IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

CONTINENTAL SERVICE GROUP, INC. Plaintiff, v. UNITED STATES Defendant.	No. 19-331 C (Judge _____)

COMPLAINT

Continental Service Group, Inc. ("ConServe"), through its undersigned attorneys, files this Complaint against Defendant the United States of America, acting through the U.S. Department of Education, Federal Student Aid ("ED" or "Defendant"), and states as follows:

SUMMARY

1. This is a pre-award protest action challenging ED's decision to procure debt collection services for defaulted student loans ("default recovery services") through three new solicitations under the Next Generation Financial Services Environment Procurement ("NextGen Procurement"), each of which ***improperly consolidates many distinct services*** in violation of the Competition in Contracting Act ("CICA"). *See* 41 U.S.C. § 3301; Federal Acquisition Regulation ("FAR") Subpart 6.1.

2. ED apparently has decided that rather than conduct multiple, independent procurements, that it would be more administratively efficient for it to acquire many of its service needs – from default recovery services to information technology ("IT") services – through one procurement.

3. This "***everything but the kitchen sink***" approach violates CICA by improperly consolidating many distinct services, including ***default recovery services*** (performed by private collection agencies ("PCAs") like ConServe), ***financing services*** (performed by ED in conjunction with higher education institutions), ***in-repayment and back-office post-school processing services*** (performed by loan servicers), and ***the development of a new IT servicing platform*** (hereinafter referred to as the "consolidated services").

4. ED's new "streamlined" approach may be more administratively efficient for ED, but ED's approach unreasonably and unnecessarily restricts competition to those firms or teams that can provide ***all*** of these discrete services. This is problematic because it has sidelined ConServe – who, in ED's own words, submitted "***one of the most highly rated proposals***" in response to Solicitation No. ED-FSA-16-R-0009 (hereinafter referred to as the "Default Collection Procurement") – from competing to provide default recovery services, unless ConServe can find a suitable teaming partner interested in teaming that can provide all of the other services.

5. Since 2016, ED has led ConServe and other PCAs down the primrose path, focusing them intently on its efforts to procure default recovery services through the Default Collection Procurement. After being unable to complete that procurement multiple times from 2016 through 2018 due to evaluation errors and resulting successful bid protests, ultimately, ED abruptly threw up its hands and attempted to cancel the procurement in 2018, a decision that was protested successfully. In light of the U.S. Court of Federal Claims' ("COFC") decision dated September 14, 2018, invalidating ED's cancellation, the PCAs awaited another announcement from ED as to how it intended to proceed.

6. While awaiting that announcement, ***which has yet to come***, in late 2018 ED, ***without notifying interested offerors***, attempted to shoehorn in default recovery services under NextGen Procurement Phase II Solicitation No. 910031-18-R-0024. With the options of either watching their huge financial investments waste away to nothing or protect their interests and the employment of their valued employees, ConServe and other PCAs successfully protested their exclusion from the NextGen Procurement, which resulted in ED again taking "corrective actions" to address the protests that included cancelling Solicitation No. 910031-18-R-0024 and related solicitations and issuing three new solicitations – No. 910031-19-R-0005 for an Enhanced Processing Solution, No. 910031-19-R-0007 for an Optimal Processing Solution, and No. 910031-19-R-0008 for Business Process Operations (collectively referred to as "the New NextGen Solicitations").

7. Unfortunately, ED, again, has erred with its corrective actions and rather than moving forward, has taken at least two steps backward. Prior to filing this protest, ConServe, desiring to avoid another round of protests, proactively brought its concerns to ED's attention, and, at ConServe's request, the Court convened a hearing on February 15, 2019. *See* Feb. 15, 2019 Hearing Transcript, *Navient Solutions, LLC, et al*, No. 18-1679C. After hearing from ConServe, this Court suggested that ED, avoid protracted litigation, and ***consider mediation*** to resolve the dispute. *Id.* at 23:1-20. ConServe expressed its eagerness to resolve this matter amicably through mediation, as did other PCAs, but again, ED, through counsel, declined such suggestions, which necessitated the filing of this protest. *Id.* at 24:23-26 – 25:1-6.

8. ConServe has identified numerous violations of law and regulation that require the Court to sustain this Protest and enjoin ED from proceeding with the New NextGen Solicitations.

9. First, the New NextGen Solicitations improperly consolidate many distinct services from default recovery services to the development of a new IT servicing platform. In doing so, ED has unreasonably and unnecessarily restricted competition to the offeror that can provide all of those services. As a result, a highly rated PCA like ConServe – who was likely to receive an award for default recovery services work under ED's prior long-standing procurement model – cannot compete on its own to provide default recovery services but rather can only compete if it can identify and team with other highly qualified and rated firms that have financing, loan servicing, other back-office processing, and IT platform development capabilities. This procurement model unreasonably and unnecessarily precludes ConServe from competing on its own to provide default recovery services work in violation of CICA.

10. Second, the improper consolidation of many services has created an unmitigable organizational conflict of interest ("OCI") for any winning team – an ***OCI that would impair their objectivity***. For example, and highlighting but one OCI, default recovery services and loan servicing historically have been procured separately and compensated under separate payment regimes with different funding sources. Now, however, the awardee can decide where to focus its time and resources and will therefore have a financial incentive to divert incoming accounts to the service that yields a higher recovery. Consequently, the awardee's financial interests may impair the awardee's judgment and ability to render objective services.

11. Third, ED unreasonably failed to recognize that its attempt to procure loan servicing services from a single loan servicer under the New Enhanced Processing Solution and the New Optimal Processing Solution Solicitations violates a federal law, which seeks to protect loan servicers by providing that "in order to promote accountability and high-quality service to borrowers, the Secretary shall not award funding for any . . . solicitation for the FSA Next

Generation Processing and Servicing Environment . . . unless such an environment provides for the participation of ***multiple student loan servicers***." Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Title III (emphasis added).

12. In direct violation of law, ED is seeking to award a contract to a single loan servicer under the New Enhanced Processing Solution Solicitation to "provide full 'life of the loan' servicing" including "servicing loans for customer accounts of all statuses." New Enhanced Processing Solution Solicitation at 3, 7; *cf.* New Business Process Operations Solicitation at 3 (stating that "ED intends to make multiple awards for Business Process Operations"). The New Optimal Processing Solution Solicitation similarly seeks to award a contract to a single loan servicer to "execute the full range of 'life of the loan' servicing functions." New Optimal Processing Solution Solicitation at 2, 13. Thus, ED's violation of a federal law that was written specifically to protect loan servicers seeking to obtain award under the NextGen Procurement and provides an additional basis to sustain this Protest.

