

PUBLIC VERSION

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

Protest of)
)
CGH Technologies, Inc.) Docket No. 14-ODRA-00700
)
Pursuant to Solicitation DTFAWN-13-R-00071)

DECISION ON REQUEST FOR SUSPENSION

This matter arises from a pre-award bid protest (“Protest”) filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) by CGH Technologies, Inc. (“CGH”). The Protest challenges the Contracting Officer’s decision not to accept a modified proposal by CGH pursuant to Solicitation DTFAWA-13-R-00020 (“Solicitation” or “SIR”) for the delivery of a software system to provide the FAA with the ability to access a variety of types of aeronautical information (“AI”) in different formats under the Aeronautical Information Management Modernization (“AIMM”) Program. *Protest at 1; Product Team Opposition at 2.*

In its original Protest filing, CGH requested suspension of the evaluation of proposals and ultimately the contract award during the pendency of its Protest (“Initial Suspension Request”), but failed to address the elements required by the ODRA Procedural Regulations at 14 C.F.R § 17.15(d). The ODRA permitted CGH to file a supplement to its Suspension Request (“Supplemental Request”), which CGH did on March 24, 2014. The Product Team filed its Opposition to the Suspension Request on March 27, 2014 (“Opposition”), and CGH filed a Reply to the Opposition (“Reply”) on March 31, 2014.

After reviewing the submissions of the parties, for the reasons set forth below, the ODRA concludes that CGH failed to demonstrate compelling reasons to support the suspension of the evaluation of proposals and contract award. The ODRA, therefore, will neither

PUBLIC VERSION

impose a temporary suspension nor recommend that the FAA Administrator permanently suspend procurement activities.

I. STANDARD OF REVIEW

The FAA's Acquisition Management System ("AMS") sets forth a presumption that procurement activities and contract performance will continue during the pendency of 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). It is well established that the ODRA, absent compelling reasons, will not issue a temporary suspension or recommend that the FAA Administrator suspend procurement activities during the pendency of protests. *See, e.g., Protests of Hi-Tech Systems, Inc.*, 08-ODRA-00459 and 00460 (Decision on Protester's Request for Suspension, dated September 15, 2008). The ODRA Procedural Rules require the use of a four part test to determine whether compelling reasons exist to suspend contract activities. 14 C.F.R. §17.15(d)(2)(i)-(iv) (2012). The factors are: (1) whether the protester has alleged a substantial case; (2) whether a suspension or lack of a suspension would likely 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 remaining three. *Id.*

II. DISCUSSION

CGH's Suspension Request focuses on the potential harm that its business would incur if the Product Team does not consider its modified proposal and subsequently award a contract to CGH. *Supplemental Request* at 1. Specifically, CGH asserts that as an incumbent provider of software development and services under the Solicitation, the loss of an opportunity to meaningfully compete for the contract would "jeopardize [REDACTED] CGH's software development business line" resulting in irreparable injury. *Id.* at 2. The Product Team, on the other hand, contends that it would face significant hardship from a suspension of the evaluation, selection, and award due to such factors as loss of funding, disrupted scheduling and increased costs. *Opposition* at 5.

PUBLIC VERSION

A. The Substantial Case Factor

CGH asserts that it has alleged a substantial case providing a fair ground for litigation and a more deliberative investigation. In this regard, CGH alleges that the FAA “failed to comply with the plain language of the Solicitation provision ([AMS] Clause 3.2.2.3-14(g)) [which] requires the FAA to accept and consider otherwise acceptable modified proposals.” *Supplemental Request* at 1. The Product Team asserts that AMS Clause 3.2.2.3-14(g) does not mandate acceptance of CGH’s modified proposal and emphasizes that “the FAA Product team correctly rejected both the Protestor’s initial proposal and modified proposal as untimely as the initial proposal was submitted after the time frame established in the SIR.” *Product Team Response* at 3.

When evaluating whether a protest alleges a substantial case, the ODRA looks at whether the protest allegations present arguments demonstrating a “fair ground for litigation” or “deliberate investigation.” *Protest of All Weather, Inc.*, 04-ODRA-00294 at 4; *see also Protest of ITT/Exelis*, 12-ODRA-00628, (Decision on Request for Suspension, dated December 12, 2012). Here, the ODRA concludes that CGH’s Protest allegations are sufficient to constitute a substantial case, in that they allege deficiencies in the evaluation and source selection process and thus provide a “fair ground for litigation” or “deliberate investigation.” *Id.* The substantial case factor, however, is de-emphasized in favor of the balancing of the three remaining factors in determining 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).

