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

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| Contract Dispute of | ) | |
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| Globe Aviation Services Corporation | ) | Docket No. 04-TSA-007 |
| | ) | |
| Pursuant to Solicitation DTFA01-02-C-04021 | ) | |

**DECISION ON MOTION TO DENY ACCESS TO PROTECTED MATERIALS**

## I. INTRODUCTION

This matter currently is before the Office of Dispute Resolution for Acquisition ("ODRA") on the Motion of the Transportation Security Administration ("TSA"). The TSA Motion seeks to deny Globe Aviation Services Corporation's ("Globe") outside counsel access to materials covered by the Protective Order issued in this case. TSA alleges that Globe's outside counsel is involved in the competitive decisionmaking process and that access of counsel to protected information "presents a risk of inadvertent disclosure of proprietary and pre-decisional information to its client while providing their legal support." *See* TSA Reply to Globe Opposition to TSA Motion at 3. The TSA Motion further requests that, in addition to excluding two attorneys who were directly involved in advising Globe, the ODRA deny access to "any attorney at Arnold & Porter…." *See* Motion at 2. For the reasons discussed herein, the ODRA concludes that TSA has failed to satisfy its burden of establishing that: (1) the attorneys in question were involved in competitive decisionmaking on behalf of Globe such that they should be excluded from access to protected information; or (2) admission to the Protective Order of the named attorneys involved or of others within their law firm would create a significant risk of inadvertent disclosure of proprietary or competition-sensitive information. [1]

[1] The ODRA notes that, in its Reply to the Globe Opposition to its Motion, counsel for TSA clarifies that the Motion "involves the risk of inadvertent disclosure of proprietary or pre-decisional information, and not

## II. DISCUSSION

This dispute centers around Globe's allegations that the Government breached the terms of a letter contract ("Letter Contract") by failing to: equitably adjust the amount due Globe under the Letter Contract; pay incentive bonuses; provide adequate notice of transitioning of the work; and definitize the Letter Contract. Globe seeks to recover $28,270,000 and further damages in an amount to be determined. *See* Globe Contract Dispute Letter of March 29, 2004. ("Globe Dispute Letter") at pages 1-41.

The Protective Order in question was issued on September 29, 2004. Rather than utilizing the standard ODRA protective order, counsel for the parties choose to negotiate a modified version, which was jointly presented by counsel to the ODRA and executed by the ODRA Director. Following entry of the Protective Order, counsel for Globe, sought admission to the Protective Order through applications filed on October 1, 2004. The three attorney applicants are with the law firm of Arnold & Porter, LLP and had been retained to represent Globe in this contract dispute. The applications of each attorney include, among other things the following certifications:

> My professional relationship with the party I represent in this contract dispute and its personnel is strictly one of legal counsel. I am not involved in competitive decision making as discussed in U.S. Steel Corp v. United States, 730 F.2d 1465 (Fed. Cir. 1984), for or on behalf of the party I represent or any entity that is an interested party to this contract dispute. I do not provide advice or participate in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means that I do not, for example, provide advice concerning or participate in decisions about marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected material could provide a competitive advantage.

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Messers. Harker and Handwerker's probity and willingness to abide by the terms of the Protective Order." Reply at 2.

*See* Applications for Access to Materials of Drew Harker, Jeffery Handwerker and Joseph Meadows. The applications of Messers. Harker and Handwerker also included the following pertinent statement:

> I understand that, during negotiations of this protective order, the Government has taken the position that because I assisted Globe in the negotiation and the administration of the letter contract at issue in this action (including by signing certain letters on behalf of Globe), I am a competitive decisionmaker as contemplated under paragraph 4 of this certification. My activities on behalf of Globe have always been strictly of a limited legal nature, and consisted of participating in the negotiation of legal terms and conditions and providing legal advice as issues arose and were brought to my attention during contract formation and performance. I have never advised Globe in connection with or participated in any decisions about marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers or proposal with respect to which the use of protected material could provide a competitive advantage. Thus, I am not involved in competitive decision making as discussed in U.S. Steel Corp. v United States, 730 F.2d 1465 (Fed. Cir. 1984). See, e.g., AirTrak Travel et al., 203 CPD para 117.

*See* Applications Harker and Handwerker at 3.

The applications of all three attorneys further certify that: no other attorneys at the firm are involved in competitive decisionmaking; no members of the attorneys' families have an interest in the matters in dispute or are involved with firms that could gain a competitive advantage; and none of the attorneys has been denied admission to protective orders by any administrative or judicial forum. Finally, all the applications contain the following language:

> I have read the protective order issued by the FAA Office of Dispute Resolution in this dispute, and I will comply in all respects with that protective order and will abide by its

> terms and conditions in handling any protected material filed or produced in connection with the dispute.
>
> I acknowledge that any violation of the terms of the protective order will make any certification made hereunder a fraudulent statement subject to 18 U.S.C. § 1001, and may result in the FAA Office of Dispute Resolution referring this Application to the appropriate United States Attorney for disposition, and the FAA Office of Dispute Resolution exercising other retaliatory measures, including but not limited to referral of the violation to appropriate bar associations or other disciplinary bodies, and restricting my practice before the FAA Office of Dispute Resolution. I further acknowledge that a party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

*See* Applications at 2.

