

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

Protest of _____)
)
HyperNet Solutions Incorporated) Docket No. 07-ODRA-00416
)
Solicitation No. DTFAAC-07-R-00224)

DECISION ON REQUEST FOR SUSPENSION

I. INTRODUCTION

This matter arises from a protest (“Protest”) filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on August 17, 2007, by HyperNet Solutions Incorporated (“HyperNet” or “the Protester”). The Protester challenges the FAA Mike Monroney Aeronautical Center’s (“the Center”) selection of CNI Aviation (“CNI” or “the Intervenor”) for award of a Center-wide Administrative Support Services contract pursuant to Solicitation No. DTFAAC-07-R-00224, that will support approximately 5,000 employees. *See Protest* at 1; *see also Center’s Objection to Protester Request for Stay (“Center Opposition”)* at 1. Specifically, HyperNet challenges its past performance rating, and protests that because it presented “the highest technically rated [and] lowest priced” offer, it should have been selected for award. *Protest* at 1. HyperNet also requests that the ODRA direct the Center to suspend CNI’s performance of the contract. *Protest* at 7. For the reasons explained below, the ODRA denies the Protester’s request for a suspension.

II. THE PARTIES' POSITIONS

Per the ODRA's instructions—and in accordance with the ODRA Procedural Regulations, *see* 14 C.F.R. § 17.17(a)—the Center submitted its Opposition to HyperNet's suspension request on Friday, August 24, 2007. Two business days later—on Tuesday, August 28, 2007—the Protester submitted its response (“*Protester Reply*”) to the Center's Opposition. That same day, the Intervenor also filed comments (“*Intervenor Response*”) on the suspension request which concurred—and somewhat amplified—the Center's objections to the requested suspension.

In its Protest, HyperNet reports that a “[c]ompelling reason . . . to suspend or delay the procurement” exists because the incumbent for these services—“who has already received one extension” to its contract—can receive “another extension” and not “be a burden on either the FAA” or CNI. *Protest* at 7. HyperNet also maintains that a suspension is warranted because otherwise, the currently performing contract employees—who are to begin working for their third contractor, CNI—will be then be forced to work for a fourth contractor—HyperNet—once it is successful in this Protest. *Id.* According to HyperNet, requiring these employees to work for “four (4) employers in a three to four year time frame” warrants suspending CNI's contract to avoid “adding more turmoil” and to protect the “best interests” of the employees and the Agency. *Id.*

The Center opposes HyperNet's suspension request on the ground that the Protester has failed to establish “any scintilla of irreparable injury.” *Center Opposition* at 6. Despite HyperNet's references to “turmoil” and “burden,” the Center argues that the Protester has failed to identify any specific damage that would occur “if the awardees contract performance is allowed to progress from phase-in to full performance.” *Id.* To that end, the Center avers that if the Protester's unsupported request for a contract suspension were sufficient to stay the contract, the ODRA “would be required to enter a stay in every protest in which one is requested.” *Id.* at 7.

The Intervenor concurs in the Center's objections—and reports that the only potential “hardship” or “disruption” which the current contractor employees potentially face as a

result of the contract award to CNI “comes primarily in the form of transition activities, such as a review of [CNI’s] policies and procedures, signing up for health insurance benefits and making elections under [CNI’s] 401(k) or similar retirement plan.” *Intervenors Response* at 3. To that end, CNI emphasizes that “all transition activity” has already been completed—as contemplated by CNI’s proposal—and thus, the “only change the employee[s] should experience in the coming weeks if the stay is denied is the [contractor’s] name on their paycheck.” *Id.*

III. DISCUSSION

A. Standard of Review

The Acquisition Management System (“AMS”) contains a strong presumption that contract-related activities will continue during the pendency of acquisition disputes. *See Protest of Informatica of America, Inc.*, 99-ODRA-00144, *ODRA Decision on Stay Request* dated October 10, 1999 (*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). Consistent with the AMS, the ODRA Procedural Regulations provide that procurement activities, and, where applicable, contractor performance, shall generally continue during the pendency of a protest. *See* 14 C.F.R. § 13.17(g). However, pursuant to 14 C.F.R. §17.15(d) and 14 C.F.R. § 17.17(b), the ODRA may impose a temporary suspension of an award or a delay of contract performance, in whole or in part, where it determines: (1) there is a compelling reason; and (2) where it is recommended that the FAA Administrator impose a permanent suspension pending the outcome of a protest. *See* 14 C.F.R. § 13.17(g). The Protester bears the burden of overcoming the presumption against the issuance of a stay. *See All Weather, Inc.*, 04-ODRA-00294, *Decision on Protester’s Request for Stay of Contract Performance* dated February 4, 2004. In deciding whether to impose a suspension, the ODRA utilizes the four-part test employed by the United States Court of Appeals for the District of Columbia. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d. 841 (D.C. Cir. 1977) *discussed in Consolidated Contests of Agency Tender Official James H.*

Washington and Kate Breen, Agent For A Majority Of Directly Affected Employees, 05-ODRA-00342C and 05-ODRA-00343C, *Decision on Request for Suspension*, dated April 12, 2005. To determine whether there is a compelling reason in support of a requested suspension, the ODRA examines a combination of factors, on a case-by-case basis, including:

- (1) whether the protester made out a substantial case;
- (2) whether a stay or lack of a 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.

