

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BID PROTEST

COMPREHENSIVE HEALTH SERVICES, LLC)
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 Plaintiff,)
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 v.)
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UNITED STATES OF AMERICA)
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 Defendant.)
 _____)

Case No. 20-1585 C

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

CHS seeks declaratory and injunctive relief to prohibit the United States Department of Homeland Security, Federal Emergency Management Agency (“FEMA” or the “Agency”) from unlawfully proceeding with the performance of a sole source contract in the amount of nearly \$50 million awarded to Wellness Coaches USA, LLC (“Wellness Coaches”) under Solicitation No. 70FB7021Q00000001 (the “Solicitation”). CHS filed a protest at the United States Government Accountability Office (“GAO”) on November 3, 2020 challenging the sole source award and GAO notified FEMA of the protest that same day, thereby triggering the automatic stay of performance under the Competition in Contracting Act (“CICA”), 31 U.S.C. § 3553(d). FEMA notified CHS on November 10, 2020 that FEMA had determined “that urgent and compelling circumstances per FAR 33.104(c)(2)(ii) require the performance to continue” under the sole source contract during the pendency of the GAO protest. Because FEMA’s decision to override the CICA stay was arbitrary, capricious, and contrary to law, this Court must enjoin and

restrain FEMA from proceeding with performance and must declare that FEMA's decision is invalid and has no effect.

JURISDICTION AND STANDING

1. This is a civil action for declaratory and injunctive relief pursuant to the Tucker Act, 28 U.S.C. § 1491(b)(1). This Court has original jurisdiction over challenges to agency procurement actions pursuant to 28 U.S.C. § 1491(b)(1), which allows the Court to hear “an action by an interested party objecting to ... any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.” Challenges to alleged violations of the CICA automatic stay provision are within this jurisdiction. *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1290 (Fed. Cir. 1999).

PARTIES

2. Plaintiff CHS is a Virginia-based limited liability company. CHS is a prospective bidder for the procurement at issue and the party whose GAO protest triggered the automatic CICA stay. CHS's direct economic interest is affected by FEMA's improper sole source contract award and the decision not to stay performance of that contract as required by CICA. Accordingly, CHS is an interested party to this protest.

3. Defendant is the United States of America, its agents, officers, and employees in their official capacities, acting by and through FEMA.

PENDING GAO PROCEEDING

4. Currently pending before GAO is CHS's protest (Comp. Gen. B-419409.1) filed on November 3, 2020, which challenges FEMA's decision to issue a sole source contract to Wellness Coaches. CHS's protest, which was timely filed within ten days of FEMA's

publication of the Justification and Approval for the sole source on Friday, October 30, 2020, and GAO's notification to the Agency, triggered the automatic CICA stay.

5. CHS's protest contends that FEMA cannot show that use of other than full and open competition is justified by any "unusual and compelling urgency" and that FEMA's justification for the sole source award impermissibly rests on a lack of advance planning.

STATEMENT OF THE CASE

I. The Procurement

1. FEMA seeks to acquire commercial services to conduct rapid antigen coronavirus disease 2019 ("COVID-19") testing of federal responders, partners, and other individuals designated to receive tests by the government.

2. FEMA seeks equipment and personnel to conduct on-site COVID-19 testing at any designated FEMA facility or disaster site where FEMA employees are located throughout the United States and its territories, including FEMA headquarters in Washington, D.C.

II. The September Solicitation and CHS's GAO Protest

3. On September 22, 2020 at 3:13 p.m., FEMA issued Solicitation No. 70FB7020Q00000056 (the "RFQ") for the services described above. (Exs. A, B.) (original Solicitation, posting notice).

4. In response to the 58-page RFQ, FEMA required potential offerors to submit bids the same day, September 22, 2020, by 9:00 p.m., allowing potential offerors just 5 hours, 47 minutes to respond. (Ex. A.)

5. On September 23, 2020, CHS personnel contacted the FEMA contracting officer to determine whether FEMA's limited response time for submitting bids had been an administrative error. (Ex. C.)

