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

Protest of)
)
A3 Technology, Inc.) Docket No. 21-ODRA-00890
)
Pursuant to Solicitation No. 693KA9-20-R-00001)

DECISION ON REQUEST FOR SUSPENSION

This matter arises from a protest filed with the Federal Aviation Administration’s (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) by A3 Technology Inc. (“A3T”). The protest challenges the outcome of corrective action taken by the FAA Product Team in response to prior protests filed by Cavan Solutions (“Cavan”) and A3T, respectively docketed as 21-ODRA-00882 and 20-ODRA-00883.¹ The corrective action involved a re-evaluation of proposals and a new source selection decision that resulted in the award of three large, and two small, multiple award, indefinite delivery/indefinite quantity (“IDIQ”) task order contracts.² Following the re-evaluation, the FAA Product Team awarded two small business contracts to Regulus Group, LLC (“Regulus”) and Cavan, but did not award a contract to A3T.³ The ODRA permitted Regulus and Cavan to participate as interveners in this protest under 14 C.F.R. § 17.3.⁴

The contracts awarded under Solicitation No. 693KA9-20-R-00001 (“solicitation” or “SIR”) provide Program Support Services (“PSS”) for the FAA’s Air

¹ Protest at 20-21; Protest Ex. N.

² *Id.*

³ Protest at 4; Protest Ex. N.

⁴ *See* ODRA Initial Status Conference Memorandum, dated August 2, 2021.

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Traffic Organization's Program Management Organization ("PMO").⁵ The contracts provide a wide range of technical and professional services to support FAA infrastructure programs in transforming, modernizing and sustaining the National Airspace System ("NAS").⁶ The contracts have a 7-year period of performance and combined value in excess of \$1 billion, of which 33% the FAA intends to set aside for small businesses.⁷

A3T seeks a stay of performance for the contracts awarded to Regulus and Cavan, but not for the contracts awarded to the three large businesses.⁸ The Product Team filed a response opposing A3T's suspension request on August 2, 2021.⁹ On August 4, 2021, A3T, Regulus and Cavan filed comments to the Product Team's response.

For the reasons discussed below, the ODRA finds that A3T has not demonstrated compelling reasons to suspend performance of the contracts awarded to Regulus and Cavan. The ODRA therefore will not impose a temporary stay or recommend that the FAA Administrator order a suspension.

I. Standard of Review

Under the FAA's Acquisition Management System ("AMS"), procurement activity and contract performance ordinarily continues during the pendency of bid protests.¹⁰ The ODRA Procedural Regulation permits a protester to request a

⁵ Protest Ex. A, SIR Amend. 6 at 1; Product Team Response, Ex. 3, Declaration of Evaluation Team Lead V. Bruni, dated July 30, 2021, at ¶¶ 4-5.

⁶ *Id.*

⁷ Protest Ex. A, Amend. 6 at 1, 82.

⁸ Protest at 87.

⁹ Product Team Response at ¶ 4.

¹⁰ 14 C.F.R. § 17.13(g) (2020); *Protest of A3 Technology, Inc.*, 21-ODRA-00882 (Decision on Request for Suspension, February 4, 2021).

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suspension at the outset of a protest based on compelling reasons.¹¹ The ODRA considers the following factors to determine whether compelling reasons exist:

- (i) The protester has alleged a substantial case;
- (ii) The lack of a suspension would be likely to cause irreparable injury;
- (iii) The relative hardships on the parties favor a suspension; and
- (iv) That a suspension is in the public interest.¹²

The ODRA relies on well-established precedent for granting injunctive relief to guide its interpretation of “compelling reasons,” applying a “give-and-take” approach to the four factors with the weight of each factor dependent on the nature of the facts presented.¹³

II. Discussion

A. Substantial Case

When the ODRA reviews the first factor of the suspension test to determine whether the protest alleges a substantial case, it makes no final decision as to the merits of the underlying protest.¹⁴ The weight or degree of the first factor in the ODRA’s analysis varies in light of the other three factors, and “it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.”¹⁵

The Product Team does not dispute that A3T has alleged a substantial case to the extent that there is “a fair ground for litigation’ that justifies a ‘deliberate

¹¹ 14 C.F.R. § 17.15(d) (2020). The burden of proof rests with the protester. *Id.* at (d)(2).

