

## **PUBLIC VERSION**

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

## **FINDINGS**

**Matter:**       **Equal Access to Justice Act Application of IBEX Group, Inc.  
Regarding Protest Under Solicitation No. DTFA01-02-R-031130**

**Docket No.:**  **02-ODRA-00254EAJA**

### *Appearances:*

For the Applicant, IBEX Group, Inc.: Eric J. Marcotte, Esq., Winston & Strawn

For the FAA Headquarters Product Team: Maureen Cummings-Spickler, Esq.

### **I. Introduction**

IBEX Group, Inc. (“IBEX”) filed the instant application for relief under the Equal Access to Justice Act, 5 U.S.C. §504 (“EAJA”). The application arises from an Order of the Administrator issued on May 2, 2003 (“Order”) in the *Consolidated Protests of Consecutive Weather, Eye Weather, Windsor Enterprises and IBEX Group, Inc.*, 02-ODRA-00250, 02-ODRA-00251, 02-ODRA-00252 and 02-ODRA-00254. The Order involved four separate consolidated bid protests filed in connection with an FAA procurement of contract weather observer (“CWO”) services at designated groupings of airports located in the United States and Puerto Rico (“Procurement”). The Procurement was conducted by the FAA Headquarters Air Traffic Planning and Procedures, CWO Program Office Product Team (“Product Team”) and involved two Solicitations, namely, Solicitation DTAF01-02-R-03113, which was a small business set-aside (“Restricted Solicitation”); and Solicitation DTFA01-02-R-031130, which was not restricted to small businesses (“the Unrestricted Solicitation”). The Restricted Solicitation contemplated

possible awards of twelve groupings of weather observations sites (Site Groups 1-12). The Unrestricted Solicitation contemplated the possible awards of four groups of sites (Site Groups 13-16). IBEX had filed a protest with respect to awards of all four Site Groups made by the Product Team under the Unrestricted Solicitation.

In the Order, the Administrator adopted Findings and Recommendations of the Office of Dispute Resolution for Acquisition (“ODRA”) and, among other things, dismissed for lack of standing the IBEX protest with respect to one of the four awards (that for Site Group 16) and sustained in part the remainder of the IBEX protest, directing the Product Team to conduct a reevaluation of the proposals consistent with the ODRA’s Findings and Recommendations, in order to determine whether IBEX would be entitled to an award of one or more of the other three Site Groups, *i.e.*, Site Groups 13, 14 and/or 15.<sup>1</sup>

The mandated reevaluation ultimately did not result in an award to IBEX. The ODRA finds, however, that IBEX is an eligible small business entity for purposes of EAJA relief and that it qualifies as a “prevailing party” within the meaning of the EAJA. The ODRA finds further that certain of the Product Team’s positions were without substantial justification and that there are no special circumstances that would render an EAJA award unjust. The ODRA therefore finds that IBEX is entitled to an award of EAJA fees and expenses. Nevertheless, because IBEX’s protest was not sustained completely, the EAJA claim requires apportionment. In this connection, for the reasons explained below, the ODRA finds that IBEX is entitled to recover for 54% of the fees and expenses claimed. The amount resulting from the application of this percentage must be reduced further, however, to eliminate any fees and expenses that may have been incurred in connection with a concurrent ODRA alternative dispute resolution (“ADR”) process. Because the present record does not contain sufficient information to permit the ODRA to determine the amount of such ADR-related fees and expenses, further proceedings are required in accordance with the accompanying Order.

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<sup>1</sup> Pursuant to the Solicitation language, a contractor could receive awards for **no more than** two Site Groups. *See* AR, Tab 4, §L.5, “Number of Awards,” page L-3. The Solicitation does not preclude limiting an award to a single Site Group for a particular contractor.

