

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

Protest of)
)
Data Transformation Corporation) Docket No. 15-ODRA-00731
)
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 Lockheed Martin Corporation (“Lockheed”) on May 12, 2015 for Direct User Access Terminal Services (“DUATS”) II pursuant to Solicitation DTFAWA-15-R-00126 (“Solicitation” or “SIR”).¹ DTC is the incumbent under the predecessor DUATS contract and has provided DUATS services to the FAA since 1989. *Protest* at 3. The DUATS II contract services are scheduled to transition from DTC to Lockheed on July 15, 2015. *Opposition to the Suspension Request*, dated June 17, 2015 (“*Opposition*”), *Attach. B, Declaration of Patrick Weare*, dated June 15, 2015, (“*Weare Declaration*”) at ¶ 11.

The DTC Protest includes a request that the FAA suspend contract performance pending the resolution of the Protest (“*Suspension Request*”). *Protest* at 13-14. The Program Office filed its *Opposition* on June 17, 2015, and DTC filed its *Reply* on June 19, 2015 (“*Reply*”). 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

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 Declaration*”) at ¶¶ 5-7.

not recommend that the FAA Administrator suspend contract performance pending the resolution of this matter.

I. Standard of Review

The ODRA Rules of Procedure include 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). 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, *inter alia*, that the evaluation of Lockheed’s proposal was inconsistent with the SIR’s evaluation criteria, as well as applicable policy and law.² 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 Specifically, DTC alleges that: (1) Lockheed’s proposal was technically unacceptable in that it included pricing only for the base contract year; (2) consideration of Lockheed’s proposal effectively relaxed the SIR requirements for Lockheed thereby causing offerors to be evaluated unequally; (3) Lockheed’s proposal should have been evaluated as “high risk” because its low price bid; and (4) Lockheed submitted an alternative proposal that was not contemplated by the terms of the SIR. *Protest* at 1-2.

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 grounds that could result in the protest being sustained. As noted above, however, this first factor of the suspension test is de-emphasized and the ODRA considers it in the context of the remaining factors to determine whether compelling reasons exist for a suspension. *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 “sufficiently stanch the bleeding caused by the award to Lockheed.” *Protest* at 14. In this regard, DTC asserts that its situation is unique in that it is the incumbent under the current DUATS contract, which represents a “[DELETED] of DTC’s total revenue.” *Protest* at 14, Exhibit B, *Declaration of Terri C. Thrash*, dated June 8, 2015 (“*Thrash Decl.*”) at ¶ 11. DTC further states that [DELETED]. *Thrash Decl.* ¶¶ 11.a-b.

DTC argues that these harms would prevent DTC from taking “full advantage” of a recommended remedy. *Id.* DTC also contends that a lack of a stay “unnecessarily risks lasting damage to DTC’s DUATS program” because, in the time the ODRA would require to adjudicate the protest, DTC’s DUATS former users who transitioned away to the new DUATS II contracts would be required to transition back and this would cause an erosion of “user confidence” and “disillusionment” in DUATS and DTC’s service. *Id.*

The Program Office asserts that any economic harm that may result from the loss of revenues from the DUATS II contract does 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 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

³ DTC urges the ODRA to consider as persuasive authority decisions of United States Court of Federal Claims for the proposition that the loss of a contract may constitute irreparable harm. *Reply* at 3. 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).

performance period of one base year with four one-year option years that can be exercised in 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 will be available to address any of the protest grounds which 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 Program Office overstates the harms it would suffer as the result of a suspension and the balance of relative hardships favors a suspension. *Reply* at 5-6. 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 3-5; *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, 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, given the alleged technical unacceptability of Lockheed's proposal and great risks attendant to its performance of the contract. *Reply* at 6-7. These arguments would require the ODRA to accept DTC's allegations as true.

As the ODRA previously has stated, the ultimate issue of whether the challenged award decision complies with the AMS will be determined through the prompt adjudication of the merits 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 a substantial case, it has not demonstrated that it will suffer irreparable injury absent a suspension, or that the other three 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.

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

July 9, 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. *Protest of Systems Atlanta, Inc.*, 10-ODRA-00530 (Decision on Suspension, dated July 12, 2010).