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

Protest of)
)
SENTEL Corporation) Docket No. 09-ODRA-00497
)
Pursuant to Solicitation DTFAWA-09-R-0028)

DECISION ON REQUEST FOR SUSPENSION

This matter arises from a post-award bid protest (“Protest”) filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) by SENTEL Corporation (“SENTEL”). SENTEL challenges the award of a contract (“Contract”) to CSSI, Inc. (“CSSI”) under Solicitation DTFAWA-09-R-0028 (“Solicitation”) for engineering, programmatic, and administrative support services for the Air Traffic Organization (“ATO”) Safety Management System Program Office (“Program Office”). SENTEL’s Protest alleges that: (1) CSSI has an Organizational Conflict of Interest (“OCI”) because the Contract will require it to review its own work; (2) SENTEL does not have an OCI; and (3) the FAA failed to properly evaluate CSSI’s allegedly unreasonably low cost proposal.

The Protest includes a request that the “FAA suspend the start of performance under CSSI’s contract until this protest has been resolved and the FAA makes a new source selection consistent with the recommendation of ODRA” (“Suspension Request”). *See Protest* at 12. Funding for SENTEL’s performance of a predecessor contract for the work ended on August 31, 2009. *Protest* at 12. CSSI was scheduled to commence performance under the Contract on September 9, 2009. *Id.* The FAA Program Office filed its Opposition to the Suspension Request (“Opposition”) on September 8, 2009. SENTEL and CSSI, which intervened in the Protest, filed their replies to the Opposition

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on September 10, 2009 (referred to herein, respectively, as “SENTEL Reply” and “CSSI Reply”).

For the reasons discussed below, the ODRA finds no compelling reason to support a suspension of activities during the pendency of this Protest. 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 this matter.

I. Background

In support of its Suspension Request, SENTEL asserts that it would be “adversely affected if the performance of the new contract is not delayed” and it is “not permitted to maintain its support level.” *Protest* at 13. SENTEL argues that absent a stay it would suffer irreparable injury because it “has no adequate remedy for its right to a valid and fair procurement process.” *Id.* The Suspension Request further argues that SENTEL:

[E]mploys approximately [DELETED] individuals who have supported the SMS Office, with SENTEL’s work authorization ending just yesterday, August 31, 2009. If the new award is temporarily stayed, it is likely that FAA would determine to extend SENTEL’s current work for a brief period of time to continue support for the SMS Office. This decision could avert the loss of jobs and maintain SENTEL’s experienced workforce if the protest is sustained and the contract is awarded to SENTEL. CSSI, by contrast, does not currently employ a similarly situated cadre of personnel dedicated to supporting the SMS Office. CSSI must only assemble and employ its contract workforce by September 8, 2009. If the protest is denied, CSSI thus will not be comparably prejudiced.

Id. SENTEL also contends that the “public interest will be served by the increased competition – a net benefit to FAA – and the valid enforcement of procurement law and regulation.” *Id.*

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In its Opposition to the Suspension Request, the Program Office asserts that, although SENTEL has presented a “substantial case,” this consideration receives less weight than the other considerations of irreparable injury, relative hardships and the public interest. *Opposition* at 1, citing *Protest of HyperNet Solutions Incorporated*, 07-ODRA-00416 (Decision on Request for Suspension, August 30, 2007). The Program Office asserts that although “a stay, or the lack of a stay, will not cause *irreparable harm* to either party,” (emphasis added) a stay would clearly and directly harm the Program Office’s safety management operations, upon which the FAA’s Air Traffic Organization (“ATO”) depends. *Protest* at 2-3. The Program Office further asserts that the harmful impact of a stay on its operations outweighs the “speculative nature of potential job loss and reassignments” that SENTEL might suffer. *Id.* at 3. In this regard, the Program Office specifically identifies three areas of harm that it would suffer as a result of a stay of contract performance:

The Program Office intends to use this contractor to continue development of the Safety Risk Management Tracking System (SRMTS), a database-centric software system. Current plans are to continue operational testing, culminating in implementing the SRMTS throughout the FAA’s Air Traffic Organization (ATO) by December 1, 2009. If there is any suspension to contract performance, these plans will have to be adjusted and the implementation date will be missed. The SRMTS is a key function of obtaining SMS Compliance, as part of the Flight Plan Goal for March 2010.

Another area of harm is the substantial support to the Air Traffic Procedures Waiver process. Current agency policy requires compliance with the SMS process. Various facilities must apply SMS Policy and SRM processes when requesting waivers to the Air Traffic procedures and the process during a system installation or test procedure to collect data, in part to see if the system or test will improve or degrade safety. A suspension under this contract will delay the SMS Program Office’s ability to process waivers, which will create delays in system installation schedules requiring workarounds and re-prioritizing work packages for system contractors and other support efforts.

Delays could be incurred by such programs going through the AMS/JRC process such as WAM, SBS, and DTACOMM efforts. The AJS-SSWG requires contract support in order to meet these critical program timelines. Other delays will occur in air traffic procedure revisions, which will delay testing and implementation of changes to air traffic control procedures.

