

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

RECOMMENDATION REGARDING RECONSIDERATION REQUEST

Matter: Protest of Consecutive Weather

Pursuant to Solicitation DTFA06-99-R-30004

Docket: ODRA Docket 99-ODRA-00112

I. INTRODUCTION

This matter currently is before the Office of Dispute Resolution for Acquisition ("ODRA") on Consecutive Weather's ("Consecutive") Request for Reconsideration ("Request") of the Final Decision of the FAA Administrator in this case.¹ For the reasons stated herein, the ODRA believes that the Request is meritless and recommends that the Administrator decline to reconsider the Final Decision.

Consecutive filed the instant protest ("Protest") with the ODRA on January 11, 1999. The Protest related to the acquisition of weather observation services by the FAA's Southern Region ("Region") for seven different sites. In the Protest, Consecutive alleged that it improperly had been found technically unacceptable as an offeror and excluded from the competition. Consecutive's Protest challenged as irrational, the rating of "poor" it had received for the "Management Plan" portion of the evaluation, and the overall evaluation scheme of the procurement.

On April 9, 1999, acting on the Findings and Recommendation of the ODRA, the FAA Administrator issued a Final Decision denying the Protest. *See* Administrator's Order ODRA-99-113. In so doing, the Administrator specifically adopted the Findings and Recommendations of the ODRA that: (1) the evaluation scheme utilized by the Region was rationally based and rationally applied; (2) the "poor" rating received by Consecutive for one of the evaluation factors was rationally based on the failure of Consecutive to provide a required staffing plan; and (3) there had been an adequate competition notwithstanding the exclusion of Consecutive and six other bidders during the evaluation process.

II. THE REVIEW PROCESS AND STANDARD

This case represents the ODRA's first consideration of a request for reconsideration of an Administrator's Final Decision. It should be noted at the outset that the ODRA cannot itself decide a request to reconsider a final Agency decision by the Administrator. Rather, the ODRA, as the delegatee of the Administrator for purposes of adjudications under the AMS, will review and conduct appropriate proceedings on such reconsideration requests and make recommendations to the Administrator concerning their disposition. The ODRA's authority to review reconsideration requests on the Administrator's behalf is grounded in the general grants of authority to the ODRA under the AMS and the Delegation of Authority from the Administrator dated July 29, 1998, to manage and adjudicate AMS-related disputes on her behalf.

Although this case represents the first consideration of a request for reconsideration of a final Agency order under the AMS process, the ODRA has previously ruled on a request for reconsideration of an ODRA-issued interlocutory order. In the *Protests of Camber Corporation and Information Systems & Networks Corporation*, ODRA Docket Numbers 98-ODRA-00079 and 98-ODRA-00080 (Consolidated) ("ISN Protest"), the ODRA considered and rejected a request for reconsideration of an interlocutory order denying the applications of two attorneys to a protective order. In ruling that it has authority to enter interlocutory orders and decisions in pending matters without referring such decisions to the Administrator, the ODRA noted that it would not refer such interlocutory decisions to the Administrator during the pendency of a case because:

"To routinely refer such matters earlier in the adjudication process would only result in delayed, piecemeal litigation, which is inconsistent with the ODRA's charge to administer a timely, efficient dispute resolution process." ISN Protest, Decision on Reconsideration at 2.

In the ISN Protest reconsideration decision², the ODRA established the following standard that it applies to reconsideration requests:

In reviewing requests for reconsideration of its decisions and orders, the ODRA similarly will require that the moving party demonstrate either:

(1) clear errors of fact or law in the underlying decision; or (2) previously unavailable information warranting reversal or modification. The ODRA will not entertain such requests as a routine matter. Nor will it consider requests demonstrating mere disagreement with a decision or restatement of a previous argument. ISN Protest, Decision on Reconsideration at 2.

