

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

MEDLINE INDUSTRIES, INC.,)
Plaintiff,)
And)
CONCORDANCE HEALTHCARE)
SOLUTIONS, LLC,) Consol. No. 21-1174C
Plaintiff,) (Sub-case No. 21-1098C)
v.) Judge Tapp
THE UNITED STATES,)
Defendant,)
And)
CARDINAL HEALTH 200, LLC, and)
OWENS & MINOR DISTRIBUTION, INC.,)
Defendant-Intervenors.)

)

DEFENDANT'S MOTION FOR VOLUNTARY REMAND AND RELATED RELIEF

Pursuant to Rule 52.2 of the Rules of the United States Court of Federal Claims, defendant, the United States, respectfully requests that the Court remand this consolidated action to the Department of Veterans Affairs (VA) and the Defense Logistics Agency (DLA) for six months to reconsider the agencies' planned transfer of the VA's medical/supplier prime vendor (MSPV) program to DLA. We are making this request in response to the complaint filed by plaintiff, Medline Industries, Inc. (Medline), ECF No. 1, and the amended complaint filed by consolidated plaintiff, Concordance Healthcare Solutions, LLC (Concordance), ECF No. 38. We further respectfully request related relief, as set forth below, as well as a stay of the briefing deadlines pending resolution of this motion.

All counts asserted by Medline and Concordance in their pleadings are implicated by the agencies' planned transfer of the VA's MSPV program to DLA. The pleadings make direct challenges to the legality of, and record support for, the planned transfer. They also make indirect challenges by virtue of the alleged effects of the planned transfer on VA's MSPV 2.0 procurement and DLA's existing MSPV contracts. The agencies intend to reconsider the planned transfer in light of these allegations and the lack of analysis in the record to support the planned transfer to DLA.

Rule 52.2(a) vests the Court with authority to remand a case on motion from the United States. *See generally SKF USA Inc. v. United States*, 254 F.3d 1022, 1028-29 (Fed. Cir. May 25, 2001) (discussing common grounds for remand); 28 U.S.C. § 1491(a)(2) (remand power). A remand is in the interests of justice because it will provide the VA and the DLA with an opportunity to reconsider the planned transfer. A remand with respect to all counts is appropriate because all counts challenge the planned transfer, directly or indirectly. During the proposed remand, the agencies potentially could make decisions that could moot these actions, in whole or in part. Thus, the proposed remand may obviate the need for further litigation in this Court. Moreover, as the factual basis for these claims would be in flux by virtue of the proposed remand, continued adjudication of any aspect of the claims while the remand is pending would amount to an impermissible advisory opinion.

Our remand request for reconsideration is made in good faith. *See SKF USA*, 254 F.3d at 1028-30 (reversing trial court's denial of a remand motion as an abuse of discretion, explaining: "even if there are no intervening events, the agency may request a remand (without confessing error) in order to reconsider its previous position"). When, as in this case, "the agency's concern is substantial and legitimate, a remand is usually appropriate." *Id.* at 1029.

As the Federal Circuit has explained, “[w]here there is no step one *Chevron* issue, we believe a remand to the agency is required, absent the most unusual circumstances verging on bad faith.” *Id.* at 1030. Stated another way, only in “rare” circumstances is a remand not appropriate. *Diversified Maintenance Sys., Inc. v. United States*, 74 Fed. Cl. 122, 127 (2006) (“The circumstances found not to require remand have been rare indeed.”) (citation omitted). For example, a remand has been denied when there is no possibility that the agency might reach a different result on remand. *See id.* at 127-28 (citing authorities). That is not the case here. The agencies seek to reconsider the planned transfer and the reconsideration may result in any one of innumerable paths, including but not limited to abandoning the planned transfer (permanently or temporarily), affirming intent to proceed on the same or different grounds, or other action.

Medline and Concordance suffer no undue prejudice as a result of the remand. The planned transfer, about which the parties complain, will be the subject of reconsideration. That reconsideration has the potential to moot their claims, in whole or part. During the course of the proposed remand, VA’s MSPV 2.0 procurement will not be stayed and will continue. Also, during the proposed remand: (i) the transfer of Veteran Integrated Service Network (VISN) 20 to DLA, that was accomplished last year and has been the subject of the pilot program, would remain with DLA during the remand; and (ii) the transfer of VISN 6, which is happening right now, would be completed. Unwinding these transfers during the remand would be unduly burdensome and unduly prejudicial to VA and DLA, and the communities they serve, because it would jeopardize patient safety by disrupting delivery of medical supplies caused by a sudden

change in prime vendor.¹ However, during the course of the remand, the agencies agree not to transfer any other VISNs.

While this motion is pending, we respectfully request that the briefing deadlines be stayed to avoid the undue expense of time and resources. Following the conclusion of the proposed remand, we respectfully propose that the parties file a joint status report setting forth the parties' positions regarding whether further litigation is necessary, and, if so, a proposed date for defendant to file the administrative record associated with the remand proceedings, and a proposed briefing schedule on the merits.

For these reasons, we respectfully request that the Court (1) stay the briefing deadlines pending resolution of this motion; (2) grant this motion for a voluntary remand pursuant to RCFC 52.2, (3) remand this matter to VA and DLA for reconsideration of the planned transfer and any further administrative actions consistent with that reconsideration, (4) authorize, but not require, VA and DLA to consider any further information that the agencies may gather during the remand in accordance with any procedures that the agencies may establish for that purpose, (5) establish the initial duration of the remand for six months, (6) stay further proceedings in this action pending the completion of the remand, and (7) order the parties to file a joint status report within 30 days following the conclusion of the remand proceeding that sets forth the parties'

¹ VISN 20 went live with DLA on July 15, 2020. VISN 6 went live with DLA on May 26, 2021. Prime vendors warehouse and deliver medical supplies and the DLA prime vendors have been purchasing inventory to support the medical centers and customers within VISN 20 and VISN 6. An abrupt transition in providers would disrupt the supply and delivery chain, thereby endangering patient care. There is typically a 90-day transition between vendors. In the first 45 days, outbound vendors will deplete their inventory and inbound vendors will build up their inventory. This is followed by a 45-day stabilization period in which, for example, transportation routes are confirmed and customer interactions established. If VISN 20 and VISN 6 are not permitted to stay with DLA during the remand, it will effectively shut down healthcare in those territories.

positions regarding whether further litigation is necessary, and, if so, a proposed date for defendant to file the administrative record associated with the remand proceedings, and a proposed briefing schedule on the merits for the Court's consideration.

Respectfully submitted,

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