[redacted]

No. 10-743C
(Judge Braden)

Agreed Upon
Redacted Version

(BID PROTEST)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

GOOGLE, INC.,

and

ONIX NETWORKING CORPORATION,

Plaintiffs,

v.

THE UNITED STATES,

Defendant,

and

SOFTCHOICE CORPORATION,

Defendant-Intervenor.

DEFENDANT'S REPLY IN SUPPORT OF OUR CROSS MOTION FOR JUDGEMENT UPON THE ADMINISTRATIVE RECORD AND RESPONSE TO PLAINTIFF'S RE-STATED MOTION FOR JUDGMENT ON THE RE-FILED AND UPDATED ADMINISTRATIVE RECORD

TONY WEST
Assistant Attorney General

MICHAEL F. HERTZ
Deputy Assistant Attorney General

KIRK T. MANHARDT
Assistant Director

OF COUNSEL:

SARA BIENKOWSKI
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice

SHERYL RAKESTRAW
Attorney Advisor
Departmetn of the Interior

CHRISTOPHER L. KRAFCHEK
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
Attn: Classification Unit, 8th Floor
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 305-0041

Attorneys for Defendant

June 15, 2011

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

CASES

PAGE(S)

STATUTES

MISCELLANEOUS

[redacted]

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

GOOGLE, INC.,	*	
and	*	
ONIX NETWORKING CORPORATION,	*	
Plaintiffs,	*	(No. 10-743C)
v.	*	(Judge Braden)
THE UNITED STATES,	*	
Defendant,	*	
and	*	
SOFTCHOICE CORPORATION,	*	
Defendant-Intervenor.	*	

DEFENDANT'S REPLY IN SUPPORT OF OUR CROSS MOTION FOR JUDGMENT UPON THE ADMINISTRATIVE RECORD AND RESPONSE TO PLAINTIFF'S RE-STATED MOTION FOR JUDGMENT ON THE RE-FILED AND UPDATED ADMINISTRATIVE RECORD

Despite the best of efforts of the plaintiffs, Google, Inc. ("Google") and Onix Networking Corporation ("Onix"), to confuse the facts, law, and issues in this case, the critical question before the Court is whether Google's product, Google Apps for Government, can meet the Department of the Interior's ("DOI") rationally articulated minimum-security requirements. Plaintiffs concede that Google still wholly refuses to provide a service that satisfies DOI's minimum-security requirements. Pl. Rev. MJAR at 15, fn. 4. Rather than address the issue or

[redacted]

explain why a Federal agency must consider a product that does not meet its minimum security requirements, plaintiffs have gone through the record to locate any fact to support its inane argument that DOI engaged in a conspiracy to award a contract to Microsoft, while allegedly denying plaintiffs a meaningful opportunity to compete.

As we explain below, the record conclusively establishes that DOI elected to issue a brand-name procurement pursuant to Federal Acquisition Regulation ("FAR") Part 8 for Microsoft Business Online Suite-Federal ("BPOS-Federal") only after Google indicated it would not provide a physically and logically dedicated server located within the United States. Moreover, the record establishes that DOI discussed its cloud requirements with Google as early as June, 2009, and more specifically its requirement for a physically and logically dedicated server located within the continental United States to Google as early as February, 2010. Yet, now plaintiffs contend that DOI's determination of its minimum-security requirements is a "post hoc rationalization." Pl. Rev. MJAR at 5. Notwithstanding this contention, the record demonstrates that DOI consulted industry, engaged in full and fair market research, relied upon its own internal expertise, and made a rational, informed decision when determining its minimum-security requirements.

Google's steadfast refusal to provide a server that is physically and logically separated from its other servers and located in a data center within the continental United States leads to the inescapable conclusion that DOI's procurement action cannot possibly prejudice the plaintiffs. The law of this circuit is clear that a contractor may not dictate the manner in which an agency meets its minimum needs. Savantage Financial Services, Inc v. United States, 595

[redacted]

F.3d 1282, 1286 (Fed. Cir. 2010) ("Savantage II"). Accordingly, even if we were to assume for the sake of argument that everything plaintiffs contend is accurate, which it is not, plaintiffs cannot establish prejudice in this matter because their entire case hinges upon whether DOI legitimately determined its minimum-security requirements. Perhaps realizing that a plaintiff has no business challenging an agency's determination of its minimum requirements, Savantage II, 595 F.3d at 1286, plaintiffs bury their challenge to DOI's determination of its minimum-security needs on page 18 of their revised MJAR when they argue that Google's cloud offering "that satisfies all of DOI's **legitimate** needs" is just as technically capable as BPOS-Federal. Pl. Rev. MJAR at 18 (emphasis added).

