Office of Dispute Resolution for Acquisition

Federal Aviation Administration

Washington, D.C.

FINDINGS AND RECOMMENDATION

Matter: Protest of Haworth, Incorporated

Under Solicitation No. DTFA05-98-R-78030

Docket: 98-ODRA-00075

Appearances:

For the Protester: S. Gregg Kunzi, Esq., Hogan & Hartson LLP

For the Agency: Brendan Kelly, Esq., Atttorney, Eastern Region

I. Introduction

Haworth, Incorporated ("Haworth") has submitted a protest to the FAA Office of Dispute Resolution for Acquisition ("ODRA") under a procurement by the FAA Eastern Region (the "Region"). The protest alleges that the Region improperly disqualified Haworth as an offeror, purportedly for failure to attend a mandatory, scheduled pre-proposal conference. The Region rejected and refused to consider Haworth's proposal solely on that basis. After the protest was filed, an award was made to another offeror. For the reasons set forth below, the ODRA recommends that (1) the protest be sustained, but that the award not be disturbed; and (2) Haworth be reimbursed for its reasonable proposal preparation costs.

II. Findings of Fact

A. <u>The Facts Surrounding The Protest</u>

Solicitation No. DTFA05-98-R-78030 (the "Solicitation"), a Screening Information Request ("SIR"), was issued by the Region on March 13, 1998 and required the submission of proposals by April 10, 1998. The Solicitation was sent to six companies, including Haworth, Knoll, Inc. ("Knoll"), Steelcase, Inc. ("Steelcase"), Teknion, Marvel Office Furniture ("Marvel") and Transwall. Declaration of Theresa Mirro. The Solicitation called for offers for a firm fixed-price contract for design layout services and the provision and installation of approximately 700 system furniture workstations for a new FAA office building being constructed in Jamaica, New York under a General Services Administration ("GSA") lease contract. It also called for the contractor to "buy back" some 550 existing Government-owned workstations. Protest, pages 2-3; Initial Response ("Response"), page 1.

The Solicitation stated that a pre-proposal conference (the "Conference") would be held on March 25, 1998, and mandated its attendance by "all contractors." In this regard, Part I, Section B of the Solicitation provided, in pertinent part:

A Conference will be held. *All contractors* must attend this conference. The conference will be held at the FAA Federal Building-111, JFK Airport, Jamaica, N.Y. on Wednesday, March 25, 1998 @ 10:00 a.m. followed by a walk through of FAA's Buy Back Inventory. This will be the only opportunity that contractors will have to INVENTORY the workstations that will be part of the buy back, which is a mandatory Contract Line Item Number under this contract. [Emphasis added.]

Similarly, in Part I, Section C, attendance at the Conference was made mandatory for "all offerors":

All offerors are required to attend the Conference at the existing FAA Regional office building. This conference will include a walk through enabling the offerors to view the buyback furniture, loading dock and freight elevator. [Emphasis added.]

Neither Solicitation section expressly states that (1) attendance at the conference must be by employees of the "contractors" or "offerors"— as opposed to authorized dealers or others acting as designated representatives; or (2) that failure to have an employee attend would disqualify an offeror and prevent it from submitting a proposal.

The Conference took place as scheduled on March 25, 1998. According to the Declaration of Theresa Mirro, the FAA Contracting Officer for this procurement, four of the six firms receiving the Solicitation, Knoll, Steelcase, Marvel and Transwall all "attended the pre-proposal conference with their dealers" – *i.e.*, both manufacturer and dealer employees were present. **[1]** In attendance at the Conference on behalf of Haworth and as its authorized representative was Mr. Mike Eble, a "dealer Principal," the owner of a Haworth dealership.

From the record, there appear to have been a number of communications between Haworth and Regional contracting officials, both before and after the Conference. In her declaration, Ms. Mirro speaks of three occasions prior to the conference when she had

indicated to the protester that the Region would not deal with a Haworth dealer or other non-employee representative. First, Ms. Mirro says, on September 17, 1997, during a Haworth furniture presentation at the FAA's offices, she advised Haworth that the Region "would only be dealing with contractors, not dealers or representatives, *during the acquisition*." (Emphasis added.) This statement, Ms. Mirro says, she repeated to Haworth sometime in October 1997, "when the Product Team went to the Haworth showroom . . . ." Nothing in such a statement indicated that, were the contractor to be represented only by a dealer at the Conference, it would be automatically disqualified from participating in the acquisition and would not be permitted to submit a proposal.

The next contact, according to Ms. Mirro, was on Saturday, March 14, 1992. Ms. Mirro states she checked her office Voice Mail from her home on that date and retrieved a message from a Haworth Dealer, Corporate Environments "saying they would be attending the pre-proposal meeting *instead of* Haworth." The emphasized words are those of Ms. Mirro. Haworth's Senior Dealer Market Manager, Mr. Jack Morelli, has stated that he had informed the Region that he was sending Mr. Eble to the conference "in [his] place." *See* Declaration of Jack Morelli. In other words, the Region was notified in advance that Mr. Eble, the authorized Haworth dealer, was to represent Haworth and act as its agent at that conference.

