

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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of CNI Aviation, LLC**
 Pursuant to Solicitation No. DTFAAC-07-R-02224

Docket No.: **07-ODRA-00428**

Appearances:

For the Protester: CNI Aviation, LLC
 Robert K. Tompkins, Esq., Michael J. Carrato, Esq.
 and Elizabeth M. Gill, Esq.

For the Agency: FAA Mike Monroney Aeronautical Center
 A. Lester Haizlip, Esq., Senior Center Counsel

For the Intervenor: HyperNet Solutions, Incorporated
 G. Lindsay Simmons, Esq. and J. Eric Whytsell, Esq.

I. INTRODUCTION

This matter currently is before the Office of Dispute Resolution for Acquisition (“ODRA”) for consideration of the preliminary issue of whether CNI Aviation, LLC’s (“CNI”) bid protest (“CNI Protest”) should summarily be dismissed pursuant to the ODRA Procedural Regulation, 14 C.F.R. § 17.19. Having reviewed the briefings on the issue submitted by CNI and by HyperNet Solutions Incorporated (“HyperNet”), the ODRA concludes that the CNI Protest, which seeks to challenge the implementation of the remedy ordered in an earlier sustained Protest, fails to state a claim upon which relief can be granted, and otherwise is untimely. The ODRA therefore recommends that the Protest summarily be dismissed.

II. FINDINGS OF FACT

1. On August 17, 2007, HyperNet filed a bid protest (“HyperNet Protest”) challenging the award of a contract for administrative services to CNI (“CNI Contract”) by the FAA’s Mike Monroney Aeronautical Center (“Center”). CNI had been awarded the Contract following a competition involving eight offerors, including CNI and HyperNet. *See Center Response in HyperNet Protest*, Exhibit Number (“Exh. No.”) 21, *Award Decision Document (hereinafter “ADD”)* at 2.
2. The HyperNet Protest raised several grounds in support of its allegation that the CNI Contract had been awarded improperly. *See HyperNet Protest* at 1-3.
3. Following the development of a full administrative record, including the filing of Comments by CNI and HyperNet on the Center Response to the HyperNet Protest, the ODRA prepared Findings and Recommendations (“F&R”) for review by the FAA Administrator’s Delegee. *See ODRA F&R in HyperNet Protest*. On November 21, 2007, the FAA Administrator’s Delegee adopted the ODRA’s F&R and issued a Final Agency Order (“Final Order”) sustaining the HyperNet Protest and directing the Center to terminate the CNI Contract and make a new contract award to HyperNet for the services involved. On the same date, the Final Order and the F&R were provided via facsimile to counsel for all parties, including CNI.
4. On December 17, 2007, CNI filed a Request for Reconsideration of the Final Order (“Reconsideration Request”).¹ The Reconsideration Request included the CNI Protest, which challenges the award of a contract to HyperNet that was mandated by the Final Order. *See CNI Protest* dated

¹The FAA Administrator’s Delegee denied the CNI Request for Reconsideration on January 27, 2008, based on the ODRA’s recommendation.

December 17, 2007 at 2. The ODRA docketed the CNI Protest as Case Number 07-ODRA-00428.

5. In a letter dated December 18, 2007, the ODRA advised the parties that the CNI Protest raises a preliminary legal issue (“Preliminary Issue”) of first impression. *See ODRA Letter* dated December 18, 2007 at 3. The ODRA defined the Preliminary Issue as “whether a party who participated as an intervenor in a predecessor protest that was sustained, can file a new protest that purports to challenge the Agency’s implementation of the ordered remedy.” *Id.* The ODRA noted that it was unaware of any legal precedent for protesting an ordered remedy. *Id.* The ODRA therefore directed the parties to brief the Preliminary Issue so it could determine whether a dismissal or summary decision of CNI’s Protest was appropriate. *Id.* (citing *ODRA Procedural Regulations, 14 C.F.R. § 17.19*). The ODRA suspended any further proceedings on and consideration of the CNI Protest pending the resolution of the Preliminary Issue.
6. The ODRA received CNI’s brief on the Preliminary Issue on January 4, 2008 (“CNI Brief”). The ODRA received HyperNet’s brief on January 11, 2008 (“HyperNet Brief”). The Center chose not to brief the Preliminary Issue.²
7. On January 9, 2008, the Center reported that it was in the process of completing the corrective action mandated by the Final Order in the HyperNet Protest and expected to complete the transition of work to HyperNet by February 1, 2008. *See Center Letter* dated January 9, 2008.

