

D I C K S T E I N S H A P I R O M O R I N & O S H I N S K Y L L P

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July 19, 2004

VIA TELECOPY AND MESSENGER

Office of Dispute Resolution for Acquisition, AGC-70
Federal Aviation Administration
800 Independence Avenue, SW
Room 323
Washington, DC 20591

Re: Contest Of Walter W. Pike, As Agent For A Majority Of Directly Affected FAA
 Employees, Under Screening Information Request No. DFTFAAWAACA-76001

Dear Sir/Madam:

Pursuant to the Procedural Rules for Contests for A-76 Competitions ("CR") of the Office of Dispute Resolution for Acquisition ("ODRA"), Walter W. Pike, as agent for a majority of directly affected Federal Aviation Administration ("FAA") employees, hereby contests improprieties in Screening Information Request No. DFTFAAWAACA-76001 ("SIR"), issued by the FAA for a public-private competition pursuant to Office of Management and Budget ("OMB") Circular A-76 to provide Automated Flight Service Station ("AFSS") services for the National Airspace System ("NAS"), excluding Alaska.

As grounds for this Contest, Mr. Pike asserts that: (1) the SIR contains numerous errors, omissions, and deficiencies of material terms, and is vague, ambiguous, and unclear, all of which are prejudicial to the public sector; and (2) the SIR is unduly restrictive of competition in that it improperly favors potential private commercial Service Providers ("SP") over the public sector, and does not provide for a fair, even-handed competition that will result in the selection of the most efficient and effective manner to accomplish the requirements of the SIR.

I. PARTIES

The Contester is Walter W. Pike, 11303 Amherst Avenue, Suite 4, Wheaton, MD 20902. Mr. Pike's telephone number is (301) 933-6228 and his facsimile number is (301) 933-3902. Mr. Pike is the President of the National Association of Air Traffic Specialists ("NAATS") and the single individual appointed by a majority of directly affected employees as their agent for this competition. FAA employees are the incumbent providers of the services that are the subject of the SIR.

NAATS is a labor union with national recognition as the exclusive bargaining agent for all FAA Air Traffic Control Specialists (GS-2152 series) employed in the Flight Service option. Membership in NAATS is open to all FAA employees choosing the Flight Service Option and it represents and bargains on behalf of all Flight Service Controllers. A Flight Service Station is an FAA-operated facility providing pre-flight weather and flight planning information, in-flight updates, and aeronautical facility data to pilots operating commercial, military, and general aviation aircraft.

The objectives of NAATS are to (a) promote and enhance the dignity and stature of Flight Service Controllers; (b) improve their hours, wages, and working conditions; (c) petition Congress, the FAA, and other federal agencies for the enactment and enforcement of laws and regulations that enhance the welfare of its members; and (d) to cooperate with all persons and organizations involved in the promotion and advancement of aviation safety and services. NAATS is governed by a nine-member Board of Directors that is chaired by a nationally elected President (currently Mr. Pike). At each AFSS, NAATS members elect a Facility Representative that serves as NAATS' liaison between that facility's management and the Regional Directors.

The Contracting Officer for this competition is Donald E. King, Office of Competitive Sourcing (FAA), ASU-350, 800 Independence Avenue, S.W., Washington, DC 20591. His telephone number is (202) 385-7776. A copy of this Contest has been sent to the Contracting Officer today. (A Certificate of Service is attached.)

II. TIMELINESS AND OTHER PROCEDURAL MATTERS

ODRA has jurisdiction to conduct dispute resolution proceedings concerning contests under A-76 competitions. Odra Rule CR 3. This Contest is based on alleged improprieties in the SIR that are apparent prior to the time set for receipt of initial proposals or tenders. As initial proposals under this competition are currently due by August 3, 2004, this Contest is timely filed. Odra Rule CR 8(a)(1).

