

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

AIRBOSS DEFENSE GROUP, LLC,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 24-cv-00365

Judge Charles F. Lettow

**NEW YORK EMBROIDERY STUDIO, INC.’S REPLY
IN SUPPORT OF ITS MOTION TO INTERVENE AS DEFENDANT-INTERVENOR**

New York Embroidery Studio, Inc. (“NYES”), through counsel, submits the following Reply to the Plaintiff Airboss Defense Group, Inc.’s (“Airboss” or “ADG”) Opposition (ECF No. 13, hereinafter “Opposition”) to NYES’s Motion to Intervene (ECF No. 11, hereinafter “Motion”). Contrary to Airboss’s Opposition, the relevant factors support granting NYES intervention as of right pursuant to Rule 24(a) of the Rules of the U.S. Court of Federal Claims (“RCFC”). Motion at 2-5. Alternatively, this Court should grant NYES’ permissive intervention under RCFC 24(b), or in the further alternative allow NYES to participate as amicus curiae.

I. NYES is the Contract Awardee

Airboss’ erroneously argues that “NYES is not ‘the awardee,’ but is instead only one of several offerors in the competitive range for an award.” Opposition at 2. NYES is still the contract awardee, and its proposal was previously determined to be the best value. There can be no dispute that NYES has valuable interests in its proposal and that the Airboss action in this Court seeks to

impair or diminish those interests. While corrective action is ongoing and there is a possibility that another competitor will receive an award, at present NYES remains the awardee.

At the heart of Airboss's opposition is the mistaken belief that NYES is just another offeror among many within the current competitive range. Airboss thus argues "NYES has no 'legally protectable' interest in avoiding competition with ADG in this procurement," and "NYES's interest . . . is not 'of such a direct and immediate character that [NYES] will either gain or lose by the direct legal operation and effect of the judgment.'" Opposition at 3 (quoting *Wolfsen Land & Cattle Co. v. Pac. Coast Fed'n of Fishermen's Ass'ns*, 695 F.3d 1310, 1315 (Fed. Cir. 2012)). As the awardee, however, NYES has the requisite interest under RCFC 24(a) to intervene as of right.

Indeed, NYES' interest is sufficient for NYES to file its own protest action in this Court under the Tucker Act challenging corrective action, if it wished. Similarly, if the NYES contract is terminated or NYES does not retain award, NYES has a sufficient interest to file its own protest here. Thus, NYES has a legally cognizable interest sufficient for intervention.

For the same reason, *Nev. Site Sci. Support & Techs. Corp. v. United States*, 128 Fed. Cl. 337 (2016), on which Airboss relies in its opposition, is inapposite. Opposition at 3. In *Nev. Site*, the *protester* was a prior awardee challenging the agency's rescission of its contract, and the intervenor-applicants were two other bidders. 128 Fed. Cl. at 337-38. The Court denied the motions to intervene, finding the intervenor-applicants (who were not prior awardees) had no real interest in the rescinded contract. *Id.* at 338. In contrast, unlike the intervenor-applicants in *Nev. Site*, NYES is the current contract awardee and has the strongest of interests in maintaining its award against all potential challengers, including Airboss. *Nev. Site* does not conflict at all with NYES's intervention as of right in this protest.

To the contrary, *Nev. Site* only confirms NYES's interest in the protest and right to intervene. The Court in *Nev. Site* implicitly held that the protester/original awardee, in contrast to the intervenor-applicants, had sufficient interest in the contract to protest its rescission. Here, NYES is the current awardee, and so its interest in the contract is even stronger.

Accordingly, as the current contract awardee, NYES has the requisite interest in this protest to intervene as of right.¹

II. Airboss's Protest May Well Impair and Impede NYES's Contract Award

Airboss asserts in its opposition that its protest will not impair or impede NYES's contract award, stating:

ADG's protest does not challenge the inclusion of NYES within HHS's competitive range. Rather, ADG challenges HHS's evaluation of ADG's proposal and HHS's decision to exclude ADG from the competitive range. . . . [I]nclusion of ADG's proposal in the competitive range will not "impair or impede" NYES's ability to protect its interest as an offeror in the competitive range."

Opposition at 2.

