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October 9, 2018

IMMEDIATE SUSPENSION REQUIRED

PUBLIC VERSION

[redacted]

U.S. Government Accountability Office
441 G Street N.W.
Washington, D.C. 20548
Attn: Procurement Law Control Group

Re: Protest of FMS Investment Corp.
Solicitation No. 91003118R0024
Department of Education; Federal Student Aid

Dear Sir or Madam:

Pursuant to 4 C.F.R. § 21.1(a) and Federal Acquisition Regulation ("FAR") 33.104, FMS Investment Corp. ("FMS") protests the terms of Solicitation No. 91003118R0024 (the "RFP") issued by the Department of Education, Federal Student Aid ("Agency" or "ED"). The RFP seeks to procure default collection services for federal student loans under the so-called NextGen Business Operations, which is part of Phase II of ED's Next Generation Financial Services Environment ("NextGen"). The RFP is the next procurement phase of ED's business operations process solution previously referred to as components E and F in the Phase I NextGen solicitation, which ED issued February 20, 2018.

ED has failed multiple times in recent attempts to procure federal student loan debt collection services—services that it has procured since the 1980s to collect the massive and ever-growing defaulted federal student loan debt. ED's latest failure involved a pretextual attempt to cancel the solicitation to collect defaulted federal student loan debt, which the Court of Federal Claims (the "COFC") enjoined. ED desperately needs services to collect defaulted student loans, but rather than correct the errors it has made in three years of trying to procure debt collection services, ED now has decided to lump those services into the so-called NextGen procurement, which began as an information technology procurement to service loans that had not defaulted and is closed to new offerors. This newest maneuver by ED violates procurement laws and regulations for a number of reasons. In doing so, ED failed to reasonably apprise potential offerors when it issued the Phase I NextGen procurement that the Phase II NextGen procurement would include debt collection services. In addition, by limiting offerors for Phase II of NextGen to those that ED selected after Phase I proposal submissions, ED has unfairly

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and unduly restricted competition for the unannounced debt collection services it now seeks to procure. Finally, ED has unreasonably bundled loan servicing and defaulted loan collections as a result of its last-minute expansion of the NextGen approach. Each of these procurement violations materially prejudices FMS.

FMS's address is: 1701 West Golf Road, Rolling Meadows, Illinois 60008; telephone: 888-853-8148. E-mail notifications relating to this protest may be provided to: drjohnson@velaw.com; trobinson@velaw.com; and rstalnaker@velaw.com.

Pursuant to Government Accountability Office ("GAO") Bid Protest Regulations, 4 C.F.R. § 21.1(e), a copy of this protest will be provided to the agency contact designated in the RFP. Although it appears as though Soo Kang is the Contracting Officer for this procurement, the RFP states that a copy of any protest should be delivered to the FSA Acquisition Servicing Team, whose email address is listed as MPDSETeam@ed.gov.

I. INTERESTED PARTY STATUS, TIMELINESS & MANDATORY SUSPENSION OF CONTRACT PERFORMANCE

Pursuant to 4 C.F.R. § 21.0(a)(1), FMS is an interested party because FMS has a direct economic interest in ED's procurement of default collection services for federal student loans which are at issue in this protest. FMS is a highly successful private collection agency ("PCA"). A PCA is a private sector company specializing in the collection of ***defaulted*** debt. FMS has diligently pursued a contract under the parallel default collection services solicitation for nearly three years. After careful review of the Phase I RFP, an FMS affiliate participated as part of a team that submitted a proposal in response to NextGen components A & B, however ED subsequently removed those components from the NextGen procurement and transferred them to another acquisition vehicle. FMS did not submit a proposal under Phase I of the NextGen procurement because, as detailed below, the NextGen Phase I solicitation, as well as statements from ED officials, made clear that the NextGen procurement related ***solely*** to information technology solutions and student loan ***servicing***. Senior ED officials specifically stated that the NextGen procurement was completely separate from ED's procurement of default collection services. Further, counsel from the Department of Justice ("DOJ") expressly stated that ED had not included default collection services—a component of ED's "new vision" of enhanced services—within NextGen Phase I. ED did not give notice that it intended to procure default collection services under the NextGen procurement prior to the deadline for proposals under NextGen Phase I.

Yet now—after narrowing the pool of competitors for the NextGen procurement—ED has ***added*** default collection services to the NextGen procurement. This maneuver takes the RFP well beyond the initially advertised scope of the procurement. Had ED apprised potential offerors of its intention to procure default collection services, FMS would have submitted a proposal under Phase I. Now that ED improperly has expanded the scope of its initial

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procurement, it is improperly barring FMS from competing. Should FMS prevail in this protest, and ED be required to conduct a fair and transparent procurement for default collection services, FMS will be a competitor and will have a direct economic interest in the properly run procurement. Thus, FMS is an interested party to pursue this protest. *See Oracle Am., Inc.*, B-416061, 2018 CPD ¶ 180 (May 31, 2018) (finding protester was an interested party where it would have an economic interest in the competed solicitation if the protest were sustained notwithstanding that it had not competed under the defective solicitation); *Helionix Sys., Inc.*, B–404905.2, 2011 CPD ¶ 106 (May 26, 2011) (protester who did not submit proposal was interested party to challenge solicitation terms that deterred it from competing); *Space Exploration Techs. Corp.*, B–402186, 2010 CPD ¶ 42 at n.2 (Feb. 1, 2010) (finding protester to be interested party to challenge order under IDIQ contract, even where protester was not a vendor under the IDIQ contract, where protester challenged the order as outside the scope of the IDIQ contract); *Courtney Contracting Corp.*, B–242945, 91–1 CPD ¶ 593 (June 24, 1991) (protester was interested party, despite not submitting bid or offer, where remedy sought was the opportunity to compete).

The Agency released the RFP on September 24, 2018. Offerors were instructed to submit their past performance proposal volume on October 9, 2018. This protest is timely as it is filed prior to the closing time for receipt of proposals. 4. C.F.R. § 21.2(a)(1).

As this pre-award protest is timely filed, pursuant to the Competition in Contracting Act ("CICA"), 31 U.S.C. §§ 3553(c)(1), and FAR 33.104(b)(1), ED may not award any contract with respect to this procurement while the protest is pending.

II. BACKGROUND

A. Loan Servicing and Default Loan Collections

Since the early 1980s, ED has relied upon PCA contractors to collect upon defaulted student loans. ED's Office of Federal Student Aid ("FSA") awards and administers grants, work-study funds, and low-interest loans to approximately 13 million students annually. FSA has long operated pursuant to settled definitions of delinquency and default. According to FSA, a borrower's loan becomes "delinquent" the first day the borrower misses a payment. https://studentaid.ed.gov/sa/repay-loans/default (last visited October 4, 2018). There are consequences when a loan becomes delinquent. For one thing, if a borrower becomes more than 90 days delinquent, the loan servicer will report the delinquency to the three major national credit bureaus. *Id.* As explained by FSA on its website, a delinquent loan may go into default. *Id*. According to FSA, the point when a loan is considered to be in default varies depending on the type of loan. For a loan made under the Federal Direct Loan Program or the Federal Family Education Loan Program, the loan is considered in default if no payment is made for a period of at least 270 days. This definition of default is widely use throughout industry. For example, the Consumer Financial Protection Bureau, which has authority over banks, lenders, and other financial companies, explains on its website that:

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> Default is the failure to repay a loan according to the terms agreed to in the promissory note. For most federal student loans, you will default if you have not made a payment in more than 270 days.

https://www.consumerfinance.gov/ask-cfpb/what-does-it-mean-to-default-on-my-federal-student-loans-en-649/ (last visited October 4, 2018).

In accordance with the requirements of the Debt Collection Improvement Act of 1996, OMB Circular A-129 and other rules controlling collection and servicing of Federal credit programs, FSA's administration of a federal student loan starts with a ***loan servicer***, who maintains communication with the borrower and accepts payments toward the loan under a payment plan. However, if a borrower fails to make a payment on his or her student loan for 270 days (for most student loans), the loan enters "default." FSA then removes the account from the contractor that had been servicing the loan (the loan servicer), and places the loan with one of a ***default collection services contractor*** (i.e., a PCA) for that contractor to begin default collection or rehabilitation proceedings. It is then the PCA's job to locate the borrower, establish communications with the borrower, and then either enter into a voluntary repayment plan or institute collection proceedings, such as administrative wage garnishment ("AWG"). Once the borrower and the PCA agree to a collection plan, and the borrower has made payments under the plan for a specified number of months, the loan is transferred back to a loan servicer for the servicer to resume processing and servicing the "rehabilitated" loan. The lifecycle of a student loan may include multiple defaults and separate efforts by both loan services and debt collectors.