Ms. Mirro states further that, in response to the Voice Mail message, she then called Corporate Environments and left a message "that we would only *deal with* the contractors." Mr. Eble does not challenge this statement. By the same token, there is again nothing in that statement that makes plain that the Region would **not "*deal*"** with the contractor, Haworth, **after the Conference** -- that Haworth would be precluded from submitting a proposal, simply because Mr. Eble was to attend the conference as its representative.

On Wednesday, March 18, 1998, there was a telephone conversation between Haworth's Mr. Morelli, and Ms. Maria Rosu, another FAA Eastern Region Contracting Officer. According to Ms. Rosu's Declaration, Mr. Morelli called "on or about March 17, 1998" and asked her "if it would be possible to change the date of the Conference, because he could not attend the meeting which was scheduled for March 25, 1998." She replied that the meeting "could not be postponed." Her recollection is that she also advised Mr. Morelli "that it was imperative that either he or another employee of Haworth attend the meeting." Mr. Morelli's recollection of that telephone call, set forth in his own Declaration which accompanied the Howarth protest letter, is slightly different and somewhat more detailed:

> On March 17, 1998, I was in Boston doing business with Bell Atlantic. The next day [*i.e.*, March 18, 1998], while in the airport, I checked my voice mail to discover a message from Maria Rosu from the FAA. When I called her, she asked if I had received the bid (solicitation number DTFA05-98-R-78030) and mentioned a pre bid meeting. Up until that time, I was unaware that the bid [*i.e.*, the Solicitation] had arrived at my NY office, since I am a "remote" working out of my home office. Mail

> usually gets forwarded to me a few days after it arrives. When I asked about the nature of the pre bid meeting, she said it was a time to ask any questions concerning the bid. I told her that I had a prior commitment for that date and asked if it could be rescheduled. Maria said it could not be changed and so I said I would send a dealer Principal, Mike Eble from Corporate Environments, in my place. She said this was highly unusual, since this was a meeting where manufacturers would attend. I explained that Haworth, Inc. and most of our competitors, use dealers to help us respond to bids of this nature. We would jointly develop this bid response with our dealer and that his attendance at this meeting is a very routine situation for us. I also explained that I would meet with Mike after the [pre-bid] meeting to review the substance of the meeting.

Mr. Morelli's Declaration further states in this regard, " She was not happy with my dealer coming in my place but said *it would have to do.*" (Emphasis added.)

Significantly, Ms. Rosu, in her Declaration, filed with the ODRA nearly two weeks after the protest and accompanying Morelli Declaration had been disseminated, does not address or challenge this latter statement by Mr. Morelli, a statement which was underscored within the protest letter itself. She does not deny making such a statement. Indeed, Ms. Rosu does not take issue with anything in particular in Mr. Morelli's Declaration. **[2]**

The Region has filed another Declaration containing a brief description of the Morelli-Rosu conversation, *i.e.*, the Declaration of David J. Paveglio. Mr. Paveglio's statement as to that conversation is clearly a second-hand account of what transpired, and even it does not contest that Ms. Rosu may have said sending the dealer as Haworth's representative "*would have to do*. " Therefore, based on the record, we find that Ms. Rosu actually said both (1) attendance by a contractor employee was "imperative"; and (2) Haworth's having a dealer attend in Mr. Morelli's place "would have to do." Further, even though Ms. Rosu may have used the word "imperative," and even if, as Mr. Paveglio states, Ms. Rosu had also told Mr. Morelli that attendance by a dealer was "not acceptable," once again, there is no indication of an explicit warning that failure to have a Haworth employee present would automatically disqualify a subsequent Haworth proposal.

The only eyewitness account of the March 25, 1998 Conference provided to the ODRA **[3]** is that of Mr. Eble, in his April 23, 1998 statement:

> The meeting began in a conference room with many manufacturers and their dealers present. They passed around a sign-in sheet. After we signed in, they went around and asked us to introduce ourselves and identify our companies. After I identified my company, I was asked where Haworth was. I said that Jack Morelli had a prior commitment and, as an authorized dealer, I was representing Haworth. Ms. Mirro stopped the meeting and asked all FAA employees present to meet her in the hallway. They met in the hallway for approximately 5-10 very awkward minutes. They then

> rejoined the meeting and progressed without saying another word about the incident. The meeting concluded and there was a walk through to view the old furniture, after which everyone left.

Nothing in this sworn statement or anything submitted by the Region indicates that Ms. Mirro advised Mr. Eble during the meeting that, because of Mr. Morelli's absence or the absence of any other Haworth employee, Haworth was no longer qualified to submit a proposal and that any such proposal would be rejected. Because such a warning was not given, as Mr. Eble's statement indicates: "Corporate Environments and Haworth then worked together to do the extensive amount of work required to respond to the bid."

