

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

FINDINGS AND RECOMMENDATION

Matter: Protest of A&T Systems, Inc.

Under Solicitation No. DTFA01-98-R-00045

Docket: 98-ODRA-00097

Appearances:

For the Protester: Dr. Ashok K. Thareja, President & CEO, A&T Systems, Inc.;

Mr. Robert Williams, Vice President, A&T
Systems, Inc.

For the Product Team: Anthony L. Washington, Deputy Assistant Chief Counsel,

Procurement Law Division

I. Introduction

A&T Systems, Inc. ("A&T") has submitted a protest to the FAA Office of Dispute Resolution for Acquisition ("ODRA") under a procurement by the FAA Headquarters, ASU-360 (hereinafter the "Product Team") for the Office of Information Technology ("AIT") involving the purchase of an uninterruptible power supply ("UPS") system for AIT's Computer Operations Center. A&T has challenged the award of a UPS contract to a competitor, ComTeq Federal Inc. ("ComTeq"), under an existing ComTeq contract with the National Institutes of Health ("NIH"). For the reasons set forth below, although we find the AIT procurement did not technically comply with either the FAA's Acquisition Management System ("AMS") or the requirements surrounding awards under an NIH contract, A&T was provided a fair opportunity to compete for the contract and was not prejudiced by the Product Team's actions in this instance. Accordingly, we are recommending that the protest be denied.

II. Findings of Fact

A. The Facts Surrounding The Protest

1. On May 12, 1998, the Product Team issued an Internet notice announcing its intention to award a firm fixed price contract "to purchase an uninterruptible power supply (UPS) system and certain power related accessories and support tools for the AIT Computer Operation Center, LAN rooms and wiring closets." Included with the Internet announcement were a Draft Statement of Work ("SOW") and an invitation to prospective bidders to attend a site survey scheduled for May 18, 1998. Agency Report ("AR"). Exhibit 4.

2. The site survey was attended by A&T, among other UPS manufacturers and vendors. AR, Exhibit 3.

3. The Draft SOW called for a 200 KVA UPS unit, which was to be "upgradeable to at least 250 KVA." The system was to carry a warranty for hardware and software through December 31, 1999, and yearly maintenance for hardware and software through December 31, 2005. AR, Exhibit 4, pages 3 and 9 of 9.

4. The Government estimate for the system contemplated by the DRAFT SOW was \$204,000.00, consisting of the following:

Description	Estimated Cost
UPS	\$ 70,000.00
UPS Installation	30,000.00
Warranty	4,000.00
SNMP Software	20,000.00
PDS in Room 129	16,000.00
Complete Closet UPS	64,000.00
Total	\$204,000.00

AR, Exhibit 2.

5. Although the Government's estimate was for \$204,000.00, the amount of funding initially made available for the procurement was only \$189,441.00. AR, Exhibit 1. No evidence was presented on how the estimate was formulated or why it differed from the amount of funding allotted.

6. On July 15, 1998, the Product Team Contracting Officer, Ms. Diana Offutt, issued a Screening Information Request ("SIR") under Solicitation No. DTFA01-98-R-00045,

seeking offers on the UPS system. AR, Exhibit 5. In addition to the furnishing of UPS hardware and software, installation, maintenance and warranty services, the SIR called for the vendor to provide training on the operations and support of the UPS unit. *See* AR, Exhibit 5, ¶3.9.

7. A&T submitted a proposal on the UPS system on July 31, 1998, in the total amount of \$371,570.00. AR, Exhibit 8. This amount clearly exceeded the Government's estimate as well as the available funding. A&T's proposal was the only proposal received by the Product Team in response to the SIR. AR, Exhibit 16, ¶3.

8. Based on the suggestion of Jeffrey R. Lane, an AIT Management Analyst, that the SIR be cancelled and that a "COTS solution" be pursued -- *i.e.*, that the procurement be based on a commercial-off-the-shelf UPS product (*see* AR, Exhibit 6) -- the Contracting Officer, on August 24, 1998, posted an Internet notice canceling the SIR "in its entirety." AR, Exhibit 7.

9. In August 1998, Mr. Lane solicited input from FAA technical personnel and from two UPS manufacturers, Best Power and Exide. Mr. Lane testified that he was interested in ascertaining and satisfying the Product Team's UPS needs with the funds available before those funds expired (at the end of the Government Fiscal Year, September 30, 1998). Although both Exide and Best Power had sent representatives to the May site survey for the original solicitation, Mr. Lane says, he did not contact those companies for that reason and did not attempt to contact A&T or any others who had attended the site survey. Instead, he relates, he sought to approach the procurement from another angle. He obtained Exide's name and catalogue from someone else at the FAA. Best Power's name he obtained by means of an Internet search for UPS manufacturers. Lane Testimony.

