

**UNITED STATES COURT OF FEDERAL CLAIMS
(Bid Protest)**

COAST PROFESSIONAL, INC.,)	
)	
Plaintiff,)	Case No. _____
)	
v.)	Judge: _____
)	
THE UNITED STATES OF AMERICA,)	<u>REDACTED COPY</u>
)	
Defendant.)	

**COAST PROFESSIONAL, INC.’S APPLICATION FOR
TEMPORARY RESTRAINING ORDER
AND MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff, Coast Professional, Inc. (“Plaintiff”), moves this Court to enter an Order to enjoin the procurement being undertaken by Defendant, the United States of America, acting through the United States Department of Education (“ED” or “Agency”) to award FMS Investment Corp., Continental Service Group, Inc., Account Control Technology, Inc., Windham Professionals, Inc., and GC Services Limited Partnership Award Term Task Orders.

The grounds of this Application for Temporary Restraining Order and Motion for Preliminary Injunction (“Motion”), as more fully set forth in the Complaint and Memorandum in Support of Coast Professional, Inc.’s Application for Temporary Restraining Order and Motion for Preliminary Injunction, are as follows:

1. Defendant, unless enjoined, will proceed with decision not to award Plaintiff an Award Term Task Order and instead only award FMS Investment Corp., Continental Service Group, Inc., Account Control Technology, Inc., Windham Professionals, Inc., and GC Services Limited Partnership Award Term Task Orders.

2. Plaintiff is likely to succeed on the merits in this action and to obtain the relief prayed for in the Complaint, as the Defendant (i) failed to award Plaintiff an Award Term Task Order it was clearly qualified to receive based on the one criterion for award and, alternatively, (ii) failed to follow the statutory and regulatory requirements of full and open competition in awarding Award Term Task Orders.

3. Unless Defendant is enjoined pending a hearing on Plaintiff's Motion, Plaintiff will be irreparably injured because Plaintiff will suffer the loss of revenues of \$ [REDACTED] and be forced to layoff approximately [REDACTED] employees.

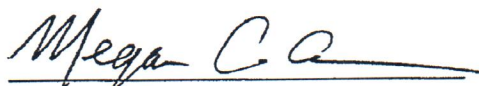
4. No injury will be sustained by Defendant or by the public through the immediate issuance of a Temporary Restraining Order and Preliminary Injunction, as Plaintiff could continue to perform the debt collection services needed by Defendant or, in the alternative, Defendant could procure the services needed through appropriate competitive procedures.

5. Plaintiff has no adequate remedy at law because Plaintiff could not recover the loss of anticipated profits in a suit for damages. Additionally, Defendant's decision not to award Coast an Award Term Task Order will require Coast to comply with the requirements of the Worker Adjustment and Retraining Notification Act, which would likely result in a [REDACTED] number of Coast's employee's to resign, thereby jeopardizing Coast's ability to perform the debt collection services needed by Defendant.

6. Enjoining Defendant will serve the public interest in that it will, among other things, effectuate public policy by ensuring the integrity and fairness of the procurement process.

WHEREFORE, Plaintiff respectfully requests that this Application for Temporary Restraining Order and Motion for Preliminary Injunction be granted.

Respectfully submitted,



Megan C. Connor
Pilieromazza PLLC
888 17th Street, NW, 11th Floor
Washington, DC 20006
(202) 857-1000 (phone)
(202) 857-7836 (protected fax)
mconnor@pilieromazza.com

*Counsel of Record for Plaintiff,
Coast Professional, Inc.*

Dated: March 2, 2015

Of Counsel:

Pamela J. Mazza
Patrick T. Rothwell
Pilieromazza PLLC
888 17th Street, NW, 11th Floor
Washington, DC 20006
(202) 857-1000 (phone)
(202) 857-7836 (protected fax)
pmazza@pilieromazza.com
prothwell@pilieromazza.com

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Filed on March 2, 2015)

_____)	
COAST PROFESSIONAL, INC.,)	
)	
Plaintiff,)	Case No. _____
)	
v.)	Judge: _____
)	
THE UNITED STATES OF AMERICA,)	<u>REDACTED COPY</u>
)	
Defendant.)	
_____)	

**MEMORANDUM IN SUPPORT OF COAST PROFESSIONAL, INC.'S
APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND
MOTION FOR PRELIMINARY INJUNCTION**

Megan C. Connor
Pilieromazza PLLC
888 17th Street, NW, 11th Floor
Washington, DC 20006
(202) 857-1000
(202) 857-7836 (protected fax)
mconnor@pilieromazza.com

*Counsel of Record for Plaintiff,
Coast Professional, Inc.*

Of Counsel:

Pamela J. Mazza
Patrick T. Rothwell
Pilieromazza PLLC
888 17th Street, NW, 11th Floor
Washington, DC 20006
(202) 857-1000
(202) 857-7836 (protected fax)

Dated: March 2, 2015

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I. INTRODUCTION

Pursuant to Rule 7(b)(1) of the Rules of the United States Court of Federal Claims (“RCFC”), Plaintiff Coast Professional, Inc. (“Coast”), hereby submits this Memorandum in Support of its Application for a Temporary Restraining Order and Motion for Preliminary Injunction. Coast respectfully requests that the United States Court of Federal Claims (“Court”) enjoin Defendant, the United States of America (“Defendant”), acting through the United States Department of Education (“ED” or “Agency”), from proceeding in any manner with its award of contracts to FMS Investment Corp., Continental Service Group, Inc., Account Control Technology, Inc., Windham Professionals, Inc., and GC Services Limited Partnership pending resolution of Coast’s protest.¹ ED’s decision not to likewise award Coast a contract, even though Coast met all criteria for an award, was arbitrary and capricious, and highly prejudicial to Coast. Additionally, because ED failed to follow the statutory and regulatory requirements of full and open competition, ED’s award of any Award Term Task Orders was improper without appropriate competitive procedures.

