

# Office of Dispute Resolution for Acquisition

## Federal Aviation Administration

Washington, D.C.

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Protests of

Camber Corporation and

Information Systems & Networks Corporation

Under Solicitation DTFA01-96-R-11087

ODRA Docket Nos. 98-ODRA-00079 and 98-ODRA-00080 (Consolidated)

### **DECISION ON RECONSIDERATION OF DENIAL OF ADMISSIONS TO PROTECTIVE ORDER**

#### **I. INTRODUCTION**

In a decision dated July 7, 1998 (the "Decision"), the Office of Dispute Resolution for Acquisition ("ODRA"), ruled on four applications for admission to the ODRA Protective Order in these consolidated protests. In the Decision, the assigned ODRA Dispute Resolution Officer ("DRO") approved applications of two attorneys for protester Camber Corporation ("Camber"), i.e., Messrs. Alan M. Grayson and Ira E. Hoffman, and denied the applications of two attorneys representing protester Information Systems & Networks Corporation ("ISN"), i.e., Messrs. Norman H. Singer and Robert M. Cozzie. On

July 9, 1998, ISN submitted a Request (the "Request") that the ODRA reconsider the Decision regarding Messrs. Singer and Cozzie or, in the alternative, "issue a final agency decision from which an appeal may be taken before the U.S. District Court (District of Columbia)." ISN Request at 1. The ODRA, through its Director, has considered the Request, and for the reasons set forth below, affirms the July 7, 1998 Decision of the DRO.

## **II. DISCUSSION**

As an initial matter, it should be noted that, under the Federal Aviation Administration's Acquisition Management System ("AMS"), a final agency decision on a bid protest or contract dispute is issued by the Administrator of the FAA at the conclusion of a case. Final decisions are appealable only to a United States Court of Appeals, either for the District of Columbia Circuit or for the circuit in which the appellant resides or has its principal offices. *See* 49 U.S.C. §46110.

In accordance with the AMS, the ODRA has authority to administer protests and issue interlocutory orders and decisions in pending matters. The ODRA does not refer interlocutory decisions to the Administrator, absent compelling circumstances, until it makes findings and a recommendation for a final agency decision concerning the underlying case. To routinely refer such matters earlier in the adjudication process would only result in delayed, piecemeal litigation, which is inconsistent with the ODRA's charge to administer a timely, efficient dispute resolution process.

Moreover, in terms of the instant case, it would be manifestly unfair to the FAA Program Office, the awardee Advanced Management Technology, Inc. ("AMTI"), or the co-protester Camber, to delay the resolution of the protests, pending a final decision or appeal concerning the admissions of Messrs. Singer and Cozzie. In that regard it should be noted that, subsequent to the issuance of the Decision, ISN sought and immediately obtained admission of an independent outside counsel to the Protective Order.

### **A. The Applicable Standard On Reconsideration**

In its Request, ISN asserts that the DRO's denial of the Singer and Cozzie applications was "arbitrary and capricious, or an abuse of discretion, and is unsupported in fact or law." Request at 1. The quoted language represents the standard of review that is applied to final agency decisions under the Administrative Procedure Act, 5 U.S.C. §§701-706 ("APA"). The ODRA has not previously issued a written decision on this issue. However, the procedures employed by other bid protest forums are instructive as to the appropriate reconsideration standard.

The General Accounting Office Bid Protest Regulations, which specifically contemplate motions for reconsideration, require that a party seeking reconsideration demonstrate that the decision contains either errors of fact or law, or presents information not previously considered that warrants reversal or modification of the GAO decision. 4 C.F.R. §21.14(a) (1997). *See Intelligent Decisions, Inc. -- Reconsideration*, Comp. Gen. Dec. B-274626.3 (May 15, 1997), 1997 U.S. Comp. Gen. LEXIS 164, 97-1 CPD ¶185. Mere disagreement with a ruling and repetition of original arguments will not satisfy this standard. *Id.*, citing *R.E. Scherrer, Inc. -- Recon.*, Comp. Gen. Dec. B-231101.3, Sept. 21, 1988, 88-2 CPD ¶274 at 2.

