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

Protest of)	
)	
Guidehouse LLP)	Docket No. 19-ODRA-00857
)	
<u>Pursuant to Solicitation No. DTFAWA-17-R-00017</u>)	

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 Guidehouse, LLP (“Guidehouse”). The Protest challenges the FAA Product Team’s decision to award an Enterprise Financial Services (“EFS”) contract to Ernst & Young LLP (“E&Y”). The contract provides a broad range of services in support of the “FAA’s need to systemically plan, implement, and monitor the efficacy of its budget and financial operations.” Product Team Opposition to Suspension, June 3, 2019 (“*PT Opposition*”) at 1.

As part of its initial filing, Guidehouse requests that contract performance be suspended pending the outcome of these proceedings. *Protest* at 1. Guidehouse contends that “given the numerous errors tainting this procurement, ODRA should order that the FAA suspend performance of E&Y’s contract during the pendency of this protest.” *Protest* at 3. Both the Product Team and the Intervener, E&Y, oppose the request. *PT Opposition* at 1; E&Y Opposition to Suspension Request, June 5, 2019 (“*E&Y Opposition*”) at 1.

For the reasons discussed below, the ODRA finds that Guidehouse has not demonstrated compelling reasons to suspend performance of the EFS contract. The ODRA therefore will not impose a temporary stay or recommend that the FAA Administrator order a suspension.

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I. Standard of Review

Under the FAA's Acquisition Management System ("AMS"), procurement activity and contract performance ordinarily continues during the pendency of bid protests. 14 C.F.R. § 17.13(g) (2019); *Protest of JL Properties, Inc.*, 18-ODRA-00836 (Decision on Request for Suspension, May 18, 2019). The Protester bears the burden of demonstrating that a suspension is necessary. *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) (2019). The factors are: (1) whether the protester has alleged a substantial case; (2) whether a stay or lack of stay would likely result in irreparable injury; (3) the relative hardships on the parties; and (4) the public interest. *Id.* The first factor of the test, however, is de-emphasized in favor of the other three factors. *Protest of JL Properties, Inc.*, 18-ODRA-00836 (Decision on Suspension, May 17, 2018).

II. Discussion

A. Substantial Case

When the ODRA reviews the first factor of the suspension test to determine whether the protest alleges a substantial case, it makes no decision as to the ultimate merits of the underlying protest. *Protest of Thomas Company, Inc.*, 16-ODRA-00781 (Decision on Suspension, December 16, 2016). Rather, if the protester shows "a fair ground for litigation and thus for more deliberative investigation," the first factor of the test is satisfied. *Id.* In the instant matter, Guidehouse asserts that it has alleged a substantial case as required under 14 C.F.R. § 17.15(d)(2)(2018). *Protest* at 18. Specifically, Guidehouse's Protest challenges the Product Team's price realism analysis as arbitrary and capricious, its evaluation of E&Y's past performance as erroneous, its technical evaluation as contrary to the solicitation, and its best value determination as flawed. *Protest* at 10-17.

Neither the Product Team nor E&Y dispute that Guidehouse has alleged a substantial case, as required under the ODRA Procedural Regulation. *PT Opposition* at 3; *E&Y Opposition* at 3.

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Accordingly, ODRA concludes that Guidehouse’s allegations establish a fair ground for litigation, and thus constitute a “substantial case” for purposes of the suspension test. *See Protest of Patriot Taxiway*, 18-ODRA-00832 (Decision on Suspension, May 7, 2018)).

B. Irreparable Injury

The ODRA Procedural Regulation requires a protester to establish that its injury—in the absence of a suspension—would be “irreparable.” 14 C.R.R. § 17.15(d)(1)(2)(ii) (2018). An irreparable injury “must be both certain and great, actual and not theoretical.” *Monument Realty LLC v. Washington Metro. Area Transit Auth.*, 540 F. Supp. 2d 66, 82 (D.D.C. 2008). Guidehouse does not allege any injury that meets this definition.

