

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

## FINDINGS AND RECOMMENDATIONS

**Matter: Protest of Kodiak Northwest, Inc.  
Under Solicitation No. DTFANM-09-R-00189**

**Docket No.: 09-ODRA-00505**

*Appearances:*

For the Protester,  
Kodiak Northwest, Inc.:

Dr. Kent Pilling, General Manager

For the FAA Program Office: Karen D. Huber, Esq.

For the Intervenor,  
Wausau Equipment Co., Inc.: Peter Tiffe, Executive Vice President

## I. Introduction

On November 3, 2009, Kodiak Northwest, Inc. (“Kodiak”) filed this Protest with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”). The Protest challenges the Northwest Mountain Region’s (“Region”) award of a contract (“Contract”) to Wausau Equipment Co., Inc., under Solicitation DTFANM-09-R-00189 (“Solicitation”). The Contract requires Wausau to supply a snow blower attachment for a front end loader for use in Ashton, Idaho. Kodiak primarily protests that the specification improperly included proprietary items “that restricted and eliminated competition.” *Protest* at 3. Kodiak also makes a variety of arguments to explain why it waited until after award to file its Protest. The Region, in response, asserts that Protest is untimely because Kodiak was legally required to file its Protest prior to award. As discussed below, the ODRA recommends that the Protest be denied as untimely in accordance with the ODRA Procedural Regulation, 14 C.F.R. § 17.15(a), and Acquisition Management System (“AMS”) Clause 3.9.1-3, “Protest (November 2002).”

## II. Findings of Fact

### A. The Solicitation

1. The Region issued Solicitation DFTANM-09-R-00179 on September 16, 2009. *Agency Response* (“AR”) Tab 1. The closing date for receipt of proposals was September 16, 2009. *Id.*
2. The Solicitation contained two Contract Line Item Numbers (“CLIN”), one for a “Front end loader per specifications,” and the other second for “Split package snow blower per specifications.” AR Tab 1 at 2.
3. Section B0003 of the Solicitation stated:

**B003. Solicitation Questions.** All contractors proposing this project desiring an interpretation or clarification of the specifications, drawings, contract terms and conditions, etc., must make the request by e-mail no-later-than 4:00 PM PST SEPTEMBER 16, 2009. E-mail your questions to MATHEW BENBOW at [matt.benbow@faa.gov](mailto:matt.benbow@faa.gov). Alternatively, you may fax your written questions to (425) 227-1055. Telephone questions will not be accepted. The requester shall provide a company name, point-of-contact name [...]. The Contracting Officer is the only person authorized to make clarifications, interpretations, or changes to this solicitation.

AR Tab 1 at 1-2. Mr. Kevin O’Hara was the Contracting Officer. AR Tab 1 at SF-33. Mr. Matthew Benbow was the Region’s “Contract Administrator,” who served as the point of contact for questions and information for the procurement. AR Tabs 1 and 7.

4. Section L of the Solicitation at pages 39, included the full text of the AMS Clause 3.2.2.3-20, Electronic Offers (July 2004). AR Tab 1 at 39. As reprinted in the Solicitation, the clause provided for electronic offers to be sent to Mr. Benbow’s email address. *Id.*

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5. Section L of the Solicitation also included the full text of AMS Clause 3.9.1-3, Protests (November 2002). *AR* Tab 1 at 40-41.
6. Section L001 required offerors to submit both a “Technical Proposal” and a separate “Business Proposal.” *AR* Tab 1 at 41.
7. Section M of the Solicitation explained the evaluation factors for award. Section M001 indicated that the “Government will make award to the responsible offeror whose proposal conforms to the solicitation terms and conditions, and represents the best value to the Government.” The same section also indicated that “the Government will award the contract to the lowest priced technically acceptable offer. Proposals will be evaluated as either ‘acceptable’ or ‘not acceptable’ on the basis of the following criteria: See M002, M003, M004.” *AR* Tab 1 at 43.
8. Section M004 identified past performance as the sole evaluation criteria for the Business Proposal. It required offerors to “be specific and provide details for each project.” It included nine separate items such as “project title, description, contract number;” “dollar value;” “customer name, address, phone number, and contact person;” “scope of work or type of work performed;” “specifications of Front End Loader and blower that meet or exceed FAA specifications;” etc. *AR* Tab 1 at 44.
9. The Rotary Snowplow Specifications were found in the single attachment to the Solicitation. *AR* Tab 1.
10. Section 2 of the Rotary Snowplow Specifications provides that the “manufacturer shall have a current ISO certification.” *AR* Tab 1, Rotary Snowplow Specification at § 4. The acronym “ISO” presumably refers to the International Standards Organization, but the ODRA has found no further reference in the Solicitation.

