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

Contests of	)	
	)	
Agency Tender Official	)	Docket No. 05-ODRA-00342C
James H. Washington and	)	Docket No. 05-ODRA-00343C
Kate Breen, Agent for a Majority of	)	
Directly Affected FAA Employees	)	
Pursuant to Solicitation DTFAAWAACA-76-001)		

RECOMMENDATION ON REQUEST FOR SUSPENSION OF ACTIVITIES

INTRODUCTION

These Consolidated Contests, filed by Agency Tender Official James H. Washington ("ATO Contest") and by Kate Breen, the President of the National Association of Air Traffic Specialists ("NAATS"), as agent for a majority of directly affected FAA employees ("Breen Contest"), are pending before the FAA Office of Dispute Resolution for Acquisition ("ODRA"). The ATO Contest and Breen Contest involve challenges to the outcome of a public-private competition for provision of Automated Flight Service Station ("AFSS") services. The competition was conducted under the FAA's adaptation of Office of Management and Budget Circular A-76 by the FAA Competitive Sourcing Program Office ("Program Office"). Both Consolidated Contests request the suspension of all activities by the selected service provider, Lockheed Martin Services, Inc. ("LMSI"), during the pendency of this matter at the ODRA ("Suspension Requests").

The Program Office and LMSI have opposed the Suspension Requests ("Program Office Opposition" and "LMSI Opposition", respectively). The Program Office Opposition included a series of commitments designed to address the irreparable injury which the Contesters allege would occur if current activities are not suspended. The Program Office subsequently clarified and ultimately expanded the commitment in a series of filings with the ODRA. With the ODRA's permission, all interested parties submitted supplementary pleadings in connection with the Suspension Requests. On March 31, 2005, the FAA and NAATS executed a Memorandum of Agreement ("MOA") that bears directly on the Suspension Requests.

After reviewing the record developed to date, the ODRA concludes, for the reasons explained below, that compelling reasons have not been shown to exist in support of a suspension. The ODRA therefore recommends that the Administrator decline to impose a suspension during the pendency of these Consolidated Contests.

DISCUSSION

The FAA Acquisition Management System contains a strong presumption that contract-related activities will continue during the pendency of acquisition disputes. *See Protest of Informatica of America, Inc.,* 99-ODRA-00144, ODRA Decision on Stay Request, dated October 10, 1999, *citing Protest of J.A. Jones Management Services*, 99-ODRA-00140. Inasmuch as a post-award bid protest and post-award contest involve similar challenges against a selection decision, the ODRA Contest Rules, CR 7(f), and the ODRA Procedural Regulations, 14 C.F.R. §17.13(g), are consistent with respect to the standard for imposition of a suspension. *See* CR 1. In the context of a contest, the ODRA will recommend a suspension or a "delay of procurement activities or performance, in whole or in part, for a compelling reason." CR 7(f).

In determining whether to impose or recommend a suspension, the ODRA has adopted the four-part test utilized by the United States Court of Appeals for the District of Columbia. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.,* 559 F.2d. 841 (D.C. Cir. 1977); s*ee also Contest of Walter W. Pike*, 04-ODRA-00310, Decision on Contestor 's Suspension Request, August 4, 2004. The ODRA determines whether there are compelling reasons in support of a suspension:

> 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 a 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.

See Protest of Crown Communications, 98-ODRA-00098, Decision on Request for Suspension, dated October 9, 1998; *Protest of J.A. Jones Management Services,* 99-ODRA-00104, Decision on Request for Suspension, dated September 29, 1999; *Protest of Glock, Inc.*, 03-TSA-003, Decision on Request for Suspension, dated October 28, 2003; *Protest of Mid Eastern Builders, Inc*., 05-ODRA-00330, Order for Temporary Stay, dated January 28, 2005.

With respect to the first element of the analysis, the ODRA will determine whether the Contestor has alleged a substantial case, *i.e.,* one that provides a fair ground for further investigation and adjudication. In this regard, the ODRA concludes that the Consolidated Contests, when viewed together, satisfy this element. The Consolidated Contests challenge several key aspects of the evaluation, thus calling the ultimate performance decision into question, and providing a fair ground for adjudication. As noted above, however, this first factor of the suspension analysis is de-emphasized in favor of a "balancing of equities as revealed through an examination of the other three factors." *Washington Metropolitan Area Transit Commission*, *supra* at 843.

After examining the remaining three factors, the ODRA concludes that the Contestors have not demonstrated that irreparable injury is likely to result if the suspension is not imposed during the adjudication of the Consolidated Contests. Moreover, the record shows that granting a suspension would not provide any additional protection from injury to the Contestors, but would

be harmful to the Agency. Finally, the public interest favors continuation of current preparatory activities. These matters will be adjudicated to a final Administrator's decision prior to: (1) the earliest effective date of any contemplated Reductions-in-Force; and (2) the transfer to LMSI of responsibility for the AFSS function. Under these circumstances, the full range of remedies, including, among other things, re-evaluation or re-competition, will be available in the event the Administrator sustains the Consolidated Contests. *See* CR 11.

