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No. 10-743C
(Judge Braden)
(BID PROTEST)

Public Redacted Version

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

GOOGLE, INC., et al,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S 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

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Pursuant to Rules 52.2(d) and 65(b)(4) of the Rules of the United States Court of Federal Claims ("RCFC") and the Court's order dated January 3, 2011, defendant, the United States, respectfully requests that the Court terminate the stay of proceedings currently in effect in this matter and, for the reasons specified below, dissolve the preliminary injunction.

PROCEDURAL HISTORY

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, defendant filed an opposition to plaintiffs' motion for a preliminary injunction. On December 3, 2010, plaintiffs filed a reply to defendant's opposition and motion for judgment upon the administrative record. On December 17, 2010, defendant filed a cross-motion for judgment upon the administrative record and response. On December 28, 2010, the Court initiated a teleconference and directed counsel for plaintiffs to file an amended complaint to address a number of arguments raised in plaintiffs' substantive motions, but not included as specific counts in the original complaint.

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 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, pPlaintiffs alleged that DOI's decisions in justifying the modification to Dell's contract and two standardization decisions were arbitrary, capricious, an abuse of

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discretion, and contrary to law. Id. On December 31, 2010, plaintiffs filed their reply and response to defendant's cross-motion and response.

On January 3, 2011, this 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, 2011 WL 17619, 19 ("Opinion"). The Court revoked the status of Softchoice Corporation ("Softchoice") as a defendant-intervenor in this case and, therefore, we do not include Softchoice in the above caption or in the procedural history of this case. In addition, the Court remanded the matter to DOI "for additional investigation or explanation." Id. On or about January 10, 2011, the Court returned the administrative record and directed DOI to file a status report within 90 days of the Court's order.

On March 3, 2011, Rhea Suh, the Assistant Secretary for Policy, Budget and Management ("PMB") for DOI, concluded an analysis into the issues identified by in the January 3, 2011 opinion and provided an explanation sought by the Court therein. D&A 1 -10.[1] Moreover, Ms. Suh produced "all of the documents in [DOI's] possession that relate to this procurement, were

[1] "D&A" refers to the Declaration and Attachments submitted by Ms. Suh on March 3, 2011. For ease of reference, we have bates stamped these pages in numerical order. Although we have attached the declaration and documents to this motion, we will provide two hard copies, bound and tabbed, to chambers.

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requested by the Court, or indicated to be missing from the Administrative Record in the Court's January 3, 2011 opinion." D&A 10. Ms. Suh's declaration and supporting documentation are attached to this motion.

ARGUMENT

I. The Court Should Terminate The Stay Of Proceedings In This Matter And Entertain The Merits Of The Case

Pursuant to RCFC 65(b)(4), the defendant respectfully requests that the Court terminate the stay current stay of proceedings in this matter. By remanding the procurement back to DOI for "investigation and explanation" on January 3, 2011, this matter was effectively stayed for a period not to exceed six months and the administrative record was returned to DOI. Moreover, the Court also identified a number of missing documents from the administrative record. As indicated in the declaration of Ms. Suh, DOI has investigated the matter, provided an explanation for establishment of its internal policy and actions that were not previously fully documented in the administrative record, and produced all documentation related to the procurement. D&A 10. In light of DOI's fully articulated position on the Court's concerns, and because DOI has produced all documents in its possession that were called for by the Court, termination of the stay is now appropriate.

II. The Court Should Issue A Briefing Schedule

Assuming the Court terminates the current stay of proceedings and entertains the merits of the case, defendant respectfully requests the Court enter the following briefing schedule:

March 11, 2011: Defendant files the administrative record on CD-ROM and two paper copies to the Court's chambers

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March 18, 2011:	Plaintiffs file response to defendant's motion to dissolve the Court's preliminary injunction
March 25, 2011:	Defendant files reply in support of its motion to dissolve and its cross-motion for judgment upon the administrative record
March 28, 2011:	Teleconference to schedule oral argument, if the Court deems necessary

III. The Court Should Dissolve The January 3, 2011 Preliminary Injunction

As we demonstrate below, the basis for entry of the Court's preliminary injunction has been addressed and corrected by Ms. Suh's declaration and the attached documents.[2] Accordingly, we respectfully request that the Court dissolve the preliminary injunction currently in effect.

