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

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of Wesson International, Inc.**
Pursuant to Solicitation DTFA03-99-R-00023
Docket: **00-ODRA-00151**

Appearances:
For Wesson International, Inc.: David W. Coyle, Esq.
For the FAA Technical Center: James J. Drew, Esq.

I. INTRODUCTION

This Protest by Wesson International, Inc. ("Wesson") involves a contract awarded by the FAA's William J. Hughes Technical Center ("Center"), pursuant to Solicitation DTFA03-99-R-00023, for an air traffic control tower simulator. Wesson forwarded the Protest to the Office of Dispute Resolution for Acquisition ("ODRA") via Certified Mail on January 4, 2000. In accordance with the ODRA Procedural Rule, the Protest is considered to have been filed with the ODRA on the date it was received, *i.e.*, January 10, 2000.[1] On January 21, 2000, the Center filed a motion for summary disposition ("Motion") alleging that the Protest was not filed timely. Wesson filed its Opposition ("Opposition") to the Center's Motion on January 31, 2000. For the reasons set forth below, the ODRA finds that the Protest was filed more than 7 business days after Wesson knew or should have known of the grounds for its Protest. The ODRA therefore recommends that the Protest be dismissed. 49 C.F.R. 17.19.

FINDINGS OF FACT

The undisputed facts in this case demonstrate that the contract in question was awarded to a competitor of Wesson on September 23, 1999. On that same date, the unsuccessful offerors, including Wesson, were notified of the award. On October 6, 1999, the Contracting Officer received a letter from Wesson indicating that Wesson planned to protest the contract award. Declaration of Michael J. Ward at ¶7. The October 6 letter was not forwarded to the ODRA. Mr. David Conley, the Air Traffic Control Supervisor of Wesson, confirms in Paragraph 3 of his Declaration in support of the Opposition that: "On October 6, 1999, I notified the FAA Contracting Officer by telephone that we <u>would be filing</u> a protest to the award." (Emphasis added).

Apparently believing that the FAA's solicitation language "did not seem to allow for a debriefing for this RFP", *See* Conley Declaration at ¶3, Wesson did not request a debriefing from the Contracting Officer[2]. Rather, Wesson filed a FOIA request because, according to the Conley Declaration "it was clear that before a protest could be pursued, I would have to file a FOIA request."[3] The Center's FOIA Coordinator received the Wesson FOIA request on October 8, 1999. Declaration of Carole Bralski at ¶3. Wesson received the Agency's response to the FOIA request via certified mail, return receipt requested, on December 17, 1999. Bralski Declaration at ¶7. However, for reasons related to his travel and Wesson's Holiday staffing, Howard Wesson, the CEO of Wesson did not review the documents included in the FOIA response until January 4, 2000. Conley Declaration at ¶9. The Protest was filed on January 10, 2000, *i.e.*, 14 business days after Wesson received the response to its FOIA request.

III. DISCUSSION

In its Protest filing with the ODRA, Wesson states:

Upon learning of the results of the selection process related to the RFQ, we promptly notified the Contracting Officer that we expected to file a protest and requested all documentation related to the selection process through the Freedom of Information Act Request. The release by the FAA of the requested information suffered an extensive administrative delay and I have just now become aware of several errors with regard to the selection process as of this date [January 4, 2000].

The Protest filing recounts three alleged errors made by the Center in the evaluation and selection process. First, Wesson contends that although the Center sought additional clarifying information from the awardee of the Contract, it failed to seek such additional information from Wesson. Second, Wesson alleges that portions of the specifications for

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[2] The Conley Declaration also states at Paragraph 3 that "that there was no offer of a debriefing during this conversation." The ODRA notes in this regard that there is no requirement under the Acquisition Management System ("AMS") that Contracting Officers specifically offer a debriefing to a disappointed offeror. The AMS does call for debriefings where requested by an offeror: "Debriefings shall be conducted with all offerors that request them." AMS §3.2.2.2.

[3] Counsel for Wesson asserts in his Opposition that "the Contracting Officer told Wesson that before a protest can be considered, Wesson needed to file an FOIA request." Although counsel cites to the Conley Declaration, the ODRA notes that the Declaration does not expressly support this assertion.

the solicitation were copied from the production information of a particular supplier, and that the awardee intends to supply a product that is not consistent with the specifications. The third error charged appears to challenge the responsibility of the contract awardee. Wesson's Opposition to the Motion asserts that Wesson: (1) informed the FAA's Contracting Officer of its intention to protest immediately after award; (2) believed that a debriefing was not available and was told that it was required to file a FOIA Request; and (3) did not know the specific grounds for its protest until it received the response to its FOIA request. Wesson Opposition at 2,3.

