Recommendation of the Office of Dispute Resolution

Protest by Boca Systems, Inc., under Solicitation

DTFA02-96-R-60015

96-ODR-0008

Appearances:

For the Protester: Robert Kohn, Vice President, Boca Systems, Inc.

For the Contracting Office: A. L. Haizlip, Office of the Assistant Chief Counsel, FAA Aeronautical Center.

For the Intervenor: Carl Walliser, President, Print-O-Tape, Inc.

I. Introduction

On August 15, 1996, Boca Systems, Inc., (Boca), protested to the Federal Aviation Administration's Office of Dispute Resolution (ODR) the award to Print-O-Tape, Inc., under solicitation DTFA02-96-R-60015. That award was a fixed price supply and maintenance contract for 800 printers and for thermal flight strips to be used by air traffic controllers to record flight data in the performance of their duties within the Flight Data Input-Output (FDIO) program.

The FDIO program office determined that the old dot-matrix printers currently in use would not be supportable after December 1996, and that there was an urgent need to replace those printers with newer technology. Boca claims that the requirement for printers and paper was improperly combined, and that the solicitation's specifications for both the printers and the paper were so generalized that the awardee's product will not meet the government's actual needs. Boca also claims that the award to Print-O-Tape violates the "Buy America Act," and that Print-O-Tape's offer was incomplete, as it was contingent on the need for further negotiation on specific items. Lastly, Boca claims that the awardee is not responsible. Each of these assertions is addressed below. For the reasons explained herein, we recommend that the protest be denied.

All document references are to the attached list of exhibits, Tabs (1) through (34).

II. Findings of Fact

Solicitation DTFA02-96-R-60015 was issued by the FAA's Aeronautical Center, Oklahoma City, Oklahoma, on March 5, 1996. The solicitation called for the provision of 800 thermal printers and flight strips, along with various forms of maintenance and engineering support. The solicitation was structured to combine printers, paper, software source code, maintenance, and engineering support in an effort to consolidate all anticipated requirements during the life cycle of the equipment. The Request for Proposal (RFP) contained option years and quantities for each line item, and contemplated a fixed price, requirements contract. Tab (1).

On April 1, 1996, pursuant to the 1996 Department of Transportation Appropriation Act, P.L. 104-50, the Federal Aviation Administration came under a new procurement system known as the Acquisition Management System, (AMS). Because of the new system, and because of several changes in the technical requirements, amendment 0002 (A0002) to the solicitation was issued on April 9, 1996. A0002 contained an entirely revised dispute resolution procedure, (Tab 2, pages 1a through 1h), established ten contract line items, maintained a "requirements" contract format, (Tab 2, P. 21), and incorporated by reference the "Buy American" provisions of Federal Acquisition Regulation (FAR) 25.105. Although the Agency was no longer subject to the FAR, it retained the language of clause 25.105 as a means of maintaining compliance with the *Buy America Act.* The clause itself was renumbered 3.6.4-2 (page 39). Tab (2).

Amendment A0003 was issued on April 22, 1996. The amendment incorporating further changes as a result of the AMS. Amendment A0003 also introduced a technical requirement that the printers have a minimum resolution of 200 dots per inch (dpi). With this change, the technical specifications for printers and paper would remain constant through to contract award. Contract line item 001, *Printers*, now called for 800 of IER model 512c-FSP or Boca model FSP-960, with the specific requirement that they meet the 200 dpi requirement. Tab (3).

A0003 [Clause M1] stated that award would be made to the technically acceptable, responsible offeror submitting the lowest offer. Tab (3), page 68. Under the terminology of the new AMS, the solicitation was now referred to as a Screening Information Request (SIR) rather than an RFP.

Two further amendments, A0004 and A0005, were issued; both made only minor administrative changes not relevant to this protest.

The solicitation closed on May 3, 1996, with offers received from four firms: Print-O-Tape, Boca, Flight Strip Printers, Inc., and IER. Print-O-Tape submitted an offer proposing IER printers and its own paper. IER is a foreign corporation. See Tabs (4) , (5), and (6). In reviewing the proposals, the contracting officer determined that Print-O-Tape's offer was ambiguous with respect to its ability to provide the software source code, as required by the SIR. Accordingly, he requested that Print-O-Tape clarify that point. Print-O-Tape responded with a revised offer by the closing date of May 24, 1996, which stated unequivocally that the source code would be provided. Tabs (7) and (8).

