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

FINDINGS AND RECOMMENDATIONS

Matter: **Contract Dispute of Zullo Building Maintenance, LLC**
Under Contract DTFAWN-11-C-00190

Docket No.: **13-ODRA-00676**

Appearances:

For the Contractor: Angelo Zullo, Director

For the FAA Western Logistics Service Area: Karen D. Huber, Esq.

Zullo Building Maintenance, LLC ("ZBM") challenges a contracting officer's decision to not exercise an option under ZBM's janitorial services contract. For the reasons explained more fully below, the Office of Dispute Resolution for Acquisition ("ODRA") recommends that the contract dispute be denied.

I. Jurisdiction and Standard of Review

ZBM holds contract DTFAWN-11-C-00190 ("the Contract"), issued by Federal Aviation Administration's ("FAA") Northwest Mountain Region/Western Service Area ("the Service Area"). *Dispute File ("DF")* Tab 2 at 1. The Contract was issued under the FAA's Acquisition Management System ("AMS"). *Id*. at 4. The ODRA finds, therefore, that it has jurisdiction over this contract dispute. 49 U.S.C. § 40110(d)(4) (2012).

The ODRA also finds that this contract dispute falls within the final decision authority delegated to the Director of the ODRA. ZBM seeks in the alternative either the award of $86,410 (comprising lost profit and unamortized equipment costs) or the award of the last two option years under the Contract. *Contract Dispute* at 2. Both the third and fourth option years were each originally priced at $468,432, but increased by a *de minimis* amount due at least in part to increases in Department of Labor wage issues. *DF* Tabs 2, 23 and 51.[1] Both of ZBM's measures of relief fall well within the FAA Administrator's Delegation of final decision authority to the Director of the ODRA. *Delegation of Authority*, March 19, 2014.[2]

The ODRA reviews AMS contract disputes *de novo*, and the burden of proof in this matter rests on ZBM as the party seeking relief. 5 U.S.C. § 556(d) (2012); *see also*, 14 C.F.R. §17.33(m)(2014). Neither party requested a hearing under 14 C.F.R. § 17.33(k), and the record closed on November 24, 2014.

II. Findings and Discussion

The Service Area executed the Contract with ZBM on January 21, 2011. *DF* Tab 1 at 1. The Contract obligated ZBM to provide a wide array of janitorial services for the Salt Lake City Air Route Traffic Control Center ("ARTCC") and Child Care Center in Salt Lake City, Utah. *Id*. at 3. The Contract includes a base period of performance, and four yearly options corresponding to fiscal years 2012 through 2015. *Id*. The Service Area exercised the first two option periods, but elected not to exercise the third option for fiscal year 2014. *DF* Tab 56, *Contracting Officer's Declaration*, at ¶¶ 7-8, 10; *see also Contract Dispute* at 1. ZBM challenges this decision on the grounds that it was based on "untrue, misleading, and discriminatory information" provided by the last contracting officer's technical representative ("COTR")[3], assigned to the Contract. *Contract Dispute* at 2. ZBM also challenges the contracting officer's decision to proceed with

[1] Monthly billing under option year two increased from the original monthly price of $39,239 to $41,359. *DF* Tabs 2 and 51. Department of Labor investigation documents in Tab 23 reveal a negotiated wage increase.

[2] *Delegation of Authority*, 79 Fed. Reg. 21,832 (April 17, 2014). Under this delegation, the Director has authority to issue final agency decisions in "a contract dispute involving a total amount to be adjudicated, exclusive of interest, legal fees or costs, of not more than ten million dollars ($10,000,000); …." *Id*.

[3] The record refers to both "Contracting Officer's Technical Representatives" (COTR) and "Contracting Officer's Representatives" (COR). ZBM refers to the "CORT" on numerous occasions apparently by mistake. For consistency in these Findings and Recommendations, the ODRA will use the acronym "COTR" in all instances. The COTR in question was officially appointed as COTR on September 17, 2013. *DF* Tab 48. Prior to that date, however, he had filled-in as the COTR starting in June, 2013. *DF* Tab 57, Decl. of First COTR, ¶ 6. For convenience, he is identified as a COTR regardless of whether he was acting for the prior COTR or exercising authority under his own appointment.

the competition for a new contract rather than await resolution of the issues raised by ZBM. Each of these two grounds is addressed in turn.

