

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

**FINDINGS AND RECOMMENDATIONS**

**Matter:           Protest of Boca Systems, Inc.**  
**Pursuant to Solicitation FAA CO 1109**

**Docket:           00-ODRA-00158**

*Appearances:*

For the Protester, Boca Systems, Inc.:           Mr. Joseph Gross

For the Awardee, IER, Inc :                   Mr. Tore Wick

For the FAA Product Team:                   Richard McCarthy, Esq.

**INTRODUCTION**

Boca Systems, Inc. (“Boca”) submitted its bid protest (“Protest”) to the Federal Aviation Administration’s Office of Dispute Resolution for Acquisition (“ODRA”) on July 7, 2000. Boca protests the FAA Product Team’s announcement of intention to award a contract, on a single source basis, for the replacement and upgrade of Flight Data Input/Output Peripheral Thermal Printers (“Announcement”). On July 11, 2000, counsel for the Product Team filed a supported Motion for Summary Disposition of the Protest on grounds of lack of timeliness (“Motion”). On July 20, 2000, Boca filed an unsupported Opposition to the Motion. All further proceedings with regard to the Protest were stayed by the ODRA pending resolution of the Motion.

For the reasons discussed herein, the ODRA concludes that the material, undisputed facts establish as a matter of law that the Protest was not timely filed. The ODRA therefore recommends that the Administrator grant the Motion and summarily dismiss the Protest.

## DISCUSSION

The time limits for filing of bid protests are clearly set forth in the ODRA Procedural Regulation at 14 C.F.R. §17.15(a), which expressly provides:

(1) Protests based upon alleged improprieties in a solicitation or a SIR that are apparent prior to bid opening or the time set for receipt for initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.

The same Regulation also provides:

(3) For protests other than those related to alleged solicitation improprieties, the Protest 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.

The ODRA Procedural Regulation does not provide the ODRA with discretion to extend the stated time limits for the filing of bid protests. Moreover, the FAA Administrator, acting on the ODRA's Recommendation, has ruled in several cases under the FAA's Acquisition Management System ("AMS") that protests must be filed in a timely manner, and that the time limits for the filing of protests will be enforced strictly. *See Protest of Bel-Air Electric Construction, Inc.*, 98-ODRA-00084; *Protest of Raisbeck Commercial Air Group, Inc.*, 99-ODRA-00123; *Protest of Aviation Research Group/U.S., Inc.*, 99-ODRA-00141.

The ODRA Procedural Regulation specifically provides for summary disposition of bid protests that have not been filed timely. 14 C.F.R. §17.19 provides:

(a) at any time during the Protest, any party may request, by Motion to the Office of Dispute Resolution for Acquisition, that –

(1) the Protest, or any portion of a Protest, be dismissed for lack of jurisdiction, if the Protestor fails to establish that the Protest is timely....

Before granting such a motion or recommending that the Administrator grant such a motion, §17.19(e) directs that the ODRA:

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.

In its Protest, Boca alleges that it “is a manufacturer of the product being sought out under the SIR. Boca has previously participated in other FAA procurements for this product.” *See* Boca Protest at 1. Boca’s Protest further alleges that Boca “makes its protest within five working days of being made aware of the intent of the FAA.” Boca Protest at 2. Boca also alleges that, prior to the Internet Announcement, it had made “numerous attempts” to communicate with the FAA regarding the procurement and that:

Several weeks later unknown to Boca, the FAA announced their intent (via an Internet posting) to award a Sole Source contract for this product to a foreign entity.

Finally, Boca alleges that a “compelling reason” exists to terminate this Solicitation, because “cost savings from purchasing hardware from a United States company, including Boca Systems, Inc., would be of vital interest to the FAA.” Boca Protest at 2. While the ODRA accepts the allegations of Boca’s Protest as true for purposes of the present Motion, the allegations do not support a finding that the Protest was timely filed.

All of the facts material to consideration of the instant Motion are undisputed. In this case, the Product Team’s “announcement of intent to award a contract to IER,

Inc. on a single source basis for the replacement and upgrade of Flight Data Input/Output (“FDIO”) Peripheral Thermal Printers” (“Announcement”) was published on the Internet in accordance with the requirements of the AMS on June 7, 2000. *See* Product Team Announcement attached to Motion; and Affidavit of Contracting Officer Mary McGrath. The Announcement set forth an expiration date of June 14, 2000. The Announcement included, as Attachments A and B, respectively, a Statement of Work and a Specification. McGrath Affidavit.