² Neither has the Center joined in or filed its own Request for Reconsideration of the ODRA’s F&R in the HyperNet Protest.

III. THE PARTIES' POSITIONS

CNI takes the position that its “submission is a valid, timely protest of the Agency’s contract action as set forth in its December 6, 2007 Notice to CNI.” *See CNI Brief* at 1. CNI further asserts that it “is challenging the award of a contract to HyperNet which upon information and belief was made by the FAA Contracting Officer on December 6, 2007.” *Id.* at 1. CNI goes on to assert that:

As is well known to ODRA, the FAA awarded a contract to HyperNet as a result of the sustained HyperNet Protest in which the ODRA has recommended the FAA take corrective action as a remedy for the allegedly improper award to CNI. The recommended corrective action was for FAA to terminate award to CNI Aviation and to award a contract for services to HyperNet, pursuant to the same Solicitation. CNI is protesting the corrective action taken the Contracting Officer, as set forth in her December 6, 2007 Notice to CNI Aviation.

Id. at 1 and 2.³

The CNI Brief cites two ODRA cases⁴ as well as one decision by the United States Court of Federal Claims⁵ in support of the broad proposition that “any Agency action taken in response to a protest is itself protestable.” *Id.* at 2. CNI also asserts that its current Protest is timely filed because “the contract action which is the subject of this protest is the FAA Contracting Officer’s award of [a] contract to HyperNet which CNI Aviation was not provided notice of until December 6, 2007.” *Id.* at 3. Since CNI filed this Protest within seven business days of December 6, 2007, *i.e.*, the date on which it learned its contract would be terminated, CNI contends that its Protest is timely filed. Under CNI’s theory, the Final Order dated and issued on November 21, 2007 did not trigger the running of the limitations period for filing the Protest. *Id.* at 4. CNI reasons that the

³ The quoted CNI assertion conveniently ignores the fact that the ODRA F&R were adopted by the FAA Administrator’s delegee as the final Agency decision in the HyperNet Protest. Thus, the remedy set forth in the ODRA F&R became an FAA Administrator’s mandate to the Contracting Officer to take the specified action, rather than the mere “recommendation” alluded to by CNI.

⁴ *Protest of Communication Technologies, Inc.*, 03-ODRA-00254 and *Protest of Hasler, Inc.*, 06-ODRA-00395.

⁵ *The Centech Group, Inc. v. United States*, 78 Fed.Cl. 496 (2007).

Final Order “does not constitute a “contract award” because only a contracting officer—and not the FAA Administrator’s Delegee—“is authorized to execute contracts on behalf of the FAA.” *Id.* at 5 and 7.

In response, the HyperNet Brief challenges the entire premise of CNI’s Protest submission, noting that “the challenged award did not result from the determination of an acquisition official—the Contracting Officer—to select [HyperNet] for award. It was remedial corrective action ordered by the FAA Administrator.” *See HyperNet Brief* at 2. HyperNet further emphasizes that:

CNI’s Protest seeks to turn the FAA’s mandated review scheme on its head. This scheme provides for ‘protests concerning FAA... contract awards’ before the ODRA, not for protests concerning ODRA’s own recommendations or the final order of the FAA Administrator.

Id.

Additionally, HyperNet points out that “once the FAA Administrator acts—to adopt in whole or in part, modify, or reject the Findings and Recommendations of the ODRA—there is final agency action,” *see Acquisition Management System* § 3.9.2; and that matters constituting final agency action are “reviewable exclusively in the United States Court of Appeals” rather than by the ODRA.

Id. at 3.

HyperNet also asserts that while the ODRA, like other bid protest forums, can consider protests against certain voluntary corrective actions, “the corrective action that may be protested before the ODRA is that based on a decision of an acquisition official, not that ordered by the FAA Administrator.” *Id.* HyperNet contends that:

[t]he facts here—an award ordered by the Administrator and the corresponding lack of any decision-making by the Contracting Officer in selecting an awardee—clearly distinguish this protest from any case regarding review of corrective action cited by CNI (or known to [HyperNet]).

Id. at 4.

Finally, HyperNet notes that the CNI Protest is otherwise untimely because the Final Order “provide[d] clear notice to CNI that the action must be taken by the [Contracting Officer] and the reasoning underlying the decision to direct such action.” *Id.* at 7. According to HyperNet, “because the Final Order providing notice of the protest grounds was served on November 21, 2007, CNI’s Protest was due seven business days later on December 3, 2007.” *Id.*

IV. DISCUSSION

A. CNI’s Protest fails to state a claim upon which relief can be granted.

The ODRA Procedural Regulation specifies that:

[e]ither upon motion by a party or on its own initiative, the Office of Dispute Resolution for Acquisition may, at any time, exercise its discretion to: (1) Recommend to the Administrator, dismissal or the issuance of a summary dismissal with respect to the entire protest

See 14 C.F.R. § 17.19(c).