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11. Section 4 of the Rotary Snowplow Specifications required that the rotary unit consist of a “two-stage rotary plow,” and continued by stating that the “first stage shall have a one piece helical reel with the diameter being not less than 52 inches.” AR Tab 1, Rotary Snowplow Specification at § 4.

12. Regarding hydraulics for the rotary unit, the Specification stated,

Hydrostatic drive pump shall be directly coupled to the engine. Belt driven hydraulic pumps are not acceptable. Pumps shall be driven at engine speed. Hydrostatic motor shall be a Hagland-Dennison P-24 Goldcup and the Hydrostatic pumps shall be two (2) Hagland-Dennison P-11 Goldcup with bootstrap accumulator system.

AR Tab 1, Rotary Snowplow Specification at § 6.

13. The Rotary Snowplow Specification also addressed the power train, and required a “ribbon side drive chain arrangement.” AR Tab 1, Rotary Snowplow Specification at § 6.

**B. Correspondence and Amendments Leading to the Submission of Kodiak’s Proposal**

14. Kodiak supplies snow blowers, and initially had planned to participate in this procurement [DELETED]. *Protest*, Pilling email to Benbow, dated September 16, 2009 at 9:06 AM.<sup>1</sup>

15. Kodiak evidently called Mr. Benbow on September 15, 2009. *Protest* at 1; AR Tab 10, Benbow Declaration (“Decl.”) ¶ 6. Kodiak asserts that the purpose was to raise “concerns regarding the proprietary nature of the specification,” and further states that it left a message on Mr. Benbow’s voicemail. *Protest* at 1. Both parties acknowledge that Mr. Benbow sent an email message to Kodiak that stated, “Please submit all questions in an email.” *Protest* at 1 (citing the Benbow

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<sup>1</sup> Kodiak did not provide separately tabbed attachments to its *Protest*. In order to distinguish the between the various email correspondence sent on September 15 and 16, 2009, the ODRA refers to both the date and the time as shown on Kodiak’s printout of the correspondence. The ODRA notes for clarity that correspondence from Mr. Benbow in Renton, Washington has time stamps referencing the Pacific Time Zone (“-0700”), while Kodiak’s emails were sent from the Mountain Time Zone.

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email to Pilling dated September 15, 2009 at 7:37:29 -0700); AR Tab 11 at 1. The record does not contain any pre-proposal email or other contemporaneous correspondence from Kodiak that describes the nature of Kodiak's concerns.

16. The Region amended the solicitation three times. *See AR Tabs 2 through 4.* The Region issued the third amendment on the closing date of the Solicitation, September 16, 2009. AR Tab 4. Amendment 3 permitted offerors to submit proposals for individual CLINs rather than the whole solicitation.

17. After receiving Amendment 3, Kodiak decided to submit its own proposal for the snow blower described in CLIN 2. Kodiak's email to the Benbow, sent on the morning that proposals were due, stated in relevant part,

This amendment allows Kodiak to bid their [sic] snow blower [DELETED]. However, since receiving this information only this morning[,] it is impossible to bid [DELETED] in time for a bid opening in Washington [State] by this afternoon. Please postpone the bid opening long enough for us to submit our bid in time for an opening. The bid is complete and ready to go but you have left us no time unless you allow us to submit our bid by fax or email.

Please respond as quickly as possible.

*Protest*, Pilling email to Benbow, dated September 16, 2009 at 9:06 AM (emphasis added).

