

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

**FINDINGS AND RECOMMENDATIONS**

**Matter: Protest of Aviation Research Group/U.S., Inc.  
Pursuant to Market Survey For the National Aviation Safety Data  
Analysis Center (NASDAC) International Aviation Historical Safety  
Data Subscription**

**Docket No.: 99-ODRA-00141**

*Appearances:*

For the Protester, Aviation Research Group/U.S., Inc.: Benjamin M. Doyle, Aviation Management Associates, Inc.

For the Agency Product Team: Robert Zuckerman, Esq.

**INTRODUCTION**

Aviation Research Group/U.S., Inc. ("ARG/US") filed a bid protest ("Protest") with the FAA Office of Dispute Resolution for Acquisition ("ODRA") on September 17, 1999. The Protest essentially alleges that the Integrated Product Team for the Office of System Safety (ASY) ("Product Team") deliberately manipulated the procurement process in order to make a sole source award in favor of the incumbent contractor. Moreover, it claims that such manipulation was evidenced by the broad scope of database information required, combined with a short deadline for submission of the information.

On October 4, 1999, the Product Team filed a Motion to Dismiss on the grounds that the Protest was untimely filed. For the reasons explained below, the ODRA must recommend that the Product Team's motion be granted. In so doing, however, we note that although a complete record does not exist in this case, the Protest raises serious

allegations, albeit in an untimely manner. Based on the facts presented thus far, and in consideration of the Acquisition Management System's ("AMS") policy preference for competition, the ODRA believes that the procurement strategy used by the Product Team should be reviewed at an appropriate level within the Agency.

## **FACTUAL BACKGROUND**

On August 17, 1999, the FAA announced that it was conducting a Market Survey entitled "Market Survey for NASDAC International Aviation Historical Safety Data Subscription." The purpose of the announcement was to identify potential sources who could provide the FAA with an International Aviation Historical Safety Data subscription/license, including monthly updates. The award contemplated a base period of one year with four option years. *Motion to Dismiss, Attachment A.*

The Market Survey invited offerors whose products met the stated requirements to submit a copy of their subscription, and provide user manuals, monthly updates, and hotline support from 8:00 a.m. EDT to 5:00 p.m. EDT, Monday through Friday, for a six-week demonstration period starting September 15, 1999 through October 31, 1999. Those offerors who intended to have their product evaluated were asked to notify the Contracting Officer no later than August 31, 1999. *Motion to Dismiss, Attachment A.*

The Market Survey identified general technical requirements, as well as data content requirements. The data content requirements were particularly extensive.<sup>1</sup>

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<sup>1</sup> Specifically, the database was to include historical data for each commercial jet, turboprop, and business jet manufactured since 1960, including the following:

Order date	Serial numbers
Manufacture date	Registration numbers
All ownership transfers	All major changes to each aircraft
All owners and operators	

The database also was to include all accidents since 1960 for each aircraft in the database, including the following:

Event date	Event location
Aircraft operator	Aircraft type
Aircraft registration number	Aircraft serial number
Phase of flight	Purpose of flight
Number of injuries	Number of fatalities

The protester alleges that on August 26, 1999, during a meeting convened for the purpose of clarifying the evaluation criteria and discussing the requirements outlined in the Market Survey, two members of the Product Team were dismayed by the competitive interest demonstrated by the protester and were "unwilling to provide necessary information." The protester further states that the Contracting Officer had indicated that Product Team had been reluctant to compete this requirement. *Protest, page 2.*

In accordance with the Market Survey, the Protester informed the Contracting Officer by letter, dated August 30, 1999, that it intended "to make available to the FAA a cost competitive system that meets all of the requirements as defined by the market survey." *Motion to Dismiss, Attachment B.* The protester asserts that once the Product Team was notified of the existence of a potential bidder, it attempted to move the submission date requirement up from September 15, 1999 to September 6, 1999. *Protest, page 2.*