10. Based on the input from Best Power, Exide and the FAA technical personnel whom he consulted, Mr. Lane determined that, for purposes of the instant procurement, the Product Team ought reduce its specified UPS kVA capacity requirements and eliminate the warranty, maintenance, and training requirements from any contract, so as to keep the cost within available funding limitations. Specifically, Mr. Lane had been told by FAA technical personnel: (1) that the existing capacity of the AIT Computer Operations Center was 100 kVA; and (2) that an appropriate level of enhancement, to allow for adequate growth, would be in the area of 20%-30%. On this basis, he sought and obtained "hardware only" quotations from Best Power and Exide for a UPS system that would satisfy these capacity needs. AR, Exhibit 16, ¶¶5,6; Lane Testimony.

11. Best Power referred Mr. Lane's request to ComTeq, a reseller of Best Power equipment, and ComTeq furnished Mr. Lane with a formal quotation in two parts, by two letters dated August 26, 1998. The amounts proposed in those letters for various equipment items totaled \$32,584.12 and \$81,314.00, respectively, for an overall total offer of \$113,898.12. AR, Exhibit 9. Both letters referred to ComTeq's contract number under the standard National Institutes of Health ("NIH") Electronic Computer Store II ("ECS2") contract in the following manner: ***"Our NIH ECS2 Contract number is 263-97-D0306."*** Both letters also contained the following footer:

Internal use only:

ECS Delivery Order Auth. #: _____

In addition, below the quotation on one of the two letters was the following statement: **"THIS PRICING HAS BEEN PRE-COMPETED."** Thus, ComTeq was proposing to offer the UPS system to the Product Team under the NIH contract vehicle, which, like the GSA Federal Supply Schedule, is available for use by any federal Government agency. *See* AR, Exhibit 11, FORWARD. Prior to these letters, Mr. Lane has indicated, he had not discussed or considered the use of the NIH contract to satisfy the Product Team's needs. Lane Testimony.

12. Exide also provided the Product Team with a quotation, but, because it exceeded the monies "allotted to the program", according to Mr. Lane, it was not considered. AR, Exhibit 16, ¶7; Lane Testimony.

13. On August 26, 1998, FAA's Mr. John Graham, the Contracting Officer's supervisor, received a telephone call from A&T, seeking information about why the SIR had been cancelled two days earlier (*see* Finding 8, above). A meeting was scheduled with A&T and Product Team representatives for September 4, 1998, in order to discuss the matter. AR, page 3; Graham Testimony.

14. Such a meeting was conducted on September 4, 1998. Attending the meeting for the Product Team were Mr. Graham, Ms. Susan Corbin, another FAA Contracting Officer who participated in the absence of Ms. Offutt (who was on extended leave at the time), and Mr. Lane. Representing A&T at that meeting were Dr. Ashok Thareja, A&T's President and CEO, Mr. Robert Williams, A&T's Vice President, and Mr. Derek Chan, A&T's Director of Business Development. Also in attendance was Mr. Clark Hoover, a representative of A&T's proposed subcontractor, M.C. Dean. During the September 4, 1998 meeting, according to Mr. Lane, Mr. Graham emphasized that the SIR would "remain cancelled" and notified A&T representatives that the FAA had "changed requirements." After a caucus of the Product Team representatives, Mr. Graham advised A&T that it would be permitted to submit a quotation on the UPS system, based on the Agency's changed (*i.e.*, reduced) requirements. At the time, Mr. Graham stated that quotations were being sought from other sources as well. AR, Exhibit 16, ¶9; Graham Testimony; Lane Testimony. At the September 4, 1998 meeting, Mr. Lane discussed the Product Team's decision to utilize the General Services Administration ("GSA") to perform installation of the UPS system. Lane Testimony.

15. Although A&T's Mr. Chan did not recall specifically Mr. Graham's statement about the solicitation of other sources for the "changed requirements", he indicated that he had the impression from what was said at the September 4 meeting that the Product Team was going to solicit a quotation from GSA for furnishing the UPS hardware. Chan Testimony.

16. On September 8, 1998, Mr. Lane met with A&T's Mr. Chan and two employees of M.C. Dean, Mr. Hoover and Mr. Manny Zaneer (phonetic). According to Mr. Lane, he

