

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

Protest of)
)
Data Transformation Corporation) Docket No. 15-ODRA-00732
)
Pursuant to Solicitation DTFAWA-15-R-00126)

DECISION ON REQUEST FOR SUSPENSION

This matter arises from a Protest filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) by Data Transformation Corporation (“DTC”). The Protest challenges the award of a contract to Computer Science Corporation (“CSC”) on May 12, 2015 for Direct User Access Terminal Services (“DUATS”) II pursuant to Solicitation DTFAWA-15-R-00126 (“Solicitation” or “SIR”).¹ DTC has provided DUATS services to the FAA since 1989 and is one of two incumbents under the predecessor DUATS contracts. *Protest* at 2. The awardee, CSC, is the other incumbent. *Opposition to the Suspension Request*, dated June 17, 2015 (“*Opposition*”), *Attach. B, Declaration of Patrick Weare*, dated June 15, 2015, (“*Weare Decl.*”) at ¶¶ 4, 10. DTC’s incumbent contract is scheduled to expire on July 15, 2015. *Id.* at ¶ 11.

The DTC Protest includes a request that the FAA suspend contract performance pending the resolution of the Protest (“Suspension Request”). *Protest* at 14-18. For the reasons discussed below, the ODRA finds that DTC has not demonstrated compelling reasons to suspend contract performance during the pendency of the Protest. The ODRA therefore declines to impose a temporary suspension, and will not recommend that the FAA Administrator suspend contract performance pending the resolution of this matter.

¹ DUATS is a popular internet-based service that provides General Aviation pilots and other users with no-cost preflight services that can be accessed directly via personal computers, mobile devices, or computers. *Opposition Attach. A, Declaration of Cynthia M. Moran*, dated June 15, 2015 (“*Moran Decl.*”) at ¶¶ 5–7.

I. Standard of Review

The FAA's acquisition system includes a strong presumption in favor of continuing contract performance during the pendency of bid protests, absent a showing of compelling reasons to suspend or delay. 14 C.F.R. § 17.13(g); *Protest of ITility Services, LLC*, 11-ODRA-00590 (Decision on Protester's Request for Suspension, dated December 5, 2011).² The Protester bears the burden of overcoming the presumption against suspension. *Protest of Hi-Tech Systems, Inc.*, 08-ODRA-00459 and 08-ODRA-00461 (Consolidated) (Decision on Suspension Request, dated September 15, 2008).

When considering a suspension request, the ODRA applies a four factor test in order to determine whether a compelling reason exists to issue a suspension. *Protest of Hi-Tech Systems, Inc., supra*. 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 to any party; (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

DTC argues that it has alleged a substantial case by asserting that CSC's proposal should have been excluded from award because, sometime in October 2015, CSC intends to "separate into two publicly traded entities," and as such, the company that submitted the proposal for the work will not actually perform the work. *Protest* at 1, 8. In its Opposition, the Program Office does not contend that the "substantial case" element of the four-part test has not been met, but asserts that the remaining three elements do not support a suspension. *Opposition* at 3.

² By statute, FAA acquisitions are not subject to automatic suspensions of contract performance when a protest is filed. 49 U.S.C. § 49110(d)(2)(E) (2012) (exempting FAA from the Competition in Contracting Act).

In determining whether a substantial case has been alleged, the ODRA considers whether a protest presents “a fair ground for litigation and thus for more deliberative investigation.” *Protest of Crown Communication*, 98-ODRA-00098 (Decision on Request for Suspension, October 9, 1998). The ODRA finds that DTC’s Protest has alleged fair grounds for litigation. Inasmuch as this first factor of the suspension test is de-emphasized, the ODRA considers it in the context of the remaining factors of the four-part test. *Id.*

B. Irreparable Injury Factor

With respect to the irreparable injury portion of the test, DTC argues that if DTC were to prevail, the FAA Administrator could provide no remedy that would “resuscitate the company from financial difficulties incurred from DUATS contract interruption” and there is no “post-petition remedy to return users who abandon DTC.” *Protest* at 15-16; *Reply* at 3. In this regard, DTC asserts that it stands to lose [DELETED] of its revenue, along with prior DTC users of DUATS services, and will suffer a compromised “ability to effectively use any remedies that the protest process can afford.” *Protest* at 17, *citing* Exhibit J, *Declaration of Terri C. Thrash*, dated June 8, 2015 (“*Thrash Decl.*”) at ¶ 11; *see also Reply* at 2. DTC further states that [DELETED]. *Thrash Decl.* ¶¶ 11.a-b.

The Program Office asserts that any economic harm that may result from the loss of revenues from the DUATS II contract do not qualify as irreparable injury that would support a stay request. *Opposition* at 4. The Program Office also asserts that DTC’s argument fails to acknowledge that users of DUATS services have a choice of providers and may transition between them at any time. *Opposition* at 4. Moreover, the Program Office notes that the full range of recommended remedies available and the services nature of the contract preclude any finding of irreparable harm resulting from no suspension. *Opposition* at 4-5.