13. Fourth, by formally announcing its intent to procure default recovery services through the New NextGen Solicitations rather than through the Default Collection Procurement, ED's conduct has resulted in an improper *de facto* cancellation of the Default Collection Procurement. Rather than address the specific litany of concerns identified in this Court's prior decision invalidating ED's cancellation of the Default Collection Procurement, ***ED appears to have ignored this Court's order*** finding that "ED either did not have, or did not sufficiently document, a rational basis for its decision to cancel" the Default Collection Procurement and continued to go on with business as usual as if this Court did not specifically enjoin ED from cancelling that procurement. *FMS Investment Corp. v. United States*, 139 Fed. Cl. 221, 223-225

(2018) (noting that the administrative record relied upon by ED was "scant," that it appeared "slipshod," and that ED's new program to procure default recovery services "still needs to be reviewed for compliance with applicable laws and regulations").

14. While ED would have this Court believe that it has not yet decided to cancel the Default Collection Procurement and has been working tirelessly evaluating how to proceed, we all have good reason to question these representations. *See* Feb. 15, 2019 Hearing Transcript, *Navient Solutions, LLC, et al*, No. 18-1679C at 24:7-14 ("Since the order, the new solicitation has come out and ***Ed has been working on reviewing the points raised in the Court's opinion***. So that's what it's working on in regards to the old procurement . . . . analyzing that data and, you know, the need for the prior solicitation."). Once the record of ED's true actions is revealed, ***which we request through this protest***, we suspect that it will show that ED has, in fact, decided to cancel that procurement and has not taken any significant actions following the Court's decision enjoining the cancellation. ED's conduct in this regard is inappropriate and unreasonable, particularly given the huge investment of resources and funds by the PCAs in pursuing this work. Among the relief sought herein, ConServe requests that this Court order that ED produce the full and complete administrative record showing what actions, if any, it has taken in response to the Court's September 14, 2018 Order invalidating ED's cancellation decision.

15. Collectively, the restrictions in the New NextGen Solicitations and the *de facto* cancellation of the Default Collection Procurement will unreasonably and irrationally shut ConServe out from ***any*** competition for default recovery services for the next 5 to 15 years.

16. In sum, while ConServe takes no enjoyment in challenging each flawed decision made by ED, if it must to protect its significant investment and the jobs of its valued employees,

it will continue to do so. As currently drafted, the New NextGen Solicitations establish new and unreasonable obstacles to competition for default recovery services in violation of CICA and other applicable procurement laws and regulations. Accordingly, ConServe files this Protest to ensure that it has a fair opportunity to compete for default recovery services.

PARTIES

17. ConServe, located in Fairport, New York, is a leading provider of accounts receivable management and debt collection services. Moreover, ConServe is a PCA that has historically provided default recovery services to ED under Task Order No. ED-FSA-0-0008, one of several such task orders, issued in July 2009 following a competitive procurement under ED-FSA-09-000178 (the "Fiscal Year 2009 Solicitation"). In 2015, when ED issued award term extensions ("ATEs") to task order holders that had met competitive performance criteria, ConServe was one of the awardees; indeed, one of five of the 17 incumbent PCAs selected for an ATE. And, ConServe was an actual offeror under the Default Collection Procurement, the follow-on procurement to the Fiscal Year 2009 Solicitation that ED has been attempting since July 2013 to complete. ConServe is a high-performing PCA, recovering over a half-billion dollars on behalf of ED in the past two years.

18. Defendant is the United States of America, acting by and through ED.

JURISDICTION, STANDING, AND TIMELINESS

19. This Court has jurisdiction over this bid protest under the Tucker Act, 28 U.S.C. § 1491(b)(l), as amended by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996), which allows the Court to hear "an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract . . . or

any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."

20. ConServe has standing and is an interested party for purposes of this pre-award protest because it is a prospective offeror whose direct economic interest will be affected by ED's arbitrary, capricious, and unlawful attempt to consolidate many distinct services under the New NextGen Solicitations. *See Banknote Corp. of Am. v. United States*, 365 F.3d 1345, 1352 (Fed. Cir. 2004) (holding that an "interested party" is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract"). In doing so, ED has unreasonably and unnecessarily restricted competition to offerors that can provide all of those services and/or those teams that can provide all of these services. As a result, a highly rated PCA like ConServe – who was likely to receive an award for default recovery services work under ED's prior long-standing procurement model – cannot compete to provide default recovery services unless it can identify and team with other highly qualified and rated firms that have financing, loan servicing and other back-office processing capabilities. Thus, given ConServe's superior record as a default recovery services provider for ED, it has a direct economic interest in how ED intends to procure default recovery services under the New NextGen Solicitations.

21. ConServe's Protest also is timely filed prior to the due date for receipt of proposals under the New NextGen Solicitations. *See, e.g., Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007) (stating that a disappointed bidder must seek clarification of any solicitation terms containing patent errors prior to the closing of the bidding process); *Sonoran Tech. & Prof'l Servs., LLC v. United States*, 135 Fed. Cl. 28, 33 (2017) (stating that "if a bidder alleges that an agency's evaluation of a proposal runs afoul of applicable

statutes and regulations, those allegations are challenges to the terms of the solicitation that must be brought before the close of bidding"); *Visual Connections, LLC v. United States*, 120 Fed. Cl. 684, 696 (2015) (stating that "if protestor believed that there may have been a statutory violation with the RFQ, the time for raising that challenge would have been before the proposals were due").

STATEMENT OF FACTS

22. The long history and facts relevant to ConServe's earlier protests are set forth in various Orders issued by this Court and ConServe, therefore, will not repeat them below. *See, e.g., Cont'l Servs. Grp., Inc. v. United States*, 130 Fed. Cl. 798 (2017) (granting ConServe's motion for a temporary restraining order in the Default Collection Procurement protests); *Cont'l Serv. Grp., Inc. v. United States*, 722 F. App'x 986 (Fed. Cir. 2018) (affirming portions of the preliminary injunction granted to ConServe in the Default Collection Procurement protests); *FMS Inv. Corp. v. United States*, 139 Fed. Cl. 221, *amended*, 139 Fed. Cl. 439 (2018) (discussing the history of the Default Collection Procurement protests); *Navient Solutions, LLC, et al. v. United States*, No. 18-1679C (Fed. Cl. Dec. 21, 2018) (discussing the PCAs' successful protest of the original NextGen Procurement solicitations). The facts pertinent to this latest protest are summarized below.

