised spreadsheet showing total contract costs as \$24,851,900. Id., Exhibit IIIF(5)(c) at 1700. In its cost proposals, Four Winds submitted balance sheets and income statements from November 30, 1994, through October 31, 1996. Id., Exhibit IIID(2)(b) at 1363-98. [\* \*] revised its pricing, increasing its labor rates. Id., Exhibit IIIF(5)(a), attachment 3 at 1649a.

By letter of November 22, the FAA advised Four Winds that it had not included required [\* \* \*] costs when calculating percentages of contractor and subcontractor labor. The FAA requested that the Limitations on Subcontracting Clause formula be completed and returned to the contracting officer. FAA Protest File, Exhibit IIIF(6) at 1707. Four Winds responded by stating that it read the labor subcontracting clause as [\* \* \*]. However, by recalculating [\* \*] costs to include [\* \*], the percentage of labor to be performed by Four Winds was 50.6 percent, by [\* \* \*] percent, and by [\* \* \*] percent. [\* \* \*] was to perform .1 percent. Id. at 1722. Later, the FAA found that Four Winds had erred in calculating FICA percentages. Four Winds had used [\* \* \* \*] as an allocation base for FICA. Id., Exhibit IIIF(7) at 1744.

Correction of the FICA percentages showed that Four Winds proposed to perform [\* \*] percent of the labor, with [\* \*] performing [\* \*] percent, [\* \*] performing [\* \*] percent, and [\* \* \*] performing [\* \*] percent. FAA Protest File, Exhibit IIIF(8)(a) at 1752.

#### Final proposal evaluation and award

In its award decision document, the FAA noted that Four Winds, revised price, after communications, was \$24,681,900. FAA Protest File, Exhibit IIIF(10) at 1808. The Pricing Team accepted Four Winds' pricing in its revised proposal as reasonable, realistic, and containing no significant errors. Id. at 1805. The increase in price was largely due to Four Winds increasing the proposed hourly wages of its employees to those paid to the incumbent employees. Id.

DCT's price was \$23,655,356.81. DCT's technical score was 3.17. Four Winds' technical score was 3.60, after being adjusted upward by .05 for each evaluator. FAA Protest File, Exhibit IIIF(10) at 1804. This adjustment was made necessary because respondent had hired one of Four Winds' proposed employees, and Four Winds substituted another individual. FAA Supplemental Submission, Enclosure A. DCT's offer would cost FAA \$7,462,257.67 per quality point. Four Winds offer would cost FAA \$6,856,061.39 per quality point. Id. at 1810. The IPT

concluded, therefore, that Four Winds' proposal represented the best value as against DCT's proposal.

This contract has been performed since December 6, 1996. To date under this contract, Four Winds, [\* \*] and [\* \*] have performed [\* \*] percent, [\* \*] percent, and [\* \*] percent of the direct labor, respectively. FAA Supplemental Statement, Exhibit I.

Four Winds has been certified by the SBA through July 31, 1997, as an 8(a) small business. Four Winds' Supplemental Protest File, Exhibit G at 11023. The SBA has approved standard industrial code (SIC) 8744, Facility/Base Support Management Services, as part of Four Winds' business plan. Id., Exhibit H at 11030. This acquisition is classified under SIC 8744. FAA Protest File, Exhibit IIIB at 140 (1 R.2).

### Discussion

Protester presents five counts. We discuss them in the order presented in DCT's statement of position of May 5, 1997.

#### Count one--affiliation

DCT maintains that Four Winds is an affiliate of JWK in that "Four Winds and JWK are sharing employees to engage in and carry out a specific business venture for joint profit"--i.e. the MMAC maintenance contractual effort. DCT Statement of Position at 10000.

As noted above, clause 3.6.1-1 of the AMS which defines a small business, and was incorporated by reference in the RFO, includes affiliates. As the MMAC maintenance contract was set aside solely for small businesses, if Four Winds is affiliated in this effort with JWK--a large business--then Four Winds is ineligible for award. The AMS defines "affiliated offerors~ as follows:

Business concerns are affiliates of each other when, either directly or indirectly, (1) one concern controls or has the power to control the other, or (2) a third party controls or has the power to control both.