went over with them a copy of the Draft SOW and indicated to them the changes being made in technical requirements for the UPS system. Mr. Lane testified that he used the Draft SOW for this purpose (rather than the SOW issued with the July 15, 1998 solicitation), because he had that document on his own computer. Mr. Lane states that these changes were the very same changes that he had earlier discussed with Best Power and Exide in August 1998 when he solicited their offers. Mr. Lane states that, as part of their September 8 meeting, the A&T and M.C. Dean representatives were given a "walk through" of the AIT Computer Operations Center facility, during which the changed requirements were discussed further. As he had earlier with Exide and Best Power, Mr. Lane advised the A&T representatives at the September 8 meeting that the AIT Computer Operations Center had existing capacity of 100 kVA and that, for purposes of a UPS unit, it was seeking to expand that capacity by some 20%-30%. M.C. Dean would be furnishing the UPS hardware for A&T, and M.C. Dean's Mr. Hoover advised Mr. Lane that A&T would be able to offer a 150 kVA UPS unit. Mr. Chan sought clarification as to the type of proposal format Mr. Lane was contemplating, and Mr. Lane stressed that, because of the short timeframe, all he wanted from A&T was a "bottom line" price quotation for the hardware. He told Mr. Chan that such a quotation from A&T would be needed within the next two days. Mr. Lane indicated during his testimony that what he was expecting was a "bottom line" "hardware only" quotation on a complete 150 kVA UPS system. AR, Exhibit 16, ¶10; Lane Testimony.

17. On September 9, 1998, Mr. Lane relates, he received a telephone call from Mr. Chan. During their telephone conversation, he states, Mr. Chan advised him that an A&T proposal would be forthcoming the next day, on September 10, 1998, and that the total amount Mr. Chan had in mind would be \$205,000.00. According to Mr. Lane, Mr. Chan then asked whether such a price would be "in line with the FAA." Mr. Lane told him that \$205,000.00 was "too much." Lane Testimony. Mr. Chan, who acknowledged speaking to Mr. Lane about a \$205,000.00 proposal, testified that he asked Mr. Lane for the figure that the FAA had in mind and that, at first, Mr. Lane alluded to a figure of \$160,000.00. Chan Testimony. It is not clear precisely what was said in that regard. There is agreement, however, that ultimately, during a subsequent conversation, either later on September 9 or on the morning of September 10, 1998, Mr. Lane provided Mr. Chan with a figure of \$114,000.00. Lane Testimony; Chan Testimony.

18. There is some confusion about specifically what was said with respect to this \$114,000.00 figure. Mr. Chan indicated during his testimony that what he was seeking from Mr. Lane was the price that would be accepted by the Product Team. He believes that in speaking to Mr. Lane he used words such as: "What price do I have to come in at to close the deal today?" or "What number do I need to come in at?" Chan Testimony. Although Mr. Lane did not challenge Mr. Chan's testimony directly, he only recalled the term "target" being discussed and states that what he had in mind in furnishing the \$114,000.00 figure was the amount of funding he had available to purchase the new UPS system hardware. In this latter regard, Mr. Chan conceded that he may have asked Mr. Lane during one of their several telephone conversations: "How much money do you have?" Chan Testimony. Both Mr. Lane and Mr. Graham testified about Mr. Lane seeking and obtaining Mr. Graham's authorization to "share" with A&T the new available

funding level, which was in the approximate amount of \$114,000.00. AR, Exhibit 16, ¶11; Graham Testimony; Lane Testimony.

19. That new funding level had been established earlier, in part because of the price quotation received on August 26, 1998 from ComTeq. Lane Testimony. Upon receipt of the two proposal letters from ComTeq -- which Mr. Lane states were transmitted to him both via e-mail and by facsimile on August 26, 1998 -- Mr. Lane prepared a spreadsheet listing the various line items contained in the ComTeq proposal letters. The descriptions of some of the items listed on the spreadsheet differed somewhat from the descriptions contained in the ComTeq letters, as did some of the listed prices. Mr. Lane indicated that he had used information from the Best Power Internet site to prepare the spreadsheet. Apparently, the prices listed by Best Power -- the ones Mr. Lane included in the spreadsheet -- differed slightly from those quoted in ComTeq's August 26 letters. Also included in Mr. Lane's spreadsheet was a separate item of UPS-related software not listed in the ComTeq letters, "CheckUPS Management Software." The associated price of \$99.00 for that software shown on the spreadsheet, Mr. Lane stated, again was obtained from the Best Power Internet data. Mr. Lane testified that he prepared the spreadsheet in order to obtain funding approval for the purchase from ComTeq.

20. Mr. Lane related that he had provided that spreadsheet to the AIT Business Staff for that purpose. The total shown at the bottom of Mr. Lane's spreadsheet, \$114,209.30, was inserted into a Procurement Request form, which was signed by Ms. Ellen Cook, Manager of the AIT Business Management Staff, as the "Funds Certification Officer". That form was also signed in two places by Mr. Lane's supervisor, Ms. Janet McNab, AIT Information Resource Manager. Ms. McNab's one signature -- found on the second page of the document -- was on her own behalf as official originator of the Procurement Request. The second signature, on the front, was in block 5 of the form, the "Approvals" section, directly above Ms. Cook's signature. In that connection, Ms. McNab had signed the form for her superior, Mr. Theron Gray, Director of Information Technology for the FAA. The latter signature was dated "8-28-98." Although the date opposite Ms. McNab's first signature appears as "8-24-98," Ms. McNab has provided the ODRA with an affidavit attesting that the August 24, 1998 was incorrect, that, in fact, she had written the wrong date when signing the form. The affidavit indicates that the form would have been executed by Ms. McNab at some point after the Product Team's receipt of the ComTeq quotation on August 26, 1998. Affidavit of Janet McNab. This would be consistent with Mr. Lane's explanation of the origin of the Procurement Request form. In any event, Mr. Lane provided Mr. Chan with a figure of \$114,000.00 on September 9 or 10, based on the funding level of \$114,209.30 that he had earlier requested and that had been approved.

