

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

FINDINGS AND RECOMMENDATIONS

Matter: Protest of Raisbeck Commercial Air Group, Inc.

Under Solicitation No. DTFA03-99-P-10070

Docket No.: 99-ODRA-00123

Appearances:

For the Protester, Raisbeck Commercial Air Group, Inc.: G. Val Tollefson, Esq.,
Danielson, Harrigan & Tollefson, LLP

For the Awardee, DuganAir Technologies, Inc.: Gregory L. Russell, Esq., Peterson,
Russell, Cofano, PLLC

For the FAA Technical Center: Kenneth S. Dobis, Esq.

INTRODUCTION

Raisbeck Commercial Air Group, Inc. ("Raisbeck") submitted a bid protest ("Protest") to the FAA Office of Dispute Resolution for Acquisition ("ODRA") on April 2, 1999. The Protest concerns the award of a single source contract ("Contract") by the FAA's William J. Hughes Technical Center ("Center") under Purchase Order DTFA03-99-P-10070. The Contract involves the supply and installation of a noise reduction system by the awardee, DuganAir Technologies, Inc. ("DuganAir"), for use on a Boeing 727-25 aircraft owned by the FAA. On April 21, 1999, the Center filed a Motion for Summary Disposition of the Protest on grounds of lack of timeliness. For the reasons explained below, the ODRA finds that the Protest does not satisfy the timeliness requirements of the FAA's Acquisition Management System ("AMS"), and therefore recommends Summary Dismissal.

DISCUSSION

The AMS expressly provides for the summary disposition, where appropriate, of protests and contract disputes. It states that: "[w]hen a dispute resolution officer or special master determines that a protest or contract dispute is frivolous or has no basis in fact or law, a summary decision may be issued as the recommendation to the FAA Administrator. The FAA Administrator will then issue a final agency decision concerning the merits of the protest or contract dispute." *See* AMS §3.9.3.2.3.3. It is similarly well established that a protest must be timely filed in order to be considered; and that the time limits for filing of protests will be strictly enforced. *Protest of Bel-Air Electric Construction, Inc.*, 98-ODRA-00084.

The material facts relevant to consideration of the Center's Motion are undisputed; and they require that Raisbeck's protest be dismissed. The Center's intention to award the Contract was published on the Internet during the period from February 2 to February 19, 1999. Raisbeck did not file its Protest until April 2, 1999, i.e., 30 business days after the last day on which the notice was published on the Internet. The Contract included the FAA's Procurement Toolbox Clause 3.9.1-3 ("August 19, 1998"), which required that any protest be filed within seven business days after the date that the protester was aware, or reasonably should have been aware, of the Agency's action or inaction forming the basis of the protest. A seven-day time limit for the filing of protests is also set forth in AMS §3.9.3.2.1.2.

In support of its Motion, the Center cites to the decision in the *Protest of NanTom Services, Inc.*, 96-ODRA-00028. *NanTom* involved the protest of a decision by an FAA Regional Office to solicit weather observation services from some but not all of the companies listed on a Qualified Vendors List. The announcement of the vendors selected to compete was posted on the Internet on January 27, 1997. The protester, NanTom, by its own admission, did not see the announcement until February 3, 1997, and submitted its protest to the ODR on February 5, 1997. The FAA Region argued that the protest was untimely inasmuch as it had not been filed within the timeframe set forth in the applicable Disputes clause. The ODR rejected the Region's position on timeliness, finding that the "the Protester exercised the diligence necessary to meet the "reasonably should have been aware standard of clause 3.9.1-3." *See NanTom, supra, at 2.*

The Center does not dispute, and we accept as true for purposes of this Motion, Raisbeck's assertion that it was unaware of the single source announcement until March 24, 1999. In its Opposition, Raisbeck notes that while it does have a Website, "Raisbeck had not had prior procurement dealings with the FAA and had no knowledge of the FAA's unique approach to publication of notice." Opposition at 2. In its Opposition to the Center's Motion to Dismiss, Counsel for Raisbeck also states that "Raisbeck generally agrees with the Agency's statement of facts, with the following exceptions and additions." Raisbeck Opposition at 1. The stated exceptions are not material to the pending Motion.

Raisbeck's Protest was filed on April 2, 1999, i.e., seven business days after Raisbeck first learned of the single source announcement. Raisbeck argues that "since the Protest was timely with reference to Raisbeck's actual knowledge, the only question is whether

Raisbeck should have known as of some earlier date." Raisbeck Opposition at 3. Raisbeck goes on to assert that "the fairly recent adaptation by the FAA of the AMS, and its unusual use of the Internet, instead of the usual means of the CBD [Commerce Business Daily], to provide notice of procurement opportunities has in this particular case deprived Raisbeck of the opportunity to participate meaningfully in the procurement process." Raisbeck Opposition at 4. Raisbeck contends that, under the circumstances presented here, there is no reasonable basis for asserting that Raisbeck should have known of the FAA's planned action before Raisbeck received actual notice of it. Essentially, Raisbeck argues that an "actual notice" test should apply in this case. Raisbeck attempts to distinguish *NanTom* on the basis that Raisbeck, unlike *NanTom*, did not regularly do business with the FAA and was not on a regular bid list. Thus, Raisbeck reasons the "should have been aware" standard should not be applied.

There is no support in the AMS, the Contract Clause, or the case law for application of an "only on actual notice" test for timeliness of bid protests; and we decline to adopt such a standard in this case. Moreover, there is no support for holding the FAA's Internet notice policy legally insufficient. The methodology employed by the Center to announce the proposed award on the Internet was in compliance with the policies set forth in AMS Section 3.2.1.3.12. *See Protest of NanTom Services 97-ODRA-00028*. The Center was not required to publish the single source announcement in the *Commerce Business Daily*, inasmuch as the FAA has been expressly exempted by Congress from, and directed not to apply, the provisions of the Competition In Contracting Act, 41 U.S.C. §§251, *et seq.*

Moreover, the FAA's AMS policy has been in effect for more than three years. Raisbeck, like other interested potential contractors, bears the responsibility for monitoring the Internet for FAA contracting opportunities. In this case, unlike *NanTom*, it cannot be said that the protester exercised the necessary diligence. Had Raisbeck monitored the Internet, it would have known of the Center's intention to make the single source award; and it would have been in a position to timely protest. The ODRAs conclude, based on the undisputed facts, that Raisbeck reasonably should have known the basis for its protest more than seven days prior to the date of filing the Protest. The Protest therefore is untimely and must be summarily dismissed.

Because of our findings with respect to the lack of timeliness of this Protest, we did not reach the issue of whether the single source award by the Center in this case satisfies the requirements of the AMS. We note in that regard, however, that the AMS favors competition and a decision to award a single source contract must have a documented rational basis. *See Protest of Wilcox Electric, Inc., 96-ODRA-0001*.

Conclusion and Recommendation

For the reasons set forth above, the ODRAs recommend that the Protest be summarily dismissed as untimely.

_____/s/_____
Anthony N. Palladino
Associate Chief Counsel and Director
Office of Dispute Resolution for Acquisition