AMS Clause 3.2.2.3-3 (April 1996). That definition is applicable to general business arrangements and is found in 13 CFR part 121. See 13 CFR 121.103(a). Part 121 of 13 CFR goes further, however, and provides a definition of affiliation based on arrangements for particular contracts. Concerns bidding as a joint venture are considered affiliated with each other with regard to performance of a particular contract. A contractor and subcontractor are treated as a joint venture if the ostensible subcontractor will perform primary and vital requirements of the contract or if the prime contractor is unusually reliant upon the ostensible subcontractor. All requirements of the contract are considered in

reviewing the relationship, including contract management, technical responsibility, and the percentage of contracted work. 13 CFR 121.103(f)(3). Since the FAA's certification in the RFO referenced 13 CFR Part 121, we consider this definition, as well as the general definition in AMS 3.2.2.3-3, relevant.

DCT has not shown that the contracting officer acted without a rational basis in accepting Four Winds' small business certification for this procurement.

DCT argues that [\* \*] affiliation is established by [\* \*] signing in as a representative of Four Winds during the pre-proposal conference for the MMAC maintenance contract. DCT argues that [\* \*] has the power to control Four Winds through providing for Four Winds' fiscal needs. [\* \*] participation at a pre-proposal conference for MMAC maintenance contract shows neither affiliation or control as part of a general business arrangement; it simply reflects [\* \*] proposed status as a subcontractor to Four Winds for the MMAC maintenance contract effort.

The SBA's regulations do not prohibit a small business from subcontracting with a large business. Creativision. DCT must show that the contracting officer acted without a rational basis in accepting Four Winds' certification. In other words, DCT must show that the contracting officer, prior to award, had information which reasonably impeached the certification. See Fiber-Lam. Inc., 69 Comp. Gen. 364 (1990).

DCT has not made the required showing. DCT points to [\* \*] promise of interim financing. Four Winds, however, has its own line of credit from the [\* \*] and was not reliant upon [\* \*] for contract performance. [\* \*] submitted its cost proposal in a sealed envelope so that Four Winds would not see it, "due to the competitive nature of our business." Four Winds took the lead management and performance role on the contract, with [\* \*] contemplating contract work of only 28.77 percent. The evidence establishes that [\* \*] was acting as a sub-contractor; it was not affiliated with Four Winds either generally or specifically for this contract. Four Winds had received an approval as a small business from the SBA and an approved business plan for the SIC code involved in this procurement. The contracting officer, therefore, acted with a rational basis in accepting the certification.

#### Count two--lack of documentation

DCT claims that the FAA did not receive the required financial capacity documentation from Four Winds, in response to either the SIR or the RFO. The SIR requested information on financial capacity, but did not specify what type of information. While all offerors submitted some information, the cost analyst rationally decided he could not determine the adequacy of offeror's financial capacity.

Later, the RFO required the latest financial statements from vendors. There is nothing in the RFO, however, requiring the contracting officer to eliminate offerors for alleged inadequate financial statements. Price/cost was to be evaluated for completeness, reasonableness, realism, and adequate accounting system, and was not to be numerically scored. The adequacy of financial statements could very well impact the cost evaluation.

Four Winds provided income and balance statements, as well as financial statements from [\* \*]. Four Winds provided a commitment letter from the [\* \*] providing for Four Winds financing. [\* \*] agreed to fund immediate financial needs. Based on these submittals, the contracting officer could rationally conclude that Four Winds was a financially stable contractor, with a price/cost proposal which was complete, reasonable, realistic and with an adequate accounting system.

As part of claim two, DCT complains that during the SIR downselect process, the TET checked only a reference for [\* \*], while the TET checked all references for DCT. DCT's submissions do not prove that the TET checked only one reference. Four Winds provided four references for its contracts that the TET could have easily have checked. Additional submissions from the agency show that it checked references for Four Winds as well. In any event, the SIR did not require the Government to check a particular number of references.

#### Count three--unrealistically priced offer

DCT maintains that Four Winds submitted an unrealistically priced offer and that Four Winds did not understand the contract requirement. The record demonstrates that Four Winds submitted an

initial cost proposal which the Pricing Team determined involved performance risk. Subsequent communications caused Four Winds' price to increase from \$21,303,710 to \$24,681,900. There is no evidence, as DCT maintains, that Four Winds did not understand the requirement and the Pricing Team did not so conclude. Four Winds' SIR submission was highly ranked technically; its RFO proposal was the highest ranked. Save for one instance (see below), DCT does not challenge the technical rankings. Based on the technical evaluation of proposals and the offerors' prices, the contracting officer's determination that Four Winds' proposal represented the best value to the Government is rationally supported.