II. STATEMENT OF FACTS

A. Coast’s Background and Initial Contract Award

Coast is a small, but experienced Private Collections Agency (“PCA”) with over 8 years servicing ED. See Exhibit A, Declaration of Brian Davis (“Davis Decl.”) at ¶ 3. Coast employs approximately 370 employees at three locations: West Monroe, Louisiana; Henrietta, New York;

¹ As explained further herein, ED awarded FMS Investment Corp., Continental Service Group, Inc., Account Control Technology, Inc., Windham Professionals, Inc., and GC Services Limited Partnership each a task order under their respective United States General Services Administration (“GSA”) Federal Supply Schedule (“FSS”) contracts. Coast contends those awards are improper.

and Geneseo, New York. Coast's business is comprised entirely of providing services for the collection of debts resulting from non-payment of student loans.

Coast's task order no. ED-FSA-09-O-0022 (hereinafter "TO") from ED began in July 2009. Id. ¶ 4. In October 2009, ED made its first transfer of accounts to Coast and Coast began its collection services under the TO. Id. ¶ 5. The TO called for Coast to provide services in support of collection and administrative resolution activities on debts resulting from non-payment of student loans made under the Federal Family Education Loan Program and maintained by ED's Office of Federal Student Aid ("FSA"). See Exhibit B, TO ED-FSA-09-O-0022 ("Coast TO") at 40, Attachment A – Statement of Work, § 1.1.

The TO was issued under Coast's GSA Financial and Business Solutions ("FABS") Schedule contract (GS-23F-0009U), under Special Item Number ("SIN") 520-4 for private collection services. Id. at 1, § B.1. Twenty-one other PCAs were also awarded similar task orders under SIN 520-4 of their respective GSA Schedule contracts in or about October 2009. Davis Decl. at ¶ 6. Of the 22 total PCAs performing these private collection services, 17 contractors are other-than-small and 5 PCAs qualify as small businesses. Id. ¶ 7. Coast qualified at award and continues to qualify as a small business. Id. ¶ 8. For all 22 PCAs, the terms and conditions of their respective task orders are nearly identical (collectively, the "TOs").² Id. ¶ 9.

The TOs specified that the first ordering period would "be from July 1, 2009 (the effective date) through twenty-four (24) months, with multiple, optional ordering periods."

² The contracts and task orders of the five contractors awarded contracts by ED that are the subject of this bid protest are as follows: FMS Investment Corp.'s task order no. is ED-FSA-09-0011 issued under contract number GS-23F-0063J; Continental Service Group, Inc.'s task order no. is ED-FSA-09-O-0008 issued under contract number GS-23F-0084P; Account Control Technology, Inc.'s task order no. is ED-FSA-09-O-0005 issued under contract number GS-23F-0235K; Windham Professionals, Inc.'s task order no. is ED-FSA-09-O-0021 under contract number GS-23F-0030U; and GC Services Limited Partnership's task order no. is ED-FSA-09-O-0012 issued under contract number GS-23F-0279K.

Coast TO at 3, § B.3. Beyond the first ordering period, the TOs provided that ED could extend the term of the TOs by “exercis[ing] options of up to 24 months, provid[ed] that the total Task Order period of performance does not exceed 60 months from the date of award.” Id. at 18, § H.1. The TOs provided that the “total Ordering Period, excluding any award term(s) earned, will not exceed 60 months from the date of initial data transfer, or October 22, 2009.” Id. After the total ordering period reached 60 months, the TOs provided that ED could exercise an option to extend the services specified in the TOs for up to an additional six months. See id. at 18, § H.3.

In addition to the ordering periods that could extend for up to 60 months under Clause B.3 and the extension options available for up to six months thereafter under Clause H.3, the TOs also provided in Clause H.4 for “award terms” that would result in the award of new task orders to contractors (“Award Term Task Orders”). See id. at 18-19, § H.4. Such Award Term Task Orders would “be executed in the form of a new Task Order issued by the Contracting Officer under the Contractor’s then current GSA Schedule contract.” Id. at 19, § H.4(e) (emphasis added). Furthermore, the TOs specified that the Award Term Task Orders would be subject to the same terms and conditions as the existing TOs and the current target prices would apply. See id. at 19, § H.4(e)(i), (iii). Moreover, the PCA’s size status at the time of the award of an Award Term Task Order would be considered in whether the contractor would be part of the small business pool or unrestricted pool for the Award Term Task Order. See id. at 19, § H.4(e)(iv).

The availability of Award Term Task Orders under the TOs is dependent upon the Contractor Performance and Continuous Surveillance (“CPCS”) conducted by ED. Award Term Task Orders could be awarded “[i]f the Contractor has an average CPCS rating of 85 or greater over the life of the Task Order, or the last 12 CPCS periods (whichever is shorter), the

Government may, [sic] award the Contractor an award-term extension in accordance with the terms of this clause in recognition of the Contractor's excellent or better quality performance." Id. at 18, § H.4 (emphasis added).

The TOs define the CPCS as "an in-depth evaluation . . . conducted to determine the adequacy of the contractors' performance on all accounts transferred." Id. at 19, § H.5(a). The TOs provided that the "CPCS will utilize two separate [contractor] pools for determining contractor standing." Id. at 19, § H.5(a). Contractors "that received Task Order awards under the small business competition (and have not been transferred to the Unrestricted Pool)" would be placed in the "Small Business Pool" and all other contractors would be placed in the "Unrestricted Pool." See id. The TOs called for the first CPCS evaluation to be conducted several months after the first placement of accounts with contractors, and for subsequent CPCS evaluations to be conducted quarterly. See id. at 19, § H.5(b). Coast's first CPCS period ran from October 2009 to March 31, 2010, and its CPCS periods have been quarterly since April 2010. Davis Decl. ¶ 10.

