

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

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Contract Dispute of	)	
	)	Docket No. 05-ODRA-00346
Dynamic Securities Concepts, Inc.	)	
	)	
Under Contract DTFA03-00-D-00014	)	

**DECISION DENYING MOTION TO DISMISS**

The above-captioned Contract Dispute was filed with the Federal Aviation Administration Office of Dispute Resolution for Acquisition (“ODRA”) by Dynamic Security Concepts, Inc. (“DSCI”) on April 14, 2005. The Contract Dispute arises under Contract DTFA03-00-D-00014 (the “NASiCMM@/Security contract” or “Contract”). DSCI claims that it suffered serious harm due to the FAA’s breach of its obligation to deal with DSCI fairly and in good faith, alleging, among other things, that task orders being properly performed by DSCI were terminated or not renewed so that work could be transferred to other favorite contractors. On July 15, 2005, the Federal Aviation Administration William J. Hughes Technical Center (the “Center”) filed the Agency Response to the Contract Dispute, along with a Motion for Summary Dismissal (“Motion”) for failure to state a claim upon which relief may be had pursuant to 14 C.F.R. §17.29(a)(3). In support of its Motion, the Center contends that the allegations of DSCI’s contract dispute are based only on “speculative beliefs” that are unsubstantiated and without merit.

DSCI filed an Opposition (“Opposition”) to the Motion on August 1, 2005, which was followed by the filing of a Reply by the Center on August 8, 2005. The ODRA conducted a telephone conference on August 11, 2005, during which the parties were informed that the Motion is denied without prejudice. This decision sets forth in greater detail the basis for the ODRA’s denial of the Motion.

The ODRA Procedural Rules provide for summary dismissal where the contractor has failed to state a matter upon which relief may be had. *See* 14 C.F.R. §17.29(a)(3); *Condor Reliability Services, Inc.*, Docket No. 00-ODRA-00162. The ODRA’s standard of review for such motions is no different than that applied in other forums: All allegations are construed in the light most favorable to the nonmoving party, dismissals are granted only for actions that are “fatally flawed in their legal premises and destined to fail,” and dismissal will not be allowed when facts are alleged, which “would, if they were ultimately established, permit relief as a matter of law.” *Schweiger Construction Company, Inc. v. United States*, 49 Fed. Cl. 188 (2001).

DSCI’s contract dispute filed on April 14, 2005 (“Contract Dispute”) alleges as follows:

[T]he FAA has breached its obligations to DSCI under the contract, including its obligation to deal with DSCI fairly and in good faith, and, among other things, improperly and without basis partially terminated various task orders issued to DSCI under the Contract, failed to renew task orders being properly performed by DSCI under the Contract, and transferred to other favorite contractors work being performed by DSCI under the contract.

Contract Dispute at 1. DSCI further alleges that these actions were motivated by at least one FAA employee, who “harbors an extreme personal animus” toward DSCI, and DSCI alleges that this employee was permitted to seriously “disparage DSCI and the Contract so as improperly to taint both” thereby constructively debarring DSCI from receiving new or additional orders under this and other contracts, including subcontracts with third parties. Contract Dispute at 1-2, 6-11. In support of its claim, DSCI sets forth detailed facts and circumstances which it believes to be true, and which support its claim for lost revenue arising from the alleged breach, “conservatively estimated” to be \$14,252,608. No discovery has been conducted to date in this matter.

The Center’s Motion highlights the fact that the contract was an IDIQ contract which expressly provided quantities that were *estimates only* and the Government was only obligated to order the \$400,000.00 minimum, and, to date, the Center has obligated

\$14,372,694.15, *i.e.*, thirty-six times over the specified minimum quantity. Motion at 2-4. The Motion argues that DSCI's claims (a) through (e), alleging that the Agency acted in bad faith in not placing further delivery orders and to continue certain work under the contract, amount to mere speculation and are not a proper subject of a contract dispute. Motion at 3.

The Center relies primarily on *Travel Centre v. Barram*, 236 F.3d 1316, 1318-1319 (Fed. Cir. 2001) in support of its Motion, asserting that DSCI is not entitled to any legal relief since, because the FAA has purchased far in excess of the minimum quantity, DSCI "could not have had a reasonable expectation that any of the government's needs beyond the minimum contract price would necessarily be satisfied under this contract." Motion at 4-5, *citing Travel Centre, supra*. Consequently, the Center is free to purchase additional supplies or services from any other source it chooses.

As for DSCI's allegations of bad faith, the Center argues that DSCI has failed to meet the requisite "well-nigh irrefragable" standard of proof. The Center further asserts that there were legitimate business reasons for the Agency's actions and in rebuttal provides supporting documentation and declarations of FAA officials. Motion at 5 – 10. The Center further challenges as speculative DSCI's claim (f), alleging that its failure to be selected by Harris Corporation as a subcontractor under another contract with the Agency was "due to the "negative environment concerning DSCI within the FAA contract community." The Center argues also that this allegation fails to state a claim upon which relief may be had.

DSCI's Opposition asserts that a contractor may maintain a breach of contract claim against an agency even though the agency has awarded the contractor the minimum amount of work stated in the contract. *See* Opposition at 4, *citing Community Consulting Int'l*, ASBCA No. 53489, 2002-2 BCA 31,940 (2002); *Burke Court Reporting Co.*, DOTBCA No. 3058, 97-2 BCA 29,323 (1997). DSCI explains that its alleged breach is based on its expectation that the Center would honor the implied obligation to act in good faith -- rather than the obligation to provide due care in preparing its work estimates.

