

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

Protest of	)	
	)	
MAXIMUS, Inc.	)	Docket No. 04-TSA-009
	)	
Under RFP No. HSTS02-04-R-SCR009	)	

**DECISION ON PROTESTER’S REQUEST**  
**FOR STAY OF CONTRACT PERFORMANCE**

This matter arises in connection with a protest (“Protest”) filed with the Federal Aviation Administration Office of Dispute Resolution for Acquisition (“ODRA”) by MAXIMUS, Inc. (“MAXIMUS”) on August 26, 2004. The Protest involves the award of a contract (“Contract”) by the Transportation Security Administration (“TSA”) to BearingPoint, Inc. (“BearingPoint” or “Awardee”), arising out of TSA’s Request for Proposal No. HSTS02-04-R-SCR009 (hereinafter referred to as “RFP”, “Solicitation” or “SIR”).<sup>1</sup>

The services provided under the Contract support the TSA’s development of a system of control for individuals requiring unescorted physical and cyber access to secure areas of the national transportation system. This effort, known as the Transportation Worker Identification Credential (“TWIC”) Program, contemplates the use of an electronic personal card or similar device to provide positive identification of transportation workers. Implementation of the TWIC program is being conducted in four phases. The instant Protest concerns the award of Phase III (the Prototype Phase), which requires the awardee to demonstrate, validate, and evaluate the utility of the TWIC integrated solution and to detect and resolve weaknesses therein.

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<sup>1</sup> The RFP was competed among awardees of the General Services Administration (“GSA”) Smart Access Common ID Contract, Contract Number GS00T00ALD0208, which is a Government-Wide Acquisition Contract (“GWAC”) available to all Federal agencies. See TSA Opposition to Protester’s Request for Suspension at 2-3.

The MAXIMUS Protest includes, *inter alia*, a request for “suspension of the procurement, or delay of award to or of the commencement of performance by BearingPoint, pending the resolution of this protest.” *See* Protest at 17. Both the TSA, and BearingPoint as the awardee/intervenor in the Protest, have opposed the request for a stay. For the reasons discussed herein, the ODRA finds no compelling reasons to support a stay in this case. The ODRA therefore declines to stay, or recommend that the TSA stay, performance of the Contract pending the resolution of this Protest.

## **I. LEGAL AND FACTUAL BACKGROUND**

When Congress established the TSA through the 2001 Aviation & Transportation Security Act (“ATSA”), 49 U.S.C. §114, it expressly directed the TSA to utilize the FAA’s Acquisition Management System (“AMS”) for TSA acquisitions. In conformance with the ATSA, the TSA utilizes the FAA’s AMS for its acquisitions, as well as for acquisition-related dispute resolution. TSA solicitations, including the instant Solicitation, direct offerors and contractors to file protests at the FAA’s ODRA. *See Protest of GLOCK, Inc.*, 03-TSA-003, Decision on Protester’s Request for Stay of Contract Performance.

The MAXIMUS Protest alleges that the TSA’s award to BearingPoint was improper because: (1) the award resulted from an improper organizational conflict of interest (hereinafter “OCI”), since the awardee has supported the TSA TWIC Program Office from the inception of the TWIC project; (2) the awardee’s team may have improperly benefited from an OCI arising from the contributions of its key subcontractor; (3) the award will create a new improper OCI because the awardee’s TWIC program support staff cannot objectively manage the TWIC Phase III implementation team, and the conflict cannot be cured by a mitigation plan; (4) the awardee’s proposal lacked price realism, and thus the award would be inconsistent with the SIR’s evaluation criteria; (5) TSA’s technical evaluation was conducted on an unequal basis, favoring the awardee while disadvantaging MAXIMUS; and (6) alternatively, TSA’s unequal evaluation of

technical proposals may have been the product of an evaluation plan crafted to favor the awardee's solution. *See* Protest, pages 1, 2.

In its Protest, MAXIMUS requests as a remedy that its Protest be sustained and TSA be informed that the proposed award does not comply with the terms of the RFP. In addition, MAXIMUS requests that TSA be directed to exclude the awardee from the competition for the TWIC Phase III award and that TSA award the TWIC Phase III contract to MAXIMUS. *See* Protest at 17.

In support of its stay request, the Protest alleges that:

[T]his project has a very short timeframe (seven months) from inception to completion. Should ODRA not suspend or delay the procurement during the pendency of the protest, either ODRA **may** find itself unable to fashion effective relief, or TSA **may** find itself in a situation in which it has expended a large amount of money implementing a solution that must be scrapped – either of which would be highly undesirable.

Protest at 18. (emphasis added).