On April 9, 1998, the day before proposals were due, Mr. David J. Paveglio, Manager of the Acquisition and Material Branch for the Eastern Region, spoke with Mr. Morelli and informed him that "Haworth's failure to attend [the Conference] disqualified it from presenting an offer." Declaration of David J. Paveglio. Mr. Morelli's recollection of the conversation is essentially the same. *See* Declaration of Jack Morelli, ¶3. As to that conversation, Mr. Morelli states that he was "shocked" by the Region's position, given that he had "told Maria [Rosu that he] was sending [Haworth's] dealer [to the Conference]" and that the dealer [Mr. Eble] and Morelli had "put in considerable time and effort to develop and respond to the bid." *Id.*

On April 10, 1998, Mr. Paveglio spoke with Mr. Thomas J. Walker, Haworth's Supervisor of GSA Contracts, discussed the Region's rationale for requiring only manufacturers' employees to attend the Conference and the Region's position regarding Haworth's disqualification. Declaration of David J. Paveglio. Mr. Walker tried to convince Mr. Paveglio that participation of dealers as representatives of furniture manufacturers was a "common, accepted, and approved practice," and, in this regard, referred Mr. Paveglio to a Mr. Arthur Hackney, Director of Procurement for the General Services Administration (GSA). Declaration of Thomas J. Walker, page 2. He also emphasized to Mr. Paveglio that "considerable time had been taken assembling [Haworths'] offer." Declaration of David J. Paveglio. At the conclusion of that April 10, 1998 conversation, Mr. Paveglio agreed to have Haworth submit its proposal, with no promise that the proposal would be accepted, but with the understanding that it may be accepted, if in the Government's best interest to do so. In this regard, Mr. Walker states:

> Mr. Paveglio stated that his inclination was to accept our offer as *it may not be in the governments* [sic] *best interest to not accept it*, and directed that we submit the offer, although he could not guarantee that it would be accepted. [Emphasis added.]

Declaration of Thomas J. Walker, page 3. Mr. Paveglio's recollection of the conversation is much the same:

> I told Mr. Walker that I would receive the offer, because I had to investigate all the facts surrounding what had been done throughout the process. Receipt was not to be construed as acceptance. . . . Mr. Walker

> was told that after review of facts and circumstances *if there was an indication that it was in the government's best interest, the offer would be accepted.* [Emphasis added.]

Declaration of David J. Paveglio. After that conversation, on April 10, 1998, Haworth's Mr. Walker sent a facsimile letter to Mr. Paveglio, putting forth Haworth's position that Mr. Eble's participation in the Conference on Haworth's behalf did not violate the terms of the Solicitation, and emphasizing the vital role Mr. Eble played in helping to develop Haworth's proposal. Protest, Exhibit 4. Also, on that date, Mr. Morelli hand-delivered Haworth's proposal to the Region. Declaration of David J. Paveglio.

The Region indicates that it had advised offerors at the Conference to expect certain amendments to the Solicitation, and that Haworth never called to inquire about them. Response, page 11. Because Haworth was considered "disqualified," the two amendments that had been issued were not provided to Haworth. Accordingly, the Haworth proposal did not acknowledge them or take them into account. Protest, page 8.

Mr. Paveglio states that, on April 13, 1998, he spoke with both Ms. Mirro and Ms. Rosu to review the "facts and circumstances surrounding the procurement," confirmed that "there were no other discussions with Mr. Morelli that changed the criteria in the [Solicitation]," and that he concurred with Ms. Mirro, the Contracting Officer's, "decision to reject the Haworth offer." Declaration of David J. Paveglio. By letter dated April 14, 1998, Ms. Mirro formally rejected and returned the Haworth proposal. The letter referred to the above-quoted Solicitation language mandating attendance at the Conference by "contractors" and "offerors." In the letter, Ms. Mirro further asserted:

> On several occasions, Haworth was informed by the FAA, that the contractor must attend the conference and not a dealer or representative. Despite these instructions, Haworth chose to have Mr. Michael Eble from Corporate Environments attend the meeting.

Protest, Exhibit 5.

B. <u>The Protest and Succeeding Events</u>

By letter of its counsel, Hogan & Hartson L.L.P., dated April 23, 1998 (the "protest letter" or "Protest"), Haworth timely submitted the instant protest to the ODRA, contending that the Region's decision to reject Haworth's proposal was "arbitrary, capricious, and not supported by substantial evidence."" The protest letter further states:

Because the Solicitation did not prohibit offerors from having an authorized agent attend the Conference, and because Mr. Eble was an authorized Haworth dealer and an expressly authorized agent of Haworth, Mr. Eble's attendance at the Conference constituted attendance by the "offeror." In addition, because the FAA officials at the

Conference were fully aware that Mr. Eble was attending the conference as Haworth's agent, but failed to inform him (or Haworth) that his attendance was improper, the FAA is equitably estopped from denying Haworth's qualification for award.