## II. Factual Background

By letter of its counsel dated December 18, 2002, IBEX had filed its protest regarding the four awards under the Unrestricted Solicitation of Site Groups 13 and 15 to MacAulay Brown, Inc. (“MAB”) and of Site Groups 14 and 16 to SERCO Management Services, Inc. (“SERCO”). Four general grounds of protest were raised:

1. allegedly improper technical evaluation;
2. allegedly improper risk evaluation;
3. allegedly improper failure to conduct discussions with IBEX; and
4. allegedly improper best value determination

Finding 115.<sup>2</sup> The protest provided the following additional detail as to these four grounds:

First, as discussed herein, the agency's award decision was based on an inappropriate and unequal evaluation of the relative technical merits of the proposals submitted by IBEX and the other offerors. In connection with its evaluation of IBEX's technical proposal, the FAA repeatedly downgraded IBEX's proposal on the basis of alleged "conflicting information" and "inconsistencies" which simply do not exist. Similarly, the procurement record reveals that IBEX's proposal was significantly downgraded on the basis that IBEX allegedly omitted various information requested by the SIR. However, an examination of IBEX's proposal reveals that the allegedly omitted material was actually provided. Moreover, on information and belief, the FAA awarded higher scores to competing firms even though those proposals offered no material advantage over IBEX's proposal. Had the FAA conducted a reasonable and equal evaluation of the technical proposals submitted, as required by the Solicitation, IBEX's proposal surely would have been among the highest-scored.

Second, the FAA compounded the errors contained in its technical evaluation when it relied on a portion of this defective and improper evaluation as a basis to assign IBEX an Overall Risk rating of "Moderate." The sole basis contained in the procurement record for the FAA's assignment of a "moderate" risk rating to

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<sup>2</sup> “Finding” refers to the numbered Finding of Fact as set forth in the ODRA’s Findings and Recommendations in the Consolidated Protests.

IBEX's proposal is the unsupported finding that IBEX's proposal contained "conflicting" or "inconsistent" information. Therefore, correction of the FAA's erroneous technical evaluation also requires that IBEX's risk rating be revised to "Low" risk -- an assessment consistent with IBEX's incumbent status at 15 of the 22 sites covered by its proposal. In addition, the FAA used the risk rating assigned the offerors as a significant discriminator during its best value evaluation. The FAA's failure to disclose the relative importance of the risk factor vis-à-vis the specified evaluation factors prejudiced IBEX who would have structured its proposal differently had it known of the significant importance attached to any perceived risk.

Third, the FAA failed to engage in meaningful discussions with IBEX and thereby denied IBEX any opportunity to address various alleged weaknesses in its proposal and dispel the evaluators' confusion. Had IBEX been afforded such an opportunity, it could have clearly substantially enhanced its evaluated scores and its chances for contract award by addressing alleged deficiencies and errors that could have been easily explained. The FAA improperly denied IBEX any such opportunity.

Fourth, the FAA clearly failed to conduct a proper best value analysis. Instead of properly weighing the qualitative benefits associated with IBEX's proposal and those of the other offerors, the FAA applied a rigid and mechanistic "point-per-dollar" scheme that was based on its erroneous technical scores. Because this process failed to consider the qualitative analysis and tradeoffs contemplated by the SIR, this analysis was flawed and cannot sustain the awards made. Moreover, instead of exercising independent business judgment in evaluating the proposals as contemplated by the FAA's guiding regulations, the Source Selection Officer simply adopted the evaluation team's findings with no discernable analysis. Thus, the selection decision is utterly devoid of any reasoned analysis explaining why the substantial price premiums associated with the winning offers will be justified by objective gains in performance.

IBEX Protest, pages 1-2; Finding 116. IBEX argued that a proper evaluation of its proposal would have yielded for IBEX one of the highest of the technical scores; that it should have received a risk rating of "Low" (rather than the "Moderate" rating it had been assigned); and that, in light of the significant price advantages it offered, it should have been in line for awards of the four Site Groups in question. IBEX concluded its protest with a request that the MAB and SERCO contracts be terminated for the FAA's

convenience and that the Administrator either direct an immediate award of at least two of the four Site Groups<sup>3</sup> to IBEX or, alternatively, that the Administrator require a re-competition in accordance with the terms of the Solicitation. IBEX Protest at 25; Finding 117.

