

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

Protest of _____)
)
HyperNet Solutions, Incorporated.) Docket No. 07-ODRA-00416
)
Solicitation No. DTFAAC-07-R-00224-A0001)

DECISION ON TIMELINESS OF PROTEST GROUND

I. INTRODUCTION

This matter arises out of a Protest that originally was filed *pro se*¹ at the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on August 17, 2007 (“Original Protest”) by HyperNet Solutions, Incorporated (“HyperNet”). The Original Protest challenges the FAA Mike Monroney Aeronautical Center’s (“Center”) award of a contract for administrative support services to CNI Aviation (“CNI” or “Awardee”). HyperNet alleges that its offer reportedly was the highest technically rated [and] lowest priced”, *Original Protest* at 1, and challenges the Center’s evaluation of its offer. HyperNet’s Original Protest also presents an allegation that CNI did not qualify under the Solicitation’s \$6.5 Million small business size standard; but states that this “issue . . . will not be part of the basis for protest since the FAA has already refused to look into the matter.” *See Protest* at 2. On September 7, 2007, the newly retained Counsel for HyperNet filed a supplemental letter (“Supplemental Letter”) to “clarify” that HyperNet’s Protest does in fact “include” the allegation that CNI “does not meet the SEDB [Socially and Economically Disadvantaged Business] 8(a) \$6.5 Million size standard” of the Solicitation (“Size Challenge”). *See Supplemental Letter* at 1.

¹ Although initially acting *pro se*, HyperNet subsequently retained counsel to represent it in the case.

On September 10, 2007, the ODRA issued a Show Cause Notice (“Notice”) requiring HyperNet to demonstrate why the Size Challenge should not be dismissed as untimely. *See Notice* at 2. On September 13, 2007, HyperNet filed its response (“Response”) to the Notice. The Center submitted its reply (“Reply”) to the Response on September 18, 2007. For the reasons discussed herein, the ODRA concludes that: (1) the inclusion of the substance of the Size Challenge ground in the timely Original Protest document reflected HyperNet’s intention to bring the matter to the ODRA’s attention; and (2) the exclusionary language included in the Original Protest reflected HyperNet’s reasonable but mistaken belief, based on information it had received from the Center that the Size Challenge would be futile. Given the unique circumstances present here, HyperNet’s Size Challenge will be treated by the ODRA as a timely-filed ground of its Original Protest.

II. BACKGROUND

The Solicitation, which was issued on or about April 11, 2007, sought administrative and technical support services for the Center’s “tenant organizations and their nearly 5000 employees.” *See Reply* at 1-2. By the May 18, 2007 Solicitation closing date, eight proposals had been received. *Id.* at 2. On July 26, 2007, after the technical, past performance, and cost evaluations of all proposals had been completed, the Center selected CNI for award. *Id.* By letter of the same date, the Contracting Officer notified HyperNet that CNI had received the contract award. *Response, Exhibit No. 2, Contracting Officer’s Letter dated July 26, 2007 (“CO Letter”)* at 1. The CO letter also advised HyperNet that if it “desire[d] a debriefing, a written debriefing will be provided unless you request a telephone debriefing.” *Id.* HyperNet was further advised that “[a]ny request for debriefing must be received by close of business 6 Aug. 2007.” *Id.*

In a letter dated August 1, 2007, HyperNet filed a protest with the Contracting Officer (“CO Protest”), alleging that CNI was ineligible for award because its business size exceeded the \$6.5 Million 8(a)/SEDB small business size standard of the Solicitation. HyperNet’s CO Protest further stated: “[i]n accordance with 13 C.F.R. § 121.1003, we are requesting you file this procurement protest with the SBA [Small Business

Administration].” See *Protester Response, Exhibit No. 2, Letter to Contracting Officer dated August 1, 2007* at 1. HyperNet received an automatic reply advising that the Contracting Officer would be out of the office from July 3, 2007 until August 6, 2007.

