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

Protest of	)	
	)	
Water & Energy Systems Technology, Inc.	)	Docket No. 06-ODRA-00373
	)	
Solicitation No. DTFANM-06-R-00016	)	

DECISION ON MOTION TO DISMISS

On May 19, 2006, Water & Energy Systems Technology, Inc. ("WEST") filed this Protest with the Office of Dispute Resolution for Acquisition ('ODRA") related to Solicitation No. DTFANM-06-R-00016 (the "Solicitation") issued by the Federal Aviation Administration Northwest Mountain Region ("Region"). The Solicitation was for the provision of water treatment services to the Air Route Traffic Control Center ("ARTCC") in Salt Lake City, Utah ("Procurement'). WEST had been one of two bidders on the Solicitation, along with Power Engineering, Inc. ("Power"), which was the successful bidder. Power has intervened in this Protest as an interested party. The WEST Protest purports to challenge the bid handling and award process followed by the Region and the terms of the Solicitation itself. On May 23, 2006, the Region filed a Motion to Dismiss the Protest as untimely. WEST filed its Opposition to the Motion on June 7, 2006. The Region filed its Reply to the Opposition on June 13, 2006. For the reasons set forth above, the ODRA grants the Motion in part and dismisses as untimely the allegations of the Protest that purport to challenge the terms of the Solicitation. The ODRA denies the Motion with respect to the Protest's challenge to the bid handling and award process.

FACTUAL BACKGROUND

The WEST Protest is set forth in a letter dated May 18, 2006. ("Protest Letter"). The Protest Letter was transmitted to and received by the ODRA via facsimile after the close of business on May 18, 2006. Therefore, pursuant to the ODRA Procedural Regulations, 14 C.F.R. Section 17, the Protest is deemed to be have been filed on May 19, 2006.

The Protest Letter, which is a one page document, states in its entirety as follows:

> This letter serves as formal notification that Water & Energy Systems Technology, Inc. (A Small Woman Owned Business) protests the award of the contract to Power Engineering Company for the above Solicitation under provisions 3.9.1-2.
>
> We believe that the facts of the award need to be examined including but not limited to the handling of the original bid submissions that were due on February 15, 2006. After that date an amended solicitation was received and was then due on March 3, 2006. The award was finally made two months later. The history of this contract is such that we have serious concerns as to whether our original bid or its content was provided Power Engineering by FAA personnel.
>
> We have had several discussions with Mr. John Knobel that have not proven satisfactory in demonstrating that our concerns are not true. We phoned Mr. Knobel several times to determine the status of the bid and only after the first of May were we informed that it had been awarded to Power Engineering. We told him that that it was our intent to protest this award.
>
> Despite the fact, that we are now in possession of a letter dated May 1, 2006 stating that the contract has been awarded to Power Engineering, we have attached the envelope showing the cancellation date of May 16, 2006. We received this notification today, May 18, 2006, in our office.
>
> We believe that this protest must be taken seriously and answered responsibly. Thank you for your immediate attention.

The Protest letter enclosed a copy of a letter from the Region to WEST ("Region Letter") dated May 1, 2006, informing WEST that "a contract was awarded to Power Engineering Company …" for the services in question. Also enclosed was a copy of what purports to be the cover of an envelope transmitting the Region's Letter and bearing a postmark of

May 16, 2006. That postmark appears to be consistent with WEST's contention that it did not receive the Region's Letter until May 18, 2006. Moreover, as the contractor working for the Region admits, the Region's Letter, for an unexplained reason, was not immediately mailed to WEST until sometime after May 1, 2006. On May 22, 2006, the ODRA convened an initial scheduling conference in the matter. On the same date, WEST filed a supplementary letter ("WEST Supplement"). In it, for the first time, WEST purported to challenge the terms of the Solicitation as well as to repeat and expand on its earlier challenge to the Region's handling of the bid and bidding process.

> During the week of February 27th, I raised my objection to the bid specification and addendum to Mr. Knobel. The object was two fold. First, the bid requested Power Engineering Products by number without regard to the fact that any products that W.E.S.T., Inc. or any other supplier would provide could claim to be "equivalent" in composition and or the pounds of chemical required to produce the desired results. Second, the prices that we had already submitted would not be modified and were now in the hands of people in the Salt Lake City ARTCC facility. Based upon the fact that the last three bids for this facility have produced similar results W.E.S.T., Inc., expressed grave concern that our pricing if provided to a competitor would allow a price adjustment by the competitor on the addendum.

