

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)	

DECISION ON
REQUEST FOR EXTENSION AND ON DISCOVERY

This matter is before the Office of Dispute Resolution for Acquisition (“ODRA”) on a Request from Counsel for the Mike Monroney Aeronautical Center (“Center”) dated October 1, 2007 for an extension of the time for filing the Center’s Supplemental Response in the above Protest. The Request is not opposed. The extension is requested because the Center has sought a determination from the Small Business Administration (“SBA”) regarding whether CNI Aviation, LLC (“the Awardee”) is an eligible small business under the subject procurement. The Awardee’s size status has been challenged by the Protester and is also before the ODRA on a Discovery Request from the Protester directed to the Center; an Objection from the Center to the Discovery Request; and a Response from the Protester to the Objection.

As a preliminary matter, the ODRA notes that any views expressed by the SBA regarding the Awardee’s size status would be advisory only and not binding precedent on the FAA or the ODRA. *See Protest of Four Winds Services, Inc.*, 02-ODRA-00219. Pursuant to federal law, all Federal Aviation Administration (“FAA”) acquisitions are expressly exempt from the Small Business Act—and other federal procurement laws and regulations. *See Public Law No. 104-50*, § 348, 109 Stat. 436, 460 (1995); *see also* Public Law 106-181, Title VII, § 704, 114 Stat. 157 (*codified at* 49 U.S.C. §

40110(d)(2)(D)(2002). By law, only the Administrator acting through the ODRA has jurisdiction to adjudicate AMS bid protests and contract disputes under the Agency's Acquisition Management System. *Id.*

Notwithstanding the above, the Center is not precluded from seeking the SBA's guidance in this matter. The ODRA historically has recognized the SBA as a source of "persuasive authority" in evaluating small business matters, see *Protest of Four Wind Services, Inc.*, 02-ODRA-00219, particularly where—as here—a contractor's small business size status is at issue. See *Protest of Engineering and Information Technology, Inc.*, 06-ODRA-00386. The AMS, at Section 3.2.2.3, and the accompanying Toolbox Guidance, see T3.6.1 require the Contracting Officer to conduct an independent evaluation of the Awardee's challenged small business size status. In the context of this bid protest, the ODRA will review the Contracting Officer's evaluation of the Awardee's size status and decide whether that evaluation has a rational basis, is arbitrary or capricious or an abuse of discretion. See Administrative Procedures Act, 5 U.S.C. § 706.

Under the circumstances presented, here, the ODRA concludes that the Center's request for assistance from the SBA presents a reasonable justification for extending the deadline for the filing of the Center Supplemental Response. Consequently, the deadline for the Center Supplemental Response is hereby extended to 5:00 p.m. (Eastern Time), Tuesday, October 23, 2007. Comments by the Protester and Awardee will be due within five business days of their receipt of the Center Supplemental Response.

With respect to the discovery issue, pursuant to the ODRA Procedural Regulations, the Center Supplemental Response must include all documents in the Center's possession relevant to the size determination issue. See 14 C.F.R. § 17.17. Such documents must include, without limitation, those documents submitted by the Center to the SBA. In

addition the Awardee is directed to forward to the ODRA and the other parties by close of business Wednesday, October 10, 2007, all documents that it has provided to the SBA in connection with the size issue. The ODRA will not direct additional discovery at this time, pending the exchange of the above referenced documentation.

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

October 3, 2007