Additionally, plaintiffs repeat their earlier arguments, still without support, that two standardization decisions issued by DOI violate FAR Part 6 and the Competition In Contracting Act ("CICA"), 41 U.S.C. § 253(a)1A.[1] Pl. Rev. MJAR, 11 - 18. Plaintiffs accuse the Government of "attempting to divert the Court's attention from the 'gravamen' of this protest to the flak and publicity over the FISMA certification issue . . . which is a red herring in the context of the merits of this case." Id. at 3. As we have previously explained, and will again demonstrate below, the plaintiffs initially raised this issue in their original complaint and amended complaint, and continued to trumpet their argument until it was pointed out that Google Apps for Government did not have, and in fact has never received, certification pursuant to the Federal Information Security Management Act ("FISMA"). Accordingly, there is no merit to plaintiffs' assertion that the Government has made this issue a "bone of contention." Id. at 15.

[1] CICA has been re-codified as 41 U.S.C. § 3304.

[redacted]

Finally, plaintiffs have consistently ignored the factual sequence of events in this case, taken comments and actions out of context, misstated our arguments, and, inappropriately and without hard facts or evidence, accused DOI of engaging in bad faith. All of plaintiffs' contentions are without merit and the Court should dismiss the complaint and amended complaint, terminate the preliminary injunction currently in place, and grant our motion for judgment upon the administrative record.

STATEMENT OF THE CASE

On October 29, 2010, Google, Inc. ("Google") and Onix Networking Corporation ("Onix") filed a pre-award bid protest in this Court, challenging an August 30, 2010 Request for Quotation No. 503786 ("RFQ") by the Department of the Interior ("DOI") to provide "hosted email and collaboration services and [Interior's] supporting 'Limited Source Justification.'" Compl. at 1-2. Along with the complaint, plaintiffs filed a motion for a temporary restraining order and sought a preliminary injunction enjoining DOI from proceeding with the procurement under challenge. On November 19, 2010, we filed an opposition to plaintiffs' motion for a preliminary injunction ("defendant's opposition"). On December 3, 2010, plaintiffs filed a reply to defendant's opposition and motion for judgment upon the administrative record ("plaintiffs' MJAR"). On December 17, 2010, defendant filed a cross-motion for judgment upon the administrative record and response ("defendant's MJAR").

On December 30, 2010, plaintiffs filed an amended two-count complaint. In Count I, plaintiffs alleged that DOI violated the Competition In Contracting Act, 41 U.S.C. § 253(a) and the Federal Acquisition Regulation ("FAR") 6.304 and 6.305 when it issued a justification for a

[redacted]

modification to a pre-existing contract for enterprise software services held by Dell Marketing, LLC ("Dell") as a proof of concept action and when it issued two standardization decisions on July 15, 2010 to create an internal policy that Microsoft Business Online Suite Federal ("BPOS-Federal") and Microsoft Desktop and Server Software would be the agency standard. Amend. Compl. at 23. Plaintiffs further alleged that the limited source justification, issued with a Request for Quotation No. 503873 ("RFQ"), violated the requirement for "full and open competition in 41 U.S.C. § 253(a)" and that it failed to comply with FAR 8.405-6 because other responsible sources can meet, or be modified to meet, DOI's requirement. Id at 24.

In Count II, plaintiffs alleged that DOI's decisions in justifying the modification to Dell's contract and two standardization decisions were arbitrary, capricious, an abuse of discretion, and contrary to law. Id. On December 31, 2010, plaintiffs filed a reply and response to defendant's cross-motion for judgment upon the administrative record.

On January 3, 2011, the Court issued an opinion and order enjoining DOI from "proceeding with or awarding a contract to implement a Microsoft Business Productivity Online Suite-Federal Messaging solution, pursuant to RFQ No. 503786 or any related procurement, solicitation, task order, or activity, including proceeding with the June 14, 2010 Amendment Modification 0003 to Contract No. GS35F4072D/NBCF09382." Google, Inc. v. United States, 95 Fed. Cl. 661, (2011) ("Google I"). In conclusion, the Court noted that it "made no judgment as to whether Interior's basis for this procurement was rational or whether the procurement was conducted in a manner that was arbitrary and capricious." Id. at 680. The Court remanded the matter to DOI "for additional investigation or explanation." Id. On or about January 10, 2011,

[redacted]

the Court returned the administrative record and directed DOI to file a status report within 90 days of the Court's order.

