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

Protest of)	
)	
Johnson Controls Security Systems, LLC)	Docket No. 11-ODRA-00571
)	
Pursuant to Solicitation DTFAWA-10-R-00021)	

DECISION ON REQUEST FOR SUSPENSION

This matter arises from a post-award bid protest (“Protest”) filed at the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on April 7, 2011 by Johnson Controls Security Systems, LLC (“JCSS”). The Protest challenges the award of a contract (“Contract”) to Honeywell Technology Solutions, Inc. (“Honeywell”) by the FAA Program Office (“Program Office”) pursuant to Solicitation DTFAWA-10-R-00021 (“Solicitation”). *Protest* at 1, 2. The Contract is for corrective maintenance of protective security systems at FAA facilities nationwide pursuant to the Facility Security Risk Management (“FSRM”) Program. *Protest* at 8, 9.

JCSS asserts several protest grounds, including: (1) failure to properly credit JCSS for its past performance as the incumbent; (2) failure to attribute performance risk to Honeywell; (3) failure to follow the stated evaluation criteria; (4) use of an unstated evaluation criterion; and (5) failure to complete a proper price analysis. *Protest* at 2-5. The Protest includes a request that the Administrator suspend contract performance until the Protest is decided (“Suspension Request”). *Id.* at 57. The Program Office filed its Opposition to the Request (“Opposition”) on April 14, 2011. JCSS filed its Reply to the Opposition on April 18, 2011 (“Reply”) and Honeywell filed its Response (“Honeywell Response”) to the Request on the same date. For the reasons discussed in detail herein, the ODRA finds that JCSS has not demonstrated compelling reasons to suspend contract

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performance. The ODRA therefore will not impose a temporary stay, and will not recommend that the FAA Administrator suspend performance of the Contract during the pendency of this Protest.

I. Standard of Review

The FAA's Acquisition Management System ("AMS") includes a presumption that procurement activities and contract performance will continue during 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. § 17.13(g). Accordingly, the ODRA consistently has ruled that it will not issue or recommend that the FAA Administrator issue suspensions during the pendency of protests, 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 uses a four factor test to determine whether compelling reasons support issuance of a suspension. *See, e.g., Protest of Crown Communications*, 98-ODRA-00098 (Decision on Suspension, dated October 9, 1998). The factors include: (1) whether a substantial case worthy of further adjudication has been alleged by the protester; (2) whether irreparable injury is likely to result from a stay or lack of a stay; (3) the relative hardships on the parties; and (4) 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 demonstrating compelling reasons to overcome the AMS presumption against suspension. *See, e.g., Hi-Tech Systems, Inc., supra.*

II. Discussion

A. Factor One: Substantial Case

In requesting that the ODRA suspend performance of the Contract during the pendency of this Protest, JCSS relies on the allegations of its Protest as sufficient to meet the "Substantial Case" element of the suspension test. *See Protest* at 6; *Reply* at 3-5. JCSS

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asserts that it has raised a substantial case, *i.e.*, one that alleges facts constituting “a fair ground for litigation and thus for a more deliberative investigation.” *Id.* at 4, *citing Protest of Crown Communications, supra*. Both the Program Office and Honeywell disagree. *See Opposition* at 3; *Honeywell Response* at 2. The Program Office “views the protest as being wholly without merit.” *Opposition* at 3. Similarly Honeywell contends that “JCSS has presented no evidence to call into question the FAA’s decision to award to Honeywell.” *Honeywell Response* at 2. Notwithstanding these strong assertions, the ODRA concludes that the Protest allegations provide a sufficient basis on which to develop 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 must also balance the remaining three elements to determine whether compelling reasons support a suspension. *Protest of Crown Communications, supra*.

B. Factor Two: Irreparable Injury

JCSS asserts under this factor that in the absence of a suspension it will lose valuable employees, which would damage its competitive position. *Reply* at 6. More specifically, it asserts that “JCSS runs the significant risk of losing its highly trained and certified network of services technicians if the Corrective Maintenance contract transitions to Honeywell”. *Protest* at 6. JCSS goes on to assert that the loss of the employees involved will place JCSS at a competitive disadvantage in relation to its competitors. *Reply* at 8. In that regard, JCSS asserts that unless the ODRA delays the currently occurring transition of work under the contract from JCSS to Honeywell, there will be [DELETED] *Id.* at 5.

