

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

Protest of \_\_\_\_\_ )  
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All Weather, Inc. ) Docket No. 04-ODRA-00294  
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Pursuant to Solicitation DTFAGL-04-R-34339 )

**DECISION ON PROTESTER’S REQUEST**  
**FOR STAY OF CONTRACT PERFORMANCE**

This matter arises from a protest (“Protest”) filed with the Federal Aviation Administration Office of Dispute Resolution for Acquisition (“ODRA”) by All Weather, Inc. (“AWI”) on January 16, 2004. The Protest involves the acquisition (“Acquisition”) by the Federal Aviation Administration’s Great Lakes Region (“Region”) of Data Display Systems to be installed in a new Air Traffic Control Tower at the Columbus, Ohio Airport (“The Project”). The Protester was one of two companies who submitted offers in connection with the Acquisition. The other offeror, Systems Atlanta, Inc. (“SAI”) was awarded a contract for the Project and has intervened in the Protest. The Protest includes a request that “a stop work order be issued to SAI during the pendency of this Protest.” *See* Protest at 8. Both the Region and SAI opposed the request for a stay. As is discussed below, the ODRA finds that no compelling reasons exist to support the issuance of a stay during the pendency of this Protest. Thus, the ODRA declines to impose a temporary stay and will not recommend that the Administrator stay performance of the work pending the resolution of this Protest.

**I. Factual Background**

AWI’s Protest challenges the evaluation process that resulted in the award to SAI. AWI claims that its proposal: “was wrongfully rejected as technically nonresponsive, SAI’s technical approach was not compliant with the SOW, no technical proposal was even

submitted by SAI pursuant to the solicitation notice and no best value analysis was completed.” *See* Protest at 2. AWI asserts that its offer had included three Options for software to be provided in connection with the Acquisition and that:

AWI learned for the first time that the FAA completely rejected Options 2 and 3 of its proposal since the software was not approved in the NAS. It was also discovered for the first time at the debriefing that the FAA rejected Option 1 as nonresponsive since AWI identified the software as being GFE [Government Furnished Equipment]. AWI was not informed of this fact before award nor was it given the option of amending its offeror to include purchase of the software directly from SAI.

*See* Protest at 5.

In support of its request for a stay, AWI’s Protest relies on its assertions that: “there are major discrepancies in this procurement which render the award invalid.” *See* Protest at 8; and that “whereas it is quite obvious that AWI would be harmed if a stop work order was not in place and the contract based on a flawed procurement was allowed to go through, no party would be harmed by a stop work order.” *Id.* SAI further states in its Protest in support of the stay request that “there have been delays in the past and there is a question whether the tower will be completed by April, 2004.” *See* Protest at 9. Finally, AWI asserts that AWI would be severely harmed because “it would have lost the opportunity to provide the contract here, will have needlessly spent bid and proposal costs in responding to a procurement which wrongfully rejected its technical solution, and will have been excluded from the potential of providing the FAA with an alternative software product which will provide the FAA with true selection and competition in future procurements.” Protest at 9.

The Region orally responded to the stay request at a telephone status conference convened by the ODRA on January 22, 2004. At that time, counsel for the Region and Region representatives provided information concerning the criticality of the equipment involved to the commissioning of the Air Traffic Control Tower and the cost that would be incurred by the Agency in the event of delay to the commissioning. Counsel for the

Region was permitted to supplement its oral presentation with a written submission from the Region Team, which was filed with the ODRA on January 26, 2004 (“Written Opposition”). The Written Opposition recounts the schedule constraints that resulted from the need to obtain the equipment on a regional, rather than a national basis; the status of construction of the Columbus Control Tower as essentially complete; the schedule for installation of the Data Display System during the second and third weeks of March, 2004; and the commissioning of the Air Traffic Control Tower on April 25, 2004. The Written Opposition further notes that the Tower will not become operational absent the installation of the Data Display System and any delay in the delivery of the system will delay the commissioning of the Tower. The Written Opposition further provides detailed information on additional costs that would be incurred by the Agency in the event of any delay. The Written Opposition describes additional potential delay impacts to other projects critical to the National Airspace System, and attempts to rebut allegations underlying the Protest. Finally, the Written Opposition notes that the subject procurement amounts essentially to a stop gap measure; that there will be “a national procurement” for upgrading the Data Display System functionality; and that the award of the current contract to SAI does not preclude AWI from participating in the planned future acquisition relating to this type of equipment.

In accordance with the ODRA Procedural Regulations, AWI filed a reply (“Reply”) to the FAA Written Opposition to the stay request. The AWI Reply seeks to take issue with the Region’s technical approach in the acquisition and charges that “it is “incredulous for the FAA to now insist that DDS must be installed prior to tower commissioning.” *See* AWI Reply at 3. The Reply goes on to address AWI’s disagreement with the conduct of the evaluation that led to the award to SAI and charges that the lack of stay will result in costs to both the Agency and to AWI and that SAI would not be impacted by a delay of the acquisition. *See* AWI Reply at 7.