On March 4, 2011, we filed a motion to terminate the stay of proceedings, dissolve the Court's preliminary injunction, and issue a schedule to resume briefing on the merits of the case ("defendant's motion to dissolve"). On April 8, 2011, plaintiffs filed a response to our motion to dissolve ("plaintiffs' response to defendant's to dissolve"). On April 26, 2011, we filed a reply to plaintiff's response to our motion to dissolve. On May 3, 2011 the Court partially granted our motion to dissolve, terminating the remand to DOI and stay of proceedings. The Court directed that the January 3, 2011, preliminary injunction remain in full force and effect.

On May 11, 2011, the Court issued a scheduling order establishing dates for filing the administrative and to conclude briefing on the merits of the case. On May 27, plaintiffs filed their revised MJAR.

COUNTER-STATEMENT OF FACTS

In their revised MJAR, plaintiffs proffer a "statement of facts" that is, in reality, an additional argument. See Pl. Rev. MJAR, at 5 - 8.[2] Seizing upon the fact that DOI representatives discussed pricing with Microsoft on February 17, 2010, created talking points prior to meeting with those same Microsoft representatives on July 19, 2010, and on that same day noted that DOI was committed to a particular product, as evidenced in the July 15, 2010, standardization decision, plaintiffs argue that the record supports a finding that DOI made a sole-source selection of Microsoft BPOS-Federal in 2009.

[2] For reference, we previously submitted statements of fact in both our opposition brief,

[redacted]

The only conclusion that should be drawn from Mr. Jackson's February 17, 2010, are that Mr. Jackson discussed pricing with Ms. Carlson and did not want a "hard sell" from Microsoft. AR1778.2. The record does not reflect what kind of "pricing" was being discussed between DOI and Microsoft on or about February 17, 2010. Id. However, even if DOI and Microsoft were discussing pricing for the unified messaging service, such discussion would not be dispositive in this matter and it would not support a finding that DOI made an unlawful sole-source award at some later, unspecified date. Indeed, the record reflects that DOI discussed pricing with Google prior to the standardization decision. See AR59, (June 17, 2009, email from Google to DOI with links to Google's website that demonstrate compliance with Microsoft Exchange), AR150 (July 9, 2009, meeting between DOI and Google to generally discuss unified messaging service), and AR 4 (May 17, 2010, Google letter advising DOI that its "pricing is less than [redacted] per user/year."). Accordingly, even if DOI and Microsoft discussed pricing for the unified messaging service, it lends no support to plaintiffs' contentions because DOI treated all interested parties equally.

Moreover, the fact that DOI created talking points and mentioned its commitment to Microsoft BPOS-Federal, a product rather than a particular offeror, also does not support a finding that DOI made an unlawful sole-source decision in 2009. In fact, the July talking points were created nearly four months after Google initially refused to meet DOI's minimum-security requirements at a February 18, 2010 meeting and over one month after Google confirmed its refusal to meet DOI's minimum-security needs at the June 9, 2010, meeting. See AR150, 152.

---

p. 3-10 [Docket #24] and our MJAR, pp. 4-15 [Docket #39].

[redacted]

As the following excerpt from Google's June 17, 2010, letter to DOI confirms, Google disagreed with, and refused to meet, DOI's minimum-security requirements:

> Specifically, during the meeting, DOI representatives expressed a preference that the messaging system's physical computing **infrastructure be operated solely for the DOI (as a "private cloud")** even though this preference was not stated in the DOI letter, would dramatically decrease competition and will result in increased costs to the DOI. It became apparent to Google that the DOI intends to convert this preference into an absolute requirement in the impending Solicitation.

AR50 (emphasis added).

The "facts" in this case demonstrate that DOI began to assess implementation of a unified messaging service for its 13 bureaus by conducting extensive market research in 2007. AR175. DOI held talks with both Microsoft and Google and asked, essentially, if each company could meet DOI's requirements. Microsoft said it could and endeavored to work with DOI to create a unified messaging service that operates on a physically and logically dedicated server and is located within the continental United States. Google, on the other hand, flatly refused to satisfy DOI's minimum security requirements and has consistently argued with DOI's determination of its minimum-security needs. These are the facts in the record and they demonstrate that DOI's actions were rational and should be sustained by this Court.

ARGUMENT

I. FAR Part 6 Was Not Applicable To DOI's FAR Part 8 Procurement

As an initial matter, any suggestion by plaintiffs that DOI violated FAR Part 6 in this procurement is wholly without merit. As we have previously demonstrated, FAR Part 6 does not apply to Part 8 procurements. Def. Mot. Dissolve, at 14-15. Moreover, the record establishes

[redacted]

that DOI decided to utilize Part 8 procedures prior to the issuance of the standardization decisions. AR2202. Plaintiffs have **never** addressed this fact or responded to our demonstration that FAR 8.405-6(a) specifically provides that "[o]rders placed under Federal Supply Schedules are exempt from the requirements in Part 6." Consequently, plaintiffs have waived any objection to our argument and, in any event, are asking this Court to render an opinion that would be legally erroneous.