In response, the Program Office cites to ample ODRA precedent for the proposition that “mere economic loss is insufficient to demonstrate an irreparable injury in support of a stay request.” *Opposition* at 4. Citing additional ODRA precedent, the Program Office states:

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Additionally, potential loss of employees and the type of economic loss asserted by the Protester are insufficient to demonstrate compelling reasons in support of a stay because, as the ODRA has noted, “employees in service contract situations often follow the work and their own professional opportunities.”

Id. (Quoting from *Protest of Sentel Corporation*, Decision on Request for Suspension 09-ODRA-00497 at 8.)

For its part, Honeywell echoes the assertions of the Program Office. It points out that:

If a suspension were granted, the predecessor contract will still expire on April 30, 2011. The FAA could only extend JCSS’s services for 17 days beyond that date because the Agency has nearly exhausted its ability to extend the contract under Acquisition Management System Clause 3.2.4-34, Option to Extend Services.

See *Honeywell Response* at 3, citing to *Declaration of David Joyce*, Paragraphs 2-4. Thus, Honeywell asserts that, regardless of a suspension “JCSS faces the risk of losing employees staffed to its contract.” *Id.*

JCSS, while noting ODRA unfavorable precedent regarding loss of employees and economic harm, urges that cases such as *Sentel*, *supra* and *Crown Communications*, *supra*, are distinguishable from the instant case because “the loss of JCSS’ uniquely experienced employees threatens an inability of JCSS to maintain its posture for re-competition.” *Reply* at 8. In support of its argument JCSS cites to the Decision of the United States Court of Federal Claims in *University Research Company, LLC v. the United States*, 65 Fed.Cl. 500, 514(2005). Both the Program Office and Honeywell note, however, that the Court’s decision in *University Research Company* “involves a different protest regime and does not reflect FAA’s protest standards, such as the presumption favoring continued performance during a bid protest.” See, *Honeywell Response* at 3; *Opposition* at 3, Note 1.

An argument similar to that made by JCSS here was asserted in connection with a request for suspension in the *Protest of Apptis, Inc.*, 10-ODRA-00535. The ODRA noted in its Decision denying the suspension request that “Apptis relies on a Declaration from its Chief Operating Officer to argue that it will be at a competitive disadvantage for future

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contracts....” *Apptis, Inc., supra* (Decision on Request for Suspension dated August 3, 2010 at 4). Essentially, *Apptis* argued its ability to market itself to the Agency would be directly impacted by its loss of employees involved. Unlike the Protester in *Apptis* however, JCSS has not supported its irreparable injury assertions with a declaration specifically addressing the potential impact on JCSS. Rather JCSS has offered a Declaration of its General Manager stating that employees of JCSS appeared to be qualified and eligible for hiring by Honeywell to work under the Contract; and that the extension of the JCSS contract would be acceptable to JCSS and would be allowable under the AMS. *See Declaration of David F. Prochnow, Reply, Exhibit A.*

As was noted in *Apptis*, the ODRA previously had held that:

[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]

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).

Under the circumstances presented here, continuation of the transition and continued performance of this Contract during the relatively brief pendency of the Protest cannot be viewed as resulting in irreparable injury. The record suggests that Honeywell may seek to regain the needed employees as readily as it claims it may now be losing them. In any event, such a loss by an incumbent coming to the end of the performance period of its contract is neither unexpected nor preventable by the issuance of a suspension. As we have stated on more than one occasion, to issue a suspension on such a basis effectively would undermine if not eliminate the presumption against suspension that is a

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fundamental principle of the AMS. *Protest of J.A Jones, supra*. For the reasons stated in denying the Suspension Request in *Apptis*, the ODRA concludes that an irreparable injury is not likely to occur in the absence of a suspension of the work currently being transitioned to Honeywell. *See Protest of Apptis, supra*.

