IN THE UNITED STATES COURT OF FEDERAL CLAIMS
Bid Protest

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

Plaintiffs' Response To 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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Plaintiffs Google, Inc. ("Google") and Onix Networking Corporation ("Onix") hereby submit their Response to 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 (the "Motion to Dissolve"), dated March 4, 2011. Plaintiffs oppose Defendant's Motion to Dissolve on the grounds that (i) Defendant failed to establish that the Department of the Interior's ("DOI") Assistant Secretary for Policy, Management and Budget ("AS/PMB") was the

appropriate agency official with authority to execute the two July 15, 2010 Standardization "Determination and Findings" documents ("Standardization Decisions") and (ii) the two Standardization Decisions constituted procurement decisions, and not internal policy decisions, that failed to comply with the requirements of Federal Acquisition Regulation ("FAR") Subpart 6.3, 48 C.F.R. §§ 6.302-1, 6.303-2, 6.304 and 6.305. [1]

Defendant's proposed briefing schedule has been rendered moot by the passage of time and the Court's direction that this Response be filed by April 9, 2011. Finally, with respect to the Court's concerns expressed in its January 3, 2011 Memorandum Opinion And Order Issuing A Preliminary Injunction (the "Memorandum Opinion" or "Mem. Op."), *Google, Inc. and Onix Networking Corporation v. United States and Softchoice Corporation,* 95 Fed.Cl. 661 (2011), that the Administrative Record ("AR") appears to be incomplete, Defendant submitted with the Motion to Dissolve a declaration from Ms. Rhea Suh, the AS/PMB, (the "Suh Declaration") and 429 pages of documents. Defendant also requested leave from the Court to refile the AR, which had been returned to Defendant after the Memorandum Opinion was issued (and in accordance with COFC Rule 52.2(c)), but the Court has not yet granted Defendant's request. Accordingly, while the record still appears to be incomplete on the basis of the documents submitted with the

[1] Defendant-Intervenor Softchoice Corporation filed a similar Motion to Dissolve on March 15, 2011 in which it joined Defendant's Motion to Dissolve and reiterated its arguments, made in Softchoice's November 19, 2010 Motion to Dismiss and December 17, 2010 Reply Memorandum, that the Court lacks subject matter jurisdiction over this lawsuit. Softchoice again focused its argument on the RFQ issued on August 30, 2010, and ignored the fact that Plaintiffs challenge the improper and unjustified sole-source procurements effected by the DOI's Standardization Decisions. In the Memorandum Opinion, the Court effectively rejected Softchoice's arguments, correctly finding that "the fact that neither individual plaintiff submitted a bid in response to the RFQ No. 503786, which was only the last step in this procurement, is not dispositive of the standing of either." *Google, Inc. and Onix Networking Corporation v. United States and Softchoice Corporation,* 95 Fed.Cl. 661, 674 (2011). Plaintiffs concur with the Court's reasoned decision regarding their standing to bring this action, and respectfully request that the Court deny Softchoice's Motion to Dissolve. On the other hand, Plaintiffs do not oppose Softchoice's Motion for Leave to Re-file Previously Dismissed Filings, also filed on March 15, 2011.

Motion to Dissolve, Plaintiffs cannot yet assess whether the AR to be refiled by Defendant will fill all the gaps noted by the Court in its Memorandum Opinion.

I. THE SUH DECLARATION AND ATTACHMENTS DO NOT ADEQUATELY ADDRESS OR RESOLVE THE COURT'S CONCERN THAT MS. SUH, AS THE AS/PMB, WAS LEGALLY AUTHORIZED TO SIGN THE STANDARDIZATION DECISIONS

In its Memorandum Opinion, the Court expressed concern that Ms. Suh, the AS/PMB, lacked the requisite authority to sign the Standardization Decisions on three grounds: (i) Ms. Suh is not the Contracting Officer or the Department's "senior procurement executive;"[2] (ii) Ms. Suh's responsibilities do not include "the establishment of a 'Department-wide standard for messaging and collaboration' and a 'Department-wide standard for Office Automation and Systems Management Software'" [95 Fed.Cl. at 676]; and (iii) Ms. Suh's "approval" of the Standardization Decisions circumvented the line of authority from the Chief Information Officer ("CIO") to the Secretary of the DOI or his deputy, and in fact reversed the roles of the AS/PMB and the CIO. The Motion to Dissolve, Ms. Suh's declaration and the documents attached to her declaration do not adequately address or resolve these concerns.