II Plaintiffs Cannot Establish That They Will Suffer Prejudice Because Google Refuses To Satisfy DOI's Minimum Security Requirements

As of the date of this brief, Google still refuses to offer a physically and logically dedicated server located within the continental United States that will satisfy DOI's rationally concluded minimum requirements. Pl. Rev. MJAR, p. 5, fn. 4. Accordingly, plaintiffs cannot establish that they will suffer prejudice if DOI is allowed to proceed with this procurement because even if the Court were to issue a permanent injunction and DOI were to take corrective action by conducting additional market research and performing a new risk assessment, these actions will not change DOI's determination that a physically and logically dedicated server is more secure than a server that is connected to world-wide data centers. Both common sense and the analysis of expert consultants at [redacted] tell us that limiting access to a server enhances security.[3] AR657. The law of this circuit holds that a Federal agency determines its minimum requirements and it need not have a historical precedent of failure in order to consider risk.

[3] Recent news reports indicate that Google's email service, Gmail, was hacked through "phishing," "Phishing" is the process by which hijackers steal passwords by malicious software installed on victims' computers or through victims' responses to e-mails from malicious hackers posing as trusted sources. See http://defensetech.org/2011/06/02/usg-officials-gmail-hacked/

[redacted]

Savantage II, 595 F.3d at 1286 (Fed. Cir. 2010), see also Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1370 (Fed. Cir. 2009) citing CHE Consulting v. United States, 552 F.3d 1351, 1355 (Fed. Cir. 2008)).

Here, despite well-settled precedent, plaintiffs seek to have this Court second guess DOI's determination of its minimum needs, particularly the need for a Federal-only cloud environment. The record in this case, however, establishes that DOI's determination of its minimum needs is rationally based upon extensive market research, valid security concerns, and by methodical analysis of: 1) what data would be housed in the cloud; 2) the sensitivity of that data; 3) its risk tolerance, and 4) the benefits and liabilities of each cloud model. See AR158-168. Throughout this process, the agency was informed by extensive market research conducted by itself and third parties. AR175-185, 167-747.

At the end of this research, and after concluding an in-depth risk assessment, DOI established the attributes of its cloud. AR168. Two of these attributes were that the cloud's infrastructure must be logically and physically dedicated to DOI or Federal agencies and that the hosting data centers must be located within the continental United States. AR168. Because DOI properly determined its minimum requirement for a physically and logically separated server, located within the continental United States, plaintiffs would not be eligible for award because Google has consistently refused to satisfy these minimum security requirements. Absent a showing of prejudice, a protester cannot prevail. The APA instructs that "due account shall be taken of the rule of prejudicial error when determining whether to set aside any unlawful agency decision." 5 U.S.C. § 706. The Federal Circuit has held that to establish prejudice, a plaintiff

[redacted]

"must show that there was a 'substantial chance' it would have received the contract award but for the errors" that the Court determines the agency made. Bannum, Inc. v. United States, 404 F.3d 1346, 1353 (Fed. Cir. 2005).

DOI insisted upon a dedicated cloud because it wanted to ensure a uniformly high standard for the cloud's security and a low risk that sensitive information would be released outside of the Federal Government. AR183. By restricting cloud membership to Federal agencies, DOI can count on the other users meeting basic Federal security requirements and be certain that other users on the cloud will have passed background checks, completed basic information security training, and been instructed to follow Federal data safeguards. Federal agency cloud users will also be subject to Federal information disclosure laws such as the Federal Trade Secrets Act 18 U.S.C. §1905, the Economic Espionage Act 18 U.S.C. § 1831, et seq., and FOIA 5 U.S.C. § 552.

Moreover, notwithstanding plaintiffs' challenge to the rationality of DOI's determination that state and local governments would not "face the same potential impacts from security issues that DOI would face, AR784, Mr. Alan Davidson, Google's director of public policy, recently gave a prepared statement to the Senate Judiciary Privacy, Technology, and the Law Subcommittee in which he addressed privacy and technology and said "the patchwork of state law in this area [privacy and security] leads to confusion and unnecessary cost. Congress should therefore promote uniform, reasonable security principles, including data breach notification procedures." See http://www.nextgov.com/nextgov/ng_20110510_8265.php. This statement is in conflict with plaintiffs' argument that DOI lacked a rational basis for concluding that Google Apps

[redacted]

for Government does not meet its minimum security requirements because it includes state and local governments, rather than DOI-only or Federal-only. Consequently, regardless of the arguments of counsel for plaintiffs in this matter, Google is on record conceding that DOI's security concerns are valid because state law, at least in regards to privacy and security, is a "patchwork . . . that leads to confusion and unnecessary cost." Thus, plaintiffs' legal argument that DOI's minimum security requirements lack a rational basis has been contradicted by Google itself and, accordingly, the Court should reject this wholly unsupportable argument.