The General Services Administration Board of Contract Appeals ("GSBCA") took a similar approach when asked to reconsider its rulings. The GSBCA standard was set forth

in *Electronic Data Systems Corp. v. Department of State*, GSBCA No. 11593-P-R, 92-1 BCA 224,763, 1992 BPD ¶27 as follows:

Motions for reconsideration should not be routine requests of losing parties. Mere disagreement with the result of a decision, or the belief that the decision is in error, does not warrant reconsideration. Nor will a request for reconsideration be granted on the basis of simple reiteration of arguments raised and rejected in the underlying decision.

*Id.*, 88-2 BCA at pp. 123,555 - 123,556, 1992 BPD ¶227 at p. 2; *see also Integrated Systems Group, Inc. v. Department of Health and Human Services*, GSBCA No. 13281-P-R, 1995 GSBCA LEXIS 313, 95-2 BCA ¶27,991.

In reviewing requests for reconsideration of its decisions and orders, the ODRA similarly will require that the moving party demonstrate either: (1) clear errors of fact or law in the underlying decision; or (2) previously unavailable information warranting reversal or modification. The ODRA will not entertain such requests as a routine matter. Nor will it consider requests demonstrating mere disagreement with a decision, or restatement of a previous argument.

**B. The Application of Norman H. Singer, Esq.**

ISN's Request is conspicuously silent concerning Mr. Singer's recent election as a Corporate Officer of the company. The record demonstrates, however, that Mr. Singer holds the positions of Corporate Secretary as well as General Counsel. ISN cites to no bid protest decisions admitting a person holding such positions to a protective order, and we are aware of none. Moreover, ISN's Request does not attempt to distinguish the instant case from the situation in *Allied Signal Aerospace Company*, Comp. Gen. Dec. B-250822, B-250822.2, 1993 U.S. Comp. Gen. LEXIS 268, 93-1 CPD ¶201, February 19, 1993, wherein the Comptroller General denied access under its protective order to one private lawyer who was Assistant Secretary to various *affiliates* of the intervenor-awardee. As the DRO correctly pointed out, there would be an even greater risk of inadvertent disclosure of confidential information here than was the case in *Allied Signal*.

Nonetheless, ISN takes issue with the DRO's conclusion that the Singer Affidavit evidenced a "close link to ISN's competitive decisionmakers." It argues that Mr. Singer's representation of ISN is "predicated upon the fact that his law firm has been retained by ISN to manage the legal affairs of the company, including the supervision of its in-house **litigation** counsel." Request, at 5 (emphasis supplied). ISN's use of the term "**litigation** counsel", as a modifier to describe the in-house legal staff at ISN, is not consistent with its earlier submissions herein. Mr. Singer's affidavit, provided in response to the DRO's request of July 2, 1998, does not describe Mr. Singer's own role and that of the in-house attorneys at ISN as being limited to "litigation." Rather, it indicates that Mr. Singer has represented ISN in connection with litigation, and "in various corporate . . . matters since May 15, 1997." Singer Affidavit, ¶7. Mr. Singer's affidavit also states that his "duties are to supervise the **in-house Legal Department** and responsibility for the **overall legal affairs of the company**." *Id.*, ¶8 (emphasis added). Mr. Cozzie's application indicates

that twenty-five percent of his duties involve non-litigation and that he and other in-house counsel report to Mr. Singer, whom he refers to as "retained outside General Counsel." Cozzie Application, Detailed Narrative at 5(a),(b).

ISN also attempts to distinguish between the provision of "legal advice" and "business advice." It states that Mr. Singer's responsibilities relate to "legal affairs of the company as the law firm's client, not the business details" and that he "would have no use for the protected information anyhow." Request, at 5 (emphasis in original). However, it is not the use of the information by Mr. Singer that concerns the ODRA, but rather the potential for its inadvertent disclosure by Mr. Singer through his provision of legal services to ISN as its General Counsel or other services as its Secretary. The Comptroller General voiced similar concerns in *McDonnell Douglas Corporation*, Comp. Gen. Dec. B-259694.2, B-259694.3, 1995 U.S. Comp. Gen. LEXIS 523, 95-2 CPD ¶51, June 16, 1995, noting that an attorney in such situations "would need to be continuously aware of, and to mentally compartmentalize, the potentially relevant information that would be non-disclosable to his colleagues, whenever they ask for advice." *See also Magnavox Electric Systems Company*, Comp. Gen. Dec. 258037, *et al.*, 1994 U.S. Comp. Gen. LEXIS 933, 94-2 CPD ¶227, December 8, 1994.