18. Within one hour and 12 minutes, according to the email time stamps on Kodiak's printouts, Mr. Benbow responded via email to Kodiak's request by succinctly advising that "email proposals are the preferred method." *Protest*, Benbow email to Pilling dated September 16, 2009 at 9:16:52-0700.

19. Shortly thereafter, Kodiak submitted its "Bid Package [DELETED]" *Protest*, Pilling's email to Benbow, dated September 16, 2009 at 12:29 PM. This "bid package," however, contained only Kodiak's technical proposal, and did not

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- include other necessary information and acknowledgments. AR Tab 10, Benbow Decl. ¶ 6.
20. Two hours later (again accounting for the time zone difference between Renton Washington and Kodiak's location in Burley, Idaho), Mr. Benbow asked that Kodiak "fill out section B and section K of the RFO, SF-33 and sign/return all 3 amendments." *Protest*, Benbow email to Pilling dated September 16, 2009 at 13:38:30-0700. Mr. Benbow attached to his email electronic versions of the amendments and the complete Solicitation, which included AMS Clause 3.9.1-3, Protests (November 2002). *Protest*, Benbow email to Pilling dated September 16, 2009 at 13:38:30-0700; AR Tab 10, Benbow Decl. ¶ 6.
21. Kodiak provided the necessary acknowledgments shortly thereafter, and Mr. Benbow confirmed receipt prior to the 4:00 PM closing time for proposals. *Protest*, Benbow and Pilling emails dated September 16, 2009 between 2:42 PM and 14:49:24-0700.
22. Kodiak's proposal included two "recommended changes" to the specification. Kodiak indicated in its proposal and in its Protest that it submitted these recommendations prior to bidding, but that it did not receive a response. AR Tab 5 at 1; *Protest* at 1-2. The proposal stated in relevant part,
- [DELETED]
- AR Tab 5 at 1.
23. Kodiak's proposal referenced prior work [DELETED], but did not provide any details [DELETED] as cited in the evaluation criteria in the Solicitation. Compare AR Tab 1 at 44, § M004, with AR Tab 5 at 1.

**C. The Technical Evaluation and the Award Decision**

24. The Region received five proposals. AR Tab 7 at 2.
25. As reflected in the “Award Decision Document,” as well as the technical “Evaluation Form,” Kodiak’s proposed equipment was technically unacceptable [DELETED].
- AR Tabs 6 at 2, and 7 at 2.
26. Recognizing that Kodiak was found not to be technically acceptable, Kodiak’s price was not considered, and on September 17, 2009, the Region awarded a contract for CLIN 2 to Wausau Equipment Company of New Berlin, Wisconsin. AR Tab 7 at 2; AR Tab 10, Benbow Decl. ¶ 8.

**D. Post-Award Communications**

27. On October 26, 2009, Kodiak filed a protest with the Contracting Officer. In full, the text of the protest reads,
- Kodiak received your letter of October 21/09 indicating that the award for Solicitation No. DTFANM-09-R-00179 for a snow blower went to Wausau Equipment in the amount of \$253,800. Kodiak Northwest, Inc. wishes to protest this award because it did not go to the lowest responsive bidder. The Kodiak Northwest Inc. bid was for [DELETED] which makes Kodiak the lowest bidder.
- Protest*, Pilling email to Benbow, dated October 26, 2009 at 15:46:27 – 0600; AR Tab 8.
28. The Region treated the protest to the Contracting Officer as a request for a written debriefing, and replied on October 28, 2009. AR Tab 9. The Contracting Officer apparently copied from the Award Decision Document the bulleted list of [DELETED] reasons that Kodiak was found to be not technically acceptable. Compare AR Tab 9 with AR Tab 7 at 2.

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29. Kodiak tendered a response to the debriefing on the same day, October 28, 2009. Kodiak raised many of the same concerns it raised in the present Protest to the ODRA, and quoted extensively from an FAA website pertaining to procurements by grantees under the Airport Improvement Program. *AR* Tab 8; *Protest*, attached letter from Kodiak dated October 28, 2009.