As part of its protest, IBEX took specific issue with only two of three Technical Sub-factors – Sub-factor A, Staffing Plans and Sample Schedules; and Sub-factor B, Technical Implementation Plans. The evaluation of Sub-factor C, Technical Methodology and Approach, was not addressed in the protest. Further, with regard to Sub-factor B, Sub-element 3, the Phase-In/Phase-Out Plan, IBEX contested only two of the four weaknesses assigned by the Product Team. Pursuant to the ODRA’s recommendations, the Administrator sustained IBEX’s protest fully with respect to Technical Sub-factor A. As to Sub-factor B, the Administrator denied IBEX’s challenge to the evaluation of Sub-element 1, Facility Training Plan; sustained only 1 of 3 challenged weaknesses under Sub-element 2, Quality Assurance; and sustained fully the two challenged weaknesses under Sub-element 3, the Phase-In/Phase-Out Plan. *See Findings and Recommendations, Section III.E.2 in Consolidated Protests of Consecutive Weather, Eye Weather, Windsor Enterprises and IBEX Group, Inc., supra.* Pursuant to the ODRA’s recommendations, the Administrator also sustained the IBEX protest grounds relating to the Overall Risk evaluation and the alleged lack of meaningful discussions. As to the final protest ground, however, the Administrator did not sustain IBEX’s position. Rather, she adopted the following ODRA findings pertaining to the methodology employed by the Product Team for its Best Value determination:

Based on its review of the IST Report and the Source Selection Decision Memorandum (SSDM) (AR, Tabs 16 and 18), aside from the items improperly downgraded within the Technical scoring, as noted above, it appears to the ODRA that the Product Team evaluators followed the specified evaluation criteria and weighting scheme as set forth in the Solicitation when making their “best value” determination. As to the purported absence of a “qualitative” analysis of the proposals, it would seem that the Overall Risk analysis was intended to be precisely that. In other words, when assigning an adjectival rating for overall risk, the

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<sup>3</sup> See Note 1, *supra*.

Product Team would necessarily consider not only the scoring of individual Technical and Business/Management sub-factors and sub-elements, and any associated computations such as those of “price-per-point,” but the nature and significance of the individual strengths and weaknesses noted by the evaluators on an overall *qualitative* basis.

Moreover, in terms of a price/technical tradeoff, the SIR speaks about the “opportunity” for a tradeoff (AR, Tab 4, Section M.1.1), and *does not mandate* a tradeoff analysis or discussion under all circumstances. Where, as had been the case here, the overall weighted score assigned to IBEX was found to have been substantially below the scores of the awardees, and its Overall Risk rating was higher than theirs, the Product Team had a rational basis for dispensing with a tradeoff analysis, especially where their prices were similarly evaluated as fair and reasonable in accordance with the specified evaluation criteria for price proposals. On the other hand, were the Technical scoring to be modified in the manner previously described, and were the Overall Risk rating also to improve as a result, some analysis of price versus weighted scoring and Overall Risk might be required.

No appeal was taken from the Administrator’s Order, by any of the protesters in the Consolidated Protest. By letter dated May 30, 2003, counsel for IBEX submitted the instant EAJA application, seeking a total recovery of attorneys’ fees and expenses of \$23,790.32. Legal fees were capped at \$125 per hour, pursuant to the statute and the FAA EAJA regulations at 14 C.F.R. §14.05(b). The application did not identify hours or costs expended by specific protest grounds.<sup>4</sup>

The Product Team filed an Opposition to the application on July 2, 2003. Although not contesting IBEX’s claimed status as a small business entity in terms of its eligibility for EAJA recovery, the Product Team asserted that IBEX was not a “prevailing party” within the meaning of the EAJA, that the Agency’s position was “substantially justified,” and that, in any event, the claimed fees and expenses must be apportioned, since the protest was not entirely successful. Further, the Product Team asserted that any allowance of

