

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

Protest of)
)
ITility Services, LLC) Docket No. 11-ODRA-00590
)
Pursuant to Solicitation DTFAWA-10-R-00340)

DECISION ON REQUEST FOR SUSPENSION

This matter arises from a post-award bid protest initially filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on October 28, 2011 by ITility Services, LLC (“ITility”) (“Initial Protest”) and amended on November 8, 2011 (“Amended Protest”). For purposes of this Decision, the Initial Protest and Amended Protest are sometimes jointly referred to herein as “the Protest”. ITility challenges the award of a cost-plus-fixed-fee, indefinite delivery, indefinite quantity (“IDIQ”) Level of Effort contract (“Contract”) to Triumph Enterprises, Inc. (“Triumph”) by the FAA Product Team (“Product Team”) pursuant to Solicitation DTFAWA-10-R-00340 (“Solicitation”).¹ *Initial Protest* at 4. Triumph timely intervened in the Protest. The Contract is a set-aside for service-disabled veteran-owned small businesses to provide systems operations management and administrative support services (“SOMASS”). *Id.*; *Product Team Opposition to the Request for Suspension* (“*Opposition*”) at 2.

The Protest includes a request by ITility that the FAA suspend the performance of the Contract and related task orders pending the resolution of the Protest (“Suspension

¹ The Protest and Amended Protest also purport to challenge a separate contract award made to CSG-OST, LLC under the Solicitation (“CSG-OST Contract”). Counsel for the Product Team reported during the preliminary scheduling conference that the CSG-OST Contract had been terminated for the convenience of the Government. *See* Scheduling Conference Memorandum dated November 7, 2011 at 1; *Product Team Opposition* at 2. ITility subsequently withdrew its Request for Suspension as it relates to the CSG-OST Contract. *See ITility Reply to Opposition to Suspension Request* (“Reply”) at 1, Fn. 1.

Request”). *Initial Protest* at 3, 4; *Amended Protest* at 3-5. The Product Team filed its Opposition on November 9, 2011, and Triumph filed its Opposition on November 22, 2011 (“Triumph Opposition”). ITility filed its Reply on the same date. For the reasons discussed below, the ODRA finds that ITility has not demonstrated compelling reasons to suspend contract activities during the pendency of the Protest. The ODRA therefore declines to impose a temporary suspension, and will not recommend that the FAA Administrator suspend contract performance pending the resolution of this matter.

I. Standard of Review

There is a strong presumption in the FAA’s Acquisition Management System (“AMS”) that procurement activities and contract performance will continue during the pendency of bid protests. *See, e.g., Protest of GTSI Corporation*, 10-ODRA-00563 (Decision on Protester’s Request for Suspension, dated January 13, 2011); 14 C.F.R. §17.13(g). It therefore long has been established that suspensions of procurement activities and contract performance will not be imposed by the ODRA, absent a showing of compelling reasons. *See, e.g., Protest of J.A. Jones Management Services*, 99-ODRA-00140 (Decision on Protester’s Request for Stay of Contract Performance, dated September 29, 1999). The ODRA utilizes a four part test to determine whether compelling reasons exist to issue a suspension. *See, e.g., Protest of Crown Communications*, 98-ODRA-00098 (Decision on Suspension, dated October 9, 1998). The considerations are: (1) whether the Protester has alleged a substantial case; (2) whether a stay or lack of a stay would be likely to result in irreparable injury; (3) the relative hardships on the parties; and (4) the public interest. *Id.* The first element is de-emphasized in favor of a balancing of the other three. *Id.* The Protester bears the burden of overcoming the AMS presumption against suspension. *Protest of Hi-Tech Systems, Inc.*, 08-ODRA-00459 and 08-ODRA-00461 (Consolidated) (Decision on Suspension Request, dated September 15, 2008).

