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VIA HAND DELIVERY

March 18th, 2005

Anthony N. Palladino, Director
Office of Dispute Resolution for Acquisition, AGC-70
Federal Aviation Administration
800 Independence Avenue, S.W., Room 323
Washington, D.C. 20591-0001

In the Matter of Contest by Agency Tender Official James H. Washington of
Performance Decision Made Pursuant to Solicitation DTFAAWAACA-76-001,
GSBCA 16614-FAA, ODR Docket 05-ODRA-00342C;

In the Matter of Contest by Kate Breen as Agent for a Majority of Directly
Affected FAA Employees under Solicitation DTFAAWAACA-76-001,
ODR Docket 05-ODRA-00343C.

Dear Director Palladino:

These are Additional Comments on behalf of Agency Tender Official James H. Washington on the Response filed Wednesday, March 16th by the Office of Competitive Sourcing to the Agency Tender Official's request for a Suspension, a request for Suspension that was filed together with the Agency Tender Official's Contest on Friday, March 11th. CR 9(a)(3).

THE FOUR VIRGINIA PETROLEUM JOBBERS FACTORS

The Office of Competitive Sourcing correctly observes that the four *Virginia Petroleum Jobbers* factors, 259 F.2d 921, 925 (D.C. Cir. 1958), necessarily inform the decision to grant, *vel non*, a requested Suspension. These four factors are: (1) the likelihood of prevailing on the merits, (2) the probability of irreparable injury, (3) likelihood of harm to others, and (4) the public interest. But the Office of Competitive Sourcing does not properly apply these four factors.

It needs to be considered, first, that it is the law announced by the United States Court of Appeals for the District of Columbia Circuit that controls, and that the United States Court of Appeals for the District of Columbia Circuit is the ultimate authority on questions of law in proceedings such as this one before the Office of Dispute Resolution for Acquisition. Why? Because it is the United States Court of Appeals for the District of Columbia Circuit that is the principal appellate authority available for review of the final Agency Orders that implement recommendations of the Office of Dispute Resolution for Acquisition. 49 U.S.C. § 46110(a); CR 17(a).

And the law announced by the United States Court of Appeals for the District of Columbia Circuit does not contemplate or authorize consideration of the four *Virginia Petroleum Jobbers* factors by rote:

To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. *Probability of success is inversely proportional to the degree of irreparable injury evidenced.* A stay may be granted with a high probability of success and some injury, or *vice versa*.

Cuomo v. U.S. Nuclear Regulatory Commission, 772 F.2d 972, 974 (D.C. Cir. 1985) (emphasis added). *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (It is a “linguistically permissible interpretation of *Virginia Petroleum Jobbers*” to say that a stay is particularly appropriate when success is “probable.”). In other words, the greater the likelihood of prevailing on the merits, the lesser the required showing of the intensity of irreparable injury. This Construct demands a Suspension in this Contest.

Judge Colleen Kollar-Kotelly of the United States District Court for the District of Columbia has a clear understanding of this point:

[C]ourts employ a sliding scale under which a particularly strong showing in one area can compensate for weakness in another. See *CityFed Fin.*, 58 F.3d at 747. Thus, “an injunction may be justified, for example, where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury.” *Id.* Notwithstanding the fluid nature of this familiar four-part inquiry, “it is particularly important for the [movant] to demonstrate a substantial likelihood of success on the merits.” *Barton v. Dist. of Columbia*, 131 F. Supp. 2d 236, 242 (D.D.C. 2001) (citing *Benten v. Kessler*, 505 U.S. 1084, 1085, 120 L. Ed. 2d 926, 112 S. Ct. 2929 (1992)). If the movant fails to do so, “it would take a very strong showing with respect to the other preliminary injunction factors to turn the tide in plaintiff’s favor.” *Davenport v. Int’l Bhd. of Teamsters*, 334 U.S. App. D.C. 228, 166 F.3d 356, 366 (D.C. Cir. 1999).

Emily’s List v. Federal Election Commission, Civil Action No. 05-49 (CKK), Memorandum Opinion, February 25th, 2005, 2005 U.S. Dist. LEXIS 2934, *18.

