

**PUBLIC VERSION**

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

**FINDINGS AND RECOMMENDATIONS**

**Matter:**       **Protests of BWC Enterprises, Inc.**  
                  **Under Solicitation No. DTFASA-17-R-00773**

**Docket No.: 17-ODRA-00809**

*Appearances:*

For BWC Enterprises, Inc.:	Brian Cook, Vice-President
For Canete, LLC	Piero De Marzo, President
For the FAA Product Team:	Peter Putzier, Esq.

This matter arises from a protest ("Protest") filed with the Federal Aviation Administration ("FAA") Office of Dispute Resolution for Acquisition ("ODRA") by BWC Enterprises, Inc. ("BWC") under Solicitation DTFASA-17-R-00773 ("Solicitation"). The Solicitation sought proposals to perform janitorial services at the ANI<sup>1</sup> Complex in Anchorage, Alaska. After reviewing proposals, the FAA's Product Team awarded Canete, LLC ("Canete") the resulting contract valued \$134,999.46 (base period plus unexercised options). *Protest* at Exh. E. BWC asserts that the Product Team improperly failed to credit BWC's past performance on another FAA janitorial contract. *Protest* at 3. BWC also charges that members of the Product Team are biased against BWC because it is not an Alaska Native Corporation. *Protest* at 4. Canete has intervened.

After considering the entire administrative record, including *inter alia*, a preliminary evidentiary

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<sup>1</sup> This acronym is not defined in the administrative record.

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motion, and for the reasons discussed herein, the ODRA recommends that the Protest be denied in its entirety.

**I. Preliminary Matter – BWC’s Motion to Exclude FAA Exhibit 6**

The Product Team included in its Agency Response a Pre-Dispute that BWC filed with the ODRA on July 15, 2015. *Agency Response (“AR”)* Exh. 6. BWC asserts the Pre-Dispute document was a confidential ADR communication, and moves that it should be deemed inadmissible in the present Protest. *BWC Letter of November 14, 2017 (“BWC Letter”)*, at 1 and 2.<sup>2</sup> BWC also seeks a monetary sanction against the Product Team’s attorney. *Id.* at 2. The motion is denied.

The motion turns on the question of whether the Pre-Dispute document was, in and of itself, a dispute resolution communication that is protected by the Administrative Dispute Resolution Act (“ADRA”) of 1996 and the ADR Agreement<sup>3</sup> signed in the Pre-Dispute. BWC cites to paragraph 7.2 of the ADR Agreement, which refers to “any written or oral information exchanged during the course of and in furtherance of the mediation process hereunder...” *BWC Letter* at 1. By its nature, the document was filed prior to the parties entering into their ADR Agreement and therefore was not actually “exchanged during the course” of the mediation. The ADR Agreement, therefore, does not protect the Pre-Dispute document from disclosure.

The ADRA of 1996 also does not prohibit the Product Team from disclosing the Pre-Dispute regardless of whether it meets the statutory definition of a dispute resolution communication. That definition is found in 5 U.S.C. § 571(5), and the relevant confidentiality provisions are codified at 5 U.S.C. § 574(b). As a general rule, parties are to refrain from voluntarily disclosing dispute resolution communications. 5 U.S.C. § 574(b). The general rule does not apply, however, to a party-generated<sup>4</sup> communication that was “provided to or was available to all parties to the dispute

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<sup>2</sup>The BWC Letter also sought sanctions and exclusion from the record of *AR* Tab 41, an unredacted version of the Protest. After providing all parties with the opportunity to respond, the ODRA issued an interlocutory letter of caution that struck the Tab 41 from the record. That letter is incorporated herein. *ODRA Letter of November 15, 2017*.

<sup>3</sup>BWC does not include the ADR Agreement in the record, but does quote the agreement within its letter.

<sup>4</sup>Dispute resolution communications “generated by the neutral” are not releasable by a party under (b)(7). 5 U.S.C. § 574(b)(7).