See Protest of Crown Communication, 98-ODRA-00098, *Decision on Request for Suspension* dated October 9, 1998; *Decision on J.A. Jones Management Services' Request for Suspension, supra*; *Protest of Glock, Inc.*, 03-TSA-003, *Decision on Request for Suspension* dated October 28, 2003; *Protest of Mid Eastern Builders, Inc.*, 05-ODRA-00330, *Order for Temporary Stay* dated January 28, 2005.¹ In this regard, it is well established that the “substantial case” prong of this 4-part suspension inquiry and analysis is generally de-emphasized in favor of a “balancing of equities as revealed through an examination of the other three factors.” *See Washington Metropolitan Area Transit Commission, supra* at 843.

B. HyperNet Has Alleged A Substantial Case

In reviewing whether “compelling reasons” to suspend exist, the ODRA does not review whether the substantive allegations underlying a Protest demonstrate a “fair ground for litigation” or “deliberate investigation.” *See Decision on All Weather's Request for Stay of Contract Performance, supra*; *Decision on Crown's Request for Suspension of Contract Performance, supra*.

¹ This approach follows the standard for injunctive relief under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and the cases interpreting it. *See Crown Communication, supra* at 3, citing *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958).

In this case, the Center does not dispute that HyperNet’s challenges against the “technical evaluation” and the “ultimate” selection of CNI for contract award likely constitute a substantial case within the meaning of the suspension test. *See Center Opposition* at 5. Citing several of the ODRA’s long-standing precedents, the Center offers that HyperNet’s allegations may properly be viewed as constituting a “fair ground for litigation and thus for more deliberative investigation.” *Id.*, quoting *Crown’s Request for Suspension of Contract Performance, supra* (citing *Washington Metropolitan Area Transit Commission, supra*). Given HyperNet’s articulated challenges against its past performance rating and the Agency’s best value analysis, the ODRA agrees that the Protester has presented a substantial case, *i.e.*, a fair ground for litigation. However, as noted above, this first factor of the suspension analysis is de-emphasized in favor of a “balancing of equities as revealed through an examination of the other three factors.” *See Protest of Knowledge Connections, Inc., 06-TSA-024, Decision on Request for Suspension of Activities* dated April 21, 2006 at 8-10.

C. HyperNet Has Not Satisfied The Remaining Factors of the Suspension Analysis

Based on the pleadings and the record to date, the ODRA concludes that the Protester has not demonstrated any of the compelling circumstances that are required under the remaining three factors of the suspension analysis governing the ODRA’s determination of whether a requested suspension is required. Specifically, the ODRA concludes that HyperNet has not demonstrated that irreparable injury will result if a suspension is not imposed during the adjudication of its Protest; nor does the ODRA find any evidence in the current record that either the relative hardships of the parties or the public interest favor the imposition of a suspension.

HyperNet advances three contentions in support of its requested contract suspension. First, the Protester contends that a suspension should be imposed because the current incumbent is available to perform these services for the duration of this Protest—and thus, a suspension of CNI’s performance “would not be a burden on the FAA or the current contractor(s).” *Protest* at 7. However, the fact that a substitute or alternative

method of contract performance or delivery is available to meet the Agency's needs while consideration and resolution of a contractor's protest proceeds at the ODRA is in no way dispositive on whether a suspension is warranted. Instead, the relevant inquiry is whether or not the requested suspension is necessary to mitigate or preclude irreparable harm to the Protester, or to otherwise preserve the Government's and/or the public interest.

HyperNet also asserts that a suspension is required in this case because the company is currently slated to graduate from the Small Business Administration's ("SBA") 8(a) business development program in early 2008—which it contends will render it ineligible to perform any 8(a) work beyond this contract's base year period.² *Protester Reply* at 1. As a result, HyperNet asserts that absent a suspension of CNI's contract performance, the Protester will suffer irreparable harm because CNI will have performed the bulk of the base period work that HyperNet would otherwise be entitled to in the event the ODRA sustains this Protest. *Id.*

It is well established that the Small Business Act and its implementing regulations are not binding on the FAA. *See Protest of Caribe Electronics, Ltd., Inc.*, 07-ODRA-00412 at 14-15 (*discussing the AMS small business set-aside framework*).³ Nevertheless, the AMS encourages the FAA to "promote and expand procurement opportunities" for all small businesses, including 8(a) concerns and Socially and Economically Disadvantaged businesses ("SEDB"). *See AMS* § 3.2.1.3.4, "*Small Business and Socially and*

² Pursuant to Section 8(a) of the Small Business Act, the SBA created the 8(a) Business Development Program to help small disadvantaged businesses compete in the American economy and access the federal procurement market. More details about the 8(a) Program are published on the SBA's federal website located at: <http://www.sba.gov/aboutsba/sbaprograms/8abd/faqs/index.html>.