The injury that Guidehouse anticipates comes from the expiration of its current contracts with the FAA. It explains, “[I]f there is no suspension of performance, Guidehouse will be forced to transition out of contract performance for work it should be allowed to continue to perform and will lose employees as a result.” *Protest* at 3. Guidehouse does not elaborate on this allegation from counsel, and certainly does not support it with reliable and probative evidence showing that the loss of employees is certain, great, actual, and not theoretical. The Product Team, on the other hand, explains through declarations that the FAA issued the existing task orders to Guidehouse pursuant to single-source justifications, and they will expire soon. *PT Opposition* at 3; Declaration of Contracting Officer, June 3, 2019 (“*CO Declaration*”) at ¶ 7. Nothing mandates that the FAA extend the task orders in question, and further, any suspension of this award to E&Y would not provide an extension of Guidehouse’s task orders.

The ODRA has faced similar allegations of harm and rejected them. It consistently rejects assertions of lost revenue and employees as insufficient to establish the likelihood of irreparable injury from continued contract performance. *See, e.g., Protest of CACI, Inc. Federal*, 15-ODRA-00733 (Decision on Request for Suspension, dated July 1, 2015). Indeed, Guidehouse’s allegations of lost revenue could be made by many disappointed offerors, and effectively would require that the ODRA order a suspension in virtually every bid protest involving incumbent contractors.

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Protest of SGT, Inc., 17-ODRA-00814 (Decision on Suspension, dated December 8, 2017). As for the loss of employees, the ODRA previously has stated, “the argument regarding employee loss is speculative and does not constitute irreparable injury.” *Protest of Apptis, Inc.* 10-ODRA-00535 (Decision on Suspension, August 3, 2010) (“[E]mployees in services contract situations often follow the work and their own professional opportunities ... [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 ODRA concludes, therefore, that Guidehouse has not demonstrated injury – much less irreparable¹ injury – in the absence of a suspension order.

C. The Relative Hardships Factor

As for the relative hardship factor, Guidehouse argues, “[c]ontract suspension for this litigation would make little appreciable difference in the long arc of this procurement” for the FAA, compared to the hardship that it would suffer from the loss of revenue and critical employees. *Guidehouse Comments* at 1-2. Guidehouse further argues that a lack of a suspension would “force Guidehouse to be transitioned off the project, resulting in more than simple revenue loss.” *Id.* Guidehouse also asserts, “[t]he Agency is capable, and empowered if necessary, to extend incumbent performance – as it has done since September 2018 when the incumbent contracts expired” on a sole-source basis. *Guidehouse Comments* at 2

In response, the Product Team contends that the hardships claimed by Guidehouse from the lack of a stay are speculative, and regardless, do not outweigh the hardships that a stay would impose on the FAA and E&Y. *PT Opposition* at 4. With regard to the hardships a stay would impose on the FAA, the Product Team submits as evidence, sworn declarations from the Contracting officer and Program Manager in support of its position. *CO Declaration*; Declaration of Program Manager, Todd Pennington, May 31, 2019 (“*PM Declaration*”).

¹ The ODRA has broad authority to recommend meaningful relief for a meritorious protest “that is appropriate under the circumstances.” 14 C.F.R. § 17.23(a)(8) (2018); *Protest of Patriot Taxiway*, 18-ODRA-00832 (Decision on Suspension, May 7, 2018). Moreover, by opposing the suspension request, the Product Team assumes the risk of any additional costs and/or delay resulting from its decision to continue contract performance, in the event the Protest is sustained. *Protest of Whitestone Group, Inc.*, 17-ODRA-00796 (Decision on Suspension, August 3, 2017).

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The Contract Officer explains that the EFS contract provides important and wide-ranging support services necessary for the FAA to perform budgetary, financial and management operations. *CO Declaration* at ¶ 2. He further states that contract performance has begun, and that a suspension would cause time consuming and costly disruption to efforts currently ongoing to consolidate and transition the work from expiring task orders to the new contract. *CO Declaration* at ¶¶ 5, 7-8.

