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

AUTOMATED COLLECTION SERVICES, INC., *Plaintiff, and* ALLTRAN EDUCATION, INC., *Intervenor-Plaintiff,* v. THE UNITED STATES, *Defendant, and* THE CBE GROUP, INC., ACCOUNT CONTROL TECHNOLOGY, INC., AND PREMIERE CREDIT OF NORTH AMERICA, LLC, *Intervenor-Defendants.*	**No. 17-765** **Chief Judge Braden**

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

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I.
PRELIMINARY STATEMENT

This protest challenges the scope of the Department of Education's ("ED" or "Agency") corrective action following multiple sustained protests at the Government Accountability Office ("GAO"). The protest hinges a single, straightforward question: Does an agency have unlimited discretion in determining the scope of corrective action? This Court and the Supreme Court have said "No"—an agency's corrective action must be targeted to address an evaluation defect and rationally based. Faced with an administrative record that provides *no* documentation of the Agency's decision-making process that led it to conclude that offerors should be able to revise their small business participation plans, this Court need look no further than GAO's decision, which found no defect in the Agency's initial evaluation of small business participation plans. Because there was no defect in the evaluation, there was nothing to "correct" through corrective action, and any corrective action that calls for resubmission and reevaluation of small business participation plans is necessarily over-broad and irrational.

The Agency itself agreed with this position throughout the balance of these protests, including in its initial announcement of corrective action. The Agency argued before GAO that its evaluation of Factor 3, Small Business Participation, was reasonable. Although GAO sustained multiple protests because of evaluation flaws under Factors 1 and 2, it upheld the Agency's Factor 3 evaluation. Accordingly, when the Agency first announced its corrective action, it stated that it would not accept revised small business participation plans because its evaluation under that factor had been found reasonable. The administrative record before this Court—as sparse as it is—confirms that the Agency's evaluation under Factor 3 was nothing short of proper.

Less than a week after announcing its initial planned corrective action, however, the Agency abruptly reversed course and announced an amendment to the corrective action to allow offerors to submit revised small business participation plans. The record does not contain a single sentence justifying this expansion of the scope of the corrective action, which allows more than a dozen offerors back into the competition that were already rightly disqualified for their failure to submit an acceptable small business participation plan. The Agency's decision was irrational. Without any procurement defect, there can be no rational basis for permitting revisions to Factor 3 proposals; because this aspect of the corrective action is not targeted to any procurement defect, it must fail.

Counsel for the Agency has proffered two justifications for allowing revisions to small business participation plans in a filing with this Court: the passage of time and the desire to receive a small business participation plan consistent with other aspects of the proposals. These justifications are found nowhere in the record other than through statements of counsel, and, in any event, are not rational. The passage of time has no relation to whether an offeror proposed to meet the Agency's stated minimum small business subcontracting goals. And the small business participation plan is an independent document that has no interplay with the Factor 1 or Factor 2 proposals; thus, there is no need to allow revisions to ensure "consistency." With no documented explanation in the record for why the Agency decided to expand the scope of the corrective action, the only logical conclusion is that the Agency decided to allow offerors to revise their small business participation plans solely for the purpose of attempting to moot other protests currently pending before this Court. That is not a rational basis to take corrective action.

As is further detailed below, ED's over-broad corrective action is irrational, arbitrary, and capricious. It cannot stand.

II.
QUESTION PRESENTED

Whether the Agency's decision to allow submission of revised small business participation plans as part of the corrective action is over-broad where there is no related procurement defect and no rational justification for doing so.

III.
STATEMENT OF JURISDICTION AND STANDING

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1491(b). ACSI is an interested party with standing to file this bid protest under 28 U.S.C. § 1491(b)(1). In the context of a challenge to a violation of law in connection with a procurement, a plaintiff must show that it is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by failure to award the contract. *Banknote Corp. of Am. v. United States*, 365 F.3d 1345, 1352 (Fed. Cir. 2004). Here, ACSI has standing because it was, and remains, an offeror in this procurement. Also, but for the errors identified by GAO in ED's evaluation of ACSI's proposal under Factor 2, ACSI would have been among the most highly rated proposals and would have received an award. Accordingly, as a presumptive awardee of one of the indefinite-delivery, indefinite-quantity ("IDIQ") contracts, ACSI has a direct economic interest that will be affected by ED's irrational decision to allow offerors to submit revised small business participation plans as part of its corrective action.