Mr. Pike requests that a protective order be issued in this Contest. Odra Rule CR 8(c)(6). Mr. Pike further requests that the FAA produce all relevant documents in response to this Contest in accordance with Odra Rule CR 9 (d).

Finally, Mr. Pike requests that the competition and receipt and evaluation of proposals under the SIR be suspended pending a ruling by Odra on the merits of this Contest. Odra Rule CR 9. There is a substantial likelihood that Mr. Pike will prevail on his allegations that the SIR is materially defective and written to favor private industry over the public sector. Thus, in the absence of a suspension, a majority of the directly affected FAA employees will be prejudiced because the public sector will be deprived of a full and fair opportunity to compete with private industry on a level playing field as required by the Acquisition Management System ("AMS") and OMB Circular A-76. Odra Rule CR 9(a)(2).

III. STANDING

Mr. Pike has standing to bring this Contest. Mr. Pike is the single individual appointed by a majority of directly affected FAA employees as their agent. As such, Mr. Pike is a directly interested party within the meaning of ODRA Rule CR 2(g). Pursuant to ODRA Rule CR 8(c)(4), there are two independent bases for Mr. Pike's status as a directly interested party: (1) appointment by the NAATS Board of Directors of Mr. Pike as agent of the Collective Bargaining Unit ("CBU") for the competition and all related matters and proceedings; and (2) election of Mr. Pike as agent for the A-76 proceedings by the members of the CBU.

There is a total of 2,437 FAA employees that are directly affected by this competition. *See* Exhibit 1, attached hereto. NAATS is the exclusive representative of the CBU of the FAA employees in the Flight Service option (all of whom are Flight Service Station controllers). The CBU does not include the 503 FAA employees that are staff and management personnel. *See* Ex. 1. Thus, the CBU comprises 80% of the total number of directly affected employees. Pursuant to the NAATS Constitution, on May 20, 2004, the Board of Directors appointed Mr. Pike as the agent of the CBU of the FAA employees in the Flight Service option for the competition and any related matters or proceedings.¹ (Copies of the NAATS Constitution and the Appointment of NAATS President Walter Pike As Agent for A-76 Affected FAA Employees are attached hereto as Exhibits 2 and 3, respectively.) Accordingly, as Mr. Pike has been appointed as the agent of a majority of the directly affected employees, he has standing to bring this action.²

As a separate and independent basis for standing, Mr. Pike was elected by the CBU as its agent for the competition and related proceedings. By letter dated May 25, 2004, each Facility Representative was instructed to provide an Urgent Notice To All Flight Service Employees to all members of the CBU ("Notice"). The Notice advised all members of the CBU of the competition and provided an opportunity for any employee to object to the appointment of Mr. Pike as agent for the competition proceedings by June 30, 2004. As of the date of this Contest, NAATS has received 32 objections to the appointment of Mr. Pike and, thus, a majority of the directly affected

¹ Article 3 of the NAATS Constitution authorizes NAATS, among other responsibilities, to engage in activities that will "promote [and] enhance . . . the stature of specialists in the FAA Flight Service option, in all phases and applications," and "to petition governmental agencies and tribunals for the . . . enforcement of laws and regulations that protect and enhance the welfare" of the employees. The Constitution, Article 6, Section 2, authorizes the Board of Directors, "to delegate its authority as necessary" and authorizes the President to "[p]erform such other duties as may be prescribed by the Board."

² NAATS does not represent management and staff and, thus, there was no viable means to include them in this process. In any event, even if all 503 management/staff personnel objected to the appointment of Mr. Pike, he still would have the consent of a majority of the total number of directly affected FAA employees.

employees has consented to Mr. Pike serving as their agent for the competition and related proceedings. Attached hereto as Exhibit 4 is the Declaration of Denise DeStefano, NAATS Administrator, that attests to the election process and results. Accordingly, Mr. Pike has standing to bring this Contest. ODR Rules CR 2(g), CR 8 (c)(4).