The TSA Motion contends that the attorneys and their law firm should be denied access:

> because of their respective positions in the decision making process of the Globe [sic] and the fact that information [to] which they seek access will enable Globe government source sensitive information having a direct bearing on the definitizing of the Globe Contract. It will be impossible for Globe's attorneys to ignore the data and information should further negations [sic] on price and terms of the Contract be necessary.

TSA Motion at 2.

In its Reply in support of its Motion, TSA further details its position as follows:

> Here, Messrs. Harker and Handwerker worked with Globe's CEO on the negotiations of the letter contract and handled matters related to its contract administration and definitization efforts. Neither of them assert that they primarily advised on litigation matters regarding the

> Federal contract for screening services and, thus, it appears that they would support Globe in negotiations should ODRA rule upon the legal issue of definization covering the entire period of the letter contract and remand the matter to the parties to negotiate a definitized contract.

*See* TSA Reply at 1.

TSA claims that allowing Globe's attorneys access to protected information as part of the current dispute would give Globe "a competitive advantage not enjoyed by other screening companies when they negotiated their definitized contract." TSA Reply at 2.

> Specifically, Messrs. Harker and Handwerker should not have access to the Government's predecisional information regarding its analyses of Globe's definization proposal (i.e., Globe's Document Request Nos. 8, 11, 21, and 22) because release of this information to them would reveal the bases of the Government's negotiations positions before the parties have negotiated a definitized contract.

The TSA arguments fail to distinguish between two separate issues, namely, the issue of whether the attorneys involved should be admitted to the Protective Order and the issue of whether particular information sought by Globe in discovery should be produced. The second issue is the subject of a Motion to Compel that currently is before the ODRA. A Decision on the Motion to Compel, which has no bearing on the instant Motion, will be issued at an appropriate time.

Globe's Opposition to the TSA Motion ("Opposition") confirms that the attorneys involved "provided legal advice to Globe in connection with this procurement" and that they had been working directly with the CEO of Globe. *See* Globe Opposition at 2. The Opposition further confirms that the attorneys involved "advised Globe on legal issues as they arose during contract negotiations, contract administration and subsequent to the completion of performance." *See* Globe Opposition at 2.

The Globe Opposition states:

> As we have certified, neither Mr. Harker nor Mr. Handwerker has ever "advised Globe in connection with or participated in any decisions about marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers of proposals with respect to which the use of protected material could provide a competitive advantage."

Globe Opposition at 2. Globe's Opposition further points out that the case cited by TSA, *i.e*., *Colonial Storage Company; Paxton Van Lines, Inc.* 93-2 CPD¶234, is factually distinguishable, because the attorneys in the instant case did not engage in pre-contract award activities of the type engaged in by attorneys in *Colonial Storage*. Rather, their work was purely legal in nature and did not involve pricing, design, or other decisions relating to bid structuring. *Air Trak Travel, et al.* 2003 CPD¶117; *US Sprint Communications Company Limited Partnership,* 91-2 CPD¶201. The mere fact that the attorneys involved dealt primarily with the CEO of Globe does not, in and of itself, provide a basis for disqualifying them from admission to the Protective Order. The attorneys have outlined the extent of their legal representation of Globe in the past and have certified that they will comply with the requirements of the Protective Order. If prior legal representation of the type provided by Globe's attorneys is viewed as disqualifying, it would be difficult for any outside attorney with historical and continuing relationships with a client to gain admission to a protective order.

As the moving party, the TSA bears the burden of establishing that the attorneys it seeks to disqualify participate in competitive decisionmaking, or other related activities on behalf of Globe, such that they should not be given access to proprietary or competition sensitive information. The TSA's speculations regarding potential impact on possible future stages of this contract dispute, particularly when viewed in light of the certifications by the attorneys involved and the limitations inherent in the Protective Order, fail to satisfy this burden. The record is devoid of any material facts that would

cause the ODRA to conclude that exposure of these attorneys to protected material would create an unacceptable risk of inadvertent disclosures in the future. *See Protests of Camber Corporation and Information Systems & Networks Corporation*, 98-ODRA-00079,-0080 (Consolidated), Decision of July 7, 1998.

CONCLUSION

For the reasons set forth above, the ODRA finds that TSA has failed to meet its burden of establishing that the attorneys involved, or their law firm participate in activities in representing Globe such that their admission to the Protective Order would entail a risk of inadvertent disclosure of protected material in the future. The TSA Motion therefore is denied.[2]

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Anthony N. Palladino
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FAA Office of Dispute Resolution for Acquisition

October 21, 2004

[2] This is interlocutory decision it will be become final upon adoption of the Findings and Recommendations of the ODRA at the conclusion of this case.