A. ZBM has not Shown Bad Faith in the Decision to not Exercise the Third Option

ZBM's first ground is a challenge to statements written by the most recent COTR on the contract. *Contract Dispute* at 1-2. The COTR wrote the statements at issue for the contracting officer eight days after ZBM received notice that the third option would not be exercised. *Compare DF* Tab 34 *with* Tab 36. ZBM argues that the statements are "discriminatory, misleading and untrue," and therefore render the option decision improper. *Contract Dispute* at 2.

When faced with allegations like ZBM's, federal contract forums consider whether the decision to forego the option was tainted by bad faith. *See e.g., Innovative (PBX) Telephone Services, Inc. v. Dept. of Veteran Affairs*, CBCA 44-46, 576, 08-1 BCA ¶ 33,854 ("gravamen" of alleged discrimination is bad faith in refusing to exercise an option).[4] Indeed, in a prior decision issued in this matter, the ODRA explained that the fundamental issue presented here is whether the contracting officer's decision was made in bad faith or constituted an abuse of discretion. *Contract Dispute of Zullo Building Maintenance, LLC*, 13-ODRA-00676 (*Decision and Order on Discovery* dated June 12, 2014).[5] Although ODRA precedent and regulation impose the

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[4] The ODRA is not bound to follow the decisions of the boards of contract appeals, but may look to their decisions as persuasive when the underlying contract issues are analogous to contracting under the AMS.

[5] The ODRA explained:

> The issue presented in this case is whether the Contracting Officer's decision not to exercise the third option year was made in bad faith or constituted an abuse of discretion. It is well established that the government has discretion to determine whether or not to exercise the option years contained in the option clause unless such decision is motivated by bad faith. *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA P 33,514, at 166,062. Relief may be granted for the Government's decision not to exercise an option only if the contractor can prove that the decision was made in bad faith or was so arbitrary or capricious as to constitute an abuse of discretion. *Id.* Notably, proof of bad faith requires more than evidence of contract administration lapses, coordination failures, interpretative errors, or incompetence. *Federal Data Corporation*, DOTCAB No. 2389, 91-3 B.C.A. (CCH) P 24,063, *citing Nolan Brothers, Inc. v. United States*, 405 F.2d 1250, 1253 (1969) ("[A]n incorrect reading of the contract by Government officials is not tantamount to malice or bad faith."). Rather, a bad faith claim requires "egregious conduct, specific intent to injure, malice, or conspiracy." *Contract Dispute of Astornet Technologies, Inc.*, 08-ODRA-00466.

"clear and convincing" standard of proof for allegations of bad faith, the facts discussed below show that ZBM has failed to prove bad faith even by the lesser preponderance of the evidence standard. *Contract Dispute of Dynamic Security Concepts, Inc.*, 05-ODRA-00346; 14 C.F.R. § 17.33(m) (2014).

The analysis naturally must start with the COTR's statements, placed in context. On August 15, 2013, the contracting officer sent a letter informing ZBM that its third option would not be exercised due to "performance difficulties" and "changes that will be incorporated into the new scope of work." *DF* Tab 34. In response, ZBM: (1) expressed confusion about any "performance difficulties," (2) asserted that during a recent inspection the COTR stated "everything looked excellent," and (3) sought more information about the difficulties. *DF* Tab 35.[6] The contracting officer, in order to respond to ZBM, requested information from the COTR about performance difficulties. *DF* Tab 36. The COTR complied, and provided the written statements now at issue. *Id*. The contracting officer attached the COTR's written descriptions of performance problems to a letter sent to ZBM on August 26, 2013. *DF* Tab 37.

The document the COTR provided strictly addresses contract performance matters. *DF* Tab 37. It opens by describing meetings with ZBM prior to the exercise of the second option year. At that meeting, "definite standards were established … which required Zullo Building Maintenance

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Contract Dispute of Zullo Building Maintenance, LLC, 13-ODRA-00676 (*Decision and Order on Discovery* dated June 12, 2014).

