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**MEMORANDUM OPINION AND ORDER DENYING F.H. CANN & ASSOCIATES, INC., IMMEDIATE CREDIT RECOVERY, INC., CREDIT ADJUSTMENTS, INC., PROFESSIONAL BUREAU OF COLLECTIONS OF MARYLAND, INC., AND NATIONAL RECOVERIES, INC.’S MOTIONS TO INTERVENE.**

**I. INTRODUCTION.**

This Memorandum Opinion And Order denies F.H. Cann & Associates, Inc., Immediate Credit Recovery, Inc., Credit Adjustments, Inc., and Professional Bureau of Collections of Maryland, Inc.’s April 21, 2017 Motion To Intervene and National Recoveries, Inc.’s April 26, 2017 Motion To Intervene.<sup>1</sup>

**II. RELEVANT FACTUAL BACKGROUND AND PROCEDURAL HISTORY.**

On March 28, 2017, Plaintiff Continental Service Group, Inc. (“Continental”) filed a bid protest in the United States Court of Federal Claims challenging the United States Department of Education’s (“ED”) award of seven contracts under Solicitation No. ED-FSA-16-R-0009. ECF No. 1. On March 29, 2017, Continental filed a Motion For Temporary Restraining Order (“TRO”) and Motion For Preliminary Injunction requesting that the court enjoin the ED from authorizing work under the disputed contracts and diverting debt collection work to other contracting vehicles. ECF No. 7. On that same day, the court granted Continental’s March 29, 2017 Motion, temporarily enjoining the ED from “transferring work to be performed under the contract at issue in this case to other contracting vehicles to circumvent or moot this bid protest for a period of fourteen days, *i.e.*, until April 12, 2017.”<sup>2</sup> ECF No. 9 at 3.

On April 21, 2017, F.H. Cann & Associates, Inc., Immediate Credit Recovery, Inc., Credit Adjustments, Inc., and Professional Bureau of Collections of Maryland, Inc. filed a Motion To Intervene (“4/21/17 Mot.”), pursuant to United States Court of Federal Claims Rule (“RCFC”) 24(a)(2). ECF No. 69. On April 26, 2017, National Recoveries, Inc. also filed a Motion To Intervene (“4/26/17 Mot.”), pursuant to RCFC 24(a)(2). ECF No. 75. The Small Businesses

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<sup>1</sup> F.H. Cann & Associates, Inc., Immediate Credit Recovery, Inc., Credit Adjustments, Inc., Professional Bureau of Collections of Maryland, Inc. and National Recoveries, Inc. are hereinafter referred to as the “Small Businesses.”

<sup>2</sup> On April 10, 2017, the court extended the March 29, 2017 TRO for fourteen days, *i.e.*, until April 24, 2017. ECF No. 56. On April 24, 2017, the court extended the TRO for another fourteen-day period, *i.e.*, until May 8, 2017. ECF No. 73.

requested to intervene, because the TRO prevented the ED from transferring new accounts to other existing contracts, including their own. *See* ECF No. 69 at 3; ECF No. 75 at 3.

On May 2, 2017, the court convened a Preliminary Injunction Hearing. That same day, the court issued a Preliminary Injunction prohibiting the ED, until May 22, 2017, from:

- (1) authorizing the purported awardees to perform on the contract awards under Solicitation No. ED-FSA-16-R-0009; and
- (2) transferring work to be performed under the contract at issue in this case to other contracting vehicles to circumvent or moot this bid protest.<sup>3</sup>

ECF No. 87.

On May 8, 2017, Plaintiffs Continental and Pioneer Credit Recovery, Inc. (“Pioneer”) filed separate Oppositions to the Small Businesses’ April 21, 2017 Motion To Intervene and April 26, 2017 Motion To Intervene (“Continental Opp’n” and “Pioneer Opp’n”). ECF Nos. 97, 99.

On May 18, 2017, the Small Businesses filed a Reply (“5/18/17 Reply”), together with an attached Memorandum Of Points And Authorities (“5/18/17 Mem. Of P. & A.”).