IV.
STATEMENT OF FACTS

A. Overview of the Procurement

The procurement at issue in this protest sought proposals for the award of multiple IDIQ contracts for the collection of debts on defaulted Federal student loans. *See* AR Tab 1. The Solicitation required offerors to submit four proposal sections: (A) management plan, (B) past performance, (C) quality control plan, and (D) small business participation plan and subcontracting plan. *Id.* at AR 59-61. The Agency would then evaluate the proposals under three factors. *Id.* at AR 62-63. Under Factor 1, the Agency would evaluate offerors' past performance. *Id.* at AR 62. Under Factor 2, Management Approach, the Agency would evaluate offerors management plans and quality control plans. *Id.* at AR 62-63. Finally, under Factor 3, the Agency would evaluate offerors' small business participation plans to determine, among other things, the extent to which offerors' small business participation plans committed to ED's small business subcontracting goals. AR Tab 5 at AR 187.

Of relevance to this protest, offerors were instructed to submit their small business participation plans using Attachment 5 to the Solicitation. AR Tab 3 at AR 158. Attachment 5 required offerors to identify the size status of the prime offeror, propose a percentage of work to be performed by large and small businesses, propose a percentage of work to be performed by each subcategory of small business, and identify the small businesses that were proposed to provide principal supplies and services in support of the prime contract. *Id.* at AR 158-159. Using Attachment 5, offerors were required to commit to subcontracting a certain percentage of the work to small businesses:

(c) Submit the total combined percentage of work to be performed by both large and small businesses (include the percentage of work to be performed both by Prime and Subcontractors):

Example: If Prime proposes a price of $1,000,000 (including all options), and small business(es) will provide $250,000 in services/supplies as a prime or subcontractor, the % planned for small businesses is 25%; and 75% for large business equaling 100%.

Total Percentage planned for Large Business(es) _____% = $ _____

Total Percentage planned for Small Business(es) _____% = $ _____

100%

When combined, LB and SB totals must equal 100%

(d) Please indicate the total percentage of participation to be performed by each type of subcategory small business. The percentage of work performed by Small Businesses that qualify in multiple small business categories may be counted in each category:

Example: Victory Prop Mgt (WOSB and SDVOSB) performing 2%; and Williams Group (SDB, HUBZone, and WOSB) performing 3%. Results equate to: SDB: 3%; SDVOSB: 2%; HUBZone: 3%; WOSB: 5%;). SDVOSBs are also VOSBs automatically; however VOSBs are not automatically SDVOSBs.

Small Disadvantaged Business (SDB) _____%

Woman Owned Small Business (WOSB) _____%

HUBZone Small Business (HUBZONE) _____%

Service Disabled Veteran Owned Business _____%

Id. at AR 158-159. Offerors were required to meet a mandatory small business participation goal of 31%. AR Tab 5 at AR 186. The Solicitation also included subcategory goals, which were not mandatory, but would be evaluated in determining the overall acceptability of the plan. *Id.*

Separate from the small business participation plan, offerors were required to submit a subcontracting plan. *Id.* at AR 187. The subcontracting plan would be evaluated as part of the responsibility determination for apparently successful offerors. *Id.* In its responsibility determination, the Agency would ensure that the subcontracting plan contained small business

commitments consistent with the commitments indicated in the small business participation plan. *Id.*

ED received, and evaluated, proposals from 47 offerors. After the evaluation of proposals, the Agency determined that the "most advantageous" offerors, and thus the prospective awardees, were the ten offerors with a rating of at least "Highly Satisfactory" under Factors 1 or 2 and a rating of at least "Satisfactory" for the other two factors. During the responsibility determination, the Agency determined that three of the prospective awardees—Continental Service Group, Inc. ("Conserve"), Pioneer Credit Recovery, Inc. ("Pioneer"), and Coast Professionals, Inc. ("Coast")—were not responsible [redacted]

Accordingly, the Agency found them ineligible for award.

The Agency thus awarded IDIQ contracts to the seven responsible offerors that were deemed "most advantageous": Premiere Credit of North America, LLC, Financial Management Systems, Inc., GC Services Limited Partnership, The CBE Group, Inc., Transworld Systems, Inc., Value Recovery Holdings, Inc., and Windham Professional, Inc.