Protest, page 8. The protest letter requested an immediate stay of any award, the provision of the two Solicitation amendments, permission to submit its proposal on the procurement, and the Region's consideration of that proposal. The protester also sought recovery of its proposal preparation costs and attorney's fees. *Id.,* page 14.

Upon receipt of Haworth's protest letter (received by the ODRA on April 23, 1998), Anthony N. Palladino, the Director of the ODRA designated Richard C. Walters, ODRA Staff Attorney, as Dispute Resolution Officer ("DRO") for the purpose of adjudication of the protest, reserving to himself the role of engaging the parties in Alternative Dispute Resolution ("ADR") and possible settlement discussions. A Preliminary Conference was conducted telephonically with the parties on April 28, 1998. During and as a result of the Preliminary Conference, which was documented by a Preliminary Conference Memorandum, the DRO, among other things, established a schedule for the submission of the Region's Response and protester reply and directed that the Region make copies of the two Solicitation amendments available to the protester.

Although, as of the time of the Preliminary Conference, no award had been made, the Region indicated to the DRO during the Preliminary Conference that it intended to make an immediate award. The Region's participants in the Preliminary Conference advised the DRO that postponement of award would pose a substantial monetary hardship to the Government. The potential for damages was elaborated upon verbally during the Preliminary Conference:

> The necessity for immediate action . . . was due to the Agency's commitments to provide design drawings to the lessor of the new building (being procured under a GSA build/lease contract). The lessor was to utilize the drawings as part of its own design of office spaces within the new structure. Mr .Kelly [FAA Counsel] asserted that the Agency was "already late" in terms of its commitments. He stated that the GSA build/lease contract was a $56 million procurement, that the lease had been signed on March 5, 1998, and that the "clock was ticking."

ODRA April 28, 1998 Preliminary Conference Memorandum. It was further expounded upon by the Region as follows in its Response:

> On March 5, 1998, GSA signed a lease with the new building Lessor to provide the FAA with a new building by September 2000. The following three items are a portion of the lease:
>
> > Item A – "Within 90 days after award of the contract, the government will furnish approved interior space layout drawings from floor plans provided by the successful offer.

> The Government-furnished layouts will determine the final agency housing arrangements and the configuration of all construction in the Government's space, including partitioning and doors, and special features, excluding the cafeteria layout."
>
> Item B – "Within 60 days after delivery of interior layout plans, the Government will furnish telco, data and electrical outlets, and systems furniture plans to the successful offeror, excluding the cafeteria layout."
>
> Item C – "In the event the Substantial Completion Date is delayed by action of the Government, then following acceptance of the improvements as Substantially Complete by the Government, the Lessor shall have the right to submit a claim pursuant to paragraph 35 of the General Clauses annexed to this Lease for any damages caused by such delay."
>
> When the [GSA] lease was signed on March 5th, 1998, the obligations of the FAA to provide the Lessor with the required information began. The FAA is required to deliver to the Building Lessor the above referenced Item A by June 3, 1998 and Item B by August 2, 1998. If the FAA does not meet the deadlines, the Lessor has the right to submit a claim in accordance with the above-referenced Item C. The FAA can estimate that a claim issued by the developer for delays caused by the government would be a significant amount. There was no dollar amount noted in GSA's lease to the Building Lessor for any delays caused by the government.
>
> The Building Lessor is to receive his payment from GSA when GSA has deemed a floor substantially complete. Therefore, any delays the government causes would delay the Building Lessor in receiving payment. This would greatly affect the amount of the Building Lessor's claim.

Response, pages 7-8. The foregoing supports a finding that a delay to contract award under the present Solicitation would indeed have caused significant harm to the FAA.

During the ODRA's Preliminary Conference, the parties discussed the protester's request for a stay of award. At that time, the DRO explained that, unlike the automatic stay provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§3553(c)(1) and (d)(3) ("CICA") (*see also* Federal Acquisition Regulation (FAR) §§33.104(b) and (c)), under the FAA's Acquisition Management System ("AMS"), there is a presumption that award and performance of FAA contracts will proceed, pending resolution of a bid protest, unless and until the Administrator (or her designee) issues a suspension, based on the recommendation of the ODRA. That recommendation must be predicated on a

finding of "compelling reasons" to justify a stay of procurement activities. In this regard, the AMS provides as follows:

> **Suspension of Activities Pending Resolution of a Protest**
>
> The FAA will continue procurement activities and, where applicable, will permit contract performance (after award) pending resolution of a protest, unless the FAA determines there is a compelling reason to suspend or delay all or part of the procurement activities. For protests after award, the ODRA may recommend suspension of contract performance. A decision to suspend or delay activities will be made in writing by the Administrator or his designee.

AMS 3.9.3.2.1.6. During the Preliminary Conference, the DRO asked Haworth's counsel to state what "compelling reasons" there were for imposing a suspension on contract award in this case. The only reason presented was that, absent a stay, the Region would award a contact, and, under those circumstances, the likelihood of obtaining a meaningful remedy would be reduced. Such an argument could, of course, apply to any procurement protest.

