

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

Protests of)	
)	Docket No. 08-ODRA-00459
Hi-Tech Systems, Inc)	Docket No. 08-ODRA-00460
)	(CONSOLIDATED)
Pursuant to Solicitations DTFAWA-08-R-55501)		
DTFAWA-08-R-55502)		

DECISION ON PROTESTERS' REQUEST FOR SUSPENSION

This matter arises from pre-award bid protests (“Protests”) filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) by Hi-Tech Systems, Inc. (“Hi-Tech”). Both Protests challenge the terms of solicitations (“Solicitations”) seeking support services for the FAA’s Air Traffic Organization (“ATO”). One of the Solicitations, Docket No. 08-ODRA-00459, involves engineering and scientific support services; while the other, Docket No. 08-ODRA-00460, involves program planning, execution, and implementation services. The sole ground raised in the Protests is that the acquisition must be set aside for small business. The Protests include a request (“Suspension Request”) that “the closing date [for offers] be delayed until this matter and all of the appeals are resolved.” *See* Protests at 4. The FAA Program Office filed its Opposition to the Suspension Request on September 2, 2008 and Hi-Tech filed its Reply to the Opposition on September 4, 2008. For the reasons discussed below, the ODRA finds that no compelling reasons exist to support a suspension of activities during the pendency of these Protests. The ODRA therefore declines to impose a temporary suspension and will not recommend that the Administrator suspend acquisition activities or contract performance pending the resolution of these Protests.

I. Factual Background

Hi-Tech's Protests challenge the terms of the Solicitations, alleging that: "[t]his procurement is required to be set aside for small business." *See* Protests at 1. In support of its Suspension Request, Hi-Tech relies on its assertions that: (1) its Protest is likely to succeed because of "the failure of the FAA to follow its own procurement policies, regulations and procedures"; (2) Hi-Tech would be irreparably injured in the absence of a suspension because an adequate remedy will not be available if the Protests succeed; (3) a suspension would not cause a hardship for the FAA; and (4) the public interest favors "the need to foster a strong and vibrant small business community." *See* Reply at 2-4.

In its Opposition to the Suspension Request, the Program Office responds by asserting that: (1) small business has not been excluded from the competition; (2) the claim that there would be irreparable injury to Hi-Tech in the absence of a suspension is speculative; (3) the hardship that would be caused to ATO operations by a suspension has been established, while the hardship that would result in the absence of a suspension has not been demonstrated; and (4) the public interest would best be served by allowing the procurement activities for these services to continue. *See* Opposition at 2-4.

II. Discussion

It is well established that under the FAA's Acquisition Management System ("AMS") and the ODRA Procedural Rules, 14 C.F.R. Part 17, stays of procurement activities and contract performance during the pendency of protests will not occur absent a showing of compelling reasons. As the ODRA has noted, on several occasions:

The FAA's Acquisition Management System ("AMS") includes a presumption in favor of continuing procurement activities and contract performance during the pendency of bid protests.... The same presumption is set forth in the ODRA Procedural Rules, 14 C.F.R. Section 17.13(g).

See Protest of Glock, Inc. 03-TSA-003; quoting *Protest of J.A. Jones Management Services*, 99-ODRA-00140, Decision on Protester’s Request for Stay of Contract Performance, September 29, 1999. The ODRA employs a three part test established by the United States Court of Appeals for the District of Columbia Circuit in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.* 559 Fed. 2nd 841, 844 (DC Cir. 1997), in evaluating stay requests. *See Protest of Crown Communications*, 98-ODRA-00098, October 9, 1998. The ODRA considers four factors, namely: (1) whether the Protester has alleged a substantial case; (2) whether a stay or lack of a stay would be likely to cause irreparable injury; (3) the relative hardships on the parties; and (4) the public interest. Greater emphasis is placed on the second, third and fourth prongs of the test and “the necessary showing on the merits is governed by the bounds of equities as revealed through an examination of the other three factors.” *Washington Metropolitan Area Transit Commission v. Holiday Tours, supra* at 844. Thus, the first element is de-emphasized in favor of a balancing of the remaining three elements and the Protester bears the burden of overcoming the AMS presumption against a suspension during pendency of a bid protest. *Id.*

A. The Substantial Case Element

In the ODRA’s view, the allegations of the Protests can be viewed as providing “a fair ground for litigation and thus for more deliberative investigation.” *Washington Metropolitan Area Transit Commission v. Holiday Tours, supra*. The allegations provide a minimal basis on which to develop and consider a record to determine whether the Solicitations violate small business set aside requirements or related policies of the AMS. Since, however, this first element of the suspension test is de-emphasized, the ODRA has analyzed it in the context of the remaining elements to determine whether compelling reasons exist for a suspension. As is discussed below, the ODRA has concluded that the Protester’s allegations do not come close to meeting its burden on any of the remaining elements.

B. Irreparable Injury and Relative Hardship Elements

As was pointed out by the Program Office Opposition, the allegation of irreparable injury is speculative at best. There is no basis to support Hi-Tech's suggestion that even if it succeeds in its Protests the Administrator would not reopen a competition that already has resulted in a contract award. *See* Reply at 2. Notwithstanding Hi-Tech's speculation, that precise remedy has been ordered in a number of post-award protests before the ODRA. *See, for example, Protests of Diversified Management Solutions, Inc. and Alaska Weather, Inc.*, 08-ODRA-00430, -00431 (Consolidated), May 23, 2008.

Hi-Tech's allegations regarding relative hardship similarly are speculative and unpersuasive. Every party who bids on a contract suffers a potential monetary loss, since it will incur costs in doing so and ultimately may not be successful. If the ODRA were to accept allegations such as Hi-tech's as sufficient to establish relative hardship or irreparable injury, it would be required to enter a suspension in every protest requesting one. Such an approach effectively would eliminate the AMS presumption that acquisition activities will continue during the pendency of bid protests absent a showing of compelling reasons.

C. The Public Interest

High-Tech suggests that because public policy has long favored the small business community, and inasmuch as the services being procured have not been shown to be critical, a suspension should be put into place. *See* Reply at 3,4. However, as discussed above, it has not been shown that the policy favoring small business opportunities would be damaged without a suspension here. The ODRA finds no basis in the record to support a conclusion that Hi-Tech will not be able to compete successfully in the absence of a suspension. Additionally, as noted above, if High-Tech's Protests are sustained, the Administrator acting on the ODRA's recommendation could order a re-competition. Moreover, the ODRA cannot agree that the Program Office has not shown that the services being procured are critical. There is ample support in the record for a finding that

the services involved support flight safety functions. Under the circumstances, the ODRA concludes that the public interest would best be served by not interrupting or delaying such support services during the pendency of these Protests.

III. Conclusion

Based on the record, and after balancing the applicable factors, the ODRA concludes that no compelling reasons exist to stay contract performance during the pendency of these Protests. The ODRA therefore declines to order a temporary stay and will not recommend that the FAA Administrator issue a permanent suspension pending the outcome of these Protests.

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September 15, 2008