B. Protests of the Award

After the award of the contracts, twenty-two unsuccessful offerors filed protests with GAO. GAO dismissed three of the protests, and ultimately issued a consolidated decision in seventeen of the protests. In the consolidated decision, GAO sustained fifteen of the protests on the grounds that the Agency's evaluation under the Past Performance and Management Approach factors was flawed. AR Tab 22. ACSI's protest was sustained because ED improperly assigned ACSI a rating of "Marginal" for Factor 2 based on an unreasonable, cabined review of ACSI's management plan

and quality control plan, and by applying unstated evaluation criteria. *Id.* at AR 958-961. But for the evaluation errors identified by GAO, ACSI would have received a rating of at least "Satisfactory" under Factor 2. Combined with its assigned ratings of "Highly Satisfactory" under Factors 1 and 3, ACSI would have met ED's definition of "most advantageous" and received an award.

GAO denied the remaining protests, finding that the offerors were not prejudiced by any flaws in the evaluation. Relevant here, the consolidated decision specifically addressed the Agency's evaluation of Factor 3, Small Business Participation. Two of the protesters—Account Control Technology, Inc. ("ACT") and Sutherland Global Services ("Sutherland")—argued that ED's evaluation of Factor 3 was unreasonable. *Id.* at AR 971-975. ED argued in response to both protests that its evaluation was reasonable. GAO agreed with ED and denied both protests, finding that the Agency reasonably evaluated ACT and Sutherland under the Small Business Participation factor:

> The record reflects that Sutherland failed to submit the required participation plan and otherwise failed to commit to meeting the 31 percent minimum mandatory small business subcontracting set-aside requirement.
>
> * * *
>
> The agency [reasonably] assigned ACT's proposal a major weakness for failing to meet the nonmandatory small business goals for small disadvantaged businesses (SDB) (RFP goal of 5.0 percent versus ACT proposed goal of 0.1 percent), historically underutilized business zone businesses (RFP goal of 5.0 percent versus ACT proposed goal of 0.4 percent), and service-disabled veteran-owned small businesses (SDVOSB) (RFP goal of 3.0 percent versus ACT proposed goal of 0.2 percent).

Id. at AR 971-972.

Conserve and Pioneer also filed protests at GAO. They both challenged ED's finding that they were not responsible [redacted] ED maintained before GAO that it had properly found that Conserve and Pioneer were not responsible. Before GAO issued a decision on the merits, Conserve withdrew its protest and filed a protest at this Court. Because Pioneer's protest involved the same subject matter, GAO dismissed Pioneer's protest pursuant to 4 C.F.R. § 21.11(b).

In its complaint before this Court, Conserve challenged the Agency's responsibility determination. Pioneer likewise filed a complaint at this Court, raising similar arguments as Conserve about the Agency's responsibility determination. ACT also filed a complaint challenging, in part, the Agency's evaluation under the Small Business Participation factor. Four other unsuccessful offerors (Alltran Education, Inc., Collection Technology, Inc., Van Ru Credit Corp., and Progressive Financial Services, Inc.) filed protests at this Court; none of these protests relates to an offeror's commitment to small business subcontracting.

C. The Agency's Initial Corrective Action

On May 19, 2017, approximately eight weeks after GAO issued its decision, the Agency announced that it would take corrective action. AR Tab 24. The Department of Justice ("DOJ"), on behalf of the Agency, submitted a declaration from Patrick Bradfield, the Director of Federal Student Aid ("FSA") Acquisitions and the Head of the Contracting Activity, that explained the scope of the corrective action and provided ED's detailed reasons for taking the corrective action. AR Tab 26. ED stated that it had "reviewed and carefully considered its evaluation of the proposals, as well as GAO's recommendations" in determining the course of its corrective action.

AR Tab 24 at AR 988; *see also* AR Tab 26 at AR 1039 ¶ 5. ED further stated that it agreed with GAO's findings that the evaluation of offerors under the Past Performance and Management Approach factors was flawed, and thus had decided to solicit revised proposals for both factors. AR Tab 24 at AR 989. Importantly, ED stated that it would not permit "[r]evisions to small business participation plans because that part of the evaluation is not being redone and the solicitation is not being revised in that area." *Id.* at AR 993; *see also* AR Tab 26 ¶ 5 (explaining that the corrective action is limited to the Past Performance and Management Approach factors "[b]ased on GAO's findings of error only in [those factors]").