6. The contracting officer confirmed the RFQ reflected the Agency's intent, stating, "Yes, the combined synopsis/solicitation was released on 9/22/2020 at 3:13 PM EST with responses due by 9:00PM EST the evening of 9/22/2020. The solicitation is now closed." (*Id.*)

7. Due to the incredibly brief window to submit bids and having received no advanced warning that the RFQ would be released, CHS was unable to submit a quotation.

8. On September 28, 2020, CHS filed a protest with the Government Accountability Office ("GAO") challenging the terms of the September 22, 2020 RFQ. (Ex. D, CHS September 28, 2020 protest without attachments.)

9. CHS challenged the RFQ as unduly restrictive of competition because the RFQ permitted prospective vendors less than six hours to submit quotations. (*See generally id.*)

10. GAO docketed CHS's September 28, 2020 protest as Comp. Gen. B-419206.1.

11. In response to CHS's protest, FEMA counsel sent an email dated September 29, 2020 to CHS counsel stating the Agency would take corrective action consisting of (a) issuing a stop work order and cancelling the Blanket Purchase Agreement ("BPA") awarded to Wellness Coaches in response to the September 22, 2020 RFQ, and (b) issuing a new solicitation giving prospective offerors approximately three days to submit quotes. (Ex. E.)

12. CHS, through counsel, indicated it would not object to the corrective action as long as the promised solicitation permitted at least three business days to respond, which the Agency counsel confirmed it would. (*See* Comp. Gen. B-419206.1, EPDS No. 7.)

13. Also on September 29, 2020, FEMA filed a motion to dismiss CHS's September 28, 2020 protest due to the Agency's decision to take corrective action in response to the protest. (Ex. F.)

14. In its September 29, 2020 filing, FEMA outlined its planned corrective action to GAO. (*Id.*)

15. It was through FEMA's September 29, 2020 notice of corrective action that CHS learned Wellness Coaches had managed somehow to submit a response to the September 22, 2020 RFQ, and FEMA had deemed the response compliant, despite the less-than-six-hour turnaround time for potential offerors to review the solicitation and draft and submit a proposal.¹

16. Even more remarkably, publicly available information from USASpending.gov and the Federal Procurement Data Systems ("FPDS") indicates Wellness Coaches had never before received a federal contract award. (Ex. G.)

17. On September 30, 2020, CHS notified GAO that CHS did not object to the Agency's planned corrective action. (*See* Comp. Gen. B-419206.1, EPDS No. 7.)

18. The same day, GAO dismissed CHS's September 28, 2020 protest as academic. (*See* Comp. Gen. B-419206.1, EPDS No. 8; *see also* Ex. H, GAO public decision dismissing CHS's protest).

III. FEMA Reverses Course, Issues Sole Source Award

19. On October 1, 2020, FEMA counsel requested a conference call with CHS counsel, during which FEMA counsel stated that the Agency's position regarding its intended corrective action had changed since the previous day. (*See* Ex. I at 4, CHS November 3, 2020 protest describing conference call).

¹ FEMA's November 10, 2020 determination to override the CICA stay (discussed below) states that a second offeror, Safety Management Systems, LLC, timely submitted a quote in response to the September 22, 2020 RFQ. (Ex. L at 3.) In response to the RFQ, FEMA made award to Wellness Coaches on September 25, 2020. (*Id.*)

20. FEMA counsel stated the Agency intended to cancel the RFQ and was considering issuing a sole source contract for the requirements sought in the RFQ challenged by CHS in its September 28, 2020 protest. (*Id.*)

21. FEMA counsel further stated that, in response to the CHS protest, FEMA reassessed its requirements and believed the RFQ did not reflect FEMA's needs, which FEMA now estimated to be valued at approximately \$40-\$50 million. (*Id.*)

22. According to Agency counsel, FEMA now intended to procure the services via one sole source contract or multiple sole source contracts, while stressing that FEMA was still considering its options with respect to the procurement. (*Id.*)

23. FEMA counsel indicated that the decision not to abide by the terms of the announced corrective action had been made on September 29, 2020, after FEMA filed its motion to dismiss for corrective action in Comp. Gen. B-419206.1. (*Id.*)

24. While FEMA counsel stated during the October 1, 2020 conference call that he had attempted to call CHS counsel and GAO late in the evening of September 29, 2020 to alert the parties of the change, he left no voicemails, sent no emails, and filed nothing on GAO's Electronic Protest Docketing System ("EPDS") to alert CHS or GAO of its intent not to take corrective action before GAO dismissed the protest on September 30, 2020. (*Id.*)

25. FEMA counsel stated that, if FEMA did move forward with a sole source award, the Agency would provide CHS with a courtesy copy of the Justification and Approval ("J&A") for the sole source award. (Ex. I at 4.)

