

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
OFFICE OF DISPUTE RESOLUTION FOR ACQUISITION**

<u>Protest of</u>)	
)	Dkt. No. 21-ODRA-00896;
RELX Inc., d.b.a. "LexisNexis")	FAA Order No. ODRA-21-896;
)	Served December 29, 2021
<u>Under Solicitation No. 693KA9-21-R-00015</u>)	

Appearances:

FOR THE CONTRACTOR:	Emily M. Noggle, Esq. Kermit F. Lowery, Esq.
FOR FAA PRODUCT TEAM:	Jeannine N. Zells, Esq. Andrew G. Williamson, Esq. Kiley G. Fishburn, Esq.

DECISION AND ORDER ON MOTION TO DISMISS

The Product Team has moved to dismiss this protest based on the filing deadlines found in 14 C.F.R. § 17.15(a) (2021). It asserts that Protester RELX, Inc. ("RELX") filed after the possible deadlines found in the regulation. The Office of Dispute Resolution for Acquisition agrees and DISMISSES the protest with prejudice.

I. Undisputed Factual Background

Solicitation No. 693KA9-21-R-00015 sought proposals for online legal research services.¹ The Product Team advertised the solicitation online using the System for Award Management ("SAM.GOV") with an updated closing date of November 17, 2021.² RELX did not submit a proposal by the closing date and, on November 18, asked the contracting officer to reopen the solicitation.³ The contracting officer denied the request, and RELX filed this protest on December 1, 2021.⁴

¹ Product Team Motion ("Motion"), Ex. 2, at 3.

² Protest at 1, 3; Motion, Ex. 3, at 2; RELX Response ("Response") at 1.

³ Protest at 3; Motion, Ex. 4.

⁴ Protest at 1, 3; Motion, Ex. 1 (Decl. of the Contracting Specialist), ¶¶ 5, 6.

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II. Jurisdiction and the Standard of Review for Dismissals Based on Timeliness

A protest may be dismissed for three distinct reasons stated in the ODRA Procedural Regulation: “lack of jurisdiction, timeliness, or standing to protest.”⁵ The regulation lists these as separate grounds, and notwithstanding older ODRA precedent, timeliness is not jurisdictional.⁶

The Supreme Court of the United States in recent years has “repeatedly held that procedural rules, including time bars, cabin a court’s power only if Congress has ‘clearly state[d]’ as much. [A]bsent such a clear statement ... ‘courts should treat the restriction as nonjurisdictional.’”⁷ An exception occurs when a court has issued a definitive and longstanding interpretation of the authorizing statute.⁸ The ODRA’s enabling statute,⁹ however, makes no mention of time bars, nor has any court definitively interpreted it (or the regulation) as a jurisdictional prerequisite to the waiver of sovereign immunity. Accordingly, there is no basis to treat the regulatory time bars for ODRA protests as anything more than procedural rules for case processing.

When considering a motion to dismiss, the ODRA must “consider any material facts in dispute[] in a light most favorable to the party against whom the dismissal or summary decision would operate and draw all factual inferences in favor of the non-moving party.”¹⁰

III. Discussion

The Product Team moves for summary dismissal on the theory that the protest challenges the solicitation terms, meaning it had to be filed before the closing date of November 17, 2021 rather than on December 1, 2021. In the alternative, the Product Team asserts that RELX failed to file its protest within seven business days of November 18, 2021, when it learned of the grounds for its protest.

⁵ 14 C.F.R. § 17.19(a)(1) (2021).

⁶ Citing older ODRA caselaw, the Product Team states that “timeliness rules are jurisdictional.” Motion at 2.

⁷ *United States v. Kwai Fun Wong*, 575 U.S. 402, 409 (2015) (citations omitted) (original punctuation) (time bar in Federal Torts Claim Act not jurisdictional).

⁸ *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (discussing Tucker Act decisions over a century).

⁹ *See* 49 U.S.C. § 40110(d)(4).

¹⁰ *Id.* at (b).

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A. The protest challenges the solicitation and is untimely.

