

**PUBLIC VERSION**

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

**FINDINGS AND RECOMMENDATIONS**

**Matter:**        **Protest of Thomas Company, Inc.**  
                  **Under Solicitation No. DTFACT-17-R-00001**

**Docket No.:**   **16-ODRA-00781**

*Appearances:*

For the Protester:                                Joel Juffe, Esq., of  
   Hankin, Sandman, Palladino & Weintrob

For the FAA Technical Center:                Michaela Davis, Esq. and William Sheehan, Esq.

This post-award protest (“Protest”) by the Thomas Company, Inc. (“Thomas”) arises out of Solicitation Number DTFACT-17-R-00001 (“Solicitation”) issued by the Federal Aviation Administration’s William J. Hughes Technical Center (“the Center”). The Solicitation sought sealed offers to perform a firm fixed-price roof replacement contract. *Agency Response* (“AR”) Tab 2 at 4. The announcement of the Solicitation, however, required prospective offerors to visit the site and pass a “pre-qualification” screening before they could receive a copy of the full Solicitation. AR Tab 1. Thomas asserts that the awardee, Ranco Construction, Co. (“Ranco”), should not have passed the pre-qualification stage, and cannot comply with Acquisition Management System (“AMS”) Clause 3.2.2.3-41, “Performing Work (July 2004).” *Protest* at 2-3. Thomas’s Supplemental Protest (filed after receipt of the Agency Response) reiterates with additional evidence its challenge to Ranco’s pre-qualification. *Supp. Protest* at 2-3.

The Center’s Agency Response denies the allegations on the merits, but also includes a motion to dismiss for lack of standing. The motion is based on the Contracting Officer’s determination that Thomas is “other than small” for the purpose of this small business set-aside acquisition.

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Having received Thomas's Comments, the ODRA closed the record. The ODRA finds that the preponderance of the evidence does not support a finding that Thomas is a small business under the applicable size standard. Further, the record shows that the Contracting Officer had a rational basis to disqualify Thomas, albeit after the filing of the Protest. Thomas, therefore, is not an interested party with standing to protest the award, and the ODRA recommends that the Protest and Supplemental Protest be dismissed with prejudice.

### **I. The Standard of Review at the Present Procedural Stage**

Although the Center raised the standing issue as a dispositive motion, the ODRA discourages separate motions in bid protests and encourages such issues to be incorporated into the Agency Response or the Comments. 14 C.F.R. § 17.19(a). The Center included the first iteration of the motion in the Agency Response, and then renewed it on January 19, 2017, to provide further documentation (collectively, "the Motion"). On the same date, after receipt of the renewed motion and documentation, Thomas expressed its belief that "the protest should move forward on schedule." *Thomas Letter* of January 19, 2017. Citing Thomas's letter, the ODRA maintained the established adjudication schedule. *ODRA Letter* of January 25, 2017. The ODRA did not require (nor prohibit) Thomas to respond to the Motion. Nevertheless, Thomas had notice of the grounds of the Motion as early as January 6, 2017, and ultimately included a specific response to the Motion in its Comments. *Comments* at 1-3. Thomas's response to the Motion included factual assertions and legal argument, as well as supporting exhibits. *Id.* at 1-3 and Exhs. B-D.

With Comments complete, the ODRA's review of the matter is governed by the preponderance of the evidence standard found in 14 C.F.R. § 17.21(m). A protester is affirmatively obligated to plead "the basis for the protester's status as an interested party." 14 C.F.R. § 17.15(c)(4). Further, it is well established that once standing is called into question, the party asserting standing bears the burden of establishing standing by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1998). Accordingly, Thomas must demonstrate by the preponderance of the evidence that it has standing.<sup>1</sup>

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<sup>1</sup> Thomas did not file a specific protest of the Contracting Officer's determination that Thomas was not a small business for the purpose of this Solicitation. See *Protest of Enterprise Engineering Services, Inc.*, 09-ODRA-00490

## **II. Positions of the Parties on Standing**

The Contracting Officer’s original pre-qualification review found that Thomas was a small business qualified to compete under the Solicitation’s \$36,500,000 size standard. *AR* Tab 7 at 3. But the Center now argues that Thomas misrepresented its size, and is too large to compete under the present Solicitation. *AR* at 5. This issue came to the attention of the Contracting Officer while working on this protest when he realized that Thomas had submitted different statements of gross revenue for different projects under his cognizance at the Center. *AR* Tab 11, *Contracting Officer’s First Decl.*, at ¶¶ 3-5.<sup>2</sup> As a result, he referred the matter to the Office of Government Contracting, Area 1, of the U.S. Small Business Administration (“SBA”). *Id.* at ¶ 12. The Director of Area 1 found Thomas “to be other than a small business” based on the fact that Thomas never submitted an SBA Form 355 or other documents to support its status as a small business. *Size Determination Memorandum*, Case No. 1-SD-2017-15, at 3. Based on the SBA’s size determination, the Contracting Officer found “that Thomas Company was ineligible to compete for SIR No. DTFAC-17-R-00001 as a small business concern.” *Contracting Officer’s Second Decl.*, dated January 19, 2017, at ¶ 3.<sup>3</sup>

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(quoted *infra* Part III.A) (referring to opportunity to protest size determinations). Had Thomas so protested, it still would be subject to the preponderance of the evidence standard to show that the Contracting Officer’s determination lacked a rational basis. 14 C.F.R. § 17.21(m).