IV. BACKGROUND

On May 3, 2004, the FAA issued the SIR for a public-private competition to provide AFSS services for the NAS. The SP selected under the SIR will be required to furnish all things necessary for, or incident to, the performance and provision of services in accordance Section C, the Performance Work Statement ("PWS"). SIR § B.1. The PWS purports to be a performance-based document that describes the performance requirements and expectations to be achieved as a result of this competition. The PWS further purports to identify the administrative and technical responsibilities, performance requirements, and workload that will form the basis for the contract. SIR § 1.1.

The PWS states that the purposes of the competition are to: deliver timely and accurate information to support safe and efficient flights; ensure quality services are delivered while carrying out the mission of the AFSS; ensure customer needs are met; and achieve significant improvements to lower costs and maximize operational efficiency of the AFSS. SIR § I.2. The mission of the AFSS is to provide customer-oriented, value-added services through the collection, processing, and delivery of aeronautical and meteorological information to promote safe and expeditious flight. SIR § 2.3.1. The AFSS provide a range of flight services to a diverse group of customers and internal users including airline transport, commercial, private, student, and recreational pilots; military, air taxi, and on-demand charter operators; domestic and international aviation interests; FAA organizations; federal, state, and local governments; and public safety and law enforcement agencies. SIR § 2.3.2. There are currently sixty-one AFSS facilities, fifty-eight of which are included in this competition. SIR § 2.3.

The SIR contemplates a phase-in period of approximately six to nine months (anticipated to be April 1, 2005 to September 30, 2005), a base period of sixty (60) months (anticipated to be October 1, 2005 to September 30, 2010), plus a three-year and a two-year incentive term option periods (anticipated to be October 1, 2010 to September 30, 2015). SIR § F.2.

The SIR states that the award will be made on the basis of the best value tradeoff provision in OMB Circular A-76 and will be the combination of the impact of overall benefits, risk, and cost for the delivery of effective flight services to support safe and efficient flight. SIR § M.2. There are four Technical Factors (Phase-In, Staffing and Management, Service Delivery, and Performance Management) which are of equal importance and, in aggregate, more important than cost. A single award is contemplated under the SIR. SIR § L.13.

Potential SPs were invited to submit questions regarding the SIR. Mr. Pike requested and was afforded the opportunity to submit questions by letter from the Contracting Officer on May 25, 2004. By letter dated May 28, 2004, Mr. Pike submitted questions on the terms of the SIR, several of which relate to the Contest issues raised herein. *See* Exhibit 5, attached hereto. On June 10, 2004, the FAA issued Amendment 001 to the SIR. Neither Mr. Pike's questions nor those of any of the potential SPs were answered in this Amendment. Rather, only change pages with change bars were provided, none of which addressed Mr. Pike's questions as they relate to this Contest. Several of Mr. Pike's questions called for a narrative response to clarify or explain vague or ambiguous provisions of the SIR and to ensure that the competition was not slanted toward private industry. Amendments 002 and 003 to the SIR were issued on July 1 and July 15, 2004, respectively, both of which again failed to address the concerns raised by Mr. Pike.

V. GROUND FOR PROTEST – THE SIR IS DEFECTIVE AND IMPROPERLY FAVORS PRIVATE INDUSTRY OVER THE PUBLIC SECTOR

A. Legal Standard

Mr. Pike asserts that the SIR contains numerous errors, omissions, and deficiencies of material terms, and is vague, ambiguous, and unclear. Moreover, the SIR is unduly restrictive of competition in that it improperly favors potential commercial SPs over the public sector, and does not provide for a fair, even-handed competition as required by the AMS, OMB Circular A-76, and applicable case law.

The AMS establishes the FAA's procurement policies for all agency procurements. Among them, the FAA procurement system will "enable the selection of the contractor with the best value to satisfy the FAA's mission; promote discretion, sound business judgment, and flexibility at the lowest levels while maintaining fairness and integrity; encourage competition as the preferred method of contracting; promote high standards of conduct and professional ethics; [and] ensure public trust." AMS 3.1.3.