On June 7, 2017, the Small Businesses filed an Expedited Motion For Ruling On Motion To Intervene. ECF No. 153. On June 14, 2017, Continental filed an Opposition to the Small Businesses’ June 7, 2017 Expedited Motion. ECF No. 159.

### **III. DISCUSSION.**

#### **A. Standing.**

“An intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing.” *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). Generally, Article III standing<sup>4</sup> requires that a plaintiff show an injury-in-fact that is fairly traceable to the defendant’s conduct, and that is redressable by a favorable court decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). A defendant, however, must satisfy slightly different requirements to show standing. *See Diamond v. Charles*, 476 U.S. 54, 66–67 (1986) (holding that a party has standing to *defend* a case when it has a “direct stake in the outcome” rather than a “mere interest in the problem”); *see also*

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<sup>3</sup> On May 22, 2017, the court extended the Preliminary Injunction until June 1, 2017. ECF No. 132. On May 31, 2017 the court extended the Preliminary Injunction until “the viability of the debt collection contracts at issue is resolved.” ECF No. 143 at 2.

<sup>4</sup> Article III standing is different from statutory standing. The latter can require a party to satisfy requirements beyond the minimum conditions established by the Constitution. For example, 28 U.S.C. § 1491(b) provides that only an “interested party,” *i.e.*, an actual or prospective bidder, has standing to initiate a bid protest. Section 1491(b), however, does not apply here, because the Small Businesses do not seek to initiate a bid protest.

*Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (holding that a party seeking a remedy “that no more directly and tangibly benefits him than it does the public at large” does not have standing); *Arizonans For Official English v. Arizona*, 520 U.S. 43, 66 (1997) (expressing “grave doubts” about whether defendant-intervenors had standing to defend a statute’s constitutionality, where the only injury was the money and effort expended in advocating for the statute’s enactment). The possibility of injury incurred by an adverse court judgment, however, is sufficient to satisfy a “direct stake in the outcome.” *See Diamond*, 476 U.S. at 66–67.

An intervening party does not need to satisfy Article III standing requirements if it takes the same position as another defendant with standing. *See McConnell v. FEC*, 558 U.S. 310 (2003), *overruled in part by Citizens United v. FEC*, 558 U.S. 310 (2010) (declining to address standing of the intervenor-defendant where the named defendant had standing and the intervenor-defendant took a position identical to the named defendant); *see also Diamond*, 476 U.S. at 68 (“[A]n intervenor’s right to continue the suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.”).

In this case, the Small Businesses request the right to intervene as defendants to lift or narrow the scope of the court’s May 2, 2017 Preliminary Injunction. 4/21/17 Mot. at 3. The Government, a defendant with standing, has argued to lift or narrow the scope of the court’s May 2, 2017 Preliminary Injunction. ECF No. 85 at 2–3. Therefore, the Small Businesses seek to take the same legal position as the Government in this case, and do not independently need to establish Article III standing.

**B. F.H. Cann & Associates, Inc., Immediate Credit Recovery, Inc., Credit Adjustments, Inc., and Professional Bureau of Collections of Maryland, Inc.’s April 21, 2017 Motion To Intervene And National Recoveries, Inc.’s April 26, 2017 Motion To Intervene.**

**1. The Small Businesses’ Argument.**

The Small Businesses argue that the May 2, 2017 Preliminary Injunction has caused them economic injury, because it enjoins the ED from transferring new work to the Small Businesses, even though no one disputes the validity of their contracts to collect student loans. 4/21/17 Mot. at 3. As a result, the Small Businesses will suffer a loss of income and have to lay off employees they can no longer afford to pay. 4/21/17 Mot. at 6. In sum, the Small Businesses seek to intervene in this case, under RCFC 24(a)(2), to challenge the scope of the Preliminary Injunction and protect their contractual interests. 4/21/17 Mot. at 3.

Regarding the first requirement of RCFC 24(a)(2), the Small Businesses argue that contract rights are “legally protectable.” 4/21/17 Mot. at 7 (citing *Amer. Renovation and Constr. Co. v. United States*, 65 Fed. Cl. 254, 257 (2005)). And, those contract rights are “directly and immediately related to the transaction that is the subject of the protest.” 4/21/17 Mot. at 6.

