

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

<u>Protest of Informatica of America, Inc.</u>	)	
	)	
	)	ODRA Docket No.
	)	99-ODRA-00144
	)	
<u>Under FAA Solicitation No. DTFA03-99-R-00020</u>	)	

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

This matter arises in connection with a protest (“Protest”) filed with the Office of Dispute Resolution for Acquisition (“ODRA”) on September 28, 1999 by Informatica of America, Inc. (“Informatica”). The Protest involves the award to Multimax, Inc. (“Multimax”) of an indefinite delivery-indefinite quantity (“IDIQ”) contract (“Contract”) for the provision of information technology support services to the FAA’s William J. Hughes Technical Center (“Center”). Informatica’s Protest includes a request for a stay of performance of the Contract (“Stay Request”) pending the outcome of the Protest. The Stay Request is made in accordance with the ODRA’s Procedural Rules, 14 C.F.R. Section 17.15(d). Both the Center and Multimax have opposed the Stay Request. As is discussed below, the ODRA has found that no compelling reasons support a stay of Contract performance in this case. The ODRA therefore denies the Stay Request and will not recommend that the FAA Administrator stay Contract performance pending the resolution of the Protest.

## I. FACTUAL BACKGROUND.

Informatica's protest sets forth four grounds. First, Informatica claims that the Center's interpretation and application of the evaluation criteria lacks a rational basis, in that the FAA improperly limited its consideration of past performance references and past performance experience. Second, Informatica claims that the Center improperly re-scored the technical scores of the offerors after pricing information had been disclosed. Third, Informatica claims that the awardee, Multimax, was not in compliance with the requirements of the SIR with respect to its staffing plan; and that the staff which had been proposed by Multimax will not be used to perform the contract. Finally, Informatica claims that although the SIR stated that a "best value" approach would be utilized, the Contract actually was awarded purely on the basis of low price. Informatica's Supplemental Protest claims that the Center improperly exercised an option, diverting a portion of the Contract work; and that Multimax has substituted Informatica's former employees for the employees Multimax had proffered to the Center.

Informatica initially claimed that it would suffer irreparable harm in the absence of a stay because it would lose valuable employees to Multimax. The Stay Request from Informatica's counsel states: "the loss of the employees targeted by Multimax would seriously cripple IAI's ability to continue in the networking business, rendering it unable to bid competitively on, or to perform, any of the contracts in that line of work."<sup>1</sup> See Informatica Stay Request, dated September 28, 1999.

Informatica's Stay Request goes on to allege that:

The contract at issue involves support services that are currently being provided under four existing contracts. The functions encompassed by the contract at issue are no broader than those covered by the existing contracts. Each of the existing contracts can be extended on a month-by-month basis, to cover any FAA needs pending resolution of this protest.

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<sup>1</sup> We note for the record that the Stay Request was not supported by any affidavit or other evidentiary submissions from Informatica.

The FAA's ability to meet its needs will not be adversely affected by a suspension.

Informatica Stay Request at 3.

Informatica also alleges that a suspension would be in the public interest; and that:

All of the work on this contract has been, is now being, and will in the future be performed by the Protester's team of people. The only difference is who will pay them.

Informatica Reply of October 5, 1999 at 1.

The Center's Opposition to the Stay Request alleges that Informatica has failed to demonstrate compelling reasons to support a stay and cites to the ODRA's recent Decision on a stay request filed in the *Protest of J.A. Jones Management Services*, 99-ODRA-00140, September 30, 1999. The Center's Opposition asserts that Informatica has not made out a substantial case on the merits of its Protest; and challenges Informatica's claim of irreparable injury in the absence of a stay. With respect to Informatica's allegation regarding a "loss" of employees, the Center points out that many of the employees in question were never on Informatica's payroll. Rather, they were employees of Informatica's subcontractor, FDC. Informatica's Reply does not refute this assertion. Further, the Center asserts those FDC employees are likely to return to FDC if and when Informatica's Protest is sustained.

Nor did the protester "lose" any of the employees that had been employed by FDC, its subcontractor.... The unfolding events on October 1, 1999 conclusively demonstrate, moreover, that the former FDC employees pledged to this contract by Informatica are capable of moving from employer to employer to stay with the job that they are doing. If the protester is ultimately successful, Informatica may chose to "enforce" those binding letters of commitment, hire the subject employees and put them back on the job.

Opposition at 9.

The Center goes on challenge Informatica's assertion that the contracts under which the services had been provided prior to October 1 could be extended to cover the stay period. The Center asserts that "while the personnel are clearly available for these tasks, there is no readily available contract vehicle to continue their services." Opposition at 11.

The Center's Opposition makes a supported showing of the necessity that the services involved be continued without interruption. The Center has submitted the affidavit of the Chairman of the Technical Evaluation Team on the issue of the impact of a stay on the Center. Finally, the Center points out that:

the exercise of the option in an existing contract with the protester to provide the services called for in Task 6 places the protester in the same position it occupied prior to the award of the subject contract. It did not lose any employees since it has never employed those people to perform Tasks 1, 2, 3, 4 or 5 under earlier contracts.

Opposition at 11.