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<sup>4</sup> The Product Team performed a reevaluation in accordance with the Administrator’s Order and submitted a report to the Administrator via the ODRA by letter dated June 2, 2003. The reevaluation did not result in any change with regard to the awards of Site Groups 13, 14 or 15. By letter dated June 3, 2003, IBEX filed a separate protest regarding the reevaluation. That protest was subsequently denied. *See Protest of IBEX Group, Inc.*, 03-ODRA-00275. The instant application does not include any fees or expenses associated with that protest.

fees and expenses under the EAJA should be reduced by legal costs incurred by IBEX in connection with IBEX's participation in a concurrent ADR effort aimed at settling the protest.<sup>5</sup>

### **III. Legal Analysis**

The Administrator has previously determined that the EAJA is applicable to ODRA adjudicative proceedings. *See Findings and Recommendation Regarding the Equal Access to Justice Act Application of Weather Experts, Inc. pursuant to FAA Order ODR 97-25, 96-ODRA-00013EAJA, and FAA Order No. ODRA-98-1EAJA.*

Here, it is undisputed that IBEX submitted a timely application and that it qualifies as a small business entity in terms of eligibility for EAJA recovery. Accordingly, the issues to be considered here include: (1) whether IBEX "prevailed" over the Government; (2) whether the Government's position was "substantially justified"; (3) whether special circumstances would make an award unjust; and (4) whether the claimed fees and costs are reasonable. *See generally Weather Experts, supra, quoting from Commissioner, Immigration and Naturalization Service v. Jean, 496 U.S. 154, 158 (1990).*

#### **A. IBEX Was A "Prevailing Party"**

As the ODRA observed in *Weather Experts, supra*, although the EAJA does not define the term "prevailing party," the Supreme Court held in *Texas State Teachers Ass'n v. Garland Independent School District*, that "[p]laintiffs may be considered 'prevailing parties' for attorney's fee purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." 489 U.S. 782, 789 (1989), *quoting Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Notwithstanding

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<sup>5</sup> In addition, the Product Team Opposition presented an argument contesting generally the FAA's authority to provide EAJA relief in connection with ODRA proceedings. At the ODRA's request, the parties submitted supplemental briefs regarding this argument, by letters dated July 23, 2003 and July 30, 2003, respectively. Not only was the Product Team argument contrary to long-established ODRA case precedent and prior Administrator's Orders regarding such authority, *see Weather Experts, Inc.*, 96-ODRA-00013EAJA, as well as to the FAA's EAJA regulations, which expressly encompass ODRA adjudications, *see* 14 C.F.R. §§14.21, 14.27(b), 14.28(b), but it is at odds with Section 224 of the recently enacted 2004 FAA Reauthorization Act, Public Law 108-176 (Dec.12, 2003; 117 Stat. 2490), which confirmed that ODRA adjudications of both bid protests and contract disputes are to be "subject to . . . 5 U.S.C. §504 [the Equal Access to Justice Act]." The Product Team's jurisdictional argument accordingly is rejected.

arguments to the contrary raised by the Product Team in its Opposition to the EAJA application, and notwithstanding that ultimately the reevaluation did not produce an award for IBEX, it is clear that IBEX did succeed with respect to several significant issues raised in its protest and that it secured an Order from the Administrator directing a reevaluation of IBEX's proposal. Thus, IBEX must be considered a "prevailing party" for purposes of the EAJA, since it achieved a significant benefit sought in the litigation.

**B. The Product Team Had No "Substantial Justification" For The Findings Successfully Challenged By IBEX**

In accordance with longstanding EAJA case precedent, the ODRA previously has recognized that an Agency position may be considered "substantially justified," even though it was found to be an incorrect position, where the position had a "reasonable basis both in fact and law." *See EAJA Application of Martin Resnik Construction Company*, 99-ODRA-00111EAJA, citing *Pierce v. Underwood*, 487 U.S. 552, 566 n.1 (1988). In *Weather Experts*, *supra*, for example, notwithstanding that it had recommended that a protest be sustained, the ODRA found the FAA's position to have been "substantially justified" based on the facts and policy guidance that was available to the participants when the acquisition was conducted. In that regard, the ODRA noted in *Weather Experts* that, as a direct result of the protest there, the FAA's Acquisition Management System policy guidance had been supplemented and that the additional guidance had not been available to the participants when the acquisition was being conducted. In that context, the ODRA concluded, it could not say that the Government's position was not "substantially justified." *Id.*; *see also EAJA Application of Camber Corporation*, 98-ODRA-00102EAJA.