II. Discussion

ITility asserts that compelling reasons exist to suspend contract performance during the pendency of this Protest. *See Amended Protest* at 3-5. ITility cites to the allegations of its Protest in support of its argument that it has alleged a substantial case. *Id.* These grounds include assertions of multiple improprieties in the evaluation process. *Id.* The Protest further alleges that the FAA made a best-value evaluation that was both irrational and contrary to the SIR by finding that the approximately [DELETED] percent difference in technical scores between the awardee and ITility Services, “a slight difference which would have been far closer if the FAA has not made the above-referenced evaluation errors”, outweighed the [DELETED] percent difference in cost/price between the awardee and ITility Services. *Id.*

In its Opposition, the Product Team “contests the Protest as being without merit and as having failed to allege a substantial case.” *Opposition* at 4. Notwithstanding the Product Team’s argument, the ODRA finds that ITility’s Protest has alleged a substantial case, i.e., one which provides a basis upon which to develop and consider a record and determine whether the challenged award decision was in compliance with the requirements of the AMS, had a rational basis and was not arbitrary capricious or an abuse of discretion. *Protest of SENTEL Corporation*, 09-ODRA-00497 (Decision on Request for Suspension dated September 15, 2009). Inasmuch as the “substantial case” element of the suspension test is de-emphasized in favor of a balancing of the remaining three elements of the suspension test, the ODRA addresses those elements below. *Id.*

With respect to the irreparable injury portion of the test, ITility argues that in the absence of a suspension ITility may be precluded from obtaining effective relief if its Protest is successful. *See Amended Protest* at 4. In that regard, ITility asserts that if Triumph’s Contract performance, proceeds unabated, it would diminish the likelihood that ITility Services would obtain relief in the form of: (a) an opportunity to receive work under the task orders that have already (or will be), awarded to Triumph under the Contract; or (b)

termination of Triumph's Contract. *Id.*; *Reply* at 2-3 citing *Overstreet Elec. Co., Inc. v. United States*, 47 Fed. Cl. 728, 744 (2000) (finding irreparable injury resulted from a lost opportunity to fairly compete for potential business).

ITility further argues that ODRA precedent, which holds "loss of employees, or other economic loss, standing alone, is not enough to demonstrate compelling reasons in support of a stay," see *SENTEL, supra*, and *Crown Consulting, supra*, is inapplicable in this case because, in addition to losing the opportunity to perform the task orders issued to Triumph under the Contract, ITility suffered irreparable harm as a result of "protracted delays by the FAA" in responding to its debriefing questions. *Reply* at 3, FN 3.

The Product Team in its Opposition points out that "this claim ignores the wide discretion the ODRA enjoys in its ability to fashion a remedy and the form of the contract, which is a support services contract which has a potential five year period of performance, assuming all options are exercised." *Opposition* at 5. The Product Team's Opposition further points out that "in the event of a successful Protest, work could re-transitioned, if appropriate from an awardee to the Protester just as it was recently transitioned from the incumbents to the awardee." *Id.* at 6. For its part, Triumph's Opposition notes that "since the SOMASS contract is a long-term contract, ITility has no basis upon which to suggest that the contract will be completed during the ODRA's review of the Protest." *Triumph Opposition* at 3.

The ODRA finds that *Overstreet Elec. Co., Inc. v. United States, supra*, is inapposite as a matter of law, since the contract at issue was awarded under statutes and regulations that do not apply to the FAA.² As discussed above, the AMS includes a strong presumption in favor of continuing procurement activity and contract performance during the pendency of protests. *GTSI Corporation, supra*. Moreover, it is well established in the

²In 1996, the Congress expressly exempted the FAA from the Competition in Contracting Act, 41 U.S.C. §§251 *et seq.*, as well as the Federal Acquisition Regulation. See Pub. L. No. 104-50, 109 Stat. 436 (codified as amended in scattered sections of 49 U.S.C.).

ODRA caselaw that speculative economic harm is not sufficient to overcome the AMS presumption of continued contract activity. *SENTEL, supra*.

ITility's attempt to factually distinguish its case from controlling ODRA precedent likewise is unavailing. In this regard, the ODRA has found that the "failure to provide a meaningful debriefing is not an independent ground for a protest." *Protest of Adsystech, Inc.*, 09-ODRA-00508. In *Adsystech*, the ODRA stated that debriefings are required to provide meaningful feedback to unsuccessful offerors regarding the evaluation of their proposals, with the additional aim of avoiding protests by demonstrating the fairness of the competition. *Id.* While in this case the Product Team's delay in answering the debriefing questions did not instill confidence, it did not prevent ITility from filing its protest at an earlier point. The delay in completing the debriefing does not support a finding that a suspension is necessary to prevent irreparable injury, given the nature and potential duration of the Contract.

