

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

FINDINGS AND RECOMMENDATIONS

Matter: Protest of Danka Office Imaging Company

Under Solicitation DTFA06-98-C-30051

Docket: 98-ODRA-00099

For the protester: John A. Howell, Esq, Squire, Sanders & Dempsey, Washington D.C.

For the Region: William G. Nelmes, Esq, FAA Southern Regional Office

I. Introduction

Danka Office Imaging Company, (Danka), protests the award to Xerox Corporation for the leasing and maintenance of "networked" photocopiers for the FAA's Southern Regional Office ("Region"). While the solicitation provided for a "best value" acquisition in which price was not the determinative award factor, the protester asserts that the Xerox copiers failed to meet the solicitation's requirement that 11 of the machines be "networked." Danka contends that the Region thus waived a critical requirement solely for the awardee, which created an unfair competition and which therefore did not provide the agency with the "best value." The protester claims that the Region's actions contravened basic principles of the FAA's Acquisition Management System, (AMS), and demands that award be made to Danka. For the reasons set forth below, ODRA recommends that the Administrator sustain the protest, but we recommend an alternative remedy.

All document references are to the protest file.

II. Findings of Fact

On August 22, 1998, the Region issued Screening Information Request, (SIR), DTFA06-98-R-3025 for printing services. The solicitation sought a technical solution and pricing

for seventeen leased, digital photocopy machines, along with associated maintenance for five years. Tab (1).

The functional requirements for the copy machines were spelled out in Section "C" of the SIR. Tab (1), "Scope of Work." In general, that section called for a central copier machine, capable of handling 350,000 to 1,500,000 copies per month, *networked* to floor copiers handling 25,000 to 30,000 copies per month. The specific requirements of Section "C" pertinent to this protest are found on pages 3 through 6 of the "scope of work," in which the networking requirement is described. While the SIR never precisely defines the term "Networked," it is clear from Section "C" that the machines must be capable of receiving digital printing commands from remote locations such that a particular printing job can be sent to any available printer. See Tab (1), pages 3-6.

Section "M" of the SIR contemplated a "best value" award in which six technical factors were more important than price. Those factors, in descending order of importance, were:

1. Past Performance and Experience Performing Work Similar in Complexity
2. Business Practices
3. Financial Condition
4. Customer Satisfaction
5. Ability to Meet Contract Requirements
6. Cost Realism

See Tab (1), pages 39 and 40.

Four firms, Xerox, Danka, Sharp and OCE submitted proposals by the solicitation's closing date of August 3. Tab (2), spreadsheets. Xerox proposed several alternate solutions based on various center and floor copier models. See Tab (3), pages 108 through 122. Danka proposed a solution based on the Konica model 7060. Danka's price for the first year was \$131,732.41. Tab (4).

Discussions were held with the vendors, and in late August, final offers were solicited. Danka did not alter its technical solution or price. Xerox changed its technical solution to incorporate a model 5690 and sixteen model DC255's at a price of \$170,750.00 for the first year. Tabs (3) and (4).

On September 10, award was made to Xerox Corporation in the amount of \$170,750.00. Tab (2), letter from contracting officer to Xerox. Danka was notified of the award and requested a debriefing, which occurred on September 16. This protest followed on September 23, 1998.

III. Analysis

Danka's protest alleges that the Region waived or relaxed the "networking" requirement of the solicitation because the Xerox technical solution cannot under any circumstance be "networked" until at least February 1999. The protester contends that this was a material

requirement, and that waiving it solely for Xerox was prejudicial to Danka and the other offerors. Danka further claims that the waiver rendered the award decision irrational because, had it known the "networking" requirement would not be enforced, it would have proposed a different technical solution even less expensive than its existing offer. See Tab (5).

In making a recommendation concerning all substantive protest issues, the FAA's Office of Dispute Resolution for Acquisition will apply the standard of review applicable 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, capricious, nor an abuse of discretion, and are supported by substantial evidence. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, (1971).