A. Standard For A Preliminary Injunction

"A preliminary injunction is a 'drastic and extraordinary remedy that is not to be routinely granted.'" National Steel Car, Ltd. v. Canadian Pac. Ry., Ltd., 357 F.3d 1319, 1324 (Fed. Cir. 2004) (quoting Intel Corp. v. ULSI Sys. Tech., Inc., 995 F.2d 1566, 1568 (Fed. Cir. 1993)). Because the grant of an injunction is "extraordinary relief," the Court applies "exacting standards." Lermer Germany GmbH v. Lermer Corp., 94 F.3d 1575, 1577 (Fed. Cir. 1996). To obtain the extraordinary relief of an injunction prior to trial, the movant must establish that "the movant is likely to succeed on the merits, that the movant will suffer irreparable harm if

[2] Because the case was remanded, along with the administrative record, these documents are attached to Ms. Suh's declaration to permit review and consideration until such time as the Court permits filing of the administrative record. Upon refilling, the administrative record will include all documents considered by Ms. Suh during the remand period. See RCFC 52.2.

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preliminary relief is not granted, that the balance of the hardships tips in the movant's favor, and a preliminary injunction will not be contrary to the public interest." FMC Corporation v. United States, 3 F.3d 424, 427 (Fed. Cir. 1993). The party seeking preliminary injunctive relief bears the extremely heavy burden of demonstrating its entitlement to this extraordinary relief by clear and convincing evidence. Cincom Systems, Inc. v. United States, 37 Fed. Cl. 266, 268 (1997). A party faces an even greater burden when it seeks injunctive relief, which, if granted, would interfere with Governmental operations. Yakus v. United States, 321 U.S. 414, 440 (1940); Virginia Railway Co. v. Systems Federation No. 40, 300 U.S. 515, 552 (1937).

B. 41 U.S.C. §§ 253(f)(1) and 253(f)(1)(B)(iii) Were Not Violated, Or Even Applicable, Because The Standardization Decisions Are Not An Award

The Court held that the two standardization decisions are "quintessential 'non-competitive procedures'" that must be justified pursuant to 41 U.S.C. 253(f)(1), the Competition In Contracting Act ("CICA"). Opinion at 24. As an initial matter, CICA was recently re-codified by Public Law 111-350, January 4, 2011, 124 Stat 3677, and is now codified at 41 U.S.C. §§ 3301 – 3311. The former provision identified by the Court, 41 U.S.C. 253(f)(1) "except as provided in paragraph (2), an executive agency may not award a contract using procedures other than competitive procedures," has been re-codified as 41 U.S.C. § 3304(e)(1), providing: "[e]xcept as provided in paragraphs (3) and (4), an executive agency may not award a contract using procedures other than competitive procedures unless." The provision, before and after re-codifcation, applies to award of a contract by an agency. There is no dispute that DOI's

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two standardizations do not purport to "award" a contract to Microsoft or any other offeror and, accordingly, this provision is not applicable to DOI's standardization decisions.

Even if we were to assume that the standardization decisions are an award of a contract, which they are not, 41 U.S.C. 3304(e)(4)(B) expressly provides the justification and approval required for an exemption to full and open competition if the agency's need is for a brand-name commercial item for authorized resale. Here, there is no question that DOI seeks to procure a brand-name commercial item authorized for resale on the GSA Federal Supply Schedule and, therefore, DOI's standardization decisions are statutorily exempt to the claimed CICA violation.

The Court also notes that 41 U.S.C. § 253(f)(1)(B)(iii), now codified at 41 U.S.C. § 3304(e)(1)(B)(iii), may have been violated because DOI's senior procurement executive did not sign either of the two documents. Opinion at 24. As noted above, DOI's senior procurement executive works for, and reports to, the Assistant Secretary-PMB. D&A 47. Consequently, even assuming, arguendo, that the Assistant Secretary-PMB intended the standardization decisions to serve as an approval for an award decision, which they do not, such action would not violate 41 U.S.C. § 3304(e)(1)(B)(iii) because that would not be a delegation of authority as contemplated in that statute. Rather, such an action would constitute a retention of authority by the Assistant Secretary-PMB, which must fall within her discretion. Moreover, because DOI's procurement is for a commercial item authorized for resale on the GSA Federal Supply Schedule, the justification and approval requirements noted in 41 U.S.C. § 3304(e)(1) are not applicable to DOI's procurement.