Under the Procedural Regulation, a protest is subject to dismissal if it is untimely, without basis of fact or law, or fails to state a claim upon which relief may be had. *See* 14 C.F.R. § 17.19(a). In considering whether to dismiss a protest, the ODRA will construe material facts in dispute in a light most favorable to the protesting party. *Id.* at Section 17.19(b).

The Procedural Regulation also provides that “a dismissal or a summary decision regarding the entire protest by either the Administrator, or the Office of Dispute Resolution for Acquisition by delegation, shall be construed as a final Agency order.” *See* 14 C.F.R. § 17.19(b). Finally, the Regulation states that:

prior to recommending or entering either a dismissal or a summary decision, either in whole or in part, the Office of Dispute Resolution for Acquisition shall afford all parties against whom the dismissal or summary decision is to be entered, the opportunity to respond to the proposed dismissal or summary decision.

See 14 C.F.R. § 17.19(e).

It is well established that a protest must allege “facts which if proven would constitute improper conduct on the part of procurement officials or a violation of the AMS by the Agency.” *Bel-Air Electric Construction, Inc.*, 98-ODRA-00084 (dismissing protest based upon untimeliness and failure to state a valid basis for protest). The CNI Protest is fatally deficient in that it fails to allege facts amounting to “improper conduct” or a “violation of the AMS”. *Id.* CNI's Protest challenges corrective action mandated by the Final Order which was issued by the FAA Administrator's Delegee. The Final Order was based on the F&R of the ODRA, which adjudicated the HyperNet Protest in accordance with: (1) its statutory authority granted by the Congress. See *2003 Vision 100—Center of Aviation Reauthorization Act*⁶; (2) the ODRA Procedural Regulation, 14 C.F.R. § 17.41; and (3) the FAA Administrator's Delegations of Authority dated March 10, 2004 and July 29, 1998.⁷

Moreover, it is well established that the FAA Administrator has full and final authority over all FAA acquisitions under the AMS. See 49 U.S.C. § 106(f)(2); § 40101 *et seq.* and § 46101 *et seq.*; see also *Protest of Consecutive Weather, Recommendation Regarding Reconsideration Request*, 99-ODRA-00112 (discussing the FAA Administrator's final decision authority). As head of the Agency and as the final authority for all FAA acquisitions and contracts, the Administrator expressly is authorized to issue Final Orders through his Delegee. See *e.g.*, 14 C.F.R. § 17.41, *Final Orders* (“all final FAA orders regarding protests or contract disputes . . . are to be issued by the FAA Administrator or by a delegee of the Administrator.”)

It further is well established that there are two avenues available to parties such as CNI, who are dissatisfied with the Administrator's Final Order in a bid protest. First, the aggrieved party may seek reconsideration of the Final Order and the underlying ODRA F&R. See 14 C.F.R. § 17.43(a). Second, pursuant to 49 U.S.C. § 46110, the aggrieved

⁶ See Pub. L. No. 108-176, § 224(b), 117 Stat. 2490, 2528 (codified as amended at 49 U.S.C. § 40110(d)(4)).

⁷ The FAA Administrator's Delegations of Authority are published on the ODRA website at <http://odra.faa.gov>.

party may appeal the matter to the appropriate United States Court of Appeals. In this case, CNI has availed itself of both of these procedurally legitimate avenues. As noted above, it unsuccessfully sought reconsideration of the Administrator's Final Order and the ODRA's F&R. CNI also filed an appeal, which remains pending, with the United States Court of Appeals for the Tenth Circuit. Apparently unsatisfied with these two avenues, CNI also has filed this Protest at the ODRA, seeking to have the ODRA review the remedy which the ODRA recommended and the Administrator's Delegee ordered in the HyperNet Protest. CNI attempts to characterize its filing as a challenge to the Contracting Officer's implementation of the corrective action. As support for its procedural approach, CNI asserts that the ODRA "and others have heard protests of both actual and proposed corrective actions," *see* CNI Brief at 2. In making this assertion, CNI cites to two ODRA decisions, *Protest of Communication Technologies, Inc.*, 03-ODRA-00254 and the *Protest of Hasler, Inc.*, 06-ODRA-00395. CNI also cites to a 2007 Decision by the United States Court of Federal Claims, *The Centech Group, Inc. v. United States*, 78 Fed.Cl. 496 (2007).