A. The Declaration And Attachments Establish That Ms. Suh Is Neither The Contracting Officer Nor The Senior Procurement Executive

The documents attached to Ms. Suh's declaration establish that Ms. Suh is neither the "Contracting Officer" nor the "Senior Procurement Executive.' First, Ms. Suh is not the Contracting Officer responsible for the DOI's Request for Quotations No. 503786 (the "RFQ") to provide hosted email and collaboration services. Nancy Moreno is the contracting officer for

[2] As the Court noted, both of the Standardization Decisions are "quintessential 'non-competitive procedure[s],' that must be justified by the 'contracting officer.' 41 U.S.C. § 253(f)(1)(A)...[and because] these Standardization 'Determinations and Findings' concern an amount exceeding $50 million (AR 753), they require the additional approval of 'the senior procurement executive of the agency.' 41 U.S.C. § 253(f)(1)(B)(iii) (emphasis added)." 95 Fed.Cl. at 676.

this procurement. *See* D&A 67, DOI's Acquisition Plan for procuring a DOI Messaging Solution, dated July 13, 2010, and signed by Nancy Moreno as Contracting Officer.

Second, Ms. Suh is not the DOI's Senior Procurement Executive. Ms. Debra Sonderman, the current Director of the Office of Acquisition and Property Management (the "OAPM Director"), is the DOI's Senior Procurement Executive. According to the DOI's documents, however, the OAPM Director did not hold that additional role in July 2010 when the Standardization Decisions were executed. *See* D&A 45-47, DOI Departmental Manual ("DOI Manual"), Part 112, Ch. 11, § 11.3 (eff. 11/30/10). The previous version of Part 112, Chapter 11, dated December 17, 1997, which was not provided by Defendant in support of the Motion to Dissolve, specifically removed the reference to the OAPM Director as the DOI's "Procurement Executive" that had been included in the 1996 version of Part 112, Chapter 11. *Cf.* DOI Manual, Part 112, Ch. 11, § 11.3 (no mention that the OAPM Director serves as the DOI's Senior Procurement Executive or Procurement Executive) (eff. 12/17/97), available at http://elips.doi.gov/app_DM/act_getfiles.cfm?relnum=3182 (last visited 3/17/11); and DOI Manual, Part 112, Ch. 11, § 3 (states the OAPM Director serves as the DOI's Procurement Executive pursuant to Executive Order 12931) (eff. 2/9/96), available at http://elips.doi.gov/app_DM/act_getfiles.cfm?relnum=3052 (last visited 3/17/11). Thus, during the relevant time frame (July 2010), (i) the OAPM Director was not the DOI's Procurement Executive or Senior Procurement Executive and (ii) the Senior Procurement Executive did not report directly to Ms. Suh's office because, as far as Plaintiffs can discern, the direct reporting

relationship from the Senior Procurement Executive to the AS/PMB did not exist between December 17, 1997 and November 30, 2010.[3]

B. The Declaration And Attachments Do Not Establish That Ms. Suh's Responsibilities And Authority Encompassed Establishing Standards For Messaging, Collaboration Or Office Automation And Systems Management Software

Ms. Suh's responsibilities, as outlined in the DOI Manual, do not include establishing standards for messaging, collaboration, or office automation and systems management software. *See* D&A 60-62, DOI Manual, Part 109, Ch. 4. Ms. Suh's authority only reaches as far as the responsibilities of her position, and nothing in the produced sections of the DOI Manual assigns Ms. Suh responsibility for standardization decisions, and particularly decisions standardizing information technology software and systems, within the DOI.

