

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

Contract Dispute of)	
)	Docket No. 05-ODRA-00346
Dynamic Securities Concepts, Inc.)	
)	
<u>Under Contract DTFA03-00-D-00014</u>)	

DECISION AND ORDER ON DISCOVERY

The above-captioned Contract Dispute was filed with the Federal Aviation Administration Office of Dispute Resolution for Acquisition (“ODRA”) by Dynamic Security Concepts, Inc. (“DSCI”) on April 14, 2005. DSCI claims that it suffered damages due to the FAA’s breach of its obligation to deal with DSCI fairly and in good faith. DSCI alleges, among other things, that task orders being properly performed by DSCI under Contract DTFA03-00-D-00014 (the “NASiCMM®/Security contract” or “Contract”) were terminated or not renewed so that work could be transferred to other favored contractors. In particular, DSCI contends that these actions were motivated by at least one FAA employee, who “harbors an extreme personal animus” toward DSCI, and that this employee was permitted to seriously “disparage DSCI and the Contract so as improperly to taint both.” DSCI alleges these actions served to constructively debar DSCI from receiving new or additional orders under this and other contracts, including subcontracts with third parties. DSCI Contract Dispute at 1-2, 6-11.

On August 25, 2005, the ODRA denied a Motion for Summary Dismissal filed by the Federal Aviation Administration William J. Hughes Technical Center (the “Center”), which argued that DSCI had failed to state a claim upon which relief may be had. The denial was based on the ODRA’s finding that DSCI’s allegations presented a foundation for a claim of the breach of good faith and fair dealing, and that facts could be presented to establish bad faith. *See* ODRA Decision Denying Motion to Dismiss, dated August 25, 2005.

Subsequently, the parties' attempts to complete voluntary discovery were hindered by disputes over responses to certain interrogatories and requests for production of documents and depositions. The ODRA held a telephone status conference on November 29, 2005, at which time the parties identified disagreements over the appropriate scope of discovery as the cause of the impasse. In this regard, the ODRA Director informed counsel that limited, focused discovery, including depositions, is contemplated by the ODRA Procedural Regulations and normal ODRA practice. Counsel for the parties agreed to attempt to resolve any discovery issues informally, before requesting that they be adjudicated by the ODRA.

On December 13, 2006, the parties filed letters setting forth their respective positions on the unresolved discovery issues. The ODRA held another telephone status conference on December 15, 2005, during which it was reported that the Department of Transportation Inspector General ("IG") had authorized the release of two of its reports related to the discovery dispute under the terms of the Protective Order issued in this case. Consequently, the ODRA allowed time for the parties to review the complete IG Reports and the accompanying exhibits.

The additional time favorably impacted the resolution of additional discovery issues. By letter, dated January 10, 2006, DSCI informed the ODRA that there are no open issues pertaining to the discovery requests that the FAA propounded to DSCI, and that it was preparing supplementary discovery responses in accordance with a January 6, 2006 discussion with Center counsel. *See* DSCI Letter, page 2, FN 1. This assertion was confirmed by letter, dated January 10, 2006 from the Center. *See* Center Letter at 1-3. (Hereinafter, the Center and DSCI's January 10, 2006 letters will be referred to as "Center Letter" and "DSCI Letter" respectively).

The Center Letter also reflects an agreement with DSCI counsel to schedule the depositions of three DSCI employees and eleven FAA employees, and requests that these depositions be scheduled after DSCI provides its supplementary discovery responses. Center Letter at 3. DSCI likewise indicates that, of the fourteen individuals it has

identified for deposition, the FAA has agreed to make available for deposition eleven, who are FAA employees, *i.e.*, Debbie Williams, Michael Virga, Rebecca Deloney, Richard Thoma, Anna Marinaro, Jim Arrasmith, Diane Schumann, Mario Maccarone, Lisa Bercher, Mike Gallagher, and Steve Carver. DSCI Letter at 2. DSCI indicates that scheduling of these depositions is in progress, and hopes that all depositions can be completed within 30 to 40 days of scheduling.

The parties' respective January 10, 2006, letters further identify the remaining discovery issues in need of adjudication by the ODRA.¹ These issues concern DSCI's requests for depositions of non-FAA employees, as well as documents and interrogatories that pertain to FAA dealings with other contractors, and for personnel related documents.

