

Office of Dispute Resolution for Acquisition

Federal Aviation Administration

Washington, D.C.

Protests of

Camber Corporation and

Information Systems & Network Corporation

Under Solicitation DTFA01-96-R-11087

ODRA Docket Nos. 98-ODRA-00079 and 98-ODRA-00080 (Consolidated)

ORDER ON REQUEST FOR PARTICIPATION AS INTERESTED PARTY

System Resources Corporation ("SRC"), by letter dated June 24, 1998 from its counsel, McKenna & Cuneo, L.L.P., has requested that the Office of Dispute Resolution for Acquisition ("ODRA") grant it permission to participate in the above-captioned consolidated protests as an "interested party." The Director of the ODRA, by letter dated June 25, 1998, asked SRC's counsel to provide the ODRA with a "further briefing, citing legal and policy reasons supporting [SRC's] intervention in these protests." SRC's counsel responded by letter dated June 29, 1998, providing additional argument in support of its request. Input of other parties also was solicited. For the reasons set forth below, the request of SRC is denied.

Background

The instant procurement is for technical engineering services and program management support for future satellite and satellite augmentation systems in support of the FAA Global Positioning System ("GPS") product team. (Hereinafter the procurement will be referred to as the "GPS TAC Contract"). On June 8, 1998, an award of the GPS TAC Contract was made to Advanced Management Technology, Inc. ("AMTI"). Post-award debriefings were conducted with the remaining offerors, the last of which, according to the FAA Contracting Officer, was held on June 15, 1998, with Information Systems &

Network Corporation ("ISN"). By letter dated June 18, 1998, Camber Corporation submitted to the ODRA a protest of the award. ISN quickly followed with its own protest, by letter dated June 22, 1998. SRC, which did not file a protest after its own debriefing, now seeks to be included as a participant in both of the pending consolidated protests.

Discussion

SRC seeks "interested party" status, based on the following language within AMS §3.9.3.2.3.5:

When a protest has been received, the FAA Contracting Officer will inform other *interested parties* of the protest within 2 business days after the date on which the protest is filed. *Interested parties* will have 4 business days after the date on which they are notified of the protest to request *interested party status* from the Office of Dispute Resolution for Acquisition. At the discretion of the Dispute Resolution Officer, other *interested parties* may participate in the proceedings.

In terms of the notice requirements of this provision, it is unknown whether the CO informed SRC of either protest here. In any event, if SRC were to qualify as an "interested party" within the meaning of the AMS, its letter of June 24, 1998 was clearly filed with the ODRA within 4 business days of both the Camber and ISN protests. The real question is whether the AMS intends disappointed offerors, such as SRC, to be able to participate as "interested party" intervenors in post-award protests filed by others. There is nothing in the above-quoted language to indicate this to be the intent of the AMS. Further, there is other AMS language which would seem to limit "interested party" intervenor status in post-award protests to the awardee. More specifically, after defining the term "interested party" -- for purposes of specifying who may file a protest --AMS §3.9.3.2.1.3 goes on to state:

Where a contract has been awarded prior to the filing of a protest, the awardee may be considered an interested party for purposes of participating in the protest proceedings.

Under the well-established principal of interpretation, *inclusio unius est exclusio alterius* (the specific inclusion of one is to be read as the exclusion of others), such language may be viewed as precluding offerors other than the awardee from participating in a post-award protest as an intervening "interested party." Such an interpretation would be consistent with the treatment of intervenors under the General Accounting Office ("GAO") Bid Protest Regulations. Under Title 4 C.F.R. §21.0, in pre-award protests, other offerors having a "substantial prospect of receiving an award" will be permitted to participate in a protest as intervenors. In contrast, for post-award protests, "intervenor" status is limited solely to the awardee:

Sec. 21.0 Definitions.

* * *

a. Intervenor means an awardee if the award has been made or, if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied.