Throughout the term of the TO, Coast's performance has been outstanding—and recognized by ED as such. Id. ¶ 11. The ratio of complaints to compliments received with regard to Coast's performance under its TO is 1:15. See id. ¶ 12. In monthly call monitoring audits conducted by FSA during the TO, Coast consistently has received success rate scores well [REDACTED]. See id. ¶ 13. Between February 2014 and January 2015, Coast averaged a success rate of [REDACTED] based on ED's call monitoring audits. See id. ¶ 14. Over its previous 12 CPCS quarterly evaluation periods, Coast has averaged a CPCS rating of 97.85 points out of a possible 100, received four perfect scores of 100 points, and finished no worse than second place in the CPCS rankings of all 22 contractors performing under their respective TOs. See id. ¶ 15. In the

most recent CPCS evaluation conducted by ED, which covered the CPCS period of October through December 2014, Coast received a CPCS rating of 98.53 points out of a possible 100. See id. ¶ 17. Out of the 22 PCAs performing this collections work for ED, nine contractors were eligible, under the terms of the TOs, for the award of an Award Term Task Order with CPCS ratings of 85 or above for the last 12 CPCS quarterly evaluation periods. See id. ¶ 18. Coast's CPCS ratings ranked second among all 22 PCAs, including the nine eligible contractors. See id. ¶ 19.

B. Award Term Task Orders Awarded to Five PCAs

On Friday, February 20, 2015, the TOs' contracting officer ("CO"), Patty Queen-Harper, informed Coast's President, Roxanne Baker, by telephone at approximately 5:10 PM EST that Coast would not be awarded an Award Term Task Order. See id. ¶ 20. The CO stated that Coast would not be awarded an Award Term Task Order as the result of an unspecified "audit" which resulted in findings of [REDACTED] on an unspecified number of collections calls. See id. ¶ 21. Further, it was unclear whether Coast would be receiving any new work for the rest of February, March and April 2015, the remaining period for Coast's TO, and the CO informed Coast's President that ED would be "recalling accounts" during those months. See Exhibit C, February 20, 2015 e-mail from Roxanne Baker to CO. On the February 20, 2015 telephone call, the CO, who assumed her position on the TOs effective February 11, 2015,³ could not provide any details to Coast regarding who performed the audit or its specific results. See Davis Decl. ¶ 22. The CO stated that she could not provide a copy of the audit to

³ See Exhibit D, February 18, 2015 e-mail from Zakia Hannie.

Coast and, indeed, that she did not even possess a copy of the audit upon which ED purportedly based its decision not to award Coast an Award Term Task Order. See id. ¶ 23.

A few hours after the call from the CO on February 20, 2015, Coast's President followed up with the CO by e-mail. Coast's President posed several questions regarding the surprise action by ED. See Exhibit C. After receiving no response to this email, Coast's Chief Executive Officer ("CEO") called the CO's office and cell phones, but neither call was returned. Davis Decl. ¶ 24. On February 21, 2015, Coast Co-Chairman and Chief Financial Officer ("CFO"), Everett Stagg, e-mailed the CO again with more detailed questions. See Exhibit E. All three Coast executives participated in this outreach to the CO. Davis Decl. ¶ 25.

In the hopes of obtaining substantive answers to their questions from the CO in-person, on Sunday, February 22, 2015, Coast's CEO, CFO, and President flew to Atlanta, GA, where the CO's office is located. See id. ¶ 26. After arriving at the CO's office at 7:30 AM EST on Monday, February 23, 2015, Coast's executives learned that the CO was in ED's Washington, D.C. office and would not be available to meet in Atlanta. See id. ¶ 27. The CO agreed by phone to meet with Coast at 4:30 PM EST on Monday, February 23, 2015 in Washington, D.C. See id. ¶ 28. As a result, Coast's CEO, CFO and President flew to Washington, D.C. that same day, arriving at ED's Washington, D.C. offices on the afternoon of February 23, 2015. See id. ¶ 29. Although the CO previously indicated her availability to meet with Coast that afternoon, when the Coast representatives arrived at ED, they were informed that the meeting would need to be rescheduled for the morning of Wednesday, February 25, 2015. See id. ¶ 30.

Subsequent to the arrival of Coast's executives in Washington, DC, Coast learned that out of the nine contractors with an average CPCS rating of 85 or greater over the relevant CPCS period, ED awarded Award Term Task Orders on February 21, 2015 to the following five

contractors: FMS Investment Corp., Continental Service Group, Inc., Account Control Technology, Inc., Windham Professionals, Inc., and GC Services Limited Partnership. See id. ¶ 31. With regard to average CPCS ratings, Coast outranked all but one of these five contractors.

In the meantime, on the afternoon of Tuesday, February 24, 2015, Coast received an e-mail from Murthlyn Aldridge, FSA's Executive Business Advisor. The e-mail stated that FSA had "conducted a review of [Coast's] call recordings for [REDACTED] [REDACTED]"

Exhibit F, February 24, 2015 e-mail from Murthlyn Aldridge. The e-mail further stated that in the review FSA found alleged [REDACTED] [REDACTED]

[REDACTED]" See Exhibit F. Upon information and belief, FSA sent an identical e-mail to all 22 PCAs performing under the TOs, via blind carbon copy of the e-mail received by Coast, notifying each PCA that FSA found they had committed the same alleged [REDACTED] [REDACTED]. See Davis Decl. ¶ 32.

On February 25, 2015, Coast attended a meeting at ED with, among others, the chief of FSA acquisitions, the FSA Chief Operating Officer, and ED General Counsel; the CO did not attend the meeting. See id. ¶ 33. In the meeting, ED officials explained that during the February 20, 2015 phone call, the CO was supposed to be following a prepared written script. See id. ¶

34. The FSA Chief Operating Officer explained that Coast did not receive an Award Term Task Order because of the alleged [REDACTED] reflected in Ms. Aldridge's correspondence. See id. ¶ 35. ED officials did not refute the fact that all 22 PCAs received an identical notice of alleged [REDACTED] from Ms. Aldridge. See id. ¶ 36. ED officials would not offer a specific explanation

as to why 5 PCAs, with lower CPCS scores and the same alleged [REDACTED] notice received Award Term Task Orders, but Coast did not. See id. ¶ 37.