Print-O-Tape's total offer of May 24 was $9,597,411. Of that amount, $1,518,400 was attributable to the IER printers. Attachment (4). Because IER was a foreign company, the contracting officer undertook the analysis required by the *Buy America* clause. In so doing, he applied a 12% additive cost to the printer portion of the offer being supplied by the foreign manufacturer, as required by the clause. Adding 12% of $1,518,400 to Print-O-Tape's price increased it by $182,208, making Print-O-Tape's total *evaluated* price $9,779,619. Tab (9).

Boca's total proposed price for this solicitation was [* * * * *]. No *Buy America* adjustment was necessary, as Boca is a domestic corporation. Tab (9). The third offeror, Flight Strip Printers, Inc., submitted an offer which was withdrawn prior to award. IER submitted an offer comprised of its own printers and Print-O-Tape paper which was priced between that of Print-O-Tape and Boca.

On June 17, 1996, while proposals were being evaluated, Boca submitted a protest to the contracting officer. The protest raising 3 arguments: (1) that the minimal technical specifications for the printers and paper were too relaxed and would not meet the government's minimum needs; (2) that the inclusion of printers and paper in the same solicitation unfairly prejudiced Boca; and (3) that inclusion of the IER model as an acceptable printer was improper because it had historically been produced outside the U.S. Tab (10).

On June 19, 1996, Boca sent a letter to the contracting officer rescinding its protest, but noting that a separate protest would be faxed the following day addressing violations of the AMS by other vendors. Tab (11).

On June 20, Boca submitted a second protest to the CO, alleging that there had been communications between the government and all the other bidders which were violative of AMS 3.2.5-2. The essence of Boca's argument was that only two brand names were specified in the solicitation, yet four companies responded. Thus, Boca concluded, there must have been collusion and communication between IER and the others in violation of AMS 3.2.5-2. Tab (12).

Also on June 20, Boca submitted an amendment to the same protest, alleging that the FAA unfairly engaged in discussions with the other offerors by allowing them to amend their offers. Boca claimed that the other offerors initially failed to provide the printer source code as required by the solicitation, which failure should have rendered those offers unacceptable. Tab (13).

On July 24, 1996, the contracting officer submitted his response to all of the arguments raised by Boca, and denied the protest. Tab (14). Award of the contract was also made that same day to Print-O-Tape, as the low priced, technically acceptable, responsible offeror.

On July 30, 1996, Boca sent a letter to the CO acknowledging award, but expressing its disappointment. Boca stated their belief that the FAA will ultimately conclude that it needs higher quality printers and paper. Tab (15).

On August 15, Boca submitted a protest to the Office of Dispute Resolution, alleging that Print-O-Tape's equipment was unacceptable because it had never been tested. Tab (16). On August 22, Boca forwarded another letter to ODR explaining that the company was aware of the 5 day requirement for filing protests, but that the information underlying its August 15th submission was not available until "several days ago." Tab (17).

Several conversations between Boca and ODR ensued. Boca submitted letters to ODR on September 19 and 30, restating and clarifying the bases of its protest. Tabs (18) &(19). On September 24, a teleconference was held among Boca, ODR, the contracting officer, and Print-O-Tape. At that time, all parties were given an opportunity to explain their concerns and responses. A letter was sent from ODR on October 1, summarizing all of the arguments, and requesting changes, additions, or clarifications from each of the parties the following week. Tab(20).

On November 8, 1996, counsel for the Aeronautical Center submitted a package of 10 documents which responded to the various issues as summarized in ODR's October 1 letter. Tabs (21) through (26). Included in that package was a four-page statement by the contracting Officer, Tab (9), as well as a copy of an FAA electronic mail message dated October 3, 1996 Tab (26). Both of these documents concerned the suitability of the awardee's [Print-O-Tape's] printers and paper.