There were no similar circumstances in the present case. The Product Team has not advanced reasonable factual or legal bases for the positions taken by it on the specific items challenged within the IBEX protest that the ODRA found were without a "rational basis."

**C. No “Special Circumstances” Exist That Would Preclude An EAJA Award**

As was noted in *Martin Resnik, supra*, the “special circumstances” exception is applied in relatively rare cases to negate the Government’s responsibility for attorneys’ fees under the EAJA. “This ‘safety valve’ helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. ” *Dougherty v. Lehman*, 711 F.2d 555, 563 (3d Cir. 1983), *quoting*, H.R. No. 1418, 96th Cong. 2d Sess., at 10-11, *reprinted in* 1980 U.S. Code Cong. & Ad. News, at 4989-90. Here, the Product Team has not identified any “special circumstances” that would preclude an EAJA award for IBEX, and the ODRA can find none.

**D. In Terms Of “Reasonableness,” The Claimed Fees And Expenses Must Be Apportioned And Must Be Reduced By Amounts Associated With The Parties’ ADR Efforts**

The amount being sought for legal fees and expenses appears to be within the realm of “reasonableness,” considering the size of the procurement involved and the complexity of the issues addressed in the protest. Nevertheless, in the past, the ODRA has recognized that, where an applicant does not prevail on all issues pursued as part of adjudication, the fees and expenses claimed must be apportioned equitably. *Martin Resnik, supra*. Here, in terms of legal fees and expenses, IBEX has not segregated its claimed fees and expenses by individual protest grounds and issues. Thus, some other method of apportionment must be resorted to, in order to provide IBEX with appropriate relief. Although there may be instances where the amount of legal fees incurred may have been necessary regardless of the numbers of issues raised<sup>6</sup>, the ODRA does not find that to have been the case with respect to the \$23,790.32 being sought for legal fees and expenses. Accordingly, as in *Martin Resnik, supra*, the ODRA finds that the fees and expenses here must be apportioned based upon the degree of success achieved by IBEX

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<sup>6</sup>*See Fanning, Phillips & Molnar*, VABCA-3856E, 97-2 BCA ¶29,008 (Board allowed 100% of the \$1,221.30 of legal fees apportioned to the one claim (of two) that was successful, even though the contractor had only recovered \$16,500 of the \$49,743.31 sought for that claim, reasoning that those fees “were necessarily expended by the Applicant in order to recover even the \$16,500 which the Board awarded. . . .”)

in its protest. This would also accord with the methodology applied by the General Accounting Office in conjunction with its bid protest adjudications – albeit that the authority for legal cost reimbursement in that forum is not under the EAJA. *See Interface Flooring Systems, Inc. – Claim for Attorneys’ Fees*, 66 Comp. Gen. 597 (1987), 87-2 CPD ¶106; *Matter of ViON Corporation – Claim for Costs*, B-256,363. B-256,363.3 (Unpublished, April 25, 1995).

Here, there were four grounds of protest. As noted above, as to the challenge to the Technical evaluation, the first protest ground, the Administrator sustained IBEX’s protests regarding all of Technical Sub-factor A (Staffing Plans and Sample Schedules); denied its challenge to Sub-factor B, Sub-element 1, Facility Training Plan; sustained its challenge to only 1 of 3 weaknesses assigned under Sub-factor B, Sub-element 2, Quality Assurance; and sustained both of the challenged weaknesses under Sub-factor B, Sub-element 3, the Phase-In/Phase-Out Plan.