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C. The Assistant Secretary for Policy, Budget, and Management Is Legally Authorized to Determine Policy And Issue Standardization Decisions

The Court's initial concern in this matter is that the administrative record did not contain any evidence that Ms. Suh possessed authority to sign the two July 15, 2010 standardization decisions. Opinion at 24. Additionally, the Court expressed concern that the Chief Information Officer ("CIO") reports directly to the Secretary, rather than Ms. Suh. Id at 25. As the attached declaration, organizational charts, Department Manuals, and Secretarial Orders establish, however, Ms. Suh, in her capacity as the Assistant Secretary for Policy, Budget and Management ("PMB") is legally authorized to determine and issue policy decisions, such as the two July 15, 2010 standardization decision. See D&A 2-63. In fact, the office of the Assistant Sectary-PMB has been responsible for "ensuring that information and associated technology are managed to support the strategic vision of the Department and are planned, properly implemented, and assessed" since December 23, 1996. D&A 60-61. Moreover, the CIO "receives administrative and management guidance from the Assistant Secretary - Policy, Management and Budget, as well as the Deputy Assistant Secretary - Technology, Information, and Business Services." D&A 15, 22. As a result, the two standardization decisions neither circumvented the Office of the Secretary nor reversed the roles of the Assistant Secretary-PMB and the CIO as feared by the Court.

Moreover, as the record now makes clear, DOI's Senior Procurement Executive, Ms. Debra Sonderman, as well as any DOI contracting officers, report directly to Ms. Suh's office and are properly considered to fall within her authority, as delegated by the Secretary and established by

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Department Manuals. D&A 47. Consequently, even if we assume, arguendo, that Ms. Suh intended to sign a procurement document in place of the CIO, a contracting officer, or DOI's senior procurement executive, which she did not, such action would have been well within her authority and legally permissible.

D. FAR §§ 6.302 – 6.304 Are Not Applicable To Internal Policy Decisions Such As DOI's Two Standardization Decisions When An Agency Does Not Utilize Them As A Substitute For A Limited Source Justification In A Part 8 Procurement Or As A Substitute For A Justification And Approval In A Part 6 Procurement

The Court's preliminary injunction raises the question of whether internal, unpublished policy decisions, such as DOI's standardization decisions fall within the purview of CICA and, therefore, are subject to immediate challenge. See generally, Opinion 24 – 28. Said another way, the issue is whether there is a legal separation between policy decisions and procurement transactions. In Savantage Fin. Servs., Inc. v. United States, 81 Fed. Cl. 300 (2008) ("Savantage I"), the Department of Homeland Security ("DHS") issued a standardization decision that also purported to serve as a limited-source justification. In fact, the contracting officer actually titled it a "Brand Name Justification." Id. 306. The Court held that the agency "was attempting to avoid the full and open competition requirements of CICA by means of this Brand Name Justification." Id. 308. In other words, the Court held that the justification was not just a policy document, but a procurement document with a direct, unmediated effect on acquisitions. Because DHS intended its standardization decision to circumvent CICA's requirements, the justification had to comply with the requirements of the FAR for such documents.

Here, in contrast, DOI produced two distinct documents: a standardization decision and a

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limited-source justification. Compare AR748-62 with AR844-51. DOI was not "attempting to avoid the full and open competition requirements" by means of its standardization decision. This first document was merely a statement of departmental policy which, standing alone, could not circumvent competition requirements. It did not circumvent competition requirements because DOI subsequently created, signed, and published the limited-source justification with the RFQ on August 30, 2010. See AR844-51. A limited source justification documents the Contracting Officer's process, rationale and facts supporting the decision to limit competition in accordance with the FAR. Such documentation is separate from the standardization decision, and while it may acknowledge the standardization decision, the standardization decision did not determine the conclusions of DOI's limited sources justification. This second document did not set a Department-wide policy, but it did have the legal effect of permitting a brand-name procurement. See FAR 8.405-6(a)(2). Moreover, it fulfilled all the requirements required by the FAR. See FAR 8.405-6(g).

The agency in Savantage I ran into trouble because its policy document was also a procurement document. Consequently, it was bound to follow the requirements in the FAR. Here, DOI split these two functions. The two standardization decisions while acknowledging the current market state and agency need did not circumvent the procurement process or bind the government. Moreover, unlike the hybrid document in Savantage I, Interior's limited-source justification meticulously followed the requirements imposed upon it by the FAR. Compare AR844-51 with FAR 8.405-6(g). Accordingly, neither of DOI's documents violated law or regulation.