On February 27, 2015, ED issued a press release announcing its intent to “end” contracts with five PCAs, including Coast. See Exhibit G, Press Release. The Press Release stated that ED “will reassign accounts held by these five agencies which are not already in repayment to other agencies.” Id.

As a result of ED’s decision not to award Coast an Award Term Task Order, which was delivered to Coast at the close of business on Friday February 20, 2015 by a CO whom ED had only placed on the TOs nine days earlier, Coast will suffer a loss of revenues of \$ [REDACTED] for the 24-month award term.⁴ See id. ¶ 41. Further, Coast’s business reputation has already begun to suffer from ED’s actions. Coast has received multiple telephone calls and inquiries from vendors and third parties regarding ED’s decision and its financial consequence for Coast. See id. ¶ 45. In 2014, Coast earned approximately \$ [REDACTED] in revenue by providing student loan collections services. See id. ¶ 38. Of that \$ [REDACTED] in revenue, more than \$ [REDACTED] in revenue came from student loan collections services Coast provided to ED. See id. ¶ 39. Currently, more than [REDACTED] of Coast’s work is comprised of the work performed under the TOs for ED. See id. ¶ 40.

III. QUESTIONS PRESENTED

1. Whether Coast is likely to be successful on the merits where ED’s decision not to award an Award Term Task Order to Coast, despite the fact that it was clearly qualified to receive an Award Term Task Order based on the one criterion for

⁴ Coast is also losing over \$ [REDACTED] in revenue from ED’s decision not to allocate any more accounts to Coast under the current TO.

award, was arbitrary and capricious and not in accordance with procurement regulations.

2. Whether Coast is likely to be irreparably harmed by ED's decision not to award it an Award Term Task Order.
3. Whether the above harm to Coast, which includes loss of revenues and massive layoffs, outweighs the minimal harm faced by ED in not proceeding with the Award Term Task Orders pending Coast's protest.
4. Whether the public interest is best served by issuing an injunction that ensures a rational procurement process that is not arbitrary and capricious and is consistent with the procurement regulations.

IV. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1491(b)(1) to issue an injunction restraining ED from procuring private collective services under the Award Term Task Orders. As a preliminary matter, the Award Term Task Orders clearly constitute new contracts because they "will be executed in the form of a new Task Order issued by the Contracting Officer under the Contractor's then current GSA Schedule." Coast TO at 19, § H.4(e) (emphasis added). Terms and conditions of these new task orders are specified as well as pricing for same. See id. at 19, § H.4(e)(i), (iii). Additionally, ED is required to confirm a contractor's size at the time of an award of the Award Term Task Order. See id. at 19, § H.4(e)(iv). Thus, the Award Term Task Orders are new contract awards. Coast has standing to bring this Complaint and is an "interested party" because it is a government contractor that is an "actual or prospective bidder[] or offeror[]" whose direct economic interest would be affected by the award of the contract or by

failure to award the contract.” Amer. Fed. of Gov’t Employees, AFL-CIO v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2004).

Moreover, this Court has long recognized that it has jurisdiction to hear bid protests concerning task orders awarded under a GSA Federal Supply Schedule (“FSS”) contract, as the Award Term Task Orders are. See, e.g., Distributed Solutions, Inc. v. United States, 106 Fed. Cl. 1, 11 (2012); Furniture by Thurston v. United States, 103 Fed. Cl. 505, 511 n. 8 (2012) (“[T]his statutory constraint [of the Federal Acquisition Streamlining Act of 1994] does not apply to the court’s jurisdiction over protests of task orders under GSA FSS contracts.”); Data Mgmt. Servs. Joint Venture, 78 Fed. Cl. 366, 371 (2007) (“The court’s protest jurisdiction extends to protests of task or delivery orders placed against a GSA schedule contract.”); Idea Int’l, Inc. v. United States, 74 Fed. Cl. 129, 130 (2006) (“[T]he Court concludes that it has subject matter jurisdiction [under 28 U.S.C. § 1491(b)(1)] to review this protest relating to a task order under a GSA Federal Supply Schedule (“FSS”) contract.”); Labat–Anderson v. United States, 50 Fed. Cl. 99, 104–05 (2001) (Court of Federal Claims possesses jurisdiction over bid protest of award of a Blanket Purchase Agreement (“BPA”) under the FSS). Similarly, this Court has found persuasive the U.S. Government Accountability Office’s (“GAO”) holding that “[i]n cases where the terms of existing contracts are used to conduct a competition resulting in the elimination of contractors as sources for the agency’s requirements for the duration of the contracts in question, as is the case here, we will consider protests concerning that competition and selection decision.” OTI Am., Inc. v. United States, 68 Fed. Cl. 108, 115-16 (2005) (quoting Electro-Voice, Inc., B-278319, Jan. 15, 1998, 98-1 CPD ¶ 23).⁵

⁵ Additionally, this Court has jurisdiction to hear challenges that an agency “is procuring goods and services through a process that should have been the subject of competition;

Accordingly, the Court has jurisdiction pursuant to 28 U.S.C. § 1491(b) to issue the relief requested.⁶

V. STANDARD OF REVIEW

The standard for obtaining emergency relief via a temporary restraining order is identical to that for preliminary injunctive relief. See Global Computer Enterprises, Inc. v. United States, 81 Fed. Cl. 506, 507 (2008). Therefore, to successfully enjoin ED, Coast must establish that: “(1) [it] is likely to succeed on the merits; (2) that it will suffer irreparable harm if preliminary relief is not granted; (3) that the balance of the hardships tips in [its] favor; and (4) that a preliminary injunction will not be contrary to the public interest.” FMC Corp. v. United States, 3 F.3d 424, 427 (Fed. Cir. 1993). Moreover, no one factor is dispositive as “the weakness of the showing regarding one factor may be overborne by the strength of the others.” Id.

