

UNITED STATES DEPARTMENT OF TRANSPORTATION

FEDERAL AVIATION ADMINISTRATION

WASHINGTON, DC

ORDER AND DECISION

FAA Order Number: ODR-97-18

Matter: Protest by GEM ENGINEERING

to FAA DTFA05-97-R-50846

Docket: 97-ODR-00029

Date Served: March 7, 1997

ORDER AND DECISION

On January 29, 1997, GEM Engineering submitted a protest to the Office of Dispute Resolution for Acquisition (ODR) objecting to the award of a contract to Baig Engineering, under solicitation DTFA05-97-R-50846. That procurement was also the subject of an earlier protest by Jo-Ja Construction, which is presently under review by the ODR.

As in the Jo-Ja protest, GEM objects to the contracting officer's decision on January 10, 1997, to cancel the original solicitation on this project and resolicit the same offerors. GEM asserts that when Baig's initial offer was found to be mistaken, the contracting officer should have solicited best and final offers only from the remaining two companies. Since GEM's price would have been low on the resolicitation if Baig's price were disregarded, GEM argues that award should be made to it.

On February 18, 1997, the FAA's Eastern Region filed (with the ODR) a motion to dismiss the GEM protest as untimely. The FAA cited clause 3.9.1-3 of the solicitation, entitled *Protests*. That clause includes a requirement that all protests must be filed with the ODR within 5 business days of the date that the protester was aware, or reasonably should have been aware, of the basis of the protest. For the reasons explained below, I am granting the FAA's motion, and dismissing this protest as untimely.

The essence of GEM's protest is that Baig should not have been permitted to participate in whatever course of action the contracting officer took after January 9, 1997. On that day, Baig confirmed that its initial low price did not include significant concrete work that GEM understood to be part of the specifications. GEM was notified on January 10, 1997, that Baig would be permitted to participate in the recompetition. If GEM objected to that decision, GEM was required to protest to the ODR within 5 business days of that decision, which it did not do.

GEM filed a response to the agency's motion to dismiss on February 19, 1997. GEM's response traces a chain of events from January 17 to January 29, 1997, during which time the contracting officer was largely unavailable. GEM apparently believes that January 17, 1997, the award date, is the decisive date from which to determine the timeliness of its protest to the ODR.

The problem with GEM's rebuttal is that January 10, 1997, is the operative date for protest purposes. This is the case, because, by its own admission, GEM received a fax from the contracting officer on that date, which explained that all of the original offerors would be resolicited. Since GEM's protest is premised on the argument that Baig should have been excluded, and since GEM knew on the January 10th that Baig was being kept in the competition, the 5 day requirement of clause 3.9.1-3 began running on January 10th, not January 17, 1997.

In summary, because the essential facts are undisputed, and the requirements for filing a protest set forth in the solicitation were clearly stated, I have determined that this protest should be dismissed without further consideration. Accordingly, pursuant to section 3.9 of the AMS, this protest is dismissed.

This is the final agency order in this matter. To the extent that this decision is subject to review, such review shall be in accordance with 49 U.S.C. §46110. A petition for review must be filed with the United States Court of Appeals for the District of Columbia Circuit, or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the date that this order is issued.

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BARRY L. VALENTINE

ACTING ADMINISTRATOR

Issued this *7th* day of March 1997