

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

Protest of)
)
Security Aviation) Docket No. 11-ODRA-00577
)
Pursuant to Solicitation DTFANM-11-R-00010)

DECISION ON MOTION TO DISMISS
FOR LACK OF TIMELINESS

I. INTRODUCTION

On May 17, 2011, Security Aviation (“SA”) filed a Protest (“Protest”) with the Office of Dispute Resolution for Acquisition (“ODRA”). The Protest challenges the award of a contract (“Contract”) to Alaska Air Transit (“AAT”) for air transportation services between Kenai and Middleton Island, Alaska. *Protest* at 1. The Contract was awarded under Solicitation DTFANM-10-R-00010 (“Solicitation”), issued by the Federal Aviation Administration’s (“FAA”) Northwest Mountain Region (“Region”). SA filed the Protest “on the basis that the FAA failed to perform its due diligence prior awarding this contract to an operator who does not meet the equipment requirements of the RFO.” *Protest* at 1. The Region’s Motion to Dismiss the Protest as untimely (“Motion”) currently is before for the ODRA for consideration as a preliminary matter. In accordance with the ODRA Procedural Regulation at 14 C.F.R. § 17.19(e), SA was provided an opportunity to respond to the Motion, but failed to do so by the established deadline (or thereafter). For the reasons stated below, the ODRA finds that the Protest was not timely filed and therefore grants the Region’s well supported, unopposed Motion and recommends that the Protest be dismissed with prejudice.

II. DISCUSSION

The ODRA Procedural Regulation, at 14 C.F.R. § 17.15(a), establishes deadlines for the filing of bid protests, as follows:

(a) Only an interested party may file a protest, and shall initiate a protest by filing a written protest with the Office of Dispute Resolution for Acquisition within the times set forth below, or the protest shall be dismissed as untimely:

...

(3) For protests other than those related to alleged to solicitation improprieties, the protest must be filed on the later of the following two dates:

(i) Not later than 7 business days after 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 5 business days after the date on which the Product Team holds that debriefing.

14 C.F.R. § 17.19(a). The ODRA Procedural Regulation also provides for summary dismissal of untimely protests:

(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 count or portion of a protest, be dismissed for lack of jurisdiction, if the protest fails to establish that the protest is timely, or that protest has no standing to pursue the protests;

14 C.F.R. § 17.19(a). It further is well established that the deadlines for the filing of bid protests are strictly construed and may not be extended by the ODRA. 17 C.F.R. § 17.13(c); *Protest of Grayhawk Construction, Inc.*, 08-ODRA-00475. Finally, prior to entering a dismissal decision, the protester must be allowed an opportunity to respond to the motion. 14 C.F.R. § 17.19(e).

The facts material to deciding the Motion are undisputed. The Protest itself reveals undisputed facts relevant to the timeliness question. The Contract was awarded on December 20, 2010. *Protest* at 1. By December 23, 2010, SA was aware of the award, and “requested information and documentation regarding the selection process for award of the contract to Alaska Air Transit.” *Id.* The Region responded with an undated letter¹ addressing SA’s various questions about the award. *Protest* at 1-2. On March 11, 2011, SA responded to the Region’s letter, and cited information regarding the awardee’s equipment obtained on March 7, 20. *Protest* at 2-4. That information alleged that AAT could not comply with the Solicitation relating to Class B aircraft. *Protest* at 3-4. On April 13, 2011, SA notified the Region of its “intent to proceed with lodging a formal dispute” regarding the award. *Protest* at 4. Finally, as stated previously, SA filed the Protest with the ODRA on May 17, 2011. *Protest* at 1.

The Region filed its Motion on May 20, 2011, three days after the Protest was filed with the ODRA. The Motion asserted that:

It is clear from the Protestor’s submissions, therefore, that this protest was not timely filed. The Protester’s letter dated March 11, 2011, establishes that it was well award of the ground for its protest at least by that date, and at least by that date it had received the [undated] written debriefing it had requested. Yet it did not file its protest until some 47 business days later.

Motion at 2. In a Supplemental Filing on May 25, 2011, the Region also provided pages 32 and 33 of the Solicitation, which contain the full text of AMS Provision 3.9.1-3 Protest (November 2002). That provision expressly states the filing deadlines set forth in the ODRA Procedural Regulation.

In a Scheduling Conference held on May 23, the ODRA directed SA to respond to the Motion by June 7, 2011. *Scheduling Conference Memorandum*, at 2. As noted above, SA did not file a response. Nor did SA seek an extension of time for filing a response. In the absence of a response, and recognizing that the Motion reiterates the correspondence

¹ The uncontroverted record shows that the Region’s letter was sent on January 6, 2011. *See Agency’s Supplement to Motion to Dismiss*, citing *the Declaration of Peggy Cuddie*, at ¶¶ 2 and 3. The precise date is not a material fact given that the Protest includes a subsequent letter dated March 11, 2011, which takes issue with certain aspects of the Region’s undated letter.

history as averred in the Protest, the ODRA finds that there are no any issues of material fact that would bar summary dismissal. *See* 14 C.F.R. § 17.21(b).

SA's sole ground of protest is its allegation that "the FAA failed to perform its due diligence prior awarding this contract to an operator who does not meet the equipment requirements of the RFO." *Protest* at 1. SA's correspondence dated March 11, 2011, and April 13, 2011 raise the identical substantive issue. *Protest* at 2-4, quoting attached letters dated March 11, 2011, and April 13, 2011. SA therefore, indisputably had the information that formed the basis of its Protest on or before March 11, 2011, or 47 business days prior to filing its Protest on May 17, 2011. Under the ODRA Procedural Regulation at 14 C.F.R. § 17.19(a)(3)(i), as well as AMS Provision 3.9.1-3 Protest (November 2002), SA was required to file with the ODRA at least 40 business days sooner than it did. Having failed to do so, it cannot now maintain its Protest. *See Protest of B&B Cafeteria*, 05-ODRA-00349 (Decision on Motion to Dismiss Protest for Lack of Timeliness).²

CONCLUSION

For the reasons discussed above, the ODRA concludes that the undisputed facts establish that SA's Protest was not timely filed as required by 14 C.F.R. § 17.19(a). The ODRA therefore grants the Region's Motion and recommends that the Protest be summarily dismissed with prejudice.

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Anthony N. Palladino
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June 9, 2011

² The ODRA does not reach the merits of SA's untimely Protest. We note, however, that even if the Protest had been timely filed, the Protest's subject matter may be attempting to raise matters that involve non-protestable matters of contract administration.