

Office of Dispute Resolution for Acquisition

Federal Aviation Administration

Washington, D.C.

Protests of
Camber Corporation and
Information Systems & Network Corporation
Under Solicitation DTFA01-96-R-11087
ODRA Docket Nos. 98-ODRA-00079 and 98-ODRA-00080 (Consolidated)

DECISION ON THE MOTION TO DISMISS THE PROTEST OF CAMBER CORPORATION

Counsel for the FAA Program Office has filed with the Office of Dispute Resolution for Acquisition ("ODRA") a Motion to Dismiss the protest of Camber Corporation ("Camber") under ODRA Docket No. 98-ODRA-00079. For the reasons set forth below, that motion is denied.

Background

The instant procurement is for technical engineering services and program management support for future satellite and satellite augmentation systems in support of the FAA Global Positioning System ("GPS") product team. (Hereinafter the procurement will be referred to as the "GPS TAC Contract"). The procurement was conducted in two phases, consisting of the issuance of a Screening Information Request (SIR), under which offerors were prequalified, followed by the issuance of a Request for Offers (RFO). Under SIR No. DTFA01-96-R-11087, issued on August 21, 1996, potential offerors were requested to submit qualification statements for the GPS TAC Contract by not later than September 11, 1996. The following eight companies submitted such qualification statements: Camber Corp. ("Camber"), Information Systems & Network Corporation ("ISN"), Intermetrics, Overlook Systems Technology, Inc. ("Overlook"), System Resources Corporation ("SRC"), Space Applications International Corporation ("SAIC"), TRW Government Information Services Division ("TRW"), and Vitro Corporation. Many (if not all) of these offerors had submitted qualification statements as parts of teams. On May 2, 1997, the FAA advised each of these offerors that they had been found "acceptable" for purposes of submitting proposals on the GPS TAC Contract.

Thereafter, many months passed without the issuance of the RFO. Because of the lengthy hiatus, the FAA Contracting Officer ("CO"), by letter of October 16, 1997, notified these eight firms that they would have an opportunity to modify or realign their teams, taking in new subcontractors, switching roles as primes and subcontractors, etc. Significant changes were made in the Overlook team. According to the protest filed by Camber, the Overlook team initially consisted of Overlook as prime, with Rockwell Space Division ("Rockwell") and Advanced Management Technologies, Inc. ("AMTI") as major subcontractors to Overlook. Between the fall of 1996, when the qualification statements had been submitted, and the fall of 1997, Rockwell had been acquired by Boeing Information Services, Inc. ("Boeing"). In response to the CO's October 16, 1997 letter, Boeing, on November 6, 1997, notified the FAA that it would be substituting for Overlook as prime.

On January 6, 1998, the RFO was issued to the pre-qualified offeror teams, including the reconstituted Boeing/Overlook/AMTI team. On January 22, 1998, Boeing notified the FAA that it was no longer interested in participating in the procurement. On January 23, 1998, Overlook advised the Agency that it intended to have the remainder of its team submit a proposal on the GPS TAC Contract and that it needed some additional time to be able to do so. The FAA's GPS product team agreed to extend the due date for receipt of proposals from January 27, 1998 until January 30, 1998 and, by letters to the offerors, amended the RFO, extending the due date until January 30, 1998. The Agency received a total of five proposals for the GPS TAC Contract, one from the Overlook team. However, that proposal was from AMTI as prime, with Overlook included as a major subcontractor. Camber asserts that it was not aware of this "last minute switch" at the time, and only learned of it on June 2, 1998.

On June 8, 1998, an award of the GPS TAC Contract was made to AMTI. Post-award debriefings were conducted with the remaining offerors, the last of which, according to the CO, was held on June 15, 1998, with ISN. Camber's debriefing was conducted on June 11, 1998. By letter dated June 18, 1998, Camber submitted to the ODRA a protest of the award. ISN quickly followed with its own protest, by letter dated June 22, 1998. The two protests have been consolidated for adjudication by the ODRA. AMTI, the awardee, has been permitted to participate as an "interested party" intervenor.

On June 29, 1998, the Program Office filed its Motion to Dismiss, alleging that Camber's protest was untimely and may not be heard. On July 1, 1998, AMTI submitted to the ODRA comments in support of the motion, and Camber, in turn, submitted its opposition to the motion.