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In Savantage Fin. Servs., Inc. v. United States, 595 F.3d 1282 (Fed. Cir. 2010) ("Savantage II"), the Federal Circuit also implicitly recognized a distinction between an internal policy document and an external procurement document. In that case, DHS re-competed the contract from Savantage I. Instead of relying on its hybrid "Brand Name Justification," this time it merely articulated its needs in narrow functional terms rather than as a brand name. 595 F.3d at 1286. Nonetheless, the plaintiff argued that DHA was executing a de facto sole-source procurement since only one company could fulfill its stringent requirements. Id. 1288.

Like DOI in this case, DHS relied upon "[i]nternal DHS documents" in "electing to acquire a core financial system pre-integrated with other key systems." Id. 1286. According to Savantage, this requirement knocked it out of the competition and effectively created a limited-source procurement. Id. 1288. The Court did not dispute that Savantage might be removed from the competition due to this internal decision which established DHS's requirements. Despite this fact, the Court never suggested that these internal documents were procurement documents whose content and publication was governed by the FAR. Similarly, here DOI relied on internal documents in choosing to standardize to Microsoft. See AR748-62. As in Savantage II, DOI's standardization decision could result in removing a number of manufacturers and retailers from a competition if implemented by actual procurement documents. But as in that case, DOI was under no obligation to publicize these internal documents in accordance with FAR Part 6 or FAR Part 8. Those requirements attached only when DOI actually decided to conduct a procurement limited to Microsoft– at which point it published its limited source justification. See AR844-51.

In Corel Corp. v. United States, 165 F. Supp. 2d 12 (D.D.C. 2001), the Court held that a

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standardization decision and individual procurement actions performed by the Department of Labor were sufficiently separate actions and, as a result, the procurement was held to be proper. In that case, the U.S. Department of Labor ("DOL") standardized to Microsoft based upon several documented factors including: (1) compatibility with other Microsoft products already in use at DOL; (2) ease of integration; (3) the fact that the majority of DOL was already using Microsoft products; and (4) the fact that conversion costs would be less. Id at 17. The Court noted that Corel expressed repeated concerns to DOL officials regarding "DOL's purported failure to comply with applicable federal procurement rules", and even demanded that the DOL provide more information about its technical concerns so that Corel could give a comprehensive presentation to the Government about its product. Id.[3] DOL implemented its standardization decision by utilizing a separate procurement vehicle expressly authorized by Federal Acquisition Streamlining Act of 1994 ("FASA"). Id at 15. Consequently, the Court held that because DOL properly undertook FASA procedures as a separate action to implement its standardization decision, there was sufficient separation between the standardization decision and the specific procurement. Corel, 165 F. Supp. 2d at 34.

In Ezenia! Inc. v. United States, 80 Fed Cl. 60 (Fed. Cl. 2007) the United States Army ("Army") standardized to Adobe software, due in part to documented interoperability concerns with other software packages the Army had previously procured, and because it preferred the

[3] Similar to the meetings between DOI and Google, the Court in Corel notes that although DOL "was under no statutory obligation to do so," Corel was afforded an opportunity to meet with DOL officials, submit pricing and technical information, and that DOL took this information nder consideration prior to its selection of Microsoft. Id at 64.

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functionality of Adobe. Id at 63. Incumbent/Plaintiff's software at the time "was not fully interoperable" with Adobe, thus, it could not participate in the new competition. Id. After completion of the standardization decision, the Army then utilized FSS procedures for the actual procurement. The Court held it did not have jurisdiction over the "policy decision" of standardizing. Id at 63. However it specifically stated that a protest would be proper if the Government had undertaken an unfair process, i.e. "had chosen to standardize its software with the actual intention of knocking out other parties, for a sole-source procurement." Id. The Court determined that the separate use of federal acquisition regulation procedures pursuant to FAR Part 8.4 was sufficient to ensure that the process was separate. Id at 64. Moreover, the Court held the Army followed the procedures as required under the statute with regard to FSS purchases and pointedly stated with regard to the operation of CICA, "[T]he bid protest mechanism has been put in place to protect the integrity of the competition, not for the protection of product choice." Id at 65.

