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

Protest of)
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Apptis, Inc.) Docket No. 10-ODRA-00535
)
Pursuant to Solicitation DTFAWA-09-R-SE2020)

DECISION ON REQUEST FOR SUSPENSION

This matter arises from a post-award bid protest (“Protest”) filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on July 20, 2010 by Apptis, Inc. (“Apptis”). Apptis challenges the award of a contract (“Contract”) to Booz Allen Hamilton (“BAH”) by the FAA Program Office (“Program Office”) pursuant to Solicitation DTFAWA-09-R-SE2020 (“Solicitation”). *Protest* at 1. The Contract is for the “System Engineering, Program Planning and Financial Management activities that occur throughout the Acquisition Management System (“AMS”) Life Cycle Management.” *Protest* at 6 (citing Solicitation § C.2.1(a) at 4). This Contract is part of the larger “NextGen” effort by the FAA aimed at improving the National Airspace System (“NAS”). *Id.* Apptis explains that the Contract is a cost-plus-fixed-fee, level-of-effort, task order, term contract that requires performance in 29 “functional areas.” *Protest* at 6-8. These functional areas include, for example, “System Engineering Management,” “System Requirements and Definition,” “Value Engineering,” “NAS Information Security (INFOSEC) Support,” and more. *Id.* at 6. Work would be performed during a base period of 60 months, with one 36-month option period and one 24-month option period. *Id.* at 9.

Apptis asserts several grounds in this Protest. It charges that the Product Team’s cost evaluation was arbitrary and irrational due to: [DELETED]. *Protest* at 15-33. Apptis

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also protests that the Product Team used unstated evaluation criteria, engaged in disparate treatment in [DELETED], and engaged in unequal communications with the offerors. *Id.* at 33-39. Finally, Apptis challenges the failure [DELETED], and numerous other alleged miscalculations of its proposal. *Id.* at 39-57.

The Protest includes a request that the Administrator suspend contract performance until the Protest has been resolved (“Suspension Request”). *Id.* at 57. The Program Office filed its Opposition (“Opposition”) on July 26, 2010. Apptis filed its Reply to the Opposition on July 29, 2010 (“Reply”). BAH filed a Response (“BAH Response”) to the Suspension Request on July 30, 2010. For the reasons discussed below, the ODRA finds that Apptis 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

There is a presumption under the AMS in favor of continuing procurement activities and contract performance during the pendency of bid protests. *See, e.g., 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). Accordingly, stays of procurement activities and contract performance during the pendency of protests will not be imposed absent a showing of compelling reasons. *See, e.g., Protests of Hi-Tech Systems, Inc.*, 08-ODRA-00459 and 00460 (Decision on Protester’s Request for Suspension, dated September 15, 2008). The ODRA employs a four factor test to determine whether compelling reasons exist to issue a suspension. *See, e.g., Protest of Crown Communications*, 98-ODRA-00098 (Decision on Suspension, dated October 9, 1998). The factors are: (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)

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the public interest. *Id.* The first factor is de-emphasized in favor of a balancing of the other three elements. *Id.* The Protester bears the burden of overcoming the AMS presumption against suspension. *See, e.g., Hi-Tech Systems, Inc.* (Decision on Suspension Request), *supra*.

II. Discussion

A. Factor One: The Substantial Case

Apptis requests that the ODRA “suspend performance of the contract during the pendency of this Protest.” *Protest* at 57. Apptis first asserts that it has raised a substantial case, *i.e.*, one that “alleges facts which constitute ‘a fair ground for litigation and thus for a more deliberative investigation.’” *Id.* at 58 (citing *Protest of J.A. Jones Mgt. Servs.*, 99-ODRA-00140 (Decision on Protester’s Request for Stay of Contract Performance, dated October 8, 1999)). BAH does not agree that Apptis has alleged a “substantial case” because BAH views the protest as raising mere disagreements with the evaluation. *BAH Response* at n. 1. Although the Product Team considers the Protest to be “wholly without merit,” it concedes that the Protest does set forth a “substantial case” as defined above. *Opposition* at 3. The ODRA concludes that the Protest allegations provide a basis on which to develop and consider a record to determine whether the challenged award decision complied with the AMS. *Protest of Sentel Corporation*, 09-ODRA-00497 (Decision on Request for Suspension, dated September 15, 2009). Inasmuch, however, as the “substantial case” element of the suspension test is de-emphasized, the ODRA will also balance the remaining three elements. *Protest of Crown Communications* (Decision on Suspension Request), *supra*.

B. Factor Two: Irreparable Injury to the Protester

Apptis asserts under this factor that it could lose potential profits, valuable employees, and the marketing opportunities now available to BAH. *Protest* at 60. Apptis states repeatedly that it will suffer the irreparable loss of profits for work that BAH will perform during the pendency of the Protest. *Id.*; *Reply* at 2-3. Although it is incumbent on the party with the burden of proof to support its request for a suspension, Apptis fails

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to explain how under the circumstances it will lose *profits* on what both the Product Team and the Protester describes a cost-plus-fixed-fee contract. *Protest* at 6; *Opposition* at 2; *see also Information Systems & Networks Corporation v. U.S.*, 64 Fed. Cl. 566 (2005) (lost profits are not available under cost-reimbursement contracts). This failing is especially significant where, as here, one possible outcome of a successful protest would be award of the contract with the proposed fee to Apptis. *See Discussion, infra*.