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resolution proceeding.” 5 U.S.C. § 574(b)(7). This exception applies to AR Exh. 6. The cover page filed with the Pre-Dispute is signed by BWC’s Vice President and expressly states that it is being forwarded to various FAA contracting officers in the matter. AR Exh. 6 at 1. The ADRA of 1996, therefore, does not protect the document from disclosure, and the motion is denied.<sup>5</sup>

### II. The Standard of Review on the Merits

BWC, as the protester, bears the burden of proof, and must demonstrate by substantial evidence that the challenged decision lacked a rational basis, was arbitrary, capricious or an abuse of discretion, or otherwise failed in a prejudicial manner to comply with the Acquisition Management System (“AMS”). *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627 (citing *Protest of Adsystech, Inc.*, 09-ODRA-00508). Consistent with the Administrative Procedures Act, 5 U.S.C. §§ 554 and 556, which applies to ODRA adjudications, the phrase “substantial evidence” means that the ODRA considers whether the preponderance of the evidence supports the challenged Agency action. Where the record demonstrates that the challenged decision has a rational basis and is not arbitrary, capricious or an abuse of discretion, and is consistent with the AMS and the underlying solicitation, the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials. 14 C.F.R. § 17.19(m) (2017); *Protests of IBEX Weather Services*, 13-ODRA-00641 and -00644.

### III. Background

Section M of the Solicitation provided that award would be made to the firm with “the lowest price technically acceptable offer.” AR Tab 2 at 43. The Solicitation identified two evaluation factors to be rated as “acceptable” or “unacceptable.” The first of these, “Past Experience,” required an offeror to identify at least two successful and relevant projects in the past three years similar to the current requirement. *Id.* at 41 and 43 (Sections L and M, respectively). The second evaluation factor, “Past Performance,” required the submission of two customer satisfaction surveys with an average rating of 3 out of 5. *Id.* The Product Team was not limited to considering only those two surveys, given that Section L stated in pertinent part:

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<sup>5</sup> Even if the motion were granted on the merits, a monetary sanction is unavailable under both the ADR Agreement and 5 U.S.C. § 574(c). Both authorities limit the remedy to excluding the communication from the adjudicatory record of that case, not subsequent matters. *BWC Letter* at 2; 5 U.S.C. § 574(c).

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### Past Performance

The offeror must have the attached Customer Satisfaction Survey (CSS) completed and returned to this office before the solicitation deadline, c/o [the Contracting Officer], by at least two (2) third party references. Customer Satisfaction Surveys with an average score of 3.0 or more may be emailed to [the Contracting Officer]. We may contact the customers directly to ensure the validity of the received surveys. We recommend the offeror distribute more than two CSSs to third party references because not all may be returned, and receipt of less than two CSSs may disqualify the offeror. We also advise that each offeror verify receipt of the requisite number of CSSs well before the submission deadline[.]

The FAA reserves the right to consult other sources for information regarding past performance. These other sources may include, but are not limited to, FAA personnel with personal knowledge of the contractor's performance capability.

*AR* Tab 2 at 41 (emphasis added). The closing date for submitting proposals, including the customer satisfaction surveys, was September 14, 2017. *Id.*

This Protest relates to the second evaluation factor. Specifically, BWC argues that it submitted the lowest bid price, and the Product Team improperly evaluated its past performance as "unacceptable" when the Contracting Officer could not verify the legitimacy of the CSS sent from the FAA's Flight Service Station ("FSS") in Homer, Alaska. *Protest* at 5.

### IV. Discussion

Although BWC raises many issues, the dispositive issue in this case relates to the undisputed fact that BWC relies on a survey written by Mr. Michael Halstead who at the time was employed by both the FAA and BWC at the Flight Services Station in Homer, Alaska. *Compare AR* at 8 with *BWC Comments* at 5. As explained below, the Contracting Officer had a rational basis to question the legitimacy of the survey that she received from Mr. Halstead.