The Opposition filed by the TSA (“TSA Opposition”) alleges that the MAXIMUS stay request does not meet the requirements of Sections 17.15(d) and 17.17 of the ODRA Procedural Rules. More specifically, TSA alleges that MAXIMUS:

has not set specific compelling reasons for a suspension; it has not supplied all the facts in support of its position or identified persons with knowledge of the facts supporting each compelling reason; it has not identified all documents that support each compelling reason; nor has it clearly identified any adverse consequences to the Protester, the TSA, or any interested party, should the TSA not suspend or delay the procurement.

*See* TSA Opposition at 5. TSA further alleges that MAXIMUS “has not shown that there is a substantial likelihood that it will prevail on the merits of its protest; that it will suffer irreparable harm; that substantial harm to any party interested in the proceedings will not

result; and that it is in the public interest (or not adverse to public interest) to grant its request.” *Id.*<sup>2</sup>

TSA further states that the Agency, rather than MAXIMUS, will be harmed if the Contract is suspended; and that suspension would jeopardize the national security of the United States. TSA Opposition at 8. Included with TSA’s Opposition is a sworn Declaration of Iola W. Kull, Project Manager for the TWIC Program, explaining the importance and urgency of unimpeded deployment of the TWIC program for all transportation modes.

The Kull Declaration states that the TWIC Program implements the legislative mandates of the USA PATRIOT Act of 2001, Pub. L. 107-56, Section 1012 (requiring Federal background checks before States can issue licenses to transport hazardous materials by motor vehicle); Aviation and Transportation Security Act of 2001 (“ATSA”), Pub. L. 107-71, Sections 106 and 114(f)(12) (requiring the strengthening of access control points in secured areas and background checks for screening and security-related personnel in all modes of transportation); and Maritime Transportation Security Act of 2002 (“MTSA”), Pub. L. 107-295, Section 102 §70105 (requiring the issuance of biometric security cards and background checks for entering secure areas of a vessel or facility). *See* Kull Declaration at ¶5.

The Kull Declaration further indicates that rapid implementation of the TWIC Program will close a “threat window” created by “identity management gaps” which could allow unauthorized individuals to gain access to secure areas of the nation’s transportation system. *See* Kull Declaration at ¶3-4. Ms. Kull further states that:

By definition, secure areas of transportation facilities are those areas which, if targeted, could result in significant loss of life and/or result in massive disruption to the national transportation system. The TWIC program will increase security by ensuring that the identity of each TWIC holder has been verified; that a satisfactory background check has been

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<sup>2</sup>The awardee/intervenor, BearingPoint, filed its own Opposition to MAXIMUS’s stay request, essentially stating that MAXIMUS failed to demonstrate compelling reasons for a stay.

completed; and, that each credential issued is positively linked to the rightful holder through the use of biometric technology.

Kull Declaration at ¶4. The Kull Declaration also explains that national security would be affected if Phase III Prototype work is suspended, in part, because:

Successful completion of the Prototype test requires the voluntary participation of workers at over forty private transportation facilities ... [and] participation of as many as 200,000 transportation workers .... Only with considerable effort has TSA been able to gain the support of facility owners and transportation workers to participate in the test. These owners and workers are under no legal obligation to participate. In making their decisions to participate owners have made plans based on adherence to the Prototype schedule. In many cases these were economic business decisions that hinge on the viability of the current Prototype schedule. Should the execution of Prototype slip there is a high risk that participants important to the program will renege on their agreement to participate. This will fragment the carefully structured Prototype plan, which requires a range of facilities of various sizes, transportation modes, and geographic locations. A compromised Prototype will adversely affect TSA's ability to make implementation decisions based on complete information, and thus exposes the program to substantial risk.

See Kull Declaration at ¶10.C. Finally, the Kull Declaration asserts that delay of TWIC implementation would affect security upgrades for all transportation modes nationwide, since many transportation facility owners are postponing making improvements to their access control systems until implementation of the TWIC Program so as to ensure compatibility with TWIC card technologies. See Kull Declaration at ¶10.D.

In accordance with the ODRA Procedural Rules, MAXIMUS, through counsel, filed a Reply on September 2, 2004. In its Reply, MAXIMUS argues that compelling reasons exist in support of a stay and that its protest provides a "fair ground for litigation and thus for more deliberative investigation." Reply at 3, *citing Protest of Crown Communications*, 98-ODRA-00098, October 9, 1998, Decision on Protester's Request for Stay of Contract Performance. MAXIMUS also contends that, in the time it takes to resolve the Protest, it will suffer irreparable injury in the absence of a suspension because:

[E]ven if MAXIMUS prevails in this protest, the ODRA **may** be unable to grant it effective relief, because ... TSA would expend so much of its funds budgeted for this procurement that starting anew with MAXIMUS would be infeasible” and “TSA would probably contend that since BearingPoint had completed a substantial portion of the work, starting anew with MAXIMUS would introduce unacceptable delay.