ODRA Discovery Authority

49 U.S.C. Section 40110(d)(4) sets forth the ODRA's adjudicative authority for contract disputes as follows:

[A] contract dispute that is not addressed or resolved through alternative dispute resolution shall be adjudicated by the Administrator through Dispute Resolution Officers or Special Masters of the Federal Aviation Administration Office of Dispute Resolution for Acquisition, acting pursuant to sections 46102, 46104, 46105, 46106 and 46107 and shall be subject to judicial review under section 46110 and to section 504 of title 5.

49 U.S.C. Section 46102, which is referenced therein, requires these adjudicative proceedings to be subject to subchapter II of chapter 5 of title 5 [5 USCS Sections 551 *et seq.*] *i.e.*, the Administrative Procedure Act ("APA"). 49 U.S.C. Section 46104, also referenced therein, provides express authority to conduct a hearing, order depositions,

¹ In this regard, DSCI indicates that it is willing to hold in abeyance its request for documents responsive to Document Requests 1-3 and 11, subject to their reinstatement should further discovery demonstrate that these requests are warranted. DSCI Letter at 5, FN 8. Also, DSCI indicates that, at this time, it does not seek responses to the document requests, and part of Interrogatory No. 2, as they relate to a company called Bloodworth Integrated Technologies; but it reserves the right to seek that information should later discovery indicate it is warranted. DSCI Letter at 4, FN5 and 6, FN10. Accordingly, the ODRA will not direct any action with respect to these requests or that portion of Interrogatory No. 2.

subpoena witnesses and records, administer oaths, and examine witnesses. 49 U.S.C. Section 46104(a)-(c).²

With respect to depositions, Section 46104 further provides the authority and procedures for ordering “a person to give testimony by deposition and to produce records. If a person fails to be deposed or to produce records, the order may be enforced in the same way a subpoena may be enforced” 49 U.S.C. Section 46104(c). In this regard, the statute provides that:

If a person disobeys a subpoena ... the Administrator, or a party to a proceeding ... may petition a court of the United States to enforce the subpoena. A judicial proceeding to enforce a subpoena under this section may be brought in the jurisdiction in which the proceeding ... is conducted. The court may punish a failure to obey an order of the court to comply with the subpoena as a contempt of court.

49 U.S.C. Section 46104(b).

14 C.F.R. Subparts C and E of the ODRA Procedural Rule specifically address the adjudication of contract disputes. These subparts set forth the rules for filing motions for dismissal and summary decision, the scope and conduct of discovery and hearings, and standards by which an impartial decision-maker, *e.g.* a Special Master or Dispute Resolution Officer, develops the administrative record and makes findings of fact based on substantial evidence and a recommendation for a final FAA Order. In pertinent part, these rules provide authority for the DRO or Special Master to control the proceedings, so as to promote the efficient resolution of the contract dispute, and to determine the appropriate amount of discovery required. *See* 14 C.F.R. Sections 17.23, 17.25, 17.27, 17.29 and 17.39. In this regard, the ODRA requires the parties to conduct discovery in a limited and focused manner, primarily in the form of document exchanges, and possibly depositions, which are limited in number and duration. As a matter of practice, the

² Toward this end, the ODRA is authorized by delegation from the FAA Administrator to issue procedural and other interlocutory orders aimed at proper and efficient case management in all contract disputes under the FAA’s Acquisition Management System, including, without limitation, scheduling orders, subpoenas, sanctions orders for failure of discovery and the like. FAA Administrator Delegation of Authority, dated July 29, 1998, paragraph g.

ODRA encourages opposing parties to obtain information held by other parties, or non-parties, on a voluntary basis, either through direct negotiations, or by use of Alternative Dispute Resolution (“ADR”) techniques, before requiring direction from the ODRA.³

Remaining Discovery Issues in Need of Adjudication

1. DSCI Request for Depositions of Individuals Not Employed by the FAA

DSCI identifies three individuals it seeks to depose, in addition to the individuals already slated for depositions:

One is a former FAA employee, Vincent Tran, who had direct responsibility for the contract and matters in issue and was directly and deeply involved in many of the actions that are the focus of this dispute. The second is a Department of Homeland Security (Science and Technology) employee, Diane Wilson, who was a customer of DSCI under the contract in issue and who has direct and personal knowledge of the actions of Michael Virga and others toward DSCI and the effects of those actions. This employee works at the FAA Technical Center in New Jersey. The third is an employee of an FAA contractor, Jefferson Heller of Programatix, to which DSCI believes tasks performed by DSCI were transferred through the improper direction or influence of Mr. Virga and others. This individual also apparently works at the FAA Technical Center in New Jersey, with the En Route/Oceanic Services organization.

DSCI Letter at 3.

