

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

FINDINGS AND RECOMMENDATIONS

Matter: Protest of Culpepper & Associates Security Services, Inc.
Under Solicitation No. DTFAWA-11-R-00023

Docket No.: 13-ODRA-00673

Appearances:

For the Protester:	Lawrence J. Sklute, Esq. of Sklute & Associates
For the FAA Program Office:	Bruce Hinchey, Esq.
For the Intervener:	Jeffrey Weinstein, Esq.

I. INTRODUCTION

On September 26, 2013, Culpepper & Associates Security Services, Inc. (“CASS”) filed a Protest (“Protest”) with the Office of Dispute Resolution for Acquisition (“ODRA”). The Protest challenges the award of a contract (“Contract”) to Whitestone Group, Inc. (“Whitestone”) for security officer (“SO”) services for the FAA’s Eastern Service Area. The Contract was awarded to Whitestone pursuant to Solicitation DTFAWA-11-R-00023 (“Solicitation”) which was issued by the Federal Aviation Administration’s (“FAA”) Facility Security Product Team (“Product Team”). Whitestone timely intervened upon receiving notice of the Protest.

CASS alleges that the Contract improperly was awarded based on a draft Solicitation, i.e., a “Pre-SIR,” and that the award process did not provide reasonable access to competition as required by the Acquisition Management System (“AMS”). *Protest* at 4. Specifically, CASS asserts that on the date the award was announced, September 19,

2013, “the link for the solicitation contained in the notice of award for the Whitestone contract ... opened the ‘Pre-SIR’ synopsis rather than the solicitation.” *Id.* CASS states: “The Pre-SIR [synopsis] indicates that it was posted on the Contracting Opportunities website on July 2, 2012.” *Opposition* at F.N. 1. CASS concludes therefore that “the award was based on the Pre-SIR” synopsis language. *Opposition* at 2. As a remedy, CASS requests that the Product Team be directed to amend and reissue the solicitation so as to permit CASS to compete for the contract. *Protest* at 1.

On October 24, 2013, the Product Team filed a Motion to Dismiss the Protest as untimely (“Motion”). In accordance with the ODRA Procedural Regulation at 14 C.F.R. § 17.19(e), CASS filed its Opposition to the Motion on November 8, 2013 (“Opposition”). Whitestone also filed a response to the Motion (“Intervenor Response”). For the reasons stated below, the ODRA recommends that the Product Team’s Motion be granted and the Protest dismissed with prejudice.

II. DISCUSSION

a. Standard of Review

As the ODRA has noted, “under the procedural regulation, a Protest is subject to dismissal if it is untimely, without basis of fact or law, or fails to state a claim upon which relief may be had.” 14 C.F.R. § 17.19; *Protest of CNI Aviation, LLC*, 07-ODRA-00428. A protest also is subject to summary dismissal for lack of ODRA jurisdiction or lack of standing by the protester. 14 C.F.R. § 17.19(a)(1). When considering a possible dismissal or summary decision, the ODRA considers any material fact in dispute in a light most favorable to the party against whom the dismissal or summary decision would operate and draws all factual inferences in favor of the non-moving party. 14 C.F.R. § 17.19(b). It further is well established that a dismissal of the entire protest is a Final Agency Order and that “prior to recommending or entering either a dismissal or a summary decision, either in whole or in part, the ODRA shall afford all parties against

whom the dismissal or summary decision is to be entered, the opportunity to respond to the proposed dismissal or summary decision.” 14 C.F.R. § 17.19(e).

b. Positions of the Parties

The Product Team’s Motion asserts that the “Pre-SIR” language on the FAA Contract Opportunities website appeared erroneously after award had been made and that the Protest itself was “filed nearly two years after the SIR was released publicly, and nearly a year and a half since proposals were due.” *Motion* at 1-2. The Product Team further asserts that at no time during the period from the issuance of the final SIR to the deadline for proposal submissions did any postings contain the phrase “Pre-SIR.” *Id.*

The Product Team supports its Motion by providing a declaration of the Contracting Officer (“CO Declaration”) and nine attachments (“Attachments”). These Attachments include seven public notices posted by the Product Team on the FAA’s Contract Opportunities website regarding the status of the procurement, a notice of award dated July 19, 2012, and a copy of a letter sent to CASS on July 31, 2013, notifying it of a decision not to exercise the remaining option years of its contract. *CO Declaration, Attachments* 1-9. They also include a July 31, 2013 letter that notifies CASS of the date when the services that it was providing to the FAA would be transitioned to Whitestone. *CO Declaration, Attachment* 9.

