IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COAST PROFESSIONAL, INC., NATIONAL RECOVERIES, INC., ENTERPRISE RECOVERY SYSTEMS, INC., and PIONEER CREDIT RECOVERY, INC.,	)	
Plaintiffs,	)	**BID PROTEST**
v.	)	**No. 15-207C**
	)	**(Judge Braden)**
THE UNITED STATES,	)	
Defendant,	)	
and	)	
FINANCIAL MANAGEMENT SYSTEMS. INC., ACCOUNT CONTROL TECHNOLOGY, INC., CONTINENTAL SERVICE GROUP, INC., WINDHAM PROFESSIONALS, INC., and GC SERVICES LIMITED PARTNERSHIP,	)	
Defendant-Intervenors.	)	

DEFENDANT'S MOTION TO DISMISS

CHAD A. READLER
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, Jr.
Director

s/ Reginald T. Blades, Jr.
REGINALD T. BLADES, Jr.
Assistant Director

OF COUNSEL:

s/ Michael D. Snyder
MICHAEL D. SNYDER
JANA MOSES
Trial Attorneys
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Tel. (202) 616-0842

JAY URWITZ
JOSE OTERO
SARA FALK
Attorneys
United States Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

February 24, 2017

Attorneys for Defendant

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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Defendant-Intervenors.	)	

DEFENDANT'S MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of this Court (RCFC), defendant, the United States, respectfully requests that this Court dismiss the amended complaints filed by plaintiffs, Coast Professional, Inc. (Coast), National Recoveries, Inc. (NRI), Enterprise Recoveries Systems, Inc. (ERS), and Pioneer Credit Recovery, Inc. (Pioneer) (collectively, plaintiffs).

In light of the remedial action taken by the Department of Education (Education), plaintiffs' claims challenging the actions of the department are moot. Specifically, because the contracting officer will reevaluate the four plaintiffs for an award term extension, their primary claims are moot. Declaration of Patty Queen Harper, the contracting officer (Harper Decl.)

¶ 5 (attached hereto at Exhibit A). As also explained below, to the extent plaintiffs have raised additional claims that are not mooted by Education's remedial action, these claims should be dismissed pursuant to Rule 12(b)(6), because plaintiffs have failed to state any additional viable claims.

STATEMENT OF FACTS

In May 2008, Education issued a Request for Quotes under Solicitation ED-08-R-0052 for collection and administrative resolution services on defaulted student loans. With that solicitation, the Department planned to issue task orders to PCAs under existing General Services Administration (GSA) Financial and Business Services (FABS) schedule contracts.

In or about April 2009, the Department selected 22 PCAs and issued 22 task orders. Seventeen of those task orders went to firms in the unrestricted pool; the other five firms were selected from the small business pool. Plaintiffs Coast and NRI competed under the small business pool and received task orders. Plaintiffs ERS and Pioneer, as well as all the defendant-intervenors, competed in the unrestricted pool and received task orders. The terms and conditions of all 22 task orders from 2009 are virtually identical.

Under clause H.4 of the task orders, Education may extend performance of some PCAs beyond the base term and last optional ordering period. AR Tab 4a, at 173-74.[1] The 2009 task orders also incorporated the specific quantitative performance metrics outlined in Education's

[1] "AR Tab __" refers to pages in the corrected administrative record that the Government filed on March 12, 2015.

Competitive Performance Continuous Surveillance (CPCS) system.[2] AR Tab 4a, at 174 (clause H.5). A CPCS score of 85 or more made a contractor eligible for consideration for an award term extension pursuant to clause H.4 of the task orders. Award term extensions were intended as recognition for high-quality performance.

In December 2014, Education's Federal Student Aid (FSA) component began conducting focused reviews of all 22 PCAs to determine whether, and at what frequency, the PCAs may have provided misinformation to borrowers in violation of consumer protection laws (2015 focused review), specifically the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, and the Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) statute, 12 U.S.C. § 5536. FSA calculated an error rate for each PCA by tallying the number of calls containing at least one violation.

