

Via Hand Delivery

March 16, 2005

Anthony N. Palladino, Esq.
FAA, Office of Dispute Resolution
For Acquisition (ODRA)
800 Independence Ave., S.W., Room 323
Washington, D.C. 20591

OFFICE OF DISPUTE
RESOLUTION FOR
ACQUISITION

2005 MAR 16 P 4: 15

RE: Contest by Agency Tender Official James H. Washington
ODRA Docket 05-ODRA-00342
Pursuant to Solicitation DTFAAWACA-76001

Dear Mr. Palladino:

Pursuant to the letter dated March 11, 2005, ODRA requested the Office of Competitive Sourcing's response to the Contestor's request for suspension of procurement activities to be filed on the date of the preliminary conference. As the conference was held this morning, this Response is timely filed.

Precedent

A request for suspension of procurement activities after an OMB Circular A-76 performance decision is a case of first impression for ODRA. However, there is substantial precedent regarding stays of contract awards on which to base a decision. The language in ODRA Procedural Rules for Contests of A-76 Competition 7(f) states that "performance pending resolution of a contest shall continue during the pendency of a contest, unless there is compelling reason to suspend or delay all or part of the procurement activities." This language is similar to the language in ODRA's Protest Rules regarding stays of contract awards. In a previous A-76 Contest brought by Mr. Walter Pike (04-ODRA-00310) challenging the solicitation, ODRA relied on its bid protest precedent in analyzing the request for stay. Recognizing the similarity between protests and contests, ODRA stated in its Decision on Contestor's Suspension Request dated August 4, 2004 in the Pike Contest that "[u]nder the FAA Acquisition Management System, there is a strong presumption that acquisition activities will continue during the pendency of protest or contests." (Decision at 3, emphasis added)

Four Part Test

In its past considerations of stay requests, ODRA established a four-part test to be applied in determining whether there are compelling reasons in support of a suspension:

- 1) Whether the [Contestor] made out a substantial case;
- 2) Whether a stay or lack of a stay is likely to cause irreparable injury to any party;

- 3) The relative hardships on the parties; and
- 4) The public interest.

See, generally, Protest of Crown Communications, Inc., 98-ODRA-00098 (Interlocutory Decision on Suspension Request); Protest of J.A. Jones Management Services, Inc., 99-ODRA-00140 (Interlocutory Decision on Suspension Request).

In applying this four-part test to the instant Contest, there is no compelling reason to support the issuance of the stay.

Whether the Contestor made out a substantial case.

The Contestor has not met the burden of alleging a substantial case on the merits. The Contestor cites several instances where it believes that the solicitation was not followed or that the evaluation was otherwise improper. How the cited allegations materially affect the outcome of the competition is not stated. Nowhere does the Contestor make a statement that if these allegations were taken for true, for purposes of determining whether a substantial case has been made, the outcome of the competition would be different.

Whether a stay or lack of a stay is likely to cause irreparable injury to any party.

Whereas a stay will cause immediate and irreparable harm to the Program Office, any irreparable injury to the Contestor (or more accurately the Contestor's employees) is based on conjecture. The Contest alleges three bases for irreparable injury: the emotional stress employees may incur; an inability to participate in the Agency's Preferred Placement Program (PPP); and the potential for additional costs the Agency will have to incur if the performance decision is ultimately overturned and Lockheed Martin has been proceeding with Phase-in

Regarding the first basis, the Program Office is sensitive to the welfare and the emotional distress on the employees. It is counter-intuitive to believe, as suggested by the Contestor, that receiving an offer from Lockheed Martin will increase employees' stress. The Program Office proposes that having an offer from Lockheed Martin will decrease stress about the future and that the Contestor's concerns regarding the employees worrying whether they will have to work for Lockheed Martin if they accept the offer even if the Contest is sustained can be easily remedied (see Attachment 1).

Regarding the second basis, the Program Office submits that the PPP currently provides for continued preferential treatment for displaced employees even after they have received an offer from Lockheed Martin. However, to further remedy any concern that may remain, the Program Office is proposing a commitment to remove all doubt the Contestor may have (see Attachment 1).