PUBLIC VERSION

B. The Irreparable Injury Factor

CGH asserts that, absent a suspension of procurement activities, CGH's modified proposal will be denied a fair evaluation. *Supplemental Request* at 1. Specifically, CGH claims that "fair evaluation of CGH's modified proposal is unlikely to take place if award has already been made and contract performance begun." *Id.* As an incumbent contractor for software development and services under the Solicitation, CGH attributes [REDACTED] to work performed under the current contract. *Declaration of Cindy Troutman* ("*Troutman Declaration*") at ¶ 3. CGH also states that it has [REDACTED] employees dedicated to the current contract, which comprises [REDACTED] percent of its workforce. *Id.* CGH proceeds to state that the loss of opportunity to meaningfully complete would result in irreparable injury by effectively "eliminating [CGH] from consideration for a contract that could compromise over [REDACTED] percent of its labor force and revenue." *Supplemental Request* at 1.

According to Cindy Troutman, the President and owner of CGH, the loss of an opportunity to compete for the AIMM award would "devastate CGH" with a "loss of capacity and loss of access to financing." *Troutman Declaration* at ¶ 4. She further contends that an inability to compete would "dramatically impair [CGH's] ability to maintain current operations and to compete for other significant procurements" as well as "negatively impact CGH's strategic business plan with respect to [its] entire software development," integration, and data fusion business. *Id.* at ¶ 4-5. In its Opposition, the Product Team notes that CGH's Suspension Request and its Supplemental Request fail to allege facts that would support a finding that irreparable harm would result if procurement activities are not suspended. *Product Team Opposition* at 4. Counsel for the Product Team points out that CGH's position is comparable to that of "any incumbent who loses a competition and thus loses a source of revenue or employees." *Opposition* at 4.

CGH does not provide further support for its contention that it would suffer irreparable harm if the Product team continues to evaluate proposals during the pendency of this

PUBLIC VERSION

Protest. Under the circumstances here, the ODRA finds CGH's assertions to be speculative and based on the faulty assumption that a suspension is necessary to avoid irreparable injury. The award of the AIMM Contract is not expected to be made until August, 2014. *Declaration of Robert McMullen* ("McMullen Declaration") at 2. The adjudication of the Protest is likely to be completed well in advance of the planned contract award and, should CGH prevail, effective remedies would be available in the absence of the requested suspension. *Protest of Potter Electric Company*, 13-ODRA-00657 (Decision on Suspension, dated July 5, 2013). The ODRA retains broad discretion to recommend whatever protest remedies are appropriate under the circumstances of the case. 14 C.F.R. §17.23 (2012). Such remedies in this case could include, *inter alia*, mandated evaluation of CGH's proposal.

C. The Relative Hardships Factor

CGH fails to establish that the hardship it would suffer in the absence of a suspension outweighs any hardship to the FAA from a suspension. Rather, CGH merely asserts that the relative hardships "clearly favor suspension" because it is unable to discern any harm to the FAA. *Supplemental Request* at 2. On the contrary, the Product Team states that the suspension of procurement activities at this time would cause a substantial hardship by causing "a delay to the agency in obtaining the software sought in this procurement." *Product Team Opposition* at 5. Robert McMullen, the Program Manager for AIMM, states that a delay in the award of the AIMM Contract would result in the NAVLean Program, "a cross-agency Navigation Procedures project to streamline policies and processes used to implement Instrument Flight Procedures (IFP) in the [National Airspace System]," to miss a December 2015 operational target date. *McMullen Declaration* at ¶ 1-2. A delay could also add approximately \$2 million in costs to the NAVLean Program, and cause the AIMM Program to lose \$6.2 million in FY12 funding. *Id.* at 2.

Thus, the relative hardship factor does not support issuance of a suspension in the instant case. While there is a possibility that the FAA will incur added cost and delay if no

PUBLIC VERSION

suspension is ordered and the Protest ultimately is sustained, the Product Team assumes such a risk by proceeding with the procurement process in the face of this Protest. *Protest of Potter Electric Company, supra.*

D. The Public Interest Factor

CGH only addresses the public interest factor in its allegations by stating that if the suspension request is not granted, the FAA “may not meaningfully consider the enhancements and improvements offered by CGH” [REDACTED] contained in its modified proposal. *Supplemental Request* at 5. The Product Team asserts, however, that “a delay in this procurement would cause the Agency to lose funding that could potentially mean cancellation of the program.” *Product Team Opposition* at 6.

The ODRA finds no evidence that the lack of a suspension would detract from the recognized public interest in preserving the integrity of the procurement process. The ODRA concludes that the public interest favors the prompt adjudication of the Protest while procurement activities continue. 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).*

III. CONCLUSION

After balancing the applicable factors, the ODRA concludes that, although CGH has presented a substantial case, the remaining three factors of the test do not support the Suspension Request. The ODRA therefore declines to temporarily suspend procurement

PUBLIC VERSION

activities during the pendency of this Protest and will not recommend that a permanent suspension be issued.¹

- S -

C. Scott Maravilla
Dispute Resolution Officer and Administrative Judge
FAA Office of Dispute Resolution for Acquisition

April 8, 2014

¹ This is an interlocutory decision. It will become final upon issuance of the Final Order at the conclusion of this Protest.