A. THE RATIONALITY OF WAIVING OR RELAXING MATERIAL SPECIFICATIONS FOR ONE VENDOR.

The sole issue for resolution is whether the Xerox copiers upon which award was made did in fact meet the "Networking" requirement in the specifications. We agree with the protester that a waiver or relaxation of such a technical specification in favor of one offeror creates a double standard that is so inherently at odds with general principles of procurement fairness and efficiency as to fail the "rational basis" analysis.

It has always been fundamental that an agency may not solicit offers on one basis, then make award on a materially different basis. *Armour of America*, Comp. Gen. Dec. B-237690, 90-1 CPD 304, (March 19, 1990), *Brennan Assocs.*, Comp. Gen. Dec. B-231859, 88-2 CPD 295, (Sept. 28, 1988). The FAA's Acquisition Management System, (June 1997), incorporates this general principle of prior law at Section 3.2.2.3.1.2.3:

The evaluation criteria form the basis on which each offeror's submissions are to be evaluated. Once these criteria have been established and disclosed to the offerors, criteria should not be modified without first notifying offerors competing at that stage of the process and allowing such offerors to revise their submissions accordingly.

While the cases under prior law focused on the unfairness to other vendors caused by relaxing or waiving material requirements, (*Discount Machinery and Equipment*, Comp. Gen. Dec. B-220949, 86-1 CPD 193, (Feb 25, 1986)), there is an additional rationale under the AMS which is equally compelling. The agency will never know whether it truly obtained the "best value," because the offerors were not competing on an equal basis. As Danka asserts, some or all of the other offerors would have proposed different technical solutions at significant savings had they known that the "networking" requirement would be waived. Conducting a competitive acquisition that sets an expensive technical standard for everyone and then waives it for one vendor is irrational.

B. WHETHER THE AWARDEE'S TECHNICAL SOLUTION MET THE SIR'S "NETWORKING" REQUIREMENT.

The requirement at issue stems from page 6 of the SIR's Statement of Work, Tab (1), which reads, in pertinent part:

Line Item 002—16 (Sixteen) Digital Copiers

The **floor equipment** should be made of digital copier-printers, 11 of the machines must be networked and 5 machines must have the ability to be networked in the future....

(Emphasis in original)

While the solicitation does not further define the term "networked," it is clear from the protest file that the term relates to the copiers' ability to receive digital signals, such that a particular copy order can be sent to any of the "networked" machines for actual printing. Thus, although this was a "best value" procurement, Line Item 002 above sets forth a definitive, minimum requirement for technical acceptability for all vendors. Eleven of the sixteen machines had to be "networked" already. Only five were to be "networked in the future."

ODRA believes that the "networking" requirement was material. Danka has asserted that, absent the "networking" requirement, it could have submitted a much lower priced offer based on a different technical solution. This is supported by various pre and post-protest documents submitted by both Xerox and Danka, as well as by several spreadsheets drafted by the Region in comparing the offered prices. *See* various documents contained at Tab (2). Since the "networking" requirement likely had both a pricing and technical impact, ODRA believes it was material for purposes of this procurement.

As explained above, the total system leased under this acquisition consisted of a large, central copying machine, "networked" to eleven, (and eventually to all 16), remote copiers. Xerox's revised offer, which formed the basis of award, proposed their model 5690 Center copier for line item 001, along with sixteen model DC 255 copiers for line item 002. The protester concedes that the model 5690 is "networkable," but claims that the model DC 255's are not. The agency initially argued that the Xerox DC 255's in fact met the networking requirement. Danka then disputed this through the statements of several of its technical personnel. ODRA was prepared to submit the issue to an independent technical authority; however, a document was produced as part of the agency report that, in our view, renders such a referral unnecessary.

Tab (6) is a letter of October 27, 1998 from the Xerox Marketing Operations Manager to the contracting officer, drafted in support of the award decision. The following excerpts are pertinent to this issue:

- 1) The DC255 is a member of the Document Centre family of products. The DC 255 is modular and upgradable to a Digital copier/printer. As a networked printer, the DC 255 can support a variety of operating systems...