These principles of a fair, equitable, and trustworthy procurement system are also reflected in the Revised A-76 Circular which explicitly prohibits favoritism in the procurement process, particularly in the solicitation requirements for public-private competition. OMB Circ. A-76 §§ D(3)(a)(7), D(3)(a)(5). To institute these policies, an SIR must be (1) clear and unambiguous, and (2) not favor either public or private SPs. Specifically, the revised A-76 Circular provides that "all evaluation factors shall be clearly identified in the solicitation." OMB Circ. A-76 (Revised 2003) Attachment B § D(3)(a)(3)(a) ("[a]n agency shall not issue a solicitation that places any prospective provider at an unfair competitive advantage"). Further, "no solicitation shall include evaluation factors that could provide an unfair advantage for or inherently benefit a prospective provider, public or private." *Id.* In fact, an agency is expressly prohibited from issuing any solicitation unfairly favoring any offeror. *Id.* § D(3)(a).

ODRA will sustain a protest where a procurement is based on solicitation terms that contained ambiguities that prejudiced an offeror or did not allow an offeror to

compete on an equal basis. *Protest of Danka Office Imaging Co.*, 98-ODRA-00099; *Protest of B & M Lawn Maintenance, Inc.*, 03-ODRA-00271. The U.S. General Accounting Office ("GAO") has reinforced the mandate for fair and equal treatment of offerors in OMB Circular A-76 cases, and required that solicitations be clear, unambiguous, and devoid of favoritism for either public or private offerors. *Dynallectron Corp.*, B-220518, Feb. 11, 1986, 86-1 CPD ¶ 151, at 9 (solicitations must "inform all offerors in clear and unambiguous terms what is required of them so that they can compete on an equal basis"); *Newport News Shipbuilding & Dry Dock Co.*, B-221888, July 2, 1986, 86-2 CPD 23, at 8 (solicitations must be drafted in clear and unambiguous terms); *Klein-Seib Advertising & Public Relations, Inc.*, B-200399, Sept. 28, 1981, 81-2 CPD ¶ 251, at 4 (specifications should be free from ambiguity and should describe the agency's minimum needs accurately). GAO has required that A-76 solicitations be corrected when they contained ambiguities and deficiencies that prevented the public sector from competing on an equal basis with the private sector. See *EDP Enterprises, Inc.*, B-284533.6, May 19, 2003 CPD ¶ 93.

B. Deficiencies In The SIR

1. Technical Requirements of the PWS

The technical requirements of the PWS are vague and ambiguous and fail to properly set forth performance standards for the AFSS controller work, including standards that are required by federal law and apply to the public sector. Thus, the cost comparison contemplated by the SIR will be meaningless because the FAA will not know the performance it will receive for the proposed costs of the commercial SPs, and those proposed costs will be misleading. See *SAFECOR Security & Fire Equipment Corp.*, B-217216, May 10, 1985, 85-1 CPD ¶ 527, at 4 (a solicitation must provide a clear description of the "technical requirements for the product or service that includes the criteria for determining whether these requirements are met"). In this regard, the SIR is improperly slanted towards commercial SPs because it imposes certain performance standards on the public sector that are not equally applied to commercial SPs. The following are examples of the technical deficiencies in the PWS:

Section 1.1, "Purpose." This Section should state that the competition also will be conducted in accordance with all FAA directives. While methods of meeting the requirements can be left up to the SP, the actual requirements must be specified to ensure a level playing field. AFSS employees currently are required to follow the guidelines in FAA directives. The lack of any reference requiring this of the SPs puts the public sector at a substantial competitive disadvantage.