¹² 14 C.F.R. § 17.15(d)(2)(i)-(iv) (2020).

¹³ *Protest of A3 Technology, Inc. supra*, (citing *Protest of Crown Communications, Inc.*, 98-ODRA-00098 (Decision on Suspension dated October 9, 1998)).

¹⁴ *Protest of Thomas Company, Inc.*, 16-ODRA-00781 (Decision on Suspension, December 16, 2016).

¹⁵ *Protest of A3 Technology, Inc.*, 21-ODRA-00882 (Decision on Request for Suspension, February 4, 2021).

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investigation’ by ODRA.”¹⁶ While A3T’s protest raises many issues, none are so strong as to demonstrate a “strong likelihood of success on the merits,” which could justify placing greater weight on the first factor.¹⁷ Rather, the ODRA finds that A3T’s protest satisfies the first factor as it makes out a substantial case and provides fair grounds for litigation.

B. Irreparable Injury

ODRA Procedural Regulations require a protester to establish that its injury would be “irreparable” in the absence of a suspension.¹⁸ ODRA caselaw defines “irreparable injury” to be “both certain and great, actual and not theoretical.”¹⁹ It is well established that irreparable harm does not include speculative and general economic harms commonly suffered by any disappointed bidder, such as lost profits, loss of employees, loss of the right to compete for task orders; nor does it include harms dependent on future actions of procurement officials.²⁰ Moreover, allegations of irreparable harm must be supported by competent evidence rather than rely only on argument of counsel.²¹

A3T asserts that it will suffer irreparable injury in that its competitive standing in the re-evaluation and new award decision will be diminished.²² A3T’s further points to the “irreparable” loss of its opportunity to compete for work “on the

¹⁶ Product Team Response at ¶ 2.1; Protest at 88.

¹⁷ *Protest of A3 Technology, Inc., supra*, citing *Protest of Mid Eastern Builders, Inc. 05-ODRA-00330 (Order for Temporary Stay, dated January 28, 2005)*

¹⁸ 14 C.F.R. § 15(d)(2).

¹⁹ *Protest of A3 Technology, Inc., supra*, citing *Protest of Grant Thornton LLP, 19-ODRA-00858 (Decision on Request for Suspension, June 28, 2019)*.

²⁰ *Protest of A3 Technology, Inc., supra*, citing *Protest of 36th Ave. Co-Tenancy, International Office Building, JL Office Tower, LLC and SJ/JL Calais Office II, 17-ODRA-00798, -00799, -00800 and -00801 (Decision on Suspension Request dated September 8, 2017 at 2)*.

²¹ *Id.*

²² Protest at 88-89.

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order of \$300 million.”²³ The evidence in the record shows the solicitation contemplates the award of multiple IDIQ contracts, under which task orders can be issued at any time during a potential 7-year performance period.²⁴ The contract value is over \$1 billion and no contractor is guaranteed any work beyond the \$10,000 guaranteed minimum.²⁵ Furthermore, there is no evidence that the FAA intends to meet the entirety of its small business set-aside goal of 33% during the pendency of these protest proceedings.

As discussed above, the harms A3T alleges are no different from those commonly suffered by any disappointed bidder and do not qualify as “irreparable.” In post-award protests, nearly every disappointed offeror claims that it was denied a fair opportunity to compete and that continued performance by the awardee will cause it lost profits, loss of employees, loss of the right to compete for task orders, and the like. As for A3T’s claims that it will be deprived irreparably of an adequate remedy if its protest is meritorious, it is well established that the ODRA has broad authority to recommend relief “that is appropriate under the circumstances.”²⁶

It also is well established that where the Product Team elects to continue performance it assumes the risk of an adverse adjudicative outcome.²⁷ In this regard, the Product Team affirms for the record that it is “aware of and understands

²³ *Id.*

²⁴ *Id.* at ¶8.

²⁵ *Id.*; Product Team Response, Ex. 2, SIR § B.6

²⁶ Protest at 88; 14 C.F.R. § 17.23(a)(8) (2020); *Protest of A3 Technology, Inc.*, supra, citing *Protest of Patriot Taxiway*, 18-ODRA-00832 (Decision on Suspension, May 7, 2018).