In short, the loan servicer and default collector have entirely separate roles within the lifecycle of a student loan. It is the loan servicer's responsibility to manage and service the student loan so long as the borrower is making payments, and it is the PCA's responsibility to collect upon loans if the borrower defaults and the loan is removed from the loan servicer. These distinctions are important as Congress has passed laws that apply to debt collectors and mandate the use of collection agencies, but do not apply to loan servicers who service loans or debt which were not in default at the time the loan or debt was obtained by the servicer. *See* 15 U.S. Code § 1692a(6)(F)(iii) (excluding from the definition of a "debt collector" "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person"). A loan servicer, which is given non-defaulted loans to service by ED, is not therefore, a debt collector. However, a PCA, which receives loans from ED only after the borrower is in default, is a "debt collector." This distinction is important because PCAs—as debt collectors—are subject to the Fair Debt Collection Practices Act ("FDCPA"), which "authorizes private lawsuits and weighty fines designed to deter the wayward practices of 'debt collector[s]', a term embracing anyone who 'regularly collects or attempts to collect … debts owed or due … another.'" *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718, 1719 (2017).

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Because each of these roles historically has been wholly separate, companies have specialized in performing one service or the other. Thus, in the case of FMS, FMS focuses its business solely on the collection of defaulted loans. Tackling defaulted loans requires skills and expertise that differ substantially and materially from the skills and expertise required for loan servicing. FMS has systems, processes and procedures to efficiently collect defaulted student loans while ensuring compliance with statutes and rules applicable to debt collection, such as the FDCPA. Loan services do not possess these skills, expertise and processes.

B. For Years ED Has Unsuccessfully Attempted to Procure Default Collection Services for Federal Student Loans

In order to place this protest in context, it is first necessary to briefly recap the years-long odyssey of ED's repeated attempts (and corresponding failures) to reasonably and properly procure default collection services. On December 11, 2015, ED issued Solicitation No. ED-FSA-16-R-0009 (the "PCA Solicitation") seeking to award the next iteration of default collection contract awards. The PCA Solicitation stated that ED would award multiple Indefinite Delivery/Indefinite Quantity ("IDIQ") contracts and Task Orders to an undefined number of awardees. Forty-seven offerors, including FMS, submitted proposals in response to the PCA Solicitation.

On December 9, 2016, ED notified FMS that it along with six other offerors had been selected for award under the PCA Solicitation. *See Gen. Revenue Corp.*, B-414220.2 *et al.*, 2017 CPD ¶ 106 (Mar. 27, 2017). Following ED's December 2016 award announcements, numerous disappointed offerors filed bid protests at the GAO. GAO consolidated some of the protests, and addressed some of the protests alone. On March 27, 2017, GAO issued a decision on the consolidated protests. *See id.* GAO sustained the protests in part and denied the protests in part, finding that ED had failed to conduct reasonable and equal technical and past performance evaluations. *Id.* GAO recommended that ED amend the PCA Solicitation, as appropriate, to accurately reflect its needs; and then conduct and adequately document a new evaluation of proposals under the past performance and management approach factors. *Id.* GAO recommended that, after conducting a new evaluation, ED prepare and adequately support a new source selection decision. *Id.* ED never recovered from GAO's initial finding that it had not properly conducted the default collection services procurement.

On March 28, 2017, Continental Service Group, Inc. ("Conserve") filed a bid protest in the COFC. *See Continental Serv. Grp., Inc. v. United States*, No. 17-449 *et al*. Conserve challenged both ED's evaluation of its proposal and the number of defaulted borrower accounts it was receiving under its incumbent 2015 Award Term Extension ("ATE") agreement. Additional bid protests in the COFC followed.

On May 19, 2017, the Government filed a notice of corrective action in response to the COFC protests advising the Court that ED had decided to implement the GAO's recommendations. *See id.*, Dkt. No. 122. Dr. Patrick Bradfield, FSA's Director of Acquisition

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V&E

and Head of the Contracting Activity ("HCA") filed a sworn declaration[1] stating that, "FSA intends to take corrective action under this Solicitation in response to the recommendations of the [GAO] and the exhortations of the Court to find a global solution to these protests." Exhibit A ¶ 4. As Dr. Bradfield explained, ED's plan "will entail making minor amendments to the Solicitation, requesting revised proposals, and conducting a new evaluation." *Id.* Having agreed to follow GAO's recommendation, ED plainly had reevaluated its requirements for default collection services and decided that the PCA Solicitation still accurately reflected its needs. Nowhere in his sworn declaration did Dr. Bradfield state that ED's was reevaluating its debt collection system or its need for default collection services.

According to Dr. Bradfield, ED would complete the reevaluation, responsibility determinations, and other pre-award activities by August 24, 2017, and by August 25, 2017, ED would issue new notices of award and notices of termination of the default collection services contracts it had originally awarded in December 2016 (if any). On May 25, 2017, ED amended its notice of corrective action. ED subsequently amended the PCA Solicitation four more times, and requested revised proposals from offerors. None of those amendments changed or altered ED's requirements or the evaluation framework initially describe in the PCA Solicitation. FMS timely submitted a fully responsive proposal on June 20, 2017.

Despite its promised timeline, ED failed to meet its schedule for the reevaluation. Although it updated the Court several times as to its progress, ED did not conclude the reevaluation or announce new award decisions until several months after its stated completion date, and even then, only after ordered to do so by the Court.

C. ED Announced the NextGen Procurement as Solely for Loan Servicing, and Not for Default Collection Services

On August 4, 2017, while ED was conducting its corrective action reevaluation under the PCA Solicitation, William Leith, FSA's Chief Business Operations Officer, filed a sworn declaration under penalty of perjury in the COFC to clarify the differences between ED's loan and debt collection services, and to explain how loan management servicing was unrelated to the single procurement for private collection agency services for student loans that are in default. *Continental Serv. Grp., Inc. v. United States*, No. 17-449 et al., Dkt. No. 183-2 ("Leith Decl."), attached at Exhibit B. ED, through Mr. Leith's sworn declaration, intended to provide the COFC information about the planned NextGen solicitation.

Speaking on behalf of ED, Mr. Leith represented to the Court that the NextGen procurement would relate "***solely to loan servicing*** and not collection activities for defaulted loans." *Id.* ¶ 9 (emphasis added). Mr. Leith explained that loan servicing is "managing loans which are not in default, meaning while the borrowers are in school, in the post-graduation grace period, or in repayment status." *Id.* ¶ 5. Mr. Leith continued:

[1] A copy of Dr. Bradfield's Declaration is attached at Exhibit A.

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> "The Department contractors who perform that loan servicing work (commonly referred to as "loan servicers") receive 'booked' loans after the funds are disbursed to students, contact borrowers once they are in the grace period (i.e., prior to beginning repayment of a loan) to determine the desired repayment plan, and set up payment methods. Once in repayment, the loan servicer contractors provide borrowers with billing statements, process payments, and offer services to borrowers such as processing changes to repayment plans, forbearance and deferments, and the like."

Id. As Mr. Leith emphasized within his sworn statement, "[t]he ***work of the loan servicers is separate and distinct from the debt collection work*** that the PCAs perform under their respective default collection services contracts. PCA contractors perform services on only defaulted loans." *Id.* ¶ 6 (emphasis added). Mr. Leith explained that debt collection concerns "loans which are extremely delinquent (payment is 360 days past due)." *Id.* He further explained that debt collectors perform activities that loan servicers do not, insofar as debt collectors "conduct 'skip trace efforts' to obtain contact information on borrowers, contact borrowers seeking to collect, explain various options available for curing the default, including loan rehabilitation programs, and set up rehabilitation payment plans. PCAs also process administrative wage garnishment procedures, if applicable." *Id.*

In speaking specifically about the NextGen procurement, Mr. Leith told the Court that ED had cancelled an earlier loan ***servicing*** solicitation and that, as of August 2017, ED intended to "develop a new, enhanced Next Generation Processing and Servicing Environment" for those services. *Id.* ¶ 3. He attached a copy of ED's press release about NextGen to this declaration. *Id.* at Exh. B. Notably, the press release referred only to servicing, not default collections, and provided:

> The anticipated FSA Next Generation Processing and Servicing Environment will provide for a single data processing platform to house all student loan information while at the same time allowing for ***customer account servicing*** to be performed either by a single contract servicer or by multiple contract servicers. This new approach is also expected to require separate acquisitions for database housing, system processing and ***customer account servicing*** which will allow for maximum flexibility today and into the future. FSA expects these contemplated changes to the ***servicing and processing environment*** to provide the opportunity for additional companies to submit proposals for contracting with FSA.

Id., ED press release Aug. 1, 2017, "Secretary DeVos Announces Intent to Enhance FSA's Next Generation Processing and Servicing Environment Creating the Foundation of Tomorrow's Student Loan Program" (emphasis added).

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If the press release was not clear enough, Mr. Leith explained in his sworn declaration that:

> Neither of these press releases, nor the Federal Student Loan Servicing Solicitation to which they both relate, are at all related to the debt collection solicitation (Solicitation No. ED-FSA-16-R-0009) under which the private collection agencies (PCAs) will perform debt collection services. ***As explained below, the work to be performed under Solicitation ED-FSA-16-R-0009 is different from loan servicing, involving an entirely separate procurement effort***.

