

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

Matter: Protest of J.A. Jones Management Services

Under FAA Solicitation No. DTFA03-99-R-COMS

Docket: ODRA Docket No. 99-ODRA-00140

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

This matter arises in connection with a protest ("Protest") filed by J.A. Jones Management Services ("Jones") on September 15, 1999, and docketed as ODRA Docket Number 99-ODRA-00140. Jones requests a stay of performance of the operation and management services contract ("Contract") awarded to Wackenhut Services, Inc. ("Wackenhut") for the FAA's William J. Hughes Technical Center ("Center"). Both the Center and Wackenhut have opposed the Jones request. The parties have briefed the issue and made written evidentiary submissions in the form of affidavits and supporting documents. Oral arguments on the request were heard on Friday, September 24, 1999 and supplementary evidentiary submissions made on September 27, 1999. As is discussed herein, the ODRA finds no compelling reasons supporting a stay. The ODRA therefore will not recommend that the Administrator stay contract performance pending the resolution of the Protest.

I. FACTUAL BACKGROUND

Jones is the incumbent on the predecessor contract and an unsuccessful offeror. The Contract is for an initial one year period, starting on October 1, 1999. In addition, the Contract includes four one-year extension options. A transition period from the incumbent Jones to Wackenhut began on September 3, 1999 and will continue to the end of September, at which time contractual responsibility shifts to Wackenhut.

The Protest states four grounds. First, Jones asserts that Wackenhut did not and cannot provide the experiential information and references required by the Solicitation and that the Agency essentially waived the Solicitation requirements in this regard. Second, Jones claims that Wackenhut made an unauthorized proffer of Jones employees to the Center; did not submit required resumes, licenses and certifications for those employees; and improperly planned "cross use" of key personnel in violation of the Solicitation requirements. Third, Jones claims that Wackenhut submitted an "unbalanced offer" that was one-half of the price of the Jones' offer and may violate the Service Contract Act, 41

U.S.C. § 351, *et seq.* (1999). Fourth, Jones alleges the Center improperly amended the Solicitation in order to facilitate an award to Wackenhut. In this regard, Jones alleges that while the Solicitation originally provided that a failing grade from a board member in a technical area would disqualify an offeror, this requirement was later relaxed to require a failing grade from *each* board member in order to disqualify an offeror.

In support of its request, Jones argues that, in the absence of a stay: (1) it will lose important, valuable employees to Wackenhut or other companies; (2) the FAA will bear a substantial risk of a termination claim for contractor furnished equipment to be purchased by Wackenhut; and (3) Jones and the FAA may incur substantial costs for demobilization/remobilization of Jones. In addition, in its reply ("Reply") to the Center's opposition to the stay request, Jones argues that "if the protest is sustained both the FAA and the Awardee will argue that it would be too costly to terminate its contract because performance has begun and phase in completed." Jones Reply at 5. Jones raises concerns that "any continuation in the transition will further hamper ODRA's ability to give Jones any meaningful relief." Jones Reply at 5.

By contrast, according to Jones, a stay would impose no meaningful hardship on the Center. Jones suggests that as the incumbent contractor it could continue to perform all the contract requirements until the Protest is resolved. Jones Reply at 5. Jones further suggests that the transition period be extended pending the completion of the Protest. It maintains that the costs incurred as a result of such an extension would be significantly less than those that would be incurred in the absence of a stay, should Jones be successful in this Protest. Finally, Jones argues that the FAA's interest in maintaining a fair forum for bid protests would be impaired if a stay is not ordered.

For its part, the Center's Opposition to the stay request notes that the protester has the burden of proving that a stay is warranted. The Center asserts that the protester has not demonstrated irreparable harm, and argues that any employees lost by Jones would return to it if it is successful in the Protest. The Center also challenges the allegations made by protester as the basis for its Protest; and has submitted an affidavit asserting that the Center would incur costs and disruptions if a stay is ordered.

Wackenhut also filed an Opposition to the request for a stay, along with supporting affidavits and materials. Wackenhut's Opposition centers on an interlocutory decision issued by this Office on October 9, 1998 in the *Protest of Crown Communications, Inc.*, 98-ODRA-00098. Wackenhut's Opposition notes that pursuant to the AMS "there will be no stay of performance unless a 'compelling reason' is shown for that stay." Wackenhut Opposition at 1. Wackenhut's Opposition further alleges that the protest does not make out a substantial case on the merits. Affidavits submitted by Wackenhut confirm that the transition phase of the Contract is currently at an advanced stage, with many transition activities already complete. *See Affidavits of Frank Russo, dated 9/27/99 and of Larry K. Luper, dated September 22, 1999.* In addition, Wackenhut's Opposition challenges Jones' claim of irreparable injury, noting that "the possible loss of the contract is not irreparable harm under the ODRA's test, and here the cost involved would be unlikely to preclude

reinstatement of Jones in any case." Wackenhut Opposition at 8. Finally, Wackenhut notes that a stay at this stage in the transition would be disruptive and costly.

II. DISCUSSION

It should be noted at the outset that 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 § 3.9.3.2.1.6. The same presumption is set forth in the ODRA Rules of Procedure. 14 C.F.R. § 17.13(g).