THE AGENCY TENDER OFFICIAL WILL PREVAIL ON THE MERITS

The Office of Competitive Sourcing would have the Office of Dispute Resolution for Acquisition conclude that the Agency Tender Official has not pled an adequate Contest, arguing that the Agency

Tender Official has not stated how his grounds of Contest “materially affect the outcome of the acquisition,” and arguing that the Agency Tender Official has not averred that if the grounds of Contest “were taken for true,” “the outcome of the competition would be different.”

Obviously, the Office of Competitive Sourcing has not taken a good look at the Contest, for had it done so, it would have seen that at page 4 of the Contest, the Agency Tender Official has asserted grounds of Contest that compel a re-opened Public-Private Standard Competition, and has asserted that a new Performance Decision well may not confirm the previous Performance Decision for Lockheed Martin Services, Incorporated (LMSI). This same page of the Contest concludes with the Agency Tender Official’s assertion (and a mandatory assertion, at that) that the Agency Tender Official is likely to succeed on the merits. Again, why?

Simple. Members of the Most Efficient Organization team have credible evidence, from persons who say that they were members of the Technical Evaluation Team, that these members of the Technical Evaluation Team were not allowed to disagree with the results, and that the Chairman of the Technical Evaluation Team demanded “consensus” evaluations when in fact there was no consensus and some members of the Technical Evaluation wished to record different evaluations. Members of the Most Efficient Organization team have credible evidence, again from persons who say that they were members of the Technical Evaluation Team, that the Chairman of the Technical Evaluation Team ordered that all notes and memoranda of members of the Technical Evaluation Team were to be destroyed. Members of the Most Efficient Organization team likewise have credible evidence that records of these disallowed, different evaluations are still extant.

The likelihood of an improper and biased evaluation is confirmed by records of the Source Selection Organization that have already been disclosed: there were some forty members of the Technical Evaluation Team, and there were additional persons on the Cost Evaluation Team. There was a Source Selection Evaluation Board of seven members in addition to the Chairman of the Technical Evaluation Team (who was also a member of the Source Selection Evaluation Board), and there was a Source Selection Authority. This is an Acquisition with an approximate value of \$2.1 billion. Yet given all these people, and given the magnitude of this Acquisition, are we to believe the records of the Source Selection Organization that have already been disclosed, that the Competitive Proposal from LMSI *did not have even a single weakness, or any technical risks, or any cost risks?* No! This alone demonstrates a biased and improper evaluation, an evaluation, and a Performance Decision, dictated by the “consensus” evaluations demanded by the Chairman of Technical Evaluation Team. So far, this is not a “Competition,” this is a simple “Conformation,” likely a choice among any of the private-sector Prospective Service Providers, in other words, a choice to be made of anyone *other* than the Agency’s own organization.

This determination to select anyone other than the Agency’s own organization is manifest: (1) in the Source Selection Organization’s irrational failure to consider either the Most Efficient Organization’s incumbency or the effect of the Most Efficient Organization’s incumbency on Influential Weaknesses assessed against the Agency Tender; and (2) in the unwarranted negative assumptions arising only from the Most Efficient Organization’s status as a Federal entity, including, but not limited to, (a) an Influential Weakness assessed because the Most Efficient Organization does not propose hiring a Human Resources liaison until after the Letter of Obligation is signed (Attachment B, “Public-Private Competition,” to Office of Management and Budget Circular Number A-76, at paragraph D.4.a.(1)(a), requires that the Agency’s Human Resource Advisor “shall develop and classify new position descriptions based

on the MEO [Most Efficient Organization], *but the agency shall not hire employees to staff these positions unless the agency is the selected provider.*” (emphasis added); (b) the Influential Weakness for the Transition Schedule proposed in the Agency Tender that is assessed because the Most Efficient Organization “did not identify or adequately substantiate all of the necessary agreements, processes, and activities for the interface with the various FAA organizations necessary to implement this service;” and (c) the Influential Weakness assessed because of the need for “Bargaining with an Existing Union” (Office of Management and Budget Circular Number A-76 recognizes that it is Agencies, not Prospective Service Providers, either private-sector or public-sector, which are responsible for dealing with Federal employee unions whose work may be out-sourced to the private-sector. 5 U.S.C. § 7111(a)).

