

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

Protest of _____)
)
ITT Information Systems / Exelis, Inc.) Docket No. 12-ODRA-00628
)
Pursuant to Solicitation DTFAWA-11-R-00022 _____)

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 ITT Information Systems / Exelis, Inc. (“ITT”) ¹ against the award of a contract to Harris Corporation (“Harris”). Solicitation DTFAWA-11-R-00022 (“Solicitation” or “SIR”) and the resulting contract procures Data Communications Integrated Services (“DCIS”). ITT protests that the FAA Product Team (“Product Team”): (1) improperly evaluated ITT’s technical/management volume;² (2) improperly evaluated the cost/price volume;³ (3) conducted inadequate communications with ITT;⁴ (4) failed to properly consider a mandatory sub-contractor’s relationship with Harris;⁵ and (5) conducted a flawed best value analysis.⁶ ITT alleges that it was prejudiced by these matters, and requests a suspension of contract performance. *Protest* at 93. The Product Team filed its Response to the Suspension Request (“Suspension Response” or

¹ ITT Information Systems, a division of ITT Corporation, submitted the initial proposal from the Protester in this matter. During the course of the evaluation process, corporate restructuring transformed the Protester into Exelis Inc., doing business as “ITT Exelis.” See *Protest* at 1, n. 1. For the sake of simplicity and consistency, the ODRA adopts the short form reference “ITT,” as used by the parties in their pleadings to date.

² *Protest* at 33.

³ *Id.* at 71.

⁴ *Id.* at 78.

⁵ *Id.* at 86.

⁶ *Id.* at 89.

“SR”) on November 26, 2012. Both Harris and ITT filed Comments on the Suspension Response (“Comments on SR”) on November 28, 2012.

For the reasons discussed below, the ODRA finds that ITT has not demonstrated compelling reasons to suspend contract performance during the pendency of the Protest. The ODRA therefore declines to temporarily suspend contract performance and will not recommend that a permanent suspension be ordered in this matter.

I. Standard of Review

There is a strong presumption under the FAA’s Acquisition Management System (“AMS”) that procurement activities and contract performance will continue during the pendency of bid protests. 14 C.F.R. §17.13(g) (2012); *Protest of Security Support Services, LLC*, 12-ODRA-00595 (Decision on Request for Suspension, dated March 22, 2012). The burden of overcoming the AMS presumption against suspension is on the protester. *Id.* The ODRA uses a four factor test to determine whether compelling reasons exist to issue a suspension when considering a request to suspend procurement activity. 14 C.F.R. §17.15(d)(2)(i)-(iv) (2012); *Protest of Hi-Tech Systems, Inc.*, 08-ODRA-00459 and 08-ODRA-00461 (Consolidated) (Decision on Suspension Request, dated September 15, 2008). The factors are: (1) whether the protester has alleged a substantial case; (2) whether a stay or lack of a stay would be likely to result in irreparable injury; (3) the relative hardships on the parties; and (4) the public interest. *Id.* The first factor is de-emphasized in favor of a balancing of the other three. *Id.*

II. Discussion

A. The Substantial Case Factor

The Product Team believes the grounds of the Protest are “wholly without merit,” but acknowledges that ITT has alleged a substantial case. *SR* at 4. Harris, by contrast, describes the Protest as “tautological,” and reasons that a protest is not “substantial” just because it is long. *Harris Comments on SR* at 3. Harris further characterizes the Protest

as “nothing more than an extended disagreement with the FAA’s technical and business judgments,” which fails to make a substantial case. *Id.*

Regardless of how the Protest is characterized, the ODRA finds that ITT has alleged a substantial case for purposes of the suspension test. The ODRA has previously described a “substantial case:”

In reviewing whether “compelling reasons” to recommend a stay exist, the ODRA does not prejudge whether a protester has a probability of success on the basis of initial pleadings since in a bid protest context, the stay issue will often be litigated before the agency report is filed. *See Decision on Crown’s Request for Suspension of Contract Performance*, 98-ODRA-00098. The substantive allegations underlying a Protest—and whether those arguments demonstrate a “fair ground for litigation” or “deliberate investigation”—are relevant to the ODRA’s evaluation of whether the Protester has made out a substantial case warranting a suspension, as required by the first prong of the 4-part suspension analysis. *See Protest of All Weather, Inc.*, 04-ODRA-00294 at 4.

