2022 Annual Review
Small Business Contracting Panel

Supplementary Materials

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
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M-22-03

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Jason S. Miller
Deputy Director for Management

SUBJECT: Advancing Equity in Federal Procurement

The Federal Government is the largest consumer of goods and services in the world, spending more than $650 billion each year. This purchasing power makes Federal procurement a powerful tool to support small business growth and build generational wealth throughout the United States, including for firms owned by underrepresented individuals.

The President has set a policy of using Federal contract spending to support small businesses and advance equity. In Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities through the Federal Government* (the Executive Order), the President directed agencies to make Federal contracting and procurement opportunities more readily available to all eligible vendors and to remove barriers faced by underserved individuals and communities.[1] In his June 2021 speech commemorating the centennial of the Tulsa Race Massacre, the President announced an additional step. He set a goal of increasing the share of contracts awarded to small disadvantaged businesses (SDBs) to 15% by 2025. And he charged every agency to assess available tools to increase opportunities for small businesses and traditionally underserved entrepreneurs to compete for Federal contracts.

This memorandum implements the President's commitments to increase spending to SDBs to 15% by fiscal year (FY) 2025 and to increase baseline spending for the additional socioeconomic small businesses and traditionally underserved entrepreneurs recognized in the Small Business Act. These additional businesses include women-owned small businesses (WOSBs), service-disabled veteran owned small businesses (SDVOSBs), and small business contractors in Historically Underutilized Business Zones (HUBZones).[2] To achieve the President's commitment, the memorandum instructs agencies to take five management actions, which have been developed in partnership with the Small Business Administration (SBA) and Federal buying agencies. These actions will help to increase spending to underserved

[1] The Executive Order calls for a comprehensive approach to advancing equity for all, including "people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality."

[2] For purposes of this guidance, the term "socioeconomic small business" refers collectively to SDBs, WOSBs, SDVOSBs, and HUBZone small business contractors.

communities and to broaden participation from within these communities. As a result, they will strengthen the breadth and depth of the Federal Government's small business supplier base, which has eroded significantly over the past decade.

These actions will also advance the third priority of the President's Management Agenda (PMA): managing the business of Government to build back better. The *Biden-Harris Management Agenda Vision* (November 2021)[3] recognizes that fostering lasting improvements in the Federal acquisition system, including through the management actions described in this memorandum, can create opportunities for underserved communities. The PMA Vision states, "By creating more opportunities for all types of businesses and underserved entrepreneurs to compete for Federal contracts, the Federal marketplace can serve as a platform to create a more equitable economy."

Management Actions

Federal agencies should take the following five management actions to implement the commitments described above.

1. **Agree with SBA on an agency-specific SDB contracting goal for FY 2022 that will allow the Federal Government to cumulatively award at least 11% of Federal contract spend to SDBs in FY 2022.**

Federal law contemplates that the Government will structure its approach to procurement in a manner that increases access for socioeconomic small businesses and establishes a baseline of goals for overall small business contracting. In FY 2020, 10.45% of Federal agencies' total eligible contracting dollars went to SDBs.

To meet the President's 15% goal by FY 2025, agencies and SBA shall negotiate interim SDB contracting goals for FY 2022. These interim goals shall demonstrate improvement at each agency. Taken together across the Government, these goals shall result in the award of 11% of total eligible contract spending to SDBs. Increasing Federal spending with SDBs can accelerate inclusive entrepreneurship, narrow wealth gaps, and create a more dynamic and resilient supplier base. SBA plans to reflect in agencies' FY 2022 small business scorecards agency efforts to increase SDB spending. And SBA will work with the Office of Management and Budget (OMB), the Domestic Policy Council (DPC), and the National Economic Council (NEC) to identify possible increases in the floor amount of spending for WOSBs, SDVOSBs, and HUBZone contractors that agencies should strive to achieve in FY 2023.

2. **Review and adjust category management stewardship practices to boost contracting opportunities for SDBs and other socioeconomic small businesses.**

Since 2014, the Executive Branch has organized its buying practices for common goods and services (which make up about 60% of total Federal contract spending) using the stewardship principles of "category management." Under category management, teams of experts in each significant category of Federal contract spending (e.g., professional services,

[3] Performance.gov/PMA

medical supplies, industrial products, etc.) help agencies buy as an organized entity, rather than as thousands of independent buyers. Stewardship practices include using data analysis to inform buying decisions, adopting vendor management strategies to eliminate redundant actions with the same contractor, and developing tools to share contract terms and prices paid for goods and services so buyers can make better-value purchases in the future.

With its focus on interagency collaboration and coordination, category management can help achieve key Administration priorities, including domestic sourcing and combatting climate change, by ensuring the many agency buying offices across the Federal Government offer sellers and supply chains clear and consistent demand signals and predictable work streams. As one measure of category management's positive impact, validated agency data shows that category management has saved more than $33 billion in three years.[4]

Since 2017, OMB has given agencies credit for contract activity that is aligned with category management principles, activity we call "spend under management" (SUM). Analysis of SUM credit since 2017 shows that socioeconomic small businesses have received a proportionally lower share of spending under category management than other spending. This trend is most likely a reflection of agencies having generally sought SUM credit for their use of large, high-dollar Government-wide and agency-wide contracts. Small firms face challenges in accessing these contracts when agencies do not set them aside exclusively for small business participation.

In furtherance of the Executive Order, OMB is committed to promoting a stronger and clearer alignment between the acquisition stewardship practices promoted by category management and the goal of advancing equity in procurement. The category management infrastructure built to help the Government become a more organized and informed buyer can be effective in supporting agencies as they promote more equitable buying practices.

For these reasons, through this memorandum, OMB is revising and clarifying the guidance in OMB Memorandum M-19-13, *Category Management: Making Smarter Use of Common Contract Solutions and Practices*, which provides guidance on the use of category management. The revisions and updates are set forth in the Attachment and summarized in the table below.

Revisions and Updates to OMB Memorandum M-19-13 on Category Management

Revision/Update	Purpose of Change
• A new Tier 2-Socioeconomic Small Business (SB) SUM measure takes effect at the beginning of FY 2022 (retroactive to October 1, 2021) to give agencies automatic credit towards agency category management goals for *all awards* made to certified and self-	• Empowering the workforce to pursue the best acquisition strategy for reaching underserved small business communities helps to maximize awards to socioeconomic small businesses

[4] These savings were cited favorably by the Government Accountability Office in its November 2020 report *OMB Can Further Advance Category Management Initiative by Focusing on Requirements, Data, and Training* (GAO 21-40).

Revision/Update	Purpose of Change
certified socioeconomic small businesses[5]	
• Agencies are reminded to establish and implement category management plans consistent with statutory socioeconomic responsibilities and the need to diversify the agencies' small business supplier base	• Using category management practices to promote industry-specific best practices reduces burdens on small business vendors and reinforces small business goal achievement
• Agencies are reminded that category management plans shall not prioritize spending on "Best in Class" (BIC) solutions at the expense of meeting socioeconomic small business goals and providing maximum practicable opportunity to small businesses	• Ensuring that use of BIC solutions is balanced with decentralized contracts and other strategies that are necessary to increase diversity within the agency's small business supplier base advances equity in procurement
• SBA and the Department of Commerce, which includes the Minority Business Development Administration, are recognized as voting members of the Category Management Leadership Council[6]	• Accounting for small business equity in category management governance furthers the consideration of procurement practices that promote supplier diversity

Agencies should immediately review and update any internal guidance implementing Memorandum M-19-13 or other category management guidance to ensure it aligns with the revisions and clarifications described above and in the Attachment. Agencies should also clearly communicate these changes with their workforce to support better alignment between category management stewardship and attainment of socioeconomic small business contracting goals. OMB and SBA will work with Chief Acquisition Officers (CAOs) and Senior Procurement Executives (SPEs), directors of agency Offices of Small Disadvantaged Business Utilization (OSDBUs), and agency senior accountable officials for category management to monitor implementation.

[5] Tier 2-SB credit applies to 8(a) and other small disadvantaged businesses, women-owned small businesses, service-disabled veteran-owned small businesses, and small businesses working in HUBZones. Tier 2-SB credit will be awarded to agencies automatically in bi-monthly updates to category management dashboards found on the Acquisition Gateway: Public Category Management Dashboards & Analytics | D2D (gsa.gov).

[6] The CMLC is the interagency governing body for category management activities.

3. Increase the number of new entrants to the Federal marketplace and reverse the general decline in the small business supplier base.

A recent report found that the number of new small business entrants to Federal procurement decreased by 79% from 2005 to 2019.[7] Analysis of agency data reported in the Federal Procurement Data System finds similar trends regarding the small business supplier base at large, including a loss of 49,000 small businesses (or 38% of small businesses) in the Federal supplier base since 2010. These trends are at odds with the Administration's goal of advancing equity in procurement and portend a less dynamic and competitive Federal marketplace that could leave agencies at greater risk of being unable to withstand supply chain disruptions.

The OMB *Study to Identify Methods to Assess Equity: Report to the President* (July 2021)[8] found that new and recent entrants face difficulties navigating the Federal marketplace due to inadequate Government outreach to diverse vendors and the lack of visibility into available opportunities. The report concluded that these shortcomings "create unfair advantages for incumbent contractors, complicating efforts to diversify the Federal supplier base."

To address these challenges, the following initial Government-wide steps will be taken.

- *New entrant management tools*. OMB, DPC, and NEC will work with agencies to develop: (i) a common definition of "new entrant" for the purpose of benchmarking current performance and tracking progress over time, and (ii) a plan for public reporting of agency performance on this metric.

- *Strengthened procurement forecasting capabilities*. OMB will work with agencies to achieve greater consistency across the Federal Government in the availability and quality of procurement forecasting tools[9] by ensuring they provide: (i) early awareness of potential opportunities, (ii) user friendly search and filter functions, and (iii) advanced information that can be used to prepare more effectively for competition (e.g., description of requirement, anticipated place of performance, whether the opportunity will be set aside for small businesses, fiscal quarter of award).

- *Improved data management*. SBA, OMB, the General Services Administration, and other agencies will work together to provide data analytic capabilities, including on demographic and geographic information, to help the workforce understand the impact of current buying practices across industries and sectors and take focused actions in areas with the greatest opportunity for growth by socioeconomic small businesses. These actions will be informed by analyses of market trends in the U.S. economy to help determine where adjustments in procurement practices, including more targeted outreach, can drive more equitable results, and where other types of government action outside the Federal procurement process may be required.

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[7] *Supporting Small Business and Strengthening the Economy Through Procurement Reform* (June 22, 2021)

[8] *Study to Identify Methods to Assess Equity: Report to the President* (July 2021)

[9] Section 8(a)(12)(C) of the Small Business Act requires agencies to compile and make available projections of contracting opportunities that small business concerns, including SDBs, may be able to perform.

- *Increased transparency for Federal agencies and interested businesses*. OMB will work with the Department of Treasury to add small business user-friendly data capabilities to USAspending.gov. This action will help businesses who are not current Government contractors to identify opportunities, and navigate information about purchasing histories and other relevant geographic or socioeconomic factors.

In parallel with these Government-wide efforts, agency equity teams for procurement established under the Executive Order are encouraged to pursue additional strategies that can reverse recent declines in the contracting base and promote greater small business supplier diversity across business categories. Agencies should consider the following steps:

- Engage early in the acquisition process with the agency's OSDBU and SBA's assigned Procurement Center Representative to identify barriers to access and craft acquisition strategies to maximize opportunities for small business participation. In addition, any release of 8(a) contracts should be paired with new 8(a) opportunities at a commensurate level.

- Hold regular meetings with program managers of new socioeconomic small businesses to improve understanding of mission and awareness of upcoming opportunities.

- Increase use of innovative business practices that reduce administrative burden or increase the participation rate of small businesses within the procurement process. Many of these practices are highlighted in the Periodic Table of Acquisition Innovations (PTAI), available at https://fai.gov/periodic-table.

- Make commitments for data-driven outreach, including, where practicable, crowdsourcing tools that allow for dynamic community engagement and supplier scouting targeted at increasing participation in underserved communities, especially by new entrants, small business manufacturers, small business service providers of specialized and other in-demand services, and sellers in supply chains that are the focus of increased domestic sourcing efforts or are advancing our clean energy future.

- Track the percentage of contract spending under the simplified acquisition threshold that is set aside for small businesses.

- Strengthen oversight of prime contractor reporting of subcontracting plans and goals, as subcontracting opportunities are often pathways for small businesses to become involved with Federal contracting.

- Proactively use the "Acquisition 360" survey to understand better how contractors and potential contractors from underserved communities experience the Federal contracting process.[10]

[10] The Federal Acquisition Regulatory Council will soon release a final rule to encourage the use of the Acquisition 360 tool, which provides a standardized survey instrument to facilitate feedback. This rule builds on the March 18, 2015 OFPP Memorandum, *Acquisition 360 – Improving the Acquisition Process Through Timely Feedback from External and Internal Stakeholders*.

4. Include the achievement of small business contracting goals as a part of the performance plans for key Senior Executive Service (SES) officials.

Advancing equity for socioeconomic small businesses will require focused attention, proactive engagement, and follow-through by the agency's senior leadership. A decade ago, achievement of small business contracting goals was added to the performance plans of many agency SES program officials responsible for procurement. This strengthening of accountability began a decade-long record of meeting small business contracting goals.[11] However, some plans did not specifically focus on particular socioeconomic small business goals. And application was uneven for program officials who can play a significant role in deciding the extent to which work for their agency is set aside for socioeconomic small businesses.

Agencies are expected to include progress towards achievement of each of the socioeconomic small business goals, including the heightened SDB goal negotiated with SBA, as evaluation criteria in all performance plans for SES managers that oversee the acquisition workforce or agency programs supported by contractors. These managers include the agency's CAO, SPE, OSDBU directors, and heads of contracting activities, as well as SES program officials who participate in planning acquisitions or selecting contractors to support their projects. In order for changes to maximally affect FY 2022 socioeconomic small business goal achievement, agencies should take any necessary actions by January 10, 2022.

5. Ensure agency small business contracting offices have access to senior leadership.

The Small Business Act requires that each Federal agency with procurement powers maintain an Office of Small and Disadvantaged Business Utilization to advocate for small businesses in procurement and contracting processes. These offices play an important role in advancing equity by, among other things: working with agency acquisition officials to increase the probability of participation by small businesses; assisting small businesses in obtaining payments from an agency (or prime contractor) with which they have contracted; and providing the agency's CAO and SPE with advice and comments on acquisition strategies, market research, and other actions to expand access to the agency's supplier base.

Section 15(k)(3) of the Act requires that OSDBU directors generally be responsible only to and report directly to agency heads or their deputies. Implementation of this requirement is uneven across agencies, however. Sufficient access to senior agency leadership is necessary to ensure that Federal small business contracting goals are core to each department's mission and to facilitate effective collaboration with CAOs, SPEs, and senior accountable officials for category management.

[11] In the National Defense Authorization Act for FY 2013, Congress required agencies to take steps to ensure that members of the SES responsible for acquisition and other members of the SES, as appropriate, "assume responsibility for the agency's success in achieving each of the small business prime contracting and subcontracting goals and percentages by (1) promoting a climate or environment that is responsive to small business concerns; (2) communicating the importance of achieving the agency's small business contracting goals; and (3) encouraging small business awareness, outreach, and support." Pub. Law No. 112-239, 126 Stat. 2076, sec. 1633(b), 15 U.S.C. § 631 note.

By January 10, 2022, CFO Act agencies[12] shall report to the SBA Administrator and OMB's Deputy Director for Management whether they currently meet the requirements of section 15(k)(3). To the extent OSDBUs lack the access specified in section 15(k)(3), the response should include a plan on how and when the agency will come into compliance during FY 2022. Reports should be sent to section15k@sba.gov and MBX.OMB.OFPPv2@OMB.eop.gov.

Related Actions

In assessing procurement barriers pursuant to direction in section 5 of the Executive Order, agencies have identified challenges facing socioeconomic small businesses as well as other underserved communities, including individuals who are blind or have severe disabilities, Historically Black Colleges and Universities and other Minority-Serving Institutions, and Tribal Colleges and Universities.[13] The guidance in this memorandum is intended to inform and complement the actions agencies are considering for the underserved communities in their Equity Plans required by the Executive Order. OMB will consider additional management actions to advance equity in procurement based on these ongoing efforts.

Questions regarding this management guidance may be sent to MBX.OMB.OFPPv2@OMB.eop.gov.

Attachment

[12] 31 USC § 901.

[13] Under section 2 of the Executive Order, the term "underserved communities" refers to "populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life."

Attachment

M-19-13 (Revisions)

SUBJECT: Category Management: Making Smarter Use of Common Contract Solutions and Practices

OMB Memorandum M-19-13 provides guidance on the use of category management—that is, the practice of buying common goods and services as an organized enterprise in order to improve the efficiency and effectiveness of acquisition activities—while meeting small business goals and other socioeconomic requirements. To achieve a stronger and clearer alignment between category management stewardship principles and small business contracting, agencies shall implement Memorandum M-19-13 as modified by the following revisions and clarifications:

Section 1. Annual establishment of category management goals and plans.

Agencies shall continue to develop strategic plans for category management informed by market intelligence, as provided in section 1, subject to the following changes and clarifications.

a. *SUM Credit*. OMB will continue to use the three-tier system reflected in M-19-13[14] to measure agency progress in implementing category management principals. However, OMB will no longer measure reductions in unmanaged (Tier 0) spend and instead will focus on increasing SUM.

   In addition, OMB has modified how credit is provided to agencies under their category management plans in order to maximize awards to socioeconomic small businesses. Beginning in FY 2022 (retroactive to October 1, 2021), agencies will receive automatic Tier 2 SUM credit towards agency category management goals for all awards made to certified and self-certified socioeconomic small businesses. For purposes of this category management guidance, "socioeconomic small business" refers to 8(a) and other small disadvantaged businesses, women-owned small businesses, service-disabled veteran-owned small businesses, and small businesses working in HUBZones. This credit will be tracked under a new Tier 2-Socioeconomic Small Business (SB) designation.

   Agencies shall continue to receive Tier 1 SUM credit for spending awarded to a small business contractor other than a socioeconomic small business, including under smaller decentralized set-aside contracts, if that award is designed to achieve small business goals and is conducted pursuant to a comprehensive, organized, agency-level strategy, as approved

[14] SUM includes all contract spending that falls under any of three tiers, each of which is defined based on certain category management principles of stewardship. Tier 1 is agency-wide spending with strong contract management practices. Tier 2 is procurement spending via Government-wide or multi-agency contract vehicles that reflect strong management practices, including data and information sharing across agencies and use of cross-agency metrics. Tier 3 is procurement spending via Government-wide contract vehicles that meet additional "Best in Class" standards for management and stewardship.

by the agency after consultation with OMB. Agencies are not required to address plans for awards to socioeconomic small businesses, as credit will be automatically provided.[15]

Tier 2-SB SUM is designed to empower agencies to take full advantage of the best strategies for reaching underserved small business communities. In some cases, this will involve using existing Government-wide contracts to bring established socioeconomic small businesses into the agency's supplier base, helping to broaden the cache and resiliency of those businesses. In other cases, it will involve awarding small decentralized contracts or medium or large set-aside vehicles to create diversity by doing business with entities that are new or recent additions to the Federal market. Tier 2-SB SUM credit will be provided automatically regardless of the vehicle used to reach the socioeconomic small business.

b. *Plan submission and execution*. When submitting plans to OMB, the SAO should be prepared to discuss with OMB's OFPP and SBA's Office of Government Contracting and Business Development (GCBD) any efforts by the acquisition policy and OSDBU offices to use the new Tier 2-SB SUM credit to increase the participation of underserved communities while upholding the principles of category management stewardship. The SAO is encouraged to share any promising strategies and identify areas where further guidance, data analytics, and/or training (either at the agency or government-wide level) may be needed.

In executing plans, SAOs, CAOs, SPEs, and OSDBUs shall ensure the following:

- **The achievement of socioeconomic and other small business goals shall be prioritized over achievement of category management goals if the achievement of both goals is not possible.** Agencies remain fully responsible for meeting and exceeding their small business and socioeconomic small business contracting goals. Steady focus on these goals is a key to advancing equity.

- **The achievement of socioeconomic and other small business goals shall be prioritized over achievement of Best in Class (BIC) contract goals if achievement of both goals is not possible.** BIC contracts shall not be used where doing so might imperil the agency's ability to meet and exceed its socioeconomic small business contracting goals, or might threaten growth of the agency's small business supplier base. BIC contracts are held by high-performing and seasoned contractors, including more than 2,000 well-established socioeconomic small businesses. Each agency should carefully consider where these sources can provide benefit if they are not already included in the agency's supplier base. At the same time, agencies must recognize that BIC contractors represent only a small fraction of the total number of small business contractors who do business with the Government. Also, BICs are generally designed for more seasoned contractors and therefore are not easily accessed by new and recent entrants. For these reasons, agencies must actively balance any consideration of BICs with other contracting strategies, including set-aside contracts, that can help the agency increase diversity within the agency's supplier base.

[15] The same caveat applies to references to decentralized set-aside contracts in Attachments 3 and 4.

If, during the implementation of a category management plan, an agency believes a category management goal or target needs to be adjusted to achieve small business goals, the agency should make any necessary adjustments and promptly notify OMB.

Attachment 2 - Roles and responsibilities.

To better ensure the challenges facing small businesses are fully considered in the governance of category management practices and activities, section I(2) is amended to reflect that the Small Business Administration will participate as a voting member of the Category Management Leadership Council (CMLC), and the Department of Commerce will be added as a voting member, so that the Minority Business Development Agency and the Economic Development Administration may also contribute to the work of the CMLC.

Sections I(2) and (3) and section II(1) are amended to reflect that the CMLC, category managers, and SAOs will elevate the importance of requirements development in category management activities, both at the government-wide and agency levels. These officials will be expected to promote the early and effective engagement of key stakeholders to shape category management strategies and acquisition solutions, including program and requirements officials, end users, acquisition officials, information technology officials, and OSDBUs.

In the United States Court of Federal Claims

No. 21-493

(Filed Under Seal: November 18, 2021)
(Reissued: November 29, 2021)

QUANTERION SOLUTIONS, INC.,	)	Pre-award bid protest; SBA's decision accepting a procurement into the 8(a) program; "new work;" "price increase;" standing
Plaintiff,	)	
v.	)	
UNITED STATES,	)	
Defendant,	)	
and	)	
KAPILI SERVICES, LLC,	)	
Defendant-Intervenor.	)	

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Damien C. Specht, Morrison & Foerster LLP, Washington, D.C. for defendant-intervenor, Kāpili Services, LLC. Of counsel were James A. Tucker and Alissandra D. Young, Morrison & Foerster LLP, Washington, D.C.

OPINION AND ORDER[1]

LETTOW, Senior Judge.

In this pre-award bid protest, Quanterion Solutions, LLC ("Quanterion") challenges the Small Business Administration's ("SBA") determination that a proposed 8(a) contract involved new work, excusing SBA from the obligation to conduct an adverse impact analysis of Quanterion prior to accepting the requirement and proposed new awardee into the 8(a) program. Quanterion has filed a motion for judgment on the administrative record of SBA's decision. *See* Pl.'s Mot., ECF No. 63. Both defendant, United States, and defendant-intervenor, Kāpili Services, LLC ("Kāpili"), have submitted cross-motions. *See* Def.'s Cross-Mot., ECF No. 69, and Def.-Int.'s Cross-Mot., ECF No. 68. The case is fully briefed, *see* Pl.'s Reply and Resp., ECF No. 70; Def.'s Reply, ECF No. 71; Def.-Int.'s Reply, ECF No. 72, and a hearing was held November 3, 2021. For the reasons stated in this opinion, the court DENIES Quanterion's motion and GRANTS the defendants' cross-motions.

BACKGROUND[2]

This bid protest involves the Defense Threat Reduction Agency ("DTRA" or "the agency") and its Information Analysis Center ("DTRIAC"). The agency's mission is to enable the Department of Defense and the United States government "to prepare for and combat weapons of mass destruction and improvised threats and to ensure nuclear deterrence." AR 8-152.[3] The program conducted by DTRIAC "provide[s] timely electronic access to all nuclear weapons test data, legacy and current, to U.S. [g]overnment programs supporting U.S. [n]uclear [d]eterrent missions." *Id.* The agency conducted market research in 2019 in anticipation of a new contract to continue the "[c]ore [o]perations" of an existing contract under the program (then performed by Quanterion), as well as to undertake two new initiatives within the

[1] Because of the protective order entered in this case, this opinion was initially filed under seal. The parties were requested to review the decision and provide proposed redactions of any confidential or proprietary information. The resulting redactions are shown by elipses enclosed by brackets, *e.g.*, "[***]."

[2] The recitations that follow constitute findings of fact by the court from the administrative record of the procurement filed pursuant to Rule 52.1(a) of the Rules of the Court of Federal Claims ("RCFC"). *See Bannum, Inc. v. United States*, 404 F.3d 1346, 1356 (Fed. Cir. 2005) (specifying that bid protest proceedings "provide for trial on a paper record, allowing fact-finding by the trial court").