The Suspension Requests of both the ATO Contest and the Breen Contest focus on the assertion that a suspension of activities is necessary in order to protect the preferred job placement rights of affected employees. *See* ATO Contest at 3; Breen Contest at 3. The ATO contends that "continuation of the Phase-In Period of performance by [LMSI] will result in immediate, irreparable injury to the incumbent" federal personnel since an offer from LMSI "may disqualify" those personnel "from future participation in the Agency's preferred placement program" as well as the Agency's Selection Priority Program ("SPP"). *See ATO Contest* at 2 and *ATO Comments on Program Office Response*, dated March 18, 2005, at 4.

Ms. Breen requests a suspension for similar reasons. Specifically, Ms. Breen argues that a stay is needed to avoid irreparable harm to the incumbent FAA employees, who it is alleged:

> are faced with trying to decide if it would be better to get RIF'ed by the Federal Government, be without a job, and take one's chances in the Federal job market; or, or accept the Lockheed offer because it's in hand, but lose (for about one-half of the employees) full retirement eligibility, RIF benefits such as training/relocation assistance (when they are let go by Lockheed instead of the Federal government), and their Selection Priority Program rights for finding Federal position once they are let go by Lockheed. The issuance of these offers by Lockheed during the early part of Phase-In (while the Contest is pending) is what is placing the employees in an untenable position. They should not be put in that position while the procurement is being reviewed."

See Breen Comments on Program Office Response, dated March 18, 2005, at 2.

In the ODRA's view, these concerns have been addressed fully by the Program Office in the series of commitments made during the course of the briefings on the suspension issue. *See Program Office Letters*, dated March 16, March 18, March 22, March 23 and April 5, 2005. In its March 16 filing, the Program Office provided the following commitments, and made clear that these commitments "were being presented without condition for [the] ODRA's consideration of the Suspension Request":

> Lockheed Martin has agreed to include in each and every offer of employment a notice stating that the offer is contingent on LMSI's keeping the work.
>
> …[N]o employee will be denied participation in the Agency's PPP based on that employee's receipt of a job offer from Lockheed Martin.
>
> ...[N]o employee will be denied participation in the Agency's Selection Priority Program based on that employee's acceptance/declination of an offer from Lockheed Martin for the duration of the Contest.

> …[N]o Reductions-in-Force [RIFs] for affected … employees will occur prior to September 30, 2005.

See Attachment 1 to *Program Office Letter*, dated March 16, 2005.

Ms. Breen asserts that the initial commitment is not sufficient because it permits the issuance of RIF notices to affected employees, adversely impacting the rights of affected employees to participate in the SPP, which, it is alleged, offers employees the most protection. Ms. Breen alleged that once a RIF notice is issued to an employee, the acceptance or declination of any job offer would terminate the employee from SPP eligibility. *Breen Comments on Program Office Response*, dated March 18, 2005, at 3.

During the briefing of the Suspension Requests, the FAA and NAATS engaged in separate collective bargaining negotiations which resulted in a Memorandum of Agreement ("MOA") dated March 31, 2005. The MOA specifically addresses the RIF-related concerns that are integral to the ODRA's evaluation of whether the contestors are likely to suffer irreparable harm in the absence of a suspension. The MOA expanded the prior commitments offered by the Program Office, and established that: (1) Once a RIF notice is issued (thereby triggering SPP rights), eligibility for the SPP will continue – regardless of an LMSI offer, acceptance or declination of such an offer, or even actual employment by LMSI – for two years unless the employee accepts or declines a position at the same pay with an employer other than LMSI; and (2) notwithstanding any RIF notice, affected employees will remain eligible for the PPP until October 1, 2005 regardless of an LMSI offer, acceptance or declination of such an offer, or actual employment by LMSI. *See* MOA Sections 4 and 6, Attachment 1 to *Program Office Letter*, dated April 5, 2005; *see also LMSI Letter*, dated April 5, 2005, at 3.

In its submission of April 5, 2005, the Program Office expressly confirms that:

> **[P]articipation in the Selection Priority Program will continue for the affected employees for two years from the date of separation regardless of whether an employee accepts or declines the initial job offer from Lockheed Martin, and will also continue for two years if the employee rejects any subsequent job offer from Lockheed Martin.**

Program Office Letter, dated April 5, 2005 at 2 (emphasis in original).

There is simply no basis in the current record to support a conclusion that the extension of job offers by LMSI or the issuance of notices of prospective RIFs is likely to cause irreparable injury to the affected employees. The record in this case establishes that: (1) any reductions in force will only take effect, at the earliest, on September 30, 2005, *i.e.*, after the anticipated completion of this Contest process; (2) in the event that one or both of the consolidated Contests is sustained, the effective dates of RIFs could be postponed indefinitely; and (3) employees' rights under the SPP and the PPP will not be lost during the pendency of these Consolidated Contests regardless of the issuance of RIF notices or the extension of job offers by LMSI.

CONCLUSION

Neither the ATO nor Ms. Breen has demonstrated that the continuation of current activities will cause irreparable injury to their clients. The record clearly establishes, however, that implementation of the results of the competition would be adversely impacted by a suspension. Under the circumstances, the ATO and Ms. Breen have failed to overcome the presumption in the FAA process against suspension of contracting activities pending the outcome of these Consolidated Contests. For the foregoing reasons, the ODRA recommends that the Administrator deny the Suspension Requests.

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Anthony N. Palladino
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Office of Dispute Resolution for Acquisition

April 12, 2005