#### Count four--alleged competitive advantage through communications with agency

DCT complains that the agency gained a competitive advantage by holding "discussions" with one offeror--Four Winds--and not with it. The AMS principles provide for agency "communications," (not discussions) with offerors, and provide for communications with only one offeror:

- • One-on-one communications may continue throughout the process, as required, at the discretion of the IPT. Communications with one offeror do not necessitate communications with other offerors since communications will be offeror specific. Regardless of the varying level of communications with individual offerors, the CO should ensure that such communications do not afford any offeror an unfair competitive advantage.

AMS 3.2.2.3.1.2.2. The purpose of communications is to insure that "there are mutual understandings between the FAA and the offerors on all aspects of the procurement, including the offerors' submittals/proposals." Id.

Here, the FAA conducted communications with Four Winds to ensure that Four Winds eliminated performance risk from its pricing. Four Winds did change its pricing, but its pricing increased, by \$3,378,190 or 15.8 percent. The revised price decreased the competitive advantage accruing to Four Winds because of its initial lower priced proposal. Four Winds' proposal was now higher priced than DCT's proposal; Four Winds would win the contract award only if its higher priced proposal proved the best value in light of the competing technical scores. The price increase, therefore, contrary to DCT's argument, decreased Four Winds' competitive advantage.

The contracting officer also engaged in communications about the percentage of contract labor Four Winds had planned to devote to the contract effort. In making its original calculation of labor hours, Four Winds misapplied the stated formula. When it recalculated the labor hours in accordance with the formula for labor hour percentages and for the correct FICA allocation base, its adjustment resulted in a percentage of 50.38 for the labor it was to perform. The AMS principles allow for these discussions.

As regards Four Winds' initial cost proposal, the Pricing Team had found a major problem in allocation of labor percentages among the prime- and subcontractors and performance risk problems with hourly wage rates. DCT speculates that had the communications not occurred, Four Winds may well have been eliminated. Whether or not that is true--it is speculative at best--the AMS principles provide for the communications that the FAA conducted. The AMS principles leave to the discretion of the contracting officer the decision as to the number of offerors to be engaged in communications. Four Winds' technical score was 13.2 percent higher than DCT's, and the contracting officer's decision (through the IPT) to conduct communications with only Four Winds is rationally based in light of the significant difference in technical scores.

DCT argues that if the FAA had held communications with DCT, DCT would have been able to clarify that its proposed substitute quality control specialist possessed quality control experience that the FAA overlooked. DCT claims that its technical score might have improved. The above is also speculation, and does

not change the fact that the contracting officer and IPT had a rational basis for its decision to limit communications to Four Winds.

To the extent that this argument includes an implicit challenge to the FAA's technical evaluation of the qualifications of the substitute quality control specialist, the challenge is untimely. This complaint was raised for the first time in DCT's statement of position of May 5, 1997. The AMS clause provides:

- • Protests must be filed with the Office of Dispute Resolution within five business days of the date that the protester was aware or should have been aware of the agency action or inaction which forms the basis of the protest.

AMS Clause 3.9.1-3 (April 1996). DCT was required to protest this issue no later than five business days after it received the notice of award. DCT has advised the Board Judge that it received the FAA's notice of award to Four Winds on December 11, 1996. DCT should have raised this issue in its protest of December 17.

Count five--required disqualification Four Winds because of Four Winds' use of [\* \*] as a subcontractor

DCT maintains that [\* \*] had an agreement to be a subcontractor to SWS, and that when SWS was eliminated from the competition as not qualified, [\* \*]--and by extension Four Winds, which had engaged [\* \*] as a subcontractor--should have also been eliminated. This argument is specious. SWS was downselected for no reason involving [\* \*] as [\* \*] was not involved in the downselect evaluation. [\* \*] had orally agreed to become a subcontractor to SWS if SWS was deemed qualified for further proceedings in the procurement during the SIR process. The contracting officer acted rationally in not considering this oral contingent agreement in evaluating Four Winds' qualifications and the qualifications of its subcontractors.

#### Recommendation

The Board Judge recommends denial of the protest.

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ANTHONY S. BORWICK

Board Judge