Based on the results of the focused review, the contracting officer, in consultation with other Education officials, determined that the four plaintiffs (as well as one other PCA) were ineligible to receive award term extensions under clause H.4 of the task orders. AR 1090-94. On February 20, 2015, the contracting officer notified each plaintiff by telephone that it would not receive an award term extension task order due to unacceptably high rates of consumer protection law violations, regardless of its CPCS score. *Id*. On March 3, 2015, the contracting officer sent each plaintiff an email memorializing the information that she had provided during the calls. AR 1139-47.

In March 2015, each plaintiff filed a separate action in this Court, which the Court subsequently consolidated into the current action. The PCAs that were awarded extensions

[2] Clause H.4 was modified in all task orders in 2011. AR Tab 5, at 469. The only change was a modification to the minimum performance rating required to be eligible for an extension. *Id*.

intervened as defendants. Following briefing and oral argument, the trial court dismissed the cases, finding that the Court lacked jurisdiction. Plaintiffs ERS and Pioneer each filed an appeal in the United States Court of Appeals for the Federal Circuit.

In July 2016, the Federal Circuit vacated the trial court's decision and remanded the matter. The Federal Circuit held that Education's decisions to extend the contracts of some of the PCAs, but not others, gave rise to bid protest jurisdiction under 28 U.S.C. § 1491(b). *Coast Prof'l, Inc. v. United States, Fin. Mgmt. Sys., Inc.*, 828 F.3d 1349, 1356-57 (Fed. Cir. 2016). On remand, plaintiffs have filed amended complaints, motions for judgment on the administrative record, and motions to supplement the administrative record.

The Government has recently concluded that Education will take corrective action. To that end, the contracting officer will reevaluate the plaintiffs for award term extensions, and the 2015 focus review will not be considered as part of the reevaluation. *See* Harper Decl. ¶ 5.

ARGUMENT

These consolidated protests should be dismissed for lack of subject matter jurisdiction, because Education has taken corrective action that moots plaintiffs' primary claims. Moreover, to the extent plaintiffs have raised claims that are not mooted by the corrective action, any such claims should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

In their prayers for relief, plaintiffs make similar requests, differing to some extent from plaintiff to plaintiff. *See* Coast Amended Compl. at 9; ERS Amended Compl. at 17; NRI Amended Compl. at 35; Pioneer Amended Compl. at 22-23 (Prayers for Relief). The plaintiffs' prayers for relief, when considered together, request the following relief: (1) an award of an award term extension, commensurate in scope and length with the extensions awarded to

intervenors, in accordance with clause H.4 of the 2009 task orders; (2) a finding that the 2015 focused review and the subsequent decision not to issue plaintiffs extensions were arbitrary and capricious; and (3) an award of bid and proposal costs, as well as attorney fees. *See id*. Although each plaintiff's prayer for relief is distinct (for example, only ERS and Pioneer include requests for attorney fees), these three components comprise the bulk and crux of the four plaintiffs' prayers for relief.

As we explain below, the first two components of plaintiffs' claims for relief—for an award of an award term extension, and for a finding that the 2015 focused review and subsequent decision not to issue plaintiffs extensions were arbitrary and capricious—are mooted by Education's corrective action (we refer to these two components of plaintiffs' claims as their primary claims). As we further explain below, the balance of plaintiffs' claims should be dismissed for failure to state a claim upon which relief may be granted.

I. This Court Does Not Possess Jurisdiction To Consider Plaintiffs' Mooted Claims

Because this Court does not have jurisdiction to decide moot claims, plaintiffs' mooted claims should be dismissed.

A. This Court Does Not Have Jurisdiction To Consider Moot Claims

It is well-established that justiciability, including mootness, is a question of subject-matter jurisdiction. *CW Gov't Travel, Inc. v. United States*, 46 Fed. Cl. 554, 556 (2000) (citing *N.C. v. Rice*, 404 U.S. 244, 246 (1971)). "The mootness doctrine originates from the 'case or controversy' requirement of Article III of the United States Constitution." *Northrop. Corp., Northrol Elecs. Sys. Div. v. United States*, 27 Fed. Cl. 795, 800 n.4 (1993) (citing *De Funis v. Odegaard*, 416 U.S. 312, 316 (1974)). Although the jurisdiction of this Court, as an Article I court is not limited by the "case or controversy" requirement of Article III, this Court and other