None of cases cited by CNI, however, involved a challenge to the mandate of an FAA Final Order. The Protest of *Communication Technologies, Inc. supra*, involved a displaced awardee's challenge against voluntary corrective action taken as result of a settlement agreement negotiated between the Protester and the FAA Program Office. As such, the protest challenged voluntary corrective action taken by the Agency prior to the issuance of any Findings and Recommendations by the ODRA and prior to a Final Order by the FAA Administrator. *Hasler, supra*, also involved corrective action that was proposed by the FAA Program Office and subsequently protested by Hasler to the ODRA. Since the involved corrective action had not been mandated by a Final Order adopting ODRA Findings and Recommendations, the ODRA held that it would review the proposed voluntary corrective action in the context of a bid protest so long as the challenge was timely filed.⁸ *See Protest of Communication Technologies, supra*, and *Protest of Hasler, Inc., supra*. Inasmuch as the instant CNI Protest does not arise from voluntary corrective action, but rather from an adjudicated Final Agency Order, the

⁸ The ODRA found the FAA Program Office's proposed corrective action to be unreasonable, and sustained the protest. *See Protest of Hasler, Inc., supra*.

Communications Technologies and *Hasler* protests are distinguishable and do not support CNI's Protest.

The only other authority cited by CNI, *i.e. The Centech Group, supra*, is both factually and legally distinguishable from the CNI Protest. *Centech* involved an Air Force procurement that had been protested to and sustained by the Government Accountability Office ("GAO").⁹ In sustaining the protest, the GAO recommended that the Air Force revoke the award and re-open competition for the contract. Acting on the GAO's recommendation, the Air Force amended the Solicitation and sought revised proposals. In addition, because over two years had passed since the original Solicitation was issued, the Air Force voluntarily "endeavored to revise its evaluation procedures to meet other allegations in [the] GAO protest." *Id.* at 20. *Centech*, which had been the original awardee, protested the Air Force's implementation of the GAO's recommendation at the United States Court of Federal Claims, which held that the implemented corrective action was protestable. *Id.*

The ODRA has stated on several occasions that it will consider decisions of the United States Court of Federal Claims as persuasive authority provided such decisions are consistent with the AMS. *See Consolidated Protests of Camber Corporation and Information Systems & Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080. Unlike the approach followed by CNI in this case, *Centech* did not file a new protest with the adjudicating body. Moreover, in *Centech*, the corrective action was based on a recommendation set forth in the original protest rather than on a Final Order by the head of the procuring Agency. Finally, in the *Centech* case, the Court of Federal Claims was reviewing the recommendation of the GAO under an entirely different acquisition system, rather than a Final Order under the FAA's AMS and the ODRA dispute resolution process. Unlike the FAA, the Air Force is subject to federal acquisition laws and regulations controlling government procurement. In addition, unlike the jurisdictional scheme applicable to Air Force procurements, and those of other Federal

⁹ Congress expressly exempted AMS acquisitions from the Competition in Contracting Act and review by the Government Accountability Office ("GAO"), among other things. *See Department of Transportation and Related Agencies Appropriations Act of 1996*, Pub. L. No. 104-50, § 348(b), 109 Stat. 436, 460; *see also Protest of Northrop Grumman Systems Corporation*, 06-ODRA-00384.

agencies, the statutory and regulatory authorities underlying the FAA Administrator's and the ODRA's jurisdiction provide an exclusive avenue of appeal of an FAA Final Order at an appropriate United States Court of Appeals. *See* 49 U.S.C. § 46110, *supra*. Given the divergent circumstances presented in *Centech* and the instant CNI Protest, the *Centech* decision is inapposite and cannot be viewed as persuasive authority on the Preliminary Issue presented here.

Finding no authority for the proposition that a party who participated as an intervener in a predecessor, sustained protest may file a new protest with the ODRA challenging implementation of the remedy ordered in the predecessor protest, the ODRA concludes that CNI's Protest fails to state a claim upon which relief may be granted. The ODRA therefore recommends that the CNI Protest be dismissed in its entirety.

