Receipt number 9998-5509674

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

EMERGENCY PLANNING MANAGEMENT INC.,	)	
Plaintiff,	)	
v.	)	Case No. 19-1024 C
THE UNITED STATES DEPARTMENT OF EDUCATION,	)	Judge _____
Defendant.	)	

COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION

Plaintiff, Emergency Planning Management, Inc. ("EPM"), by and through its undersigned attorney, files this Complaint against the United States, acting through the Department of Education ("the Agency" or "ED"), and alleges as follows:

NATURE OF ACTION

1. EPM—a Service-Disabled, Veteran-Owned Small Business and Small Disadvantaged Business (Minority-Owned)—brings this pre-award protest to ask this Court to set aside as unlawful a procurement under ED's Next Generation Processing and Servicing Environment ("NextGen") Business Process Operations Solicitation No. 91003119R0008 (the "Solicitation"), attached hereto as Exhibit A.

2. EPM is a government contractor and Private Collection Agency ("PCA") seeking to provide private debt collection services as a prime contractor for defaulted student loans administered by ED under the Solicitation.

3. As part of ED's ongoing efforts to procure services relating to student loans issued under the William D. Ford Federal Direct Loan Program ("FDLP"), the Solicitation seeks a suite of services to fulfill its requirements. Rather than follow law and regulation, however, ED has taken a decidedly abrupt approach to achieve its goals by bundling two separate and distinct services under the Solicitation without adhering to the strict procedural requirements to do so.

4. The Solicitation describes, for example, how the expansive solution should support the "full life cycle" of student financing, from financing, origination and disbursement, to processing and loan servicing, loan pay-off, and default/collections services. The Solicitation also describes a separately procured requirement to build a digital platform to consolidate multiple websites and applications into a single resource that borrowers can use during the life of the loan.

5. Indeed, the bundled Solicitation seeks requirements that have been consistently recognized as separate and distinct, perhaps due to the nature of the work and disparate regulatory regimes that loan servicers, PCAs, and other entities in the credit industry must comply with. At a high level, ED's requirements under the Solicitation can be summed up as follows:

- Loan Servicing (including origination and disbursement of funds as well as account servicing);
- Default Recovery Services (provided by PCAs, like EPM); and
- Integration with a massive "digital front door" IT platform to replace multiple websites and that features a "mobile-first, mobile-complete, and mobile-continuous solution" (provided by IT/web/mobile development companies).

6. ED's decision to bundle the loan servicing and default collection work under the Solicitation is arbitrary, capricious, and contrary to law, as its actions violate the Small Business Act, 15 U.S.C. § 631 *et seq.*, the Competition in Contracting Act ("CICA"), 31 U.S.C. § 3551, *et*

seq, and the Federal Acquisition Regulation (the "FAR"). As a result, ED has unlawfully limited competition and materially prejudiced EPM's ability to compete for a prime contract award for defaulted loan collection services.

7. Further, ED's attempt to bundle these distinct services is wholly inconsistent with Congressional mandates on the collection of government receivables, will decrease consumer protections for borrowers, create intractable conflicts of interest, and result in increased costs to taxpayers.

8. Still, the Solicitation also provides for a small business participation scheme that not only treats small businesses unequally and unfairly but also improperly fails to follow law and regulation regarding partial set-asides for small business concerns. Even so, the small business participation scheme is also ambiguous and will lead to an unequal evaluation among offerors.

9. Absent this Court taking action against ED, unfortunately, taxpayers and contractors alike will arrive at the same conclusion: ED has no issue with sweeping under the rug procurement laws, consumer protections, and other critical statutes and regulations, all to hastily achieve its goal of administrative convenience.

THE PARTIES

10. EPM is a small, disadvantaged (minority-owned) and service-disabled, veteran-owned small business duly organized pursuant to the laws of the Commonwealth of Virginia, with its principal place of business located at 108 Lupine Drive, Stafford, VA 22556.

11. Defendant is the United States of America, acting by and through ED. ED is a Federal agency, residing in the District of Columbia.

JURISDICTION AND STANDING

12. This Court has jurisdiction over this action pursuant to the Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, §§ 12(a), (b), 110 Stat. 3870 (Jan. 3, 1996), codified at 28 U.S.C. § 1491(b)(1).

13. Pursuant to the Tucker Act, this Court has jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. 28 U.S.C. § 1491(b)(1).

14. Under the Tucker Act, an "interested party" includes an actual or prospective offeror whose direct economic interest would be affected by failure to award a contract.

15. EPM is a small business PCA which is a government sector company specializing in the collection of defaulted debt. EPM has subcontracting experience in providing defaulted student loan debt collection and support services to prime contractors under current ED's portfolio and is well positioned to compete for similar prime contract opportunities.

16. EPM is a prospective bidder—deadline for proposal submissions is July 31, 2019— and EPM's economic interest has been directly affected by ED's decision to bundle loan servicing and collections services, as well as restricting small business participation, under the Solicitation in violation of applicable law and regulation. As a result, EPM has suffered a non-trivial competitive injury that this Court can remedy. Under a revised, lawful solicitation, EPM expects to compete for a prime contract award.

FACTUAL BACKGROUND

A. The Federal Student Loan "Lifecycle" and ED's History of Contracting with PCAs

17. ED's Office of Federal Student Aid ("FSA") is responsible for administering FDLP which authorizes the agency to award and administer grants, work-study funds, and loans to student borrowers across the United States. The administration of the loans under FDLP, as well as the Federal Family Education Loan Program, includes several distinct functions throughout the "lifecycle" of the loan including, (a) application and eligibility determination, (b) disbursement, (c) loan processing and servicing, and (d) recovery. *See* FSA Next Generation Financial Services Environment Phase I Solicitation ("Phase I Solicitation") at 2, attached hereto as Exhibit B.

18. The "loan processing and servicing" stage of this "lifecycle" involves, "customer service; loan counseling; loan consolidation; billing and payment application and processing; repayment plan adjustments and application of benefits such as deferments, forbearance, or loan forgiveness/discharge; outreach and default aversion; quality control; and financial and other data reporting." Solicitation at 3 § C.2.1. Loan servicing also encompasses services when loans enter "delinquency[1]" including communicating with borrowers and national credit bureaus regarding such status.

19. The "recovery" stage, also referred to as "collections services," begins once a loan enters default. For most federal student loans—those repayable in monthly installments—default occurs where no payment is made on the loan for a period of at least 270 days. *See* 34 C.F.R. §

[1] According to FSA, a student loan enters delinquency status on the first day the borrower misses a payment and remains in this status until all past due amounts are paid, the borrower's account enters deferment or forbearance, or the borrower changes repayment plans. *See* Dept. of Educ., *Understanding Delinquency & Default*, https://studentaid.ed.gov/sa/repay-loans/default (last visited July 15, 2019).