On November 13, 1996, Boca sent another letter to ODR restating it's areas of concern. Tab (27). On that same day, under separate cover, Boca forwarded copies of five earlier memos it had sent to various FAA offices between April 13 and September 12, 1996. Each of these memos dealt with the technical specifications of this procurement. Tab (28). In the cover letter to this package, Boca stated that the five memos were provided to give ODR an idea of the types of communication that had been ongoing between Boca and the FAA technical offices.

In reviewing the contracting office's submission of November 8, 1996, it became apparent to ODR that two of the documents, Tabs (9), and (26), evidenced some disagreement within the agency as to the suitability of the awardee's equipment. ODR concluded that those two documents were contradictory to other documents and assertions in the file. A further teleconference was conducted in which the protester and the agency agreed that resolution of those inconsistencies warranted further investigation and explanation. Accordingly, on November 14, ODR addressed a series of eight questions to the agency and the protester in an effort to clarify the record. Tab (29). On that same day, Boca confirmed receipt of ODR's questions, stating that they adequately framed the issues that Boca wanted addressed. Tab (30).

On December 5, 1996, Boca submitted a letter to ODR explaining that it had information that IER printers and Print-O-Tape paper were undergoing testing by the FAA at one of its facilities, and that the printers and paper had failed that test. Tab (31). On December 9, Boca requested that it be provided copies of any intermediate reports produced by the test evaluators.

The agency responded on December 10, 1996, with a four-page supplementary statement by the contracting officer. Also included in this submission were three statements by FDIO program officials, a copy of an agreement between the FAA and the National Air Traffic Controllers Union, (NATCA), and a copy of a Human Factors test conducted on the IER printers and paper (dated November 27, 1996). For ease of reference, this package of materials is contained together at Tab (33).

III. Issues presented

1. Has the protester demonstrated that the FAA's specifications for printers and thermal paper lack a rational basis in that they will not meet the agency's actual needs.

2. Has the protester demonstrated that the agency lacked a rational basis for combining its printer and paper requirements in a single solicitation.

3. Has the protester demonstrated that the agency failed to comply with the requirements of the *Buy America Act* in the conduct of this procurement.

4. Has the protester demonstrated that the agency conducted any improper communications with the awardee with respect to the requirement for software source code.

5. Has the protester demonstrated that the agency lacked a rational basis for finding the awardee to be responsible.

IV. Analysis

The protester has raised a number of substantive issues, each of which is addressed below. There are, however, four procedural points raised by the parties that must be addressed at the outset. First, the contracting office at the FAA Aeronautical Center initially objected to the Office of Dispute Resolution.

acting as the deciding official in this case. The objection was premised on the lack of published rules from the ODR providing authority to decide cases with in-house, FAA personnel.

In initial discussions with the parties, ODR indicated that in the event a settlement or agreement on Alternative Dispute Resolution (ADR) techniques was not reached, the protest would likely be submitted to an independent *Special Master* for decision under ODR's *default* process. That process, however, also permits decision by *in-house* Dispute Resolution Officers. Under the FAA dispute resolution process, parties do not have a right to select an FAA Dispute Resolution Officer (DRO) or a third party neutral unless they elect to proceed under ADR procedures. In the absence of such an election, the assignment of a DRO or third party is within the discretion of the Office of Dispute Resolution. The Manager of the ODR determined that this protest was appropriate for decision by an ODR DRO. Further discussions with the parties resulted in agreement on this issue.

Once the protest was assigned for *in-house* decision by ODR, this office reviewed the file and contacted the parties to determine the appropriate means and level of fact-finding. Based on the initial document review, and on several teleconferences and phone calls in which the parties concurred, ODR determined that it would not be necessary to hold a formal hearing. ODR concluded that the issues were well enough defined that they could be addressed through the submission of documentation and position papers. Accordingly, both parties have provided documentation with supporting explanations and clarifications, as they deemed necessary. All relevant documents and position papers are attached and addressed in the findings of fact.

Secondly, the contracting office has raised the issue of timeliness as a bar to this protest. The contracting office's argument is based on the fact that the issues raised in Boca's June 20, 1996, protest were denied by the contracting officer in his letter of July 24, the same date as the award. The agency then points to the fact that the protest to ODR, which argued essentially the same points, was not filed until August 15, 1996, and that the dispute resolution clause incorporated into the revised solicitation required that all protest be filed within 5 days of the date it knew or should have known of the protest basis. The agency also cites to the fact that in its letter to ODR of August 22, 1996, Boca admits it knew of the 5-day requirement, and that the protest should, therefore, be dismissed.