On January 26, 2004, SAI filed its response (“SAI Response”) on the stay issue. The SAI Response notes that among other things, “SAI has already completed much of the work toward fulfilling this contract.” *See* SAI Response at 1. SAI further states that “we

estimate that at least 80% of the contract fixed price and an even greater percentage of employee effort has already been invested in this project to meet the rapid delivery time required by the contract.” *Id.* SAI’s Response further speaks to the criticality of the DDS equipment to the operation of the Tower:

A DDS is essential to the safety and the efficiency of ATC operations. The system provides consolidated aeronautical data from many sources. These data elements contribute to controller situational awareness and decision support. The DDS must be installed and fully functioning in order for controllers to begin ATC operations at the new ATCT.

SAI Opposition at 1.

## **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. It expressly provides that contract performance shall continue absent a showing of compelling reasons to suspend or delay. *See* AMS Section 3.9.3.2.1.6. 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. As the ODRA recently noted in the *Glock* case, a three part test established by the United States Court of Appeals for the District of Columbia Circuit in *Washington Metropolitan Area Transit Commission vs. Holiday Tours, Inc.* 559 Fed. 2nd 841, 844 (DC Cir. 1997), has been adopted by the ODRA in evaluating stay requests. *See Protest of Crown Communications*, 98-ODRA-00098,

October 9, 1998. In analyzing such requests, the ODRA will consider four factors, namely: (1) whether the Protester has made out 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. Thus, “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 vs. Holiday Tours, supra* at 844.

### **A. Substantial Case**

In its Protest, AWI challenges various aspects of the technical evaluation and technical approach, as well as the ultimate award decision made by the Region. In the ODRA’s view, the allegations are properly viewed as constituting “a fair ground for litigation and thus for more deliberative investigation.” *Washington Metropolitan Area Transit Commission vs. Holiday Tours, supra*. In accordance with that caselaw and prior ODRA authority, the ODRA believes there is a basis to review and consider the record in this matter to determine whether the source selection lacked a rational basis, was arbitrary and capricious or constituted an abuse of discretion. Having concluded that a substantial case exists, the ODRA will review the remaining three factors to determine whether compelling reasons exist for a stay in this case.

### **B. Irreparable Injury**

The Protester bears the burden of overcoming the presumption against the issuance of a stay. In this case, the Protester’s unsupported allegations of injury, even if true, do not come close to meeting its burden of establishing irreparable injury. Essentially, the allegations on this point consist of: (1) a complaint that AWI has incurred costs in bidding on a contract and has lost money as a result of not being awarded the Contract; and (2) the Region conducted the acquisition improperly. Were the ODRA to accept these allegations as sufficient to establish irreparable injury, it would be required to enter a stay in every protest in which one is requested. Every party bidding on a contract

incurs costs in doing so, and presumably suffers a monetary loss by not winning the competition. Further, were the ODRA to sustain the Protest, one possible remedy may be the award of bid and proposal costs. Thus, AWI cannot say it will sustain “irreparable” harm in terms of the incurrence of such costs. Moreover, as to the second allegation – relating to improper conduct of the Acquisition – every party in every protest alleges that the Agency’s actions were in one way or another improper or incorrect. Accepting such allegations as demonstrating irreparable injury would undermine and defeat the AMS’s basic presumption that acquisition activities will continue during the pendency of bid protests absent a showing of compelling reasons.

### **C. The Relative Hardships**

AWI has made no real attempt to demonstrate that the relative hardships would favor the entry of a stay in this case. By contrast, both the Region and SAI have explained in detail that the equipment in question is on the critical path to completion and commissioning of the new Air Traffic Control Tower. Additionally, it has been demonstrated that: the current acquisition is essentially a necessary stop gap measure that would allow the Tower to be constructed, and timely commissioned; and that a later national procurement for upgraded equipment of this type will take place. Thus, the record at this point suggests AWI may have opportunities in the future to offer to provide its products to the FAA. Under the circumstances, the relative hardships on the parties strongly militate against a stay.

### **D. The Public Interest**

AWI cites to the need to ensure that the FAA conducts its acquisitions properly and in accordance with the law, and that it is in the public interest for the FAA to conduct its acquisitions properly. The question, however, of whether the FAA acted properly will be determined in the context of the Protest itself. The Region has made a showing in its Opposition that the timely commissioning of the Tower has both cost and other ramifications for the Agency and for the flying public. Given this showing, the ODRA

finds that the public interest strongly favors not staying activities related to the acquisition.

### **III. Conclusion**

Based on the record to date on this case, and after balancing the applicable factors, the ODRA concludes that no compelling reasons 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 stay pending the outcome of this Protest.<sup>1</sup>

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/s/  
Anthony N. Palladino  
Associate Chief Counsel and Director  
FAA Office of Dispute Resolution for Acquisition

February 4, 2004

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<sup>1</sup> The ODRA has however, established a briefing scheduling which has the potential for resulting in an early decision in this Protest, far in advance of the scheduled commissioning date of the Tower. It is the responsibility of the Region's Product Team to ensure that potential costs and litigative risk factors related to the Protest are taken into account in the timing of its acquisition decisions relative to the equipment involved. The Region, in opposing a stay, bears the risk that additional delays and costs may be incurred if the Protest is successful.