#### A. BWC Failed to Obtain a Second Timely Customer Satisfaction Survey

Mr. Halstead works as an Air Traffic Control Specialist at the Homer FSS. *Agency Response, Exh. 2, Halstead Decl.*, ¶¶ 1 and 2. Since at least 2005 and through the period in question, he also provided janitorial services as a BWC employee at the same location when off duty from his FAA job. *Id.* at ¶¶ 2 and 3. He admits in his declaration:

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I filled out the Customer Satisfaction Survey used by BWC Enterprises for the Anchorage ANI Complex. Brian Cook emailed me at my private email address on the day before proposals were due and asked that I submit the CSS. I was still an employee of BWC Enterprises at that time. I did so, in part because a co-worker at the Homer FSS – Darrell Beeker – normally submits such surveys but was not in the office at the time.

*Id.* at ¶ 3. Without qualification, Mr. Halstead described his own performance on BWC's behalf as "Excellent," meriting a full five out of five possible points for all four survey questions, and he commented that overall service was "reliable and thorough." *AR* Tabs 15 and 16. On September 14, 2017, the closing date of the Solicitation, Mr. Halstead sent it to the Contracting Officer using his FAA email account. *AR* Tab 15 and 16. Although Mr. Halstead identified Mr. Beeker as the "Contact" listed on the Customer Satisfaction Form, he did not speak with Mr. Beeker about the survey until October 1, i.e., over two weeks after submitting the survey. *AR* Exh. 4, *Beeker Decl.*, at ¶ 3.

The Contracting Officer declares that when she reviewed the proposals, she noticed that the survey listed Mr. Beeker as the point of contact, but that it was sent by Mr. Halstead. *AR* Exh. 3, *Contracting Officer's Decl.*, at ¶ 3. On September 25, 2017, prior to issuing the award decision, she attempted without success to contact Mr. Beeker to verify whether he completed the survey. *Id.* at ¶¶ 8 and 9. On September 26, 2017, she received an email message from one of the evaluators who stated that she spoke with Mr. Beeker, and learned that he did not remember sending in the customer satisfaction survey regarding BWC. *AR* Tab 26. The next day, September 27, the Contracting Officer issued the award to Canete. *AR* Exh. 3, *Contracting Officer's Decl.*, at ¶¶ 8 and 9. The record shows, however, that also on September 27, Mr. Beeker replied via email to the Contracting Officer, and stated, "I concur with the survey. The janitorial work was great in Homer." *AR* Tab 30; *see also AR* Exh. 3, *Contracting Officer's Decl.*, at ¶¶ 9. The Contracting Officer explained that she did not see this message until she began preparing the Agency Response in this matter. *AR* Exh. 3, *Contracting Officer's Decl.*, at ¶ 9.

The elimination of BWC is documented in the Award Decision Document. *AR* Tab 28. Regarding BWC's evaluation and elimination, the Contracting Officer recorded:

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### **BWC Enterprises:**

BWC was found Acceptable for Past Experience, but Unacceptable for Past Performance by the Technical Evaluation members. The required Customer Satisfaction Surveys were submitted. However, one survey was submitted by an FAA person whose name *was not* the name on the survey. The CO contacted that FAA person by phone on 9/26/2017 and confirmed the survey was not completed by the name POC on the Survey. The CO attempted to contact the named person on the survey to get the satisfactions survey answers confirmed or not. At the same time, the CO called the name listed on the second survey and was able to confirm the survey was indeed completed by her.

The CO attempted to contact the references listed on the projects submitted by phone on 9/25/17 and left voice messages for the first three. No calls were returned resulting in the CO being unable to confirm positive Past Performance other than the 2<sup>nd</sup> Customer Satisfaction Survey.

BWC was deemed as Unacceptable overall for not meeting the Criteria as set forth under Section M of the RFO, and therefore could not be further considered for this contract opportunity.

AR Tab 28 at FAA000148-49. BWC was informed by letter dated September 29, 2017 that Canete had received the award. AR Tab 33.

