

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

Protest of)
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CGH Technologies, Inc.) Docket No. 10-ODRA-00556
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Pursuant to Solicitation DTFAWA-09-R-00004)

DECISION ON TIMELINESS OF PROTEST GROUND

On October 20, 2010, CGH Technologies, Inc. (“CGH” or “Protester”) filed a post-award bid protest (“Protest”) with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”). The Protest challenges the award of Contract No. DTFAWA-10-C-00117 (“Contract”) to Enterprise Information Services, Inc. (“EIS”) under Solicitation DTFAWA-09-R-0004 (“SIR” or “Solicitation”) for Architectural System Engineering and Support Services (“Services”). For the reasons discussed below, the ODRA concludes that: (1) CGH raised for the first time in its Comments a new protest ground challenging the [DELETED] adjustment of its cost proposal by the evaluators (“Cost Adjustment Ground”); and (2) the Cost Adjustment Ground was not timely filed in accordance with the ODRA Procedural Regulations at 14 C.F.R. §17.15 and therefore must be dismissed.

I. FACTUAL BACKGROUND

CGH’s initial Protest challenged the adequacy of its debriefing, alleging: inconsistency and unjustified evaluation scoring; lack of explanation of the award decision; and concerns regarding the hiring by the FAA of an employee of the awardee. The Agency Response to the Protest was filed with the ODRA on January 12, 2011 and served by

hand on CGH on the same date. *See Agency Response* (“AR”) at 22. Following receipt of the Agency Response, CGH, in a letter dated January 14, 2011, requested a three week extension of the due date for the filing of Comments on the Agency Response. Counsel for the Program Office opposed the extension. The ODRA found the requested extension “excessive and unjustified,” but granted “an extension of five business days for the filing of the Comments to the Agency Response.” *See ODRA Letter* dated January 18, 2011.¹ CGH filed its Comments on the Agency Response (“Comments”) on January 28, 2011, *i.e.*, twelve business days after CGH’s receipt of the Agency Response. The CGH Comments included, *inter alia*, the Cost Adjustment Ground.

Specifically, the CGH Comments contend that the Evaluation Team “misconstrued CGH’s cost proposal, which negatively impacted the overall evaluation of its submission.” *Comments* at 2. CGH argues that the Team’s [DELETED] adjustment of CGH’s cost proposal was unwarranted and prejudicial, and that the Team [DELETED] adjusted CGH’s fee, which served to [DELETED] between the CGH and the EIS cost proposals. *Comments* at 3 and 8. CGH also contrasts the Team’s finding that the CGH cost proposal was [DELETED] with the Team’s finding that the Awardee’s cost proposal “could result in [DELETED] to the government after contract award.” *Comments* at 2, *citing AR*, Tab 24 at 14 and 33.

Following its review of the Protester’s Comments, the ODRA, in a letter dated February 4, 2011, scheduled limited briefings from the parties on the timeliness of the Cost Adjustment Ground. In so doing, the ODRA noted that: “It appears that this issue, raised for the first time in the Protester’s Comments, is based on information contained in the Agency Response and is untimely.” *Id.* *See CGH Comments* at 3 and 8. CGH filed its response on February 9, 2011 (“CGH Response”); while the Program Office and Intervenor filed responses thereto on February 14, 2011.

¹ The ODRA subsequently granted a CGH request for an additional one day extension, to and until January 28, 2011, due to inclement weather in the Washington, D.C. area.

II. DISCUSSION

It is well established that bid protests filed with the ODRA must satisfy the requirement of timeliness; and that the time limits set forth in the Procedural Regulations for the filing of protests will be strictly enforced. *See, e.g., Protests of Hi-Tec Systems, Inc.*, 08-ODRA-00459, -00460, *Decision on Timeliness of Protest Ground*, December 1, 2008. The ODRA has no authority to adjudicate matters that are filed outside of the time limitations; nor can it extend the protest filing time limits established in the Procedural Regulations. *See* ODRA Procedural Regulations, 14 C.F.R. § 17.13(c); *see also Protest of Boca Systems, Inc.*, 00-ODRA-00158. Pursuant to the ODRA Procedural Regulations, post-award protests such as CGH's must be filed on the later of the following two dates:

- (i) Not later than seven (7) business 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.

ODRA Procedural Regulations, 14 C.F.R. §17.15(a)(3). Finally, it is well established that protests or portions of protests that are not timely filed must be dismissed. *See* 14 C.F.R. § 17.19. The same Section of the ODRA Procedural Regulation provides 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 decision is to be entered the opportunity to respond. *Id.*

The ODRA has ruled that the timeliness of supplemental protest grounds that are not expressly raised in an original protest filing depends on:

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. 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.*

See Protest of Hi-Tec Systems, Supra at 8. In the instant case, it is undisputed that the Cost Adjustment Ground was not expressly discussed in CGH's initial, timely Protest filing. CGH asserts, however, that "its challenge to the Federal Aviation Administration's ("FAA") cost evaluation is not an untimely new ground of protest. Rather, this challenge flows from CGH's original protest assertions regarding inconsistencies in the Agency's cost evaluation report. *See CGH Protest*, ¶¶ 4, 5, and 6." CGH Letter of February 9, 2011.