21. After receiving the \$114,000.00 figure from Mr. Lane, Mr. Chan transmitted an offer to Mr. Lane on the UPS system by e-mail at 10:48 A.M. on September 10, 1998. That offer -- in the total amount of \$113,220.00 -- read as follows:

Take the current requirements and purchase the hardware
now and make the labor for rigging and installation an
option for when the money becomes available like in FY99

. . . it is less than 3 weeks away! And if you don't have the money you just do not exercise the option for labor. This can be done today! Thank [sic]!

Here's what you get:

For critical power -

150 kVA UPS \$71,520.00

(4) batteries \$ 0.00

SNMP Mgt \$ 0.00

(8) 5 kVA UPS \$41,700.00

Total - \$113,220.00

The e-mail was signed "Derek." AR, Exhibit 12.

22. Mr. Chan testified, in explanation of the first paragraph of its e-mail proposal, that A&T was still interested in the possibility of performing rigging and installation of the UPS. Chan Testimony. Mr. Lane testified that he had told Mr. Chan that GSA would be doing that work. Lane Testimony. As to the price of \$113,220, Mr. Chan states, he and Mr. Hoover developed a "strategy," deciding to bid below the \$114,000.00, figuring that would "be safe," *i.e.*, that such a bid would assure A&T of an award. Chan Testimony.

23. In reviewing this quotation against the earlier quotation letters received from ComTeq, Mr. Lane found missing from A&T's quotation any mention of the "necessary bypass switch" for the 150 kVA UPS unit. Mr. Lane informed Mr. Chan of this observation. AR, Exhibit 16, ¶12; Lane Testimony; Chan Testimony. Mr. Chan testified that, because he was not sufficiently aware of the technical aspects of the UPS unit, he conferred with M.C. Dean's Mr. Hoover. According to Mr. Chan, he learned that the bypass switch was not missing from the quotation, but rather was integral to the UPS unit and was not normally priced separately. Once he ascertained this, Mr. Chan states, he and Mr. Hoover decided that they had to develop a separate price for the bypass switch, and eventually arrived at a separate price, based on what a bypass switch would cost as a replacement part. Chan Testimony.

24. According to Mr. Lane, Mr. Chan stated to him during a subsequent telephone conversation on September 10 that the bypass switch had, in fact, been omitted from the original quotation, that it would cost some \$5,000, and that its inclusion in the A&T quotation would mean that A&T would "take a loss." Lane Testimony. During Mr. Chan's testimony, he acknowledged having made these statements to Mr. Lane. Chan Testimony.

25. Although Mr. Lane recalled a statement by Mr. Chan that any other omitted items would have to be deferred to a later Government Fiscal Year, Mr. Chan emphatically denied having made such a statement, stressing that the only context in which he had alluded to deferring the purchase of anything to a subsequent Government Fiscal Year was in connection with his mention of rigging and installation in the first September 10, 1998 A&T e-mail quotation. Lane Testimony; Chan Testimony; AR, Exhibit 12. To the contrary, Mr. Chan testified that he had told Mr. Lane that A&T would be willing to take a loss on anything else that might have been inadvertently omitted. Chan Testimony. Mr. Lane recalled no such statement. Lane Testimony. Although their testimony cannot be reconciled readily, I find both individuals to have been honest, sincere and credible. What is obvious is that Messrs. Lane and Chan had been unable to communicate adequately with one another about the nature of the A&T quotation and what A&T intended it to cover.

26. At 1:20 P.M. on September 10, 1998, Mr. Chan transmitted to Mr. Lane via e-mail a second quotation in the form of an A&T letter bearing that date. The quotation in that letter -- in the total amount of \$114,000.00 -- includes, in addition to the previously listed items, a line item for "500a 480v MDP," which Mr. Chan has confirmed is a bypass switch. Chan Testimony. The letter, which referenced the original SIR ("SIR DTFA01-98-R-00045 dated 15 July 1998"), read, in pertinent part as follows:

Dear Mr. Lane:

A&T Systems welcomes the opportunity to present this hardware only cost proposal to the FAA for an Uninterruptable [sic] Power Supply in accordance with the referenced SIR with the following changes:

This cost proposal is for the following items only:

CLIN	QTY	COST
CLIN 01 150kVA UPS	1	\$68,838.00
CLIN 02 Battery System*	2	\$ NSP
CLIN 03 SNMP mgt	1	\$ NSP
CLIN 04 5kVA UPS	8	\$40,136.25
CLIN 05 500a 480v MDP	1	\$ 5,025.75
TOTAL PRICE		\$114,000.00

* Battery System are battery cabinets with batteries sized to provide 150 KVA for 20 minutes at full load (model number Johnson Control 12-370).