[3] The administrative record filed with the court in accord with RCFC 52.1(a) is divided into tabs and is consecutively paginated. The record will be cited by tab and page, *e.g.*, "AR ___-___."

anticipated contract. *Id.* As a result of this market research, the agency identified Kāpili, a Native-Hawaiian-Owned small business, which the agency intended to submit to SBA for acceptance into the 8(a) business development program. AR 9-169.[4]

The agency submitted a letter to SBA in June 2020, offering the new contract requirement, as well as Kāpili, into the 8(a) program and asserting that the proposed contract involved new work, obviating the need to assess whether awarding the contract to Kāpili would have an adverse impact on the incumbent, Quanterion. AR tab 11. After SBA failed to respond to the agency's offer letter within five business days, the agency treated Kāpili as automatically accepted into the 8(a) program. AR 14-338; AR 14-345; AR 21-488. The agency publicly stated that it would award a sole-source, 8(a) contract, prompting Quanterion to contact the agency in July 2020 to inquire whether SBA had conducted an adverse impact analysis. AR 21-495 to 497. The agency responded that it was unaware of whether SBA had conducted an adverse impact analysis. AR 21-496.

Within about a week of this exchange, DTRA contacted SBA to inquire whether an adverse impact analysis was necessary. AR 21-487 to 488. SBA responded by telephone, asking for the agency's "offer letter, the [p]rogram [m]anager['s] analysis of . . . new work, and the [agency's] correspondence . . . with the incumbent." AR 23-502. SBA clarified a few days later by email that DTRA could apply "the 25% rule" to determine whether the anticipated contract was new, but it expected "to see the 25% increase [in cost] stemming from new contract requirements that would involve meaningfully different capabilities or work." AR 24-505. The agency responded that different capabilities or work accounted for at least 35% of the contemplated contract cost increase. AR 26-517.

In August 2020, SBA formally responded to the agency's request, indicating its acceptance of the new contract requirement and Kāpili into the 8(a) program on the ground that SBA had found no adverse impact to Quanterion (not on the ground that the agency advanced—that the contract requirement involved new work). AR 31-1076. In October 2020, the agency sent Kāpili a request for proposal for the anticipated contract. AR 39-1110. Kāpili in turn submitted its proposal to the agency in December 2020. AR 60b-5152.

Quanterion filed a pre-award bid protest before the Government Accountability Office ("GAO") in November 2020 challenging SBA's decision. AR 45-4836. GAO dismissed plaintiff's protest as untimely, AR 50-5097, after which Quanterion filed the protest currently before the court in January 2021, *see* Compl., ECF No. 1.

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[4] "Section 8(a) [of the Small Business Act] authorizes the Small Business Administration . . . to enter into procurement contracts with other federal agencies and to subcontract performance of these contracts to disadvantaged small businesses." *Infiniti Info. Sols., LLC v. United States*, 92 Fed. Cl. 347, 349 (2010).

In connection with the pending protest, Kāpili contacted the agency in March 2021 to inform it that, as of January 1, 2021, Kāpili no longer qualified as small under the size standard applicable to the anticipated contract. AR 60d-5294. It averred, however, that it had met the applicable size standard when SBA accepted it into the 8(a) program in August 2020 and when it submitted its proposal to the agency in December 2020. *Id.* It indicated that any action by the agency that resulted in a new 8(a) acceptance date would likely render Kāpili ineligible for the projected contract. *Id.* Finally, Kāpili proposed changing the size standard to accommodate its new size or awarding the contract to one of its "8(a) sister firms." AR 60d-5295.

In the proceedings before the court, Quanterion filed a motion for judgment on the administrative record, *see* ECF No. 30, after which the government moved to remand the case to the SBA to reconsider its 8(a) acceptance decision. *See* Def.'s Mot. for Voluntary Remand, ECF No. 35. The government averred that SBA's 8(a) acceptance "letter did not address the documentation and analysis provided by DTRA regarding the question of whether the program was 'new' within the meaning of SBA regulations." *Id.* at 3. Instead, according to the government, SBA's letter had stated that it had conducted an analysis and found no adverse impact against Quanterion. *Id.* The government asserted that SBA should have focused on whether the requirement was new, as indicated in the agency's offer letter, and should not have conducted an adverse impact analysis. *Id.* The court ultimately granted the remand. *See* Order of April 20, 2021, ECF No. 40.

On remand, SBA withdrew Kāpili's acceptance into the 8(a) program. AR 57-5141. The agency submitted a new 8(a) offer letter to SBA, supported by detailed documentation explaining the types and cost of work performed under the existing Quanterion contract requirement and the contemplated Kāpili contract requirement. AR tab 60. Included was a detailed memorandum by the project manager that concluded that new work made up at least 35% of the increase in cost of the contemplated Kāpili contract. AR 60g-5406. Based on the agency's documentation, SBA again accepted Kāpili into the 8(a) program, this time on the grounds that the contract involved new work and that no adverse impact analysis of Quanterion was required. AR 58-5143.

STANDARDS FOR DECISION

A. Motion for Judgment on the Administrative Record

The standards of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, govern the court's consideration of a protest of the government's decisions regarding the award of a contract. *See* 28 U.S.C. § 1491(b)(4) ("In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5."). Under the APA, the court may set aside a government procurement decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), subject to the traditional balancing test applicable to a grant of equitable relief, *see*

PGBA, LLC v. United States, 389 F.3d 1219, 1224-28 (Fed. Cir. 2004); *Hyperion*, *Inc. v. United States*, 115 Fed. Cl. 541, 550 (2014). "The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (brackets omitted) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)).

The court may not "substitute its judgment for that of the agency," *Hyperion*, 115 Fed. Cl. at 550 (quoting *Keeton Corrs., Inc. v. United States*, 59 Fed. Cl. 753, 755 (2004) (in turn quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds as recognized in Califano v. Sanders*, 430 U.S. 99, 105 (1977))), but "must uphold an agency's decision against a challenge if the 'contracting agency provided a coherent and reasonable explanation of its exercise of discretion,'" *id.* (quoting *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1381 (Fed. Cir. 2009)). This is so even if the clarity of the agency's decision is "less than ideal," so long as "the agency's path may reasonably be discerned." *Federal Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). "'[T]he deference afforded to an agency's decision must be even greater when a trial court is asked to review a technical evaluation' because of the highly specialized, detailed, and discretionary analyses frequently conducted by the government." *CSC Gov't Sols. LLC v. United States*, 129 Fed. Cl. 416, 434 (2016) (quoting *L-3 Commc'ns EOTech, Inc. v. United States*, 83 Fed. Cl. 643, 650 (2008)) (additional citations omitted).

The court may overturn the government's procurement decision only "if '(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure.'" *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009) (quoting *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001)). In conducting the rational-basis analysis, the court looks to "whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion," *Axiom*, 564 F.3d at 1381 (quoting *Impresa Construzioni*, 238 F.3d at 1333), and affords "contracting officers . . . discretion upon a broad range of issues," *AgustaWestland N. Am., Inc. v. United States*, 880 F.3d 1326, 1332 (Fed. Cir. 2018) (quoting *Impresa Construzioni*, 238 F.3d at 1332-33). Accordingly, "the disappointed bidder bears a heavy burden of showing that the award decision had no rational basis." *Centech*, 554 F.3d at 1037 (quoting *Impresa Construzioni*, 238 F.3d at 1332-33). Protests alleging a violation of regulation or procedure "must show a clear and prejudicial violation." *Axiom*, 564 F.3d at 1381 (quoting *Impresa Construzioni*, 238 F.3d at 1333).

B. Standing

The plaintiff has the burden of establishing standing to bring a bid protest. *See Myers Investigative & Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1369 (Fed. Cir. 2002) (quoting

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). "A party seeking to establish jurisdiction under § 1491(b)(1) must show that it meets § 1491(b)(1)'s standing requirements, which are 'more stringent' than the standing requirements imposed by Article III of the Constitution." *Diaz v. United States*, 853 F.3d 1355, 1358 (Fed. Cir. 2017) (quoting *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009)). To satisfy these more stringent requirements, a plaintiff must show that it is an "interested party," *see Digitalis Educ. Sols., Inc. v. United States*, 664 F.3d 1380, 1384 (Fed. Cir. 2012) (quoting *Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1307 (Fed. Cir. 2006)), and "that it was prejudiced by a significant error in the procurement process," *Labatt Food Serv., Inc. v. United States*, 577 F.3d 1375, 1378 (Fed. Cir. 2009) (citing *JWK Int'l Corp. v. United States*, 279 F.3d 985, 988 (Fed. Cir. 2002)).

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 the failure to award the contract." *Weeks Marine*, 575 F.3d at 1359 (quoting *American Fed'n of Gov't Emps. v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001)). To have a direct economic interest, the plaintiff must show that it had a substantial chance of winning the contract. *See Digitalis*, 664 F.3d at 1384. An interested party suffers prejudice from a significant procurement error when "but for the error, it would have had a substantial chance of securing the contract." *CliniComp Int'l, Inc. v. United States*, 904 F.3d 1353, 1358 (Fed. Cir. 2018) (emphasis omitted) (quoting *Labatt*, 577 F.3d at 1378); *see also Red Cedar Harmonia, LLC v. United States*, 144 Fed. Cl. 11, 21 (2019), *aff'd*, 840 Fed. Appx. 529 (2020). The prejudice inquiry and the economic-interest inquiry must not be conflated—"an error [may be] non-prejudicial to an economically interested offeror." *CliniComp*, 904 F.3d at 1358 (quoting *Labatt*, 577 F.3d at 1379-80); *see also Veteran Shredding, LLC v. United States*, 140 Fed. Cl. 759, 765 (2018) ("Despite the potential relevance of prejudice in determining substantial chance, direct economic interest should still be evaluated separately from prejudice."). "[A] party cannot be prejudiced unless it first has a substantial chance of [obtaining the] award." *Veteran Shredding*, 140 Fed. Cl. at 765.

ANALYSIS

Quanterion's bid protest is governed primarily by the Code of Federal Regulations applicable to SBA's 8(a) program. "A procuring activity contracting officer indicates his or her formal intent to award a procurement requirement as an 8(a) contract by submitting a written offering letter to SBA." 13 C.F.R. § 124.502(a). "Upon receipt of the procuring activity's offer of a procurement requirement, SBA will determine whether it will accept the requirement for the 8(a) [business development ('BD')] program." 13 C.F.R. § 124.503(a). "Where SBA decides to accept an offering of a sole source 8(a) procurement, SBA will accept the offer both on behalf of the 8(a) BD program and in support of a specific Participant. As part of its acceptance of a sole source requirement, SBA will determine the eligibility of the Participant identified in the offering letter, using the same analysis set forth in § 124.501(g)." 13 C.F.R. § 124.503(a)(1). "Before a

Participant may be awarded . . . a sole source . . . 8(a) contract, SBA must determine that the Participant is eligible for award." 13 C.F.R. § 124.501(g).

Quanterion's protest centers on the determination to admit Kāpili into the 8(a) program, *i.e.*, to consider the requirement and the proposed 8(a) participant eligible for the 8(a) program. Plaintiff's arguments fall into two categories: challenges to SBA's decision to treat the proposed requirement as comprising new work and challenges to SBA's decision regarding Kāpili's eligibility, specifically its size.

A. Adverse Impact Exception for New Work

"SBA will not accept a procurement for award as an 8(a) contract if," among other circumstances, "SBA has made a written determination that acceptance of the procurement for 8(a) award would have an adverse impact on an individual small business." 13 C.F.R. § 124.504(c). "[A]dverse impact does not apply to 'new' requirements. A new requirement is one which has not been previously procured by the relevant procuring activity." 13 C.F.R. § 124.504(c)(1)(ii). Notably, "[t]he expansion or modification of an existing requirement may be considered a new requirement where the magnitude of change is significant enough to cause a price adjustment of at least 25 percent (adjusted for inflation) or to require significant additional or different types of capabilities or work." 13 C.F.R. § 124.504(c)(1)(ii)(C).

The court addresses the parties' threshold dispute concerning new work under § 124.504(c)(1)(ii)(C). Citing a recent GAO decision, Quanterion asserts that the regulation must be read in the conjunctive, *i.e*, that magnitude of change of at least 25% must come from significant additional or different types of capabilities or work. Pl.'s Mot. at 37 (citing *Eminent IT, LLC*, B-418570, 2020 CPD ¶ 222, 2020 WL 4260503 (Comp. Gen. June 23, 2020)). The government and Kāpili counter that the correct reading of the regulation is in the disjunctive, *i.e.*, that *either* a price adjustment of 25% *or* additional or different types of capabilities or work may *independently* constitute new work. Def.'s Cross-Mot. at 10; Def.-Int.'s Cross-Mot. at 4; *see also* Hr'g Tr. 28:24 to 29:9 (Nov. 3, 2021); Hr'g Tr. 40:17 to 25.[5] In its recently promulgated definition of a "follow-on requirement or contract," SBA acknowledged that the expansion or modification concept is disjunctive, 13 C.F.R. § 124.3 ("As a general guide, if the procurement satisfies at least one of these . . . conditions, it may be considered a new requirement."); however, SBA has expressed its preference against a strict, disjunctive approach focused on the 25% element of the rule in favor of a conjunctive approach that deemphasizes the 25% element of the rule, *see* 13 C.F.R. § 124.3 ("However, meeting any one of these conditions is not dispositive that a requirement is new. In particular, the 25 percent rule cannot be applied rigidly in all cases."); *see also* Consolidation of Mentor-Protege Programs and Other Government Contracting Amendments, 85 Fed. Reg. 66188 (Oct. 16, 2020) ("Amend § 124.504 by . . .

[5] The date will be omitted from further citations to the transcript of the hearing held on November 3, 2021.

[r]emoving the word 'will' and adding in its place 'may' in paragraph (c)(1)(ii)(C)."); *AccelGov, LLC v. United States*, __ Fed. Cl. __, No. 21-1647C, 2021 WL 4808039, at *7-8 (Sep. 30, 2021) ("In 2020, the SBA amended the regulation to ensure a twenty-five percent price variance would not be dispositive." (citing 85 Fed. Reg. 66188)). It is apparent, moreover, from the administrative record that SBA informed DTRA that § 124.504(c)(1)(ii)(C) was to be read in the conjunctive. *See* AR 24-505 (emails between SBA and DTRA stating the requirement in the conjunctive). The court will therefore decline the parties' invitation to read § 124.504(c)(1)(ii)(C) as strictly disjunctive or conjunctive. To do so is unnecessary both because of SBA's regulations and—as defendants aver, *see* Def.'s Cross-Mot. at 10-11, 28; Def.-Int.'s Mot. at 10-12—because the new requirement would pass muster under either the disjunctive or conjunctive reading of the regulation.

Turning to the parties' arguments, Quanterion contends that SBA's decision to readmit the requirement and Kāpili into the 8(a) program was procedurally irrational because SBA's acceptance letter lacks any explanation as to how or why it concluded that the Kāpili contract comprises new work, *see* Pl.'s Mot. at 29-31, and because it provides summary conclusions instead of reasoned explanation, *see id.* at 31. Namely, SBA's second acceptance decision, according to plaintiff, lacks any discussion, analysis, or explicit adoption of DTRA's document submissions, as well as applicable regulations. *Id.* at 31-32. The government counters that SBA's decision to admit the new requirement and Kāpili into the 8(a) program was not arbitrary and capricious for failure to explain its reasoning because SBA necessarily relied upon the agency's "considered analysis of its own requirement." Def.'s Cross-Mot. at 9, 28-29. Alternatively, defendant avers that the administrative record provides sufficient support for DTRA's decision even if the court considers SBA's second acceptance decision insufficiently detailed or explained. *Id.* at 9, 29-30. Kāpili, as defendant-intervenor, adds that Quanterion's argument boils down to a disagreement with "DTRA's technical judgment and the SBA's acceptance of the requirements into the 8(a) program," which decisions are entitled to deference because of DTRA's expertise in the existing and new contract requirements. Def.-Int.'s Cross-Mot. at 5-6.

The court concurs with the government and Kāpili that SBA's second acceptance letter reasonably implies that SBA reviewed, relied on, and agreed with DTRA's documentary submissions. *Compare* AR 58-5143 ("The *offer letter* indicates that this is a new 8(a) requirement.") (emphasis added), *with id.* (explaining that no adverse impact analysis was conducted "based upon the procurement history revealed in the *offer letter*") (emphasis added).[6]

[6] Quanterion acknowledges SBA's reliance on DTRA's documentary submissions in its motion for judgment. *See* Pl.'s Mot. at 41 ("The SBA failed in its responsibility to obtain a complete record through ordinary due diligence, and *instead* blindly *accepted DTRA's* unsubstantiated *claims and presentations* created in response to [Quanterion's] challenge to the acceptance of the Proposed Requirement into the 8(a) BD Program." (emphasis added)). Notably, the regulatory framework for offering a potential 8(a) contract requirement and

While the clarity of SBA's second offer letter may be "less than ideal," the court has no difficulty discerning "the agency's path" from DTRA's submissions to SBA's acceptance decision. *Fox*, 556 U.S. at 513-14. From this inference, the court looks to the administrative record to determine whether DTRA's documents provide "a coherent and reasonable explanation" of its conclusion that the contemplated Kāpili contract consisted of new or substantially different work under 13 C.F.R. § 124.504(c)(1)(ii)(C). *Hyperion*, 115 Fed. Cl. at 550.[7]

DTRA's submissions first establish the value of the Quanterion contract at $25.37 million, adjusted for inflation at $30.60 million, and converted from an 81-month period of performance to a 60-month (five-year) period of performance to match the new contract requirement at $22.66 million. AR 60g-5416. The agency's documents explain how these figures were calculated. AR 60g-5418 (listing executed task orders under the Quanterion contract, total cost, periods of performance, and sources of funding); AR 60g-5409 (adjusting the initial contract value "based on an estimated inflation factor of 21% for total inflation from 2015 (middle of the 2014 IDIQ [p]eriod of [p]erformance [(the Quanterion contract)]) to 2023 (middle of the FY21-26 [period of performance (the Kāpili contract)])"); AR 60g-5409 n.14 (explaining calculation of inflation rate). The DTRA submissions then establish the value of the

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participant to SBA places the burden on the procuring agency, which implies that SBA is permitted to rely on the submissions that the regulation requires the agency to produce. *See* 13 C.F.R. § 124.502 (outlining the agency's responsibilities regarding its offering letter to SBA); *see also MCB Lighting & Elec.*, B-406703, 2012 CPD ¶ 206, 2012 WL 2878575, at *3 (Comp. Gen. Jul. 13, 2012) ("As a general matter, the SBA is entitled to rely on a contracting agency's representations in making decisions regarding 8(a) acquisitions, and SBA's regulations place primary responsibility on the procuring agency to submit all relevant information necessary to SBA's decision-making process.").

[7] In its motion for judgment and at a hearing before the court on November 3, 2021, Quanterion urged a narrow review of the administrative record limited to a line-by-line comparison of its performance work statement and the performance work statement for the anticipated Kāpili contract. Pl.'s Mot. at 36-37; Hr'g Tr. 14:2 to 9. Plaintiff contends that this limited record review proves that the Quanterion and Kāpili contract requirements are "nearly identical." Pl.'s Mot. at 37. The court rejects plaintiff's notion that administrative review should not include the entire administrative record. *See* 5 U.S.C. § 706 ("[T]he court shall review the whole record."). At bottom, Quanterion's request that the court limit its review to the performance work statements is an invitation to substitute its own judgment for that of the procuring officials at DTRA, something the court is not permitted to do. *See Hyperion*, 115 Fed. Cl. at 550. While the court is obliged to compare performance work statements as part of its review of the administrative record, *see, e.g.*, *AccelGov*, ___ Fed. Cl. at ___; 2021 WL 4808039, at *8-9, it will not consider that segment of the record to be uniquely pertinent, especially where there is no regulatory requirement for the agency to submit such statements with its offer letter to SBA, *see* 13 C.F.R. § 124.502 (listing required contents of offer letter, without mentioning performance work statements).

contemplated contract to Kāpili at [***] million, while also explaining the sources used in forming the basis for this calculation and adjustments for inflation. AR 60g-5420 (listing labor categories and total cost based on a cross-referenced internal government cost estimate ("IGCE") prepared for the proposed acquisition); AR 60g-5411 ("The IGCE assumed a constant 3% year-over-year inflation rate for FY21 through FY26. As such the 5-year (60-month) totals shown in *Table 3* are effectively in FY23 dollars (the middle of the 5-year [period of performance]). The loading factors and fee rates used in the IGCE were based on the vendor proposals for [Task Orders] 0001 and HDTRA1-19-F-0079. The labor mix, subcontractor costs, and other direct costs (ODCs) were based on the Performance Work Statement (PWS), Quality Assurance Surveillance Plan (QASP), and Contract Delivery Requirements Lists (CDRLs) prepared for the acquisition.") (footnotes omitted). Under a disjunctive reading of § 124.504(c)(1)(ii)(C), the proposed contract requirement would constitute new work because the price adjustment would amount to [***] of the cost of the existing requirement, well exceeding the 25% requirement. *See* AR 60g-5417 ("When compared to the 2014 IDIQ 5-year [period of performance] baseline ($22.66M), this 'price adjustment' (+[***] over the baseline) increases to +[***].").

The documents also provide a rational basis for the determination that the new contract requirement consisted of a price adjustment greater than 25% due to new or different types of work under the conjunctive reading of § 124.504(c)(1)(ii)(C). After demonstrating the value of the existing and new requirements, DTRA's submissions describe the nature of the performance areas under the Kāpili contract as "Core Operations," "The Nuclear Information Analysis Center," and "The Advanced Search and Discovery Program." AR 60g-5410. The documents explain that,

> [Core Operation] tasks and scope are similar for both the 2014 IDIQ [(the Quanterion contract)] and FY21-26 Requirements [(the Kāpili contract)]. [Nuclear Information Analysis Center] tasks contain a mixture of tasks similar to the existing requirement but also require[] some tasks and skills that are substantially different from those required for the 2014 IDIQ. Effort under both of these Program Areas is to be increased under the FY21-26 Requirement. The [Advanced Search and Discovery] R&D Program Area is fully new for FY21-26, requiring new capabilities and work.

AR 60g-5410. The submitted materials then analyze, line by line, the types of work required under the existing and new requirements, demonstrate where tasks are the same, mixed, or entirely new, and indicate the percentage cost of new work under the projected Kāpili contract compared to the Quanterion contract. AR 60g-5421 to 5428. The documents conclude that "[t]he estimated cost of the [Advanced Search and Discovery] tasks represent a 'price adjustment' of +[***] relative to the inflation-adjusted, total cost ($30.60M) of the 2014 IDIQ [(the Quanterion contract)]. When compared to the 2014 IDIQ 5-year [period of performance] baseline ($22.66M), this . . . 'price adjustment' increase to +[***]." AR 60g-5417.

The court reviews the administrative record to ascertain whether SBA had a rational basis for accepting the requirement and Kāpili into the 8(a) program. *Centech*, 554 F.3d at 1037. The dispositive question is whether the record provides a coherent and reasonable explanation for the challenged decision. *Hyperion*, 115 Fed. Cl. at 550. The submissions described above provide the court with the requisite line of reasoning. DTRA envisioned a contract similar to Quanterion's but with two additional performance areas of mixed or entirely new work. The documentation is coherent and detailed. The court cannot adopt Quanterion's position that SBA acted arbitrarily or capriciously in deferring to DTRA's detailed and documented analysis of the existing and new requirements without substituting its own judgment for that of the agency.

Quanterion also raises a substantive disagreement with SBA's decision to admit the requirement and Kāpili into the 8(a) program. Namely, it urges that DTRA's submissions to SBA erred in determining that plaintiff had not performed certain work categories under the existing requirement, such as machine learning-related tasks, and that informal, internal agency communications referring to the new requirement as a "follow-on" contract disprove the agency's representations to SBA that the requirement included new types of work. Pl.'s Mot. at 33-41.[8] These other arguments against SBA's determination ask the court to substitute its judgment for that of the agency's procurement personnel who, unlike the court, have direct knowledge of the existing and new contracts and are therefore more qualified to make the assessment detailed above. *See Terex Corp. v. United States*, 104 Fed. Cl. 525, 532 (2012)

[8] Similarly, Quanterion raises a variety of cost-related arguments, reiterating its earlier contentions either that, procedurally, SBA irrationally relied upon DTRA's document submissions or that, substantively, the total cost increase of the new requirement did not exceed 25% of the existing requirement and include new work. Pl.'s Mot. at 42-47. For example, plaintiff invokes the internal government cost estimate included in DTRA's second offer letter to SBA to argue that SBA failed to take "[a] close look" at the agency's cost estimate, *id.* at 44, engaged in a "mistaken analysis" of the new requirement's cost estimate, *id.* at 46, did not "conduct proper diligence" in reviewing the cost estimate, *id.*, and "failed to properly engage with the available precedent" applicable to the cost estimate, *id.* at 47. On these bases, Quanterion avers that SBA should have rejected the agency's cost estimate, applied hypothetical surge pricing to Quanterion's contract to match the surge pricing estimated on the new requirement, and conducted its own cost analysis of the proposed Kāpili contract, to conclude that the new requirement was only minimally more expensive than the existing requirement. *Id.* at 43-46; *see also* Pl.'s Reply at 24 (arguing that the agency's submissions to SBA failed to "substantiate" DTRA's "estimate as reflective of the actual true cost of the contract, to describe which work is 'new' or 'meaningfully different' based on [the proposed performance work statement], or how the [estimated] 'surge options' are not just more of the same work performed by QSI."). As explained *supra*, SBA was entitled to rely on DTRA's assessment, so long as there was a coherent explanation in the record. *See Centech*, 554 F.3d at 1037. Even if the court treated Quanterion's cost arguments as independent protest grounds, procedural errors in estimating cost fail to demonstrate that the new requirement did not contemplate new types of work. Without that, plaintiff cannot show any prejudice in the agency's cost estimate or internal budgeting processes. *See, infra*, at 13-14.

