

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
(BID PROTEST)**

FMS INVESTMENT CORP., et al.)	
)	
Plaintiffs,)	
)	
)	No. 1:18-cv-00204-TCW
)	(Consolidated)
)	
THE UNITED STATES,)	
)	
Defendant,)	
)	Judge Thomas C. Wheeler
and)	
)	
PERFORMANT RECOVERY, INC., et al.)	
)	
<u>Intervenor-Defendants.</u>)	

**PLAINTIFF WILLIAMS & FUDGE, INC.
RESPONSE TO DEFENDANT’S MOTION TO DISMISS**

Plaintiff Williams & Fudge, Inc. (“WFI”), by counsel, hereby submits its Response to Defendant’s Motion to Dismiss (the “Motion”). ECF No. 189. As set forth further below, the Government’s basis for moving to dismiss is no longer valid and the Government’s motion should be denied.

FACTS

On May 3, 2018, the Department of Justice filed a Notice with the Court explaining that the Department of Education (“ED”) would cancel Request for Proposal No. ED-FSA-16-R-0009 (the “RFP”) and terminate for convenience the awards to Performant and Windham. ECF No. 188. On May 7, 2018, the Agency terminated for convenience the awards to Performant and Windham. That same day, the Government filed its Motion to Dismiss because “ED’s decision to cancel the RFP and terminate the awards renders the consolidated plaintiffs’ protests of that

award decision moot.” ECF No. 189, p. 3. Thereafter, numerous plaintiffs, including WFI, filed their respective motions for leave to file supplemental complaints. With the ongoing dispute around the RFP and cancellation, the Government’s basis for dismissal is no longer valid and its Motion to Dismiss should be accordingly denied.

ARGUMENT

When previously deciding similar scenarios, this Court has allowed plaintiffs to supplement their complaints and the bid protest litigation to proceed. *See Coastal Envtl. Grp., Inc. v. United States*, 114 Fed. Cl. 124 (2013); *Madison Servs., Inc. v. United States*, 90 Fed. Cl. 673 (2009). Almost identically to the instant case, in both *Coastal* and *Madison Services*, the government cancelled the underlying solicitations after the plaintiffs filed their bid protests. Thereafter the government moved to dismiss the actions as moot because there was no longer a live controversy between the parties. *See Coastal*, 114 Fed. Cl. at 128-129; *Madison Servs.*, 90 Fed. Cl. at 677. The Court, however, granted the plaintiffs’ requests for leave to file supplemental complaints thus reviving the live controversy between the parties and maintaining the Court’s subject matter jurisdiction. *See Coastal*, 114 Fed. Cl. at 132-34; *Madison Servs.*, 90 Fed. Cl. At 681-83.

The reasoning supporting the decisions in *Coastal* and *Madison Services* is equally applicable to the case presently before the Court:

If the court were to deny plaintiff's motion to amend (or, rather, to supplement) its complaint, forcing plaintiff to file a new petition, nothing would be gained save the court's collection of a new filing fee. To paraphrase the Supreme Court, it is far too late in the day, and entirely contrary to the spirit of the rules of the court and to longstanding principles, for decisions on the merits to be avoided or delayed on the basis of such mere technicalities

Coastal, 114 Fed. Cl.at 135. The history of this case shows that the Government will make every attempt to avoid litigating the bid protest and avoid adjudication. These tactics result in needless additional costs to the plaintiffs on top of the resources already expended to respond to the RFP and litigate the bid protests. WFI asks that this Court deny the Government's Motion and allow plaintiffs' bid protests to proceed.

CONCLUSION

For all the foregoing reasons, Williams & Fudge, Inc. requests that the Court deny the Government's Motion to Dismiss, maintain the preliminary injunction in this matter until the underlying dispute is resolved, and grant any other relief the Court deems just and proper.

Dated: May 18, 2018

Respectfully submitted,

WILLIAMS & FUDGE, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2018, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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