The DOI Manual does not delegate authority to Ms. Suh's office for standardization decisions. In fact, the documents produced by the Defendant place that responsibility on the shoulders of and give the requisite authority to the CIO -- a position that reports to the Secretary of the Interior, not to the AS/PMB. *See* D&A 19-20, Secretarial Order 3244 dated November 12, 2002. Secretarial Order 3244 gives standardization authority to bureau and office CIOs and

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[3] Other current and superseded documents in the DOI Manual indicate that the Senior Procurement Executive position was held by the Director of Administration, a position previously supervised by the Deputy Assistant Secretary – Budget and Finance. *See* DOI Manual, Part 112, Ch. 1, § 1.2.D (eff. 12/17/97), available at http://elips.doi.gov/app_dm/act_getfiles.cfm?relnum=3180 (last visited 3/31/11), and organization chart (eff. 10/31/00) (showing OAPM reportable to the Director of Administration/Senior Procurement Executive, which was reportable to the Deputy Assistant Secretary – Budget and Finance), available at http://elips.doi.gov/app_dm/act_getfiles.cfm?relnum=3345 (last visited 3/31/11). The current version of Part 112, Chapter 1, dated April 12, 2002, eliminates all references to the Director of Administration and the Senior Procurement Executive. *See* DOI Manual, Part 112, Ch. 1, available at http://elips.doi.gov/app_dm/act_getfiles.cfm?relnum=3396 (last visited 3/31/11). None of these versions was produced with the Motion to Dissolve.

arguably permits the DOI's CIO to standardize products for the entire agency. Nothing in Secretarial Order 3244, however, gives standardization authority to the AS/PMB.[4]

Secretarial Order 3309 also does not delegate standardization authority to the AS/PMB or establish a reporting relationship from the CIO to the AS/PMB. Furthermore, even if Secretarial Order 3309 delegated such authority or established such a relationship, Secretarial Order 3309 is irrelevant because it was issued on December 14, 2010, five months after Ms. Suh signed the Standardization Decisions.

Additionally, Defendant relies on DOI Manual Part 112, Chapter 11 to show that the DOI's Senior Procurement Executive and contracting officers report to the AS/PMB, that such offices fall within the AS/PMB's authority, and therefore that the AS/PMB could sign the Standardization Decisions in place of either official. *See* D&A 45-47, DOI Manual, Part 112, Chapter 11. Part 112, Chapter 11, in the version presented to the Court, does not apply because it became effective on November 30, 2010 -- after the AS/PMB signed the Standardization Decisions -- and Defendant offers no other evidence to prove a delegation of standardization authority to the AS/PMB.

C. Nothing In The Motion To Dissolve Or In The Suh Declaration Establishes A Reporting Relationship From The CIO To The AS/PMB

The Motion to Dissolve and the Suh Declaration fail to establish a reporting relationship running from the CIO to the AS/PMB and otherwise do not allay the Court's concern that Ms. Suh's execution of the Standardization Decisions circumvented the Office of the Secretary. In

[4] Secretary Norton issued Secretarial Order 3244 in 2002, and according to Section 7 thereof, DOI was instructed to incorporate the provisions of Order 3244 into the DOI Manual within six months. As far as Plaintiffs can tell, this incorporation never occurred. And because Secretarial Orders are insufficient to accomplish permanent delegations of authority, it is unclear, at best, whether even the DOI CIO had the authority to approve standardization decisions. *See* DOI Manual, Part 200, Ch. 1, § 1.3, available at http://elips.doi.gov/elips/release/3373.htm (last visited 3/16/11); DOI Manual, Part 012, Ch. 1, § 1.1, available at http://elips.doi.gov/app_dm/act_getfiles.cfm?relnum=2948 (last visited 3/17/11).