("[W]here the resolution of an issue 'requires a high level of technical expertise,' it is 'properly left to the informed discretion of the responsible federal agencies.'" (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976))). In this instance, the court defers—as SBA did—to the procuring agency's technical expertise as to the nature of its research and development requirements under the Advanced Search and Discovery program area, as it is coherently and reasonably explained in the record. *See Alabama Aircraft Indus., Inc.-Birmingham v. United States*, 586 F.3d 1372, 1375 (Fed. Cir. 2009) (requiring deference to an agency's decision if, among other things, it is not "so implausible that it could not be ascribed to a difference in view or the product of agency expertise" (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))). Quanterion's arguments against the merits of SBA's and DTRA's conclusions only amount to a second plausible reading of the administrative record and would not satisfy plaintiff's "heavy burden of showing that the award decision had no rational basis." *Centech*, 554 F.3d at 1037.

The level of deference owed in the context of an 8(a) procurement is considerable. *Data Transformation Corp. v. United States*, 13 Cl. Ct. 165, 173 (1987) ("Judicial intrusion into the procurement process is generally infrequent, limited and circumspect. The discretion inherent in the section 8(a) contractor selection process requires even greater judicial restraint." (internal citations omitted)). In light of this level of deference, and the thoroughness and rationality of the agency's explanation, *Hyperion*, 115 Fed. Cl. at 550, the court upholds SBA's determination that the anticipated Kāpili contract consisted of new or substantially different types of work. SBA was therefore excused under 13 C.F.R. § 124.504(c)(1)(ii)(C) from conducting an adverse impact analysis on Quanterion prior to accepting the new requirement and Kāpili into the 8(a) program.

B. Size Eligibility of Proposed 8(a) Participant

SBA has a duty to verify a proposed 8(a) participant's size eligibility. "Eligibility is based on 8(a) BD program criteria, including whether the Participant," among other conditions, "[q]ualifies as a small business under the size standard corresponding to the [North American Industry Classification System ("NAICS")] code assigned to the requirement." 13 C.F.R. § 124.501(g)(1). SBA's duty to verify a proposed participant's size is reiterated in 13 C.F.R. § 124.503(c): "SBA will determine whether an appropriate match exists where the procuring activity identifies a particular Participant for a sole source award. . . . Once SBA determines that a procurement is suitable to be accepted as an 8(a) sole source contract, SBA will normally accept it on behalf of the Participant recommended by the procuring activity, provided that . . . [t]he Participant is small for the size standard corresponding to the NAICS code assigned to the requirement by the procuring activity contracting officer."

Quanterion makes two size-related arguments against SBA's decision to admit the new requirement and Kāpili into the 8(a) program. First, it asserts that SBA's decision was procedurally deficient because SBA did not conduct a second size determination on remand.

Pl.'s Mot. at 25-26. Second, it contends that SBA's decision was substantively deficient because Kāpili, by its own admission, is no longer a small business under the NAICS code that applies to the challenged procurement. Pl.'s Mot. at 27-28. The government counters that Quanterion lacks standing to challenge Kāpili's size eligibility because Quanterion is not an 8(a) participant and that controlling regulations do not require the SBA to conduct a second size determination. Def.'s Cross-Mot. at 39-43. Kāpili's arguments are materially identical. Def.-Int.'s Cross-Mot. at 21-30.

The parties dispute the timing of SBA's obligation to verify a proposed participant's size eligibility. Quanterion cites 13 C.F.R. § 124.501(g) ("SBA will determine eligibility at the time of its acceptance of the underlying requirement into the 8(a) BD program for a sole source 8(a) contract."). Pl.'s Mot. at 25-26. It argues that because SBA withdrew its acceptance of the requirement and Kāpili into the 8(a) program on remand, this regulation required a new size verification before reaccepting both into the program. *Id.* Had SBA done so, plaintiff contends, Kāpili would have been disqualified because, as it acknowledged, it no longer meets the size standard applicable to the new requirement. *Id.*

The government and Kāpili counter with 13 C.F.R. § 121.404(a) ("SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer or response which includes price."), and 13 C.F.R. § 121.603(a) ("A[n] 8(a) BD Participant must certify that it qualifies as a small business under the NAICS code assigned to a particular 8(a) BD subcontract as part of its initial offer including price to the procuring agency. The Participant also must submit a copy of its offer, including its self-certification as to size, to the appropriate SBA district office at the same time it submits the offer to the procuring agency."). Def.'s Cross-Mot. at 41; Def.-Int.'s Cross-Mot. at 25. They argue that Kāpili's size certification, submitted with its offer in December 2020, was still valid after SBA's adoption on remand, obviating the need to reverify its size upon reacceptance. Def.'s Cross-Mot. at 41-42 Def.-Int.'s Cross-Mot. at 28-29; *see also* 13 C.F.R. § 121.603(c)(1) ("Where SBA verifies that the selected Participant is small for a particular procurement, subsequent changes in size up to the date of award . . . will not affect the firm's size status for that procurement.").

For purposes of Quanterion's bid protest, if defendants' contention prevailed, and the court applied 13 C.F.R. §§ 121.404(a) and 121.603(a) and (c), there would be no error, and, therefore, no prejudice to Quanterion. Alternatively, if Quanterion's argument prevailed, and the court applied 13 C.F.R. § 124.501(g) the way that plaintiff proposes, there would be a procedural error but no harm to Quanterion. Though Quanterion would have prevailed in challenging SBA's size verification, ostensibly removing Kāpili from consideration now that it has surpassed the applicable size standard, the proposed requirement would still consist of new work that would permit DTRA to resubmit it to the 8(a) program with any other eligible 8(a) participant. The court does not, by this reasoning, decide the merit of defendants' shared contention that

SBA could use the substitution mechanism of 13 C.F.R. § 124.503(e) to replace Kāpili with the other potential 8(a) contractor that DTRA had identified during market research. Def.'s Cross-Mot. at 40-41; Def.-Int.'s Cross-Mot. at 24-25. The court, instead, notes that because SBA made a rationally supported decision that the requirement involved new work, the requirement would still involve new work even if the court remanded the case for a subsequent procedural error, effectively precluding Quanterion from showing a substantial chance of obtaining an award. *See Axiom*, 564 F.3d at 1381 (requiring that plaintiff "must show a clear and *prejudicial* violation" to prevail on a violation of regulation or procedure (emphasis added)); *Digitalis*, 664 F.3d at 1384 (requiring showing that plaintiff had a substantial chance of winning the contract); *Veteran Shredding*, 140 Fed. Cl. at 765 ("[A] party cannot be prejudiced unless it first has a substantial chance of [obtaining the] award.").

The court therefore rejects Quanterion's challenge of SBA's size verification process in its decision to reaffirm the requirement and admit Kāpili into the 8(a) program.

CONCLUSION

For the foregoing reasons, Quanterion's motion for judgment on the administrative record is DENIED, and defendant's and defendant-intervenor's motions for judgment on the administrative record are GRANTED.

The Clerk shall enter judgment in accord with this disposition.

No costs.

It is so **ORDERED**.

s/ Charles F. Lettow
Charles F. Lettow
Senior Judge

Caution
As of: January 10, 2022 11:08 PM Z

Tolliver Grp., Inc. v. United States

United States Court of Federal Claims

November 30, 2020, Filed

Nos. 20-1108C and 20-1290C

Reporter
151 Fed. Cl. 70 *; 2020 U.S. Claims LEXIS 2421 **; 2020 WL 7022493

THE TOLLIVER GROUP, INC., and PEOPLE, TECHNOLOGY AND PROCESSES, LLC, Plaintiffs, v. THE UNITED STATES, Defendant.

Core Terms

solicitation, procurement, cancellation, protest, contracts, bid, issuance, small business, proposals, regulation, set-aside, acquisition, negotiated, decisions, prong, agency's decision, alleged violation, orders, provisions, challenges, award a contract, scope of work, Tucker Act, contractors, training, reasons, utilize, merits, corrective action, cause of action

Case Summary

Overview

HOLDINGS: [1]-Pursuant to *28 U.S.C.S. § 1491(b)(1)*, the Court of Federal Claims had jurisdiction over this case that challenged whether an agency could cancel a FAR Part 8 procurement to move it from a service disabled veteran-owned small businesses (SDVOSB) set-aside under a GSA Federal Supply Schedule (FSS) to a multiple award indefinite delivery indefinite quantity (MAIDIQ) vehicle because this was an alleged violation of statute in connection with a procurement; [2]-The FASA task order bar did not pose a jurisdictional hurdle to the causes of action, including the Rule of Two arguments; [3]-Plaintiffs were entitled to relief because the agency's decision was inadequate, both in terms of the dearth of its analysis and because the agency had not complied with the Rule of Two and other provisions of law.

Outcome

Plaintiffs' respective motions for judgment on the administrative record granted. Government's cross-motion for judgment denied.

LexisNexis® Headnotes

Administrative Law > Agency Adjudication > Alternative Dispute Resolution

Public Contracts Law > Dispute Resolution > Bid Protests

Public Contracts Law > Dispute Resolution > Jurisdiction

HN1[] **Agency Adjudication, Alternative Dispute Resolution**

The Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320, 110 Stat. 3870, provides the Court of Federal Claims with jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. *28 U.S.C.S. § 1491(b)(1)*.

Governments > Courts > Authority to Adjudicate

HN2[] **Courts, Authority to Adjudicate**

The Court of Federal Claims has a duty — as does every Federal court — to assure itself of jurisdiction over any complaint or cause of action.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

HN3[] **Jurisdictional Sources, Statutory Sources**

A non-frivolous allegation of a statutory or regulatory violation in connection with a procurement or proposed procurement is sufficient to establish jurisdiction under *28 U.S.C.S. § 1491(b)(1)*.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN4[] **Standards of Review, Arbitrary & Capricious Standard of Review**

In procurement cancellation cases, the United States Court of Appeals for the Federal Circuit has invoked the APA standard of review applicable to *28 U.S.C.S. § 1491(b)(1)* claims, explaining that under this standard, a procurement decision may be set aside if it lacked a rational basis or if the agency's decision-making process involved a clear and prejudicial violation of statute, regulation, or procedure. In reviewing an agency's exercise of discretion, the court has articulated relevant factors as general guidelines in determining whether the agency's

actions were arbitrary, capricious, or an abuse of its discretion. Relevant factors include: subjective bad faith on the part of the officials; the absence of a reasonable basis for the administrative decision; the amount of discretion entrusted to the procurement officials by applicable statutes and regulations; and proven violation of pertinent statutes or regulations.

Public Contracts Law > Dispute Resolution > Bid Protests

Public Contracts Law > Bids & Formation > Competitive Proposals

HN5[] **Dispute Resolution, Bid Protests**

The fourth-prong of *28 U.S.C.S. § 1491(b)(1)* — covering an alleged violation of law in connection with a procurement or a proposed procurement — provides the necessary ballast for solicitation cancellation cases.

Public Contracts Law > Bids & Formation > Authority of Government Officers > Contracting Officers

Public Contracts Law > Types of Contracts > Federal Supply Schedule Contracts

HN6[] **Authority of Government Officers, Contracting Officers**

The *48 C.F.R. § 1.602-2(b)* requirement that contracting officers shall ensure that contractors receive impartial, fair and equitable treatment is, among other things, the codification of the government's duty, previously implicit, to fairly and honestly consider bids. In other words, just as the Court of Federal Claims would have been able to hear a challenge to the cancellation of a solicitation under the Federal Supply Schedule program pursuant to *28 U.S.C.S. § 1491(a)*, the Court may continue to do so under the fourth prong of *§ 1491(b)* as an alleged violation of *FAR 1.602-2(b)*.

Public Contracts Law > Bids & Formation > Offer & Acceptance > Acceptances & Awards

Public Contracts Law > Bids & Formation > Competitive Proposals

Public Contracts Law > Bids & Formation > Sealed Bids > Invitations for Bids

Public Contracts Law > Dispute Resolution > Bid Protests

Public Contracts Law > Bids & Formation > Offer & Acceptance > Offers

HN7[] **Offer & Acceptance, Acceptances & Awards**

41 U.S.C.S. § 107 defines full and open competition to mean that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement. Similarly, *10 U.S.C.S. § 2304(a)(2)(B)* provides that the head of an agency shall request competitive proposals if sealed bids are not appropriate.

Public Contracts Law > Bids & Formation > Competitive Proposals

HN8[] **Bids & Formation, Competitive Proposals**

The acid test for deciding whether an agency has engaged in discussions is whether the agency has provided an opportunity for proposals to be revised or modified. A solicitation that contemplates the submission of proposals and the possibility of discussions is a negotiated procurement.

Public Contracts Law > Bids & Formation > Competitive Proposals

HN9[] **Bids & Formation, Competitive Proposals**

A negotiated procurement involves competitive proposals.

Civil Procedure > Pleading & Practice > Motion Practice > Content & Form

HN10[] **Motion Practice, Content & Form**

A request for quotation (RFQ) is nothing more than a request for information.

Governments > Courts > Judicial Precedent

HN11[] **Courts, Judicial Precedent**

Though GAO opinions are not binding on the Court of Federal Claims, the court may draw on GAO's opinions for its application of this expertise.

Public Contracts Law > Bids & Formation > Competitive Proposals

HN12[] **Bids & Formation, Competitive Proposals**

Solicitations under negotiated procedures are called requests for proposals. *48 C.F.R. § 2.101*.

Public Contracts Law > Dispute Resolution > Bid Protests

HN13[] **Dispute Resolution, Bid Protests**

The FASA task order protest bar provides that a protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order. *41 U.S.C.S. § 4106(f)(1)*.

Public Contracts Law > Dispute Resolution > Bid Protests

HN14[] **Dispute Resolution, Bid Protests**

As long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction under *28 U.S.C.S. § 1491*.

Governments > Legislation > Interpretation

HN15[] **Legislation, Interpretation**

With any question of statutory analysis, the court starts, as it must, with the applicable statutory language.

Governments > Courts > Authority to Adjudicate

Public Contracts Law > Dispute Resolution > Bid Protests

HN16[] **Courts, Authority to Adjudicate**

A Tucker Act cause of action may be in connection with the issuance (or proposed issuance) of a task order, but not subject to the FASA task order protest bar because the cause of action simply does not qualify as a protest.

Public Contracts Law > Dispute Resolution > Bid Protests

HN17[] **Dispute Resolution, Bid Protests**

The Tucker Act nowhere employs the term protest but rather refers repeatedly to an action (or any action). *28 U.S.C.S. § 1491(b)*.

Public Contracts Law > Dispute Resolution > Bid Protests

Public Contracts Law > Bids & Formation > Competitive Proposals

HN18[] **Dispute Resolution, Bid Protests**

The fourth prong of 28 U.S.C.S. § 1491(b)(1) — pursuant to which a plaintiff may allege a violation of statute or regulation in connection with a procurement or a proposed procurement — is not necessarily a protest, at least as that term is defined in the Competition in Contracting Act (CICA).

Governments > Legislation > Interpretation

Public Contracts Law > Dispute Resolution > Bid Protests

HN19[] **Legislation, Interpretation**

The language of 28 U.S.C.S. § 1491(b) does not require an objection to the actual contract procurement, but only to the violation of a statute or regulation in connection with a procurement or a proposed procurement. Simply put, an action under the last prong of § 1491(b) is not a protest because it is not a challenge to a solicitation or to the proposed award or award of a contract. In that regard, an axiomatic canon of statutory interpretation is that when construing a statute, this court must, if at all possible, give effect to all its parts. Accordingly, § 1491(b)(1) must be construed to permit a cause of action which is neither a protest of a solicitation, nor of a contract award (or proposed award).

Governments > Legislation > Interpretation

Public Contracts Law > Dispute Resolution > Bid Protests

HN20[] **Legislation, Interpretation**

The current FASA task order protest bar itself provides GAO with exclusive jurisdiction over a protest of an order valued in excess of $10,000,000. 41 U.S.C.S. § 4106(f)(1)(B) & (f)(2). The term "protest" in the jurisdictional bar must be read as coterminous with what that term means at the GAO. Viewed from the other end of the telescope, the word "protest" cannot be read to mean one thing in the task order protest bar, but something else in the jurisdictional grant to the GAO, as both provisions are contained within 41 U.S.C.S. § 4106(f).

Public Contracts Law > Dispute Resolution > Bid Protests

HN21[] **Dispute Resolution, Bid Protests**

The FASA task order protest bar does not preclude claims that an agency failed to comply with the Rule of Two, particularly to the extent that such an alleged violation may be viewed as distinct from the solicitation cancellation decisions themselves. Although the Competition in Contracting Act's definition of protest includes an objection to the cancellation of a solicitation, *31 U.S.C.S. § 3551(1)(B)*, and thus such a claim (or cause of action) is plausibly within the ambit of FASA's task order protest bar, the Tucker Act does not even authorize that same, independent action per se.

Public Contracts Law > Dispute Resolution > Bid Protests

Public Contracts Law > Bids & Formation > Competitive Proposals

HN22[] **Dispute Resolution, Bid Protests**

The fourth prong of *28 U.S.C.S. § 1491(b)(1)* constitutes an independent cause of action that is best understood as covering even non-traditional disputes arising from the procurement process as long as the violation is in connection with a procurement or proposed procurement. The Competition in Contracting Act's definition of protest contains no analog to that prong of *§ 1491(b)(1)*.

Public Contracts Law > Dispute Resolution > Bid Protests

Public Contracts Law > Dispute Resolution > Jurisdiction

HN23[] **Dispute Resolution, Bid Protests**

The word "protest" cannot mean one thing in the FASA provision precluding the Court of Federal Claim's jurisdiction over a particular class of actions, but another thing in conferring exclusive jurisdiction on the GAO for the very same objections (or "protests"). Accordingly, the FASA statutory provision only precludes the Court of Federal Claims from hearing actions over which GAO would itself have exclusive jurisdiction were the task order award (or proposed award) valued in excess of $10 million (or $25 million for DOD procurements). *41 U.S.C.S. § 4106(f)(2)*; *10 U.S.C.S. § 2304c(e)(1)(B)*. The GAO does not have jurisdiction over RAMCOR-type actions brought pursuant to the final prong of *28 U.S.C.S. § 1491(b)(1)*.

Public Contracts Law > Dispute Resolution > Bid Protests

Public Contracts Law > Bids & Formation > Competitive Proposals

HN24[] **Dispute Resolution, Bid Protests**

Just as a challenge to a solicitation is distinct from the challenge to a proposed award of contract, so too a challenge to the selection (or planned selection) of a particular (task order) contracting vehicle does not equate to the proposed issuance of a task order. FASA's reference to the "proposed issuance" of a task order mirrors *§ 1491(b)(1)*'s use of "proposed award" — the former does not cover an agency's "proposed issuance" of a task order solicitation any more than the latter includes an agency's mere issuance of a standard solicitation.

Governments > Legislation > Interpretation

Public Contracts Law > Dispute Resolution > Bid Protests

HN25[] **Legislation, Interpretation**

While the phrase "in connection with" must be interpreted broadly per the directions of the Federal Circuit, the neighboring language in *41 U.S.C.S. § 4106(f)(1)* — the phrases "protest" and "issuance or proposed issuance of a task order" — serve to limit the reach of the FASA task order protest bar.

Governments > Legislation > Interpretation

Public Contracts Law > Dispute Resolution > Bid Protests

HN26[] **Legislation, Interpretation**

For purposes of the FASA task order bar, *41 U.S.C.S. § 4106(f)(1)*, while the Federal Circuit often has recognized that the phrase "in connection with" should be interpreted broadly, the Court of Federal Claims recognizes that the Supreme Court has cautioned that a non-hyperliteral reading of this term is needed to prevent the statute from assuming near-infinite breadth.

Governments > Courts > Courts of Claims

HN27[] **Courts, Courts of Claims**

Judgment on the Administrative Record, pursuant to *U.S. Ct. Fed. Cl. R. 52.1*, is properly understood as intending to provide for an expedited trial on the record. The rule requires the Court to make factual findings from the record evidence as if it were conducting a trial on the record. The Court asks whether, given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record.

Evidence > Burdens of Proof > Allocation

Public Contracts Law > Bids & Formation > Offer & Acceptance > Acceptances & Awards

Public Contracts Law > Dispute Resolution > Bid Protests

HN28[] **Burdens of Proof, Allocation**

Generally, in an action brought pursuant to 28 U.S.C.S. § 1491(b), the Court of Federal Claims reviews the agency's actions according to the standards set forth in the Administrative Procedure Act, 5 U.S.C.S. § 706. 28 U.S.C.S. § 1491(b)(4). In applying this standard of review, the court determines whether (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure. When a challenge is brought on the first ground, the test is whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion, and the disappointed bidder bears a heavy burden of showing that the award decision had no rational basis. When a challenge is brought on the second ground, the disappointed bidder must show a clear and prejudicial violation of applicable statutes or regulations. To establish prejudice, a protestor must further demonstrate that there was a substantial chance it would have received the contract award but for the errors in the bid process.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Public Contracts Law > Dispute Resolution > Bid Protests

HN29[] **Standards of Review, Arbitrary & Capricious Standard of Review**

While a finding of bad faith may be sufficient, it is not necessary for the Court of Federal Claims to determine that an agency decision is arbitrary and capricious. Even though FAR Part 8 does not specify substantive cancellation considerations, the Tucker Act explicitly imports the APA standard of review into the Court of Federal Claims' review of agency procurement-related decisions. Under FAR subpart 8.4 procedures, an agency need only advance a reasonable basis to cancel a solicitation. 48 C.F.R. § 1.602-2(b) permits the Court to conduct an APA review, while 10 U.S.C.S. § 2305(b)(2) supplies a procedural requirement and a substantive yardstick, against which the court may evaluate the agency's decisions.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN30[] **Standards of Review, Arbitrary & Capricious Standard of Review**

An agency decision must be supported by the reasoned basis the agency actually provided.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN31[] **Standards of Review, Arbitrary & Capricious Standard of Review**

Although the APA rational basis standard of review is highly deferential and the court should not substitute its judgment for that of the agency, that does not mean that the court's review is toothless. More specifically, courts are authorized to set aside agency action where the record fails to articulate a rational connection between the facts found and the choice made. Where an agency fails to undertake a review or fails to document such review, the court must conclude that it acted irrationally.

Administrative Law > Judicial Review > Reviewability > Factual Determinations

HN32[] **Reviewability, Factual Determinations**

Meaningful judicial review requires more than just accepting a bald assertion. An agency's statement of reason need not include detailed findings of fact but must inform the court and the petitioner of the grounds of decision and the essential facts upon which the administrative decision was based.

Banking Law > ... > Banking & Finance > Federal Acts > Small Business Act

Public Contracts Law > Bids & Formation > Authority of Government Officers > Contracting Officers

Public Contracts Law > Business Aids & Assistance > Small Businesses

Public Contracts Law > Costs & Prices > Cost Analysis

HN33[] **Federal Acts, Small Business Act**

The Rule of Two is straightforward, and provides that the contracting officer shall set aside any acquisition over the simplified acquisition threshold for small business participation when there is a reasonable expectation that (1) Offers will be obtained from at least two responsible small business concerns; and (2) Award will be made at fair market prices. *48 C.F.R. § 19.502-2(b)*.

Public Contracts Law > Business Aids & Assistance > Small Businesses

HN34[] **Business Aids & Assistance, Small Businesses**

15 U.S.C.S. § 644(r) mandates the issuance of regulations to provide agencies at their discretion to take several actions. This language is straightforward. The first subparagraph means that an agency, when awarding a multiple award contract, may designate particular portions of the scope of work to be performed only by small business. The second paragraph means that even though, normally, every multiple award contract holder must be permitted —

pursuant to "fair opportunity requirements" — to compete for every task order, agencies may set aside particular task orders for which only small business multiple award contract holders may compete. And the final paragraph means that, of the multiple awards to be made in a multiple award contract procurement, some contact award slots may be set aside for small business concerns, even though the overall procurement is generally full and open.

Public Contracts Law > Bids & Formation > Authority of Government Officers > Contracting Officers

HN35[] **Authority of Government Officers, Contracting Officers**

48 C.F.R. § 19.502-4 covers partial set-asides of multiple-award contracts and specifically provides that contracting officers may, at their discretion, set aside a portion or portions of a multiple-award contract under certain circumstances.

Public Contracts Law > Business Aids & Assistance > Small Businesses

HN36[] **Business Aids & Assistance, Small Businesses**

The grant of discretion at *15 U.S.C.S. § 644(r)* applies even where the Rule of Two does not require a set-aside, but the grant of discretion does not somehow, by negative implication, eliminate the Rule of Two requirement.