Although it is recognized that such an argument is the underlying basis for the CICA's automatic stay provision, in mandating the establishment of a unique acquisition management system for the FAA, the Congress, in Section 348 of the 1996 Department of Transportation Appropriations Act, Pub. L. 104-50, specifically directed that the CICA – among other procurement-related statutes applicable to other federal agencies -- "not apply" to the new FAA system.

Because it was unable to advance any other arguments at the time of the Preliminary Conference, Haworth agreed to withdraw its request for a stay, subject to resubmission of such a request, if facts were to emerge during the proceeding that would evidence "compelling reasons" for a stay. Haworth's counsel thereafter provided a letter dated April 28, 1998 to the ODRA withdrawing the request for a stay on that condition. Haworth has not made such a re-submittal. Subsequent to the Preliminary Conference, the Region made an award under the instant Solicitation.

Pursuant to the direction of the DRO, the Region submitted an Initial Response to Protest on May 4, 1998, and the protester submitted its reply thereto, by letter of its counsel dated May 6, 1998.

II. Discussion

The instant protest presents the following four issues:

1. Whether the Region has the right to disqualify prospective offerors, based on their failure to attend a mandatory scheduled Conference.

2. Whether the Region had a rational basis for requiring that only manufacturers' employees represent the manufacturers at the Conference for the instant procurement.
3. Whether the Region properly notified Haworth of the consequences of not having an employee attend the Conference on its behalf, and, thus, whether the Region had a rational basis in this instance for disqualifying Haworth from further participation in the procurement.
4. If no rational basis existed for Region's action, what the appropriate remedy would be in this case.

These issues will be addressed below.

A. The Right To Disqualify An Offeror For Failure To Attend A Mandatory Conference

On those few occasions where the issue has arisen, the General Accounting Office ("GAO") has held "that the failure of a prospective contractor to attend . . . a [pre-proposal] conference, even where required by negotiated solicitation documents, furnishes no basis to deny that contractor an opportunity to participate in the procurement." Comp. Gen. Dec. B-176593, 1972 U.S. Comp. Gen. LEXIS 1674 (November 17, 1972), *citing* 50 Comp. Gen. 355 (1970); *see also* 52 Comp. Gen. 955 (1973)(Government cannot make attendance a mandatory condition of submitting a bid.); Comp. Gen. Dec. B-164675 (September 17, 1968)(Procedures of the Armed Services Procurement Regulation (ASPR 3.504.2 (1974 Ed.)) for conducting Conferences do not provide a basis for disqualifying offerors who fail to attend such conferences.); 58 Comp. Gen. 214, 79-1 CPD ¶20, 1979 U.S. Comp. Gen. LEXIS 188 (January 15, 1979), *citing Southeastern Services, Inc., and MC&E Service and Support Co., Inc.,* Comp. Gen. Dec. B-183108, 75-1 CPD ¶366 (June 16, 1975)(Government cannot make a pre-bid site inspection a mandatory condition of submitting a bid.)

Such GAO precedent, however, is readily distinguishable. As the lead GAO case clearly indicates, the Comptroller General's refusal to countenance making pre-proposal conference attendance a condition precedent to submitting a proposal was based upon the statutory and regulatory scheme applicable to federal agencies other than the FAA under which competition must be maximized:

> [W]e conclude that the failure to attend the prebid conference properly may not be used as a basis to deny Comnet an opportunity to submit a proposal. While it may be that adequate competition would exist without the benefit of a proposal from Comnet, such fact would not justify a denial of competitive opportunity to Comnet. *The regulatory requirements for maximum competition would not be served unless that opportunity is extended to Comnet.* See sections 1-1.301-1, 1-3,101(b)(c)[sic], and 1-3.101(d) of the Federal Procurement Regulations.

50 Comp. Gen. 355, 1970 U.S. Comp. Gen. LEXIS 24 (November 10, 1970) (Emphasis added.) As noted previously, FAA acquisitions are no longer subject to many of the procurement-related statutes and regulations that apply to procurements by other federal Government agencies. The 1996 Department of Transportation Appropriations Act, Pub. L. 104-50, not only exempted the FAA's new and "unique" acquisition management system from the CICA, and its requirements for "full and open competition," but also freed the new FAA system from several other statutes and regulations, notably, the Federal Acquisition Regulation (FAR), which replaced the Federal Procurement Regulations (FPR) in 1984.