I. ED HISTORICALLY HAS PROCURED DEFAULT RECOVERY SERVICES THROUGH STAND-ALONE CONTRACTS SEPARATE FROM LOAN GENERATION AND SERVICING CONTRACTS

23. ED administers student financial assistance programs pursuant to Title IV of the Higher Education Act of 1965. For more than 37 years, ED has used PCAs to assist in administering ED's debt management and collection systems. *See Coast Prof'l, Inc. et al. v. United State*s, 120 Fed. Cl. 727, 730 (2015), *vacated and remanded*, 828 F.3d 1349, 1351 (Fed. Cir. 2016). The assignment of a defaulted student account to a PCA for collection does not

begin until the borrower fails to make a single payment for 360 days. These collections are distinct from loan generation and other loan servicing activities. PCAs, such as ConServe, collect payments on defaulted student accounts and assist qualifying borrowers in resolving their default status voluntarily by making reasonable and affordable payments. For the past 37 years, ED has procured default recovery services through stand-alone contracts, which have not included loan generation and other loan servicing activities.

24. For example, in 2009, ED awarded an identical task order contract to 22 PCAs – including ConServe – under each PCA's respective General Services Administration Schedule 520-4 contract for default recovery services. *See Coast*, 120 Fed. Cl. at 730-731. The 22 contracts, which did not include loan generation and other loan servicing activities, had virtually identical terms and conditions and included a base period of performance and option periods. *Id.* at 730. The ordering period for the majority of the 2009 task orders ended in April 2015. *Id.* at 732.

25. Notably, the 2009 contracts also included a provision that allowed ED to reward its top-performing PCAs by extending their performance through award term extension ("ATE") contracts. The ATE contracts were intended to serve as bridge contracts between the expiration of the 2009 contracts and ED's award of follow-on contracts under the Default Collection Procurement. When ED awarded the initial 2015 ATEs, ED awarded contracts to only five top performing companies, including ConServe, based largely on their high recovery rates and low error rates. *See* ConServe ATE Task Order No. ED-FSA-15-O-0029. This contract is the lifeblood of ConServe.

II. THE COURT OF FEDERAL CLAIMS ENJOINED ED FROM CANCELING THE DEFAULT COLLECTION PROCUREMENT

26. ConServe, and other PCAs, are currently providing default recovery services and collecting on defaulted student loans pursuant to task orders issued to them under a 2009 ED contract, which was extended only for the top performers in 2015 pursuant to Award-Term-Extension contracts.

27. ED has been attempting since July 2013 to complete a follow-on procurement via the Default Collection Procurement to continue this program of default recovery services. The Default Collection Procurement was the subject of several rounds of protests, resulting in numerous decisions from the Government Accountability Office ("GAO") and the federal courts. *See, e.g., General Revenue Corp. et al.*, B-414220.2 *et al.*, Mar. 27, 2017, 2017 CPD ¶ 106; *Cont'l Serv. Grp. v. United States*, 722 Fed. App'x 986 (Fed. Cir. 2018); *FMS Inv. Corp. v. United States*, 136 Fed. Cl. 439 (2018); *Premiere Credit of N.A., LLC; Financial Mgmt. Sys. Inv. Corp.-- Recon.*, B-414220.49, B-414220.50, Apr. 6, 2017, 2017 CPD ¶ 117.

28. After successfully protesting multiple rounds of flawed evaluation decisions, ED then decided to cancel that procurement. ConServe and seven other PCAs filed protests at the Court challenging ED's May 3, 2018, decision to cancel the Default Collection Procurement. On September 14, 2018, this Court granted the PCAs' motions to permanently enjoin ED from cancelling the Default Collection Procurement on the basis of the administrative record that ED relied on to justify its cancellation decision. *FMS Investment Corp. v. United States*, 139 Fed. Cl. 221, (2018), *amended*, 139 Fed. Cl. 439 (2018). Based on the "scant" and "slipshod" record before it, this Court held that "ED either did not have, or did not sufficiently document, a rational basis for its decision to cancel" the Default Collection Procurement. *FMS Investment Corp*., 139 Fed. Cl. at 223-225. The Court also noted that ED's new program to procure default recovery

services "***still needs to be reviewed for compliance with applicable laws and regulations***." *Id.* at 225 (emphasis added).

29. This Court highlighted additional flaws in ED's attempted cancellation:

> Furthermore, the [Administrative Record ("AR")] is missing critical information about the enhanced servicer program. The AR does not include any plan or timeline for implementing the program. It does not include a request for proposals, or any mention of what that request might look like. It does not refer to a source of funding. It does not even include a copy of the solicitation that ED cancelled to clear a path for the enhanced servicers.
>
> The AR also lacks thorough estimates of current and future defaulted loan volumes and loan processing capacity. The cancellation notice assumes that enhanced servicers will begin processing loans "in the near future." AR 27. But it sheds no light on exactly when the enhanced servicers will begin processing loans, or what the enhanced servicers' processing capacity will be at any point in the future.

Id.

III. CONSERVE AND OTHER PCAS SUCCESSFULLY PROTESTED ED'S ATTEMPT TO SHOEHORN DEFAULT RECOVERY SERVICES INTO NEXTGEN PROCUREMENT PHASE II SOLICITATION NO. 910031-18-R-0024

30. Two months later, in November 2018, ConServe and several other PCAs challenged ED's attempt to procure default recovery services through NextGen Phase II Solicitation No. 910031-18-R-0024 - "Business Process Operations," which was previously known as Components E and F in the Phase I Solicitation. ConServe explained that ED's efforts to shoehorn in default recovery services into the NextGen Procurement ***after*** the Phase I Solicitation was issued and proposals were due improperly and unfairly sidelined ConServe and the other PCA protesters from the competition in violation of CICA. In short, ConServe sought merely a fair opportunity to compete to provide ED with default recovery services under the NextGen Procurement.

31. At a hearing on December 4, 2018, this Court commented that protesters had made a convincing argument that they had been excluded from the NextGen Procurement in a seemingly "blatant violation" of CICA. Dec. 4, 2018 Hearing Transcript at 33:11-12; 37:2-3, *Navient Solutions, LLC, et al*, No. 18-1679C. The Court asked ED whether it would voluntarily take corrective actions to afford ConServe and the other protesters the relief they requested – the opportunity to compete. *Id.* at 33-34.

32. Shortly after the hearing, on December 14, 2018, ED represented to the Court that it would take corrective actions that "will render the consolidated plaintiffs' claims moot because it provides the consolidated plaintiffs with the relief they seek: a fresh opportunity to participate in the solicitation for support across the student aid lifecycle covered by NextGen components C, D, E, and F." Defendant's Motion to Stay Case Pending Corrective Action at 1, *Navient Solutions, LLC, et al*, No. 18-1679C.

