

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

FINDINGS AND RECOMMENDATIONS

**Matter: Protest of Galaxy Scientific Corporation
 Regarding Proposed Single Source Award of
 Electronic Document Imaging and Workflow Contract**

Docket No.: 01-ODRA-00193

Appearances:

For the Protester, Mr. Glenn Botkin, Technology Director

For the Agency Product Team: William G. Nelmes, Esq., FAA Southern Regional Office

I. INTRODUCTION

On June 27, 2001, Galaxy Scientific Corporation (“Galaxy”) submitted its bid protest (“Protest”) to the Federal Aviation Administration’s Office of Dispute Resolution for Acquisition (“ODRA”). Galaxy protested the FAA Southern Region’s (“Region”) announcement of its intention to award a contract on a single source basis for electronic document imaging workflow services (“Announcement”). On July 6, 2001, counsel for the Region filed a supported motion to dismiss the Protest on grounds of lack of timeliness (“Motion”). On July 13, 2001, Galaxy filed a supported opposition to the Motion (“Opposition”).

For the reasons discussed below, the OIRA concludes that the material, undisputed facts establish that the Protest was not timely filed in accordance with the requirements of the OIRA Procedural Regulation, 14 C.F.R. Section 17.15(a)(3)(i). The OIRA therefore recommends that the Administrator grant the Region's Motion and summarily dismiss the Protest.

II. MATERIAL FACTS.

All of the material facts relevant to consideration of the Region's Motion are not in dispute. On June 5, 2001, the Region's Contracting Officer Theresa K. Burgess published the Announcement of the Agency's intention to award a single source indefinite-delivery, indefinite-quantity contract on the FAA Internet Website. *See* Announcement, attached as an exhibit to the Galaxy Protest; Affidavit of Glenn Botkin, attached to Galaxy Opposition. The Announcement set forth an expiration date of June 29, 2001, and stated:

The Federal Aviation Administration (FAA) intends to issue a single source indefinite-delivery, indefinite-quantity contract to 170 Systems of Cambridge, Massachusetts, for design, programming, implementation, training and support for various electronic document imaging and workflow requirements within the U.S. Department of Transportation using the MarkView and SQL*Flow software products. The FAA purchased an unrestricted license for MarkView and SQL*Flow for Oracle Applications from 170 Systems in May 2000 for the U.S. Department of Transportation, including its operating administrations, along with software support for four option years. Under separate contract, 170 Systems has designed, programmed, installed and configured the application and workflow for DELPHI, the Department's new accounting system, and DocMan, the FAA Southern Region's pilot application for F&E (Facilities & Equipment) project file management, closeout, and capitalization. The initial task under the contract will be the nationalization of DocMan, including the design, programming, installation and training.

The contract will be issued to 170 Systems by approximately June 29, 2001, and will include four one-year options with estimated cost ceiling of \$3 million for each option year.

See Affidavit of Contracting Officer Theresa K. Burgess, dated July 6, 2001 at ¶3. On Wednesday, June 6, 2001, Galaxy became aware of the procurement. *See* Botkin Affidavit. Beginning on Wednesday, June 6, 2001, and continuing until Thursday, June 14, 2001, Mr. Botkin attempted without success to contact the Contracting Officer. *See* Botkin Affidavit.

On Friday, June 15, 2001, Mr. Botkin had a telephone conversation with the Contracting Officer regarding the Announcement. *See* “Record of Conversation”, Attachment 2 to Botkin Affidavit. Mr. Botkin’s Record of Conversation notes that he “expressed interest in submitting a competitive proposal, stating that the 170 System’s products are not uniquely capable of satisfying the FAA’s requirements.” The Record of Conversation further reflects that:

She [the Contracting Officer] stated that she would investigate the possibility of providing the requested information, and the viability of accepting a competing proposal from Galaxy.

Mr. Botkin’s Record of Conversation with the Contracting Officer does not reflect any firm commitment from the Contracting Officer to provide Mr. Botkin with additional information; or any commitment to consider a competing proposal from Galaxy.

Mr. Botkin’s Affidavit and Record of Conversation are consistent with Galaxy’s original Protest and with the Affidavit of the Contracting Officer submitted in support of the Region’s Motion to Dismiss. The Protest alleged that sometime during the period from Monday, June 11, 2001 through Friday, June 15, 2001, a representative of Galaxy, Mr. Glenn Botkin, contacted the contracting officer “in an effort to provide competition for this requirement.” Galaxy Protest at 1. During the conversation, “Galaxy requested a copy of the Statement of Work and the sole source justification. Ms. Burgess stated that she would research the issue.” Galaxy Protest at 1. In her Affidavit in support of the Region’s Motion, Ms. Burgess confirmed that “during the week of June 11, 2001, I received a phone call from Glenn Botkin of Galaxy Scientific Corporation indicating that he has seen the Internet Announcement.” *See* Burgess Affidavit at ¶4.

