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

**FINDINGS AND RECOMMENDATIONS**

**Matter:**           **Protest of Hasler, Inc.**  
                          **Pursuant to Purchase Order dated September 25, 2006**

**Docket No.:**   **06-ODRA-00395**

*Appearances:*

For the Protester, Hasler, Inc.: Richard P. Rector, Esq., David E. Fletcher, Esq., J. Philip Ludvigson, Esq., DLA Piper

For the Agency Product Team: Gregory Carter, Esq., FAA Office of Chief Counsel

**I.       Introduction**

This Protest by Hasler, Inc. (“Hasler”) challenges a Purchase Order (“Original PO”) issued to Pitney Bowes, Inc. (“PB” or “Pitney Bowes”) on September 25, 2006 pursuant to a request for quotes (“RFQ”) issued by the Resource Management Branch (ASU360-ARA) of the Federal Aviation Administration (“FAA”) in Washington D.C. The subject of the acquisition is the purchase of commercial mail systems and services in compliance with a United States Postal Service (“USPS”) directive to replace outdated postal meters.

Hasler filed its Protest with the FAA Office of Dispute Resolution for Acquisition (“ODRA”) on November 13, 2006, after a debriefing conducted by the Product Team on November 9, 2006. At the debriefing, the Product Team acknowledged that the award to PB for mailing systems in support of FAA Centers and Regions was based on a mistaken interpretation of PB pricing information. The Product Team further informed Hasler during the debriefing that Hasler mailing systems in operation at FAA Headquarters would be replaced pursuant to a second purchase order which purportedly had just been issued to PB (“the Second PO”).

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Based on the information received during the debriefing, Hasler filed the instant Protest requesting a suspension and alleging that the Original PO issued to PB pursuant to the RFQ was improper because it was: (1) contrary to the stated requirements in the RFQ itself; and (2) based on a mistake of fact. The Protest also alleges that the Second PO issued to PB to replace Hasler equipment at FAA Headquarters was improper and not the result of a competitive acquisition.

On November 16, 2006, the Product Team voluntarily agreed to a suspension of further delivery and installation of equipment acquired under the Original PO covering FAA Centers and Regions. *See ODRA Status Conference Memorandum* dated November 16, 2006. The Product Team did not agree to a suspension of procurement activity relative to the Second PO. Although the parties initially agreed to use Alternative Dispute Resolution (“ADR”) procedures to resolve the Protest, they were unable to do so, and the default adjudicative process commenced on December 6, 2006. On December 15, 2006, the Product Team filed its Agency Response (“AR”) to the Protest, acknowledging that the acquisition process was flawed and stating its intent to take corrective action by recompeting the requirement.

For the reasons discussed herein, the ODRA finds that: (1) the Product Team acted irrationally and arbitrarily, and abused its discretion during the two acquisition processes at issue; and (2) the proposed corrective action is inadequate to remedy the situation. The circumstances surrounding this procurement require a directed award to Hasler as well as programmatic review by FAA management. The ODRA therefore summarily sustains this Protest and directs the Product Team to terminate the Original PO and make the award to Hasler based on its Proposal dated September 7, 2006.

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### II. Findings of Fact

#### A. Background

1. The instant protest by Hasler raises issues similar to those that were raised in the context of an earlier Product Team procurement involving mailing systems and services. On January 6, 2006, the Product Team awarded Contract No. DTFAWA-06-C-00001 (“C-0001”) to PB for leasing and maintenance of USPS Postage Meters and related services in support of the FAA Agency-wide Metered Mail Program. Agency Response, (“AR”), Tab 1. This award to PB followed voluntary corrective action in response to a protest that had been filed at the ODRA in October 14, 2003. That Protest, docketed as 03-ODRA-00284, was settled pursuant to the ODRA’s ADR process. *See Product Team Letter* dated November 16, 2006. The ODRA Administrative Record in that matter contains a settlement agreement, dated October 17, 2003, providing *inter alia* that, in exchange for withdrawal of the protest, the Product Team would issue no directives to Pitney Bowes for the installation of new equipment and it would prepare and issue a new solicitation for metered mailing machines for the FAA facilities.<sup>1</sup>
2. The Original PO contract awarded to PB on January 6, 2006 (“C-0001”) identifies [DELETED] as the Contract Specialist and further specifies that deliveries be marked for [DELETED] of the FAA. [DELETED] signed the award document on behalf of PB and is identified in the contract as the Strategic Account Manager for the Federal Government. AR, Tab 1 at. 1, 3 and 11.

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<sup>1</sup> According to Hasler, that protest involved a request for quotes that resulted in an award made to PB at almost four times the price of the Hasler proposal. Hasler reports that six months after execution of the ADR settlement agreement, on April 2, 2004, a second RFQ was issued for the requirement, the fate of which is unknown, and then a third RFQ was issued on September 8, 2005, again for the same requirement. At that point, however, Hasler had abandoned its efforts to compete in this procurement, apparently due to its perception that the FAA was determined to award the contract to PB. There is no indication in the record that, besides PB and Hasler, any other companies competed for this requirement. *See Hasler Letter* dated November 20, 2006.