Discussion

In terms of time limitations for filing of procurement protests before the ODRA, the current version of FAA's Acquisition Management System (AMS) (June 1997) provides as follows:

Protests must be filed (*see section 3.9.3.4*) with the Office of Dispute Resolution for Acquisition on the later of the two dates: (1) Not later than 7 business days after the date of the agency action or inaction which forms the basis of the protest (*for example, the date of contract award*); or (2) if the protester was entitled to and requested a post award debriefing from the FAA, then any protest must be filed not later than 5 business days after the date which the FAA makes available for that debriefing. A copy of the protest must also be served upon the Contracting Officer on the same day as it is served on the Office of Dispute Resolution for Acquisition. Service upon the Contracting Officer may be accomplished via facsimile transmission.

Protests based upon alleged improprieties in a solicitation, or Screening Information Request (SIR), which are apparent prior to bid opening or the time set for the receipt of initial proposals shall be filed prior to bid opening or the time set for the receipt of initial proposals. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation.

The Office of Dispute Resolution for Acquisition may promulgate additional protest procedures and time limitations for the resolution of protests, which will be published in the Federal Register and referenced or included in FAA SIRs.

Camber presents two grounds for its protest: (1) that Overlook ought never have been pre-qualified for the submission of a proposal under the provisions of the SIR; and (2) that the "last minute switch" of AMTI as the prime of the Overlook team was impermissible. The Program Office argues that both of these protest grounds are untimely. Its argument takes two approaches. First, the Program Office asserts that the protests ought not be considered by the ODRA, because Camber was well aware of both grounds many months prior to filing its protest. The above-quoted AMS language, however, is not couched in terms of when the protester may or should have been aware of the Agency action giving rise to a protest. Rather, it permits a protest to be filed within seven (7) business days after such Agency action, or within five (5) business days after a post-award debriefing, *whichever is later*. Camber filed its protest on the fifth business day following its June 11, 1998 post-award debriefing.

Notwithstanding this AMS provision, the Program Office points to a special "Protest" provision which had been included within the SIR for the GPS TAC Contract. That provision purported to limit post-debriefing protests to those raising grounds discovered during the course of the debriefing. The provision reads, in pertinent part:

A. PROTESTS

**AS A CONDITION OF SUBMITTING AN OFFER OR RESPONSE
TO THIS SIR (OR OTHER SOLICITATION, IF APPROPRIATE),**

THE OFFEROR OR POTENTIAL OFFEROR AGREES TO BE BOUND BY THE FOLLOWING PROVISIONS RELATING TO PROTESTS:

* * *

e. Protests must be filed with the Office of Dispute Resolution within 5 business days of the date that the protester was aware, or should reasonably have been aware, of the agency action or inaction which forms the basis of the protest. If the protester was entitled to and requested a debriefing from the FAA, ***and the basis of the protest was not known or could not have been known prior to the debriefing***, then the protest must be filed within 5 business days after the date which the FAA makes available for that debriefing. ***The Office of Dispute Resolution may promulgate additional procedures and time limitations for the resolution of protests, which will be described in a provision to be referenced or included in FAA SIRs, and provided upon request. Both parties agree to be bound by any such procedures.***

* * *

(Emphasis added). The Program Office maintains that this clause ought govern over any contrary AMS provision, since it was drafted specially for the August 1996 SIR. It argues that to permit the protester to take advantage of the later (June 1997) "change in AMS policy" -- to withhold its protest "for 13 months until after contract award" -- would be "manifestly unfair to the other offerors and to FAA." In this regard, the Program Office seeks to distinguish the present case from the ruling of the ODR in *Washington Consulting Group, Inc.*, 98-ODRA-00059, where it was held that the current AMS protest time limitations will govern over the SIR's "Protests" clause. The "Protest" clause at issue in *Washington Consulting* was the standard AMS clause, entitled "Protests (August 8, 1996)," AMS 3.1.3. In this regard, the Program Office states:

The SIR did not reference the Standard AMS clause, which had been issued that month (August 1996), but instead continued to use the earlier clause drafted specifically for the SIR. This non-standard clause specifically addressed the issue of whether an offeror with a pre-award basis for protest could nonetheless reserve its protest until after award This clause, agreed to by Camber as a condition of submitting its SIR response, allowed Camber to file a protest within five business days of the debriefing only as to issues that were not know prior to the debriefing. Otherwise, Camber had five business days from the time of the allegedly improper action to file a protest.