D. The Agency's Amended Corrective Action

Approximately one week after submitting its notice that ED would be taking corrective action, DOJ filed a notice with this Court amending the scope of the corrective action. AR Tab 28. The amended corrective action notice stated that offerors would now be allowed to revise their small business participation plans:

> After further review, and considering the time that has passed since the original solicitation and the desire to receive up-to-date small business participation plans that are consistent with the other elements of the revised proposals, ED has decided to amend the notice and to allow offerors to submit revised small business participation plans, if they so choose.

Id. at AR 1045. Unlike the initial notice of corrective action, the revised notice was based solely on statements of counsel, and did not include a declaration from ED personnel justifying the corrective action. *See generally id.* Shortly after the DOJ filed the revised notice of corrective action, the Agency issued Amendment 5 formally amending the Solicitation consistent with the notice. *See* AR Tab 6. The Agency later issued Amendments 6, 7, and 8 to answer questions. *See* AR Tabs 7, 8, and 9. Proposals were due by 10 AM on June 20, 2017. AR Tab 9 at AR 239.

V.
ARGUMENT

A. Standard of Review

Whether an agency's procurement action is reasonable is reviewed by this Court under the standards set forth in the Administrative Procedure Act ("APA"). 28 U.S.C. § 1491(b)(4); 5 U.S.C. § 706(2)(a). Under the APA's "arbitrary and capricious" standard, the Court conducts a "searching and careful," but narrow, review of the record to determine whether the agency considered the relevant factors or has made a clear error in judgment. *Citizens to Preserve Overton Park, Inc. v. United States*, 401 U.S. 402, 416 (1971). An agency action "may be set aside if either (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001).

Here, as discussed below, ED's decision to expand its corrective action to allow offerors to submit revised small business participation plans is unreasonable because it is not targeted to address a procurement defect. Further, the stated justifications for allowing revisions to the small business participation plans are irrational and likewise do not provide a basis for allowing revisions to the small business participation plans.

B. The Agency's Decision to Expand the Scope of its Corrective Action Is Irrational, Unreasonable, and Not Supported by the Record.

ED's decision to take corrective action by allowing revised small business participation plans is irrational and unreasonable because (i) it is not rationally related to any procurement defect, and (ii) Agency counsel's stated justifications are irrational.

1. ED's Amended Corrective Action Is Not Rationally Related to Any Identified Evaluation Defect.

Contracting officers are provided "broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition." *DGS Contract Serv., Inc. v. United States,* 43 Fed. Cl. 227, 238 (1999). The corrective action must be "reasonable under the circumstances," though. *Id.* This Court has explained that "[t]o be reasonable, the agency's corrective action must be rationally related to the defect to be corrected." *Sheridan Corp. v. United States*, 95 Fed. Cl. 141, 151 (2010); *see also WHR Grp., Inc. v. United States*, 115 Fed. Cl. 386, 400 (2014) ("[C]orrective actions regarding flaws in the evaluation process must be targeted at those evaluation issues and cannot consist of wholesale resolicitation."). The reason for corrective action must also be supported by the evidence in the record. *See Macaulay-Brown, Inc. v. United States*, 125 Fed. Cl. 591, 605 (2016).

The corrective action here does not meet these standards. The Agency has maintained throughout the protests before GAO (and since) that its evaluation under the Small Business Participation Factor was reasonable. The Agency consistently argued before GAO that it reasonably evaluated Factor 3. GAO sustained multiple protests challenging the reasonableness of the Agency's evaluation under Factors 1 and 2, but GAO agreed with the Agency and denied all challenges related to Factor 3. *See generally* AR Tab 22. In both protests challenging the Agency's evaluation of Factor 3, GAO correctly found that the Agency's Factor 3 evaluation, in which it determined that the offerors' small business subcontracting plans were unacceptable, was reasonable. *Id.*

As recently as May 19, 2017, the Agency informed this Court that it believed that its evaluation of small business participation plans was proper. AR Tab 24 at AR 993 (noting that

the corrective action plan was tailored to the "specific errors in the recent evaluation and the actions necessary to fully correct them," and that the Agency was not permitting revisions to the small business participation plans). In fact, when the Agency originally announced its corrective action, the scope of the corrective action was "carefully tailored" and limited in scope to remedy the evaluation flaws under Factors 1 and 2. AR Tab 24 at AR 993. The Agency explicitly stated that it would not "permit revisions to the small business participation plans because that part of the evaluation is not being redone and the solicitation is not being revised in that area." *Id.*

