IN THE UNITED STATES COURT OF FEDERAL CLAIMS
No. 12-315C

(NOT TO BE PUBLISHED)

(Filed Under Seal: May 24, 2012)
(Reissued: May 31, 2012)

PHOENIX MANAGEMENT, INC.	)
Plaintiff,	)
v.	)
UNITED STATES,	)
Defendant,	)
and	)
DATA MONITOR SYSTEMS, INC.	)
Intervening Defendant.	)

Gerald H. Werfel, Pompan, Murray & Werfel, P.L.C., Alexandria, Virginia, for plaintiff. With him on the brief and at the hearing was Todd Whay, Whay Law Firm, Sterling, Virginia.

Elizabeth M.D. Pullin, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for defendant. With her on the brief were Stuart Delery, Acting Assistant Attorney General, Civil Division, and Jeanne E. Davidson, Director, and Deborah A. Bynum, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C. Of counsel was Jared D. Minsk, Trial Attorney, United States Department of the Air Force.

Robert Stewart Gardner, Law Offices of Robert S. Gardner, Colorado Springs, Colorado, for intervening defendant.

ORDER[1]

[1]Because this order might have contained confidential or proprietary information within the meaning of Rule 26(c)(1)(G) of the Rules of the Court of Federal Claims and the protective order entered in this action, it was initially filed under seal. The parties were requested to review

LETTOW, Judge.

Pending before the court is an application by plaintiff, Phoenix Management, Inc. ("Phoenix"), for a temporary restraining order barring the Air Force from implementing the award of a contract to a competitor, Data Monitor Systems, Inc. ("DMS"), for the provision of aircraft refueling services at Tinker Air Force Base in Oklahoma. Phoenix is the incumbent contractor for refueling services at Tinker Air Force Base. On May 14, 2012, Phoenix filed a post-award protest regarding the contract secured by DMS, alleging that the Air Force made a series of errors in the procurement proceedings leading up to the award to DMS.

Phoenix previously filed a protest and subsequent supplemental protests of the award with the Government Accountability Office ("GAO"). Upon reviewing Phoenix's fourth supplemental protest filed with GAO, the Air Force elected to take corrective action regarding offerors' submission of past performance information during the procurement,[2] and GAO dismissed the set of protests on December 5, 2011. Upon completion of the corrective action, DMS again received the contractual award. Phoenix then filed a further protest with GAO, which that agency denied on May 1, 2012. Phoenix filed its complaint in this court on May 14, 2012.

Among other things, Phoenix contends that the corrective action was improper because it was designed to favor DMS by allowing DMS to provide past performance information that otherwise could not have been considered by the Air Force in the procurement.

During a hearing held on May 16, 2012 regarding Phoenix's application for a temporary restraining order, taking into account that the administrative record had not yet been filed, the court posed three questions to be addressed by the parties prior to ruling on the application:

> (1) What past performance information did DMS submit in its initial proposal; (2) whether offerors, including DMS, actually

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the order and to provide proposed redactions of any confidential or proprietary information on or before May 30, 2012. No redactions were requested.

[2]Eight offerors initially submitted separate proposal volumes addressing technical, past performance, price, and contract documentation. The award was to be made using price/past performance tradeoff procedures among those offerors who had been determined to be technically acceptable. As part of its evaluation of the proposals, the Air Force conducted interviews and also sent evaluation notices to four of the eight offerors to clarify relationships among proposed prime contractors and subcontractors. In addition, the Air Force retrieved ratings available on the Contractor Performance Assessment Reporting System. After discussions, the Air Force sent letters to each of the eight offerors requesting that the offerors submit revised versions of their price, technical, and contract-document proposal volumes. Nothing was said about the past performance volume. The letter did state that the Air Force would consider only information contained in the revised proposals, and not information submitted in response to the evaluation notices. No offerors submitted a past performance volume.

> submitted past performance information in response to the corrective action; and (3) what was the nature and result of the Air Force's past performance assessment of the offerors before and then after the corrective action.

The government has responded with information relating to, and partially answering, these questions.

In acting on an application for a temporary restraining order, the court applies the standards for considering a preliminary injunction, *viz*., whether (1) the movant is likely to succeed on the merits, (2) the movant will suffer irreparable harm if preliminary relief is not granted, (3) the balance of hardships tips in the movant's favor, and (4) preliminary injunctive relief will not be contrary to the public interest. *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993). These factors are addressed together in a balancing calculus:

> No one factor, taken individually, is necessarily dispositive. If a preliminary injunction is granted by the trial court, the weakness of the showing regarding one factor may be overborne by the strength of the others. If the injunction is denied, the absence of an adequate showing with regard to any one factor may be sufficient, given the weight or lack of it assigned to the other factors, to justify the denial.

Id.

In this instance, taking into account the declarations, briefs, and argument of the parties, the court makes the following findings.

Phoenix is currently providing refueling services at Tinker Air Force Base under a contractual arrangement that is scheduled to expire on May 31, 2012.[3] DMS has undertaken preliminary preparatory steps to provide that service commencing on June 1, 2012, but has not actually begun work. Phoenix employs approximately 55 persons in providing the necessary refueling services at Tinker (managing inventory, testing fuel, and refueling planes), whose jobs would be terminated upon loss of the contract. If temporary equitable relief is not ordered, at least some of those employees may be offered positions by DMS, but perhaps not at the same salary or wage. At present, the cost to the Air Force of Phoenix's interim contractual arrangement exceeds the cost that would be incurred under both DMS' awarded contract and Phoenix's unsuccessfully proposed contract price.

The court was concerned that the Air Force may have favored DMS over its competitors by structuring corrective action to benefit only DMS, allowing DMS to shore up an aspect of the procurement in which it may have submitted deficient information. This concern has not been fully assuaged by the government's response to the court's questions. Nonetheless, the court

[3]The government retained an option to extend the current contract through September 30, 2012, but it has chosen not to exercise that option. *See* Def.'s Opp'n Appx. 1, ¶¶ 6-8.

cannot confidently conclude that DMS was actually provided favored treatment by the corrective action. The existing materials before the court simply are insufficient to make any determination one way or the other in that regard. As a result, the likelihood-of-success factor is nearly in balance. The other factors point in different directions. If temporary equitable relief is denied, Phoenix will lose an important segment of its business and its employees may lose their jobs or be forced to shift to different employment. This factor is relevant but not determinative because "loss of its current [business and] employees as a basis for irreparable injury would require this [c]ourt to consider any incumbent contractor's loss of a successor contract to be irreparable harm." *PGBA, LLC v. United States*, 60 Fed. Cl. 196, 221 (2004), *aff'd*, 389 F.3d 1219 (Fed. Cir. 2004). Additionally, the government seems satisfied that DMS is adequately prepared to step into Phoenix's shoes to provide the refueling services, and to do so at a lower cost, so the balance of hardships and public interest favor denying the application for temporary relief. Overall, the court concludes that entry of a temporary restraining order against implementation of the Air Force's contractual award to DMS is not justified. Phoenix's application for a temporary restraining order is consequently DENIED.

It is so ORDERED.

s/ Charles F. Lettow
Charles F. Lettow
Judge