There are serious flaws with this first approach. Initially, the ODRA questions the Contracting Officer's authority to have issued the "non-standard" clause as part of the instant SIR. The AMS in effect at that time -- *i.e.*, the April 1, 1996 version -- itself did not specify filing time limitations for protests. What it stated instead was the following:

3.9.3.2.1.2 Protest Procedures and Time Limitation of Protests

The Office of Dispute Resolution will promulgate protest procedures and time limitations for protests, which will be described in a provision to be referenced or included in FAA SIRs, or provided upon request.

There is no indication that the so-called "non-standard" clause was based upon any procedures promulgated by the ODRA or that it was sanctioned in any way by the ODRA. Moreover, as the Program Office concedes, a standard AMS "Protest" clause was already put into effect several days prior to the issuance of the GPS TAC SIR on August 21, 1996. That clause, which the ODRA had sanctioned, a clause entitled "Protest (August 8, 1996)," which has been identified in the FAA's Acquisition System Toolbox ("FAST") as a "**required**" clause, reads, in pertinent part, as follows:

PROTEST (AUGUST 8, 1996)

AS A CONDITION OF SUBMITTING AN OFFER OR RESPONSE TO THIS SIR (OR OTHER SOLICITATION, IF APPROPRIATE), THE OFFEROR OR POTENTIAL OFFEROR AGREES TO BE BOUND BY THE FOLLOWING PROVISIONS RELATING TO PROTESTS:

* * *

(e) Protests must be filed with the Office of Dispute Resolution within 5 business days of the date that the protester was aware, or should reasonably have been aware, of the agency action or inaction which forms the basis of the protest. **If the protester was entitled to and requested a debriefing from the FAA, then any protest must be filed within 5 business days after the date which the FAA makes available for that debriefing.** The Office of Dispute Resolution may promulgate additional protest procedures and time limitations for the resolution of protests, which will be described in a provision to be referenced or included in FAA SIR's, or provided upon request. Both parties agree to be bound by any such procedures.

* * *

(Emphasis added). Conspicuously absent from the above language is the non-standard clause's limitation on post-debriefing protests -- *i.e.*, that only protest grounds not known prior to the debriefing would be protestable within 5 business days of the debriefing. Significantly, the non-standard clause itself effectively incorporated the provisions of the standard clause, by speaking of "additional protest procedures and time limitations" and by stipulating that the parties "**agree to be bound by any such procedures.**" Such language was likewise included in the above-quoted standard clause -- and thus incorporated the time limitations provisions of the current AMS. Further, as the Program Office has noted, it was the standard "Protest" clause that was incorporated by reference into the RFO for this procurement.

Thus, the language upon which the Program Office places such heavy reliance in seeking to dismiss the Camber protest was effectively excised and superseded by the time the contract at issue was awarded. The ODRA will not rely on language in a non-standard, unauthorized and obsolete solicitation provision as the basis for a dismissal, where, under both the standard clause and the current version of the AMS, a protest has been timely filed. Here, we do not view the excised language as having any applicability. But even where there is ambiguity regarding protest time limitations, such ambiguity must be resolved in the protester's favor, under the doctrine of *contra proferentum*. *Washington Consulting Group, supra*. Thus, the first approach taken by the Program Office to establishing untimeliness is without merit.

The second approach is to argue that the two protest grounds are essentially protests against improprieties in the solicitation. In this regard, the Program Office states:

Camber . . . describes the October 16, 1997 letter, allowing realignment of teams, as "change in procedures" for the SIR. [Camber Protest, page 4]. Under this definition, which is correct, FAA's January 23, 1998 decision to extend the proposal due date in order to allow last-minute realignment of teams would constitute further changes in SIR procedures. The AMS provides that:

Protests based upon alleged improprieties in a solicitation, or Screening Information Request (SIR), which are apparent prior to bid opening or time set for the receipt of initial proposals shall be filed prior to bid opening or the time set for the receipt of initial proposals. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation. *AMS Sec. 3.9.3.2.1.2*

Therefore, Camber was obliged to protest this alleged impropriety in the SIR allowing realignment of teams *before* the closing date for receipt of

proposals, *CC Distributors, Inc. v. United States*, 38 Fed. Cl. 771 (1997), and not *after* award.