Regarding the second requirement of RCFC 24(a)(2), the Small Businesses argue that “any TRO, preliminary injunction, or other holding of [the] Court may come with a preclusive effect”

that would impair the Small Businesses' ability to protect their interests in a subsequent proceeding under the doctrine of *res judicata*. 4/21/17 Mot. at 7.

Regarding the third requirement of RCFC 24(a)(2), the Small Businesses insist that the Government will not adequately represent their interests. 4/21/17 Mot. at 7. Although the Government can show the harm caused by the Preliminary Injunction on a macro level, only the Small Businesses can show the particular effects of the Preliminary Injunction on these small enterprises. 4/21/17 Mot. at 8. Moreover, the Government's interests are divergent from those of the Small Businesses as exemplified by the Government's proposal voluntarily to stay proceedings, pending the ED's decision to take corrective action. 4/21/17 Mot. at 8. In addition, because none of the parties currently in this case is a small enterprise, the Small Businesses are not adequately represented by the other parties in this case. 4/21/17 Mot. at 8.

## **2. Continental's And Pioneer's Responses.**

Continental responds that the Small Businesses' interest is not directly related to Continental's bid protest. Continental Opp'n at 2. Instead, the Small Businesses are solely concerned with the scope of the court's injunctive relief. Continental Opp'n at 2. Therefore, the Small Businesses' interests are, at best, indirect and subordinate to the subject matter of the action. Continental Opp'n at 6.

Second, a final decision will not impair or impede the Small Businesses' abilities to protect their contractual interests. Continental Opp'n at 6. The Preliminary Injunction does not affect the Small Businesses' abilities to perform work on student loan accounts that they are currently servicing under their contracts; the Preliminary Injunction only prohibits the ED from transferring new work to those contracts. Continental Opp'n at 7. In addition, even if the Preliminary Injunction was lifted, the ED is not legally obligated to transfer any new student loan accounts to the Small Businesses' contracts. Continental Opp'n at 7. Therefore, the disposition of Continental's bid protest will not impair or impede the Small Businesses' abilities to protect their contractual interests. Continental Opp'n at 7.

Third, the Small Businesses' interests are adequately represented by the Government. Continental Opp'n at 7. For example, after the court issued the March 29, 2017 TRO, the Government immediately filed a motion to reduce its scope to allow the ED to transfer new student loan accounts to existing Small Businesses' contracts. Continental Opp'n at 7.

Fourth, the April 21, 2017 and April 26, 2017 Motions do not comply with the procedural requirements of RCFC 24(c). Continental Opp'n at 8. Under RCFC 24(c), a motion to intervene must "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." RCFC 24(c). The Small Businesses have not filed such a pleading. Accordingly, the court should deny their Motions to Intervene. Continental Opp'n at 8. In the alternative, if intervention is granted, the court should limit the Small Businesses' participation to matters relating solely to the scope of the Preliminary Injunction. Continental Opp'n at 8.

Pioneer makes substantially the same arguments as Continental, but Pioneer also argues that the court should deny permissive intervention under RCFC 24(b)(1), because the Small

Businesses cannot establish a question of law or fact common to the main bid protest, and intervention will unduly delay the proceedings. Pioneer Opp'n at 5–6.

### 3. The Small Businesses' Reply.

The Small Businesses reply that they have the same direct interests in the transfer of new accounts to their existing contracts as Continental and Pioneer. 5/18/17 Reply at 2. The only difference is that Continental and Pioneer want to stop the transfer of new accounts; the Small Businesses want to allow transfers. 5/18/17 Reply at 2.

Second, even if the Small Businesses are not legally entitled to new account transfers from the ED, the Small Businesses contend they would have received those account transfers, but for the Preliminary Injunction. 5/18/17 Reply at 2. Therefore, the Small Businesses have established that their contractual interests were injured, satisfying RCFC 24(a)(2)'s second requirement. 5/18/17 Mem. Of P. & A. at 7.

Third, the Small Businesses assert that they fulfill the “inadequate representation” requirement of RCFC 24(a)(2) because they merely need to show that the Government's representation of their interests “may be” inadequate. 5/18/17 Mem. Of P. & A. at 7–8.

