

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

<u>Protest of</u>	)	
	)	
PHT Aerospace LLC	)	Docket No. 19-ODRA-00861
	)	
<u>Under Solicitation 693KA7-18-R-00010</u>	)	

**DECISION ON APPLICATION FOR ACCESS TO
MATERIALS UNDER THE PROTECTIVE ORDER**

On August 13, 2019, Nicholas Antaki, Esq., of the Ajax Law Group LLC, representing the protester, PHT Aerospace LLC (“PHT”), filed an application requesting access to materials under a protective order issued in this matter. In his application, he explained that his immediate family members include PHT’s Chief Executive Officer and one of its engineers. *Application* at 2. Counsel for the Product Team objected to his admission based on these family ties. *Product Team Letter*, dated August 14, 2019. In response, PHT’s Applicant explained the relationship and sought a ruling granting access to material covered by the protective order. *Antaki Response Letter* (“*Response*”), dated August 20, 2019. As directed by the Office of Dispute Resolution for Acquisition (“ODRA”), PHT and the Product Team filed briefs with supporting documentation. The intervenor, Merlin Embedded, has been silent on the matter. For the reasons discussed below, the application for access is denied.

I. Discussion

The ODRA issued a standard protective order on July 30, 2019, “in order to protect proprietary and competitive-sensitive information so that no party obtaining access to protected material ... will gain a competitive advantage thereby.” *Protective Order* at 1. Protective orders of this nature are necessary to preserve

both the integrity of the acquisition process and the bidders' confidence that their sensitive information will not be disclosed to their business competitors. Presiding hearing officials have wide discretion regarding orders permitting access to protected information. *E.I. Du Pont De Nemours Powder Co. v. Masland*, 244 U.S. 100, 103 (1917); *Centurion Indus., Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323, 326, (10th Cir. 1981); *see also Sioux Pham, Inc. v. Eagle Laboratories, Inc.*, 865 N.W.2d 528, 536 (Iowa 2015). In the context of an ODRA protective order, the standard for admission is stated in a regulation:

(c) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for access to the material under the order by submitting an application to the ODRA, with copies furnished simultaneously to all parties. The application shall establish that the applicant is [1] not involved in competitive decision-making for any firm that could gain a competitive advantage from access to the protected information and [2] that the applicant will diligently protect any protected information received from inadvertent disclosure. Objections to an applicant's admission shall be raised within two (2) days of the application, although the ODRA may consider objections raised after that time for good cause.

14 C.F.R. § 17.9(c) (2019) (boldfaced enumeration added). The added enumeration highlights the two elements expected to be considered when an application is filed.

A. Involvement in the Competitive Decision-making Process

Questions regarding admission to a protective order should be answered after considering "the particular counsel's relationship and activities" vis-a-vis his client. *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984). Objections to applications filed with the ODRA often concern the applicant's status as in-house counsel and whether the applicant is involved in the competitive decisionmaking process. *See, e.g., Protest of Camber Corporation*, 98-ODRA-00079 and -00080 (consolidated). Where an in-house counsel was not involved in competitive decision-making, the seminal *U.S. Steel Corp.* decision explains: "Like retained counsel,

however, in-house counsel are officers of the court, are bound by the same Code of Professional Responsibility, and are subject to the same sanctions. In-house counsel provide the same services and are subject to the same types of pressures as retained counsel.” *U.S. Steel Corp.*, 730 F.2d at 1468. This reasoning, however, has only limited application in the present matter.

The present record includes the standard certified application used in ODRA matters, and two affidavits from the Applicant’s relatives. The application represents that the Applicant is a member of the Colorado and Texas bars. *Application* at 1, ¶ 3. The application contains without qualification the express, certified representation from the Applicant that he is not involved in competitive decision-making as that term is used in *U.S. Steel Corp.* *Application* at 1, ¶ 4. The Applicant’s representation is supported by the two affidavits, both of which state that the Applicant serves solely as “independent outside counsel,” has no “equity or monetary interest in PHT,” and has never been “an officer, manager, or employee of PHT.” *Affidavit of Alan Antaki, President, PHT Aerospace LLC*, at 1; *Patrick Antaki, Engineer, PHT Aerospace LLC*, at 1. As suggested by the affiant’s names, they are the Applicant’s relatives; Alan Antaki is the Applicant’s uncle, and Patrick Antaki is his father. *PHT Brief* at 1. The record does not include any affidavits from individuals who are not in the Antaki family.

The ODRA does not doubt that the Applicant is a member of good standing in the Colorado and Texas Bars, and therefore, an officer of the court. The difficulty lies in whether a personal interest renders him unusually susceptible to pressure to violate the protective order. In *U.S. Steel*, a personal interest in the form of decision-making responsibilities was not present, and the court treated in-house counsel no differently than retained counsel because the relationship with a client is the same. Here, however, the Applicant has close familial relationships with competitive decision-makers that render him significantly different from other officers of the court. This difference is apparent through the engagement letter that

PHT provided with its brief, which establishes an attorney-client relationship but also includes a favorable retainer and hourly rates that do not support the conclusion that their bargain is entirely at arms-length. *PHT Brief*, attachment A. Indeed, the Applicant acknowledges that his “engagement for this protest was one of opportunity due to his familial relationships.” *PHT Brief* at 5.¹ His relationship to his client, therefore, is not the same as any other officer of the court.