**E. The Protest Proceedings**

30. Kodiak filed its Protest with the ODRA on November 3, 2009. *Protest at fax coversheet*.
31. Wausau filed a notice of intervention on November 6, 2009. *ODRA Protest File*, Tab 5.
32. Although the parties attempted to use an Alternative Dispute Resolution process on two occasions, they were unable to reach a resolution of the Protest.
33. Consistent with the ODRA's Scheduling Conference conducted on December 14, 2009, the Region submitted its Agency Response on January 4, 2009. *AR* at 1; *ODRA Status Conference Memorandum* dated December 14, 2009.
34. Both Wausau Equipment Co. and Kodiak had the opportunity to file Comments consistent with the ODRA Procedural Regulation, 14 C.F.R. § 17.37(c). Neither party filed Comments either before or after the deadline of January 12, 2010, as established during the ODRA's Scheduling Conference conducted on December 14, 2009. *See ODRA Status Conference Memorandum* dated December 14, 2009.
35. The ODRA closed the record in this Protest on January 15, 2010. ODRA Letter dated January 15, 2010.

**III. Discussion**



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Kodiak's Protest raises one substantive argument and three procedural arguments. The substantive argument charges that the specification improperly included proprietary items "that restricted and eliminated competition." *Protest* at 3. The three procedural arguments attempt to avoid determinations that the Protest is untimely. In particular, Kodiak's first procedural argument asserts that the "specification" improperly omitted the procedures for filing a protest. *Protest* at 2. The second procedural argument raises objections that Amendment 3, which permitted the snow blower to be bid separately from the wheel loader, was issued "only hours" before bid opening and therefore was "not issued in a timely manner." *Protest* at 3. Finally, Kodiak alleges that the FAA Contracting Specialist did not respond to Kodiak's request for changes prior to the closing date and time, and therefore, Kodiak justifiably assumed that the requested changes were acceptable. *Protest* at 3-4. The Region responds that these issues represent Kodiak's "dissatisfaction with the terms of the solicitation" and are untimely under the ODRA Procedural Regulation, 14 C.F.R. § 17.15(a). According to the Region, the regulation required Kodiak to file its Protest before the closing time for receipt of proposals. *AR* at 1. As discussed below, the ODRA agrees with the Region, and recommends that the Protest be denied.

The ODRA Procedural Regulation and AMS Clause 3.9.1-3, Protest (November 2002) contain identical language dictating the filing deadlines for protests alleging improprieties in a solicitation:

- (1) 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 the receipt of initial proposals.
- (2) In procurements where proposals are requested, alleged improprieties that do not exist in the initial solicitation, but which are subsequently incorporated into the solicitation, must be protested not later than the next closing time for receipt of proposals following the incorporation.

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14 C.F.R. § 17.15(a)(1) and (2); AMS Clause 3.9.1-3, “Protest (November 2002) at ¶ (e)(1) and (2). The Region appropriately cites to the *Protest of Grayhawk Construction, Inc.*, 08-ODRA-00475, and the cases cited therein for the proposition that the ODRA strictly construes these deadlines. *AR* at 3. Kodiak’s allegation that the specification improperly “restricted and eliminated competition” (*Protest* at 3) falls squarely within the category of challenges to the amended solicitation. Both the ODRA Procedural Regulation, and AMS Clause 3.9.1-3, obligated Kodiak to file its Protest prior to the closing time for receipt of proposals.

Kodiak’s asserts that it was unaware of the filing deadline because the “specification” allegedly omitted the mandatory clause. *Protest* at 2. To the contrary, the record demonstrates that Section L of the Solicitation properly contained the full text of AMS Clause 3.9.1-3, Protest (November 2002). *Finding of Fact (“FF”) 5*. Regardless of whether Kodiak was aware of the terms of this clause, offerors are charged with reading and complying with all of the provisions in solicitations prior to submitting their proposals. *Accord Contract Dispute of Technical Innovative Concepts, Inc.*, 08-ODRA-00470, *citing, Contract Dispute of Strand Hunt Construction*, 99-ODRA-00142.