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3. Specifically, C-0001 obligates PB to provide “all personnel, management, materials, facilities, equipment, supplies, and services” that are required to provide metered mail services. C-0001, Section C, entitled “Scope of Work” describes these services as follows:

FAA intends to lease digital postal meters capable of processing low to medium mail volumes. The FAA is currently operating under a GSA granted waiver to convert agency postal expenditures to commercial payment options. The agency will begin commercial payment options and now has a requirement to lease 600 commercial meters to support agency locations within the contiguous United States and its possessions.

AR, Tab 1, Section C, p. 3.

4. With respect to the equipment requirements, the C-0001 specifies that “Pitney Bowes shall provide DM100 postal meters” capable of functioning independently, and not requiring additional equipment to operate. AR, Tab 1, p. 3. The DM100 postal meters are required to possess certain features, including digital postal meters approved for use by the USPS and interface capability with an electronic scale that has weighing capacity up to 70 pounds. *Id.* The C-0001 Contract also requires this equipment to be delivered to over 550 regional postal meter locations, as well as serviced and maintained, with all equipment remaining the property of the lessor. AR, Tab 1, pp. 4-5; Section J, Attachment 1.

### B. The Protested Procurement Actions

5. Pursuant to a directive from the United States Postal Service published on November 15, 2001, all “Phase III” postal meters are to be withdrawn from service and replaced by December 31, 2006 with postal meters that possess more

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secure digital technology. Comments, p. 6, Attachment 1.<sup>2</sup> The instant Protest relates to the Agency's attempt to comply with this directive.

6. On August 18, 2006, [DELETED] sent a general email message to three companies, National Mailing Systems, Inc. (Hasler), Neopost, Inc. and Pitney Bowes, Inc., regarding "Market Survey/Quotes." The message stated:

Please provide your quote, using GSA schedule, for a mailing system that is USPS compliant that possess [sic] the following capabilities:

- (1) process large volumes of mail at a speed up to 135 letters per minute
- (2) handle mail pieces up to 5/8" thick; ranging in sizes from post cards to 10" x 13"
- (3) security features
- (4) in motion or differential weighing
- (5) automatic feeder/stacker

Also, include a quote for the appropriate digital meter monthly rental fee. Quotes are also required for the equipment maintenance package(s) available 1-year; 2-year; or 3-year maintenance packages. Requirement is systems. Please fax your quote to: ....

AR, Tab 3.

7. On August 18, 2006, by email, [DELETED] of Pitney Bowes responded to [DELETED]' August 18, 2006 email, stating:

Regarding requirement number 4, "in motion or differential weighing", the [Pitney Bowes] Model DM500 does not offer that feature. The Model DM550 includes the Differential Weighing feature and processes up to 160 letters per minute, but costs more than the Model DM500.

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<sup>2</sup> During the course of this Protest, on December 15, 2006, the USPS clarified that customers with valid orders placed for a USPS approved meter could continue to use their Phase III postage meters until the digital meter is installed or through March 31, 2006, whichever comes first. See *Comments* at Attachment 5.

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The Model DM500 System with a 70-lb. Scale is offered at [DELETED] (The GSA price is \$8,069.00).

If the Differential Weigh feature is still desired, the request should require a processing speed of 160 letters per minute. Or if the Model DM500 System with a 70-lb. scale is requested, the “in motion or differential weighing” feature should be eliminated from the requirement.

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The annual maintenance price for the Model DM500 and 70-lb. Scale is [DELETED], for up to three years ....\*\*\*

I'll call you Monday morning, the 21<sup>st</sup>, and discuss this with you further, if that's convenient for you.

AR, Tab 5.

8. On August 23, 2006, [DELETED] sent another email to [DELETED] confirming that Pitney Bowes could supply scales to interface with the current DM100 mailing systems at a cost of [DELETED] per unit. AR, Tab 5. Presumably, the reference to “current DM100 mailing systems” meant those items being provided by PB under the C-0001 Contract.
9. On August 24, 2006, [DELETED] sent an email to [DELETED] which referenced “DM800 Prices –GSA Contract No. GS-25F-0010M” and stated:

As we discussed earlier, based on a purchase of five Model DM 800 mailing systems, we are pleased to offer the following prices.

Model DM800 mailing system w/Weigh-On-The-Way, 70-lb. scale and 25 department accounting at [DELETED] each.

Option prices are: (1) Power Stacker @ [DELETED] each.  
(2) Console @ [DELETED] each  
(3) Report Printer @ [DELETED] each.