Additionally, the WEST Supplement includes the following statement:

> In a final conversation with Mr. John Knobel, on or near May 1, 2006, W.E.S.T., Inc. verbally learned that the contract had been issued to Power Engineering Company. I, Frank Leaver, personally reiterated <u>all</u> of the concerns that had previously been expressed. Again, I explained the position of W.E.S.T., Inc. as to the solicitation and discussed several areas that could have been written differently to provide fair and open competition.

Finally, the WEST Supplement states the following with respect to the timing of the filing of the Protest:

> Mr. Knobel and I concluded our conversation with him informing me as to how and where to file a protest if W.E.S.T., Inc. had a problem with the process. Upon recommendation of our counsel, we waited until we received a written notification of the award to Power Engineering Company. Although the award was made on May 1, 2006, we did not receive written notification until May 18, 2006.

On May 23, 2006, the Region filed its Motion to Dismiss the Protest as untimely ("Motion"). The Region argues that:

> It is clear from WEST's letter of May 22, 2006, that the grounds alleged in the protest against the award were known to the protestor on or about May 1, 2006. The letter does not recite any additional grounds for protest coming its to attention as a result of the written notice of award dated May 1, 2006, which is attached to its protest.

See Motion at 2.

The Motion goes on to cite to the Procedural Regulation regarding timeliness of the filing of pre-award challenges to the terms of the Solicitation and post-award to award decisions. *See* Motion at 2, 3.

The Region asserts that:

> No debriefing was requested in this matter; accordingly, the protest should have been filed within 7 business days after WEST learned of the award to Power Engineering, i.e., on or about May 10, 2006. The protest was not filed until after the close of business on May 18, 2006.

Finally, the Region notes that:

> The Rules of Procedure for Protests do not extend or toll the time for filing a protest until a written notice of award is received, regardless of the advice a protestor may have received from its counsel. The time limits begin to run when the protestor knew or should have known of the grounds for its protest.

The Region cites to the ODRA decision in *Protest of Bel-Air Electric Construction*, 98-ODRA-00084 (August 27, 1998) as controlling on the issue of whether, after being informed by phone of the outcome of the competition, the protester is entitled to wait until after it receives a formal written notice before protesting.

In its Opposition ("WEST Opposition"), WEST contends that it was not until it received the Region's letter on May 18 that it unequivocally knew that the contract had in fact been awarded. West Opposition at 1.

> As is clear from the attached Affidavit of Frank Leaver, the May 1, 2006 conversation ended with Mr. Leaver not being clearly informed as to what had been decided. He was led to believe that the whole matter was under review and subject to further deliberations. Therefore, Mr. Leaver did not have a basis for knowing exactly what to protest or in what form to protest it until he actually received the May 1st letter, mailed on May 16th and received by WEST on May 18th. That miscommunication, along with other previous contradictory information from Mr. Knobel (see WEST's letter of May 22nd), was sufficiently confusing as to keep WEST guessing as to what had happened. No party in the position of WEST would be able to file an intelligent protest until the written notice of award was received. Only after the May 1st letter was received on May 18th did WEST have a concrete basis for filing a protest, which it did promptly that same day, filing a follow-up letter on May 22nd.

In an affidavit attached to the WEST Opposition, the principal of WEST states:

> Affiant believed that there were going to be further deliberations by Mr. Knobel prior to the actual award taking place. The discussion of protesting of the award was based upon a negative outcome to these further discussions and the recourse that WEST, Inc. would have if the contract was in fact awarded to Power Engineering.

The Region's Reply to the WEST Opposition consists of a letter from counsel together with supplemental affidavits of the senior contracting specialist and the Contracting Officer. The Reply states, "a review of the documents submitted in this matter will show there is no genuine issue of material fact, *i.e.*, there is not a credible basis for concluding that the Protest was timely." *See* Reply at 1. The Region's Reply together with the affidavits further contradict the WEST Opposition with respect to whether "there were going to be further deliberations by Mr. Knobel prior to the actual award taking place." *See* Supplemental Affidavit of John E. Knobel at paragraph 3. Mr. Knobel states unequivocally that "this statement is totally incorrect. At no time during my conversation with Mr. Leaver did I hold out any hope to him that the award to Power Engineering was being reconsidered." *See* Knobel affidavit at 3.

DISCUSSION

The basic principles and authorities regarding the timeliness of bid protests are well established in the ODRA Procedural Regulations and ODRA caselaw. 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. *See* ODRA Procedural Regulations, 14 C.F.R. §17.15(a). Protests alleging improprieties that do not relate to a challenge of the terms of the solicitation must be filed (a) not later than seven business days after the date that the protester knew or should have known of the grounds of protest, or (b) where a debriefing has been requested, not later than five business days after the date on which the debriefing is held. It is further well established that these timeliness rules are jurisdictional, *i.e.,* the ODRA does not have jurisdiction to adjudicate matters that are filed outside of the time limitations set forth above. *See* ODRA Procedural Regulations, 14 C.F.R. § 17.13(c). The ODRA Procedural Regulations also expressly permit the summary dismissal of protests that are not timely filed. 14 C.F.R. §17.19.