Public Contracts Law > Bids & Formation > Competitive Proposals

Public Contracts Law > Bids & Formation > Authority of Government Officers > Contracting Officers

HN37[] **Bids & Formation, Competitive Proposals**

In the absence of an applicable exception, the contracting officer shall give every awardee a fair opportunity to be considered for a delivery-order or task-order exceeding $3,500. *48 C.F.R. § 16.505(b)(2)(i)*. In other words, contracting officers may, at their discretion, set aside orders under an IDIQ without violating the fair opportunity to compete requirement that normally applies. *48 C.F.R. § 16.505(b)(2)(i)(F)*.

Public Contracts Law > Bids & Formation > Competitive Proposals

HN38[] **Bids & Formation, Competitive Proposals**

Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract

performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract. *48 C.F.R. § 2.101*.

Public Contracts Law > Business Aids & Assistance > Small Businesses

HN39[] **Business Aids & Assistance, Small Businesses**

The Rule of Two unambiguously applies to any acquisition. *48 C.F.R. § 19.502-2*.

Banking Law > ... > Banking & Finance > Federal Acts > Small Business Act

Public Contracts Law > Bids & Formation > Competency of Parties

Bankruptcy Law > ... > Bankruptcy > Debtor Benefits & Duties > Small Business Debtors

Public Contracts Law > Business Aids & Assistance > Small Businesses

Public Contracts Law > Bids & Formation > Authority of Government Officers > Contracting Officers

HN40[] **Federal Acts, Small Business Act**

48 C.F.R. § 19.502-9 permits a contracting officer to withdraw a small business set-aside only where before award of a contract involving a total or partial small business set-aside, the contracting officer considers that award would be detrimental to the public interest. Where such a decision is made, the contracting officer shall initiate a withdrawal of an individual total or partial small business set-aside, by giving written notice to the agency small business specialist and the SBA PCR stating the reasons.

Administrative Law > Judicial Review > Remedies > Injunctions

Public Contracts Law > Dispute Resolution > Bid Protests

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

HN41[] **Remedies, Injunctions**

The Tucker Act vests the Court of Federal Claims with authority to award any relief that the court considers proper, including injunctive relief. *28 U.S.C.S. § 1491(b)(2)*. In evaluating whether permanent injunctive relief is warranted in a particular case, a court must consider (1) whether the plaintiff has succeeded on the merits; (2) whether the

plaintiff has shown irreparable harm without the issuance of the injunction; (3) whether the balance of the harms favors the award of injunctive relief; and (4) whether the injunction serves the public interest. In evaluating irreparable harm, the relevant inquiry is whether plaintiff has an adequate remedy in the absence of an injunction. Moreover, in the bid protest context, the loss of the opportunity to fairly compete for future government contracts constitutes irreparable harm.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Public Contracts Law > Dispute Resolution > Bid Protests

HN42[] **Grounds for Injunctions, Irreparable Harm**

In a bid protest, the potential profits that are lost to offerors when arbitrary procurement actions would deprive them of the opportunity to compete for a contract will normally be sufficient to constitute irreparable injury for purposes of injunctive relief.

Governments > Federal Government > Claims By & Against

Public Contracts Law > Dispute Resolution > Bid Protests

HN43[] **Federal Government, Claims By & Against**

The public always has an interest in the integrity of the federal procurement system.

Headnotes/Summary

Headnotes

Solicitation cancellation; *Small Business Act*; Rule of Two; set-aside; withdrawal; Federal Supply Schedule (FSS); multiple award contract; IDIQ; *RAMCOR; SRA Int'l*; Federal Acquisition Streamlining Act (FASA); Administrative Dispute Resolution Act of 1996 (ADRA); Competition in Contracting Act (CICA); GAO protest jurisdiction; *Tucker Act* jurisdiction; FAR Part 8; FAR Part 14; FAR Part 15; FAR Part 19.

Counsel: [1]** Jon D. Levin, Maynard, Cooper & Gale, PC, Huntsville, AL, for Plaintiff, The Tolliver Group, Inc. With him on the briefs were W. Brad English, Emily J. Chancey, and Michael W.Rich.

Craig A. Holman, Arnold & Porter Kaye Scholer LLP, Washington, DC, for Plaintiff, People, Technology and Processes, LLC. With him on the briefs was Nathaniel E. Castellano.

David R. Pehlke, United States Department of Justice, Civil Division, Washington, DC, for Defendant. With him on the briefs were Jeffrey Bossert Clark, Acting Assistant Attorney General, Civil Division, Robert E. Kirschman, Jr., Director, and Douglas K. Mickle, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC.

Judges: Matthew H. Solomson, Judge.

Opinion by: Matthew H. Solomson

Opinion

[*79] OPINION AND ORDER

***SOLOMSON*, Judge**.

This case presents the question of whether, or under what circumstances, an agency - in this case, the Department of the Army ("Army" or the "agency") — may cancel a Federal Acquisition Regulation ("FAR") Part 8 procurement for the express purpose of moving it from a service disabled veteran-owned small businesses ("SDVOSB") set-aside under a General Service Administration ("GSA") Federal **[**2]** Supply Schedule ("FSS") to a multiple award indefinite delivery indefinite **[*80]** quantity ("MAIDIQ") vehicle, a contract that the Plaintiffs in this case do not hold. Additionally, the Court must address the source, if any, of this Court's jurisdiction to decide complaints challenging an agency's cancellation of a FAR Part 8 procurement.

Plaintiffs, The Tolliver Group, Inc. ("TTGI" or "Tolliver"), and People, Technology and Processes, LLC ("PTP"), claim that the agency's decision to cancel two GSA FSS support staffing solicitations fails the *Administrative Procedure Act ("APA")* standard of review applicable in actions brought pursuant to *28 U.S.C. § 1491(b)(1)*, which requires that an agency action must not be arbitrary, capricious, or otherwise contrary to law. Plaintiffs allege the agency's cancellation decisions fail the APA standard of review based on the extreme brevity of the analysis underlying the agency's decision and, in Plaintiffs' view, the agency's *ipse dixit* conclusions. More significantly, Plaintiffs assert that the agency's decision and supporting rationale — namely, to move the solicitations at issue to a recently awarded MAIDIQ — violates *FAR 19.502-2(b)*, commonly known as the "Rule of Two." Plaintiffs seek **[**3]** permanent injunctive relief, including an order preventing the Army from cancelling the set-aside solicitations and resoliciting the work under the MAIDIQ until the agency complies with the Rule of Two and other relevant regulations.

Defendant, the United States, counters that the agency acted reasonably under the APA review standard, or, in the alternative, because the agency's power to cancel a FAR Part 8 solicitation is virtually plenary, the decision should be reviewed only for "bad faith," which, the government claims is unsupported based on the record. The government further contends that Plaintiffs' Rule of Two claim is foreclosed by the Federal Acquisition Streamlining

Act ("FASA") task order protest bar and, that on the merits, an agency is not required to perform a Rule of Two analysis before soliciting work under an existing MAIDIQ.

For the reasons explained below, the Court holds: (1) in the context of the facts of this case, this Court has jurisdiction based upon an "alleged violation of statute or regulation in connection with a procurement or a proposed procurement[,]" *28 U.S.C. § 1491(b)(1)*; (2) the FASA task order bar does not pose a jurisdictional hurdle to Plaintiffs' respective causes **[**4]** of action, including the Rule of Two arguments; and (3) pursuant to the APA review standard, which applies here, the agency's decision is inadequate, both in terms of the dearth of its analysis and because the agency has not complied with the FAR's Rule of Two and other provisions of law. Consequently, the Court holds that Plaintiffs are entitled to the equitable relief that they seek.

I. Factual and Procedural Background[1]

TTGI and PTP are both Florida-based SDVOSBs which provide, among other things, staffing and technical support services. ECF 21 ("TTGI Am. Compl.") at ¶ 5; *People, Technology and Processes, LLC, v. United States*, Fed. Cl. No. 20-1290, ECF No. 1 ("PTP Compl.") at ¶¶ 15-17. The Army maintains the Fires Center of Excellence ("FCoE"),[2] a field artillery school located at Fort Sill, Oklahoma, that "trains soldiers, officers, and marines in tactics, techniques, and procedures for the use of fire support systems in combat." PTP Compl. at ¶ 16. From 2010 until 2016, the Army had utilized a long-term omnibus multiple award IDIQ ("OMNIBUS MAIDIQ") contract to procure training and instructor services at Fort Sill. ECF No. 25 ("Administrative Record" or "AR") at 617-20 **[**5]** (AR 613-16).[3] Following the expiration of those contracts, the Army utilized a series of short-term contracts to procure those services. *Id.* at 617 (AR 613). This case arises out of the Army's issuance of two solicitations in early 2020 — the 13F and Joint Fires Observer Course ("JFOC") Solicitations — for procuring training instructors **[*81]** for fire support specialists at Fort Sill, awarding contracts pursuant to those solicitations, and subsequently cancelling both the contracts and the solicitations, the latter for the purpose of transferring their scopes of work to an existing MAIDIQ. This section summarizes this matter's factual background and procedural history.

A. The 13F And JFOC Solicitations And Award Of The Contracts

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[1] *See, infra*, Section III.A.

[2] *See* Fort Sill Fire Center of Excellence, *Fort Sill Values*, https://sill-www.army.mil/index.html (last visited Nov. 11, 2020).

[3] Throughout this opinion, the dual citations to the Administrative Record account for discrepancy between the page number indicated in the Court's CM/ECF stamp on the PDF document and the AR page cite.

On April 3, 2020, the Army's Mission and Installation Contracting Command ("MICC")[4] at Fort Sill issued Solicitation No. W9124L-20-R-0016 (the "13F Solicitation") pursuant to the GSA Multiple Award Schedule ("MAS")[5] as a 100% SDVOSB set-aside using primarily the procedures outlined in *FAR 8.4* and incorporating certain FAR Part 15 provisions. ECF No. 25 at 5-7, 346 (AR 1-3, 342). Specifically, the 13F Solicitation sought to procure "20 fully qualified personnel to instruct 13F **[**6]** [Advanced Individual Training] courses" regarding "[p]lanning and coordinating fire support for the maneuver commander, locate and engage targets utilizing calls for indirect fire to mortars, field artillery and naval surface fire support assets and battlefield information reporting." *Id.* at 40, 44, 83 (AR 36, 40, 79). This solicitation contemplated the award of a contract with a "twelve (12) month base period [of performance] to include a 90 day [sic] phase-in period, followed by one (1), one-year option period." *Id.* at 40 (AR 36).

On April 6, 2020, the MICC separately issued Solicitation No. W9124L-20-R-0020 (the "JFOC Solicitation"), pursuant to the GSA MAS, also as a 100% SDVOSB set-aside. *Id.* at 386-88 (AR 382-384). Specifically, the JFOC Solicitation sought to procure "14 qualified personnel" to provide "JFOC instruction to multi-service and coalition students attending Field Artillery Basic Officer Leader Course." *Id.* at 428-29 (AR 424-25). This solicitation contemplated the award of a contract with a "twelve (12) month base period [of performance] to include a 90 day [sic] phase-in period, followed by one (1), one-year option period." *Id.* at 428 (AR 424).

In sum, both the 13F and JFOC Solicitations contemplated relatively short-term contracts that the agency designated **[**7]** as 100% SDVOSB set-asides.[6] Several eligible small businesses submitted timely proposals under both solicitations, including TTGI and PTP, the latter which was the incumbent provider of these services at Fort Sill. TTGI Am. Compl. at ¶ 14; PTP Compl. at ¶¶ 26, 34. On April 30, 2020, the agency awarded the 13F contract to TTGI. TTGI Am. Compl. at ¶ 16; ECF No. 25 at 244-49 (AR 240-45). On May 18, 2020, the agency awarded the JFOC contract to Navigation Development Group, Inc. ("NDGI"), another SDVOSB. *Id.* at 565, 576 (AR 561, 572).

B. Bid Protests And Corrective Actions

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[4] The MICC "provides contracting support for Soldiers across Army commands, installation and activities" and is "responsible for contracting goods and services in support of Soldiers as well as readying trained contracting units for the operating force and contingency environment when called upon." *See* https://www.army.mil/micc#org-locations (last visited Nov. 15, 2020).

[5] GSA Schedules are referred to as a Multiple Award Schedules ("MAS") and Federal Supply Schedules ("FSS"). *See* https://www.gsa.gov/buying-selling/purchasing-programs/gsa-schedules (last visited Nov. 25, 2020); *see also* FAR Part 8.

[6] The Veterans Benefit Act of 2003 ("the Act"), amending the Small Business Act, created the SDVOSB program to facilitate the participation of service-disabled veteran-owned small businesses in federal contracting. Pub. L No. 108-183, 117 Stat. 2651. The Act contemplates the use of "set asides," which permits federal agencies to limit certain procurements for exclusive competition among SDVOSBs. *See* ***15 U.S.C. § 657f***. This program is implemented via FAR provisions and Small Business Administration ("SBA") regulations. *See* *FAR 6.206*, *19.1401-19.1408*; *13 C.F.R. §§ 125.11-125.33*.

1. PTP's 13F GAO Protest[7]

On July 17, 2020, PTP filed a post-award bid protest with GAO, challenging the agency's **[*82]** award of the 13F contract to TTGI. ECF No. 25 at 358-81 (AR 354-77). PTP alleged, among other things, that the method the agency employed to evaluate PTP's professional compensation, in comparison to that of TTGI, was improper and that, in awarding the task order to TTGI, the agency had "departed from the Solicitation's required evaluation process, held PTP and Tolliver to unequal standards, and conducted a[] flawed price realism evaluation." *Id.* at 359 (AR 355).

On July 29, 2020, Contracting Officer ("CO") Pauline K. Abraham issued a Notice of Corrective **[**8]** Action. *Id.* at 382 (AR 378). CO Abraham acknowledged that "[t]he Army believes that taking corrective action would better serve the procurement process" and identified the measures that the agency would take, as follows:

> a. Cancel the task order award to The Tolliver Group, Inc.
>
> b. Re-evaluate the requirement and acquisition strategy to ensure that it accurately reflects the Army's current need.
>
> c. Once the reevaluation is complete, the solicitation will *either be cancelled or amended*.
>
> d. If the solicitation is amended, the Army will evaluate revised proposals, conduct discussions if necessary, and make a new award decision.

Id. (emphasis added). While the Notice of Corrective Action did not elaborate on what considerations the agency would weigh as part of its re-evaluation, CO Abraham, in an internal agency memorandum (dated July 29, 2020), further explained that the rationale behind the agency's "reevaluat[ing] its acquisition strategy" was that "[o]n 21 July 2020, MICC-Fort Eustis awarded the Training Management Support ('TMS') Multiple Award Indefinite Delivery Indefinite Quantity contract, which *may* provide a *potentially* better procurement vehicle for this requirement than the [current GSA MAS]." *Id.* at 383 (AR 379) (emphasis **[**9]** added). Following the Army's July 29, 2020 Notice of Corrective Action, the GAO dismissed PTP's bid protest "as academic." *Id.* at 385 (AR 381).

2. PTP's JFOC GAO Protest

A similar situation unfolded with the JFOC contract. On May 28, 2020, PTP filed a post-award bid protest before the GAO, challenging the agency's award of the JFOC contract to NDGI. ECF No. 25 at 581 (AR 577). PTP alleged that the agency's price evaluation did not comply with the solicitation, that the agency had conducted an improper best value decision, and that the agency had evaluated PTP's past performance in an unreasonable manner. *Id.* at 582-602 (AR 578-98).

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[7] On May 8, 2020, PTP filed its first post-award protest before GAO, alleging that the agency did not reasonably evaluate its price proposal and that certain provisions in the 13F Solicitation were ambiguous. *See* ECF No. 25 at 327, 343 (AR 323, 339). The Army took corrective action on May 21, 2020 and, after re-evaluating the relevant proposals, on July 9, 2020, once again, awarded the task order to TTGI. *Id.* at 342-57 (AR 338-53). For purposes of the pending motions, however, the particulars of PTP's first GAO protest is not relevant.

On July 29, 2020, CO Lisa Slagle[8] issued a Notice of Corrective Action that was similar to the one CO Abraham had issued in response to PTP's 13F bid protest. *Id.* at 612 (AR 608). CO Slagle's Notice of Corrective Action outlined the same steps that the agency intended to take in response to the JFOC bid protest as the agency did for the 13F bid protest: cancel the contract award, re-evaluate the Army's needs, and either amend the solicitation or cancel it. *Id.* CO Slagle also authored an internal agency memorandum (dated July 29, 2020), which similarly explained that the agency's re-evaluation of its acquisition strategy **[**10]** was based on the availability of the recently awarded TMS MAIDIQ. *Id.* at 613-14 (AR 609-10). The GAO also dismissed PTP's bid protest of the JFOC award as "academic." *Id.* at 615-16 (AR 611-12).

C. The TMS MAIDIQ

As noted above, the Army previously had procured training and instructor services using the OMNIBUS MAIDIQ, which expired in 2016, thus necessitating the use of the GSA MAS contracts. ECF No. 25 at 617-20 (AR 613-16). On October 31, 2017, the Army approved the creation of a new contractual vehicle — the TMS MAIDIQ — for the purpose of procuring these services. *Id.* at 618 (AR 614). While the Army initially intended the TMS MAIDIQ to be a small business set-aside, **[*83]** the Army determined, after conducting market research, that — given the breadth of the MAIDIQ's anticipated scope of work — none of the small business proposals could meet the requirements; the set-aside plan for the TMS MAIDIQ thus was abandoned in coordination with the SBA. *Id.* at 618, 1194-1212 (AR 614, 1190-1208). On September 13, 2018, the Army issued the TMS MAIDIQ Solicitation as a full and open competition. *Id.* at 618, 1207 (AR 614, 1203). After numerous delays in the evaluation process, the agency, on July 21, 2020, awarded TMS MAIDIQ contracts to five companies, all of which were large businesses. *Id.*; ECF No. 21 at ¶ 26. Plaintiffs in this case **[**11]** do not hold a TMS MAIDIQ contract.

D. The Army's Cancellation Of The 13F And JFOC Contracts

On August 10, 2020, CO Abraham — presumably as part of the agency's correction action processes — authored an internal agency Memorandum For Record (the "August 10 MFR"), "[t]he purpose" of which was "to capture the background for the recently award Training Management Support (TMS) Multiple Award Indefinite Delivery Indefinite Quantity Contract awarded by MICC-Fort Eustis." ECF No. 25 at 617 (AR 613); *see generally* ECF No. 25 at 617-20 (AR 613-16). In her four-page memorandum, CO Abraham detailed the history of the 13F and JFOC Solicitations, as well as the TMS MAIDIQ, and in the last paragraph concluded:

> Based upon the above information, *I believe the Government's best interest* ***can be*** *met* by competing the JFO, 13F and KMS requirements under the MICC-Fort Eustis recently awarded TMS MAIDIQ. Both *time and money can be saved* by the Government in pursuit of this avenue. Time and money are expended on soliciting and awarding interim short term contract actions to support on-going requirements. Contract periods can be

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[8] Apparently, CO Slagle retired, two days later, on July 31, 2020, and was replaced by another as the cognizant contracting officer for the JFOC procurement. ECF No. 40 at 5.

> adjusted to support a Base and Four Option periods on most requirements thus saving **[**12]** manpower and costs tied to phase-in and certification of new contractor employees. Longer periods of performance also support the Government's ability to successfully recruit and retain qualified personnel on existing requirements, thereby ensuring continuity of the training mission.

Id. at 620 (AR 616) (emphasis added). Her memorandum also referenced 11 enclosures that further detailed the development and scope of the TMS MAIDIQ, but that did not otherwise address, in any way, the corrective action or any cancellation decisions. *Id.* at 621-862 (AR 617-858).[9] The August 10 MFR does not itself purport to be a solicitation cancellation decision, nor is it a recommendation to another agency official.

E. Procedural History

On August 31, 2020, TTGI filed its initial complaint against the United States, in this Court. *See* ECF No. 1. On September 3, 2020, PTP filed an Unopposed Motion to Intervene, pursuant to *Rule 24 of the Rules of the United States Court of Federal Claims* ("RCFC"), which the Court granted. Minute Order (Sep. 3, 2020). On September 4, 2020, TTGI filed an amended complaint. TTGI Am. Compl. at 1.

[*84] In the amended complaint, TTGI maintains that the Army's decision to cancel the 13F Solicitation was not rationally related to the "alleged procurement defect" which had been raised in PTP's **[**13]** GAO protest and was instead a "decision solely because [the Agency] likes the New Ft. Sill IDIQ better than the GSA schedule contract it used originally." TTGI Am. Compl. at ¶¶ 30, 33. Moreover, TTGI contends that by "mov[ing] the unchanged requirements to the New Ft. Sill IDIQ, where only large businesses are eligible for award" the Army violated the "Rule of Two." *Id.* at ¶¶ 36-38. Accordingly, TTGI asks that this Court "permanently enjoin the Agency proceeding with its corrective action as implemented." *Id.* at 10-11.

Although PTP initially entered this case as an intervenor, PTP sought leave to file a separate complaint and requested that its new case be consolidated with TTGI's case. ECF No. 26. On September 29, 2020, the Court

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[9] Subsequently, on August 21, 2020 — presumably based on her August 10 MFR — CO Abraham authored an additional internal agency memorandum, documenting that "a reevaluation of the acquisition strategy has resulted in the decision to solicit [the 13F Solicitation] requirement under the recently awarded [TMS] Contract awarded by the [MICC] Fort Eustis" as "[t]he requirements addressed by this specific task order were included within the scope of the TMS and support the long term, continuous service need of Fort Sill." *Id.* at 1235 (AR 1231). That same day, the Army notified PTP and TTGI that "after thoughtful review, the decision has been made to utilize [the TMS MAIDIQ] contract to support [the 13F Solicitation] requirement." *Id.* at 1236-37 (AR 1232-33) (August 21, 2020 letter to PTP); ECF No. 1 Appendix A (August 21, 2020 letter to TTGI). Regarding the JFOC Solicitation, however, the Administrative Record does not appear to contain any materials documenting the agency's final decision to utilize the TMS MAIDIQ instead of the JFOC Solicitation (*i.e.*, subsequent to the August 10 MFR). The Administrative Record also does not appear to contain any actual cancellation of the 13F or JFOC Solicitations. Nevertheless, the parties do not dispute — and the Court agrees — that, as a practical matter, the agency's decision to abandon the 13F and JFOC Solicitations constitutes a final agency decision that is ripe for review.

granted PTP's motion to file its own complaint. ECF No. 28.[10] PTP's complaint advances similar claims to those of TTGI. Specifically, PTP alleges that the Army's decision to cancel the 13F and JFOC Solicitations was arbitrary and capricious because "there is no documented cancellation decision for either procurement. And, to the extent there are any record materials that shed light on the Agency's decision, the record materials do not justify cancellation." PTP Compl. at **[**14]** ¶¶ 5, 45-48. Further, PTP contends that, by cancelling the 13F and JFOC Solicitations for the purpose of reissuing the requirements using the TMS MAIDIQ, the Army violated the Rule of Two. *Id.* at ¶¶ 87-90, 104-08. Accordingly, PTP seeks injunctive relief, ordering the Army to refrain from cancelling (or to reinstate) the 13F or JFOC Solicitations and from resoliciting those requirements "absent Agency compliance with the Rule of Two and all other applicable regulations." *Id.* at ¶¶ 66, 78, 95, 111.

On September 18, 2020, the government filed the Administrative Record. ECF No. 25. On October 5, 2020, TTGI and PTP filed motions for judgment on the Administrative Record ("MJAR") and the government filed a cross-motion for judgment on the Administrative Record. ECF No. 29-1 ("PTP MJAR"); ECF No. 30 ("Def. MJAR"); ECF No 31 ("TTGI MJAR"). On October 12, 2020, the parties filed their respective response briefs. ECF No. 32 ("PTP Resp."); ECF No. 33 (Def. Resp."); ECF No. 34 ("TTGI Resp.").

On October 16, 2020, the Court held oral argument. ECF No. 35. Following oral argument, the Court ordered the parties to file supplemental briefs addressing a variety of specific issues that had not been covered **[**15]** in the parties' briefs or at oral argument. ECF No. 39. In particular, the Court ordered supplemental briefing for the parties to address several issues, including the application of *10 U.S.C. § 2305(b)(2)* to the agency's cancellation decision. ECF No. 39; *see* *10 U.S.C. § 2305(b)(2)* ("[A] solicitation may be rejected if the head of the agency determines that such action is in the public interest."). On October 28, 2020, the government filed its supplemental brief, ECF No. 40 ("Def. Supp. Br."), and, on November 2, 2020, both PTP and Tolliver filed their respective supplemental briefs. ECF No. 41 ("PTP Supp. Br."); ECF No. 42 ("TTGI Supp. Br.").

II. Jurisdiction

Both Plaintiffs seek relief pursuant to *28 U.S.C. § 1491(b)(1)*. TTGI Am. Compl. at ¶ 2; PTP Compl. at ¶ 18. *HN1*[↑] In that regard, the *Tucker Act*, as amended by the *Administrative Dispute Resolution Act of 1996 ("ADRA"), Pub. L. No. 104-320, 110 Stat. 3870*, provides this Court with "jurisdiction to render judgment on an action by an interested party objecting [1] to a solicitation by a Federal agency for bids or proposals for a proposed contract *or* [2] to a proposed award *or* [3] the award of a contract *or* [4] any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." *28 U.S.C. § 1491(b)(1)* (emphasis and alterations **[**16]** added).[11]

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[10] The caption in this case has been revised to reflect PTP's position as a plaintiff only, given the nature of PTP's claims in its complaint and the arguments in PTP's motion for judgment on the administration record.