682.200(b). At this stage, the loan is referred from the loan servicer to a default collection servicer (i.e., a PCA) who is responsible for collections or rehabilitation of the loan. This involves locating and establishing communications with the borrower to either enter into a voluntary payment plan or pursue collections proceedings.

20. ED has contracted with private loan servicers and PCAs for these distinct services since the inception of the FDLP in 1992. *See* Higher Education Amendments of 1992, S. 1150, 102nd Cong. §§ 416(t), 428I(a)(1) (1992). Throughout the history of ED's direct loan program, these services have been kept entirely separate with the sole interaction between servicers and PCAs being the referral of defaulted and rehabilitated[2] loans.

21. This dichotomy has been maintained for good reason, as the stringent regulations that apply to PCAs as "debt collectors" do not apply to loan servicers because the debts are not in default at the time they are received. *See* 15 U.S.C. § 1692a(6)(F) (emphasis added) (excluding from the definition of "debt collector," "any person collecting or attempting to collect any debt… to the extent such activity… concerns a debt ***which was not in default at the time it was obtained*** by such person"). Loan servicers take on these debt accounts before they are ever in default. Therefore, loan servicers are not "debt collectors" and thus are not subject to the regulatory oversight and rights of private action authorized pursuant to the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.*, and similar statutes regulating debt collectors.

22. On the other hand, Congress has imposed strict restrictions on the entities authorized to collect non-tax debts owed to the Federal Government. The Debt Collections Improvement Act of 1996 ("DCIA"), 31 U.S.C. § 3701, *et seq.*, contemplates a private

[2] When a student borrower and their assigned PCA agree to a collection plan and the borrower makes payments in accordance with that plan, the loan can be rehabilitated in which case it is referred back to a loan servicer.

collections contractor engaging in collections activities but only if the debt is "referred" to it by the Secretary of the Treasury. *See* 31 U.S.C. § 3711(g)(4). This would not be possible under the Solicitation, as in being responsible for both loan servicing and default collection services, the contractor would effectively be referring the debt to itself. Furthermore, contractor compensation for collections services are *statutorily mandated* to be on a contingency fee basis unless otherwise appropriated by Congress. *See* 31 U.S.C. § 3718(d)-(e) (a contract for collections services to recover debts owed to the Federal Government is "effective only to the extent and in the amount provided in an appropriation law," or "is payable from the amount recovered."). With the lack of a referral from the loan servicer to a PCA and the Solicitation's "price per task" pricing model, it remains to be seen how any awardee can comply with these Congressional mandates.

23. Indeed, the unmistakable dichotomy between loan servicing and collections services is discussed at length in Office of Management and Budget Circular A-129 (the "OMB Circular"), which provides guidance to ED and other agencies on how to manage government receivables. Office of Mgmt. & Budget, Exec. Office of the President, Circular No. A-129, *Policies for Federal Credit Programs and Non-Tax Receivables* (Jan. 2013). The OMB Circular indicates that Loan Servicing involves tasks including billing and recording payments, providing account information to credit reporting agencies, and maintaining loan documentation. *Id.* at 15. Delinquent debt collection on the other hand involves monitoring delinquent borrowers such as through "skiptracing," issuing demand letters, wage garnishment, and other collections activities. *Id.* at 18-19.

24. Further, with these services being procured separately for nearly thirty years, contractors in both the loan servicing and PCA industries have necessarily become highly

specialized. The unique requirements facing PCAs has resulted in contracts such as those awarded to small, agile businesses, like EPM, who have a history of successful and compliant collections practices. Meanwhile, the contractors providing loan servicing have also become specialized to address the multitude of statutorily mandated payment methods, loan forgiveness programs, and other aspects unique to loans currently in good standing. Quite clearly, these distinct industries not only operate under separate regulatory and legal regimes but also have produced highly specialized businesses with entirely different expertise, processes, and procedures.

B. ED's Inability to Procure Debt Collection Services Lead the Agency to Pursue the Next Generation Financial Services Environment by Excluding PCAs

25. In 2014, after ED's contract with five small business PCAs and seventeen "unrestricted," large business PCAs for debt collection services ended, the agency issued a two-phase solicitation, pursuant to Education Federal Acquisition Regulations ("EDARS") § 3415.302-70(b), seeking follow-on PCAs. This approach called for ED to narrow the field of offerors following Phase I evaluations, cutting the field of offerors allowed to bid on Phase II. *Id.*

26. After ED awarded contracts to eleven small businesses and made its initial cut from the over forty large businesses that placed bids in the first phase of the solicitation, several protests were filed mainly challenging the Agency's selection criteria. *See, e.g.*, *Northstar Location Servs.*, B-409722.10, May 8, 2015, 2015 CPD ¶ 153; *Fin. Asset Mgmt. Sys. Inc.*, B-490722.9, Apr. 24, 2015, 2015 CPD ¶ 145.

27. After numerous delays and amendments, ED announced that it had completed Phase I and selected seven large companies as eligible to participate in Phase II of the solicitation to provide collections services. Again, ED's protracted procurement process led to more

protests, and in the face of mounting scrutiny of the agency's ability to procure collections services, ED cancelled the solicitation.

28. In December 2015, ED issued its renewed attempt to procure collections services in the form of Solicitation No. ED-FSA-16-R-0009 (the "PCA Solicitation"). This time, ED sought to award several Indefinite Delivery/Indefinite Quantity ("IDIQ") contracts for collections services.

29. In December 2016, ED announced awards to seven offerors and, yet again, protests ensued. In a decision regarding several consolidated protests against the PCA Solicitation, the Government Accountability Office ("GAO") found that ED had failed to conduct reasonable evaluations of the offerors' past performance and recommended that the agency amend the PCA Solicitation to more accurately reflect the needs of the agency and re-evaluate the offers accordingly. *Gen. Revenue Corp.,* B-414220.2, *et al.*, Mar. 27, 2017, 2017 CPD ¶ 106.

30. In May 2017, in response to even more protests against the PCA Solicitation filed in this Court, ED filed a notice of corrective action noting that it would implement GAO's recommendations. *See Cont'l Servs. Grp., Inc. v. U.S.*, 722 Fed. Appx. 986, 992 (Fed. Cir. 2018). ED subsequently amended the PCA Solicitation several times, yet none of these modifications altered the agency's evaluation methodology nor changed the stated requirements.

31. On August 4, 2017, during the course of ED's corrective reevaluation, FSA's Chief Business Operations Officer filed a sworn declaration to this Court explaining the distinction between loan servicing and debt collection services. *See Automated Collection Servs. v. U.S.*, 133 Fed. Cl. 231, 233-34 (2017). Specifically, FSA's declaration explained that loan servicing involves the management of loans ***which are not in default*** and that such work is,

"***separate and distinct from the debt collection work***," performed by PCAs. *Cont'l Servs. Grp., Inc. v. U.S.*, No. 17-449 *et al.*, Dkt. No. 183-2 at ¶ 6 (emphasis added).

