

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

Protest of)	
)	
JL Properties, Inc.)	Docket No. 18-ODRA-00836
)	
Pursuant to Solicitation No. RETS-AL-10860-A)	

DECISION ON REQUEST FOR SUSPENSION

This matter arises from a protest (“Protest”) filed with the Federal Aviation Administration’s (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) by JL Properties, Inc. (“JL Properties”). The Protest challenges the FAA Alaska Region’s (“Region”) decision to award a lease for commercial office space for the FAA’s Flight Standards Team in Anchorage, Alaska to 949 E. 36th Avenue (“949 East”) pursuant to Solicitation for Offers No. RETS-AL-10860-A (“SFO”). *Protest* at 1; *Initial Agency Response (“IAR”)* at 2.¹ As part of its protest filing, JL Properties requested a suspension of the award pending the outcome of the Protest. *Id.* at 12. Both the Region and the Intervener, 949 East, oppose the request. *IAR* at 24; *949 East Opposition to Suspension Request (“949 Opposition”)* at 1.

For the reasons discussed below, the ODRA finds that JL Properties has not demonstrated compelling reasons to suspend the execution of the lease. The ODRA therefore will not impose a temporary stay or recommend that the FAA Administrator order a suspension.

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.

¹ In response to the Protest, the Region filed a combined response that includes a motion to dismiss for lack of timeliness, a response to the merits of the Protest, and an Opposition to the Request for Suspension. This Decision addresses only the Request for Suspension.

14 C.F.R. §17.13(g); *Protest of Science Applications International Corporation*, 17-ODRA-00813 (Decision on Request for Suspension, dated November 21, 2017). The Protester bears the burden of overcoming the AMS presumption against a suspension. *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). 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. *Id.* The first factor of the suspension test is de-emphasized, and the ODRA must balance it in the context of the remaining 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. Substantial Case

A substantial case under the first factor of the test is satisfied when the protester shows “a fair ground for litigation and thus for more deliberative investigation.” *Protest of Thomas Company, Inc.*, 16-ODRA-00781 (Decision on Suspension, December 16, 2016). In the instant matter, JL Properties alleges that the evaluation of its offer was defective, and resulted in an improper source selection decision. *Protest* at 11-12.

The Region’s Opposition states that a deliberative investigation of the merits is not necessary because JL Properties’ “protest points can almost all be dismissed by simple reference to the proposals and SFO terms.” *IAR* at 26. What the Region describes is an adjudication on the merits as set forth in the Procedural Regulations, 14 C.F.R. §§ 17.11-17.23. It is well established that the ODRA does not decide the merits of the underlying Protest in a Decision on Suspension. *Protest of Patriot Taxiway*, 18-ODRA-00832 (Decision on Suspension, dated May 7, 2018) (“At this stage of a Protest, the ODRA does not decide the merits of the protest grounds when it determines whether a substantial case exists.”).

The ODRA concludes that JL Properties' Protest allegations of a defective evaluation and source selection decision establish a fair ground for litigation, and thus constitute a "substantial case" for purposes of the suspension test.

B. Irreparable Injury

JL Properties argues under the second factor that "[a]n award based on the FAA's irrational evaluation would irreparably harm [JL Properties] because there is no adequate remedy at law to compensate [it] for the loss it would suffer from not being selected for award." *Protest* at 12. JL Properties further submitted the Affidavit of Levi Kincaid, the Senior Project Manager of JL Properties, as support, in its Response to the Region's Opposition to Suspension. Mr. Kincaid states, without supporting documentation, that the Anchorage real estate market is "soft," and "it is unlikely that another tenant or tenants will lease the space offered to the FAA during the pendency of this protest, thereby depriving JL Properties of almost \$60,000 in revenue per month." *Affidavit of Levi Kincaid*, dated May 15, 2018 at ¶ 3.

Both the Region and 949 East argue that these statements are conclusory, and do not support a finding of irreparable injury. *IAR* at 27-28; *949 East Opposition to Suspension* at 1-2. The ODRA agrees. JL Properties assertions are insufficient to overcome the AMS's strong presumption against suspension. 14 C.F.R. §17.13(g). It is well established that "speculative economic harm is not sufficient to overcome the presumption of continued contract activity." *Protest of Raytheon Company*, 16-ODRA-00774 (Decision on Suspension, dated October 12, 2016). JL Properties' allegations of lost revenue potentially are those of every disappointed offeror. To order a suspension on that basis effectively would eliminate the strong AMS presumption against suspension, and require that the ODRA order a suspension in virtually every case. *Protest of SGT, Inc.*, 17-ODRA-00814 (Decision on Suspension, dated December 8, 2017).

Moreover, adequate remedies are available in the event the Protest is sustained because the ODRA Procedural Regulations provide for broad remedies. 14 C.F.R. § 17.23(a)(5) and (6). Rather, it is "the Agency [that] bears the risk of added cost and delay resulting from any decision to continue

contract performance during the pendency of a protest.” *Protest of Thomas Company, Inc.*, 16-ODRA-00781 (Decision on Suspension, December 16, 2016). The ODRA therefore finds that JL Properties has not established that it would suffer irreparable injury within the meaning of the test.

C. Remaining Factors

Inasmuch as JL Properties has failed to establish irreparable injury, the ODRA need not conduct an extensive analysis of the other factors of the suspension test. *See, e.g., Protest of CACI, Inc.-Federal*, 15-ODRA-00733 (Decision on Suspension, dated July 1, 2015). Nonetheless, it is clear that JL Properties has not met its burden regarding the relative hardships and public interest factors. There is no controversy as to the relative hardships to the parties. JL Properties argues that “[t]he FAA will face no hardship from a small delay while it corrects its procurement deficiencies because the FAA’s [sic] has existing space which it can stay in.” *Protest* at 12. The Region states that “[d]uring the pendency of the protest, [it] will continue to rent from JL Properties at the 36th Ave. Co-Tenancy building.” *IAR* at 28. Thus, it does not appear that a suspension order would serve to address any hardship that otherwise would be suffered by either party while the Protest is adjudicated.

Finally, “in the absence of any demonstrable irreparable harm that would be incurred by the protester, the public interest lies not in delaying the acquisition process, but rather in upholding the integrity of the FAA’s Acquisition Management System” through a prompt adjudication on the merits. *Protest of CACI, Inc.-Federal*, 15-ODRA-00733 (Decision on Suspension, dated July 1, 2015). The ODRA therefore concludes that JL Properties has not met its burden under the relative hardships and public interest elements of the suspension test.

III. CONCLUSION

Based on the record, and after balancing the applicable factors, the ODRA concludes that JL Properties has not met its burden of demonstrating that compelling reasons exist to stay contract

performance during the pendency of this Protest. Therefore, the ODRA declines to order a temporary stay and will not recommend that the FAA Administrator issue a permanent suspension.

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C. Scott Maravilla
Dispute Resolution Officer and Administrative Judge
FAA Office of Dispute Resolution for Acquisition

May 17, 2018