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

Protest of
The Whitestone Group, Inc. Docket No. 17-ODRA-00796
Pursuant to Solicitation No. DTFAWA-17-R-00014

DECISION ON REQUEST FOR SUSPENSION

This matter arises from a protest (“Protest”) by The Whitestone Group, Inc. (“TWG”) filed with the Federal Aviation Administration’s (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”). The Protest challenges the FAA’s Headquarters Product Team’s (“Product Team”) evaluation of proposals submitted under Solicitation DTFAWA-17-R-00014, which supported the National Security Officer Program in the Eastern Service Area. Generally speaking, TWG challenges the evaluation of its own proposal, the evaluation of the awardee’s proposal, and the best value decision. Protest at 1. TWG requests a suspension of the procurement process during the pendency of its Protest. Protest at 3-4. The Product Team opposes the request for suspension. Response in Opposition to the Request for Suspension (“Response”) at 1. The awardee, ADC LTD NM (“ADC”) has intervened, but did not file its own comments regarding the requested suspension or the Product Team’s Response.

For the reasons discussed below, the ODRA finds that TWG has not demonstrated compelling reasons to suspend the procurement process during the pendency of the Protest. The ODRA will not impose a temporary stay and will not recommend that the FAA Administrator order a permanent suspension pending the resolution of this matter.

I. Standard of Review

There is a strong presumption under the FAA’s Acquisition Management System (“AMS”) that procurement activities and contract performance will continue during the pendency of bid protests. 14 C.F.R. §17.13(g) (2016); Protest of Security Support Services, LLC, 12-ODRA-00595 (Decision on Request for Suspension, dated March 22, 2012). The burden of overcoming
the AMS presumption against suspension is on the protester. *Id.* The ODRA uses a four factor test to determine whether compelling reasons exist to issue a suspension. 14 C.F.R. §17.15(d)(2)(i)-(iv) (2016); *Protest of Hi-Tech Systems, Inc.*, 08-ODRA-00459 and 08-ODRA-00461 (Consolidated) (Decision on Suspension Request, dated September 15, 2008). The factors are: (1) whether the protester has alleged a substantial case; (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) the public interest. 14 C.F.R. §17.15(d)(2)(i)-(iv) (2016). The first factor of the suspension test is de-emphasized, and the ODRA must balance it in the context of the remaining three factors to determine whether compelling reasons exist for a suspension. *Protest of Security Support Services, LLC*, 12-ODRA-00595 (Decision on Request for Suspension, dated March 22, 2012).

II. Discussion

A. The Substantial Case Factor

A “substantial case” under the first factor of the suspension test is satisfied when the protester shows “a fair ground for litigation and thus for more deliberative investigation.” *Data Transformation Corp.*, 15-ODRA-00732 (Decision on Suspension, July 10, 2015) (citing *Protest of Crown Communication*, 98-ODRA-00098 (Decision on Suspension, October 9, 1998)). Under that stated standard, the ODRA does not decide the ultimate merits of the protest when considering a suspension request.

TWG has raised several issues that span eighteen single-space pages of its Protest. *Protest* at 7-23. These pages set forth a variety of common protest issues concerning both TWG’s own proposal and ADC’s proposal. *Id.* The Product Team does not argue that these issues fail as “fair grounds for litigation,” but simply points out that the first factor is de-emphasized. *Response* at 2. While the Product Team is correct that the first factor is de-emphasized (see *supra* Part I), the ODRA concludes that a fair ground for litigation has been established.
B. TWG has not demonstrated Irreparable Injury

TWG’s alleged injury stems solely from its status as the incumbent contractor for the services in question, and from the undisputed fact that [REDACTED].  Protest at 3; see also Response at 5. While TWG describes this [REDACTED][,] the Product team states that [REDACTED].” Compare Protest at 3 with Response at 5.  The Contracting Officer declared that she did not [REDACTED]. Response Exh. A (Contracting Officer Decl.) at ¶¶ 8-11. Additionally, her letter to TWG does not expressly [REDACTED], and instead, states that [REDACTED]. Protest Exh. A. The letter closes by referencing TWG’s “[REDACTED].” Id. Thus, regardless of the nature of the contractual status for [REDACTED], it is clear that work continues at [REDACTED] under TWG’s current contract.

The ODRA finds that these circumstances do not demonstrate “irreparable injury.” First, TWG does not attempt to show that the Product Team is obligated to continue funding the current contract.1 The ODRA previously has held under similar circumstances that “the alleged harm is merely the natural progression of a contract to its completion,” and that filing a protest “does not entitle an incumbent to either the windfall of an option exercise or a bridge contract during the pendency of a protest.” CGH Technologies, Inc., 16-ODRA-00767 (Decision on Suspension dated July 11, 2016). By the same reasoning, a protesting incumbent is not entitled to increases in incremental funding. This circumstance, therefore, does not describe a recognizable “injury” for the purpose of a suspension request.