Beyond this obvious bias against the Agency’s own organization, there are also the egregious failures by the Source Selection Organization to conduct a proper evaluation of the Agency Tender. These include, but are not limited to: (1) the Influential Weakness, “Lack of Performance Penalties,” assessed because the Most Efficient Organization did not offer monetary credits for failure to meet Acceptable Performance Levels (APLs) (The Screening Information Request explicitly provides that “*in lieu of such credit payment*, [the Agency] may accept an enhanced corrective action plan from the SP [Service Provider] or MEO to remedy the deficiency.” (emphasis added)); and (2) the Influential Weakness assessed because the Most Efficient Organization did not offer APLs at, or above “the existing benchmark of the MITRE survey’s 92% customer satisfaction rating” (Among the Questions and Answers published last year by the Office of Competitive Sourcing is the following: “QUESTION: Will the MITRE pilot survey be used as a benchmark for future Flight Service Performance? ANSWER: No.” (See the Enclosure to these Additional Comments)).

THERE WILL BE IRREPARABLE INJURY

Neither the Agency’s Preferred Placement Program nor the Agency’s Selection Priority Program, both of which are now offered by the Office of Competitive Sourcing in opposition to the Agency Tender Official’s request for a Suspension, will ameliorate the injuries to the incumbent Air Traffic Control Specialists which will surely occur if LMSI is allowed to continue Contract performance.

It turns out that many Air Traffic Control Specialists are close to retirement from Federal service and may choose to leave Federal service before October 1st when their Federal employment will cease and they must accept employment with LMSI else resign. Some know that they do not wish to relocate to one of the three hubs proposed by LMSI, yet they cannot be certain of the outcome of this Contest. Under the Agency Tender, these people would be eligible for a Buy-Out. Certainly this Competition will be reopened. If the result is a new Performance Decision, one for the Agency Tender, these people will have foregone an available financial opportunity.

Likewise, many Air Traffic Control Specialists have school-age children. “Contingent” offers of employment, as are now proposed by LMSI, will lead some of these Air Traffic Control Specialists to gamble on the outcome of this Contest, and they may sell their homes, and their spouses may accept jobs in new locations, etc., only to find there is a new, changed Performance Decision. Other Air Traffic Control Specialists will suffer if they decline employment with LMSI because they cannot afford to pay the cost of higher education due to a required move to a new location that has a higher cost of living (many Automated Flight Service Stations are in places with lower costs of living) and leave employment as an Air

Traffic Control Specialist, only to find, after this Contest is granted, that there is a new, changed Performance Decision for a “solution” with hubs at different locations.

Variations on this last scenario include other, associated lifestyle impacts, *viz.*, the need to obtain outside support to care for children and/or elders, costs of establishing two households to support two careers, and loss of access to healthcare facilities for families with specific needs.

THE BALANCE OF HARMS

The Competitive Sourcing Office offers up as a harm a very familiar theme for this Agency, “a day-for-day slip” in the implementation of the entirely new system, “Flight Service 21,” which LMSI proposes to implement, if the Contract is suspended. The Competitive Sourcing Office supposes that the prospect of resolution of this Contest before October 1st is adequate to overcome this harm.

Not so. The harm of this day-for-day slip must here be balanced against the certain injury to Air Traffic Control Specialists that will ensue before October 1st, and this because neither the Agency’s Preferred Placement Program nor the Agency’s Selection Priority Program can ameliorate the injuries to the incumbent Air Traffic Control Specialists which will surely occur if LMSI is allowed to continue Contract performance. These injuries, like environmental injury, are ones that cannot be remedied:

[E]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely . . . the balance of harms will usually favor issuance of the injunction to protect the environment.

Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 545 (1987). Surely these certain injuries to the Air Traffic Control Specialists are every bit as worthy an injury as an injury to the enjoyment of viewing five hundred twenty-five mute swans here in the Chesapeake. *The Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 224, 238 (D.D.C. 2003) (the Court “speaks for the mute swans” and enjoins a planned Cull by the State of Maryland).

