

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

Protests of)	
)	Docket No. 08-ODRA-00459
Hi-Tec Systems, Inc)	Docket No. 08-ODRA-00460
)	(CONSOLIDATED)
Pursuant to Solicitations DTFAWA-08-R-55501)		
and DTFAWA-08-R-55502)		

DECISION ON MOTION TO DISMISS

On October 6, 2008, the FAA Air Traffic Organization - Terminal (“ATO-T”) Program Office (“Program Office”) filed a Motion to Dismiss (“Motion”) two pre-award bid protests (“Protests”), which had been filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on August 25, 2008 by Hi-Tec Systems, Inc. (“Hi-Tec”). The Protests challenge the terms of two of three ATO-T support service procurements that were issued on June 19, 2008: Solicitation No. DTFAWA-08-R-55501, which is for support services in engineering and scientific areas; and Solicitation No. DTFAWA-08-R-55501, which is for support services in the program planning, execution and implementation, cost and financial areas (“Solicitations”).¹ The Protests involve identical challenges to the terms of the Solicitations, asserting that the procurements at issue were required to be set aside for small business. *Protests* at 1.

The Program Office’s Motion responds to the Protests on the merits, and includes a binder of exhibits identified in an “Index to [the] Agency Report.” With respect to the Protests’ challenge that the procurements at issue were required to be set aside for small business, the Motion sets forth facts and arguments in support of the Program Office’s

¹ The third acquisition, Solicitation No. DTFAWA-08-R-55503, which has not been protested, was set aside for SEDBs 8(a) certified firms, and is for Administrative/IT Support Services.

position that it complied with the policy and guidance of the FAA's Acquisition Management System ("AMS") concerning small business set-asides. *Motion to Dismiss* at 7-8. The Motion goes on to assert that the actions of the Program Office were rational and supported by substantial evidence. *Id.*

The Motion also requests that the ODRA dismiss the Protests on the basis that they fail to state a claim upon which relief may be granted. *Id.* at 1. This Decision addresses only the Program Office's request for dismissal, which for the reasons discussed herein, is granted in part and denied in part.

I. Background

Hi-Tec's Protests of August 25, 2008

The Hi-Tec Protests allege that the procurements at issue are "required to be set aside for small business," or alternatively, "given that multiple awards are contemplated by the Screening Information Request ("SIR"), a category of the multiple awards is required to be set aside for small business." *Protests* at 1. The Protests state:

Hi-Tec submits the FAA does have a reasonable expectation of obtaining offers from two or more responsible small business concerns, and there is no rational basis for contracting with a single source. Accordingly, the FAA has no legitimate reason to not set aside this procurement in total or at least partially.

Protests at 2. The Protests further assert that the services described in the Solicitations "were previously provided by a multitude of procurements both in headquarters and in the field", and the consolidation of these services into a single procurement constitutes improper bundling of requirements, which has the effect of limiting small business participation. *Id.* citing AMS Procurement Guidance T3.6.1.A.7. Finally, Hi-Tec argues that the statute establishing the FAA AMS, which requires small business concerns to be provided "all reasonable opportunities to be awarded contracts," *Id.* at 2, citing Section 348(b)(4) of P.L. 104-50 (Nov. 15, 1995), read in combination with the AMS Toolbox

Guidance T3.6.1.A.3.a, which provides that “[a]ll procurements must first be considered for set aside before procuring ... on an unrestricted basis,” mandates that the Solicitations at issue be set aside for small business. *Id.* at 3-4.