The proposal pricing for the hardware only system is \$114,000.00.
Delivery will be 4-6 weeks after receipt of order.

AR, Exhibit 13 (emphasis added).

27. On September 10, 1998, the Product Team also received a final quotation from ComTeq. That proposal again was transmitted via two letters (both dated September 10, 1998) and again reflected a total price of \$113,898.12. Like the earlier ComTeq proposal letters, the September 10, 1998 ComTeq letters contained several separately identified and priced line items that did not appear within A&T's quotation, in particular, items listed as "START UP," "OUTPUT TRANSFORMER 480/208," "SERIAL ADAPTER," and 8 bypass switches for the smaller 5 kVA UPS units, which switches were listed as "40A UL/CUL, 50A TUV/CE, 600V BREAK-BEFORE-MAKE BYPASS SWITCH." Also listed in ComTeq's quotations were shipping costs and a 1% "PROCESSING FEE" for NIH. Both ComTeq September 10, 1998 letters, like the earlier August 26, 1998 letters, invoke the NIH ECS2 contract. AR, Exhibit 10.

28. Mr. Lane has testified that, after comparing the quotation of A&T with that of ComTeq, because A&T's quotation was higher and because he was concerned about items being omitted from the A&T quotation, he recommended to the Contracting Officer that an award to ComTeq would be in the Government's best interest. Lane Testimony; AR, Exhibit 16, ¶13.

29. On September 11, 1998, the Contracting Officer issued a purchase order (hereinafter the "Purchase Order") to ComTeq in the amount of \$113,898.21 (the difference from the total of ComTeq's offer of \$113,898.12 being due to an obvious inversion error relating to the last two figures). The Purchase Order was made under ComTeq's NIH ECS2 Contract No. 263-97-D0306. AR, Exhibit 11.

30. The Product Team concedes that the Purchase Order to ComTeq was not awarded in accordance with the procedures called for within the ECS2 contract itself, namely, the provision entitled "G.10 Fair Opportunity To Be Considered," which requires, *inter alia*:

At least three awardees' catalogs shall be compared, taking into account awardees' past performance, delivery schedules, prices, and other factors pertinent to the particular delivery order. The customer's Delivery Order file shall document the process and provide the rationale for the selection of the vendor for the particular delivery order.

Id.; AR, pages 5 and 7-8.

31. Before issuing the Purchase Order, Mr. Lane contacted ComTeq and determined, among other things, that the UPS system quoted in ComTeq's September 10, 1998 letters

already included the CheckUPS software. Accordingly, he made appropriate modifications to the earlier Procurement Request, by interlineating and conforming several of the figures on the Procurement Request to those appearing on the ComTeq quotation letters. The funding total of \$114,209.30 shown on that form was modified to read \$113,898.21 (again reflecting the same inversion error as appears on the Purchase Order). AR, Exhibit 9, Procurement Request.

32. By e-mail message dated September 11, 1998, Mr. Lane notified A&T that the Product Team had decided to use "another source, whose proposal was more comprehensive for a competitive price." By e-mail message to Mr. Lane dated September 15, 1998, M.C. Dean's Mr. Hoover expressed disappointment regarding the award decision and requested a "complete, comprehensive technical debriefing" as to the decision. In response, by e-mail message dated Friday, September 18, 1998, Mr. Lane advised Mr. Hoover that the A&T proposal was determined to have been "not inclusive of all requirements" and therefore "not acceptable," and that, because only a quotation was involved, a "debriefing" was "not required." AR, Exhibit 15, E-Mail Messages of September 11, 1998, September 15, 1998, and September 18, 1998.

B. The Protest and Subsequent Events

33. On September 22, 1998, by letter bearing that date, A&T filed its protest with the ODRA. The protest letter states: "The FAA Contracts Office has yet to formally notify us as to the disposition of our UPS proposal or the return of our proposals." As the "Legal Basis for Protest," A&T provides the following:

A&T Systems is filing this letter on the basis of the UPS contract being awarded to a source that did not submit an original proposal under the above solicitation [*i.e.*, DTFA01-98-R-00045]. Additionally, under provisions provided by the AMS, paragraph 3.9.3.1.1, we have made efforts with the Contracts Office to discover the disposition of our proposals.

