**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**
**BID PROTEST**

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| FMS INVESTMENT CORP., *et al.*, | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | |
| | ) | No. 18-204C (consolidated) |
| THE UNITED STATES, | ) | |
| | ) | Judge Thomas C. Wheeler |
| Defendant, | ) | |
| | ) | |
| and | ) | |
| | ) | |
| PERFORMANT RECOVERY, INC., and WINDHAM PROFESSIONALS, INC. | ) | |
| | ) | |
| Intervenor-Defendants. | ) | |

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Pursuant to Rule 12(b)(1) of the Rules of this Court (RCFC), defendant, the United States, respectfully submits this reply in support of its motion to dismiss.

The consolidated plaintiffs and the two intervenor-defendants filed 15 separate responses to our motion to dismiss, 10 motions to supplement pleadings, and one notice of intent to file a bid protest. *See* ECF Nos. 214-242. Seven plaintiffs elected not to oppose the motion to dismiss. *See* ECF Nos. 204, 207, 209-212. The arguments raised across these filings are nearly identical. The parties opposing the motion to dismiss argue that the decision to cancel the solicitation was irrational, and that their claims challenging the original award decision are not moot because they can amend their complaints with a challenge to the cancellation decision (intervenor-defendant Windham Professionals, Inc. generally concurs with these arguments (ECF No. 217); intervenor-defendant Performant Recovery, Inc. limits its argument to the assertion that the cancellation was irrational (ECF No. 240)). The arguments regarding the rationality of the cancellation decision are

premature and unfounded. Those claims can be addressed via protests of the cancellation. Any such protest, however, cannot cure the claims that the cancellation rendered moot. That result is supported by the very cases upon which the opposing parties uniformly rely: *Madison Servs., Inc. v. United States*, 90 Fed. Cl. 673 (2010); *Coastal Envtl. Grp., Inc. v. United States*, 114 Fed. Cl. 124 (2013). Following plaintiffs' own cases, the motion to dismiss should be granted and any party wishing to protest the cancellation should do so with a complaint limited to that claim.

## ARGUMENT

### I. The Department Of Education's Decision To Cancel The Solicitation Was A Rational One And Any Challenge To That Decision Must Come Through A Separate Bid Protest

On May 3, 2018, we notified the Court that the Department of Education (ED) planned to cancel the solicitation. ECF No. 188. The cancellation decision was based on a plan recently adopted by ED to begin using one or more "enhanced servicers" to assist delinquent borrowers prior to default and the fact that there was no need for additional private collection agency support while that new plan was developed and implemented. *Id.* Many of the parties opposing the motion to dismiss argue that those stated bases are irrational. *See, e.g.*, ECF Nos. 218, 231, and 240. In support, they cite gross data on student debt and argue that the existing small business contracts could not possibly meet ED's needs. *See, e.g.*, ECF No. 219 at 3, ECF No. 234 at 1-3, ECF No. 240 at 11-13. These arguments are irrelevant to the pending motion to dismiss and pointless unless and until new protests of the cancellation decision are filed and reviewed against an administrative record specific to the cancellation decision. Moreover, as indicated in the decision memorandum regarding the cancellation decision that is attached to this reply,

the record supporting the decision will demonstrate these arguments to be baseless. Ex.1.

The contracting officer's decision memorandum explains that the decision to improve borrower services and outcomes by enhancing the provision of services at 90 days after delinquency, as opposed to 360 days or more, when the borrower is already in default, will be implemented through an enhanced servicer or servicers. As a result, "[Federal Student Aid's] need for Private Collection Agency (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." *Id.* The contracting officer also determined that the current PCA solicitation (the subject of these consolidated protests and the cancellation) "did not solicit, and will not meet, the needs and requirements of FSA for the work to be performed by the enhanced servicer(s)." *Id.* The new approach will place a greater emphasis on customer service and early outreach to address delinquencies with the full range of early options for borrowers (deferments, forbearances, forgiveness). *Id.* at 2.

Before canceling the solicitation, the contracting officer considered whether sufficient PCA capacity already existed to absorb the flow of new accounts until the enhanced servicer(s) begin servicing accounts. *Id.* at 2. She determined that "[t]here is presently more than sufficient capacity, through at least 2024 to perform any Debt Collection Services that may be needed." *Id.* at 1. The 11 active small business contracts are capable of handling 750,000 new accounts per month. *Id.* at 2. The contracting officer estimated the current need, even excluding the eventual impact from the enhanced service provider(s), to be approximately 120,000 new accounts per month. *Id.* at 2; *see*

*also Cont'l Servs. Grp. v. United States*, COFC No. 449, Dkt. No. 157 at ¶ 13 (June 2017 J. Manning Declaration stating that the then estimate of new monthly accounts was 118,000).[1] This leaves a cushion of over 600,000 accounts per month while ED transitions to the enhanced servicer(s).

