

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

Protests of)	
)	
Lakloey, Inc.)	Docket Nos. 19-ODRA-00859 and
)	19-ODRA-00860
Pursuant to Solicitation Nos. 697DCK-19-R-00362)	
and 697DCK-19-R-00370)	

DECISION ON STANDING

These protests (“Protests”) by Lakloey, Inc. (“Lakloey”) arise out of two solicitations¹ that required pre-qualification to participate in the competitive process. For both competitions, the contracting officer eliminated Lakloey because it had not pre-qualified under an earlier solicitation that established the Qualified Vendors List (“QVL”). A full record has been developed, and the FAA’s Regional Acquisition Division (the “Product Team”) included in its Agency Response (“AR”) a challenge to Lakloey’s standing,² charging that Lakloey did not qualify for inclusion on the QVL, and therefore is not an interested party. Upon the filing of Lakloey’s Comments (“Comments”), the record closed. As discussed below, the ODRA finds that Lakloey is not an interested party, and therefore DISMISSES the Protests for lack of standing. 14 C.F.R. § 17.19(a)(1) and (d) (2019).

¹ The protest docketed as 19-ODRA-00859 pertains to Solicitation No. 697DCK-19-R-00362 (“Solicitation 00362”), and the protest docketed as 19-ODRA-00860 pertains to Solicitation No. 697DCK-19-R-00370 (“Solicitation 00370”). The Protests were consolidated based on the similarity of issues and facts. *See Initial Status Conference Memorandum* at 1.

² The ODRA Procedural Rule discourages the filing of separate motions in protests, favoring instead that these arguments be reserved for inclusion in the Agency Response. 14 C.F.R. § 17.19(a) (2019).

I. The Standard of Review

A protester, as the party seeking relief, bears the burden of proof and must demonstrate by the preponderance of the evidence that the challenged decision lacks a rational basis; is arbitrary, capricious, or an abuse of discretion; or is inconsistent with the Acquisition Management System or the underlying solicitation.³ More specifically, protesters must affirmatively plead “the basis for the protester’s status as an interested party,”⁴ and they bear the burden of establishing standing by a preponderance of the evidence.⁵ Accordingly, Lakloey must demonstrate by the preponderance of the evidence that it has standing.

II. Background – The “On-AOA QVL” and the Current Solicitations

In 2018, the FAA’s Western Logistics Service Area issued a solicitation aimed at creating a QVL for construction services to be performed “on airport operating areas,” located in various geographic locations throughout the United States.⁶ Based on the phrase, “on airport operating areas,” the QVL is referred to as the “On-AOA QVL.”⁷ Although Lakloey responded to the On-AOA QVL solicitation,⁸ the FAA informed Lakloey on September 13, 2018 that it “did not qualify to be on the QVL established.”⁹ At Lakloey’s request, the contracting officer provided a written debriefing on September 24, 2018.¹⁰ Nothing in the record demonstrates that Lakloey protested this decision.¹¹

³ 14 C.F.R. § 17.21(m) (2019); *see also* 5 U.S.C. § 556(d); *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627 (citing *Protest of Adsystech, Inc.*, 09-ODRA-00508).

⁴ 14 C.F.R. § 17.15(c)(5) (2019).

⁵ *Protest of Thomas Company, Inc.*, 16-ODRA-00781 (citing *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1998)).

⁶ *See AR* Tab 3 (Solicitation No. 697DCK-18-R-00399).

⁷ *Id.*

⁸ *AR* Tab 5a.

⁹ *AR* Tab 6a.

¹⁰ *AR* Tab 7a.

¹¹ *See AR* at 3; *Lakloey Comments, passim*.

On May 15, 2019, several months after the On-AOA QVL competition closed, the Product Team sent via email drafts of the two new solicitations relating to the present Protests.¹² The salutation of both email messages referred to “selected, potentially interested and prequalified contractors,” and both email messages listed “Lakloey, Inc.” as a recipient.¹³ Both solicitations, as ultimately published, estimated the value of the projects to range from \$100,000 to \$300,000.¹⁴ Solicitation 00362 sought proposals for work at Halliburton Field in Duncan, Oklahoma, and was expressly subject to the On-AOA QVL, stating that “all provisions, clauses, terms and conditions of SIR No.697DCK-18-R-00399 apply to the subsequent contract awarded under this solicitation.”¹⁵ Similarly, Solicitation 00370, seeking work at three towers in Buena Vista, Virginia, contained the same reference to the On-AOA QVL.¹⁶

After the release of the draft solicitations on May 15, 2019, and up to July 8, 2019, Lakloey and the contracting officer engaged in a series of unremarkable email exchanges and telephone calls regarding both solicitations.¹⁷ At no time during this period did Lakloey call to the contracting officer’s attention the fact that it had been rejected from the QVL but had also received the notices regarding the new projects in Oklahoma and Virginia.¹⁸ On July 8, 2018, the contracting officer informed Lakloey that it would not be considered for award on either project because it did not advance to the On-AOA QVL.¹⁹ He acknowledged that he “mis-sent” communications to Lakloey, explained that Lakloey should have confirmed

¹² AR Tabs 10.a. and 10.b.; *Protest (-00859)* at Bates 000002; *Protest (-00860)* at Bates 00001).