fact, Defendant's only explanation for why the two Standardization Decisions did not circumvent the Office of the Secretary and did not reverse the roles of the AS/PMB and the CIO is that the AS/PMB provides "administrative support and guidance" to the CIO (a fact of which the Court was well aware [95 Fed.Cl. at 677]). Defendant, however, does not explain how the provision of administrative support and guidance establishes a reporting relationship that justifies Ms. Suh's exercise of the CIO's purported standardization authority [*see* note 4 above] or otherwise alters the clearly delineated reporting relationship running from the CIO to the Office of the Secretary.

In summary, Defendant has failed to dispel the concerns expressed by the Court regarding the authority of Ms. Suh to approve the Standardization Decisions. Indeed, Defendant's sole basis for its assertion that the "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 Department Manuals" [Motion to Dissolve, pp. 8-9] is a version of DOI Manual Part 112, Chapter 11 that did not exist when the Standardization Decisions were signed. Thus, Defendant's penultimate conclusion that Ms. Suh's signing of the Standardization Decisions in place of the CIO, a contracting officer, or the DOI's Senior Procurement Executive was "well within her authority and legally permissible" is fundamentally flawed.

II. DEFENDANT ERRONEOUSLY ASSERTS THAT THE STANDARDIZATION DECISIONS ARE MERELY POLICY DECISIONS AND ARE NOT SUBJECT TO THE REQUIREMENTS OF FAR SUBPART 6.3

Defendant takes issue with the Court's ruling that the Standardization Decisions are "quintessential 'non-competitive procedure[s]'" [95 Fed.Cl. at 676], and posits both factual and legal arguments to support its position that the Standardization Decisions were policy decisions and not procurement decisions subject to FAR Subpart 6.3. Defendant's arguments are unavailing.

First, relying on 41 U.S.C. § 3304(e)(4)(B), which is the re-codification of 41 U.S.C. § 253(f)(2)(B), Defendant contends that the Standardization Decisions are exempt from the Competition in Contracting Act ("CICA") requirements for a properly-authorized justification and approval because the "DOI seeks to procure a brand-name commercial item authorized for resale on the GSA Federal Supply Schedule." Motion to Dissolve, p. 7. This CICA exception, however, was not intended to apply to agency purchases against the GSA Federal Supply Schedule. The exception at subsection 253(f)(2)(B) was added to CICA by P.L. 99-145, § 961(a)(2), and House Conference Report No. 99-235 made only one reference to the exception, describing it as a provision to "exempt from the requirement to justify in writing use of a sole-source exemption to purchase of brand-name commercial items purchased for resale in commissaries and ships stores." *See also* Senate Report No. 98-297, p. 5, referencing the Committee of Armed Services' expansion of CICA's authority to use noncompetitive procedures "to apply in those cases in which the need is for a brand-name commercial item for authorized resale" and stating "[t]his addition recognizes that in some situations, such as soft drink bottling, there may be only one source of supply."

FAR 6.302-5 confirms the meaning of this statutory exception. Subsection (a)(2)(ii) provides that full and open competition need not be provided when "the agency's need is for a brand name commercial item for authorized resale," and subsection (c)(3) states as follows:

> (3) The authority in (a)(2)(ii) of this subsection may be used only for purchases of brand-name commercial items for resale through commissaries or other similar facilities. Ordinarily, these purchases will involve articles desired or preferred by customers of the selling activities (but see 6.301(d)).

(emphasis added). Quite unlike a government commissary's or similar facility's purchases of specific brands of soft drinks, chips or candies for resale to their patrons, the DOI's decisions to

standardize to and purchase only Microsoft's BPOS-Federal and other products are not for the purpose of reselling those products to DOI customers. The exemption upon which Defendant relies clearly has no applicability in this case.

