

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

Contests of)	
)	
Agency Tender Official)	Docket No. 05-ODRA-00342C
James H. Washington and)	Docket No. 05-ODRA-00343C
Kate Breen, Agent for a Majority of)	
Directly Affected FAA Employees)	
<u>Pursuant to Solicitation DTFAAWAACA-76-001)</u>)	

**ORDER ON REQUEST FOR
INTERVENTION AS INTERESTED PARTY**

BACKGROUND

By letters dated March 15, 2005, Computer Sciences Corporation (“CSC”) and Raytheon Technical Services Company L.L.C. (“Raytheon”) requested that the Office of Dispute Resolution for Acquisition (“ODRA”) allow them to intervene in the above-captioned Consolidated Contests as interested parties. Lockheed Martin Services, Inc. (“LMSI”), which is the selected service provider, and the FAA Competitive Sourcing Program Office (“Program Office”) filed objections to the requested interventions. At the request of the ODRA, CSC and Raytheon filed briefs in support of their proposed interventions.¹ Subsequently, as a result of an alternative dispute resolution (“ADR”) effort, the objections of LMSI and the Program Office to Raytheon’s intervention were withdrawn in consideration of an agreement (“ADR Agreement”) to limit and define Raytheon’s participation in the Contests. Inasmuch as the ODRA finds the terms of the ADR Agreement to be consistent with the prompt and efficient resolution of the Consolidated Contests, Raytheon is permitted to intervene in accordance with the terms of the ADR

¹ No other parties or prospective parties have objected to the proposed interventions of Raytheon and CSC.

Agreement. The only issue remaining to be decided herein is the request of CSC to intervene. For the reasons set forth below, CSC's request to intervene is denied.²

The instant procurement is for Automated Flight Service Station services and was conducted as a private-public competition under the FAA's adaptation of OMB Circular A-76. On February 5, 2001, the Agency announced that it had selected LMSI to be the service provider. Post-award debriefings were subsequently conducted with each offeror, including CSC and Raytheon. By letter dated March 11, the Agency Tender Official ("ATO") filed a contest challenging the performance decision ("ATO Contest"). On March 16, 2005, Ms. Kate Breen, the President of the National Association of Air Traffic Control Specialists filed a contest also challenging the performance decision on behalf of the Majority of Directly Affected FAA Employees ("Breen Contest"). The ODRA consolidated the ATO Contest and Breen Contest for adjudication. CSC and Raytheon each chose not to file their own contests of the performance decision. Both CSC and Raytheon contend, however, that they should be permitted to intervene as interested parties in the Consolidated Contests, because the ATO and Ms. Breen have requested a remedy that could reopen the procurement evaluation process.

DISCUSSION

The ODRA Contest Rules, together with the Delegations of Authority from the FAA Administrator to the Director of the ODRA, vest the ODRA with discretion to conduct the dispute resolution process in a timely and efficient manner. Under the ODRA Rules for post-award protests, only the awardee of the contract that is the subject of a protest may intervene as a matter of right. *See* 14 C.F.R. § 17.3(l) and 14 C.F.R. § 17.15(g). As the ODRA previously has held in the bid protest context, the Acquisition Management System does not contemplate the intervention of a non-protesting disappointed offeror in a post-decision protest brought by another disappointed offeror. *See Camber Corp. and Information Systems & Networks Corp.*, 98-ODRA-00079 and 98-ODRA-00080

² The ODRA will permit CSC to intervene under the terms agreed to by Raytheon. Should CSC wish to do so, counsel for CSC is asked to promptly notify the ODRA.

(Consolidated), *Decision on Intervention Request, dated July 6, 1998*. In *Camber*, the ODRA held that it has discretion to permit participation by such parties, where the ODRA can discern some benefit from their participation and where the participants would not adversely impact the prompt resolution of the matter. *See Camber, supra, citing Digital Equipment Corp. et al., GSBCA No. 12891-P, 94-3 BCA ¶ 27,146.*³

