

FAA OFFICE OF DISPUTE RESOLUTION

FOR ACQUISITION

Re: Protest of Washington Consulting Group, Inc.

Against the Award of Contract No. DTFA01-98-C-00012

Docket: 97-ODR-00059

DECISION

The Motion of the Awardee, Lockheed Martin Services, Inc., ("LMSI") to dismiss the First Amended Protest filed on January 6, 1998 by Protester, Washington Consulting Group, Inc. ("WCG") is before this Office. LMSI's Motion, in which the FAA joins, alleges that the First Amended Protest was not timely filed. For the reasons set forth below, it is the determination of the Office of Dispute Resolution for Acquisition ("ODR") that the First Amended Protest was timely filed under the applicable version of the FAA's Acquisition Management System ("AMS"); and that therefore LMSI's Motion must be denied.

I. FACTUAL BACKGROUND

WCG filed its original protest in this case ("Protest") on December 12, 1997. The Protest raised several, independent grounds underlying an allegation of improper award of the subject contract ("Contract") to LMSI. On December 24, 1997, FAA provided a copy of the Source Selection Official's Evaluation Report ("Report") to WCG. The FAA voluntarily produced the Report as preliminary, informal discovery.

On January 6, 1998, i.e. six business days after receiving the Report, WCG filed its First Amended Protest with the Office of Dispute Resolution for Acquisition. The First Amended Protest alleged that the FAA's risk evaluation and trade-off analysis were inconsistent and incorrect. WCG contended that the First Amended Protest was timely filed "within seven (7) business days of December 24, 1997, the date upon which WCG received the Source Selection Official's ("SSO") Report. First Amended Protest at 1.

On January 9, 1998, LMSI moved to dismiss the First Amended Protest on grounds that it had not been timely filed. The FAA, through a letter of January 12, 1998, joined in the LMSI Motion. The moving parties contend that the First Amended Protest was untimely inasmuch as it was not filed within five business days of the date that WCG became aware of the information forming the basis of the protest.

II. DISCUSSION

The Motion squarely presents the question of whether the applicable deadline for filing the first Amended Protest is: the five-business-day deadline set forth in Acquisition Management Clause 3.9.1.-3, as incorporated by reference in the RFO/SIR for the Contract; or the seven-business-day time limitation of §3.9.3.2.1.2 of the current version of the AMS.

A. ODR Authority to Consider and Decide the Motion.

The FAA's Acquisition Management System establishes the ODR as the exclusive venue for resolution of bid protests and contract disputes related to Agency acquisition under the dispute resolution system. See AMS §3.9.3.2.1.1,-.2.2.2. The ODR was established pursuant to §3.9.4.1 of the AMS "as an organization that is independent of Agency organizations responsible for procurement actions and reports to the FAA Chief Counsel." Under the express terms of §3.9.4.2 of the AMS, the ODR has "broad discretion to resolve protests and contract disputes;" and is authorized to "provide fair and impartial decisions or recommendations, supported by the case record and law." Id.

The ODR is expressly empowered to make determinations and issue summary decisions and recommendations to the FAA Administrator for dismissal of protests or contract disputes that are frivolous or have no basis in fact or law. AMS §3.9.3.2.3.3. Pursuant to the AMS, the FAA Administrator's decision constitutes the final Agency action concerning the merits of a protest or contract dispute.

B. Applicability of the Current Version of the AMS to this Protest.

The original version of the Acquisition Management System took effect on April 1, 1996 ("Original AMS"), upon execution by FAA Administrator David R. Hinson. The Administrator's Introductory Statement contained a preservation of rights provision as follows:

FAA reserves the right to modify, add to, waive or delete any portion of this Acquisition Management System, either in whole or in part, as deemed appropriate by Administrator or his designee.

See AMS of April 1, 1996, at Page ii.

The Introductory Statement of the Original AMS contained provisions indicating its applicability to pending litigation. It provided that: "unless the parties agree otherwise, all acquisition litigation timely filed and pending before forums of competent jurisdiction on or before the effective date, April 1, 1996, of this Acquisition Management System may remain under the jurisdiction of that tribunal in accordance with the applicable contract or solicitation provision." Id. Thus, the Original AMS automatically was made applicable to acquisition litigation filed after April 1, 1996.

The movants contend that the timeliness of WCG's First Amended Protest is governed by Acquisition Management System Clause 3.9.1-3 ("Protest Clause"), which provides in pertinent part as follows:

Protests must be filed with the Office of Dispute Resolution within five business days of the date that the Protester was aware, or should reasonably have been aware of the Agency action or inaction which forms the basis of the protest.

The Protest Clause containing the five-business-day time limitation for filing protests was added to the AMS as a contract clause in August, 1996. Prior to that, the AMS did not include a specific time limitation on the filing of protests.

FAA Acting Administrator Barry L. Valentine issued a revised version of the AMS ("Revised AMS") on June 2, 1997. It included the Acting Administrator's Statement that:

[t]his document implements Title II and makes other necessary changes to and clarifications of, the Federal Aviation Administration Acquisition Management System and takes effect on the date executed."

The movants contend that the seven-business-day protest time limitation of §3.9.3.2.1.2 of the Revised AMS is not applicable to this protest. The FAA states in support of the Motion that the incorporation of the Protest Clause, including the five-day limitation, into the NISC II RFO/SIR represents "an unambiguous statement, and a clear rule." FAA Letter of 1/12/98 at 1. The FAA further contends that WCG essentially has admitted the applicability of the five-day limitation by filing a Second Amended Protest within five days, and stating that it was doing so to preclude any attack on timeliness grounds.

In opposing the Motion, WCG urges that ODR "follow the precedent of other protest forums and resolve timeliness issues in favor of WCG." Responsive letter of WCG at 3. As an example, WCG cites the Decision of the General Accounting Office in Warren Pumps, Inc., B-258710, 1995, WL 64154, for the proposition that any doubts concerning timeliness should be resolved in the Protester's favor. However, that case did not address which of two protest filing deadlines would apply to a protest. Rather, Warren Pumps, Inc. involved a dispute over when the Protester became aware of the basis for its protest. GAO concluded that any uncertainty concerning when the Protester became aware of its protest grounds would be resolved in favor of the Protester for purposes of determining the timeliness of protest. Id.; See Ekland Infrared, 69 Comp. Gen. 354 (1990), 90-1 CPD Para. 328. It appears to be undisputed here that WCG became aware of its First Amended Protest grounds upon receipt of the SSO Report on December 24, 1997.

As noted above, the FAA reserved in the Original AMS, the right to modify, add to or delete any its provisions. The Agency chose to amend the five-day deadline of the Protest Clause when it promulgated the June, 1997 Revised AMS. Moreover, the parties agreed in the Protest Clause to be bound by such amended protest procedures and time limitations. Protest Clause of August 8, 1996 at subsection (e).

