

**UNITED STATES DEPARTMENT OF TRANSPORTATION**

**FEDERAL AVIATION ADMINISTRATION**

**WASHINGTON, DC**

**ORDER AND DECISION**

**FAA Order**

**Number: ODR-97-44**

**Matter: Protest by HUGHES CONTRACTING of Award**

**Pursuant to Solicitation DTFA11-97-R-00128**

**Docket: 97-ODR-00046**

**Date Served: January 20, 1998**

**ORDER AND DECISION**

Hughes Contracting submitted a protest dated June 12, 1997, against the award of a contract for the construction of fire safety improvements at the Salt Lake City, Utah, Air Route Traffic Control Center (ARTCC). Hughes contends that it submitted the low offer in response to the solicitation, and that the award was incorrectly made at a higher price to M-Construction. The contracting office of the FAA's Northwest Mountain Region responded that the award was properly made in accordance with the "best value" selection scheme of the solicitation, and that Hughes' protest is untimely. For the reasons below, I deny Hughes' protest.

The following facts, which derive from Hughes' protest, the agency response, and the documentation of record are largely undisputed:

The FAA's Air Route Traffic Control Center at Salt Lake City Utah issued a Screening Information Request (SIR) on January 28, 1997, for fire protection system modifications and upgrades. The SIR was structured on a "best value" basis, under which award would not necessarily be made to the low offeror, but would be based on evaluation of technical advantage and price. Section "M" of the solicitation gave the following four technical factors to be evaluated: (1) Knowledge and experience of key project elements; (2) Past performance, (3) Management understanding of the project and approach, and

(4) Qualifications of key personnel. The solicitation made clear that contract award would not necessarily be made to the lowest priced offeror if technical factors outweighed the price advantage.

The solicitation also incorporated by reference Clause 3.9.1-3 of the agency's Acquisition Management System (AMS) which provided, in pertinent part:

Protests must be filed with the Office of Dispute Resolution within 5 business days of the date the protester was aware, or reasonably should have been aware, of the agency action or inaction which forms the basis of protest...

Hughes and four other companies responded to the SIR. Based on the information in those responses, the Integrated Product Team (IPT) determined that all offerors except one would be invited to provide more detailed information on each of the four technical criteria. A Request for Offers (RFO), including specifications and drawings, was mailed to each offeror on March 14, 1997. One of the five offerors withdrew, and discussions were held with the remaining four in late March. On April 7, pricing proposals were received as follows:

Hughes Contracting  
\$140,050.20

M-Construction \$170,000.21

U-Systems, Inc. \$210,350.08

CDR Enterprises, Inc.  
\$212,226.00

The IPT determined to hold final price and technical discussions with the two lowest offerors, Hughes and M-Construction. Those discussions occurred on April 24 and 25, respectively. Based on both the discussions and the proposals already submitted, the IPT determined that, notwithstanding its higher price, M-Construction offered the better value in accordance with the terms of the solicitation. Award notice was sent to the other offerors on May 23, and on May 28, Hughes filed a request under the Freedom of Information Act for an abstract of offers. On June 2, the contracting officer had a telephone conversation with Mr. Hughes, and on June 9, the agency responded to his FOIA request. The instant protest was filed on June 12, 1997.

*Timeliness.* The Northwest Mountain Region argues that the protest is untimely, and that it should be dismissed without review of the merits. The Region's argument is premised on the fact that notice of the award was sent to Hughes on May 23, yet the protest was not filed until June 12, which exceeds the five day filing requirement of clause 3.9.1-3. Hughes responds that the essence of its protest is that it was the low offeror, but that fact was not disclosed until he received the FOIA response on June 9. The agency disputes this, arguing that prices were mentioned in the June 2 telephone conversation with the C.O. Mr. Hughes asserts that he was not advised of M-Construction's higher priced offer on June 2, and that the C.O. pointedly refused to answer his questions about who was the low offeror.

This is a factual dispute which cannot be resolved from the contemporaneous documentation. Mr. Hughes is adamant that he did not know that the awardee's price was higher than his until the FOIA response of June 9, and that he protested immediately. The agency response on this precise point is less definite, and thus, I find that Hughes met the timeliness requirements of the AMS.

