PUBLIC VERSION

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

Protest of	)	
	)	
GLOCK, Inc.	)	Docket No. 03-TSA-003
	)	
Pursuant to Solicitation DTSA-20-03-R-00932	)	

DECISION ON PROTESTER'S REQUEST
FOR STAY OF CONTRACT PERFORMANCE

This matter arises in connection with a protest ("Protest") filed with the Federal Aviation Administration Office of Dispute Resolution for Acquisition ("ODRA") by GLOCK, Inc. ("GLOCK") on October 20, 2003. The Protest involves the award of a contract ("Contract") by the Transportation Security Administration ("TSA") to Heckler and Koch, Inc. ("H&K"), arising out of TSA's Solicitation DTSA-20-03-R-000932. The Contract involves the acquisition of handguns for the Federal Flight Deck Officer ("FFDO") Program. GLOCK's Protest includes, *inter alia*, a request "that the Office for Dispute Resolution for Acquisition suspend the award and procurement of Heckler and Koch (H&K) pistols until this Protest is resolved." *See* Protest at 1. The TSA, and H&K as the awardee/intervenor in the Protest, have opposed the request for a stay. For the reasons discussed herein, the ODRA finds no compelling reasons to support a stay in this case. The ODRA therefore declines to recommend that the TSA stay performance of the Contract pending the resolution of this Protest.

I. LEGAL AND FACTUAL BACKGROUND

Under the Department of Transportation Appropriations Act of 1996 (Public Law 104-50, codified at 49 U.S.C. §40110(d)), Congress mandated that the Federal Aviation Administration ("FAA") develop a new acquisition management system ("AMS").

Congress exempted the AMS from existing acquisition laws and regulations including, *inter alia*, the Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, the Competition in Contracting Act of 1982, 41 U.S.C. § 251, *et seq.* and the Federal Acquisition Regulation, Title 48 Code of Federal Regulations. As part of the AMS, the FAA created the Office of Dispute Resolution for Acquisition ("ODRA") to serve as the FAA Administrator's forum for adjudication and resolution of bid protests and contract disputes. The ODRA's Procedural Rules are set forth in the Code of Federal Regulations at 14 C.F.R. Part 17.

When Congress established the TSA through the 2001 Aviation & Transportation Security Act ("ATSA"), 49 U.S.C. §114, it expressly directed the TSA to utilize the FAA's AMS for TSA acquisitions:

> (o) ACQUISITION MANAGEMENT SYSTEM. – The acquisition management system established by the Administrator of the Federal Aviation Administration under section 40110 shall apply to acquisitions of equipment, supplies, and materials by the Transportation Security Administration . . . .

Id. at §114(o). In conformance with this Congressional directive, the TSA utilizes the FAA's AMS for its acquisitions and for acquisition-related dispute resolution. TSA solicitations, including the instant Solicitation, direct offerors and contractors to file protests at the FAA's ODRA.

GLOCK's Protest alleges that the technical evaluation conducted by the TSA was factually inaccurate and irrational. More specifically, GLOCK challenges conclusions reached by the Technical Evaluators in the areas of: (1) the relative safety of the GLOCK and H&K products; (2) the testing of the GLOCK product by the former Immigration and Naturalization Service ("INS"); and (3) the conclusions reached by the Technical Evaluators concerning the "loaded chamber indicator" of the GLOCK product [1] in comparison to the H&K product. *See* Protest, pages 3 –7.

In its Protest, GLOCK requests as a remedy that its product "be re-evaluated by a new

panel led by a new Contracting Officer." The Protest also states: "If technical information on the pistols submitted is required, GLOCK requests that a valid government test such as the through [sic] FBI or DEA test data be used." Protest at 9. GLOCK's Protest further requests "that the TSA follow the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. §253, which requires full and open competitive procedures …." *Id.*

In support of its stay request, GLOCK's Protest alleges that:

> GLOCK will be irreparably harmed if TSA continues to purchase HK pistols during the pendency of this Protest. If GLOCK wins the Protest and is selected as the best pistol in future independent tests, the TSA will have obligated all of the program funds.

Protest at 1. GLOCK also offers to provide "free of charge to the Government, any pistols required for training classes that will be effected [sic] during the period of this Protest and procurement suspension." Protest at 1.