VI. ARGUMENT

A. Coast Will Likely Succeed on the Merits

Coast will likely succeed in this bid protest because it will demonstrate that ED’s decision not to award Coast an Award Term Task Order was arbitrary and capricious, and highly prejudicial to Coast, as it was clearly qualified to receive an Award Term Task Order based on

and that the failure to compete the procurement is in violation of law.” CCL, Inc. v. United States, 39 Fed. Cl. 780, 789 (1997).

⁶ Clause H.4(d) of the TOs states that “[d]ecisions regarding the [Award Term Task Orders] are not subject to . . . review by any authority above the Contracting Officer.” Coast TO at 19, § H.4(d). To the extent ED argues that Clause H.4(d) precludes the Court’s jurisdiction in this matter, that clause is unenforceable and cannot deprive this Court of subject matter jurisdiction over Coast’s instant bid protest. See United States v. Cotton, 535 U.S. 625, 630 (2002) (“[S]ubject matter jurisdiction, because it involves a court’s power to hear a case, can never be waived or forfeited.”); Yosemite Park v. United States, 582 F.2d 552, 560 (Ct. Cl. 1978) (finding government contract provision violating federal procurement law is an “invalid, unenforceable provision of the Agreement.”). Moreover, it does not appear the CO made the decision because she was reading from a script during the February 20, 2015 phone call with Coast’s President. See Davis Decl. ¶ 34.

the one criterion for award. In the alternative, because ED failed to follow the statutory and regulatory requirements of full and open competition, ED's award of any Award Term Task Orders was improper without appropriate competitive procedures.

To demonstrate a likelihood of success on the merits, the plaintiff must show that the agency's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See 28 U.S.C. § 1491(b)(4) (adopting standard of the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A)). In applying the APA standard to protests, the Court determines whether "(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1358 (Fed. Cir. 2009).

The Court also should set aside an agency's decision as arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [the decision] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Alabama Aircraft Indus., Inc. v. United States, 586 F.3d 1372, 1375 (Fed. Cir. 2009) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). A plaintiff's burden in proving its likelihood of success is equivalent to the standards and burdens of proof required to prevail on the merits. Erico Int'l Corp. v. Vutec Corp., 516 F.3d 1350, 1359 (Fed. Cir. 2008) (Newman, J., dissenting).⁷

As discussed below, ED's decision not to award Coast an Award Term Task Order was arbitrary and capricious, and thus, improper. In the alternative, ED's award of the Award Term

⁷ Where the Court determines the agency's action did not comport with the APA standard, it then determines whether as a result the protestor has been prejudiced.

Task Order to any contractor without following proper competition procedures was improper. Under either scenario, Coast's protest will succeed on the merits.

1. ED's Decision Not to Award Coast an Award Term Task Order Was Arbitrary and Capricious

ED's arbitrary decision not to award Coast an Award Term Task Order when it was clearly qualified under the only criterion for award was improper and prejudicial to Coast. Agency procurement actions should be set aside when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (2)(D). In considering whether an agency's actions have been arbitrary or capricious, this Court must consider the following four factors: (1) subjective bad faith on the part of the procuring officials; (2) absence of a reasonable basis supporting the award decision; (3) degree of discretion afforded to procurement officials by applicable statutes and regulations; and (4) violation of a statute or regulation. Beta Analytics Int'l, Inc. v. United States, 44 Fed. Cl. 131, 136 (1999) (citing Keco Indus., Inc. v. United States, 203 Ct. Cl. 566, 574, 492 F.2d 1200 (1974)). There is no requirement or implication that each of the factors must be present in order to establish arbitrary and capricious action by the government. Prineville Sawmill Co. v. United States, 859 F.2d 905, 911 (Fed. Cir. 1988).

While the agency's decision is entitled to "a presumption of regularity," that presumption does not shield the agency's decision from a "thorough, probing, in-depth review." Great Lakes Dredge & Dock Co. v. United States, 60 Fed. Cl. 350, 358 (2004) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971)). "And although the arbitrary and capricious standard is highly deferential, 'it is not a rubber stamp.'" Id. When evaluating competitive proposals, an agency shall assess their relative qualities solely on the factors and subfactors specified in the solicitation. See 48 C.F.R. ¶ 15.305(a); 10 U.S.C. § 2305(b)(1); see

also CSE Constr. Co. v. United States, 58 Fed. Cl. 230, 245 (2003) (“Where an evaluation is challenged, we will examine the agency’s evaluation to ensure that it was reasonable and consistent with the evaluation criteria and applicable statutes and regulations[.]”).

The current TOs provided that in addition to the ordering periods in Clause B.3 and any option terms under Clause H.1, “the Contractor may earn performance extensions (hereinafter called ‘award terms’), based upon the quality of performance during the evaluation periods.”

See Coast TO at 18, § H.4. It further provided that:

If the Contractor has an average CPCS rating of 85 or greater over the life of the Task Order, or the last 12 CPCS periods (whichever is shorter), the Government may, [sic] award the Contractor an award-term extension in accordance with the terms of this clause in recognition of the Contractor’s excellent or better quality performance.

Id. Thus, Clause H.4 sets out the procedure for an Award Term Task Order. According to Clause H.4, the only criterion under which to evaluate contractors is whether the contractor has an average “CPCS rating of 85 or greater” over the life of the TOs or the last 12 CPCS periods.

Coast has an average CPCS rating of 97.85 for the last 12 CPCS periods, far greater than the minimum rating of 85 required under the TOs. See Davis Decl. ¶ 15; see also Coast TO at 18, § H.4. In fact, of the nine contractors with ratings of 85 or greater, Coast’s rating was ranked second. See Davis Decl. ¶ 19. Yet, although Coast clearly exceeded the only criterion to be considered in awarding an Award Term Task Order, ED decided not to award Coast an Award Term Task Order. As ED’s evaluation of Coast was not in accordance with the one factor specified in Clause H.4, this decision was arbitrary and capricious and should be set aside. See CSE Constr., 58 Fed. Cl. at 245.