Three companies responded to the Announcement, and one of the three provided a Capability Statement. However, Boca did not respond to the Announcement. McGrath Affidavit. Boca’s protest allegations indicate that Boca did not learn of the Announcement until after the stated closing date. Boca Protest at 2. On June 27, 2000, *i.e.*, thirteen days after the closing date of the Announcement, Contracting Officer McGrath received an electronic mail inquiry from Boca, requesting information on the FAA’s plans for acquisition of the FDIO Printers. McGrath Affidavit. Ms. McGrath responded to the inquiry by contacting a representative of Boca by telephone. The date of the telephone conversation has not been specified in the filings of either party. However, based on the record, the conversation in question must have occurred on either June 27, 28, 29 or 30. On June 30, 2000, Boca submitted a protest to the Contracting Officer via electronic mail. McGrath Affidavit. However, Boca did not file its protest with the ODRA until July 7, 2000, *i.e.*, 23 calendar days after the closing date of the Announcement.<sup>1</sup>

In its Opposition to the Motion to Dismiss, Boca does not take issue with any of the material facts referenced in the Product Team’s supported Motion. Nor did Boca file its own affidavit in support of its position. Rather, Boca attempts to distinguish the decision of the *Protest of Raisbeck, Commercial Air Group, Inc.* 99-ODRA-00123, which is cited in the Product Team’s Motion. The Opposition references “substantial differences”

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<sup>1</sup> §17.15 expressly provides that protests are initiated only by filings with ODRA. The filing of a protest with the Contracting Officer does not serve to toll the time limitations for filing with the ODRA. For the reason discussed herein, even had Boca filed its protest with the ODRA on the same date it filed with the Contracting Officer, the Protest would still have been untimely.

between the cases. Essentially, Boca alleges that it was involved as a bidder and a bid protester in the 1996 original procurement of the printers that are being replaced and upgraded through the current Announcement. Boca claims, that it “relied [on] being a qualified bidder on the previous Solicitation to receive the subject package without requesting it. Sending the bid package to previously qualified bidders is usual general practice for government procurements.” Boca Opposition at 2.

Essentially, Boca contends that because it participated in the original Solicitation in 1996, its case is distinguishable from *Raisbeck, supra*. However, Boca’s status as an unsuccessful bidder and an unsuccessful protester in the original solicitation related to this requirement does not provide it with a special status with respect to receipt of announcements for follow-on procurements. There is no requirement under the AMS that all prospective contractors be individually notified of an acquisition. Furthermore, the publication of notice through an Internet posting, and the requirement that potentially interested contractors monitor the FAA Website are well established under the AMS. *See Raisbeck, supra*.

This case is analogous in several respects to *Raisbeck*. Both in *Raisbeck* and here the Protestors were not aware of the single source announcement until after the last date on which notice was published on the Internet. *Raisbeck* claimed that its protest filing was timely because it occurred within seven business days of its first learning of the single source Announcement. Similarly, the record herein demonstrates that Boca filed its protest shortly after learning from the Contracting Officer of the Internet Announcement. In both cases the filing of the Protest with the ODRA occurred long after the closing date of the Announcement on the Internet.

In *Raisbeck*, the ODRA concluded, and the Administrator held that “*Raisbeck* reasonably should have known the basis for its protest within seven days prior to the date of filing the protest.” *Raisbeck, supra*. Thus, it was held that *Raisbeck* failed to file its protest

“not later than seven (7) business days after the protester knew of should have known of the grounds for the protest...” 14 C.F.R. §17.15(a)(3)(i).

However, the instant case also differs from *Raisbeck* because it presents an initial question concerning which of the timeliness provisions of 14 C.F.R. §17.15 is applicable *i.e.*, the provision set forth in §17.15(a)(1) or in 17.15(a)(3)(i). Generally speaking, an announcement of sole source intent, in and of itself, does not meet the definition of a solicitation or a SIR under the AMS or §17.15(a)(1). However, the Announcement here included a fourth paragraph, which stated:

The FAA invites interested vendors to submit a capability statement, no later than the closing date of this Announcement, of no more than three (3) pages, describing their ability and resources to meet the requirements of the Statement of Work, and the Technical Specification for the thermal printers used in the FDIO program. See Attachments A and B below.

The ODRA views the quoted language of the Announcement as an express request for information on competing products. Thus, in our view the Announcement included a “solicitation or SIR” as broadly defined in the AMS, and thus is within the purview of §17(a)(1). *Protest of Aviation Group/U.S., Inc., supra.*

The *Protest of Aviation Research Group/U.S., Inc.*, did not involve a sole source announcement but, rather a “Market Survey”. There the ODRA concluded and the Administrator held that a Market Survey is a form of screening information request or “SIR” because the Market Survey in question “clearly invited potential offerors to submit their product for purposes of screening by means of a product demonstration...” Thus, the ODRA concluded the timeliness provisions of §17.15(a)(1) were applicable and the