The problem with the agency's argument is that it is not supported by the file documentation. On April 5, 1996, ODR released a disputes clause, for incorporation in SIRs, which contained a 5-day filing requirement. This particular SIR did not, however, include that revised clause. Rather, the disputes clause in A0003, (pages 63 and 64), was an older version which contained no timeliness requirements at all. Since this procurement spanned the conversion from the old FAR to the new AMS, and since the disputes clause that was actually issued contained no timeliness requirements, we cannot now recommend dismissal of Boca's protest as untimely, notwithstanding the fact that it was filed some 21 days after award.

As an independent timeliness issue, the ODR notes that Boca's principal argument, that the printer specifications will not meet the agency's actual requirements, could also be viewed as untimely in that it refers to a specification that was clear prior to the close of the solicitation. The two acceptable brand names and the 200 dpi requirement remained

constant from the issuance of A0003, on April 22, 1996, through to the close of the SIR on May 3, 1996. Accordingly, under prior law, this is an issue which should have been raised prior to the close of the solicitation, and which would likely have been dismissed as untimely if raised after award. 4 CFR 21.2 (a), Dayron, 96-1 CPD 10, Washington Utility Group, 96-1 CPD 27, GSBCA Rules of Procedure 5(b)(3)(i). AT&T, GSBCA 13107-P, 1995 BPD 14, Wilcox, GSBCA 9531-P, 1988 BPD 150.

In this case, however, A0003 only made reference to the fact that ODR would promulgate separate protest procedures and time limitations for protests, which would presumably deal with allegations of defective specifications in solicitations. See pages 63 and 64 of Tab (3). As noted above, there were no timeliness requirements spelled out in the solicitation itself. The Agency has not proffered any evidence that separate protest regulations which would have rendered this argument untimely were published, or even in existence prior to May 3, 1996. Accordingly, we are also reluctant to find this recommend dismissal of the protest as untimely on that basis.

Thirdly, the contracting office raises the issue of *standing*, in that Boca was the fourth low offeror in a procurement where award was based on low price. The agency's position is that, since Boca was not *next in line* for award, it is not an interested party in this matter, and thus lacks standing.

Under prior law, the General Accounting Office and the General Services Board of Contract Appeals recognized the doctrine of *standing* as it applied to an offeror *not next in line for award*. 4 CFR 21.0(a), Concrete Systems, 95-1 CPD 15, Tulane University, 95-1 CPD 210, U.S. v. International Business Machines Corp., 892 F. 2d 1006, 1011 (Fed. Cir. 1989), Federal Systems Group, GSBCA 13160-P, 1995 BPD 46. The theory underlying that doctrine has been that since the protester would not receive the award even if its protest were upheld, the protester was not *interested* within the meaning of the applicable regulations. An exception to that doctrine, however, is found where the protester's allegations, if true, might alter the relative standing of the competitors such that the protester would be *in line* for award. Telecom Design Group, GSBCA 13025-P, 1995 BPD 3. Here, the thrust of Boca's complaint is that the specifications were inadequate and that improper discussions were conducted; if upheld, these allegations could result in a revised procurement where Boca would be *in line* for award. Accordingly, while the *not next in line* doctrine should be applied, where appropriate, we do not urge dismissal of the instant case for lack of standing.

Lastly, the protester raised the issue of contract suspension. Under the AMS, however, the policy is the reverse of what it was under prior law: The agency will not suspend contract performance unless the Administrator determines that it is appropriate to do so. AMS 3.9.3.2.1.5. In this case, ODR does not believe that a suspension recommendation is appropriate, and the Administrator has not suspended contract performance.

The substantive arguments:

In making a recommendation concerning all substantive protest issues, the FAA's Office of Dispute Resolution will apply the standard of review applicable under the Administrative Procedures Act, 5 U.S.C. 706. Agency actions will be upheld so long as they have a rational basis, are neither arbitrary or capricious, and are supported by substantial evidence. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, (1971),

1. *Specifications*. Boca's central complaint is that the agency's specifications are overly generalized and will not meet the government's actual needs. More particularly, the protester argues: (1) that the printer specifications are too lax with respect to the 200 DPI resolution requirement; (2) that the paper specifications are lacking in that they have no requirements for heat toleration or other storage and quality concerns; and (3) that the two requirements were improperly combined.