Article I courts have adopted many justiciability precepts based upon prudential grounds. *See, e.g., Schooling v. United States*, 63 Fed. Cl. 204, 209 (2004) (dismissing case for lack of subject-matter jurisdiction because claims asserted in the complaint were moot); *CW Gov't Travel*, 46 Fed. Cl. At 558 (citing *Zevalkink v. Brown*, 102 F.3d 1236, 1243 (Fed. Cir. 1996)) (granting motion to dismiss for mootness); *see also Anderson v. United States*, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003) ("The Court of Federal Claims, though an Article I court . . . applies the same standing requirements enforced by other federal courts created under Article III.").

The Supreme Court has stated that "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Cnty of L.A. v. Davis*, 440 U.S. 625, 631 (1979) (citing *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). "[J]urisdiction, properly acquired, may abate if the case becomes moot because: (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." *Davis*, 440 U.S. at 631 (citations omitted).

B. Education's Corrective Action Moots Plaintiffs' Primary Claims

Pursuant to Education's corrective action, Education will reevaluate each plaintiff for an award term extension, and the 2015 focused review will not be considered as part of the reevaluation. *See* Harper Decl. ¶ 5. Dismissal is warranted in this circumstance, because the alleged prejudicial aspect of the initial evaluation—the 2015 focused review—will not be considered in the reevaluation.

Specifically, Education will reevaluate plaintiffs in accordance with the terms of the 2009 task orders, including clause H.4, as if Education had not previously declined to issue the plaintiffs award term extensions. *See Davis* 440 U.S. at 631; *Chapman Law Firm Co. v. United*

States, 490 F.3d 934, 940 (Fed. Cir. 2007) ("When, during the course of litigation, it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should generally be dismissed."). Given this corrective action to reevaluate plaintiffs for award term extensions without considering the 2015 focus review, plaintiffs' primary claims are no longer live and should be dismissed. *See* Coast Am. Compl. at 9; ERS Am. Compl. at 17; NRI Am. Compl. at 35; Pioneer Am. Compl. at 22-23 (Prayers for Relief).[3]

Relatedly, in the event that a plaintiff is awarded an extension as a result of the corrective action, the plaintiff's award term extension task order will be governed by the same material terms as the 2015 award term extension task orders. *See* Harper Decl. ¶ 5. For example, as with the award term extensions provided to intervenors, any award term extension that a plaintiff receives will have a maximum term of 24 months, *see id*., and will end when performance begins on the next set of task orders that were awarded in December 2016 (the awards of those task orders are currently under protest at the Government Accountability Office).[4]

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[3] To the extent plaintiffs have requested that the Court should "award" them an award term extension—*see* ERS Am. Compl. at 17; Pioneer Am. Compl. at 22-23—such claims should also be dismissed on the independent basis that this Court does not have the authority to award a contract to a party. *See Innovative Res. v. United States*, 63 Fed. Cl. 287, 290 n.5 (2004) (The Court is "without power to award a contract.") (citation omitted); *CCL Serv. Corp. v. United States*, 43 Fed. Cl. 680, 683 (1999) ("[D]eference [is] to be given to the agency and the court [is] without power to award the contract.") (citation omitted); *see also Parcel 49C Ltd. P'ship v. United States*, 31 F.3d 1147, 1153 (Fed. Cir. 1994) ("[T]he trial court did not order the award of the contract to [the plaintiff]. Instead, the trial court properly enjoined the illegal action and returned the contract award process to the *status quo ante* any illegality.");

[4] Clause H.4 of the 2009 task orders states that "[i]t is the Government's intent to time any award-term extension so that the extension period will coincide with the award date of the next round of Task Orders." AR333-34 (Task Order at Clause H.4(b)). As the contracting officer explained in a prior declaration, Education's consistent application of this clause is for the end of the extensions to "coincide with" the beginning of performance of the next round of task orders. *See* Queen Harper Decl. of Mar. 25, 2015, Dk. No. 118 at PDF page 71 ¶ 27 ("[T]he extended performance will end once the new task orders are awarded under the follow-on