Id. ¶ 4 (emphasis added). Mr. Leith emphasized that "[i]n short, these two functions (loan servicing versus default collection), are substantively different and take place at different stages in the life of a loan. FSA acquires these two types of services using distinct and separate solicitations and contracts. Loan servicer contractors are assigned work from a pool of accounts distinct and separate from the pool of accounts the PCAs service." *Id.* ¶ 7. He attached as Exhibit C to his declaration a chart listing the distinct activities performed by these two groups of contractors, each possessing specific skills and expertise to perform their tasks. *Id.* Late in his declaration, Mr. Leith again stated in no uncertain terms that ED's "development of the Next Generation Processing and Servicing Environment in no way impacts any corrective action currently underway on the PCA [S]olicitation at issue in these cases, as such activities relate solely to loan servicing and not collection activities for defaulted student loans." *Id.* ¶ 9.

Mr. Leith's declaration was made under oath on behalf of ED and submitted to the Court by the DOJ. The *Continental Services* case in which this declaration was filed ended on February 14, 2018, just days before ED issued the NextGen Phase I RFP. At no time during the pendency of that case, or several related cases afterwards, did Mr. Leith, ED or DOJ inform the Court that Mr. Leith's sworn declaration was no longer accurate.

D. ED Released the NextGen RFP Without Identifying Any Default Collection Services

On February 20, 2018, ED issued the NextGen RFP. In the NextGen RFP, ED stated that it was seeking to procure services for the servicing of non-defaulted accounts. *See, e.g.*, Leith Decl. ¶ 9 (noting that NextGen "activities relate solely to loan servicing and not collection activities for defaulted student loans").

In addition, ED separately stated that it intended to procure the NextGen platform in phases, and that ED was pursuing only the ***loan servicing*** phase at this time. The NextGen Phase I RFP demonstrated this iterative procurement process by illustrating both a current and future state for the NextGen system. Notably, ED's illustrated solution includes a "Debt Management and Collection System" component, in which default collection services contractors (*e.g.*, PCAs) clearly play a prominent role—they are specifically identified by name. In fact, the requirements for the NextGen system specifically state the need to handle, on average, 350,000 defaulted loans monthly (over four million defaulted loans annually!),

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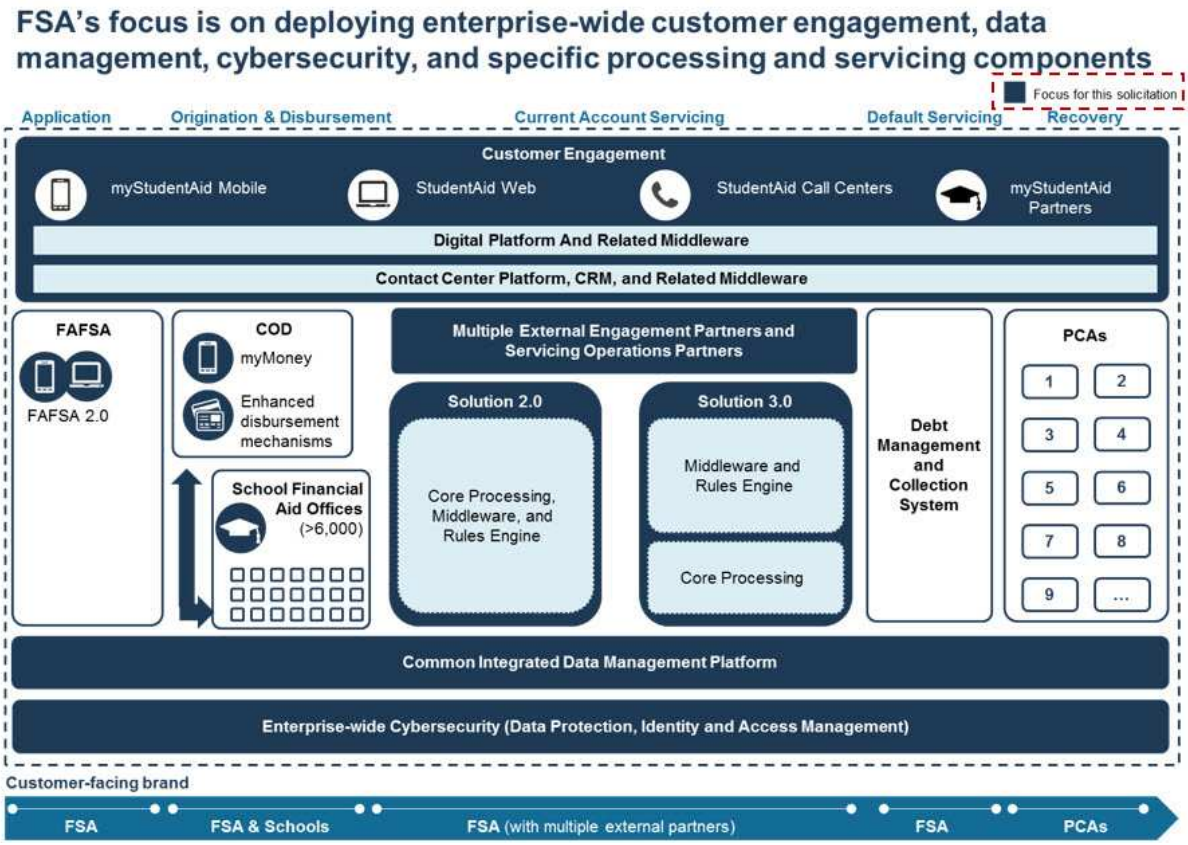
transferred from loan servicing to default collections and FSA's Debt Management and Collection System. *See* NextGen RFP Amdt. 4 at 21.

Nowhere in the NextGen RFP did ED say it intended to procure default collection services for federal student loans. In fact, the RFP expressly excluded these services—as set forth in a depiction of what was included in the RFP and what was excluded. The RFP directed potential offerors to Exhibit 3 "for a visual representation of the NextGen vision." RFP page 6.

EXHIBIT 3: NEXTGEN VISION HIGHLIGHTING THIS SOLICITATION'S FOCUS



As shown in ED's depiction, those items in dark blue were the "Focus for this solicitation" (see key at top right of depiction circled with a red dashed line for GAO's convenience) while debt management and collection and PCA services were shown in white and thus, expressly excluded.

E. In a Parallel Procurement ED Made New Flawed Default Collection Services Awards

On January 11, 2018, ED issued two new notices of award under the PCA Solicitation and unsuccessful offeror notices to the 40 other competing PCAs. FMS received an unsuccessful offeror notice the afternoon of January 11, 2018. After receiving its debriefing

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letter, on February 9, 2018, FMS filed a Complaint at the COFC protesting ED's irrational, arbitrary, and capricious evaluation and the resulting flawed award decisions. *FMS Investment Corp. et al. v. United States*, Nos. 18-204 *et al.*, Dkt. No. 1. Numerous other unsuccessful offerors filed similar complaints at the COFC, and the actions were consolidated, with FMS's protest being designated as the lead case. *See, e.g.*, *id.*, Dkt. No. 16.

On February 11, 2018, FMS moved for a Temporary Restraining Order and a Preliminary Injunction to enjoin ED from recalling accounts under its bridge contract. *See FMS Investment Corp. et al. v. United States*, Nos. 18-204 *et al.*, Dkt. No. 11. After ED produced certain "Core Documents," briefing, and oral argument, on February 26, 2018, the Court granted FMS's motion and issued a preliminary injunction to preserve the status quo while it further evaluated the merits of FMS's protest. In issuing the injunction, the Court indicated that it had "serious questions over ED's evaluation of proposals in this procurement." *Id.*, Dkt. No. 126 at 3. The Court stated that "[t]he evidence before the Court points to inconsistencies, omissions, unequal treatment of offerors, and cherry-picked data that the Court finds to be rather problematic." *Id.* at 3-4. As a result, the Court concluded that FMS and the other consolidated plaintiffs were likely to succeed on the merits of their bid protests. In other words, ED once again had failed to properly issue contract awards for necessary default collection services. The Court also found that FMS had sufficiently demonstrated that it would be irreparably harmed absent preliminary injunctive relief while ED had failed to offer any justification that it would be harmed at all if the injunction were entered. *Id.* at 4. Finding that the "balance of hardships clearly weigh[s] in favor of Plaintiffs," given that "there will be little to no harm to the Government if injunctive relief is granted," *id.*, the Court found that preliminary injunctive relief was appropriate and granted FMS and the other plaintiffs' motions.

F. ED Abandoned The Litigation and Attempted to Cancel the PCA Solicitation

On March 9, 2018, the Government filed its Administrative Record ("AR"). *See id.*, Dkt. Nos. 131. Just days before another oral argument, on March 19, 2018, the Government filed a notice informing the Court and the parties that ED had been reviewing the protests and the PCA Solicitation "in order to assess its options and to identify the best path forward for the agency and borrowers." *Id.*, Dkt. No. 149 at 1. The Government stated that "ED has reached a point in its analysis where it appears likely that a course of action other than continued litigation of the pending protests will be pursued," but it did not specify what actions ED actually would take. *Id.* After prompting by the parties, the Government filed a subsequent notice stating that it would file an update with the Court by April 11, 2018, advising the Court and the parties of the results of ED's internal review. *Id.*, Dkt. No. 154.