Section 1.2, "Goals of Competition." The FAA Air Traffic Control ("ATC") mission is to provide for the safe and expeditious flow of air traffic. The PWS does not include a requirement to adhere to safety standards and FAA directives while trying to lower costs. This actually could drive up the costs due to increased accidents, deaths, and legal costs. Customer service and lower costs are very important performance goals, but the paramount concern must be to ensure aviation safety.

Section 1.4, "Workload Information." The workload data being provided to the vendors is approximated and forecasted. Definitive data is necessary and

attainable. The historical data does not include all of the tasks currently performed in an AFSS. To date, the FAA does not have a program to count all the traffic at Flight Service Stations. The best that an SP can do is estimate what it will need for a workforce and later bill the FAA when it needs to hire more staff, resulting in unnecessary contract cost escalations. In the interim, inadequate staffing likely will compromise the FAA's critical safety mission. Under such circumstances, the FAA will not be able to determine whether an SP's proposal will, in fact, result in the lowest overall cost to the Government or the best value.

Section 2.1, "Purpose of A-76." FAA Order 7110.10 must be referenced as the standard for any SP. The stated purpose of OMB Circular A-76 is to solicit the most efficient and effective manner to accomplish the requirements. All of these requirements should be driven by FAA directives such as FAA Order 7110.10, which has evolved over many years to represent how requirements are to be accomplished. The FAA has informed the SPs what documents they must use for the purpose of this competition, i.e., PMA, FAIR Act, and OMB Circular A-76, but has not defined the documents that are necessary to accomplish the FAA's specific AFSS requirements.

Section 3.2.1, "Preflight Services." This section should state that SPs must provide services in accordance with FAA Order 7110.10, "Flight Services," until such time as they submit the document change proposals to the FAA for review and approval. It should also include language that personal interaction to help pilots make informed decisions is a mandatory performance goal. Service is not just about providing general meteorological information to pilots, but also to help them understand it so they can make educated decisions from the information they receive for their safety and the safety of their passengers. Absent further requirements, the SPs are free to provide preflight services in any manner they choose. The requirement should be stated that FAA Order 7110.10 is the standard to be used and that certified air traffic controllers must be used for product delivery.

Section 3.2.2, "Inflight Services." This section should require compliance with FAA Order 7110.10 as the standard for certified air traffic controllers for product delivery. This is even more critical in the in-flight environment since these pilots are airborne and do not have the luxury of time to decipher information that may be provided to them using automation.

Section 3.2.2.5, "Emergency Services." This section also should require adherence to FAA Order 7110.10. Search and rescue services and emergency services need to be addressed to reflect the requirements in FAA Order 7110.10. For emergency services to be provided in a timely and proper manner they must comply with FAA Orders 7110.10 and 7110.65. FAA Order 7110.10 states:

Because of the infinite variety of possible emergency situations, specific procedures cannot be prescribed. However, when you believe an emergency exists or is imminent, select and pursue a course of action which appears to be most appropriate under the circumstances, and which most nearly conforms to the instructions in this manual.

Section 2.2, "AFSS Service History." Contrary to this section, the AFSSs do not provide meteorological and aeronautical information; this is provided by the AFSS air traffic controllers. The SIR should be revised to specify that AFSS controllers provide meteorological and aeronautical information at AFSS facilities and are certified as air traffic controllers. Failure to clarify this could imply that the complex duties of the air traffic controllers can be performed by administrative personnel.

Section 3.1.2, "Provision of Flight Services." This section needs to address the specific services to be provided by certified air traffic controllers. Failure to do so will allow SPs to automate everything and, thus, compromise safety. The human interaction between pilots and AFSS controllers is critical. Depending on their experience level, pilots need varying assistance in understanding the complex data contained in a weather briefing. Failure to specify the required duties of the air traffic controllers and how they will meet those requirements could lead to accidents and possible deaths due to inexperienced pilots struggling to understand and interpret the data without professional assistance.