The circumstances also demonstrate a second reason to find that the irreparable harm prong has not been met. The ODRA has previously explained that “[o]nly economic loss that threatens the survival of the movant’s business constitutes irreparable harm.” Protest of Crown Communications, Inc., 98-ODRA-00098 (Decision on Suspension dated October 9, 1998). Work remains at [REDACTED] under the current contract until the [REDACTED]. Protest Exh. A.

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1 To the contrary, the FAA posits that the decision to let funding lapse is based on [REDACTED]. Response at 5 (citing Contracting Officer Decl., at ¶¶ 8-11). This places into issue the question of whether the cause of the alleged injury is the award of the new contract to ADC, or in reality, an ordinary issue of contract administration relating to TWG’s contract. In its Reply, TWG raises counterpoints under a 30-day notice requirement found in special clause H.2 of TWG’s contract. TWG Reply at 4. The ODRA, however, does not need to decide these contract administrations issues in the context of a suspension request.
TWG does not explain how the remaining volume of work – [REDACTED] – is so insignificant that the firm’s survival would be at stake in the absence of a stay during the pendency of the protest.

Finally, TWG cites to the potential loss of its employees, i.e., that they would begin to migrate to the successful offeror. Protest at 3 (citing Exh. B, TWG President’s Decl., at ¶ 6). The ODRA has repeatedly rejected such arguments, most recently explaining:

As for the potential loss of employees resulting from the loss of the contract, the ODRA previously has rejected the loss of employees as constituting irreparable harm in a services contract situation, noting that employees will “naturally follow the work.” Protest of J.A. Jones Management Services, 99-ODRA-00140 (Decision on Protester’s Request for Stay of Contract Performance, dated September 29, 1999). The cited potential harms are not unusual or unique under the circumstances. Protest of Crown Consulting, Inc., 06-ODRA-00372 (Decision on Protester’s Request for Suspension, dated May 11, 2006). Every incumbent contractor suffers the loss of revenue and the potential loss of employees when it competes for and loses the award of its contract. Id. If the ODRA were to recommend a suspension on that basis, the FAA would be required to impose a suspension in virtually every case where an incumbent loses a competition. Such an approach would undermine the presumption against suspensions. Protest of All Weather, Inc., 04-ODRA-00294 (Decision on Suspension, dated February 4, 2004).

Protest of Data Transformation Corporation, 15-ODRA-00732 (Decision on Request for Suspension, dated July 10, 2015). This reasoning applies with equal force in the present Protest.

Based on the foregoing, the ODRA finds that TWG has not demonstrated that it will incur irreparable injury under the second factor of the suspension analysis.

C. The Relative Hardships and the Public Interest do not Support a Suspension

Without irreparable injury, extensive analysis of the other factors of the suspension test is not necessary. Nevertheless, the third factor of the suspension test looks to whether the relative hardships favor a suspension. Whereas TWG does not establish irreparable injury to itself in the

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2 The cited declaration paragraph on this point is speculative and barren of details. It states in its entirety, “6. Additionally, many of TWG’s employees likely will be hired by ADC.” Protest Exh. B, TWG President’s Decl., at ¶ 6.
absence of a suspension, the Product Team decries any suspension order that would leave critical FAA facilities unguarded and insecure, or alternatively, force the FAA to extend the current contract with TWG. *Response* at 6. Both alternatives create hardships on the FAA. The first – unsecure facilities – creates substantial risks to critical infrastructure, FAA employees, and the flying public. *Response*, Exh. B, *Decl. of Program Manager* at ¶ 8. The second – restraining the Product Team’s vested business discretion as to how to obtain the guard services during the protest period – ignores the well-established principle that the Product Team can assume the financial risk of proceeding with their award decision if they choose.3 *Protest of Ribeiro Constr. Co.*, 08-TSA-031, n.3 (Decision on Protester’s Request for Suspension, dated April 30, 2008) (citing *Protest of All Weather, Inc.*, O4-ODRA-00294, Decision on Protester Request for Stay, February 4, 2004). Under such circumstances, the hardships to the Agency that would result from the issuance of a stay would far outweigh any potential hardship that could result from allowing the procurement process to continue.

For the same reason, the public interest strongly favors continuation of the procurement process. Absent irreparable harm to the protester, the public interest lies not in delaying that process, but rather in upholding the integrity of the FAA’s Acquisition Management System. The adjudication process itself, rather than a suspension, will promptly address the issues and if the Protest is sustained, appropriate remedies are available.

III. Conclusion

Based on the record, the full arguments, and the applicable factors, the ODRA concludes that TWG has alleged a substantial case within the meaning of the four-part suspension test, but it has not demonstrated that it will suffer irreparable injury in the absence of a suspension or that the relative hardships and the public interest favor a suspension in the case. Thus, TWG has not met its burden of demonstrating compelling reasons to suspend this procurement during the pendency

3 Indeed, the Product Team may use its own judgment to voluntarily suspend a protested award if the risk of harm to the FAA’s interests becomes too great.
of this Protest. The ODRA accordingly declines to order a temporary stay, and will not recommend that the FAA Administrator issue a permanent suspension.

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John A. Dietrich
Dispute Resolution Officer and Administrative Judge
FAA Office of Dispute Resolution for Acquisition

August 3, 2017