Second, Defendant has strained mightily, but unsuccessfully, to construe pertinent cases as supporting Defendant's contention that the DOI's Standardization Decisions are not procurement decisions subject to the requirements of FAR Subpart 6.3. Motion to Dissolve, pp. 9-13. In an attempt to distinguish the facts in *Savantage Financial Services, Inc. v. United States,* 81 Fed.Cl. 300 (2008), in which the court struck down a brand name justification as violating CICA and the requirements of FAR Subpart 6.3, Defendant argues that the justification in *Savantage* was "a procurement document with a direct, unmediated effect on acquisitions" whereas the DOI produced two distinct documents. The first was the DOI's BPOS-Federal standardization decision, which Defendant characterizes as a "statement of departmental policy," and the second was the DOI's Limited Source Justification, dated August 30, 2010, which Defendant agrees was a procurement document. This distinction is without a difference, however, because the court in *Savantage* premised its decision on its determination that the justification selecting two vendors' systems for purposes of consolidating all financial management systems used by the Department of Homeland Security's 22 components constituted a procurement as defined at 41 U.S.C. § 403(2). *Id.* at 304-05.[5] Here, the DOI's Standardization Decisions clearly fall within the statutory definition of "procurement" because (i) they reflect the agency's determination of a need for a consolidated messaging solution based on cloud computing technology, as well as for specified Microsoft products, and (ii) the DOI selected the Microsoft BPOS-Federal and other products as the only solution and software

[5] The statute defines the term "procurement" to encompass "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout."

available to meet those needs.[6] The DOI's Limited Source Justification is no more than a reaffirmation of the procurement decisions made on July 15, 2010 that was necessitated not only by FAR 8.405-6, but also by the DOI's realization that the Standardization Decision selecting BPOS-Federal did not comply with FAR 8.405-6.

The decision of the U.S. District Court for the District of Columbia in *Corel Corp. v. United States,* 165 F.Supp.2d 12 (D.D.C. 2001), also does not support Defendant's position. While the facts are somewhat similar in that the Department of Labor ("DOL") determined to standardize to Microsoft products for word processing and other functions and then proceeded to obtain quotes from Microsoft resellers under existing IDIQ contracts in order to purchase the products, the fundamental difference rests upon the District Court's conclusion that a "procurement" is "the process by which the government pays money or confers other benefits in order to obtain goods and services from the private sector." *Id.* at 24, citing *Rapides Regional Med. Ctr. v. Secretary, Dep't of Veterans' Affairs,* 974 F.2d 565, 573 (5th Cir. 1992), *cert. denied,* 508 U.S. 939, 113 S.Ct. 2413, 124 L.Ed.2d 636 (1993). More importantly, the District Court relied on the Fifth Circuit's rejection of the definition of "procurement" in 41 U.S.C. § 403 on the basis that the definition was found in Chapter 7 of Title 41, which is the Office of Federal Procurement Policy Act and, according to the Fifth Circuit, was inapplicable to CICA. *Id.* at

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[6] Contrary to Defendant's arguments [Motion to Dissolve, p. 11], the circumstances in the second Savantage protest are inapposite. After losing the first protest, the DHS issued a new solicitation for a pre-integrated financial, acquisition and asset management system without specifying any products or solutions by name, and Savantage challenged the terms of that solicitation as being unduly restrictive of competition. *Savantage Financial Services, Inc. v. United States,* 86 Fed.Cl. 700 (2009), *aff'd,* 595 F.3d 1282 (Fed.Cir. 2010). The "internal documents" that DHS relied on in determining its need for a pre-integrated system were market research materials, such as lessons learned from earlier DHS attempts to consolidate its financial management systems and analyses of other agency acquisitions of financial management systems. 86 Fed.Cl. at 705-06. They were not documents reflecting DHS's selection of a specific product or software solution and are, thus, in no way comparable to DOI's Standardization Decisions.