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A third area of harm will be support for the coordination and preparation of training materials used in training that is currently underway at the three ATO Service Centers. The SMS Program Office is scheduled to have the Safety management System implemented across the agency by March, 2010.

Protest at 2-3. The Program Office also argues that SENTEL's allegation that CSSI is ineligible for award due to an organizational conflict of interest ("OCI") is insufficient "to support a claim of public interest favoring suspension," since the FAA's Acquisition Management System ("AMS") expressly provides contracting officials with the discretion to "eliminate or mitigate actual and perceived OCI situations." *Protest* at 4, citing *AMS Procurement Guidance*, at T3.1.7(A)(1)(a).

In its Reply to the Program Office's Opposition to the Stay Request, SENTEL contends that a substantial case exists for a potential OCI based on the "evident risk of impaired objectivity" on the part of CSSI. *SENTEL Reply* at 1-2. As for irreparable injury, SENTEL asserts that it "agrees that SMS Program Office support should not lapse and that many important SMS Office tasks are adversely affected by an interruption in contractor support." *Id.* at 2. SENTEL argues that "the option to extend SENTEL's incumbent contract or to issue a single-source bridge contract to SENTEL" is readily available to the FAA and could serve as a "rationally-based" exercise of discretion under the AMS so as to maintain the status quo during the pendency of a protest. *SENTEL Reply* at 3-4. SENTEL also repeats its earlier argument that the lack of a stay is likely to cause [DELETED] irreparable injury due to the likely loss of [DELETED] skilled incumbent workforce. *Id.* Noting that funding for the predecessor contract ended on August 31, 2009, SENTEL explains:

At present, the vast majority of the [DELETED] contractor personnel are available to resume work for SENTEL in support of the SMS Office, assuming FAA promptly directs further performance. If, however, FAA does not suspend CSSI's performance and issue new funding to SENTEL ... then SENTEL **may** lose many of these employees. That loss would irreparably injure SENTEL because skilled employees are valuable assets in whom SENTEL has made significant corporate investments in terms of

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recruitment, integration, and training. The loss of key personnel **could** be particularly damaging to SENTEL in this case in connection with any new FAA evaluation of the key personnel available to work on the new contract. There are no adequate remedies at law for losses of key personnel and the risk of loss of the competition for this contract following further evaluation of offeror proposals.

SENTEL Reply at 5 (emphasis added). SENTEL further states that [DELETED]. *SENTEL Reply* at 5. SENTEL argues that this loss of highly qualified key personnel could possibly result in the FAA downgrading its proposal if a further evaluation of proposals is required. *SENTEL Reply* at 6. Moreover, SENTEL asserts that its lost investment – in terms of recruitment, integration, and training” of these highly skilled employees, along with the loss of contract revenue and profit, constitute irreparable injury. *SENTEL Reply* at 6.

In contrast to the irreparable injury that SENTEL claims it would suffer absent a stay, SENTEL asserts that the FAA would suffer no hardship if SENTEL provides support to the SMS Office during the pendency of the Protest, and that such a stay in fact would be advantageous since certain key projects could be completed. *SENTEL Reply* at 6. SENTEL further asserts that given CSSI’s lack of time on the contract and unfamiliarity with SMS projects, a stay would cause it less cost, inconvenience and disruption than it would cause SENTEL. *SENTEL Reply* at 7. As for the public interest, SENTEL asserts that where a protest is based on “hard facts” and “not supposition,” a suspension of contract performance serves the public’s interest in ensuring that the awardee does not have an OCI that renders it ineligible for award and the procurement was conducted in accordance with law and regulation. *SENTEL Reply* at 7.

Finally, the CSSI Reply agrees with “all comments” made in the Program Office’s Opposition to the Stay Request, and notes that, while SENTEL’s claim that CSSI has an OCI may identify a “substantial issue,” it does not “create a substantial case,” since the “mere existence, if any, of an OCI does not disqualify an offeror.” *CSSI Reply, citing Protest of MAXIMUS, Inc., 04-TSA-009.*

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II. Discussion

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 Hi-Tech Systems, Inc., supra, quoting Protest of J.A. Jones Management Services, 99-ODRA-00140 (Decision on Protester's Request for Stay of Contract Performance, dated September 29, 1999). It is well established under the AMS and the ODRA Procedural Rules, 14 C.F.R. Part 17, that stays of procurement activities and contract performance during the pendency of protests will not be imposed absent a showing of compelling reasons. *See Protests of Hi-Tech Systems, Inc., 08-ODRA-00459 and 00460 (Decision on Protester's Request for Suspension, dated September 15, 2008).*