On April 11, 2018, the Government once again deferred any definitive action, advising the Court and the parties only that it would file another notice on or before May 4, 2018 to advise on ED's proposed course of action. *FMS Investment Corp. et al. v. United States*, Nos. 18-204 *et al.*, Dkt. No. 178. Then, on May 3, 2018, the Government filed a notice with the Court indicating that it had completed its review of the PCA Solicitation, and that it had

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decided to cancel the PCA Solicitation "due to a substantial change in the requirements to perform collection and administrative resolution activities on defaulted Federal student loan debts." *Id.*, Dkt. No. 188 at 1. The May 3 Notice, which ED issued the same day that Phase I NextGen proposals were due, provided:

> In the future, ED plans to significantly enhance its engagement at the 90-day delinquency mark in an effort to help borrowers more effectively manage their Federal student loan debt. ED expects these enhanced outreach efforts to reduce the volume of borrowers that default, improve customer service to delinquent borrowers, and lower overall delinquency levels. The current private collection agencies (PCA) under contract with ED have sufficient capacity to absorb the number of accounts expected to need debt collection services while the process for transitioning to the new approach is developed and implemented. Therefore, additional PCA contract work is not currently needed.

Id.

ED gave no indication as to when or how it would implement this new "plan" or the basis for believing that additional outreach efforts—which it apparently assumed the borrower would respond to—would reduce debt collection demand so much as to render a procurement for default collection services superfluous. Instead, despite volumes of contrary information that ED itself has published and is otherwise widely available in the press, and nearly four years of attempting to award contracts under the PCA Solicitation, ED claimed that its new, yet-to-be-developed future plan would so greatly reduce ED's statutorily required default collection services demand as to render the need for PCAs "nonexistent."

In a subsequent filing with this Court, on May 23, 2018, the Government submitted a May 3, 2018 Memorandum to File authored by Murthlyn Aldridge, Contracting Officer. *Id.*, Dkt. No. 244-1. This Memorandum to File had the subject line, "CANCELLATION DECISION—SOLICITATION NO. ED-FSA-16-R-0009 DEBT COLLECTION SERVICES" (the "Cancellation Decision"). A copy of the Cancellation Decision is attached as Exhibit C. In several respects Ms. Aldridge's Cancellation Decision was consistent with the Notice that the Government filed with the Court on May 3, 2018. Ms. Aldridge wrote that after making the awards to two PCAs, "FSA Business Operations informed FSA Acquisitions that FSA's needs and requirements for servicing student loans in delinquency and default will change significantly in the near future." She did not define what she meant by "near future." Ms. Aldridge then explained that she had reviewed "FSA's revised requirements" and based on that review, she determined "that the contracts awarded under Solicitation ED-FSA-16-R-0009 will not satisfy FSA's new requirements and therefore are no longer needed." Ms. Aldridge, however, did not identify what those revised requirement consisted of or when they were developed.

Instead, Ms. Aldridge wrote in her Cancellation Decision about a "new vision" that FSA had "for an enhanced servicer(s) to provide services to borrowers beginning ninety (90)

days after a borrower account becomes delinquent and continue those services through the resolution of any subsequent default." She boldly stated that "FSA's need for [PCA] services as a function separate from the work provided by the enhanced servicer(s) will diminish rapidly in the coming months and ultimately become nonexistent." These assertions by Ms. Aldridge, however, completely contradict information and assertions that Mr. Leith made to the Court in his August 4, 2017 sworn declaration. As discussed above, in that sworn declaration, Mr. Leith explained that the loan servicers service the loans, and the PCAs collect on the loans that inevitably fall into default.

According to Ms. Aldridge in the Cancellation Decision, at or around May 3, 2018, ED came up with a new idea to "service borrower accounts starting at 90 days or more delinquent versus 360 days or more delinquent." According to the Cancellation Decision, to facilitate the "new" idea, ED plans on creating a new portfolio "for all borrower accounts that are 90 days or more delinquent." To service this new portfolio, Ms. Aldridge wrote that "FSA will need a contractor(s) that will focus solely on the resolution of delinquencies and collection activities for the new portfolio of work that will be comprised of accounts beginning at 90 or more days delinquency." This new approach will require that "[t]he contractor(s) will provide all aspects of collection and default resolutions related to servicing borrower accounts in repayment including entitlements such as deferments, forbearances, repayment plans discharge/forgiveness, etc. and the same contractor(s) will be able to handle post default collections such as [Administrative Wage Garnishment] and [Treasury Offset Program]." In short, the Cancellation Notice stated that it was ED's intention to take two, entirely separate services—loan servicing and default collection services—and combine them under a single contract.

But, as industry publication insideARM observed, this "solution"—even if it is logical—is not able to be fielded for many years: "In addition to getting all servicers on one platform (the Navients, Nelnets, etc.), industry experts noted that the system design revealed in December 2017 included a default management module as well. It seemed, though, that this module would be years away from becoming a reality, as it hasn't yet been the subject of a technology solicitation." https://www.insidearm.com/news/00044012-ed-data-shows-109-increase-student-loan-de/ (last visited October 4, 2018). Ms. Aldridge even admitted that the plan is, generously put, in its infancy. In fact, ED did not even know whether the plan is consistent with the law, because at some point, "[a]ll proposed changes to current collection practices will be reviewed to ensure legal compliance with the Higher Education Act, Department and Treasury regulations, and other applicable regulations before they are implemented."

Based on Ms. Aldridge's justification nonetheless, the Government moved to dismiss all the protests of the January 2018 awards. The Court dismissed the pending protests as moot, but indicated that interested parties could separately challenge the Cancellation Decision.

G. GAO Denied GC Services' Protest

In late May 2018, GC Services Limited Partnership ("GC Services")—an offeror on the Phase I NextGen procurement interested in providing services related to loan servicing—

filed a bid protest with GAO challenging the terms of ED's Phase I request for proposals for NextGen. *GC Services Limited Partnership*, B-416443.2, 2018 CPD ¶ 313 (Sept. 5, 2018. As an offeror on the Phase I Solicitation for services other than default collection services, GC Services alleged that the Phase I NextGen solicitation was defective because it did not reflect ED's actual requirements based on ED's proposed corrective action taken in response to bid protests at the COFC concerning the default collection services solicitation. GC Services objected to the fact that in its May 3, 2018 Cancellation Decision and accompanying memorandum also dated May 3, ED had identified that it had a "new vision" to procure something called "enhanced services" which purportedly would cause defaults to diminish rapidly and render the need for default collection services moot.[2] GC was concerned that its proposal would not be well received by ED because the Phase I solicitation was not sufficiently detailed and it should have been provided an opportunity to revise its proposal given ED's apparent desire—stated as of May 3—to procure "enhanced services" at some point in time. GAO denied the protest, holding among other things that "the protester's arguments here merely anticipate adverse actions by the agency, and are thus premature."

In the decision denying the GC Services bid protest, GAO included a footnote 7, which addressed an argument that ED made during the protest. According to this footnote, ED asserted that its use of general reference terms such as "innovation" and "flexibility" in the Phase I solicitation, reasonably put offerors on notice of ED's "anticipated enhanced servicing requirements, and that the implementation of the enhanced servicing requirements [in Phase II] do not constitute a material change to the RFP's stated objectives and constraints because vendors should have reasonably anticipated them." To this, GAO wrote, "we question the agency's position in this regard." GAO pointed out that the concept of enhanced servicing "was first documented in an internal agency draft memorandum on the same day as the Phase I response deadline, and was not publicly disclosed until more than a month later." In other words, GAO observed that the Phase I solicitation was issued long before the "enhanced servicer" concept was identified, and thus, it was not credible to claim that Phase I put offerors on notice that ED was intending to procure "enhanced services." Notably, the Cancellation Decision had an accompanying May 3, 2018 memorandum, which described ED's new "enhanced Services" idea. Exhibit D. On page 2 of that memorandum, ED states that the contractor providing enhanced services would possess "full and complete understanding" of "all methods of collection and default resolution." *Id*. at 2.

H. Court of Federal Claims Enjoined ED from Canceling its Solicitation for Default Collection Services

FMS filed a protest challenging the Cancellation Decision with the Court on June 18, 2018. Seven other PCAs similarly filed protests challenging ED's decision to cancel the PCA Solicitation. The consolidated plaintiffs argued that ED's Cancellation Decision was undocumented, unreasonable, and arbitrary and capricious. Among other arguments, plaintiffs argued that ED's decision to cancel the PCA Solicitation because of its "new vision" of enhanced servicers was irrational because ED could not even approximate when it might be

[2] The COFC ultimately would find that there was no credible support for this assertion, as discussed below.

V&E

able to procure these services. Without having any sort of timetable as to when it would issue a solicitation seeking these enhanced servicer services, it was not reasonable for ED to claim that it no longer needed PCA default collection services. At the very least, ED would need default collection services during the interim while the Agency created an acquisition plan, developed a solicitation, notified potential offerors of the new requirements, conducted a procurement, made enhanced servicer contract awards, and actually accepted the new processing and collection systems that needed to be developed. As the plaintiffs argued, despite these numerous, substantive, and complex steps, ED had not even thought about a plan for completing it—ED had no idea whether enhanced servicers would be up a running in the coming years or even in this decade.

