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

Protest of)	
)	
The Rigil Corporation)	Docket No. 17-ODRA-00806
)	
<u>Pursuant to Solicitation No. DTFACT-17-R-00003</u>)	

DECISION ON REQUEST FOR SUSPENSION

This matter arises from a protest (“Protest”) by Rigil Corporation (“Rigil”) filed with the Federal Aviation Administration’s (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”). The Protest challenges the FAA Product Team’s (“Product Team”) evaluation of proposals submitted under Solicitation DTFACT-17-R-00003 (“Solicitation”). Generally speaking, Rigil challenges the evaluation of its own proposal and the evaluation of the awardee’s proposal. *Protest* at 11-15. Rigil requests a suspension of the procurement process during the pendency of its Protest.¹ *Protest* at 3-4. The Product Team and the intervening-awardee, Karsun Solutions, Inc. (“Karsun”), oppose the request for suspension. *Response in Opposition to the Request for Suspension (“Response”)* at 1; *Karsun’s Suspension Comments* at 1.

For the reasons discussed below, the ODRA finds that Rigil 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

¹ Rigil modified its Request for Suspension in its Comments, stating, “Rigil agrees to limit its request for suspension solely to the contracts under which Rigil is current performing.” *Rigil’s Suspension Comments* at 4.

(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) (2017); *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) (2017). 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.

The evaluation issues that Rigil has raised proposal evaluation issues that are typical of protests filed under 14 C.F.R. pt. 17, Subpart B. *Protest* at 11-15. For example, [REDACTED]. *Id.* at 11. Additionally, Rigil challenges the Product Team’s evaluation of the size and scope of the past performance examples provided in Rigil’s proposal. *Id.*, at 14. 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. Karsun, however, challenges the factual allegations and the interpretation of the Solicitation to argue that grounds for litigation are not present. *Karsun’s Suspension Comments* at 1-2. Ironically, Karsun’s position demonstrates that fair grounds for litigation exist inasmuch Karsun would have the ODRA – at this preliminary stage – render

PUBLIC VERSION

determinations of the merits based on the evidence and law. The ODRA concludes that fair grounds for litigation have been established.

B. Rigil has not demonstrated Irreparable Injury

The second analytical factor addresses whether the lack of a stay would likely result in irreparable injury to Rigil. *See supra* Part I. Rigil's alleged injury stems solely from its status as the incumbent contractor for a portion of the services provided under the Solicitation and resulting contract. *Protest* at 15. Without supporting materials, Rigil's counsel elaborates on the percentage of Rigil's annual revenue that is derived from its expiring contract, and that there is a risk that its employees will be recruited by Karsun. *Rigil's Suspension Comments* at 3-4. Counsel further states that Rigil "continues to perform this work for the Agency and is schedule to continue a large portion of that work through March 2018." *Id.* at 3.

The statement that Rigil still has a large portion of FAA work (as well as the associated revenue stream) over the next six and one half months demonstrates that the company is not likely to be irreparably harmed without the issuance of an immediate stay or a permanent suspension. Moreover, regardless of the issuance of a suspension, the anticipated end date of the current work "is merely the natural progression of a contract to its completion." *CGH Technologies, Inc.*, 16-ODRA-00767 (Decision on Suspension dated July 11, 2016). The imposition of a stay or suspension of the current procurement efforts will not change the closeout of the Rigil's present contract, and it is well established that the Acquisition Management System "does not entitle an incumbent to either the windfall of an option exercise or a bridge contract during the pendency of a protest." *Id.*

As to the concern that employees will migrate to the successful offeror, the ODRA has routinely rejected such arguments. *See e.g., Protest of Data Transformation Corporation*, 15-ODRA-00732 (Decision on Request for Suspension, dated July 10, 2015); *Protest of Johnson Controls Security Systems, LLC*, 11-ODRA-00571 (Decision on Request for Suspension, April 22, 2011). More importantly, the record is barren of evidence of such migration, which renders the issue as merely speculative argument of counsel. *Protest of Thomas Corporation*, 16-ODRA-00781, n.7.

PUBLIC VERSION

Based on the foregoing, the ODRA finds that Rigil 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 Rigil does not establish irreparable injury to itself in the absence of a suspension, the Product Team asserts with evidentiary support that a suspension will seriously interfere with its current efforts to consolidate ten expiring contracts, transition work, and ensure timely obligation of appropriated funds. *Response* at 3 (citing Attach. 2, *Decl. by Contracting Officer*). On balance, these considerations heavily outweigh the non-existent irreparable harm to Rigil, and the relative hardships therefore do not favor suspension. In circumstances such as these, the Product Team voluntarily may choose to suspend its efforts, or it may assume the financial risk of proceeding with its award decision. *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.*, 04-ODRA-00294, Decision on Protester Request for Stay, February 4, 2004).

As to the factor pertaining to the public interest, absent irreparable harm to 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. 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 Rigil 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, Rigil has not met its burden

PUBLIC VERSION

of demonstrating compelling reasons to suspend this procurement during the pendency 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

September 19, 2017