Program Office Motion to Dismiss filed on October 9, 2008

On the due date for filing the Agency Response to the Protests, the Program Office filed its Motion to Dismiss. The Motion asserts that:

[The] Protester advances no arguments or facts and provides no precedents to support its contentions that portions of the ATO-T requirement contained in the two SIRs being protested should have been set aside for competition among small businesses, and the FAA respectfully contends that there are none. The protester merely states in its protest at p. 2 that: “Hi-Tec submits the FAA does have a reasonable expectation of obtaining offers from two or more responsible small concerns” Beyond this mere statement, Hi-Tec has failed to “... articulate any basis for challenging the solicitation requirements beyond its mere disagreement”

Motion to Dismiss at 5, citing *Knowledge Connections, Inc.*, 06-TSA-024. The Motion also argues that the Protests should be dismissed for failing to state a legal basis in that:

[T]he protester has not alleged any facts to demonstrate any violation of the AMS small business set-aside policy or guidance, nor is there any basis for this conclusion. Merely alleging the ATO-T requirement should be set aside for small businesses does not prove the market survey conducted and the analysis thereof (which supports the acquisition strategy and the three SIRs issued) were irrational.

Id. at 8.

Motion to Compel filed on October 9, 2008

Hi-Tec filed a “First Supplemental Motion to Compell [sic] Discovery” with the ODRA on October 9, 2008 (“Motion to Compel”). In this filing, Hi-Tec justified its discovery requests as follows:

There are at least five (5) separate allegations which are required to be developed and analyzed which relate to the decision [not to set the procurement aside]. These allegations result from the Government’s

failure to follow the specific language of the organic statute which established the ... [FAA AMS]. That language states in part that the Small Business Act (15 U.S.C. 631 et seq.) shall not apply to the AMS except that

“... **all** reasonable **opportunities** to be awarded **contracts shall** be provided to small business concerns...” (Emphasis supplied.)
P.L. 104-50, Section 348.

1. The Government failed to utilize an applicable NACIS [sic] code which if utilized would have provided to Protester a reasonable opportunity to be awarded a contract.
2. The Government failed to utilize a size standard that was developed by the Small Business Administration (“SBA”) which if utilized would have provided to Protester a reasonable opportunity to be awarded a contract.
3. The Government failed to utilize a size standard that FAA has developed which if utilized would have provided to Protester a reasonable opportunity to be awarded a contract.
4. The Government failed [sic] to follow its own policies and guidance which if followed would have provided to Protester a reasonable opportunity to be awarded a contract.
5. The Government’s acquisition policies [sic] and guidance as written, do not implement P.L. 104-50, section 348. If the acquisition policies and guidance had been properly drafted, published and implemented, Protester would have been provided with a reasonable opportunity to be awarded a contract.

Motion to Compel at 1-2.²

Hi-Tec Reply to Motion to Dismiss filed on October 21, 2008

On October 21, 2008, Hi-Tec filed its Reply to the Motion to Dismiss (“Reply”). The Reply states that the Hi-Tec Protests are:

² Hi-Tec’s Motion to Compel was denied in its entirety by the ODRA on October 29, 2008 in an interlocutory decision. *Protest of Hi-Tec Systems, Inc.*, 08-ODRA-00459 (Decision on Protester’s Motion to Compel).

[B]ased upon the assertion that the Government has failed to follow applicable statutes, regulations, policies, procedures and guidance ... with regard to its decision not to set aside procurement(s) for small business concerns (“SBCs”) and/or not to establish with the procurement(s) which provided for multiple awards, a category in which competition would be set aside for SBCs.

Reply at 2-8. The *Reply* goes on to elaborate on the five allegations identified in the Motion to Compel, and argues that “if the material facts are viewed in the light most favorable to Protester, it would be concluded that there has been improper conduct on the part of Government procurement officials and a violation of the AMS by the FAA.” *Id.*

Program Office Letter of October 22, 2008

On October 22, 2008, the Program Office requested permission from the ODRA to respond to, what the Program Office argues as, the five “new protest grounds which were not in Hi-Tec’s protest as originally filed on August 25, 2008.” The Program Office Letter further states: “These protest grounds are now being introduced for the first time in Hi-Tec’s October 21, 2008, response to the Agency’s Report filed on October 6, 2008.”