ED could not rebut those arguments. In fact, on several occasions, the Government conceded that ED had not developed an actual plan for procuring enhanced servicing. On July 19, 2018, in open court, the DOJ attorney confirmed to the Court that ED had ***no plan*** about when it plans to issue a solicitation to procure the enhanced servicer solution or even how it intends to do so:

> MR. PEHLKE: They -- my understanding is ***there's no target date right now*** for the next -- for moving to phase -- ***what would be -- could be a phase two or a different solicitation to bring that together, and that's why in the cancellation -- in the Administrative Record and the things that you see around it, the determination was made, because that was a concern.*** What they looked at is do we have the capacity and the ability to continue to move forward, to meet all of our requirements, to fulfill our mission, while we develop that? And they determined yes.

Hr'g Tr. 39:14-24, July 19, 2018 (emphasis added), excerpt attached at Exhibit E. Thus, by the Government's own admission, there was no date when it might issue a solicitation to implement the "new vision."

The Government also informed the Court that ED's enhanced servicer vision—which includes default collection services as identified in ED's May 3 memorandum that accompanied the Cancellation Decision of the same date—***was not included in the NextGen Phase I procurement***. The DOJ attorney similarly conceded this exclusion:

> MR. PEHLKE: So the NextGen went onto the street on February 20th. The proposals were due in April. They are currently being evaluated for phase 1, ***and phase 1 is about implementing and developing this seamless system online***. Because currently, what – and this you see in some of the enhanced servicer description and some of the problems that we discuss in our briefs is designed to deal with, right now there's every PCA, every debt collector, they have their own websites, there's a lot of different mechanisms for borrowers to deal with whoever it is

V&E

> handling their account, and the goal is to get one platform that services the life of a loan.
>
> ***So that's phase 1 is about developing that technology***. When -- so my understanding of the timeline right now is the ***one decision that needs to be made for ED is whether or not they are going to do the enhanced servicing strategy via phase 2*** of the NextGen procurement, or if they're going to separately procure it. Separate services. ***And that decision won't be made until they finish the phase 1 evaluation, which is ongoing***.

Hr'g Tr. 58:14-22, August 30, 2018 (emphasis added), excerpt attached at Exhibit F. In other words, the DOJ attorney expressly informed the Court that enhanced servicing services—including default collection services—were not included in NextGen Phase I, and that ED would not even decide when and how to procure those services until after Phase I was complete.

On September 14, 2018, Judge Thomas C. Wheeler agreed with FMS and the other plaintiffs and issued an opinion and order permanently enjoining ED from proceeding with the cancellation on the present record. Based on the parties' briefs, the "scant" 33 page record, and oral argument, Judge Wheeler concluded that "ED either did not have, or did not sufficiently document, a rational basis for its decision to cancel the solicitation." As relevant here, Judge Wheeler noted that the hasty maneuvers of ED appeared "slipshod," and that even ED's own May 3, 2018 documents note that, however grand ED's "new vision" may be, "the program still needs to be reviewed for compliance with applicable laws and regulations." Judge Wheeler continued:

> Furthermore, the [Administrative Record] is missing critical information about the enhanced servicer program. ***The AR does not include any plan or timeline for implementing the program.*** It does not include a request for proposals, or any mention of what that request might look like. It does not refer to a source of funding. It does not even include a copy of the solicitation that ED cancelled to clear a path for the enhanced servicers.

Id. (emphasis added). After detailing numerous other flaws in ED's rationale, the Court concluded, as follows:

> The cancellation notice and the AR purport to outline a significant policy change. ***ED had clearly planned for PCAs to continue to administer defaulted student loans as recently as January 2018 because the agency awarded two PCA contracts that month***. Yet not four months later, in a procurement cancellation notice, ED declared a new direction and an end to contracting for PCA services. ED needs to provide a "reasoned

V&E

> analysis" for the policy change. For all the reasons above, it has failed to do so.

Id. (emphasis added) (internal citations omitted).

In short, having reviewed the full administrative record of ED's attempt to cancel the PCA Solicitation, and heard argument from the parties, Judge Wheeler concluded—as FMS and others argued—that ED had no plan for enhanced servicers—which included default collection services. ED even expressly admitted that its enhanced servicer "vision"—including default collection services—was not part of NextGen Phase I, and that ED would not even consider whether to add these requirements into NextGen ***until after Phase I was completed***. Thus, as Mr. Leith had informed the COFC, loan servicing and default loan collection are two separate services, and the Phase I NextGen procurement was only intended to cover loan servicing.

I. ED Released the Phase II NextGen RFPs

Ten days after being enjoined from cancelling the PCA Solicitation, on September 24, 2018, ED issued the RFP for Phase II of NextGen. Surprisingly, under the Phase II RFP, ED now appeared to be attempting to procure defaulted loan debt collection services. As one example, paragraph C.3.3.b., "Student aid back-office processing" provides that the contractor will provide solutions that, among other things, engage in the following: "Rehabilitation, Administrative Wage Garnishment (AWG), Treasury Offset Program (TOP), and other related processing." AWG was authorized by § 3720D. "Garnishment" of the Debt Collection Improvement Act of 1996. 31 U.S.C. 3701, et seq. AWG is an administrative process that requires that debtors be notified of the Government's intent to have their wages withheld by their employer. As part of the process, the borrower who has failed to make payments on a loan has a right to request a hearing. As noted by Mr. Leith in Exhibit C to his sworn declaration, AWG is the work of debt collectors, not loan servicers. Exhibit B.

Section J of the RFP provides a list of attachments to the RFP. However, none of those attachments are published on www.FBO.gov and none are included with the RFP that is available to FMS. The RFP provides that Attachments will be distributed directly to offerors. RFP § L-2.3. ED selected nine firms as the offerors who could compete for the Phase II NextGen Business Process Operations contract. FMS is not an offeror under Phase I, it does not have access to the Attachments. However, the RFP lists Attachment 12 as covering "Life of Loan Servicing Intended State: Continuous, frequent, and tailored customer engagement." In addition, Attachment 12 is referred to in RFP § C.3.3 "Operating Elements and Related Requirements (see attachment 12: Life of Loan Servicing Intended State: Continuous, frequent, and tailored customer engagement)." That RFP section discusses AWG and other default collection services activities. Hence, Attachment 12 amplifies these requirements.

ED was not forthcoming about whether it was trying to add defaulted loan collection services into the NextGen procurement. Beginning on September 26, 2018, another PCA, ConServe, asked ED whether ED intends to procure default recovery services (*i.e.*, traditional PCA services) and/or "enhanced servicing" services under NEXTGEN Phase II (Components

V&E

E&F). Exhibit G. By October 1, 2018, ConServe had followed up on the question three times, but ED still had not responded. Exhibit H. However, on October 4, 2018, ED issued an amendment to the RFP providing the following Q&A:

> Question: Understanding whether the scope of E&F relates solely to direct student loan servicing activities or to the broader student aid lifecycle activities (i.e. FAFSA application, COD assistance, Ombudsman) is important in assembling teams. Could FSA please clarify whether the scope of EF relates only to student loan repayment activities and services, or whether it relates to the broader scope of the student aid lifecycle beginning with the FAFSA application through the entire student aid lifecycle?
>
> Answer: FSA anticipates that the Business Process Operations vendor(s) will support the entire student aid lifecycle.

Solicitation 91003118R0024 - NextGen Business Process Operations, Attachment 13 - Responses to Questions.

FSA's answer to the question about the scope of the RFP admits that ED is procuring default collection services as part of the NextGen Business Process Operations RFP. These services are a substantial requirement, but at this time FMS is excluded from participating in the competition. As long as FSA has been in the business of administering federal student loans, defaults have been as certain as death and taxes. On September 28, 2018, FSA posted information on its website about the most recently calculated student loan default rates which covered the fiscal year 2015 cohort. https://ifap.ed.gov/eannouncements/092618CDRNationalBriefings_FY15.html, last visited October 4, 2018. This information included a PowerPoint that summarized the default rates, a copy of which is attached at Exhibit I, obtained from, https://ifap.ed.gov/eannouncements/attachments/FY2015OfficialCDRBriefing.pdf. This information shows that default rates have ranged from 10.8% to 14.7% for the most recent seven years studied. Between 500,000 to 600,000 borrowers a year are defaulting. The lifecycle of student aid means that over 10% of student loans default each year, and therefore require default collection services.

Finally, on October 5, 2018, ED expressly confirmed that it intends to procure default collection services under the Phase II Business Process Operations RFP. In response to ConServe's repeated inquiries, the Contracting Officer finally responded:

> The Phase I Solicitation advised prospective offerors that NextGen contract(s) may encompass any and all activities associated with servicing of student aid, including servicing aid at every stage in the lifecycle, from application and disbursement of the aid, to payment and to servicing in delinquency or default status. As such, the Phase II Solicitation

[redacted]

V&E

> language for Business Process Operations (formerly referred to as Components E&F) advises eligible, prospective offerors that potential NextGen contract(s) may service the entire student aid lifecycle and life of the loan, ***including default servicing***.

Exhibit J (emphasis added). While the Contracting Officer's response attempts to downplay ED's maneuver by using the word "servicing" in relation to debt collections, it is clear that ED intends to procure default collection services under the Phase II RFP.