Additionally, DOI rationally concluded that Google Apps for Government cannot meet the minimum requirements spelled out in the RFQ. DOI fully and fairly considered Google products as a viable, competitive alternative to Microsoft BPOS-Federal until Google indicated that it could not and would not meet the agency's minimum needs. AR150-152, 783-785. The record reflects that DOI met with Google prior to making the challenged standardization decision or approving the justification to conduct a brand-name procurement. In fact, DOI discussed Google Apps for Government with Google in numerous meetings, letters, and emails. See AR3-6, 50-117, 1004-1038. The central theme throughout all these exchanges is that Google is unable and unwilling to meet DOI's minimum requirements. In a February 18, 2010 meeting, Google representatives indicated that Google would not offer a single tenant solution. AR150. Google repeated this refrain in a meeting on June 9, 2010, where it also tried to convince DOI that its government-wide cloud would meet its needs. AR151. In its June 17, 2010 letter, Google indicated that it "intends to offer messaging services hosted in a Government-only cloud" and complained that restricting the solicitation to a private cloud "would arbitrarily exclude

[redacted]

Google from the competition." AR50.

Similarly, in its June 24, 2010 email, Google asserted that "the DOI's security requirements can be stated . . . without requiring a particular infrastructure or computing delivery model," such as a dedicated cloud. AR115. Finally, contrary to plaintiffs' contentions, DOI also considered Google Apps for Government in its market research. See AR169-172, 279-281, 625-632, 664-674, 678-687, 763-764, 783-785. None of this research even remotely suggested that Google can or would meet DOI's minimum security requirements. To the contrary, it confirms that Google's proposed Government cloud would be open to State and local entities as well as Federal agencies. AR784.

III. Federal Agencies Are Not Required To "Justify And Approve" Internal, Unpublished Policy Decisions

When a Federal agency makes a policy determination and issues a document to reflect that policy, such as a standardization decision, it is not required to justify and approve or issue a limited source justification. The informational requirements found in CICA, and as implemented in the FAR, are not applicable at the time the standardization decision is made and the decision is not subject to immediate challenge. In fact, those requirements do not become actionable until the agency engages in a triggering event, such as the issuance of a solicitation or request for quotations. Contrary to plaintiffs' arguments, we have not asserted or otherwise claimed that a standardization decision is "beyond the scrutiny of the Court." Pl. Rev. MJAR at 4, fn. 3.

Plaintiffs mistakenly claim that our foregoing explanation is fundamentally flawed and raises the specter that agencies will have "free reign to avoid the mandates of CICA and FAR Subpart 6.3 by merely calling any document that identifies a need and specifies a product or

[redacted]

vendor a 'standardization decision.'" Id. First, plaintiffs' are wrong because they ignore that neither CICA nor the FAR require Federal agencies to issue a formal standardization decision prior to issuing a new procurement through a solicitation or request for quotations. It follows that if there is no statutory or regulatory requirement to document an internal policy decision, such as the decision to standardize to a unified messaging service, there cannot be a statutory and regulatory requirement to justify that determination. Second, plaintiffs also ignore that DOI strictly adhered to the informational requirements in FAR § 8.4 when issuing the request for quotations and the supporting limited source justification. Accordingly, in future cases, if an agency issues a standardization decision, but fails to adhere to the applicable informational requirements in either FAR Part 6 or FAR Part 8 when an issuing its follow-on procurement, that hypothetical Federal agency will not be able to escape judicial review.

IV. DOI Did Not Pre-Select Microsoft BPOS-Federal

Plaintiffs continue to accuse high-ranking DOI officials of bad faith and pre-textual conduct, see, e.g., Pls. Rev. MJAR at 6 (accusing DOI and Microsoft of cutting a secret deal in 2009), 12 (accusing DOI of "purposefully tailor[ing]" its minimum requirements), 19 (accusing DOI of misleading Google officials). Notwithstanding the severity of these allegations, plaintiffs offer no "hard facts" or "evidence" supporting their claims. Consequently, the Court should categorically reject plaintiffs' contentions because DOI officials are entitled to the presumption that they acted in good faith in carrying out their responsibilities. See T&M Distributors, Inc. v. United States, 185 F.3d 1279, 1285 (Fed. Cir. 1999) ("[G]overnment officials are presumed to act in good faith, and 'it requires well-nigh irrefragable proof' to induce

[redacted]

a court to abandon the presumption of good faith.") (citing Kalvar Corp. v. United States, 211 Ct. Cl. 192, 543 F.2d 1298, 1301-02 (1976), cert. denied, 434 U.S. 830 (1977)).

