In the United States Court of Federal Claims

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
(Originally Filed: May 14, 2025)
(Reissued Publicly: May 30, 2025)

Daniel P. Graham, *Llewelyn M. Engel*, McDermott Will & Emery LLP, Washington, D.C., for Plaintiff AirBoss Defense Group, LLC.

Eric S. Crusius, *Amy L. Fuentes*, *Richard Ariel*, Holland & Knight LLP, Tysons, Virginia and Washington, D.C., for Plaintiff-Intervenor String King Lacrosse, LLC.

Jana Moses, Senior Trial Counsel, *Franklin E. White, Jr.*, Assistant Director, *Patricia M. McCarthy*, Director, Commercial Litigation Branch, *Brian M. Boynton*, Principal Deputy Assistant Attorney General, Civil Division, United States Department of Justice, Washington, D.C., for Defendant. *Megan R. Nathan* and *Anthony E. Marrone*, Attorneys, U.S. Department of Health and Human Services, Washington, D.C., of counsel.

Tara D. Hopkins, *Jonathan D. Shaffer*, *Scott E. Whitman*, Haynes & Boone, LLP, Tysons Corner, Virginia and Washington, D.C., for New York Embroidery Studio, Inc.

OPINION AND ORDER[1]

HADJI, *Judge*.

Pending before the Court is the Government's Motion to Dismiss this pre-award bid protest on the basis that the Government has implemented corrective action, including awarding contracts to Plaintiffs, which they allege moots the pre-award protest. ECF 92.

BACKGROUND

This pre-award bid protest is brought by Plaintiffs Airboss Defense Group, LLC (Airboss) and String King Lacrosse, LLC (String King), and stems from solicitation number 75A50322R00008 issued on June 28, 2022, by the U.S. Department of Health and Human Services (HHS). That solicitation sought to create a national stockpile of personal protective equipment (PPE), specifically Level 2 Isolation Gowns. AR 132. In September 2023, HHS awarded a contract to Defendant-Intervenor New York Embroidery Studio, Inc. (NYES). AR 1308. Plaintiffs challenged the award before the U.S. Government Accountability Office (GAO), but these protests were dismissed in November 2023 after HHS agreed to take corrective action by reevaluating proposals and making a new source selection decision. AR 1636-37, 1646-47.

This matter reawakened in February 2024 when HHS published Amendment 0008 to the solicitation. AR 1916. String King filed a second pre-award protest at the GAO alleging that the amendment improperly modified the evaluation criteria by eliminating shelf life. AR 1923. Similarly, Airboss filed a pre-award protest in this Court on March 7, 2024, alleging that HHS improperly evaluated its proposal and erred in excluding Airboss from the competitive range determination. ECF 1.

Following these protests, HHS again proposed corrective action, including canceling the solicitation, terminating the contract award to NYES, and reviewing and reconsidering the requirement for isolation gowns, to include shelf-life considerations. AR 2253. The GAO then dismissed String King's second GAO protest due to the proposed corrective action. AR 2011-13. However, String King filed a motion to intervene in Airboss's protest before this Court, ECF 29, which was granted. ECF 30. In its initial Complaint, String King primarily challenged the issuance of Amendment 008. ECF 37.

Subsequently, on May 31, 2024, HHS issued Amendment 0009. AR 2395. This amendment superseded the prior solicitation in its entirety (including the amendments) and replaced it with a new solicitation with altered requirements and different evaluation criteria. AR 2395-2448. Among other things, Amendment 0009 revised shelf-life requirements to require that Isolation Gowns have a shelf life of three years and be manufactured within three months of delivery. AR 2410. Despite the establishment of a

[1] The Opinion was issued under seal on May 14, 2025. The parties were directed to propose redactions within 14 days of issuance of the Opinion. No proposed redactions were received. The Court hereby publicly releases the Opinion in full.

three-year shelf life requirement, however, Amendment 0009 omitted previously included language regarding shelf-life as part of the agency's evaluation criteria. *See* ECF 73 at 4-5 (comparing the language in Amendment 0009 with prior versions of the solicitation).

In June 2024, Airboss amended its Complaint to challenge the changes made by Amendment 0009, specifically the elimination of shelf life as an evaluation criterion and the prohibition on accepting gowns that are more than three months old. *See generally* ECF 51. That same month, String King also amended its Complaint to challenge Amendment 0009 as well as the changes formerly made by Amendment 0008. *See generally* ECF 52. String King filed a motion for a preliminary injunction and a temporary restraining order preventing HHS from moving forward with the newly amended solicitation. ECF 54.