III. PROTEST GROUNDS

A. ED Failed to Reasonably Apprise Potential Offerors of the Materially Different Phase II Scope Prior to the Receipt of Phase I Proposals

In the Phase I NextGen RFP, ED did not indicate that it would be procuring any type of default collection services. To the contrary, statements by high ranking ED officials, public press releases, and statements by an attorney for DOJ speaking on behalf of ED expressly stated that ED ***was not*** procuring any type of default collection services under the NextGen procurement. Given that ED is trying to do just that, GAO should conclude that ED failed to inform potential offerors of the scope of services it was procuring under the NextGen procurement, thereby dissuading default collection servicers (*i.e.*, PCAs) from participating in the procurement and submitting Phase I proposals. As a result of these improper and unreasonable actions, ED failed to satisfy the foundational requirement that agencies should promote full and open competition, and this protest should be sustained.

In a two-phase procurement like NextGen, ED is required by its own procurement regulations to publish a synopsis that includes, "[a] general notice of the scope or purpose of the procurement that provides sufficient information for sources to make informed business decisions regarding whether to participate in the procurement." *See* 48 C.F.R. § 3405.207(c)(2). Put simply, although this is a low bar, ED is required to give reasonable and adequate notice of the procurement's scope so potential offerors can decide whether to participate in the opportunity. While ED's specific requirements may be refined during the second stage of the procurement, those revisions cannot be outside the scope of the initial Phase I notice or else ED has failed in its obligation to permit sources to "make informed decisions" about whether to participate. Moreover, reasonable notice of the procurement's scope—and then adherence to that announced procurement scope—is necessary, because as it is attempting here, ED limits Phase II participation only to Phase I selectees. In short, it is a matter of basic fairness that ED cannot publish a limited scope in Phase I, restrict the potential competitor pool, then suddenly greatly expand the procurement's scope to the detriment of offerors who would have participated had they been given notice of the Agency's actual intentions.

Thus, even under ED's procurement regulations, it was imperative that ED clearly and forthrightly state the complete scope of the procurement to ensure ***all*** potential offerors could make an informed decision regarding whether to submit proposals and participation in the NextGen procurement. ED failed in that simple task. ED now seeks to procure default collection services under Phase II. However, by omitting all reference to default collection

services from the Phase I NextGen RFP—which would have triggered interest and participation by PCAs, including FMS, in the NextGen procurement—and in fact, actively stating that the NextGen RFP ***covered only loan servicing and not default collection services***, ED failed to provide potential offerors with reasonable notice of the scope of the procurement thereby depriving them of the right to compete for default collection services work.

GAO has routinely rejected agency actions that hide the ball about a procurement's future scope, or where the agency expands the scope of a procurement beyond that which contractors may have reasonably anticipated. In the analogous world of task order procurements under IDIQ contracts (as ED's two-phase procurement essential is a down select, or a narrowing of the pool of potential competitors), GAO has said "[t]he overall inquiry is whether the modification is of a nature which potential offerors would reasonably have anticipated." *Ervin and Associates, Inc.*, B-278850, 98-1 CPD ¶ 89 (Mar. 23, 1998) (sustaining protest of task order where agency sought to acquire services similar to the contract, but for which potential offerors would not have been on notice were being acquired during competition for the underlying ID/IQ contract). To determine if the agency has exceeded the scope of work originally contemplated by the initial RFP, GAO looks to see if there is a "material difference" between the original scope and the newly-sought work. *Id.* Evidence of a material difference "is found by reviewing the circumstances attending the procurement that was conducted; examining any changes in the type of work, performance period, and costs between the contract as awarded and as modified by the task order; and considering whether the original contract solicitation adequately advised offerors of the potential for the type of task order issued." *Id.*

ED's Phase II RFP impermissibly expands the scope of the NextGen procurement and introduces a material change from the services ED initially indicated it was procuring. As explained above, there is a fundamental difference between loan servicing and default collection services. *See supra* at 3-5. These two services historically have been performed by separate groups of companies, involve entirely different skills and expertise, and are subject to entirely different legal requirements. As FSA's own Chief Business Operations officer articulated, "[t]he work of the loan servicers is separate and distinct from the debt collection work that the PCA's perform under their respective contracts." Leith Decl. at ¶ 6; Mr. Leith continued: "In short, these two functions (loan servicing versus default collection), are substantively different and take place at different stages in the life of the loan. FSA acquires these two types of services using distinct and separate solicitations and contracts." *Id.* ¶ 7. Thus, by FSA's own admission, it is indisputable that an agency would institute a material change to the scope of a loan servicing procurement if it decided to add requirements for default loan collections. The services exist in parallel universes, so no potential offeror could reasonably envision a solicitation for one of the two services (*e.g.*, loan servicing) would ever expand to include the other service (*e.g.*, default collection services).

And here, it is also indisputable that ED's public statements, Phase I RFP, and simultaneous procurement actions broadcast that NextGen would be a procurement relating ***only to loan servicing***. Consider the following facts:

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First, in August 2017, several weeks before ED's self-imposed deadline for new awards under the PCA Solicitation, ED's senior officials informed the COFC that loan servicing and default collection services are two different and separate aspects of the student loan program and that they were being procured under separate procurement vehicles. Mr. Leith proceeded to tell the Court that the NextGen procurement "in no way impacts any corrective action currently underway on the PCA solicitation at issues . . . ***as such [NextGen] activities relate solely to loan servicing and not collection activities for defaulted loans***." *Id.* (emphasis added). Thus, FSA's Chief Business Operations Officer, in a sworn declaration to a federal court, drew a clear and unambiguous line between loan servicing and default collection services. Moreover, he expressly informed the Court, the PCAs, an the public that the NextGen procurement would relate only to loan servicing.

Second, on November 29, 2017, (while ED was reevaluating revised proposals under the PCA Solicitation) ED announced the NextGen program in a press release:

> To address future ***loan servicing*** needs, FSA is in the process of researching how world-class financial services organizations design and operationalize their customer service engagement practices, as well as web and mobile, middleware, data processing, analytics, storage and hosting capabilities. Through this market research, FSA is refining its strategy to implement the Next Gen Processing and ***Servicing*** Environment.

See Exhibit K (emphasis added). ED further noted it "anticipates issuing one or more solicitations in the first quarter of 2018 focused on ***account processing and loan servicing***." *Id.* (emphasis added). Nowhere in the ED's announcement of the NextGen program did ED mention or discuss PCAs, defaulted loans, or default collection services.

Third, the Phase I RFP only furthered its exclusive focus on loan servicing. In the Phase I RFP, on February 20, 2018, ED repeatedly discusses loan processing and servicing while excluding all mention of the default collection services. ED's singular focus on loan servicing—and its express exclusion of default collection services—is graphically illustrated at Phase I RFP page 6, Exhibit 3, which, as illustrated above, stated that the "focus for this solicitation" was loan servicing. If it was ED's intent to acquire default collection services via the NextGen Phase I RFP (or somehow combine the two services), no reasonable person could reach that conclusion from the Phase I RFP.

Fourth, ED's simultaneous actions indicate that ED had no intention of acquiring default collection services under NextGen at the time it issued the Phase I RFP. At the same time ED rolled out the Phase I procurement, ED was trying to issue PCA awards for default collection services under the PCA Solicitation. Specifically, having already tried once to award default collection services contracts in December 2016, on January 11, 2018, just weeks before issuing the NextGen Phase I RFP, ED awarded two new, multi-year PCA contracts to Performant and Windham. *See* page 9, *supra*. In light of the stand-alone PCA procurement, it would have been completely redundant and illogical for ED to include the same debt collection services on the NextGen Phase I RFP. And ED, like any organization, is not in the

business of intentionally increasing its workload to do the same thing twice. Instead, the simplest explanation for ED's bifurcated procurements (NextGen for loan servicing/processing and the stand-alone PCA default collection procurement) is that (just as its Chief Business Operations Officer stated in a sworn declaration) ED had no intention of including default collection services within the NextGen procurement, and thus entirely excluded these default collection services from the Phase I RFP.

Fifth, and finally, ED's DOJ attorney expressly informed the Court that ED had not included default collection services within the Phase I RFP—thus failing to provide potential offerors reasonable notice of its intention to procure these default collection services under NextGen. As the DOJ stated to the Court:

> "So that's phase 1 is about developing that technology. When -- so my understanding of the timeline right now is the one decision that needs to be made for ED is whether or not they are going to do the enhanced servicing strategy via phase 2 of the NextGen procurement, or if they are going to separately procure it. Separate services. And that decision won't be made until they finish the phase 1 evaluation, which is ongoing."

Exhibit F. In other words, the DOJ attorney clearly noted that ED's "new vision" of enhanced servicing—i.e., the inclusion of default collection services within a loan servicer procurement—was not intended as part of Phase I ***and that ED would not even make the decision as to whether to include this fundamentally different service within NextGen until after Phase I evaluations were completed***.

The DOJ attorney thus admitted that ED would consider whether to change the scope of the NextGen procurement after it already had narrowed the pool of potential offerors. This is a quintessential example of a material scope change in the middle of a procurement. ED had no intention of procuring default collection services within the NextGen RFP when it announced the NextGen program, when it issued the Phase I RFP, or while it was evaluating the Phase I responses. Only after it was enjoined from cancelling the PCA Solicitation did ED consciously decide to materially alter the scope of the NextGen procurement and include default collection services.