26. On October 7, 2020, CHS counsel requested an update from FEMA counsel, who responded on October 9, 2020 that he was unable to provide a response due to "the immediate

landfall of Hurricane Delta on the gulf coast of Louisiana and the activation of the National Response Coordination Center.” (*Id.* at 5.)

27. FEMA counsel noted again, however, that CHS would receive a courtesy copy of the J&A at the time of posting. (*Id.*)

28. CHS counsel requested confirmation that the J&A would be released before issuance of any sole source award but received no response. (*Id.*)

29. Unbeknownst to CHS, FEMA had issued the sole source award to Wellness Coaches on October 3, 2020.

30. On Friday, October 30, 2020 at approximately 7:00 p.m., FEMA posted its J&A and Determination and Findings (“D&F”) for award of a \$48 million sole source BPA for rapid COVID-19 testing to Wellness Coaches.²

31. Both documents are signed and dated October 3, 2020, three days after GAO dismissed CHS’s protest as academic because FEMA had represented it would issue a new solicitation to procure the services using full and open competition. (*See* Ex. J, Agency J&A; Ex. K, Agency D&F.)

32. The October 3, 2020 J&A indicated the \$48 million BPA would begin the same day, *i.e.*, October 3, 2020. (Ex. J at 3.)

33. FEMA stated in the October 3, 2020 J&A that Wellness Coaches is the only contractor capable of meeting the Agency’s requirements: “Wellness Coaches is the only firm known to be able to provide these services immediately with the required expertise in testing, rapidity of deployment capability, and turnaround time of tests.” (*Id.*)

² *See*

https://beta.sam.gov/opp/2028d546b9324f03b0271c9d02ea656c/view?index=opp¬ice_type=u&page=1 (last accessed November 11, 2020).

34. In the D&F, the Agency stated it was granting authority to the Head of Contracting Activity (“HCA”) to award a sole source contract for on-site COVID-19 testing due to “unusual and compelling urgency” under 41 U.S.C. § 3304(a)(2) and FAR 6.302-2. (Ex. K at 1.)

35. FEMA asserted the sole source award was in response to the COVID-19 pandemic, stating “with the declared pandemic on March 11, 2020, a national emergency via Presidential Proclamation on March 13, 2020, and the restricted COVID-19 environment, expedited delivery of this service is key in support of response and recovery.” (*Id.*)

IV. GAO Protest and CICA Override

36. On November 3, 2020, CHS filed a protest with GAO challenging the Agency’s decision to forego full and open competition and issue the nearly \$50 million BPA to Wellness Coaches. (*See Ex. I, CHS protest dated November 3, 2020 without exhibits.*)

37. As CHS noted in its November 3, 2020, protest, although FEMA relied on purported “unusual and compelling urgency” to issue the sole source award to Wellness Coaches, FEMA failed to provide any reasonable basis for foregoing full and open competition. (*See generally id.*)

38. CHS further noted FEMA could not support its assertions that: (a) Wellness Coaches is the only contractor capable of providing rapid COVID-19 testing; and (b) FEMA has a purported “urgent” need for testing seven months into the COVID-19 pandemic. (*Id.*)

39. CHS based its protest on two primary arguments: (a) FEMA’s sole source award is contrary to statute and regulation and is an abuse of discretion as FEMA cannot show use of other than full and open competition is justified (*id.* at 7-9); and (b) FEMA’s sole source award

to Wellness Coaches rests on a lack of advance planning, contrary to statute and regulation (*id.* at 9-10.)

