

FEDERAL AVIATION ADMINISTRATION
Office of Dispute Resolution for Acquisition
Washington, D.C.

Protest of)
)
Northrop Grumman Corporation) Docket No. 00-ODRA-00159
)
Pursuant to Solicitation No. DTFA01-00-R-00040)

DECISION ON MOTIONS TO DISMISS

INTRODUCTION

Northrop Grumman Corporation (“Northrop”) filed the above captioned bid protest (“Protest”) on July 24, 2000. The Protest challenges the terms of a solicitation (“Solicitation”) for the acquisition of Airport Surface Detection Equipment (the “Acquisition”). The Solicitation was issued by the Federal Aviation Administration Surveillance Branch (the “Product Team”). More specifically, Northrop’s pre-award Protest alleges that the Product Team’s inclusion in the Solicitation of an active interrogation multilateration (“Multilateration”) requirement is overly restrictive and results in a *de facto* sole source procurement.

The Product Team has moved to dismiss the Protest on timeliness grounds, alleging that Northrop “knew every basis of this protest before the date for closing of receipt of offers for the initial SIR [Screening Information Request], March 20, 2000....” See Product Team Motion at 6. Sensis Corporation (“Sensis”), which was admitted to the Protest as an interested party intervenor, *see* ODRA Order dated August 1, 2000, also has filed a Motion to Dismiss on grounds of timeliness. Sensis contends that the Multilateration requirement was “contained within the Solicitation documentation from the outset of this

procurement.” Sensis Motion at 1. Following briefings on the Motions, the parties were informed during a telephone conference on August 10, 2000, that the Motions would be denied and that this written decision would be forthcoming.

For the reasons discussed herein, the ODRA concludes that the current record does not support a finding that the alleged improprieties complained of in Northrop’s Protest with respect to the Multilateration requirement of the Solicitation were apparent prior to the issuance of the Request for Offers (“RFO”) on June 6, 2000. The Motions to dismiss for lack of timeliness are therefore denied.

DISCUSSION

The time for filing of bid protests related to solicitation improprieties is controlled by the ODRA Procedural Regulation, which provides:

Protests based upon alleged improprieties in a solicitation or a SIR that are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.

14 C.F.R. §17.15(a)(1). As we have previously stated, the ODRA Procedural Regulation does not allow the ODRA discretion to extend the stated time limits for protest filings. *See Protest of Boca Systems, Inc.*, 00-ODRA-00158. Furthermore, the time limits will be strictly enforced. *See Protest of Boca Systems, Inc., supra; Protest of Bel-Air Electric Construction, Inc.*, 98-ODRA-00084; *Protest of Raisbeck Commercial Air Group, Inc.*, 99-ODRA-00123; *Protest of Aviation Research Group/US, Inc.*, 99-ODRA-00141.

The ODRA Procedural Regulation further provides at §17.19(a)(1) that any party may request by motion, that:

[t]he protest, or any count or portion of a protest, be dismissed for lack of jurisdiction, if the protester fails to establish that the protest is timely, or that the protester has no standing to pursue the protest.

Subsection (b) of §17.19 further provides that:

in connection with any request for dismissal or summary dismissal, the Office of Dispute Resolution for Acquisition shall consider any material facts in dispute in a light most favorable to the party against whom the request is made.

The Product Team issued a Market Survey for the Acquisition on or about December 2, 1999. The Market Survey included the following statements:

FAA Airport Surface Detection Equipment-X (ASDE-X) Acquisition. The purpose of this market survey is to: 1) Engage industry in an early dialogue regarding plans for an ASDE-X acquisition; 2) Communicate the FAA's current plans for such an acquisition; 3) Allow industry adequate time to plan teaming or subcontracting arrangements as appropriate; and 4) Obtain industry feedback regarding both the feasibility of the planned approach and interest in the program.

* * *

FAA is defining the ASDE-X system as a radar, a processor, an ADS-B/multilateration sensor, and a display. The data from the radar and multilateration sensor is to be fused together for presentation on the display. Safety logic and conflict alerts may be added at a later date. The ASDE-X system shall also have the capability for each sensor, e.g., radar or ADS-B/multilateration, to operate and be displayed independently. The system shall have the capability to be expanded to include other sensors such as ASDE-3.

* * *

Development of an ASDE-X Specification and statement of work is in process. The specification will be the requirements document.

The Acquisition will be a competitive procurement. FAA plans to issue a Screening Information Request ("SIR") in February of 2000 with high level screening evaluation criteria. Offerors will be screened down to those that are considered most likely to receive an award. A specification and SOW will be issued to the screened down offerors. The goal is to award a contract by September 29, 2000.

See Market Survey of December 2, 1999 at pages 1 and 2, Attachment 7 to Product Team Motion to Dismiss. The record reflects that a total of 16 offerors responded to the Market Survey. The respondents included Northrop Grumman and Sensis.

