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

Protest of)
)
Oerlikon Contraves S.p.A.) Docket No. 04-ODRA-00320
)
Pursuant to Market Survey for Low Cost Radar)
as an Airport Surface Surveillance System and)
Runway Incursion Prevention Tool)

DECISION ON MOTION TO DISMISS
FOR LACK OF JURISDICTION

I. INTRODUCTION

This matter currently is before the Office of Dispute Resolution for Acquisition ("ODRA") on the Motion of the Federal Aviation Administration Surface Technology Assessment Team ("Assessment Team"). The Motion requests that the ODRA dismiss the Protest of Oerlikon Contraves S.p.A. ("Oerlikon") on the alternative bases that (1) the ODRA is without jurisdiction over the subject matter of the Protest, and (2) the Protest is untimely. Essentially, the Assessment Team alleges that this Protest involves a cost-sharing cooperative agreement, as opposed to a protestable acquisition of goods or services. Alternatively, the Assessment Team argues that the Protest should be dismissed because it alleges improprieties in the solicitation document and was not filed prior to the time set for receipt of proposals.

For the reasons discussed herein, the ODRA concludes that the Protest concerns an authorized cooperative agreement, as contemplated by the

FAA Acquisition Management System ("AMS"), and actions taken by the Assessment Team in connection with that agreement are not protestable before the ODRA.[1]

II. DISCUSSION

The Oerlikon Protest consists of a one page letter from the U.S. Representative of Oerlikon purporting to set forth five grounds of protest as follows:

> 1. The referenced solicitation never suggested any restriction or limitation regarding "siting".
> 2. Even after repeated exchanges of emails with the Program Manager Mr. Son Tran, the verbal requirement for "total flexibility in siting" remains an un-qualified and subjective criterion.
> 3. In the 30 September response to my inquiry, Ms. Constance Brown, FAA Contracting Officer, attempted to provide an explanation by once again asserting that in 16mm of rainfall the SMART Radar would require 2 systems which would exceed the $500,000 cost criteria. Unsaid is the unidentified predicate that the radar must be sited at some unquantified location from mid-field.
> 4. In the larger context of a "Market Survey", the narrow drawing of the grounds of elimination does not serve the public interest by eliminating a proven, fielded, and reliable technology without the proper test against other systems under controlled conditions.
> 5. Finally, since the FAA has already extracted a pledge of "Cost Sharing" from Oerlikon Contraves S.p.A.. There is hardly a reason to eliminate SMART at this early stage. It is requested that SMART participate in the LCSS field evaluation.

The Assessment Team asserts that "the purpose of the Market Survey was to identify companies with low cost radars who were willing to enter into a Cost Sharing Agreement to evaluate their proposed product." *See*

[1] The ODRA does not reach the issue of whether the Protest was timely filed. The ODRA notes, however, it is clear from the face of the Protest itself that Oerlikon's challenge largely is focused on challenges to the terms of the Assessment Team's announcement and it is undisputed that the Protest was filed after the time set for initial proposals.

Assessment Team Motion to Dismiss at 1. Oerlikon does not dispute this assertion. In its Opposition to the Motion to Dismiss, Oerlikon states:

> We are in agreement with the facts as they relate to the "Market Survey". However, we must note that the emphasis added to the "Cost Sharing Agreement" is puzzling since Oerlikon Contraves S.p.A. on two occasions stipulated its understanding of and willingness to enter into a Cost Sharing Agreement.

See Oerlikon Opposition to Motion to Dismiss at 1.

The "Market Survey" in question ("Survey") was entitled "Low Cost Radar As An Airport Surface Surveillance System and Runway Incursion Prevention Tool". *See* Assessment Team Motion, Exhibit 1. The Survey stated that "the Surface Technology Assessment Team is investigating the commercial availability of low cost airport surface surveillance systems that can meet the basic capabilities of small to medium airports." Survey at 1. The Survey went on to state clearly that its purpose was to: "identify companies willing to enter into a Cost Sharing Agreement for the purpose of evaluating their proposed product…." *Id.* at 1. The Survey made clear that interested companies were required to deliver, install, operate and maintain their respective products for a period of up to twelve months in order for the Assessment Team to complete an evaluation. *Id.* The Survey specified a number of programmatic and technical requirements, and went on to describe what the individual company responses to the Survey must include. *Id.* at 1 through 4. As a final matter, the Survey also included the following statement on page 5: "This public notice is not intended to guarantee procurement of the requirements addressed in this Market Survey."

The closing date specified in the Survey was July 23, 2004, at 5:00 p.m. Oerlikon did not protest the terms of the Solicitation prior to the specified closing date. Rather, Oerlikon submitted its Response to the Survey on

July 23, 2004. *See* Motion, Attachment B. The cover letter to the Oerlikon Response stated, among other things, that:

> We understand that the FAA proposes to conduct the evaluation of our "SMART" equipment on a "cost sharing" basis. Based on the information currently in hand, Oerlikon Contraves agrees to participate in this important evaluation.