²⁷ *Protest of Whitestone Group, Inc.*, 17-ODRA-00796 (Decision on Request for Suspension, August 3, 2017).

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the risks associated with continuing procurement activities” and accepts the risks associated with a successful protest.”²⁸

Given the 7-year duration and the IDIQ multiple award nature of the contract, the ODRA simply does not find A3T’s alleged losses to be irreparable if its protest is successful. The ODRA therefore concludes that A3T has not satisfied the second factor of the four-part test, inasmuch as it fails to demonstrate injury that meets the definition of irreparable.

C. The Relative Hardships

Since A3T presents a “fair ground for litigation” but no irreparable injury, the ODRA’s analysis of the relative hardships focuses on the comparison between the alleged injury to the A3T weighed against the injury that a suspension would cause to the FAA, Regulus, Cavan and the public interest.²⁹

In response to the earlier protests filed concerning this acquisition, the FAA agreed to suspend the performance of all the contracts awarded to large and small businesses while it conducted the corrective action.³⁰ Inasmuch as A3T limits its suspension request only to performance by the small businesses, the FAA presumably could still satisfy its PSS requirements under the large business contracts. The FAA identifies no direct hardship that would result from a suspension of only the small business contracts. The record shows the FAA “does not have specific awards identified for small businesses” except for its small business participation goals.³¹ The only hardship identified by the FAA is losing

²⁸ Product Team Response, Ex. 3, Declaration of Evaluation Team Lead V. Bruni, dated July 30, 2021, at ¶14.

²⁹ *Protest of A3 Technology, supra.*

³⁰ Product Team Response, Ex. 3, Declaration of Evaluation Team Lead V. Bruni, dated July 30, 2021, at ¶ 11.

³¹ *Id.*; Ex 1, SIR § M.1.B; *see also* Exhibit 3, Declaration of Technical Evaluation Lead V. Bruni, dated July 30, 2021, at ¶ 8.

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out on the “best fit” to meet technical requirements, reduced available workforce and potential disruption.³² The ODRA concludes that the FAA would suffer minor hardship from suspending performance of the small business contracts.

While Cavan and Regulus argue that they would be harmed by a suspension, their arguments are not supported by evidence. However, as a matter of law, by virtue of the Product Team’s decision to award Cavan and Regulus contracts following the corrective action, they currently have the opportunity to compete for task order work and provide employment for their personnel as a matter of right. A suspension would deprive Cavan and Regulus of those rights and benefits due; thereby causing them actual harm. A3T has not met its burden to show that the balance of hardships tips sharply in its favor.³³ Instead, the ODRA finds that the hardship a suspension would impose on the Product Team, Cavan and Regulus collectively is greater than the hardship that A3T would suffer from no suspension. The ODRA thus finds the relative hardships do not favor a suspension.

D. The Public Interest

With respect to the fourth factor, A3T argues that the “public interest in saving taxpayer dollars would be served by the suspension.”³⁴ The public interest also lies in compliance with FAA statutory authority, the ODRA Regulation and AMS policy, which do not contemplate automatic stays of contract performance when a disappointed bidder files a protest.³⁵ Given the absence of proof that A3T would suffer irreparable harm without a suspension, and that the relative hardships do not tip in A3T’s favor, the ODRA finds the interest of the public lies in

³² FAA Response at ¶ 2.3.2.

³³ 14 C.F.R. § 17.15(d)(2) (2020).

³⁴ A3T Comments at 4.

³⁵ *Protest of A3 Technology, supra*.

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continuing performance of the awarded contracts and promptly adjudicating the protest pursuant to 14 C.F.R. § 17.21(m) (2020).

III Conclusion

The ODRA concludes that A3T has alleged a substantial case that provides fair grounds for litigation, but it has not demonstrated that it is likely to suffer irreparable injury in the absence of a suspension. Further, neither the relative hardships nor the public interest favor a suspension in this case. The ODRA, accordingly, declines to order a temporary stay and declines to recommend that the FAA Administrator issue a permanent suspension.

-S-

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

August 6, 2021