33. At a separate hearing held on December 21, 2018, ConServe, through counsel, suggested to the Court that ED give the protesters the opportunity to review and comment on a draft solicitation before it was released out of concern that ED, again, would implement measures that would address one protest while creating another; specifically, ***ConServe was concerned that ED would attempt to consolidate or bundle a multitude of services and again sideline ConServe from participating in its own right to provide such work***. Dec. 21, 2018 Hr'g Tr. 30:1-16, *Navient Solutions, LLC, et al*, No. 18-1679C. In response, the Court suggested that protesters meet with ED and try to work this all out, which ConServe expressed a willingness to do, but ED, through counsel, made no similar gesture. *Id.* at 28-30.

34. In the name of "corrective actions," on January 15, 2019, ED cancelled the component C, D, E, and F solicitations and issued the New NextGen Solicitations discussed below.

IV. ED ISSUED NEW NEXTGEN SOLICITATIONS WHICH ATTEMPT TO CONSOLIDATE HISTORICALLY SEPARATELY PROCURED SERVICES

35. On January 15, 2019, ED issued three New NextGen Solicitations: the New Enhanced Processing Solution Solicitation (No. 910031-19-R-0005), the New Optimal Processing Solution Solicitation (No. 910031-19-R-0007),[1] and the New Business Process Operations Solicitation (No. 910031-19-R-0008).

36. All three of the New NextGen Solicitations attempt to consolidate historically separately procured services, including default recovery and loan servicing. The New Business Process Operations Solicitation, which prominently addresses default recovery services, states that the services acquired under this solicitation will support 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***)." New Business Process Operations Solicitation at 3 (emphasis added). The solicitation describes the "life cycle of student financing" and the current structure of ED's student loan processing:

> At the beginning of the life cycle, customers apply for federal financing via the Free Application for Federal Student Aid ("FAFSA"). FSA uses this information to calculate eligibility for federal student loans. For eligible customers, FSA then originates and disburses loans, primarily through higher educational institutions, to FSA customers.
>
> ***Once customers enter repayment, customer loans are currently assigned to one of nine servicers, which perform a complete set***

[1] This solicitation was originally titled the "Optimal Solution Platform." The word "Processing" was added on January 15, 2019, and on January 22, 2019, ED revised the title further to drop the word "Platform." Thus, at the time of filing this protest, the title is "Optimal Processing Solution."

> ***of Federal student loan servicing activities*** including: 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. Each of the nine servicers operates its own engagement layer with proprietary branding (e.g., websites, tools, contact centers), utilizes one of four servicing platforms, and maintains certain additional technical systems (e.g., identity and access management solutions). Individual customers may have several loans on different repayment plans and may be enrolled in specialty programs (e.g., Public Service Loan Forgiveness ("PSLF"), Total and Permanent Disability Discharge ("TPD"), Teacher Education Assistance for College and Higher Education Grants ("TEACH"), Federal Perkins Loans ("Perkins"), Pell Grant overpayments ("Pell")).
>
> ***For customers who fail to pay their loans, currently FSA and private collection agencies share Federal default recovery activities.*** Once a loan defaults, FSA transfers the loan to a default management and collection system (DMCS) and attempts to bring the loan back to good standing. If unsuccessful, collections activity is turned over to one of a group of contracted third-party Private Collection Agencies (PCAs) that pursue default resolution. Customers may rehabilitate a defaulted loan by making a series of payments or consolidating their loans out of default. This process often results in rehabilitated borrowers being handed off multiple times between DMCS/PCAs and the servicers.

Id. at 3-4 (emphasis added).

37. ED's stated goal with the New Business Process Operations Solicitation is to "procure an enterprise-wide, FSA-branded omni-channel digital platform featuring a mobile-first, mobile-complete, and mobile-continuous solution." *Id.* at 5. The solicitation states that this "digital platform ***will consolidate the functionalities*** of the multiple websites, mobile applications, and contact centers ***that currently exist across the full customer lifecycles (from application to school to servicing to default)***." *Id.* at 5-6 (emphasis added). ED then describes the litany of disparate services that have been consolidated. *See id.* at 9-10.

38. Although the New Business Process Operations Solicitation most directly addresses the procurement of default recovery services, the other two New NextGen Solicitations also seek to procure default recovery services. The New Enhanced Processing Solution Solicitation explains that the procurement will provide a technical platform that will encompass default recovery services:

> The Enhanced Processing Solution (Solution) will serve as the student financing servicing environment for FSA's existing customers. ***Solution will provide full "life of the loan" servicing: servicing loans for customer accounts of all statuses, including those that are in default.*** Solution will rapidly migrate existing loans from current servicers, through loan migration (maintaining dynamic and complete customer historical data) while minimizing customer disruption, per target milestones...

New Enhanced Processing Solicitation at 7 (emphasis added).

39. Like the New Enhanced Processing Solution Solicitation, the Optimal Processing Solution Solicitation seeks to procure a technical platform that will encompass default recovery services:

> Optimal Processing Solution shall be a highly adaptable solution set which ***supports current and future FSA products and processes across the entire lifecycle of student financing, including but not limited to functions for application for financing, to origination and disbursement, to processing and servicing and pay-off or default.*** Solution will deploy integrated functions and products over time. Solution shall deliver cost efficiencies through significantly increased automation and a modern technical backbone (e.g., modular code base, cloud operability, microservices, two-speed development compatibility, and/or innovative middleware), aiming for a set of integrated microservices.

New Optimal Processing Solution at 3 (emphasis added).

40. Notably, while at first blush the New Enhanced Processing Solution and Optimal Processing Solution Solicitations appear to focus solely on the procurement of digital platforms, a closer reading reveals that ***ED may use those solicitations to procure default recovery services***

outside of the New Business Process Operations Solicitation. For example, the New Enhanced Processing Solution Solicitation enables ED to jettison the New Business Process Operations Solicitation and instead procure all of its default recovery services through the New Enhanced Processing Solution Solicitation:

> ***Business process operations: Solution may serve as the sole business process operations (both contact center support and back-office processing) provider for all customer accounts as they are migrated onto the new servicing platform until the multiple vendors to be awarded under the separate Business Process Operations solicitation are fully operational***. Once the Business Process Operations vendors are fully operational, no less than 80% of customer accounts will be re-assigned to the separate Business Process Operations vendors. The percentage allocated to this Solution may increase, at the discretion of ED, in the public's interest.

New Enhanced Processing Solution Solicitation at 12 (emphasis added).

