

**PUBLIC VERSION**

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

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Protest of )  
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CEMSol, LLC ) Docket No. 16-ODRA-00762  
 )  
Pursuant to Solicitation No. DTFAWA-14-R-18678 )

**DECISION ON MOTION TO DISMISS**  
**FOR LACK OF TIMELINESS**

On April 1, 2016, CEMSol LLC (“CEMSol”) filed a bid protest (“Protest”) with the Office of Dispute Resolution for Acquisition (“ODRA”) against the award of a contract (“Contract”) to The Boeing Company (“Boeing”), which has intervened in the Protest. *Protest* at 1. The Federal Aviation Administration’s (“FAA”) Headquarters’ EnRoute & Terminal Contracts Division Product Team (“Product Team”) awarded the Contract under Solicitation DTFAWA-14-R-18678 for Central Reporting and Data Link Monitoring Agency Support Services.

**I. Background**

CEMSol, a *pro se* litigant, alleges “the SIR review & evaluation contained multiple significant errors resulting in an undue award to the only other viable Offeror – Boeing.” *Protest* at 2. CEMSol generally alleges that these errors “resulted in artificially lower rating scores for technical performance and higher than reasonable risk factors.” *Id.* CEMSol alleges that despite a proposed price lower than the awardee, the evaluation errors led to a flawed best value determination. *Id.*

The Product Team filed a Motion to dismiss the Protest as untimely on April 8, 2016 (“Motion”). The Motion contends that CEMSol received a final debriefing on March 24, 2016 via a letter which expressly stated that it “officially concludes CEMSol’s

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debriefing.” *Motion* at 3-4; Exhibit B. The Motion asserts that the Protest was filed on April 1, 2016, more than five business days after the debriefing was concluded, and therefore, is untimely under 14 C.F.R. § 17.15(a)(ii). *Id.*

In accordance with the ODRA Procedural Regulation at 14 C.F.R. § 17.19(e), CEMSol and Boeing were provided an opportunity to respond to the Motion. CEMSol filed a Response to the Motion on April 11, 2016, arguing that the Product Team’s re-evaluation of its Past Performance and CEMSol’s receipt of a redacted Supplemental Source Selection Official (“SSO”) Award Decision on March 24, 2016, rendered the protest timely under 14 C.F.R. § 17.15(a)(3)(i). *CEMSol Response* at 1-2. Boeing joined the Product Team in its Motion, arguing that CEMSol knew of all grounds of its Protest as of the date of a debriefing provided to CEMSol on September 10, 2015, and failed to file its Protest in accordance with any of the deadlines specified in 14 C.F.R. § 17.15(a)(3). *Boeing Response* at 1. For the reasons stated below, the ODRA grants the Product Team’s Motion in part and denies it in part.

### II. Discussion

The ODRA Procedural Regulation and ODRA precedent establish firm deadlines for the filing of bid protests, as follows:

(a) Only an interested party may file a protest, and shall initiate a protest by filing a written protest with the Office of Dispute Resolution for Acquisition within the times set forth below, or the protest shall be dismissed as untimely:

...

(3) For protests other than those related to alleged solicitation improprieties, the protest must be filed **on the later of** the following two dates:

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(i) Not later than 7 business days after the protester knew or should have known of the grounds for the protest; or

(ii) If the protester has requested a post-award debriefing from the FAA Product Team, not later than 5 business days after the date on which the Product Team holds that debriefing.

14 C.F.R. § 17.15(a) (emphasis added). Deadlines for filing of protests are strictly construed and may not be extended by the ODRA. 14 C.F.R. § 17.13(c); *Protest of Security Aviation*, 11-ODRA-00577, *Decision on Motion to Dismiss*, dated June 9, 2011.

The ODRA Procedural Regulation also provides for summary dismissal of untimely protests; however, there is a strong preference for deciding cases on the merits. 14 C.F.R. § 17.19(a); *Protest of Water & Energy Systems Technology, Inc.*, 06-ODRA-00373. When a motion is filed, the moving party bears the burden of establishing that there are no issues of material fact to be determined and that the movant is entitled to judgment as a matter of law. *Protest of Northrop Grumman Corporation*, 00-ODRA-00159, *Decision on Motion to Dismiss*, dated August 17, 2000. In construing a dispositive motion of this type, the ODRA accepts the allegations of the non-moving party as true for purposes of the motion and will draw any inferences in favor of the non-moving party. 14 C.F.R. § 19.19(b). Like any court, the ODRA liberally interprets the filings of a *pro se* party. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

The Contract was awarded to Boeing on June 5, 2015. *Motion*, Exhibit A. The Protest indicates that a written debriefing was provided to CEMSol by letter dated June 30, 2015. *Protest* at 2; Article 7. The debriefing letter included an explanation of the basis for award and provided a summary of the offerors' evaluated standings that included price, overall technical scores, risk ratings and past performance ratings. *Protest*, Article 7. Also enclosed with the debriefing letter were redacted copies of the Technical Evaluation Report, Past Performance Evaluation Report and the Price Evaluation Report. *Id.* at 4; Articles 8-10. The redacted copy of the Technical Evaluation Report provided specific details regarding the results of CEMSol's technical evaluation. *Protest*, Article 8. In this

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regard, it identified the specific strengths, weaknesses and risks found by the Technical Evaluation Team relative to the evaluation sub-factors set forth in Sections L and M of the SIR and the Evaluation Plan, i.e., General Support, Personnel Experience, Tools, Test Support, Corrective Actions, Security, and Transition Plan. *Protest*, Article 8, p. 11.