Section 3.2.2.8, "Airport Advisory Services." The SIR states that SPs will provide Airport Advisory Services to only those airports listed in Technical Exhibit No. G-5. If this information is required to be provided to pilots at any other airport, it likely will result in additional cost to the FAA above the original proposed cost. As written, this section reflects either a reduction in service to the aviation public or an oversight. This section should state "The SP shall provide airport advisory services upon request."

Section 3.2.3.1, "NOTAM Services." This section should include language that the Notices to Airmen ("NOTAMS") in this section shall be formatted and disseminated in accordance with FAA Order 7930.2, Notices to Airmen. While NOTAMS were the one area determined by the feasibility study to be inherently governmental, they are relegated to a few vague lines in the PWS. If this is not corrected to reference FAA Order 7930.2, there will be no consistency throughout the country and between other air traffic facilities. FAA Order 7110.10 also should be referenced.

Section 3.2.3.4.2, "Presidential and VIP Movements." This section refers to providing assistance to the U.S. Secret Service, but omits the military and any other government agency that may need assistance with Presidential/VIP movements. This lack of specificity will create problems regarding Temporary Flight Restrictions ("TFR"), Air Defense Identification Zones ("ADIZ"), and other activities. AFSS controllers currently provide TFR and ADIZ information to representatives from other agencies (e.g., Drug Enforcement Agency, Customs, etc.). The SIR has now eliminated this as it concerns Presidential and VIP movements. The military frequently provides escort for Presidential and VIP flights. Law enforcement agencies, other than the Secret Service, have legitimate concerns regarding these flights. With no requirement to provide assistance, a vendor can simply ignore these requests with no other recourse for interagency coordination. The consequences of failing to consider this could be disastrous to national security.

Section 4.1, "Program Management." This section needs to be amended to take into account the current transition underway at FAA to an Air Traffic Organization. An Air Traffic Organization involves a massive organizational change that will take years to fully realize and implement. The failure to reflect this in the PWS will disadvantage the public sector which will be required to address organizational issues beyond its control. The public sector proposal will not only have to factor the current air traffic structure into its proposal, but it will also have to guess what the new organizational structure will be. No other vendor has this requirement.

Section 4.1.5, "Workload and Performance Data." This section should require that the SPs use FAA Order 7210.3, "Facility Operations and Administration," for collecting workload and performance data until such time they can develop their own system, obtain FAA approval, and implement the system. Without a standardized tracking system, the FAA will not be able to monitor performance effectively.

Section 4.2.2.1, "Citizenship Requirements." This section improperly allows non-U.S. operational personnel to perform the AFSS services and is inconsistent with congressional intent by potentially allowing SPs to send critical jobs overseas. Moreover, this section allows SPs to hire non-U.S. citizens if they are unable to find a sufficient number of "well-qualified" applicants or in an "emergency." However, there is no definition of "well-qualified" or "emergency" in the PWS. The SPs should be required to use U.S. citizens for safety and security-related positions such as those involved with Program Management.

Section 4.3, "Quality Management Program." This section should specify that FAA Orders 7010.1, "Air Traffic Evaluations," and 7210.56, "Air Traffic Quality Assurance," which are currently mandatory requirements, also are mandatory for SPs under the PWS. There is no direction to SPs in the PWS on how to implement a Quality Management/Assurance Program. The failure to specify these Orders jeopardizes quality and disadvantages the public sector which is required to comply with them.

2. Labor Matters

Retirement Age. FAA AFSS controllers are subject to a mandatory retirement age of 56. 5 U.S.C § 8335. The retirement age is based primarily on safety concerns. S. Rep. No. 92-744 (1972), *reprinted in* 1972 U.S.C.A.N. 2287, 2288. However, the SIR does not specify a required retirement age for AFSS controllers that may be employed by the commercial SPs. The absence of a mandatory retirement age would jeopardize public safety. It also improperly treats the public and private sectors differently and puts the public sector (which must comply with the mandatory retirement age) at a competitive disadvantage.