To overcome the presumption of good faith, a plaintiff must "present 'clear and strong proof of specific acts of bad faith,' demonstrating that a Government official acted with malice or a specific intent to injure the plaintiff." Morris v. United States, 39 Fed. Cl. 7, 15 (1997) (citing Torncello v. United States, 681 F.2d 756, 771, (Ct. Cl. 1982)). The type of Government actions that have been deemed to rise to the level of this specific intent include those "motivated alone by malice;" Gadsden v. United States, 78 F.Supp. 126, 127 (Ct. Cl. 1948); "actuated by animus toward the plaintiff;" Kalvar Corp., 543 F.2d at 1302 and those the government enters "with no intention of fulfilling its promises;" Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1545 (Fed. Cir. 1996). Certainly, plaintiffs have made no such showing.

In making its various arguments, plaintiffs ignore the fact that DOI also worked closely with Google from as early as June 17, 2009 and continued to do so until February 18, 2010 when Google indicated that it would not provide an isolated physical server or a DOI-only private external cloud or a Federal-only community cloud. See AR59, 66, 150-151, 184. Remarkably, notwithstanding Google's statement that it could not and would not meet DOI's requirements at the February 18, 2010, DOI afforded Google another opportunity to participate in the implementation of a unified messaging service on June 9, 2010. If plaintiffs' contentions has any substance, common sense dictates that DOI would not have included Google in the process and certainly would not have met with Google officials on multiple occasions. Based upon the complete absence of any evidence supporting a finding of malice or intent to harm Google by

[redacted]

pre-selecting Microsoft BPOS-Federal, this Court should hold that DOI did not pre-select the Microsoft BPOS-Federal solution and reject plaintiffs' various claims to the contrary.

V. DOI's Assistant Secretary For Policy, Management, And Budget Possesses The Requisite Authority To Sign Standardization Decisions

Plaintiffs again quibble with whether DOI's Assistant Secretary for Policy, Management and Budget ("AS-PMB") possesses the requisite authority to sign standardization decisions. Pl. Rev. MJAR at 3, fn. 1. As we explained in our motion to dissolve, pages 8 – 9, and our reply in support of our motion to dissolve, pages 7 – 10, the record fully supports the determination that the AS-PMB is legally authorized to review and approve policy decisions, such as the two July 15, 2010 standardization decision. On November 12, 2002, former Secretary of the Interior Gale Norton issued Order No. 3244, specifically making DOI's Chief Information Officer ("CIO") "responsible for all [information technology] expenditures" and charged to "develop a plan for approval of information technology expenditures, including delegation of authority to bureau and office CIOs." AR1661-1662. DOI's CIO "receives administrative and management guidance from the [AS-PMB], as well as the Deputy Assistant Secretary - Technology, Information, and Business Services." AR1992.

The two July 15, 2010 standardization decisions under challenge in this case were signed by Bernard Mazer, DOI's current CIO. AR 748, 757. Thus, when the CIO submitted the two standardization decisions to the AS-PMB, they were, for all legal and practical considerations, already approved by the Secretary of the Interior. By submitting the two standardization decisions to the AS-PMB, the CIO sought "administrative and management guidance from the AS-PMB," as he is required by DOI's organizational charts and Department Manuals. AR1992. Accordingly, to the

[redacted]

extent that plaintiffs continue to contend that the AS-PMB is without authority to sign the two standardization decisions, this argument is without merit because DOI's CIO, who received a proper delegation of authority in 2002 from the Secretary of the Interior, reviewed and signed each document prior to submission to the AS-PMB.

VI. Plaintiffs Raised The FISMA Issue And Google Apps For Government Is Not, And Has Never Been, FISMA Certified

As noted above, plaintiffs falsely accuse the Government of making Google's lack of FISMA certification for its Google Apps for Government program a "bone of contention" in this case. Plaintiffs, however, conveniently forget that this issue was initially raised in their pleadings to support their contention that DOI allegedly acted without a rational basis when determining that only Microsoft BPOS-Federal, a product that did not have FISMA certification at the time, could meet its unique security requirements. See Pl. MJAR at 18, 29, 37, and 47.