Boca has explained that that even the 200 DPI requirement, which was incorporated by Amendment 0003, will permit acceptance of printers with resolutions that will be inadequate for actual use. The protester states that it has had extensive dealings with the air traffic controllers who will be the users of these flight strips, and that the controllers prefer the quality of Boca's higher resolution printers and paper. Boca also states that the awardee's paper is difficult to read or write upon because of its glossy texture, that it does not fit properly into the standard flight-strip holders, and that the Print-O-Tape paper will degrade in the unairconditioned storage facilities typical at many control towers. Lastly, the protester claims that by combining the printers and paper requirements, the agency converted what was basically a highly specialized printer acquisition, into a generic procurement which permitted another firm to offer inferior equipment. Boca's ultimate concern is that the agency will eventually need to modify Print-O-Tape's contract, at great expense, to obtain its actual requirements.

We must emphasize here that Boca has not alleged that the Print-O-Tape/IER product fails to meet any of the specifications called out in the SIR. On the contrary, the IER model 512c-FSP was specifically cited in CLIN 001. Likewise, there has been no allegation that the awardee fails to meet the 200 dpi requirement. What the protester is arguing is that the FAA will ultimately conclude that these specifications are wholly inadequate for its actual needs and that higher quality printers and paper are required.

The problem with each of these arguments is that they are completely refuted by the agency's statement that the printers and paper meet its actual requirement. As explained in Tab (33), the 200 dpi resolution requirement was the result of extensive research, review, and testing. The 200 dpi level was chosen because it was acceptable to the controllers and because it represented a quantum leap over the quality of the old dot-matrix printers currently in use. While the printers proposed by the protester may in fact yield even greater resolution, that level is not required. It is not unreasonable or irrational for the agency to have determined that this level could not be justified in terms of the additional cost.

Boca's argument appears to be premised on a fundamental misunderstanding; it has insisted repeatedly that, unlike its own equipment, the IER printers were never evaluated prior to award for technical acceptability. In fact, as Tab (33) indicates, extensive testing of Boca and IER printers had been conducted during 1995 and early 1996 by the user organization (AOS) under the DSR and TCCC programs, as well as for FDIO. DSR and both of those other programs required flight strip printers for use in conditions similar to those under the instant FDIO requirement. The FAA's system contractor, Loral, selected the IER printer for TCCC. Additionally, in late 1995, AOS purchased both an IER and a Boca printer to determine compatibility with the host computer system; both were found to be acceptable.

Because only the IER and Boca printers were technically acceptable, and because of the urgency of the FDIO requirement, this solicitation was limited to those companies' models.

The protester makes numerous references to Human Factors, (HF), testing which it claims supports its arguments. The record indicates that there were, in fact, two HF tests conducted independently of the technical acceptability testing. The first test was conducted in January 1996, and the second in November 1996. The purpose of those tests was different from the technical acceptability testing described above. See Tab (33), statement of Larry Smith. The first test was performed not to determine technical acceptability, or the relative merits of one company over another, but rather to determine if the entire FDIO program could transition from the old, dot-matrix, dual-color printers, to the newer, thermal, monochrome printers. In that test, a Boca 300 dpi machine was used. The test results validated the proposed transition in printer types.

At some point after the January HF test, the Air Traffic Controllers Union expressed concern about the switch to the new printers. This concern was based, in part, on the fact that the January test did not include controllers from Oceanic offices. Accordingly, an agreement was reached between the FAA and the Union on September 12, 1996, that the new printers would be evaluated for "print enhancement" prior to deployment. That test was conducted in Oakland, California in late November of 1996. The report is contained in Tab (33). As noted therein, several recommendations were made concerning the printers and paper, and it is these recommendations that Boca claims supports it argument that the awardee's equipment is unacceptable.