32. FSA also made reference to ED's August 1, 2017 press release[3] announcing NextGen. *Id.* at Exh. B. This press release made no mention of debt collection services nor PCAs and strictly discussed modifications to ED's approach to loan servicing. FSA confirmed as much, stating that the press release does not, "relate to the [PCA Solicitation] under which the [PCAs] will perform debt collection services. As explained below, ***the work to be performed under [the PCA Solicitation] is different from loan servicing, involving an entirely separate procurement effort***." *Id.* at ¶ 4 (emphasis added).

33. Mere days after the resolution of the case in which this sworn declaration was filed, ED issued the NextGen Phase I request for proposals (the "NextGen RFP") on February 20, 2018. *See* Exhibit B. The RFP made no reference to procurement of debt collection services. In fact, is specifically carved out such services, noting that PCAs would be involved in that stage of the student loan lifecycle. *See* Exh. A at 6 (Depicting "Debt Management and Collection System" and PCAs as excluded from the services noted as the "focus for this solicitation."). Accordingly, PCAs did not submit bids in response to the NextGen RFP and instead pursued the PCA Solicitation.

34. Concurrently, ED was mired in yet another string of protests related to new awards under the PCA Solicitation. *See FMS Inv. Corp. v. U.S.*, 136 Fed. Cl. 439 (2018). At issue in *FMS Inv. Corp.*, which was a consolidated case, was ED's actions in recalling loan accounts from PCAs providing debt collection services under the bridge contract extending the

[3] Dept. of Educ., *Secretary DeVos Announces Intent to Enhance FSA's Next Generation Processing and Servicing Environment*, Aug. 1, 2017, online at https://www.ed.gov/news/press-releases/secretary-devos-announces-intent-enhance-fsas-next-generation-processing-and-servicing-environment.

2009 PCA task orders until award could be made under the PCA Solicitation. *Id.* at 442. Disappointed offerors on the PCA Solicitation maintained that ED's evaluation and award decisions were arbitrary and capricious and sought an injunction against ED from making awards. *Id.* After this Court granted the protesters' injunction, ED represented that it would not continue to pursue litigation in support of the PCA Solicitation awards and would announce how it would proceed with the procurement on May 4, 2018. *See FMS Inv. Corp. v. U.S.*, 139 Fed. Cl. 221, 224 (2018).

35. Yet one day before this self-imposed deadline, ED announced that it would cancel the PCA Solicitation entirely because under the agency's "new vision," it would transition to utilizing "enhanced servicers" to administer delinquent loans "***through the resolution of any later default***," and as such the agency's need for PCA servicers "will diminish rapidly in the coming months and ***ultimately become non-existent***." *Id.* (emphasis added). The Government accordingly motioned to dismiss the protest as moot. *Id.*

36. In response, the protesters filed a separate action seeking to permanently enjoin the cancellation of the PCA Solicitation as arbitrary, irrational, and unsupported by documented agency findings. *Id.* Noting the cancellation notice as the first public announcement of ED's intention to use "enhanced servicers," as well as terming the administrative record ("AR") as "slipshod," and devoid of, "any plan or timeline for implementing the [enhanced servicer] program," the Court granted the permanent injunction and restored the PCA Solicitation on September 14, 2018. *Id.* at 225-26. In a telling description of ED's arbitrary and severely disjointed string of procurement decisions around the NextGen initiative, the Court stated:

> The cancellation notice and the AR purport to outline a significant policy change. ***ED had clearly planned for PCAs to continue to administer defaulted student loans as recently as January 2018 because the agency awarded two PCA contracts that month. Yet not four months later, in a procurement cancellation***

> ***notice, ED declared a new direction and an end to contracting for PCA services.*** ED needs to provide a 'reasoned analysis' for the policy change…. For all the reasons above, it has failed to do so. The AR before the court is not enough to show that ED's decision to cancel the solicitation was rational.

Id. at 226. (internal citations omitted) (emphasis added).

37. Just ten days after the injunction was granted, ED announced the eleven offerors who had been selected under Phase I Solicitation to be eligible to compete for the three Phase II Solicitations: RFP No. 91003118R0023 for a "future state core platform" (Component C); RFP No. 91003118R0022 for "transitional core processing and related support activities" (Component D); and, RFP No. 91003118R0024 for "business process operations" (Components E & F) (collectively, the "Phase II Solicitations"). Included among the Phase I awardees were several state government entities including Missouri Higher Education Loan Authority, Oklahoma Student Loan Authority, Pennsylvania Higher Education Assistance Agency ("PHEAA"), and Utah Higher Education Assistance Authority. *See* Solicitation No. 91003118R0024 attached hereto as Exhibit C at 49, § L.1.2. This is notable as at least one of these entities has argued that as a state entity, they are immune from suits seeking monetary damages under the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.*, and other statutes regulating loan servicers. *See, e.g., Pele v. Pa. Higher Educ. Assistance Agency*, 628 Fed. Appx. 870 (4th Cir. 2015), *cert. denied*, 137 S. Ct. 617, 196 L. Ed. 2d 513 (2017) (rejecting PHEAA's argument that as an "arm" of the Commonwealth of Pennsylvania, it enjoys immunity from a lawsuit under the Fair Credit Reporting Act pursuant to the Eleventh Amendment).

38. Concurrent with this announcement, ED released the Phase II Solicitations and, shockingly, folded debt collection services into its terms despite the explicit carve out in Phase I. In addition to the typical loan servicing activities such as repayment plan processing, deferment and forbearance applications, specialty programs such as TEACH grants, Public Service Loan

Forgiveness, etc., the Phase II Solicitations sought services including processing for rehabilitation, wage garnishment, and the treasury offset program. *See* Exhibit C at 10, § C.3.3(b). It also sought contractors who could engage in common collections activities such as resolution of payment issues, "frequent outbound calls, early engagement for delinquent borrowers, skip tracing, etc." *Id.* at 9, § C.3.3(a). Tellingly, only one of the eleven contractors selected in Phase I, Teleperformance, has ***any*** experience in debt collection services; however, that experience does not derive from any ED contracts servicing federal student loans.[4]

39. Unsurprisingly, PCAs were incensed to discover that ED had slipped debt collection services into Phase II and some immediately filed protests at GAO alleging that ED had violated its own procurement regulations by failing to give notice to prospective offerors of the, "scope or purpose of the procurement that provides sufficient information for sources to make informed business decisions regarding whether to participate." *See GC Servs. Ltd. P'ship*, B-416443, B-416443.2, Sept. 5, 2018, 2018 CPD ¶ 313 at 3 (citing 20 U.S.C. § 1018a(d)(2)); *See also Cont'l Serv. Grp., Inc., et al.*, B-416443.3, *et al.*, Nov. 19, 2018, 2018 CPD ¶ 393; *Navient Sols., LLC v. U.S.*, 141 Fed. Cl. 181 (2018). Specifically, the protesters argued that due to its failure to provide notice of its intent to procure debt collection services in the Phase I Solicitation, ED had acted arbitrarily and contrary to its own procurement regulations. *See Navient*, 141 Fed. Cl. at 183. Additionally, the protesters argued that ED had violated the Competition in Contracting Act ("CICA"), 31 U.S.C. § 3551, *et seq.*, by impermissibly bundling loan servicing and default recovery services and, in so doing, created immitigable impaired organizational conflicts of interest. *Cont'l Serv. Grp.*, B-416443.3 at 3.

