

**Federal Aviation Administration
Washington, D.C.**

Office of Dispute Resolution for Acquisition

Protest of)
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Crown Consulting, Inc., Inc.) Docket No. 01- ODRA-00181
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Pursuant to Solicitation DTFA01-00-R-01086)

**DECISION ON MOTION TO DISMISS
FOR LACK OF JURISDICTION**

On April 11, 2001, Universal Systems & Technology, Inc. (“UNITECH”), the Awardee-Intervenor in the above-captioned Protest, filed a Motion to Dismiss for Lack of Jurisdiction (“Motion”). Specifically, UNITECH alleges that the ODRA lacks subject matter jurisdiction to adjudicate this Protest, inasmuch as the acquisition involves a GSA Federal Supply Schedule Contract. UNITECH further asserted that because the ODRA allegedly lacks jurisdiction to formally adjudicate the Protest, it also lacks authority to provide ADR services requested by the Product Team and the Protester. The Protestor, Crown Consulting, Inc., (“Crown”) has filed an Opposition to the Motion, as has the Agency Product Team. Unitech has filed a Reply to the oppositions. For the reasons set forth herein, the Motion is denied.

I. ODRA Adjudicative Authority

The ODRA’s jurisdiction over bid protests and contract disputes is broadly defined by: FAA Regulations found at 14 C.F.R Part 17 (“The ODRA Procedural Regulations”); Delegations of Authority from the FAA Administrator dated July 29, 1998 and March 27, 2000 (“Delegations”); and provisions of the FAA’s Acquisition Management System (“AMS”). Under the ODRA Procedural Regulations, the ODRA is granted exclusive

jurisdiction over:

all protests or contract disputes against the FAA that are bought on or after the effective date of these Regulations, with the exception of those contract disputes arising under or related to FAA contracts entered into prior to April 1 of 1996.

14 C.F.R. § 17.1. Section 17.5 of the ODRA Procedural Regulations, entitled “Delegation of Authority” further provides that

(a) the authority of the Administrator to conduct dispute resolution procedures concerning acquisition matters, is delegated to the Director of the Office of Dispute Resolution for Acquisition.

14 C.F.R. § 17.5(a). *See also* The Delegations, (<http://www.faa.gov/agc/deleg2.htm>).

These provisions, together with similar provisions within the AMS policy document, establish the ODRA’s exclusive subject matter jurisdiction over disputes arising from FAA acquisitions under the AMS. For example, Section 3.9.1 of the AMS, entitled “APPLICABILITY” provides: “protest and contract disputes guidance and principles outlined herein apply to all FAA Screening Information Requests (SIRs), contract awards, and contracts.”

The ODRA Procedural Regulation further provides that certain procurement activities are “not protestable”. *See* 14 C.F.R. § 17.11. Such matters include “FAA purchases from or through other federal agencies.” *See* 14 C.F.R. § 17.11(b). UNITECH relies primarily on this provision in support of its Motion.

In its essential elements, the instant protest is not a challenge to the Agency’s compliance with requirements of the General Services Administration for Federal Supply Schedule (“FSS”) acquisitions. Rather, the protest raises justiciable issues regarding the Product Team’s compliance with the requirements of the AMS in making its award decision. As is noted in the Protestor’s Opposition to the Motion to Dismiss, *See Opposition*, at 4, the ODRA previously has taken jurisdiction to review FAA product team compliance with

the AMS in acquisitions involving other agencies. *See, Knoll, Inc.*, 99-ODRA-00122; *A&T Systems, Inc.*, 98-ODRA-00097.

The situation presented here is analogous to one often faced by the General Accounting Office (“GAO”) where a protest challenges the practices followed by an agency in issuing a delivery order against the FSS Contract. The GAO has held that where an agency issues a solicitation for an FSS buy in the form of a request for quotations (“RFQ”), and performs a detailed technical evaluation and cost/technical tradeoff, the GAO will apply the standards under Part 15 of the Federal Acquisition Regulation (“FAR”) to review whether the source selection process was reasonable and consistent with the terms of the agency’s solicitation. *COMARK Fed. Sys.*, B-278343, B-278343.2 Jan. 20, 1998, 98-1 CPD ¶ 34; *see also Digital Systems Group, Inc.*, B-286931, 2001 U.S. Comp. Gen. LEXIS 46, *citing COMARK Fed. Sys.*, *supra*.¹

Here, the ODRA has been asked to review whether the Product Team complied with the AMS in making its award decision. In this case the SIR sets forth specific requirements and evaluation criteria for determining the “best value” to the Agency. *See* Acquisition Report, Attachment 2 to the Crown protest. Three offerors, including Crown and UNTECH responded and were evaluated by the Contracting Officer and the Source Selection Official, with the result that the contract was awarded to UNITECH. *See* Attachments 3 and 4 to Crown protest. The Protest is aimed squarely at this evaluation process. Crown alleges that:

The FAA failed to properly evaluate proposals in the technical, past performance and cost areas. Moreover, the FAA failed to properly document the proposal evaluations so that the rationale underlying the agency’s actions could be determined. Finally, the FAA’s award decision is irrational, and should be overturned.

Crown protest at 9.

¹ The ODRA notes that the FAA Product does not take the position that the ODRA lacks jurisdiction to adjudicate this matter. Further, there is a serious question whether, in the absence of ODRA review, any administrative forum would have jurisdiction to review the allegations raised in this protest. Congress expressly directed that the GAO have no jurisdiction over protests involving FAA procurements. *See* Section 345 of Pub. L. 104-50, Department of Transportation and Related Agencies Appropriations Act, 1996; *see also Knoll, Inc.*, B-283031, June 22, 1999 (Unpublished).

The ODRA concludes, based on the Procedural Regulations, the AMS and the Delegations that it has jurisdiction over the subject matter of this Protest; and is authorized to determine whether the Product Team's actions in awarding the contract to UNITECH had a rational basis and were not arbitrary, or capricious or an abuse of discretion.

II. ODRA ADR Authority

UNITECH's Motion baldly asserts that "if the ODRA lacks jurisdiction to hear a protest it also lacks jurisdiction to have that protest resolved by ADR." *Motion* at 2.² Since, the ODRA has subject matter jurisdiction over the Protest, it is not necessary to decide this aspect of UNITECH's Motion. The ODRA notes, however, that subject matter jurisdiction is not a prerequisite to the provision of ADR services.

ADR is the primary dispute resolution process employed by the ODRA; and its use expressly is authorized by the ODRA Procedural Regulations. 14 C.F.R §17.33. The Administrator's Delegation dated July 28, 1998, expressly authorized "ODRA Dispute Resolution Officers to engage with Agency program offices and contractors in voluntary, mutually agreeable ADR efforts aimed at resolving acquisition related disputes at the earliest possible stage..." even where no adjudication is pending. Consistent with this Delegation, and the AMS, the ODRA frequently provides ADR services in the absence of a formal dispute.

² UNITECH now concedes in its Reply to the Opposition to its Motion that "the Administrator has the authority to enter into arbitration of the issue at question." See Reply at 2, fn. 1.

III. Conclusion

For the reasons discussed above, UNITECH's Motion is denied.

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Dated: April 26, 2001