It appears that ED still believes there was no defect in its Factor 3 evaluation. Although the revised corrective action allows revisions to small business participation plans, there is nothing in the record even suggesting that the Agency has now concluded that it evaluation under Factor 3 was flawed in any respect. The only evidence in the record of the Agency's evaluation under Factor 3 shows that the Agency's evaluation was reasonable; the only Factor 3 evaluation in the record is the Agency's evaluation of ACSI's small business participation plan, in which the Agency reasonably awarded ACSI a rating of "Highly Satisfactory." AR Tab 15. The only contemporaneous documentation of the Agency's decision to allow revisions to the small business subcontracting plan are statements by counsel notifying GAO and the Court that it will allow revisions to the small business participation plans. *See* AR Tab 27 (notifying GAO of the broader corrective action); AR Tab 28 (notifying the Court of the amended course of corrective action). Even Agency counsel does not take the position that there was any flaw in the underlying evaluation.

Despite conducting a reasonable Factor 3 evaluation and consistently maintaining that its evaluation was reasonable, the Agency's amended corrective action would allow more than a

dozen offerors who could not meet the requirement to submit an acceptable small business participation plan another shot at an award. The corrective action is fundamentally unfair to offerors like ACSI that submitted acceptable small business participation plans. The Agency's revised corrective action is also irrational and improper under this Court's case law. The Agency has not identified a defect in the evaluation of the small business participation plans, and because there is no such defect, there is no rational basis to reopen this aspect of the competition; the Agency's corrective action is not reasonable under the circumstances. *See Sheridan*, 95 Fed. Cl. at 151.

This Court's decisions in *Macaulay-Brown* and *Sheridan* are instructive on this issue. In *Macaulay-Brown*, the agency took corrective action in response to a protest at GAO that alleged that the agency failed to properly consider potential organizational conflicts of interest ("OCI"). 125 Fed. Cl. 591. Upon reviewing the protest allegations, the agency determined that it had not performed a proper OCI analysis. *Id.* at 599. As a result, the Agency decided to take corrective action by amending the solicitation and soliciting revised proposals. *Id.* The court found, however, that "the agency's proposed corrective action goes too far and thus must be set aside" because there was nothing in the record to suggest that the OCI analysis was insufficient such that a resolicitation would be required. *Id.* at 602-605. Similarly, in *Sheridan*, the Agency took corrective action by reopening the competition and allowing revised proposals based on a belief that the Agency had incorrectly evaluated Sheridan as having "very low risk." 95 Fed. Cl. at 152-153. The Court found that "[a] careful review of the administrative record [did] not reveal any errors that required corrective action." *Id.* at 153.

Here, the Agency's proposed corrective action has even less support in the record. Indeed, unlike the agencies in *Macaulay-Brown* and *Sheridan*, ED has not even attempted to identify a flaw in the evaluation or in the Solicitation that would justify resoliciting small business participation plans. *See also MCII Generator & Elec., Inc. v. United States*, No. 1:02-cv-00085, 2002 WL 32126244 (Fed. Cl. Mar. 18, 2002) (finding that the record did not show that the agency had clearly identified a defect that would warrant its proposed corrective action). Nor could it, as the record is devoid of any support for the expanded corrective action. Rather, the record reflects that the Agency is correct in its long-held belief that its evaluation under Factor 3 was reasonable. *See, e.g.,* AR Tab 15 (reasonably awarding ACSI a rating of "Highly Satisfactory" for its small business participation plan); *see also* AR Tab 24 at AR 993 (Agency agreeing with GAO's findings, including the finding that its Factor 3 evaluation was reasonable). Notwithstanding the Agency's repeated insistence that there was no Factor 3 procurement flaw to remedy in the corrective action, the amended Solicitation permits offerors to revise their Factor 3 proposals. This is the very definition of an over-broad corrective action that is not targeted to address any defect, and it is thus not reasonable under the circumstances. *See WHR*, 115 Fed. Cl. at 400; *see also Macaulay-Brown*, 125 Fed. Cl. at 605.

