

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

Protest of	)	
	)	
Telephonics Corporation, Inc.	)	Docket No. 20-ODRA-00873
	)	
<u>Under Solicitation 693KA7-18-R-00010</u>	)	

**DECISION ON MOTION TO AMEND PROTECTIVE ORDER**

On May 29, 2020, the Federal Aviation Administration (“FAA”) Product Team and Telephonics Corporation, Inc. (“Telephonics”) filed a joint motion to amend the Protective Order in this matter. The motion seeks to provide limited access to protected material for 14 officers and employees of Telephonics. The extraordinary list of individuals includes the President, various Vice Presidents, the Chief Financial Officer, the Chief Technology Officer, and no less than six company engineers. *Motion* at 3. The purpose of which is to assist “the parties’ efforts to resolve this matter through Alternative Dispute Resolution” (“ADR”)<sup>1</sup> *Motion* at 1.

Counsel for the intervener, Leidos, Inc. (“Leidos”), has no objection to the motion. *Leidos Response to Motion to Amend Protective Order* at 1. The Office of Dispute Resolution for Acquisition (“ODRA”), however, has “an independent obligation to protect proprietary, confidential, and competition sensitive information.” *Protest of MOSA Technology Solutions, LLC (“MOSA Tech.”)*, 18-ODRA-00850 (Decision on Admission to the Protective Order), *see also* 18 U.S.C §

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<sup>1</sup> While the Acquisition Management System encourages voluntary ADR to the “maximum extent practicable,” *AMS Policy* 3.9.2, this does not supersede the ODRA’s duty to protect confidential information. *See Protest of MOSA Technology Solutions, LLC*, 18-ODRA-00850 (Decision on Admission to the Protective Order).

1905; 14 C.F.R. § 17.9 (2018). For the reasons discussed below, the motion is DENIED.

## I. Discussion

On April 20, 2020, the ODRA issued a protective order “in order to protect proprietary and competition-sensitive information so that no party obtaining access to protected material . . . will gain a competitive advantage thereby.” *Protective Order*, dated April 20, 2020. The Protective Order limits access to protected materials to individuals “who are *not involved in competitive decision-making* for . . . any firm that might gain a competitive advantage from access to the protected material disclosed.” *Protective Order* at ¶ 7 (emphasis added).

The ODRA Procedural Regulation establishes the standard for admission to a protective order. The Regulation sets forth the requirement that counsel or consultants retained by counsel must file an application for admission with the ODRA. 14 C.F.R. § 17.9(c) (2020). The application must “establish that the applicant is not involved in competitive decision-making.” *Id.*; *see also Protective Order* at ¶ 4. The Protective Order also explicitly prohibits the admission of a consultant “if he or she is employed by a party to the action, or is working under contract to such a party.” *Protective Order* at ¶ 5. In this case, the very individuals barred from viewing sensitive information, i.e. officers and employees of the company, would be admitted to the Protective Order by amending its text. *Motion* at 3-5 (proposed ¶ 16 to the Protective Order). Thus, for purposes of this decision, the ODRA treats the motion as an application for admission to the Protective Order.

While, the ODRA has “wide discretion regarding orders permitting access to protected information,” the parties have not demonstrated a need for access in light of real concerns that Telephonics may gain a competitive advantage. *Protest of PHT Aerospace LLC*, 19-ODRA-00861 (Decision on Admission to the Protective

Order, August 29, 2019). Indeed, counsel have not identified any precedent involving the admission of competitive decision-makers to a protective order.

**A. Amending the Protective Order Would Result in a Competitive Advantage to Telephonics.**

In the motion, counsel state that “[t]he Product Team has agreed to provide, the Operational Capability Demonstration” (“OCD”) data to Telephonics. *Motion* at 1. The OCD data “does not comprise or imply data regarding any other offeror or proposed solution, nor does it comprise source selection sensitive information for any other vendor besides Telephonics.” *Id.* at 2. In addition, the motion states that, “much of the data was previously provided to Telephonics.” *Id.* Indeed, it emphasizes that the OCD data excludes “Live World Data” classified as sensitive subject to FAA Order 1600.75. *Id.* at 1, fn. 1.