DSCI further distinguishes the *Travel Centre* case, stating that, unlike the situation there where the breach was based on the fact that the estimated level of work failed to materialize, here the alleged breach is based on improper and bad faith actions taken by the Center in connection with the administration of the contract.

In *Travel Centre*, the United States Court of Appeals for the Federal Circuit reversed a decision of the General Services Board of Contract Appeals (“GSBCA”), that determined that the GSA had induced the contractor to base its proposal on quantities that GSA knew or should have known were overstated, and in so doing breached its duty to deal with the contractor fairly and in good faith. There, the Court of Appeals held that:

[U]nder an IDIQ contract, the government is required to purchase the minimum quantity stated in the contract, but when the government makes that purchase its legal obligation under the contract is satisfied. *See E.g., Mason v. United States*, 222 Ct. Cl. 436, 615 F.2d 1343, 1346 (1980). Moreover, once the government has purchased the minimum quantity stated in an IDIQ contract from the contractor, it is free to purchase additional supplies or services from any other source it chooses. An IDIQ contract does not provide any exclusivity to the contractor. The government may, at its discretion and for its benefit, make its purchases for similar supplies and/or services from other sources.

The Court of Appeals also found that the contractor could not have had a reasonable expectation that any of the government’s needs beyond the minimum contract price would necessarily be satisfied under the contract, and, because GSA met the legal requirements of the contract at issue, its “less than ideal contracting tactics” failed to constitute a breach.<sup>1</sup>

The issue of what constitutes a bad faith breach of an IDIQ contract has been the subject of legal commentary in various forums since the issuance of the Court of Appeal’s *Travel Centre* decision. In *Abatement Contracting Corporation v. United States*, 58 Fed.Cl. 594 (2003), citing to the decision in *Travel Centre v. Barram*, 236 F.3d F.3d 1316

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<sup>1</sup> The “contracting tactics” at issue in *Travel Centre* amounted to what the GSBCA had found to be the negligent preparation of estimated quantities.

(Fed.Cir.2001), the Court of Federal Claims granted a motion for summary judgment, holding among other things, that the contractor did not establish that the government breached the contract by failing to accurately estimate the amount of work that would be required, as there was no evidence of egregious conduct, beyond mere negligence, that rose to the level of bad faith. In so holding, the court stated that it was bound by its decision in *Travel Centre* and thereby compelled to reject the contractor's claims concerning the lack of an accurate estimate of work. The court, however, went on to note its decision in *Schweiger Construction Company, Inc. v. United States*, 49 Fed. Cl. 188 (2001) which sets forth another standard of review for a bad faith breach of an IDIQ contract, that could be met by demonstrating facts that show more than just "mere negligence."

In *Schweiger*, the court denied a motion to dismiss an allegation of breach of the implied duty of good faith and fair dealing in an IDIQ contract, finding that the plaintiff did make allegations that presented a bare foundation for a claim of bad faith and that it was possible that the plaintiff could present a set of facts which establish bad faith. The court discussed at length Judge Hyatt's dissent in the original GSBCA Travel Centre decision wherein she found that "[t]he government's failure to update the estimates constituted, at most, negligent conduct" and thus was "insufficient to warrant recovery. In her dissent, Judge Hyatt had found it "critical" that there was no proof that GSA had any deliberate intent to harm" and noted that bad faith means more than just an "unfortunate oversight" or "sloppy contract administration," but rather, it requires "some specific intent to injure the contractor or a showing of malice or conspiracy." *Schweiger* at 201.

Significantly, in *Schweiger*, the court stated that it had no intention of implying that the only circumstances under which the government could breach an IDIQ contract would be the failure to order the guaranteed minimum, since there could be other circumstances in which the government might be liable for damages or breach of an IDIQ contract. *Id.* at FN3. The court further indicated that it would evaluate egregious conduct by the government that rises to the level of bad faith, but cautioned that "there is a presumption that the government acts in good faith which cannot easily be rebutted

[and to] overcome this presumption contractors must submit “well-nigh irrefragable proof” of bad faith. *Id. citing Kalvar Corp. v. United States*, 211 Ct. Cl. 192, 543 F.2d 1298, 1301-02 (1976), *cert denied*, 434 U.S. 830, 98 S.Ct. 112, 54 L.Ed.2d 89 (1977); *see also Protest of Royale’L Aviation Consultants*, Docket No. 04-ODRA-00304C. Moreover, even assuming that the requisite burden of proof of bad faith can be met, the ODRA notes that not all breaches are remediable in damages, and this is particularly true of claims for lost profits, which must be “definitely established.” *See CACI International, Inc.*, 2005 WL 1006865 (A.S.B.C.A.), 05-1 BCA P 32,948, ASBCA No. 53,058, ASBCA No. 54,110 (April 29, 2005) (finding breach but denying claim for lost profits).

## CONCLUSION

The ODRA finds that notwithstanding the fact that the Center met the contract’s specified minimum quantity, DSCI’s allegations (a) – (f) present a bare foundation for a claim of the breach of good faith and fair dealing and that facts could be presented to establish bad faith. Therefore, at this juncture, it would be premature to dismiss this case, particularly before the conduct of any discovery. For these reasons, the Center’s Motion is denied without prejudice.<sup>2</sup>

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

August 23, 2005

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<sup>2</sup> This is an interlocutory order. It will become final only upon its adoption as part of the Final Order in this matter.