573. The District Court therefore held that CICA "has no application to government decisions which do not involve the actual purchase of a good or service . . .." *Corel, supra,* 165 F.Supp.2d at 24.

The reasoning of the Fifth Circuit in *Rapides*, adopted by the District Court in *Corel*, has not been followed by the Federal Circuit or this court. *See Distributed Solutions, Inc. v. United States,* 539 F.3d 1340, 1345 (Fed.Cir. 2008) (holding that it is appropriate to adopt the definition of "procurement" at 41 U.S.C. § 403(2) to determine whether a procurement has occurred pursuant to 28 U.S.C. § 1491(b)); *Savantage, supra,* 81 Fed.Cl. at 304, citing *OTI Am., Inc. v. United States,* 68 Fed.Cl. 108, 114 (2005), and *Pub. Warehousing Co. K.S.C. v. Def. Supply Ctr. Phila.,* 489 F.Supp.2d 30, 38 (D.D.C. 2007).[7] Thus, Defendant's attempt to draw parallels between this case and the *Corel* decision, *i.e.*, that the Standardization Decisions are written policy documents separate from the subsequent acquisition of the software via a legitimate procurement method, fails because relevant precedent establishes that the Standardization Decisions were procurements subject to the requirements of CICA and FAR Subpart 6.3.

Finally, Defendant's reliance upon this court's decision in *Ezenia!, Inc. v. United States*, 80 Fed.Cl. 60 (2008), is misplaced. In *Ezenia!,* the Army decided to standardize to an Adobe software product based upon a competitive process and "Best of Breed" evaluation, and then proceeded to purchase the software using the Federal Supply Schedule. *Id.* at 63. The court

[7] In addition to pointing out that the U.S. District Court for the District of Columbia, in its later decision in *Pub. Warehousing Co. K.S.C. v. Def. Supply Ctr. Phila., supra,* declined to follow the reasoning in its earlier *Corel* decision regarding the applicability of the 41 U.S.C. § 403(2) definition of "procurement" in CICA cases, we note that the re-codification of CICA at 41 U.S.C. §§ 3300 *et seq.* includes both a definition of "acquisition" and of "procurement." Section 111 in P.L. 111-350 provides that "procurement includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." Thus, the reasoning of the *Rapides* court, adopted by the *Corel* court, for holding that the definition of "procurement" contained in the OFPP Act was inapplicable to CICA no longer has any validity.

rejected Ezenia's protest for lack of jurisdiction because the Army's standardization decision was not a procurement decision falling within the court's bid protest jurisdiction. *Id.* Just as the *Savantage* court distinguished the facts in *Ezenia!* because there was no competitive process resulting in the brand name justification [*Savantage, supra*, 81 Fed.Cl. at 305], the facts here are distinguishable because the Standardization Decisions were not the result of a competitive process. In addition, and again like the situation in *Savantage*, the DOI clearly intended to "knock out" Google (and all the other vendors with competing products that were allegedly reviewed by the DOI's market research support contractor) when it issued the Standardization Decisions. The DOI's issuance of the RFQ specifying the Microsoft BPOS-Federal product attests to that fact. *See Savantage, supra*, 81 Fed.Cl. at 305 ("The fact that DHS issued the TASC solicitation for services to support the transition to Oracle and SAP indicates that such a determination [to purchase Oracle and SAP financial management system licenses] was made."). Further, contrary to Defendant's assertion, the DOI's decision to standardize to the Microsoft products was not driven by any failings or representations on Google's part – the record establishes that the DOI made that decision in mid-2009, as evidenced by the DOI's Project Plan and related documentation in the record.

In sum, Defendant has failed to demonstrate that the Standardization Decisions were not procurements, *i.e.,* they identified the DOI's need for software products and a cloud-based messaging solution, that were quintessentially non-competitive, *i.e.,* they designated Microsoft products to satisfy the DOI's needs. As non-competitive procurements, the Standardization Decisions were required to meet the requirements of FAR 6.303 and 6.304. Defendant's Motion to Dissolve makes no attempt to demonstrate compliance with FAR 6.303 and, as discussed

above, Defendant has failed to show that Ms. Suh was the appropriate DOI official to approve the Standardization Decisions.