The ODRA finds these statements misleading. Counsel would have the ODRA believe that only information proprietary to Telephonics is at issue. Contrary to the above representations, however, the text of the proposed amendment includes providing Telephonics with the “FAA’s OCD Analysis Tool Code.” *Id.* at 3. Digging deeper the proposed amendment shows concern by the FAA that Telephonics will have unequal access to information in obtaining the Tool Code. It requires, in relevant part:

Each Named Individual shall also include in his/her statement a certified assurance that he/she shall never attempt to recreate all or any portion of the FAA’s OCD Analysis Tool Code and *will never use it as part of any future procurement, whether such procurement is sought by Telephonics or any other company.*

*Id.* at 4 (emphasis added).

The Product Team clearly considers this information protected. *Id.* at 5. Counsel for the Product Team even confirmed to the ODRA that the OCD Analysis Tool Code constitutes source selection sensitive information. *Conference*

*Memorandum*, dated June 16, 2020. Thus, the ODRA finds that the amendment would result in the disclosure of source selection sensitive information to Telephonics that may lead to a competitive advantage in this and future procurements.<sup>2</sup>

## **B. The Balance of Risks Favors Denying the Motion.**

When considering an application for admission to a protective order, the ODRA balances the need to protect sensitive, confidential, and proprietary information with the potential of prejudice to the applicant. *Protest of PHT Aerospace, supra*. As the proponents, the Product Team and Telephonics have the burden of persuasion. 5 U.S.C.S. § 556(d); *see also Protest of Adsytech, Inc.*, 09-ODRA-00508 ("ODRA proceedings . . . place the burden of proof on the proponent of an order[.]"). The evidence in support of the motion, however, is woefully inadequate to allow the ODRA to make a determination in the moving parties' favor.

### **1. There is no Administrative Record before the ODRA.**

As a preliminary matter, the ODRA cannot conduct the balancing analysis in a vacuum of information. The matter is currently subject to a voluntary mediation process, and an agency response with relevant documents has not been filed with the ODRA. The motion and its attachment do not make up for this deficiency. The parties merely provide a spreadsheet with file names, general descriptions, and the software used to open them. *Motion, Appendix A*. It does not, however, substantively discuss the OCD conducted by the FAA and the data requested by Telephonics. There is also no description of Telephonics's proposed "SkySearch-2020 system" or the FAA's OCD Analysis Tool Code. Accordingly, the parties have

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<sup>2</sup> Should the ODRA ultimately sustain the protest and the Administrator direct a reevaluation in this acquisition, Telephonics will have gained a competitive advantage in the OCD.

not provided the ODRA with a basis to understand the nature of the protected material and the need for access by Telephonics personnel.

**2. There is no Means of Enforcing the Terms of the Protective Order.**

The ODRA is not convinced that sufficient procedures can be established to safeguard the FAA's OCD Analysis Tool Code. 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." *PHT Aerospace LLC*, *supra* citing *Mine Safety Appliances Co.*, B-242379.3, B-242379.2, B-242379, 91-2 CPD P 506 (Nov. 27, 1991). The same cannot be said with a private corporation.

In the instant case, the motion prescribes no special procedures to safeguard protected information. The 14 officers and employees of Telephonics would only self-certify destruction of the material, and promise not to use that inside knowledge in a future procurement. *Motion* at 4. While the ODRA has no basis to doubt the present intent of the proposed applicants, it also has no basis to ignore their roles as employees and decision-makers for an offeror in this competitive procurement. ODRA precedent establishes that these circumstances require it to "err[ ] on the side of protecting the process from undue risk." *PHT Aerospace, LLC*, *supra*.

Telephonics is represented by counsel admitted to the Protective Order. *Protester Counsel Admission to Protective Order*, dated April 22, 2020. In the motion, counsel make no argument how Telephonics will suffer prejudice without its officers and employees accessing protected information. The ODRA thus cannot conclude that Telephonics will suffer injury by relying on its own counsel to review

protected material. Accordingly, the ODRA finds that the balance of risks from disclosure greatly outweighs an illusory prejudice to Telephonics.

## **II. Conclusion**

For the reasons discussed above, the motion to amend the Protective Order is denied.



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C. Scott Maravilla  
Dispute Resolution Officer and  
Administrative Judge  
Office of Dispute Resolution for Acquisition  
June 26, 2020