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[4] *See*, Stephanie Eidelman, *ED Moves NextGen Procurement to Phase II; Changes Rules of the Game*, insideARM (Oct. 3, 2018), https://insidearm.com/news/00044383-eds-nextgen-procurement-moves-phase-ii-el/.

40. However, during the pendency of these proceedings, ED again agreed to institute corrective action, this time at the urging of this Court, by terminating the Phase I Solicitation awards, cancelling the Phase II Solicitations entirely, and reissuing the Phase I Solicitation. *Navient*, 141 Fed. Cl. at 183. Although this Court agreed that ED had acted arbitrarily, "by adding PCA services to NextGen Phase II after downselecting the Phase I offerors," it ultimately denied the consolidated protests on the basis that ED had, "already agreed to take corrective action to address the Plaintiffs' allegations." *Id.* at 184.

41. ED implemented the corrective action on December 14, 2018. Ostensibly in an attempt to avoid additional protests, ED abandoned its two-phase procurement strategy and allowed any interested offeror to submit bids under its next round of solicitations.

C. The Solicitation

42. On January 15, 2019, ED issued three solicitations, including Solicitation No. 91003119R0008 (NextGen Business Process Operations).

43. Unfortunately, however, the Solicitation (No. 91003119R0008) is chock-full of problems as it unlawfully restricts small business competition by bundling distinct services into a single procurement without regard for the mandated process to do so. This is not a new issue. ED was acutely aware of the challenges that plagued the Phase II Solicitations on the bases of improper bundling and creation of conflicts of interest, yet the Solicitation continues down that same path.

44. Particularly, the Solicitation seeks a contractor to provide services "across the entire life cycle of student financing (from application for financing, to origination and disbursement, to processing and servicing and pay-off or default)." Solicitation at 6 § C.3.1.

45. In other words, the Solicitation bundles separate and distinct services for both loan servicing and collections services. Indeed, ED repeatedly confirmed in the Solicitation, and

through Amendment 4 to the Solicitation, that offerors were required to provide both default collections work and loan servicing. For example, the following were provided in the answers to questions from offerors:

Question 92	Back Office tasks reflect Eligibility, Origination and Servicing tasks. There is no task identified as Default Borrower or Default Management tasks. Where does FSA want Default Management tasks to be presented? If these tasks are included in Servicing tasks the servicing unit price will be greater to accommodate the default tasks.	Offerors shall consider all aspects of the student financing lifecycle, ***including tasks for borrowers in recovery***, for the back office tasks listed in the pricing template.
Question 95	C.3.3.b – A large majority of credit bureau disputes are received from customers that have defaulted. These loans may or may not have a servicer. How should the BPO's plan this work to be distributed?	Each borrower account will be assigned to a BPO provider. Offerors shall propose solutions that provide efficient and effective support for all customers, ***including those in recovery***. BPOs must perform the work for all accounts assigned to them, ***including borrowers in recovery*** once the loans are transferred to the EPS system. See Amendment 03 for an updated Performance Management section.
Question 116	C.3.2.I – Who will be considered the Servicer: FSA; Command Center; BPO provider; system provider?	***Differentiations between FSA, servicers, and PCAs are indicative of the current state, not the NextGen Financial Services operating environment.***
Question 168	To be eligible to receive a contract award under Solicitation 91003119R0008 for NextGen Business Process Operations, does an offeror have to propose to provide both debt collection work and loan servicing work or may an offeror propose to provide only debt collection work and still be eligible for award?	FSA expects proposals to address the entire lifecycle of student financing. In accordance with Section M, Evaluation Factor 1, the government will consider whether the offeror "has a documented plan to execute contact center support and back-office processing ***across the full life cycle of student financing*** (from application for financing, to origination and disbursement, to processing and servicing and pay-off ***or default***), with the appropriate level of resources".

Question 170	If it is the intent of FSA to have enhanced servicer provider (or business process operations (BPO) provider) handle these defaulted loans – can FSA provide in C.4 Expected Volumes – the number of calls per loan in a post 360-day default status that currently the PCAs are providing this service as those volumes do not appear to be in the 'expected volumes' table. Additionally, will these default collections be priced on a contingency basis, as is currently the pricing methodology or a different pricing methodology as it appears there is no mechanism in the current pricing table for these types of inbound and outbound communications. Will all collections – regardless of days past due – be considered "First Party" Collections or is there any stage or days past due where the collections would be considered third party collections?	FSA intends that communications to students and partners will be done under a single, unified brand rather than under the name of a vendor. However, FSA's communications will comply with any other applicable laws that may require additional information. ***FSA intends for BPO vendors to provide "life of the loan" support, including for accounts in recovery***. Pricing for borrowers in recovery will follow the pricing structure and assumptions in "Attachment 18 - Pricing Template." Offerors can include an assumed number of daily calls for post-360 day recovery status in their proposal.

Solicitation, Amendment 4, Responses to Questions at 11, 13, 18-19 (emphasis added).

46. For collections services, the Solicitation provides that one of ED's goals is to improve customer outcomes by "[d]ecrease[ing] [the] percentage of borrowers in delinquency or default[.]" Solicitation at 5. In this respect, part of the work that PCAs routinely perform involves rehabilitating defaulted borrowers—i.e., getting the borrower on track with making payments so that the account can be transferred back to the loan servicers to resume loan servicing activities—by locating and establishing communications with the borrower to either enter into a voluntary payment plan or pursue collections proceedings. This aspect is highly regulated, as PCAs are licensed and required to follow many laws that prescribe what time, what days, and how many times they can call a borrower. 15 U.S.C. § 1692c(a). The laws are also specific about what may be discussed and how it may be discussed. For example PCAs must use professional language and may not call repeatedly with the intent to annoy or harass the

borrower, may not contact friends, family or other third parties concerning the debt, and may not engage in misleading communications such as threatening unauthorized legal action on behalf of the government. 15 U.S.C. § 1692c(a); 15 U.S.C. § 1692d(2), (5); 15 U.S.C. § 1692e.