B. CNI's Protest Was Not Timely Filed

The deadlines for filing bid protests at the ODRA are well established. The ODRA Procedural Regulations, at 14 CFR § 17.15(a)(3) provide:

for protests other than those related to alleged solicitation improprieties, the Protest must be filed on the later of the following two dates:

- (i) no later than seven business days after the protester knew or should have known of the grounds for the protest

Furthermore, it is well established that the time limits established in the Procedural Regulations for filing of bid protests are strictly enforced. *See Protest of B&B Cafeteria*, 05-ODRA-00349; and *Protest of Galaxy Scientific Corporation*, 01-ODRA-00193. The ODRA has no discretion to extend the time limits stated in the Procedural Regulation for the filing of bid protests. *See Protest of B&B Cafeteria, supra.*; *Protest of Boca Systems, Inc.*, 00-ODRA-00158.

The facts material to a determination of the timeliness of CNI's Protest are not in dispute. The Agency Final Order, sustaining the HyperNet Protest and directing that CNI's

contract be terminated and an award be made to HyperNet, was released to counsel for all parties on November 21, 2007. CNI's Protest was not filed until December 17, 2007, *i.e.*, 17 business days after the issuance of the Final Order. CNI asserts however, that the issuance of the ODRA's F&R and the Administrator's Final Order within seven (7) business days¹⁰ of receiving the F&R and Final Order on November 21, 2007 was timely because CNI "is challenging the award of the contract to HyperNet which upon information and belief was made by the FAA Contracting Officer on December 6, 2007." *CNI Brief* at 1. CNI reasons that it was "formal notice of contract action from the Contracting Officer", rather than the issuance of the final Agency Order mandating the action taken by the Contracting Officer, which triggered the running of the seven business day filing period set forth in the ODRA Procedural Regulations. *CNI Brief* at 3 and 4. CNI's rationale for this argument is that "until receipt of the notice terminating its contract, CNI Aviation did not know if and when the Administrator's Order would actually be implemented", *Id.* at 4; and further that "the actual basis of protest could not have been know to CNI Aviation until it received the December 6, 2007, Notice from the Contracting Officer." *Id.* at 5.

Notwithstanding these contentions, it is clear that CNI either knew or should have known of the grounds of its protest based on the unambiguous FAA Final Order directing that CNI's contract be terminated and that a contract be awarded to another company. Despite its assertions to the contrary, CNI's Protest is squarely aimed at reversing the ODRA's F&R and the Final Order implementing them, rather than at the formal, nondiscretionary action of the Contracting Officer to terminate its contract. Moreover, even if the CNI Protest is viewed as directed at the Contracting Officer's termination action, it is well established that the government has discretion to terminate contracts such as that awarded to CNI for convenience at any time and that such terminations do not present a protestable issue. *See also Fisher-Cal Industries, Inc.*, B-28150.2, July 6, 2000, 2000 CPD ¶ 115. *See FAA Acquisition Writing Toolbox, Contract Clause* § 3.9.1.2, *Protest after Award*, ¶ (e) ("[t]he Government's rights to terminate this contract at any time are not affected by action taken under this clause").

¹⁰ November 22, 2007 is not considered a business day as it was the federal Thanksgiving holiday.

Given that the Agency's Final Order adopting and incorporating the ODRA's F&R was served on CNI's counsel on November 21, 2007, CNI's Protest was due to be filed with the ODRA no later than seven business days thereafter, *i.e.*, by December 3, 2007. Inasmuch as CNI's Protest was not filed until December 17, 2007, *i.e.*, ten business days after the deadline, it is untimely and must be dismissed.

Nor does the ODRA's dismissal of this Protest leave CNI without a potential remedy. As was noted above, CNI unsuccessfully pursued a reconsideration option and it has an appeal pending before the United States Court of Appeals for the Tenth Circuit. Finally, there is no merit to CNI's argument that the dismissal of the CNI Protest will force future awardees to "file a protest at the start of the initial protest in order to preserve their rights." *CNI Brief* at 5. The ODRA Procedural Regulations permit any awardee such as CNI to timely intervene as a matter of right and to participate in any protest challenging its contract award. *See* 14 CFR § 17.15(g); *Consolidated Protests of Camber Corporation and Information Systems & Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080, *Interlocutory Decision on Request for Participation by Systems Research Corporation* dated July 6, 1998. CNI timely availed itself of the intervention right offered in the ODRA Procedural Regulations and fully participated in the adjudication of the HyperNet Protest.

V. CONCLUSION

The current CNI Protest is a thinly veiled, legally insufficient and untimely attempt to re-litigate the remedy ordered in the HyperNet Protest. For the foregoing reasons, the ODRA recommends that CNI's Protest be dismissed for the failure to state a claim upon which relief may be granted and as untimely.

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Anthony N. Palladino
Associate Chief Counsel & Director
FAA Office of Dispute Resolution
for Acquisition