41. Similarly, the New Optimal Processing Solution Solicitation ***includes a Business Process Operations indefinite delivery, indefinite quantity component*** with a base ordering period of 5 years and two optional 5-year ordering periods, ***which would enable ED to use this solicitation to shut ConServe out of default recovery services work for 15 years***. New Optimal Processing Solution Solicitation at 2 ("The Government anticipates the following periods of performance . . . Business Process Operations (IDIQ) – a base ordering period of five years, with two (2), five-year optional ordering periods.").

42. In addition, the New Optimal Processing Solution Solicitation seeks to further reduce the potential default recovery services work that could be performed under the New Business Process Operations Solicitation:

- Processing Administrative Wage Garnishment (AWG) and Treasury Offset Program (TOP) initiation, tracking and reporting, and research (e.g., processing customer payments to reflect offsets, initiating transmission of required customer due process notices);

> and,
>
> - Identifying defaulted accounts for litigation referral, as required by law, and working with Business Process Operations to prepare litigation packets and Certificates of Indebtedness (COI).
>
> - Solution shall automate all possible servicing and other functions to minimize manual processing. Solution may only rely on streamlined manual processing by the separately provided Business Process Operations in the cases where automation is not feasible; however, ***Solution shall provide personnel to do manual processing related to financial functions and error/dispute investigation and processing to be performed at the portfolio level (refer to prior two bullets for those functions and tasks)***.

New Optimal Processing Solution Solicitation at 14 (emphasis added).[2]

43. Thus, in addition to consolidating many distinct services from default recovery services to loan servicing services under the New Business Process Operations Solicitation, ED also seeks to procure default recovery services, loan servicing services, and the development of a new IT servicing platform through the New Enhanced Processing Solution and Optimal Processing Solution Solicitations that are clearly focused on the development of a digital platform.

44. Keenly aware that ConServe and other PCAs cannot, independently, provide these consolidated services, all three of the New NextGen Solicitations attempt to appease PCAs like ConServe by advising them to use ***non-exclusive teaming agreements*** to form a team, or multiple teams, to bid on the procurements:

> Offerors shall not enter into any exclusivity agreements with subcontractors. Nothing in the offeror's teaming agreement or other arrangement with a proposed subcontractor shall prohibit or restrict in any way the ability of the proposed subcontractor from

[2] Notably, during ConServe's prior protest at COFC regarding the Default Collection Procurement, ED's Chief Business Operations Officer of Federal Student Aid filed a declaration, under penalty of perjury, that included a chart that identified administrative wage garnishment and litigation referral as default recovery activities exclusively performed by PCAs. *See* Exhibit 1, Declaration of William Leith, Case No. 17-0449, Dkt. No. 183-2 (Aug. 4, 2017) at 12.

> pursuing subcontract or teaming arrangements with other offerors participating in this competition or from entering in any such arrangement. Proposals that include the use of exclusivity agreements will be considered by the Government as deficient and eliminated from consideration.

New Business Process Operations Solicitation at 55; New Optimal Processing Solution Solicitation at 89; the New Enhanced Processing Solution Solicitation at 60. Offering offerors the ability to team, however, does not cure the blatant competition violations.

45. Importantly, all three of the New NextGen Solicitations also contain express Conflict of Interest provisions, which state:

> (a)(1) The contractor, subcontractor, employee, or consultant, has certified that, to the best of its knowledge and belief, there are no relevant facts or circumstances that could give rise to an ***organizational or personal conflict of interest*** (see FAR Subpart 9.5 for organizational conflicts of interest) (or apparent conflict of interest) for the organization or any of its staff, and that the contractor, subcontractor, employee, or consultant has disclosed all such relevant information if such a conflict of interest appears to exist to a reasonable person with knowledge of the relevant facts (or if such a person would question the impartiality of the contractor, subcontractor, employee, or consultant). Conflicts may arise in the following situations:
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> . . .
>
> (iii) ***Impaired objectivity —A potential contractor,*** subcontractor, employee, or consultant, or member of their immediate family (spouse, parent, or child) ***has financial or other interests that would impair, or give the appearance of impairing, impartial judgment*** in the evaluation of government programs, in offering advice or recommendations to the government, or ***in providing*** technical assistance or other ***services to recipients of Federal funds as part of its contractual responsibility***. . . .

New Business Process Operations Solicitation at 32 (emphases added); New Enhanced Processing Solution Solicitation at 36-37 (emphasis added); New Optimal Processing Solution Solicitation at 51-52 (emphasis added).

46. In sum, a plain reading of the New NextGen Solicitations reveals that ED did exactly what ConServe expressed concern about at the December 21, 2018 hearing with this Court – improperly consolidated distinct services – thereby precluding ConServe from competing to provide default recovery services. For these reasons, ConServe must file this Protest to ensure that it has a fair opportunity to compete for default recovery services.

COUNT I

(THE NEW NEXTGEN SOLICITATIONS IMPROPERLY CONSOLIDATE MANY DISTINCT SERVICES FROM DEFAULT RECOVERY TO LOAN SERVICING TO THE DEVELOPMENT OF A NEW IT SERVICING PLATFORM IN VIOLATION OF CICA)

47. ConServe incorporates by reference the foregoing paragraphs as if fully stated herein.

48. The New NextGen Solicitations violate CICA by improperly consolidating many distinct services from default recovery services to the development of a new IT servicing platform. As a result, ED has unreasonably and unnecessarily restricted competition under the New NextGen Solicitations to those offerors that can provide ***all*** of these discrete services.

49. CICA generally requires that solicitations permit full and open competition and contain restrictive provisions only to the extent necessary to satisfy the procuring agency's needs. *See* 41 U.S.C. § 3301; FAR Subpart 6.1; C*harles H. Tompkins Co. v. United States*, 43 Fed.Cl. 716, 720 (1999) ("A consequence of this [full and open competition] duty is the requirement that solicitation provisions which restrict competition be used only to the extent necessary to satisfy the needs of the agency or as authorized by law.") (internal quotations omitted). Under CICA, the term "full and open competition" means that "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement." 41 U.S.C. § 107.

50. And while this protest presents matters of first impression as the Court has not directly addressed an allegation of improper consolidation outside the small business context, the GAO consistently has recognized that an allegation of improper consolidation (or bundling) under CICA reflects a claim that ***a contract combines separate requirements beyond what is reasonable and necessary*** to meet the agency's needs, thereby limiting competition by sidelining offerors that can only perform a portion of the requirement.[3] *See, e.g.*, *Vantex Serv. Corp*., B–290415, Aug. 8, 2002, 2002 CPD ¶ 131 at 4 (sustaining protest where the agency improperly bundled two distinct types of waste removal services which reduced competition in violation of CICA); *EDP Enters., Inc*., B-284533.6, May 19, 2003, 2003 CPD ¶ 93 (sustaining protest where the agency improperly bundled food services with other logistics support functions which restricted competition in violation of CICA).

