

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

<u>Protest of</u>	)	
	)	Docket No. 10-ODRA-00536
Advanced Sciences & Technologies, LLC	)	
	)	
<u>Pursuant to Solicitation DTFAC-09-R-00023</u>	)	

**DECISION ON REQUEST FOR SUSPENSION**

Advanced Sciences & Technologies, LLC (“AS&T”) filed a Protest with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on July 23, 2010 (“Instant Protest”). The Instant Protest challenges a contract award made to Columbus Technologies and Services, Inc. (“Columbus”) after a reevaluation mandated by FAA Administrator Order Number ODRA-10-541 (“Administrator’s Order”). The Administrator’s Order directed the William J. Hughes Technical Center (“Center”) to take the remedial action of re-evaluating the proposals of AS&T and Columbus based on the sustaining of the Protest of Columbus, ODRA case number 09-ODRA-00514. The re-evaluation resulted in a determination by the Center to award the contract (“Contract”) to Columbus and terminate AS&T’s contract for the convenience of the government.

In connection with the Instant Protest, AS&T requests that the ODRA suspend and delay any transition of the subject contract from AS&T to Columbus while the Protest is pending (“Suspension Request”). The Program Office filed its Opposition on July 30, 2010. AS&T and the Intervenor, Columbus, filed Replies to the Opposition on August 3, 2010 (“AS&T Reply” and “Columbus Reply,” respectively). With the permission of the ODRA, AS&T filed a supplemental reply (“AS&T Supplemental Reply”) on August 6, 2010, to which the Center and Columbus filed supplemental replies on August 9, 2010 (“Center Supplemental Reply” and “Columbus Supplemental Reply,” respectively). For the reasons discussed below, the ODRA finds that AS&T has not met its burden to

demonstrate compelling reasons to suspend procurement activities during the pendency of this Protest. The ODRA therefore declines to impose a temporary suspension, and will not recommend that the FAA Administrator suspend acquisition activities or contract performance pending the resolution of this matter.

## **I. Standard of Review**

Under the FAA's Acquisition Management System ("AMS"), there is a presumption in favor of continuing procurement activities and contract performance during the pendency of bid protests. *Protest of Systems Atlanta, Inc.*, 10-ODRA-00530 (Decision on Request for Suspension, dated July 12, 2010), *citing 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. Section 17.13(g). Absent a showing of compelling reasons by the protester, a suspension of procurement activities and contract performance will not be imposed during the pendency of a protest. *Id.*, *citing Protests of Hi-Tech Systems, Inc.*, 08-ODRA-00459 and 00460 (Decision on Protester's Request for Suspension, dated September 15, 2008).

In order to determine whether compelling reasons exist to issue a suspension, the ODRA considers the following four factors: (1) whether the Protester has alleged a substantial case worthy of further adjudication; (2) whether a stay or lack of a stay would be likely to result in irreparable injury; (3) the relative hardships on the parties; and (4) the public interest. *Id. citing Protest of Crown Communications*, 98-ODRA-00098 (Decision on Suspension, dated October 9, 1998). The first factor is de-emphasized in favor of a balancing of the other three factors. *Id. citing Hi-Tech Systems, Inc.* (Decision on Suspension Request), *supra*.

## **II. Discussion**

AS&T argues that there are compelling reasons to suspend activities with respect to the Contract, which is for the provision of technical services in support of facilities

operations, software maintenance and development support, as well as for library and laboratory support at the Center. *Id.* In this regard, AS&T submits:

[T]hat this matter presents compelling and unique circumstances where AS&T was the original awardee under the Solicitation, and has been performing the Contract which has now been awarded to another contractor pursuant to a new evaluation conducted after the prior protest by Columbus. The result is the potential transition of the same Contract and various personnel three times within a short period would cause significant expense to the government and contractors, delay and disrupt the performance of the Contract, and inconvenience and burden employees, not the least being the uncertainty of employment and continued changes and potential disruptions in healthcare coverage or the use thereof.

