

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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of Counter Trade Products, Inc.**
 Pursuant to Solicitation Nos. DTFAWA-10-R-00024,-25 and -26

Docket No.:10-ODRA-00539

Appearances:

For the Protester: Mr. Joseph Calabria,
 President, Counter Trade Products, Inc.

For the FAA Product Team: Jane Converse, Esq.

I. Introduction

On August 9, 2010, Counter Trade Products, Inc. (“CTP” or “Protester”) filed a bid protest (“Protest”) with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”). The Protest involves the acquisition of computer equipment, servers, storage systems, network devices, and other services in support of the FAA’s Information Technology (“IT”) enterprise architecture. *Agency Response* (“AR”), Tab 1, at C-2. CTP challenges the Contracting Officer’s decision to reject CTP’s proposals (“Proposals”) on the grounds that they were received after the established deadline for the submission of offers. *Protest* at 1. CTP concedes that its Proposals were received by FAA contracting officials 24 minutes after the deadline. *Id.* However, CTP asserts that the delay was the direct result of “FAA security measures,” and, therefore that the Proposals should have been accepted. *Id.*

For the reasons discussed herein, the ODRA finds that CTP has failed to satisfy its burden of proof that the late submission of its Proposals was the result of government action. As is discussed more fully below, the ODRA therefore recommends that the Protest be denied in its entirety.

II. Findings of Fact

1. In 2006, the FAA started a program known as Strategic Sourcing for the Acquisition of Various Equipment and Supplies (“SAVES”) Program. The SAVES Program involves Indefinite Delivery, Indefinite Quantity (“IDIQ”) contracts for personal computers, servers, storage systems, network devices, computer peripherals and miscellaneous equipment and services in support of the FAA's information technology enterprise architecture. *AR*, Tab 1 at C-2, Tab 2 at C-3, and Tab 3 at C-2.
2. On May 10, 2010, the Product Team issued three Screening Information Requests including SIR Numbers: DTFAWA-10-R-00024; DTFAWA-10-R-00025; and DTFAWA-10-R-00026 (referred to collectively herein as the “SIRS”). *AR* Tabs 1, 2 and 3.
3. Identical instructions for the submission of proposals were set forth in the SIRS, as follows:

L.3.1 Delivery of Proposals

Proposals in response to this SIR shall be due by 12 pm Eastern Daylight Time on July 8, 2010.

Proposals must be submitted directly to the CO, or designated official. The FAA will require a paper copy of proposals for contract award, as appropriate, for its internal auditing and other purposes. The SF-30 must be signed by an officer of the business or an authorized obligating official.

All copies of the proposal must comply with noted page limitations, whether double or single sided. All electronic file contents must match print versions of submitted

documents.

Proposals received after the designated time will be considered late and will be excluded from further consideration. Proposals must be delivered to the Contracting Officer at the following address:

Federal Aviation Administration
Executive & Managerial Support Services
Contracts Branch,
AJA48
Attn: Sharonda Holmes
800 Independence Ave., SW, Suite 406
Washington, DC 20591

AR, Tab 1 at L-4-L-5, Tab 2 at L-4-L-5, and Tab 3 at L-4-L-5.

4. Amendments to the SIRS were issued on May 26, 2010 (Amendment 1, *AR*, Tabs 4, 5 and 6), and on June 4, 2010 (Amendment 2, *AR*, Tabs 7 and 8). Amendments 1 and 2 did not modify the due dates or arrangements for proposal submissions.
5. Following a request from a potential Offeror for an extension of the proposal due date (*AR*, Tab 9), the Product Team issued two Amendments on June 29, 2010. *AR*, Tabs 10, 11 and 12 (referred to herein collectively as the “Scheduling Amendments”). The Scheduling Amendments included language stating:

The SIR is hereby extend [sic] for one (1) week. As a result, the proposal due date changes from July 8, 2010 to July 15, 2010. NOTE: Proposals in response to this SIR are still due by 12 p.m. Eastern Daylight Time.

AR, Tabs 10, 11, and 12.

6. The SIRS incorporated by reference AMS clause 3.2.2.3-14, which states as follows:

3.2.2.3-14 Late Submissions, Modifications, and Withdrawals of Submittals (July 2004)

(a) The FAA (we) will consider an offer received after the time specified for receipt only if we receive it before making an award and --

(1) The offeror (you) sent it by registered or certified mail not later than the fifth calendar day before the date specified for receiving offers (for example, you must have mailed an offer by the 15th in response to a SIR requiring that we receive offers by the 20th);

(2) You sent it by mail or, if authorized by the SIR, by telegram and we determine that we received it late only because of mishandling by the FAA;

(3) You sent it by U.S. Postal Service Express Mail Next Day Service- Post Office to Addressee, not later than 5:00 p.m. in the time zone from which you mailed it, two working days before the date specified for receiving offers. The term 'working days' excludes weekends and U.S. Federal holidays;

(4) You transmitted it electronically by a method the SIR authorized and the Contracting Officer (CO) received it by 5:00 p.m. in the CO's office on the date specified for receiving offers; or

(5) it is the only offer we received.