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AR, Tab 5 (emphasis in original). Although the email provided unit pricing for its DM800 system, it did not provide annual maintenance pricing for the system. *Id.*

10. On August 25, 2006, [DELETED] emailed a revised and more detailed request for quotes to specific employees at the companies she originally contacted on August 18, 2006. This request for quotes was consistent with the instructions and information provided to [DELETED] by [DELETED] on August 18, 2006. This time a copy of the email was provided to [DELETED]. Specifically, the email requested quotes for 5 systems and 19 systems as follows:

For market research purposes - please provide your quote, using GSA schedule, for a mailing system that is USPS compliant that possess [sic] the following capabilities:

A. Base quote/discounts on a quantity of 5 systems:

- (1) process large volumes of mail at a speed up to 210 letters per minute
- (2) handle mail pieces up to 5/8" thick; ranging in sizes from post cards to 10" x 13"
- (3) security features
- (4) in motion weighing
- (5) automatic feeder/stacker

B. Base quote/discounts on a quantity of 19 systems:

- (1) process large volumes of mail at a speed up to 135 letters per minute
- (2) handle mail pieces up to 5/8" thick; ranging in sizes from post cards to 10" x 13"
- (3) security features
- (4) automatic feeder/stacker

Also, include a quote for the appropriate digital meter monthly rental fee. Quotes are also required for the equipment maintenance package(s) available 1-year; 2-year; or 3-year maintenance packages. Requirement is for 24 such systems. Please fax your quote ....

AR, Tab 4.

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11. The Administrative Record contains no indication that Pitney Bowes responded to the request for quotes that was emailed on August 25, 2006.
12. On September 8, 2006, National Mailing Systems—as an authorized dealer for Hasler—submitted a quotation and proposal to [DELETED] for Hasler digital mailing machines, 70 lbs. scales, meter rental and maintenance under GSA Contract No. GS-25F-0168M. AR, Tab 6. The total pricing for three years, including equipment, meter rental and maintenance was [DELETED]. There is no evidence in the administrative record of any other responses to the RFQ or that the Hasler quote was not fully-compliant with the requirement. AR, Tab 6.
13. On September 15, 2006, [DELETED] provided to [DELETED] “supporting documentation for the mods to the subject PR.” Supplemental AR dated December 21, 2006, p. 79 of 81. The “supporting documentation” consists of two documents, one of which is entitled “PB Mod Mailing Machines Commercial Acct.doc” and the other “PB Mod Scales Commercial Acct.doc.” Both documents are identified as “IGCEs” (Independent Cost Estimates). *Id.*
14. The “PB Mod Scales Commercial Acct.doc” transmitted to [DELETED] by [DELETED] on September 15, 2006 states “the purpose of this procurement is to purchase 487 scales to support postage meters covered under the existing contract. The scales will interface with Pitney Bowes metering equipment currently installed at FAA locations.” *Id.* at 80. The reference to “existing contract” presumably means the C-0001 Contract. The “total price” stated for the IGCE, which includes delivery installation and training for 487 PB DM100 10 pound scales at [DELETED] per unit, is [DELETED]. *Id.* This information is consistent with the prices offered by [DELETED] to [DELETED] on August 23, 2006. AR, Tab 5.<sup>3</sup>

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<sup>3</sup> Although the email expressly references “1-lb. scales” instead of 10-lb scales, the record indicates this was the result of a typographical error by [DELETED].



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15. The “PB Mod Mailing Machines Commercial Acct.doc,” which was transmitted to [DELETED] simultaneously with the above IGCE for the Pitney Bowes DM100 scales, states the following:

### Statement of Work (Commercial Postage Equipment regions/centers)

The FAA uses mail-metering equipment to support the agency wide metered mail program. In accordance with a GSA mandate to convert to commercial payment processes, on 1/6/06, the FAA awarded contract number DTFAWA-06-C00001 to Pitney Bowes, Inc., Federal Government Sales ... for the lease and maintenance of 600 standalone commercial postage meters to support FAA field offices and facilities that process small to mid-volumes of mail.

The purpose of this procurement is to convert the large volume mail processing centers located in the region and center headquarters with commercial metering equipment. This procurement is to support the purchase of 24 Pitney Bowes mail stations consisting of mailing machines, scales, and lease and maintenance of commercial postal meters that support the mailing stations.

### IGCE

	Qty	UOM	Unit Price	LI Total
PB Mailing Station Model DM500 w/70-lb Scale. Delivery, installation, and training are included.	19	Each	[DELETED]	[DELETED]
Model DM500 3-year Maintenance Plan	19	Each	[DELETED]	[DELETED]
PB Mailing Station Model DM800 w/70-lb Scale, Power Stacker, Console, Report Printer	5	Each	[DELETED]	[DELETED]
Model DM800 3-year Maintenance Plan	5	Each	[DELETED]	[DELETED]

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	<b>Qty</b>	<b>Rate/ Mth(ea)</b>	<b>Total/ Mth</b>	<b>Total Amount</b>
Lease/maintenance Commerical Postage Meter Model 1A00 60 months	24	[DELETED]	[DELETED]	[DELETED]

### **Total Firm Fixed Prices [DELETED]**

Supplemental AR dated December 20, 2006, p. 81 of 81.

