

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

<u>Protest of</u>	)	
	)	Docket No. 15-ODRA- 00739
Aviation Management, Inc. LLC	)	
	)	
<u>Pursuant to SIR No. DTFAWN-15-Q-00108</u>	)	

**DECISION ON MOTION TO DISMISS PROTEST  
AS UNTIMELY AND MERITLESS**

This matter concerns a bid protest (“Protest”) filed at the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on July 13, 2015 by Aviation Management, Inc. LLC (“AMI”). AMI’s Protest challenges the award of a contract by the FAA Western Pacific Region (“Region”) to a non-intervening company for four signal light guns and related equipment (“Contract”). In a filing dated September 25, 2015, the FAA Region moved to dismiss the Protest as untimely and without merit (“Motion”).

The Motion alleges that: (1) the Protest constitutes an untimely challenge to the terms of Solicitation DTFAWN-15-Q-00108 (“Solicitation”); and, alternatively, (2) “even if AMI had timely submitted its protest, it would not have received the award because it was not the LPTA [lowest priced technically acceptable bidder].” *Motion* at 2-3. AMI filed its response to the Motion on September 27, 2015. (“Opposition”). After reviewing the parties’ submissions, the ODRA concludes, for the reasons stated below, that the Protest is untimely to the extent that it constitutes a post-award challenge to the terms of the Solicitation; but that there are material facts in dispute with respect to AMI’s challenges to the evaluation of its proposal and the award decision in this procurement. Accordingly, the Region’s Motion is granted in part and denied in part.

## I. FACTUAL BACKGROUND

The FAA issued the Solicitation on April 29, 2015 and established a due date for proposals of May 8, 2015. *Motion* Exhibit 1. Prior to the date established for submission of proposals, AMI corresponded with the contracting officer expressing concerns that the terms of the Solicitation favored the eventual awardee. *Opposition* at 2. It is undisputed, however, and AMI did not file a protest with the ODRA at that time but rather submitted its proposal in a timely fashion on May 5, 2015. *Motion* at 1. The Contract was awarded on May 27, 2015. *Motion* at 2. AMI claims that it was not notified of the contract award until July 13, 2015, i.e. the same date on which it filed its Protest with the ODRA. *Opposition* at 3. The Region's filings do not contradict AMI on this point and, for purposes of this Motion, the ODRA accepts that AMI was first notified of the contract award on that date.<sup>1</sup>

AMI's Protest is grounded on its allegations that the Region "illegally tailored" the specifications to constitute a sole source procurement and favor a particular vendor by requiring only ATI Avionics Model-901 Light Guns. *Protest* at 1. AMI also challenges the evaluation of its proposal to the extent that the evaluation of its price took into account items that were identified as "optional," and alleges that this was done "just to eliminate competition" against the higher priced proposal of the awardee. *Protest* at 1.

## III. DISCUSSION

The pertinent timeliness rules for filing protests at the ODRA are set forth in the ODRA Procedural Regulations:

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.

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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

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<sup>1</sup> Under the ODRA Procedural Regulations, the allegations of the non-moving are accepted as true for purposes of a dispositive motion. *Protest of Water & Energy Systems Technology, Inc.*, 06-ODRA-00373 (Decision on Motion to Dismiss, dated June 16, 2006).

of the grounds for the protest; or (ii) If the protester has requested a post-award debriefing from the FAA Region, not later than five (5) business days after the date on which the Region holds that debriefing.

14 C.F.R. §17.15 (a)(1) and (3). Summary dismissal of untimely protests expressly is permitted by the ODRA Procedural Regulation at 14 C.F.R. §17.19(a)(1), which provides that the ODRA may recommend or order that “the protest, or any count or portion of a protest, be dismissed for lack of jurisdiction, timeliness, or standing to pursue the protest.” *Id.*

In this case, it is undisputed that the due date for proposals was May 5, 2015. It similarly is undisputed that AMI’s Protest was not filed until July 13, 2015. Finally, AMI cannot contend that the Solicitation contained a latent defect, i.e., one that was not readily apparent from the Solicitation itself, since AMI expressly complained of the terms of the Solicitation to the contracting officer prior to bidding. *Protest* at 1.

The FAA dispute resolution process under the Acquisition Management System is designed to be streamlined and efficient in nature and the ODRA does not have discretion to extend the time limits for the filing of protests. Section 17.13 of the ODRA Procedural Regulations provides: “Other than the time limitations specified in §17.15 for the filing of protests, the ODRA retains the discretion to modify any timeframes established herein in connection with protests.” 14 C.F.R. §17.13 (c) (2012); see *Protest of Boca Systems, Inc.*, 00-ODRA-00158. The stated time limits for the filing of bid protests therefore are strictly enforced. *Protest of Aviation Research Group, Inc.* 99-ODRA-00141. Accordingly, AMI’s challenge to the terms of the Solicitation is untimely under the ODRA Procedural Regulations and must be dismissed. *Id.*; *Protest of Kodiak Northwest*, 09-ODRA-00505.

To the extent, however, that AMI alleges improprieties with respect to the Region’s evaluation of AMI’s bid, and the ultimate award decision, it appears that the Protest constitutes a timely post-award challenge. Based on the current record, the ODRA cannot conclude as a matter of law that AMI could not have received the award as the lowest priced, technically acceptable offeror. *Protest of Water & Energy Systems*

*Technology, Inc.*, 06-ODRA-00373 (Decision on Motion to Dismiss, dated June 16, 2006).

#### IV. CONCLUSION

For the reasons discussed herein, the ODRA concludes that the portion of the Protest challenging the allegedly sole source terms of the Solicitation was not timely filed and must be dismissed. Accordingly, the Motion is granted in part. The Motion is denied without prejudice concerning AMI's challenges to the Region's evaluation of AMI's offer and the resulting award.

The Agency Response to the remaining allegations of the Protest, including a statement of its legal position and all relevant documents chronologically arranged, tabbed and indexed, will be due to be filed and served by Wednesday, October 28, 2015. Comments of AMI on the Agency Response will be due to be filed and served 5 business days after AMI's receipt of the Response.<sup>2 3</sup>



Anthony N. Palladino  
Director and Administrative Judge,  
Office of Dispute Resolution for Acquisition  
Dated: October 14, 2015

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<sup>2</sup> The Opposition filed by AMI's legal representative includes statements that impugn the integrity and impartiality of the Alternative Dispute Resolution ("ADR") and adjudication proceedings at the ODRA. The AMI representative had signed an ADR agreement specifying that ADR proceedings were to be confidential and not used for purposes of adjudication. The Opposition, however, included specific references to ADR communications and indicated that AMI "recorded" ADR communications. *Opposition* at 2-5, 10. In addition, the Opposition suggested at several places, without support, that the ODRA has colluded with the Region. *Id.* The above described conduct of AMI's representative does not comport with the terms of the ADR agreement, or the Procedural Regulations, which require that legal representatives "conduct themselves at all times in a civil and respectful manner appropriate to an administrative forum." 14 CFR §17.51. AMI's representative is admonished regarding such conduct, which may result in the imposition of sanctions under 14 CFR §17.49. None of the referenced conduct of AMI's legal representative was considered or used in deciding this Motion.

<sup>3</sup> This is an interlocutory decision. It will become final upon issuance of the Final Order at the conclusion of this Protest.