Hi-Tec Letter of October 23, 2008

In response to the Program Office’s October 23, 2008 letter, Hi-Tec filed a letter with the ODRA disagreeing with the Program Office’s assertion that the five protest grounds were introduced for the first time in Hi-Tec’s October 21, 2008 letter. Hi-Tec explains that the Protests are “grounded upon the Government’s noncompliance with its own acquisition statute, policies and procedures with regard to its treatment of Protester as a small business concern” and notes that “[n]early two (2) pages of the Protest[s] are devoted to a recitation of some of those procedures.” The letter further asserts that: “The five (5) areas in question were specifically identified in Protester’s First Supplemental Motion to [C]ompel Discovery of October 9, 2008.”

Program Office Letter of October 27, 2008

By letter of October 27, 2008, the Program Office submitted “[S]upplemental Agency comments to the Protester’s Reply to the Motion to Dismiss,” arguing that five of Hi-Tec’s “new arguments must fail as a procedural matter because the arguments are untimely.” Letter of October 27, 2008 at 1. The five “new” arguments were those which Hi-Tec raised for the first time in the context of its Motion to Compel and then developed in its Reply. Background Section at 4, *supra*. The Program Office argues that Hi-Tec knew of the bases for these protest grounds, particularly with respect to the NAICS code and applicable size standard specified in the Market Survey, when it was issued on January 3, 2008. The Program Office argues that Hi-Tec should have protested these actions before February 5, 2008, which was the date set for the receipt of responses to the Market Survey. Letter of October 27, 2008 at 3, *citing Protest of PCS*, 01-ODRA-00184.

The Program Office also provides a Declaration of the FAA Contracting Officer (“Declaration”), explaining that “NAICS Code 541611 Administrative Management and General Management Consulting Services was established as the qualifying NAIC code on the Administrative /IT support services set-aside SIR” [Solicitation DTFAWA-08-R-55503 which is not the subject of these Protests] because it represents the “predominant portion of the work to be performed.” Declaration, paragraph 4. The Declaration further explains that, contrary to a recommendation made by Hi-Tec in its capability statement that NAICS code 541512 be added as a qualification to compete, the Program Office determined that the work represented by that particular code, *i.e.*, “planning and designing computer systems,” was not covered by the statements of work for the protested solicitations. Letter of October 27, 2008 at 3; Declaration, paragraph 5. The Program Office asserts that Hi-Tec’s challenge to the NAICS code determination amounts to a mere disagreement, which is not a valid protest ground. *Id.* at 4. Additionally, to the extent that Hi-Tec argues that the FAA failed to use a process consistent with the Federal Acquisition Regulations (“FAR”), the Program Office argues that this allegation should be summarily dismissed, as the FAR is inapplicable to the

FAA's acquisition process, and thus does not provide a basis for protesting an AMS solicitation. *Id.*

Hi-Tec Supplementary Opposition to Reply to Opposition to Motion to Dismiss

On November 7, 2008, Hi-Tec filed a Supplementary Opposition to Reply to Opposition to Motion to Dismiss ("Supplementary Opposition"). In the Supplementary Opposition, Hi-Tec sets forth arguments that: (1) "The five (5) of violations [sic] set forth by Protester are not new;" (2) "[t]he allegations are not untimely;" (3) "[t]he Government never determined the 'predominant portion of the overall requirement' for the SIRs that are the subject of this Protest;" (4) "[r]eliance upon the Protest of PCS, 01-ODRA-000184 is misplaced;" (5) "[t]he difference between an objection and a recommendation is irrelevant;" (6) "[t]he Government Contracting Officer made an erroneous statement regarding the establishment of NAIC codes and size standards;" (7) "[t]he Protester is not untimely in its protest of FAA's failure to issue policies and procedures which properly implement Section 348(b)(4) of P.L. 104-50 (Nov. 15, 1995);" (8) "[d]ispute over the selection of a NAIC code requires fact-finding and an improper selection may result in a statutory violation;" and (9) "[t]he FARs [sic] provide a base line which FAA must follow." *Supplementary Opposition* at 1-5.