16. On September 25, 2006 [DELETED] issued Purchase Order No. DTFAWA-06-P-00236 (“PO”) to PB, which was received and signed by [DELETED] on September 28, 2006. AR, Tab 7 at 1. The PO incorporates prices quoted by PB on August 8, 2006 for the DM500 system and DM500 maintenance pricing, and prices quoted by PB on August 24, 2006 for the DM800 system. *Id.* The PO also includes maintenance pricing for the DM800, but there is nothing in the record that reflects a quote from PB for such maintenance. *Id.*
17. Moreover, the PO quotes verbatim the language and description set forth in the IGCE that [DELETED] emailed to [DELETED] on September 15, 2006 as “supporting documentation for the mods to subject PR,” except that the heading of “IGCE” was deleted from the unit pricing. *Id.* at 3. The PO also provided funding in the amount of [DELETED] for the replacement of equipment, *i.e.*, to convert government meters at the regions and centers to commercial meters and to provide mail stations consisting of mailing machines, meters and scales. *Id.* at 2. The period of performance is from September 25, 2006 to September 24, 2010. *Id.*

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18. Notably, the PO award of \$312,652.00 provides for a 3-year maintenance plan for the 24 mailing stations, along with 60 months (5 years) for the lease and maintenance of 24 commercial postage meters. *Id.* Moreover, the PB award includes a 3-year maintenance price of \$548.00 per system for the DM500, which is inconsistent with the PB quote that offered DM500 maintenance for an “annual” price of \$548.00 for up to 3 years. *Compare PB Quote* dated August 18, 2006, AR, Tab 5 at 1 to *PB PO* dated September 25, 2006, AR, Tab 7.
19. On September 27, 2006, Hasler sent a letter to [DELETED] requesting a post-award debriefing and a cost comparison of the maintenance pricing based on a three-year term rather than a five-year comparison. *See Protective Order* at 14. The record contains no evidence of a response to this request.
20. On October 2, 2006, Hasler sent a letter to [DELETED] requesting a post-award debriefing within five days. *Id.* at 10. No debriefing was scheduled.
21. On October 4, 2006, [DELETED] sent an e-mail to a U.S. Department of Transportation (“DOT”) on the metering equipment currently used in the FAA mail room. AR, Tab 2. [DELETED] wrote that the purpose of her email request was to enable her to “provide comparable equipment under the agency wide meter contract.” *Id.* In response, the DOT employee indicated that the meters in the FAA mail center were Hasler models provided by National Mailing Systems. *Id.*
22. On October 16, 2006, Hasler sent another letter to [DELETED] expressing concern that the PB quote was based on maintenance per year rather than all three years combined, as was Hasler’s bid. *Protest*, p. 11 of 14. The letter documented a conversation between the Hasler representative and [DELETED], in which after initially stating that the PB bid was for five years, she then said that she had to rework the numbers based on three years to see if PB was still lower, and subsequently confirmed that the PB bid was based on three years combined and was indeed lower than the Hasler bid. *Id.* at 11-12. In light of this conversation,

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Hasler requested that [DELETED] review the pricing for accuracy. Protest at 2 and attached letter, dated October 16, 2006. *Id.* at 12.

23. On November 9, 2006, [DELETED] met with Hasler to discuss the award to PB. The Product Team did not dispute Hasler's account of the meeting, which is as follows:

At the meeting, [DELETED] stated that the PB quote was \$312,652 for a three-year contract. She acknowledged that she was not sure why the award went to PB, particularly since Hasler had submitted a substantially lower bid that met or exceeded all required specifications. When questioned on this issue, [DELETED] admitted in the presence of [DELETED] and a Hasler representative that she "made a mistake" and thought that the PB pricing was for three years rather than one. She could not explain, however, why the award was made to PB, despite the fact that – even with the benefit of the mistake – PB had submitted the higher-priced quote. Hasler requested immediate suspension of the PB order. [DELETED] did not agree to suspend the Contract, but stated that she would get back to Hasler after discussing the matter with legal counsel. At that meeting, [DELETED] also informed Hasler that PB had been awarded a separate purchase order to replace the two Hasler systems at FAA Headquarters. Hasler was given no opportunity to bid on that equipment.

*Comments*, Paragraph 16 at 4 (emphasis in original).

24. On November 13, 2006, Hasler filed the instant protest at the ODRA.
25. On November 16, 2006, the ODRA held an initial status conference, during which counsel for the Product Team stated that he believed that there was a good chance that the matter could be resolved in ADR, and confirmed that the Product Team would voluntarily suspend further deliveries and installations of the equipment in question, pending the protest resolution, and a letter to that effect would be sent that day to PB along with notification of the filing of the Protest. Product Team counsel further indicated that the various offices of the FAA that have received the equipment would be informed of the suspension and directed not to install any

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equipment that had not already been installed. *See* ODRA Status Conference Memorandum, dated November 16, 2006.