Two of the other three protest grounds – those relating to the Overall Risk evaluation and alleged lack of adequate discussions – were directly tied to IBEX’s challenge of part of the Technical evaluation and were dependent on the degree of success that IBEX would achieve in that challenge. More specifically, both of these other grounds were tied to the Product Team’s disputed findings regarding alleged “inconsistencies” within the IBEX proposal, *i.e.*, the supposed inconsistencies in IBEX’s Staffing Plans and Sample Schedules under Technical Sub-factor A. IBEX explains in its protest that the “Moderate” Overall Risk rating had been assigned to IBEX solely on the basis of such purported “inconsistencies.” (“The sole basis contained in the procurement record for the FAA’s assignment of a ‘moderate’ risk rating to IBEX’s proposal is the unsupported finding that IBEX’s proposal contained ‘conflicting’ or ‘inconsistent’ information.” IBEX Protest, page 2). Likewise, the protest’s challenge to the Product Team’s failure to conduct meaningful discussions was directly linked to these alleged “inconsistencies.” (“As explained above, the FAA downgraded IBEX’s technical proposal on the basis of alleged ‘conflicts’ and ‘inconsistencies’ contained in IBEX’s staffing plan and target schedules.” IBEX Protest, page 22).

In contrast, IBEX’s fourth protest ground – its criticism of the Best Value determination – was at least somewhat independent of the Technical challenge. Unlike the other grounds, it cannot be said that the Administrator sustained IBEX protest on this protest ground. On the other hand, by reason of the ordered re-evaluation, the Best Value determination and associated Technical/Price tradeoff issue had to be revisited. Under these circumstances, it would be reasonable to apportion EAJA recovery based solely on the degree of success achieved in conjunction with IBEX’s Technical challenges of the first protest ground. In addition, because the protest of one of four Site Groups was dismissed for lack of standing, the apportioned fees and expenses must be reduced further by 25%, *i.e.*, multiplied by 75%. The ODRA thus finds that IBEX would be entitled to recover approximately 54% of the eligible fees and expenses claimed. This percentage was derived as follows:

Technical

Sub-factor A (Staffing Plans and Sample Schedules) fully sustained:	50%
Sub-factor B (Implementation Plans) [16.7% for each of three sub-elements]	
Sub-element 1 (Facility Training Plan) denied:	0%
Sub-element 2 (Quality Assurance) – 1 of 3 challenged weaknesses sustained:	5.6%
Sub-element 3 (Phase-In/Phase-Out Plan) – 2 of 2 challenged weaknesses sustained:	<u>16.7%</u>
Total Proportion of Technical Protest Ground Sustained	72.3%
Percentage of Protest Partially Sustained	<u>x75%</u>
Proportion of Fees and Expenses Recoverable	<u>54.2%</u>

The ODRA finds further that the amount resulting from the application of the 54% figure must be reduced by any fees and expenses that may have been incurred in connection with the parallel ADR efforts that were ongoing during the course of the adjudication. *See EAJA Application of Camber Corporation, supra*, at Footnote 1. Because the record does not reveal the amounts of the fees and expenses that may have been incurred in

conjunction with such ADR efforts, the ODRA must reopen the record at this stage to obtain additional information from the parties regarding this issue.<sup>7</sup>

#### **IV. Conclusion**

For the reasons and to the extent set forth above, the ODRA finds that the application of IBEX for EAJA recovery is meritorious. By the accompanying Order, the parties are directed to make additional submissions relating to the final computation of EAJA fees and expenses in accordance with the foregoing findings.

\_\_\_\_\_/s/\_\_\_\_\_  
Anthony N. Palladino  
Dispute Resolution Officer  
Associate Chief Counsel and Director  
FAA Office of Dispute Resolution for Acquisition

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<sup>7</sup> The parties are encouraged to resume their parallel efforts to utilize ADR techniques to reach an amicable resolution of this discrete issue. This would be in accord with established FAA policy and the Congressional mandate of Section 224 of the 2004 FAA Reauthorization Act that acquisition-related disputes be resolved by the FAA by means of consensual ADR techniques “to the maximum extent practicable.”