The foregoing indicates that the cancellation decision was not arbitrary and capricious, but was instead based on a review of ED's needs. Plaintiffs' arguments to the contrary in their oppositions to the motion to dismiss are baseless and ultimately irrelevant to the question of mootness. Should any party still wish to challenge the cancellation decision it can file a protest and this Court can adjudicate that claim based on the full administrative record for the cancellation decision.

## II. Adding A Claim That Challenges The Cancellation To The Complaints Challenging The Award Decision Does Not Cure The Fact That The Original Claims Are Moot And Must Be Dismissed

All of the parties opposing the motion to dismiss rely on *Madison Services* and *Coastal Environmental* for the proposition that a cancellation does not render a bid protest moot if the protester challenges the cancellation. These parties overstate the holdings in these cases. In both cases, the Court elected, for efficiency purposes, to allow the protesters to file supplemental complaints pursuant to RCFC 15(d). *Madison Servs.*,

[1] Some parties have argued that the base ordering period of the small business contracts will end in September 2019 and that some of the contractors may not qualify for recertification as a small business at the time ED considers whether to exercise the optional ordering periods under those contracts. *See, e.g.*, ECF No. 234 at 3 n.2. First, there is more than enough capacity, even absent some current contractors, to absorb the flow of new accounts. Second, contrary to these plaintiffs' contention, ED can exercise an option under a small business set-aside contract even where the contractor no longer qualifies as a small business. ED would simply be unable to include the value of such options in its small business prime contracting goal achievements. *See* 13 C.F.R. § 121.404. To preserve the small business credit in such cases, ED can exercise the option and request a subcontracting plan from that former small business contractor. *See* 13 C.F.R. § 121.404.

90 Fed. Cl. at 682-83; *Coastal Envtl.*, 114 Fed. Cl. at 134. In both cases, the Court also explicitly found that the original claims related to the canceled solicitation were moot. On that basis, in each case, the Court dismissed those claims from the original complaints and/or the proposed amended complaints. *Madison Servs.*, 90 Fed. Cl. at 683 ("the court . . . grants defendant's renewed motion to dismiss counts I-III"); *Coastal Envtl.*, 114 Fed. Cl. at 134 ("the court . . . grants both of defendant's motions to dismiss and dismisses plaintiff's original and proposed amended complaints, as moot."); *see also Coastal Envtl.*, 114 Fed. Cl. at 133 (discussing *Madison Services* and noting that there the Court "allowed the protestor to file the proposed supplemental complaint, but dismissed the three claims for relief that originally appeared in the initial complaint"). Plaintiffs cite no case law, and no case law exists, to support a finding that the claims directed at the prior award decision are not moot. Those claims should be dismissed.

The proposed supplemental pleadings filed to date uniformly seek to add the cancellation claim while retaining all of the moot claims related to the award decision. *See, e.g.*, ECF Nos. 214, 215, 227, and 233. None of those proposed supplemental pleadings is appropriate under the applicable case law. Should the Court decide that it would be more efficient to retain the current case numbers and to allow supplemental pleadings, then, following *Madison Services* and *Coastal Environmental*, it should dismiss the existing complaints, deny the motions to supplement, and direct any party who wishes to challenge the cancellation to file a supplemental pleading limited to that claim.[2]

[2] Although the Court ultimately may prefer this approach, the possible efficiencies would not materialize in a case of this size. Proceeding through supplemental pleadings invites a revolving door of parties dropping out and repositioning (including two

III. The Court Should Lift The Preliminary Injunction Preventing The Recall Of In Repayment Accounts Because The Claims Supporting That Injunction Are Moot

The Court's February 26, 2018 preliminary injunction preventing ED from recalling in repayment accounts from the PCAs whose retention periods are set to expire in April 2019 should be lifted, because it rests on findings specific to claims regarding the prior award decision. *FMS Inv. Corp. v. United States*, 136 Fed. Cl. 439 (2010). Those claims are now moot. Moreover, there is little to no chance that those claims will be resurrected. As set forth above, the cancellation is a well-founded decision based on a lack of current need and a planned new approach for servicing delinquent borrowers. Any protester is unlikely to succeed on a challenge to that rational decision. ED is willing to voluntarily stay any recall of the accounts subject to the injunction until June 30, 2018. The notice of intent to recall on June 30, 2018, would then be sent to the PCAs on June 15, 2018.