Here, it is apparent from the record that DOI never intended to "knock out" Google, or otherwise seek to circumvent the integrity of the process. Indeed, it is indisputable that DOI's decision to standardize, and the subsequent procurement decision and limited source justification, were based in part upon Google's representations that it could not and would not meet DOI's security requirements.

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E. DOI's Exchanges With The Information Technology Industry, Including Microsoft And Google, Did Not Constitute Commencement Of Negotiations For A Sole Source Award Of A Contract To Microsoft

The Court's preliminary injunction finds that DOI's communications with Microsoft may have constituted unlawful negotiations for a sole source award in violation of FAR Part 6. Such a conclusion, however, is not supported in the record. First, DOI's exchanges with the IT industry concerning its needs predominantly occurred during the procurement's market research phase. See AR Tabs 14, 17, 21. 32. Second, DOI communicated with multiple potential sources, including Google. Id. Third, the record is devoid of any evidence that DOI ever intended to make a sole source award of a contract to Microsoft or any other prospective offeror. Fourth, FAR § 2.101 defines a sole source award as "a contract for the purchase of supplies or services that is entered into or proposed to be entered into by an agency after soliciting and negotiating with only one source." Id. Here, DOI solicited multiple sources by issuing a RFQ to holders of the GSA Schedule 70, category 132 32, contract. Accordingly, DOI's procurement actions were not demonstrative of an intent to make a sole source award. Indeed, there is no evidence that suggests or supports the conclusion that award of a contract to Microsoft has or will occur at any time in the future. Indeed, even in the broadest sense, only a reseller of Microsoft products, rather than Microsoft itself, may be awarded a contract based upon the procurement and it will not be a sole-source award.

F. FAR Part 6 Is Not Applicable To DOI's Procurement

The record demonstrates that DOI intended at all times in the process to utilize FAR Part 8 procedures in its procurement. D&A 70, AR 169-172, 769. In fact, DOI's acquisition plan,

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dated July 13, 2010, expressly indicates that DOI intended to utilize Part 8 procedures in the procurement. D&A 70. FAR 8.405-6(a) specifically provides that "[o]rders placed under Federal Supply Schedules are exempt from the requirements in Part 6." Accordingly, the manner in which DOI utilized and relied upon the standardization decisions in this case did not, as a matter of law, violate FAR 6.302 - 6.304.

Pursuant to FAR 8.405-6(a) (2), a procuring agency placing an order on the Federal Supply Schedule may limit its consideration to brand name items if "the particular brand name, product, or feature is essential to the Government's requirements, and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs." Id. DOI determined through extensive and well documented market research that BPOS-Federal is the only solution that meets its needs, because it is the only solution that provides a unified and consolidated email system hosted in a cloud that is physically and logically dedicated solely to Federal government departments and agencies. Use of FAR Part 8 procedures is a legally permissible procurement tool, designed to prevent Federal agencies from acquiring goods or services that only partially meet some of the required services, but do not meet the agency's stated needs. See Savantage II 86 Fed. Cl. 700, 705-706 ("Defendant argued at oral argument that the rules of competition do not require that the Government purchase water and sand if it needs a concrete block; if a concrete block is available in the market, taxpayers need not be forced to pay for its reconstruction.")

G. DOI Fully Considered Cost And The Potential For Organizational Lock-In

The Court also expressed concern that DOI may not have considered various costs

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associated with the program. In particular, the opinion identified both internal agency costs and the embedded costs of "organizational lock-in." Opinion at 26. As the updated record demonstrates, the agency paid full attention to these types of costs during the procurement process. The spreadsheet employed by the agency broke costs out into six categories: personnel, equipment, materials, facilities, travel, and contracts. D&A 72. Thus, for instance, DOI was aware that the executive sponsorship of the project would probably require [redacted] percent of the time of [redacted] GS-15 employees over the [redacted] at an estimated cost of $[redacted] D&A 75. As this example demonstrates, DOI fully incorporated internal agency costs into its assessment of the Electronic Messaging System procurement. Furthermore, as discussed in the Assistant Secretary's declaration, Mr. Corrington's estimate also considered a wide array of direct and indirect costs in arriving at his predicted savings. D&A 3-4.