Service Contract Act ("SCA") Requirements. The FAA apparently has not submitted a notice of intention to issue a service contract to the Department of Labor ("DOL") as required by 29 C.F.R. § 4.4. The Service Contract Act of 1965, 41 U.S.C. §§ 351-358, applies to the SIR, which includes several SCA clauses. *See, e.g.,* SIR §§ H.7 ("Labor Position Descriptions – Service Contract Act") and I.3 ("Service Contract Act –

Place of Performance Unknown"). However, there is no Wage Determination attached to the SIR and no evidence that the FAA has requested one in time to be issued and included in the SIR as required by the SCA. A Wage Determination can be included in an SIR or RFP only if DOL has issued one for a particular solicitation. 41 U.S.C. 5351(a); 29 C.F.R. §§ 4.50, 4.56. The agency cannot simply assume that a particular standard Wage Determination (or a particular labor class) will apply and include one that it selects. The issuance of Wage Determinations for procurements is solely and exclusively within the jurisdiction of DOL. *Id.*

Collective Bargaining Agreement. Under the SCA (and applicable labor law), if a contractor is a successor contractor, the successor contractor must pay the same wages and benefits for at least the first year of the contract as are required by the Collective Bargaining Agreement ("CBA") if (a) the work it will be performing will be at the same facility as the prior contractor, (b) the services will be substantially the same as those performed by the prior contractor, and (c) the prior contractor's employees were covered by a CBU. 29 C.F.R. §§ 4.1b, 4.6(d).

If a commercial SP that succeeds the FAA employees is permitted to bid wages lower than those of the current CBA applicable to the federal employees and then hire the former federal employees, it would undercut the entire purpose of the SCA and put the public sector at a substantial competitive disadvantage. The SIR does not contain or reference the current CBA with the federal employees. The SIR should be amended to incorporate the current CBA which also should be provided to DOL by the FAA for consideration in issuing a Wage Determination for the SIR.

Section L.6.2, "Submit Staffing Plan." This section states: "The compensation levels should also reflect an understanding of the similarity to the work to be performed in response to this SIR, to the type of work done today by employees inside and outside of government." As it is highly unlikely that there are any employees or persons *outside* of the government whose work is similar to that of the employees currently performing the AFSS services covered by the SIR, the SIR should be amended to identify such persons, if any. The compensation levels proposed for the persons providing the flight services should reflect an understanding of the work performed by current FAA AFSS controllers. Otherwise, the offerors are proposing against a nonexistent, undefined standard and there will not be a common basis for the competition. The risk inherent in delivering the proposed staffing plan, i.e., compensation for AFSS work is going to have to be sufficiently comparable to other employment opportunities such that the SP has a reasonable likelihood of delivering new and replacement staff.

Section H. 7, "Labor Position Descriptions." This section includes certain position descriptions, but is unclear as to whether an SP must strictly comply with those descriptions or would be permitted to modify them in any way.

3. Evaluation Items

Evaluation of Conversion Costs; Impact of Collective Bargaining Agreement. During an FAA briefing on May 5, 2004 on this competition, Joann Kansier, Program Director, Office of Competitive Sourcing made certain vague comments to the effect that the public sector proposal might be considered "high risk" if "union concerns" were not resolved by August 3, 2004 (the date for receipt of initial proposals under the SIR). Ms. Kansier did not explain what "union concerns" needed to be resolved³, what "resolved" means, why these "concerns" would constitute "high risk,"⁴ or how these matters would be factored into the evaluation process.

