

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

Protest of)
)
Mechanical Retrofit Solutions, Inc.) Docket No. 07-ODRA-00402
)
Solicitation No. DTFASO-07-R-00012)

DECISION ON REQUEST FOR SUSPENSION OF ACTIVITIES

I. INTRODUCTION

This matter arises in connection with a protest (“Protest”) filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on February 12, 2007 by Mechanical Retrofit Solutions Incorporated (“MRSI” or “the Protester”). In its Protest, MRSI challenges the decision by the FAA Southern Region (“Region”) to select Comfort Engineers Inc. (“CEI”) instead of the Protester for the award of a contract to replace three cooling towers at the FAA’s TRACON A80 facility located in Peachtree, Georgia (“hereinafter the TRACON Project”). *Protest* at 2. In addition to challenging the evaluation and selection decision, MRSI’s Protest also requests that the contract award “be immediately suspended” for the duration of its Protest to avoid “irreparable harm to” MRSI. *See Protest* at 1. As explained below, the ODRA denies the suspension request.

II. BACKGROUND

On January 11, 2007, the Southern Region issued an e-mail “request for pricing” to three contractors, and provided each with “preliminary documents” on the TRACON Project that “referenced certain, or all of the FAA contract clauses,” *see Protest* at 3, and including a

written “scope of work.” *Id.* at 2. During a January 15, 2007 teleconference between the parties, the Region advised the Protester “that the project was going to be awarded based on lowest price and that a bond was to be provided” after award. *See Protest* at 3.

After the January 19, 2007 initial closing date, the Region immediately eliminated one of the three proposals from further consideration. *Id.* On January 22, 2007, the Region issued Solicitation No. DTFASO-07-R-00012 (“Solicitation”) to the two remaining offerors—including the Protester. *Id.* Of relevance to this Protest, the Solicitation expressly advised that the award “decision would be based on technical merit and price,” and the accompanying cover sheet (“Cover Sheet”) specified that “the bid bond requirement was waived.” *Id.* However, the solicitation continued to require that “a Performance and Payment bond” be submitted fifteen days after award. *Id.*

One day prior to the January 25, 2007 deadline the Protester submitted its “final fixed price” along with a “clarification that a performance and bid bond would be provided” after award in the event MRSI was selected to perform the contract. *Id.* Following that date—and until January 30, 2007—the parties engaged in “[s]everal phone calls, e[-]mails and correspondence . . . concerning clarifications, completion of forms . . . and vendor requirements, etc.” *Id.* On February 6, 2007, the contracting officer advised MRSI that the contract had “been awarded to the highest bidder,” CEI, because the Protester’s “size, number of employees, experience and revenue dollar volume” were determined unacceptable. *Id.*

In its Protest, MRSI challenges the “award decision [a]s arbitrary, irrational, [and] . . . not in compliance with the bid documents.” *Id.* at 4. First, the Protester contends that the award “shows extreme favoritism towards” CEI because the Region is “paying an approximate 20% [price] premium” which significantly exceeds the budget” for the TRACON Project. *Id.* According to MRSI, the Region’s evaluation of its proposal was also unreasonable because the Solicitation did not require offerors to demonstrate or discuss “company size, experience, revenue volume or other company data.” *Id.* MRSI further complains that “[t]here was no rating system used” during the evaluation of its proposal, and maintains that its ability “to

perform is supported and guaranteed by” its ability to submit the required post-award payment and performance bonds. *Id.* at 4.

MRSI’s Protest also requested that all contract performance be suspended for the duration of its Protest; on February 21, 2007, MRSI submitted additional details in support of its suspension request (“Supplemental Suspension Request”) which the Region responded to on February 27, 2007 (“Agency Comments on the Suspension Request”).

III. DISCUSSION

A. Standard of Review

Under the Acquisition Management System (“AMS”) there is a strong presumption that procurement activities and contract performance will continue during the pendency of a bid protest. *See Protest of Knowledge Connections, Inc.*, 06-TSA-024, *Decision on Request for Suspension Activities* dated April 21, 2006 (and cases cited therein). Consistent with the AMS, the ODRA Procedural Rules similarly provide that procurement activities, and where applicable, contractor performance, shall generally continue during the pendency of a protest. *See* 14 C.F.R. § 13.17(g). However, the ODRA also may impose a temporary suspension of contract performance, and recommend that the FAA administrator issue a permanent suspension, where there is a compelling reason to do so. *Id.*

To that end, the Protester bears the burden of overcoming the presumption against the issuance of a stay. *See Protest of All Weather, Inc.*, 04-ODRA-00294, *Decision on Protester’s Request for Stay of Contract Performance* dated February 4, 2004. To determine whether there are sufficient compelling reasons alleged to warrant imposing a contract suspension, the ODRA applies a four part test that considers: (1) whether the protester has made a substantial case, *i.e.*, one that provides a fair ground for adjudication and deliberative investigation; (2) whether the issuance of a contract suspension—or the absence of a suspension—is likely to cause irreparable injury; (3) the relative hardships on the parties; and