On February 2, 2000, the Product Team published a supplemental Announcement designed to assist offerors responding to a Screening Information Request (“SIR”). *See* Product Team Motion to Dismiss, Attachment 9. The February 2 supplemental Announcement provided additional information “intended to aid offerors in responding to a Screening Information Request (SIR), which is projected to be issued in mid-February.” *See* Product Team Motion, Attachment 9 at page 1. The Announcement also stated that “the information reflects what is currently planned and may be subject to change after internal FAA review.” Finally, the Announcement specifically stated that:

Schedule is one area which will be discussed on a high level basis in the February SIR. Negotiations on a more detailed level will be conducted with the down selected offerors.

Id., at page 3.

On or about February 17, 2000, the Product Team released its SIR for the Acquisition. *See* Attachment 11 to Product Team Motion to Dismiss. Responses to the SIR were due to be filed by March 15, 2000. The date was subsequently extended to March 20, 2000. The SIR stated that the Acquisition would be accomplished through a two-step procurement process. All offerors were required to address a series of technical and other topics in response to the SIR. Following receipt and evaluation of responses to the SIR, the Agency would narrow the competitive field by down selecting to the offerors considered most likely to receive an award. This approach is widely and properly used by the Agency pursuant to the provisions of the FAA’s Acquisition Management System (“AMS”). The SIR also indicated that the down selected offerors would receive contract packages to be negotiated; and a set of evaluation criteria to be used for award. Finally, it indicated that the Specification would accommodate commercial practices where

possible, and that the Agency would issue a Request For Offers (“RFO”) and evaluate the responses of the down selected offerors to the RFO in order to make contract award. *See* Attachment 11 to Product Team Motion.

Northrop Grumman submitted its response to the SIR on March 20, 2000. *See* Attachment 13 to Product Team Motion to Dismiss. In its response, Northrop Grumman indicated that its “proposed multilateration system (developed by ERA Corporation) currently provides only passive operation; and it would require significant development to provide active interrogation functionality.” *See* Northrop Opposition, ¶16. In a technical clarification of its response, Northrop stated: “Northrop Grumman will offer an active interrogation capability to augment passive mode S/A/C multilateration capability.” *See* Northrop Grumman Submission of March 31, 2000, included as Attachment 14 to Product Team Motion to Dismiss.

On or about April 18, 2000, the Product Team down selected to two offerors, *i.e.*, Northrop Grumman and Sensis. Thereafter, Northrop raised a series of objections. According to the declarations of Stephen F. Unger, the Northrop representative for the acquisition:

On May 1, 2000, I advised [the Contracting Officer] that Northrop Grumman was preparing a draft protest, challenging the requirement for multilateration with active interrogation. [The Contracting Officer] responded that filing such a protest before issuance of the RFO and the *definitive* ASDE-X Specification would be premature, because (i) the FAA would be flexible during the Specification negotiations and (ii) the Specification negotiations could result in removal of the requirement for active interrogation, if Northrop Grumman could justify an alternative technical approach for identification tagging. [The Contracting Officer] had made similar statements to me during previous conversations.

See Affidavit of Stephen F. Unger, attached as Exhibit 4 to Opposition of Northrop to

Motions to Dismiss.¹ (Emphasis supplied). The Northrop Opposition makes reference to a series of meetings with the FAA in May and June of 2000. Northrop alleges that: “On May 31 and June 1, 2000, Northrop Grumman and FAA personnel met to tailor the ASDE-X Specification.” See Northrop Opposition, ¶27. Northrop also alleges that other meetings were either proposed or took place in the May-June timeframe, for the purposes of tailoring of the ASDE-X Specification. See Northrop Opposition, ¶¶21–27.

The RFO issued by the Product Team on June 6, 2000, included a Specification, Statement of Work, and Solicitation/Contract. See Northrop Opposition, ¶29. The Solicitation/Contract also included a schedule that called for completion of critical design review (“CDR”) within 145 days. Northrop alleges in this regard that:

Given the significant development effort necessary to comply with the ASDE-X Multilateration Specification, only Sensis can meet the CDR requirements within the aggressive 145-day schedule period.

See Northrop Opposition, ¶30. The Solicitation/Contract also presented evaluation criteria, and Northrop alleges that:

Sensis’ inherent competitive advantage from multilateration will impact many of the evaluation criteria, and provide Sensis with additional risk and cost advantage.

See Opposition, ¶33. Northrop filed its Protest on July 24, 2000, *i.e.*, prior to the due date for offers established in the RFO.

In opposing the Motions to dismiss, Northrop states:

¹ The alleged statements of the Contracting Officer regarding the ripeness of a protest would not represent a controlling legal opinion on the timeliness issue. However, assuming, as the ODRA is required to do (*see* 14 C.F.R. §17.19(b)), that the statements were in fact made by the Contracting Officer, such statements would support a finding that the specifics of the multilateration requirement were not definitized at the time the statements were allegedly made.