DOI also considered the possibility of "lock-in" that was referenced by the Court. DOI incorporated special provisions in the RFQ to minimize the threat posed by this issue. These clauses mandate that "Contractor and Microsoft will provide Transition Readiness" when and if the Government decides to terminate BPOS-Federal. AR823. At that point, the contractor and Microsoft will be obligated to use "reasonable efforts to assist the Government to migrate data from the Microsoft system to the new Government system." AR824. In addition to providing such assistance, the contractor and/or Microsoft will provide the agency with the information necessary to design and implement an alternative messaging system, including: data concerning the user accounts, training material and end-user documentation, solution descriptions, agency-furnished information used to customize certain systems, and the type of software in use to

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provide BPOS-Federal. Id.

There will always be some transaction costs in moving from one vendor to another, regardless of whether DOI uses the cloud of Microsoft, Google, or some other provider. DOI recognizes this fact and has taken measures to address the problem as best it can. Moreover, the agency will periodically assess the marketplace to determine whether a better alternative exists. See AR785. This vigilance, combined with the contract provisions outlined above, will permit DOI to move to a better product should it find one.

H. Adding BPOS-Federal Was A Proper In-Scope Modification To Dell's Existing Contract To Provide Microsoft Software Licenses

The purchase of BPOS-Federal was an in-scope modification of the Dell contract. In assessing whether a contract change is in scope, the courts consider both the scope of the original contract and the magnitude of the change. If the original contract had a broad scope, this "validate[s] a broader range of later modifications without further bid procedures." AT&T Communications, Inc. v. Wiltel, Inc. 1 F.3d 1201, 1205 (Fed. Cir. 1993). Here, the scope of the original procurement was very broad. D&A 97-102. DOI Interior used this contract to purchase a wide range of Microsoft product licenses, upgrades, and software maintenance services. D&A 99-100. The addition of BPOS-Federal to this list is a relative small alteration given the breadth of Microsoft products provided under the original contract.

"Another factor is whether the modification substantially changes the type of work, performance period, and costs as between the original contract and modified contract." CESC Plaza Ltd. Partnership v. United States, 52 Fed.Cl. 91, 93 (2002) (quoting CCL, Inc. v. United

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States, 39 Fed.Cl. 780, 791 (1997)) (internal quotation marks omitted). Here, the proof-of-concept modification did not alter the performance period at all and increased the three-year price by approximately one-half of a percent. See AR 858. Moreover, the type of work provided under the contract remained essentially the same. The unmodified Dell contract provided various Microsoft product licenses. D&A 97 - 102. The modification merely added a number of additional licenses to the contract.

IV. Plaintiffs Are Not Entitled To Continued Preliminary Injunctive Relief

A. Plaintiffs Cannot Demonstrate A Likelihood Of Success On The Merits

As explained above, the primary cause for the Court's concern has been corrected. Thus, the only support remaining for plaintiffs' claims are the unsupported arguments marshaled in the complaint, the amended complaint, and the substantive briefs previously filed in this matter. Plaintiffs' still retain the burden, in the context of this bid protest, to demonstrate the likelihood that DOI's standardization decision and subsequent limited source justification issued with the RFQ were improper. As we establish below, plaintiffs cannot meet this burden.

First, as we demonstrated in our motion for judgment upon the administrative record, plaintiffs cannot establish that they will suffer prejudice based upon DOI's procurement activity. There is no question that DOI properly determined its minimum requirements and, contrary to the efforts of the plaintiffs, "competitors do not dictate an agency's minimum needs, the agency does." Savantage II, 595 F.3d at 1286. Here, despite this well-known precedent, plaintiffs seek to have this Court second guess the agency's determination of its minimum needs, particularly the need for a "Federal-only cloud environment. Irrespective of whether plaintiffs or this Court

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may second-guess or dictate an agency's minimum needs, the record in this case unequivocally establishes that DOI's determination of its minimum needs is rationally based upon extensive market research, valid security concerns, and by methodically analyzing: 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 the DOI or Federal agencies and that the hosting data centers would be located within the continental United States. AR168. It follows that because DOI properly determined its minimum requirement for a physically and logically separated server, located within the continental United States, plaintiffs can would not be eligible for award because Google has consistently refused to satisfy these minimum technical requirement. Absent a showing of prejudice on the merits of its claims, a protester cannot succeed on the merits. 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 based upon on the merits of the case, a plaintiff "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).