The awardee, Multimax also opposes the Stay Request. Its Opposition asserts that the Informatica protest is untimely; that its version of the facts is inaccurate; and that Informatica did not demonstrate any defects in the procurement decision. Multimax's Opposition also discusses the harm that it will incur in the event of an imposition of a Stay.<sup>2</sup>

## II. DISCUSSION

As we have previously noted:

The FAA's Acquisition Management System ("AMS") includes a presumption in favor of continuing procurement activity 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

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<sup>2</sup> Multimax's Opposition, like Informatica's Stay Request, is not supported by affidavit or other evidentiary submissions.

presumption is set forth in the ODRA Rules of Procedure. 14 C.F.R. Section 17.13(g).

*Protest of J.A. Jones Management Services*, 99-ODRA-00140, Decision on Protester's Request for Stay of Contract Performance, September 29, 1999. In determining whether compelling reasons support a stay of contract performance, the ODRA applies the standard first announced in the *Protest of Crown Communications*, 98-ODRA-00098, October 9, 1998; and more recently discussed and explained in the decision in *Jones, supra*. The ODRA will determine whether compelling reasons exist in support of a stay:

on a case-by-case basis by looking at a combination of factors including: (1) whether the protester made out a substantial case; (2) whether a stay or lack of stay is likely to cause irreparable injury to any party; (3) the relative hardships on the parties; and (4) the public interest. Greater emphasis will be placed on the second, third and fourth prongs of the analysis. This approach is consistent with that of the Court of Appeals for the District of Columbia Circuit and provides for a flexible analysis "under which the necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors".

*Crown, supra*, quoting from *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.* 559 Fed. 2d 841, 843 (D.C. Cir. 1977).

Informatica's Protest, in the ODRA's view, alleges facts which constitute "a fair ground for litigation and thus for a more deliberative investigation." *Washington Metropolitan Area Transit Commission, supra* at 843. Thus, we conclude that Informatica has satisfied the requirement that it make out a "substantial case" in requesting a stay.<sup>3</sup> Under the ODRA's test for considering a stay request, a showing on the merits is de-emphasized as an element, in relation to the balancing of the remaining three factors discussed above. Here, after balancing those remaining factors, we conclude that the Protester has not demonstrated that irreparable harm will result if a Stay is not imposed. The Center has demonstrated that a stay would impose hardships on its operations. Finally, under these

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<sup>3</sup> In so finding, we do not decide any preliminary or ultimate legal issue that may arise with respect to any grounds of the Protest.

circumstances, the public interest supports allowing contract performance to continue while the ODRA's default adjudicative process promptly is completed.

For stay consideration purposes, the situation presented here is analogous to that presented in *Jones, supra*. Both cases involve services contracts. In *Jones*, the transition of work from the incumbent protester to the awardee was virtually complete and performance was about to begin. In this case, the incumbent, through the exercise of an option, maintained a portion of the work, which it continues to perform. The remainder of the work was commenced under the new Contract shortly after the Protest was filed, and during consideration of this Stay Request. Both in *Jones* and here, the chief claim in support of the stay is the loss of employees. The *Jones* stay request alleged that employees were being hired by the awardee. In this case, based on the submissions, it appears that at least some of the employees allegedly lost by Informatica and hired by Multimax actually were employees of an Informatica subcontractor. As in *Jones*, the employees involved here were, for the most part, working under the predecessor contract and continued to work under the Contract that the Protester seeks to stay. Thus the real question that would be decided by a stay is whether the incumbent Protester or the Awardee will pay the employees and stand to profit from their work during the pendency of the Protest.

As we said in *Jones* and in the *Crown* stay decision that preceded it, an allegation of a loss of employees, in and of itself, is not persuasive. We noted in *Jones* that:

A stay will not assure the return of any employees to Jones. Conversely, the lack of the stay would not preclude the return if the protest is sustained and Jones obtains the contract. Nor would a stay or the lack of a stay affect the ability of Wackenhut [the Awardee] to hire whatever employees it wishes to obtain.

See *Jones, supra* at 6.

As was the case in *Jones*, there is nothing about the nature of the services work to be performed under this Contract that would render the ODRA unable to recommend effective relief should the Protest be successful. As we said in *Jones*:

This contract is readily distinguishable from those where, because of nature, timing or anticipated completion of the work involved, it could be impracticable to terminate or replace the contractor once the work has commenced.”

*Jones supra* at 5.

As in *Jones*, effective relief potentially is available to the Protester in the absence of a stay because this Protest will be decided within a few weeks of the commencement of Contract performance. Inasmuch as the Protester has opted out of the ODRA’s ADR process, the Agency Report will be filed in this case on October 18, 1999. The Protester’s comments will be due on October 25, 1999, and the Protest will proceed to decision promptly thereafter.

The ODRA believes that the public interest would not be served by staying performance of the Contract work. Rather, the prompt completion of the Protest to a final decision by the FAA Administrator, within a timeframe that affords the possibility of effective relief to the protester, would best serve the public interest.

III. CONCLUSION

The ODRA believes that no compelling reason exists here to overcome the AMS presumption of continuation of contract performance during the pendency of bid protests. Therefore, in accordance with its authority, the ODRA hereby denies Informatica's Stay Request and will not recommend a stay to the FAA Administrator.

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Office of Dispute Resolution for Acquisition

Dated: 10/8/99