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March 18, 2005

BY FACSIMILE

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

Re: Contests of Agency Tender Official and Kate Breen, as Agent for a Majority of Directly Affected FAA Employees, Under Solicitation No. DTFAAWACA-76-001, ODRA Docket Nos. 05-ODRA-00342C and 05-ODRA-00343C and GSBICA Docket No. 16614-FAA

Dear Mr. Palladino:

Intervenor Lockheed Martin Services, Inc. ("LMSI") opposes the requests of the Agency Tender Official ("ATO") and Kate Breen, as Agent for a Majority of Directly Affected FAA Employees, for a suspension of procurement activities and supports the position of the Program Office that procurement activities should be allowed to proceed.

The ODRA Procedural Rules for Contests of A-76 Competitions provide: "Procurement activities and, where applicable, performance pending resolution of a contest shall continue during the pendency of a contest, unless there is a **compelling reason** to suspend or delay all or part of the procurement activities." ODRA Contest Rule 7(f) (emphasis added). As ODRA has emphasized in a prior request for suspension in this very A-76 competition: "Under the FAA Acquisition Management System, there is a **strong presumption** that acquisition activities will be continued during the pendency of protests or contests." *Contest of Walter W. Pike*, Decision on Contestor's Suspension Request, 04-ODRA-00310, Aug. 4, 2004 (emphasis added).

In order to determine whether the contestor has overcome the strong presumption and demonstrated a compelling reason for a suspension, ODRA uses the four-factor test for injunctive relief articulated by the United States Court of Appeals for the District of Columbia Circuit. *Id.* Under that test, ODRA considers: "(1) whether the protester

made out a substantial case; (2) whether a stay or lack of stay is likely to cause irreparable injury to any party; (3) the relative hardships on the parties; and (4) the public interest.” *E.g., Protest of Glock, Inc., Decision on Protester’s Request for Stay of Contract Performance*, 03-TSA-003, Oct. 28, 2003. ODRA places substantially greater emphasis on the second, third, and fourth elements of the test (the balance of equities). *Id.*

In this contest, neither the ATO nor Ms. Breen has offered any substantial reason for overcoming the presumption against suspension (much less a compelling reason), and the balance of equities strongly favors the position of the Program Office.¹ The ATO offers two reasons in support of its request for a suspension. First, the ATO argues that because the Most Efficient Organization (“MEO”) and LMSI have proposed differing technical solutions, any activities undertaken by LMSI in the Phase-In Period of performance and any costs incurred by LMSI and reimbursed by the FAA will have been “wasted” if the contest is successful and some other Service Provider eventually displaces LMSI. ATO Contest at 3-4. Second, the ATO states that hiring and personnel-recruitment related activities by LMSI during the Phase-In Period will result in injury to incumbent Air Traffic Control Specialists because the job offers that LMSI will be required to make to them will cause stress and confusion in the workforce and potentially disqualify the incumbents from future participation in the agency’s Preferred Placement Program. *Id.* at 4. Ms. Breen joins the ATO in advancing the second justification. Breen Contest at 3-4.

The first proffered reason is solely a matter of cost to the agency that does not constitute irreparable harm to the ATO or MEO. As ODRA has made clear: “[I]n any situation where work is transitioned away from a protester/incumbent during the course of protest proceedings, there is a potential for additional expense and inconvenience if the protest ultimately is successful. This, in and of itself, is not sufficient to qualify as a ‘compelling reason’ for granting a stay of performance.” *Protest of Raytheon Tech. Servs. Co., Findings and Recommendations on Protester’s Request for Reconsideration of Remedy*, 02-ODRA-00210, April 10, 2002. Further, the risk of any increased cost to the

¹ Because the balance of equities so clearly disfavors the contestors’ position, there is no need to examine the underlying merits. For purposes of analysis, therefore, LMSI will assume, *arguendo*, that the contestors have pleaded a substantial case on the merits.

agency in the absence of a suspension “falls squarely on the Government,” and not on the protester/contestor. *See id.* FAA can choose to bear that risk.²

In addition, these contests will be resolved during the contract Phase-In Period and long before LMSI would begin the Transition Period, which is scheduled to commence on October 1, 2005. Accordingly, the only activities that will take place during the pendency of the contests are phase-in activities, defined in the Screening Information Request (“SIR”) as “getting personnel in place, relocating equipment, and any other actions necessary to assume operational responsibility on the first day of the Transition Period.” SIR sec. 7.1. Under the terms of the SIR, LMSI will not perform any operational services during the Phase-In Period, and no incumbent FAA employees would become LMSI employees until October 1. LMSI’s short-term phase-in activities and costs are merely preparatory to the long-term implementation and operational activities that will be required during the potential ten-year contract period of performance that follows the Phase-In Period. Where, as here, the period of performance during the protest/contest proceedings is insignificant as compared to the entire contract performance period, ODRA repeatedly has rejected requests for suspension based on the theory that contract performance during the pendency of a protest would irreparably harm the protester. *E.g., Protest of Glock, Inc.*

The second proffered reason — relating to employee stress and potential prejudice in a preferred placement program — has been resolved by the Program Office and is not compelling in any event. The Program Office’s response to the ATO’s suspension request: (1) represents (correctly) that LMSI has agreed to notify applicants that its employment offers are contingent on LMSI retaining the work; (2) commits that no employee will be denied participation in the Agency’s Preferred Placement Program based on the employee’s receipt of a job offer from LMSI; (3) commits that no employee will be denied participation in the agency’s Selection Priority Program based on the employee’s acceptance or declination of a job offer from LMSI for the duration of the contests; and (4) commits that no Reductions-In Force for affected Automated Flight Service Station employees will occur prior to September 30, 2005. These representations and commitments address all of the stated employee concerns. But even if they did not, the asserted harm based on stress and impact on future employment of individual employees is not the kind of harm to which ODRA gives substantial weight in the balance of harms. *See, e.g., Protest of Crown Communications, Inc., Decision on Crown’s Request for Suspension of Contract Performance, 98-ODRA-00098, Oct. 9,*

² In fact, a suspension and work stoppage could actually increase LMSI’s costs and require the FAA to adjust the contract price after the resumption of performance.

