

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

**FINDINGS AND RECOMMENDATION**

**Matter: Protest of Windsor Enterprises**

**Pursuant to Solicitation DTFA14-98-R-33980**

**Docket: ODRA Docket 98-ODRA-00100**

*Appearances:*

For the Protester: Mr. Fred J. Wilmers

For the FAA Program Office: Glenn L. Brown, Esq., Senior Attorney, Great Lakes Region

**I. Introduction**

Windsor Enterprises ("Windsor") submitted this protest to the Office of Dispute Resolution for Acquisition ("ODRA") of awards made pursuant to solicitation DTFA14-98-R-33890 issued by the FAA's Great Lakes Region ("Region"). For the reasons set forth herein, the ODRA recommends that the protest be summarily dismissed.

**II. Findings of Fact**

By letter dated September 29, 1998 Windsor protested the award by the Region of eight of nine weather observation sites to C. Price Associates ("Price"). The solicitation had been conducted on the basis of the lowest cost to the Agency.

This protest constitutes the second protest filed by Windsor in connection with the same procurement. The first protest, which was filed on August 26, 1998, was voluntarily withdrawn by Windsor on September 1, 1998, as a result of an alternative dispute resolution process conducted by the ODRA. Both the original protest and the current protest essentially allege that the awardee submitted bids that were below the costs that would be incurred in performing the contract. Windsor claims that, because it would otherwise be faced to sustain losses based on those bids, the awardee will be required to

ignore provisions of the Service Contract Act, 41 United States Code, §§ 351-358 (1994) ("SCA"). In the current protest, Windsor claims that it has obtained information indicating that the awardee has defaulted on its payment obligations on contracts with the FAA's Northwest Mountain Region; and that the Great Lakes Region should therefore have found the awardee to not be a responsible bidder for the instant procurement. The ODR A previously ruled that a below cost bid will not automatically render a proposal ineligible for award. See *IBEX Group, Inc.*, 96-ODRA-00037 EAJA, FAA Order Number 98-2 EAJA.

In an initial status conference, Windsor was informed by Counsel for the Program Office that Windsor's current protest is untimely. Furthermore, the protest challenges an affirmative responsibility determination, but has not alleged any facts amounting to fraud, bad faith or the limited grounds that permit review of such determinations. In addition, there is no allegation that the awardee has been found to be in violation of the SCA by the Department of Labor or that it has been debarred. For all those reasons, in the initial status conference, the ODR A directed that the protester either withdraw the protest or show cause no later than October 15 why the protest should not be dismissed.

In response to that direction, on October 9, 1998, Windsor submitted a letter to the ODR A indicating that "There are legal technicalities, such as the ones you pointed out in your 7 October 1998 Memorandum, that would make my continuance of the protest time consuming for all parties concerned." Windsor then offered to withdraw the protest in return for an agreement that, if the awardee defaults on the current contracts, the contracts would be awarded to Windsor. Counsel for the Program Office responded to the proposal, by indicating that the Program Office was not in a position to make such a commitment to Windsor. Windsor's October 9, 1998, letter did not attempt to show cause why the matter should not be dismissed summarily.

### **III. Discussion**

Section 3.9.3.2.3.3 of the AMS provides, in pertinent part, as follows:

"Summary Dismissals – When a dispute resolution officer or special master determines that a protest...is frivolous or has no basis in fact or law, a summary decision may be issued as the recommendation to the Administrator..."

The AMS, and the decisions interpreting it, require dismissal of protests which are not timely filed. See *Bel-Air Electric Construction, Inc.*, 98-ODRA-00084, FAA Order Number ODR A-98-78. Windsor is aware that this Office has previously ruled that the ODR A will not ordinarily review matters of affirmative responsibility determinations, absent extraordinary circumstances. See *Washington Consulting Group*, 97-ODRA-000059. In addition, in a case that is analogous to this one in all material respects, this Office has recommended, and the FAA Administrator has ruled that matters of establishing labor act violations are solely within the preview of Department of Labor. See *Midwest Weather, Inc.*, 98-ODRA-00070, FAA Order Number ODR A-98-67.

The instant protest, which was filed on September 29, 1998, involves an award decision that was made sometime prior to August 26, 1998, which was the date when Windsor filed its initial protest. Since Windsor was aware of the protested decision on August 26, 1998, its protest is clearly untimely and must be dismissed on that basis.

In addition, the protest lacks a legal basis in fact or law, inasmuch as: (1) it purports to challenge an affirmative responsibility determination but alleges none of the limited circumstances that would permit a review of such a determination in the context of a bid protest; (2) it would seek to force the Program Office to act for the Department of Labor in making a Service Contract Act determination and; (3) it alleges no other facts or grounds for protest.

#### **IV. Conclusion and Recommendation**

For the reasons set forth above, the ODRA finds this protest is wholly without factual or legal basis and frivolous. Accordingly, pursuant AMS Section 3.9.3.2.3.3, the ODRA recommends that the protest be dismissed summarily and with prejudice.

\_\_\_\_\_/s/\_\_\_\_\_  
Anthony N. Palladino  
Dispute Resolution Officer  
For the Office of Dispute Resolution for Acquisition