In support of the Product Team’s Motion, Whitestone adds that CASS knew or should have known of the procurement as early as December 2010 when the FAA put the procurement community on notice of the acquisition in question by posting a Market Survey on the FAA Contract Opportunities website. *Intervenor Response* at 2. Whitestone asserts that the CASS’s failure to submit a proposal “was self-imposed” due to its failure to “diligently monitor” the FAA’s Contract Opportunities website. *Id.*

In response, CASS contends that its Protest is timely filed because it “first learned of the grounds for the protest on September 19, 2013 when Mr. Taylor [of CASS] clicked on

the link for the solicitation contained in the notice of award for the Whitestone contract, which opened the ‘Pre-SIR’ synopsis rather than the solicitation.” *Protest* at 3; *Opposition* at 2. In this regard, CASS argues: “[T]he Government confuses the acquisition process overall with the ‘grounds for the protest’” and explains that CASS is “protesting the FAA’s failure to provide reasonable access to competition as Mr. Taylor revealed that the award was based on the Pre-SIR.” *Id.* CASS further asserts: “The December 2011-February 2012 dates on which the Government alleges it posted the SIR and its Amendments bear no relation to the protest ground. Indeed the Government admits that the SIR and its Amendments ‘make no reference to Pre-SIR’ Since the grounds for the protest did not even exist on these dates, the protester obviously did not and could not have knowledge of it.” *Id.*

c. Timeliness

The record shows that the original SIR posted on the FAA’s Contract Opportunities website on December 15, 2011 did not contain any “Pre-SIR” language. *CO Declaration, Attachment 1.* Likewise, the four amendments to the SIR, posted respectively on December 20, 2011; January 18, 2012; January 19, 2012; and February 1, 2012, did not contain any “Pre-SIR” language. *CO Declaration, Attachments 2-5.* Still further, an announcement posted on February 7, 2012, which provided instructions to offerors regarding prime and subcontractor arrangements, did not contain any “Pre-SIR” language. *CO Declaration, Attachment 5.*¹

¹ Prior to the issuance of the SIR on December 15, the Product Team publicly posted announcements on the Contract Opportunities website characterizing the upcoming solicitation as “Pre-SIR.” These announcements included, among other things, notice of a small business conference presentation regarding the procurement, a draft SIR for the purpose of eliciting questions and comments from industry, and tentative schedule information. *Motion* at 2, F.N. 7 (citing FAA, PUBLIC ANNOUNCEMENT, SECURITY OFFICER PROGRAM PROCUREMENT OPPORTUNITIES TO BE BRIEFED AT THE ANNUAL FAA NATIONAL SMALL BUSINESS PROCUREMENT OPPORTUNITIES TRAINING CONFERENCE AND TRADE SHOW, May, 24, 2011, available at <https://faaco.faa.gov/index.cfm/announcement/view/10762>); F.N. 11 (FAA, PUBLIC ANNOUNCEMENT, NATIONAL SECURITY OFFICER PROGRAM, JUNE 16, 2011, available at <https://faaco.faa.gov/index.cfm/announcement/view/10833>); and F.N. 17 (FAA, NATIONAL SECURITY OFFICER PROGRAM - UPDATED *PROCUREMENT/TENTATIVE* SCHEDULE, Sept. 29, 2011, available at <https://faaco.faa.gov/index.cfm/announcement/view/11214>). These “Pre-SIR” postings clearly were part of the market research process and ultimately were superseded by the final SIR, which stands on its own. *Protest of Systems Research and Applications Corporation*, 10-ODRA-00562. Unlike the prior

It is undisputed that from the time the final SIR was published on December 15, 2011, until the deadline for proposal submissions on February 16, 2012, the postings on the FAA's Contract Opportunities website regarding this acquisition did not contain any "Pre-SIR" reference. *Opposition* at 2. Moreover, the record shows the "Pre SIR" language erroneously was inserted prior to the award announcement date of September 19, 2012, but *after* the due date for proposals had passed.² *Motion* at 1, 7 (citing FAA SCREENING INFORMATION REQUEST, AMENDMENT 003, DTFAWA-11-R-0002, available at <https://faaco.faa.gov/index.cfm/announcement/view/11364>); *CO Declaration* at ¶6; and *Opposition* at 2, n. 1.