Thus, because ED had no intention of including these default collection services within NextGen, it did not reasonably inform potential offerors of the scope of its needs and did not permit potential offerors the opportunity to make an informed decision as to whether to compete under the NextGen procurement. Such a failure is a violation of ED's own procurement regulations. *See* 48 C.F.R. § 3405.207(c)(2). Thus, the terms of ED's Phase II RFP—which now includes the previously excluded default collection services—are unreasonable and in violation of procurement law. Under well-established law, ED may not materially alter the scope of a procurement after it already has limited the pool of potential offerors, thus depriving potential offerors the chance to compete for the services. Thus, because the terms of the Phase II RFP materially deviate from the notice provided to potential offerors under Phase I, ED has improperly altered the scope of its procurement, denied

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potential offerors of the ability to compete, and failed to promote full and open competition. Thus, this protest should be sustained. *Ervin and Associates, Inc.*, *supra*.

B. ED Has No Reasonable Basis to Restrict the Phase II Competition to Only Phase I Selectees Given Its Material Changes to the Phase II RFP's Scope

Additionally, ED's recent inclusion of default collection services within the Phase II NextGen RFP unduly and unnecessarily restricts competition. As noted above, the PCAs that perform default collection services were not provided notice under Phase I that such services would, or could, be acquired under the NextGen procurement. Thus, FMS and others reasonably chose not to submit Phase I proposals to pursue NextGen contracts. However, despite ED's material alteration of the scope of the procurement effort and radical change to its requirements, ED now seeks to preclude those PCAs from competing for substantial default collection servicers work by operation of the Phase I downselect. However, because of ED's decision to materially alter the scope of the NextGen procurement, and the utter lack of any reasonable rationale for restricting the pool of potential offerors to compete for these new requirements, ED's actions are unduly restrictive of full and open competition. As a result, GAO should sustain this protest.

"In preparing a solicitation, a contracting agency is generally required to specify its needs and solicit offers in a manner designed to achieve full and open competition, ***so that all responsible sources are permitted to compete***." *Madahcom, Inc.*, B-298277, 2006 CPD ¶ 119 (Aug. 7, 2006) (sustaining protest where agency failed to provide a reasonable basis for inclusions of provisions that restricted competition) (emphasis added); *Total Health Res.*, B-403209, 2010 CPD ¶ 226 (Oct. 4, 2010) (sustaining protest of unduly restrictive solicitation and noting "[w]e will examine the adequacy of the agency's justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny"); *Omega World Travel, Inc*, B-258374, 95-1 CPD ¶ 20 (Jan. 13, 1995) (sustaining protest that solicitation was unduly restrictive where agency did not have a reasonable basis for excluding certain providers in preference to other providers of the same system). As GAO has stated, agencies may use restrictive provisions "only to the extent necessary to satisfy the agency's needs," and that the agency is responsible for "establishing that the [restrictive] specification is reasonably necessary to meet its needs." *Id.*

Here, FMS and dozens of PCAs did not participate in the NextGen procurement because the Phase I RFP did not include default collection services. As explained above, it was abundantly clear that, prior to the issuance of the Phase II RFP, ED had absolutely no intention of including any default collection services within NextGen. The Phase I RFP contained no notice relating to default collection services, and ED's public statements and parallel procurement contract made explicit that the NextGen procurement did not include these default collection services. There was thus no reason for FMS to expend the time and cost associated with drafting and submitting a proposal for a procurement that did not include the services it provides.

Yet ED's Phase II RFP, now attempts to procure those very services. The Phase II RFP notably adds paragraph C.3.3.b., "Student aid back-office processing" which provides that the

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contractor will provide solutions that, among other things, engage in: "Rehabilitation, Administrative Wage Garnishment (AWG), Treasury Offset Program (TOP), and other related processing." AWG is an administrative process that requires that debtors be notified of the government's intent to have their wages withheld by their employer. As part of the process, the borrower who has failed to make payments on a loan has a right to request a hearing. As noted by Mr. Leith in Exhibit C to his sworn declaration, AWG is the work of debt collectors, not loan servicers. This is the type of service, that if included in the Phase I RFP, would have triggered interest by FMS and other PCAs to participate in the procurement. Further, as noted above, ED has expressly confirmed that it intends to procure default collection services under the Phase II RFP. *See* Exhibit J.

Despite this material change to the scope of procurement, ED is unreasonably insisting that only those offerors selected in Phase I (under an RFP that did not include or contemplate the provision of default collection services) are eligible to compete for the new requirements. Thus, ED has effectively pulled a bait and switch, informing potential offerors under Phase I that NextGen would not include requirements, then, after narrowing the pool of competitors and restricting who may continue to compete, introducing materially different requirements precisely of the type the PCAs have been pursuing for years under the PCA Solicitation. In effect, the PCAs are now on the outside looking in despite never having been given notice of ED's intentions or being given the ability to make an ***informed*** decision about whether to compete.

But there is no logical or reasonable explanation for locking FMS and other PCAs out of the Phase II competition that includes materially different terms for which they would be responsible offerors. *See Madahcom, Inc., supra* (sustaining protest where agency failed to provide a reasonable basis for inclusions of provisions that restricted competition). ED has not, and cannot, articulate any reasonable justification for limiting the Phase II competition with these new default collection services requirements only to offerors who submitted proposals under a Phase I RFP ***that did not contemplate or include these requirements***. In short, ED now seeks to procure default collection services. There are many potential responsible offerors who provide default collection services and would be eager competitors for this work. Yet ED is denying these eligible and capable offerors the chance to compete because they did not express interest in a prior proposal that dealt with materially different services outside the scope of their expertise. This artificial limiting of competition is entirely unreasonable and a direct affront to CICA's requirement that agencies promote full and open competition. Because there is no reasonable justification for limiting the competition now that ED has materially changed the scope of the NextGen procurement to include entirely new and different services than those it initially sought, the restriction of limiting Phase II proposal only to those offerors who were selected out of Phase I is unreasonable and unduly restrictive of competition. *See Madahcom, Inc., supra*. Thus, GAO should sustain this protest on this basis.

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C. The RFP Improperly Bundles Loan Servicing and Defaulted Loan Collections

Finally, ED's addition of default collection services into the Phase II RFP improperly bundles two discrete and independent services: loan processing/servicing and default collection. As a result, ED has unnecessarily (and unreasonably) limited the procurement contrary to its obligations to promote full and open competition. "CICA generally requires that solicitations include specifications which permit full and open competition and contain restrictive provisions and conditions only to the extent necessary to satisfy the needs of the agency" *See Vantex Serv. Corp.*, B-290415, 2002 CPD ¶ 131 (Aug. 8, 2002) (sustaining protest where agency bundled two distinct types of waste removal services which resulted in reduced competition). GAO has recognized that "[b]ecause procurements conducted on a bundled or total package basis can restrict competition, [GAO] will sustain a challenge to the use of such an approach where it is not necessary to satisfy the agency's needs." *Id.* Consequently, where an agency bundles requirements, "CICA and its implementing regulations require that the scales be tipped in favor of ensuring full and open competition." *Id.*

Here, ED is attempting to bundle default collection services (performed by FMS and other PCAs) with loan processing and servicing (performed by loan servicers) in the new IT environment sought under the NextGen procurement. ED is unreasonably combining these two discrete services despite never having done it before, not intending to do it when it released the Phase I RFP, and not possessing any actual procurement plan or rationale that even remotely suggests that this concept is workable, let along legal or necessary. As of September 14, 2018, ED ***had absolutely no procurement plan and could not articulate how it was even thinking of proceeding***. This resulted in the clear order from the Court that ED's combined services "new vision" was nothing more than a back-of-a-napkin concept to which ED had not yet given any actual, serious thought. Now, midstream, and unannounced during Phase I, ED has decided to simply tack on default collection services to a loan servicing procurement. This is unreasonable.

As discussed above, loan servicing is—and for the past 40 years has been—treated as different and unique from defaulted loan collection services both in law and in practice. This is not a controversial statement; it is just common knowledge and accepted practice within the industry. ED's senior management has acknowledged the differences between the two types of services, filing a sworn declaration unequivocally stating that the two services are distinct. *See* Exhibit B. ED's Phase I RFP itself recognized the difference in these services. The chart included in the RFP (reproduced in the background section above) expressly shows the separation between loan servicers, which engage with borrowers throughout the administration of the loan, and defaulted loan collection (services provided by PCAs) after a loan has entered default. The chart—contained within the Phase I RFP and describing the scope of the NextGen procurement—plainly states that the Phase I RFP's focus is on loan servicers. *See* page 8, *supra*. Thus, the Phase I RFP confirms that ***it is not necessary*** for ED to bundle default collection services and loan servicing ***because ED had no intention of procuring them together under the NextGen procurement***.

V&E

For the past 40 years, ED has acquired default collection services under stand-alone contracts. *See* pages 3-5, *supra*. Nevertheless, in the aftermath of litigation surrounding ED's debt collection procurements—and the COFC's permanent injunction barring ED from cancelling the PCA Solicitation—ED abruptly changed course. Post-injunction, ED announced a Phase II NextGen procurement that bundles loan servicing and default collection services, yet entirely excludes every single PCA, all of whom were advised that the NextGen procurement covered only loan servicing.

