

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

Protest of	)	
	)	
Aerospace Safety and Security, Inc.	)	ODRA Docket 10-ODRA-00527
	)	
<u>Relating to an Unsolicited Proposal</u>	)	

**DECISION RECOMMENDING**  
**DISMISSAL FOR LACK OF JURISDICTION**

On April 14, 2010, Aerospace Safety and Security, Inc. (“ASAS”) filed a Protest with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”). The Protest challenges the FAA’s refusal to accept an unsolicited proposal from ASAS for a cooperative research and development agreement (“CRDA”) involving runway safety. After giving ASAS the opportunity to explain the basis for the ODRA’s jurisdiction in this matter, the ODRA recommends that the Protest be dismissed for lack of jurisdiction, pursuant to the ODRA Procedural Regulation at 14 C.F.R. §§ 17.11(d) and 17.15(a)(3).

**I. Standard of Review and Factual Background**

The ODRA may, on its own initiative, consider dismissing a protest for lack of jurisdiction. 14 C.F.R. § 17.19(c)(2). When deciding whether to dismiss a protest for lack of jurisdiction, the ODRA will consider any material facts in dispute in a light most favorable to the protester. 14 C.F.R. § 17.19(b). Prior to dismissing a protest for lack of jurisdiction, the ODRA is required to afford the protester an opportunity to respond to the proposed dismissal. 14 C.F.R. § 17.19(e).

According to ASAS, in December 2008, it forwarded to the FAA’s Director of FAA Runway Safety “an Unsolicited Proposal [ ] for the approval and acquisition of the Safe Runway System through the FAA approved applicable CRDA [cooperative research and

development agreement] process.” *Protest* at 1. ASAS described its unsolicited proposal as “a pro bono, no charge, an absolutely free plan, to eliminate runway incursions at major airports.” *Id.*

After receiving the Protest, the ODRA sent a letter to ASAS. The ODRA noted that there was no mention in the Protest that cognizant Agency officials had made a decision regarding the unsolicited proposal. *ODRA Letter dated April 16, 2010* at 1. The ODRA further explained that its jurisdiction is limited to pre-award and post-award bid protests under 49 U.S.C. § 40110(d)(4), and that it did not have authority to review protests arising out of cooperative agreements such as CRDAs. *Id.* The ODRA therefore directed ASAS to either voluntarily withdraw its Protest or show cause why the matter should not be dismissed. *Id.* at 2.

The ASAS filed its timely response on April 19, 2010 (“Response”).<sup>1</sup> It addressed the ODRA’s observation regarding the necessary action by cognizant officials by including a letter dated December 22, 2009 from the FAA’s Director for Acquisition and Contracting. That letter rejected the unsolicited proposal from ASAS. *Response Attached Letter dated December 22, 2009.* ASAS also included another letter from the Director for Acquisition and Contracting, dated January 19, 2010, which reiterated the rejection of the unsolicited proposal. *Response, Attached Letter Dated January 19, 2010.*

Finally, the Response from ASAS continues to refer to the proposed transaction as a CRDA, and does not suggest that the unsolicited proposal could relate to an acquisition contract. *Response passim.* ASAS advised that it “refuse[s] to voluntarily withdraw the issues regarding the CRDA submitted to your office.” *Response, ASAS E-mail of 04/18/2010 01:34 PM.*

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<sup>1</sup> ASAS responded by sending two email messages and faxing one letter to the Director of the ODRA. The first email indicates that it was sent on “04/18/2010 01:34 PM.” It included an email exchange between ASAS and the Office of the Chief Counsel for the FAA. ASAS also sent to the Director of the ODRA another email at “04/18/2010 02:15 PM.” This second email contained as an attachment a letter dated December 22, 2010 from the FAA’s Director for Acquisition and Contracting. A second attachment contained a biographical statement for the Director of the Office of Airport Safety and Standards. The faxed letter has several attachments of correspondence between ASAS and various FAA officials. The ODRA collectively refers to the two emails and the letter from ASAS as the “Response.”

## II. Discussion

The ODRA Procedural Rules, 14 C.F.R. Part 17, only permit offerors or prospective offerors “whose direct economic interest has been or would be affected by award or failure to award *an FAA contract*” to file a protest. 14 C.F.R. §17.3(k) (emphasis added); *see also*, 14 C.F.R. §§ 17.13(c) and 17.15(a); *Protest of Edward B. Block Consulting*, 02-ODRA-00225. Contracts do not include CRDAs, and the Regulation expressly states in part:

### **17.11 Matters not subject to protest.**

The following matters may not be protested before the Office of Dispute Resolution for Acquisition:

...

(d) Cooperative agreement;

14 C.F.R. § 17.11. The facts as alleged by ASAS in both its Protest and its Response, even when viewed in a light most favorable to ASAS, demonstrate that ASAS seeks review of an unsolicited proposal for a CRDA, which is beyond the jurisdiction of the ODRA.

The ODRA also finds that even if the present Protest addressed a matter pertaining to award of a contract rather than a CRDA, ASAS failed to file a timely protest. As the documents that ASAS submitted demonstrate, the Director for Acquisition and Contracting rejected the unsolicited proposal from ASAS on December 22, 2009, and again on January 19, 2010. ASAS filed its Protest on April 14, 2010, which is sixty business days after the second rejection from the Director for Acquisition and Contracting. The ODRA Procedural Regulation, however, requires that a protest be filed not later than seven business days after the date the interested party knew or should have known of the grounds for the protest, and the Protest from ASAS therefore would be untimely regardless of the fact that it concerns a CRDA. 14 C.F.R. § 17.15(a)(3).

### **III. Conclusion**

Recognizing that the ODRA lacks subject matter jurisdiction over protests involving CRDAs, and further recognizing that ASAS filed its protest well after the seven day period deadline to file a protest, the Protest from ASAS should be dismissed for lack of jurisdiction.

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### **APPROVED:**

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April 20, 2010