In sum, plaintiffs will be reevaluated for the award term extensions in accordance with the terms of the 2009 task orders, the 2015 focused review will not be considered as part of the reevaluation, and any award term extensions received by the plaintiffs will be governed by the same material terms as the award term extensions that were issued to the intervenors in 2015. *See* Harper Decl ¶ 5. Thus, plaintiffs' primary claims are moot. *See* Coast Amended Compl. at 9; ERS Amended Compl. at 17; NRI Amended Compl. at 35; Pioneer Amended Compl. at 22-23 (Prayers for Relief).[5] Accordingly, there is no basis for the Court to retain jurisdiction over plaintiffs' primary claims, and the claims should be dismissed.[6]

II. Plaintiffs' Remaining Claims Should Be Dismissed Because Plaintiffs Have Failed To State A Claim Upon Which Relief May Be Granted

The court should dismiss plaintiffs' remaining claims because plaintiffs have failed to state a claim upon which relief may be granted.

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procurements and the firms competitively selected thereunder are ready to begin work."); *see also id*. at PDF page 68 ¶ 17. We acknowledge that the Federal Circuit, in *dicta*, had a different view of this clause, observing that clause "H.4 expressly anticipates . . . the award-term extensions will issue concurrently with Task Orders issued pursuant to additional rounds of procurement . . . ." *Coast*, 828 F.3d at 1355. The Federal Circuit's observation is not consistent with the fact that the April 2015 extensions were issued long before the "next round" of task orders were awarded in December 2016.

[5] As an alternative request for relief, ERS requests that Education be enjoined from assigning additional accounts to intervenors under their extension contracts. ERS Am. Compl. at 17. Because ERS's primary claims have been mooted, this claim, which it asserted only in the alternative, should be dismissed. Moreover, intervenors extensions end on April 21, 2017 in any event, and in the event that one or more of the plaintiffs receive award term extensions, they will be entitled to a "fair opportunity" to share in accordance with the contractual terms outlined in their contracts with Education. *See* Federal Acquisition Regulation, 48 C.F.R. § 16-505(b) ("The contracting officer must provide each awardee a fair opportunity to be considered for each order . . . .").

[6] In its prayer for relief, Pioneer requests that the Court retain "continuing jurisdiction" over this matter. Pioneer Am. Compl. at 23. Because, for the reasons explained in this motion, Pioneer's claims are moot and should otherwise be dismissed, the Court should not grant this relief.

A. Standard For Rule 12(b)(6) Of The RCFC

Dismissal for failure to state a claim upon which relief may be granted is appropriate when the plaintiff's alleged facts do not entitle it to a remedy. *Godwin v. United States*, 338 F.3d 1374, 1377 (Fed. Cir. 2003). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007) (citations omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Griffin Broadband Communs., Inc. v. United States*, 79 Fed. Cl. 320, 323 (2007). "Legal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness." *Figueroa v. United States*, 57 Fed. Cl. 488, 497 (2003). Relatedly, a claim should be dismissed if the court lacks the power to decide the matter and award relief, *i.e.*, if the basis for the claim presents a non-justiciable or non-reviewable issue. *See Sargisson v. United States*, 913 F.2d 918 (Fed. Cir. 1990).

B. Plaintiffs' Remaining Claims Are Not Claims Upon Which Relief May Be Granted

Certain of the plaintiffs have requested bid and proposal costs, as well as recovery of attorney fees. *See* Coast Am. Compl. at 9; ERS Am. Compl. at 17; Pioneer Am. Compl. at 22-23. As explained below, any such claims should be dismissed for failure to state a claim upon which relief may be granted.