Moreover, ED apparently justified its decision not to award Coast an Award Term Task Order by relying on an audit of Coast’s performance on the TO which allegedly revealed

negative performance. Although the findings of this alleged audit have not been confirmed, it is clear that findings of an audit are not included in the one evaluation criterion for awarding Award Term Task Orders. Clause H.4 of the current TOs makes no reference to audit analysis in ED's decision to award. While agencies properly may apply evaluation considerations that are not expressly outlined in the solicitation if those considerations are reasonably and logically encompassed within the stated evaluation criteria, there must be a clear nexus between the stated and unstated criteria. See Risk Analysis & Mitigation Partners, B-409687, July 15, 2014, 2014 CPD ¶ 214.⁸ An agency may not give importance to specific factors, subfactors, or criteria beyond that which would reasonably be expected by offerors. Id. Pursuant to the terms of the Clause H.4, offerors reasonably expected ED to award Award Term Task Orders based only on their CPCS ratings. Thus, ED's reliance on an unstated evaluation criterion was improper, and the information contained in the audits may not form the basis for ED's issuance of an Award Term Task Order. See Huntsville Times Co. Inc. v. United States, 98 Fed. Cl. 100, 112 (2011) (holding reliance on evaluation criteria in Source Selection Plan was in error when the evaluation committee did not adhere to the evaluation criteria set forth in the Request for Proposals).

To the extent ED argues that it had discretion in awarding Award Term Task Orders, that discretion must be exercised reasonably. A court evaluating a challenge to an agency's procurement decision on the ground that it lacks a rational basis "must determine 'whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion.'" CliniComp Int'l, Inc. v. United States, 117 Fed. Cl. 722, 733 (2014). In reviewing the contracting officer's decision, the "standard of reasonableness . . . is not subjective, but

⁸ The Court of Federal Claims, in recognition of the GAO's expertise in resolving contested procurement decisions, treats GAO cases as persuasive authority. See CSE Constr., 58 Fed. Cl. at 255 n.15 (citation omitted).

objective.” OTI Am., Inc. v. United States, 68 Fed. Cl. 646, 657 (2005). To justify its decision not to award Coast an Award Term Task Order, ED sent Coast an email outlining its purported [REDACTED]. See Exhibit F. However, ED sent an identical email to all 22 contractors holding the current TOs listing the same [REDACTED]. See Davis Decl. ¶ 32. As five of those contractors with alleged [REDACTED] were awarded Award Term Task Orders, despite only one contractor having a higher average CPCS than Coast (see id. ¶¶ 15, 31), ED’s exercise of discretion was inherently arbitrary and thus unreasonable.⁹

Moreover, the alleged [REDACTED] are based on statements made in calls that comport with ED’s own guidance to PCAs. As to the allegation concerning statements that [REDACTED], these exact statements are found on FSA’s own website. See https://www.myeddebt.com/borrower/mobile/main_landing_webkit.action (“You can have the negative credit information regarding your defaulted education debt removed from your personal credit report by completing our loan rehabilitation program.”); see also <https://studentaid.ed.gov/repay-loans/default/get-out#loan-rehab>; https://www.myeddebt.com/borrower/myoptions_rehabilitate.action. FSA’s PCA Procedures Manual: 2009 ED Collections Contract (“PCA Manual”) similarly states that rehabilitation will lead to adverse information being “expunged” from the consumer’s credit report. See Exhibit H, Excerpts of PCA Manual at 22; see also id. at 49, 73, 108.

⁹ ED’s treatment of Coast vis-à-vis the five awardees of Award Term Task Orders was also patently unequal. “It is well-established that a ‘contracting agency must treat all offerors equally, evaluating proposals evenhandedly against common requirements and evaluation criteria.’” CliniComp Int’l, 117 Fed. Cl. at 741 (citation omitted). Even if ED could consider audit results in its decision to award the Award Term Task Orders, the five awardees also allegedly [REDACTED]. Yet, without explanation, they received new business from ED and Coast did not.

Likewise, as to the purported [REDACTED] [REDACTED] (see Exhibit F), such statements are again based on guidance from the PCA Manual. For instance, the PCA Manual contains a script drafted by FSA to deliver the benefits of the loan rehabilitation program to eligible borrowers stating “any remaining collection fees on you loan(s) will be waived.” Exhibit H at 108; see also id. at 48, 107. Thus, the same types of statements for which ED is now punishing Coast are sanctioned by ED’s own PCA Manual and website.

Finally, Coast clearly was prejudiced by ED’s misapplication of the evaluation criteria, as it was qualified to receive an Award Term Task Order. To prevail in a bid protest, a protester must show a significant, prejudicial error in the procurement process. CSE Constr., 58 Fed. Cl. at 247 (quoting Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir.1999)). To establish prejudice, “the protester must show ‘that there was a substantial chance it would have received the contract award but for that error.’” Id. As Coast exceeded the only requirement for receiving an Award Term Task Order, ED’s failure to properly apply the evaluation criterion was prejudicial error. It is clear that but for ED’s improper reliance on the alleged audit, there was a substantial chance Coast would have received the contract award. Thus, as ED’s failure to award an Award Term Task Order was arbitrary, capricious, and prejudicial to Coast, Coast’s protest is likely to succeed.

2. ED Improperly Awarded the Award Term Task Order to Several Contractors Without Appropriate Competitive Procedures

In the alternative, if this Court does not find that ED’s failure to award an Award Term Task Order to Coast was arbitrary and capricious, it should find that ED’s decision to issue any Award Term Task Orders was improper. The TOs were issued in accordance with the GSA

Financial and Business Solutions (FABS) Schedule under Special Item Number 520-4 for private collection services. Coast TO at 3, § B.1. ED's attempt to issue new task orders to other GSA Schedule holders without following the competitive procedures required by the Federal Acquisition Regulation ("FAR") is improper and in violation with the applicable statutes and regulations.

