

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COAST PROFESSIONAL, INC.,)	
NATIONAL RECOVERIES, INC.,)	
ENTERPRISE RECOVERY SYSTEMS, INC., and)	
PIONEER CREDIT RECOVERY, INC.,)	
)	
Plaintiffs,)	BID PROTEST
)	
v.)	No. 15-207C
)	
)	(Chief Judge Braden)
THE UNITED STATES,)	
)	
Defendant,)	
)	
and)	
)	
FINANCIAL MANAGEMENT SYSTEMS, INC.,)	
ACCOUNT CONTROL TECHNOLOGY, INC.,)	
CONTINENTAL SERVICE GROUP, INC.,)	
WINDHAM PROFESSIONALS, INC., and)	
GC SERVICES LIMITED PARTNERSHIP,)	
)	
Defendant-Intervenors.)	

REPLY IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS

Defendant, the United States, respectfully submits this reply to the response to our motion to dismiss filed by Windham Professionals, Inc. (Windham), on March 27, 2017.

Windham objects to the Department of Education’s (Education) proposed corrective action, arguing that Education cannot “validly award Plaintiffs ATEs [award-term extensions] [n]or can [Education] do so in a manner that precludes other existing ATE holders [*i.e.*, the intervenors] from receiving placements of accounts on a going forward basis.” Resp. at 2. As explained below, both of Windham’s arguments are misplaced and should be rejected.

ARGUMENT

First, Windham contends that Education should not be permitted to potentially issue award-term extensions to plaintiffs as part of the corrective action, because Education did not provide the plaintiffs with notice, prior to the expiration of the ordering periods of the plaintiffs' 2009 task orders, that the extensions may be issued. Although Windham is correct that the 2009 task orders do contemplate that notice should be provided prior to the expiration of the ordering period, the 2009 task orders also state that "the Contracting Officer may[] determine whether to award an award-term extension *at any time after completion of the Ordering Period of the Task Order.*" AR Tab 4a at 174 (clause 4(b)) (emphasis added). Relatedly, the 2009 task orders further state that providing a contractor with "preliminary notice does not commit the Government to an extension" in any event. *Id.* (clause 4(c)).

Thus, it would not make sense to preclude the Government from implementing the proposed corrective action on the basis of the notice provision, particularly given that the United States Court of Appeals for the Federal Circuit has held that Education's decision to issue award-term extensions to some contractors but not others in 2015 is a procurement for the purposes of 28 U.S.C. § 1491(b). *See Coast Prof'l, Inc. v. United States, Fin. Mgmt. Sys., Inc.*, 828 F.3d 1349 (Fed. Cir. 2016). Application of the notice provision in the manner that Windham suggests would essentially block Education's voluntary redress of the plaintiffs' grievances.

Moreover, the notice provision in the 2009 task orders is for the benefit of the contractor that may receive an extension (here, the protestor-plaintiffs), so that the contractor is not taken by surprise if an extension is issued. None of the plaintiffs in this case have raised any issues regarding lack of notice regarding the proposed corrective action. Relatedly, the Federal Circuit explained that each of the award-term extensions are separate bilateral contracts, (unlike a

contract option that may be exercised by the Government unilaterally). *Id.* at 1356. Thus, if one or more of the protestors decides it does not want to perform under an award-term extension, it can decline. Accordingly, Windham's argument regarding the notice provision should be rejected.

Second, Windham contends that the proposed corrective action "cut[s] short Windham's validly awarded and effective ATE to steer work toward Plaintiffs" and "precludes other existing ATE holders [*i.e.*, the intervenors] from receiving placements of accounts on a going forward basis." Resp. at 2, 7. Windham's argument is unfounded. To start, Education is not cutting any of the intervenors' extensions short; rather, since December 2016, the pool of small businesses have been able to handle the volume of accounts that have been assigned each month, and there has not been any overflow of accounts left over to be assigned to the intervenors. *See* Supplemental Declaration of Patty Queen-Harper (the contracting officer) ¶¶ 7-8 [Dk. No. 222, at Ex. A].¹ Based upon the most recent account data, Education has represented that, for the month of April (the final month of the intervenors' respective award-term extensions), there also

¹ In paragraphs 7 and 8 of her supplemental declaration, the contracting officer explained:

The ATE task orders held by the intervenors expire soon, on April 21, 2017. The Department has not placed any new accounts with any of the Intervenor since December 24, 2016. The number of accounts placed in December was significantly lower than in previous months. The Department will not place any new accounts under any of the ATE task orders held by the intervenors in the future. There is considerable variability from month to month in the number of accounts needing placement, based on changes in demand and other factors. Just as the volume of accounts the intervenors received varied significantly from month to month, the same could happen to any plaintiff receiving a new ATE. Allocations to ATEs have depended on the amount of volume needing placement as an overflow after the small businesses receive the amounts they are capable of handling.

will not be any overflow of accounts for intervenors, including Windham. *See id.* In sum, Windham and the intervenors have not received new accounts since December 2016 because the pool of small businesses has been able to service the volume of new accounts, and there is no plan or intent to “steer” work away from intervenors and towards plaintiffs.

The intervenors, including Windham, each have award-term extensions that expire on April 21, 2017. *See id.* Thus, Windham’s extension will not be “cut short,” but rather will expire in accordance with its terms. If plaintiffs are issued award-term extensions as a result of the proposed corrective action, at this point, the timing will be such that there will be little if any overlap with intervenors. As the contracting officer recently explained in her supplemental declaration, there can be considerable fluctuation in the number of accounts from month to month, and there is no guarantee regarding the volume of accounts that plaintiffs may receive if they are awarded extensions as a result of the proposed corrective action, just as Windham and the intervenors also are not entitled to any volume of accounts under their current extensions which are about to expire. *See id.*

Regarding the term of any award-term extension that may be issued as a result of the proposed corrective action, the length of any extensions is still not clear. On March 27, 2017, the Government Accountability Office (GAO) issued a decision resolving all but two of the protests challenging Education’s award of the next round of task orders in December 2016.² While that decision is not yet publicly available, the GAO did sustain certain of the protest grounds and Education is now considering how best to take corrective action. Thus, performance under the next round of task orders is not likely to begin for several months, and, as

² Of the two remaining protests, one of them was recently dismissed by the GAO, because the protestor withdrew from GAO and filed in this Court. *See Continental Serv. Grp., Inc. v. United States*, Fed. Cl. No. 17-449.

a result, any award-term extensions that result from the proposed corrective action should be in place for an appreciable period of time.

In sum, as we explained in our initial motion to dismiss and in our reply to plaintiffs' responses, the proposed corrective action plan is reasonable in these circumstances, and as we explain here, Windham's arguments are unavailing.

CONCLUSION

For the reasons stated here and those provided in our motion to dismiss and our reply to plaintiffs' responses, we respectfully request that the Court dismiss as moot plaintiffs' amended complaints.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, Jr.
Director

s/ Reginald T. Blades, Jr.
REGINALD T. BLADES, Jr.
Assistant Director

OF COUNSEL:

JAY URWITZ
JOSE OTERO
SARA FALK
Attorneys
United States Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

s/ Michael D. Snyder
MICHAEL D. SNYDER
JANA MOSES
Trial Attorneys
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Tel. (202) 616-0842
Fax. (202) 305-7643

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Attorneys for Defendant