[11] This Court reads the statute as the United States Court of Appeals for the Federal Circuit, our appellate court, interpreted it in *Sys. Application & Techs., Inc. v. United States*, where the Federal Circuit counted four separate causes of action: "On its face, the statute grants jurisdiction over [1] objections to a solicitation, [2] objections to a proposed award, [3] objections to an award,

[*85] The government concedes that this "Court's jurisdiction extends to an agency's decision to cancel a solicitation." Def. MJAR at 15 (citing *Madison Servs., Inc. v. United States, 92 Fed. Cl. 120, 125-26 (2010)*, and *FFTF Restoration Co., LLC v. United States, 86 Fed. Cl. 226, 236-37 (2009)*). ***HN2***[⬆] This Court has a duty, however — as does every Federal court — to assure itself of jurisdiction over any complaint or cause of action. *Folden v. United States, 379 F.3d 1344, 1354 (Fed Cir. 2004)* ("Subject-matter jurisdiction may be challenged at any time by the parties or by the court *sua sponte*."); *RCFC 12(h)(3)*. Thus, although the Court generally agrees with both Plaintiffs and the government with regard to jurisdiction here, we write at greater length to address the unique aspects of a FAR Part 8 procurement, generally, and the facts and circumstances of the procurements at issue here, in particular.

A. Source Of Jurisdiction For Challenges To Cancellation Of FAR Part 8 Procurements

We begin, as always, with the plain language of the applicable jurisdictional statutory provision, in this case *28 U.S.C. § 1491(b)(1)*. A plaintiff's claim that a government agency improperly has cancelled a solicitation is plainly not a challenge "[1] to a solicitation . . . or [2] to a proposed award or [3] the award of a contract..." (alterations added). For the reasons explained **[**17]** in this subsection, this Court concludes, however, that it possesses jurisdiction to decide Plaintiffs' claims that the agency improperly decided to cancel the solicitations at issue, pursuant to the fourth prong of *28 U.S.C. § 1491(b)(1)*; Plaintiffs sufficiently have alleged "[a] violation of statute or regulation in connection with a procurement or a proposed procurement." *28 U.S.C. § 1491(b)(1)*. ***HN3***[⬆] In that regard, "[a] non-frivolous allegation of a statutory or regulatory violation in connection with a procurement or proposed procurement is sufficient to establish jurisdiction." *Distributed Sols., Inc. v. United States, 539 F.3d 1340, 1345 n.1 (Fed. Cir. 2008)*. That standard is easily met here. TTGI Am. Compl. at ¶¶ 31-38; PTP Compl. at ¶¶ 64-66, 76-78, 81-95; *see also* TTGI Supp. Br. at 3; PTP Supp. Br. at 6-7. In particular, Plaintiffs' respective complaints

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and [4] objections related to a statutory or regulatory violation so long as these objections are in connection with a procurement or proposed procurement." *691 F.3d 1374, 1380-81 (Fed. Cir. 2012)*; *see also Jacobs Tech. Inc. v. United States, 100 Fed. Cl. 173, 174 (2011)* (explaining that "this provision *[§ 1491(b)(1)]* grants the Court jurisdiction over [objections to] (1) a 'solicitation,' (2) a 'proposed award' (3) an 'award' or (4) 'any alleged violation of statute or regulation in connection with a procurement or a proposed procurement'"). The government, on occasion, also has counted four separate prongs. *FFTF Restoration Co., LLC v. United States, 86 Fed. Cl. 226, 234 (2009)* ("The government further contends that, because *28 U.S.C. § 1491(b)(1)* only allows for objections to (1) 'a solicitation by a Federal agency for bids or proposals for a proposed contract,' (2) 'a proposed award,' (3) 'the award of a contract,' or (4) 'any alleged violation of statute or regulation in connection with a procurement or a proposed procurement,' see *28 U.S.C. § 1491(b)(1)* . . . ."). Although some decisions group the statute into just three prongs, *Angelica Textile Servs., Inc. v. United States, 95 Fed. Cl. 208 (2010)*, the critical point, as explained *infra*, is that the objection "to a solicitation" prong or cause of action is distinct from the others, and the first two or three prongs — again, depending on how they are counted — are themselves distinct from the final prong, permitting an objection to "any alleged violation" of law in connection with a procurement. *95 Fed. Cl. at 212* ("The first two portions of *Section 1491(b)(1)* address pre-award and post-award bid protests" while "the third portion of the Section concerns protests involving 'any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.'").

regarding the agency's cancellation decisions sufficiently allege a violation of FAR 1.602-2(b) and 10 U.S.C. § 2305(b)(2).[12]

[*86] 1. FAR 1.602-2(b)

The basis for this Court's jurisdiction to decide a challenge to an agency's cancellation of a procurement solicitation is not unambiguous; it is certainly not explicit in the text of 28 U.S.C. § 1491. While the Federal Circuit has upheld this Court's jurisdiction to consider challenges to an agency's allegedly improper cancellation of a solicitation, those [**18] decisions involved solicitations issued pursuant to FAR Part 14 or 15, which contain specific provisions governing cancellation. For example, in Croman Corp. v. United States, 724 F.3d 1357, 1359, 1363 (Fed. Cir. 2013), the Federal Circuit reviewed the reasonableness of the cancellation of a FAR Part 15 ("Contracting By Negotiation") procurement, where the regulations require that "[t]he source selection authority may [only] reject all proposals received in response to a solicitation, *if doing so is in the best interest of the government*." FAR 15.305(b) (emphasis added). More recently, in Veterans Contracting Grp., Inc. v. United States, 920 F.3d 801, 806 (Fed. Cir. 2019), the Federal Circuit addressed whether an agency acted reasonably in cancelling a FAR Part 14 ("Sealed Bidding") procurement, where the regulations mandate that after the opening of bids there must be "*a compelling reason* to reject all bids and cancel the invitation." FAR 14.404-1(a)(1) (emphasis added); *see* FAR 14.404-1(c).

HN4[] In such cases, the Federal circuit has invoked the APA standard of review applicable to § 1491(b)(1) claims, explaining that "[u]nder this standard, a procurement decision may be set aside if it lacked a rational basis or if the agency's decision-making process involved a clear and prejudicial violation of statute, regulation, or procedure." Croman, 724 F.3d at 1363. In particular, in *Croman*, the Federal Circuit observed that "[i]n [**19] reviewing [an agency's] exercise of discretion, this court has articulated relevant factors as general guidelines in determining whether [the agency's] actions were arbitrary, capricious, or an abuse of its discretion." 724 F.3d at 1365. "'[R]elevant factors include: subjective bad faith on the part of the officials; the absence of a reasonable basis for the administrative decision; the amount of discretion entrusted to the procurement officials by applicable statutes and regulations; and proven violation of pertinent statutes or regulations.'" *Id.* (quoting Prineville Sawmill Co., Inc. v. United States, 859 F.2d 905, 911 (Fed. Cir. 1988) (quoting Keco Indus., Inc. v. United States, 492 F.2d 1200, 1203-04, 203 Ct. Cl. 566 (Ct. Cl. 1974))).[13]

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[12] This subsection only addresses the Court's jurisdiction to review the merits of the agency's solicitation cancellation decisions. The Court separately has jurisdiction — pursuant to the fourth prong of 28 U.S.C. § 1491(b)(1) — to consider Plaintiffs' independent claims that the government violated FAR 19.502-2 and FAR 19.502-9, provided that the FASA task order protest bar does not apply to such allegations. *See, infra*, Section II.B. The Court recognizes that the question of whether Plaintiffs may obtain relief for the government's alleged violation of any of these provisions may be more accurately viewed as merits issues, Perry v. United States, 149 Fed. Cl. 1, 10-14 (2020), but that distinction is not critical here given the outcome.

[13] There is a difference in the requirements applicable to the cancellation of a sealed bidding procurement as compared to a negotiated procurement. "In contrast to sealed bidding, in a negotiated procurement . . ., [GAO] decisions have found that 'the

In neither *Croman* nor *Veterans Contracting*, however, did the Federal Circuit identify which prong of § 1491(b)(1) was at issue, but, notably, both *Prineville Sawmill* and *Keco Indus., Inc.* involved a prior version of the Tucker Act, pursuant to which this Court's predecessor had jurisdiction under § 1491(a) to decide whether the government breached an implied contractual duty to fairly consider responsive bids or proposals. *Prineville Sawmill, 859 F.2d at 909* ("An invitation for bids issued by the government carries, as a matter of course, an implied contractual obligation to fairly and honestly consider all responsive bids."); *see also Parcel 49C Ltd. P'ship v. United States, 31 F.3d 1147, 1153 (Fed. Cir. 1994)* (holding that plaintiff **[**20]** "showed that GSA had *no rational basis* for the cancellation" in case brought pursuant to § 1491(a) and the prior version of the Tucker Act, as amended by the *Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133(a), 96 Stat. 25* (emphasis added)). This, of course, tends to demonstrate that our jurisdiction to decide such procurement cancellation cases was imported into § 1491(b), **[*87]** following ADRA. *Res. Conservation Grp., LLC v. United States, 597 F.3d 1238, 1246 (Fed. Cir. 2010)* (holding that "[t]he legislative history makes clear that the ADRA was meant to unify bid protest law in one court under one standard" and that "it seems quite unlikely that Congress would intend that statute to deny a pre-existing remedy without providing a remedy under the new statute").

Turning back to *28 U.S.C. § 1491(b)(1)*, while the case law makes clear that a plaintiff's challenge to the rationality of an agency's cancellation of a solicitation may be brought as an alleged violation of *FAR 14.404-1* or *FAR 15.305(b)* in, respectively, a sealed bid (FAR Part 14) or negotiated procurement (FAR Part 15), the jurisdictional (and merits) questions in this case are complicated by the fact that the cancelled solicitations were issued pursuant to FAR Part 8, under the FSS program, and thus are not subject to either FAR Part 14 or FAR Part 15 cancellation provisions. *See 28 U.S.C. § 1491(b)(1)* (covering an "alleged **[**21]** violation of statute or regulation in connection with a procurement or a proposed procurement"). In other words — given the absence of any analogous FAR Part 8 provision governing an agency's solicitation cancellation — does our Court possess jurisdiction to decide a challenge to an agency's cancellation of a solicitation issued under FAR Part 8?

Judge Wolski decided that precise question in *MORI Assocs., Inc. v. United States, 102 Fed. Cl. 503 (2011)*. In that case, Judge Wolski held that "the protest of a cancellation of a solicitation is not an 'objecti[on] to a solicitation ... for bids or proposals for a proposed contract or to a proposed award or the award of a contract.'" *102 Fed. Cl. at 523* (quoting *28 U.S.C. § 1491(b)(1)*). Therefore, the statutory "phrase 'or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement,' . . . must be the vehicle by which the remainder of our pre-existing jurisdiction over procurement protests was preserved." *102 Fed. Cl. at 523*.

HN5[↑] This Court concurs with *MORI* that the fourth-prong of *28 U.S.C. § 1491(b)(1)* — covering an alleged violation of law in connection with a procurement or a proposed procurement — provides the necessary ballast for

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contracting officer need only have a reasonable basis for cancellation after receipt of proposals, as opposed to the cogent and compelling reason required for cancellation of a solicitation after sealed bids have been opened [,] ... because in sealed bidding competitive positions are publicly exposed as a result of the public opening of bids, while in negotiated procurements there is no public opening.'" *DCMS-ISA, Inc. v. United States, 84 Fed. Cl. 501, 511 (2008)* (quoting *Cantu Servs., Inc., B-219998, 89-1 Comp. Gen. Proc. Dec. ¶ 306, 1989 WL 240549, *1 (Mar. 27, 1989)* (internal quotations omitted)).

solicitation cancellation cases,[14] but, as Judge Wolski correctly observed, and as noted above, FAR 15.305(b) "does **[**22]** not apply to FSS procurements such as the . . . procurement cancelled" in the instant case. *Id.* (citing FAR 8.404(a) and rejecting various "provisions plaintiff cites from the FSS subpart of the FAR" as a basis for such jurisdiction). HN6[↑] In the absence of a specific cancellation provision, "[the Court] should look for a regulation codifying the duty to fairly consider bids, as the repository of the remainder of our bid protest jurisdiction." 102 Fed. Cl. at 523 (explaining that pre-ADRA, "our court's jurisdiction over challenges to solicitation cancellations was not based on the violation of a regulation specifically addressing cancellation, but rather on the implied contract to fairly and honestly consider bids"). In that regard, *MORI* "holds that that the FAR section 1.602-2(b) requirement that contracting officers shall '[e]nsure that contractors receive impartial, fair and equitable treatment' is, among other things, the codification of the government's duty, previously implicit, to fairly and honestly consider bids." 102 Fed. Cl. at 523-24 (concluding that "numerous opinions of our court have treated FAR section 1.602-2(b) as a binding requirement the violation of which may be reviewed in a bid protest"). In other words, just as this Court, pre-ADRA, would have been able to hear **[**23]** a challenge to the cancellation of a solicitation under the FSS program pursuant to 28 U.S.C. § 1491(a), we may continue to do so under the fourth prong of § 1491(b) as an alleged violation of FAR 1.602-2(b).

[*88] Despite the government's initial concession in its motion for judgment on the Administrative Record, acknowledging our jurisdiction to review the solicitation cancellation decisions at issue, *see* Def. MJAR at 15,[15] the government later "disagree[d] with the conclusion in *MORI* that FAR 1.602-2(b) confers jurisdiction upon this Court over any general allegation of an arbitrary decision to cancel a solicitation that is not instead based on a specific violation of statute or regulation." Def. Supp. Br. at 6. According to the government in its supplemental brief, "a

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[14] *See also* Def. Supp. Br. at 6 ("An action challenging a cancelation decision does not challenge a solicitation for bids or proposals or a proposed award."). This appears to be the government's consistent position, and the Court concurs that the government is correct. *See* MCI Diagnostic Ctr., LLC v. United States, 147 Fed. Cl. 246, 270 (2020) (noting the government's argument that plaintiff "challenges only the VA's decision to cancel the solicitation ... and the protest of a cancellation is not an 'objecti[on] to a solicitation ... for bids or proposals for a proposed contract or to a proposed award or the award of a contract'").

[15] The government in its MJAR relied upon Madison Servs., Inc., 92 Fed. Cl. at 125-26, and FFTF Restoration Co., 86 Fed. Cl. at 236-37, in conceding that the Court of Federal Claims possesses jurisdiction to review an agency's decision to cancel a solicitation. Def. MJAR at 15. In *FFTF Restoration*, Judge Firestone — in addition to relying upon FAR 15.305(b) — "reject[ed] the government's attempt to carve out challenges to negotiated procurement cancellations from this court's bid protest jurisdiction" because "28 U.S.C. § 1491(b)(1) authorizes this court to review cancellations of negotiated procurements to ensure compliance with the requirements of 'integrity, fairness, and openness' in FAR 1.102(b)(3) and the requirement that '[a]ll contractors and prospective contractors shall be treated fairly and impartially' in FAR 1.102-2(c)(3)." FFTF Restoration, 86 Fed. Cl. at 237 & n.15. In *Madison Servs.*, this Court held that "the decision to cancel a negotiated procurement remains subject to the court's review, pursuant to 28 U.S.C. § 1491(b) and the APA standard." 92 Fed. Cl. at 125; see Def. Tech., Inc. v. United States, 99 Fed. Cl. 103, 114-15 (2011) (surveying the prior case law, and "conclud[ing] that Judge Firestone's decision in *FFTF Restoration* is on point and should be followed by this Court.").

contracting officer cannot violate FAR 1.602-2(b) by taking an action that a plaintiff deems 'unfair,' unless the contracting officer violated another, specific substantive provision of the FAR." *Id.* at 7.

The government's contentions must be rejected for several reasons. First, a recent Federal Circuit decision all but precludes the government's position. *Office Design Grp. v. United States, 951 F.3d 1366, 1372 (Fed. Cir. 2020)* ("The [FAR] requires an agency to treat offerors fairly and impartially. *[FAR] 1.602-2(b)* **[**24]** . . . . This obligation necessarily encompasses an agency's obligation to fairly and impartially evaluate all proposals.").[16] Second, apart from the Federal Circuit's decision in *Office Design Grp.*, the great weight of authority supports Plaintiffs' position that *FAR 1.602-2(b)* *is* indeed "substantive" and supports a claim under the fourth prong of *28 U.S.C. § 1491(b)(1)*. *MORI, 102 Fed. Cl. at 524* (cataloging decisions that "reinforce[] the Court's conclusion that *FAR section 1.602-2(b)* is the place where the formerly implied contract now expressly resides" and holding "that this provision is violated by government actions which would have breached the implied duty to fairly and honestly consider bids, and thus such actions—including arbitrary cancellations of solicitations—would be the 'violation of ... regulation in connection with a procurement'"); R. Nash, *FAIR TREATMENT OF CONTRACTORS: Do FAR Provisions Confer Rights*?, 27 NO. 7 Nash & Cibinic Rep. ¶ 35 (noting that "[t]here are numerous Court of Federal Claims decisions relying on *FAR 1.602-2(b)* to find a substantive right of a contractor" and commenting that "it is good to see the Court of Federal Claims finding that the FAR confers a right of contractors to fair treatment").[17]

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[16] *See also* *Krygoski Const. Co. v. United States, 94 F.3d 1537, 1542-43 (Fed. Cir. 1996)* ("CICA mandates impartial, fair, and equitable treatment for each contractor. This competitive *fairness requirement*, with its *bid protest remedies* ***[**25]***, restrains a contracting officer's contract administration. If, for instance, a contracting officer discovers that the bid specifications inadequately describe the contract work, regulations promulgated under CICA may compel a new bid." (emphasis added) (citing *10 U.S.C. §§ 2304* and *2305 (1994)*, and *FAR 1.602-2*)).

[17] *See also, e.g.,* *MCI Diagnostic Ctr., 147 Fed. Cl. at 272* ("It is, therefore, consistent with *Resource Conservation Group* to hold that this court continues to have jurisdiction over alleged arbitrary cancellations of procurement solicitations. Moreover, given this court's pre-ADRA jurisdiction to address procurement cancellation issues, it follows that whether or not protestor alleges the violation of a specific statute or regulation, this court continues to be able to address cancellation issues."); *B & B Med. Servs., Inc. v. United States, 114 Fed. Cl. 658, 660 (2014)* ("Given our long history of entertaining such [arbitrary procurement cancellation] protests, the Court does not find subject-matter jurisdiction to be absent merely because the particular regulation that is violated by arbitrary cancellation is absent from the complaint."); *Sigmatech, Inc. v. United States, 141 Fed. Cl. 284, 313 (2018)* ("The [FAR] requires that contracting officers '[e]nsure that contractors receive impartial, fair, and equitable treatment.'" (quoting *FAR 1.602-2(b)*)); *Centerra Grp., LLC v. United States, 138 Fed. Cl. 407, 413 (2018)* (holding that "[f]airness in government procurements is enshrined in a number of FAR provisions[,]" including *FAR 1.602-2(b)*); *BCPeabody Constr. Servs., Inc. v. United States, 112 Fed. Cl. 502, 512 (2013)* ("Contracting officers are required to 'ensure that contractors receive impartial, fair, and equitable treatment.'" (quoting *FAR 1.602-2(b)*)); *Serco Inc. v. United States, 81 Fed. Cl. 463, 482 (2008)* (noting "agency's fundamental duty to '[e]nsure that contractors receive impartial, fair and equitable treatment'" (quoting *FAR 1.602-2*))); *Precision Images, LLC v. United States, 79 Fed. Cl. 598, 619 (2007)* ("The [FAR] impose[s] upon the Air Force the affirmative duty to '[e]nsure that contractors receive impartial, fair, and equitable treatment' *during the procurement process*." (citing *FAR 1.602-2(b)*) (emphasis added)), *aff'd*, ***283 F. App'x 813 (Fed. Cir. 2008)***; *Jacobs Tech. Inc. v. United States, 131 Fed.*

[*89] 2. ***10 U.S.C. § 2305(b)*****(2)**

Even if *FAR 1.602-2(b)* were construed not to provide a basis for this Court's review of a challenge to a solicitation cancellation in a FAR Part 8, FSS procurement, the Court holds that, in this case, *10 U.S.C. § 2305(b)(2)* *does* provide such a predicate for this Court's jurisdiction, again pursuant to the fourth prong of *28 U.S.C. § 1491(b)(1)*. In that regard, and as noted above, the Court ordered the parties to submit supplemental briefs addressing *10 U.S.C. § 2305(b)(2)*, which provides that "[a]ll sealed bids or competitive proposals received in response to a solicitation may be rejected if the *head of the agency* determines that such action is *in the public interest*" (emphasis added). Given that *FAR 15.305(b)* may serve as a jurisdictional predicate where applicable, the Court has no trouble concluding that almost identical language in *10 U.S.C. § 2305(b)(2)* similarly provides jurisdiction here. Although FAR Part 15 provisions do not apply wholesale to the procurements at issue, the referenced Title 10 statutory provision does apply by its terms. The Court further notes that the statutory provision contains a heightened procedural requirement of a determination by the "head of the agency" and a heighted **[**26]** substantive requirement that a cancellation be "in the public interest" and not merely "in the best interest of the government" as in *FAR 15.305(b)*. *See* *10 U.S.C. § 2305(b)(2)*.

The government contends that *10 U.S.C. § 2305(b)(2)* is inapplicable to the cancelled solicitations because the agency did not seek "competitive proposals." Def. Supp. Br. at 1-2. According to the government, the FAR distinguishes between procurements seeking "competitive proposals" and those involving "competitive procedures":

> *FAR 6.102(d)(3)* provides that the "[u]se of multiple award schedules issued under the procedures established by the Administrator of General Services consistent with the requirement of *41 U.S.C.152(3)(A)* for the multiple award schedule program of the General Services Administration is a *competitive procedure*" (emphasis added). *FAR 6.102(b)* explicitly defines "competitive proposal" as "other" than a *subsection (d)* "competitive procedure[.]"

Def. Supp. Br. at 2. The Court rejects the government's argument for two reasons: (1) the hypothesized dichotomy between a procurement requesting "competitive proposals" and a procurement involving "competitive procedures" is false — there is no inherent contradiction or distinction; and (2) the cancelled solicitations at issue here in fact sought competitive proposals. **[**27]** This is evident from statutory language, as well as the mechanics of a typical FAR Part 8 procurement, the latter which the agency did *not* follow in this case.

First, Title 10 of the U.S. Code consistently uses the term "competitive proposals" not in contrast with "competitive procedures" but rather only in contrast with sealed bids. For example, *10 U.S.C. § 2302(3)(D)* incorporates the definition of the term "full and open competition" found "in chapter 1 of title 41." *HN7*[⬆] The latter statutory section, in turn, defines "full and open competition" to "mean[] that all responsible sources are permitted to submit *sealed bids or competitive proposals* on the procurement." *41 U.S.C. § 107* (emphasis added). Similarly, *10 U.S.C. §*

Cl. 430, 445 (2017) (holding that plaintiff "sufficiently alleged that the Army violated applicable regulations in connection with the . . . procurement" (citing *FAR 1.602-2(b)*)).

2304(a)(2)(B) provides that "the head of an agency . . . shall request competitive proposals if sealed bids are not appropriate . . . ." *Cf.* 41 U.S.C. § 3701(a) ("An executive agency shall evaluate *sealed bids* and *competitive proposals*, **[*90]** and award a contract, based solely on the factors specified in the solicitation." (emphasis added)). The solicitations at issue were not invitations for sealed bids.

Second, although the government relies on FAR 6.102, as explained above, to argue that "competitive proposals" are synonymous with FAR Part 15 procurements, that **[**28]** thread quickly unravels as the Court follows it through. For example, FAR 6.401 indicates that "[s]ealed bidding and competitive proposals, as described in parts 14 and 15, are both acceptable procedures for use under subpart[] 6.1," which, of course, includes FAR 6.102. Furthermore, FAR 6.401(b) covers "competitive proposals" and references FAR Part 15 "for procedures"; but, FAR 15.000 itself — similar to the statutory provisions discussed above — distinguishes only between negotiated procurements and sealed bidding. *See* FAR 15.000 (noting that "[t]his part prescribes policies and procedures governing competitive and noncompetitive negotiated acquisitions" and providing that "[a] contract awarded using other than sealed bidding procedures is a negotiated contract"). The cancelled solicitations in this case contemplated negotiated procurements and did not follow "sealed bidding procedures." *Id.*

Accordingly, while the Court agrees with the government that the cancelled solicitations at issue were not subject to FAR Part 15 *per se*, Def. Supp. Br. at 3-5, the Court agrees with the PTP that the solicitations nevertheless constituted "negotiated procurements" that solicited "competitive proposals" pursuant to a Request for Proposals ("RFP"). **[**29]** *See* PTP Supp. Br. at 8-9 ("Although the Agency may have had the authority to structure the Solicitations as RFQs seeking only responsive quotes, the Agency here issued unmistakable RFPs, seeking competitive proposals that the Agency could evaluate and accept." (emphasis in original)). The Administrative Record thoroughly supports PTP's position in that regard. For example, the July 10, 2020 Task Order Decision Document ("TODD") for the 13F procurement, signed by the Contracting Officer, *see* ECF No. 25 at 346-55 (AR 342-51), admits that the "solicitation was placed against the GSA MAS . . . as a 100% [SDVOSB] set-aside competitive action using order procedure under [FAR] 8.405-2 ***in conjunction with FAR Part 15-Contract by Negotiation*** and FAR Part 12-Acquisition of Commercial Items." *Id.* at 346 (AR 342) (emphasis added).