ITility also argues, under factor three, that the balance of relative hardships between the Parties favors suspending performance of the Contract. *Id.* at 3. The Product Team's Opposition includes the Declaration of Mr. Tim Hall, the Director of System Operations finance in the FAA Air Traffic Organization ("*Hall Decl.*"). The Declaration states, among other things that:

The Program Office is using the SOMASS contract vehicle to consolidate all of ATO System Operations' current management and administrative support contracts and to service any new management and administrative support needs of the Program Office. The Program Office has an urgent need for the support that is provided through the SOMASS contract vehicle. The Program Office has many tasks it has placed and more which it intends to place on the Triumph contract The SOMASS competition was intended in part to realize benefits ... such as achieving cost savings, reducing administrative burden and costs and improving management oversight. Any delay or halt to performing this consolidation would seriously impede the FAA's ability to achieve the purposes and benefits of the SOMASS competition, resulting in significant additional time, resources and cost to the FAA. Any suspension ... would require that the FAA seek several short-term solutions for these existing and new

needs, resulting in the potential for ... possible work interruptions [and] and inefficient and costly administrative environment where work would need to be temporarily housed on other contracts only to be moved later

Hall Decl. ¶ 6.

ITility challenges the hardships described above as relating to ordinary matters of contract administration and argues that they “would not result in any genuine interruption of essential ATO function.” *ITility Reply* at 4. ITility also raises questions as to the reasonableness of the statements contained in the declaration and infers that there must be other contract vehicles against which the FAA could issue task order in order to meet its SOMASS requirements. *Id.* Even so, ITility does not provide a declaration or other evidentiary support for its contention that the harm to the FAA would be miniscule as compared to the harm to ITility. *Id.* at 5. In that regard, it is well established that mere arguments of counsel that are unsupported by facts in the record are not sufficient to support a suspension request. *Protest of GTSI Corporation*, 10-ODRA-00563 (Decision on Protester’s Request for Suspension, dated January 13, 2011), *citing Protest of Systems Atlanta, Inc.*, 10-ODRA-00530. Thus, the ODRA finds that ITility has not met its burden with respect to the third element of the suspension test. *Id.*, *citing Protest of Hi-Tech Systems, Inc.*, 08-ODRA-00459 and 08-ODRA-00461 (Consolidated) (Decision on Suspension Request, dated September 15, 2008).

With respect to the fourth element, the ODRA finds that the public interest favors continuation of contract activities during the prompt adjudication of this Protest. ITility speculates that unless a suspension is imposed, “the FAA will be free to ‘run out the clock’ in any future procurements by means of strategic delays in responding to debriefing requests, thereby making it less likely that a disappointed bidder who has succeeded on the merits to receive full relief.” *Reply* at 7. As discussed previously, interested parties are not precluded from filing their protests *before* the deadlines specified in 14 C.F.R. § 17.15(a)(3), if circumstances warrant. Moreover, the ODRA has

broad discretion to recommend and impose whatever protest remedies are appropriate under the circumstances of the case, considering such factors as “the nature of the procurement deficiency; the degree of prejudice to other parties or to the integrity of the acquisition system; the good faith of the parties; the extent of performance completed; the feasibility of any proposed remedy; the urgency of the procurement; the cost and impact of the recommended remedy; and the impact on the Agency’s mission.” 14 C.F.R. § 17.23. Furthermore, the ODRA notes that the Product Team assumes programmatic risk by not voluntarily suspending contract performance in the face of a protest. Where, as in this case, the Product Team decides to continue contract performance, the risk it assumes includes the possibility of a sustained protest and the award of “full relief” along with any added costs and delays that would ensue. *See Protest of All Weather, Inc.*, O4-ODRA-00294, (Decision on Protester Request for Stay, F.N. 1, February 4, 2004).

III. Conclusion

Based on the record and consideration of the applicable factors, the ODRA concludes that ITility has not met its burden of demonstrating that compelling reasons exist to stay contract performance during the pendency of this Protest. The ODRA accordingly declines to order a temporary stay, and will not recommend that the FAA Administrator issue a permanent suspension.

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Marie A. Collins
Dispute Resolution Officer and
Administrative Judge
FAA Office of Dispute Resolution for Acquisition

December 5, 2011