II. Discussion

It is well established that in order to be considered by the ODRA bid protests must satisfy the requirement of timeliness; and that the timeframes for the filing of protests will be strictly enforced. *See, e.g., Protest of Water & Energy Systems Technology, Inc.*, 06-ODRA-00373. Protests seeking to challenge the terms of a solicitation must be filed prior to the date set for the receipt of proposals or the closing date for receipt of proposals, after the incorporation of the terms being objected to in the protest. ODRA Procedural Regulations, 14 C.F.R. §17.15(a). It is further well established that timeliness rules are jurisdictional. ODRA Procedural Regulations, 14 C.F.R. § 17.13(c); *see also Protest of Boca Systems, Inc.*, 00-ODRA-00158. The ODRA does not have jurisdiction

to adjudicate matters that are filed outside of the time limitations set forth above. *Id.* When considering the timeliness of supplemental grounds for protest, the timeliness of specific bases of protest raised after the filing of an earlier timely filed protest, depends upon the nexus between the later-raised bases and the initial, timely filed protest. Where the later-raised bases present new and independent grounds for protest, they must independently satisfy the ODRA's timeliness requirements. *Oceaneering International, Inc.* B- 287325, June 05, 2001; 2001 CPD ¶ 95; *see also Ti Hu, Inc.*, B-284360, Mar. 31, 2000, 2000 CPD ¶ 62.³ Where the later-raised bases merely provide additional support for an earlier, timely raised protest basis, the ODRA will consider those arguments timely based on the initial filing. *Id.*

The allegations raised in Hi-Tec's initial Protests filed on August 25, 2008 assert that the challenged procurements are required to be set aside, and the FAA does have a reasonable expectation of obtaining offers from two or more responsible small businesses. *Protests* at 2. The Protests also contend that the consolidation of the requirements into a single procurement constitutes improper bundling, and is inconsistent with the FAA's organic acquisition statute (P.L. 104-50, Section 348) as well as AMS policy, which implements that statute. *Background Section* at 2, *supra*.

After the due date for initial offers specified in the Solicitations, Hi-Tec raised additional arguments, which the Program Office asserts are "new" and, therefore, untimely. These later-raised arguments concern an alleged failure by the Program Office to use an applicable NAIC code and size standard developed by the SBA. *Background Section* at 4, *supra*. Hi-Tec further contends, in these later-raised arguments, that the Program Office failed to use a size standard developed by the FAA, and failed to follow its own policies and guidance regarding small business. *Id.* Additionally, Hi-Tec asserts that the FAA's acquisition policies and guidance "as written" do not properly implement the FAA's organic acquisition statute. *Id.* at 5.

³ While the FAA is not bound by the decisions of the Comptroller General, the ODRA has held that decisions in GAO bid protests may be viewed as persuasive authority insofar as the principles and rules announced in such cases are consistent with the AMS and ODRA case precedent. *Protest of International Services, Inc.*, 02-ODRA-00224.

The ODRA finds that Hi-Tec's allegation that the AMS does not properly implement the statutory mandate must be dismissed for lack of subject matter jurisdiction. *Protest of Edward B. Block Consulting*, 02-ODRA-00225. Hi-Tec's allegation challenges the FAA Administrator's promulgation of acquisition policy and guidance in the AMS, as opposed to challenging the Program Office's compliance with that policy and guidance. In this regard, the ODRA has held that it will dismiss matters in which the ODRA has not been granted, either by statute or by delegation, the authority to review. *Protests of Air Transport Association, et al.*, 08-ODRA-00452, -00453, -00454, -00455, -00456, -00457, -00461, and -00462, citing *Electronic Data Systems Federal Corp. v. General Services Administration, Board of Contract Appeals*, 792 F.2d 1569 (Fed.Cir.1986). The ODRA's protest and contract dispute function does not encompass review of directives and policies issued by the Administrator as head of the Agency. *Id.* Here, the ODRA lacks jurisdiction to review whether, in issuing the AMS, the Administrator complied with an alleged statutory mandate regarding contracting opportunities for small business. *Id.*

As for the remaining protest grounds raised by Hi-Tec in its Motion to Compel, the ODRA finds that, rather than raising new and independent protest grounds, they provide support for the initial protest allegations that essentially challenge the Program Office's determination not to set aside the procurement for small business. As such, the ODRA will consider these arguments as timely and justiciable pursuant to the initial filing. To the extent that the Program Office argues that Hi-Tec should have protested the use of the NAICS code and size standard by the due date for receipt of responses to the Market Survey, citing *Protest of PCS*, 01-ODRA-00184, the ODRA finds that case inapposite.