³ As explained in *Caribe, supra*, the Department of Transportation and Related Agencies Appropriations Act of 1996 exempted the FAA from most federal procurement laws and regulations, including the Small Business Act, and directed the FAA to create its own "unique" Acquisition Management System ("AMS") to facilitate the FAA's faster acquisition of higher quality, more affordable products and services. *See Public Law No. 104-50*, § 348, 109 Stat. 436, 460 (1995). Congress reiterated the FAA's exemption from the Small Business Act in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, enacted on April 5, 2000. *See Public Law No. 106-181*, Title VII, § 704, 114 Stat. 157 (*codified at* 49 U.S.C. § 40110(d)(2)(D)(2002)).

Economically Disadvantaged Small Business.”⁴ Moreover, while not mandatory, the FAA often relies on the SBA’s expertise—and its regulations—as persuasive guidance in making its small business policy and related decisions.

Notably, where an 8(a) firm was eligible for, and otherwise properly received the award of a contract pursuant to an 8(a) set-aside, the AMS does not mandate that the contractor forfeit the awarded contract simply because it subsequently graduates from the 8(a) program during its contract performance. In fact, the AMS contracting clause required for 8(a) and SEDB set-asides defines eligibility according to the status of the firm “at the time of the release of the initial SIR or public announcement . . . whichever is first.” See *AMS Contracting Clause* § 3.6.1-8, “*Notification of Competition Limited to Eligible SEDB Concerns.*” Similarly, the Small Business Regulations expressly permit a graduated contractor—or even a business that has been terminated or “is no longer eligible” for the 8(a) program—that properly received an 8(a) contract for which it was eligible at the time of award to continue to perform that work “if to do so is in the best interests of the Government.” See 13 C.F.R. § 124.514(b). Under these circumstances, HyperNet’s assertion that it will be irreparably harmed because it will no longer be eligible to perform the contract once it graduates from the 8(a) program in 2008 is not supported by either the AMS or the SBA Regulations—and as such, only constitutes a speculative claim—which is insufficient to demonstrate irreparable harm. See *Protest of Mechanical Retrofit Systems*, 07-ODRA-00402, *Decision on Request for Suspension of Activities* dated February 27, 2007 at 5 (*possibility of awardee’s project completion by itself does not constitute a sufficient irreparable harm for imposing suspension*); see also *Minor Metals, Inc. v. United States*, 38 Fed.Cl. 379 (1997) (*mere possibility or*

⁴ The AMS Procurement Guidance similarly encourages the FAA to “take reasonable action” to “provide reasonable contracting opportunities” to all small businesses. See *AMS Procurement Guidance*, § T3.6.1, “*Small Business Development Program*,” ¶ 1.b, “*Procurement Team Responsibilities in Support of the Small Business Development Program*.” In particular, the AMS Procurement Guidance suggests providing these opportunities through various set-asides—including procurements restricted to 8(a) concerns—which the Guidance defines as “socially and economically disadvantaged businesses . . . that are expressly certified by the [SBA] for participation in the SBA’s 8(a) business development program. *Id.*, ¶ 3.a, “*Prime Contracting with Small Business.*”

apprehension of future harm cannot constitute irreparable harm sufficient to issue an injunction).

Moreover, HyperNet’s anticipated loss of this contract in the event its requested suspension is not granted merely amounts to an assertion of economic harm—which, without more, does not rise to the level of irreparable injury warranting a suspension . *See Decision on Crown’s Request for Suspension of Contract Performance, supra* at 5-6; *see also Minor Metals, Inc., supra* (citing *Zenith Radio Corp. v. United States, 710 F.2d 806, 810 (Fed.Cir. 1983)*). HyperNet’s irreparable harm argument is further unpersuasive as it fails to recognize that the ODRA has broad discretion to recommend any remedy consistent with 14 C.F.R. § 17.21—including directing the contract award to the Protester. To that end, it is well recognized that the Center proceeds with CNI’s contract performance at its own risk and ultimately is responsible for any additional cost or delay that may result should this Protest be sustained. *See Protest of Mechanical Retrofit Systems, supra*.

