

Office of Dispute Resolution for Acquisition

Federal Aviation Administration

Washington, D.C.

FINDINGS AND RECOMMENDATION

Protest of Bel-Air Electric Construction, Inc.

Under Solicitation No. DTFA05-97-R-50853

Docket: 98-ODRA-00084

Appearances:

For the Protester: Mrs. Eti Gal, President

For the Agency: Zachary Berman, FAA Counsel, Eastern Region

I. Introduction

The FAA Office of Dispute Resolution for Acquisition ("ODRA") received a protest from Bel-Air Electric Construction, Inc. ("Protester") against a procurement by the FAA Eastern Regional Office ("Region"). As the sole basis for its protest, the Protester complains that the awardee is an out-of-state contractor who manufactures and supplies government furnished materials that are used for the contract. The Protester states "[o]ur strong opinion is that, since ... [the awardee] manufactures and supplies the materials, they would have an unfair advantage over our company, who has not seen nor handled these products." For the reasons set forth below, the ODRA recommends that the protest be dismissed as it fails to state a proper basis for protest, and is untimely.

II. Findings of Fact

The record shows that the protested award was made on May 1, 1998. On May 13, 1998, the Protester sent a letter to the Contracting Officer admitting the fact that sometime during the week of May 4, the Contracting Officer by telephone informed it as to the results of the bidding. Specifically, the Contracting Officer informed the Protester that its bid placed number two out of the two contractors that bid on the project. The ODRA received the protest, dated July 23, 1998, by regular mail on July 27, 1998. Counsel for the Region then moved to dismiss the protest as untimely on July 31, 1998.

Upon receiving the FAA Counsel's motion to dismiss the protest for untimeliness, the ODRA requested that the Protester provide no later than August 10, any facts and/or legal arguments that establish that its protest is timely, as required by the FAA Acquisition Management System ("AMS") § 3.9.3.2.1. In its letter responding to the ODRA's request, the Protester did not dispute the facts set forth in the FAA Counsel's motion to dismiss. Rather, the Protester argued that the FAA's untimeliness argument is "poor", as it is based on a "technicality regarding the five-day period of time allocated to protest award of this project." In support of its position, the Protester provided the ODRA with a copy of a memorandum it had prepared on May 20, 1998. The memorandum recounts a telephone conversation with the Contracting Officer that morning, in which the Protester again was informed that its bid price places it "No. 2, nothing else."

The memorandum further states that the Contracting Officer advised the Protester that if it wanted to get official results of the bidding it would have to make a request under the Freedom of Information Act ("FOIA"). Based on this memorandum, the Protester contends that the FAA Counsel's timeliness arguments should be disregarded on the basis that "that the five-day protest time frame has not yet begun" because it is "still waiting for the official results" pursuant to a FOIA request.

III. Discussion

The standard protest clause, entitled "Protest (August 1996)" that is contained in the solicitation, establishes a five business day time limitation for filing a protest. It states that "[p]rotests must be filed with the Office of Dispute Resolution within 5 business days of the date that the protester was aware, or should reasonably have been aware, of the agency action or inaction which forms the basis of the protest." See Solicitation Section 3.9.1-3. This clause differs from the June 2, 1997 revised version of the AMS, which calls for protests to be filed with the ODRA within seven business days after the date of the agency action or inaction which forms the basis of the protest. AMS § 3.9.3.2.1.2. In an interlocutory decision issued in Washington Consulting Group, Inc., 97-ODRA-00059, this Office applied the doctrine of *contra proferentum* to resolve inconsistencies in timeliness requirements.

In this case, the agency action was the contract award on May 1, 1998. Therefore, to be timely under the AMS, the Protester would have had to file its protest with the ODRA no later than May 12, 1998, *i.e.*, seven business days after the date of the award. Under the protest clause contained in the solicitation, the Protester was required to file its protest within five business days of the date it was aware or reasonably should have been aware

of the fact that it was not the awardee. The above-mentioned telephone call from the Contracting Officer during the week of May 4, *i.e.*, sometime between May 4 – 8, should have made the Protester reasonably aware that the FAA was not going to award it the contract. To be timely under the solicitation's protest clause, the Protester would have had to file its protest with the ODRA no later than May 15, 1998. Moreover, even assuming that the Protester received no call from the Contracting Officer during the week of May 4, the facts show that the Protester did not file its protest within five business days after it had another opportunity to become reasonably aware of its basis for protest. The memorandum submitted by the Protester shows that on the morning of May 20 it was informed by the Contracting Officer that its bid was "No. 2, nothing more." Despite this confirmation of the bidding results, the Protester still did not file its protest until July 27, sixty-eight days later. In sum, the facts show that this protest is clearly untimely under any interpretation of either the AMS or the applicable contract protest clause.

Furthermore, the Protester's claim that the time frame for filing a protest does not begin until it receives documentation pursuant to its FOIA request is without merit. Under the AMS, the seven business days run from the date of the agency's action or inaction. Therefore, under the seven day rule the receipt of any FOIA documents by the Protester is irrelevant in determining the timeliness of the protest. Even if the time for filing is measured from the date the Protester was aware or reasonably should have been aware of the action, *i.e.*, the contract award, the fact that the Protester requested FOIA documents in support of its protest would not extend its timeframe for filing. Here, the record shows that the protester was aware of its protest basis *months before* it filed its protest with the ODRA and the receipt of any FOIA documents only would have served to corroborate what it already knew. Hence, the ODRA finds that the protester's FOIA request did not serve to toll the limitations periods for filing the instant protest.

Finally, the allegations made by the Protester that (1) the awardee is an out-of-state contractor who manufactures and supplies government furnished materials that are used for the contract; and (2) the awardee has an unfair advantage over the Protester because the Protester has not seen nor handled these products, are not proper bases for protest as they do not allege any facts which if proven would constitute improper conduct on the part of procurement officials or a violation of the AMS by the Agency.

IV. Conclusion and Recommendation

For the reasons set forth above, the ODRA recommends that this protest be dismissed, because it fails to state a proper basis for protest, and is clearly untimely.

_____/s/_____

Marie A. Collins
Dispute Resolution Officer
For the Office of Dispute Resolution for Acquisition

Approved: _____ /s/ _____
Anthony N. Palladino
Associate Chief Counsel and Director