(4) the public interest.¹ Greater emphasis is accorded to the second, third, and fourth prongs of this test. *See Protest of All Weather, Inc., supra; Protest of Knowledge Connection, Inc., supra.*

B. MRSI Has Alleged a Substantial Case

To prevail on the substantial case factor, the Protester must simply allege facts that on their face constitute “a fair ground for litigation” and require “a more deliberative investigation.” *See Protest of Informatica of America, Inc., 99-ODRA-00144, Decision on Protester’s Request for Stay of Contract Performance* dated October 8, 1999 at 5. Here, both MRSI’s Protest and Supplemental Suspension Request set forth numerous detailed arguments in support its chief allegation that the contract award to CEI was: “arbitrary [and] not in compliance with the bid documents,” *see Protest* at 3; had “no rational value,” *Supplemental Suspension Request* at 4; exhibited “extreme favoritism” by the Region towards CEI, *Protest* at 3; and “was not in accordance with the solicitation documents.” *Supplemental Suspension Request* at 5. The ODRA concludes that the Protest filings have sufficiently alleged the “substantial case” necessary to warrant further consideration of its suspension request. *See Northrop Grumman Systems Corp., 06-ODRA-00384, Decision on Protester’s Request for Suspension* dated September 14, 2006 at 5.

C. MRSI Has Not Satisfied the Remaining Suspension Test Factors

It is well established that the “substantial case” factor discussed above is de-emphasized in favor of the suspension test’s three remaining factors, namely, irreparable injury, relative harm, and the public interest. *See Protest of Knowledge Connections, Inc., 06-TSA-024, Decision on Request for Suspension of Activities* dated April 21, 2006 at 7.

The gravamen of MRSI’s argument is that without a suspension, it will suffer irreparable injury because the “costs and expenses” it incurred “to satisfy the specific bid requirements

¹ This test was first established by the United States Court of Appeals for the District of Columbia Circuit Court. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 2.d 841, 844 (D.C. Cir. 1997).*

for this project . . . cannot be recouped.” *See Supplemental* at 3. In this regard, MRSI’s argument could be made by any disappointed bidder. *See Protest of All Weather, supra* at 5-6. Were the ODRA to accept such an argument as satisfying the irreparable injury requirement, it would be forced to suspend virtually all protested awards. Such an approach would effectively do away with the assumption that contract activities would continue during bid protests. *Id.* Moreover, it is well established that economic loss by the Protestor does not, in and of itself, support a finding of irreparable injury. *See Protest of Crown Consulting, Inc., 06-ODRA-00372, Decision on Protestor’s Request for Suspension dated May 11, 2006* at 6.

MRSI also maintains that absent a “suspension of activities,” the requested “remedy” of a contract award will “not be available” to MRSI because the work will proceed and likely be completed before the ODRA decides the merits of the Protest. *Id.* at 5. MRSI’s argument is unpersuasive in that it is speculative and otherwise fails to recognize that the ODRA has broad discretion to recommend any remedy consistent with 14 C.F.R. § 17.21, including recommending *any or all* remedial actions enumerated in the Protest. *See Protest of Maximus, Inc., 04-TSA-009, Decision on Protester’s Request for Stay of Contract Performance dated September 13, 2004* at 7. Thus, the possibility of project completion during the pendency of a protest does not, standing alone, constitute a sufficient rationale for imposing a contract suspension. The Region proceeds with contract performance at its own risk and ultimately is responsible for any additional cost or delay that may result to the project should this Protest be sustained. *See Protest of Northrop Grumman, supra* at 7.

The Region reports that “[c]oncomitant harm to the flying public flows from . . . the unacceptable risk of equipment failure that would result from failure of the existing cooling towers.” *Agency Comments* at 2. MRSI’s submission similarly identifies the risk resulting from non-performance of the contract by emphasizing that the current construction schedule and May 15, 2007 completion date are “based strictly on warm weather.” *See Protest* at 5. In sum, based on statements by both parties, it appears that any delay in the construction of the TRACON towers threatens major disruption to the TRACON project and mission.

While MRSI suggests that a temporary tower could be leased during the suspension, the ODRA concludes that the risks to the TRACON construction and mission do not warrant this additional expense. Similarly, because the cooling towers are clearly integral to TRACON safety and mission concerns, the ODRA also concludes that the public interest would not be served by the contract suspension MRSI seeks here.

IV. CONCLUSION

For the reasons set forth above, the ODRA concludes that the Protestor has made out a substantial case, but has failed to demonstrate that irreparable injury would occur in the absence of a suspension. The ODRA further concludes that the relative harm would be greater to the Region should a suspension be issued, than would result to the Protestor in the absence of a suspension. Finally, the ODRA concludes that the public interest strongly favors the uninterrupted operation of the TRACON involved and that the issuance of the requested suspension would potentially have a negative impact on the facility's function. The ODRA therefore denies the Protester's request for contract suspension and will not recommend that the administrator issue a suspension order.

Behn M. Kelly, Esq.
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

APPROVED:

-S-

Anthony N. Palladino
Director
FAA Office of Dispute Resolution for Acquisition