BWC filed this protest in a timely manner following a telephonic debriefing. AR Tab 40; *Protest*. BWC argues that the completed Homer FSS evaluation, which did not require a signature, met the requirement for submitting a timely customer satisfaction survey. Addressing the two surveys submitted in support of its proposal, BWC states: "Both surveys were received from a government employee from a government email address. Since two surveys with an acceptable score were received, the Standard for Review for Acceptable Past Performance was met." *Protest* at 3. Further, given that Mr. Beeker subsequently agreed with Mr. Halstead's statements, BWC argues that "the effect was the same as if Mr. Beeker had sent in the form." *BWC Comments* at 6. BWC further asserts that the Contracting Officer's failure to read Mr. Beeker's September 27<sup>th</sup> email prior to rendering the award decision amounted to willful blindness or misrepresentation.

The ODRA rejects these arguments for several reasons. First and foremost, a Customer Satisfaction Survey is plainly intended to survey the "customer," not the offeror's employee who performed the work. The ODRA will not split hairs based on the FAA email account that Mr.

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Halstead used to send what amounts to a self-assessment. Second, the Solicitation expressly required a "third party" to provide the customer satisfaction survey by the closing date on the Solicitation. *See supra* Part II (quoting *AR* Tab 2 at 41 (Section L)). This survey was not from a third party, and the ODRA finds that Mr. Halstead wrote and filed the survey to promote the interests of BWC. *See AR* Exh. 5; *BWC Comments* at 4. Third, as to timeliness, Mr. Beeker's ratification of the document came well after the closing date of the Solicitation regardless of when the Contracting Officer actually noticed it. Accepting BWC's ratification theory under these circumstances would encourage offerors to use deceptive business practices to give themselves an extension of closing dates for solicitations. There is no sound reason in law, equity or AMS policy to do so. To the contrary, BWC's approach at the very least threatened the integrity of the acquisition process.<sup>6</sup> The ODRA therefore finds that the record supports the Contracting Officer's conclusion that BWC was "[u]nacceptable overall for not meeting the Criteria as set forth under Section M of the RFO...."<sup>7</sup> *See AR* Tab 28 at FAA000149.

**B. Bias**

Citing to the alleged termination of ten unspecified prior contracts, and to unstated prior competitions wherein award was made to other firms, BWC argues that the present award to Canete is part of a "pattern to find a reason or reasons –not – to [sic] award BWC certain janitorial contracts." *Protest* at 4. These reasons, according to BWC, include the acknowledged fact that BWC is not an Alaska Native Corporation, a woman-owned business, or a minority-owned business. *Id.* BWC also points out that one of the evaluators is a member of the Native American

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<sup>6</sup> The Product Team reinforces its defense by relying on government ethics rules found in AMS policy, statutes, and ethics regulations. Specifically, the Product Team argues that BWC, by being in a position to review its own work to submit for a Customer Satisfaction Survey, had an organizational conflict of interest that it failed to disclose in violation of AMS Clause 3.1.7-2, "Organizational Conflicts of Interest (August 1997)," which is found in the Solicitation. *AR* at 5-6 (citing *AR* Tab 2, § I, at FAA053). The Product Team also asserts that Mr. Halstead, as both an FAA employee and a BWC employee, had a personal conflict of interest that mandated his withdraw from any participation in the acquisition process. *AR* at 7-11 (citing *AMS Policy* 3.1.5, 18 U.S.C. § 208, and Office of Government Ethics Regulations found at 5 C.F.R. § 2640.103). As a result, according to the Product Team, any award to BWC under these circumstances would be tainted by impropriety. *AR* at 11-12. These grounds are supported by evidence in the record and well-taken, but unnecessary to decide given that the actual grounds for excluding BWC have a rational basis supported by the record.

<sup>7</sup> The record contains many allegations and responses regarding BWC's performance on other contracts. *See e.g., AR* at 15; *BWC Comments* at 8-10. The Product Team raised these issues to show that even with two acceptable customer satisfaction reviews, an award to BWC would not be automatic. *AR* at 15. Given that the Source Selection Memorandum relied on the inability to verify BWC's survey from Homer, the ODRA need not reach the issue.