34. In terms of the remedy being sought by A&T under its protest, the protester states:

A&T Systems would like to discover how the successful source was awarded the UPS contract when they did not submit an original proposal under the above solicitation. Preparation cost for this proposal was very high because much analysis was necessary after the site survey. Analysis included noise abatement, floor loading, HVA concerns, etc.

35. Upon receipt of the protest, the ODRA designated Richard C. Walters as Dispute Resolution Officer ("DRO") for the case. An initial Status Conference was conducted by telephone on September 24, 1998. In an effort to resolve the matter amicably via Alternative Dispute Resolution ("ADR"), and in light of A&T's request to discover more about how the award was made in the present instance, the DRO arranged for the Product

Team to conduct a post-award "debriefing" to review with A&T representatives the circumstances surrounding the award to ComTeq.

36. Such a "debriefing" was conducted at the FAA offices on September 28, 1998, and the parties participated in a second telephone conference with the DRO on September 29, 1998. At that time, A&T indicated that, as a result of the "debriefing," it was not satisfied that the Product Team had acted properly and consistently in making the award to ComTeq. It was apparent during the discussion on September 29 that more information was needed by both parties' representatives regarding the NIH contract vehicle that had been utilized and how it had been used in this case. It was agreed that a third telephone conference would be conducted on October 2, 1998. In the interim, Product Team counsel was to attempt to obtain further information regarding the NIH contract.

37. During that third telephone conference on October 2, 1998, because Product Team counsel had been unable to obtain additional information about the NIH contract in the interim, in order not to delay resolution of this matter further, the DRO established a schedule for adjudication under the ODRA's Default Adjudicative Process. Thereafter, on October 16, 1998, the Product Team filed its Agency Report. A&T, which was afforded two extensions of time, filed its comments on the Agency Report (the "A&T Comments") on the morning of November 2, 1998.

38. In order to complete the record and to clarify certain questions which he had regarding the facts surrounding this protest, the DRO conducted an informal hearing at the ODRA offices. More specifically, on the afternoon of November 9, 1998, testimony under oath was taken from Messrs. Graham, Lane and Chan. Thereafter, at the DRO's request, the Product Team furnished the aforesaid Affidavit of Janet McNab, whereupon the record in this case was closed.

III. Discussion

As a preliminary matter, we will first address a jurisdictional argument raised in the Product Team's Agency Response. More particularly, the Product Team conceives of the A&T protest as one against the cancellation of the original SIR, asserts that the meeting of September 4, 1998 was a "debriefing," and invokes the provision of the standard clause entitled "Protests-August 1996" as somehow rendering A&T's September 22, 1998 protest "untimely." The ODRA cannot accept the Product Team's argument. The protest was asserted not against the cancellation, but against the award to ComTeq:

"A&T Systems is filing this letter on the basis of the UPS contract being awarded to a source that did not submit an original proposal under the above solicitation." AR, Exhibit 15, A&T Letter of September 22, 1998, page 2.

Second, the meeting of September 4, 1998 was not a post-award "debriefing." The meeting was focused on the reasons for the cancellation of the original solicitation. The only post-award debriefing in this case was the one conducted on September 28, 1998.

That "debriefing" was held after the protest had already been filed and at the ODRA's behest.

Finally, as we noted in our interlocutory decision denying an Agency motion to dismiss for alleged lack of timeliness in *Washington Consulting Group, Inc.*, 97-ODRA-00059, a case cited by the Product Team, we will apply the timeliness rules of the AMS rather than those under the standard "Protests" clause, based on the doctrine of *contra proferentum*, if the AMS allows for a more lenient protest filing deadline. In this case, whereas the standard clause called for protests to be filed within five (5) business days of the action giving rise to the protest, absent a "post-award debriefing," AMS §3.9.3.2.1.2 requires the filing of a protest with our Office "not later than 7 business days after the date of the agency action or inaction which forms the basis of the protest (*for example, the date of contract award*)." (Emphasis in original). Here, the award was made on September 11, 1998. The A&T protest of September 22, 1998 was filed with this Office on the seventh business day following the award and was thus timely.

In deciding all substantive issues in conjunction with the adjudication of protests, the ODRA will apply the standard of review applicable under the Administrative Procedure Act, 5 U.S.C. §706. As such, Agency actions will be upheld so long as they have a rational basis, are supported by substantial evidence and are neither arbitrary, capricious, or an abuse of discretion. *Jo Ja Construction Limited*, 97-ODRA 00027, *citing Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, (1971). Moreover, even where Agency actions are found to have been improper or otherwise without a rational basis, a protest will not ordinarily be sustained, unless the actions in question have in some way prejudiced or resulted in harm to the protester. This has long been the rule enunciated by the Comptroller General, *e.g.*, Comp. Gen. Dec. B-277833, 1997 U.S. Comp. Gen. LEXIS 404 (November 25, 1997), and the ODRA finds such a rule appropriate and adopts it for purposes of adjudicating protests under the AMS.