Regarding bid and proposal costs, all four plaintiffs were awarded and performed the underlying 2009 task orders, and none of the plaintiffs incurred any bid or proposal costs in connection with the separate award term extensions. Thus, just as a protestor of a sole source award does not incur—and therefore may not recover—any bid and proposal costs, none of the

plaintiffs here are entitled to recover any such costs. *See Innovation Dev. Enters. of America v. United States*, 114 Fed. Cl. 213, 223 (2014), *aff'd*, 600 Fed. Appx. 743, 746 (2015) (holding that a potential bidder who successfully protested a sole source award could not recover any monetary damages because it did not submit or prepare a bid proposal). Moreover, an agency "reevaluation restores to a [protestor] its substantial chance to receive the contract award," and such reevaluation "[t]ypically . . . eliminate[s] the basis for an award of bid and preparation and proposal costs, as the investment in the proposal is no longer a needless expense." *Beta Analytics Int'l, Inc. v. United States*, 75 Fed. Cl. 155, 159 (2007) (quotation omitted). In other words, if a protester is reinstated for consideration in the procurement process, it should be required to bear the costs of participating in that process, like any competitor. *See White v. Delta Construction Int'l., In*c., 285 F.3d 1040, 1043 (Fed. Cir. 2002); *see also Bannum, Inc. v. United States*, 56 Fed. Cl. 453, 462 (2003) (holding that assessment of "possible entitlement to bid preparation costs cannot be determined until the conclusion of the procurement process").

Given that plaintiffs did not incur any bid and proposal costs in connection with the award term extensions, coupled with the fact that plaintiffs will be reevaluated for the extensions as a result of the corrective action, there is no basis upon which to consider plaintiffs for such costs. Indeed, plaintiffs do not assert that they incurred such costs. Accordingly, plaintiffs' claims for bid and proposal costs should be dismissed for failure to state a claim upon which relief may be granted, because they fail to state facts that could form the premise for such a claim. *Godwin*, 338 F.3d at 1377; *see also Twombly*, 127 S. Ct. at 1964-65.

To the extent some of the plaintiffs have also requested attorney fees, the same result is appropriate, for similar reasons. In the United States, under the "American Rule," "parties are ordinarily required to bear their own attorney fees—the prevailing party is not entitled to collect

from the loser." *Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Servs*., 532 U.S. 598, 620 (2001). Pursuant to the American Rule, a court may award fees to a prevailing party only by explicit statutory authority. *Id*. In suits against the United States, the prevailing party may not recover attorney fees absent a waiver of sovereign immunity. *Consumers Power Co. v. Dep't of Energy*, 894 F.2d 1571, 1578 (Fed. Cir. 1990).

Once such waiver is the Equal Access to Justice Act, 28 U.S.C. § 2412 (EAJA). Pursuant to EAJA, the prevailing party must submit the necessary application under 28 U.S.C. § 2412(d)(1)(B) and establish that it meets the EAJA's requirements before the court can award fees or expenses. *KWR Construction, Inc. v. United States*, 124 Fed. Cl. 345, 364 (2015). Because the award of EAJA costs depends upon which party prevails in court, an EAJA petition that is filed prior to final judgment in a case is premature and should be dismissed without prejudice. *White Buffalo Const., Inc. v. United States*, 101 Fed. Cl. 1, 23 (2011).

Moreover, when the court dismisses a protest because the agency takes voluntary corrective action, the protestor is not "a prevailing party." *Rice Servs., Ltd. v. United States*, 405 F.3d 1017, 1027 (Fed. Cir. 2005) (finding protestor was not a prevailing party when the trial court "entered its order because the government had voluntarily abandoned its position" and the trial court "did not state that it was entering the order as a merits adjudication in the face of a continuing controversy. . . ."); *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, 1380 (Fed. Cir. 2002) (agency corrective action following court's preliminary comments about merits of protestor's TRO did not render protestor a prevailing party); *see also Chapman Law Firm Co. v. Greenleaf Const. Co*., 490 F.3d 934, 940 (Fed. Cir. 2007) (trial court should not have entered judgment for plaintiffs, which arguably would have allowed plaintiff to claim prevailing party status, because "[t]he revised corrective action adequately addressed the effects of the

challenged action, and the Court of Federal Claims had no reasonable expectation that the action would recur. Accordingly, the Court of Federal Claims should have dismissed the case.").

In sum, because plaintiffs' claims for attorney fees are premature, and because Education's corrective action moots plaintiffs' primary claims, plaintiffs' claims for attorney fees should be dismissed for failure to state a claim upon which relief may be granted.