The Product Team characterizes this matter as a “pre-award” protest regarding the terms of a solicitation.¹¹ Therefore, according to the Product Team, 14 C.F.R. § 17.15(a)(1) required RELX to file the protest before the closing date of November 18, 2021.¹² But RELX contests the notion that it protested the terms of the solicitation:

Contrary to the FAA’s characterization, the protest does not contest any term of the SIR [solicitation]. Rather, LexisNexis has protested the FAA’s dissemination of the SIR as unreasonable, misleading and inconsistent with AMS [Acquisition Management System] Procurement Guidance. As noted above, the FAA’s specific error was its utilization of the wrong NAICS code when posting the requirement on SAM. Nowhere is that NAICS code included in the SIR. *See* FAA Motion, Ex. 2 SIR, p. 31 (Clause I.18 3.6.1-17, which left the NAICS code as blank in the SIR). The only place that the NAICS code appeared was in the SAM listing, which is not a part of the SIR and was produced by the FAA as a separate exhibit. *See* FAA Motion, Ex. 3 SAM Listing, p. 2.¹³

Thus, RELX distinguishes between the solicitation and the manner of advertising.

RELX relies on a distinction without a meaningful difference. Yes, for whatever reason, the solicitation oddly includes a small business “provision” in Section I of the contract that is ordinarily reserved for “clauses.”¹⁴ Further, nobody filled in the blanks for the NAICS code in that provision. Regardless, the NAICS code in a solicitation is ordinarily the code used for notices in SAM.GOV, and the odd technical errors in this solicitation do not change the nature of the protest as a challenge to the solicitation.

The OIRA recognizes that RELX’s protest, on both the merits and timeliness, includes a fundamental argument that using the wrong NAICS code was unfair to RELX. RELX states, “If the FAA had properly described and publicized the procurement, as required by AMS Procurement Guidance, [RELX] would have identified the SIR before the proposal deadline and submitted a competitive

¹¹ Motion at 3.

¹² *Id.* Section 17.15(a)(1) states:

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

¹³ Response at 2.

¹⁴ Motion, ex. 2 at § I.18 (restating the text of AMS Provision 3.6.1-17, “North American Industry Classifications System (NAICS) Code (January 2021)).

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proposal.”¹⁵ Nevertheless, similar challenges to the NAICS code, while rare before the ODRA, are relatively common in the rest of the Federal Government and have somewhat similar time bars.

Challenges against the designated NAICS code in most Federal solicitations are handled through appeals to the Small Business Administration’s Office of Hearings and Appeals (OHA). The FAA, however, is statutorily exempt from the Small Business Act and OHA oversight. Instead, the ODRA retains subject matter jurisdiction over protests relating to small business issues but may look to the OHA decisions as persuasive precedent.¹⁶ The SBA’s timeliness rules governing appeals from NAICS designations provide at least one deadline based on the closing date:

- (b) NAICS code appeals must be filed within 10 calendar days after issuance of the solicitation, or amendment to the solicitation affecting the NAICS code or size standard. However, SBA may file a NAICS code appeal at any time before offers or bids are due.¹⁷

The ODRA looks to this regulation not to supplant its own rules but to demonstrate that relying on the closing date as a time bar for NAICS designation appeals is not inherently unfair. Indeed, advertising based on the NAICS code hampers notice to many prospective offerors who might wish to challenge the designated code in a solicitation. It does not, however, preclude prospective offerors from getting notice.¹⁸

In this matter, the protest is most akin to a challenge to the solicitation, which under the ODRA’s rule, must be filed before the closing date of the solicitation. The fact that a contracting specialist failed to complete the blanks in AMS Provision

¹⁵ Response at 1.

¹⁶ See e.g., *Protests of IBEX Weather Services*, 13-ODRA-00641, -00644 (quoting *Protest of Alutiig Pacific LLC*, 12-ODRA-00627):

By law the FAA is exempted from the normal small business contracting rules for Government procurements. 49 U.S.C. § 40110(d)(2)(D) (2006). Small Business Administration (“SBA”) rules, regulations, and decisions therefore are not binding on the FAA. They may, however, be viewed as persuasive authority as long as they do not conflict with the principles of the AMS. *Protest of HyperNet Solutions Inc.*, 07-ODRA-00416; See also 49 U.S.C. § 40110(d)(4) (stating that all bid protests and contract disputes shall be resolved through the authority of the FAA Administrator).

IBEX, (Findings and Recommendations, (Pub. Ver.) slip op. at 41-42).