The Center takes the position that these three individuals are not Agency employees and therefore it has no authority or control over their availability for deposition. Center Letter at 3. As such, the Center argues that it should not be tasked with the responsibility and burden of conducting a search to locate and attempt to schedule these non-Agency individuals for a deposition. Nevertheless, the Center reports that it has provided DSCI with the last known address and telephone number for Mr. Tran, a point of contact in Counsel’s Office for the Department of Homeland Security (“DHS”) where Diane

³ See ODRA Guide discussion regarding discovery in contract disputes at: http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc70/odra_process/ODR_AGUIDE.cfm

Wilson is or was an employee; and a point of contact for Agency contractor Programatix, where Mr. Heller is or was an employee. Center Letter, page 4.

DSCI confirms that, based on the contact information provided by the Center, it will attempt to schedule these witnesses for depositions and further requests that the ODRA issue a subpoena for their attendance if one or more of these individuals refuse to be deposed on a voluntary basis. DSCI Letter at 3.

The ODRA finds that, if these individuals can be located, their depositions would be appropriate, given that they may well possess relevant and probative information central to the issues in this case. DSCI should attempt to contact these individuals directly to schedule them for depositions on a voluntary basis at a time and place convenient to all parties. Specifically, the Center is directed to request Programatix to make Jefferson Heller available for deposition, if he is still employed by Programatix,⁴ Also, upon request, the ODRA can provide assistance in this regard, including, if necessary, issuing an order for deposition that can be enforced in accordance with 49 U.S.C. Section 46104(b) and (c).

2. DSCI Requests for Documents Pertaining to the FAA's Dealings With Other Contractors

DSCI Document Request Nos. 5 – 7 request from the Center all documents relating to any investigation, including any report, draft report, correspondence, communications or notes concerning any investigation, conducted on behalf of the FAA or any other entity, including the Department of Transportation Office of Inspector General, relating in whole or in part to any dealings between any former or present FAA employee and specified companies serving as either FAA contractors or subcontractors. The specified companies are Programatix, Computer Technology Associates, Inc. (“CTA”), and Management Engineering & Technology Associates, Inc. (“META”), which DSCI explains is a “spin off” of CTA or Programatix. *See* DSCI’s First Document Request.

⁴ The parties should establish in advance the topics to be covered in each deposition and the anticipated length of time required for its completion.

DSCI further explains that the contracts subject to these requests are either prime contracts between these companies and the FAA, or subcontracts between these companies and other contractors such as Apptis, Inc. (successor to Technology & Management Associates (“TMA”)) and Crown Consulting Inc., under contracts in FAA programs such as the Broad Information Technology Services II (“BITS II”) program and the Service Operations Support 6 (“SOS-6”) program. DSCI Letter at 4. Moreover, with respect to Document Request No. 5, DCSI reports that FAA counsel indicated that she would provide DCSI with one contract document relating to Programatix. DSCI Letter, page 4, FN 6.

The Center objects to this request to the extent that it requests DOT IG documents which are outside the Agency’s control. The Center further reports that with respect to documents within its control “[a]fter a diligent search and reasonable inquiry,” it is unable to locate any responsive documents. Center Letter at 4.

The Center has represented that it has provided all documents in its possession, custody, and control, and without specific refutation by DSCI, the ODRA accepts this assertion on its face. The Center, however, is reminded that it has a continuing obligation to provide DSCI with any additional responsive documents that come into its possession, custody, or control.

DSCI’s Document Request No. 15 requests all documents relating to any correspondence between or among any of the nine individuals identified in Request No. 12 (Rebecca Deloney, Mike Gallagher, Robert Long, Anna Marinaro, Cheryl Matthews, Rick Thoma, Vincent Tran, Michael Virga, and Laurel Wittman), as well as the following individuals: (a) Matt Clark; (b) Jeff Heller; (c) Linda Stone; and (c) Becky Viggiano, relating in any way to DSCI or its officers, employees, or subcontractors; Programatix or its officers, employees or subcontractors; CTA or its officers, employees or subcontractors; or META or its officers, employees or subcontractors. *See* DSCI First Documents Request.

The Center objects to this request as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The Center further states as a response to this request that it will provide DSCI with Technical Center and Headquarters' contracts awarded to Programatix, CTA and META from 2000 through 2004. Center Letter at 4.

The ODRA concurs with the Center that, as stated, the request is overly broad, but further finds that it can be appropriately narrowed by limiting it to any correspondence between or among individuals to be scheduled for depositions (Deloney, Gallagher, Mariano, Thoma, Tran, Virga and Heller), which relates to work performed by DSCI, Programatix, CTA and META under contracts with the Technical Center and Headquarters from 2000 through 2004. Accordingly, the Center is directed to produce to DSCI any such correspondence that is in the FAA's possession, custody, or control, within 30 days of the date of this Order.