The record in this case makes clear that Google's consistent statement that it received FISMA certification for Google Apps for Government on July 22, 2010 is false. AR2036. Moreover, as the record unequivocally establishes, not only was Google Apps for Government not FISMA certified on July 22, 2010, [redacted]

[redacted]

VII. Plaintiffs Are Not Entitled To A Permanent Injunction

A. Plaintiffs Have Not Demonstrated Success On The Merits

Plaintiffs possess the burden, in the context of this bid protest, to demonstrate that DOI's standardization decision and subsequent limited source justification issued with the RFQ were improper. As we established in our opposition brief, MJAR, motion to dissolve, and reply in support of our motion to dissolve, plaintiffs have not met this burden. DOI possessed a rational basis to determine that its minimum requirements will only be satisfied by a DOI only or Federal-only cloud. AR183.

B. Plaintiffs Have Not Demonstrated Irreparable Harm

Plaintiffs have not demonstrated irreparable harm. Plaintiffs only claim of irreparable harm in this case has been that they will suffer "severe competitive disadvantage" because they will be denied the opportunity to compete for the procurement. Pl. Rev. MJAR, 20. Contractors compete, not for the sake of competition, but to win contract award and earn profits and, therefore, alleging "loss of opportunity to compete," is tantamount to an allegation of lost profit. Accordingly plaintiffs allege economic harm. Economic harm alone, however, is not sufficient to establish irreparable injury. See Minor Metals, Inc. v. United States, 38 Fed. Cl. 379, 381-82 (1997) (citing Zenith Radio Corp. v. United States, 710 F.2d 806, 810 (Fed. Cir. 1983)) ("economic harm, without more, does not seem to rise to the level of irreparable injury."). This Court has applied this principle in the bid protest context. See, e.g., Sierra Military Health Serv. v. United States, 58 Fed. Cl. 573, 582 (2003) (quoting OAO Corp. v. United States, 49 Fed. Cl. 478, 480 (2001)) ("these potential losses are primarily monetary. While these losses may be

[redacted]

substantial, they are not irreparable."); Minor Metals, 38 Fed. Cl. at 381-82 (1997).

As plaintiffs note, however, this Court has departed from this well-established principle in some bid protest cases. See Pl. Rev. MJAR. 20 (citing PGBA, LLC v. v. United States, 60 Fed. Cl. 196, 221, *aff'd,* 389 F.3d 1219 (2004) and Information Science Corp. v. United States, 80 Fed. Cl. 759, 798 (2008)). These decisions, however, have been called into question by the Supreme Court's recent decisions in eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) and Monsanto Co. v. Geertson Seed Farms, 130 S.Ct. 2743 (2010).

In eBay, the Supreme Court held that the Federal Circuit's "general rule" in patent disputes "that a permanent injunction will issue once infringement and validity have been adjudged" was improper, and reiterated that, in deciding whether to award permanent injunctive relief, courts must apply the traditional four-factor test applied by courts of equity. 547 U.S. at 392-93. In so holding the Supreme Court noted that it has long recognized that "a major departure from the long tradition of equity practice [i.e., the traditional four-factor test] should not be lightly implied" and that "nothing in the Patent Act indicates that Congress intended such a departure." Id. at 391-92 (citations omitted). If, in bid protest cases, lost profits and/or the loss of the opportunity to compete in a fair and competitive bidding process amounts to irreparable harm, then a protestor's success on the merits will nearly always result in a finding of irreparable harm, and a portion of the four-factor injunctive relief test will effectively be eliminated. This is precisely what the Supreme Court held was improper. Id. at 392-93. There is no evidence that Congress, by limiting monetary remedies in bid protests, intended to create a presumption that injunctive relief should issue in the event that plaintiff succeeds on the merits.

[redacted]

Expanding upon its reasoning in eBay, the Supreme Court in Monsanto reaffirmed that the "drastic and extraordinary remedy" of injunctive relief should not be "granted as a matter of course." 130 S.Ct. at 2761 (citation omitted). In Monsanto, the plaintiffs obtained injunctive relief pursuant to the National Environmental Policy Act of 1969 ("NEPA"). See id. at 2556. The district court in that case had noted that in "the run of the mill NEPA case," injunctive relief is the proper remedy for a NEPA violation, but that "'in unusual circumstances, an injunction may be withheld, or, more likely, limited in scope[.]" Id. at 2556-57 (citations omitted). The Supreme Court held that such statements "invert the proper mode of analysis" because they "appear to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances." Id. at 2557. As the Supreme Court noted, "[n]o such thumb on the scale is warranted." Id.

Importantly, the Supreme Court further held that "a perfunctory recognition that 'an injunction does not automatically issue' in NEPA cases" did not cure the district court's erroneous analysis. Id. Rather, it "is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should not issue; rather, a court must determine that an injunction should issue under the traditional four-factor test[.]" Id. Plaintiffs' allegation of irreparable harm ultimately amounts to no more than potential lost profits, the type of injury that will be present in every "run of the mill" bid protest. Pl. Rev. MJAR 20. Accordingly, in light of eBay and Monsanto, plaintiffs' claim of irreparable harm should be rejected.