Under CICA, agencies are obligated to obtain full and open competition through the use of appropriate competitive procedures. See 10 U.S.C. § 2304(a) (agencies "shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the Federal Acquisition Regulation"); 48 C.F.R. § 6.101(a)¹⁰ (statute requires that "contracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contracts"). In accordance with FAR 6.102(d)(3), use of the GSA Schedules Program is considered a "competitive procedure" under CICA when the GSA Schedule ordering procedures are followed. FAR 6.102(d)(3).

Pursuant to FAR 8.405-2,¹¹ an agency requesting orders under a GSA Schedule must provide the Request for Quotation ("RFQ"), which includes the statement of work and evaluation criteria, to schedule contractors that offer services that will meet the agency's needs. FAR 8.405-2(c). FAR 8.405-2(c)(3)(iii) requires the agency to post the RFQ on e-Buy or to provide it to as many schedule contractors as possible to reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirements. See FAR 8.405-2(c)(3)(iii). The procuring agency must ensure all quotes received are fairly considered and award is made in

¹⁰ Unless otherwise noted, all future references to Title 48 of the Code of Federal Regulations will be referred to as "FAR."

¹¹ As the TOs require a statement of work, it is assumed that FAR 8.405-2, Order Procedures for Services Requiring a Statement of Work, applies to the Award Term Task Orders.

accordance with the evaluation criteria in the RFQ. FAR 8.405-2(c)(3)(iii)(C). If an agency procures services under a GSA Schedule using this procedure, it is “considered to be issued using full and open competition.” FAR 8.404(a).

ED failed to comply with the requirements under FAR 8.405-2 for the GSA Schedule exception to using competitive procedures when issuing the Award Term Task Orders. ED simply provided in the TOs that “[a]ny award-term extension under this clause will be executed in the form of a new Task Order issued by the Contracting Officer under the Contractor’s then current GSA Schedule contract.” Coast TO at 19, § H.4. It further provided that “[t]he award-term Task Order extension will be subject to the terms and conditions of the existing Task Orders” and the “Government target prices for the current PCA Task Orders will apply to the award-term extension.” *Id.* ED did not provide a RFQ, but instead attempted to re-use the terms of the TOs, including their statement of work and prices. Clause H.4 of the TOs did not set out any evaluation criteria other than receiving an average CPCS rating of 85 or greater. *See id.* at 18, § H.4. In essence, ED attempted to short circuit an entire procurement in the form of Clause H.4 of the TOs. Thus, ED failed to use a competitive procedure as defined by FAR 8.405-2, and could not take advantage of the GSA Schedule exception to the CICA competition requirements.

Because ED did not follow the GSA Schedule competition requirements, it was obligated to use a competitive procedure as defined by CICA. CICA requires full and open competition absent one of several relatively narrow exceptions. *See Distributed Solutions, Inc. v. United States*, 104 Fed. Cl. 368, 385 (2012). If an exception does not apply, agencies must solicit proposals in accordance with FAR Subpart 15. *See FAR 15.000 et seq.* As ED failed to comply with the GSA Schedule exception available to it, it was required to comply with FAR Subpart 15 to meet the requirements of CICA. *See FAR 6.102(d)(3)*. ED made no attempt to solicit

proposals or any information from potential awardees for the Award Term Task Order, and simply awarded the Award Term Task Order based on the TOs. It is apparent that ED wholly failed to comply with the statutory and regulatory requirements of full and open competition, and thus the entire Award Term Task Order procurement was improper. Therefore, to the extent this Court does not order ED to award an Award Term Task Order to Coast, it is clear that the award of an Award Term Task Order to any contractor without proper competitive procedures was improper.

Thus, as outlined above, ED's decision not to award an Award Term Task Order to Coast was arbitrary and capricious, given that Coast exceeded the single criterion for award. ED's arbitrary decision significantly prejudiced Coast, as there was a substantial chance it would have received an Award Term Task Order but for ED's improper miscalculation of Coast. In the alternative, ED's issuance of any Award Term Task Orders without proper competitive procedures violated its obligations under CICA and the FAR, and should be set aside. Accordingly, Coast's protest will succeed on the merits under either scenario.

B. Coast Will Suffer Irreparable Harm

In evaluating whether there is irreparable harm, the Court considers whether an adequate remedy exists in the absence of an injunction. See Overstreet Elec. Co. Inc. v. United States, 47 Fed. Cl. 728, 743 (2008). Irreparable injury can be demonstrated "in the lost opportunity to fairly compete for and perform work under the contract, including, but not limited to lost profits that would generate therefrom." SAI Indus. Corp. v. United States, 60 Fed. Cl. 731 (2004) (internal citation omitted); see also Magnum Opus Techs. v. United States, 94 Fed. Cl. 512, 544 (2010) (being deprived of the chance to compete for a procurement constitutes irreparable harm); Overstreet Elec., 47 Fed. Cl. at 743-44 (finding that a "lost opportunity to compete in a fair

competitive bidding process for a contract” constitutes irreparable harm). Heritage of America, LLC v. United States, 77 Fed. Cl. 66, 78 (2007). As explained below, Coast will be irreparably harmed if no injunction is issued.

First and foremost, Coast will be harmed because ED has determined not to award Coast the Award Term Task Order. The Award Term Task Order is valued at \$ [REDACTED] for a twenty-four month period and, as such, losing the Award Term Task Order represents a loss of a \$ [REDACTED] future revenue stream. See Davis Decl. ¶ 41. Without being able to perform on the TO, Coast will lose [REDACTED] (approximately [REDACTED]) of its current revenue. See id. ¶ 40. Accordingly, such damages represent a harm for which Coast would not have an adequate remedy at law.