DSCI's Document Request No. 18 requests all documents relating to any prime contracts (or amendments or modifications thereto, or delivery orders thereunder) awarded by the FAA under which any of the following firms (or any of their employees) served or was proposed to serve as subcontractor: (a) CTA; (b) Programatix; and/or (c) META. DSCI further indicated in a December 13, 2006 letter that it was willing for present purposes to limit this request for the prime contracts to those relating to Programatix. DSCI Letter, page 4, FN 7.

The Center objects to this request as overly broad and unduly burdensome, since it has no privity of contract with actual or proposed subcontractors and has no means to trace them. The Center further reports that, notwithstanding its objection, it may have found at least one instance where Programatix was a subcontractor under one delivery order under one of the Broad Information Technology and Telecommunications Services (BITS) contracts awarded out of Agency Headquarters, and is obtaining that documentation. The Center also indicated that it will determine whether any of the three companies were

subcontractors under BITS contract numbers DTFA03-02-D-00015 and DTFAWA-03-D-03045. Center Letter at 5.

The ODRA concurs with the Center that, as stated, this request is overly broad, but finds that the request can be appropriately narrowed by limiting it to documents relating to work performed by Programatix, CTA and META as actual subcontractors under BITS contracts awarded by Agency Headquarters since January 1, 2000. Accordingly, the Center is directed to provide to DSCI such documents, within 30 days of the date of this Order, to the extent that such documents are within the FAA's possession, custody and control.

3. *DSCI Requests for Personnel-Related Documents*

DSCI Document Request No. 14 requests all personnel files or records relating to each of the individuals identified in Request No. 12 (Rebecca Deloney, Mike Gallagher, Robert Long, Anna Marinaro, Cheryl Matthews, Rick Thoma, Vincent Tran, Michael Virga, and Laurel Wittman). *See* DSCI First Document Request. The Center objects to this request as not relevant to the subject matter of the litigation; as not reasonably calculated to lead to the discovery of admissible evidence; and on privacy grounds. The Center also offers to answer any request for admission which DSCI would like to pose to the Agency on this point. Center Letter at 4.

The ODRA views DSCI's request as overly broad, since it is not tailored in any way to prevent the disclosure of irrelevant, confidential personal information. The Center has offered to answer any request for admissions which DSCI would like to pose to the Agency, and the ODRA notes that depositions will be scheduled for Deloney, Gallagher, Marinaro, Thoma, Virga, and Tran (if he can be located). Given the ODRA's discretion to limit discovery to ensure that it be focused and relevant, this Office views the Center's offer to answer any request for admissions, combined with the planned depositions of the aforesaid individuals, as providing DSCI a fair and reasonable opportunity to develop facts relevant to the issues in this case.

DSCI Document Request No. 16 requests all employment and assignment histories of Michael Virga, Vincent Tran and Dr. Rebecca Deloney, including any and all evaluations and disciplinary or personnel-related actions concerning Messrs. Virga and Tran and Dr. Deloney, for the period January 1, 1996 to the present. The Center asserts that “[t]o avoid the needless duplication of documents, the Agency’s response referred DSCI to the documents DSCI’s counsel has already received from the Agency, by letter dated March 7, 2005, under FOIA Request number 2005-0394, item no. 10.” Center Letter at 4. The Center states that these documents were responsive to the employment and assignment histories.

The ODRA directs the Center to supplement its previous response to FOIA Request number 2005-0394, item no. 10 with any additional responsive documents that have been generated by the Agency from March 7, 2005 to the present, within 30 days of the date of this Order. Also, with respect to that portion of DSCI’s Document Request No. 16 that pertains to any and all evaluations and disciplinary or personnel-related actions concerning Virga, Tran, and Deloney, the ODRA considers its analysis of DSCI’s Document Request No. 14 above to be controlling. Likewise, with respect to DSCI’s Document Request No. 20, which requests all documents relating to Vincent Tran’s separation from or termination of employment with the FAA, the ODRA also considers its analysis of DSCI’s Document Request No. 14 above to be controlling.

4. DSCI Interrogatories

DSCI asserts that the open issues with respect to its interrogatories all relate to the FAA’s dealings with other contractors who DSCI believes received work that had been performed by DSCI, as a result of the improper actions or influence of FAA personnel. DSCI Letter at 5.