C. Factor Three: Relative Hardships

With respect to the third factor of the test, JCSS asserts that “there is no risk of significant negative consequences for the FAA if the suspension is granted” *Reply* at 9. JCSS notes in that regard that the JCSS incumbent contract could be extended to allow for continuation of the work until May 17, 2011. It further asserts that the extension could be extended beyond that date. *Id.* JCSS goes on to repeat its earlier argument that it would be placed in a weakened competitive position in the absence of a suspension in the event a recompetition is ordered. *Id.* at 11. In its Opposition, the Program Office points out the “the predecessor [JCSS] contract will expire on April 30, 2011 regardless of whether a suspension is granted or not.” *Id.*; *See Honeywell Response* at 4. The Program Office notes that “any loss of employees by Protester would flow from the natural expiration of the [JCSS] CMC-I contract, and are not in anyway the result of the award to Honeywell.” *Opposition* at 4. The Program Office further notes that the transition to Honeywell will be complete by April 30, 2011. *Id.* The Program Office cites to the Declaration of David Joyce, the Program Manager for the FSRM Program. *Id.* at Attachment A. The Joyce Declaration categorically states, among other things, that:

A suspension of any work related to the corrective maintenance of security systems in the Air Route Traffic Control Centers (ARTCCs), Air Traffic Control Towers (ATCT), Terminal Radar Approach and Control (TRACON) and the Air Traffic Control System Command Center (ATCSCC) under the CMC II contract will cause a disruption in the provision of maintenance that would jeopardize personnel and equipment that have overriding and far-reaching safety implications for our National Airspace System (NAS) and for the safety of the flying public.

Id. at Para. 9. The Joyce Declaration goes on to describe both the important role of the Contract in the security of the National Airspace System (“NAS”) and the hardships that

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would result if the work is disrupted in the final stages of transitioning to Honeywell. The ODRA finds the Joyce Declaration to be both credible and persuasive, and further finds that the imposition of a suspension would have the potential of seriously endangering air safety and the security of the NAS. Under such circumstances, the ODRA concludes that the relative hardships strongly militate against issuance of a suspension.

D. Factor Four: The Public Interest

JCSS argues that the public interest favors the issuance of a suspension because “the public interest is not served when a government contract subject to competitive bidding procedures has not been properly executed.” *Protest* at 7, 8. Additionally, JCSS repeats its argument that a suspension would “maintain the parties’ respective bidding positions and allow for a fair re-bidding process in the event that the pending Protest is sustained....” *Reply* at 12. Finally, JCSS asserts its earlier argument that it, rather than Honeywell, is in a better position to “perform the full range of corrective maintenance services required....” *Id.* In response to this argument, the Program Office asserts “the integrity of the procurement process and the AMS will be upheld by the prompt adjudication of the protest, and not by the granting of a suspension.” *Opposition* at 6 (*citing to Protest of Sentel, Supra* at 9). Honeywell essentially echoes this argument in its Response. *See Response* at 5, 6. Most significantly, the Joyce Declaration states in this regard that:

The safety of the NAS and the flying public depends on the protection provided to FAA personnel and facilities by the security equipment that is maintained using the Corrective Maintenance contract. These personnel and the equipment that they operate directly controls aircraft movement throughout the nation. The CMC II provides maintenance support to the security equipment installed at approximately 1,100 FAA staffed facilities. Suspending corrective maintenance for any amount of time would put the FAA at risk of failing to deliver on its critical mission of safeguarding facilities, personnel and other components of the critical National Airspace infrastructure.

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Opposition, Attachment A at Para.10, *supra*. The ODRA finds no basis in the record to challenge the veracity of this statement or to downplay the significance of the Contract work involved. The ODRA therefore concludes that the public interest strongly favors continuation of the contract work without suspension during the pendency of this Protest.

III. Conclusion

After balancing the applicable factors the ODRA concludes that, although the JCSS Protest presents a substantial case, the remaining three factors of the suspension test do not support its Request. Inasmuch as JCSS has not demonstrated that compelling reasons exist to stay contract performance during the pendency of this Protest, the ODRA 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

April 22, 2011