The ODRA also does not accept Kodiak’s argument that the timing of the Amendment 3, issued on the closing date, somehow compelled Kodiak to file a proposal that did not allow “all matters of concern to be addressed.” *Protest* at 3. The contemporaneous email correspondence from Kodiak to the Contract Specialist stated, “The bid is completed and ready to go but you have left us no time unless you allowed us to submit our bid by fax or by email.” *FF* 17. (emphasis added). The Contract Specialist promptly replied that “emailed proposals are the preferred method,” which was consistent with the terms of Section L of the Solicitation. *FF* 4 and 18. On this record, by Kodiak’s own contemporaneous admission, its proposal was “ready to go,” and the FAA even encouraged Kodiak to use the method of delivery that Kodiak requested.<sup>2</sup> Kodiak, therefore, cannot support the factual basis for its argument regarding Amendment 3.

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<sup>2</sup> The ODRA also notes that Amendment 3 did not change or create the alleged proprietary requirements of the specification. Amendment 3 simply permitted offerors to submit proposals for individual CLINs rather than the whole solicitation. *FF* 16.

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More importantly, if Kodiak indeed had proper grounds to protest the timing of Amendment 3,<sup>3</sup> then it had the legal right to quickly file a protest via fax under the ODRA Procedural Regulations.

Kodiak next asserts that prior to submission of its bid, it raised issues with the Contracting Specialist regarding whether the specification unduly required proprietary equipment. *Protest* at 3. Citing AMS Clause 3.9.1-3, *Protest* (November 2002) at paragraph (b), Kodiak argues that the Contracting Officer's alleged failure<sup>4</sup> to address these issues somehow "denied Kodiak the opportunity to protest prior to bid opening and left [Kodiak] with the only option of protesting after the award." *Id.* While Kodiak correctly quotes the clause for the proposition that Contracting Officers should make reasonable efforts to resolve issues and questions, Kodiak omits key language in the clause that is fatal to its argument. The full text reads,

Offerors initially should attempt to resolve any issues concerning potential protests with the Contracting Officer. The Contracting Officer should make reasonable efforts to answer questions promptly and completely, and, where possible, to resolve concerns or controversies. The protest time limitations, however, will not be extended by attempts to resolve a potential protest with the Contracting Officer.

AMS Clause 3.9.1-3 (b), "Protest" (November 2002), (emphasis added). Kodiak's *Protest* omitted the emphasized language, which forecloses any argument that the Contracting Officer's alleged failure to respond to Kodiak's concerns somehow extends the deadline for submission of this *Protest*. The clause requires Kodiak to vigilantly

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<sup>3</sup> The ODRA does not reach the question, nor express an opinion, regarding whether an argument based on the timing of Amendment 3 has any legal merit.

<sup>4</sup> This allegation is not supported by the record. While it may be true that Kodiak telephoned Mr. Benbow and left messages, Mr. Benbow actually did respond by advising Kodiak to submit its questions via email. FF 15. Mr. Benbow's response was consistent with § B003 of the Solicitation, which required potential offerors to email or fax questions, and which expressly stated, "Telephone questions will not be accepted." FF 3 (emphasis in the original). Kodiak has not submitted to the ODRA any emails or faxes containing such questions, and if the issue is material, then the ODRA makes an adverse inference that Kodiak never properly submitted its concerns prior to submitting its proposal.

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protect its interests by filing a protest with the ODRA, and Kodiak cannot shift the blame for its own failure onto the Contracting Officer.

**IV. CONCLUSION**

Kodiak's Protest that the solicitation was proprietary and overly restrictive raises issues that were apparent prior to submission of proposals, and therefore, is untimely under the ODRA Procedural Regulation, 14 C.F.R. § 17.15(a), and AMS Clause 3.9.1-3, "Protest (November 2002)." Moreover, Kodiak's other arguments against enforcing these time limitations lack merit. The ODRA therefore recommends that Kodiak's Protest be dismissed in its entirety as untimely.

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John A. Dietrich  
Dispute Resolution Officer  
FAA Office of Dispute Resolution for Acquisition

**APPROVED:**

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-S-

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