On Thursday, June 21, 2001, Mr. Botkin forwarded to Ms. Burgess a follow-up e-mail, which stated:

Many thanks for taking the time to speak with me last week, and for your candor in discussing the 170 Systems announcement. Per our conversation, I would like to request the sole source justification for this action, as well as the Statement of Work for this and the preceding two 170 Systems' procurements, if it is possible to provide those items.

See e-mail message of June 21, 2001, attached to Galaxy Protest. The e-mail message from Mr. Botkin also discussed his company's interest in competing for the contract requirement and its capabilities to perform the work involved. Galaxy filed its Protest with the ODRA via telecopy on June 27, 2001. The Region provided the Statement of Work to Galaxy on July 11, 2001. See Galaxy Opposition at 5.

III. DISCUSSION

The ODRA Procedural Regulation, Section 17.15(a)(3) provides:

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 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.

As we previously held, a protest of an announcement of intention to make a single source award must be filed within seven business days after the date the Protester knew or should have known of the grounds of the Protest, unless the Announcement also contains an invitation for proposals from potential competitors. See *Protest of Boca Systems, Inc.*, 00-ODRA-00158. In *Boca Systems*, we recognized that "generally speaking, an

announcement of sole source intent, in and or itself, does not meet the definition of a Solicitation or a SIR under the Acquisition Management System (“AMS”) or Section 17.15(a)(1). In *Boca*, we went on to note that, in accordance with Section 17.15(a)(1), where a single source announcement also contains language requesting information on competing products, any protest is required to be filed by no later than the deadline established in the Announcement for submitting such information.¹

In this case, Galaxy filed its Protest prior to the expiration date of the Announcement, *i.e.*, prior to June 29, 2001. However, the Announcement at issue, unlike that at issue in *Boca Systems*, did not contain any language that expressly or implicitly requested information on competing products from other companies. Thus, any protest of the Announcement in this case was required under Section 17.15(a)(3)(i) to be filed within seven days of the date the protester knew or reasonably should have known of the grounds. *See Protest of Raisbeck Commercial Air Group, Inc.*, 99-ODRA-00123.

As we have previously stated:

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 AMS, that protests must be filed in a timely manner, and that the time limits for the filing of protests will be enforced strictly.

Protest of Boca Systems, Inc., 00-ODRA-00158, citing *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.

Moreover, the ODRA Procedural Regulation, 14 C.F.R. Section 17.19 contemplates summary dismissal of untimely bid protests. It expressly provides:

¹ Section 17.15(a)(1) provides: “Protests based upon alleged improprieties in a solicitation or a SIR that are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for the receipt of initial proposals.”

(a) that 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....

Galaxy essentially takes the position that, notwithstanding the fact that it filed the Protest on June 27, 2001, it still does not have enough information and thus is exempt from applicable time limitations. Galaxy attempts to argue that:

The Galaxy Protest on June 27, 2001, was a prophylactic protest, because Galaxy was not provided the information needed to make an informed decision. Galaxy still does not understand what the parameters are with respect to the Announced Single Source Contract.

See Galaxy Opposition at 4. In opposing the Region’s Motion to dismiss, Galaxy relies heavily on its repeated efforts to confer with and obtain additional information from the Region regarding the procurement. In this regard, the Procedural Regulation clearly states that:

Offerors or prospective offerors shall file a protest with the Office of Dispute Resolution for Acquisition in accordance with Section 17.15. The protest time limitations set forth in Section 17.15 will not be extended by attempts to resolve a potential protest with the Contracting Officer.

See ODRA Procedural Regulation Section 17.13(c). Thus, Galaxy’s efforts to confer with the Region did not in and of themselves extend the mandatory time limits for protesting the single source Announcement.

Galaxy’s Opposition also indicates that after receiving the Statement of Work from the Region on July 11, 2001, it now has “sufficient information” that “should permit Galaxy’s Protest to continue to resolution.” *See* Galaxy Opposition at 5. Despite this allegation, Galaxy has pointed to no new information from the Statement of Work to support its Protest. Rather, it asserts that the Statement of Work “still does not clearly