(b) Any modification you make to your offer for a reason other than the CO's request is subject to subparagraphs (a)(1), (2), and (3).

(c) We will not consider a modification resulting from the CO's request received after the time and date specified in the request. The exception to this is if we received it before we awarded the contract and we received it late only because we mishandled it;

(d) The U.S. or Canadian postmark is the only acceptable evidence of the date you mailed a late offer or modification sent by registered or certified mail. The postmark must be on the envelope or wrapper and on the original receipt from the U.S. or Canadian postal service. Both postmarks must show a legible date or we will consider the offer to have been mailed late. 'Postmark' means a printed, stamped, or otherwise placed impression (exclusive of a postage meter machine impression) that is readily identifiable without

further action as having been applied by the postal service on the date of mailing. Therefore, you should ask the postal clerk to place a legible hand cancellation bull's eye postmark on both the receipt and the envelope or wrapper.

(e) Our time and date stamp on the wrapper or other documentary evidence of receipt are the only acceptable evidence of when we received it.

(f) The date the post office receiving clerk enters is the only acceptable evidence of the date you mailed a late offer, modification, or withdrawal sent by Express Mail Next Day Service. The postmark must be on the envelope or wrapper and on the original receipt from the postal service. 'Postmark' has the same meaning as in paragraph (d), excluding Canadian postmarks. Therefore, you should ask the postal clerk to place a legible hand cancellation bull's eye postmark on both the receipt and the envelope or wrapper.

(g) Despite paragraph (a), we will consider a late modification of an otherwise acceptable offer if the modification makes the offer's terms more favorable to the FAA.

(h) You may withdraw your offer by written notice or by any other means specified in this SIR for submitting offers. If the SIR allows electronic offers, this provision is subject to the conditions specified in provision 3.2.2.3-20, Electronic Offers. You may withdraw offers in person either directly or through an authorized representative identified to FAA through the procedures in provision 3.2.2.3-77, "Authorizing Agents." We must receive any withdrawal before we award the contract.

7. On July 14, 2010 the Contracting Officer made arrangements with the FAA Security Office regarding hand delivery of proposals in response to the SIRS. *AR*, Tab 19, Declaration of Contracting Officer Sharonda Holmes, ("Holmes Declaration") at ¶ 5.
8. The arrangements included, among other things, designating the contracting Officer and two other individuals, Joseph Carey and Tyrone White, as points of contact for the deliveries that were expected the following day. *Id.*

9. On July 15, 2010, beginning at 6:45 a.m. and continuing until the established proposal deadline of 12:00 p.m., one or more designated points of contact were continually present and available as provided in the SIRS to receive and accept hand delivered proposals. *AR*, Tab 20; Declaration of Contract Specialist Tyrone White (“White Declaration”) at ¶ 4; *AR*, Tab 21, Declaration of Supervisory Contracting Officer Joseph Carey (“Carey Declaration”) at ¶ 3.
10. The Contracting Officer and the Contracting Specialist received deliveries of proposals at the Building Lobby and at the Building Loading Dock throughout the morning of July 15, 2010. *AR*, Tab 19, *Holmes Declaration* at ¶ 7, 8, and 10; *AR*, Tab 20, *White Declaration* at ¶ 7 and 9.
11. The Contracting Officer also received telephone calls throughout the morning from vendors who were at the security desk and wished to deliver proposals and from the Security Officer at the loading dock regarding proposals that had been delivered there. None of the phone calls concerned the Proposals of the Protester. *AR*, Tab 19, *Holmes Declaration* at ¶ 7, 8 and 10. That morning the Contracting Officer also checked her telephone for messages, and there were no calls regarding the Protester’s Proposals. *Id.* at ¶ 9. Neither did the Contract Specialist or the Supervisory Contracting Officer receive any telephone calls that morning regarding the Protester’s Proposals. *Id.*
12. A total of 25 proposals were received by the 12:00 p.m. deadline. Five proposals, including those of the Protester, were received after the deadline and all were excluded from the competition as untimely. *AR*, Tab 19, *Holmes Declaration* at ¶ 15.
13. At 12:24 pm Eastern Daylight Time, the Protester’s Proposals were directly hand delivered by a UPS courier to the room designated in the SIRS, and received by Joseph Carey. *AR*, Tab 21, *Carey Declaration* at ¶ 6. The UPS Website

Shipment Tracking Page confirms the date and time of delivery as "07/15/2010 12:24 P.M." *AR*, Tab 13.

