



necessary showing for the imposition of the requested suspension. Thereafter, on July 28, 2004, in response to a request for clarification from the ODRA Director, the Product Team committed to refrain from making any performance award decision for a period of 90 calendar days from the date of the filing of the Contest, *i.e.*, until October 17, 2004.

The Contestor was permitted to file a Reply (“Reply”) to the Product Team’s Opposition to the suspension Request. In that Reply, counsel for the Contestor asserted that the Product Team’s voluntary stay of an award decision was insufficient to protect his client. The Contestor’s Reply further discussed the justification for a suspension in the context of the ODRA’s standards. Counsel claimed that, in the absence of a suspension, the Product Team would not have the time or the inclination to take corrective action in the event that the Contest is successful. *See* Contestor Reply at 2, 3. Essentially the Contestor’s reply argues that in the absence of a stay no effective relief would be available to his client. Finally, the Reply points out that in the absence of a stay, the Agency potentially would incur additional costs to implement any corrective action.

Following the submission of the Reply, both the Product Team and the Contestor filed additional written briefs. Neither of the submissions had been authorized by the ODRA or contemplated by the ODRA Procedural Rules. However, the ODRA accepted both submissions in the interest of a full briefing of this issue, in order to ensure that both the Product Team and the Contestor had a full opportunity provide their views. None of the intervenors chose to respond to the suspension Request.

## DISCUSSION

Under the FAA Acquisition Management System, there is a strong presumption that acquisition activities will continue during the pendency of protests or contests. Through a series of decisions, the ODRA has established a four-part test, based on that utilized by the United States Court of Appeals for the District of Columbia Circuit, when reviewing suspension requests. The ODRA will determine whether there are compelling reasons in support of a suspension:

on a case-by-case basis by looking at a combination of factors including:  
whether the protester made out a substantial case; (2) whether a stay or lack of a 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.

*See Protest of Crown Communications*, 98-ODRA-00098, October 9, 1998; *See also Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.* 559 F.2d. 841, (DC Cir. 1977); *Protest of J.A. Jones Management Services*, 99-ODRA-00104, September 29, 1999.

With respect to the first element of the analysis, the ODRA concludes that the Contestor has alleged a substantial case on the merits, *i.e.*, one that provides a fair ground for adjudication. The Contestor specifically has challenged several provisions of the Solicitation and has raised serious questions with respect to their effect on the Competition. However, as noted above, this

element of the analysis is de-emphasized in favor of a “balancing of equities as revealed through an examination of the other three factors.” *Washington Metropolitan Area Transit Commission, supra* at 843. In this case, after examining the remaining three factors, the ODRA concludes that the Contestor has not demonstrated that irreparable harm will result if the stay is not imposed at this stage of the Competition. Moreover, a stay would delay the Competition process, while not providing any additional protection to the Contestor. Finally, the public interest favors continuation of the Competition and a prompt adjudication of this Contest to a final decision to be issued prior to any final performance decision by the Product Team.

With respect to the lack of irreparable injury, it is significant that this issue arises in the context of a pre-decisional Contest. No contract award decision has been made, and a stay is not needed in order to prevent the transitioning of work or disruption of the work force. The Product Team in this case has committed that no decision will be made prior to October 17, 2004. Thus, for purposes of a suspension, this Contest must be viewed differently than a post-decisional contest in which a product team contemplates implementing a performance decision during the pendency of the contest.

The chief argument made by the Contestor in support of the Request is that the affected FAA employees will be prejudiced if the bid process and the evaluation process are allowed to commence during the pendency of the Contest. The Contestor attempts to argue that in the absence of a stay the Team will have made its decision prior to the Contest being decided and that the Product Team would not likely have either the time or the inclination to re-evaluate its decision in the event the Contest is successful. *See* Contestor Reply at 2, 3. The Contestor further suggests that the Product Team may choose not to follow an ODRA recommendation of corrective action. *See* Reply at 3. In this regard, the Contestor fails to recognize that the ODRA process does not culminate merely in a recommendation from the ODRA for corrective action, but rather in a final order from the FAA Administrator. If the Contest is sustained, the Administrator’s Order for corrective action would be mandatory on the Product Team. There is no basis in the record to support a conclusion that the Product Team would ignore such an Administrator’s order or fail to act in good faith to attempt to implement it. By proceeding with the Competition during this Contest, the Product Team bears the risk and the responsibility for any delay and added cost that may result should the Contest be sustained and the Product Team required to reconfigure the Solicitation and re-evaluate bid submissions.

## CONCLUSION

The Contestor has failed to demonstrate that a remedy would not be available to it in the event that its Contest is successful. Given that: (1) the Contestor has not made the requisite showing of irreparable harm in this case; (2) unnecessary delay inevitably would result if a complete suspension were to be imposed at this time; and (3) the public interest favors both prompt completion of the Competition and prompt adjudication of this pre-decisional Contest, the ODRA will not recommend that the Administrator stay the bid process or the evaluation process at present. However, as previously noted, the ODRA retains the authority to recommend that the Administrator stay the issuance of a final performance decision during the pendency of this

Contest.

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