The Opposition filed by the TSA ("TSA Opposition") alleges that the GLOCK stay request does not meet the requirements of Sections 17.15(d) and 17.17 of the ODRA Procedural Rules. *See* TSA Opposition at 2. More specifically, TSA alleges that GLOCK:

> has not set specific compelling reasons for a suspension; it has not supplied all the facts in support of its position or identified persons with knowledge of the facts supporting each compelling reason; it has not identified all documents that support each compelling reason; nor has it clearly identified any adverse consequences to the Protester, the TSA, or any interested party, should the TSA not suspend or delay the procurement.

See TSA Opposition at 2, 3. TSA further alleges that GLOCK "has not shown that there is a substantial likelihood that it will prevail on the merits of its Protest; that it will suffer irreparable harm; that substantial harm to any party interested in the proceedings will not result; and that it is in the public interest (or not adverse to public interest) to grant its request." *Id.* at 3.

TSA further states that the Agency, rather than GLOCK, will be harmed if the Contract is suspended; and that suspension is not in the public interest. TSA's Opposition includes a sworn Declaration of Terry A. Bickham, Jr., TSA's Assistant Administrator for Training and Quality Performance. The Bickham Declaration states that the FFDO training program was established as a result of the mandate of the Arming Pilots Against Terrorism Act ("APATA"), a part of the Homeland Security Act of 2002, Public Law 107-296; and that "the FFDO program is of vital interest to the national security of the United States." *See* Bickham Declaration at ¶3. Bickham asserts that "the acquisition of training, lock boxes, pistols, holsters, pistol simulators were required for the full implementation of the program." *See* Bickham Declaration at ¶4.

Bickham states:

> the FFDO program is absolutely critical in the Department of Homeland Security (DHS) and to the country as yet another layer in the aviation security matrix. APATA clearly marked Congress's [sic] intent to support the program. Weapons for the program are the most immediate requirement for the program.

Bickham Declaration at ¶11. Bickham urges that any stay of Contract performance during the pendency of the Protest would adversely impact the training schedule. *See* Bickham Declaration at ¶12. Finally, the Bickham Declaration confirms that only the base year of the Contract has been performed and that three option years remain. *See* Bickham Declaration at ¶10.

The awardee/intervenor, H&K, filed its own Opposition to GLOCK's stay request. The H&K Opposition essentially mirrors that of the TSA, alleging that the "Protester has not and cannot demonstrate the requisite 'compelling reasons" to suspend the contract." *See* H&K Opposition at 3. The H&K Opposition notes further that GLOCK's allegation that it will be irreparably harmed in the absence of a stay, because all program funds will have been expended, is inaccurate. *Id.*, F.N. 2.

H&K goes on to argue that GLOCK has failed to demonstrate a substantial likelihood of success on the merits and, in terms of alleged irreparable harm, has failed to demonstrate

any threat to its ongoing business. Finally, H&K asserts that the public interest will be harmed by any suspension of contract performance and, in this regard, argues: "The importance of the FFDO program cannot be understated.… A suspension of the contract will effectively halt the FFDO program, a consequence that is severely adverse to the public interest." H&K Opposition at 5, 6.

In accordance with the ODRA Procedural Rules, GLOCK, through counsel, filed a Reply to the TSA and H&K Oppositions on October 22, 2003. In its Reply, GLOCK argues that it has made a substantial showing that: (1) the award to H&K was improper; (2) the lack of a stay will cause irreparable injury to GLOCK as demonstrated by TSA's claim that it must continue to buy H&K pistols; (3) the relative hardships favor a stay "because TSA already has purchased sufficient guns and GLOCK has no objection to TSA acquiring its additional, minimum short-term needs from H&K during the stay"; and (4) the public interest favors a stay, because the GLOCK pistol is a superior weapon available at a lower price. *See* Reply, pp. 1- 8, 9.

II. DISCUSSION

Any consideration of whether a stay should be recommended in this case must begin with the basic principles of the AMS and the ODRA Procedural Rules. In that regard, the ODRA has noted in prior cases:

> The FAA's Acquisition Management System ("AMS") includes a presumption in favor of continuing procurement activities and contract performance during the pendency of bid protests. It expressly provides that contract performance shall continue absent a showing of compelling reasons to suspend or delay. *See* AMS Section 3.9.3.2.1.6. The same presumption is set forth in the ODRA Rules of Procedure. 14 C.F.R. § 17.13(g).

Protest of J.A. Jones Management Services, 99-ODRA-00140, Decision on Protester's Request for Stay of Contract Performance, September 29, 1999. *See Protest of Informatica, Inc.*, 99-ODRA-00144, Decision on Protester's Request for Stay of Contract Performance, October 8, 1999.