In addition to these timeliness principles, there is a strong preference for deciding cases on the merits, rather than on a dispositive motion. Additionally, any decision on a dispositive motion may only be rendered after the non-moving party has had an opportunity to respond 14 C.F.R. §17.19(e). Finally, in construing a dispositive motion of this type, the ODRA will accept 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. §17.19(b).

A. The Purported Challenge to the Terms of the Solicitation is Untimely

The WEST Supplement states that on two occasions, *i.e.,* during the week of February 27 and on or about May 1, 2006, WEST raised concerns about the terms of the Solicitation with the Region's representative. According to WEST, it had told the Region's representative that the Solicitation, "requested Power Engineering products by number

without regard to the fact that any products that WEST, Inc. or any other supplier would provide could claim to be 'equivalent ….'". WEST Supplement at 1.

In a conversation that allegedly occurred on or about May 1, 2006, the principal of WEST states that "I explained the position of WEST, Inc. as to the Solicitation and discussed several areas that could have been written differently to provide fair and open competition." WEST Supplement at 1.

The ODRA interprets the above portions of the WEST Supplement as intending to assert challenges to terms of the Solicitation in this case. These challenges were not set forth in the original WEST Protest filing of May 18 and thus can be reviewed as pending at the ODRA as of the date when the WEST Supplement was filed, *i.e.*, May 22, 2006. In any event, WEST's purported challenges to the terms of the Solicitation are plainly untimely inasmuch as they were filed after the closing date for receipt of proposals. The purpose of the timeframe for filing challenges to solicitation terms is to ensure that protests challenging solicitation terms are filed prior to bid submission rather than after the evaluation and award process has been completed. WEST's allegations of defects in the Solicitation defects must be dismissed as untimely. *See* 14 C.F.R §17.15(a).

B. Based On The Record To Date, The ODRA Cannot Conclude As A Matter Of Law That The Challenge To The Region's Processing and Handling Of The Bid By The Region Is Untimely.

The principal complaint of WEST's Protest relates to the bidding process conducted by the Region, and more specifically to the handling of the WEST bid. Essentially, WEST claims that the process followed by the Region unfairly resulted in the sharing of WEST's bid prices with its opponent. WEST provides no specific facts supporting this allegation but rather states its "concerns" about sharing its prices with the competitor. This ground of WEST's Protest clearly is timely under the ODRA Procedural Regulations inasmuch as it was filed within seven business days of the undisputed date when it learned of the contract award. In a dismissal situation, the ODRA must accept any facts alleged by the nonmoving party as true for purposes of the Motion and must draw any inferences in favor of the nonmoving party. Here, there is directly conflicting

evidence as to exactly what WEST was told in the conversation that occurred on or about May 1, 2006. Moreover, the ODRA notes that by the Region's own admission, normal procedures were not followed with respect to informing bidders of the outcome of the competition. The Region's representative did not inform WEST of the outcome in writing until several weeks after the award decision had been made. Moreover, while the letter informing WEST of the award decision was dated May 1, the postmark indicated it apparently was not mailed until May 16 and the Region's representative admits that the letter was not promptly forwarded to WEST. Under all these circumstances, the Region has not established that as a matter of law, WEST was on notice of its post award grounds prior to its undisputed receipt of the letter *i.e.*, May 18. Inasmuch as its Protest was filed on that same date, it was timely.

CONCLUSION

For the reasons set forth above, the ODRA finds that the WEST challenge to the terms of the Solicitation is untimely and the Region's Motion to dismiss such allegations is granted. The Region's Motion is denied with respect to WEST's post award challenges to the bid submission process and handling of the WEST bid.

The Region is directed to file its substantive Response to the remaining WEST Protest allegations by no later than June 23, 2006.[1]

-S-

Anthony N. Palladino
Director
Office of Dispute Resolution for Acquisition

June 16, 2006

[1] While finding a portion of the Protest to be timely for purposes of the current Motion, the ODRA notes that the Protester's sole remaining allegation consists only of its stated "concerns" regarding mishandling of its bid and disclosure of its pricing to its competitor. Protester has not thus far supported its allegation with any facts. The Protester is reminded that it bears the burden of proof, including demonstrating that it was prejudiced by the complained of actions.