14. The shipping label for the Protester's Proposals correctly identified the Contracting Officer's name and the delivery address specified in the SIRS; but includes the Protester's telephone number rather than that of the Contracting Officer. *AR*, Tab 14.
15. The Protester was notified by the Contracting Officer via email transmission on July 19, 2010 that its Proposals had been excluded from the competition because they were not timely submitted. *AR*, Tab 15. The Product Team's position was confirmed by email on August 6, 2010. *AR*, Tab 17.
16. The instant Protest was filed with the ODRA on August 6, 2010.
17. The Protest alleges that "the security measures in place at this FAA facility detained [Protester's] responses from prompt arrival" and that the Proposals were "delayed and/or mishandled by the FAA, and this late submission is no fault of [Protester]." The Protest further alleges that the Proposals "arrived per solicitation requirements (2) hours prior to the noon deadline. The packages containing our responses left the UPS delivery warehouse at 7:39 am for arrival at approximately 10:30 am on July 12, 2010." Attached to the Protest is a letter dated August 3, 2010 from UPS stating that:

The UPS delivery driver departed the local UPS facility to perform the delivery at 7:30 AM on the morning of July 15. The driver arrived at the facility and was delayed by security; two security screenings including an x-ray screening and the delivery was ultimately performed at 12:24 PM on July 15th.

Protest, Attachment 1. The UPS letter does not indicate what time the Proposals actually arrived at the FAA building or the length or nature of the delay allegedly

attributable to building security. Nor is there any indication in the record of any attempt by UPS or the Protester to contact the Contracting Officer or any member of the Product Team on the morning in question regarding the delivery.

III. DISCUSSION

In accordance with the ODRA Procedural Regulations, 14 C.F.R. Part 17, and the FAA's Acquisition Management System ("AMS"), the ODRA will not recommend that a protest be sustained where the challenged decision was made in compliance with the AMS, has a rational basis, and is not arbitrary, capricious, or an abuse of discretion. *Protest of Perera Construction, Inc.*, 09-ODRA-00507. The Protester bears the burden of proof to demonstrate by substantial evidence that the complained of decision lacked a rational basis or was otherwise improper. 14 C.F.R. § 17.37(j); *Protest of Adsystech*, 09-ODRA-00508.

In the instant Protest, CTP has failed to prove that the Contracting Officer's decision to exclude it from the competition due to the lateness of its Proposals lacks a rational basis or was otherwise improper. While CTP generally alleges that FAA security improperly delayed its carrier, UPS, from timely delivering its Proposals to the source selection officials (*Protest* at 1; *Comments* at 3), CTP completely has failed to provide competent, substantial evidence of the time that its courier arrived at the FAA Building or the nature and extent of the alleged delay encountered by the UPS delivery person. Thus, CTP has failed to satisfy its burden of proving that its late submission was caused by any action or inaction by Agency security or contracting personnel.

It is uncontested in the record that the Proposals were delivered by UPS to a representative of the Product Team 24 minutes after the submission deadline. *Protest* at 1; *AR* at 5. Moreover, substantial evidence in the record establishes that reasonable arrangements between contracting personnel and building security were in place on the date in question to ensure that all offerors had an opportunity to timely file their proposals. See Findings of Fact ("FF") 7-11. The Contracting Officer and the Contracting Specialist made themselves available throughout the morning in question to

receive proposals, and 25 other proposals were timely submitted. FF 7-12. By contrast, the evidence proffered by CTP fails to establish that a delivery attempt was made prior to the deadline established in the SIRS. CTP's Protest includes an unsworn, letter dated August 24, 2010 from the UPS Area Sales Manager, Max Bradley, generally discussing the matter ("Bradley Letter"). The Bradley letter, however, is not corroborated by the UPS courier or anyone else with firsthand knowledge, or by contemporaneous documentation. *Comments*, Enclosure A. More importantly, neither the Bradley Letter nor any other competent evidence proffered by CTP identifies the time that the UPS courier actually arrived at the FAA Building, or provides any details concerning the alleged security delay.

Under such circumstances, and given that it is undisputed that CTP's submission did not meet the criteria established for the acceptance of late proposals, the Product Team's action of excluding CTP's Proposals cannot be said to have lacked a rational basis, or to have been arbitrary, capricious or an abuse of discretion. *Protest of Perera Construction, Inc., supra*.

Finally, to the extent that CTP challenges provisions of the SIRS on the grounds of unequal treatment of out-of-state bidders, *Comments* at 5, such allegations are not timely. The timeliness deadlines for the filing of bid protests are set forth in the ODRA Procedural Regulations at 14 C.F.R. § 17.15(a), which provides, in relevant part:

(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.

It is well established in ODRA caselaw and regulation that protests must be timely filed in order to be considered by the ODRA and that the time limits for the filing of protests will be strictly enforced. *See, e.g., Protest of Galaxy Scientific Corporation*, 01-ODRA-00193. Here, CTP filed its protest only after its Proposals were submitted and rejected. FF 16. Accordingly, a challenge to the terms of the SIRS cannot be considered.

IV. CONCLUSION

For the reasons discussed above, the ODRA finds that: (1) CTP has failed to meet its burden of proving that the late submission of its Proposals was the result of any action or inaction by FAA contracting or security personnel; and (2) its allegation that the provisions of the SIRS disfavor out-of-state offerors is untimely. Accordingly, the ODRA recommends that the Protest be denied in its entirety.

Anthony N. Palladino
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FAA Office of Dispute Resolution for Acquisition

September 17, 2010