3) The DC 255 can be upgraded and attached to the network by ordering the connectivity upgrade kit. The upgrade kit is installed by the Xerox Customer Service Engineer. Xerox provides support to install the Document Centre onto the network through our Document System Analysts on a fee basis...

From these statements, ODRA concludes that while the DC 255s proposed by the awardee *can* be configured in such a way as to be "networked," the actual technical solution upon which award was based was not "networked" within the meaning of Line Item 002 of the SIR. By the awardee's own explanation, the Region must purchase the "connectivity upgrade kit," which then requires installation by either a Xerox Systems Analyst, (on a fee basis), or by someone else with technical competence. Under these facts, ODRA believes that the award did not meet SIR requirement of "Networked," and thus a material aspect of the solicitation was waived or relaxed. For the reasons expressed above, we believe that this was an irrational basis for award.

IV. Remedy

AMS Section 3.9.3.2.2.4 conveys to the ODRA "broad discretion" to recommend remedies for both protests and contract disputes:

The Dispute Resolution Officer...has broad discretion to recommend a remedy for a successful protest...that is consistent with the FAA's Acquisition Management System and applicable statutes. The Administrator has final authority to impose a remedy.

The protester has argued that the Xerox contract should be terminated and award made to Danka. We decline to recommend such a "directed award" in this case because there is no certainty or even indication in the record that, absent the waived requirement, Danka would have been the successful offeror. By the protester's own argument, if the "networking" requirement had been waived for all vendors, the entire field of competition might have been different. Additionally, this was a "best value" acquisition in which the agency could select a superior technical proposal at a higher price. Price, in fact, was designated as the least important of six factors. In light of these facts, ODRA will not substitute its judgment for that of the contracting office.

Danka has cited two cases, *Contel Federal Systems*, GSBCA No. 9743-P, 89-1 BCA 21,458, and *Integrated Systems Group, Inc.*, GSBCA 10985-P, 95-2 BCA 27,741, in support of its contention that a directed award is appropriate, even in a "best value" acquisition such as this. While the FAA is not bound by these decisions under prior law, the ODRA will consider this precedent as "persuasive authority" in deciding ODRA cases. Protests of Camber Corporation and Information Systems and Networks Corporation, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated), Final Redacted Findings and Recommendation at 62. Our review of these decisions, however, reinforces the inappropriateness of a directed award in this case.

In *Contel*, the General Services Board determined that one offeror was ineligible for award, leaving only the protester and another company. The other company had already been evaluated as technically inferior and more costly than Contel, which, under that solicitation's evaluation scheme, meant that it had no reasonable chance for award. After reemphasizing its general rule that it would not substitute its judgment for that of the contracting officer, the Board concluded that the selection decision under these unusual facts was clear, and directed award to Contel.

Integrated Systems Group likewise involved facts where, after sustaining a protest, the Board was faced with a situation where the award decision under Section "M" was indisputable. After Best and Final Offers, one company presented a vastly superior technical proposal at a slightly higher price, and the solicitation accorded greater weight to technical factors. The Board first restated the general rule *against* directed awards, then concluded that since there was only one possible outcome under the solicitation's evaluation scheme, it was warranted under those exceptional facts.

ODRA believes that both cases argue against a directed award in this protest. The critical distinction is that, here, the record is far from clear as to which offeror would have been the "best value" under Section "M" if the "networking" requirement had been enforced. We recommend that the Region reassess its requirements to determine exactly what it needs in terms of "networking." If it is satisfied with the existing equipment, even without the "networking," Danko should be reimbursed its bid and proposal costs for having been induced to compete. If the Region determines that it does need the "networking" capability, it should terminate the existing contract for convenience, define the requirement more precisely, and recompetes on that basis.

_____/s/
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APPROVED:

_____/s/
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Associate Chief Counsel and Director
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