In the October 9, 1998 interlocutory decision issued in *Crown, supra*, the ODRA established a four-part test to be applied in determining whether compelling reasons exist in support of a stay of contract performance. We stated in *Crown* that the existence of such compelling reasons:

shall be determined 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 Commission v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977).

The Jones Reply criticizes the ODRA decision in *Crown* as an application of a "wooden" irreparable harm standard. Reply at 3. Jones reads *Crown* to hold that a protestor must demonstrate its business *will fail* in the absence of a stay in order to demonstrate irreparable harm and to obtain a stay of procurement.

The decision in *Crown* was not intended to suggest that the ODRA *requires* a protestor to demonstrate that its business will fail in order to obtain a stay of procurement. Rather, in *Crown* the ODRA did not view the loss or potential loss of employees, in the absence of any other indicator or evidence of effect, to constitute "irreparable harm." In *Crown*, the FAA Program Office already had voluntarily agreed to suspend 97% of the contract work pending the outcome of the protest. In balancing the equities, including the relative hardships and the public interest, the ODRA found that the facts did not demonstrate compelling reasons to stay the remaining work.

In determining whether compelling reasons exist to stay a procurement under 14 C.F.R. §17.15(d), the ODRA will review a combination of factors and the balance of equities will govern its determination. The Jones Protest has made out a substantial case, *i.e.*, a case which alleges facts which constitute "a fair ground for litigation and thus for a more deliberative investigation." *Washington Metropolitan Area Transit Commission v. Holiday Tourist, Inc.*, 559 F. 2nd 841, 843 (D.C. Cir. 1977). However, after balancing the equities by examining the second, third and fourth elements of the *Crown* standard, we conclude that there are no compelling reasons supporting the issuance of a stay in this case.

This Contract is readily distinguishable from those where, because of the nature, timing or anticipated completion date of the work involved, it could be impractical to terminate or replace the contractor once work has commenced. The Contract in question is a one-year operations and management contract. It includes four one-year options that the Center may exercise in its sole discretion. Contract performance will begin on October 1, 1999. Given the average protest resolution timeframe at the ODRA, this protest is likely to be completed with a decision by the FAA Administrator in late October or early November of 1999, *i.e.*, approximately one month into the first year of the Contract. The cases cited by Jones for the proposition that delay which impairs an agency's ability to terminate an awarded contract establishes irreparable harm, are inapposite. *See United Power Corp. v. U.S.*, 736 F. Supp. 354, 358; *Baird Corp. v. Marsh*, 579 F. Supp. 1158, 1161 (D.D.C. 1983).

Although Jones claims that in the absence of a stay, effective relief will not be available to it, the ODRA does not accept this argument. If Jones is successful in this Protest, a broad range of possible remedies would be available. Such remedies might include, for example: (1) an ordered termination of the Contract for the convenience of the FAA, coupled with a direction to award the Contract to Jones or to recompetitively; or (2) a direction that the Center not exercise an option at the end of the initial period of the Contract, coupled with a direction to award the Contract to Jones or to recompetitively. When a protest is sustained, the ODRA, in making its remedy recommendation, considers all of the circumstances of the case, including the impact on the integrity of the FAA's procurement system, along with the impact on the Agency of the recommended remedy. *See Protest of Haworth, Inc.*, 98-ODRA-00075.¹

The relative hardships on the parties also do not favor a stay of contract performance. As noted above, effective relief is likely to be available regardless of a stay. Moreover, Jones' assertion that it will sustain an injury from a loss of valuable key employees is not, in and of itself, persuasive.² As was noted in *Crown, supra*, a stay would not assure the return of any employees to Jones. Conversely, the lack of a stay would not preclude their 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 to hire whatever employees it wishes to obtain. As we have stated, "employees are not possessions of their employers and may naturally follow the work and their own professional opportunities." *Crown* at 4.

By contrast, the Center clearly will incur additional costs should it be required to reverse course at this late stage in the transition, in order to maintain Jones as the contractor pending the outcome of the Protest. Most of the contractor furnished equipment referenced by Jones has been purchased and has either been delivered or will be delivered shortly. In addition, subcontracts and key personnel already are in place. Given the nature of the Contract, the anticipated timeframe for the final resolution of this Protest, the status of the transition from Jones to Wackenhut, and the availability of effective relief in the event the Protest is sustained, we find no basis to conclude that lack of a stay would cause irreparable injury to Jones or that the relative hardships favor a stay. Finally, there is no evidence that the public interest would be served by the granting of a stay in this case.

III. CONCLUSION

The ODRA has concluded, after balancing the applicable factors, that no compelling reason exists to stay contract performance. Pursuant to its authority, and for the reasons set forth above, the ODRA denies Jones' request for a stay of Contract performance.

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

Dated: September 29, 1999

¹ As noted in the *Haworth* decision, the FAA dispute resolution process is not subject to the provision of the Competition in Contracting Act ("CICA") that explicitly requires the Comptroller General to make its recommendation for corrective action "without regard to any cost or disruption from terminating, re-competing or re-awarding the contract."

² The *Crown* decision did not establish, and we do not say here, that the possible loss of critical employees cannot, when combined with other factors or under other circumstances, provide the basis for a suspension of contract performance.