IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

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

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Defendant, the United States, respectfully submits this reply in support of its motion to dismiss this case. The controversies that initiated the complaints in this case—AirBoss's exclusion from the competitive range and String King's challenge to how the agency would evaluate the shelf-life subfactor and its award to defendant-intervenor New York Embroidery Studio, Inc. (NYES)—have been finally resolved by the Department of Health and Human Services' (HHS) corrective action. Both AirBoss and String King have received awards and have executed contracts agreeing to meet the underlying contractual requirements. Any challenges to the amount of work under the awarded contracts are matters of agency contract administration, which are not the proper subject of suit brought under this Court's bid protest jurisdiction. Thus, for the reasons stated in our motion to dismiss and further explained in this reply, this case is moot and should be dismissed.

In its response, AirBoss argues that it "was denied the competitive advantage it would have enjoyed but for HHS's elimination of shelf-life as a consideration, which would have earned ADG a greater share of HHS's requirements." AirBoss Resp. at 6. However, these arguments are speculative as to effect and factually incorrect.

To start, HHS did not eliminate shelf life as an evaluation criterion. As we explained in our opposition to String King's application for a temporary restraining order (TRO) and motion for a preliminary injunction, HHS decided that shelf life exceeding three years would not be evaluated higher or considered to be an additional strength in the evaluation process. Defendant's Supp. Resp., at 13-17; *see also AirBoss Def. Grp., LLC v. United States*, 172 Fed. Cl. 219, 230 (2024) (denying String King's application for a TRO and motion for a preliminary injunction, finding that HHS's decision "to alter the shelf-life requirement falls within its broad discretion to set and implement national public health policy," and concluding that HHS "reasonably decided not to prioritize longer shelf-life gowns because 'lengthy real-time aging testing is not available' given that these types of products 'have been produced for a relatively short period of time'" (citing Defendant's Suppl. Resp. Ex. B, Competitive Range Determination, at 57, ECF No. 63-1)).

In addition, HHS made awards of equal quantities to all awardees, so having different shelf-life requirements as Air Boss desires would not necessarily change the agency's decisions. AirBoss wants a "greater share of HHS's requirements" under the contract it has accepted, AirBoss Resp. at 6, but that is a matter of agency contract administration, which cannot be pursued under this Court's bid protest jurisdiction.

AirBoss also argues, "Amendment 0009's prohibition on the delivery of gowns manufactured more than three months before delivery arbitrarily 'harms those offerors who began to scale up manufacturing in response to this procurement,' including ADG." AirBoss Resp. at 5. To the extent any vendors may have rescaled production in response to a solicitation before receiving a contract award, doing so was a business decision at the vendor's risk and cannot serve as a basis for a protest. Further, AirBoss has agreed to this three-month requirement by accepting its contract and should not be permitted to undo that obligation under the guise of a bid protest.

Equally unavailing, String King argues that "[h]ad the Government abided by its original award criteria that took shelf-life into consideration, the award would not have been divided six ways because String King was one of a few offerors that provided a longer shelf-life product at a reasonable price." String King Resp. at 4. Again, this argument for a larger share of work is speculative at best. String King and AirBoss take issue with Amendment 0009, but even earlier amendments of the solicitation, *e.g.*, Amendment 0005, reflect that shelf life was ranked low in relative importance than most other technical subfactors. *See* AR313,[1] Amendment 0005, Section M, Factor 2: Technical Capability (concerning the "Relative Order of Importance: The Government will evaluate the following technical subfactors listed in descending order of importance as outlined in Section M," and listing shelf life as the sixth subfactor). And price was the least important of the four evaluation factors. AR322. So even under the "original award criteria," no reasonable basis exists to challenge how many contracts HHS decided to

[1] "AR_" refers to pages in the administrative record filed on May 24, 2024, ECF No. 48.

award, particularly because the solicitation contemplates multiple awards. *See* AR315 ("The Government intends to award multiple contracts.").

AirBoss's and String King's reliance on *AccelGov, LLC v. United States* and *SEKRI, Inc. v. United States* is misplaced. Indeed, this protest is not like *AccelGov*, where the agency's corrective action was not fully implemented. 166 Fed. Cl. 606, 609 (2023). Nor is this case like *SEKRI*, where the protestors were "seeking to vindicate a specific *right* to manufacture all ATAP the defendant plans to procure." 165 Fed. Cl. 21, 37 (2023) (emphasis added).

Although *National Air Cargo* involved a post-award challenge to the agency's corrective action, AirBoss and String King overlook that the Court had previously dismissed National's protest on mootness grounds based on the Government's representations that it had commenced corrective action and intended to re-evaluate all offerors' past performance and make a new award decision. 127 Fed. Cl. 707, 713 (2016); *see also National Air Cargo Grp. Inc. v. United States*, No. 15-1191 (Fed. Cl. Nov. 30, 2015), Order granting defendant's motion to dismiss, ECF No. 14. After the agency's corrective action, National filed a new protest, challenging the agency's award decision and arguing that the agency's six awards violated the solicitation that limited the number of awardees and required recompetition before awarding further contracts beyond the original awardees. *Id.* at 709. The Court stated that a new award decision typically moots a pending protest, but recognized an exception that applies when the "errors in the original evaluation have gone unresolved during corrective action, cannot be fixed in corrective action, or otherwise continue to affect the decision made by the agency." *Id.* at 717. Despite AirBoss's and String King's insistence, this case does not fit neatly within any of these categories.

The further relief sought by AirBoss and String King is either beyond the Court's power to grant (a particular selection decision and award) or pertain to HHS's discretionary contract administration (allocation of quantities). Otherwise, it is not entirely clear what remaining permanent injunctive relief the parties seek or what redressable injury the parties can convincingly claim. Returning the procurement process to the *status quo* before the alleged illegal action occurred would presumably result in termination of AirBoss's and String King's contracts, agency reevaluations, and a new award decision under the solicitation that contemplates multiple awards. It is not readily apparent where this result gets AirBoss and String King.

AirBoss's protest challenged HHS's decision to exclude them from the competitive range and String King's protest challenged HHS's award to NYES. Both parties take issue with Amendment 0009, but as we explained in our response to String King's application for a TRO and motion for a preliminary injunction, Amendment 009 *improved* the competitive process. Defendant's Suppl. Resp. at 2, 16, ECF No. 63; *see also AirBoss Def. Grp.*, 172 Fed. Cl. at 229 ("[T]he new shelf-life requirement beneficially promotes competition because it is minimally restrictive considering HHS's needs, in accordance with the Competition in Contracting Act."). HHS's corrective action, which is complete, permitted AirBoss and String King to compete for the contracts at issue, resulted in a new award decision, and allows AirBoss and String King to receive profits under their respective contracts. In this multiple-award procurement, AirBoss and String King have effectively received all the relief it could have obtained in its protests. Assuming AirBoss and String King want HHS to add work to its existing contracts, these requests for relief do not raise a viable bid protest. Likewise, String King's arguments concerning the delivery schedule should be resolved pursuant to the Contract

Disputes Act. *See Gov't Tech. Servs. LLC v. United States*, 90 Fed. Cl. 522, 527 (2009) ("The Federal Circuit has made it crystal clear that the CDA is the 'exclusive mechanism' for the resolution of disputes arising, as here, in contract management."). In sum, no further judicial proceedings are warranted in this case.

For these reasons, this case is moot and should be dismissed.

Respectfully submitted,

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