SRC states: "On information and belief, under a best value analysis SRC would be found to be next in line for award after AMTI." It further argues that SRC would have qualified as an "interested party" and would have been permitted to participate as an intervenor, were these protests before the GAO:

Although not dispositive, we note that SRC would be an interested party if the referenced protests had been filed at the General Accounting Office ("GAO"). When determining whether a party is sufficiently interested to intervene in a protest, the Comptroller General considers three primary factors: (1) the nature of the issues raised, (2) the benefit or relief sought by the protester, and (3) the party's status in relation to the procurement. *See OMNIPLEX Would Servs. Corp. -- Recon.*, B-278105.2; B-278105.3, Nov. 13, 1997, 97-2 CPD ¶ 147 at 2; *Four Seas and Seven Winds Travel, Inc.*, B-244916, Nov. 15, 1991, 91-2 CPD ¶ 463 at 3.

In our view, the cases cited by SRC are not supportive of its argument. Both cases deal with "interested party" status only in connection with who may file a protest. In both cases, the protests were dismissed, because the protesters could not qualify as "interested parties." The "primary factors" enumerated by SRC were stated only in terms of whether a protester has a sufficient interest to maintain a protest before the GAO, and do not apply to determining the sufficiency of interest for the purpose of intervention in someone else's protest:

Under the Competition in Contracting Act of 1984, 31 U.S.C. §3553 (a) (1988), and our Bid Protest Regulations, 4 C.F.R. §21.1(a) (1991), a protester must qualify as an interested party in order to have its protest considered by our Office. *Jack Young Assocs., Inc.*, B-243633, June 20, 1991, 91-1 CPD P585. An interested party is defined as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award or failure to award a contract. 4 C.F.R. §21.0(a). A protester will not be deemed an interested party if it will not be in line for award if its protest were upheld. *Jack Young Assocs., Inc.*, *supra*. Determining whether a party is sufficiently interested [**i.e., for purposes of maintaining a protest -- not for purposes of intervening in a protest**] involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. *Id.*

Four Seas and Seven Winds Travel, Inc., Comp. Gen. Dec. B-244916 (November 15, 1991), 91-2 CPD ¶463 at 3.

Even if SRC may have qualified in this case as an "interested party" under AMS §3.9.3.2.1.3, for purposes of instituting its own protest, there is nothing in the AMS -- or for that matter in GAO rules or precedent -- which would contemplate the participation of non-protesting offerors other than the awardee in the context of a post-award protest. The above-quoted language of AMS §3.9.3.2.3.5 which speaks of "other interested parties" -- *i.e.*, in the plural -- applies to pre-award protests, where the Dispute Resolution Officer ("DRO") will have discretion to include as participants other offerors who have a reasonable chance of receiving an award if the protest is successful. This, too, would be entirely consistent with GAO rules and practice.

Such discretion may be exercised to permit participation by such parties, when the DRO can discern some benefit from their participation. *See Digital Equipment Corporation, et al.*, GSBCA No. 12891-P, 94-3 BCA ¶27,146. In the present instance, ODRA sees no real benefit to the process from the proposed participation by SRC or similarly situated entities. Indeed, there are a number of distinct disadvantages that would be presented by allowing such participation. AMS and ODRA policies strongly favor prompt and efficient resolution of disputes. The addition of one or more disappointed offerors to an existing post-award protest would inevitably complicate the process and render it more expensive, and time consuming. Such participation effectively would create shadow protests that would absorb time and resources more appropriately directed at resolving actual protests, either through ADR or adjudication. Such additional participation could also compound the difficulties of protecting sensitive proprietary information.

Finally, given the participation of the protesters, the awardee and the Agency, the ODRA is confident that all pertinent issues and arguments relating to the instant procurement will be reviewed thoroughly and afforded full consideration. Thus, SRC ought not be prejudiced by its non-participation.

Conclusion

For all the foregoing reasons, the request of System Resources Corporation that it be permitted to participate in the consolidated protests as an "interested party" is hereby denied.

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Richard C. Walters, Dispute Resolution Officer

For the FAA Office of Dispute Resolution for Acquisition

Date: July 6, 1998