The Section of the ODRA Procedural Rule entitled "Dismissal or Summary Decision of Protest" provides, among other things, that:

> At any time during the protest, any party may request, by motion to the Office of Dispute Resolution for Acquisition, that – (1) the protest, or any count or portion of the protest, be dismissed for lack of jurisdiction, if the protester fails to establish that the protest is timely, or that the protester has no standing to pursue a protest;

49 C.F.R. 17.19 (a). Subsection (e) of Section 17.19 requires that:

> Prior to recommending or entering either a dismissal or 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, an opportunity to respond to the proposed dismissal or summary decision.

The Center's Motion argues that Wesson failed to satisfy the timeliness requirements of the ODRA Procedural Rule, 49 C.F.R. 17.15 (a)(3), which provides:

> 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 that 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 five (5) business days after the date on which the Product Team holds that debriefing.

The Center urges that we follow a recent GAO case, *Automated Medical Products Corporation*, B-275835, 91-1 CPD ¶52 (February 3, 1997), and hold that because Wesson did not request a post-award debriefing but, rather made a FOIA Request, it did

not diligently pursue the information needed to file a successful protest. The ODRA declines to apply such a standard in this case.[4] In a summary disposition matter such as this, the ODRA follows the general rule that all material disputed facts, and inferences to be drawn from these facts, will be viewed in a light most favorable to the non-moving party. See ODRA Procedural Rule, 49 C.F.R. 17.19(b).

Here, there is a weakly supported suggestion that Wesson was led to believe that it was required to file a FOIA Request before bringing its protest. For purposes of the pending Motion, the ODRA accepts that Wesson reasonably, but wrongly, believed that no debriefing was available to it; and that a FOIA request would be necessary. Moreover, the record in this case does not support a finding that the specific grounds for the Protest were known or should have been known to Wesson prior to its receipt of the FOIA response. Thus, the issue to be determined is whether Wesson knew or should have known of the basis of its protest more than 7 business days prior to January 10, 2000.

With respect to the issue of why it took no action between December 17, 1999, when it received the FOIA response, and January 4, 2000, when it first reviewed the documents supplied with the FOIA response, counsel states that:

> Wesson's business schedule from 17 December 1999 – 4 January 2000 was not a 'normal business schedule' for Wesson, the reduced work schedule for the holiday had partial staffing in the office on only 6 days between 17 December 1999 and 4 January 2000. The other days were not <u>work</u> days.

Opposition at 2. The Conley Declaration states at Paragraph 8 that "On December 17, 1999 Wesson office on holiday staffing through Jan 4th and Bob Wesson out of the country during this period."

In the ODRA's view, the fact that Wesson was on "holiday staffing" for two and one-half weeks and that Robert Wesson was out of the country did not serve to toll the running of the limitations period. Wesson was in possession of the information underlying its Protest by no later than the FOIA response date, *i.e.*, December 17, 1999. The ODRA therefore concludes that Wesson knew or should have known of the grounds for its Protest by no

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[4] The instant case is also readily distinguishable from *Bel-Air Electric Construction, Inc.*, 98-ODRA-00084, which predated the current Procedural Rule's timeliness requirements. In *Bel-Air*, the protester was found to be aware of the grounds for its protest "months before" the protest was filed. Here, the ODRA cannot find, on a summary basis, that Wesson had complete awareness of the grounds of its current protest.

later than December 17, 1999; and that the Protest was required to be filed by no later than the close of business on December 29, 1999, *i.e.*, 7 federal government working days thereafter. Inasmuch as the Protest was not filed until January 10, 2000, it must be dismissed as untimely.

CONCLUSION AND RECOMMENDATION

For the reasons set forth above, the ODRA recommends that the Protest be dismissed.

/s/

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

[5] The ODRA Procedural Rule, 49 C.F.R. 17.7 (a), expressly provides, among other things, that " a protest or contract dispute is considered to be filed on the date it is received by the Office of dispute Resolution for Acquisition during normal business hours."