Moreover, although AMS §3.1.3, Fundamental Principles, states that the FAA procurement system will "encourage competition as the *preferred method* of contracting," it does not mandate "full and open competition" and the participation of "all responsible offerors" in all but limited circumstances, as does the FAR. *See* FAR Part 6. The AMS, in enunciating "source selection" "policy," requires only that the FAA "provide *reasonable access to competition* for firms interested in obtaining contracts." AMS §3.2.2.3 (Emphasis added). It does not require the participation of "all responsible offerors," but only speaks of competition in terms of "two or more sources," *id.*, and requires a Contracting Officer to "solicit an *appropriate* number of vendors to ensure quality products and services in a timely manner at a fair and reasonable price." AMS §3.2.2.5.2 (Emphasis added). This is vastly different and far more flexible in terms of competition requirements than the statutory and regulatory scheme that governs procurement by other federal agencies.

In this light, the ODRA concludes that, under proper conditions and with a rational basis for doing so, the FAA has the right to make mandatory attendance at a pre-proposal conference a condition precedent to permitting the submission of a proposal and to disqualify a prospective offeror for failure to attend such a conference.

B. The Right To Restrict "Attendance"
To Employees Of The Offeror In This Case

In making its findings and recommendations concerning substantive protest issues, the ODRA will apply the same standard of review that is to be applied under the Administrative Procedure 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. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). In this case, therefore, we must determine whether the Agency had a rational basis for requiring that employees of the solicited manufacturers attend the Conference – that they not dispatch dealers to represent them on that occasion. In this regard, there is no question that Government contractors do, and frequently must, act through their authorized/disclosed agents. *E.g., International Management and Communications Corp.*, Comp. Gen. Dec. B-272456, 96-2 CPD ¶156, page 1 at n.1 (October 23, 1996).

In terms of the Region's rationale for mandating "attendance" by manufacturers' employees in this case, the Agency's Contracting Officer, Ms. Mirro, has offered the following:

> The decision not to deal directly with the dealers or representatives was made by me based on past acquisitions, that dealing with them adds a middle man to the process. This is a high profile acquisition that has an extremely tight schedule to comply with. We wanted to deal with the contractor, not any subcontractors, dealers or representatives. We wanted to give information and get information back quickly. We wanted to make sure the information that was given, was given directly to the contractor, so there would be no discrepancies where a contractor could say, that is not what my dealer told me. It was a good business decision to deal in this manner.

Declaration of Theresa Mirro. The Response provides a further explanation:

> During the preparation of the SIR, several internal FAA meetings were held. During these meetings, it was determined that the SIR needed to be distributed and awarded as quickly as possible, in order for the furniture

> manufacturer to be provided with sufficient time to submit required information, so that the FAA could keep to a rigid schedule with the Building Lessor. During these meetings it was decided that, in order to expedite everything quickly, from the Conference throughout all the phases of the contract, the FAA wanted to work strictly with the furniture manufacturer. . . . The FAA wanted to make sure any answers to questions that were raised were heard by all manufacturers.

In this case, the Region was about to make a significant dollar investment in office systems furniture. The layout design of that furniture was critical to the configuration of the office spaces in the new $56 million FAA facility that is being constructed. Close coordination of the furniture layout design and the office configuration design will be essential. The Region has advised that the furniture layout design must be completed first and must be submitted to the lessor within a tight deadline, *i.e.*, by June 3, 1998. The purpose of the Conference was to initiate communications about this important project at the earliest stage, between the Region and prospective contractors/manufacturers. The Region intended to have those communications directly with the manufacturers, rather than through "middle men."

Because of the nature of this project and the extent of monetary damages that can result if it is not properly coordinated, the Region had every right to be concerned about the potential for confusion, mistakes and project delay that might be created by the relay of information to the manufacturers through their dealers or other non-employee representatives at the conference. Accordingly, there was a sufficient and rational basis for the Region to require that manufacturers have their own employees in attendance at the Conference. Unfortunately, as discussed below, the Region in this case failed adequately to specify such a requirement within the Solicitation, failed consistently to convey to Haworth the mandatory nature of that requirement during various pre-bid contacts, and, most importantly, failed to provide Haworth and other potential offerors with any advanced notice regarding the consequences of not adhering to such a requirement. **[4]**

C. Disqualification Of Haworth From Further Participation In the Procurement

Even though the Region had the right to require that "attendance" at the Conference be by employees of Haworth and not by dealers such as Mr. Eble, the Region did not have a rational basis for disqualifying Haworth and precluding it from submitting a proposal in the present case. In order to take such drastic action, there first would have had to have been adequate notice to Haworth of the requirement and, more particularly, that

disqualification would be the direct and automatic result of dispatching Mr. Eble to represent Haworth at the Conference.

Even aside from the absence of express language to that effect within the Solicitation, the Region had several other opportunities prior to Haworth preparing its proposal to provide Haworth with a clear and unambiguous warning regarding disqualification. As stated in the above Findings of Fact, although Haworth's Mr. Morelli had been told that attendance by a Haworth employee was "imperative," and initially was advised that Mr. Eble's attendance was "unacceptable," even that message was not conveyed in an unambiguous manner, since the record shows that Mr. Morelli was also told that Mr. Eble's attendance "would have to do."