The contracting and program offices respond that these recommendations concern only minor adjustments, such as fonts and print size, that would have been necessary irrespective of which company won the contract. They cite to the solicitation's requirement for source code in support of their contention that *tweaking* was anticipated and would be needed with either company's printer as the entire program moved to the thermal, monochromatic format. See Tab 33, statements of the contracting officer, Jeff Wargo, and Larry Smith.

We recommend a finding that the agency's position on this point is rational; supported by substantial evidence. While Boca's proposed printer and paper may, in fact, produce a

higher quality product, the agency has reasonably concluded that the IER product meets its requirements. The requirements office has demonstrated that, contrary to Boca's assertions, it has procured its minimum needs. That conclusion was supported by acceptability testing prior to solicitation, both in the FDIO and in the TCCC programs. Prior to the competition, Boca and IER printers were purchased and mated with the host computer to ensure compatibility, with affirmative results. To the extent that the later HF testing indicated that adjustments were necessary, the agency has produced statements from program technicians that those adjustments were minor and would be required with either company. Tab 33, statements of Wargo and Smith. The agency has stated unequivocally that the printers and paper meet its functional needs, and under these facts, we can only conclude that the agency has proffered substantial evidence to support its decision.

In passing, we should note that this standard of review is in accord with prior law. The Comptroller General has long held that allegations concerning the restrictiveness of solicitation specifications would be reviewed only to determine whether the specifications had a rational basis, as the agency is in the best position to determine its own requirements and must live with the results. ABC HealthCare, 96-1 CPD 16, Building Systems Contractors Inc. 96 CPD 18. In that line of cases, GAO dealt with allegations of overly *restrictive* specifications; in this case, the protester is alleging that the specs are *insufficiently* detailed, as they permit acceptance of equipment which will ultimately prove inadequate. For the reasons cited above, we believe the Agency's rejection of that argument was reasonable.

2. *Combined requirements*. Likewise, there is no basis for now overturning the agency's determination to combine the printer and paper requirements. As explained in Tab (33), the FAA was concerned about the compatibility between the printers and the paper, as well as the overall life cycle support and maintenance of the entire flight strip system. The contract line item structure of section "B" specifically combined all the anticipated supply and service requirements of the printing systems for five years; the intent of which was to create a single point of responsibility for any supply or support issue that might arise. Under these facts, this office cannot say that the agency's decision to combine the requirements was irrational. On the contrary, the FAA's actions here are in accordance with Section 2.7 of the AMS, which encourages consideration of the entire life cycle of fielded systems.

3. *The Buy America Act*. Boca also argues that award was made to a foreign corporation, in violation of the *Buy America Act*, 41 U.S.C. 10. Our review of the file indicates that the contracting officer did in fact undertake the proper *Buy America* analysis, as required by the Clause 3.6.4-2 on page 39 of the SIR, Tab (3), and that his calculations in this respect were correct. Clause 3.6.4-2 of the SIR contained language identical to that in the old FAR clause 52.225-3, which required the government to accept only American made materials unless one of several conditions was met, including a determination that the price is unreasonable. To make that determination, the language of FAR 25.105 was also incorporated, which provided that a 12% surcharge must be added to the foreign product for *evaluation* purposes if the competing product is from a domestic, small business

concern. Since Boca is a domestic, small business concern, the contracting officer applied a 12% surcharge to the foreign made portion of Print-O-Tape's offer, the printers, which had the effect of raising Print-O-Tape's *evaluated* price by $182,208.00. See Tab (9).

We also concur with the contracting officer's determination to apply the 12% surcharge only to the printers. FAR 25.105(b), in pertinent part, states:

The evaluation in paragraph (a) of this section shall be applied on an item by item basis or to any group of items on which award may be made...

- Since the printers were a distinct line item, and since they were the only portion of Print-O-Tape's offer which was not a domestic end product, the contracting officer was correct in applying the 12% adjustment only to the printers. Even with that additional $182,208.00, Print-O-Tape's offer was still [* * * *] less than Boca's. See Tab (21).