40. GAO docketed CHS's November 3, 2020 protest as Comp. Gen. B-419409.1.

41. On November 10, 2020, the Agency provided notice to GAO that FEMA had determined to override the automatic CICA stay required by 31 U.S.C. § 3553(d)(3), 4 C.F.R. § 21.6, and 48 C.F.R. § 33.104(c) during the pendency of CHS's protest. (*See* Comp. Gen. B-419409.1, EPDS No. 7.)

42. FEMA counsel provided notice to CHS counsel of the Agency's determination to override the CICA stay the same day. (Ex. L.)

43. According to FEMA's Head of Contracting Activity:

[U]rgent and compelling circumstances per FAR 33.104(c)(2)(ii) require the performance to continue with respect to the contract awarded to Wellness Coaches, LLC pursuant to FEMA's Justification for Other Than Full and Open Competition dated October 3, 2020, for COVID-19 testing at FEMA sites directly responding to and/or aiding recovering from a Presidentially declared disaster or emergency and that these circumstances will not permit waiting for the Government Accountability Office (GAO) to adjudicate [CHS's November 3, 2020] protest.

(*Id.* at 1.)

44. FEMA repeated its assertions from the October 3, 2020 J&A that FAR 6.302-2 (unusual and compelling urgency) supported award of the sole source BPA to Wellness Coaches, which, according to FEMA "was uniquely positioned over all other potential contractors since [Wellness Coaches] had taken substantial steps to ramp up its ability to provide these services after being awarded the prior [September 25, 2020] BPA" (*Id.*)

45. Per FEMA's November 10, 2020 determination, "on October 8, 2020, FEMA awarded a call order to Wellness Coaches USA to provide on-site COVID-19 testing services at

the following locations: a joint field office in Rancho Cordova, California; a joint field office in Windsor Heights, Iowa; a joint field office in Baton Rouge, Louisiana; a Branch 6 office in Pineville, Louisiana; a joint field office in Salem Oregon; and its Personnel Mobilization Center in Dallas, Texas.” (*Id.*)

46. FEMA issued a second call order for on-site COVID-19 testing at FEMA headquarters in Washington, D.C., and, according to FEMA, Wellness Coaches is currently performing testing services under the sole source BPA. (*Id.* at 3-4.)

47. According to FEMA, three purported “risks” justified the decision to override the required CICA stay due to “urgent and compelling circumstances”:

Without testing services for the next 93 days while this GAO protest is pending, FEMA risks not being able to (i) detect positive COVID-19 cases amongst its workforce, (ii) hinder the spread of this deadly disease, as well as (iii) ensure that the current working environment for its employees at its many offices is safe.

(*Id.* at 5.)

48. FEMA further asserts that, if it does not override the automatic stay, it will only be left with three options, none of which FEMA considers “prudent”:

If FEMA did not have the ability to override Comprehensive Health’s CICA stay, then the Agency would only be left with the options of either (i) taking corrective action and competing this requirement with no guarantee as to when the apparent awardee could begin performance, (ii) abiding by this CICA stay and not utilizing these on-site COVID-19 testing services until the near end of winter, or (iii) requesting for GAO to expedite its consideration of Comprehensive Health’s protest.

(Ex. L at 5.)

49. FEMA asserts that overriding the automatic CICA stay is necessary to prevent and hinder the spread of COVID-19 during colder months. (*Id.* at 6.)

50. In the November 10, 2020 determination to override the stay, FEMA states, “Since Wellness Coaches USA began providing these testing services, FEMA detected seven (7)

COVID-19 infections amongst its personnel who would have otherwise reported to work within an enclosed FEMA facility” (*Id.*)

V. The Impact of FEMA’s Actions on Any Urgency

51. FEMA’s actions to date make clear that no “urgent and compelling” circumstances exist and, *arguendo*, any that do are solely of FEMA’s own making.

52. The October 3, 2020 J&A for the sole source award to Wellness Coaches (not posted by FEMA until Friday, October 30, 2020) concedes a pandemic and national emergency related to COVID-19 were declared seven months before the Agency issued the nearly \$50 million sole source BPA to Wellness Coaches. (Ex. L at 1.)