Reply at 5. (emphasis added). MAXIMUS further asserts that the irreparable harm that TSA claims it would suffer as a result of any suspension is unsupported, exaggerated, and of the Agency’s own making. Reply at 5-6.

## **II. DISCUSSION**

In prior cases, the ODRA has noted:

The FAA’s Acquisition Management System (“AMS”) includes a presumption in favor of continuing procurement activities and contract performance during the pendency of bid protests. It expressly provides that contract performance shall continue absent a showing of compelling reasons to suspend or delay. *See* AMS Section 3.9.3.2.1.6. The same presumption is set forth in the ODRA Rules of Procedure. 14 C.F.R. § 17.13(g).

*Protest of GLOCK, Inc.*, 03-TSA-003, Decision on Protester’s Request for Stay of Contract Performance, October 28, 2003, *citing* *Protest of J.A. Jones Management Services*, 99-ODRA-00140, Decision on Protester’s Request for Stay of Contract Performance, September 29, 1999. The issue of whether compelling reasons exist in support a stay is determined by the ODRA:

on a case-by-case basis by looking at a combination of factors including: (1) whether the Protester made out a substantial case; (2) whether a stay or lack of 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. This approach is consistent with that of the Court of Appeals for the District of Columbia Circuit and provides for a flexible analysis “under which the necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors.”

*Protest of GLOCK, Inc., supra, citing Crown Communications supra (quoting from Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d. 841, 844 (D.C. Cir. 1997)).*

In the instant Protest, MAXIMUS raises issues concerning: (1) the impact of an alleged OCI in connection with the award and performance of Phase III of the TWIC Program to BearingPoint; and (2) the allegedly improper conduct of the technical evaluation. The ODRA finds that these allegations constitute “a fair ground for litigation and thus for more deliberate investigation” within the meaning of *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., supra* at 841, 844, and prior ODRA decisional authority. The fact that MAXIMUS ultimately may establish a substantial case on the merits is not determinative, however, on the current stay issue. Rather, the ODRA must balance the remaining three factors of the test annunciated in *Crown, supra*, before deciding whether a stay is warranted.

The MAXIMUS Protest and stay request fail to demonstrate that irreparable injury will occur in the absence of a stay. The MAXIMUS argument that effective relief “may” be unavailable in the absence of a stay constitutes unsupported speculation. The argument fails to recognize that the ODRA has broad discretion to recommend any remedy consistent with 14 C.F.R §17.21. Such discretion includes the authority to recommend *any or all* remedial actions enumerated in the MAXIMUS Protest “without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.” *See Reply at 5, citing 31 U.S.C 3554(b)(2).*<sup>3</sup>

Assuming arguendo that MAXIMUM had demonstrated that it would incur irreparable injury in the absence of a stay, the ODRA still would balance any such injury against the other factors. In the ODRA’s view, the strong public interest in providing a safe and

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<sup>3</sup> Notably, under the AMS, Agency officials are not precluded from voluntarily suspending contract performance in the face of a protest, based on their own considerations of urgency, public interest and mitigating programmatic risks. The Agency bears the risk of added cost and delay resulting from any decision to continue contract performance during the pendency of a Protest. *See Protest of All Weather, Inc., O4-ODRA-00294, Decision on Protester Request for Stay, F.N. 1.*

secure national transportation system at the earliest possible date militates against issuance of a stay in this case. The hardship that would result from the issuance of a stay has been shown to be potentially far greater than that which may occur in the absence of a stay. The ODRA is not persuaded by the assertions that TSA exaggerates the harm it would suffer from a suspension and that TSA itself delayed progress towards completion of this procurement. Reply at 6. Any earlier delay allegedly caused by TSA does not detract from the overriding national security concerns identified in the Kull Declaration. If anything, the existence of earlier delay only serves to emphasize the need for continuation of contract activities during the pendency of the Protest. In sum, the ODRA finds the public interest strongly favors allowing contract activities to continue during the pendency of this Protest and outweighs the showing of harm that may result to MAXIMUS in the absence of a stay.

### **III. CONCLUSION**

The ODRA concludes, after balancing the applicable factors, that no compelling reasons exist to stay contract performance during the pendency of this Protest. The ODRA therefore declines the MAXIMUS request.<sup>4</sup>

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Anthony N. Palladino  
Associate Chief Counsel and Director  
FAA Office of Dispute Resolution for Acquisition

September 13, 2004

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<sup>4</sup> This is an interlocutory order. It will become final only upon its adoption by the TSA Administrator as part of the Final Order in this matter.