

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

Protests of)	
)	Docket No. 08-ODRA-00459
Hi-Tec Systems, Inc.)	Docket No. 08-ODRA-00460
)	(CONSOLIDATED)
Pursuant to Solicitations DTFAWA-08-R-55501)		
DTFAWA-08-R-55502)		

DECISION ON ADMISSION TO PROTECTIVE ORDER

This matter currently is before the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on an application (“Application”) for admission to an ODRA protective order. The Applicant is the sole in-house counsel for the Protester, Hi-Tec Systems, Inc. (“Hi-Tec”) in these consolidated bid protests (“Protests”). The FAA Program Office (“Program Office”) filed an objection (“Objection”) to the Application. Hi-Tec replied to the Objection by filing an amended application (“Amended Application”), which also was objected to by the Program Office. For the reasons discussed herein, the ODRA denies the Application of the In-house Counsel for Hi-Tec to the Protective Order in these Protests.

I. Factual Background

This issue arises in the context of Hi-Tec’s pre-award Protests challenging the issuance by the Program Office of two solicitations (“Solicitations”). The Protests allege that the Program Office was required to set aside the Solicitations for small business. *See Protests* at 1. Initially, Hi-Tec indicated that it was not requesting issuance of a protective order. *Id.* Thus, no protective order was issued by the ODRA in the early stages of the case. On October 6, 2008, the Program Office filed its Agency Response in

the form of a Motion to Dismiss the Protest (“Agency Response”). Included within the Agency Response was a statement of the Program Office’s legal position and a binder containing relevant documents. The Program Office filed both a full version of the Agency Response and a redacted version. The redacted version, which was provided to Hi-Tec, deleted information that the Program Office believed was competition sensitive. *See Program Office Transmittal Letter of October 6, 2008.* The ODRA ultimately found that the redactions were for the most part appropriate, except for redactions of the names of certain individuals who participated in the challenged action. *See ODRA Letter of October 14, 2008.*

At the request of counsel for Hi-Tec, the ODRA issued a protective order on October 15, 2008 (“Protective Order”). On October 16, 2008, the Applicant submitted his first application for admission under the Protective Order (“First Application”). The First Application was submitted on the ODRA’s standard form for applications by in-house counsel (“In-house Form”). In the First Application, the Applicant identifies himself as “in-house counsel for Hi-Tec Systems, Inc.”; as well as “corporate counsel” and as a “sole practitioner”. *See First Application* at 1, 2. In an earlier letter of October 14, 2008, the Applicant stated, among other things, “I am not an employee and receive no employment ‘fringe’ benefits.”

The First Application failed to provide the narrative statement and the specific information required by Paragraph 5 of the In-house Form. More specifically, the First Application failed to provide information concerning the Applicant’s responsibilities as an in-house counsel, or to identify the person to whom the Applicant reports and the responsibilities and position of that person. On October 17, 2008, the Program Office timely objected to the First Application as incomplete on the basis that the Applicant allegedly “participates in the competitive decision-making process of Hi-Tec”. *Objection* at 2. The Objection further noted that “it appears [the Applicant] reports directly to Mr. Singh, the President, who is undoubtedly engaged in ‘competitive decision-making’ of Hi-Tec.” *Objection* at 3.

On October 20, 2008, the Applicant submitted a supplement to the First Application (“Application Supplement”). The Application Supplement included a narrative statement; however, it again failed to identify the person or persons to whom the applicant reports at Hi-Tec and the position and responsibilities of those persons. The Application Supplement again confirmed that the Applicant is “not an employee” of Hi-Tec. *See Application Supplement, Attachment A* at 1, *quoting Counsel for Protester Letter of October 14, 2008* at 3.

