IN THE UNITED STATES COURT OF FEDERAL CLAIMS
(Bid Protest)

SWIFT & STALEY, INC.,	)	
Plaintiff,	)	
v.	)	No. 21-1279C
	)	(Judge Dietz)
THE UNITED STATES,	)	
Defendant,	)	
and	)	
AKIMA INTRA-DATA, LLC,	)	
Defendant-Intervenor.	)	

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO MODIFY THE INJUNCTION PENDING APPEAL

Pursuant to Rule 7.2 of the Rules of the Court of Federal Claims (RCFC), defendant, the United States, respectfully submits this reply in support of our motion to modify the injunction pending appeal. SSI's response to our motion largely ignores the legal arguments we cited in support. For that reason alone our motion should be granted, and the injunction pending appeal should be modified to state that it will terminate at 11:59 pm on March 31, 2023, or when the U.S. Court of Appeals for the Federal Circuit issues its decision on the appeal filed by Swift & Staley, Inc. (SSI), whichever occurs first. The largely nonresponsive arguments SSI does provide are legally insufficient to justify denying our motion.

First, SSI fails to dispute that this Court has an obligation to tailor its injunction to minimize excess harm to the United States and the public interest. Def. Mot. (ECF No. 95) at 2 (citing cases). This accords with the Supreme Court's repeated instruction that, as a "general

rule . . . 'injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). And the Court previously acknowledged that the injunction would impose harms on the United States, but held that those harms did not outweigh the harms to SSI would experience without an injunction. ECF No. 93 at 4.

Second, SSI implicitly concedes that it cannot claim irreparable harm based on the possibility that it may go out of business nearly a year from now if the injunction is not maintained. *See* Pl. Resp. (ECF No. 98) at 5-7. *Cf.* Def. Mot. at 3 (citing cases explaining that if SSI chooses to maintain its exclusive reliance on this single Government contract, the Court's equitable powers cannot remedy that harm). Tellingly, SSI tries to rewrite the Court's opinion to state that the possible loss of the contract prior to resolution of SSI's appeal is the harm the Court is remedying. Pl. Resp. at 5-7. But that was not the basis of the Court's decision to grant the injunction; rather, the Court found that SSI would suffer irreparable harm "[b]ecause SSI stands to lose an overwhelming percentage of its revenue *and* SSI would also lose its opportunity to compete for the contract . . . ." ECF No. 93 at 4 (emphasis added).

Indeed, the Court would have had no authority to grant SSI's injunction based solely on the possibility that DOE's award of the contract to another company would have effectively rendered SSI's appeal moot. *SAGAM Securite Senegal v. United States*, 156 Fed. Cl. 319, 327 (2021). The likelihood that SSI would go out of business absent the injunction was required to support the injunction. SSI does not even attempt to argue that it would still be entitled to an injunction after March 31, 2023 based on a likelihood that it would go out of business at that time. Instead, SSI retreats to arguing that it would suffer revenue and employee losses if DOE

were to award the contract to another company then. But "[n]o federal contractor has a right to maintain its incumbency in perpetuity . . . ." *Akima Intra-Data, LLC v. United States*, 120 Fed. Cl. 25, 28 (2015) (quotation omitted). "[L]ost profits . . . [and] an adverse impact on [the protestor] and its employees[] . . . are the unavoidable results of its contract coming to an end" and do not constitute "irreparable injury". *Telos Corp. v. United States*, 129 Fed. Cl. 573, 578 (2016). SSI has entirely failed to rebut our argument that it will have no legally cognizable irreparable harm by March 31, 2023, at which point the existing harms to the United States (which the Court previously acknowledged) would necessarily outweigh SSI's nonexistent harms. For that reason alone, the Court must grant our motion to appropriately tailor the injunction by establishing March 31, 2023 as a fixed end date for the injunction.

Third, and finally, SSI claims that the Government's motion is premature and based only on what the United States believes is likely to occur by March 31, 2023. Pl. Resp. at 2-3. To be clear, the Court has already concluded that SSI's appeal is unlikely to succeed. ECF No. 93 at 2. Our motion to modify the injunction relies on that finding, not the Government's own evaluation of the merits of SSI's appeal. As explained above, SSI does not dispute that it will face no irreparable harm that this Court has authority to address by March 31, 2023, and the harm to the United States will still exist. Thus, it is appropriate for the Court to modify its injunction now to allow all parties to plan appropriately. It would only increase the burdens on both SSI and the United States to wait to modify the injunction until SSI's current contract extension nears termination on March 31, 2023, requiring one party or the other to respond to the Court's decision on a short timeline.

For these reasons, we respectfully request that the Court grant our motion to modify the injunction pending appeal entered on April 26, 2022 (ECF No. 93) to state that the injunction will terminate at 11:59 pm on March 31, 2023, or when the U.S. Court of Appeals for the Federal Circuit issues its decision on the appeal filed by Swift & Staley, Inc. (SSI), whichever occurs first.

Respectfully submitted,

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