It is well established in ODRA case law that lost opportunity for revenue is not sufficient to overcome the presumption. *Protest of SENTEL Corporation*, 09-ODRA-00497 (Decision on Request for Suspension dated September 15, 2009). As for the potential

loss of employees resulting from the loss of the contract, the ODRA previously has rejected the loss of employees as constituting irreparable harm in a services contract situation, noting that employees will “naturally follow the work.” *Protest of J.A. Jones Management Services*, 99-ODRA-00140 (Decision on Protester’s Request for Stay of Contract Performance, dated September 29, 1999). The cited potential harms are not unusual or unique under the circumstances. *Protest of Crown Consulting, Inc.*, 06-ODRA-00372 (Decision on Protester’s Request for Suspension, dated May 11, 2006). Every incumbent contractor suffers the loss of revenue and the potential loss of employees when it competes for and loses the award of its contract. *Id.* If the ODRA were to recommend a suspension on that basis, the FAA would be required to impose a suspension in virtually every case where an incumbent loses a competition. Such an approach would undermine the presumption against suspensions. *Protest of All Weather, Inc.*, 04-ODRA-00294 (Decision on Suspension, dated February 4, 2004).³

The ODRA further finds DTC’s claim that a transition of services would cause irreparable harm to be speculative, i.e., it assumes that an effective remedy will not be available if DTC’s protest is successful, and that DUATS users and employees would not return to DTC if it ultimately is awarded the contract. It is well established that speculative economic harm is not sufficient to overcome the presumption of continued contract activity. *SENTEL Corporation, supra*. The contract is service-based, with a performance period of one base year with four one-year option years that can be exercised at the FAA’s sole discretion. *Weare Decl.* at ¶ 3. Moreover, DUATS users are not restricted in their choice of DUATS service providers. *Moran Decl.* ¶ 10. These facts further support the speculative nature of DTC’s claims of irreparable harm absent a suspension. *Protest of Crown Consulting, supra*. Under the circumstances presented here, effective relief likely will be available to address any of the protest grounds which

³ DTC urges the ODRA to consider decisions of United States Court of Federal Claims for the proposition that the loss of a contract may constitute irreparable harm. *Reply* at 2. Such decisions are inapposite, given that unlike the acquisition system applicable to those cases, the FAA acquisition system includes a strong presumption in favor of continuing contract performance during the pendency of protests. 49 U.S.C. § 49110(d)(2)(E) (2012); 14 C.F.R. § 17.13(g); *see also Protest of Northrop Grumman Systems Corporation*, 06-ODRA-00384 (Decision on Protester’s Request for a Suspension, dated September 14, 2006).

are found to be meritorious, regardless of whether a stay is granted. *Protests of Hi-Tech Systems, Inc., supra.*

C. Relative Hardship Factor

With respect to the third factor, DTC argues that the FAA will not suffer any hardship from a stay of performance and the balance of relative hardships favors a suspension. *Protest* at 17. In its Opposition, the Program Office identifies a number of hardships that a suspension would impose on the DUATS Program, hardships which it claims could seriously impact the FAA's ability to provide weather and aeronautical information directly to pilots and the public via the internet. *Opposition* at 6-7; *Moran Decl.* ¶ 14. The Program Office further contends that a suspension would require a short term solution to provide DUAT services to the public, resulting in an "inefficient and costly administrative environment," and interfering with the realization of annual savings of approximately \$[DELETED] under the new DUATS contracts. *Moran Decl.* ¶¶ 13 and 16.

The ODRA concludes that the relative hardships on the parties of continuing or suspending contract performance do not favor recommending a suspension. If DTC ultimately prevails in this Protest, and is awarded the contract, it would have the opportunity to re-establish its revenue stream, [DELETED]. In contrast, the FAA would not be in a position to undo any adverse impact on aviation safety that may be suffered by pilots and the public as the result of disrupted access to weather and aeronautical information during the pendency of this Protest.

D. Public Interest Factor

With respect to the fourth factor, DTC argues that the public interest is furthered by a suspension, which will preserve the integrity of the bidding process by allowing the Agency to examine the propriety of a contract award made to a company with "Herculean resources" and which "jeopardize[s] the continued existence of small businesses." *Protest* at 18. These arguments also would require the ODRA to accept as true DTC's allegations that CSC's proposal should have been excluded from award as technically

unacceptable. In this regard, DTC contends that CSC knew at the time of proposal submission, but did not disclose as its management approach, the fact that work actually would be performed by another entity, “CSC-U.S. Public Sector.” *Protest* at 1.

As the ODRA previously has stated, the ultimate issue of whether the challenged award decision complies with the FAA’s Acquisition Management System will be determined through the prompt adjudication of the Protest. *Protest of Apptis, Inc.*, 10-ODRA-00535 (Decision on Request for Suspension, dated August 3, 2010). Moreover, in the event this Protest is sustained, the ODRA could recommend any number of remedial actions that would provide DTC with a meaningful remedy. 14 C.F.R. § 17.23(a); *Protests of Hi-Tech Systems, Inc., supra*. The ODRA thus finds that the public interest factor does not favor recommending a suspension.⁴

III. CONCLUSION

While DTC has alleged fair grounds for investigation and litigation, it has not demonstrated that it will suffer irreparable injury absent a suspension, or that the relative hardships or the public interest factors favor a suspension. Thus, based on the record and consideration of the applicable factors, the ODRA concludes that DTC has not demonstrated compelling reasons for a suspension. The ODRA therefore declines to order a temporary stay, and will not recommend that the FAA Administrator issue a permanent suspension.

-S-

Marie A. Collins
Dispute Resolution Officer and
Administrative Judge
FAA Office of Dispute Resolution for Acquisition

July 10, 2015

⁴ Where, as in this case, the Program Office decides to continue procurement activity, it 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 DTC. *Protest of Systems Atlanta, Inc.*, 10-ODRA-00530 (Decision on Suspension, dated July 12, 2010).