Knowledge Connections, Inc., 06-TSA-024 (Decision on Request for Suspension of Activities, dated April 21, 2006). Other protests at the ODRA have advanced through the adjudication process and ultimately were found to constitute “mere disagreements” with the procurement officials. *See e.g., Protest of Systems Atlanta, Inc.*, 10-ODRA-00530 (a lengthy protest decision with approximately 38 separate findings of “mere disagreement”). Nonetheless, such cases can provide fair ground for litigation or deliberate investigation under the above suspension test. *See e.g., Protest of Systems Atlanta, Inc.*, 10-ODRA-00530 (Decision on Request for Suspension, dated July 12, 2010).

In the present Protest, the ODRA does not prejudge the outcome, but finds that ITT has presented fair ground for litigation. The allegations appear on their face to be sufficiently defined, and grounded in the Solicitation, proposals, or other documents. Additionally, ITT’s grounds of protest challenging the evaluation process present well recognized protest theories that, if proven, could result in the sustaining the Protest.

While ITT's Protest allegations make a substantial case and present a fair ground for litigation, this first factor of the suspension test is de-emphasized, and the ODRA must analyze the remaining factors to determine whether compelling reasons exist for a suspension. *Protest of Security Support Services, LLC*, 12-ODRA-00595 (Decision on Request for Suspension, dated March 22, 2012).

B. Irreparable Injury

ITT alleges it would suffer two specific irreparable injuries if a suspension were not issued. *Protest* at 96. The alleged injuries relate to "two large broker tasks" expected to begin shortly after the award of the contract. The Solicitation summarizes these two tasks as follows:

Upon contract award, the DCIS Contractor has two large broker tasks to accomplish: first, establish subcontract(s) with [Communication Service Provider(s) ("CSPs")] in order to obtain access to appropriately equipped aircraft, and second manage an incentive program to stimulate the emergence of appropriately equipped aircraft. The initial investment by the agency to stimulate equipage for Data Comm should lead to benefits for NAS users and benefits for the Program. Incentivizing the equipage of aircraft that only utilize a CSP, which does not have a subcontract relationship with the DCIS Contractor, will not yield benefit for the Data Comm Program.

Solicitation, § J-3. As discussed below, the ODRA finds that neither of these brokerage tasks gives rise to an irreparable injury.

1. Negotiation of the CSP Subcontracts

The Performance Work Statement (Solicitation section C) requires the contractor to provide a data communications network service (DCNS) that delivers its messages using radio frequencies provided by the FAA's current communications service providers (CSPs), *i.e.*, two companies named in the Solicitation, ARINC and SITA. *Solicitation* at § C.4. To ensure full coordination with these CSPs, the Solicitation and resulting Contract require the DCIS contractor to execute subcontracts to "procure the services of ARINC, SITA, or both." *Id.* at § H.30. The Solicitation further requires the prime contractor to meet with FAA program officials to discuss the subcontracting requirement

and the prime contractor's "approach and plans for negotiating and obtaining these subcontracts." *Id.* at § C.4.4.1.1.2. "The FAA's goal is for these meetings to be concluded as soon as possible, but they must be concluded no later than sixty (60) days after the DCIS contract award." *Id.* After the sixty day period, "the [Contracting Officer] will issue a Request for Proposal to the Contractor for a price proposal for [the DCNS] and Monitoring Services." *Id.* at § H.30. The prime contractor's responsive proposal, in turn, must include the "sub-contract agreements negotiated with the CSPs." *Id.*

ITT charges that "if Harris continues to bargain with the CSPs and ... to expend funds in pursuit of subcontracts with the CSPs ..., ITT will suffer irreparable injury because Harris will march forward toward the implementation of a worldwide communications system under a contract that is slated to last as long as 17 years in its first iteration." *Protest* at 96. Moving forward with contract performance, however, is the presumed norm under the AMS; it is not an injury. 14 C.F.R. § 17.13(g) (2012). ITT does not explain how it would be unable to negotiate with CSPs if, ultimately, its Protest led to an award of a contract to ITT. Moreover, despite ITT's argument that Harris can "lock up a relationship with SITA" (*ITT Comments on SR* at 9), a suspension affects only the relationship between the Product Team and the awardee, not transactions between private companies. Further, CSPs will have little incentive to remain "locked up" if ultimately Harris' contract is terminated as a result of this Protest. Accordingly, ITT has not shown that it will be irreparably harmed vis-à-vis the negotiation of CSP subcontracts.