51. Despite ED's idea to conduct many procurements simultaneously under NextGen for administrative convenience, the GAO has consistently held that administrative convenience ***does not*** justify an agency's consolidation (bundling) of disparate requirements and, in turn, violates the CICA's "full and open competition" mandate:

> The agency's justification, quoted above, essentially amounts to reliance on administrative convenience as the basis for the bundling. However, ***the fact that the agency may find that combining the requirements is more convenient administratively,*** in that it has found dealing with one contract and contractor less burdensome, ***is not a legal basis to justify combining the requirements, if the combining of requirements restricts competition***.

[3] The FAR defines the term "consolidation" as "a solicitation for a single contract . . . to satisfy . . . Two or more requirements of the Federal agency for supplies or services that have been provided to or performed for the Federal agency under two or more separate contracts . . . ." FAR 2.101. "Bundling," on the other hand, is merely a subset of "consolidation" that combines two or more requirements for supplies or services, previously provided or performed under separate smaller contracts, in a manner that impacts a small business' ability to compete. *Id.*

Vantex Serv. Corp., *supra*, at 4 (emphases added).

52. The GAO has explained that "***CICA and its implementing regulations require that the scales be tipped in favor of ensuring full and open competition***, whenever concerns of economy or efficiency are being weighed against ensuring full and open competition." *Id.* (emphasis added)*; see also Better Serv.*, B-265751, Jan. 18, 1996, 96-1 CPD ¶ 90 ("When concerns of administrative convenience are being weighed against ensuring full and open competition, [CICA]. . . and its implementing regulations require that the scales be tipped in favor of ensuring full and open competition.").

53. Furthermore, ***allowing teaming does not cure this serious defect***. Indeed, the GAO has found unpersuasive an agency's position that offerors can team to meet the solicitation requirements. Specifically, GAO held that "[t]he fact that the agency expects to receive some competition under the RFP does not relieve an agency of the burden under CICA of justifying restrictions to full and open competition." *2B Brokers, et al*., B-298561, Nov. 27, 2006, 2006 CPD ¶ 178 at 10; *see also Nat'l Customer Eng'g*, B–251135, Mar. 11, 1993, 93–1 CPD ¶ 225 at 6. "The issue is not whether there are any potential offerors which can surmount barriers to competition by, ***for example, entering into teaming or partnering arrangements as argued by the agency***, but rather whether the barriers themselves--here, bundling--are required to meet the government's needs." *EDP Enters., Inc.*, B-284533.6, May 19, 2003, 2003 CPD ¶ 93 (emphasis added); *see also Vantex Serv. Corp*., *supra*, at 5; *Nat'l Customer Eng'g*, *supra*, at 5.

54. Here, ED is attempting to consolidate via the New NextGen Solicitations many distinct and independent services that have historically been procured separately or otherwise handled directly by ED. As a result, a highly rated PCA like ConServe – who was likely to receive an award for default recovery services work under ED's traditional procurement model –

cannot compete for default recovery services work unless it can identify and team with other highly qualified and rated firms that can provide the remaining panoply of services. This new teaming requirement is unreasonable and unnecessarily restricts competition in violation of CICA.

55. Similar to the GAO's explanation in *EDP Enterprises., Inc.*, the issue here is not whether ConServe or any other potential offeror can form a team potentially to surmount the barriers to competition, but rather whether the barriers themselves – *i.e.*, the improper consolidation of disparate and distinct services – are required to meet the Government's needs. B-284533.6, May 19, 2003, 2003 CPD ¶ 93 at 8. ***The answer to that question is indisputably "no."*** Indeed, ED has not – and cannot for that matter – provide a reasonable explanation for why the consolidation of these disparate services is necessary to meet the Government's needs, particularly when the consolidation will result in the exclusion of the most qualified and highly rated PCAs from the competition for default recovery services work. ***Nor can ED reasonably explain why it would wish to sideline highly experienced PCAs like ConServe from competing***, which is good for ED and taxpayers.

56. Moreover, while ED may assert that consolidating all of these disparate services is more convenient administratively to the agency and borrowers, the GAO persuasively has explained that convenience "is not a legal basis to justify combining the requirements, if the combining of requirements restricts competition." *Vantex Serv. Corp.*, *supra*, at 4. Indeed, "[w]hen concerns of administrative convenience are being weighed against ensuring full and open competition, the Competition in Contracting Act . . . and its implementing regulations require that ***the scales be tipped in favor of ensuring full and open competition***." *Better Serv.*, B-265751, Jan. 18, 1996, 96-1 CPD ¶ 90 (emphasis added).

57. In short, ED has erected unreasonable and unnecessary barriers to competition in violation of CICA. For these reasons, the Court should sustain this Protest.

COUNT II
(ED'S IMPROPER CONSOLIDATION OF DEFAULT RECOVERY SERVICES AND LOAN SERVICING HAS CREATED AN UNMITIGABLE ORGANIZATIONAL CONFLICT OF INTEREST FOR ANY WINNING TEAM)

58. ConServe incorporates by reference the foregoing paragraphs as if fully stated herein.

59. As this Court has recognized, an underlying principle of the FAR's OCI rules is "[p]reventing the existence of conflicting roles that ***might bias a contractor's judgment***." *Aegis Techs. Grp., Inc. v. United States*, 128 Fed. Cl. 561, 575 (2016) (quoting FAR 9.505(a)) (emphasis added). Towards this end, this Court has explained that the "primary concern" of an impaired objectivity OCI is that "***a firm might not be able to render impartial advice***." *Sigmatech, Inc. v. United States*, No. 18-1425C, 2018 WL 6920166, at *40 (Fed. Cl. Nov. 30, 2018) (internal quotations omitted); *see also Turner Const. Co., Inc. v. U.S., 94 Fed. Cl.* 561, 569 (2010); *C2C Innovative Solutions, Inc*., B-416289, B-416289.2, July 30, 2018, 2018 CPD ¶ 269 at 8 (stating that "an impaired objectivity OCI exists where a firm's ability to render impartial advice to the government will be undermined by ***the firm's competing interests***, such as a relationship to the product or service being evaluated").