This Court denied the motion for preliminary injunction on June 27, 2024, but did not settle the overarching pre-award protest on the merits. ECF 73. Two months later, HHS awarded contracts to six different contractors, including String King and Airboss, with each contractor receiving an award for the same number of gowns. AR 2473-2523. Both String King and Airboss accepted the awards on September 6, 2024. AR 2540, 2615.

Following the award of these contracts, on September 20, 2024, String King and Airboss indicated a willingness to settle this matter after the Government presented their intention to have this case dismissed on the grounds of mootness. ECF 92 at 2. On October 1, 2024, pursuant to Court of Federal Claims Rule 40.1(c), this matter was transferred to the undersigned. ECF 91. On October 3, 2024, after failing to reach a settlement agreement to resolve this litigation, the Government filed the instant Motion to Dismiss. ECF 92.

DISCUSSION

The Government's Motion to Dismiss under RCFC 12(b)(1) asserts that, due to the corrective action taken by HHS which culminated in contract awards to Plaintiff and Plaintiff-Intervenor, there is no longer an active case or controversy, and so this pre-award bid protest is therefore moot and must be dismissed. ECF 92 at 1.

The mootness doctrine is one of several justiciability doctrines originating from the "case or controversy" requirement of Article III of the Constitution.[2] *Fisher v. United States*, 402 F.3d 1167, 1176 (Fed. Cir. 2005). At all stages of litigation, a plaintiff must maintain a personal interest in the dispute. *Uzuegbunam v. Preczewski*, 592 U.S. 279, 282 (2021). The doctrine of standing generally assesses whether that interest exists at the outset, while the doctrine of mootness considers whether it exists throughout the proceedings. *Id.* The Supreme Court has cautioned that "[t]he burden of demonstrating mootness 'is a heavy one.'" *Cnty. of L.A. v. Davis,* 440 U.S. 625, 631 (1979). "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *NEC Corp. v. United States,* 151 F.3d 1361, 1369 (Fed. Cir. 1998) (quoting

[2] "The Court of Federal Claims, though an Article I court, … applies the same standing requirements enforced by other federal courts created under Article III." *Anderson v. United States,* 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003).

Powell v. McCormack, 395 U.S. 486, 496 (1969)). Under the Supreme Court's two-part test, a case is moot if "(1) it can be said with assurance that 'there is no reasonable expectation …' that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Cnty. of L.A.,* 440 U.S. at 631 (alteration in original) (citations omitted) (quoting *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953)).

The Government argues that Plaintiffs "have effectively received all the relief [they] could have obtained in [these] protests." ECF 95 at 5. The Court disagrees. This case remains a live controversy because Plaintiffs have yet to receive the very relief sought in their Complaint. Specifically, for all its corrective action following Plaintiffs' pre-award protests, the Government has still not addressed Plaintiffs' concerns relating to shelf-life. Although Plaintiffs received an award in the latest round of corrective action, such an award cannot be viewed as full relief in the context of Plaintiffs' Complaint. Indeed, Plaintiffs do not simply seek any award—rather, they seek an award *based on proper evaluation criteria*. Plaintiffs contend that they were "denied the competitive advantage [they] would have enjoyed but for HHS's elimination of shelf-life as a consideration, which would have earned [them] a greater share of HHS's requirements." ECF 93 at 6. Specifically, String King contends 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." ECF 94 at 4. Plaintiff's arguments that procurement errors reduced the size of their overall contract award is sufficient to find that Plaintiffs maintain a legally cognizable interest in the outcome of this case even considering their contract award. *See NEC Corp.,* 151 F.3d at 1369 (noting a case is not moot when an intervening event satisfies some of the plaintiff's concerns if other consequences of defendants' actions remain). Given Plaintiffs' economic interest in a larger portion of the contract award, coupled with the fact that the Court has never addressed the crux of Plaintiffs allegations that the Government's procurement process was arbitrary and capricious due to the decreased weight of shelf-life in the evaluation criteria, the Court simply cannot find that the Government met its heavy burden of demonstrating that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Cnty. of L.A.,* 440 U.S. at 633. In fact, the Government's reply brief appears to concede that the Court could return the procurement process to the status quo by terminating the contract awards, which it simply dismisses as a result that plaintiffs would not want. *See* ECF 95 at 5. Accordingly, the Government's Motion to Dismiss on grounds of mootness is denied.

CONCLUSION

For the foregoing reasons, the Government's Motion to Dismiss (ECF 92) is **DENIED**. The parties **SHALL** submit a joint status report on or before June 13, 2025, including a proposal for further proceedings.

IT IS SO ORDERED.

PHILIP S. HADJI
Judge