In evaluating stay requests, the ODRA employs a four factor 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. 2d 841, 843-844 (DC Cir. 1997). *See Protest of Crown Communications, 98-ODRA-00098 (Decision on Suspension, dated October 9, 1998).* The factors the ODRA considers include: (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. *Id.* Greater emphasis is placed on the second, third and fourth factors 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." *Id. citing Holiday Tours, 559 F.2d at 844.* Thus, the first factor is de-emphasized in favor of a balancing of the remaining three elements. *Id.* The Protester bears the burden of overcoming the AMS presumption against suspension. *Hi-Tech Systems, Inc., supra.*

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A. The Substantial Case Element

In the ODRA's view, SENTEL's Protest allegations satisfy this element in that the allegations can be viewed as providing "a fair ground for litigation and thus for more deliberative investigation." *Holiday Tours, supra*, at 559 F.2d at 844. More specifically, the allegations provide a basis on which to develop and consider a record to determine whether: (1) there is a risk of impaired objectivity that creates a potential OCI for CSSI; and (2) the procurement was conducted in accordance with the AMS. As noted above, however, the "substantial case" element of the suspension test is de-emphasized, and thus the ODRA must analyze the Suspension Request in the context of a balancing of the remaining elements of the test to determine whether compelling reasons exist for a suspension.

B. Irreparable Injury

SENTEL's principal argument in support of its Suspension Request centers on its anticipated loss of employees who had been working on the predecessor contract. *See Protest* at 13; *SENTEL Reply* at 5-6. The ODRA previously has addressed claims of irreparable injury resulting from an incumbent's potential loss of employees and revenue in the *Protest of Crown Consulting, Inc.*, 06-ODRA-00372 (Decision on Request for Suspension, dated May 11, 2006). In *Crown Consulting*, the protester argued, among other things, that absent a suspension it would suffer irreparable injury from the loss of "important, valuable employees" and loss of revenue. Additionally, like SENTEL, Crown argued that the absence of a stay would work a hardship on the FAA due to a substantial transition effort involving highly technical services. *Id.* at 3.

The record here shows that SENTEL's performance of the predecessor contract has ended and that CSSI was scheduled to commence work under the Contract as of September 8, 2009. *See Protest* at 12. Thus, imposing a suspension would not serve to preserve the status quo, but rather would require a reversal of transitioning of the work, which, depending on the outcome of the Protest, might need to be repeated.

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Moreover, SENTEL's argument regarding employee loss is speculative and does not constitute irreparable injury. As the ODRA has stated, the potential loss of employees and mere economic loss of the kind asserted here are not sufficient to demonstrate compelling reasons in support of a stay. *Crown Communications, supra, citing J.A. Jones, supra*. As the ODRA has noted, "employees in services contract situations often follow the work and their own professional opportunities." *Id.* at 6. SENTEL likely would be in a position to rehire or replace any employees that it has lost should this Protest be successful and it be awarded the contract. SENTEL's situation is not different than that faced by any incumbent who loses a competition and thus loses a source of revenue. To issue a suspension on that basis would severely undermine the AMS presumption against suspensions and require the ODRA to impose a suspension in virtually every case where an incumbent loses a subsequent competition for the work involved. *Crown Communications, citing Protest of All Weather, Inc., 04-ODRA-00294* (Decision on Suspension, dated February 4, 2004). Under these circumstances, SENTEL has failed to demonstrate that it will be irreparably injured in the absence of a suspension.

C. The Relative Hardships

The nature of this Contract, *i.e.*, ongoing support services extending potentially over multiple years, belies SENTEL's assertion that, in the absence of a suspension, no meaningful remedy will be available in the event the Protest is successful. The lack of a stay does not preclude the re-transitioning of the work, should the ODRA recommend a remedy of a directed award, or re-evaluation of proposals and reconsideration of the award decision. Moreover, the record demonstrates that a suspension would directly cause hardships to the Program Office's safety management operations in the form of delays to: (1) the development and continued operational testing of the Safety Risk Management Tracking System; and (2) the Air Traffic Procedures Waiver process. On balance, the ODRA concludes that these hardships, along with the potential disruption and increased costs that would be associated with suspending CSSI's contract, issuing a bridge contract to SENTEL and re-transitioning the work, outweigh the potential

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hardship that SENTEL might suffer if contract performance by CSSI continues during the pendency of the Protest.

D. The Public Interest

SENTEL argues that a stay will serve the public interest by ensuring that the procurement was “conducted in accordance with law and regulation.” *See SENTEL Reply* at 7. The ODRA finds, however, that the public’s interest in uninterrupted support of the safety management function of the Program Office strongly militates against a suspension, and that, in any event, imposing a suspension will not aid in ensuring the integrity of the procurement. The issue of whether the challenged award decision is in accord with applicable law and the AMS will be determined through the prompt adjudication of the merits of the Protest.

III. Conclusion

Based on the record, and after balancing the applicable factors, the ODRA concludes that compelling reasons do not exist to stay contract performance during the pendency of this Protest. 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 this Protest. The ODRA notes in this regard that the Program Office, by choosing to continue with the Contract work notwithstanding the Protest allegations, assumes the risk and responsibility for additional costs and delay that may result if the Protest is sustained and a contract ultimately is awarded to SENTEL.

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September 15, 2009