2. The Agency's Stated Justifications for Permitting Revisions to the Small Business Participation Plans Are Irrational.

In addition to contravening this Court's precedent about the permissible scope of corrective action, the Agency's over-broad corrective action also fails under Supreme Court precedent guiding agency action. The Supreme Court has explained that in general, an agency's decision is arbitrary and capricious and lacks a rational basis if it (1) relied on factors which Congress did not intend it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered

an explanation for its decision that runs counter to the evidence before the agency, or (4) was so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983); *see, e.g., URS Fed. Servs., Inc. v. United States*, 102 Fed. Cl. 664, 670 (2011) (sustaining protest by applying *State Farm* factors to find agency procurement action unreasonable). Here, the administrative record contains no support for the Agency's action other than *post hoc* statements of counsel, and even the *post hoc* justifications proffered by Agency counsel are irrational under *State Farm*.

a. The Record Contains No Basis for Concluding that the Agency's Actions Are Rational.

As an initial matter, the Agency's Factor 3 corrective action should be rejected because it is unsupported by the administrative record. It is a well-settled principle of administrative law that a federal agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (internal quotation marks and citation omitted). Further, while a court "may not supply a reasoned basis for the agency's action that the agency itself has not given," the court may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id*. (internal quotation marks and citation omitted). It is also well-established that the contemporaneous administrative record, not arguments raised by counsel for the Government during a protest should be the focus of a Court's review when reviewing an agency's actions under the arbitrary and capricious standard. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) (holding that when reviewing an agency's action under the APA, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court").

Here, there is simply nothing in the record that provides a satisfactory explanation for the Agency's abrupt decision to expand its corrective action, nor any way for this Court to reasonably discern the rationale for the Agency's decision-making process. While an agency that changes its policy "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one," an agency must provide "a reasoned explanation [] for disregarding facts and circumstances that underlay . . . the prior policy." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515–16 (2009). There is *no* explanation in the record for the Agency's decision to suddenly revise its "carefully tailored" corrective action plan and allow more than a dozen offerors to get another chance at award by fixing their flawed small business participation plans. The sum total of support in the administrative record for the Agency's decision to expand the scope of its corrective action to permit revisions to small business participation plans are statements of counsel announcing the corrective action. *See* AR Tabs 27 and 28. There is nothing in the record showing any deliberation about the course of the corrective action. Nor is there even a single sentence from contracting personnel explaining why allowing revisions to the small business participation plans was necessary. On this record—without any explanation of the deliberation underlying the Agency's decision to resolicit Factor 3 proposals—it is impossible to determine whether the Agency's action is reasonable under the standards articulated in *State Farm*.

b. The Stated Justifications for the Factor 3 Corrective Action Proffered by Agency Counsel Are Irrational.

Another fatal flaw in the Agency's over-broad corrective action is that the stated justifications for the Factor 3 corrective action that have been proffered by counsel are arbitrary and capricious under *State Farm.* In the revised corrective action notice, the Agency provided two supposed justifications for allowing revisions to the small business participation plans: (i) the

passage of time, and (ii) the need to receive small business participation plans that were consistent with the other proposal revisions. AR Tab 28 at AR 1045. Neither is a rational basis for allowing revised small business participation plans.

First, the passage of time does not require the submission of revised small business participation plans. Whether an offeror has proposed to meet the small business subcontracting goals does not change with the passage of time. This is not an area like past performance, where offerors may have more recent, relevant information that would bear on the evaluation of its proposal. Rather, an offeror has either proposed to comply with ED's mandatory small business goals or it has not; the passage of time has no impact on the offeror's compliance.

Notably, during its initial corrective action, the Agency considered how the passage of time would affect offerors' proposals and concluded that revisions to the small business participation plans would not be permitted. AR Tab 24 at AR 988-989 (allowing offerors to submit new past performance proposals "[b]ecause a significant amount of time has elapsed since February 2016"). A week later, according to Agency counsel and DOJ, the Agency concluded that the passage of time could affect the percentage of small business subcontracting that offerors proposed.

"Passage of time" is not a get-out-of-jail-free card that allows the Agency to take any corrective action it desires. When an agency takes corrective action, it is always the case that time has passed from the initial submission of proposals. But an agency does not have carte blanche to take whatever corrective action it wishes. Its corrective action must be rational. It is not rational to conclude that the passage of time requires revision to the part of offerors' proposals where they stated the amount of work they would strive to subcontract to small businesses. DOJ's attempt to explain the Agency's unreasonable expansion of its corrective action is "so implausible that it

[cannot] be ascribed to a difference in view or the product of agency expertise," *State Farm*, 463 U.S. at 43, rendering it irrational for the Agency to permit revised small business participation plans based on the passage of time.

