

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

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Protest of	)	
	)	
Harris IT Services Corporation	)	Docket No. 12-ODRA-00604
	)	
<u>Pursuant to Solicitation DTFAWA-12-C-00043</u>	)	

**DECISION ON REQUEST FOR SUSPENSION**

On May 3, 2012, Harris IT Services Corporation (“Harris”) filed the instant pre-award bid protest (“Protest”) with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”). The Protest alleges that the FAA Integrated Services Team (“IST”) improperly excluded Harris from competing for a contract that would use commercially available cloud technology in an Enterprise Messaging System (“EMS”) for the FAA. Harris contends the IST incorrectly concluded that the technical solution proposed by Harris failed to meet two of one hundred and fourteen required technical features for the EMS and that the IST failed to confer with Harris prior to removing Harris from the competition. The matter currently is before the ODRA on the Harris request that the acquisition process be suspended during the pendency of the Protest (“Suspension Request”). As is discussed herein, the ODRA concludes that Harris has not demonstrated compelling reasons for suspension of the acquisition process. The ODRA therefore denies the Suspension Request.

**I. Standard of Review**

The FAA’s Acquisition Management System (“AMS”) incorporates a longstanding, strong presumption that procurement activities and contract performance will continue during the pendency of bid protests. *See, e.g., Protest of Security Support Services, LLC*, 12-ODRA-00595, (Decision on Protester’s Request for Stay of Contract Performance, dated March 22, 2012); *Protest of J.A. Jones Management Services*, 99-ODRA-00140 (Decision on Protester’s Request for Stay of Contract Performance, dated September 29, 1999); 14 C.F.R. § 17.13(g) (2012).

Accordingly, it is well established in case law that the ODRA will not issue or recommend that the FAA Administrator issue suspensions during the pendency of protests, absent the existence of compelling reasons. *See, e.g., Protests of Hi-Tech Systems, Inc.*, 08-ODRA-00459 and 00460 (Decision on Protester's Request for Suspension, dated September 15, 2008). The ODRA employs a four factor test to determine whether such compelling reasons exist in a case. *See, e.g., Protest of Crown Communications*, 98-ODRA-00098 (Decision on Suspension, dated October 9, 1998). These include whether: (1) the Protester has alleged a substantial case worthy of adjudication; (2) irreparable injury will likely result from a stay or lack of a stay; (3) the relative hardships on the parties favor a suspension; and (4) a suspension would be in the public interest. *Id.*; 14 C.F.R. § 17.15(d)(2) (2012). The first factor is de-emphasized in favor of a balancing of the other three. *Crown Consulting, supra*. The Protester, as the party requesting the suspension, bears the burden of demonstrating compelling reasons to overcome the AMS presumption. *See, e.g., Protests of Hi-Tech Systems, Inc., supra*.

## **II. Discussion**

### **A. Factor One: Substantial Case**

Harris relies on the allegations of its Protest to meet the "Substantial Case" element of the suspension test. *See Protest* at 11. Harris contends that it has raised a substantial case, i.e., one that alleges facts constituting a fair ground for litigation and a more deliberative investigation. Harris alleges that it:

was excluded from the competition based on FAA's determination that Harris' proposed (DELETED) solution did not meet two of the 114 EMS Required Features and Functions. As discussed above, the FAA's determination is incorrect and based on a misreading of Harris' proposal. Harris' proposed solution, in fact, fully satisfies these two EMS Required Features and Functions as Harris stated in its proposal. Had the FAA conducted limited communications with Harris, Harris easily could have clarified that its proposed (DELETED) solution fully complies with the two EMS Required Features and Functions. Thus, conducting communications with Harris is consistent with the fundamental AMS principles that promote sound business judgment, fairness, and integrity.

*Id.* The IST does not dispute that the Harris Protest satisfies this factor of the suspension test. *See IST Opposition* at 1. In this regard, the IST Opposition states “for the purposes of this filing, and this filing only, the IST submits that Harris has filed a Protest that is well-plead and is sufficient to warrant further examination and consideration.” *Id.*

The ODRA agrees and concludes that the Protest allegations provide an adequate basis on which to develop the administrative record to determine whether the challenged IST decision to remove Harris from the competition had a rational basis, was not arbitrary, capricious or an abuse of discretion and complied with the AMS. *Protest of Security Support Services, LLC, supra; Protest of Sentel Corporation*, 09-ODRA-00497 (Decision on Request for Suspension, dated September 15, 2009). Inasmuch, however, as the “Substantial Case” factor is de-emphasized, the ODRA must also balance the remaining three factors to determine whether compelling reasons support a suspension here. *Protest of Crown Communications, supra.*

#### **B. Factor Two: Irreparable Injury**

Harris supports its assertion that irreparable injury will occur in the absence of a suspension by arguing that:

If Harris is not afforded a fair opportunity to compete for this work, Harris effectively will be barred from doing this type of work for the FAA (and potentially other DOT organizations) for the next seven years.