47. In addition to collections services, the Solicitation makes clear that the contractor must also provide loan servicing activities. In that regard, the Solicitation provides that the contractor must "support efficient and effective operations, across the entire life cycle of student financing (from application for financing, to origination and disbursement, to ***processing and servicing and pay-off*** or default." Solicitation at 3 § C.1. (emphasis added). The loan servicing called for in the Solicitation includes, "customer service; loan counseling; loan consolidation; billing and payment application and processing; repayment plan adjustments and application of benefits such as deferments, forbearance, or loan forgiveness/discharge; outreach and default aversion; quality control; and financial and other data reporting." *Id.* These tasks all involve support for the borrower to *avoid* default and are devoid of the adversarial nature of collections services. The distinction with collections services could not be clearer.

48. Indeed, ED even recognized the distinct regulatory regimes that govern loan servicing and collections services by specifically drafting a tailor-made H clause, which provides that, "[t]he Contractor agrees that any payment of incentives for exceeding [a Service Level Agreement] is conditioned on continued ***compliance by the Contractor with all laws governing loan servicing and collection practices***." Solicitation at 23 § H-1 (emphasis added).

49. In addition to bundling default collections work with loan servicing, the Solicitation also provides for small business participation. Solicitation at 61 § L-2.4.5. The small business portion of the Solicitation requires that offerors submit Small Business Participation Plans ("SBPP") as part of an offeror's proposal. *Id*.

50. The Solicitation advises that offerors will be "contractually bound" to the terms of the SBPP and that an offeror will be ineligible for award if it fails to submit an acceptable SBPP. *Id*. In that regard, the Solicitation notes ED's small business contracting goals of:

- Total Subcontracting Goal for all Small Businesses – 32%;
- Women Owned Small Businesses – 5%;
- Small Disadvantaged Businesses – 5%;
- Service-Disabled Veteran-Owned Small Businesses – 3%; and
- Historically Underutilized Business Zones (HUBZones) – 19%

Solicitation at 62 § L-2.4.5.

51. Moreover, the Solicitation also cautions offerors that:

> Offerors are also ***expected to increase their percentage of HUBZone utilization to 25% within two years after award, and to 30% within three years after award***. This may result in total small business subcontracting exceeding 32%. Offerors are strongly encouraged to exceed the cited goals. The plan will be reviewed for compliance with FAR 19.705-4.

Id. (emphasis added).

52. In short, by combining loan servicing and collections services, ED has improperly bundled the Solicitation for which there is no reason and thus its actions are arbitrary, capricious, and contrary to law. Plainly, the Solicitation unreasonably and inequitably curtails competition––both, for small business prime contractors and subcontractors—and materially and substantially prejudices EPM.

53. As a result, EPM brings this protest asking the Court to set aside as unlawful the Solicitation and enjoin ED from making any awards thereunder until it complies with law and regulation.

CAUSES OF ACTION

COUNT I

VIOLATION OF THE COMPETITION IN CONTRACTING ACT, FEDERAL ACQUISITION REGULATION, AND ADMINISTRATIVE PROCEDURES ACT

54. EPM incorporates the foregoing numbered paragraphs as if set forth at length herein.

55. It is axiomatic that under the Competition in Contracting Act ("CICA"), the government must procure goods and services in such a way as to "achieve full and open competition." 41 U.S.C. § 3301.

56. Thus, pursuant to CICA, agencies must solicit proposals from potential awardees in accordance with FAR Part 15. Alternatively, agencies can fulfill their CICA requirements by following the procedures outlined at FAR § 8.401, *et seq.*

57. Additionally, the FAR and the Small Business Act, 15 U.S.C. § 631 *et seq.*, requires all federal agencies to include small business concerns as prime contractors, subcontractors, and suppliers "to the maximum extent possible," and take, "all reasonable steps to eliminate obstacles to," small business participation. 15 U.S.C. §§ 631(j)(2), 644(e).

58. In accordance with Congressional policy to encourage small business participation in federal procurement activities, federal agencies must, "avoid ***unnecessary and unjustified bundling*** of contract requirements that precludes small business participation in procurements ***as prime contractors***." 15 U.S.C. § 631(j)(3) (emphasis added).

59. This Court has held that "bundling" occurs where a solicitation, "(1) consolidate[s] two or more requirements that were previously procured under separate smaller contracts into a single contract, and (2) [is] likely [to] be unsuitable for award to a small

business." *CHE Consulting, Inc. v. U.S.*, 125 Fed. Cl. 234, 245 (2016) (quoting *Benchmade Knife Co. v. U.S.*, Fed. Cl. 731, 739 (2007)); *see also* FAR § 2.101.

60. However, bundling is only violative of the FAR and CICA where it is "unnecessary and unjustified." *Tyler Constr. Grp. v. U.S.*, 570 F.3d 1329, 1335 (Fed. Cir. 2009). Agencies bear the burden of conducting *extensive* market research and taking other procedural steps during acquisition planning to establish that consolidating procurement requirements is "necessary and justified." *Id.* Accordingly, FAR Part 7 establishes the procedures which agencies must follow when considering consolidation or bundling of two or more distinct services.

61. Specifically, FAR § 7.105 requires that the acquisition plan: include a consideration of the impact of bundling on small business participation; include a list identifying incumbent contractors and contracts affected by the bundling; and address the results of market research as it relates to the intention to bundle such services. FAR § 7.105(b).

62. Where the agency is considering, "substantial bundling," which for ED procurements means bundling resulting in a contract with an estimated value in excess of $2.5 million, the agency must document:

> (1) The specific benefits anticipated to be derived from substantial bundling;
>
> (2) An assessment of the specific impediments to participation by small business concerns as contractors that result from substantial bundling;
>
> (3) Actions designed to maximize small business participation as contractors, including provisions that encourage small business teaming;
>
> (4) Actions designed to maximize small business participation as subcontractors (including suppliers) at any tier under the contract, or order, that may be awarded to meet the requirements;
>
> (5) The determination that the anticipated benefits of the proposed bundled contract or order justify its use; and

> (6) Alternative strategies that would reduce or minimize the scope of the bundling, and the rationale for not choosing those alternatives.

FAR § 7.107-4(b). The agency also must publish a notice on a public website including a justification which includes:

> (A) The specific benefits anticipated to be derived from the bundling of contract requirements and a determination that such benefits justify the bundling.
>
> (B) An identification of any alternative contracting approaches that would involve a lesser degree of bundling of contract requirements.
>
> (C) An assessment of—
>
> > (i) the specific impediments to participation by small business concerns as prime contractors that result from the bundling of contract requirements; and
> >
> > (ii) the specific actions designed to maximize participation of small business concerns as subcontractors (including suppliers) at various tiers under the contract or contracts that are awarded to meet the requirements.