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Second, DOI possessed a rational basis to determine that its minimum requirements will only be satisfied by a DOI or Federal-only cloud. The record reflects that DOI insisted upon a Federal-only cloud because it wanted to ensure a uniformly high standard for the cloud's security and a lower risk of sensitive information being released outside of the Federal Government. AR 183. By restricting cloud membership to Federal agencies, DOI can count on the other users meeting basic Federal security requirements and be certain that they will have passed background checks, completed basic information security training, and been instructed to follow Federal data safeguards. They 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. Sharing an infrastructure with State and local users increases the risk that sensitive Federal data will be accessed by individuals not governed by Federal information security requirements. Similarly, DOI possesses a rational basis to determine that State and local governments would not "face the same potential impacts from security issues that DOI would face." AR784. Like other Federal agencies, DOI must protect data of national importance: Indian trust accounts; information about its own $12 billion budget; and Departmental policies that touch every state in the Union. AR164-65. The possible consequences of a security breach are sweeping, as evidenced in the seven-year moratorium on Internet use in the aftermath of Cobell v. Salazar. AR164. Other Federal agencies can be counted on to take security as seriously as DOI does, because they have a similar stake in protecting their own data.

Third, DOI rationally concluded that Google products cannot meet the minimum requirements spelled out in the RFQ. DOI fully and fairly considered Google products as a

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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 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 Google from the competition." AR50. Similarly, in its June 24, 2010 email, Google argued 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, DOI also considered Google Apps 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 suggests that Google can meet DOI's requirements. To the contrary, it confirms that Google's proposed multi-government wide cloud would be open to State and local entities as well as Federal agencies. AR784.

[redacted]

B. Plaintiffs Will Not Suffer Irreparable Harm If The Court Dissolve's The Preliminary Injunction

Plaintiffs only claim of harm in this case has been that in the absence of a preliminary injunction, they will suffer "severe competitive disadvantage" because they will be denied the opportunity to compete for the procurement. Pl. Memo. 37-38. A plaintiff must demonstrate irreparable injury in order to obtain injunctive relief and to demonstrate an irreparable injury, a plaintiff must show that without a preliminary injunction it will suffer irreparable harm before a decision can be rendered on the merits. Heritage of Am., LLC v. United States, 77 Fed. Cl. 66, 78 (2007). See also Sierra Military Health Services, Inc. v. United States, 58 Fed. Cl. 573, 582. In this case, plaintiffs have failed to demonstrate that they will suffer any harm in the absence of a preliminary injunction, let alone irreparable harm. Any alleged harm to the plaintiffs is belied by the fact that if they are successful on the merits of their claims, this Court will consider issuing a permanent injunction enjoining DOI from proceeding with award of the contract. Although lost competitive advantage may constitute a valid injury, it is not an injury that provides, standing alone, a compelling justification for a preliminary injunction. Protection Strategies, Inc. v. United States, 76 Fed. Cl. 225, 236 (2007). Accordingly, any alleged harm to plaintiffs may be alleviated and plaintiffs would, presumably, have the chance to compete in DOI's action. By definition, harm cannot be "irreparable" if it can be alleviated at a later time.

C. Plaintiffs Can Not Demonstrate That The Harm To The Government From Maintaining The Preliminary Injunction Would Be Less Than The Harm To Plaintiffs If The Court Dissolved The Injunction

As demonstrated above, plaintiffs will not be able to show they will suffer any harm if the

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Court dissolves the preliminary injunction. The Government, however, is suffering harm while the preliminary injunction is in full force and effect. First, due to the broad language of the injunction, DOI has not moved forward in any way on other related procurements. Second, as we have previously established, 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 continued imposition of the preliminary injunction will continue to cause DOI to suffer 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 approximately an additional 150 million spam attacks 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. Plaintiffs Cannot Demonstrate That A Continued Preliminary Injunction Is In The Public Interest

In light of Ms. Suh's investigation and explanation, and after review of the additional documentation provided by DOI, 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. Accordingly, this Court should dissolve the preliminary injunction currently in effect. 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

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within its ambit, and in reducing excessive costs and thereby saving taxpayer dollars.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court terminate the stay of this case, issue a briefing schedule, and dissolve the preliminary injunction issued on January 3, 2011 because DOI has fully addressed the Court's concerns by investigating the absence of documents in the administrative record and providing both the documents and an explanation.

Respectfully submitted,

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