By letter to Ms. Kansier, dated May 17, 2004, Mr. Pike sought clarification of Ms. Kansier's comments, but her May 25, 2004 response letter was equally vague and unclear and did not answer the questions raised by Mr. Pike. See Exhibits 6, 7, attached hereto. Nor has the FAA responded to Mr. Pike's follow-up questions on this matter in his May 28, 2004 letter. See Ex. 7. The FAA is required to specify how the cost to convert from the current workforce to the public sector will be calculated *in advance* of the due date for proposals. These types of costs are to be standardized in accordance with OMB Circular A-76 and the FAA is not free to develop these costs on its own in an ad-hoc fashion after proposals are received. See *Protest of Informatica of America, Inc.*, 99-ODRA-00144 (protest sustained where agency employed cost-evaluation scheme not described in solicitation).

Cost Realism Evaluation. Amendment 002 to the SIR added the following language to Section M.3.5.1: "The Government will assess the realism of the proposed labor mix and rates using the incumbent wage rate for a Full Performance Level (FPL) 2152 – AAFSS Specialist, which is equivalent to a General Schedule (GS) 12 Step 5 plus GS locality pay, and the current Department of Labor (DOL) approved Service Contract Act (SCA) rates." However, the majority of AFSS controllers are paid more than this pay grade under the CBA. Cost realism should not be assessed against a pay grade arbitrarily selected by the FAA. Under the SCA, the AFSS controllers will have to be paid wages and benefits that are no less than those in the CBA during the first year of the contract. 29 C.F.R. §§ 4.1b, 4.6(d). The SIR should be amended to state that any costs that indicate wages and benefits in that first contract year are less will be deemed unrealistic. Moreover, for the balance of the contract years, the FAA should not base its

³ For example, is the entire CBA supposed to be renegotiated by the proposal due date? If so, why? Is the FAA referring to arrangements with individual employees to be negotiated by the proposal due date? Is this a reference to buy-outs, retirement, transfers, early outs? Is the FAA suggesting that NAATS require each employee to enter into a binding agreement in advance of any decision on the competition? It would be unlawful for the FAA to require any CBU member to do so before it is known whether that employee will be staying in his/her current job.

⁴ If the costs of conversion from the current workforce to the public sector are evaluated in accordance with OMB Circular A-76, then there are no risks to the FAA.

cost realism assessment on a wage picked arbitrarily by the FAA, but rather, on a DOL Wage Determination (and the CBA).

Other Evaluation Matters. Section M.2.2 of the SIR discusses a risk evaluation, but does not specify the type of risk that the FAA will be evaluating. The SIR also fails to include an evaluation of whether the proposal poses a safety risk in the performance of the AFSS services. Also, it is unclear from the SIR whether the technical elements under each factor will be weighted equally.

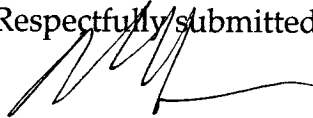
VI. REQUEST FOR RELIEF

Mr. Pike hereby respectfully requests that its Contest be sustained and that the receipt and evaluation of proposals be suspended pending a ruling by ODRA on this Contest. Mr. Pike further requests that the SIR be amended in accordance with the matters set forth in this Contest. In the alternative, Mr. Pike requests that the SIR be withdrawn and that a new SIR be issued. Finally, Mr. Pike requests its costs of pursuing this Contest, including legal fees, and such other relief as ODRA may deem appropriate. ODRA Rule CR 11.

VII. CONTESTER DESIGNEE

The Contester's Designee for this Contest is David M. Nadler, Dickstein Shapiro Morin & Oshinsky LLP, 2101 L Street NW, Washington, DC 20037, telephone (202) 785-9700; facsimile (202) 887-0689.

Respectfully submitted,



David M. Nadler
Charlotte Rosen

*Counsel to Walter W. Pike, As Agent For A Majority Of
Directly Affected FAA Employees*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Contest of Walter W. Pike, As Agent For A Majority Of Directly Affected FAA Employees, Under Screening Information Request No. DFTFAAWAACA-76001 was sent to Donald E. King, Contracting Officer via fax and hand delivery on the 19th day of July, 2004 at 5⁰⁰ p.m.



David M. Nadler