

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

AIRBOSS DEFENSE GROUP, LLC,)
)
Plaintiff,)
)
and)
)
STRING KING LACROSSE, LLC,) No. 24-365
) (Judge Lettow)
Plaintiff-Intervenor,)
)
)
v.)
)
THE UNITED STATES,)
)
Defendant,)
)
and)
)
NEW YORK EMBROIDERY STUDIO, INC.,)
)
Defendant-Intervenor.)

REDACTED VERSION

DEFENDANT'S STATUS REPORT

Defendant, the United States, respectfully submits this status report to advise the Court of the timeline for the corrective action that the Department of Health and Human Services (HHS) intends to take and to respectfully propose that the Court suspend all future deadlines.

HHS's intended corrective action schedule includes the following:

1. By May 10, 2024, HHS will make a new competitive range determination and notify offerors who are in the competitive range.
2. By the end of May 2024, HHS will issue an amendment to the solicitation to offerors in the competitive range. As part of the amendment, HHS intends to

[REDACTED]

[REDACTED]

[REDACTED].

3. By the end of July 2024, HHS will evaluate revised proposals and make a new award decision.

The administrative record is currently due May 3, 2024, followed by motions for judgment on the administrative record, with the last brief due July 8, 2024. However, the Government respectfully proposes that the Court suspend the current schedule until HHS finalizes its corrective action. The corrective action will result in an amended solicitation, new evaluations, and a new source selection decision. As previously noted, *see* Joint Status Report, April 17, 2024, ECF No. 34, it is our position that HHS's corrective action moots the current protest because HHS has decided to reconsider its requirements, reopen competition, and consider the contract award anew. *Cf. Nat'l Air Cargo Grp., Inc. v. United States*, 127 Fed. Cl. 707, 717 (2016) ("In cases where the agency has taken corrective action that resulted in a new evaluation and source selection decision, the court must review the agency's new decision. . . . The initial agency decision typically will not present a live controversy after corrective action, making moot those errors alleged in an initial decision.") (citing *Tenica & Assocs., LLC v. United States*, 123 Fed. Cl. 166, 171 (2015)).

Aside from the Government's position on mootness, ADG has stated it "believes that resolution of the Government's motion to dismiss *depends entirely on the results of the actions that the Government has stated HHS will take*, [REDACTED]

[REDACTED]

and be considered for award, and whether HHS amends the solicitation in a manner that clarifies the provisions of the solicitation that ADG has alleged HHS has misinterpreted or, in the alternative, are latently ambiguous.” Joint Status Report, ECF No. 34 (emphasis added); Scheduling Order, April 22, 2024, ECF No. 36. But the administrative record will not contain documents reflecting those decisions if it is filed before HHS amends the solicitation. Moreover, to the extent ADG believes that this case is not ready for judicial resolution until the “results” of the corrective action are known, any briefing at this time would be premature because the agency’s corrective action has only just begun. *See, e.g., Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757, 772 (2017) (“To be ripe, a claim must not be contingent upon future events that may or may not occur.” (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985))).

Additionally, around the time that the parties finalize briefing in accordance with the current schedule and prepare for oral argument, HHS’s new award decision will have overtaken prior agency actions. As well, HHS’s corrective action might create grounds for a new protest. The Government believes that it would be inefficient at this time to have the parties unnecessarily review the current administrative record—which supports an agency decision that HHS intends to replace with a new decision—and to prepare motions for judgment on the administrative record.

To avoid “premature adjudication” and the potential “entangl[ement] in abstract disagreements over administrative policies,” *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967), the Government respectfully proposes that the Court suspend all upcoming deadlines, including the Government’s obligation to file the administrative record by May 3, 2024. The

Government further respectfully proposes that the Government files a status report in 90 days from the Court's order to apprise the Court of whether HHS has completed its corrective action. Once corrective action is complete, the parties will be able to assess whether further judicial proceedings are necessary. If corrective action does not resolve this case to plaintiff's satisfaction, the parties will discuss next steps and propose a litigation schedule to the Court, if needed.

Counsel for String King has represented that String King has no issue with the schedule proposed by the Government with respect to the corrective action, but requests the briefing schedule already approved by the Court continue as scheduled simultaneously including the production of an administrative record. Counsel for AirBoss has represented that AirBoss joins String King's request that the briefing schedule already approved by the Court continue as scheduled. Counsel for defendant-intervenor, New York Embroidery Studio, Inc. (NYES), did not respond by the time of this filing to indicate NYES's position.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney
General

PATRICIA M. McCARTHY
Director

s/ Franklin E. White, Jr.
FRANKLIN E. WHITE, JR.
Assistant Director

OF COUNSEL:

Megan R. Nathan
Anthony E. Marrone
Attorneys
U.S. Department of Health and Human Services
Office of the General Counsel,
General Law Division
Washington, D.C. 20201

s/ Jana Moses
JANA MOSES
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
Tel: (202) 616-2279
Fax: (202) 307-0972
Jana.Moses@usdoj.gov

Attorneys for Defendant

April 26, 2024