26. Following the telephone conference, the Product Team filed a letter that opposed Hasler's request that the second PO for the replacement of Hasler postal equipment at HQ be suspended on the basis that:

The equipment being replaced in the HQ mail room is Hasler equipment, and is being replaced with PB (PB) equipment. The replacement is being conducted under contract DTFAWA-06-C-0001, and meets a different set of requirements than that covered by the contract under the present dispute. That contract (06-C-0001) was competitively awarded, and the competition was the result of a bid protest to award of contract DTFAWA-03-C-00055. In that protest, 03-ODRA-00284, filed by Hasler, Inc., the parties entered into alternative dispute procedures, resulting in an agreement dated October 17, 2003. ODRA records indicate the protest was withdrawn and dismissed. For reasons not found in the contract file, Hasler did not bid in the competition leading up to the 06-C-0001 contract.

For these reasons, the program office contends Hasler has not made out a substantial case, has not shown a likelihood of success on the merits, and has not shown irreparable harm if the HQ equipment is replaced. Further, since the program office has ordered the replacement HQ equipment under an existing contract, and the equipment is within the scope of said contract, public policy interests, including the integrity of and confidence in, the procurement process, compel the program office to oppose Hasler's request for suspension of activities related to the HQ equipment replacement.

Product Team Letter, dated November 16, 2006.

27. By letter dated November 17, 2006, [DELETED] notified PB of the Hasler protest and advised that contract performance under the PO "would continue without suspension for the duration of the protest, however, no further delivery of equipment and no additional installation/training should be conducted until further notice." Although notified of the protest, PB did not intervene.

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28. In response to the Product Team's opposition to the suspension request concerning the FAA HQ requirement, Hasler filed a reply on November 20, 2006. This Reply reiterated Hasler's belief that the HQ requirements were not within the scope of C-0001, which called for smaller machines than those needed at FAA HQ. Additionally, Hasler requested confirmation that all FAA offices had been notified of the suspension, pointing out that the FAA sent notice of the suspension to PB a day after it said that it would, as well as a report on how many offices had already been upgraded to PB equipment. *See Comments on Program Office Response* dated November 20, 2006 at 5.
29. The default adjudicative process began on December 6, 2006, after an extended ADR effort. On December 7, 2006, the ODRA granted the Product Team's request for an extension of time for the filing of the Agency Response from December 13, 2006 to December 15, 2006. The ODRA also directed the Product Team to provide information as to when any postage machine/mail equipment item purchased under the PO was delivered and installed.
30. By letter dated December 15, 2006, the Product Team requested a two-day extension for filing the Agency Response. This request was opposed by Hasler and the Product Team subsequently filed its Agency Response on that same day.
31. The Agency Response attempts to clarify the facts surrounding the requirement for replacement postal metering equipment in the FAA HQ mailroom. It states that there was no second PO issued to replace Hasler equipment at HQ:

Upon receipt of PB's response, [DELETED] began the process to order equipment off the C-0001 contract by calling the representative to ensure the metering equipment available under that contract would be sufficient. Upon recent review of the product team's letter of November 16, the product team recognizes it stated in that letter that "the program office has ordered the replacement equipment", when in fact no purchase order or

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contract direction has been placed with PB to provide equipment to the FAA mail room. The distinction between the ordering process and the issuance of contract direction should have been made clearer. The Protester has made no showing of irreparable harm, and that the integrity of the procurement process underpinning the C-00001 contract supports continuation of efforts under that contract.

AR, *Legal Brief* at 1-2.

32. The Agency Response also attempts to exonerate the actions of [DELETED], [DELETED] and the “members of the product team” arguing that:

[DELETED] is not a warranted contracting officer, and was not authorized to issue any form of a screening information request. The contracting officer, [DELETED], was not involved in the preparation or issuance of either request for quotes. In addition, the documents do not define FAA’s requirements outside of the equipment specification. In particular, there is no articulation in any documentation, internal or public, of maintenance or warranty requirements. The FAA, however, has a requirement for maintenance that is not adequately reflected in the “solicitation” documents. Further, the absence of evaluation criteria allows an assumption that the agency’s best value is contained in the technically acceptable, lowest cost bid. However, there have been no discussions between the members of the product team as to agency requirements or how best to obtain them. Such lack of discussions and considerations impair the integrity of the procurement processes set out within the FAA’s Acquisition Management System.

*Id.* at 2. Also provided with the Agency Response was information showing that all twenty-four systems had been installed during the period of October 4, 2006 through November 16, 2006. AR, Tab 8.

33. In light of the above, the Product Team admits in its Agency Response that “the PO was not properly supported, the process that led up to the CO signing the PO was flawed from the beginning, and the CO was not involved in the screening effort.” As a remedy, the Product Team believes that “the best course of action is