By e-mail of August 2, HyperNet forwarded its “Small Business Size Standard Challenge” to a Specialist (“SBA Specialist”) located in the Small Business Administration’s District Office. In its e-mail, HyperNet advised that it had forwarded its size challenge against CNI to the SBA Specialist because the Contracting Officer “is not in her office and her Division told us they will not do a size challenge.” *Protester’s Response, Exhibit No. 3, E-mail to SBA Specialist dated August 2, 2007 at 11:09 a.m.* at 2-3. HyperNet further advised the SBA Specialist that “[w]e send this only to you because we wanted the SBA to know that the FAA will not file this size standard challenge.” *Id.* at 3.

That same day, the SBA Specialist sent a reply e-mail to HyperNet advising that the “SBA will not act upon this size protest until we receive the referral from the Contracting Officer.” *Id., SBA Specialist’s E-mail to HyperNet dated August 2, 2007 at 11:48 A.M.* at 1. The SBA Specialist further advised HyperNet that “regardless of whether the Contracting Officer is in,” the Protester “still” had only 5 days to submit a size protest. *Id.* at 2. In addition, the SBA Specialist explained that she was “not sure if the size protest procedures” of the SBA “are applicable” to the FAA, *id.*, and that “[t]o be on the safe side . . . just follow the normal size protest procedures [and t]hen the [Contracting Officer] can let you know if they do not follow this part of the [Federal Acquisition Regulation].” *Id.*

On August 10, 2007, HyperNet sent an e-mail to the Contracting Officer asking whether the FAA had “forwarded [HyperNet’s] size standard challenge to the SBA District Office.” *Id., HyperNet E-mail to Contracting Officer dated August 10, 2007, 11:40 a.m.* at 6-7. In a reply e-mail of that same date, the Contracting Officer advised that the “FAA will not be submitting a size standard challenge to the SBA,” and further advised that the Small Business Act does not apply to the FAA. The Contracting Officer’s message also stated that “all offerors qualified under the NAICS code 561110 size standard of \$6.5 M,” and that “[p]er the information given to [HyperNet] by the [SBA Specialist] . . . CNI is

exempt to affiliation rules as a Tribal owned business concern.” *Id.*, *Contracting Officer’s E-mail to HyperNet dated August 10, 2007, 6:35 p.m.* at 4-5. The Contracting Officer also included the “Business Declaration” section of the AMS Procurement Guidance, *see* §T.3.6.1.6, which explains the purpose of the Business Declaration form and how it is a tool used to ensure that the small business program only benefits small businesses. *Id.*

On Monday, August 13, 2007, HyperNet received its debriefing. On August 17, 2007, HyperNet filed the Original Protest with the ODRA. Notably, the Original Protest began the required “Statement of Legal and Factual Grounds of Protest” by explaining that it had “challenged the size standard of CNI Aviation” but subsequently was “informed” by the Contracting Officer that “[t]he FAA will not be submitting a size standard challenge to the SBA” because the FAA is exempt from the Small Business Act. *See Protest* at 1. HyperNet went on to explain that:

We understand that since the FAA is not congressionally funded they do not have to comply with ... [the Small Business Act]. However, we wonder if the FAA is setting a precedence [sic] that will allow any company, regardless of size to submit proposals that they can self-certify as small when they in fact are not.

Id.

CNI further advised that “[a]lthough this is an issue it will not be part of the basis of protest since the FAA has already refused to look into the matter.” *Protest* at 2.

III. PARTIES’ ARGUMENTS

A. The Show Cause Response

HyperNet first contends that “good cause exists for the ODRA to consider the size standard protest ground” because it was initially “excluded” by HyperNet from its Protest filing based on an “entirely reasonable, albeit erroneous . . . belief that reasserting it before the ODRA would be futile.” *See Protester Response* at 1.

In addition, the counsel for HyperNet points out that the timeliness issue presented is unique because the Original Protest filing by HyperNet clearly presented the size standard as a basis for protest by providing a detailed narrative of all the underlying details surrounding its initial size challenges and the explanations from the contracting officer and the SBA representative as to why this protest ground could not proceed.