15 U.S.C. § 644(e)(3).

63. Furthermore, to justify bundling, the agency must establish that it would obtain, "***measurably substantial benefits*** as compared to meeting its… requirements through separate smaller contracts." FAR § 7.107-3 (emphasis added). While a decrease in administrative costs can support a finding that the benefits meet this threshold, the anticipated financial benefits must be equivalent to, "[t]en percent of the estimated contract or order value (including options) if the value is $94 million or less; or [f]ive percent of the estimated contract or order value (including options) or $9.4 million, whichever is greater, if the value exceeds $94 million." FAR § 7.107-3(d).

64. Additionally, ED is required to notify the incumbent small business concerns who may be affected by the intention to bundle distinct services and refer them to a local Small Business Administrative procurement center representative. FAR § 10.001(c)(2).

65. Once the acquisition planning stage has been completed, the agency must issue notifications to (a) current small business contractors, (b) to the U.S. Small Business Administration ("SBA") regarding the savings and benefits of follow-on requirements that have been bundled, and (c) the public notification on its website as discussed above. FAR § 7.107-5. Such notices must be provided at least 30 days prior to the issuance of the solicitation for the bundled requirement. *Id.*

66. Yet even prior to considering "bundling," agencies must partially set aside a contract exclusively for small business participation where:

> (1) A total set-aside is not appropriate [];
>
> (2) The requirement is severable into two or more economic production runs or reasonable lots;
>
> (3) One or more small business concerns are expected to have the technical competence and productive capacity to satisfy the set-aside portion of the requirement at a fair market price;
>
> (4) The acquisition is not subject to simplified acquisition procedures; and
>
> (5) A partial set-aside shall not be made if there is a reasonable expectation that only two concerns (one large and one small) with capability will respond with offers unless authorized by the head of a contracting activity on a case-by-case basis. Similarly, a class of acquisitions, not including construction, may be partially set aside. Under certain specified conditions, partial set-asides may be used in conjunction with multiyear contracting procedures.

FAR § 19.502-3(a).

67. ED's actions in seeking to push small business PCAs out of the federal student loan industry and consolidate loan servicing and collections services quite clearly constitutes improper and unjustified bundling. It is neither necessary nor prudent for ED to take such action. First, ED failed to undertake any of the procedural requirements to justify bundling the loan servicing with the debt collection. Second, and most importantly, any such process would be

fundamentally flawed as not only is there is no justification for bundling these two requirements, but also such a combination runs counter to Congressional policy and statutory mandates.

68. In fact, the distinction between loan servicing and default collections services was recognized even by ED in the Phase I Solicitation which expressly shows the clear separation between loan servicers who engage with borrowers throughout the administration of the loan and defaulted loan collection services provided by PCAs after the loan enters default. *See* Exhibit B at 6. Thus, even ED has recognized that bundling these services is neither justified nor necessary because the agency had no intention of doing so as recently as September 2018.

69. Moreover, ED has failed entirely to take any of the procedural steps required for bundling these distinct services. EPM has been advised that ED has not issued any notices to incumbent small business contractors, ED failed to post any notice or justification of its intent to bundle these services on a public website, and to the extent ED performed any reasonable analysis during acquisition planning on the impact to small businesses, it has not taken the necessary next step of communicating its findings with incumbents nor the SBA.

70. Furthermore, the ED's decision runs counter to Congressional policy and statutory mandates. For example, Congress has encouraged ED to contract with PCAs in accordance with ED's legislative mandate to, "try to collect [funds owed on account of loans made by] the United States Government… arising out of the activities of… the agency." 31 U.S.C. § 3711(a)(1); *see also* 31 U.S.C. § 3718(a) ("Under conditions the head of an executive… agency considers appropriate, the head of the agency may enter into a contract… for collection service[s] to recover indebtedness owed [to] the United States Government.").

71. As discussed above, loan servicing and private debt collection services are completely distinct and subject to entirely different regulatory regimes and funding mechanisms.

As is the case with most federal contracts, funding for loan servicing is derived from congressional appropriations. *See, e.g.,* H.R. Rep. No. 115-862 at 149 (establishing annual appropriation for "loan servicing activities" under the Student Aid Administration). Contracted PCAs on the other hand are *statutorily mandated* to receive compensation via a contingency fee based on the amount recovered from defaulted borrowers. *See* 31 U.S.C. § 3718(d)-(e).

72. Even from a policy perspective, ED's decision to bundle the Solicitation is entirely flawed. For example, to have a single entity[5] responsible for both loan servicing and private debt collection services creates an unmitigable impaired objectivity conflict of interest[6] in part because of the differing funding mechanisms for these services. Where a single entity undertakes both services with regard to the same loan, it would have a natural and unmitigable incentive to shift work to the service that results in the highest returns for the contractor. This has the potential create an incentive to shirk loan servicing in favor of collection services, or vice versa.

73. The bundling is also likely to result in *decreased* oversight on debt collection practices and a loss of consumer protections.[7] The primary vehicle for protecting the rights of borrowers facing collection is the Fair Debt Collections Practices Act ("FDCPA"). 15 U.S.C. § 1692, *et seq.* The purpose of this statute is to eliminate abusive debt collection practices and to ensure that debt collectors who refrain from abusive collection practices are not competitively disadvantaged. 15 U.S. Code § 1692(e). However, its provisions only apply to "debt collectors"

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[5] Amendment No. 91003119R00050002 includes a response to an offeror indicating, "FSA intends to make one award for the Enhanced Processing Solution."

[6] Such a conflict of interest exists where a firm's ability to render impartial advice to the government is undermined by competing interests such as a relationship to the service being evaluated. FAR § 9.505-3.

[7] *See* U.S. Dept. of Educ., Office of Inspector General, Federal Student Aid: Additional Actions Needed to Mitigate the Risk of Servicer Noncompliance with Requirements for Servicing Federally Held Student Loans, Rpt. No. ED-OIG/A05Q0008 (Feb. 12, 2019).

as that term is defined in the act and its definition provides an explicit exception for, "any person collecting or attempting to collect any debt… owed or due another to the extent such activity... (iii) *concerns a debt which was not in default at the time it was obtained* by such person." 15 U.S.C. § 1692a(6)(F) (emphasis added). This suggests that loan servicers responsible for the pre-default services with regard to student loans *would not be subject to the restrictions imposed by the FDCPA* when they engage in collections activities on defaulted loans.

74. Finally, ED's bundling is also likely to impose intractable compliance problems on would-be prime contractors. For example, as previously discussed, to collect on debts owed to the Federal Government, the DCIA requires that a federal agency must "refer" the debts to them after default occurs following 270 days of non-payment. *See* 31 U.S.C. § 3711(g)(4); 34 C.F.R. § 682.200(b). If the Solicitation were to proceed undisturbed, there would be no "referral" at all, as the prime contractor would already be servicing the debt. This would raise serious doubts as to the application of DCIA and the authorization required for private entities to collect on debts to the Federal government.

75. In short, under the Solicitation, ED has engaged in unnecessary and unjustified bundling at the expense of small business participation in the federal student loan marketplace and to the extent that the agency's bundling action was justified, it nevertheless has failed to adhere to the procedural requirements authorizing such action under the FAR.