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Alaska Native Coalition of Federal Aviation Employees (“NAAN”), and in the Comments, BWC adds to the allegation by citing other contract matters reaching as far back as 2005. *Protest* at 4; *BWC Comments* at 10-11.

The ODRA analyzes allegations of impermissible bias as charges of bad faith. *Contract Dispute of Zullo Building Maintenance, LLC*, 13-ODRA-00676. BWC has the burden of proof in this matter, and “although ODRA precedent and regulation impose the ‘clear and convincing’ standard of proof for allegations of bad faith,” the facts in the present Protest show that BWC “has failed to prove bad faith even by the lesser preponderance of the evidence standard.” *See Contract Dispute of Zullo Building Maintenance, LLC*, 13-ODRA-00676; *see also Protest of Royalea’L Aviation Consultants*, 04-ODRA-00304. BWC’s charge of bias suffers from at least three deficiencies.

The first deficiency is BWC’s flawed premise that providing opportunities for Alaska Native Corporations (“ANCs”) or other disadvantaged groups is impermissible *per se*. To the contrary, federal acquisition law is replete with many examples of statutes, regulations, and policies that provide competitive advantages to these groups. In particular, Congress directed that the FAA’s AMS ensures that “all reasonable opportunities to be awarded contracts shall be provided to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.” 49 U.S.C. § 40110(d)(2)(D). Regarding ANCs specifically, in 1992 Congress amended the Alaska Native Claims Settlement Act (at 46 U.S.C. § 1626) to ensure that ANCs and their subsidiaries are considered economically disadvantaged business enterprises for the purpose of qualifying for participation in federal contracting and subcontracting programs. *See Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490 (discussing the applicability of the Alaska Claims Settlement Act to the FAA’s small business programs implemented through the AMS). The programs in question encourage agencies like the FAA to acquire a portion of their needs through contracts set aside for certain classes of contractors, and regardless of whether this is a “bias,” it certainly is not a basis for protest unless it can be shown in a timely protest that contracting officials failed to follow applicable laws and procedures.<sup>8</sup> *See e.g., Protests of Hi-Tec*

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<sup>8</sup> Ironically, the competition under the current Solicitation is set aside for small businesses. *AR* Tab 2 at FAA0044. Although not at issue here, BWC derives its standing in part from its representations regarding size found in the System for Award Management (“SAM”). *AR* Tab 10 at FAA0175.

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*Systems, Inc.*, 08-ODRA-00459 and -00460.

BWC's reliance in this Protest on historic contractual actions suffers from its failure to pursue the matters at the time. BWC complains about three non-competitive awards made in 2005, as well as award of another contract in 2008. *BWC Comments* at 10. BWC also complains about a contract awarded two years ago to an ANC for twelve locations where BWC previously worked. *Id.* at 11. Even if such contracts were awarded, merely contracting to other firms is not evidence of impermissible bias without demonstrating with reliable, probative evidence that the awards were tainted by bad faith. Although family responsibilities may be the reason that BWC did not pursue some issues,<sup>9</sup> the regulatory period to protest these alleged historic wrongs has long since passed and they cannot be revived in this Protest. 14 C.F.R. § 17.15 (2017).

Finally, the evidence does not show "egregious conduct, specific intent to injure, malice, or conspiracy." *Contract Dispute of Zullo Building Maintenance, LLC*, 13-ODRA-00676 (citing *Contract Dispute of Astronet, Inc.*, 08-ODRA-00466). While the record contains disagreements about past performance,<sup>10</sup> "[n]either 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. *Zullo, supra* (citing *Innovative Telephone Services*, 2008 WL 1960352, at 20).

For the foregoing reasons, the ODRA finds that BWC has not shown an impermissible bias that affected the award decision.

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<sup>9</sup> *BWC Comments* at 11.

<sup>10</sup> The record includes narratives and counter narratives of isolated performance issues over many years.

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**IV. Conclusion**

BWC has not shown by the preponderance of the evidence that the finding of "Unacceptable" for the past performance evaluation factor lacked a rational basis. It also has not shown that an impermissible bias tainted the award. The ODRA therefore recommends that the Protest 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