In *PCS*, the ODRA dismissed as untimely protest grounds that challenged the solicitation as incomplete and lacking objectivity with respect to the evaluation criteria. The solicitation at issue in *PCS* contemplated a three-phased approach, with the protester opting to submit a Phase I proposal, and then protesting apparent solicitation improprieties, *after* it was downselected. The response by Hi-Tec to a Market Survey is distinguishable from the submission of a Phase I proposal as part of a competition. Consistent with AMS Procurement Guidance, the Market Survey for the ATO-T Support Services expressly sought to determine the capabilities and interest of vendors in the form of feedback on a draft statement of work and labor categories, which were due on February 5, 2008. Procurement Guidance T3.2.1.2.A.1. Moreover, the Market Survey for the ATO-T Support Services expressly states: “[T]his is a market survey, not a solicitation, a screening information request (SIR). Please note that neither the existence of this document, nor the process guarantees that a Request for Proposal (RFP) or Screening Information Request (SIR) will follow.” Agency Response, Exhibit 4.

It is well established at the ODRA and elsewhere that there is a strong preference for deciding matters on the merits, rather than by dispositive motion. *Protest of Water & Energy Systems Technology, Inc.*, 06-ODRA-00373. In this regard, ODRA Procedural Rule 17.19, entitled “Dismissal or summary decision of protests,” provides for the dismissal of a protest for failure to state a claim upon which relief may be had, if, considering any material facts in dispute, in a light most favorable to the party against whom the request is made:

- (i) the undisputed material facts demonstrate a rational basis for the Product Team action or inaction in question and there are no other material facts in dispute that would overcome a finding of such a rational basis; or
- (ii) 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.

14 C.F.R. § 17.19(a).

In the Agency Response, the Program Office requests that the Protests be dismissed for failing to state a claim upon which relief can be granted, and sets forth facts and arguments in support of its position that it complied with AMS policies and guidance and that its actions had a rational basis. Notably, Hi-Tec has yet to file its Comments on the Agency Report; however, in the Protests and other filings so far, Hi-Tec disputes the Program Office's version of the facts and questions whether its actions had a rational basis. Among other things, Hi-Tec disputes the Program Office's view that it did not have a reasonable expectation of receiving offers from two or more small businesses. Hi-Tec also disputes whether the services at issue were properly bundled into the two procurements. Hi-Tec further disputes the Program Office's determination as to the "predominant portion of the overall requirement" for purposes of identifying an NAIC code for the SIR; and a statement by the Contracting Officer regarding the establishment of NAIC codes and size standards.

Given that there are material facts in dispute and viewing these disputed facts in a light most favorable to Hi-Tec, the ODRA will not dismiss the remaining grounds of Protests for failing to state a claim upon which relief may be had, at this stage in these proceedings. ODRA Procedural Rule 17.19(a); *Protest of Northrop Grumman Systems Corporation*, 06-ODRA-00384, *Decision on Motion for Partial Dismissal and Limitation on Discovery*, dated September 22, 2006; *Contract Dispute of Dynamic Security Concepts, Inc.*, 05-ODRA-00346, *Decision Denying Motion to Dismiss*, dated August 23, 2005.

III. Conclusion

For the reasons set forth above, Hi-Tec's protest ground alleging that the FAA's Acquisition Management System does not properly implement the FAA's governing acquisition statute is dismissed for lack of subject matter jurisdiction. The remainder of the Program Office's Motion requesting that the Protests be dismissed as untimely or for failing to state a claim upon which relief may be granted is denied.

Hi-Tec bears the burden of proving its allegations that the Program Office failed to comply with the requirements of the AMS in deciding not to set aside the procurements and that the Program office failed to utilize a proper size standard and NAIC code for the procurements.

-S-

Marie A. Collins
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

December 1, 2008