A post-decisional contest and a post-award bid protest are similar in that both challenge the selection decision made by the program office involved. The ODRA's Contest Rules for A-76 competitions generally mirror the ODRA Procedural Rules governing bid protests, and the Contest Rules expressly provide that the Procedural Rules for protests are applicable to Contests to the extent they are consistent with the Contest Rules. *See CR 1*. Under the ODRA Contest Rules, an intervenor is defined as "an interested party other than the Contester whose participation in a Contest is *allowed by ODRA*." *See CR 2(g)* (emphasis added). The ODRA Contest Rules state that in the context of a Contest, a "directly interested" party "can be the agency tender official who submits an agency tender; a single individual appointed by a majority of directly affected FAA employees as their agent; a public agency or agency component that submits a 'public reimbursable tender' (as contemplated by OMB Circular A-76); or a private sector offeror." *See CR 2(g)* (emphasis added.). The ODRA Contest Rules also provide that a "directly interested party may participate as an intervenor in a contest that has been initiated by another directly interested party." *CR 2(g)*. Prior to these consolidated cases, the ODRA had not had an opportunity to interpret or apply the intervention provisions of *CR 1* and *CR 2* in the context of a post-decisional contest.⁴ The ODRA construes the intervention

³ The GSBCA has denied motions to intervene where, as here, the requesting party seeks to intervene solely in order to permit its counsel to monitor the protest. *See Litton Systems, Inc. v. DOT et. Al., 94-3 BCA, ¶ 27,122*. The Government Accountability Office similarly will not permit a party to intervene where it will not be next in line for award if a protest is sustained. *See Medical Information Services., B-277824, 2001 CPD ¶ 122*.

⁴ During a pre-decisional contest filed against the terms of the Screening Information Request issued for this public-private competition, Raytheon and CSC were considered interested parties because ODRA's bid Protest Rules permit any actual or prospective competitor, except a subcontractor, to participate in a pre-award challenge. *See CR 1*.

language of the two Contest Rules, together with that of the protest Procedural Rules, as providing discretion to the ODRA to permit or deny intervention in a contest by any entity other than the selected service provider, who may intervene as a matter of right in a post-decisional contest. While disappointed potential service providers may seek permission to intervene, they may not intervene as a matter of right in a post-decisional contest brought by another disappointed service provider.

As part of the briefings of the intervention requests in these Consolidated Contests, the ODRA directed CSC to provide information on the following:

- (1) The nature and extent of its present interest in the Contests;
- (2) Whether the intervention would contribute to or otherwise affect, positively or negatively, development of the record;
- (3) Whether it supports or opposes the Contests;
- (4) Why intervention should be permitted given that CSC did not file its own post-award challenge of the performance decision;
- (5) Whether CSC would attempt to raise its own challenges or issues if permitted to intervene.

In its Response, CSC stated that it should be permitted to intervene since “any reopening of the procurement would affect CSC’s interest” and because it has “an in-depth knowledge of the procurement at issue.” *CSC Brief* at 1. CSC also advised the ODRA that it would “assist positively” in the development of the record “as will be discovered through the Contest process,” and that the company supported four of the Contester’s contentions, and did “not expect to raise additional issue[s] or challenges outside of those raised by the Contesters.” *CSC Brief* at 1,2. In this case, CSC maintains that its participation as an intervenor will enable it to monitor the Contests, permitting it to assist in developing the Contest litigation record *CSC Brief* at 1; and that it has an interest because of its likely eligibility to participate in any remedy resulting from either Contest. *Id.*

The reasons stated in support of CSC's intervention are not compelling. In this case, CSC has not filed its own contest, and has otherwise failed to offer any non-speculative basis for a full intervention. Under the circumstances, the ODRA sees no benefit to the process that would accrue from the requested intervention. Rather, permitting an unlimited intervention would only serve to complicate the contest adjudication process and render it more expensive, and time consuming. Such additional participation also could increase the risk of inadvertent disclosure of the proprietary, competition-sensitive or source-selection sensitive information that will be the subject of litigation in these Contests.

The ODRA is confident that all pertinent issues and arguments relating to the challenged performance decision will be articulated and afforded full consideration. Finally, there is no basis in the record to conclude that CSC will be prejudiced by its non-participation as a full intervenor in the Contests. Had CSC felt strongly about particular issues that it wished to raise, it was free to file its own contest. It chose not to do so, and will not be permitted to fully intervene for the purpose of pursuing a shadow contest here. *Camber, supra.*

Conclusion

For the foregoing reasons, the request by CSC to intervene in the Consolidated Contests is denied.



Anthony N. Palladino
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March 28 , 2005