III. SIGNIFICANT GAPS IN THE RECORD REMAIN UNRESOLVED

In its Memorandum Opinion, the Court expressed concerns regarding materials that were absent from the original AR. 95 Fed.Cl. at 679-80. Although the new AR to be filed by Defendant may address these concerns in more detail, Defendant's Motion to Dissolve only cites to documents attached to the Suh Declaration and those previously included in the AR to respond to some of the gaps in the record identified by the Court. Specifically, Defendant addressed whether the DOI considered the embedded costs of organizational lock-in; and whether the Dell contract modification, implementing the pilot project, was within that contract's scope. To the extent that Defendant believes the 429 pages of materials submitted with the Motion to Dissolve have resolved these two concerns, Plaintiffs disagree. As described below, the attachments do not reflect any meaningful discussion or consideration of the embedded costs associated with the DOI's degree of organizational lock-in resulting from the implementation of the Standardization Decisions. Similarly, the Dell contract that was included with the declaration is missing key attachments that apparently list the Microsoft licenses that defined the contract's scope.

Defendant argues that the Court's concerns about whether the DOI considered the embedded costs of organizational lock-in are resolved by the fact that the BPOS-Federal contract would incorporate termination provisions. Motion to Dissolve, p. 16. The cited termination provisions would require Microsoft to cooperate with the DOI in any efforts to migrate DOI data to another service provider, although these provisions did not establish pricing for any such transitional support. AR 823, Tab 24. This argument demonstrates that Defendant misunderstands the Court's fundamental concern about organizational lock-in. The Court was

not so much troubled by the issue of data portability, but rather by the concern that the more Microsoft products an organization uses, the more reliant it will become on all of Microsoft's products and services.[8] It logically follows that once organizational lock-in is achieved, future software purchases are pre-defined; full and open competition for product selection is no longer available; the organization loses bargaining power; and the organization loses the option to incorporate new technology or products without incurring substantial costs. *See* AR 651, Tab 14DD [redacted]); AR 251, Tab 14I (same); AR 677, Tab 14GG [redacted]).

As Figure 2 from [redacted] demonstrates, the BPOS-Federal procurement would apparently increase the DOI's [redacted]. AR 652, Tab 14DD.

[8] Even if data portability were the only concern, without transition pricing terms, the risk remains that Microsoft will make transition of data cost prohibitive. AR 823, Tab 24 ("If the Government terminates BPOS-Federal Solutions for Convenience, then additional fees may apply for such Transition Readiness for the Transition Period."); *see also Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 476-77, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) (rejecting Kodak's contention that lock-in risks were effectively resolved by the ability of customers to switch products, in part, because of the question of whether the costs of switching could exceed the costs of paying "supra-competitive" prices).

[redacted]

As the Court explained in its Memorandum Opinion, none of the embedded costs of organizational lock-in was addressed in the Standardization Decisions [95 Fed.Cl. at 678], and Defendant's Motion to Dissolve provides no evidence that the DOI has considered or addressed such costs.

Defendant's Motion to Dissolve also does not adequately address whether the DOI's modification to Dell's contract to implement the pilot project was an in-scope modification. Defendant simply asserts that "the scope of the original procurement was very broad" and that the DOI "used this contract to purchase a wide range of Microsoft product licenses, upgrades, and software maintenance services." Motion to Dissolve at 17. The Statement of Work, however, suggests the contract was only intended to cover specific Microsoft product licenses:

B. Enterprise Agreement **Scope of Support** Provided

The EA shall provide:

1. Continuation of Microsoft Software Assurance support for the Microsoft product licenses currently held by DOI, **as outlined in Attachment (1).**