60. ED's improper consolidation of many services has created an unmitigable OCI for any winning team. For example, and highlighting but one OCI, default recovery services and loan servicing historically have been procured separately ***and compensated under separate payment regimes with different funding sources***. PCAs performing default recovery services are compensated through a contingency fee that is based upon the amount of money actually recovered from defaulted borrowers, and the fee is derived from the funds collected. *See* 31

U.S.C. §§ 3718(d)-(e). Loan servicers, on the other hand, are paid a set monthly fee per account through Congressional appropriations. *See, e.g.*, H.R. Rep. No. 115-862 at 149 (setting the appropriation amount for "Loan Servicing Activities" in fiscal year 2019 at $980,000,000); H.R. Rep. No. 115-244 at 125 (setting the appropriation amount for "Loan Servicing Activities" in fiscal year 2018 at $1,017,000,000). Thus, since ED's new procurement model consolidates these services under the New NextGen Solicitations, the winning team will be subject to both payment regimes.

61. Moreover, the winning team will have a financial incentive to divert incoming accounts and shift resources to the service that will provide higher compensation and/or profits, which may conflict with what is best for the borrowers or the Government. As a result, this inherent incentive to assign accounts and shift resources to the more profitable components will impair the winning team's objectivity and will affect its ability to render impartial "services to recipients of Federal funds as part of its contractual responsibility." New Business Process Operations Solicitation at 32; New Enhanced Processing Solution Solicitation at 37; New Optimal Processing Solution Solicitation at 52.

62. Furthermore, while not entirely clear, the New NextGen Solicitations appear to exacerbate the issue by allowing offerors to set their own pricing models for loan servicing and default recovery work. *See, e.g.*, New Business Process Operations Solicitation Attachment 18 ("Vendors may adjust both price methodologies (e.g., with/without implementation) and pricing model (e.g., per customer, flat price, performance-based)."); New Enhanced Processing Solution Solicitation Attachment 20 (same). As a result, an offeror who underbids one component (e.g., loan servicing) in an attempt to be the lowest priced offeror would have an inherent financial

incentive to assign accounts and shift resources to the more profitable component (e.g., default recovery) after award has been made.

63. In either case, by consolidating many services, including specifically default recovery services with loan servicing, ED has created an OCI that no winning team could reasonably mitigate. Accordingly, the Court should sustain this Protest because ED's new procurement model under the New NextGen Solicitations is arbitrary, capricious, and in violation of applicable law and regulations.

COUNT III

(The NEW NEXTGEN SOLICITATIONS VIOLATE THE FEDERAL LAW THAT FUNDS THE NEXTGEN PROCUREMENT)

64. ConServe incorporates by reference the foregoing paragraphs as if fully stated herein.

65. This Court has made clear that it "is a rule of constitutional law that a government agency cannot validly contract to pay funds in contravention of a federal statute because any 'payment of funds from the Treasury must be authorized by a statute.'" *Fluor Enterprises, Inc. v. U.S.*, 64 Fed. Cl. 461, 491–92 (2005) (quoting *Office of Personnel Management v. Richmond,* 496 U.S. 414, 424 (1990) and citing U.S. Const. art. I, § 9 cl. 7).

66. With this is mind, this Court has noted that "Congress can and frequently does 'legislate' in appropriation acts." *Envirocare of Utah, Inc. v. United States,* 44 Fed. Cl. 474, 482, *dismissed*, 217 F.3d 852 (Fed. Cir. 1999). "Like any other statute, appropriation acts are passed by both houses and signed by the President (or enacted over the president's veto). As such, they are just as effective a way to legislate as are ordinary bills relating to a particular subject." *Id.* (citations omitted). Thus, because the Constitution forbids payment of funds from the Treasury except as provided for in an appropriation, it is "the duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Urban Data Sys., Inc. v. United States,*

699 F.2d 1147, 1154 (Fed.Cir.1983) (quoting *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947)).

67. ED's intention to procure loan servicing services from a single loan servicer under the New Enhanced Processing Solution and the New Optimal Processing Solution Solicitations violates a recent law passed by Congress that applies directly to the NextGen Procurement. Specifically, that law provides, in relevant part, that:

> . . . [I]n order to promote accountability and high-quality service to borrowers, ***the Secretary shall not award funding for any*** contract solicitation for a new Federal student loan servicing environment, including the ***solicitation for the FSA Next Generation Processing and Servicing Environmen***t as amended by the Department of Education on February 20, 2018, ***unless such an environment provides for the participation of <u>multiple</u> student loan servicers*** that contract directly with the Department of Education to manage a unique portfolio of borrower accounts and the full life-cycle of loans from disbursement to pay-off with certain limited exceptions, and allocates student loan borrower accounts to eligible student loan servicers based on performance. . . .

Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Title III (emphasis added).

68. In clear violation of Congress' mandate – designed to protect loan servicers – ED is seeking to award a contract to a single loan servicer under the New Enhanced Processing Solution Solicitation to "provide full 'life of the loan' servicing" including "servicing loans for customer accounts of all statuses." New Enhanced Processing Solution Solicitation at 3, 7; *cf.* New Business Process Operations Solicitation at 3 (stating that "ED intends to make multiple awards for Business Process Operations"). The New Optimal Processing Solution Solicitation similarly seeks to award a contract to a single loan servicer to "execute the full range of 'life of the loan' servicing functions." New Optimal Processing Solution Solicitation at 2, 13.

69. In short, ED's violation of a federal law, which was written specifically for the benefit of loan servicers competing for award under the NextGen Procurement provides an additional basis to sustain this Protest. *See Lyng v. Payne,* 476 U.S. 926, 937 (1986) (noting that "an agency's power is no greater than that delegated to it by Congress"); *see also United States v. Amdahl Corp.*, 786 F.2d 387, 392–93 (Fed. Cir. 1986) ("Administrative actions taken in violation of statutory authorization or requirement are of no effect."); *Centech Group, Inc. v. U.S.*, 554 F.3d 1029, 1039 (Fed. Cir. 2009) (same).

COUNT IV
(ED'S INACTION AND ISSUANCE OF THE NEW NEXTGEN SOLICITATIONS HAS RESULTED IN AN IMPROPER DE FACTO CANCELLATION OF THE DEFAULT COLLECTION PROCUREMENT)

70. ConServe incorporates by reference the foregoing paragraphs as if fully stated herein.

71. The phrase, "the writing is on the wall" could not be more appropriate. ED effectively has cancelled the Default Collection Procurement since the Court's September 14, 2018, decision invalidating ED's prior cancellation decision. ED would have this Court believe that it has been working tirelessly evaluating how to proceed when ConServe suspects ***ED has continued to proceed as though the procurement was cancelled***. *See* Feb. 15, 2019 Hearing Transcript, Navient Solutions, LLC, et al, No. 18-1679C at 24:7-14 ("Since the order, the new solicitation has come out and Ed has been working on reviewing the points raised in the Court's opinion. So that's what it's working on in regards to the old procurement . . . . analyzing that data and, you know, the need for the prior solicitation.").