The ODRA Procedural Regulation establishes deadlines for the filing of post-award bid protests and cautions that protests not timely filed shall be dismissed. 14 C.F.R. § 17.15(a)(3). In part, the Regulation requires such protests to be filed:

(i) Not later than seven (7) days after the date 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 five (5) business days after the date on which the Product Team holds that debriefing.

14 C.F.R. § 17.15(a)(3) (emphasis added).

The Protest was filed on September 26, 2013, which is more than one year after the date that the FAA publicly announced the award of the Contract to Whitestone on September

"Pre-SIR" postings, the final SIR did not contain any language characterizing itself as a "Pre-SIR;" nor did it caution offerors that "no solicitation exists at this time" and "to monitor this site for the release of the solicitation." *CO Declaration, Attachment 5*.

² While CASS asserts that the incorrect posting occurred on July 2, 2012, *Opposition* at 2, n. 1, the Product Team contends that it occurred on December 17, 2012 after the FAA's eFAST Support Contractor made a system wide change to the website which altered the headers to include the "Pre-SIR" language. *CO Declaration*, ¶ 20. For purposes of this Motion, however, the ODRA considers the facts as alleged by CASS as true. 14 C.F.R. § 17.19(b).

19, 2012. Even accepting as true that CASS only had actual notice of the basis for its Protest on September 19, 2013, its Protest is untimely. In the *Protest of Raisbeck Commerical Air Group, Inc.*, 99-ODRA-00123, the ODRA found “[t]here is no support in the AMS ... or the case law for application of an ‘only on actual notice’ test for timeliness of bid protests,” and the ODRA expressly declined to adopt such a standard. Moreover, there is no evidence in the record here that the FAA’s notice of the award was legally inadequate, or failed to comply with the AMS. Rather, the fact that CASS “first learned of the grounds for the protest on September 19, 2013,” *Opposition* at 2, stems from its own failure to diligently monitor the FAA’s Contract Opportunities website. Thus, based on the undisputed facts, the ODRA finds that CASS reasonably should have known of the basis for its Protest as of the publication date of September 19, 2012. It therefore was required to file its Protest within seven business days of that date, i.e., by no later than September 28, 2012. 14 C.F.R. § 17.15(a)(3). CASS did not file its Protest until one year later, on September 26, 2013.

Finally, inasmuch as the erroneous re-insertion of “Pre-SIR” language occurred well after the deadline for proposals had passed, it could not have “deprived [CASS] of the opportunity to bid,” *Protest* at 8, or otherwise prejudiced CASS’s ability to compete for the award of this Contract.³

³ Even if its Protest had been timely filed by September 28, 2012, CASS would not have been an interested party with standing to challenge the award of the Contract to Whitestone since it had not submitted a proposal in response to the publicly available SIR postings on the FAA Contracting Opportunities website. A protester who is not an offeror for the contract involved generally has no standing to protest the award of that contract. *Protest of Edward B. Block Consulting*, 02-ODRA-00225. An ODRA bid protest may only be brought by an entity or person with the requisite legal standing. *Id.* The Procedural Regulations require that a protester be an “interested party,” which is defined as, “one whose direct economic interest has been or would be affected by the award or failure to award an FAA contract.” *Id.*; 14 C.F.R. §§ 17.3(m) and 17.15(a).

CONCLUSION

For the reasons discussed above, the ODRA recommends that the Motion be granted and the Protest summarily dismissed with prejudice as untimely.

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

APPROVED:

-S-

Anthony N. Palladino
Director and Administrative Judge
FAA Office of Dispute Resolution for Acquisition