HyperNet also contends that a suspension of CNI’s contract performance is required because otherwise, the employees who are currently performing this work will be forced to work under a third contractor—CNI—which means “adding more turmoil [that] is not in the employees’ or governments’ best interests.” *See Protest* at 7. As a preliminary matter, there is nothing in this record to support the Protester’s allegations about the “turmoil” and hardship that will inure to the currently performing employees if CNI’s contract performance is not suspended. Notably, the Protester is not arguing that a suspension of CNI’s performance is necessary in order to protect the job rights of the affected employees. *See e.g., Consolidated Contests of ATO James H. Washington and Kate Breen, 05-ODRA-00342C and 05-ODRA-00343C, Recommendation on Request for Suspension of Activities* dated April 12, 2005. Moreover, as reported by the Center Contracting Officer, CNI has already “conducted [all] meetings with their new employees for purposes of transitioning to full contract performance,” briefed the employees about their “benefits and fringe benefits,” and has otherwise “contractually secured the services of virtually the [entire] incumbent workforce.” *See Center Opposition, Affidavit of*

Contracting Officer Sonja Watts dated August 24, 2007 at ¶¶ 7-9. As noted above, the Intervenor also confirms that the employee transition has been completed. *See Intervenor’s Response*, ¶ 3 at 3.

In contrast to the unsubstantiated harms incurred by the Protester and the current contract employee workforce, the Center reports that “this contract involves mission critical implications to more than 130 people, 8 different organizations and 20 divisions and lines of business.” *See Center Opposition* at 11. The Center further maintains that any “delay” or a “stay” of CNI’s “contract phase in” or “full performance” will require the Center to procure these vital services via “a letter contract”—most likely with the incumbent *Id.* According to the Center, the “additional cost and risk of an undefinitized letter contract” with either “the incumbent who is virtually phased out” of its performance at the Center—or alternatively, “a 3rd party, presents an unacceptable, unfortunate, and unnecessary risk and waste of . . . resources.” *Id.* (emphasis in original).

The letter contract vehicle referred to by the Center is a preliminary contractual instrument that authorizes a contractor to immediately begin work, subject to the parties subsequently negotiating a definitive contract after the performance has begun. *See AMS* § 3.2.4-23, “*Contract Definitization*,” *see also AMS Procurement Guidance*, ¶ 7.b, “*Letter Contract*.” Because letter contracts permit work to proceed before the contracting parties have achieved a meeting of the minds, the “general policy has been to greatly restrict the use of such transactions because they are open ended arrangements that place the risk of excessive costs largely on the government.” *See John Cibinic, Jr., & Ralph C. Nash, Jr., Formation of Government Contracts*, 1073-1074 (1998); *see also Globe Aviation Services, Corp. v. TSA*, 04-TSA-07 (“[b]ecause of the attendant uncertainty that accompanies the use of undefinitized contracts, these instruments are not favored”). Consistent with these concerns, the AMS Procurement Guidance emphasizes the Letter Contract as an instrument for “[u]se [w]hen:

- (a) The FAA's interests demand that the contractor be given a binding commitment so that work can start immediately and negotiating a definitive contract is not possible in sufficient time to meet the requirement.
- (b) Emergency or other special situations for limited amounts.

AMS Procurement Guidance, ¶ 7.b(2).

The Protester has not demonstrated that CNI's continuation of its contract performance will result in any irreparable injury to itself, the currently performing contractor employees, or the FAA. By contrast, the Center has made a persuasive showing that a suspension would force it to undertake emergency letter contracting procedures—which as noted above place significant time, financial and performance risk on the Agency. *Center Opposition* at 11-12 (citing *Affidavit of Contracting Officer Sonja Watts, supra*). Under these circumstances, the Protester has not demonstrated a basis for suspending CNI's contract—particularly given the potential hardships faced by the Center in the event the suspension were to be imposed. In addition, because of the potential risk faced by the Center in the event of a suspension of the CNI contract, the ODRA further concludes that the public interest strongly supports continued performance of the work involved without disruption. Given the nature of the contract work, the ODRA is confident that no purpose would be served by a suspension and that the full panoply of remedies will be available in the event the Protest ultimately is sustained.

IV. CONCLUSION

For the foregoing reasons, the ODRA concludes that there are no compelling reasons to suspend contract performance during the pendency of this Protest. The ODRA therefore denies the Protester's request for a suspension and will not recommend that the FAA Administrator impose one.⁵

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Behn M. Kelly
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

APPROVED:

-S-

Anthony N. Palladino
Director
FAA Office of Dispute Resolution for Acquisition

August 30, 2007

⁵ This decision represents an Interlocutory Order. It will become final and appealable upon the entry of a Final Order in this case. See *ODRA Bid Protest Regulations*, 14 C.F.R. § 17.43(a).