Moreover, the Administrative Record confirms that the agency engaged in negotiations insofar as "[p]roposal revisions were allowed and offerors could submit a final offer based on changes provided on solicitation amendments." *Id.* at 348 (AR 344) (also citing FAR 15.404-1 regarding price analysis); *see also* AR 350 (citing FAR 15.403 regarding "adequate price competition"). Similarly, the JFOC Past Performance Questionnaire explicitly **[**30]** informed prospective references that the agency's planned "schedule will allow sufficient time to analyze the data prior *to the start of negotiations*." *Id.* at 499 (AR 495) (emphasis added). The JFOC TODD indicated that the FAR Part 8 RFP "was placed against the GSA MAS . . . as a 100% [SDVOSB] set-aside competitive action using ***FAR Part 15-Contract by Negotiation*** and FAR Part 12-Acquisition of Commercial Items." *Id.* at 565 (AR 561) (emphasis added). As part of the JFOC procurement, the agency conducted discussions and permitted final proposal revisions. AR 563 (indicating that "[t]wo of the four offerors made changes and submitted Final Offers"). *HN8*[⬆] As this Court has noted, "the acid test for deciding whether an agency has engaged in discussions is whether the agency has provided an opportunity for proposals to be revised or modified." *Allied*

Tech. Grp., Inc. v. United States, 94 Fed. Cl. 16, 44 (2010) (quoting *Career Training Concepts, Inc. v. United States, 83 Fed. Cl. 215, 230 (2008)*). A solicitation that contemplates the submission of proposals and the possibility of discussions is a negotiated procurement.

The government itself further admits that the procurements at issue in this case are "negotiated procurement[s]." Def. MJAR at 15 (acknowledging that "[i]n the context of a negotiated procurement ***like this one***," the contracting officer's cancellation decision **[**31]** is subject to the APA review standard in *§ 1491(b)(4)* (emphasis added)); *id.* at 16 (addressing the "Court's review of a cancellation decision in the course of a negotiated procurement" and arguing that "[b]ecause the **[*91]** contracting officer has the discretion to cancel a negotiated procurement," a plaintiff must show the decision "had no rational basis"). *HN9*[] As demonstrated above, a negotiated procurement involves competitive proposals. *See PHT Supply Corp. v. United States, 71 Fed. Cl. 1, 12 (2006)* ("This federal statute provides that, in negotiated procurements, agencies 'shall evaluate ... competitive proposals and make an award based solely on the factors specified in the solicitation.'" (quoting *10 U.S.C. § 2305(b)(1)*)).

The government's attempt to distinguish the solicitations at issue from a procurement seeking competitive proposals is particularly unavailing where, as here, the government did not follow normal FAR Part 8 procedures. In that regard, the government is correct that, *typically*, there *is* a distinction between procurements conducted pursuant to FAR Parts 14 and 15, on the one hand, and FAR Part 8 procurements, on the other: the former solicit bids or proposals from bidders or offerors, respectively, while the latter solicits quotations. *FAR 2.101* delineates the difference:

> *Offer* means **[**32]** a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. Responses to invitations for bids (sealed bidding) are offers called "bids" or "sealed bids"; responses to requests for proposals (negotiation) are offers called "proposals"; however, responses to requests for quotations (simplified acquisition) are "quotations", not offers.

FAR 2.101 (emphasis added).[18]

HN10[] The GAO also helpfully has explained that a request for quotation ("RFQ") is nothing more than a request for information:

> The submission of a bid or proposal constitutes, by its very nature, an offer by a contractor that, if accepted, creates a binding legal obligation on both parties. Because of the binding nature of bids and offers, they are held open for acceptance within a specified or reasonable period of time . . . .
>
> A quotation, on the other hand, is not a submission for acceptance by the government to form a binding contract; rather, vendor quotations are purely informational. *In the RFQ context, it is the government that*

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[18] *Cf. FAR 13.004(a)* ("A quotation is not an offer and, consequently, cannot be accepted by the Government to form a binding contract. Therefore, issuance by the Government of an order in response to a supplier's quotation does not establish a contract. The order is an offer by the Government to the supplier to buy certain supplies or services upon specified terms and conditions. A contract is established when the supplier accepts the offer.").

> *makes the offer*, albeit generally based on the information provided by the vendor in its quotation, and no binding agreement is created until the vendor accepts the **[**33]** offer. FAR § 13.004(a). A vendor submitting a price quotation therefore could, the next moment, reject an offer from the government at its quoted price. Because vendors in the RFQ context hold the power of acceptance and their submissions are purely informational, there is nothing for vendors to hold open.

*Sea Box, Inc., B-405711, 2012 Comp. Gen. Proc. Dec. ¶ 116, 2012 WL 924951, *2-*3 (Mar. 19, 2012)* (internal citations omitted) (emphasis added).[19]

In this case, in contrast, the agency did not merely solicit quotes resulting in a purchase order to the putative awardees. Rather, the agency solicited competitive proposals pursuant to RFPs, contemplated negotiations, and awarded contracts based upon those proposals.[20] ECF No. 25 at 5 (AR 1) (13F Solicitation); *id.* at 386 (AR 382) (JFOC Solicitation); *id.* at 244-45 (AR 240-41) (F13 TODD consistently **[*92]** using the term "proposals"); *id* at 565-66 (AR 561-62) (JFOC TODD consistently using the term "proposals").

Because the solicitations at issue here were RFPs seeking competitive proposals as part of a negotiated procurement — and were neither Invitations for Bids ("IFBs") nor Requests for Quotations ("RFQs"), *see* PTP Supp. Br. at 8 — the Court concludes that the agency had to comply with *10 U.S.C. § 2305(b)(2)*. The FAR's definition of "solicitation" proves the point: "*Solicitation* means any request to submit offers **[**34]** or quotations to the Government. Solicitations under sealed bid procedures are called 'invitations for bids.' *HN12*[↑] *Solicitations under negotiated procedures are called 'requests for proposals*.'" *FAR 2.101* (emphasis added). Accordingly, in this case, the cancelled solicitations were not IFBs or RFQs, but rather were RFPs — that is, "requests for proposals" as part of negotiated procurements conducted under FAR Part 8. *Id.* That is all that is necessary for *10 U.S.C. § 2305(b)(2)* to apply, and the government cannot now, for the purposes of litigation, recharacterize the procurements as typical FSS purchases seeking only quotations. *Aiken v. United States, 4 Cl. Ct. 685, 694 (1984)* ("party characterizations or mere contract formalisms cannot alter the substance of a transaction"); *Burstein v. United States, 622 F.2d 529, 537, 224 Ct. Cl. 1 (Ct. Cl. 1980)* ("[W]e must look to the substance of the transaction; the true nature of the arrangement cannot be altered by mere contractual formalisms."); *see IBM U.S. Fed., A Div. of IBM Corporation, B-*

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[19] *HN11*[↑] "Though GAO opinions are not binding on this court, . . . this court may draw on GAO's opinions for its application of this expertise." *Allied Tech. Grp., Inc. v. United States, 649 F.3d 1320, 1331 n.1 (Fed. Cir. 2011)* (citing *Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989)*; *see Tech. Innovation All. LLC v. United States, 149 Fed. Cl. 105, 140 n.6 (2020)* ("GAO decisions are not binding on the Court but may be treated as persuasive authority in light of GAO's expertise in the bid protest arena.").

[20] The GSA itself warns against using an RFP for FSS purchases, but that is exactly what the agency did here. https://interact.gsa.gov/wiki/its-rfq-quote-rather-rfp-offer-when-talking-about-orders-against-schedules-far-84 ("It is inappropriate and contrary to FAR SubPart 8.4 to call a Schedule order request for quotation an 'RFP.' The FAR never recognizes 'RFP' as a suitable substitute for a Schedule order's 'RFQ.' As the FAR (as well as the Government Contracts Reference Book and other sources) point out, 'RFP' and 'RFQ' are not interchangeable. They differ in when offer and acceptance occurs. When talking about Schedule orders, only 'RFQ' is recognized by the FAR.") (last visited Nov. 25, 2020).

409806, 2014 Comp. Gen. Proc. Dec. ¶ 241, 2014 WL 4160022, *6 (Aug. 15, 2014)* ("Where, as here, an agency . . . uses an approach more akin to a competition in a negotiated procurement than to a simple FSS buy, GAO will review the record to ensure that the procurement was conducted on a fair and reasonable basis and consistent with standards generally applicable to negotiated **[**35]** procurements."); *Omniplex World Servs. Corp., B-291105, 2002 Comp. Gen. Proc. Dec. ¶ 199, 2002 WL 31538212, *3 (Nov. 6, 2002)* ("[W]hile the provisions of FAR Part 15, which govern contracting by negotiation, do not directly apply, . . . we analyze [the protestor's] contentions by the standards applied to negotiated procurements."); *Allied Tech. Grp., Inc., B-402135, 2010 Comp. Gen. Proc. Dec. ¶ 152, 2010 WL 2726056, *4 n.8 (Jan. 21, 2010)* ("The procurement here was conducted under the FSS provisions of FAR subpart 8.4, and thus the negotiated procurement provisions of FAR part 15 do not directly apply. However, our Office has held that where agencies use the negotiated procurement techniques of FAR part 15 in FSS buys, such as discussions, we will review the agency's actions under the standards applicable to negotiated procurements.").[21]

[*93] * * * *

Plaintiffs also allege violations of *FAR 19.502-2* and *FAR 19.502-9*, TTGI Am. Compl. at ¶¶ 36-38; PTP Compl. at ¶¶ 87-90, 104-08, independently vesting this Court with jurisdiction to consider **[**36]** those claims pursuant to the fourth prong of *28 U.S.C. § 1491(b)(1)*. Finally, even if Plaintiffs were unable to rely on any particular statute or regulation to challenge the cancellation of the solicitations at issue pursuant to *28 U.S.C. § 1491(b)(1)*, the Court still would have jurisdiction under *28 U.S.C. § 1491(a)*, although the available relief would include only proposal costs, and not injunctive relief. *See* *Eco Tour Adventures, Inc. v. United States, 114 Fed. Cl. 6, 41-42 (2013)* ("[E]quitable relief is . . . unavailable in implied contract bid protests pursued under *section 1491(a)*.").

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[21] The Court acknowledges that the GAO's decision in *The MIL Corp., B-297508, 2006 Comp. Gen. Proc. Dec. ¶ 34, 2006 WL 305965 (Jan. 26, 2006)*, may be read to have reached a contrary conclusion, in part in reliance upon this Court's decision in *Systems Plus, Inc. v. United States, 68 Fed. Cl. 206, 209-210 (2005)*. Both cases are distinguishable, however, because while they involved FSS procurements having *elements* of negotiated procedures, they involved RFQs and *not* RFPs. *The MIL Corp., B-297508 at *5* ("Here, the procurement was not conducted pursuant to the negotiated procedures of FAR Part 15, *nor did it involve the issuance of a request for proposals*. Rather, the procurement here was conducted under the FSS program, pursuant to the procedures set forth in FAR Subpart 8.4 and *using a request for quotations*." (emphasis added)); *Sys. Plus, Inc., 68 Fed. Cl. at 206* (noting that the procurement at issue was an RFQ). Moreover, the GAO in *The MIL Corp.* explicitly agreed with our determination here that "the use of negotiated procedures in accordance with [FAR] Part 15 *and as evidenced by the issuance of a request for proposals*, constitutes a procurement conducted *on the basis of competitive proposals*." *The MIL Corp., B-297508 at *5* (emphasis added) (citing cases in which the GAO equated "a negotiated procurement with a procurement conducted on the basis of competitive proposals"); *see also* *Comfort Inn South, B-270819.2, 96-1 Comp. Gen. Proc. Dec. ¶ 225, 1996 WL 251441, *2* (equating the term "competitive proposals" in *10 U.S.C. § 2304(a)(2)(B)* with "negotiated procedures"). On another note, the Court finds it very hard to believe that the government would argue that Plaintiffs' proposals are subject to public disclosure. *See* *41 U.S.C. § 4702* ("Prohibition on release of contractor proposals") (providing that "[a] proposal in the possession or control of an executive agency may not be made available to any person under [the *Freedom of Information Act,] section 552 of title 5*" where "proposal" is defined as "including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a *solicitation for a competitive proposal*" (emphasis added)); *see also* *10 U.S.C. § 2305(g)* (same).

B. The FASA Task Order Protest Bar

HN13[↑] The FASA task order protest bar provides that "[a] *protest* is not authorized *in connection with* the issuance or *proposed issuance* of a task or delivery order . . . ." 41 U.S.C. § 4106(f)(1) (emphasis added). The government does *not* contend that the FASA task order protest bar precludes this Court's jurisdiction over Plaintiffs' claim generally challenging the propriety of the agency's solicitation cancellation decisions (*i.e.*, even though the agency intends to utilize a task order vehicle for the replacement procurement). The government argues, however, that this Court is precluded from deciding Plaintiffs' claims to the extent that they depend upon this Court's ruling on the application of the Rule of Two. Def. MJAR at 30-33.

Relying **[**37]** on Federal Circuit precedent in *SRA Int'l, Inc. v. United States, 766 F.3d 1409 (Fed. Cir. 2014)*, where that court held that "nothing in FASA's language automatically exempts actions that are temporally disconnected from the issuance of a task order," *id. at 1413*, the government asserts that *SRA* "affirms the broad reach of FASA and establishes that a protest of the failure to conduct a rule of two analysis prior to issuing a task order [under an IDIQ] is not a colorable basis to avoid the statutory [task order protest] bar." Def. Mot. at 30-31.[22] Furthermore, the government notes that the Federal Circuit in *RAMCOR Servs. Grp., Inc. v. United States, 185 F.3d 1286, 1289 (Fed. Cir. 1999)*, has interpreted broadly the phrase "in connection with" in the *Tucker Act, 28 U.S.C. § 1491(b)(1)*.[23] Def. Resp. at 8-9. **[*94]** Accordingly, the question that the government fairly raises is

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[22] Candidly, the Court notes that the government's position is far more persuasive than the Court at oral arguments gave the government credit for and, thus, the Court addresses the relevant issues at greater length.

[23] The filing of a protest with the General Accounting Office ("GAO") may trigger an automatic stay of a procurement under the provisions of the *Competition in Contracting Act ("CICA"), 31 U.S.C. §§ 3551-56*, prohibiting an agency from awarding a new contract pending a decision on the protest. *See* *31 U.S.C. § 3553(c)(1)*. CICA, however, also allows an agency to override the automatic stay if it issues a written finding that "urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting" for the bid protest decision. *31 U.S.C. § 3553(c)(2)*; *see* *RAMCOR, 185 F.3d at 1287*. In *RAMCOR*, the Federal Circuit addressed the question of "whether an objection to a [*31 U.S.C.] § 3553(c)(2)* override can serve as a jurisdictional basis under *§ 1491(b)(1)*." *Id. at 1289*. The Federal Circuit thus had "to determine whether *§ 3553(c)(2)* is a statute 'in connection with a procurement,' as required by *§ 1491(b)(1)*." *Id.* While the Court of Federal Claims had held that a plaintiff protestor "could only invoke *§ 1491(b)(1)* jurisdiction by including in its action an attack on the merits of the underlying contract award" — and that this Court accordingly lacked jurisdiction to decide an override challenge — the Federal Circuit reversed. *Id.* The Federal Circuit explained its reasoning as follows:

> The **[**38]** language of *§ 1491(b)* . . . does not require an objection to the actual contract procurement, but only to the "violation of a statute or regulation in connection with a procurement or a proposed procurement." ***The operative phrase "in connection with" is very sweeping in scope***. HN14[↑] As long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction. *Section 3553(c)(2)* fits comfortably in that broad category. After all, [the agency's*] § 3553(c)(2)* override allowed it to procure immediately [the awardee's] services. Moreover, under that procurement, [the contact awardee] could have immediately commenced work. Where an agency's ***actions under a statute***

whether Plaintiffs' claims that the Army failed to perform the Rule of Two analysis (before deciding to move the 13F and JFOC scopes of work to the TMS MAIDIQ) constitute a "protest" that is "in connection with the issuance or proposed issuance of a task or delivery order." Def. MJAR at 30 (discussing *41 U.S.C. § 4106(f)(1)*).[24] According to the government, "[t]here simply is no way to view *the protests of the TMS MAIDIQ* as anything other than the protest of a proposed task order." *Id.* at 32-33 (emphasis added).

This Court disagrees that Plaintiffs are protesting either the TMS MAIDIQ itself or even the "proposed issuance" of a task order. The Court further disagrees with the government that the FASA protest bar is at all applicable here.

The Court must first appropriately frame Plaintiffs' Rule of Two arguments. All of the parties (and the Court) appear to agree that the Army's decision **[**39]** to cancel the solicitations at issue depends upon the availability of the TMS MAIDIQ as a viable alternative under which the procurements may be conducted. In other words, there is no question about the agency's continuing need for the precise services sought pursuant to the 13F and JFOC Solicitations. Accordingly, there are several possible ways to view Plaintiffs' Rule of Two arguments. One possible way is that the agency's cancellation decisions are irrational to the extent the agency has not performed a Rule of Two analysis in order to know whether the TMS MAIDIQ is, in fact, a viable alternative. Another possible way to view Plaintiffs' claims is that because the agency *has* selected the TMS MAIDIQ vehicle as part of a revised acquisition strategy, *that selection* itself violated the Rule of Two, irrespective of the rationale offered in the agency's August 10 MFR.[25] The first view ties the Rule of Two issue to the propriety or legality of the agency's cancellation decisions, while the latter view constitutes a challenge to the legality of an independent agency action. Viewed either way, Plaintiffs' actions before this Court do not constitute a "protest . . . in connection with the **[**40]** issuance or proposed issuance" of a task order, nor does the Court agree with the government that Plaintiffs are protesting the TMS MAIDIQ itself (or the proposed issuance of a task order).

> ***so clearly affect the award and performance of a contract***, this court has little difficulty concluding that that statute has a "connection with a procurement."

Id. (emphasis added).

[24] In terms of the FASA task order protest bar, the government relies exclusively upon the provision in Title 41, notwithstanding the government's contention in its supplemental brief that "*Section 3701(b) of Title 41* does not apply here because nothing in Title 41, Subtitle I, Division C (*§§ 3101 - 4714*) applies to the Department of Defense." Def. Supp. Br. at 2 (citing *41 U.S.C. § 3101(c)(1)(A)*). The government nowhere addresses *10 U.S.C. § 2304c(e)*, the task order protest bar applicable to Department of Defense ("DOD") procurements. The difference between the two statutes is the dollar value of the GAO jurisdictional threshold; for DOD procurements, the applicable threshold is $25 million. *10 U.S.C. § 2304c(e)(1)(B)*. Because there is no practical difference between the two provisions for the purposes of this decision, the instant decision discusses *41 U.S.C. § 4106(f)*, the statutory provision upon which the government has relied in its briefs.

[25] Even on that point, however, the government is noncommittal, in one sentence asserting that "there is no uncertainty as to what contracting vehicle *would be* selected," and then in the very next sentence asserting that "the administrative record demonstrates that the agency *has decided already* to use the TMS MAIDIQ." Def. MJAR at 32 (emphasis added).

For the reasons explained below, the Court finds that the FASA task order bar does not apply to the present case because: (1) FASA only applies to a "protest" but that term does not necessarily encompass an action alleging an independent "violation of statute or regulation in connection with a procurement or proposed procurement"; (2) even where an action properly may be considered a "protest," FASA only applies where there is some relationship to a "proposed issuance or issuance of a task order" — that is, where a plaintiff is, in effect, a disappointed bidder or offeror; and (3) a challenge to an agency's alleged failure to conduct a Rule of Two analysis is not "in connection with" a task order, no matter how Plaintiffs' claims are viewed or how the other operative language in FASA is interpreted or parsed.

HN15[↑] As with any question of statutory analysis, this Court starts, as it must, with the applicable **[*95]** statutory language.[26] The FASA task order protest bar provides, in its **[**41]** entirety, as follows: "[a] protest is ***not*** authorized ***in connection with*** the ***issuance or proposed issuance of a task or delivery order*** except for—(A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or (B) a protest of an order valued in excess of $10,000,000." *41 U.S.C. § 4106(f)(1)* (emphasis added). With respect to the latter exception, the GAO has exclusive jurisdiction to decide such claims. *Id. § 4106(f)(2)*.

The interpretative difficulty is that FASA does not provide any further definitional clarity regarding its operative terms. Solving this puzzle requires paying close attention to the entirety of the FASA's statutory language. While decisions from this Court and the Federal Circuit generally have focused on the "in connection with" language[27] — and that phrase's "very sweeping . . . scope," *RAMCOR, 185 F.3d at 1289* — that is but one-third of the FASA statutory equation. The remaining operative language that remains to be unpacked is (a) "protest" and (b) "issuance or proposed issuance of a task or delivery order," *41 U.S.C. § 4106(f)(1)*, both of which, in this Court's view, considerably narrow the FASA's jurisdictional bar. *Cf. Maracich v. Spears, 570 U.S. 48, 60, 133 S. Ct. 2191, 186 L. Ed. 2d 275 (2013)* ("[T]he phrase 'in connection with' provides little **[**42]** guidance without a limiting principle consistent with the structure of the statute and its other provisions.").

1. FASA Does Not Necessarily Bar Claims Alleging A "Violation Of Statute Or Regulation In Connection With A Procurement Or Proposed Procurement"

The FASA task order bar applies only to "protest[s]." This Court therefore must decide whether Plaintiffs' claims in this case — specifically with respect to the agency's alleged violation of the Rule of Two — constitute a "protest." The Court is unconcerned with how that word is employed colloquially to describe *§ 1491(b)* actions generally;

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[26] *Dyer v. Dep't of the Air Force, 971 F.3d 1377, 1380 (Fed. Cir. 2020)* (quoting *Kingdomware Techs., Inc. v. United States, U.S. , 136 S. Ct. 1969, 1976, 195 L. Ed. 2d 334 (2016)*, for the proposition that "[i]n statutory construction, we begin with the language of the statute" (internal quotes omitted)).

[27] *BayFirst Sols., LLC v. United States, 104 Fed. Cl. 493, 502 (2012)* ("There seems to be some variation in this court's approach to interpreting the term 'in connection with' when applying the ban on task order protests in particular cases.").

instead, the Court focuses on the language that Congress actually enacted in its statutes. *Azar v. Allina Health Servs., 587 U.S. , 139 S. Ct. 1804, 1812, 204 L. Ed. 2d 139 (2019)* ("This Court does not lightly assume that Congress silently attached different meanings to the same term in . . . related statutes."). In that regard, on the one hand, neither the FASA task order protest bar provision nor the Tucker Act defines the term "protest" and the question of what that term includes is not straightforward. On the other hand, the GAO's bid protest jurisdictional statute, the Competition in Contracting Act ("CICA"),[28] defines that term as follows:

> The term "protest" means a written objection by **[**43]** an interested party to any of the following:
> (A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.
> (B) The cancellation of such a solicitation or other request.
> (C) An award or proposed award of such a contract.
> (D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.
> (E) Conversion of a function that is being performed by Federal employees to private sector performance.

31 U.S.C.A. § 3551(1); *see also FAR 33.101* (defining "protest" similarly to CICA).[29]

HN16[↑] **[*96]** Focusing on CICA's definition of the word "protest," a Tucker Act cause of action may be "in connection with" the issuance (or proposed issuance) of a task order, but not subject to the FASA task order protest bar because the cause of action simply does not qualify as a "protest."[30] As a more obvious practical analogy demonstrating the accuracy of that conclusion, the government could not contend that a Contract Disputes Act ("CDA") claim qualifies as a "protest" subject to the FASA task order protest bar. *Kellogg Brown & Root Servs., Inc. v. United States, 117 Fed. Cl. 764, 770 (2014)* (holding that "this **[**44]** matter is not within our bid protest jurisdiction, but instead involves questions of contract administration that must be brought under the CDA"); *Itility, LLC v. United States, 124 Fed. Cl. 452, 458 (2015)* (noting that "a long line of our cases has held that the 'interested party' standing to bring a bid protest does not extend to the complaints of contractors concerning the administration of contracts they have been awarded and performing"); *Digital Techs., Inc. v. United States, 89 Fed.*

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[28] *Pub. L. No. 98-369, 98 Stat. 1175 (1984)* (codified, as amended, at *31 U.S.C. §§ 3551-3557*).

[29] Notably, the CICA's definition of "protest" explicitly distinguishes between an objection to a solicitation, an objection to a solicitation's cancellation, and an objection to "[a]n award or proposed award."

[30] "The CICA and the ADRA are, after all, different statutes, with different definitions of bid protest." *Alaska Cent. Exp., Inc. v. United States, 50 Fed. Cl. 510, 517 (2001)*.