Motion, Attachment B at 1.

On September 27, 2004, the Assessment Team informed Oerlikon by letter, that Oerlikon's system "did not satisfy the system cost and the technical elements of the key criteria. It is with great regret that we inform you that your company will not be asked to participate in the Low-Cost Surveillance System (LCSS) Cost-Sharing Agreement." *See* Motion, Attachment C. By letter dated September 30, 2004, the Assessment Team provided a more detailed explanation of its position. *See* Motion, Attachment D. Oerlikon filed its Protest with the ODRA on October 7, 2004, citing the five grounds of protest referenced above.

In support of its Motion to Dismiss the Protest for lack of jurisdiction, the Assessment Team relies on Section 3.9.8 of the AMS which provides, among other things:

> The following matters may not be protested before the Office of Dispute Resolution for Acquisition:
>
> ***(b) Cooperative agreements;
>
> ***(e) Other transactions which do not fall into the category of procurement contracts subject to the AMS.

The Assessment Team further notes that express reference is made in the Survey to the Team's intention to enter into a "Cost Sharing Agreement". *See* Motion at 3. The Motion also cites to specific statutory authorities that authorize the FAA to enter into such agreements. *See* 49 U.S.C. Section 44505(d) (regarding the Administrator's authority to "enter into cooperative agreements on a cost-shared basis"); and 49 U.S.C. Section 106(1)(6) (authorizing the Administrator to "enter into and to perform such contracts, leases, cooperative agreements or other transactions as may be necessary to carry out the functions of the Administrator"). The Assessment Team goes on to note that, although the word "cooperative" was not used in the Survey, the nature of the arrangement is consistent with the concept of a cooperative agreement. *See* Motion at 3. The Team points out that under the contemplated arrangement:

> The FAA will cooperate by locating suitable siting and allowing the selected companies whose equipment meets the specifications to place the radar on FAA sites for testing. The companies will continue to own their own radar systems and to deliver, install, operate and maintain their systems for up to 6 months with an option for further evaluation at no cost to FAA.

See Motion at 3, 4.

Oerlikon filed its Opposition to the Motion on November 3, 2004 ("Opposition"). As noted above, Oerlikon states in its Opposition that it has "stipulated its understanding of and willingness to enter into a cost-sharing agreement." *See* Opposition at 1. The Opposition, then goes on to recount in detail why Oerlikon believes that its system satisfies the requirements of the Market Survey from a technical standpoint. *See* Opposition 1, 2. The Opposition fails, however, to address substantially, or otherwise to take issue with, the Assessment Team's legal argument that this matter involves a non-protestable cooperative agreement. Rather, Oerlikon merely states:

> With regard to the Section headed "Arguments" regrettably, we now descend from the clear light of technical/scientific discussion into the murky realm of legalese. Counsel for the FAA pulls the "cooperative"

rabbit out of a hat and attempts to distract and divert our attention from the realities of this Protest.

See Opposition at 2.

The ODRA's jurisdiction over bid protests is clearly defined and limited by the AMS and by law. The ODRA Procedural Regulation, at 14 C.F.R. Section 17.1, entitled "Matters Not Subject to Protest" provides:

> The following matters may not be protested before the Office of Dispute Resolution for Acquisition: (a) FAA purchases from or through state, local, and tribal governments and public authorities; (b) FAA purchases from or through other federal agencies; (c) grants; (d) cooperative agreements; (e) other transactions which do not fall into the category of procurement contracts subject to the AMS.

Furthermore, it is settled that the ODRA will dismiss matters including bid protests where it does not have jurisdiction over the subject matter involved. *See Protest of Edward B. Block Consulting,* 02-ODRA-00225, June 17, 2002.

In the instant case, there are no material facts in dispute. As the Team alleges, and Oerlikon admits, this dispute is grounded on Oerlikon's exclusion from participation in a cost-sharing arrangement. As structured, the proposed arrangement for evaluation and testing of privately owned equipment is not an acquisition within the meaning of the AMS. Rather, it can only be viewed as a cost-sharing arrangement. As such, it falls squarely within the cooperative agreement authority of the Agency, and, by its terms, does not involve a protestable acquisition of goods or services. The ODRA has no authority to review whether the Team acted properly in not entering into a cooperative agreement with Oerlikon.

III. CONCLUSION

For the foregoing reasons, the ODRA finds that the Assessment Team's actions in this matter are not protestable and that, pursuant to 14 C.F.R. Section 17.29, this Protest must be dismissed as involving a matter not subject to the jurisdiction of this Office.

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

November 5, 2004