Moreover, neither the Solicitation language nor the telephone conversation and voice mail message that pre-dated the scheduled conference made clear the consequence or sanction of Haworth not having its own employee at the Conference. There is a marked difference between saying something is "unacceptable" and saying that the Region will refuse to receive the offeror's proposal, so "don't bother preparing a proposal." The latter was not communicated to Haworth, either before, during, or after Haworth's dealer attended the Conference.

At the Conference itself, despite a hallway caucus (See Protest, Exhibit 2), no decisive, unambiguous statements were issued that addressed the consequence of Mr. Eble's presence on behalf of Haworth. Regional personnel did not contact Haworth directly on that occasion, nor did it tell Mr. Eble to advise Haworth that its failure to have an employee present at the conference would be fatal to its ability to have a proposal considered by the Region. As a result of these omissions, after the Conference concluded, Haworth expended time and effort compiling a proposal. Even after the Region finally (via the Paveglio-Morelli conversation of April 9, 1998) advised Haworth that it had been disqualified, Haworth was led to believe there was still some chance the Region would reconsider its position and accept the Haworth proposal, if it were determined to be "in the government's best interest." *See* Declarations of David J. Paveglio and Thomas J. Walker.

All of the above supports a finding that the Region's actions were unreasonable. While it should have been clear from the various telephone conversations with Haworth that the Region wanted to "deal" only with a manufacturer, there was not enough to impute to the protester the knowledge that it would be summarily disqualified from the entire procurement, simply for having its authorized representative attend the pre-bid

conference on its behalf. This is especially so here, where the Region gave conflicting messages about whether Mr. Eble's attendance would be sufficient. In light of all of these circumstances, therefore, the ODRA finds: (1) that the Region failed to provide Haworth with adequate advance notice regarding the employee attendance requirement and no notice whatsoever of the consequence of sending a non-employee to the Conference as its representative; and (2) that, accordingly, the ultimate decision to reject and return the Haworth proposal lacked a rational basis.

D. The Appropriate Remedy

The April 23, 1998 protest letter submitted by Haworth's counsel sought as remedies that the Contracting Officer be directed to: "(a) provide copies of the Solicitation amendments to Haworth, and (b) permit Haworth to submit a proposal, and (c) consider and evaluate Haworth's proposal for this procurement." Protest, page 14. That initial remedy request also sought recovery of both proposal preparation costs and attorneys' fees. *Id.*

This initial request for remedy has been overtaken by events. As noted above, at this stage, there is already a contract in existence. As the facts enumerated by the Region's Response demonstrate, and as the protester's reply of May 6, 1998 appears to acknowledge, time was of the essence in this procurement. There were compelling reasons for the Region to proceed with an award, and a lack of such reasons sufficient to justify a stay of award. To put Haworth in the same position as it would have been at the time its protest was filed, the ODRA would have to recommend that the Administrator order that the now-existing contract be terminated for the Government's convenience. Unlike similar situations involving procurements of other federal agencies, where the CICA explicitly requires the Comptroller General to make its recommendation for corrective action "without regard to any cost or disruption from terminating, recompeting or re-awarding the contract," *GIC Agricultural Group*, Comp. Gen. Dec. B-249065, 92-2 CPD 263 (October 21, 1992), neither the FAA nor the ODRA is similarly constrained. Indeed, as noted above, the CICA is not applicable to acquisitions under the AMS.

Moreover, for the Administrator to direct a termination and re-competition would be in the nature of providing an "equitable" remedy, *i.e.*, not merely an award of legal damages. The protester itself invoked the notion of "equitable" remedies, when, in the protest letter, its counsel spoke of the doctrine of "equitable estoppel." *See* Protest at page 8. It is well established that one who seeks an "equitable" remedy must approach the forum with "clean hands." *Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945); *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240 (1933); *Southwest Products Co. v. United States*, 882 F.2d 113 (4th Cir. 1989); *see also Computer Network Corporation, et al., requests for reconsideration*, B-186858, 56 Comp. Gen. 694, 77-1 CPD ¶422 (June 13, 1977).

In this case, even though we find the protest to be valid, we also find that Haworth contributed to the creation of the current situation. For example, when Mr. Morelli first

spoke with Ms. Rosu and noted her "unhappiness" with the notion of his sending Mr. Eble to the Conference in his stead, he could have changed his conflicting appointment and come to the Conference. Similarly, when Mr. Eble heard from Ms. Mirro by voice mail that the Agency only wanted to "deal" with the manufacturer directly, that message could have been relayed to his "principal" and heeded by Haworth, even in the absence of a warning regarding the sanction that was ultimately imposed. In our view, sound business practice mandated a higher degree of care on Haworth's part than was exercised here.