Moreover, ED has not yet conducted any type legal review or analysis as to whether these two distinct services can be bundled together under the same provider without violating existing law. As one example of the numerous legal complications inherent in ED's new direction, ED has provided no analysis or explanation for how such a bundled procurement will comply with Office of Management and Budget ("OMB") Circular A-129, which describes two separate regimes for loan servicing and debt collection. As another example, ED has not yet analyzed or explained how combining both loan servicing and default collection services will be funded under federal law. Under existing law, PCAs, such as FMS, are compensated through contingency fees earned on the success of their collections work. This arrangement is provided for in federal law and does not require federal appropriations to be carried out. *See* 31 U.S.C. § 3718(d)-(e) (allowing PCAs to be compensated through a contingency fee based on the amount recovered from defaulted borrowers). By contrast, loan services receive compensation through annual appropriations provided by Congress. *See, e.g.*, H.R. Rep. No. 115-862 at 149 (stating the annual federal appropriation amount for "loan servicing activities" under the Student Aid Administration). And here, ED has failed to explain how such structural differences will be, or whether they can be, resolved under federal law and what funding mechanism would be necessary to reconcile these separate payment regimes. These disparate funding mechanisms further highlight the distinct differences between these two services and highlight how unnecessary it is to combine them within a single procurement.

While ED may argue that bundling will afford it convenience in administering the contract, and avoid further litigation, such considerations are improper bases for bundling. *See Vantex Serv. Corp.*, B-290415, 2002 CPD ¶ 131 (Aug. 8, 2002) ("the fact that the agency may find that combining the requirements is more convenient administratively, in that it has found dealing with one contract and contractor less burdensome, is not a legal basis to justify combining the requirements, if the combining of requirements restricts competition"); *Better Serv.*, B-265751, 96-1 CPD ¶ 90 (Jan. 18, 1996) ("Further, the fact that bundling will be more administratively convenient is insufficient to support this inherently restrictive approach. When concerns of administrative convenience are being weighed against ensuring full and open competition, the Competition in Contracting Act (CICA) . . . and its implementing regulations require that the scales be tipped in favor of ensuring full and open competition.").

In short, ED has not—and cannot—provide any reasonable basis for the necessity of bundling loan servicing and default collection into a single contract, let alone one that justifies excluding an entire industry from the competition for the services the industry provides. As discussed above, FMS did not participate in the Phase I NextGen procurement because—as announced—that procurement did not cover the skills and expertise that FMS had developed

over many years of successfully collecting defaulted federal student loan debt. Now, by bundling default collection services with the originally intended NextGen loan servicing, ED has improperly, and without justification, precluded FMS and other PCAs from engaging in a robust competition to provide those services. ED's improper actions violate procurement law, and GAO should sustain this protest for this reason as well.

D. In Combining Loan Servicing and Default Collection Services, ED Has Created an Unmitigable OCI For Any Awardee

Finally, as further evidence of ED's inattention to the consequences of its hasty bundling of loan servicing and default collection services, ED has shifted to a procurement model that necessarily creates an internal conflict of interest for any awardee of such bundled services. As GAO has explained, "an impaired objectivity OCI exists where a firm's ability to render impartial advice to the government will be undermined by the firm's competing interests, such as a relationship to the product or service being evaluated." FAR 9.505–3; *Alion Sci. & Tech. Corp.*, B–297022.3, 2006 CPD ¶ 2 (Jan. 9, 2006). GAO has found that "a firm's participation in work that could affect its own interests or the interests of its competitors can give rise to an impaired objectivity OCI." *Id.*; *see also PURVIS Sys., Inc.*, B–293807.4, 2004 CPD ¶ 177 (Aug. 16, 2004).

By handling both loan servicing and default loan collection for the same accounts, but under different payment structures, ED has necessarily created an internal impaired objectivity conflict for any potential awardee under the Phase II RFP. As explained above, historically, loan servicing and default collection services have been procured separately, handled separately, and paid for separately. Loan servicers are paid out of appropriated funds, which historically has meant that loan servicers are paid a set fee per account held each month. Default collection agencies, however, are paid out of a separate fund by contingency fee based on the amount of money actually collected. As a result, given the legal requirements for how each of these activities are funded, the same contractor would be subject to two separate payment regimes depending on how an account is classified. With such a structure, there is a natural, and unmitigable incentive to shift work to that service that would provide the highest compensation to the contractor. As a result, as currently structured, the RFP would result in a contractor necessarily performing servicing when collections work on the same account could be more profitable, or entirely neglecting the expenditure of resources on collections given loan servicing could be more profitable.

Either way, placing dual, historically separate responsibilities on the same contractor will impair that contractor's objectivity in performing either of those responsibilities. Either the contractor's objectivity will be impaired within the loan servicing component or it will be impaired within the default collection component. GAO has stated that internal firewalls are insufficient to mitigate impaired objectivity OCIs, no contractor could reasonably mitigate this inevitable conflict of interest because the RFP requires the contractor to perform both, conflicting services. *See Nortel Gov't Sols., Inc.*, B-299522.6, 2009 CPD ¶ 10 (Dec. 30, 2008). In *Nortel*,

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> However, while a firewall arrangement may resolve an 'unfair access to information' OCI, it is virtually irrelevant to an OCI involving potentially impaired objectivity. This is because the conflict at issue pertains to the organization, and not the individual employees. Id. Thus, while the firewall proposed by [the organization] may create the appearance of separation to mitigate the OCI, the fact remains that personnel under both contracts will be working for the same organization with an incentive to benefit [the organization] overall. Accordingly, the firewall does not avoid, mitigate or neutralize the impaired objectivity OCI . . . .

Id. (internal citations omitted). The same rationale must apply here. By bundling both loan servicing and default collection requirements, ED has created an unmitigable internal conflict of interest for any contractor. Because this is unreasonable, GAO should sustain this protest.

E. FMS Has Been Denied a Chance to Compete for An Award and Prejudiced By ED's Actions

"In the context of a protest challenging the terms of a solicitation, competitive prejudice occurs where the challenged terms place the protester at a competitive disadvantage or otherwise affect the protester's ability to compete." *CWTSatotravel*, B-404479.2, 2011 CPD ¶ 87 (Apr. 22, 2011) (citing *Pond Sec. Grp. Italia Jv-Costs*, B-400149.2, 2009 CPD ¶ 61 (Mar. 19, 2009)). Here, FMS challenges the terms of the NextGen Phase II RFP, which now includes default collection services previously unannounced (and, in fact, expressly disavowed) under the Phase I RFP. By suddenly inserting these default collection services in Phase II of the procurement, ED has improperly precluded FMS from even participating in the solicitation for the very services it specializes in. ED has (once again) violated procurement law and failed to provide for full and open competition. As such, FMS was prejudiced by ED's erroneous actions, because, under a proper solicitation, FMS would be able to participate in the competition for default collection services.

IV. REQUESTS FOR DOCUMENTS

Subject to issuance of a protective order, FMS requests that in addition to the documents required by 4 C.F.R. § 21.3(c), GAO direct the Agency to provide the following documents:

1. A complete copy of the Phase I and Phase II RFPs, including all amendments and attachments. These documents are relevant because FMS is challenging the terms of the Phase II RFP and the expanded scope from the Phase I RFP.

2. All documents comprising the source selection plan and evaluation plan established for this procurement, including those documents for both Phase I and Phase II. These documents are relevant because FMS is challenging the terms of the Phase II RFP and the expanded scope from the Phase I RFP.

V&E

3. All communications or documents relating to ED's inclusion of default collection services within the NextGen procurement. These documents are relevant because FMS in challenging ED's expansion of the scope of the procurement from Phase I to Phase II.

4. A copy of Attachment 12 to the Phase II RFP, which is referenced on page 40 of 53.

V. HEARING REQUEST

FMS reserves the right to request a hearing pending further development of the record.

VI. REQUEST FOR PROTECTIVE ORDER

Because this protest and the documents to be produced by the Agency will contain proprietary and/or source selection sensitive information, FMS hereby requests that GAO issue a protective order in this protest. *See* 4 C.F.R. § 21.4.

VII. REQUEST FOR DECISION & RELIEF REQUESTED

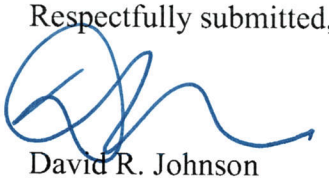
For the foregoing reasons, FMS respectfully requests that the GAO sustain this protest and recommend that ED take corrective action to:

(i) Modify the RFP to ensure that it does not include default collection services for federal student loans, or

(ii) If ED desires to include default collection services for federal student loans in the RFP, that ED cancel the RFP and issue a new solicitation for business operations process solutions and allow FMS and other potential offerors to submit proposals on that new solicitation.

In addition, FMS requests that it be reimbursed for its costs for filing and pursuing this protest, including reasonable attorneys' fees.

Respectfully submitted,



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Encl.

[redacted]