

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

Protest of _____)	
)	Docket No. 05-ODRA-00349
B & B Cafeteria _____)	
)	
Under Solicitation DTFASO-05-R-00848 _____)	

DECISION ON MOTION TO DISMISS
PROTEST FOR LACK OF TIMELINESS

BACKGROUND

On July 19, 2005, the Office of Dispute Resolution for Acquisition (“ODRA”) received a one page hand-written letter of Protest filed by Mr. Larry Bing of B&B Cafeteria (“B&B”). The body of the letter stated:

I would like to file a Protest to the Hilliard Cafeteria Contract (DTFASO-05-P-00848) due to the illegal solicitation of the bid. I was excluded because my brother, Gregory Bing, works for the FAA. Please look into this matter.

On July 21, 2005, counsel for the FAA Southern Region (“Region”) filed a Motion to Dismiss the B&B Protest as untimely (“Motion”). On September 2, 2005, the ODRA indirectly received from the Region a copy of an Opposition (“Opposition”) filed by counsel by B&B to the Motion. On August 16, 2005, the ODRA received directly from B&B, a copy of the notice (“Notice”) allegedly posted on the Hilliard Air Traffic bulletin board which stated, among other things, that:

To avoid a “conflict of interest”, applications from family and friends of Government employees or those under contract with the FAA will not be accepted.

The Notice was attached to a letter from Mr. Bing which stated that:

As you can see, the Flyer explicitly states that applications from family and friends of Government employees would not be accepted. At the time of circulation of said Flyer, I called and spoke with Hank Smith, who then stated that an application from B&B Cafeteria would not be considered because my brother, Gregory Bing, works for the FAA.

B&B Letter of August 9, at 1.

B&B's Opposition to the Motion states that: "Mr. Bing was in no way dilatory in filing his Protest, due to misinformation, the right to protest was never made known to him."

B&B Opposition at 1. The Opposition recounts the posting of the Flyer, indicating that B&B was told not to bid on the contract because Mr. Bing had a relative employed by the FAA. The Opposition goes on to state that:

Upon inquiry after the protest period had expired, Mr. Bing was told that there was no such rule and that he was eligible to apply. Since the initial indication (albeit incorrect), was that Mr. Bing was disqualified from bidding on the Contract, his Protest would have been futile.

B&B Opposition at 1.

Following its review of the Motion and Opposition, the ODRA by letter dated September 13, 2005, found that neither side had supplied required information concerning the Solicitation, bidding and award process or the circumstances surrounding the submission of the Protest. The ODRA therefore directed that the parties provide further information. Specifically, the ODRA requested that the Region provide: a complete copy of the Solicitation; a copy of any offer submitted by B&B in response to the Solicitation; documents regarding the evaluation of the submitted offer and the basis for the award decision; and documents reflecting communication between the Region and B&B regarding any offer submitted by B&B. Additionally, the Region was directed to indicate whether the Flyer in question had in fact been posted by the Region and the date of the posting; whether any offer was received by B&B before or after the posting of the Flyer; and whether any offer received by B&B had been rejected because of the "conflict of interest" provision of the Flyer. The ODRA also directed submissions from B&B

concerning: the facts and circumstances of any offer submitted by B&B; the date on which B&B learned of the existence of the Flyer; the date when Mr. Bing allegedly had been told that the conflict of interest rule of the Flyer did not exist; and any other documents that it believed are relevant to the timeliness of the Protest. *See* ODRA letter September 13, 2005 at 2.

On September 21, 2005, counsel for Mr. Bing responded to the ODRA's direction for a supplementary submission ("B&B Supplementary Submission"). The B&B Supplementary Submission indicates that B&B did in fact submit a bid in response to the Solicitation on or about May 25, 2005, and that Mr. Bing had contacted representatives of the Region at the time of submitting his bid. In this regard, his counsel states that:

Officially the Region never confirmed that the "family and friends" rule existed. Mr. Hanks only told Mr. Bing that his application would not be considered because he was "family". However, Mr. Bing's partner told him that he thought that the rule did not exist. His partner stated to him that the worst that could happen is that the application is rejected. Thus, Mr. Bing followed through and applied to the bid. This conversation with his partner occurred approximately within two weeks prior to May 27, 2005.

On September 27, 2005, the Region filed its supplementary submission ("Region Supplementary Submission") in response to the ODRA directive. The Region Supplementary Submission included: a complete copy of the Solicitation; a copy of B&B's offer in response to the Solicitation; documentation of the evaluation of submitted offers and the basis for the award decision; and a letter between the Region and B&B dated June 2, 2005. The Region stated that: "although the exact date can not be determined, the Flyer was, in fact, posted sometime after May 2, 2005. B&B's offer was received after the posting of the Flyer." Region Supplementary Submission at 1.

The Region went on to note that: "B&B's offer was not rejected because of any 'conflict of interest' provision; rather the Region's Security Division refused to grant a security waiver to Mr. Larry Bing, owner and chef for B&B, and advised Logistics Management Specialist, Marilyn Browning, that therefore Mr. Bing could not work on any FAA

contracts.... It was on this basis that B&B's offer was rejected:" See Region Supplementary Submission at 1,2.

DISCUSSION

The timing 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 was 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.*, "the ODRA Procedural Regulation does not provide the ODRA with discretion to extend the stated time limits for the filing of bid protests."

Moreover, summary dismissal of untimely protests is expressly contemplated by ODRA Procedural Regulation, 14 C.F.R. Section 17.19(a). That Section provides:

That at any time during the protest, any party may request, by motion to the Office of Dispute Resolution, that – (1) the protest, or any portion be dismissed for lack of jurisdiction if the protester fails to establish that the protest is timely.

See Galaxy Scientific Corporation, 01-ODRA-00193.

All the facts material to a determination of the timeliness of this Protest are not in dispute. While it is clear that the Region published a Flyer which purported to disqualify persons with a familial relationships with FAA employees, equally it is clear that B&B was not dissuaded from bidding by that Flyer. By its own admission, B&B did bid on the contract in a timely fashion and was informed sometime prior to July 19, 2005 that the contract award had been made to another entity. It also is clear that even before bidding, B&B was aware of the potential ground for its Protest, *i.e.*, an alleged improper requirement that the bidders not have any familial relationships with FAA employees. In this case, B&B's Protest must be summarily dismissed as untimely.

Moreover, timeliness issues aside, in order to prevail, a protester must show that it was prejudiced by the complained of activity. *See Protest of DMS Technologies*, 04-ODRA-00306. Here, B&B cannot demonstrate requisite prejudice since it disregarded the Flyer and submitted a bid. For these reasons, B&B's single ground of protest fails to state a claim upon which relief may be had.

CONCLUSION

Under the circumstances, B&B's Protest is both untimely and fails to state a ground upon which relief may be granted. The Protest therefore is summarily dismissed.

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Office of Dispute Resolution for Acquisition

October 7, 2005