*Protest* at 13. Harris goes on to assert that “Harris will lose the ability to obtain the present contract and the profits it could make on the contract.” *Id.*

Finally, Harris urges that “The FAA also faces the prospect of being irreparably harmed,” contending, on information belief, that the solution that it has proposed will satisfy all the FAA’s requirements at a (DELETED) lower price than those proposed by other offerors, who propose a different technical solution. *Id.*

In response to these arguments, the IST asserts that:

Harris misconstrues this element of the test. The analysis is not whether Harris will suffer irreparable injury in the event its protest is not granted; the analysis *sub judice* is whether a stay or lack of a stay, during the pendency of the protest, will cause any party irreparable injury.

*IST Opposition* at 3. The IST notes that “in the event that Harris is successful in its protest, the Administrator\* would likely direct the IST to reverse its decision to remove Harris from the competition and evaluate Harris’ proposal as part of the source selection process.” *Id.* Essentially, the IST asserts that because of this possible remedy, Harris cannot establish that irreparable injury would occur to it if the Suspension Request is not granted. *Id.* In its Reply, Harris reiterates that in the absence of a suspension it would have no available legal remedy. *Harris Reply* at 2.

In a letter dated May 21, 2012, the ODRA directed that counsel for the IST report, by the close of business that day, on the schedule for completion of the acquisition process. In a responding letter of the same date, the IST Counsel stated, *inter alia*, that an EMS contract had been awarded that day. *IST Letter of May 21, 2012*. Notwithstanding the award of an EMS contract, effective remedies remain available. As noted above, the IST has conceded that re-admission of Harris to a competition is among the remedies that could be imposed if the Protest is sustained. Such re-evaluations have been mandated in sustained post-award protests in the past. *Protest of Columbus Technologies and Services, Inc.*, 10-ODRA-00514; *Protest of Adsystech, Inc.*, 09-ODRA-00508; *Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490. Under the circumstances, continuation of the contracting process during the relatively brief pendency of this Protest has not been shown to be likely to result in irreparable injury to Harris. *Protest of Security Support Services, LLC, supra*.

### **C. Factor Three: Relative Hardships**

In support of this element, Harris reiterates its earlier arguments and states that: “I(i)ncluding Harris in the Phase III evaluation would not delay the procurement in any material way, but

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\*The FAA Acting Administrator has recused himself from participating in the adjudication of this Protest.

would cure a defect in the Phase II evaluation process.” *Protest* at 13. Notwithstanding this assertion, the IST is correct in noting that the imposition of a suspension would not restore Harris as a competitor for an EMS contract. *Opposition* at 3. Such an adjudicated outcome only could occur upon the sustaining of the Harris Protest in a Final Agency Order mandating a re-evaluation.

In the ODRA’s view neither party has put forward a persuasive case that it would suffer a relatively greater hardship in the event of a stay or the lack of a stay of the acquisition process. The ODRA therefore concludes that the relative hardship factor does not support overcoming the AMS presumption against suspension.

#### **D. Factor Four: The Public Interest**

Harris argues that the public interest favors the issuance of a suspension because “where, as here, the evaluation is flawed and the level of competition has been compromised accordingly, the public interest in a fair and cost effective procurement system is served by rectifying the flaws in the source selection process.” *Protest* at 14. In its *Opposition*, the IST concurs that a flawed evaluation process must be remedied if one has been demonstrated; but does not concede that Harris has proven its case. *IST Opposition* at 3. In its *Reply*, Harris reiterates its arguments regarding improper exclusion from the competition and deprivation of the best value to the taxpayer. *See Harris Reply* at 3.

Harris has not made a compelling argument that the public interest favors a suspension here. The issue of whether Harris was improperly excluded from the competition will be decided on its merits during the protest process. If Harris is able to meet its burden of proof with regard to its substantive allegations, it ultimately may achieve the remedy it seeks. As noted above, however, that remedy cannot be achieved nor enhanced through the suspension of the ongoing contracting process.

For its part, the IST should keep in mind that it retains flexibility concerning whether and how to proceed with the awarded contract in light of the pending Protest; but that in proceeding, it

assumes the risk of additional expense to the FAA and delay to the EMS Program should the Protest ultimately be sustained and corrective action ordered. *Protest of ITility Services, LLC*, 11-ODRA-00590 (Decision on Request for Suspension, dated December 5, 2011); *Protest of All Weather, Inc.*, 04-ODRA-00294 (Decision on Request for Suspension, dated February 4, 2004, Fn. 1).

The ODRA concludes that the public interest in a properly conducted acquisition process will be served by the prompt adjudication of the merits of this Protest. To that end, the IST Response to the Protest will be due to be filed 10 business days from the date of this Decision. The Harris Comments on that Response will be due 5 business days from receipt of the Response. Thereafter, unless the ODRA requires additional filings, the record will close and the case will be given expedited consideration.

### **III. Conclusion**

After balancing the applicable factors, the ODRA concludes that, although the Harris Protest presents a substantial case, the remaining three factors of the suspension test do not support its Request. Inasmuch as Harris has not demonstrated that compelling reasons exist to stay activities during the pendency of this Protest, the ODRA declines to order a temporary stay and will not recommend that a permanent suspension be ordered. The Harris Suspension Request therefore is denied.

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Anthony N. Palladino  
Director and Administrative Judge  
FAA Office of Dispute Resolution for Acquisition  
May 22, 2012