*Suspension Request* at 2.

**A. Factor One: Substantial Case**

AS&T asserts that it has raised a substantial case on the face of its Protest allegations. In this regard, AS&T contends that the “determination on re-evaluation that Columbus presented the best value to the government though AS&T was the lower priced offeror was predicated upon the sole distinction that AS&T was scored ‘good’ for the least important of all adjectival rated technical factors (Key Personnel) while Columbus was rated ‘excellent.’” *Suspension Request* at 3. AS&T argues that this “good” rating was arbitrary and capricious and an abuse of discretion, and resulted in a flawed cost/technical tradeoff analysis on re-evaluation. *Id.*

In the ODRA’s view, AS&T’s Protest allegations provide a basis on which to develop and consider a record to determine whether the challenged award decision has a rational basis. *Protest of Systems Atlanta, Inc., supra.* Inasmuch, however, as the “substantial case” factor of the suspension test is de-emphasized in favor of balancing the other factors of irreparable injury, relative harm and the public interest, the ODRA’s analysis will address these remaining three factors. *Id.*

**B. Factor Two: Irreparable Injury**

AS&T asserts that the facts in this case present “unique circumstances” and it will suffer irreparable harm as a result of significant administrative burdens associated with three potential transitions of work and personnel. *AS&T Reply* at 10-11. Specifically, AS&T identifies the harm that it would suffer in connection with the “administrative burden of terminating employees, cancelling benefits providing legal notices such as COBRA notices and the like,” as well as “interference with the relationships between employer and employee” that would, as a consequence of three transitions, manifest itself as the potential loss of key qualified individuals due to job insecurity and disruption of benefits. *Suspension Request* at 6; *AS&T Reply* at 10. AS&T further identifies harm to the Government as the result of “additional costs associated with the termination for convenience, delay and disruption in contract performance” *Id.*

The Columbus Reply counters the AS&T Suspension Request by asserting that AS&T’s arguments assume that “its protest will be successful and it will win the contract via another reevaluation.” *Columbus Reply* at 2-3. Columbus asserts that “the very nature of government procurements assumes transitions between contractors” and “the situation AS&T now faces is no different than that faced by any other incumbent contractor that loses a competition for follow-on contract work.” *Id.* at 3.

With respect to AS&T’s assertions regarding the potential loss of employees due to job insecurity and disruption of benefits, the ODRA finds these to be speculative in nature. Moreover, it is well established that “loss of employees or other economic loss, standing alone, is not enough to demonstrate compelling reasons in support of a stay. *Protest of Crown Consulting, Inc.*, 06-ODRA-00372, Decision on Protester’s Request for Suspension. At most, AS&T’s argument is centered on the costs and administrative burden of transitioning the Contract from AS&T to Columbus. *Suspension Request* at 6. It is well established in the ODRA case law that mere economic loss of the kind asserted here is not sufficient to demonstrate irreparable injury in support of a stay. Even

assuming for purposes of the Suspension Request that AS&T's assertions with respect to the increased cost and administrative burden are true, AS&T still has not demonstrated that it would be irreparably injured, *e.g.*, that the survival of its business is threatened. *Protest of Crown Communications, Inc., supra*. If the ODRA were to issue a suspension on this basis, it would be required to impose a suspension in virtually every case, thereby undermining the AMS presumption against suspensions. *Protest of Systems Atlanta, Inc., supra*.

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

AS&T also asserts that the relative hardships on the parties favor a suspension because a suspension would pose “no potential harm to Columbus” other than a delay in the start of a new contract if the Instant Protest is not successful. In comparison, AS&T asserts that its employees would suffer substantial potential hardships as a result of the disruption of another transition and cites to changes in health care providers or benefits. *AS&T Reply* at 9. AS&T also states that a transition to Columbus increases the cost and burden on the government and the taxpayer. *AS&T Reply* at 8. The Columbus Reply notes that to date it has invested considerably in the transition process, stating: “Columbus personnel have traveled from California to the FAA on numerous occasions over the last several weeks to facilitate the transition” and, among other things, is in the process of finalizing offer letters and hiring contract employees. *Columbus Reply* at 4.