Accordingly, the circumstances in this case are not such that the ODRA ought be willing to recommend a contract termination, even though it finds the protest to be meritorious. In the reply letter of May 6, 1998, Haworth's counsel recognized this possibility, and reformulated the request for remedy as follows:

> Haworth understands from the FAA's Response that time is of the essence in this procurement, and that any delay in final contract award will be detrimental to the FAA's interests. Although Haworth believes that these facts should not influence ODRA's decision in this protest, in the event ODRA sustains Haworth's protest but also determines that the contract award should not be disturbed, Haworth strongly believes that, at the very least, it should be entitled to recover (1) its proposal preparation costs; and (2) its attorneys' fees incurred in pursuing this protest. See, e.g., DHL Enterprises, Inc., B-256451, 94-1 CPD ¶376; Continental Maritime of San Diego, Inc., B-249858, et al., 93-1 CPD ¶230.

As noted above, at various junctures up until April 10, 1998, the Agency could easily have prevented Haworth from expending the time and associated cost of preparing a proposal for the instant procurement, simply by telling Haworth that its proposal would not be considered if submitted. It did not do so. Therefore, the award of reasonable proposal preparation costs in this case would be appropriate.

As to its demand for attorneys' fees, however, Haworth may only claim entitlement to the extent permissible under the Equal Access to Justice Act, 5 U.S.C. 504 ("EAJA"). The Administrator has previously determined that the EAJA is the sole means of recovering attorneys' fees and expenses in an ODRA adjudicatory proceeding. *IBEX Group, Inc.*, 96-ODRA-00037 EAJA. The GAO cases cited by the protester in support of its request for attorneys' fees – *DHL Enterprises, Inc.*, B-256451, 94-1 CPD ¶376 (June 22, 1994),

and *Continenetal Maritime of San Diego, Inc.*, B-249858, et al., 93-1 CPD ¶230 (February 11, 1993) -- are inapposite, since award of attorneys' fees in those cases had been predicated on the provision for such fees in the CICA, 31 U.S.C. §3554(c)(1)(A), and the implementing regulations promulgated by the GAO under 4 C.F.R. §21.6. As stated above, Congress has made a number of statutes, including the CICA (as well as the Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355 ("FASA"), which modified the CICA in certain respects) expressly inapplicable to FAA procurements under the AMS. *See* Section 348 of Pub. L. 104-50; *Weather Experts.*, 96-ODRA–00013 EAJA.

To recover under the EAJA, a protester must not only "prevail" in its protest, but it must first establish basic entitlement to EAJA relief under that Act's size standards and then demonstrate that the Agency's position was not "substantially justified" and that there were no "special circumstances" that would render an EAJA award "unjust." *Compare IBEX Group, Inc., supra* (EAJA relief granted where Agency position not "substantially justified") *with Weather Experts, supra* (EAJA relief denied, notwithstanding protest being sustained, where Agency position was found "substantially justified"). Any EAJA award would have to be determined based on Haworth filing a separate application to the ODRA in accordance with the provisions of that statute.

IV. Conclusion and Recommendation

For the reasons set forth above, the ODRA finds the protest meritorious, but does not recommend disturbing the contract award, which has already been made. ODRA therefore recommends that the Administrator sustain the protest and direct that the Agency reimburse the protester for its reasonable proposal preparation costs.

Richard C. Walters

Dispute Resolution Officer
For the Office of Dispute Resolution for Acquisition

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[1] Although the Response does not mention Teknion, Mr. Thomas R. Walker, a Haworth Supervisor, relates that he was informed by FAA's Mr. Paveglio that one other prospective offeror did send only a dealer to represent it at the Conference. *See* Declaration of Thomas R. Walker, page 2. It is unknown whether Teknion ever submitted a proposal and, if so, whether such proposal was similarly rejected. In any event, no protest was filed by Teknion for this procurement.

[2] The Declaration of Maria Rosu contains only the following statement regarding the March 17 (March 18), 1998 telephone conversation:

> "On or about March 17, 1998, I received a telephone call from Mr. Jack Morelli (Haworth). Mr. Morelli asked me if it would be possible to change the date of the Conference, because he could not attend the meeting, which was scheduled for March 25, 1998. I replied that the meeting could not be postponed and that it was imperative that either he or another employee of Haworth attend the meeting."

[3] There are conflicting contentions regarding whether or not Mr. Eble participated in the "walk through" which followed the Conference as well as the extent of his participation and his reasons for purportedly not participating. *Compare* Paveglio Declaration with Haworth's May 6, 1998 Reply. In any event, any failure by Mr. Eble to participate in the "walk through" – in whole or in part -- does not seem to have impacted Haworth's ability to submit a proposal by which it was willing to be bound. The case law clearly places on the bidder any risk of not participating in such a pre-bid site visit. *E.g., Zinger Construction Company, Inc*, ASBCA No. 26331, 82-2 BCA ¶ 15,988, *aff'd*, 807 F.2d 979 (Fed. Cir. 1986).

[4] The Region likewise would have had a rational basis for requiring further that the "employees" attending the Conference be sufficiently competent and knowledgeable of the FAA's procurement, so that they would be capable of understanding and responding meaningfully to any information conveyed at the Conference.