The standard of review for substantive issues under the AMS is that required by the Administrative Procedures Act, 5 U.S.C. 706. Agency actions will be upheld so long as they have a rational basis and are neither arbitrary, capricious, or an abuse of discretion. Accordingly, I have reviewed the record focusing on the following points.

This was a "best value" procurement, in which technical factors were stated as being as important as price. As the agency report indicates, this was because the construction was to take place at an operational, 24-hour facility, where disruption had to be kept to a

minimum. The Region, therefore, clearly and justifiably stated its willingness to pay a premium for a proposal that promised certain technical advantages. Hughes' proposal was never determined to be technically unacceptable; rather, the Region concluded that M-Construction's proposal was worth the premium. The basis for that determination was:

- *Quality Control*. The IPT was impressed by M-Construction's proposed use of a full-time, independent, on-site quality control representative who would report directly to the owner. While Hughes' proposed assumption of that function by the site superintendent was technically acceptable, the IPT clearly believed that M-Construction's approach was superior. Given Section "M's" stated concern for *Management Approach*, I find that the IPT's conclusion on this point was rational.

- *The superintendent*. M-Construction proposed that the site superintendent would be one of several individuals within the company whose resumes would be submitted for approval post-award. Hughes' proposal was more ambiguous about who and how a superintendent would be assigned. This was also an appropriate consideration for the IPT.

- *Subcontracting*. The IPT was concerned about a statement that Mr. Hughes made during the discussions which suggested that he would use informal, or "gentleman's agreements" with his subcontractors. There is some dispute over whether the term "gentleman's agreement" was actually used, and Mr. Hughes strongly disputes that he would rely on any such informal relationships, but the IPT clearly believed that

M-Construction's formalized subcontracting plan was superior. I believe that this was a valid consideration, given the solicitation's stated concern for *Management Approach*, and that the IPT acted rationally in according more weight to M-Construction on this point.

- *Past performance*. In keeping with the *Past Performance* factor of section "M," the contracting officer called prior jobsites of both contractors for references. While

M-Construction's references were excellent, two of the offices contacted for Hughes noted some dissatisfaction relating to Hughes' ability to correct problems during performance, working irregular hours, and keeping the jobsite clean and orderly.

Mr. Hughes vigorously disputes these assertions, and claims that the individuals contacted were not the people with whom he dealt and were not knowledgeable about the facts in question. The contracting officer, however, states that in each case, he asked for

the reference's name and relationship to the job. In each instance, the person giving the reference was an employee of the respective organization who claimed some knowledge of the project being discussed. While these two references may not have been the most knowledgeable persons available, the IPT acted rationally in considering their input.

- *Pricing.* During the April 24 discussions, Hughes was asked whether its proposed price may have been mistaken in any regard. While Mr. Hughes affirmed that he could profitably complete the project at its proposed price, he made a comment to the effect that the price could have been adjusted upward by some \$5,800. While the IPT did not consider this to be an admission of mistake, or adjust Hughes' proposed price upwardly for evaluation purposes, the statement caused some concern that Hughes might encounter performance difficulties at its proposed price. This also was an appropriate consideration in the award determination.

Cumulatively, these points support the IPT's decision to award to M-Construction at a price about 20% higher than Hughes. That determination was consistent with section "M" of the solicitation and the technical evaluation. The award decision was supported by two separate rounds of discussions with, and two written submissions from, each contractor. While the protester disputes various aspects of the technical findings, there is substantial evidence in the record to support that, overall, M-Construction's proposal offered several advantages consistent with the solicitation's award scheme. Accordingly, pursuant to section 3.9 of the Acquisition Management System the protest is denied. [1]

This is the final agency order in this matter. To the extent that this decision is subject to review, such review shall be sought in accordance with 49 U.S.C. 46110. A petition for review must be filed with the United States Court of Appeals for the District of Columbia Circuit, or in the Court of Appeals of the United States for the Circuit in which the petitioner resides or has its principal place of business. The petition must be filed no later than 60 days after the date that this order is issued.

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JANE F. GARVEY

ADMINISTRATOR

Issued this 20th day of January 1998

[1] The Federal Aviation Administration Acquisition Management System implements section 348 of Public Law 104-50.