CONCLUSION

For these reasons, we respectfully request that the Court dismiss the plaintiffs' amended complaints.[7]

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, Jr.
Director

s/ Reginald T. Blades, Jr.
REGINALD T. BLADES, Jr.
Assistant Director

OF COUNSEL:

s/ Michael D. Snyder
MICHAEL D. SNYDER
JANA MOSES
Trial Attorneys
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Tel. (202) 616-0842
Fax. (202) 305-7643
Attorneys for Defendant

JAY URWITZ
JOSE OTERO
SARA FALK
Attorneys
United States Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

February 24, 2017

[7] We respectfully request that briefing on the merits be suspended while this motion is pending. Should the Court deny this motion, we respectfully request the opportunity to coordinate with the parties in an effort to agree upon a revised schedule, regarding which we will promptly inform the Court.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

COAST PROFESSIONAL INC., NATIONAL RECOVERIES, INC. ENTERPRISE RECOVERY SYSTEMS, INC., and PIONEER CREDIT RECOVERY, INC.		
Plaintiffs,		No. 15-207-C
v.		(Judge Braden)
THE UNITED STATES,		
Defendant,		
and		
FINANCIAL MANAGEMENT SYSTEMS, INC., ACCOUNT CONTROL TECHNOLOGY, INC., CONTINENTAL SERVICE GROUP, INC., WINDHAM PROFESSIONALS, INC., and GC SERVICES LIMITED PARTNERSHIP,		
Defendant-Intervenors.		

DECLARATION OF PATTY QUEEN-HARPER

1. I, Patty Queen Harper, am the Contracting Officer for the U.S. Department of Education Debt Collection and Administrative Resolution Services. Pursuant to 28 U.S.C. § 1746 (2006), I submit this declaration in support of defendant's motion to dismiss the above-captioned case.

2. Currently, I have been appointed as the Contracting Officer for Solicitation No. ED-08-R-0052. It was under that Solicitation that the Department issued several Task Orders in 2009 for performance of private collection agency (PCA) services. Clause H.4 of the Task Orders provided for issuance of new Award Term

Extension (ATE) task orders, at the discretion of the Department. On April 2015, I issued ATE Task Orders to five PCAs.

3. I have been informed of the protests brought by Coast Professional, Inc (Coast), Pioneer Credit Recovery, Inc (Pioneer), Enterprise Recovery System (ERS) and National Recoveries, Inc. (NRI), before the United States Court of Federal Claims.

4. While I do not agree with the allegations made in the protest, I have nonetheless decided to take corrective action in response to the protest.

5. I have decided that:

a. The decision not to issue award-term-extension (ATE) task orders to the four plaintiffs (Coast, Pioneer, ERS, and NRI) will be reconsidered;

b. The contracting officer's decision regarding whether each plaintiff should receive an ATE task order will be made in accordance with the terms and conditions of Clause H.4 and other relevant clauses in plaintiffs' 2009 Task Orders;

c. The results of the 2015 focused review on Fair Debt Collection Practice Act (FDCPA)/Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) compliance will not be considered in the reevaluation of the plaintiffs for the ATE task orders.

d. In accordance with Federal Acquisition Regulation Subpart 9.1, a responsibility determination will be conducted before award of any ATE task order to any plaintiff;

e. Any ATE task order awarded as a result of the reevaluation shall incorporate the same material terms as the 2015 ATE task orders, including, but not limited to, payment terms, allocations, the need to meet and continue meeting all performance and security requirements (e.g. Authority to Operate, Personal Identity Verification Interoperable, Government call monitoring, etc.) ;

f. Any new ATE task order awarded to a plaintiff may last up to a maximum of 24 months, the same as the terms of the ATE task orders awarded in 2015;

g. If an ATE task order is awarded as a result of the reevaluation and the awardee currently holds a debt collection contract with the Department, then that awardee must decide whether to accept the ATE task order (and perform all work under the ATE task order) or maintain their existing contract, since an entity may only hold one debt collection contract with the Department per Clause H.9 of the 2009 task orders, entitled Organizational Limit on Contracts.

6. I declare under penalty of perjury that the foregoing is true and correct. Executed on this 22 day of February, 2017.

Patty Queen-Harper
Contracting Officer