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- to resolicit the requirements and make a proper evaluation and award.” Moreover, because “the PO and the emails do not reflect the same requirements, the Team represents it will define an explicit and complete description of such requirements, state delivery locations, and develop evaluation factors to be used to make award” and “best efforts” would be made to issue the solicitation by the middle of January, with an award to be made 30 days later. *AR Legal Brief* at 2-3.
34. The ODRA held a status conference on December 19, 2006 to obtain further information from the Product Team regarding its intentions to take corrective action. During the conference, counsel for the Product Team explained that, although there was a plan to satisfy a requirement for postage meter equipment for the mail room at FAA Headquarters under an existing PB FAA Contract, no action had taken place in that regard. As for the impact of the suspension of contract performance on the proposed corrective action, the Product Team counsel advised that, although the 24 systems were delivered and installed in the Centers and Regions prior to notification to PB of the suspension, the suspension would cover the procurement of additional equipment under PB’s existing FAA Contract with respect to the mail room requirements at HQ. *See ODRA Status Conference Memorandum* dated December 19, 2006.
35. On December 21, 2006, the Product Team provided the additional information requested by the ODRA during the December 19, 2006 telephone conference. According to the Product Team, the September 28, 2006 PO to PB was a stand-alone order and not issued under C-0001 or any other GSA Schedule contract. The Product Team also indicated that it would no longer pursue its attempts to upgrade the FAA HQ mail room via a second PO with PB under the C-0001 Contract, and that the Department of Transportation had been instructed to oversee the upgrade of mailing equipment at FAA HQ. Finally, the Product Team explained the proposed corrective action in more detail:



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We intend to develop and define a complete description of agency requirements for this recompetition, which will include delivery locations, minimum warranty and maintenance terms, as well as the construct of the contract itself, including base and option year terms. The team will develop evaluation factors to be used in evaluating offers, and will state the basis for award, including the relative importance of the price and non-price factors. As stated at the status conference, there will be no evaluative advantage provided PB by reason of its delivery and installation of the equipment purchased under the challenged contract. Further, the team will provide the requirements and evaluation factors to both the Protestor and PB for their review and comment prior to the solicitation is issued.

.... While the exact makeup of the team is uncertain at this time, there will be at least two technical (non-price) evaluators, and the assigned contracting officer will review prices and act as the source selection official.

Supplemental AR, *Legal Brief* at 1-2.

36. Hasler filed its Comments on January 5, 2006, after requesting and receiving a five day extension.

### **III. Discussion**

ODRA Procedural Rule §17.19 (a)(3)(ii) authorizes the ODRA to summarily decide a protest if the “undisputed material facts demonstrate, that no rational basis exists for the Product Team action or inaction in question, and there are no material facts in dispute that would overcome a finding of the lack of such a rational basis.” After vigorously defending its actions, the Product Team now admits that the procurement process in this case was “flawed.” Finding of Fact No. (“FF”) 33. The ODRA agrees based on the undisputed facts that numerous significant defects occurred during the conduct of this acquisition. These are discussed below.

#### **A. The “Stand-Alone” Procurement**

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Although the Product Team now contends that the PO issued to PB was a stand-alone procurement under the AMS, if that were the case, the PO would have been awarded in clear violation of AMS policy and as such would have been void *ab initio*. Even if treated as a simplified purchase for commercial mailing equipment and services under AMS §3.2.2.5<sup>4</sup>, the PO would have failed to comply with the requirement that it be publicly announced on the Internet or through other means, since it was in excess of \$100,000. AMS §§3.2.1.3.12.1 and 3.2.2.5.1. Moreover, in contravention of the AMS, the Product Team never articulated any evaluation criteria for making the selection decision.<sup>5</sup> Nor did it document its method of selection and rationale for the PB award, including a determination that the price was fair and reasonable. *See* AMS §3.2.2.5.4.1. On its face, the award decision would have been materially flawed since it was based on a clear misinterpretation of maintenance pricing for the DM500 mailing equipment, as well as longer duration of 60 months for the lease and maintenance of commercial postage meters, a duration that exceeded any duration specified in the RFQ.<sup>6</sup> Moreover, the record indicates that the Hasler proposal was never found to be non-compliant and the award to PB was for a price higher than that of Hasler, and no justification has been provided for paying the price premium.

The Product Team's actions following the award to PB, *i.e.*, the delay in scheduling Hasler's requested debriefing, coupled with a plan to issue a second PO to PB under a

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<sup>4</sup> AMS §3.2.2.5, entitled "Commercial and Simplified Purchase Method," provides that the "FAA may acquire commercial products and services from the competitive market place by using the simplified purchase method ... and best commercial practices. Commercial and simplified purchases are used for commercial items or for products or services that have been sold at established catalog or market prices and are generally purchased on a fixed-price basis."

<sup>5</sup> In this regard, AMS §3.2.2.5.4 provides:

The CO's selection decision should be based on the FAA's stated evaluation criteria. The selection decision for commercial or simplified purchases should be based on the best value to the FAA including, but not limited to, factors such as price, functional specifications, delivery capability, warranty, and payment terms. This may be accomplished through establishing specific evaluation criteria with an accompanying evaluation plan as described under Complex, Noncommercial Source Selection, and making the selection based on the stated criterion.

<sup>6</sup> It is fundamental that an agency may not solicit quotations on one basis and then make award on a materially different basis when other vendors would be prejudiced by such an award. *Armour of America*, B-237690, 90-1 CPD ¶1304, *citing* *Discount Mach. and Equip., Inc.* B-220949, Feb. 25, 1986, 86-1 CPD ¶193.