72. In its September 14, 2018 decision, this Court held that "ED either did not have, or did not sufficiently document, a rational basis for its decision to cancel" the Default Collection Procurement. *FMS Investment Corp.*, 139 Fed. Cl. at 223. This Court noted that the

administrative record relied upon by ED was "scant," that it appeared "slipshod," and that ED's new program to procure default recovery services "***still needs to be reviewed for compliance with applicable laws and regulations.***" *Id.* at 225 (emphasis added). This Court also highlighted additional flaws in ED's attempted cancellation:

> Furthermore, the [Administrative Record ("AR")] is missing critical information about the enhanced servicer program. The AR does not include any plan or timeline for implementing the program. It does not include a request for proposals, or any mention of what that request might look like. It does not refer to a source of funding. It does not even include a copy of the solicitation that ED cancelled to clear a path for the enhanced servicers.
>
> The AR also lacks thorough estimates of current and future defaulted loan volumes and loan processing capacity. The cancellation notice assumes that enhanced servicers will begin processing loans "in the near future." AR 27. But it sheds no light on exactly when the enhanced servicers will begin processing loans, or what the enhanced servicers' processing capacity will be at any point in the future.

Id.

73. For these reasons, the Court enjoined ED from cancelling the Default Collection Procurement based on the administrative record that it submitted and, in a subsequent Order, clarified that the protest proceedings had been restored to "the posture of the process before the illegal cancellation." *Id.* at 227; *FMS Investment Corp. v. United States*, 139 Fed. Cl. 439, 440 (2018).

74. Rather than address the specific ***litany of concerns identified by the Court***, ED has continued to go on with business as usual as if the Court did not enjoin it from cancelling the procurement. In doing so, ED appears to have cancelled the Default Collection Procurement, but yet ED still has not provided this Court with a "reasoned analysis" for this significant change in

the way that ED procures default recovery services. *FMS Investment Corp. v. United States*, 139 Fed. Cl. at 226.

75. Collectively, the restrictions in the New NextGen Solicitations and the *de facto* cancellation of the Default Collection Procurement will unreasonably and irrationally shut ConServe out from ***any*** ED competition for default recovery services.

COUNT V
(DECLARATORY RELIEF)

76. ConServe incorporates by reference the foregoing paragraphs as if fully stated herein.

77. With respect to Counts I thru III, ConServe seeks a declaratory judgment that ED's decision to procure default recovery services under the New NextGen Solicitations is arbitrary, capricious, and in violation of CICA and other applicable procurement laws and regulations.

78. With respect to Count IV, ConServe seeks a declaratory judgment that ED's issuance of the New NextGen Solicitations has resulted in an improper *de facto* cancellation of the Default Collection Procurement.

79. These declaratory judgments will provide a conclusive and practical resolution to this protest by making it clear to ED that its current attempt to procure default recovery services under the New NextGen Solicitations is improper and prejudicial to prospective offerors like ConServe.

COUNT VI
(INJUNCTIVE RELIEF)

80. ConServe incorporates by reference the foregoing paragraphs as if fully stated herein.

81. ED's decision to consolidate default recovery, loan servicing, back office, digital platform development, and other discrete services under the New NextGen Solicitations is arbitrary and capricious, constitutes a clear and prejudicial violation of CICA, and violates other applicable procurement laws and regulations.

82. ConServe, as an experienced and highly rated PCA who has and is providing default recovery services to ED, has been materially prejudiced by ED's failure to procure default recovery services through fair and open competition. But for ED's improper consolidation of distinct services, ConServe will have a substantial chance to receive a contract award under the NextGen Procurement given its superior record as a default recovery services provider for ED.

83. For these reasons, ConServe requests that this Court grant ConServe permanent injunctive relief enjoining ED from procuring default recovery services under the New NextGen Solicitations unless and until ED cancels the New NextGen Solicitations, amends the solicitations to unbundle default recovery services and to procure them separately, and allows all interested offerors, including ConServe, to submit proposals using their own capabilities without the imposition of unreasonable obstacles requiring them to secure an equal teaming partner.

84. ConServe will meet its burden to show that permanent injunctive relief is appropriate and necessary in this litigation. Specifically, ConServe will demonstrate that it will prevail on the merits, that it will suffer irreparable harm if the Court withholds injunctive relief, that the harm to ConServe of not being able to fairly compete to provide default recovery services to ED under the New NextGen Solicitations and being sidelined from providing such services to ED far outweighs any harm to ED, and that granting such injunctive relief serves the public interest in open and fair competition in public procurements.

PRAYER FOR RELIEF

WHEREFORE, ConServe respectfully requests that the Court:

1. Declare that ED's decision to improperly consolidate default recovery, loan servicing, back office, digital platform development, and other discrete services under the New NextGen Solicitations is arbitrary, capricious, and in violation of CICA and other applicable procurement laws and regulations;

2. Enjoin ED ***from accepting proposals*** to provide default recovery services unless and until ED cancels the New NextGen Solicitations, amends the solicitations to un-bundle the default recovery services and to procure them separately, and allows all interested offerors, including ConServe, to submit proposals using their own capabilities without the imposition of unreasonable obstacles requiring them to secure an equal teaming partner;

3. Enjoin ED ***from procuring default recovery services*** unless and until ED cancels the New NextGen Solicitations, amends the solicitations to un-bundle the default recovery services and to procure them separately, and allows all interested offerors, including ConServe, to submit proposals using their own capabilities without the imposition of unreasonable obstacles requiring them to secure an equal teaming partner;

4. Declare that ED's issuance of the New NextGen Solicitations has resulted in an improper ***de facto*** cancellation of the Default Collection Procurement;

5. Order that ED produce the full and complete administrative record showing what actions, if any, it has taken in response to the Court's September 14, 2018, Order invalidating ED's cancellation decision;

6. Require ED to extend ConServe's existing contract or award ConServe a new ATE contract to remedy ED's continuing unreasonable and dilatory conduct in awarding new contracts under the Default Collection Procurement;

7. Require ED to diligently proceed with the Default Collection Procurement evaluation and require that ED complete its evaluation and make new award decisions under the Default Collection Procurement by a set date in the near future or, in the alternative, articulate the reasons for not proceeding with the Default Collection Procurement in a manner that addresses the requirements set forth in the Court's September 14, 2018 Order; and

8. Afford ConServe such other and further relief as the Court may deem just and proper, including, but not limited to, its bid and proposal costs, attorneys' fees associated with each of the bid protests described herein, and other related costs.

Dated: March 4, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed electronically via the CM/ECF system. A true and correct copy was also served by email to the following party, this 4th day of March 2019:

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