In addition to its arguments for lost profits, Apptis relies on a declaration from its Chief Operating Officer to argue that it will be at a competitive disadvantage for future contracts because “BAH will be able to market itself to the Agency and FAA personnel,” and because of the “probable loss of several highly valuable and skilled employees.” *Protest* at 60 (citing Exhibit 6). These arguments speculate on economic and personnel losses and are not sufficient to demonstrate irreparable injury. The ODRA previously has held that:

[The] argument regarding employee loss is speculative and does not constitute irreparable injury. As the ODRA has stated, the potential loss of employees and mere economic loss of the kind asserted here are not sufficient to demonstrate compelling reasons in support of a stay. [citation omitted] As the ODRA has noted, “employees in services contract situations often follow the work and their own professional opportunities.” [citation omitted] [The protester] likely would be in a position to rehire or replace any employees that it has lost should this Protest be successful and it be awarded the contract. [The protester’s] situation is not different than that faced by any incumbent who loses a competition and thus loses a source of revenue. To issue a suspension on that basis would severely undermine the AMS presumption against suspensions and require the ODRA to impose a suspension in virtually every case where an incumbent loses a subsequent competition for the work involved. [citation omitted] Under these circumstances, [the protester] has failed to demonstrate that it will be irreparably injured in the absence of a suspension.

Protest of Sentel Corporation (Decision on Suspension Request), *supra* (citing *Protest of J.A. Jones Management Services* (Decision on Suspension Request), *supra*; *Crown Communications*, (Decision on Suspension Request), *supra*; and *Protest of All Weather, Inc.*, 04-ODRA-00294 (Decision on Suspension, dated February 4, 2004)). Moreover, as counsel for the Product Team points out:

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The nature of the contract – i.e., contract for long-term support services – does not support the issuance of a stay because it does not present a situation in which contract performance will be completed before the Protest is fully adjudicated. ... [I]n this case there is no risk that a significant portion of the services to be provided under the Contract will be completed before the Protest can be adjudicated.

Opposition at 3-4 (citations omitted). Under the circumstances, continuation of the contract performance during the relatively brief pendency of the Protest cannot be viewed as resulting in irreparable injury.

C. Factor Three: Relative Hardships on the Parties

The Product Team has provided the ODRA with the declaration of the Director of Financial Planning and Operations for the FAA’s Air Traffic Organization, who is charged with the development of the business plan and the management of the contracts portfolio across NextGen and Operations Planning. *Opposition, Vorce Decl.* at ¶¶ 1 and 2. She identifies at least six offices that “require immediate support of the type that is provided under the Contract.” *Id.* at ¶ 5. She also identifies many of the tasks required over the next four to eight weeks to support her statement that “[f]ailure to issue the above task orders will result in a loss of continuity of service and impact mission critical milestones.” *Id.* Additionally, she observes that the various FAA offices will rely on the contract with BAH to transition and continue performance of work being performed under contracts that will expire on September 30, 2010. *Id.* at ¶ 6. The ODRA finds this declaration to be both credible and persuasive, and that the harm to the Agency from the imposition of a suspension would be significant and span several organizations within the FAA.

Apptis asserts in its Reply that the FAA can mitigate any harm from a suspension by using the services of different contractors under other existing contracts. *Reply* at 3-5. Apptis reasons that the availability of other contractors to perform the work means the Product Team “suffers no harm at all” if BAH’s contract is suspended. *Reply* at 3. Regardless of any administrative burden posed by this suggestion, it contradicts Apptis’

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position under Factor Two. In particular, Apptis does not explain how performance by the other contractors – as opposed to BAH – will ensure that Apptis has the opportunity to earn the profit alleged to be available under this cost-plus-fixed-fee contract. To the contrary, any possible profit on work performed during the pendency of this Protest will belong to the performing contractor rather than to Apptis.

D. Factor Four: The Public Interest

Apptis reiterates its allegations of “serious flaws in the procurement process,” arguing generally that the “public interest in the integrity of the procurement system would be served by suspending performance” while the ODRA considers the merits. *Protest* at 63. Apptis’ Reply provides no more meaningful detail. *Reply* at 5. The issue of whether the challenged award decision complies with the AMS will be determined through the prompt adjudication of the merits of the Protest. *Protest of Sentel* (Decision on Suspension Request), *supra*. The Product Team asserts that continued performance “during the pendency of the Protest will not impact the ODRA’s ability to evaluate the merits [], ensure the integrity of the procurement process, or issue an effective remedy if appropriate.” *Opposition* at 5. The record to date is consistent with this view, and the ODRA concludes that Apptis has not shown that a suspension is in the public interest.

III. Conclusion

Based on the record, after balancing the applicable factors, the ODRA concludes that Apptis 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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Anthony N. Palladino
Associate Chief Counsel and Director
FAA Office of Dispute Resolution for Acquisition

August 3, 2010