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contract whose scope did not appear to support such an acquisition, failed to comport with the AMS Fundamental Principles of maintaining fairness and integrity, ensuring public trust, promoting open communication and access to information throughout the procurement process, promoting high standards of conduct and professional ethics and encouraging competition. *See* AMS § 3.1.3. Although the second PO never went beyond the procurement planning stages, FF 31, the timing of the effort, and the choice of contract vehicle selected, suggests a retaliatory motive on the part of the Product Team, *i.e.*, an intent to punish Hasler for challenging the award to PB by taking the HQ work away from Hasler and placing it under a PB contract.

### B. The Proposed Corrective Action

The Product Team's procurement actions appear to be consistent with a buy off the General Services Administration ("GSA") Multiple Award Schedules ("MAS") Program, which makes available government wide contracts with commercial firms to provide access to commercial supplies and services which can be ordered directly from GSA Schedule contractors at volume discount pricing.

The mailing equipment and associated services at issue in this protest are such commercial items, and were available to the Product Team via the schedule. Moreover, use of the GSA schedule in this manner is contemplated by AMS §3.8.3.2. and the FAA Toolbox Guidance, T3.8.3 Federal Supply Schedules (Revision 3, June 2006), which states: "[t]he FAA may place orders against FSS [Federal Supply Schedule] contracts awarded by GSA, or other agencies, when use of an FSS contract is in the FAA's best interest, e.g., provides the best value, is most expeditious, offers quality supplies or services, etc." The Toolbox specifies use of purchase orders as one of the methods of doing so, and provides "[w]hen selecting FSS contractors, ordering offices should consider Acquisition Management System principles regarding competition" and orders would be governed by applicable Federal Acquisition Regulation clauses.<sup>7</sup> The record

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<sup>7</sup> The applicable Federal Acquisition Regulation ("FAR") clause reference above is to Subpart 4.804, which among other things, directs agencies to consider reasonably available information about the supply or

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shows that until the award decision was made, the Product Team's actions followed the steps outlined in the AMS Toolbox for purchasing from the Schedules. For example, the Product Team issued an RFQ and sought information from at least three schedule contractors about its requirement and sought discounts from their GSA contract prices for the items.

Notwithstanding the Product Team's characterization of this action as a stand-alone PO under the AMS, the ODRA finds this acquisition to possess all the earmarks of a schedule buy, and will review it as such in the context of the Product Team's proposed corrective action.<sup>8</sup> The ODRA's final Procedural Rules provide the ODRA wide latitude in terms of the remedies available for a meritorious protest. 14 C.F.R §17.21. In this regard, the ODRA must take into account:

The circumstances surrounding the procurement or proposed procurement including, but not limited to: the nature of the procurement deficiency; the degree of prejudice to other parties or to the integrity of the acquisition system; the good faith of the parties; the extent of performance completed; the cost of any proposed remedy to the FAA; the urgency of the procurement; and the impact of the recommendation on the FAA.

14 C.F.R. §17.21 (b).

In fashioning a remedy, the ODRA is cognizant of the principle that equitable remedies are available only to those parties with "clean hands" and whose actions in no way contributed to the creation of the current situation. *See Protest of Informatica of America, Inc.*, 99-ODRA-00114. There is nothing in the record here to suggest that Hasler contributed in any way to the flawed procurement process. Rather, Hasler has done the Agency a service by bringing the matter to the attention of the ODRA.

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services offered by at least three schedule contractors. Agencies also can seek price reductions before placing an order.

<sup>8</sup> It is well established that the ODRA has jurisdiction to review FAA product team compliance with the AMS in acquisitions involving other agencies, including the issuance of orders against an FSS contract pursuant to a request for quotations. *Protest of Crown Consulting, Inc.*, 01-ODRA-00181, *Decision on Motion to Dismiss for Lack of Jurisdiction*.

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The record shows that the Product Team acted irrationally and arbitrarily, abused its discretion and cannot support its action with substantial evidence. Without justification, the contracting personnel delayed scheduling the debriefing requested by Hasler for 43 days, shortly after Hasler filed this Protest, and in the meantime, sought to replace mailing equipment that Hasler was providing under a separate contract with DOT with PB equipment. FF 20, 22, 23, 26, 27 and 32. The ODRA finds a complete lack of credibility on the part of the Product Team, which initially asserted that it had ordered the replacement HQ equipment from the C-0001 Contract and that the equipment was within the scope of that Contract, *see Product Team Letter, dated November 16, 2006*, but then one month later stated in fact no such “purchase order or contract direction has been placed” and attempted to explain this apparent inconsistency by attributing it to the subtle difference between the “ordering process” and “the issuance of contract direction.” FF 31.<sup>9</sup>

Of equal concern to the ODRA is the preferential treatment given PB in connection with establishing requirements for the procurement as evidenced by discussions with only PB prior to and after the issuance of the RFQ regarding the RFQ’s requirements. FFs 7 - 10. The ODRA also finds disturbing [DELETED]’ apparent solicitation of quotes – after consulting with PB – and her wholesale adoption of PB’s proposed solution in the ICGE. FFs 7 – 10, 14 and 15.