DSCI Interrogatory No. 2 requests that the Center identify all persons presently or formerly employed at the FAA who were ever or are in a position to have

communications relating to FAA business with the following entities: (1) Programatix; (2) CTA; (3) META; and (4) Bloodsworth Integrated Technologies, Inc. *See* DSCI's First Set of Interrogatories. The Center objects to this interrogatory as overly broad and burdensome, as it lacks parameters to assist with a search. Center Letter at 5. DSCI subsequently narrows this interrogatory in its January 10, 2005 letter, asserting that the FAA should be directed to identify:

[T]he relationship between the contracts performed by DSCI and Programatix, CTA, and META. (For example, do the other contractors perform the same type of work as DSCI? Were any of the services provided by DSCI awarded to one of these other contractors for performance?) The FAA should also be directed to identify the names of the contracting officer, the contracting officer's technical representative, the various key program employees and the identities and duties of any other FAA employee or private contractor individual/employee who was substantially involved in, directly participated in or had direct knowledge of the sequence of events and decisions underlying the current dispute. To the extent any of the identified federal personnel were replaced, transferred or reassigned, the FAA should describe the basis for the action, and identify what subsequent assignment or role the removed FAA or contractor employee assumed. The FAA should also identify which FAA employees were directly involved in or responsible for the key contracting and/or funding decisions in these contracts.

DSCI Letter, page 5-6.

The ODRA concurs with the Center that DSCI Interrogatory No. 2, as originally stated, is overly broad and burdensome, however, the ODRA views DSCI's reformulation of this interrogatory, as set forth in its January 10, 2006 letter, to be appropriately limited. Accordingly, the Center is directed to provide a narrative response thereto within 30 days of the date of this Order.

DSCI Interrogatory Nos. 8 and 15 seek specific information about the Center's process of awarding and funding certain contracts. Specifically, DSCI's Interrogatory No. 8 asks the Center to describe with particularity the process by which it awards contracts for professional services, including its involvement, if any, in prime contractors' selection and use of subcontractors in the performance under such contracts, while DSCI's

Interrogatory No. 15 asks the Center to describe with particularity the process by which the FAA and/or the Center, particularly ATO-R Management, identifies, analyzes and allocates funds to be made available to contracts including specifically the NASCiCMM®/Security contract, any FAA contract awarded to CTA, Programatix or META, or any FAA contract under which Programatix or META serve or served as a subcontractor, including the roles and responsibilities of all FAA employers with any level of signature authority for such funding. *See* DSCI's First Set of Interrogatories.

In response, the Center claims that it has answered that such contracts are awarded in accordance with the Agency's Acquisition Management System, and explains:

The Technical Center has, at any given time, approximately 150 contracts in place and most of those contracts are for professional support services. There is no per se "process" that is used in the procurement of professional services. The Agency has also already answered that it is generally not involved with the prime contractor's selection and use of subcontractors. Exceptions may be in a small business set-aside where the prime contractor is using subcontractors and is not performing at least fifty percent of the labor costs under the contract or where the contract contains a consent to subcontract clause.

Center Letter at 5.

With respect to Interrogatory Nos. 8 and 15, in its January 10, 2006 letter, DSCI now seeks an explanation of the following from the Center:

(1) the contracting process it generally follows for procuring the services that are the subject of DSCI's contract dispute; (2) what other methods, services or process the FAA has used to procure services identical or similar to those provided by DSCI; and (3) whether any exceptions to the general contracting process occurred in the history of the services provided since January 1, 2000 by DSCI and Programatix, CTA or META. The FAA should also describe the process by which it allocated funds to any contract relevant to this dispute in which Programatix, CTA or META served as a contractor or subcontractor.

The ODRA views DSCI's clarification of the information sought by Interrogatory Nos. 8 and 15 to be appropriately limited. Accordingly, the Center is directed to provide a narrative response thereto within 30 days of the date of this Order.

With respect to Interrogatories Nos. 9 and 10, DSCI asks the ODRA to direct the Center to “identify all prime contracts with Programatix as well as any contracts under which Programatix served as a subcontractor, which are relevant to the issues raised in this dispute, as well as the extent to which and process by which the FAA was involved in the selection of Programatix as a subcontractor.” DSCI Letter, page 6. The ODRA views DSCI’s reformulation of its Interrogatory Nos. 9 and 10, as set forth in its January 10, 2006 letter, to be appropriately limited. Accordingly, the Center is directed to provide a narrative response thereto within 30 days of the date of this Order.

-S-

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

January 27, 2006