On September 8, 1999, allegedly at the recommendation of the Contracting Officer and with the understanding that there was support for a reasonable time extension within the contracting office, the protester requested an extension of time of up to two months to submit its data systems for testing and evaluation by the FAA. The protester indicated that the purpose of the extension was to provide the FAA with a "fully integrated" system for evaluation and noted that, unlike the incumbent vendor, the Protester had not yet had the opportunity to work closely with the FAA in developing the International Aviation Historical Safety Data System. The Protester further asked that if the extension date was not possible, that it be advised "immediately of any alternative to insure FAA [sic] can fairly evaluate competitive systems." *Opposition to Motion to Dismiss, Attachment 3.*

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Total people on board  
Weather conditions  
Loss value Total

Cause of accident or incident  
Disposition of aircraft

The database also was to include hours and cycles of operation for each aircraft in the database, covering the full life of the aircraft; and to include details for each owner and aircraft operator, including address, points of contact, and corporate background (size, number of employees, areas served, etc.). The database was to include technical data for each aircraft, including high level specifications for weight, capacity, dimensions and seating configuration, as well as engine type, registration and serial number. Furthermore, all data in the database was required to be updated on a monthly basis, and to be complete, consistent, valid, and accurate. *Motion to Dismiss, Attachment A.*

However, on September 13, 1999, the Product Team flatly refused to grant any form of extension to the Protester. *Protest, page 2.*

The Protester did not submit its product for evaluation by September 15, 1999. Rather, it filed the Protest, which alleges that the Product Team, by ensuring that all interested parties would fail to fulfill the stated requirements (with the exception of the incumbent contractor) and arbitrarily refusing the Protester's request for an extension without explanation, is in effect conducting a sole source procurement without proper justification. The Protester also claims that such actions reflect a pattern on the part of the Product Team of discouraging competition for this requirement, citing the experiences of another company, Aviation Data Service, Inc. of Wichita, Kansas. *Protester's Opposition to Motion to Dismiss, page 3.*

In the Motion to Dismiss, the Product Team characterizes the Protest as an untimely challenge against (1) the stated requirements; (2) the alleged lack of evaluation criteria; and (3) the September 15, 1999 start date for product demonstration. The Product Team asserts that each of these grounds of protest was apparent on the face of the August 17, 1999 Market Survey and should have been protested prior to the September 15, 1999 deadline for product submission.

The Product Team further asserts that nothing said at the August 26, 1999 meeting could be construed as discouraging the Protester from participating in the demonstration, and that the "necessary information" sought by the Protester actually was the incumbent's proprietary data, which was being provided to the FAA under a commercial license. *See Motion to Dismiss, page 7; Jennings Affidavit and Hume Affidavit.* The Product Team further denies that the Contracting Officer indicated that the Product Team was reluctant to conduct a competition and that he "advised" the Protester to request a time extension. Rather, the Product Team contends that the Contracting Officer only stated to the Protester that, should it decide to request an extension, it must do so in writing. *See Motion to Dismiss, page 7 and Jennings Affidavit.*

## DISCUSSION

It is well established that a protest must be timely filed in order to be considered; and that the time limits for filing of protests will be strictly enforced. *See Raisbeck Commercial Air Group, Inc.*, 99-ODRA-00123, *citing Protest of Bel-Air Electric Construction, Inc.*, 98-ODRA-00084. The timeframes for filing protests against FAA procurements are set forth in 14 C.F.R. §17.15(a). Protests based upon alleged improprieties in a solicitation or a SIR that are apparent prior to the time set for receipt of initial proposals are required to be filed with the Office of Dispute Resolution for Acquisition (ODRA) prior to the time set for the receipt of initial proposals. 14 C.F.R. §17.15(a)(1). For protests other than those related to alleged solicitation improprieties, the protest must be filed with the ODRA not later than seven business days after the date the protester knew or should have known of the grounds for the protest. 14 C.F.R. §17.15(a)(3)(i).

It is similarly well established that the ODRA may consider and, where appropriate, make recommendations to the Administrator in connection with requests for summary dismissals.<sup>2</sup> 14 C.F.R. §17.19(c)(1). In considering such requests, the ODRA will view the facts and inferences in a light most favorable to the non-moving party.