CONCLUSION

For these reasons, and those stated in our motion to dismiss, we respectfully request that the Court dismiss the complaints for lack of subject-matter jurisdiction and lift the February 26 preliminary injunction that is predicated on those complaints.

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defendant-intervenors who will have to switch sides), further complicating an already complicated docket. It will also combine the docket and record of mooted and dismissed claims with entirely new claims. The most efficient approach is to dismiss the existing protest and to consolidate any complaints protesting the cancellation under a new case number. If fees are a concern, the Court could perhaps waive the filing fees for the new complaints.

Respectfully submitted,

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May 23, 2018

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# MEMORANDUM

**TO:** FILE

**FROM:** MURTHLYN ALDRIDGE, CONTRACTING OFFICER

**SUBJECT:** CANCELLATION DECISION – SOLICITATION NO. ED-FSA-16-R-0009 DEBT COLLECTION SERVICES

**DATE:** 05/3/2018

On January 11, 2018, under solicitation No. ED-FSA-16-R-0009 Debt Collection Services, Federal Student Aid (FSA) awarded contracts for Debt Collection Services to Performant Recovery, Inc. and Windham Professionals, Inc.

Subsequent to the issuance of those awards, 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. Based on my review of FSA's revised requirements, I have 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. FSA's new vision is 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. As a result, FSA's need for Private Collection Agency (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.

There is presently more than sufficient capacity, through at least 2024 to perform any Debt Collection Services that may be needed during FSA's transition to the new enhanced servicer(s) obviating the need for additional PCA contracts. I have also determined that the current Solicitation did not solicit, and will not meet, the needs and requirements of FSA for the work to be performed by the enhanced servicer(s).

Solicitation No. ED-FSA-16-R-0009 Debt Collection Services was issued with requirements for a Defaulted Service Provider(s) to service borrower accounts that are 360 days or more delinquent. Under the scope of work, the Defaulted Service Provider(s) would contact borrowers and work to resolve their student loan debt via collection of payment(s), rehabilitation, consolidation and/or involuntary payment programs such as Administrative Wage Garnishment (AWG) and Treasury Offset Program (TOP).

One of FSA's goals is to provide and deliver a higher level of services to borrowers. In order to meet this goal, FSA has determined that the focus needs to be on reducing the volume of borrowers that default and improving customer service to delinquent borrowers. In order to achieve this under FSA's new strategy, FSA will need to service borrower accounts starting at 90 days or more delinquent versus 360 days or more delinquent. Based on this change, borrowers who are 90 days or more delinquent will not be kept in the current non-default portfolio. Instead, a new portfolio will be created for all borrower

accounts that are 90 days or more delinquent. FSA Business Operations has identified significant benefits to the Government and to borrowers from this new approach including: improved customer service, decreased security risks and decreased costs.

As a result of this new approach, 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. The 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 AWG and TOP. All 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.

In addition, based on input from FSA Business Operations, I have determined that the current volume of defaulted borrowers portfolio can be handled successfully by the eleven (11) small business contractors currently providing Debt Collection Services. The eleven (11) small businesses are presently under their base period of performance which ends on September 30, 2019. Thereafter, FSA has the option of extending those contracts for an additional 5 years through September 30, 2024. Presently, the eleven small businesses are capable of handling approximately 750,000 new accounts per month. Specifically, FSA projects that, at most (even without considering the transition to the enhanced servicer(s), FSA would need to place approximately 120,000 accounts on a monthly basis. In short, FSA has more than sufficient capacity under the existing contracts, even if the plan changes or is delayed for a significant period of time.

I note further that there are currently two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery. Therefore, if there is a need to solicit for additional contractors to handle this portfolio while FSA transitions to its new strategy, the Department would also consider whether such work should be appropriately set-aside for small business concerns.

Based on the information above, as the Contracting Officer, I have determined that Solicitation No. ED-FSA-16-R-0009 Debt Collection Services no longer accurately reflects FSA's needs and requirements and any amendment proposed would be so substantial as to exceed what prospective offerors reasonably could have anticipated, so that additional sources likely would have submitted offers had the substance of the amendment been known to them. Therefore in accordance with FAR 15.206(e) – Amending the Solicitation, I have determined that the cancellation of this Solicitation and the issuance of a new Solicitation that more accurately reflects FSA's new needs and requirements are appropriate.

Murthlyn Aldridge, Executive Business Advisor/Contracting Officer
Federal Student Aid
Acquisitions