Notwithstanding these assertions, a review of the three Protest paragraphs cited by CGH reveals no clear nexus between the original allegations and its Cost Adjustment Ground. The three paragraphs involved provide:

[DELETED]

CGH Protest, ¶¶ 4, 5 and 6. Paragraphs 4 and 5 of the Protest pertain solely to the subcontracting strategy issue of whether the CGH proposal satisfied the Solicitation requirement that CGH perform at least 50% of the contract work as the prime. Essentially, in these paragraphs, CGH complains that it did not receive an adequate explanation of the basis of the evaluation on that point. Paragraph 6 of the Protest addresses the evaluation of risk and alleged internal inconsistency in the evaluation team's finding of [DELETED] with respect to cost and the finding of [DELETED] with respect to CGH's subcontracting teaming strategy.

Nothing in these paragraphs raises or hints at any specific challenge to the [DELETED] adjustment of CGH's costs relative to its [DELETED], which was raised for the first time by CGH in its Comments filed twelve business days after CGH's receipt of the Agency Response. Moreover, contrary to the Protester's assertions, the Agency Response did not address the issues of whether the cost evaluators misinterpreted CGH's cost proposal, improperly adjusted CGH's fixed fee rate [DELETED], and improperly calculated the costs of the Awardee. *Compare Comments* at 3 *with AR* at 19 – 21.

Rather, the Agency Response simply addresses the alleged inconsistency between the cost evaluation's finding of [DELETED] risk with respect to probable cost, and the finding of [DELETED] risk with respect to the subcontracting teaming strategy and work distribution, *i.e.*, non-cost related risks. *Id.* at 19 – 21. The Agency Response generally describes the evaluation of risk for each evaluation factor, and confirms that CGH's cost proposal was considered to be [DELETED], while its management proposal was considered to [DELETED]. *Id.* The Product Team makes the point that the risk ratings for two independent volumes of CGH's proposal are not required to be consistent, as “[i]t is a leap of faith and confidence to assume that a well-written cost proposal, evidencing a low risk to cost variances, translates to successful contract performance, evidence of a low-risk technical proposal.” *Id.* at 21; *see also* AR Tab 24, Cost Evaluation Report at 30 (discussion of “non-cost” risks such as [DELETED]).

It is axiomatic that a broadly stated general allegation in an initial protest does not permit a protester to later present specific and otherwise untimely arguments. *See LeBoeuf, Lamb, Greene & MacRae*, B-283825, B-283825.3, 2000 CPD P 35, 2000 WL 248616 (Comp.Gen.).² The timeliness requirements of the ODRA Procedural Regulations, like those applicable to GAO Protests, “do not contemplate the unwarranted piecemeal presentation or development of Protest issues.” *See Neopost USA Inc.*, B- 404195, B-404195.2, 2011 WL 456767, (Comp.Gen.), January 19, 2011. The ODRA adopts the GAO rule and views “allegations raised for the first time in comments to constitute independent protest grounds if a further response by the agency is needed to adequately review the matter.” *Id.* Here, CGH's Cost Adjustment Ground clearly would require a supplemental response from the Agency in order for the record to be complete. The ODRA therefore concludes that the CGH's Cost Adjustment Ground constitutes a new independent ground of Protest, and thus is required to independently satisfy the timeliness requirements of 14 C.F.R. § 17.15.

² Decisions in GAO bid protest cases may be treated as persuasive authority in ODRA bid protests 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.

CGH does not dispute that information providing the basis of the Cost Adjustment Ground was in the Agency Response that it received on January 12, 2011. Thus, it was required to file the Cost Adjustment Ground of protest not later than seven business days after the date that it received the Agency Response, *i.e.*, by no later than the close of business January 24, 2011. CGH's Comments challenging the Cost Adjustment Ground of protest were not filed with the ODRA until January 28, 2011, *i.e.*, four business days after the deadline.

CGH additionally argues, however, that because it was granted an extension of time to file its Comments, its Cost Adjustment Ground should not be viewed as untimely. *See CGH Opposition* at 1 and 2. Counsel for the Intervenor correctly points out however that "while CGH was granted an extension of time to file Comments to the Agency Response, no such grant of an extension of time was given for CGH to file a supplemental protest." *Intervenor's Response of February 14, 2011*, at 3.

As discussed above, the record shows that CGH did not directly or indirectly raise the Cost Adjustment Ground in its original Protest filing. It similarly did not directly or indirectly request an extension of time for the filing of a supplemental protest. Nor would the ODRA have been able to grant such a request had CGH done so. As was correctly pointed out by counsel for the Program Office, the Procedural Regulation expressly prohibits the ODRA from extending the time limits established in the Regulation for the filing of Protests. *See* 14 C.F.R. §17.19.

Finally, the ODRA notes that CGH's original request for a three week Comment extension, which the ODRA found unreasonable and unjustified, was based on CGH counsel's assertion that voluminous documents that counsel had not previously seen had been produced with the Agency Response. As counsel for the Program Office and Intervenor pointed out at the time, the actual volume of documents produced with the Agency Response that were not previously available to Protester's counsel, was not excessive. *Program Office and CGH Responses*, dated February 14, 2011. In any event, the timeframe specified in the Procedural Regulations for the filing of a new protest or

protest ground begins to run on the date that the information providing the basis for the protest ground comes into the possession of the protester or its counsel. In this case, that date was January 12.

III. CONCLUSION

For the foregoing reasons the ODRA concludes that the Cost Adjustment Ground set forth in the Comments filed by CGH must be dismissed, as it constitutes a new and independent ground of protest that was not timely filed in accordance with 14 C.F.R. §17.15.³

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Anthony N. Palladino
Associate Chief Counsel and Director
FAA Office of Dispute Resolution for Acquisition

March 2, 2011

³ This Decision is interlocutory in nature. It will become final and appealable upon issuance of the Administrator's Final Order in this Protest.