[6] ZBM's managing member wrote specifically:

> I am somewhat confused by your statement that there has [sic] been performance difficulties meeting the contract requirements. On July 29, 2013 a walkthrough inspection was performed by [the COTR] with our janitorial lead …. <u>At the conclusion of the inspection he stated that everything looked excellent</u>. In the almost eight years that Zullo Building Maintenance has been performing this contract we have received minimal write-up's. I would appreciate your informing me of what challenges the FAA has encountered with our performance.

DF Tab 35 (underline added). The underlined language contradicts correspondence ZBM sent later as this contract dispute developed. Specifically, the underlined language is from ZBM's first attempt to question the contracting officer's rationale about the quality of ZBM's work. In its September 10, 2013 letter, however, ZBM changed its story by relying upon and submitting the lead janitor's unsworn statement asserting that the COTR described various areas as "gross." *Contract Dispute*, attachments dated September 6, 2013 and September 10, 2013. The lead janitor's statement does not provide any information that could suggest the COTR found the conditions to be "excellent," as previously represented by ZBM management.

to raise the level of their performance and fulfill all of the terms of their contract with the FAA." *DF* Tab 37, attachment at 1. The document then provides examples with citations to the paragraphs in the contract. These examples address quality control, inspection schedules, carpet cleaning, "high cleaning," trash along the perimeter fence, restocking the restrooms, failure to replace the bulbs and ballast in fluorescent light fixtures, inadequate window cleaning, vole infestations, and a trash dumpster that "is often overflowing." *Id*. at 1-2. The only mention of ZBM personal states, "When the site superintendent is required to perform inspections on the mid shift or swing shift, there is no one available on the day shift to address janitorial issues." *Id.* at 2. The ODRA finds that the statements in and of themselves reveal no improper motive or evidence of bad faith.

ZBM's position regarding the COTR's statements is found in a letter dated September 10, 2013 wherein ZBM responds to eight specific issues. *Contract Dispute,* at attached *ZBM Letter of September 10, 2013*; *DF* Tab 43. The issues ZBM addresses include site supervision, quality control, trash at the fence line, restroom supplies, burnt-out bulbs and ballast, window cleaning, voles, and an overflowing trash dumpster. *Id*. ZBM's letter uses general terms to deny the existence of problems, but does not provide citations to the contemporaneous records or sworn statements to support its version of events. *Id*. ZBM's letter also cites to an incident that occurred eight years earlier when the COTR in question allegedly was "confrontational and rude," and to another incident involving a specific employee. *Id.* at 4. Both of these incidents were under a prior contract. *Compare DF* Tabs 2 (the contract date of January 21, 2011) *with* DF Tabs 3 (record of a September 27, 2006 meeting) and 43 (*ZBM's Letter of September 10, 2013,* at 3). ZBM asserted in its letter that these incidents show racial bias.[7] *Contract Dispute*, at attached *ZBM Letter of September 10, 2013*; *DF* Tab 43.

Consistent with the ODRA Procedural Regulation, 14 C.F.R. § 17.33(b) (2014), the Service Area provided a substantive response with a tabbed and indexed dispute file containing fifty-five exhibits. In one exhibit, the contracting officer explained that when faced with the decision of whether to exercise the option, he considered funding, the option prices, and contractor's performance. *DF* Tab 56, *Contracting Officer's Decl*., at ¶ 9. More specifically, he considered

[7] Nowhere in the record does ZBM allege or establish the protected class to which its employees or owners belong.

the "strong level of dissatisfaction" at the facility over ZBM's performance. *Id.* He also considered the need to change the contract to meet the additional requirement of the organization. *Id.*, at ¶¶ 8 and 9. Finally, he considered the "robust market" of qualified, small business vendors that might "provide better services as well as better pricing." *Id.* at ¶ 9.

In contrast to ZBM's Contract Dispute and its attachments, the Service Area's Dispute File is replete with contemporaneous documents supporting the statement in the contracting officer's declaration and in his letters of August, 2013 giving notice that the option would not be exercised. The contemporaneous documents reveal on-going concerns of several ARTCC employees regarding the quality of ZBM's services under the Contract.[8] These issues included:

- Carpet cleaning (*DF* Tabs 9, 19,);
- Lighting (*DF* Tabs 17, 20, 24, 26);[9]
- Stairwell cleanliness (*DF* Tab 12);
- Window Cleaning (*DF* Tabs 13, 14, 15, 16, 18, 19, 24, 33, 53, 54);
- Dumpsters (*DF* Tab 24);
- Trash along the fence line (*DF* Tab 24);
- Supervision and responsiveness (*DF* Tab 24)