The ODRA determines whether compelling reasons exist in support of the stay:

> on a case-by-case basis by looking at a combination of factors including: (1) whether the Protester made out a substantial case; (2) whether a stay or lack of stay is likely to cause irreparable injury to any party; (3) the relative hardships on the parties; and (4) the public interest. Greater emphasis will be placed on the second, third and fourth prongs of the analysis. This approach is consistent with that of the Court of Appeals for the District of Columbia Circuit and provides for a flexible analysis "under which the necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors."

Protest of Crown Communications, 98-ODRA-00098, October 9, 1998. *See also Informatica, supra; Jones supra, quoting from Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d. 841, 844 (D.C. Cir. 1997).

In the instant case, GLOCK raises serious issues concerning the conduct of the technical evaluation. There is no question but that the allegations constitute "a fair ground for litigation and thus for more deliberate investigation" within the meaning of *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., supra* at 841, 844, and prior ODRA decisional authority. Thus, the ODRA will review and consider the complete record to be developed in this matter and determine whether the TSA's actions in connection with the source selection lacked a rational basis, were arbitrary and capricious or constitute an abuse of discretion. *See Protests of Consecutive Weather, Eye Weather***,** *Windsor Enterprises and IBEX Group, Inc.*, 02-ODRA-00250, 02-ODRA-00251, 02-ODRA-00252 and 02-ODRA-00254 (Consolidated).

As noted above, however, the fact that GLOCK ultimately may establish a substantial case on the merits is not determinative on the current stay issue. Rather, the ODRA must balance the remaining three factors of the test annunciated in *Crown, supra*, before deciding whether to recommend a stay.

Glock's Protest and stay request utterly fail to demonstrate that irreparable injury will occur in the absence of a stay. GLOCK's allegation that "if GLOCK wins the Protest and is selected as the best pistol in future independent tests, that TSA will have obligated

all of the program funds," Glock Protest at 1, constitutes unsupported speculation and is contradicted by the record developed thus far in this case. More specifically, the Declaration of TSA's Assistant Administrator confirms that the acquisition involves a multi-year contract with three one-year options that will potentially run through September 30, 2006. *See* Bickham Declaration at ¶10. The Declaration further confirms that a total of 700 pistols have been delivered under the base year of the Contract; and that the first option year of the Contract has been exercised but that no additional pistols have been ordered. *Id*. Given these facts and the fact that the average adjudication time for bid protests at the ODRA from filing to issuance of final decision is 67 calendar days, it is unlikely that work under the Contract will be completed prior to the issuance of the final decision on the Protest.

Neither does GLOCK's Reply to TSA's Opposition demonstrate irreparable injury. Essentially, GLOCK posits that no effective remedy will be available to GLOCK in the absence of a stay because "TSA will claim that it is irreversibly committed to H&K's product by the time this Protest is resolved." *See* GLOCK Reply at 7. GLOCK's argument in this regard is unpersuasive. Based on the current record, the ODRA concludes that a full range of remedies will likely be available at the conclusion of this Protest. *See* J.A. Jones, *supra; Protest of Hayworth, Inc.*, 98-ODRA-00075. [2]

Moreover, the possibility of irreparable harm occurring during the pendency of this Protest is belied by the statement made in Protester's Reply that: "GLOCK has no objection to TSA acquiring its additional, minimum short-term needs from H&K during the stay …." *See* Reply at 1. This statement causes the ODRA to question whether GLOCK itself believes that there is a need for a stay in this case. Moreover, the record reflects that the hardship on the TSA that would result from a stay is far greater than the lack of a stay would cause to GLOCK. Finally, the public interest, as clearly articulated in the Bickham Declaration, and as reflected in the APATA, overwhelmingly favors allowing contract activities to continue during the pendency of this Protest.

III. CONCLUSION

The ODRA concludes, after balancing the applicable factors, that no compelling reasons exist to stay contract performance during the pendency of this Protest. The ODRA therefore declines to recommend to the TSA that it stay Contract performance in this case.

/s/

Anthony N. Palladino
Associate Chief Counsel and Director
FAA Office of Dispute Resolution for Acquisition

October 28, 2003

---

[1]
In GLOCK's Reply to TSA's Opposition to the stay request, Glock's counsel asserts that the Protest can be viewed as having raised an alleged deviation from the stated award criteria by the Evaluation Team.

[2]
At the conclusion of these proceedings the Director of the ODRA will make a recommendation to the Transportation Security Administration as to whether the Protest should be sustained; and if the recommendation is that the Protest be sustained, the ODRA will recommend a specific remedy be imposed.