In establishing the reconsideration standard, the ODRA adopted the approach taken by other acquisition dispute forums:

Motions for reconsideration should not be routine requests of losing parties. Mere disagreement with the result of a decision, with the belief

that the decision is in error, does not warrant reconsideration. Nor will a request for reconsideration be granted on the basis of simple reiteration of arguments raised and rejected in the underlying decision.

ISN Protest, Decision on Reconsideration at 2, *quoting from Electronic Data Systems Corporation v. Department of State*, GSBCA Number 11593-P-R, 92-1 BCA ¶224, 763, 1992 BPD ¶27.

In cases where a party seeks reconsideration after issuance of an Administrator's Final Decision, the ODRA will, after providing opportunity for briefing by the interested parties, prepare Findings and Recommendations for the FAA Administrator, or the Administrator's delegate, who will make the final decision on the reconsideration request. In preparing its Findings and Recommendations, the ODRA will apply the reconsideration standard stated in the ISN Protest reconsideration decision.

III. DISCUSSION

Consecutive cites two grounds in support of its Reconsideration Request, as follows:

1. The point scoring used to arrive at the satisfactory and excellent rating is irrational.
2. The basis used for the protest denial concerning a specific KD factor was not accurate. Request at 1.

Consecutive elaborates on the first ground by first conceding that "the evaluation team scored KD 002 Factor A in accordance with the Washington mandated evaluation scheme". Consecutive then asserts that "it is the very Washington mandated evaluation scheme that is irrational." Request at 1. This same challenge to the rationality of the evaluation scheme was asserted by Consecutive in the Protest and implicitly rejected by the ODRA. *See* Consecutive Weather letter dated March 8, 1999, Reply to Agency Report (Regarding the Washington-mandated evaluation scheme, Consecutive asserted: "This newly introduced evaluation scheme is fatally flawed, irrational and invalid.") Consecutive's Request presents no new evidence and identifies no errors of fact or law that would support its reiterated challenge to the evaluation scheme. The ODRA therefore finds this ground to be meritless.

The Request's second ground, concerning the "poor" rating received by Consecutive Weather as not "accurate" also was adjudicated in the original Protest. As is more fully explained in the ODRA's Findings and Recommendation in the Protest, the ratings received by Consecutive were consistent with the criteria set forth in the SIR, and were rationally based. Consecutive attempts to resurrect the argument by asserting that the "poor" rating it received for the KD 002B "Staffing" portion of the evaluation was irrelevant. According to Consecutive "the Southern Region did not consider a poor rating in a particular factor as disqualifying." Request at 2. In support of its position,

Consecutive cites only to hearsay evidence, *i.e.*, conversations which it purportedly had with an ADR neutral appointed by the ODRA and certain Southern Region personnel during the pendency of the Protest. Such conversations were not part of the record in the Protest. Rather, such conversations took place in an attempt at alternative resolution of the dispute. Any such information may not have been admissible in the adjudication and cannot be considered at this time. In any event, Consecutive did not seek to include the referenced information in the record during the pendency of protest, even though the information was, by its own admission, available to it at the time. The ODRA already has adopted the well established rule that potentially relevant facts known by, or available to a party during pendency of an adjudication, but not brought forward, may not support a reconsideration request. ISN Protest, Decision on Reconsideration.

IV. CONCLUSION AND RECOMMENDATION

Consecutive's reconsideration request fails to demonstrate any errors of fact or law that would warrant a reversal. The ODRA therefore recommends that the Administrator summarily deny Consecutive's Request and decline to reconsider the Final Decision in this case.

_____/s/_____
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FOOTNOTES:

¹ Consecutive's *pro se* reconsideration request, filed with the ODRA on June 7, 1999, was styled as a "Request for Review." By letter of the same date, the ODRA informed the parties that it would treat the filing as a request for reconsideration. The FAA Southern Region subsequently filed an Opposition to the Request.

² The ODRA denied the ISN reconsideration request, finding that ISN had not raised any errors of fact of law that would warrant or reverse the modification and that the request presented no new information but, merely disagreed with the analysis of the underlying decision.