Motion to Dismiss, page 10 (Emphasis in original). First of all, this argument addresses only the second ground of Camber's protest, *i.e.*, the alleged impropriety of the "last minute switch" of AMTI for Overlook. It does not cover the first protest ground relating to whether or not Overlook should have been pre-qualified for participation in the second phase of the procurement. Furthermore, even if the ODRA were to accept that the October 16, 1997 letter constituted a solicitation amendment, the facts do not support the Program Office argument (and that of AMTI) that the subsequent extension of the date for receipt of proposals amounted to a solicitation amendment "allowing realignment of teams." First, the January 23, 1998 facsimile letter which effected that extension -- a letter which consisted of a single sentence -- made no mention whatsoever about team realignment. It stated simply:

The date and time for receipt of offers under RFO DTFA01-96-R-11087 has been extended to 2:00 P.M., e.s.t., on January 30, 1998.

Second, contrary to the argument of the Program Office and that of AMTI, the other offerors were *not* otherwise "informed . . . that the closing date for proposals was extended *to permit further adjustments to team alignment*." Reed Smith Shaw & McClay L.L.P. letter of July 1, 1998 (Comments on Motion to Dismiss), page 3 (emphasis added). The Affidavit of Sandra Harrelson, the Contracting Officer, makes plain that, when she notified the offerors about the extension, she advised them that it was for the purpose of allowing the remaining team members of one offeror to reconstitute themselves and to submit a proposal:

I telephoned my contact at each prospective offeror. At Camber I called Stephanie Jattuso, Camber's Contracts Manager. I informed her that the prime on **one of the teams** participating on the SIR had withdrawn from the competition, that the remaining team members wished to continue in the competition, and that FAA would extend the due date until 2:00 p.m. on January 30 **to enable them to regroup and submit a proposal**.

Affidavit of Sandra Harrelson, ¶3, page 2 (emphasis added). The decision to permit the Overlook team to realign itself a second time was never made part of the solicitation. Thus, the Program Office decision to permit the Overlook team to "regroup" was *not* an alleged "impropriety *in the solicitation*." Rather, it was an action taken with respect to the solicitation. The protest of that action was timely under the AMS, since it was lodged within five business days after Camber's post-award debriefing. Accordingly, the second approach taken in the Program Office Motion to Dismiss likewise fails.

Finally, it would be appropriate to address briefly the policy basis for the AMS provision regarding post-debriefing protests. To avoid the possibility of pre-mature protests, the GAO Bid Protest Regulations (4 C.F.R. §21.2(2)) extend the limitation for filing of bid protests until after post-award debriefings. The Federal Acquisition Regulation requires

the post-award debriefings whenever they are requested by an offeror within three days of its receipt of notice of contract award. FAR §15.1006(a). Although neither the GAO Bid Protest Regulations nor the FAR apply directly to FAA contracting, the AMS has adopted the post-award debriefing concept and the extension afforded for the submission of protests associated with post-award debriefings. AMS §3.9.3.2.1.2. Notwithstanding such AMS guidance, the Program Office pleads for "logic" and "fairness" in the closing summary to its Motion to Dismiss:

It is neither logical nor fair to allow Camber to hold in reserve a protest based on alleged pre-award improprieties until after contract award.

Motion to Dismiss, page 11.

In the ODRA's view, it makes ultimate good sense to permit a competitor to wait until after an award decision has been made and until after it has received its post-award debriefing before requiring that it file a bid protest. Obviously, requiring the submission of a pre-award protest would be of no benefit to the Agency, if the would-be protester ultimately turns out to be the awardee. Allowing protests to be postponed until after post-award debriefings provides the opportunity for offerors to learn as much as possible about the Agency's award decisions and to rethink their positions before proceeding with ill-conceived protests. To require that protests be filed prior to award and prior to post-award debriefings would thus likely result in a great many more protests being filed against the Agency. That would be neither "logical" nor "fair" to the Agency, to protesters, or to anyone else. Indeed, many ODRA protests have been quickly settled and withdrawn once the Agency procurement officials have provided protesters with additional explanation for an award decision -- in other words, an adequate post-award debriefing. Therefore, the "logic" and "fairness" argument advanced by the Program Office simply will not wash.

Conclusion

For all the foregoing reasons, the Motion to Dismiss the protest of Camber Corporation is hereby denied.

_____/s/_____
Richard C. Walters, Dispute Resolution Officer
For the FAA Office of Dispute Resolution for Acquisition

Date: July 6, 1998