The Protest documents indicate that subsequently, on July 2, 2015, CEMSol notified the Contracting Officer of an error in the evaluation that resulted in the assignment of a [DELETED] rating for its past performance. *Protest* at 2; Article 22. On September 10, 2015, CEMSol received an in-person debriefing. On that same date, the Contracting Officer, by email, confirmed the error in the past performance evaluation and indicated that, as a consequence, the review committee would be reconvened. *Protest* at 2; Article 24. In addition, the Contracting Officer's email advised CEMSol that "we are keeping this debrief open until we fully address the past performance evaluation issue." *Id.*

The undisputed facts show that a Supplemental Past Performance Evaluation Report was issued on December 2, 2015, and a Supplemental Award Decision was issued on February 16, 2016. *Protest*, Articles 26 and 27. According to these documents, the re-evaluation of CEMSol's Past Performance did not change the outcome of the original award decision. *Protest*, Article 27. The Supplemental SSO Award Decision indicates that although CEMSol previously was not considered [DELETED], it became [DELETED] when the error in its past performance evaluation was corrected. *Protest*, Article 27. The Supplemental SSO Award Decision discusses the technical delta between the offers based on the weaknesses and risks that had been identified previously in the Technical Evaluation Report. *Id.* It further contains a "Best Value Trade-Off Analysis" of the offers based on the SSO's "integrated assessment" of all the information contained in the evaluation record. *Id.*

On March 24, 2016, CEMSol received a final debriefing letter from the Contracting Officer ("Final Debriefing Letter"). *Protest*, Article 25. The Final Debriefing Letter references the previous in-person debriefing conducted on September 10, 2015 and provides the "Offerors' Revised Evaluated Standings" resulting from the re-evaluation of

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CEMSol's Past Performance. *Protest*, Article 25. The Final Debriefing Letter further explains: "Based on the results of the Technical, Price, Past Performance evaluations ... CEMSol's past performance, including the technical scores and price analysis, the evaluation of risks, and the order of importance and definition of Best Value in Section M of the SIR, the SSO determined that CEMSOL did not present the Best Value to the Agency." *Id.* The last sentence of the Final Debriefing Letter states: "This letter officially concludes CEMSol's debriefing for the above referenced SIR." *Id.* Also on March 24, 2016, CEMSol received for the first time redacted copies of the Supplemental Past Performance Report and Supplemental SSO Award Decision, which describes the outcome of the re-evaluation of CEMSol's past performance and sets forth an analysis of best value. *Protest*, Articles 26 and 27.

As noted above, 14 C.F.R. § 17.15(a)(3) identifies the applicable protest filing deadlines as either seven business days from the date when the protester knew or should have known of the protest grounds, or five business days after the debriefing, *whichever is later in time*. For purposes of deciding the Motion, the ODRA differentiates between two categories of CEMSol's protest grounds and concludes that different protest filing deadlines apply to each category under the ODRA Procedural Regulation. The first category of grounds involves challenges to the evaluation of the specific weaknesses and risks of CEMSol's proposal relative to the technical sub-factors set forth in Sections L and M of the SIR. The record reflects that the technical ratings were provided to CEMSol before September 10, 2015 in a written debriefing. *Protest* at 2, 5-20; Articles 7 and 8. Thus, the undisputed record shows that CEMSol knew or should have known of the protest grounds pertaining to its technical evaluation as of September 10, 2015, which was the date of the in-person debriefing. *Id.* However, since the debriefing was held open and not concluded until March 24, 2016, the deadline for filing the first category of grounds was not seven business days after September 10, 2015. Rather, under 14 C.F.R. § 17.15(a)(3)(ii), the latest deadline for filing these protest grounds was March 31, 2016, i.e., five business days after CEMSol's receipt of the March 24 Final Debriefing Letter. Inasmuch as the Protest was not filed until April 1, 2016, i.e., on the sixth business day, it

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is untimely with respect to the first category of grounds challenging CEMSol's technical evaluation.

The second category of protest grounds pertains to the allegedly flawed determination of Best Value that followed the re-evaluation of past performance. *Protest* at 3. The ODRA construes these allegations to be based on information that was first communicated to CEMSol in the March 24, 2016 transmission of the Supplemental Past Performance Report and Supplemental SSO Award Decision. *Protest* at 3; *CEMSol Response* at 1. In particular, the Supplemental SSO Award Decision describes the SSO's rationale for the determination of best value. *Protest*, Article 27. This specific information was not made available to CEMSol prior to March 24, 2016. *Protest*,; Articles 25 and 27; *CEMSol Response* at 1.

Thus, 14 C.F.R. § 17.15(a)(3) applies to the second category of protest grounds and required that the challenge to the best value determination be filed within seven business days of March 24, 2016, i.e., the date when CEMSol "knew or should have known" of those grounds of protest. 14 C.F.R. § 17.15(a)(3)(i). Inasmuch as CEMSol filed its Protest on April 1, 2016, within six business days, the ODRA finds the second category of protest grounds to be timely filed.

### **III. Conclusion**

In light of the above, the ODRA grants the Product Team's Motion to dismiss as untimely the first category of protest grounds challenging CEMSol's technical evaluation. The ODRA, however, denies the Motion with respect to the second category of protest grounds challenging the best value determination.

In accordance with the ODRA's Procedural Regulations at 14 C.F.R. § 17.21(d), the Product Team is directed to file a substantive Agency Response with respect to the second category of protest grounds within ten (10) business days from the issuance of this decision, unless the Product Team and CEMSol file a written agreement to attempt to

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resolve the matter through Alternative Dispute Resolution (“ADR”) before commencing the adjudication.<sup>1</sup>

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Marie A. Collins  
Dispute Resolution Officer and Administrative Judge  
Office of Dispute Resolution for Acquisition

April 28, 2016

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<sup>1</sup> This is an interlocutory decision. It will become final and appealable upon the issuance of a final order at the conclusion of the adjudication.