<sup>2</sup> The following table compares the figures in Thomas’s two Business Declarations:

<b>Year</b>	<b>Stated Yearly Gross Revenue in Business Declarations</b>		<b>Differences</b>
	<b>Business Decl. of 3/11/2015 (AR Tab 9)</b>	<b>Business Decl. of 8/02/2016 (AR Tab 4 at end)</b>	
2012	\$[REDACTED]		--
2013	[REDACTED]	\$[REDACTED]	\$7,859,945
2014	[REDACTED]	[REDACTED]	1,336,945
2015		[REDACTED]	--

Given the two declarations, the Contracting Officer found that if the maximum representation for each year were used, the average gross revenue would be \$[REDACTED], which exceeded the \$36,500,000 size limitation applicable to the Solicitation. *AR* Tab 11, *Contracting Officer’s First Decl.*, at ¶¶ 8 and 9.

<sup>3</sup> The Contracting Officer also filed a third declaration, stating that Thomas,

... did not qualify as a Small Business concern under NAICS Code 236220, \$36.5 Million at the time it submitted its proposal under Solicitation DTFAC-17-R-00001. It, therefore, was ineligible to compete in this acquisition.

*Supplemental Declaration of Contracting Officer*, dated January 24, 2017, at ¶ 11.

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Thomas initially responded by stating that it “is in the process of filing an appeal petition” to dispute the SBA’s size determination. Thomas observed that “a court will only dismiss a bid protest for lack of standing when the size of the bidder is undisputed.” *Comments* at 2 (citing *Lock Harbour Grp., Inc. v. United States*, 128 Fed. Cl. 294 (2016)). Thomas expressed confidence that its appeal “should result in the reversal of the SBA’s size determination and undermine the FAA’s standing argument.” *Comments* at 3. But after the record closed, Thomas sent a one-page letter to the ODRA stating it “will be withdrawing its appeal of the SBA Size Determination.” *Thomas Letter* dated February 2, 2017.<sup>4</sup> Thomas further stated that it “maintain[s] the position set forth in Thomas Company Inc.’s Protest and Comments,” and “respectfully await[s] the decision in the protest.” *Id.*

### III. Discussion.

The Center’s position presents a matter of first impression at ODRA inasmuch as post-protest size determinations are not ordinarily performed to defeat a protester’s standing. In the one case considering a similar argument, the ODRA refused to entertain an *intervenor’s* challenge to a protester’s size because the record before the ODRA lacked an actual size determination by the Contracting Officer that disqualified the protester. *Protest of Enterprise Engineering Services, Inc.*, 09-ODRA-00490. The preliminary question for the ODRA, therefore, is whether the approach in *Enterprise Engineering* should be applied so as to find standing based on the Contracting Officer’s initial decision to pre-qualify Thomas, or whether Thomas has a burden to establish standing now that the Contracting Officer has reconsidered its set-aside eligibility and disqualified Thomas.

#### A. *Enterprise Engineering* Does Not Limit the Review of Standing

In *Enterprise Engineering*, the ODRA relied on several circumstances for refusing to entertain the intervenor’s challenge to the protester’s size. These included: (1) the fact that the contracting officer had no reason to question the protester’s Business Declaration, (2) the contracting officer had never actually disqualified the protester based on size, (3) the ODRA’s protest function is to review decisions by contracting officials rather than conduct *de novo* determinations, and (4)

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<sup>4</sup> Although the record closed, the ODRA finds the letter material and relevant, and therefore admits it into the record.

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administrative economy and the need for an efficient protest process counseled against expanding the record for review. *Enterprise Engineering Services, Inc.*, 09-ODRA-00490, 2009 ODRALEXIS 9, 54-58 (ODRA 2009). The ODRA also recognized, however, that certain exceptions have been entertained by the Government Accountability Office,<sup>5</sup> such as when a protester admits to exceeding a size standard, or if there had been an intervening determination by the SBA's Office of Hearings and Appeals. *Id.* at 2009 ODRALEXIS 9, 56-57 (citing *Priority One Services Inc.*, B-288836.5, 2002 CPD P 191, and *Four Winds Services, Inc.*, B-280714, 98-2 CPD P 57).

The present record is significantly different from that found in *Enterprise Engineering*. The ODRA has before it a Contracting Officer's size-determination that was prompted by questions about Thomas's Business Declarations and supported by the intervening SBA determination. This record is sufficiently developed (at least by the Center) to relieve any concerns over administrative economy. Indeed, if the ODRA avoided the size issue and otherwise sustained the Protest, in all likelihood the issue would arise again on remand to the Center.