Airboss's argument that its protest will not hinder NYES's retention of its contract is mistaken for two reasons. First, assuming, *arguendo*, that Airboss were to succeed in this protest, Airboss would then be included in the competitive range and NYES would face more competition; and the more competition NYES will face, the less likely it is NYES will retain its contract. Second, under the same assumption that Airboss were to prevail, then this protest may not only result in Airboss's entry into the competitive range but also may produce a potential amendment to the solicitation that disadvantages NYES or even removes NYES from the competitive range. Indeed, Airboss concedes as much, stating: "It is conceivable that ADG may identify errors in

¹ Even if NYES is somehow no longer the awardee at some future date, it would still maintain a sufficient interest as the original awardee to intervene or to file its own protest.

HHS’s evaluation of the proposals that, if corrected, could result in a new competitive range determination that might not include NYES.” Opposition at 3. Airboss attempts to temper this obvious issue, noting that “[t]his Court, however, will not set a new competitive range in deciding this protest.” *Id.* But whether directly or indirectly, the protest may result in NYES’s exclusion from the competitive range. Airboss’s assertion to the contrary is erroneous.

Therefore, Airboss’s protest may well hinder NYES’s contract award.

III. NYES’s Interests—including NYES’s Proprietary Data Interests—Are Not Adequately Represented By the Government

Airboss also erroneously contends that the Government can adequately represent NYES’s interests.

First, Airboss incorrectly characterizes NYES’s interest as “defending HHS’s inclusion of NYES in the competitive range.” Opposition at 4. Again, NYES is the current contract awardee, and its interests go beyond remaining in the competitive range but maintaining its contract award as well. There is no reason the Government would share that interest, let alone adequately. *See, Air Borealis Ltd. P’ship v. United States*, 162 Fed. Cl. 778, 782 (2022) (“[T]he government’s interest in receiving contractual performance and defending its decisions during a procurement is distinct from a contractor’s interest in receiving an award and being paid.”).

Second, Airboss claims NYES’s argument that its interests are similar but not identical to the Agency’s interests is “conclusory” and “devoid of any facts or evidence that would provide a basis for this Court to find that the Government cannot adequately defend its competitive range determination.” Opposition at 4. But, Airboss applies the wrong standard. “A minimal showing that the absentee’s representation of his interest may be inadequate is sufficient to justify intervention.” *Armour of Am. v. United States*, 70 Fed. Cl. 240, 245 (2006). NYES has met this

standard given its status as the contract awardee, and because of its unique interests in protecting its highly valuable proprietary data. *See* Motion at 4-5.

Third, Airboss argues NYES's strong interest in protecting its proprietary data is also adequately protected because "ADG has requested that the Court issue its standard protective order, which limits the disclosure of confidential and proprietary information. NYES cannot demonstrate that the Court's protective order is inadequate to protect NYES's interests." Opposition at 4. As explained in NYES's Motion, however, multiple cases establish that the Court's protective order is inadequate to protect NYES data without NYES participation. *See* Motion at 4-5 (discussing *Voith Hydro, Inc. v. United States*, 141 Fed. Cl. 723, 726 (2019); *EER Sys. Corp.*, B-256383, June 7, 1994, 94-1 CPD ¶ 354). Airboss addresses none of these cases. The only other way for NYES to protect its data is to seek relief in district court to challenge this Court's application of the protective order, as in *EER*. *See* B-256383, June 7, 1994, 94-1 CPD ¶ 354. Judicial economy and efficiency support inclusion of NYES here.²

Accordingly, the Government cannot adequately protect NYES's interests in this case.

² Indeed, NYES's interest in its proprietary data as the awardee is greater than other potential competitors. The NYES proposal and proprietary data have heightened value because NYES already won the contract once. This Court and the Government Accountability Office ("GAO") have implicitly recognized the value of the original awardee's proprietary data. In *Voith* and *EER*, based on the intervenors' objections, the Court and GAO denied access to protesters' outside consultants. In *EER*, the intervenor was initially forced to file suit against the Comptroller General (GAO) to protect its data. The GAO decision notes: "The filing of these applications prompted Swales to file a request for injunctive relief in the United States District Court for the District of Columbia (Civil Action No. 94-1036). The court entered an order in this matter, which recognized Swales's and GAO's agreement that the proprietary information would not be disclosed to the experts until the lawsuit was resolved, although GAO's consideration of the protest would otherwise continue." It is highly likely that the consultants would have received access but for the intervention and objection of the original awardee.

IV. Airboss Applies an Incorrect, Hypertechnical Standard for Permissive Intervention

Airboss advances two arguments against NYES’s permissive intervention into this protest, but both fail.