THE PUBLIC INTEREST COMPELS A SUSPENSION

It appears that the Agency Tender Official will be joined in this Contest by two of the three private-sector Potential Service Providers other than LMSI; that is, Raytheon Technical Services Company LLC and Computer Sciences Corporation will seek to Intervene on the side of the Agency Tender Official. Already in this Contest there is enough that the general public, and the customers of the Automated Flight Services Stations, will question the integrity of this Performance Decision.

Paragraph 4.e. of Office of Management and Budget Circular Number A-76 requires that Agencies performing A-76 Public-Private Competitions must “comply with procurement integrity, ethics, and standards of conduct rules.” That is, as required by paragraph 3.1.3 of the Agency’s Acquisition Management System, the Agency must “[p]romote discretion, sound business judgment, and flexibility at the lowest levels while maintaining fairness and integrity.”

Here there has been no discretion, there has been no exercise of sound business judgment, there has been no fairness, and it appears there has been no integrity.

Sincerely,

/s/ Cyrus E. Phillips, IV

Cyrus E. Phillips, IV
D.C. Bar Number 456500
Legal Agent for the
Agency Tender Official

Enclosure (as stated)

Cc:

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CERTIFICATE OF SERVICE

I hereby certify that on Friday, March 18th, 2005 true and complete copies of these Additional Comments of the Agency Tender Official have been served by facsimile, and by overnight delivery, on the following individuals, and that these Additional Comments have been served at the addresses listed herein above:

Nathan Tash, Esq.
Thomas C. Papson, Esq.
Gerard F. Doyle, Esq.
Carl J. Peckinpaugh, Esq.
David M. Nadler, Esq.
William W. (Tom) Thompson, Jr., Esq.

/s/ Cyrus E. Phillips, IV

Cyrus E. Phillips, IV

Enclosure

<p>The FAA is supporting many new initiatives such as Voice Switch, Data Link, NexCom, and new FTI. How may we discover and encompass these initiatives within our proposal?</p>	<p>The FAA is offering the specifically identified GFE on a mandatory or optional basis to potential service providers. Other systems and capabilities are not provided.</p>
<p>The FAA is tasked to move the communications DEMARC to any new contractor facilities. What level of commitment can be expected (i.e. will they adhere to our schedule)?</p>	<p>The Government is committed to respond to all requests for service.</p>
<p>If we intend to replace the GFE {i.e. new generation of briefing tool} will the FAA support that on a time and materials basis?</p>	<p>No.</p>
<p>We need the expected status of building leases as of Oct. 1, 2005.</p>	<p>This information will be updated in Amendment 001.</p>
<p>For government owned facilities, what may we expect as far as availability and maintenance beyond the initial 2-year period?</p>	<p>See Section 5 for Government-furnished facility requirements.</p>
<p>If the contractor proposes new facilities, will the FAA support time and materials development?</p>	<p>No.</p>
<p>During the Phase-In period, may the contractor bill monthly for the costs of new Real Property acquisition (i.e. we need initial capital for land and building construction)?</p>	<p>No, however, refer to Amendment 001 for a description of Fixed Price Phase-In CLINS.</p>
<p>Will the MITRE pilot survey be used as a benchmark for future Flight Service performance?</p>	<p>No.</p>
<p>Section L of the solicitation documents is contradictory, L.3.1, L.3.2, L.3.3 are confusing as to when technical volume IV is to be presented.</p>	<p>The SIR Section L will be revised to address this issue.</p>
<p>Liability Insurance or responsibility is not defined. Does the contractor assume all liability or as in the contact tower program, does the FAA provide Liability Insurance?</p>	<p>The FAA will not indemnify contractors for this service.</p>
<p>The make up of the individuals on the Source Selection Board or the Technical Evaluation Team is not identified. Since this is a "Best Value" contract the identification of the individuals involved would be most important, as "Best Value" is a subjective judgment. Additionally, this would preclude any specter of conflict of interest.</p>	<p>The Government does not provide the names of source selection evaluators or source selection board members.</p>