Regarding the third basis, ODRA has consistently held that the Program Office bears the responsibility and the costs for continuance during a Contest. In this case, the Contract

Line Item Number under which Lockheed Martin is working is fixed-price so that the Agency's liability is limited. Indeed, if there is a stop work order wherein the Program Office requests that Lockheed Martin be ready to commence activities immediately upon resolution of the Contest, the costs to the Agency could actually increase by the granting of a stay.

The relative hardships on the parties

The hardship to the Program Office if the stay is granted is immediate and substantial. Lockheed Martin has proposed to start Transition to the new service on October 1, 2005. There are many activities during this Phase-in period on the critical path to start delivering those new services. There could be a day-for-day slip in the implementation of the new services for every day of delay to Phase-in activities. As substantiated in numerous FAA reports and validated by the FAA's customers in general aviation, the enhancements to the technology and the improvements to the facilities are critically needed. The simple fact is a stay of acquisition activities will delay much needed improvement.

On the other hand, the MEO did not establish any hardship. Even the concerns raised in the Contest have all been remedied based on Attachment 1 to this document.

The public interest

The public interest favors continuation of the contract and denying of the stay request. The quality of the services provided will be improved by various factors including technology upgrades and facility modernization. In particular, the technology upgrades mean benefits for both the users and the employees of the Automated Flight Service Stations. Continuation of this contract would lay the groundwork for the future benefits to be obtained by almost the entire general aviation community and better working conditions for the employees.

Conclusion

It should be noted that at the earliest, Lockheed Martin is not scheduled to take over the services until October 1, 2005. Therefore, there is more than adequate time for resolution of this Contest before the MEO or its employees encounter any actual hardship. If the Contest continues for an unprecedented amount of time, ODRA has the authority to revisit the issue of a stay.

Respectfully submitted,



Nathan Tash
Federal Aviation Administration
Counsel for the Program Office

Attachment 1
Alternatives

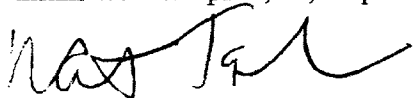
The Acquisition Team believes that the Contester has not overcome its burden given the strong presumption in favor of continued performance. However, the Acquisition Team appreciates the emotional stress that the MEO's Contest filing may have caused employees and wants to become an active participant in ameliorating that stress. To that end, the FAA proposes to do the following so that there is no need to issue a stay:

1. To address the Contester's concern that a job offer from Lockheed Martin may cause an employee stress because there will be uncertainty as to whether he must work for Lockheed Martin if he accepts the offer and the Contest is sustained, Lockheed Martin has agreed to include in each and every offer of employment a notice stating that the offer is contingent on Lockheed Martin's keeping the work.
2. To address the Contester's concern that a job offer from Lockheed Martin will eliminate that employee from the Agency's PPP, the Acquisition Team, with the concurrence of the FAA's Assistant Administrator for Human Resource Management, commits that no employee will be denied participation in the Agency's PPP based on that employee's receipt of a job offer from Lockheed Martin.
3. To address the Contester's concern raised this morning at the Preliminary Conference that a job offer from Lockheed Martin and the acceptance/declination of that offer by the employee will eliminate that employee from the Agency's Selection Priority Program, the Acquisition Team, with the concurrence of the FAA's Assistant Administrator for Human Resource Management commits that no employee will be denied participation in the Agency's Selection Priority Program based on that employee's acceptance/declination of an offer from Lockheed Martin for the duration of the Contest. Once the Contest is concluded employees who accepted or declined job offers with Lockheed Martin during the Contest are immediately subject to the termination of eligibility provisions contained the FAA's Selection Priority, EMP-1.9, effective October 22, 2001 based on that employee's prior acceptance/declination.
4. At the conference this morning, ODRA also asked whether any of the employees would be subject to a Reduction-in-Force during the Contest period. Counsel for the Acquisition Team stated at the conference and hereby confirms that no Reductions-in-Force for affected Automated Flight Service Station employees will occur prior to September 30, 2005.

Certificate of Service

I certify that a true and certain copy of the foregoing was served via facsimile copy this 16th day of March, 2005 to the following individuals:

Cyrus E. Phillips IV, Esq.
David M. Nadler, Esq.
Carl J. Peckinpaugh, Esq.
Thomas C. Papson, Esq.
Gerard Doyle, Esq.
William W. Thompson, Jr., Esq.



Nathan Tash