¹⁷ 13 C.F.R. § 134.304(b) (2021). Recognizing that the ten-day rule within the same SBA regulation could run past a closing date, the ODRA also prudently considers its own seven-business-day rule in Part III.B, *infra*.

¹⁸ See, e.g., *Protest of Culpepper & Associates Security Services, Inc.*, 13-ODRA-00673 (protest dismissed as untimely where late “actual notice” of the SIR resulted from the failure to diligently monitor the FAA’s Contract Opportunities website).

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3.6.1-17 does not change the fundamental nature of the protest. Recognizing that the undisputed record establishes that RELX filed the protest after the closing date, the motion should be granted.

B. The protest also is untimely under the seven-day rule.

Assuming in arguendo that the protest does not represent a challenge to the solicitation, RELX argues that it satisfied the seven-day rule found in § 17.15(a)(3)(i), which states:

(3) For protests other than those related to alleged solicitation improprieties, the protest must be filed on the later of the following two dates:

(i) Not later than seven (7) business days after the date the protester knew or should have known of the grounds for the protest[.]¹⁹

The phrase “business days” excludes “weekends, Federal holidays and other days on which Federal Government offices in Washington, DC are not open.”²⁰ But here, RELX runs into a problem: excluding Federal holidays and weekends from the date it knew of the issue (November 18) to the date it filed the protest (December 1) is eight days, not seven. RELX contends, however, that Friday, November 26, 2021, the day after the Federal Thanksgiving holiday, was a day “on which Federal Government offices in Washington, DC are not open.”²¹

RELX does not argue that all Federal Government offices were closed on that Friday. It also does not say that the Department of Transportation, the Federal Aviation Administration, or most specifically, the ODRA was closed on that day. Instead, it observes that “the GAO, the U.S. Court of Federal Claims, the U.S. District Court for the District of Columbia, and the Social Security Administration were closed on November 26, 2021.”²² According to RELX, “Because those Federal Government offices in Washington, D.C. (among others) were not open, November 26, 2021 cannot be counted as a business day, and the protest was timely filed.”²³

The ODRA will not interpret its Procedural Regulation so broadly as to allow the GAO, the Court of Federal Claims, or a district court to dictate its hours of

¹⁹ 14 C.F.R. § 17.15(a)(3)(1) (2021).

²⁰ *Id.* at § 17.7(c).

²¹ Response at 3.

²² Response at 3 (citing website announcements attached to the Response). Consistent with the standard of review for motions to dismiss, the ODRA views these alleged closures in a light most favorable to RELX.

²³ *Id.*

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operation. The evident purpose of the regulation—even if the regulatory history is silent—is to account for closures due to unexpected emergencies, Executive Orders, or other determinations that directly affect the ODRA. To rule otherwise would lead to absurd results that would extend all ODRA deadlines whenever one or a few Federal offices close, *for any reason*, within the Washington, DC area.²⁴

The ODRA finds, therefore, that RELX filed its protest eight business days after the date it learned of the protest grounds, and this matter should be dismissed as untimely.

IV. Conclusion

The discussion above demonstrates that in this unusual factual situation, RELX did not timely file its protest under either arguable regulatory deadline. Therefore, this matter is DISMISSED with prejudice under 14 C.F.R. § 17.19(c)(2) and the Administrator’s delegation of dismissal authority to the Director.²⁵ This is the final order of the Agency.²⁶

/S/

John A. Dietrich

Director and Chief Administrative Judge

Issued on December 29, 2021

²⁴ *Protest of Wesson International, Inc.*, 00-ODRA-00151 (holiday schedule did not excuse filing later than seven days from when protest grounds were or should have been known).

²⁵ *See Designation of Administrative Judges and Delegation of Authority*, 76 Fed. Reg. 70529, 70530 (Nov. 14, 2011) (as revised, *Delegation of Authority*, 79 Fed. Reg. 21832 (Apr. 17, 2014)).

²⁶ 14 C.F.R. § 17.19(d) (2021). To the extent that this decision and order is subject to judicial review, such review must be sought under 49 U.S.C. § 46110 and the ODRA Procedural Rule, 14 C.F.R. § 17.43 (2021), within sixty (60) days of issuance.