No party has identified precedent involving an applicant who has so close a relationship to company decision-makers. In analogous contexts, the law prohibits or restricts people from participating in activities that require procedural integrity when such close familial relationships are present. *See, e.g.*, 5 C.F.R. § 2635.501 and 2635.502 (executive branch employees with parents or close relatives involved); *Code of Conduct for United States Judges*, Canon 3(C)(1)(d) (judges with relatives within the third degree of relationship who are parties or officers of corporate parties). The law in these contexts makes no favorable assumption that the particular employee, officer, or judge will abide by ethical obligations when close familial ties are present. Instead, it errs on the side of protecting the process or information from undue risk. In the context of commercially sensitive information in a bid protest, this approach makes sense because release of sensitive information to a competitor is difficult to discover and remedy.

Ultimately, PHT has the burden to demonstrate that its applicant has no involvement in competitive decision-making. Given the closeness of the familial relationships, the familial motivation for the engagement, and the favorable engagement terms, the ODRA cannot conclude that PHT has met this burden.

¹ PHT’s brief is not paginated. The ODRA, therefore, has supplied the page number for this citation.

B. The Risk of Inadvertent Disclosure is not Small

Inadvertent disclosures, by definition, are accidental. Accidents can occur in many ways that are hard to foresee, but measures that can be expected to forestall accidents include appropriate support systems, experienced personnel, and internal oversight. In cases involving legitimate concerns over an attorney's independence from the decision-makers, the forum can fashion special procedures to ensure that measures are taken in the law firm to eliminate the chance of accidental disclosure. *See, e.g., Mine Safety Appliances Co.*, B-242379.3, B-242379.2, B-242379, 91-2 CPD P 506 (Nov. 27, 1991).

In the present matter, the ODRA is not convinced that the sensitive information can be diligently protected from mistakes or that sufficient procedures can be established. First, there is the fundamental task of simply identifying proprietary, confidential, and source-selection material. Here, the Applicant acknowledges his inexperience, explaining that he has never drafted a bid, and that the "first solicitation and bid" he "ever read ... was in preparation for and a result of his engagement ... for this Protest." *PHT Brief* at 2. Second, he has nobody with whom he can consult, as he is the only attorney in his firm. *Id.* Third, and finally, no other counsel for PHT has submitted an application, meaning that no other officer of the court is available for special oversight procedures that ensure compliance with the protective order. In these circumstances, the ODRA finds that the risk of inadvertent disclosure is significant.

The Applicant, therefore, has not shown that he can diligently protect sensitive information from inadvertent disclosure.

C. The Balance of Potential Injuries favors Denial

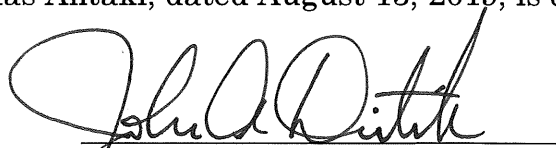
In considering the application, the ODRA must balance the need to protect sensitive commercial with the potential harm to the applicant. *U.S. Steel Corp.*, F.2d at 1468. On the one hand, the protest itself raises issues that will require

information regarding Merlin's internal corporate structure, and the FAA's evaluation of Merlin's proposal. *See Protest, passim*. This type of information, broadly speaking, is the very kind of information must be protected in bid protests. On the other hand, denying Mr. Antaki's access will not prejudice PHT. The record does not reveal that Mr. Antaki has critical expertise that makes him uniquely qualified to represent PHT. *Response* at 1. Further, the matter is in the earliest stages, and the adjudication is suspended because the parties are engaged in an alternative dispute resolution process. PHT, therefore, has time to secure new counsel if desired, and if requested, the ODRA will liberally grant reasonable time to secure new counsel. All considered, the balance of the potential injuries favors denial of the application.

The ODRA stresses that this denial of access is not based on any action, inaction, or malfeasance. To the contrary, the Applicant's candor to the forum is noted and appreciated. This denial likely should not have an adverse effect on his applications on behalf of other clients before the ODRA or other forums. Further, nothing in this decision disqualifies the Applicant or his firm from representing PHT.

II. Conclusion

The "Application for Access to Materials under Protective Order for Outside Counsel," filed by attorney Nicholas Antaki, dated August 13, 2019, is denied.²



John A. Dietrich
Director and Chief Administrative Judge
Office of Dispute Resolution for Acquisition
August 29, 2019

² This is an interlocutory decision. It will become final and appealable upon issuance of the final Agency Decision in this case.