Under these circumstances, Mr. Singer's dual status as Corporate Secretary and General Counsel aligns him with ISN's competitive decisionmakers and creates an unacceptable risk of inadvertent disclosure should he be admitted to the Protective Order.

### **C. The Application of Robert M. Cozzie, Esq.**

In the July 7, 1998 Decision, the DRO expressed concerns regarding the likelihood of Mr. Cozzie providing advice to ISN on bids and proposals. These concerns were based, in part, on the DRO's perception regarding the "fluid nature of the ISN Legal Department over the past year . . . ." That perception stemmed from the fact that two of a total of four ISN staff attorneys had departed within that short timeframe, *i.e.*, Mr. Bobbie Melvin, the in-house General Counsel, and Mr. Carlos Cancel, who was described by

Mr. Melvin as the "primary legal advisor to the [ISN] contract administrators." *See* Exhibit A to Camber's Response to ODRA's Questions and Cozzie Supplemental Affidavit, ¶3.

Contrary to ISN's argument, the DRO's concerns are well founded. Mr. Cozzie's application states that he is currently the **only** in-house counsel who deals in any way with "procurement-related matters." Cozzie Application, ¶5(c). Mr. Melvin's application under a GAO protective order stated that there was previously an attorney on his staff at ISN (Mr. Cancel) who "sometimes [was] involved in reviewing certain portions of proposals for compliance with the RFP." Exhibit A to Camber's Response to ODRA's Questions. Although Mr. Cozzie has advised that Mr. Cancel's position was "terminated," he also has stated that Mr. Cancel's duties regarding the provision of legal advice on bidding matters have yet to be re-assigned. Cozzie Supplemental Affidavit, ¶3. Given

these facts concerning the operation of the ISN Legal Department, the DRO had justified concerns about Mr. Cozzie's role.

Inasmuch as Mr. Cozzie is not clearly segregated from competitive decisionmaking, the single case cited in support of his application, *Robbins-Gioia, Inc.*, Comp. Gen. Dec. B-274318, *et al.*, 96-2 CPD ¶222, is not factually analogous. Moreover, there was no evidence in *Robbins-Gioia, Inc.* that the General Counsel of Lockheed, who supervised the in-house attorney in question, had attempted to gain access to protected materials and to serve as lead counsel in the protest, as Mr. Singer has in this case.

Finally, ISN also complains in the Request that the DRO "concluded that there may be an advertent disclosure of the protected materials by Mr. Cozzie, because he will not be able to withhold the information." Request at 2. This argument mischaracterizes the DRO's Decision. The DRO's appropriate concern was that, if and when Mr. Cozzie is called upon by ISN to provide advice about future solicitations, it might well be impossible for such advice to be devoid of insight into the operations of competitors that might be gained through exposure to protected materials. *See McDonnell Douglas Corporation, supra; Magnavox Electric Systems Company, supra.*

### **III. CONCLUSION**

ISN has not demonstrated that the Decision contained errors of fact or law that would warrant a reversal, or even a modification. *See Intelligent Decisions, supra.* The Request presents no new information, but merely disagrees with the DRO's analysis and repeats previously rejected arguments. Accordingly, the ODRA hereby affirms its July 7, 1998 Decision and again denies the applications of Messrs. Singer and Cozzie for admission to the Protective Order in these consolidated protests. This decision, and the Decision of July 7, 1998, will become final and appealable upon the issuance of a final decision by the FAA Administrator in the underlying protests.

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For the FAA Office of Dispute Resolution for Acquisition

Date: July 17, 1998