4. *Improper discussions*. Boca has raised several issues concerning the awardee's proposal. These have been variously described as *responsiveness*, or the use of an *escrow agreement*, or *unfair discussions*. The essence of the concern is that the specifications required the offerors to provide the printers' software source code, and that Print-O-Tape's initial offer was ambiguous on this point, having made reference to the need for something described as an *escrow agreement*. This office's review of the protest file indicates the following: The solicitation clearly called for the provision of the software source code because the FAA needed the flexibility to make adjustments to the printers for operational requirements. In the cover letter to its proposal of May 2,1996, Print-O-Tape indicated that the source code would be provided subject to an *escrow agreement*. Tab (4). While the term may be confusing, it is apparent from the context that it refers to some form of software licensing agreement. Since this was ambiguous, and possibly conflicting with the SIR's requirements, the contracting officer responded on May 30, 1996, with a request for best and final offers. This request specifically addressed the issue, and demanded that Print-O-Tape state unequivocally whether the source code would or would not be provided as required by the specifications. Tab (7). In response to this, Print-O-Tape submitted a letter on June 3, 1996, which unequivocally stated that the source code would be provided in accordance with the terms of the solicitation. Tab (8).

Under these facts, we construe Boca's protest on this issue as being against the agency's conducting discussions with IER on a point which might otherwise have rendered Print-O-Tape's proposal unacceptable. Print-O-Tape's response of June 3 was unequivocal; thus Boca's argument must be viewed as saying that discussions should not have been permitted at all, or that it was unfair that they were conducted with some offerors and not others. Under the AMS, the need to conduct discussions is strictly within the discretion of the contracting officer, and he may do so with any or none of the offerors, to the extent that he deems necessary. AMS 3.2.2.3.1.2.2. In this case, Print-O-Tape's initial offer was technically compliant in all respects, except for the ambiguity surrounding the source code. The contracting officer decided to point out that problem to the offeror. As noted in the Agency's supplemental report, Tab (33), similar discussions were conducted with all

of the offerors after receipt of initial proposals. In light of these facts, and given the breadth of discretion granted to the contracting officer by the AMS in the conduct of discussions, we cannot say that the agency's action lacked a rational basis.

5. *Responsibility*. Boca has also argued that Print-O-Tape is essentially a paper supplier, and that it will not be able to meet the contract requirements for printers, code, and the associated maintenance and engineering support. The protester believes that the overall requirements of the contract will exceed the awardee's capabilities. This is essentially a responsibility argument. Other fora have, as a matter of policy, stated that they will not review challenges to an affirmative responsibility determinations, 4 CFR 21.5 (c) (1996), Carter Chevrolet Agency, 96-1 CPD 210. Similarly, under the AMS, the Administrator will generally not question a contracting officer's determination that an awardee is responsible to perform a contract. In this case, however, it should be noted that the Aeronautical Center's initial submission, (Tab (9)), contained an explanation with supporting documentation of the responsibility analysis that was conducted. The contracting officer elicited the following data from Print-O-Tape prior to making the award:

- Prior year's financial statements, balance sheet, income

• • statement, current year's estimates

- Last year's total sales, current year estimates

- Information on contracts/orders for last three years demonstrating

satisfactory delivery

- List of customer references

The contracting officer received and reviewed this data, called at least one of the references, and obtained a Dunn & Bradstreet report on the Print-O-Tape. Additionally, Tab (9) indicates that Print-O-Tape has been in the paper manufacturing business for some 50 years, with numerous completed contracts over that time. As to the printers and source code, Tabs (5) and (6) demonstrate IER's contractual commitment to supply the equipment and codes to Print-O-Tape. Based on that information, the contracting officer concluded that the awardee was responsible. Under these facts, we cannot say that his actions were unreasonable, or unsupported by substantial evidence.

V. Conclusion

For the reasons explained above, we cannot conclude that the agency lacked a rational basis on any of the issues raised by the protester. It has produced substantial evidence detailing its pre-solicitation acceptability testing of the IER printer, and it has stated

unequivocally that the device meets its needs. The decision to combine the printer and paper requirements was rationally based, and the *Buy America* analysis was in accordance with all regulatory and statutory requirements. There was nothing inappropriate in the discussion held with Print-O-Tape, and the contracting officer's determination that Print-O-Tape is responsible is supported by substantial evidence. For all of these reasons, we recommend that the protest be denied.

William R. Sheehan

For the Office of Dispute Resolution