The RFO was the first solicitation issuance to contain the definitive specification requirement for multilateration with active interrogation. Similarly, it was the first solicitation issuance to contain definitive ASDE-X schedule requirements and the precise evaluation criteria, including relative weighting, for contract award.

See Northrop Opposition at ¶28. Northrop argues: (1) that while a Multilateration requirement was listed at earlier stages in the acquisition, the exact terms were not known; and (2) that until the RFO was released, it was not clear that the Multilateration requirement would remain in the final Specification.

The question presented by the current Motions is whether Northrop was required, as a matter of law, to file its Protest at the time of issuance of either the Market Survey or the SIR or whether instead, as Northrop now contends, it was entitled to wait until issuance of the RFO, when the Multilateration requirement was “definitive” as a requirement. *See* Affidavit of Stephen F. Unger.

Based on the record to date, and accepting Northrop’s factual allegations for purposes of the pending Motions,² the ODRA resolves the issue by finding that the Northrop Protest is grounded on its allegation that the combination of two factors established by the RFO – *i.e.*, (1) the “aggressive schedule” and (2) the alleged evaluation weight accorded to the multilateration capability – serve to render Northrop incapable of competing effectively for the award. In this regard, footnote 5 to Northrop’s Opposition states:

For example, if the RFO contained a less aggressive schedule and/or allocated less evaluation weight to multilateration, Northrop Grumman may have concluded that it could compete effectively for the ASDE-X Contract. Under these circumstances, the ASDE-X RFO would not constitute an improper *de facto* sole source procurement to Sensis.

² As noted previously, the ODRA Procedural Regulation requires that the ODRA “consider any material facts in dispute in a light most favorable to the party against whom the request is made.” 14 C.F.R. §17.19(b).

See Opposition, footnote 5 at page 16. Northrop's Protest, as refined in its Opposition and in its supplemental letter of August 10, 2000, is that "the ASDE-X solicitation, *as currently structured*, will result in a *de facto* sole-source award to the Sensis/Raytheon team." Northrop August 10, 2000 letter. (Emphasis supplied). In the ODRA's view, the *structure* of the Solicitation's Multilateration requirement complained of in the Protest was first established in the RFO.

In this case, technical and other significant aspects of the Acquisition, including the Specification, the schedule, and the evaluative criteria weighting scheme, evolved through successive stages – *i.e.*, the Market Survey, followed by the SIR, followed by the RFO. There is no question that the term "multilateration" was included in the Acquisition documentation from the very beginning, *i.e.*, in the Market Survey, and that certain information regarding multilateration was provided. However, the documentation also indicates that, prior to the issuance of the RFO, multilateration was not presented as a "definitive" contract requirement in such a way that the grounds of Northrop's Protest were "apparent" as a matter of law, for purposes of protest timeliness. *See* 14 C.F.R. §17.15(a)(1). Finally, inasmuch as the purported implications of a finalized Multilateration requirement were only fully apparent upon issuance of the RFO, the GAO case law urged upon the ODRA by Sensis as "persuasive authority" would not support a dismissal here.³

CONCLUSION

³ Because Section 348 of Public Law 104-50 makes the Competition in Contracting Act ("CICA") expressly inapplicable to the FAA Acquisition Management System, the FAA is not bound by precedent of the GAO, which resolves bid protests pursuant to the CICA. Nevertheless, the ODRA has, on occasion, applied GAO decisions as "persuasive authority". *Protests of Camber Corporation and Information Systems & Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated). Although the General Accounting Office ("GAO") has held in connection with two-step procurements that solicitation improprieties must ordinarily be protested prior to the Step 1 closing date, the improprieties complained of must be *apparent* in the first-step solicitation. *See Colt Industries, Fairbanks Morse Engine Division*, Comp. Gen. Dec. B-212241, 83-2 CPD ¶664 (December 12, 1983), *citing Julie Research Laboratories, Inc.*, Comp. Gen. Dec. B-207745, 82-2 CPD ¶446 (November 16, 1982).

For the foregoing reasons, the Motions of the Product Team and Sensis are denied.⁴ The ODRA Director has appointed a Special Master to conduct fact finding proceedings and to provide findings and recommendations on the merits of the Protest, pursuant to the ODRA Procedural Regulation, 14 C.F.R. §17.37, and the Memorandum of Understanding dated March 30, 2000 between the FAA and the General Services Administration Board of Contract Appeals.

_____/s/_____
Anthony N. Palladino
Associate Chief Counsel and Director
FAA Office of Dispute Resolution for Acquisition

Dated: August 17, 2000

⁴ This decision constitutes an interlocutory order. It will be incorporated into and become final upon issuance of the final decision of the FAA Administrator at the conclusion of this protest adjudication. *See Protests of Camber Corporation and Information Systems & Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated) (Decision on Reconsideration of Denial of Admissions to Protective Order); *see also Protest of Informatica of America, Inc.*, 99-ODRA-00144 (Preliminary Finding and Interlocutory Order).