1998 (focus is on severe economic loss; loss of valuable employees generally does not constitute irreparable harm).

Not only have the contestors failed to proffer any compelling reason for a suspension, but there would be severe harm to the interests of the FAA if a suspension were granted. The phase-in activities in which LMSI is currently engaged are essential to putting LMSI in a position to assume full operational responsibility by October 1, 2005. Any suspension of performance of the phase-in activities is likely to delay LMSI's assumption of operational responsibility and the commencement of the Transition Period. It is only at that point that the Government will begin to obtain the benefits either of the substantial cost savings that this contract will provide or the significant operational improvements that were sought by the SIR.

The cost savings are estimated by the FAA at \$2.2 billion over the next ten years. Press Release, FAA, FAA Selects Lockheed Martin to Operate Automated Flight Service Stations (Feb. 1, 2005) (attached). Any delay in the Phase-In Period will postpone the realization of those savings. But even more important than the enormous cost benefit is the urgent need for an improved flight service system. As the FAA has explained, "many automated flight service stations contain outmoded equipment, are in need of upgraded technology and are housed in deteriorating buildings." *Id.* As with the cost savings, the Government will not begin to realize the benefit of new equipment and upgraded technology and facilities until LMSI begins the Transition Period.

LMSI needs all of the scheduled phase-in time between now and October 1 to be in a position to assume operational responsibility and commence the transition to the end state. Among other things, it must lease the space required for its new hubs in the next several weeks, conduct an on-site assessment of all 58 current AFSS facilities, integrate the Flight Service 21 system, and continue employee recruitment activities in order to stay on the critical path to October 1. Even a short suspension of phase-in activities will jeopardize the schedule.

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Accordingly, the balance of harms and hardships weighs substantially in favor of the Program Office. The contestors have not demonstrated a compelling reason for the suspension and have failed to overcome the strong presumption of continued procurement activities. The requests for suspension therefore should be denied.

Sincerely,



Thomas C. Papson
Alison L. Doyle
Jeniffer M. De Jesus

Counsel for Lockheed Martin
Services, Inc.

TCP:mmc

Enclosure

cc: Honorable Edwin B. Neill, GSBCA
Cyrus E. Phillips, IV, Legal Agent for the Agency Tender Official
David M. Nadler, Counsel for Kate Breen
Nathan Tash, Counsel for FAA Program Office
Gerard F. Doyle, Counsel for Raytheon Technical Services, LLC
Carl J. Peckinpaugh, Counsel for CSC



Press Release

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Contact: Greg Martin
Phone: 202-267-3883
APA 05-05
Date Posted: February 1, 2005

FAA Selects Lockheed Martin to Operate Automated Flight Service Stations

Washington, DC The U. S. Department of Transportation's Federal Aviation Administration (FAA) announced today it has selected a team headed by Lockheed Martin to provide services now offered by the agency's automated flight service stations. The total evaluated cost of the five-year contract, with five additional option years, is \$1.9 billion and represents estimated savings of \$2.2 billion over the next ten years.

The FAA selected Lockheed Martin, based in Bethesda, Maryland, for its demonstrated ability to deliver high-quality safety and services and technical excellence at a competitive cost while providing a seamless transition to new operations. Under continued FAA oversight, Lockheed Martin will operate flight service stations to the agency's strict safety and service requirements.

Approximately 2,500 FAA employees now provide services at 58 automated flight service stations in the contiguous 48 states, Hawaii and Puerto Rico. Flight service specialists provide a variety of services, including weather briefings, inflight radio communications, flight planning and search-and-rescue support, primarily to private and non-airline commercial pilots. These specialists do not separate or control aircraft.

Studies by the FAA and the Department of Transportation's Inspector General identified significant potential cost savings among automated flight service stations. FAA spending on flight service operations totaled about \$500 million in fiscal year 2003. Of these total operating costs, only \$60 million was offset by federal fuel taxes collected from general aviation. Additionally, many automated flight service stations contain outmoded equipment, are in need of upgraded technology and are housed in deteriorating buildings.

After completing a careful review, the FAA formally announced in December 2003 that its flight service stations met the criteria for competitive sourcing and that it would conduct a competition under the Office of Management and Budget's Circular A-76 guidelines for an improved way to provide flight service operations.

The FAA evaluated five competing service providers, including the incumbent government organization, on the best value to the government for the delivery of effective services to support safe and efficient flight. The FAA required each potential service provider to demonstrate savings of almost \$1 billion over ten years.

Lockheed Martin will assume operations in October of this year. Incremental consolidation of the 58 current flight service stations will begin in April 2006 and is expected to result in 20 sites by the end of March 2007. More information on the results of the competition is at www.faa.gov/aca.

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