

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

Protest of)	
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Water & Energy Systems Technology, Inc.)	Docket No. 07-ODRA-00419
)	
<u>Solicitation No. DTFANM-06-R-00016</u>)	

DECISION ON MOOTNESS

This matter currently is before the Office of Dispute Resolution for Acquisition (“ODRA”) on the issue of whether this Protest filed by Water & Energy Systems Technology, Inc. (“WEST”) on September 21, 2007, should be dismissed as moot. By letter dated September 21, 2007, counsel for the Northwest Mountain Region (“Region”) reported that prior to the date of the filing of the Protest, the Region had taken corrective action. The Region reported that it had cancelled the Solicitation involved and plans to reissue it in corrected form. The ODRA, by letter of September 24, 2007, informed WEST that in light of the Region’s action, it appeared that the Protest may be moot. WEST was asked to inform the ODRA if it would agree to the dismissal of the Protest without prejudice. WEST further was directed to respond to the ODRA in writing by no later than the close of business, September 26, 2007 stating any reasons why it believed that the Protest should not be dismissed.

WEST responded by letter dated September 26, 2007, (“WEST Letter”) notifying the ODRA that WEST “does not agree to the voluntary dismissal with the prejudice of our protest dated September 14, 2007”. It should be noted in this regard that the ODRA had asked whether WEST would agree to the voluntary dismissal *without* prejudice of the Protest. In the WEST Letter, the Protester further stated that “it is our belief that the withdrawal of the RFP and the issuance of ‘new’ scope of work will only further cloud the issue.” *WEST Letter* at 1. Finally, the WEST Letter goes on to state that the other

bids received by the Region “should have been declared non-responsive and the award should have made to a legitimate supplier.” *Id.*

The ODRA Procedural Regulation set forth at 14 C.F.R. § 17.19(c) permits the ODRA to dismiss a protest or a portion of a protest. Moreover, the ODRA previously has held that protests may be dismissed as moot where the FAA contracting officer involved voluntarily cancels the solicitation as a corrective action in response to a protest. *See Protest of Transgroup Express*, 00-ODRA-00157. In *Transgroup*, the protester had challenged the terms of the solicitation for emergency relief transportation services. The protest challenged the nature of the contract as improper for: (1) allowing either party to not perform; (2) limiting the region from conducting a rational best-value analysis; and (3) permitting the region to waive contract requirements without providing all offerors an opportunity to update their submittals. *Id.* During the course of an alternative dispute resolution (“ADR”) effort that followed, the region unilaterally decided to cancel the solicitation. Thereafter, the region filed a motion to dismiss the protest as moot and Transgroup opposed that motion arguing that the region was not likely to complete the corrective action. The ODRA found no basis in the record to suggest that the region was acting in bad faith or that it would not in fact take the additional corrective action that it promised. *See Transgroup, supra* at 7.

The instant Case is factually distinguishable from the situation presented in *Transgroup*. Here, a fair reading of the allegations made by WEST in its original Protest Letter as well as its response to the mootness issue demonstrates that this Protest, which was filed *after* the cancellation of the Solicitation, was directed specifically at the cancellation decision. Thus, it is the cancellation of the Solicitation, rather than the terms of the Solicitation, that is at issue in the WEST Protest. Under such circumstances, the ODRA will review the cancellation decision and determine whether it has a rational basis, is arbitrary or capricious or constitutes an abuse of discretion. *See JO-JA Construction Limited*, 96-ODRA-00024.

The Region hereby is directed to file its substantive Agency Response to the Protest, including its legal position and all relevant documents, chronologically arranged tabbed and indexed within 10 business days of the date of this Decision *i.e.* by no later than Tuesday, October 23, 2007. The Protester may file Comments on the Agency Response no later than five business days after its receipt of that Response.

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Anthony N. Palladino
Associate Chief Counsel and Director

October 5, 2007