¹³ AR Tabs 10.a. and 10.b.; *Protest (-00859)* at Bates 000002; *Protest (-00860)* at Bates 00001).

¹⁴ AR Tabs 8.a. and 9.a.

¹⁵ AR Tab 8.a. at 1.

¹⁶ AR Tab 9.a. at 1.

¹⁷ *Protest (-00859)* at Bates 000002-30; *Protest (-00860)* at Bates 00001-23.

¹⁸ *Protest (-00859)* at Bates 000002-30; *Protest (-00860)* at Bates 00001-23; *see also AR* at 4, ¶ 15.

¹⁹ *See Protest (-00860)* at 1; *Protest (00859)* at 1; AR Tab 11. The record shows that in response to a July 8, 2019, question from Lakloey, the contracting officer attempted to call the firm twice. AR Tab 11. Unsuccessful, he sent an email seeking a return call. *Id.* Later that same day, following a telephone call with the contracting officer, Lakloey sent an email expressing disappointment that it “will not be allowed to respond” to the solicitations. *Protest (-00860)* at 1; AR Tab 12.

“that the communication was applicable,” but nevertheless expressed regret over the matter.²⁰

On July 15, 2019, Lakloey sent its Protests to the ODRA via express mail, which the ODRA received on July 17, 2019.²¹ Following an effort to mediate these matters, the parties developed the full administrative record, which then closed on September 23, 2019.

III. Discussion

The FAA rejected Lakloey’s proposal under the On-AOA QVL solicitation in September of 2018, and nothing in these Protests challenges that earlier conclusion.²² Instead, considering the pleadings as a whole, Lakloey alleges that it should be permitted to compete for the new projects in Oklahoma and Virginia because it relied to its detriment on the various communications it received from May 15 to July 8, 2019. This argument, however, lacks merit, and the ODRA finds that Lakloey is not an interested party with standing to protest.

The ODRA has never relied on theories like detrimental reliance or estoppel to overturn a QVL or other source selection decision, and the present circumstances provide no reason to change that approach. Nevertheless, *without embracing such theories now and solely for the sake of argument*, at the very least Lakloey would have to show that it reasonably relied upon the communications from May to July of 2019. *See e.g., Restatement (Second) Contracts* § 90, cmt. b (1981).

In this case, nothing about Lakloey’s alleged reliance was reasonable. First and foremost, having received in 2018 actual notice—*explained in a debriefing*—that its

²⁰ AR Tab 12.

²¹ *Comments* at 2-3.

²² *Protests, passim; Comments, passim; AR* at 3 (citing Tabs 7a. and 7b.)

proposal for inclusion in the QVL was rejected,²³ Lakloey cannot be excused for letting the present contracting officer in 2019 operate under a mistaken impression that Lakloey was admitted to the On-AOA-QVL. Second, the record also shows that Lakloey previously experienced this kind of mistake regarding a different QVL. Specifically, in March of 2019, Lakloey received a notice of a project under the “Off-AOA QVL,” a QVL for which it had also been rejected.²⁴ Unlike the present contracting officer, that contracting officer caught her mistake within a few days, and she sent a notice confirming that Lakloey was not eligible for consideration.²⁵ Knowing that mistakes can happen, Lakloey should have been alert to the possibility of another mistake. Third, and finally, once Lakloey had access to the solicitations at issue, it should have noted the references to the On-AOA QVL²⁶ and confirmed whether it was actually eligible to compete. The ODRA, therefore, finds no basis in fact that Lakloey reasonably relied on the communications in question.

Having found that Lakloey was not a firm included in the On-AOA QVL, and further, having found no other reason to suggest Lakloey is entitled to compete, the ODRA concludes that Lakloey is not eligible for award under the solicitations. Lacking such eligibility means that Lakloey is not an interested party “whose direct economic interest has been or would be affected by the award or failure to award” these “FAA contract[s].”²⁷ Lakloey, therefore, lacks standing to protest.²⁸

²³ *See supra* notes 8-11.

²⁴ *AR* Tab 13.

²⁵ *Id.*

²⁶ *See supra* p. 3.

²⁷ 14 C.F.R. § 17.3(m) (2019).

²⁸ 14 C.F.R. § 17.15(a) (2019) (only an “interested party may initiate a protest”); *Protest of Thomas Company, Inc.*, 16-ODRA-00781.

IV. Conclusion

Lakloey has failed to meet its burden to show that it has standing to file the Protests. The ODRA therefore DISMISSES the Protests with prejudice.²⁹

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John A. Dietrich
Director and Chief Administrative Judge

²⁹ The Director of the ODRA has been delegated authority to grant dismissals, and further, the value of this acquisition is well within the delegation of final decision authority involving acquisitions valued up to 20 million dollars. Delegation of Authority of October 12, 2011, as revised March 19, 2014; *see also* 79 FR 21832 (Apr. 17, 2014).