2. Purchase of new Microsoft product licenses with Software Assurance, **as outlined in Attachment (2)**
...
3. Purchase of new Microsoft product licenses ("True Up") for the products **outlined in Attachment (3).**

D&A 106-107 (emphasis added). This Statement of Work indicates that there were five attachments to the Dell contract that defined what products would be considered in-scope. The documents provided with the Motion to Dissolve do not include these attachments, do not state that BPOS-Federal was listed or contemplated on these attachments, and do not list the other products available for purchase on the Dell contract. Without these attachments, Plaintiffs cannot discern whether the pilot project was actually within the scope of the Dell contract.

The Court noted several other shortcomings in the AR, and the Suh Declaration suggests that the 429 pages produced with the Motion to Dissolve and/or the new AR have addressed, or will address, each of those shortcomings. D&A 8, ¶ 11. Plaintiffs question whether the DOI has fully responded to the record gaps identified by the Court. For example, regarding the Court's observation that the AR does not evidence that the RFQ was posted on the GSA eBuy on August 30, 2010 [95 Fed.Cl. at 671 fn.21], the DOI produced no additional documents. Instead, Ms. Suh stated that her "staff is confident" that the right procedures were followed when posting the RFQ and its attachments on GSA eBuy. D&A 5-6, ¶ 7. In response to the Court's comments regarding the lack of documentation reflecting communications and meetings between DOI and Microsoft in 2009 [95 Fed.Cl. at 679-80], the DOI produced only (i) Mr. Jackson's notes from

meetings on September 22, 2009 (D&A 181 and 186) and on August 30, 2010 (D&A 182-85), (ii) five e-mail exchanges from April, February, July and November 2010 (D&A 188-95), and (iii) a few Microsoft product description and other materials (D&A 196-272, 402-39). With the possible exception of the Microsoft product description materials, the DOI did not produce the attachments to emails between DOI and Microsoft that the Court specifically said were missing. 95 Fed.Cl. at 680. Finally, in response to the Court's suggestion that the DOI seek the independent views of outside experts as to whether a reconsideration of the Standardization Decisions is warranted [95 Fed.Cl. at 680], Ms. Suh relied on the actions of DOI officials taken before the RFQ was issued on August 30, 2010 and, thus, made no attempt to reconsider the Standardization Decisions in light of the Court's decision. D&A 6-7, ¶ 9.

As evidenced by Defendant's Motion to Dissolve and attached documents, the DOI either could not or would not address the Court's explicit concerns regarding the DOI's actions and the completeness of its record. Consequently, Defendant has failed to provide an adequate basis for the Court to dissolve the preliminary injunction.

IV. CONCLUSION

The Memorandum Opinion identified numerous deficiencies in the DOI's process for selecting a unified messaging solution based on cloud technology and remanded the procurement to the DOI "for additional investigation or explanation." 95 Fed.Cl. at 680. During the injunction period, the Court anticipated that "the Secretary of the Department of the Interior will have an opportunity to correct the deficiencies herein cited, with the advice of the Solicitor and the Inspector General." *Id.* The only thing the DOI did in its Motion to Dissolve was to tell the Court that (i) the Court's decision was wrong, (ii) there were no deficiencies in the DOI's procurement processes, and (iii) further investigation or explanation by the DOI was unnecessary.

Based on the foregoing, Plaintiffs very much disagree with Defendant's contentions that Ms. Suh, as the DOI's AS/PMB, was the proper official to approve the Standardization Decisions; that the Standardization Decisions were not procurements subject to the requirements of CICA and FAR Subpart 6.3; that the DOI has provided full and accurate responses to the Court's concerns; and that the DOI has produced a complete administrative record. Accordingly, Plaintiffs respectfully request that the Court deny Defendant's Motion to Dissolve.

Respectfully submitted,

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Dated: April 8, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2011, a copy of the foregoing "Plaintiffs' Response To 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" was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Timothy Sullivan