Finally, HyperNet contends that the Size Challenge ground should not be dismissed as untimely because the Contracting Officer's inaction in response to the CO Protest caused the Protester's confusion about the legality of its size standard objection—and consequently should be viewed as having tolled the timeliness deadline of this particular challenge. *Id.* at 5. In sum, HyperNet advises that:

These circumstances provide good cause . . . to find that [HyperNet's] the size standard protest ground is not an untimely supplemental protest ground subject to dismissal but instead an original protest ground included in a timely protest but reasonably 'excluded' in error based on the FAA's misleading comments.

Id.

B. The Center's Reply

As a preliminary matter, the Center contends that contrary to HyperNet's representations, HyperNet actually "was both informed and well aware of its protest rights" because "[i]n fact the Protester filed this protest." *See Center Reply* at 5. The Center also argues that the Size Challenge ground of protest is untimely because "[t]his Protester knowingly and explicitly excluded the size standard issue from the protest." *Id.* at 6.

III. DISCUSSION

The timeliness deadlines applicable to bid protests are set forth in the ODRA Procedural Regulations at 14 C.F.R. Section 17.15(a), which provides:

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

(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.

It is well established in ODRA caselaw and regulation that protests must be timely filed in order to be considered by the ODRA and that the time limits for the filing of protests will be strictly enforced. *See Protest of Galaxy Scientific Corporation*, 01-ODRA-00193; *Protest of Boca Systems, Inc.*, 00-ODRA-00158; *Protest of Raisbeck Commercial Air Group, Inc.*, 99-ODRA-00123; *Protest of Aviation Research Group/US, Inc.*, 99-ODRA-00141. As we noted in the *Protest of Boca Systems, Inc., supra*, “the ODRA Procedural Regulation does not provide the ODRA with discretion to extend the stated time limits for the filing of bid protests.”

In this case, the Contracting Officer’s August 10, 2007 correspondence was reasonably interpreted by the Protester as precluding the possibility of the Size Challenge. The statement that “[t]he Small Business Act does not apply to FAA” was accurate but incomplete and misled HyperNet into believing it had no recourse, even though it did in fact have recourse by filing a Protest at the ODRA. The ODRA has reviewed size challenges in previous protests. *See Protest of Engineering and Information Technology, Inc.*, 06-ODRA-00386.

Center Counsel's Reply, that HyperNet must have known it had the right to protest because it filed a Protest at the ODRA, begs the question of why HyperNet would include a detailed size-standard allegation in its Original Protest but then purport to exclude it.

Summary dismissal is not favored in the law and there is a strong preference for deciding matters on their merits. *See Water & Energy Systems Technology, Inc.*, 06-ODRA-00373.² In summary dismissal situations, the ODRA will draw inferences in favor of the party against which the summary dismissal would operate and will accept that party's allegations as true. *See Protest of Boca Systems, Inc., supra*. Here, the ODRA infers that HyperNet reasonably but incorrectly concluded that it would be futile to raise the issue because "the FAA has already refused to look into the matter." *See* Protest at 2. The ODRA finds no support in the record for Center Counsel's assertion that HyperNet excluded the ground "knowing that it had a right to include it." Reply at 6.

Given that HyperNet's Size Challenge to CNI's claimed status was clearly stated in the August 17, 2007 Protest filing, and inasmuch as the Center's communications were reasonably interpreted as foreclosing HyperNet's ODRA protest option on the issue, the ODRA will treat the Size Challenge as timely filed.³ The Center is directed to file a substantive, Supplemental Response to the Size Challenge ground of Protest within ten business days of the date of this Decision. Comments by the Protester must be filed within five days of receiving the Center's Supplemental Response.

-S-

Anthony N. Palladino
Director
FAA Office of Dispute Resolution for Acquisition

September 24, 2007

² Notably, the Federal Circuit has recognized that where a contractor detrimentally relies on a contracting officer's final decision containing incorrect advice regarding appeals rights, the applicable time period for pursuing further action is tolled. *See Decker v. West*, 76 F.3d 1573 (Fed.Cir. 1996).

³ Even were the ODRA to find that the ground was not timely, the Center's ongoing contract administration responsibility would require it to investigate the allegation that the awardee did not meet the size standard, and take corrective action if it determines that the allegation is well founded.