53. FEMA’s determination to override the CICA stay explains that, at the start of the pandemic, COVID-19 testing was in critically short supply and had not advanced to the point that FEMA could test large number of employees. (*Id.* at 2.) Accordingly, FEMA indicates that it relied on “a combination of remote work, social distancing, face coverings, facility cleaning, temperature screening, contact tracing, and questioning about potential employee exposure to prevent a spread of COVID-19 within its facilities and its workforce.” (*Id.*)

54. FEMA outlines the circumstances that led it to determine a COVID-19 testing program was appropriate, citing the hurricane season and internal decision-making processes made throughout the summer of 2020. (*Id.*) The document indicates that “FEMA’s on-site COVID-19 testing requirement was viewed as a requirement that needed to be in place no later than the fall of 2020.” (*Id.* at 3.)

55. What the document fails to address, however, is why – with the knowledge throughout the spring and summer of 2020 that this requirement would be necessary – FEMA did not perform advance planning to allow for a competitive procurement.

56. It also fails to indicate why COVID-19 management strategies that have been sufficient, even if not ideal, for seven months cannot now be used even for a few weeks to permit a competitive procurement.

57. FEMA's J&A indicates the Agency has been conducting market research since March 2020 – when the pandemic and national emergency were declared – resulting in identification of at least four sources, including CHS, capable of providing the services the Agency obtained through its sole source award to Wellness Coaches. (Ex. J at 4.)

58. If FEMA had conducted advance planning sufficient to conduct the competitive procurement anticipated under the September RFQ at any point in the summer of 2020, the full and open competition would have been complete before the fall and winter timeframe in which FEMA states a testing program must be in place.

59. In addition to FEMA's failure to conduct the competitive procurement earlier despite its awareness admittedly since March 2020 that the requirement would be necessary, FEMA further created any claimed urgent and compelling circumstances by releasing an unlawful RFQ on September 22, 2020 RFQ.

60. If the Agency had allowed offerors a reasonable amount of time to submit quotations in response to the RFQ, FEMA could have conducted a competitive procurement and made award before or shortly after October 3, 2020 (given, in response to the September 22, 2020 RFQ, FEMA reviewed two quotes and made award to Wellness Coaches on September 25, 2020). (Ex. L at 3.)

61. Even following CHS's September 28, 2020 protest at GAO, FEMA could have implemented the promised corrective action and made award by mid-October 2020, a mere two weeks after the Agency made its sole source award to Wellness Coaches.

62. In its September 29, 2020 notice of corrective action, the Agency represented to GAO that FEMA would issue a new solicitation and permit prospective offerors at least three business days to respond. (Ex. F at 1.)

63. Given that FEMA released the September 22, 2020 solicitation and made award three days later, the Agency could have immediately reissued the solicitation on a competitive basis, permitted offerors a reasonable opportunity to submit quotes, and made award within days.

64. In the November 10, 2020 determination to override the CICA stay, FEMA asserts Wellness Coaches is uniquely able to meet the Agency's needs given purported "urgent and compelling" circumstances because Wellness Coaches is currently performing services for the Agency. (Ex. L at 3.)

65. Wellness Coaches' current performance of services for FEMA – which is Wellness Coaches' first contract for the U.S. government (*see* Ex. G) – results solely from the Agency's improper, anti-competitive actions, including release of an unduly restrictive RFQ and the decision not to release the sole source J&A for almost a month after its issuance.

BASIS FOR INJUNCTIVE RELIEF

66. Injunctive relief is unnecessary in this case; the requested declaratory relief is sufficient and fitting. *See Chapman Law Firm v. United States*, 65 Fed. Cl. 422, 424 (2005) ("Declaratory relief is particularly appropriate in bid protest actions contesting agency stay override determinations entered pursuant to 31 U.S.C. § 3553(d)(3)(C).").

67. On multiple occasions, this Court has recognized declaratory relief in CICA override protests preserves Congress's intent in enacting the automatic CICA stay. *See, e.g., Technica LLC v. United States*, 142 Fed. Cl. 149, 156 (2019); *Supreme Foodservice Gbmh v.*

United States, 109 Fed. Cl. 369, 397 (2013); *Chapman Law Firm*, 65 Fed. Cl. at 424. This Court has reiterated:

Congress did not require any evaluation of injunctive relief factors as a prerequisite to a stay of contract performance upon the filing of a protest with the GAO. Thus, it would be contrary to the legislative scheme to impose such an additional requirement, upon finding that an agency override determination lacks validity, in order to reinstate the statutory stay applicable during the GAO protest period. Declaratory relief preserves the scheme that Congress enacted.