Second, the Agency's alternate stated justification for allowing such revisions—the "desire to receive up-to-date small business participation plans that are consistent with the other elements of the revised proposals"—likewise does not provide a rational basis for the over-broad corrective action. AR Tab 28 at AR 1045. The "other elements of the revised proposals" consist of revised past performance proposals, revised management plans, and revised quality control plans. *See* AR Tab 6. The revision of these aspects of an offeror's proposal does not necessitate revisions to an offeror's small business participation plan. None of the information that offerors were to provide in the small business participation plan would change based on revisions to other aspects of the proposal.

Indeed, the only aspect of the proposal that has *any* relation to the small business participation plan is the offeror's subcontracting plan, in which offerors must propose small business subcontracting goals consistent with those identified in the small business participation plan. *See* AR Tab 5 at AR 187. But, as the Agency's original corrective action notice recognized, the original corrective action already provided offerors an opportunity to revise their subcontracting plans to ensure consistency during the responsibility determination. *See* AR Tab 24 at AR 993.[1] There is no need to allow offerors to revise their small business participation plans

[1] Contrary to assertions made in the Motions to Intervene filed by Pioneer and Conserve, this protest does *not* challenge the portion of the corrective action that permits revisions to the subcontracting plan. This protest challenges only the portion of the corrective action that permits revisions to the small business participation plan—the plan being evaluated under Factor 3.

as well, especially where none of the other aspects of the proposal have any bearing on an offeror's small business participation plan. Thus, the Agency has "offered an explanation for its decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43. Accordingly, the Agency's decision to allow revisions to the small business participation plan on this basis is arbitrary and capricious.[2]

Given the dearth of support in the record for the Agency's changed course of corrective action, the only logical conclusion is that the Agency took this corrective action in an attempt to moot the protests that are currently before this Court. Indeed, shortly after announcing its corrective action, DOJ moved to dismiss Conserve's, Pioneer's, and ACT's protests by arguing that the "corrective action extinguished the existing controversy." Mot. to Dismiss, *Continental Servs. Grp., Inc. v. United States*, No. 17-449C (Fed. Cl. May 23, 2017), ECF No. 133; Mot. to Dismiss, *Account Control Tech., Inc. v. United States*, No. 17-493C (Fed. Cl. May 25, 2017), ECF No. 62. This attempt to avoid litigation cannot support an irrational decision to unfairly reopen the Factor 3 evaluation and certainly evidences ED's unreasonable reliance on a "factor[] which Congress did not intend it to consider" when determining the scope of the Agency's corrective action. *State Farm*, 463 U.S. at 43.

For these reasons, ED's decision to allow offerors to revise their small business participation plans is arbitrary, capricious, irrational and contrary to law.

[2] Beyond allowing revised Factors 1, 2, and 3 proposals, the Solicitation was revised to "[u]pdate Schedule B; [i]include appropriate FAR, EDAR and local clauses; and, [u]pdate offer submission methods and time for receipt of revised proposals." AR Tab 6 at AR 199. None of these revisions have any impact on the small business participation plan either.

C. ACSI Is Entitled to Permanent Injunctive Relief.

ACSI has moved for permanent injunctive relief, requiring this Court to weigh the following four factors: (1) whether ACSI has succeeded on the merits of the case; (2) the immediate and irreparable injury to ACSI if the court withholds equitable relief; (3) whether the balance of hardships to the parties favors the grant of injunctive relief, and (4) whether the public interest would be served by an injunction. *PGBA, LLC v. United States*, 389 F.3d 1219, 1228-29 (Fed. Cir. 2004). No single factor is determinative, and the "weakness of the showing regarding one factor may be overborne by the strength of the others." *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993). That said, the Federal Circuit has held that success on the merits is the most important factor in a court's consideration of injunctive relief. *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1312 (Fed. Cir. 2007). Applying these factors to the circumstances of this case, ACSI is entitled to a permanent injunction preventing ED from considering revised small business participation plans as part of its corrective action.

As explained above, because the Agency had no valid basis to expand the scope of its corrective action, the most important factor, success on the merits, weighs heavily in favor of ACSI. Moreover, as discussed below, the three remaining factors each lean heavily in favor of granting ACSI the permanent injunctive relief it seeks through this protest.