76. ED's actions violated the statutory requirements regarding "full and open competition through the use of competitive procedures," and as such has violated CICA and the FAR.

77. Additionally, the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.*, provides that the action of each authority of the Government of the United States, which includes

the Department of Education, is subject to judicial review except where there is a statutory prohibition on review or where agency action is committed to agency discretion by law.

78. In this case, there is no indication that Congress sought to prohibit or restrict judicial review of ED actions such as those at issue here.

79. Pursuant to 5 U.S.C. § 706, "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

The reviewing court shall—

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> > (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> >
> > (b) contrary to constitutional right, power, privilege, or immunity;
> >
> > (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> >
> > (d) without observance of procedure required by law;
> >
> > (e) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> >
> > (f) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

80. As set forth above, ED's conduct, *inter alia*: constituted a violation of the Small Business Act, CICA, and the FAR; lacked the observance of procedure required by law; was arbitrary and capricious; constituted an abuse of discretion; and was otherwise not in accordance with law.

81. As such, this Court should set aside as unlawful ED's Solicitation that improperly bundles loan servicing and default collections services at the expense of small business prime contractor participation and enjoin ED from making any awards thereunder until ED complies with applicable law and regulation.

COUNT II

THE SOLICITATION'S SMALL BUSINESS PARTICIPATION PLAN IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW AND REGULATION

82. EPM incorporates the foregoing numbered paragraphs as if set forth at length herein.

83. The Small Business Act provides that the President shall establish goals for small businesses participation in government contracts. *See* 15 U.S.C.§ 644(g). The governmentwide goal for small business concerns shall not be "less than 23% of the total value of all prime contract awards for each fiscal year." 15 U.S.C.§ 644(g)(1)(A)(i). The governmentwide break down for various small business programs is:

- Service-disabled veteran owned small businesses – 3%;
- HUBZone small businesses – 3%;
- Small businesses owned and controlled by socially and economically disadvantaged individuals – 5%; and
- Women-owned small businesses – 5%.

15 U.S.C. § 644(g)(1)(A)(ii)–(v).

84. In order to achieve these governmentwide goals, each agency shall also have an "annual goal" that presents small businesses with the maximum practicable opportunity to participate in the performance of government contracts. 15 U.S.C. §§ 644(g)(1)(B). The Small Business Act also provides that "[t]he head of each Federal agency shall, after consultation with the [SBA], establish goals for the participation by small business concerns" in contracts and subcontracts from the agency. 15 U.S.C. § 644 (g)(2)(A). Even so, those annual goals must be

jointly established with the SBA and shall "***realistically reflect the potential of small business concerns***" to perform on such contracts and subcontracts. 15 U.S.C. § 644 (g)(2)(B) (emphasis added).

85. In establishing these annual goals, agencies "shall make a consistent effort to ***annually expand participation by small business concerns*** from each industry category in procurement contracts . . . ***including participation by small businesses concerns***" (such as, SDVOSB, WOSB, HUBZone small businesses). 15 U.S.C. § 644(g)(2)(D) (emphasis added).

86. In addition to the Small Business Act establishing the annual small business contracting goals, the FAR likewise implements the "acquisition-related" portions of the Small Business Act, among others. FAR § 19.000. In that regard, Government's policy is to provide "maximum practicable opportunities" for small businesses to participate in prime contracts (as well as subcontracts, which typically are not "won" under competitive procedures). FAR § 19.201(a).

87. To that end, contracting officers are required to take a number of actions to achieve small business participation as primes, including, for example, dividing proposed acquisitions into reasonably small lots to "permit offers on quantities less than the total requirement" and planning acquisitions that more than one small business can perform work. FAR § 19.202-1. Indeed, contracting officers must encourage maximum participation by "mak[ing] every reasonable effort to find additional small business concerns," including by contacting the SBA procurement center representative. FAR § 19.202-2.

88. Relatedly, the FAR also provides that "[s]mall business concerns shall be afforded an equitable opportunity ***to compete*** for all contracts that they can perform to the extent consistent with the Government's interest." FAR § 19.202-1 (emphasis added). Indeed, CICA

also authorizes small businesses set-aside competitive contracting. 41 U.S.C. § 3303(b). The FAR also notes that, "[s]mall business set-asides have priority over acquisitions using full and open competition." FAR § 19.203(e).

89. Relevant here, where the proposed acquisition is for a bundled requirement, the contracting officer shall provide to the SBA procurement center representative, at least 30 days prior to the solicitation is published, with "all information relative to the justification for the consolidation or bundling, including the acquisition plan or strategy, and if the acquisition involves substantial bundling, the information identified in [FAR §] 7.107-4." *See* FAR § 19.202-1(e)(1).

90. The agency must also provide a statement to the SBA explaining why the:

- Proposed acquisition ***cannot be divided into reasonably small lots*** (not less than economic production runs) ***to permit offers on quantities less than the total requirement***;
- Delivery schedules cannot be established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the Government;
- Proposed acquisition ***cannot be structured so as to make it likely that small businesses can compete for the prime contract***;
- Consolidated construction project cannot be acquired as separate discrete projects; or
- ***Consolidation or bundling is necessary and justified***.

FAR § 19.202-1(e)(2) (emphasis added).

91. This deliberative process is intended to provide a level of protection for small business contractors affected by abrupt agency decisions to consolidate services previously procured under several small business set-asides. If implemented properly, small business contractors will be put on notice and have time to work with the SBA to pivot their business model to meet the government's revised procurement strategy. ED's efforts to side-step this all-

important process in the name of administrative convenience evidences a disregard for this pivotal protection for small business contractors.

92. Additionally, while there are a number of small business contracting programs subject to various regulatory regimes, including procedures regarding bundling, the FAR importantly prompts that, "[t]here is no order of precedence among" the 8(a), SDVOSB, HUBZone, and WOSB programs. FAR § 19.203(a). In fact, in choosing a socioeconomic program for a particular procurement, contracting officers must, at minimum, consider (1) the results of market research to see if there are any small businesses who are capable in fulfilling the agency's requirements, and (2) the agency's progress in fulfilling its goals. FAR § 19.203(d).

93. Notwithstanding these procedures, the FAR also provides for procedures related to set-aside contracts. *See generally* FAR Subpart 19.5 (discussing small business set-asides). Indeed, under multiple award contracts, like the Solicitation, contracting officers are authorized to set-aside one or more contract awards to small business or set-aside all or part of the award for small businesses. FAR § 19.502-4. Regarding the general procedures, the FAR notes that, "contracting officer shall perform market research and document why a small business set-aside is inappropriate when an acquisition is not set aside for small business[.]" FAR § 19.501(c).