Thus, it is appropriate for the ODRA to limit the application of *Enterprise Engineering*, and to consider whether Thomas has standing as a small business.

### **B. Thomas has not shown that it is Small or that the Contracting Officer Lacked a Rational Basis**

Just as Thomas elected to not to support the initial review by the SBA or to file an appeal with the SBA's Office of Hearings and Appeals, Thomas has not submitted substantial evidence to the ODRA to support its standing in the present case.

The only additional exhibit that Thomas provides is a half-page email message from its "independent auditor and accountant." *Comments* Exh. D. This informal email is not a financial statement (certified or otherwise). It uses round numbers and does not explain the discrepancies<sup>6</sup>

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<sup>5</sup> The ODRA views Government Accountability Office's decisions to be persuasive authority where consistent with AMS Policy. *Protest of International Services, Inc.*, 02-ODRA-00224.

<sup>6</sup> See *supra* note 2.

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between Thomas's two business declarations. Thomas does not provide a supporting declaration or other information to explain the discrepancies.<sup>7</sup> Thus, the discrepancies in Thomas's statements regarding its gross revenues for the years 2013 and 2014 remain unexplained, and preclude a finding by substantial evidence that Thomas met the size standard.

Aside from Thomas's apparent inability to affirmatively support its status as a small business, the ODRA finds that the Contracting Officer had a rational basis to question and disqualify Thomas from the competition given the SBA determination. Although the ODRA's Standing Order 2013-2, "Protest Regarding Size or Eligibility of Awardee," addresses challenges against an awardee rather than a protester, it certainly encourages the use of "subject matter experts within the Government deemed necessary to render an informed determination supported by a rational basis." *Standing Order 2013-2* at III.B. The Standing Order (like the SBA's regulations) also permits a conclusion adverse to the company under review if necessary information is not provided. Given that necessary information was not provided through the SBA process, and given the opinion of the SBA, the ODRA finds that the Contracting Officer had a rational basis for his decision to disqualify Thomas.<sup>8</sup>

### C. Thomas Lacks Standing

Only interested parties may file protests. 14 C.F.R. § 17.15(a). An "interested party" in this context is "one whose direct economic interest has been or would be affected by the award or failure to award an FAA contract." 14 C.F.R. § 17.3(m). Having found that Thomas is not small for the purpose of the Solicitation's size limitation, the question remains as to whether Thomas retains any direct economic interest in the competition. It does not.

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<sup>7</sup> Thomas's counsel argues that the 2015 Business Declaration "was not for a small business set-aside job, so Thomas did not have an incentive to be exact in its gross receipts; round numbers were used." This carries no weight for several reasons. First, the disparity is not a function of round numbers given that the differences are measured in the millions of dollars. *See supra* note 2. Second, a Business Declaration submitted under an FAA solicitation is no place for casual representations. A company official must sign and declare that the information provided is "true and correct to the best of my knowledge, information, and belief," and the criminal false statement provision of 18 U.S.C. § 1001 is specifically referenced. Finally, mere argument of counsel without citation to the record does not constitute evidence. *Protest of Systems Atlanta, Inc.*, 10-ODRA-00530 (citing *Barnette v. Ridge*, 2004 U.S. Dist. LEXIS 27546 at 6 n. 6 (D.D.C. 2004)).

<sup>8</sup> Recognizing that the FAA is exempt from Small Business Act under 49 U.S.C. § 40110(d)(2)(D), the decision of the Contracting Officer – not the SBA – is the operative size determination for acquisitions under the FAA's Acquisition Management System.

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Even if the ODRA sustained Thomas's protest on the merits regarding Ranco's pre-qualification, two other small offerors passed the pre-qualification review and submitted bids that were rejected only on the basis of their higher prices. AR Tab 7 at 3-4. It is clear on this record, therefore, that the Center would not be obligated to reopen the competition to allow larger businesses like Thomas to compete. See *Tinton Falls Lodging Realty, LLC v. United States*, 800 F.3d 1353, 1359 (Fed. Cir. 2015). Having found that Thomas is not small for the purpose of the applicable size standard in this restricted competition, and further that other small businesses pre-qualified, Thomas does not have a direct economic interest affected by the award of the contract to Ranco. Thomas, therefore, is not an interested party with standing to protest.

### IV. Conclusion

Having found on the complete record that Thomas lacks standing, its Protest and Supplemental Protest should be dismissed with prejudice.<sup>9</sup>

/S/

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John A. Dietrich  
Dispute Resolution Officer and Administrative Judge  
FAA Office of Dispute Resolution for Acquisition

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<sup>9</sup> Ranco's contract price of \$4,886,000 is well within the delegation of final decision authority to the Director of the ODRA for protests involving acquisitions valued up to 20 million dollars. Compare AR Tab 8 with *Delegation of Authority of October 12, 2011, as revised March 19, 2014*; see also 79 FR 21832 (Apr. 17, 2014).