Technica, 142 Fed. Cl. at 156 (quoting *Chapman Law Firm*, 65 Fed. Cl. at 424).

68. In other words, “Congress . . . enacted a statute requiring *less* than the typical injunctive relief factors.” *Supreme Foodservice*, 109 Fed. Cl. at 397 (emphasis in original).

69. Therefore, “the injunctive relief factors need not be invoked when a bid protest is timely filed with the GAO.” *Technica*, 142 Fed. Cl. at 156 (internal quotation marks omitted) (quoting *Supreme Foodservice*, 109 Fed. Cl. at 397).

70. However, should the Court disagree with this Court’s previous cases, CHS is nevertheless entitled to injunctive relief under the traditional four-factor test.

71. CHS will demonstrate a likelihood of success on the merits because (1) FEMA’s decision to override the CICA stay and its justification were deficient, and (2) if they exist at all, the “urgent and compelling” circumstances FEMA claims necessitate a CICA override were created by the Agency.

72. Second, CHS will suffer irreparable harm absent injunctive relief because (a) no monetary remedy will make CHS whole; (b) CHS will lose the opportunity to compete for the COVID-19 testing requirement; and (c) CHS will lose the experience and profits it would gain from performance of the contract.

73. Next, the balance of hardships weighs in CHS’s favor because it will suffer irreparable harm, whereas FEMA and Wellness Coaches will merely suffer the inconvenience of

performance being stayed—which is exactly what the status quo would be absent FEMA’s erroneous CICA override.

74. Lastly, injunctive relief will serve the public interest because it will preserve the integrity of the federal procurement system by ensuring FEMA cannot circumvent CICA’s clear statutory policy. *See BCPeabody Constr. Servs., Inc. v. United States*, 112 Fed. Cl. 502, 514 (2013) (citing *PGBA, LLC v. United States*, 60 Fed. Cl. 196, 221 (2004), *aff’d*, 389 F.3d 1219) (“It is well established that the public interest is well-served by ensuring that the government procurement process is fair and even-handed.”); *see also URS Federal Servs., Inc. v. United States*, 102 Fed. Cl. 674, 677 (2012) (“Congress has determined that the public interest is served by the imposition of an automatic stay to allow the GAO an opportunity to ascertain the merits of a bid protest.”). The integrity of the procurement process is further implicated here because the award to Wellness Coaches was made on a sole source basis. FEMA has forgone any competition for these requirements.

CLAIMS FOR RELIEF

Count 1

FEMA’s Actions are Arbitrary, Capricious and Contrary to Law

75. Plaintiff CHS incorporates by reference paragraphs 1 through 74 of this Complaint.

76. FEMA’s decision to override the automatic CICA stay on the basis that there are urgent and compelling circumstances that significantly affect the interests of the United States is arbitrary, capricious, and contrary to applicable law.

77. CHS has been and will be directly harmed by FEMA’s improper and unlawful actions.

78. Accordingly, FEMA should be enjoined from overriding the automatic CICA stay until the GAO issues its decision on CHS's protest.

REQUEST FOR RELIEF

Plaintiff CHS respectfully requests this Court to enter judgment in Plaintiff's favor and to provide the following relief:

1. A declaratory judgment that FEMA's override decision is invalid and has no effect; and/or
2. A temporary restraining order and preliminary injunction enjoining performance of the sole source contract awarded to Wellness Coaches under Solicitation No. 70FB7021Q00000001 until the GAO issues a ruling on CHS's GAO protest; and/or
3. A permanent injunction enjoining performance of the sole source contract awarded to Wellness Coaches under Solicitation No. 70FB7021Q00000001 until the GAO issues a ruling on CHS's GAO protest; and
4. such other relief as the Court may deem just and appropriate.

Dated: November 13, 2020

Respectfully submitted,

/s Elizabeth N. Jochum

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