94. Here, the Solicitation provides for small business participation and requires offerors to submit a Small Business Participation Plan ("SBPP"). Solicitation at 61. The SBPP requires offerors to reach the small business contracting goals set forth in the Solicitation. Solicitation at 62. Specifically, the Solicitation notes ED's small business contracting goals of:

- Small Businesses – 32%;
- Women Owned Small Businesses – 5%;
- Small Disadvantaged Businesses – 5%;
- Service Disabled Veteran Owned Small Businesses – 3%; and

- ***Historically Underutilized Business Zones (HUBZones) – 19%.***

Solicitation at 62 § L-2.4.5. (emphasis added).

95. Interestingly, however, the HUBZone goal in the Solicitation is initially more than *six times* greater than ED's published FY2019 annual subcontracting goal of 3%. *See* U.S. Department of Education, *Procurement Small Business Goals available at* https://www2.ed.gov/policy/fund/reg/clibrary/sbgoals.html. The Solicitation also requires contractors to escalate the 19% HUBZone goal in the base year to 25% within two years of award and then to 30% within three years of award. Solicitation at 62 § L-2.4.5 ("[o]fferors are also expected to increase their percentage of HUBZone utilization to 25% within two years after award, and to 30% within three years after award."). Therefore, by the third year after award, contractors must increase their HUBZone subcontracts to 30%, or *ten times* ED's published FY2019 annual subcontracting goal of 3%.

96. Simply put, the Solicitation's small business scheme is at odds with ED's published FY2019 subcontracting goals and patently favors one small business program at the expense of others. Likewise, this arbitrary scheme evinces disparate treatment and may indicate that ED failed to consider structuring the Solicitation such that small businesses could compete as prime contractors. In addition, the arbitrary HUBZone goal also indicates that market research either wasn't carried out at all or was disconnected with the reality of HUBZone companies in the default collections and loan servicing industries.

97. Notably, the Small Business Act requires small business goals to "***realistically*** reflect the potential of small business concerns" and that, on an annual basis, they are to consistently expand among small businesses. 15 U.S.C. § 644 (g)(2)(B), (D) (emphasis added).

Similarly, the FAR provides that no one small business program is to be given preference over another. FAR § 19.203(a). The Solicitation likewise appears to be incongruent in these respects.

98. Curiously, there has been no indication from ED regarding why, despite longstanding history of small business participation as prime contractors on contracts for default collections, ED seemingly foreclosed that option by issuing a Solicitation that bundles default collections work with loan servicing activities. To be sure, small business prospective prime offerors (like EPM) will face addition challenges by the dual SBPP and bundling scheme. This is due to the unique regulatory requirements that determine what companies are considered to be "small businesses" for Federal contracts. *See* 13 C.F.R. Part 121.

99. Yet, the flaws with the SBPP do not end there. The SBPP also lends itself to potentially unequal treatment among offerors because it does not clearly state what exactly ED is looking for in SBPP's. Offerors—large and small—are instructed to provide a SBPP as part of their proposals, yet the Solicitation nonetheless makes it clear that an offeror ***may not be eligible for award for failing to submit an acceptable*** SBPP. Solicitation at 61 § L.2.4.5. What does "acceptable" mean? Will offerors be rewarded or penalized for choosing to subcontract with only four or five companies? What if a bidder only subcontracts loan servicing to a HUBZone company and makes a business decision to not subcontract default collection services to any HUBZone companies? These are just a few examples of how the SBPP is at odds with established procurement principles that offerors be put on notice as to what the Government wants and how offerors are to be evaluated. To that end, the Solicitation terms regarding the SBPP are also impermissibly vague.

100. ED's actions in establishing the Solicitation as unrestricted runs counter to the FAR's small business set-aside regulations. The past performance of PCAs in conjunction with

ED's loan servicing activities establishes that there are numerous small business entities, including EPM, who are capable of performing debt collection services which are undoubtedly a severable aspect of the student loan servicing portion of the "lifecycle." Accordingly, ED is at the very least required to establish a partial set-aside for this portion of the performance contemplated under the Solicitation. FAR § 19.502-3. While the Solicitation encourages small business subcontracting and requires offerors to submit plans in accordance with FAR 52.219-9, the inclusion of such provisions is insufficient to meet ED's obligations under FAR § 19.502-3.

101. Given Congressional intent that small businesses be given an opportunity ***to compete*** for Federal contracts, that no small businesses program shall be given preference over another, that the FAR and the Small Business Act both provide mechanisms that guard against an agency avoiding competition among small businesses, that the annual goals are to be increased consistently, that the dual SBPP and bundled scheme also harms small businesses due to the unique regulations regarding how the size of a small business concern is determined, and all other reasons aforementioned, the Solicitation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and regulation. It also runs contrary to public policy.

102. As such, this Court should set aside as unlawful ED's Solicitation that improperly restricts small businesses from having a fair opportunity to compete on an equitable playing field and that improperly fails to partially set-aside the Solicitation for small business. As a result, the Court should enjoin ED from making any awards thereunder until ED complies with applicable law and regulation.

COUNT III

REQUEST FOR TEMPORARY, PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

103. EPM incorporates the foregoing numbered paragraphs as if set forth at length herein.

104. This Court should issue temporary, preliminary and ultimately, permanent injunctive relief in the form requested below.

105. As set forth in further detail in the Memorandum of Law in Support of Application for Temporary Restraining order and Motion for Preliminary Injunction, filed concurrently herewith and incorporated herein by reference, there is a substantial likelihood that EPM will prevail on the merits of this protest.

106. EPM will suffer irreparable harm if no such relief is granted.

107. ED will suffer no harm if this Court grants injunctive relief.

108. Nor will any other interested parties suffer harm if EPM is granted injunctive relief.

109. There will be no harm to the public interest if this Court grants injunctive relief; to the contrary, the public interest will be served if EPM is granted its requested injunctive relief.

110. Therefore, the balance of equities tips in favor of awarding EPM the injunctive relief it seeks.

REQUEST FOR RELIEF

111. EPM incorporates the foregoing numbered paragraphs as if set forth at length herein.

WHEREFORE, Plaintiff prays that this Court:

(a) Take jurisdiction over this action;

(b) Expedite a hearing on the Temporary Restraining Order and Preliminary Injunction filed herewith;

(c) Issue a Temporary Restraining Order Enjoining ED from awarding and/or proceeding with any Award under the Solicitation;

(d) Issue a Preliminary Injunction Enjoining ED from awarding and/or proceeding with any Award under the Solicitation unless it complies with the procurement criteria and/or uses appropriate competitive procedures;

(e) Issue a Permanent Injunction Enjoining ED from awarding and/or proceeding with any Award under the Solicitation unless it complies with the procurement criteria and/or uses appropriate competitive procedures;

(f) Grant such other relief that it deems appropriate.

Respectfully submitted,

MATROSS EDWARDS LLC

/s/ *Joshua B. Duvall*_____

Dated: July 16, 2019

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