Additionally, in the Government contracting context, lost profits and other economic

[redacted]

harm are too speculative to rise to the level of irreparable harm, even where protestors are limited to bid preparation and proposal costs. Indeed, even if a protester succeeds upon the merits, there is no guarantee it will obtain a Government contract. See, e.g., Keco Industries v. United States, 492 F.2d 1200, 1206 (Ct. Cl. 1974) ("there is no assurance that any bidder would have obtained the award since the Government retains, in its discretion, the right to reject all bids without liability."). Furthermore, even if a protestor did have the right to receive a Government contract, there is no guarantee that the contract would last any appreciable amount of time. Unlike contracts between private parties, in nearly every Government contract, including the contract at issue, the Government retains the right to terminate the contract for the Government's convenience. E.g., 48 C.F.R. § 52.212-4(l); AR 67; see also AR Sales Co., Inc. v. United States, 49 Fed. Cl. 621, 630 (2001) (after a termination for convenience, the contractor "cannot recover either lost profits it anticipated upon completion of the subject contract or lost profits it anticipated from other, unrelated contracts."). Therefore, even if plaintiffs are entitled to a contract award, any "lost profits" as a result of that contract would be completely speculative.

Because plaintiffs have not demonstrated irreparable harm, they are not entitled to injunctive relief. See eBay, 547 U.S. at 391 ("According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury"); cf. Amazon.com, Inc. v. Barnesandnoble.com, Inc., 239 F.3d 1343, 1350 (Fed. Cir. 2001) ("a movant cannot be granted a preliminary injunction unless it establishes both of the first two factors, i.e., likelihood of success on the merits and irreparable harm.") (emphasis in original)

[redacted]

(citation omitted).

C. The Balance Of Harm Does Not Favor Injunctive Relief

As demonstrated above, plaintiffs will not be able to show they will suffer any harm if the Court dissolves the preliminary injunction. The Government, however, would suffer greatly from a permanent injunction. The RFQ is "a fundamental component of DOI's strategy to address ongoing operational issues that reduce DOI's information security posture, negatively impact mission performance and result in excessive costs for delivering email services." Def. Oppn. Brief, Attach. A. p.6. The imposition of a permanent injunction will cause DOI irreparable harm in mission performance. Plaintiffs have failed to show they will suffer any harm, let alone irreparable harm, whereas DOI will suffer irreparable harm in the form of continued spam attacks, numbering in the millions, and continued risk of mission failure. There can be no real debate that that the balance of harms favors of DOI and, therefore, the preliminary injunction is no longer appropriate in this case.

D. A Permanent Injunction Is Not In The Public Interest

Plaintiffs have failed to show that the integrity of the procurement system has been compromised by DOI's July 15, 2010 standardization decision or by the limited source justification approach of the RFQ and there is a strong public interest in DOI securing the information it is charged with handling and protecting, increasing the quality of its ability to accomplish its mission through more efficient communication between the 13 bureaus that fall within its ambit, and in reducing excessive costs and thereby saving taxpayer dollars..

[redacted]

CONCLUSION

There is only one reason for the exclusion of plaintiffs from the competition to meet DOI's requirement for a cloud-based messaging service and that reason is Google clearly and unequivocally refused to provide a physically and logically dedicated server located within the continental United States that creates a cloud for either DOI or Federal-only agencies. Rather than meet DOI's requirement, Google contends that DOI should base its requirements upon the services Google chooses to provide. Google's business decision, and DOI's refusal to modify its requirement based upon Google's representations, do not provide a valid basis for the extraordinary act of issuance of a permanent injunction in this matter. Accordingly, this Court should deny plaintiffs' revised MJAR, dismiss the complaint and amended complaint, and grant our cross motion for judgment upon the administrative record.

Respectfully submitted,

TONY WEST
Assistant Attorney General

MICHAEL F. HERTZ
Deputy Assistant Attorney General

s/ Kirk T. Manhardt
KIRK T. MANHARDT
Assistant Director

[redacted]

OF COUNSEL
SARAH BIENKOWSKI
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice

SHERYL RAKESTRAW
Attorney Advisor
Department of the Interior

June 15, 2011

s/ Christopher L. Krafchek
CHRISTOPHER L. KRAFCHEK
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
1100 L Street, N.W.
Washington, D.C. 20005
Tel: (202) 305-0041
Fax: (202) 305-7644

Attorneys for Defendant