1. ACSI Will Suffer Irreparable Harm If the Injunction Is Not Granted.

ACSI will suffer irreparable harm if ED is permitted to consider revised small business participation plans in reaching its post corrective action award decision. Such a result would force ACSI to re-compete against more than a dozen offerors that the Agency rightfully rejected for their failures to submit acceptable small business participation plans.

The Court has consistently found irreparable harm where, as here, the Agency does not have a rational basis for conducting its corrective action. *See, e.g.*, *Sheridan,* 95 Fed. Cl. 141 (granting permanent injunction preventing the agency "from conducting the proposed corrective action to resolicit proposals"). In *Sheridan*, the Court held that "Sheridan faces irreparable harm from an unnecessary recompetition for a contract it has already won. Without an injunction, Sheridan may lose the contract and the associated revenues." *Id.* at 155; *see also WHR,* 115 Fed. Cl. at 406 (granting permanent injunction prohibiting agency from taking corrective action and conducting new procurement). ACSI is a presumptive awardee of an IDIQ contract because it would have been among the pool of "most advantageous" proposals but for the Agency's improper evaluation under Factor 2. Like the protesters in *Sheridan* and *WHR*, ACSI's presumptive award may be in jeopardy if the Agency is permitted to continue with its proposed corrective action. This planned corrective action will only serve to benefit the unsuccessful offerors that submitted unacceptable small business participation plans to the detriment of offerors like ACSI, which met or exceeded the Agency's small business subcontracting goals and received an award (or would have received an award but for the flawed evaluation). This harm to ACSI would be avoided if the Agency were enjoined from acting on the planned corrective action.

Conversely, ED will suffer no harm from being precluded from conducting the unreasonable corrective action it has embarked upon. ED vigorously defended its decision not to award to the offerors who submitted flawed small business participation plans, and thus cannot now claim that it would be harmed by not being able to award to these offerors when it makes it next award decision. *See, e.g.,* AR Tab 22 at AR 971-972. If anything, an injunction would actually benefit the Agency by limiting the number of proposals ED must consider for award

during its corrective action reevaluation.

2. The Balance of the Hardships Weighs in Favor of ACSI.

The balance of the hardships factor requires that the Court consider the harm to the Government and the Plaintiff if a permanent injunction is granted. *WHR*, 115 Fed. Cl. at 404. Here, there would be virtually no hardship to ED from being precluded from considering revised small business participation plans as part of its award decision. Indeed, ED would benefit from not awarding to offerors that were unable to submit an acceptable small business participation plan from the beginning of this procurement.

By contrast, ACSI would suffer irreparable harm if ED were permitted to consider revisions to the small business participation plans, as it would be forced to re-compete against offerors that have already been correctly rejected for submitting unacceptable small business participation plans. Thus, the potential harms weigh in favor of granting injunctive relief.

3. The Public Interest is Served by Granting Injunctive Relief.

There is a strong public interest in "preserving the integrity of the procurement process by requiring the government to follow its procurement regulations." *Sheridan*, 95 Fed. Cl. at 155 (citing *Hospital Kelan of Texas, Inc. v. United States*, 65 Fed. Cl. 618, 624 (2005)). Indeed, this Court has found that ensuring corrective action is targeted to an existing defect is "crucial to the public interest":

> [I]f the FBI's "corrective action" in this case were not enjoined, it would signify that the government's power to take "corrective action" is nigh unlimited. The requirement that corrective action be "targeted" or "rationally related" to an existing defect in the initial procurement is essential to the integrity of the procurement system. In this case, it is clear that the "corrective action" was not targeted or rationally related to any actual defect and it is therefore crucial to the public interest that the FBI's "corrective action" be enjoined.

WHR, 115 Fed. Cl. at 405. Here, the integrity of the federal procurement process will be preserved if ED is enjoined from acting on its arbitrary, capricious, and unlawful decision to allow offerors to revise their small business participation plans. The public has a strong interest in seeing that proper procurement procedures are followed and that the Agency's actions are rational, particularly in such large procurements attracting widespread public knowledge and publicity. *See id*. Conversely, the public interest would not be served if the Agency were permitted to take corrective action based on nothing more than its desire to moot the protests pending before this Court and avoid judicial review of its actions.

VI.
CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant Plaintiff's Motion for Judgment on the Administrative Record and enter an Order permanently enjoining Defendant from considering revised small business participation plans as part of its corrective action and new award decision.

Respectfully submitted,

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