There also was a significant error made in the “evaluation” of the offers. After repeated efforts by Hasler to obtain clarification of the basis for award to PB, [DELETED] purportedly reviewed the relevant documentation and reported to Hasler that she had made a mistake in evaluating the PB price, *i.e.*, she had misevaluated it, but still refused to promptly correct the mistake. *See* Comments at 8; FFs 19 - 21. Moreover, the Contracting Officer, [DELETED], who was notified as early as October 16, 2006, of the possibility of a flawed award due to a pricing error, did not manage to schedule the

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<sup>9</sup> The ODRA further finds it significant that the instant Protest involves the same contracting personnel who administered the PB Contract previously protested by Hasler that was resolved by an ADR Settlement promising corrective action in exchange for protest withdrawal. FF 1 and 2. The implementation of the settlement agreement by the Product Team took an unreasonable amount of time and turned out to be of questionable value for the protester in the end, notwithstanding the Product Team’s assertions that the C-0001 was “competitively awarded.” FF 1, F.N. 1. FF 26.

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requested debriefing until November 9, 2006, 24 days later, and failed to take action to correct the error. FF 23. Meanwhile, PB delivered and installed the equipment at issue, effectively completing delivery and installation *prior to* the Product Team's commitment to the ODRA on November 16, 2006 to "voluntarily" suspend all further deliveries and installations of such equipment, and notification thereof to PB. FF 25, 27 and 32. The ODRA concludes that Product Team did not act in good faith throughout this procurement and protest process.

The ODRA also does not accept the Product Team's arguments that [DELETED]' actions should be excused because she is not a warranted contracting officer and [DELETED], who was the contracting officer, was not involved in the preparation or issuance of either request for quotes. FF 32. The record shows that [DELETED] provided [DELETED] a copy of the August 25, 2006 RFQ, as well as a copy of the September 15, 2006 IGCE specifically identifying the costs of PB mailing systems. FF 10, 13 – 15. [DELETED] also signed the Purchase Order to PB. FF 16. Clearly, [DELETED] was involved in the issuance of the request for quotes and issued a purchase order to PB based on the information that the RFQ generated. FF 17. As argued by Hasler, "[DELETED] possessed actual authority to bind the FAA to the terms of agreement and did so. As part of that authority, it was incumbent on her to ensure that the purchase order was properly supported before executing it. By signing the agreement, [DELETED] essentially ratified it." Comments at 8-9.

For all of the above reasons, the ODRA finds that the Product Team's proposed corrective action is inadequate. Given the above history, the ODRA concludes the Product Team's proposed corrective action presents an unacceptable risk of prejudice to Hasler and injury to the FAA acquisition process. Notwithstanding the Product Team's representation that there will be no evaluative advantage provided to Piney Bowes, the ODRA finds, as a practical matter, a level playing field would be impossible to achieve now that the items to be acquired have been purchased from and installed by one of the two prospective offerors.

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The ODRA also questions the rationality of developing and defining “a complete description of agency requirements” for the sole purpose of reprocurring the mail room equipment in the PO for the Centers and Regions, particularly given the commercial nature of these items, and the fact that no deficiencies have ever been identified with respect to the express requirements of the August 25, 2006 RFQ as it was originally issued. Based on the RFQ, the Product Team made a contract award to PB which PB is performing. But for this Protest, PB would have continued to do so.

In sum, the record shows that Hasler provided the lowest priced quote, even if the PB award price is adjusted to correct for the pricing errors, FF 7 and 18, and there is no basis on which to conclude that award was to be made on anything other than a lowest price, technically acceptable basis. Furthermore, there is no indication in the record that the Product Team did not consider the Hasler proposal to be fully compliant; nor is there any indication in the record that the Product Team had considered any other feature of the PB solution to provide greater value so as to merit the higher price. Hasler clearly was prejudiced by the Product Team’s action because had the Product Team followed the AMS and made a rational award consistent with the terms of the RFQ and without error, Hasler would have received the award. Moreover, a directed award is not impracticable.<sup>10</sup> More importantly, the integrity of the AMS requires the contract to be awarded to Hasler. To fail to do so in this case would effectively condone the Product Team’s conduct and make a mockery of the AMS.

### **IV. Conclusion**

For the reasons set forth above, the ODRA finds that the award to PB lacks a rational basis, was arbitrary and capricious, and an abuse of discretion and a directed award is the only appropriate remedy under these circumstances. Accordingly, the ODRA recommends that the Product Team be directed to terminate the Pitney Bowes PO and make the award to Hasler based on its Proposal, dated September 7, 2006. The ODRA also recommends that the Product Team’s other acquisition actions be reviewed for

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<sup>10</sup> Even though all of the PB machines have been installed, and there will be a cost to remove and replace them with Hasler systems, the Product Team’s proposed corrective action already contemplates the possibility of such an additional award.

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compliance with the AMS and that remedial training be provided to the agency contracting personnel involved.

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/S/

Marie A. Collins  
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APPROVED:

\_\_\_\_\_  
/S/

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