Cl. 711, 722, 728-29 (2009) ("By its terms, the FASA prohibition on bid protests does not apply to a breach of contract case" or CDA claims).[31]

A further comparison of the FASA task order protest bar to the Tucker Act language (and *RAMCOR*'s interpretation of the latter) is instructive and demonstrates that not all § 1491(b)(1) claims qualify as a "protest." HN17[↑] For starters, the Tucker Act nowhere employs the term "protest" but rather refers repeatedly to "an action" (or "any action"). 28 U.S.C. § 1491(b).[32] As noted previously, the Tucker Act, as amended by ADRA, provides for four distinct causes of action related to the procurement process: "an action by an interested party objecting [1] to a solicitation by a Federal agency for bids or proposals for a proposed contract ***or*** [2] to a proposed award ***or*** [3] the award of a contract ***or*** [4] any alleged violation of statute **[**45]** or regulation in connection with a procurement or a proposed procurement." *Id.* § 1491(b)(1) (emphasis added). The first three causes of action are what we typically refer to as bid "protests," as that term is defined in CICA — *i.e.*, challenges, respectively, to a solicitation or to the merits of a contract award (or a proposed award). HN18[↑] In contrast, the fourth prong of § 1491(b)(1) — pursuant to which a plaintiff may allege a "violation of statute or regulation in connection with a procurement or a proposed procurement" — is ***not*** necessarily a "protest," at least as that term is defined in CICA.[33] Indeed, although "ADRA covers *primarily* pre- **[*97]** and post-award bid protests," the Federal Circuit in *RAMCOR* explicitly reversed this Court's determination "that a [plaintiff] could only invoke § 1491(b)(1) jurisdiction by including in its action an attack on the merits of the underlying contract award" or the solicitation. RAMCOR, 185 F.3d at 1289 (emphasis added).

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[31] *Cf.* Cont'l Serv. Grp., Inc. v. United States, 722 F. App'x 986, 992 (Fed. Cir. 2018) (noting government's position that a particular claim, dismissed by the trial court, was "a contract administration claim subject to the [CDA] over which the Claims Court had no bid protest jurisdiction").

[32] CICA explicitly distinguishes between an "action" in this Court and a "protest" before the GAO. 31 U.S.C. § 3556 (explaining that "nothing contained in this subchapter shall affect the right of any interested party to file a protest with the contracting agency or to file an action in the United States Court of Federal Claims"); *see also* 41 U.S.C. § 2101(6) ("The term 'protest' means a written objection by an interested party to the award or proposed award of a Federal agency procurement contract, pursuant to subchapter V of chapter 35 of title 31."); 31 U.S.C. § 1558 (distinguishing between a "***protest*** filed under subchapter V of chapter 35 of this title," on the one hand, and "***an action*** commenced . . . ***for a judicial remedy***" involving a "a challenge to-- (i) a solicitation for a contract; (ii) a proposed award of a contract; (iii) an award of a contract; or (iv) the eligibility of an offeror or potential offeror for a contract or of the contractor awarded the contract" (emphasis added)).

[33] Thus, while "the Federal Circuit has made clear that a *RAMCOR*-type action may be brought independent of whether the plaintiff objects to the actual contract procurement[,] CICA's definition of 'protest' is more limited than the scope of actions described by the Tucker Act and does not include an independent 'violation of statute or regulation in connection with a procurement or a proposed procurement' prong[.]" M. Solomson & J. Handwerker, *Subcontractor Challenges To Federal Agency Procurement Actions*, 06-3 Briefing Papers 1, *6 (Feb. 2006). That is not to say that the GAO's protest jurisdiction precludes its consideration of alleged violations of statutes or regulations, *see* 31 U.S.C. § 3552(a), but rather the GAO may only consider such allegations *as part* of a "written objection by an interested party" that meets the definition of "protest" in 31 U.S.C. § 3551.

HN19[↑] Put differently, "[t]he language of § 1491(b) . . . does not require an objection to the actual contract procurement, but only to the 'violation of a statute or regulation in connection **[**46]** with a procurement or a proposed procurement.'" *RAMCOR, 185 F.3d at 1289*. The Federal Circuit further explained that construing § 1491(b)(1) to require a plaintiff to object to the merits of a procurement effectively would eliminate the fourth prong of the statute, as "[a] challenge on the merits would, for example, amount to an objection to 'a *proposed award or the award* of a contract.'" *Id.* (emphasis added) ("If § 1491(b) required a challenge to the merits of the contract award, the contractor would never need to use the 'violation' prong but could always rely on other jurisdictional grants in § 1491(b)(1)."). Simply put, an action under the last prong of § 1491(b) is not a "protest" because it is not a challenge to a solicitation or to the proposed award or award of a contract. In that regard, an axiomatic canon of statutory interpretation is that "[w]hen construing a statute, this court must, if at all possible, give effect to all its parts." *185 F.3d at 1289* (citing *Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 633, 93 S. Ct. 2469, 37 L. Ed. 2d 207 (1973)*, and noting that "[t]he trial court's proposed interpretation of § 1491(b)(1) would violate this basic tenet of statutory construction"). Accordingly, § 1491(b)(1) must be construed to permit a cause of action which is neither a "protest" of a solicitation, nor of a contract award (or proposed award).[34]

The question, then, is what is the nature of Plaintiffs' Rule of Two claims in this case? Does an alleged violation of the Rule of Two challenge a solicitation or otherwise object to an award or proposed award of a contract (*i.e.*, are Plaintiffs' claims "protests")? Or, are Plaintiffs' claims properly considered only under the fourth prong of § 1491(b)(1)?

Before answering those questions, the Court returns to the statutory language of the FASA task order protest bar, and concludes that it applies, by its plain terms, only to the first three causes of action identified in § 1491(b)(1), where CICA's definition of "protest" and the Tucker Act overlap.[35] In that regard, this Court concludes **[*98]** that

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[34] As *RAMCOR* confirms, the protest of a "proposed award" concerns the merits of the agency's presumptive award (prior to the actual award), but in any event is *not* the same thing as a solicitation protest. *185 F.3d at 1289* ("[a] challenge on the merits would, for example, amount to an objection to 'a proposed award or the award of a contract'"); *see also,* ***[**47]*** *e.g.,* *CGI Fed., Inc., B-418807, 2020 Comp. Gen. Proc. Dec. ¶ 276, 2020 WL 4901733, *4 (Aug. 18, 2020)* (holding that although "[u]nder CICA, protests are defined to include challenges involving solicitations, and awards made or proposed under those solicitations[,]" the putative protestors did not allege grounds within the GAO's jurisdiction "because they do not object to the terms of a solicitation and do not otherwise concern the award of a contract"); *Litton Sys., Inc., B-229921, 88-1 Comp. Gen. Proc. Dec. ¶ 448, 1988 WL 227107, *6 (May 10, 1988)* (explaining that GAO "generally see[s] nothing improper in an agency requirement that a *proposed award selection* be reviewed by higher agency officials" (emphasis added)). A typical "proposed award," for example, is an agency's announcement of its intent to award a sole-source contract. *See, e.g.,* *Wamore, Inc., B-417450, 2019 Comp. Gen. Proc. Dec. ¶ 253, 2019 WL 3214259 (July 9, 2019)* ("Wamore filed its protest challenging the Army's planned sole-source contract award to Airborne Systems."); *eFedBudget Corp., B-298627, 2006 Comp. Gen. Proc. Dec. ¶ 159, 2006 WL 3347953 (Nov. 15, 2006)* ("eFedBudget Corporation protests the proposed award of a contract on a sole-source basis to RGII Technologies, Inc.").

[35] *Alphapointe v. Dep't of Veterans Affairs, 475 F. Supp. 3d 1, 2020 U.S. Dist. LEXIS 134310, 2020 WL 4346914, at *6-*7 (D.D.C. July 29, 2020)* (transferring case to the Court of Federal Claims, and rejecting, consistent with other cases, plaintiff's

the *in pari materia* canon of statutory interpretation[36] should be applied here such that FASA's usage of the term "protest" must be read as Congress defined the term in CICA.

First, the Federal Acquisition Streamlining Act of 1994 expressly incorporated the CICA's definition of "protest." *See Pub. L. No. 103-355, 108 Stat. 3243 §§ 1004* ("Task and Delivery Order Contracts"), 1054 ("Task and Delivery Order Contracts"), 1401 ("Protest Defined"), **[**48]** 1438 ("Definition of Protest"). There is no reason to go searching for another definition of "protest" in FASA (or elsewhere) where Congress literally defined the term in context.

Second, binding Federal Circuit precedent requires us to apply CICA's definition of "interested party" to *§ 1491(b)*, and both "interested party" and "protest" are defined in the very same statutory provision. *See 31 U.S.C. § 3551*; *see also Am. Fed'n of Gov't Employees, AFL—CIO v. United States, 258 F.3d 1294 (Fed. Cir. 2001)*.[37] There is no

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argument that *§ 1491(b)(1)* only covers "a bid protest or 'a dispute over an individual contract solicitation or award.'" (quoting *Pub. Warehousing Co. K.S.C. v. Defense Supply Ctr., 489 F. Supp. 2d 30, 39-40 (D.D.C. 2007)*). In *Public Warehousing Co.*, the District Court correctly explained that the notion of a "'bid protest' limitation was squarely rejected in *RAMCOR*" because "[l]imiting the 'violation of statute or regulation' prong to bid protest cases would render it superfluous." *489 F. Supp. 2d at 40* (holding that if "*section 1491(b)(1)* were limited to claims challenging the merits of a specific solicitation or contract award, the 'violation of statute or regulation' clause would serve no purpose because the other clauses in *section 1491(b)(1)* vesting jurisdiction in the Court of Federal Claims would suffice" (citing *RAMCOR, 185 F.3d at 1289*)). Thus, although the term "bid protest" is generally used to refer to actions brought pursuant to *28 U.S.C. § 1491(b)(1)*, it more accurately describes only the first three prongs of that statutory section. *489 F. Supp. 2d at 40* (rejecting plaintiff's contention that "Congress intended the matters described [in *§ 1491(b)(1)*] to be limited to bid protests," and citing cases for the proposition that "*every* court to address the 'violation of statute or regulation' clause outside of a traditional bid protest setting—in plaintiff's words, 'some other challenge'—has concluded that the breadth of that clause covers even non-traditional disputes arising from the procurement process as long as the violation is 'in connection with a procurement or a proposed procurement'" (emphasis added)). "Thus, although it is true that litigation under the ADRA traditionally has developed around pre- and post-award bid protests, no inference can be drawn that the ADRA covers only those types of cases." *489 F. Supp. 2d at 41* (footnote omitted). The Federal Circuit favorably cited *Public Warehousing Co. K.S.C. in Distributed Sols., Inc. v. United States, 539 F.3d 1340, 1345 (Fed. Cir. 2008)*.

[36] "Under this canon, courts should interpret statutes with similar language that generally address the same subject matter together, "'as if they were one law.'" *Strategic Hous. Fin. Corp. of Travis Cty. v. United States, 608 F.3d 1317, 1330 (Fed. Cir. 2010)* (quoting *Erlenbaugh v. United States, 409 U.S. 239, 243, 93 S. Ct. 477, 34 L. Ed. 2d 446 (1972)* (internal quotes omitted)).

[37] *See also Banknote Corp. of Am. v. United States, 365 F.3d 1345, 1352 (Fed. Cir. 2004)*; *Rex Serv. Corp. v. United States, 448 F.3d 1305, 1307 (Fed. Cir. 2006)* (noting that "the term 'interested party' in *section 1491(b)(1)* is construed in accordance with the [CICA], *31 U.S.C. §§ 3551-56*"); *Digital Techs., Inc., 89 Fed. Cl. at 722 n.15* ("The United States Court of Appeals for the Federal Circuit has applied the CICA definition of 'interested party' in bid protests . . . ."); *Wildflower Int'l, Ltd. v. United States, 105 Fed. Cl. 362, 377 (2012)* (discussing *41 U.S.C. § 4106(f)*, and CICA's definition of "protest"); *Technatomy Corp., B-405130, 2011 U.S. Comp. Gen. LEXIS 100, 2011 WL 2321836, at *4 (June 14, 2011)* (employing CICA's definition of protest in GAO's analysis of *§ 4106(f)*).

plausible justification for applying CICA's definition of "interested party" to *§ 1491(b)*, while ignoring CICA's definition of "protest" in interpreting a jurisdictional limit on *§ 1491(b)*.

HN20[↑] *Third*, the current FASA task order protest bar itself provides GAO with "exclusive jurisdiction" over a "protest of an order valued in excess of $10,000,000." *41 U.S.C. § 4106(f)(1)(B)* & *(f)(2)*.[38] The term "protest" in the jurisdictional bar must be read as coterminous with what that term means at the GAO. Viewed from the other end of the telescope, the word "protest" cannot be read to mean one thing in the task order protest bar, but something else in the jurisdictional grant to the GAO, as both provisions are contained within *41 U.S.C. § 4106(f)*. *Henson v. Santander Consumer USA Inc., U.S. , 137 S. Ct. 1718, 1723, 198 L. Ed. 2d 177 (2017)* (unanimous decision) (explaining that a court must have a **[**49]** "persuasive reason" to "abandon our usual presumption that 'identical words used in different parts of the same statute' carry 'the same meaning'" (quoting *IBP, Inc. v. Alvarez, 546 U.S. 21, 34, 126 S. Ct. 514, 163 L. Ed. 2d 288 (2005)))*.

With the CICA's definition of "protest" in mind, the Court concludes that the FASA task order protest bar does not preclude Plaintiffs' respective claims that the agency failed to comply with the Rule of Two, particularly to the extent that such an alleged violation may be viewed as distinct **[*99]** from the solicitation cancellation decisions themselves. *HN21*[↑] Although we recognize that CICA's definition of "protest" includes an objection to "[t]he cancellation of . . . a solicitation[,]" *31 U.S.C. § 3551(1)(B)*, and thus such a claim (or cause of action) is plausibly within the ambit of FASA's task order protest bar, (1) the Tucker Act does not even authorize that same, independent action *per se*, as demonstrated *supra* (and as the government itself argues),[39] and (2) the government itself attempts to disengage the Rule of Two issue here from the challenged cancellation decisions.

Again, the government does *not* argue that the FASA task order protest bar generally precludes Plaintiffs' challenges to the cancellation decisions; indeed, the government's FASA protest bar **[**50]** argument is focused entirely upon Plaintiffs' Rule of Two argument standing alone and makes no mention of the cancelled procurements. *See* Def. MJAR at 30-31 (arguing for the "broad reach of FASA" such that "a protest of the failure to conduct a rule of two analysis prior to issuing a task order is not a colorable basis to avoid the statutory bar"); Def. Resp. at 11. The Court is not surprised by the government's approach because the cancellation decisions themselves are far removed from the selection of a replacement acquisition vehicle, and the government no doubt prefers to target something more likely to be considered "in connection with" a task order process. To repeat: the government does *not* argue that Plaintiffs' challenge to the solicitation cancellations are barred *per se* by FASA. Thus, the government's strategy, understandably, is to tie the Rule of Two claims directly to the agency's putative selection of a task order vehicle, and then rely upon the breadth of FASA's "in connection with" language to argue for the application of the FASA protest bar.

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[38] Or $25 million for DOD procurements. *10 U.S.C. § 2304c(e)(1)(B)*.

[39] That is why, pursuant to the fourth prong of *28 U.S.C. § 1491(b)(1)*, Plaintiffs must ground their case here upon an alleged violation of statute or regulation.

If the government's view of the Rule of Two claims is correct, however — *i.e.*, that it is segregable from the challenge to the **[**51]** solicitation cancellations as such — that means that Plaintiffs' "action" alleging a violation of various statutory or regulatory provisions does not fit within any of CICA's "protest" categories. And, thus, this Court properly may consider Plaintiffs' Rule of Two claims, as explained above, only under the fourth prong of *28 U.S.C. § 1491(b)(1)*, just as this Court must for the direct cancellation decision challenge. *HN22*[⬆] Again, the fourth prong of *28 U.S.C. § 1491(b)(1)* constitutes an independent cause of action that is best understood as "cover[ing] even non-traditional disputes arising from the procurement process as long as the violation is 'in connection with a procurement or proposed procurement[.]'" *Validata Chem. Servs. v. Dep't of Energy, 169 F. Supp. 3d 69, 78 (D.D.C. 2016)* (quoting *Pub. Warehousing Co. K.S.C. v. Defense Supply Ctr., 489 F. Supp. 2d 30, 40 (D.D.C. 2007)* (quoting *28 U.S.C. § 1491(b)(1)*)). Again, CICA's definition of protest contains no analog to that prong of *§ 1491(b)(1)*.[40]

The Court can demonstrate this conclusion by viewing the problem from yet another, slightly different, angle. As explained above, the word "protest" cannot mean one thing in the FASA provision precluding this Court's jurisdiction over a particular class of actions, but another thing in conferring exclusive jurisdiction on the GAO for the very same objections (or "protests"). *HN23*[⬆] Accordingly, the FASA statutory provision only precludes **[**52]** this Court from hearing actions over which GAO would itself have exclusive jurisdiction were the task order award (or proposed award) valued in excess of $10 million (or $25 million for DOD procurements). *41 U.S.C. § 4106(f)(2)*; *10 U.S.C. § 2304c(e)(1)(B)*. The GAO does not have jurisdiction over *RAMCOR*-type actions **[*100]** brought pursuant to the final prong of *28 U.S.C. § 1491(b)(1)*,[41] and, thus, to the extent Plaintiffs' respective actions here may be properly considered under that final prong, but not by the GAO under its jurisdictional statute, the FASA task order protest bar cannot apply to preclude them.[42] That Plaintiffs' allegations *are* properly considered under the final

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[40] To the extent Plaintiffs object to the solicitation cancellations, our jurisdiction to consider such a challenge is also covered by the fourth prong of *28 U.S.C. § 1491(b)(1)*, but at least that cause of action fits comfortably within CICA's definition of "protest," although the government does not argue that the FASA bar applies to such an objection here. *31 U.S.C.A. § 3551(1)(B)* (solicitation cancellation). In contrast, a challenge to an agency's selection of a replacement acquisition vehicle as contrary to law, while squarely within *28 U.S.C. § 1491(b)(1)*, is not covered *per se* by CICA's definition of "protest."

[41] *See* *Aerosage, LLC, B-417289, 2019 Comp. Gen. Proc. Dec. ¶ 151 n.10 (Apr. 24, 2019)* ("A protester desiring to seek enforcement of CICA's stay provisions must request relief from a court of competent jurisdiction-currently the U.S. Court of Federal Claims."); *Aerosage, LLC, B-415267.13, 2018 Comp. Gen. Proc. Dec. ¶ 114, 2018 WL 1392945 n.7 (Mar. 19, 2018)* ("our Office has no jurisdiction to consider whether an agency improperly failed to comply with a stay of performance"). A challenge to an agency's override of a CICA automatic stay is not characterized as a "protest." Any interpretation of the word "protest" in the FASA task order protest bar must come to grips with the fact that *RAMCOR*-type actions are not protests.

[42] Again, even though the CICA's definition of "protest" *does* include a challenge to the "cancellation of . . . a solicitation," *31 U.S.C. § 3551(1)(B)*, Plaintiffs here do not challenge the cancellation of a solicitation "in connection with the issuance or proposed issuance of a task . . . order" — which language concerns the merits of a task order award (or proposed award), as explained *infra*. Moreover, *§ 1491(b)(1)* does not even independently identify solicitation cancellations as a separate category of claims, and, thus, any such challenge under the Tucker Act, as amended by ADRA, must rely upon the final prong of *§*

prong of § 1491(b)(1) is a conclusion all but compelled by the Federal Circuit's decision in PDS Consultants, Inc. v. United States, 907 F.3d 1345, 1356 (Fed. Cir. 2018) ("PDS Consultants alleged a statutory violation—namely, that the VA acted in violation of [statute] by awarding contracts without first conducting the Rule of Two analysis. . . . As an 'alleged violation of statute or regulation in connection with a procurement or a proposed procurement,' PDS Consultants' action arises under the Claims Court's jurisdiction."); *see* Glob. Computer Enterprises, Inc. v. United States, 88 Fed. Cl. 350, 445-49 (2009) (rejecting government's contention that if plaintiff "can overcome the jurisdictional bar simply by alleging that a regulation was violated, then **[**53]** that just eviscerates the jurisdictional bar").

In sum, our point is only that, even assuming the Rule of Two issue may be disconnected entirely from the cancellation challenges themselves, as the government suggests, the FASA task order bar would not apply here because it does not necessarily reach "actions" brought pursuant to the fourth prong of 28 U.S.C. § 1491(b)(1). Unisys Corp. v. United States, 90 Fed. Cl. 510, 517 (2009). The Court quotes *Unisys* at length because it is particularly instructive in the context of the instant case:

> This court therefore reviews an agency's compliance with § 3553 "independent of any consideration of the merits of the underlying contract award." Planetspace Inc. v. United States, 86 Fed. Cl. 566, 567 (2009). Although "the Comptroller General of the United States" has "exclusive jurisdiction" over protests of task orders valued in excess of $10 million, *this lawsuit does not concern the task order itself*, but merely whether TSA wrongfully failed to comply with 31 U.S.C. § 3553. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 843, 122 Stat. 3, 236 (codified at 10 U.S.C. § 2304c); *see also* Digital Techs. v. United States, 89 Fed. Cl. 711, 2009 WL 4785451 (Fed. Cl. 2009). This Court thus possesses jurisdiction to review the alleged violation of § 3553.

90 Fed. Cl. at 517 (emphasis added). In terms of the language of § 1491(b)(1), Plaintiffs allege that, in cancelling the solicitations at issue, based primarily **[**54]** upon the agency's intent to use the TMS MAIDIQ, the agency has violated FAR 1.602-2(b), FAR 19.502-2 and FAR 19.502-9 — all of which are regulations "in connection with a procurement or proposed procurement" under the Tucker **[*101]** Act. TTGI Am. Compl. at ¶¶ 36-38; PTP Compl. at ¶¶ 98-111; TTGI MJAR at 20-22; PTP MJAR at 21-28.

In any event, neither the terms or parameters of the TMS MAIDIQ itself nor any specific task order solicitation is at issue. Indeed, at least as of the time of filing of Plaintiffs' respective complaints, there was no pending task order solicitation, let alone a task order award (or proposed award). TTGI Am. Compl. at ¶ 27; PTP Compl. at ¶ 51.[43]

1491(b)(1) in any event. Validata Chem. Servs., 169 F. Supp. 3d at 84 (explaining that "any arguable parallel between CICA and ADRA breaks down, as explained above, where the plaintiff's cause of action falls under the [final] prong of ADRA's 'objecting to' test, which does not require that the plaintiff object to a federal contract solicitation or award" (citing § 1491(b)(1) and RAMCOR, 185 F.3d at 1289)); Alaska Cent. Exp., Inc. v. United States, 50 Fed. Cl. 510, 517 (2001) ("The CICA and the ADRA are, after all, different statutes, with different definitions of bid protest.").

[43] The government, in its response brief, notified this Court that:

2. FASA Only Bars Challenges Related To The "Proposed Issuance Or Issuance" Of A Task Order

Further supporting the Court's conclusion that the FASA bar does not apply to Plaintiffs' Rule of Two **[**55]** claims is the fact that the FASA task order protest bar — again, by its terms — only applies to a "protest . . . in connection with the ***issuance or proposed issuance of a task*** . . . ***order*** . . . ." *41 U.S.C. § 4106(f)(1)* (emphasis added). The latter phrase further limits the scope of the protest bar insofar as it virtually mirrors *only* the second and third prongs of *§ 1491(b)(1)* — *i.e.*, "a proposed award or the award of a contract" — but with FASA replacing the Tucker Act's reference to "award" and "contract" with, respectively, "issuance" and "task order." As demonstrated, *supra*, however, the second and third prongs of *§ 1491(b)(1)*, properly understood, include challenges to the results or merits of a procurement — an award or proposed award of a contract — but do not cover solicitation protests, the latter which is a distinct cause of action under both the Tucker Act, as amended by ADRA, and CICA's definition of "protest."

HN24[⬆] Accordingly, just as a challenge to a solicitation is distinct from the challenge to a proposed award of contract, so too a challenge to the selection (or planned selection) of a particular (task order) contracting vehicle does not equate to the "proposed issuance" of a task order. The fact that the agency here **[**56]** has "proposed" to use a MAIDIQ is *not* the same as the "proposed *issuance*" of a task order.[44] Again, FASA's reference **[*102]** to the

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> [t]he agency recently issued a request for task order proposals in order to be prepared to proceed with the procurement in the event the Court dismisses plaintiffs' protest of that procurement. This precautionary step was taken *subsequent to the filing of the complaints in this action*. However, in accordance with the agency's voluntary stay to October 20, 2020, no awards will be issued.

Def. Resp. at 8 n.2 (emphasis added). Following a status conference with the parties on November 12, 2020, Minute Order (Nov. 12, 2020), the government agreed to delay the task order proposal deadline until November 30, 2020. Because this request for proposals was issued following the initiation of this action, this Court's analysis remains limited to the facts as alleged in Plaintiffs' complaints. *See Walton v. United States, 80 Fed. Cl. 251, 264 (2008)* ("[I]t appears that binding Federal Circuit law has not departed from the established rule that jurisdiction is determined on the basis of the *facts that existed* at the time the complaint was filed." (emphasis added)), *aff'd*, *551 F.3d 1367 (Fed. Cir. 2009)*.