These documents reflect the opinions of several people at the facility, i.e., employees working in the serviced spaces, contracting specialists, prior COTRs, etc. All correspondents complained about the quality of the ZBM's performance. Collectively, these exhibits show that despite the allegations of bias levelled specifically at the last COTR, the consensus of opinion at the ARTCC was that ZBM's performance was seriously deficient. Indeed, one manager of the ARTCC reviewed the COTR's statements to the contracting officer after they were written *but before* ZBM responded with its allegations of discrimination and inaccuracy. *DF* Tab 40. That manager thanked the COTR and his supervisors, and reiterated many of the same concerns

[8] The dispute file also includes correspondence regarding performance issues under the predecessor contract. *DF* Tabs 4-6. The ODRA does not rely on these documents, and does not find them probative regarding performance of ZBM's most recent contract, i.e. DTFAWN-11-C-00190.

[9] The ODRA does not consider in this list of performance problems the series of correspondence involving the lights in the parking lot. The contracting specialist resolved that matter in ZBM's favor. *See DF* Tab 11 at 8 (email dated November 3, 2011 at 11:52 AM). The need to add parking lot light maintenance to the subsequent contract, however, was a legitimate consideration for not exercising the option.

identified by the COTR. *Id.*[10] Further, and aside from performance issues, the consensus opinion within the ARTCC[11] was that ZBM's contract did not sufficiently address the exterior lighting needs of the facility. *DF* Tab 28. All of these contemporaneous documents about performance and the need to change the scope of work corroborate the contracting officer's explanation of his decision.[12]

ZBM's Final Submission, filed on November 18, 2014,[13] gives the ODRA no reason to question the contracting officer's exercise of discretion regarding the option. That submission included improperly executed declarations from ZBM's contract administrator, its project manager, and the lead janitor. *ZBM Final Submission*, Tabs 10, 11, and 5, respectively. The declarations are defective because they are not executed "under penalty of perjury" in accordance with 28 U.S.C. § 1748, and they therefore lack both reliability and probative value. *See e.g., Link Treasure Limited v. Baby Trend, Inc.*, 809 F.Supp.2d 1191, 1195 (C.D. CA 2011); 5 U.S.C. § 556(d) (2012). More importantly, regardless of the defects in the ZBM declarations, nothing in the substantive texts supports charges of discrimination. Even if the ODRA were to accept that the

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[10] The Staff Manager / Executive Officer of the ARTCC wrote in an email to the COTR and his supervisors:

> Thank you for support and immediate attention to this matter. Salt Lake City ARTCC is known for its ascetically pleasing design and cleanliness. The failure of the current janitorial contract has tarnished this reputation and is beginning to affect employee morale. Windows are in disparate [sic] need of attention, floors need cleaning. Control room high cleaning is a priority; dust has a negative effect on electronics and increases risk of equipment failure which has the potential to interfere with the success of the agency's mission. As outlined below Zullo has a history of not meeting the deliverables of the contract. Therefore, immediate resolution to this unacceptable situation is necessary.

DF Tab 40.

[11] The record shows that first COTR and his manager perceived the need to revise the Contract's statement of work. *See DF* Tabs 28 and 57, *First COTR's Decl.*, at ¶ 6. In fact, the first COTR voiced the need for new exterior lighting requirements in on May 20, 2013, a month before the last COTR assumed temporary COTR duties in June of 2013. *Compare DF* Tab 28 *with* Tab 57, *First COTR's Decl*., at ¶ 6.

[12] The contracting officer's other consideration, the "robust market" for these services, is supported by documents generated after ZBM received notice that its third option would not be exercised. Specifically, the record shows that the Service Area received ten bids for the new contract. *DF* Tab 47. A pre-solicitation market survey or analysis is not in the record.