On October 21, 2008, the Program Office filed its response (“Supplemental Response”) to the Application Supplement. In that Supplemental Response the Program Office renewed its Objection to the Applicant's admission to the Protective Order and questioned “how it is that [the Applicant] is filing an application for admission under a Protective Order as In-House Counsel for Hi-Tec, while at the same time he states: ‘I am not an employee of [Hi-Tec].’” *See Supplementary Response* at 1. On October 23, 2008, counsel for Hi-Tec filed yet another supplement to his application (“Second Supplement”) taking issue with the Program Office’s challenge to his status as an in-house counsel for Hi-Tec, and admitting that “in the broadest meaning of the word ‘report’ [sic], I report to him [the President of Hi-Tec].” *Id.* at 2.

II. Discussion

As discussed above, the characterizations of Applicant’s relationship to Hi-Tec have varied during these Protests. He was identified initially in the Protests as “Protester Designee.” *See Protest* at 1. No mention was made in the Protests of his legal representation of Hi-Tec. In a letter to the ODRA of October 7, 2008, he was identified as “not an employee” but a “consultant” to Hi-Tec. *See Letter* at 3. Ultimately, as noted above, he was identified to the ODRA as: “sole practitioner”, “corporate counsel”, and “in-house counsel”. *See First Application* at 1, 2. Notwithstanding this apparent evolution, the ODRA will evaluate the matter based on representations made by the

Applicant in the First Application and Application Supplement on the ODRA's standard In-house Form.

It is well established that status as an in-house counsel does not in and of itself present a bar to admission under a Protective Order. *Protest of Camber Corporation and Information Systems and Network Corporation*, 98-ODRA-00079 and 00080 at 7. Rather the counsel's activity, relationship with the party represented and the circumstances determine admissibility. *Id.* at 7-8 citing *U.S. Steel Corporation v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984). As we have previously noted "[a]lthough it is normally more difficult for in-house counsel to gain admission under a protective order, admission is possible where the record shows that the in-house counsel does not participate in competitive decisionmaking and that there is no otherwise unacceptable risk of inadvertent disclosure of protected information." *Id.* at 9. As the ODRA has further ruled, "[w]here the facts show there is an unacceptable risk of inadvertent disclosure because the in-house counsel advises his or her company's competitive strategist, admission of an in-house counsel to a protective order will be denied." *Id.* In *Camber*, the ODRA denied admission to an outside general counsel and an in-house counsel to an ODRA protective order based on their "close link to [the] competitive decisionmakers." *Id.*

In the instant case, it is undisputed that the Applicant is the sole in-house counsel for Hi-Tec. See *Second Supplement* at 2. Further it is undisputed that he answers to only the President of Hi-Tec. *Id.* The ODRA has no basis to question the integrity of the Applicant or his good intentions with respect to this matter. However, as with the case of the in-house counsel applicant in *Camber*, we conclude that while the Applicant here "has yet to be involved in providing competitive decisionmaking advice, there is no reasonable assurance he will not be used in that manner in the future. With his background in government contracts and with no other . . . attorney handling Government contracts issues, the likelihood would appear high that he will be called upon to provide advice in connection with bidding and proposals for future Government contract work." *Protest of Camber, supra* at 10. As was the case with the in-house counsel in *Camber*,

the Applicant's principal contact within the company is a corporate officer. In this case, that corporate officer is the President of Hi-Tec, the chief competitive decisionmaker for the Company. Were we to admit the Applicant here, "he would be faced with carrying the untenable burden of having to 'mentally compartmentalize' the potentially relevant information that would be nondisclosable to his colleagues under the ODRA Protective Order, whenever they seek competition-related advice from him." *Id.* Under the circumstances, and given that the Applicant is the sole in-house counsel for Hi-Tec and reports directly to the President of the Company, in the ODRA's view he is not sufficiently insulated from the decisionmaking process. His admission to the Protective Order thus would present an unacceptable risk of inadvertent disclosure of proprietary or competition sensitive information.

III. Conclusion

For the forgoing reasons, the Application of the In-house counsel for Hi-Tec for admission to the Protective Order in these Protests is denied. Hi-Tech is, and always has been, entitled to retain the services of outside counsel and to have that counsel apply for admission to the Protective Order.

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November 10, 2008