In the present case, we find that the UPS procurement was not conducted in accordance with the AMS. More specifically, AMS§3.1.3 states as a fundamental principle that the FAA procurement system will "encourage competition as the preferred method of contracting." AMS§3.2.1.3.8 requires that "consideration . . . be given to methods of maintaining competition throughout the lifecycle of any procurement." AMS §3.2.2.2 states as fundamental policy that "the FAA shall provide reasonable access to competition for firms interested in obtaining contracts." In furtherance of that policy, AMS §3.2.1.3.12 requires that all procurements over \$100,000 be "publicly announced on the Internet or through other means." That requirement was followed for the initial UPS procurement, when SIR No. DTFA01-98-R-00045 was publicly announced via the Internet. It should have been adhered to for the second UPS procurement as well.

Although the AMS public announcement requirement allows for exceptions, including "emergency single source actions, purchases from an established QVL or FSS, exercise of options, or changes," none of those exceptions would be applicable here. Notably absent from the list of exceptions is any mention of the use of Government-wide contracts of other federal agencies, other than FSS purchases (*i.e.*, purchases under the

GSA Federal Supply Schedule). The NIH ECS2 contract at issue would not appear to qualify technically under the AMS so as to be exempt from its public announcement requirement.

By the same token, the AMS, unlike the Federal Acquisition Regulation ("FAR"), is not a regulation, but a "policy and guidance" document, one that presumably is subject to more flexible interpretation and application. The AMS itself treats interagency agreements and the acquisition of goods and services through other federal agencies as Special Categories of Contracting under AMS Part 3.8. In that connection, however, the AMS requires that the FAA comply with the acquisition laws governing other agencies when it chooses to procure goods and services through those agencies:

In those instances where the FAA acquires goods or services through the Department of Defense or other agencies, the FAA is bound by the acquisition laws governing those agencies.

AMS §3.8.1.3, page 3-44. Thus, even if, arguably, the NIH contract Purchase Order at issue were considered to have fallen into an exception from the AMS competition principle and public announcement requirement, the Agency would still have been obligated to adhere to the laws governing the NIH and its ECS2 contract. Certainly, that would have included compliance with the terms of the ECS2 contract regarding the placement of purchase orders. Here, the Product Team has conceded not only that the instant procurement was "less than pristine," but that, in issuing the Purchase Order to ComTeq, it had even failed to comply with the competition requirements of the ECS2 contract itself, specifically those set forth in the provision entitled "G.10 Fair Opportunity To Be Considered." Finding 30.

Accordingly, the issue presented by the instant protest is not whether the Product Team's actions were generally improper and in violation of the AMS. Admittedly, they were. The issue, instead, is whether A&T was in any way prejudiced by such violation or otherwise by the manner in which the UPS procurement was conducted in this case.

Although A&T contends that it was harmed by failure to adhere to the NIH's requirements, it was not a potential competitor of ComTeq's for a Purchase Order under that contract. It is not a prime contractor under the ECS2 contract, but merely a subcontractor. *See* A&T Comments at page 12. Further, even if a procurement under the NIH contract were not exempt from the AMS public announcement requirement, since A&T was eventually provided with an opportunity to compete with ComTeq for the UPS procurement, it would not be prejudiced by a lack of public announcement. Thus, the ultimate question to be addressed is whether A&T was given a fair opportunity to compete in this instance.

The award decision here was based on two factors: (1) the ComTeq proposal was slightly lower in price than that of A&T; and (2) A&T's proposal was perceived as posing a risk, in terms of not including all necessary components for the UPS system. A&T intimates that, by providing a figure of \$114,000.00, the Product Team guaranteed that A&T would

lose the competition, since the Product Team already had in hand a proposal for \$113,898.12. A&T argues further that, by providing it with the \$114,000.00 figure, the Product Team would have been committing a violation of procurement integrity, since, admittedly, the figure was "based on the ComTeq quotation." *See* A&T Comments, page 13. A&T sums up its position by stating that "the record leaves only one inescapable conclusion," namely, that "[t]he FAA did not act in good faith." A&T Comments at 13.

First of all, as to the contention regarding the alleged procurement integrity violation, the only party with any legitimate standing to complain of such a violation would have been ComTeq, that is, if its proposal had, in fact, been disclosed to A&T, which it was not. Although the funding amount (\$114,209.30) which Mr. Lane "shared" had a relationship to the ComTeq proposal, as was explained during the informal hearing, the amount of funding requested and available was actually slightly higher than the ComTeq proposal. This was so, because the dollar figures displayed on the spreadsheet Mr. Lane developed for purposes of establishing the funding amount were not taken from the ComTeq proposal, but rather from Internet information he found at the Best Power Internet site. That information included, *inter alia*, at least one item associated with the UPS system that did not appear at all on the ComTeq proposal, namely, the "CheckUPS Management Software." Finding 19.