First, noting that NYES will argue the Solicitation requires no further amendment, Airboss contends that, “whatever argument NYES plans to make, it is not a ‘claim or defense’—NYES has been included in the competitive range, and any amendment to the Solicitation will not exclude NYES from the competitive range.” Opposition at 5. This argument merely repeats Airboss’s assertion that this protest will not impair or impede NYES’s interests. As explained above, however, that is not true given NYES’s status as contract awardee and Airboss’s concession that the protest could lead to NYES’s expulsion from the competitive range.

Second, Airboss argues that NYES has no “claim or defense that shares with the main action a common question of law or fact” because, without having seen Airboss’s complaint and knowing the potential amendment at issue, NYES “has no basis to suggest that it has arguments regarding the proper interpretation of the Solicitation that will be any different from the arguments that the Government will make.” *Id.* at 5.

Airboss advances an incorrect “hypertechnical theory” of what constitutes a “claim or defense that shares with the main action a common question of law or fact” under RCFC 24(b). *Air Borealis Ltd. P’ship v. United States*, 162 Fed. Cl. 778, 782 (2022). Airboss assumes that a successful permissive intervenor must be able to show that its claim or defense differs from all claims or defenses that the other parties will assert. Putting aside the unworkability of such a standard—how would the Court know what the other parties will argue in the future?—it is at odds with this Court’s precedent. The standard for permissive intervention under Rule 24(b) is much lower (and practical) than Airboss’s unsupported standard.

The claims or defenses necessary for permissive intervention “are simply ‘the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit.’” *Id.* (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997)). In addition, such claims or defenses “share[] with the main action a common question of law or fact” “simply because they would arise from the same procurement, reflected in the same administrative record, and governed by the same law.” *Id.* at 783. Whatever NYES’s arguments will be, they will undoubtedly be “the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit” [and] “would arise from the same procurement, reflected in the same administrative record, and governed by the same law.” *Id.* at 782-83.

Accordingly, as an alternative to intervention of right, the Court should allow NYES to permissively intervene in this protest.

V. Airboss’s Opposition to NYES Motion’s Further Alternative Entry as Amicus Curiae Misapplies the Relevant Factors

Airboss asserts that most of the factors for consideration whether to allow for amicus curiae do not support NYES’s entry. *See* Opposition at 5-6. But Airboss’s arguments are unconvincing, largely for reasons already mentioned:

Opposition of the Parties: Airboss notes its opposition to NYES’s participation as amicus curiae is “because that participation will serve no useful purpose in the resolution of this litigation.” *Id.* at 6.

But the Government does not share that opposition, which distinguishes this case from Airboss’s cited case of *Fluor Corp. v. United States*, 35 Fed. Cl. 284 (1996) where the court emphasized that “[p]laintiff and defendant here have strongly opposed movants’ request for leave to file an *amici curiae* brief[,]” *id.* at 285. In addition, as far as NYES understands, the Government maintains that NYES’s participation will serve a useful purpose in the resolution of this litigation.

See also Order at 1-2, *Noble Supply & Logistics LLC v. United States*, No. 23-1116C (Fed. Cl. August 17, 2023), ECF No. 25 (“The Court may well benefit from the perspective, not available from the defendant, offered by another experienced government contractor on the issues presented by the Complaint.”).

Interest of Movants: Consistent with its earlier arguments, Airboss contends that its “protest will not directly affect NYES’s interests and NYES has identified no ‘claim’ it has on which this Court will set a controlling precedent.” Opposition at 6. As discussed, however, NYES has the requisite interests.

Partisanship: Airboss cites *Fluor* to support its argument, *see id.*, but here again, the facts differ from *Fluor* where the movants “stated that they want to file as *amici curiae* supporting plaintiff—support which plaintiff does not want[.]” 35 Fed. Cl. at 286.

Adequacy of Representation: Consistent with its earlier arguments, Airboss argues that NYES “has identified no argument that it plans to make that the Government cannot adequately present.” Opposition at 6. As discussed, however, NYES has explained why its interests are not adequately represented by the Government.

VI. Conclusion

Accordingly, NYES respectfully requests that the Court grant NYES's motion for leave to intervene.

Date: March 15, 2024

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March 2024, New York Embroidery Studio, Inc.'s Reply in Support of its Motion to Intervene was electronically filed. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Tara D. Hopkins
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