On balance, considering the possible impacts on AS&T, Columbus and the Center, the ODRA concludes that the relative hardships favor continuation of the transition to Columbus during the pendency of the Protest. Even if AS&T ultimately prevails in this Protest and is awarded the contract, it would have the opportunity to re-hire its employees and restore their benefits. Although potentially inconvenient, the possible impacts that AS&T describes as resulting from the transition simply reflect the “usual distress of a disappointed bidder.” *Crown Communications, Inc., supra*.

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

AS&T further asserts that the public interest is negatively affected because the transition of the Contract and employees imposes additional cost and expense upon the government and disruption in contract performance. AS&T contends that since a stay would potentially avoid what it characterizes as two needless transitions and delays in contract performance, it would be in the public's best interest to allow AS&T to continue contract performance while the Protest is pending. In addition, AS&T states in its Supplemental Reply:

Indeed, it has come to AS&T's attention that various employees are extremely concerned with the benefits (or the cost thereof) that they will be receiving upon transition to Columbus and expressed such discontent to the government. .... [and that] a letter to the government by employees indicated that they felt their livelihoods were threatened and the benefits despicable. From the standpoint of the "public interest", if there is discontent on the part of employees, such creates the risk of the loss of employees. While employee content or discontent is not generally relevant to contract award decisions, here the issue is whether a stay should be granted. It is submitted that a short delay would serve the public interest where, in addition to the potentially needless disruption imposed upon employees, there are also circumstances that indicate the transition may not be as smooth as assumed and the possibility of the loss of employees exists.

*AS&T Supplemental Reply* at 1.

The Columbus Supplemental Reply takes issue with AS&T's assertions that the benefits it offers employees are inadequate, and argues that "AS&T offers this information merely to rehash its prior arguments that a stay is warranted because" of delay, disruption and the possibility of losing employees. *Columbus Supplemental Reply* at 1. The Center, in its Supplemental Reply, contends that the employees' level of satisfaction with benefits is not a proper consideration for determining whether compelling reasons exist for a suspension. *Center Supplemental Reply* at 1.

In the ODRA's view, the speculative nature of these assertions of potential impacts and possible cost and disruption to AS&T and the Center which might result from the transition of the work to Columbus do not outweigh the public interest in the integrity of the procurement process. AS&T's Suspension Request ignores the fact that the adjudication of the Columbus Protest resulted in a finding that the contract award to AS&T had been improperly made pursuant to a flawed evaluation. The Center's corrective action was mandated by the Administrator's Order and resulted in the award of the Contract to Columbus. Under such circumstances, the continued performance of the AS&T Contract does not serve the public interest. *See Cincom Systems, Inc. v. United States*, 37 Fed.Cl. 266, 269 (1997); *Magellan Corp. v. United States*, 27 Fed. Cl. 446, 448 (1993). Rather, the public interest is best served by a prompt adjudication of the merits of the Instant Protest, while the work is transitioned to Columbus. *Protest of Systems Atlanta, Inc., supra, citing Protest of Sentel* (Decision on Suspension Request), *supra*. Moreover, the performance of the Contract by Columbus during the pendency of the Instant Protest will not impact the ODRA's ability to evaluate the merits of AS&T's allegations, or preclude the ODRA from recommending a meaningful remedy, in the event that AS&T prevails. *Protest of Apptis, Inc.*, 10-ODRA-00535 (Decision on Request for Suspension, dated August 3, 2010).

### **III. Conclusion**

Based on the record, after balancing the applicable factors, the ODRA concludes that AS&T has not met its burden of demonstrating that compelling reasons exist to stay contract performance during the pendency of this Protest. The ODRA therefore declines to order a temporary stay, and will not recommend that the FAA Administrator issue a permanent suspension.

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

August 10, 2010