2. Equipage Incentive Program

"The Data Communications Program ... is a key part of the [FAA's] transition from the current analog voice-only air-to-ground communications system to a system in which digital communications becomes an alternate, and eventually predominant, mode of communication." *Solicitation* at J-2, § 1.0. Recognizing that aircraft in the National Airspace System need avionics that are compatible with the FAA's new systems, "the FAA is sponsoring an equipage initiative to help the airlines populate their aircraft with the Data Comm avionics." *Id.* "The FAA expects that a minimum of \$80M of program funds will be expended on the Avionics Equipage Initiative." *Id.* at § 2.0. After defining

aircraft eligibility and general specifications for the equipment, the Solicitation sets equipping “1,900 ... aircraft as an achievable goal for acceptable performance.” *Id.*

ITT’s Suspension Request does not explain how proceeding with the equipage incentive program activities will cause irreparable harm. *See Protest* at 96-97. In its Comments, ITT rhetorically says that as Harris continues performance, it will reach an unspecified “point of no return,” and give the Product Team little incentive to fairly re-evaluate the proposals if such a final remedy is required. *ITT Comments on SR* at 10-11. The Product Team responds by noting that Harris will not have access to \$80M to spend immediately. *SR* at 5-6. Instead, the equipage incentive program depends on the preliminary step of finalizing the subcontract(s) with the CSP(s) to ensure that avionics provided use radio links compatible with the particular CPS subcontractor’s equipment. *Solicitation* at J-2, § 2.0; *SR* at 5. The Product Team also observes – correctly – that the ODRA has broad authority to fashion an appropriate remedy if necessary to mitigate perceived harm. The ODRA finds, therefore, that ITT’s alleged harm regarding the incentive program is speculative and not irreparable.

C. Relative Hardship

The Product Team’s Suspension Response includes a declaration from the Acting Program Manager for the Data Communications Program (“PM’s Declaration”). The Acting Program Manager explains the Data Communications Program requires and depends upon “seamless integration” of the DCIS program with the En Route Automation Modernization Program (ERAM) and the Terminal Data Link Services (TDLS) program. *PM’s Decl.* at ¶ 2. Millions of dollars have been spent by the ERAM and TDLS programs to create the necessary interface devices in towers and elsewhere for controllers to send data communications. *Id.* at ¶¶ 2 and 4. Integration testing of the ERAM, TDLS, and DCIS systems is scheduled for September 2013 when valuable laboratory space is available, and this schedule depends on the DCIS contractor having its CSP subcontracts in place and equipage activities started. *Id.*, at 4. A timeline showing this schedule is found in attachment J-3 of Solicitation, which corroborates the Program

Manager's statements by showing tight deadlines and the interdependence of the three programs. *Solicitation* at J-3, Figure 2.

The relative harm of granting or refusing a suspension is clear. Whereas ITT has failed to show irreparable harm in the absence of a stay, the Product Team has demonstrated that tight schedules of three programs and perhaps two CSP contractors would be adversely affected by a stay. On the other hand, without a suspension, the harm to the Product Team is avoided entirely if the Protest is denied, and the Product Team runs a risk of schedule disruption and additional cost should the Protest be sustained. As we have noted previously, the Product Team, in deciding to proceed with contract performance during the pendency of a bid protest such as this one, assumes the risk that the Agency will incur schedule delays and costs if the Protest is sustained. *Protest of Harris IT Services Corporation*, 12-ODRA-00604 (Decision on Request for Suspension, dated May 22, 2012). If ITT prevails, the ODRA has broad discretion to recommend whatever protest remedies are appropriate under the circumstances of the case. 14 C.F.R. §17.23 (2012). Issuance of a suspension, therefore, squarely harms the Product Team far more than it would benefit ITT.

D. The Public Interest Factor

All parties recognize the dual public interests in the integrity of the procurement process and in the Data Communications Program's goals to improve flight safety, reduce flight delays, and increase fuel savings. *Compare Protest* at 98, *SR* at 10, and *Harris Comments on SR* at 8. The lack of a suspension will not detract from the public interest in preserving the integrity of the procurement process. If the Protest is sustained, any number of remedial actions could be ordered to provide relief to ITT and, in so doing, preserve the integrity of the procurement process. 14 C.F.R. §17.23(a); *Protests of Hi-Tech Systems, Inc.*, 08-ODRA-00459 and 00460 (Decision on Request for Suspension, dated September 15, 2008). Given the potentially adverse impact of delaying the Product Team's ability to achieve the goals of the Data Communication Program, the ODRA concludes that the public interest favors continuation of contract activities during the prompt adjudication of this Protest.

III. CONCLUSION

The foregoing discussion demonstrates that despite the filing of a Protest that creates a fair ground for adjudication, ITT has not demonstrated that: (1) it will be irreparably harmed without a suspension; (2) the relative hardships favor the issuance of a suspension; or (3) the public interest would be served by a suspension. The ODRA accordingly declines to temporarily suspend contract performance and will not recommend that a permanent suspension be issued.

~~—S—~~

John A. Dietrich
Dispute Resolution Officer and
Administrative Judge
FAA Office of Dispute Resolution for Acquisition

December 12, 2012