Mr. Lane did not learn from ComTeq until just before award of the Purchase Order that such software (and its related cost of \$99.00) were intended by ComTeq to be included as part of the \$113,898.12 quotation total. It was only then that Mr. Lane modified the funding request form. Finding 31. Until then, it was quite possible that the ultimate purchase price for a Best Power UPS system from ComTeq may have equaled the funding amount, \$114,209.30. Thus, Mr. Lane ought not be accused of misleading A&T purposely and of causing A&T to submit an offer which he had to know would be too high. If anything, Mr. Lane's rounding that figure down to \$114,000.00 for A&T could conceivably have given it a price advantage over ComTeq. Moreover, A&T's proposal would have been the lower of the two proposals in any event, had it simply kept to its initial proposal of \$113,220.00. Thus, A&T has failed to support its allegation of bad faith on the part of the Product Team. Certainly, it has not produced the sort of "well-nigh irrefragable proof" that would be necessary to rebut the well-established presumption that Government officials act in good faith in the performance of their duties. *See Protests of Camber Corporation and Information Systems & Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated), Final Redacted Findings and Recommendations at 48-49.

Next, there is the second factor underlying the decision to select ComTeq, *i.e.*, Mr. Lane's concern over the possibility of omitted items from the A&T proposal. In that regard, Mr. Lane was clearly interested in obtaining from A&T a "bottom line" hardware quotation on a complete UPS system, one that would meet the Product Team's current and future needs. He was advised that the existing electrical load for the AIT Computer Operations Center was 100 kVA and that an appropriate expansion plan would be for an increase of 20%-30%. This would mean a 120-130 kVA capacity UPS unit. ComTeq had offered a 160 kVA unit. As to A&T, the UPS hardware was going to be provided by M.C. Dean,

A&T's subcontractor. After reviewing the Product Team's capacity requirements, M.C. Dean's Mr. Hoover, during the September 8, 1998 meeting, advised Mr. Lane that A&T would be able to offer a 150 kVA capacity unit. What Mr. Lane expected was a "bottom line" price on a complete 150 kVA capacity UPS system. Findings 10 and 16.

A&T insists that it provided such a quotation:

"A&T provided an all inclusive quotation to the FAA, taking no exceptions and providing assurances that should the FAA determine that there were inadvertent omissions from the written quotation, that said omissions were indeed included in the complete functional system offered to the FAA at the offered price of \$114,000." A&T Comments, page 8.

It is clear, however, that Mr. Lane did not perceive the A&T quotation as being "all inclusive." That perception, we find, was not unreasonable. During their telephone conversation of September 10, 1998 preceding the furnishing of that final quotation letter, Mr. Chan did not confirm and re-tender the original \$113,220.00 quotation and assure Mr. Lane that the bypass switch and all other hardware components were already included in that "all inclusive" quotation. Had he done so, A&T might have received the award. Instead, he confirmed that the bypass switch had, in fact, been omitted from the original quotation, indicated that he would be raising the A&T quotation by \$780.00 to \$114,000.00, and stated that the item would cost \$5,000 and that A&T would take a loss by including it within the \$114,000.00 offer. Finding 24.

Moreover, the A&T letter of September 10, 1998, in furnishing the final quotation, provided no "assurances" that a "complete functional system" was being offered for the \$114,000.00 amount and that, regardless of omissions of specific line items in the written quotation, everything was "indeed included" in the hardware being offered. To the contrary, it couched the \$114,000.00 offer in exclusive, not inclusive, terminology: ***"This cost proposal is for the following items only."*** See AR, Exhibit 13, page 1. Therefore, any assurances Mr. Chan may have made to Mr. Lane about A&T's willingness to bear losses for any further omissions (something about which Messrs. Lane and Chan appear to have conflicting recollections) would have been negated in any event by the terms of the subsequent written proposal.

Thus, the concern which Mr. Lane had about the coverage of the A&T hardware quotation was not groundless, and the Product Team's decision to proceed with a Purchase Order to ComTeq cannot be said to have been arbitrary, capricious or without a "rational basis." Under these circumstances, regardless of the obvious and admitted improprieties in the contracting methodology utilized for the instant procurement, A&T was not prejudiced by the Product Team's actions. Rather, it was treated fairly and was provided with a reasonable opportunity to compete for the instant procurement.

IV. Conclusion and Recommendation

For the reasons set forth above, the ODRA finds the protest without merit and recommends that the Administrator deny the protest.

_____/s/_____
Richard C. Walters
Dispute Resolution Officer
Office of Dispute Resolution for Acquisition

APPROVED:

_____/s/_____
Anthony N. Palladino
Associate Chief Counsel and Director
Office of Dispute Resolution for Acquisition