Additionally, ED’s sudden decision to not make award of the Award Term Task Order to Coast will cause additional hardships to Coast. Coast has approximately [REDACTED] employees in Louisiana and approximately [REDACTED] employees in New York, [REDACTED] of which will need to be laid off. Id. at ¶ 42. Moreover, in order to comply with notice requirements for covered plant closings or covered mass layoffs under the Worker Adjustment and Retraining Notification (“WARN”) Act requirements, Coast may be required to give its employees sixty days advanced notice of the conclusion of work under the incumbent contract. See 29 U.S.C. § 2102(a); see also Davis Decl. at ¶ 43. If Coast were to give WARN Act notices to employees, it is likely that it would lose a significant number of employees before the conclusion of the TO, thereby jeopardizing Coast’s ability to perform the contract at the same high level of service to which ED has been accustomed. These notices also will result in lost revenues as a result of Coast’s having to perform at a lower level of service and collecting fewer delinquent loans that could otherwise not be recovered by Coast. Id. ¶ 44; see also Transatlantic Lines LLC v. United States, 68 Fed.

Cl. 48, 57 (2005) (identifying “[t]he potential loss of valuable business on [a] contract” as “sufficient to prove irreparable harm”).

Accordingly without an injunction from this Court, Coast will be irreparably harmed because it will be without an adequate remedy at law.

C. The Harm to Coast Outweighs the Harm to Defendant

Should the Court grant Coast’s application for TRO or preliminary injunction, no harm will come to ED if the Court enjoins ED’s decision to deprive Coast of an Award Term Task Order to which it is entitled. Coast could easily continue performing the debt collection services during this time. Accordingly, while the Court considers the merits of the protest, ED could obtain its requirements from Coast’s experienced and highly-qualified personnel. Coast has an average CPCS rating of well over 85, has a complaint-to-compliment ratio of 1:15, and is ranked second in terms of performance of all 22 contractors performing work under their respective TOs. See Davis Decl. ¶¶ 12, 15. Coast’s continued performance would mitigate completely any harm to ED arising from the injunction Coast is requesting.

In contrast to the lack of harm faced by ED, as explained above, the continuance of the non-award of the Award Term Task Order would cause tremendous, non-recompensable harms to Coast. Id. ¶¶ 41, 42, 45. The balance of hardships therefore strongly favors Coast’s requested relief.

D. Injunctive Relief Is in the Public’s Interest

The Court has found that the public interest is served by ensuring the integrity and fairness of the procurement process. SAI Indus., 60 Fed. Cl. at 747. More specifically, the public interest is “served by ensuring that Government officials follow applicable procurement statutes and regulations.” Magnum Opus, 94 Fed. Cl. at 551. Here, as explained above, Coast is

a small business, and it is in the public interest to ensure procurements involving small businesses are fair, particularly when the result of the procurement could create enormous harms to a small business such as Coast.

Moreover, Coast has been performing the TO since 2009 and has excelled in that performance. The Award Term Task Orders will use the prices for the current TOs. See Coast TO at 19, § H.4. The Court has found that it is in the public interest to “ensur[e] that the ultimate awardee offers the ‘best value’ to the Government.” Information Sciences Corp. v. United States, 80 Fed. Cl. 759, 778 (2008). Given that Coast offers experienced, qualified staff at the competitive rates under its GSA Schedule, and has proven, through its performance on the incumbent contract, that it provides superior service to ED, clearly the public interest is best served by granting the injunctive relief (a) to assure ED continues to have the benefit of receiving the “best value” for debt collection services, accounting also for the superior services that Coast has provided to ED and (b) to assure that ED’s procurement decision with regard to Coast complies with the applicable regulatory requirements, the terms of the Solicitation, and is otherwise reasonable.

E. No Bond Is Warranted

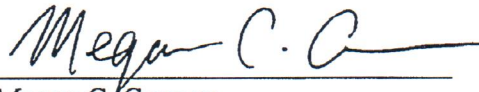
Under RCFC 65, the Court “may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” RCFC 65(c). The purpose of such a bond is “to make good any loss to any party that judicial interference may cause, if it is not ultimately upheld.” Allen M. Campbell Co. v. United States, 467 F.2d 931, 934 (Ct. Cl. 1972) (Nichols, J., concurring). Here, the requested preliminary injunction will simply reverse the arbitrary and capricious actions by the ED and halt

the non-award of the Award Term Task Order. It is highly improbable that ED would incur any damages in conjunction with a TRO or preliminary injunction. Therefore, Coast respectfully submits that no bond should be required.

VII. CONCLUSION

For the reasons discussed above, Coast respectfully requests that the Court enjoin the Defendant from proceeding with the Award Term Task Orders awarded to FMS Investment, Continental Service Group, Inc., Account Control Technology, Inc., Windham Professionals, Inc., and GC Services Limited Partnership pending a resolution of the protest action before this Court.

Respectfully submitted,



Megan C. Connor
Pilieromazza PLLC
888 17th Street, NW, 11th Floor
Washington, DC 20006
(202) 857-1000 (phone)
(202) 857-7836 (protected fax)
mconnor@pilieromazza.com

*Counsel of Record for Plaintiff,
Coast Professional, Inc.*

Dated: March 2, 2015

Of Counsel:

Pamela J. Mazza
Patrick T. Rothwell
Pilieromazza PLLC
888 17th Street, NW, 11th Floor
Washington, DC 20006
(202) 857-1000 (phone)
(202) 857-7836 (protected fax)
pmazza@pilieromazza.com
prothwell@pilieromazza.com

UNITED STATES COURT OF FEDERAL CLAIMS

(Bid Protest)

COAST PROFESSIONAL, INC.,)
)
Plaintiff,) No. _____
)
v.)
)
THE UNITED STATES OF AMERICA,)
)
Defendant.)

PROPOSED ORDER

In accordance with Rule 65 of the Rules of the United States Court of Federal Claims, the United States of America, the United States Department of Education, and their officers, agents, servants, employees, and representatives, and all persons acting in concert and participating with them respecting the subject procurement, be and they are hereby, RESTRAINED AND ENJOINED during the pendency of Plaintiff's bid protest, or until further order of this Court, from proceeding with the Award Term Task Orders awarded to FMS Investment Corp., Continental Service Group, Inc., Account Control Technology, Inc., Windham Professionals, Inc., and GC Services Limited Partnership.

Judge, United States Court of Federal Claims