[13] ZBM filed its Final Submission one day after the November 17, 2014 deadline established by the ODRA. The Service Area, however, did not object to the submission. In the interest of providing ZBM a full opportunity to be heard, the ODRA has admitted the late filing into the record.

last COTR was confrontational and rude, ZBM does not attempt to provide any actual communications from the COTR that reflect racial bias.[14] Mere confrontation does not establish discrimination. *Accord, Appeals of Franklin Wilborn*, PSBCA No. 6260, 10-2 BCA ¶ 34,608 (yelling at a negotiation shows some friction, but does not support finding discrimination). Aside from these declarations, ZBM's Final Submission also included several exhibits containing collected email correspondence, schedules, performance reports, and other items. *ZBM Final Submission*, Tabs 1-5; 6-9. Despite a lengthy discovery opportunity in this matter, the materials ZBM added to the record do not support a conclusion that bad faith was present or that the many ARTCC employees' negative impressions of ZBM's performance were anything but genuine and reasonable.

Apart from the allegations of bias, the ODRA has also reviewed the record for "egregious conduct, specific intent to injure, malice, or conspiracy." *Contract Dispute of Astornet Technologies, Inc.*, 08-ODRA-00466. As to conduct, the ODRA has found that the incidents of allegedly rude and confrontational behavior—egregious or not—occurred several years prior to performance of the contract and have no bearing on the question at hand. *See supra* p. 4. As to intent to injure, malice or conspiracy, the record as a whole shows an unremarkable mix of routine communications that seek better performance under the contract. *See supra* p. 6 (bulleted items). Even the material that ZBM provided in its Final Submission for the period after June of 2013, when the last COTR assumed his duties,[15] is barren of evidence showing malicious intent. *ZBM Final Submission*, Tabs 1-8. Neither the ODRA nor other forums will fault government personnel for "dogged persistence" in the proper administration of a contract or differences of opinion regarding performance. *Innovative Telephone Services*, 2008 WL 1960352, at 20.

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[14] The defective declaration in ZBM's Final Submission, at Tab 10, for example, discusses a meeting that occurred under a predecessor contract, well before 2006. The statement asserts that the COTR in question wiped his finger on a window sill, and then in a friendly tone asked two ZBM management officials, "Are you getting your payment checks OK?"

"Yes, thank you," they replied.

The COTR's demeanor purportedly changed, and he stated in an irritated tone, "Well good, cause [sic] we are not getting good service, for the money we have paid." The unsworn statement then explains without elaboration that the COTR "made some derogatory remarks concerning the ZBM employees [sic] quality of work."

[15] *See supra* nn.5 and 12.

ZBM has failed to establish bias or other defects amounting to bad faith or abuse of discretion regarding the decision not to exercise the third option.[16] The ODRA recommends that this ground of the contract dispute be denied.

B. The Service Area had no Obligation to Suspend Procurement Actions

ZBM's contract dispute also contests the contracting officer's "refusal to stay or cancel the bid process for the replacement contract" after ZBM made its allegations. *Contract Dispute* at 1. ZBM, however, fails to identify any legal duty that imposes upon the contracting officer an obligation to suspend the acquisition effort. *Id*. ZBM filed this matter as a contract dispute rather than as a protest containing a suspension request. Even had ZBM filed a bid protest, the contracting officer would have been under no legal obligation to suspend the new acquisition process unless FAA Administrator, on the recommendation of the ODRA, granted a fully briefed and supported request for suspension under 14 C.F.R. § 17.15(d) (2014). Under the FAA AMS, there is a strong presumption that contract activities will continue during the pendency of ODRA matters unless a suspension is ordered. 14 C.F.R. § 17.13(g) (2012); *Protest of Security Support Services, LLC*, 12-ODRA-00595 (*Decision on Request for Suspension*, dated March 22, 2012). The ODRA, therefore, recommends denying this ground of the contact dispute.

III. Recommendation

For the foregoing reasons, the ODRA recommends that ZBM's contract dispute be denied in its entirety.

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John A. Dietrich
Dispute Resolution Officer and Administrative Judge
FAA Office of Dispute Resolution for Acquisition

[16] The Contract Dispute focused its allegations of discrimination exclusively on the last COTR. *Contract Dispute* at 1-2; *see also ZBM Letter of November 18, 2013*, at 2. The last two and half pages of ZBM's Final Submission expand the charge (without requesting leave to file an amended Contract Dispute) to also include for the first time the contracting officer and the prior COTR. *ZBM Final Dispute* at "Legal Argument" (the document is not paginated). As with the last COTR, the evidence does not support a finding of bad faith by these additional officials.