The Program Manager adds that a suspension would impose considerable hardship on the FAA's ability to manage its budget, finance, and management related services. *PM Declaration* at ¶ 1. He further indicates that the FAA has an "ongoing need" and a "pent-up demand for" the services covered by the EFS contract. *Id.* The EFS contract supports operations for managing the FAA's budget and appropriations, collecting accurate cost and financial data, and ensuring the timely and responsible use of public funds in support of the FAA's mission. *PM Declaration* at ¶ 3. In this regard, the Program Manager indicates:

Given the breadth of the EFS contract and the timing of the protest, even a short suspension would impact FAA's ability to ensure the accuracy and timeliness of its budgetary, financial and managerial operations and end fiscal year 2019 with all appropriated funds accounted for, expended and monitored appropriately. *Id.*

Inasmuch as the FAA is in the process of transitioning work to E&Y from expiring task orders under the predecessor contract, any delay of this effort would have "substantial impact on FAA's operations." *PM Declaration* at 3. The evidence in the record demonstrates that a suspension of the contract could adversely affect vital FAA programs and projects that support communication goals, equipment deployment, and other critical activities. *PM Declaration* at 3-5. Based on these sworn explanations, the ODRA finds that a suspension would substantially harm the agency.

Although Guidehouse bears the burden of proof in these suspension proceedings, it provides no evidence in support of its arguments for a suspension, nor does it refute evidence placed in the record by the Product Team. *Protest of Encentric, Inc.*, 17-ODRA-00792 (Decision on Suspension, dated May 12, 2017). It is well established that legal arguments of counsel do not constitute evidence. *Protests of Avenue Co-Tenancy, International Office Building, JL Office*

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Tower LLC, and SJ/JL Calais Office II, 17-ODRA-00798, -00799, -00800, and -00801 (Consolidated) (Decision on Request for Suspension, dated September 8, 2017). Moreover, weighing all the various harms even as alleged, the ODRA still finds that overall, less hardship will result from continued contract performance than from a suspension order.

D. The Public Interest Factor

With respect to the fourth factor, Guidehouse contends that “restoring integrity to the procurement process” when it is “tainted by arbitrary and capricious government action,” protecting “Guidehouse’s rights and economic interest,” and preventing E&Y to “profit from the Agency’s unreasonable decision,” establishes the public’s interest in suspending performance in this case. *Protest* at 19. Guidehouse’s legal arguments, however, are based on its assumptions as to EY’s ratings and speculation as to the merits of its protest allegations.²

Given the absence of proof that Guidehouse would suffer irreparable harm without a suspension, and balancing the relative hardships evidenced in the record, the ODRA finds the public interest lies not in delaying the acquisition process. Rather, the public interest lies in upholding the integrity of the FAA’s AMS by promptly adjudicating the protest to determine “whether the Product Team actions in question were consistent with the requirements of the AMS, had a rational basis, and whether the Product Team decision was arbitrary, capricious or an abuse of discretion.” 14 C.F.R. § 17.21(m) (2018).

² Moreover, the cases on which Guidehouse relies are readily distinguishable from the case at hand. Guidehouse’s quotation from *Orange Park Florida T.V. Inc. v. F.C.C.*, 811 F.2d 664, 672 (D.C. Cir. 1987) for the proposition that Guidehouse’s own “discrete” economic interest relates to the public interest in the context of an injunction is inapposite. *Guidehouse Comments* at 4. In *Orange Park*, the court considered the public interest relative to the plaintiff’s *standing* to protest an award; not whether the public interest would be furthered by the “extraordinary and drastic remedy” of an injunction. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). As for Guidehouse’s arguments relative to the “burden on the public fisc,” *Monument Realty LLC v. Washington Metro. Area Transit Authority*, 540 F. Supp. 2d 66 (D.D.C. 2008), is readily distinguishable on the facts, since it involves a breach of contract claim and the sale of unique, real property. *Id.* at 82-83.

III. CONCLUSION

The ODRA concludes that Guidehouse has alleged a substantial case within the meaning of the four-part suspension test, but it has not demonstrated that it is likely to suffer irreparable injury in the absence of a suspension. Nor do the relative hardships or the public interest favor a suspension in this case. The ODRA accordingly declines to order a temporary stay and recommend that the FAA Administrator issue a permanent suspension.

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Marie A. Collins
Dispute Resolution Officer and Administrative Judge
FAA Office of Dispute Resolution for Acquisition

June 28, 2019