The first question to be resolved is which of the timeliness provisions of §17.15(a) controls the filing of the instant protest. The Product Team urges that §17.15(a)(1) should apply: "It should be beyond dispute that the improprieties alleged in the protest -- the requirement for complete international accident data, the lack of evaluation criteria, and the September 15, start date for the demonstration -- were apparent on the face of the solicitation." *Motion to Dismiss*, page 8. In contrast, the Protester argues that §17.15(a)(1) applies only to the submission of proposals and bids, but not to other types of submissions, such as responses to market surveys, which are provided only for demonstration purposes or product evaluation. The protester points out that it has not

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<sup>2</sup> The ODRA may, on its own, order partial dismissals of protests or contract disputes. Fully dispositive motions may only be decided by the FAA Administrator.

presented a proposal to the FAA; nor has the FAA requested one. *Opposition to Motion to Dismiss, page 2.*

Under the AMS, a "Market Survey" refers to any method used to survey industry to obtain information and comments and to determine competition, capabilities, and estimate costs. *See AMS Appendix C: Definitions.* A "screening information request" ("SIR") is not limited to requests for proposals, but may include any request made by the FAA for documentation, information, presentations, proposals, or binding offers for the purpose of screening to determine the best value solution for a particular procurement. *AMS § 3.2.2.3.1.2.1.* Specifically, the term "screening" refers to the process of evaluating offeror submittals to determine either which offeror/products are qualified to meet a specific type of supply or service, which offerors are most likely to receive award, or which offerors provide the best value to the FAA. . *See AMS §3.2.2.3.1.1 and Appendix C: Definitions.* In our view, the August 17, 1999 Market Survey clearly invited potential offerors to submit their product for purposes of screening by means of a product demonstration, so as to permit the FAA to determine the best value solution for this procurement. Thus, the August 17, 1999 Market Survey falls within the definition of a "SIR", as referenced in 14 C.F.R §17.15(a)(1).

No matter how the protester's allegations are characterized, they allege solicitation or SIR improprieties that were apparent to the protester prior to the time set for receipt of initial proposals. Even assuming that the stated data requirements were irrational; that the SIR lacked an adequate description of the evaluation criteria; and that the Product Team's September 13, 1999 refusal to grant an extension was arbitrary and part of an overall scheme to avoid competition and ensure a sole source award to the incumbent, such improprieties were apparent to the protester and were required to have been protested to the ODR prior to the September 15, 1999 deadline for product submissions. *See, e.g., American Association for the Advancement of Science, B-250927.2, March 12, 1993, 93-1 CPD ¶ 305* (protester's complaint of insufficient time filed after closing date was found untimely, as were alternative characterizations of bias and improper *de facto* sole source

for the same reasons).<sup>3</sup> Thus, this protest is untimely and, pursuant to the ODRA's final procedural rule, which provides the ODRA no discretion to extend the deadlines established for the filing of protests, we must recommend dismissal.

### **Conclusion and Recommendation**

For the reasons set forth above, the ODRA recommends that the Protest be summarily dismissed as untimely. The ODRA further recommends the Administrator direct that the FAA's Integrated Product Leadership Team, which has oversight responsibility for the Agency's Integrated Product Teams, review the facts surrounding the procurement in question and report back to the Administrator on the steps that will be taken by the Product Team to ensure that its actions are consistent with the AMS policy favoring competitive procurement.

/s/

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Marie A. Collins  
Dispute Resolution Officer  
Office of Dispute Resolution for Acquisition

### **APPROVED:**

/s/

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Anthony N. Palladino  
Associate Chief Counsel and Director  
Office of Dispute Resolution for Acquisition

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<sup>3</sup> Because of our findings with respect to the lack of timeliness of this Protest, we do not reach the issue of whether the award in this case satisfies the requirements of the AMS. We point out, however, that the AMS favors competition and a decision to award a single source contract must have a documented rational basis and will be subject to close scrutiny. *See Raisbeck Commercial Air Group, Inc., 99-ODRA-00123, citing Protest of Wilcox Electric, Inc., 96-ODRA-0001.*