Finally, the Small Businesses explain that their noncompliance with RCFC 24(c) is excused, because “the notice and pleading requirements under RCFC 24(c) . . . must be viewed in concert with the requirements for responsive pleadings that are imposed on defendant [*sic*] in the bid protest context.” 5/18/17 Mem. Of P. & A. at 10 (quoting *Progressive Indus. v. United States*, No. 14-1225C 2015 U.S. Claims LEXIS 460 at \*16 (Fed. Cl. Apr. 17, 2015)). Therefore, because the defendant is not required to file an answer during a bid protest, the Small Businesses are not required to file a responsive pleading under RCFC 24(c). 5/18/17 Mem. Of P. & A. at 10–11. Alternatively, even if a responsive pleading is required, the Small Businesses are unable to attach one, because Continental's March 28, 2017 Complaint is under seal, so none of the Small Businesses can access it. 4/26/17 Mot. at 3.

### 4. The Court's Resolution.

The court is required to permit anyone to intervene who: “claims an interest relating to the property or transaction that is the subject of the action, and who is so situated that disposing of the action may[,] as a practical matter[,] impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.” RCFC 24(a)(2). These requirements must be construed in favor of intervention. *See Am. Mar. Transp., Inc. v. United States*, 870 F.2d 1559, 1561 (Fed Cir. 1989).

In this case, the Small Businesses do not satisfy RCFC 24(a)(2), because they do not “claim[] an interest relating to the property or transaction that is the subject of the action.” RCFC 24(a)(2). To satisfy this requirement, the claimed interest must be “legally protectable,” *i.e.*, “one which the substantive law recognizes as belonging to or being owned by the applicant.” *Am. Mar. Transp.*, 870 F.2d at 1561–62. And, “the intervenor must either gain or lose by the *direct* legal operation and effect of the judgment.” *Id.* (emphasis in original).

The Small Businesses assert that they have an interest in this case, because the Preliminary Injunction prohibits the ED from placing new student loan accounts with Small Businesses that have existing contracts with the ED. The Small Businesses' existing contracts, however, do not require that the ED place any new student loan accounts with the movants. In fact, the ED has explained that new student loan accounts are placed with contractors, as they become available, and the ED "does not [] reserve pools of accounts for a particular contractor or set of contracts." ECF No. 34, 4/4/17 Patty Queen-Harper Decl. at ¶ 9. In short, the Small Businesses are not entitled to receive any new accounts as a matter of contract law; at best, they have an expectancy of potential new student loan accounts. Therefore, the Small Businesses do not have a "legally protectable" interest, *Am. Mar. Transp.*, 870 F.2d at 1561, "relating to the property or transaction that is the subject of [this] action," RCFC 24(a)(2).

In addition, the issue before the court in this bid protest is whether the ED properly excluded Continental and Pioneer from an award under Solicitation No. ED-FSA-16-R-0009. The Small Businesses' existing contracts have not been challenged. Therefore, a judgment in this case will not affect the Small Businesses' ability to receive new accounts. Moreover, this bid protest does not challenge the number of contracts that were awarded under Solicitation No. ED-FSA-16-R-0009, so a judgment in this case will not affect the number of contractors that the Small Businesses have to compete with for new student loan accounts. As such, the Small Businesses also failed to demonstrate that they "will either gain or lose by the *direct* legal operation and effect of the judgment." *Am. Mar. Transp.*, 870 F.2d at 1561 (emphasis in original).

#### IV. CONCLUSION.

For these reasons, F.H. Cann & Associates, Inc., Immediate Credit Recovery, Inc., Credit Adjustments, Inc., and Professional Bureau of Collections of Maryland, Inc.'s April 21, 2017 Motion To Intervene and National Recoveries, Inc.'s April 26, 2017 Motion To Intervene are **denied**.

F.H. Cann & Associates, Inc., Immediate Credit Recovery, Inc., Credit Adjustments, Inc., and Professional Bureau of Collections of Maryland, Inc.'s June 7, 2017 Expedited Motion For Ruling On Motion To Intervene is **dismissed as moot**.

**IT IS SO ORDERED.**

s/ Susan G. Braden  
**SUSAN G. BRADEN**  
**Chief Judge**