[44] *See supra* n.36. It bears repeating that if a "proposed award" were interpreted to cover the same cause of action as a challenge to a solicitation, the first prong of the *§ 1491(b)(1)* would be rendered meaningless, just as the Federal Circuit in *RAMCOR* explained with respect to the "violation of a statute or regulation in connection with a procurement or a proposed procurement" language. *RAMCOR, 185 F.3d at 1289*; *Jacobs Tech. Inc., 100 Fed. Cl. at 175* (critiquing the "conflat[ion] [of] the separate jurisdiction grounds of solicitation, proposed award or award, on the one hand, and violation of a statute or regulation, on the other"); *Nat'l Air Cargo Grp., Inc. v. United States, 126 Fed. Cl. 281, 288-89 (2016)* (noting that the Court "must address whether the protestor is objecting to a solicitation, proposed award, award, or violation of law 'in connection with a procurement or a proposed procurement'" — all distinct categories). While this Court has often grouped the first two prongs of *§ 1491(b)(1)* into pre- or post-award protest categories, as noted *supra*, the statute clearly distinguishes between an action that is an objection to a solicitation and one that constitutes a challenge to a proposed award of a contract. *Advanced Sys. Tech., Inc. v. United States, 69 Fed. Cl. 474, 482 (2006)* (explaining that "[t]he statute's use of the conjunction 'or' makes it clear that the Court

"proposed issuance" of a task order mirrors *§ 1491(b)(1)*'s use of "proposed award" — the former does not cover an agency's "proposed issuance" of a task order solicitation any more than the latter includes an agency's mere issuance of a standard solicitation.

A close reading of FASA's task order protest bar thus suggests that it is inapplicable even to a claim explicitly challenging an agency's selection of a task order vehicle for a procurement, assuming that is one way to characterize Plaintiffs claims in this case. To be clear, however, Plaintiffs here challenge neither the terms of a solicitation, the issuance of a task order solicitation, nor the award (or proposed award) of a task order. *Validata Chem. Servs., 169 F. Supp. 3d at 78* (explaining that where plaintiff "is not objecting 'to a [government] solicitation,' 'to a proposed award,' or to an actual 'award of a [government] contract,' . . . neither the first nor the second prong of ADRA's 'objecting to' test is implicated"). Instead, Plaintiffs' focus is on the agency's allegedly improper cancellation **[**57]** of two completed procurements.

As explained above, Plaintiffs allege that the agency's decision to cancel those solicitations fails the APA standard of review, at least in part because the agency erred in concluding that it could utilize the TMS MAIDIQ vehicle to procure the work at issue. In turn, whether the agency correctly (or incorrectly) reached *that* latter conclusion depends at least in-part on whether the agency complied with the Rule of Two. But whether this Court addresses the Rule of Two question simply as a subsidiary issue in deciding the propriety of the agency's cancellation decisions or whether we view Plaintiffs' Rule of Two claim as a stand-alone allegation of a regulatory violation, as explained *supra*, the action in either case is not a "*protest* . . . in connection with the *issuance or proposed issuance of a task . . . order*[.]" *41 U.S.C. § 4106(f)(1)* (emphasis added). Again, Plaintiffs' action here properly is considered pursuant to the last prong of *§ 1491(b)(1)* — an alleged "violation of a statute or regulation in connection with a procurement or a proposed procurement." *Acetris Health, LLC v. United States, 949 F.3d 719, 728 (Fed. Cir. 2020)* ("The reference to 'proposed procurements' likewise broadly encompasses all contemplated future procurements by the agency."). **[**58]** Put yet differently, while all "proposed" awards of either contracts or task orders may be subsumed within the "in connection with a procurement" language, not all alleged violations of a statute or regulation "in connection with a procurement or proposed procurement" involve an award or a proposed award.[45] Any contrary interpretation would read a statutory phrase out of existence.

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has jurisdiction over each of the . . . identified types of actions" and citing *RAMCOR, 185 F.3d at 1289*, for the proposition that the "violation of statute or regulation prong" of *28 U.S.C. § 1491(b)(1)* provides a grant of jurisdiction separate and apart from "an objection to 'a proposed award or the award of a contract'"). Indeed, *Advanced Sys. Tech.* specifically referenced "[t]he plain language of the first prong of *1491(b)(1)*" as "provid[ing] that this Court has jurisdiction over 'an action brought by an interested party objecting to a solicitation[.]'" *Id.; see also DMS All—Star Joint Venture v. United States, 90 Fed. Cl. 653, 661 n.10 (2010)* (noting the protestor challenged not the terms of the solicitation but the proposed award to a particular offeror). The Federal Circuit similarly has distinguished between the different categories of *§ 1491(b)(1) protest*-type actions. *Res. Conservation Grp., 597 F.3d at 1245* (referencing "a challenge to an award, proposed award, or solicitation").

[45] Indeed, the phrase "proposed award" in *28 U.S.C. § 1491(b)(1)* appears to be a term of art employed due to this Court's prior, more limited, pre-ADRA jurisdiction over "bid protests" pursuant to *§ 1491(a)*. Prior to ADRA, this Court had jurisdiction to consider implied contract claims exclusively from "disappointed bidders" but could only order injunctive relief in *pre-* award

[*103] The government's interpretive approach would rewrite the FASA task order protest bar as applying "in connection with a task order" generally or "in connection with a task order procurement or proposed procurement." Congress' selection of the phrase "***issuance or proposed issuance***," however, must be given meaning. HN25[↑] In sum, while the phrase "in connection with" must be interpreted broadly per the directions of the Federal Circuit, the Court concludes that the neighboring language in *41 U.S.C. § 4106(f)(1)* — the phrases "protest" and "issuance or proposed issuance of a task . . . order" — serve to limit the reach of the FASA task order protest bar.[46]

3. The Failure To Conduct A "Rule Of Two" Analysis Challenge Is Not "In Connection With" A Task Order

HN26[↑] Finally, while the Federal Circuit often has recognized that the phrase "in connection with" should be interpreted broadly, this Court recognizes that the Supreme Court has cautioned that "a non-hyperliteral reading [of this term] is needed to prevent the statute from assuming near-infinite breadth." *FERC v. Electric Power Supply Ass'n, 577 U.S. 260, 136 S. Ct. 760, 774, 193 L. Ed. 2d 661 (2016)*; *see Maracich, 570 U.S. at 59-60* (citing cases). Although the government relies upon *SRA Int'l, Inc. v. United States, 766 F.3d 1409 (Fed. Cir. 2014)*, Def. Mot. at 30-31, that case is distinguishable in a manner that supports jurisdiction here (even putting aside this Court's

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cases. That meant there was no jurisdiction over solicitation challenges brought prior to the submission of proposals because such a plaintiff could not be a "disappointed bidder" — no implied contract to fairly consider a proposal would yet exist. And, once an award was actually made, a plaintiff might be a "disappointed bidder" but could not obtain injunctive relief. For a "proposed award," however, a plaintiff could file a bid protest claim pursuant to *§ 1491(a)* *and* obtain injunctive relief. The critical point here is that the phrase "proposed award" — whether in *28 U.S.C. § 1491* or in FASA — is not intended to cover some future result of a solicitation that has not been issued or even the future result of an ongoing procurement process, in general. *See, e.g., United States v. John C. Grimberg Co., 702 F.2d 1362, 1367 (Fed. Cir. 1983)* ("Thus *[§ 1491](a)(3)* made an equitable remedy available when a claim over which the court has jurisdiction (implied contract under *(a)(1)*) is filed in the court before a contract has been awarded."); *Central Ark. Maintenance, Inc. v. United States, 68 F.3d 1338, 1341 (Fed. Cir. 1995)* (pre-ADRA *§ 1491(a)* "jurisdictional grant . . . extends to suits brought by *disappointed bidders*, commonly called bid protests, challenging the *proposed award* of contracts based on alleged improprieties in the procurement process" (emphasis added)). "Proposed award" was never understood, pre-ADRA, to encompass pre-solicitation agency decisions or even solicitation challenges for the simple reason that "[v]iolations of law, rule, or regulation in the structuring of a solicitation . . . are breaches of statutory or regulatory obligations, not contractual ones, and this court does not have the authority to redress them either in law or equity through a *disappointed bidder* suit." *Eagle Const. Corp. v. United States, 4 Cl. Ct. 470, 476-77 (1984)* (emphasis added) (explaining that pursuant to pre-ADRA *§ 1491(a)* jurisdiction, "the court's jurisdiction over the implied contract of fair dealing in disappointed bidder cases embraces neither claims challenging terms, conditions, or requirements of solicitations, nor policies and activities which preceded and resulted in the solicitations"). On the other hand, where offerors had submitted bids or proposals, "Congress intended *28 U.S.C. § 1491(a)(3)* to [provide] . . . an *unsuccessful bidder* [with] standing to challenge a *proposed contract award* on the ground that *in awarding the contract* the government violated statutory and procedural requirements." *C.A.C.I., Inc.-Fed. v. United States, 719 F.2d 1567, 1574 (Fed. Cir. 1983)* (emphasis added). In this case, there is no "proposed award" at issue.

[46] *Glob. Computer Enterprises, Inc., 88 Fed. Cl. at 414-15* ("If Congress intended to prohibit protests stemming from any action *related to a task order contract*, then it could have explicitly drafted a statute that barred any protest *in connection with a* ***[**59]*** *task order*. It did not do so. Instead, Congress prohibited bid protests *in connection with* either the *issuance or proposed issuance* of a task order." (emphasis added)).

foregoing analysis of the other parts of the FASA statutory language). In *SRA Int'l*, the protestor appealed this Court's dismissal of a protest, which alleged that the agency improperly had waived a conflict of interest *following the award of a task order.* Id. at 1410. This Court held the waiver was not in connection with the task order because the waiver was issued after the award and was "a matter left to agency discretion." Id. at 1412 (quoting SRA Int'l, Inc. v. United States, 114 Fed. Cl. 247, 255-56 (2014)). The Federal Circuit reversed, holding that neither the temporal disconnect between the task order and the waiver, nor the **[**60]** latter's discretionary nature, adequately separated the protest from the underlying task order. 766 F.3d at 1413. Thus, in *SRA Int'l*, the Federal Circuit concluded that an "OCI waiver was *directly and causally* connected to the issuance of [a task order], despite being executed after issuance." 766 F.3d at 1413 (emphasis added). Indeed, "[t]he GSA issued the waiver in order to go forward with [the selected awardee]." *Id.* Substitute "solicitation cancellation" for "OCI waiver," and the government's position here — at least on the surface — would seem to be correct.

Critically, however, the Federal Circuit cautioned that while "nothing in FASA's language *automatically exempts* actions that are temporally disconnected from the issuance of a task order[,] . . . *a temporal disconnect may, in some circumstances, help to support the non-application of the FASA bar* . . . ." 766 F.3d at 1413 (emphases added). In this case, as previously explained, Plaintiffs' respective complaints may be read as contending that the agency's failure to follow the Rule of Two (1) renders the solicitation cancellations arbitrary and capricious, and/or (2) **[*104]** independently violated FAR 19.502-2(b). Either way, for the reasons explained further below, the Rule of Two issue in the **[**61]** instant case is both conceptually and sufficiently "temporally disconnected from the issuance of a task order" to avoid it. *Id.*

Plaintiffs essentially contend that an agency must apply the Rule of Two *before* an agency can even identify the possible universe of procurement vehicles which may be utilized for a particular scope of work. TTGI Am. Compl. at ¶ 36; PTP Compl. at ¶¶ 95, 111; TTGI MJAR at 26; PTP MJAR at 25-27. The Court agrees. Where an agency refuses to perform the Rule of Two analysis or otherwise disregards the results of such an analysis, that does not mean an agency necessarily *will* select an unrestricted vehicle or a task order vehicle. Indeed, the agency still may solicit the work utilizing procurement vehicles that have nothing to do with task orders (*e.g.*, a standalone solicitation contemplating a single awardee but that is not set-aside for small business). In other words, there is no necessary connection between the Rule of Two analysis (or the failure to conduct such an analysis) and the issuance of a task order. Proxtronics Dosimetry, LLC v. United States, 128 Fed. Cl. 656, 680 (2016) ("Necessarily, the decision to set aside an acquisition for a small business must be made prior to issuing the solicitation." (citing FAR 19.508)). In contrast, in *SRA Int'l*, the agency simply **[**62]** could not proceed with a task order that the agency *already had awarded*, absent the challenged conflict waiver. The conflict waiver thus was necessary to the actual task order award (and the plaintiff had challenged a specific task order award).

To further illustrate the distinction, consider a hypothetical case in which an agency purports to have applied the Rule of Two. As a result of the agency's analysis, the agency determines that a set-aside is not required. Instead of immediately proceeding with a particular procurement strategy, however, the agency issues a request for information ("RFI"), in which the agency indicates that it is considering various unrestricted vehicles with no set-aside component: *e.g.*, a stand-alone, new solicitation with a single-awardee; an existing MAIDIQ; or the issuance

of a new MAIDIQ. At that stage, following the issuance of the RFI, may a dissatisfied small business file suit in the Court of Federal Claims, pursuant to *28 U.S.C. §1491(b)(1)*, challenging the agency's decision not to set-aside the procurement? In the Court's view, the answer to that question is a straightforward "yes" based upon a simple syllogism: (1) the RFI is part of the procurement process; (2) the **[**63]** RFI includes the agency's decision not to set-aside the procurement; (3) a small business protestor's allegation that the agency's decision violates the Rule of Two constitutes an alleged "violation of statute or regulation in connection with a procurement or a proposed procurement"; and, thus, (4) the allegation is unquestionably within this Court's jurisdiction. *Distributed Sols., Inc., 539 F.3d at 1346* ("The statute explicitly contemplates the ability to protest these kinds of pre-procurement decisions by vesting jurisdiction in the Court of Federal Claims over 'proposed procurements.' A proposed procurement, like a procurement, begins with the process for determining a need for property or services.").

In the hypothetical case outlined above, the FASA task order protest bar clearly would *not* apply because, *at a minimum*,[47] the agency has not yet selected any contract vehicle (task order or otherwise). Moreover, if the small business were to file suit in this Court, the government could not subsequently divest this Court of jurisdiction merely by selecting an IDIQ vehicle. *See GAF Bldg. Materials Corp. v. Elk Corp., 90 F.3d 479, 483 (Fed. Cir. 1996)* ("[J]urisdiction must be determined on the facts existing at the time the complaint under consideration was filed.") Nor, for that matter, should jurisdiction **[**64]** depend upon whether the small business beats the agency to the punch, and files suit to challenge the set-aside analysis, **[*105]** or whether the agency quickly makes a decision to utilize a task order vehicle prior to the filing of a suit. In both cases, the agency's Rule of Two decision simply has no necessary connection to the selection of the particular vehicle.[48] *See McAfee, Inc. v. United States, 111 Fed. Cl. 696, 709-10 (2013)* (holding that "McAfee's complaint falls under the [final] prong of *Section 1491(b)(1)*, concerning

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[47] Pursuant to the Court's interpretation of the FASA task order protest bar, *supra*, an objection to an agency's selection of a task order vehicle is not, in any event, a "protest . . . in connection with the issuance or proposed issuance of a task . . . order[.]" *41 U.S.C. § 4106(f)(1)*. The Court's point here is that, even if our statutory interpretation were rejected, *SRA Int'l* is consistent with "the non-application of the FASA bar" in this case. *766 F.3d at 1413*.

[48] Again, this assumes, *arguendo*, that the challenge to an agency's selection of a task order vehicle itself would be within the ambit of the FASA task order protest bar, a proposition with which the Court disagrees. In any event, the Court's view of the correct result in the hypothetical fits well with the Court's interpretation of the FASA statutory language. In particular, a challenge to an agency's failure to comply with the Rule of Two is not a "protest" as that term is defined in CICA. In this case, for example, it is a challenge neither to a particular solicitation nor to the merits of an award or to a proposed award of a task order. Similarly, in the Court's hypothetical case involving the RFI, the small business would be challenging the agency's decision not to set-aside the procurement, but would *not* be objecting to the agency's decision to proceed with any particular procurement strategy because none has been selected. The actual Plaintiffs in this case are similarly situated to the hypothetical small business; their complaint may be read as challenging the agency's solicitation cancellation decision and its refusal to set aside the work at issue, but not the decision to use a task order contact *per se*. In contrast, in *SRA Int'l*, the protestor had filed a post-award bid protest, challenging the issuance of a task order on the grounds of a conflict (and an improper waiver) — that clearly *is* a "protest" that is "directly and causally connected" to the issuance of a task order in way that a challenge to a Rule of Two violation is not.

an alleged 'violation of statute or regulation in connection with a procurement or a proposed procurement'" and that "the protested decision is not directly connected to the award of any particular delivery order"); *BayFirst Sols., LLC v. United States, 104 Fed. Cl. 493, 499, 507-08 (2012)* (holding that the FASA jurisdictional bar did not apply to the agency's decision to cancel a solicitation, and that although the cancellation of the solicitation and issuance of the task order were temporally connected, the cancellation of the solicitation can be viewed as "a discrete procurement decision and thus could have been the subject of a separate protest"); *cf. MORI Assocs., Inc. v. United States, 113 Fed. Cl. 33, 38 (2013)* (citing the Court's earlier decision in *MORI Assocs., Inc. v. United States, 102 Fed. Cl. 503, 533 (2011)*, for the proposition that "[d]iscrete, preliminary matters that may not necessarily lead to the proposed issuance of a task **[**65]** order may still be protested" such as "a 'Rule of Two' determination under *48 C.F.R. § 19.502-2(b)*" which is "required prior to the selection of a particular procurement vehicle, since whether the work must be set aside for small business must be known before an agency can select the means of fulfilling its needs").[49]

Finally, at least one GAO decision supports the Court's view of the jurisdictional question and the FASA task order protest bar. In **[*106]** *LBM, Inc.*, the protestor challenged the Army's decision to acquire certain services under the Logistical Joint Administrative Management Support Services ("LOGJAMSS") contracts, when those services previously had been provided exclusively by small businesses. *B-290682, 2002 Comp. Gen. Proc. Dec. ¶ 157, 2002 WL 31086989, *1*. After the Army decided to transfer the services at issue to the LOGJAMSS contracts, the agency solicited proposals from LOGJAMSS contractors, but "did not coordinate with, or notify, the SBA of its intent to withdraw . . . services from exclusive small business competition and to transfer these services to LOGJAMSS contracts." *Id. at *3*. The GAO sustained the protest. *Id. at *8*. In so doing, the GAO rejected the **[**66]** Army's

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[49] *But cf. Insap Servs., Inc. v. United States, 145 Fed. Cl. 653, 654 (2019)*. In that case, Judge Wheeler rejected plaintiff's argument "that this Court has jurisdiction to hear its protest because it is challenging the conditions antecedent to the solicitation, not the solicitation itself" and because "the decision to bundle [certain] services under a single solicitation is not connected to the solicitation, as it occurs 'prior to' and is not 'mutually dependent on' the issuance of the task order." *Id. Insap* is distinguishable insofar as it involved a challenge to a bundling decision where a "Request for Task Order Proposals" *already* had been issued at the time of the protest. *Id.* In any event, the undersigned admittedly does not share *Insap*'s capacious view of the Federal Circuit's decision in *SRA Int'l*, particularly to the extent *Insap* relied upon "[p]olicy considerations[,]" including the assessment that this Court should not "allow a protest to be heard at this Court after already being heard by GAO" as that "would burden the Government and negate Congress's intent to streamline." *Id. at 655*. Although *Insap* concluded that "[i]t would defeat Congress's purpose if would-be protestors could make an end run around the FASA's plain meaning by claiming that they are challenging the conditions of the solicitation, but not the task order itself[,]" *id.*, this Court disagrees with such an interpretation of the FASA task order protest bar for the reasons explained herein. *See BayFirst Sols., 104 Fed. Cl. at 507-08* ("The cancellation of the Solicitation may be viewed as a discrete procurement decision and one which could have been the subject of a separate protest. This approach is not unlike the one employed by the court in *MORI*, where a preliminary procurement decision, one which should have occurred before any contract vehicle was selected, was held to be subject to challenge and not barred by *§ 4106(f)*, even though the agency eventually issued a task order to fulfill its needs. *102 Fed. Cl. at 533-34*."). And, again, in any event, Plaintiffs in this case do not challenge the conditions of any solicitation.

contention that the FASA task order protest bar divested the GAO of jurisdiction because the protestor challenged the proposed issuance of a task order under the LOGJAMSS contract; the GAO explained as follows:

> LBM is not challenging the proposed issuance of a task order for these services, but is raising the question of whether work that had been previously set aside exclusively for small businesses could be transferred to LOGJAMSS. . . . This is a challenge to the terms of the underlying LOGJAMSS solicitation and is within our bid protest jurisdiction.

*Id. at *3*.[50] The GAO further held that the FASA "was not intended to, and does not, preclude protests that timely challenge the transfer and inclusion of work in ID/IQ contracts without complying with applicable laws or regulations," *id.*, and explained that Small Business Act requirements "were applicable to acquisitions prior to the enactment of [the] FASA, and nothing in that statute authorizes the transfer of acquisitions to ID/IQ contracts in violation of those laws and regulations." *Id. at *4*. The GAO indicated that the "Rule of Two" applied "to 'any acquisition over $100,000,'" *Id. at *7* (quoting *48 C.F.R. § 19.502-2(b)*), and therefore determined that the Army was required **[**67]** to comply with *FAR § 19.502-2(b)* and conduct the appropriate "Rule of Two" analysis. *Id.* ("Whatever the outcome of the *FAR § 19.502-2(b)* analysis, ... the agency's intent to use a task order under LOGJAMSS as the contract vehicle did not eliminate the legal requirement that the agency undertake that analysis.").

Accordingly, in *LBM, Inc.*, the GAO declined to apply the FASA task order protest bar even where the protestor directly challenged the agency's selection of a task order vehicle and *after* the agency had issued a task order solicitation under that vehicle — the latter which, the Court again notes, had not occurred in this case at the time Plaintiffs filed their respective complaints. Apparently, then, the GAO's view of the FASA task order protest bar is consistent with this Court's reasoning, *supra*, that even an objection to a solicitation — a "protest" within the GAO's jurisdiction — does *not* equate to a protest "in connection with" the proposed issuance of a task order. *See Glob. Computer Enters., Inc., 88 Fed. Cl. at 448* ("Although the protest in *LBM, Inc.* concerned the underlying contracts . . ., the court nevertheless finds it instructive" because the protestor "did not challenge the issuance or proposed issuance of a task order under the existing **[**68]** contract.").

* * * *

In sum, this Court holds that the FASA task order protest bar is not an obstacle to considering Plaintiffs' challenge to the cancellation of a solicitation, even where this Court will have to reach the merits of their Rule of Two claims — whether because the rationality of the agency's cancellation depends upon the availability of the preferred MAIDIQ vehicle, or because the alleged failure to conduct a Rule of Two analysis constitutes an independent basis for our jurisdiction pursuant to the last prong of *§ 1491(b)(1)*.

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[50] To be clear, although this Court agrees with the GAO's view of the scope of task order bar as applied (or, more accurately, not applied) in *LBM*, the Court does *not* concur with the GAO's view that a challenge to the agency's selection of an IDIQ task order contract vehicle constitutes a solicitation protest.

III. Standards of Review

A. Motion For Judgment On The Administrative Record

HN27[] Judgment on the Administrative Record, pursuant to *RCFC 52.1*, "is properly **[*107]** understood as intending to provide for an expedited trial on the record." *Bannum, Inc. v. United States, 404 F.3d 1346, 1356 (Fed. Cir. 2005)*. The rule requires the Court "to make factual findings from the record evidence as if it were conducting a trial on the record." *Id. at 1354*. The Court asks whether, given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record. *See id. at 1356-57*.

B. Challenge To Cancellation Decision

HN28[] Generally, in an action brought pursuant to *§ 1491(b)* of the Tucker Act, the Court reviews "the agency's actions according to the standards set forth **[**69]** in the *Administrative Procedure Act, 5 U.S.C. § 706*." *See Nat'l Gov't Servs., Inc. v. United States, 923 F.3d 977, 981 (Fed. Cir. 2019)* (citing *28 U.S.C. § 1491(b)(4)*). "In applying this standard of review, we determine whether '(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure.'" *Id.* (quoting *Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1358 (Fed. Cir. 2009)*). "When a challenge is brought on the first ground, the test is 'whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion, and the disappointed bidder bears a heavy burden of showing that the award decision had no rational basis.'" *Banknote Corp. of Am. v. United States, 365 F.3d 1345, 1351 (Fed. Cir. 2004)* (quoting *Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332-33 (Fed. Cir. 2001)*). "When a challenge is brought on the second ground, the disappointed bidder must show a clear and prejudicial violation of applicable statutes or regulations." *Impresa Construzioni, 238 F.3d at 1333*. To establish prejudice, a protestor must further demonstrate "that there was a 'substantial chance' it would have received the contract award but for the . . . errors in the bid process." *Bannum, Inc., 404 F.3d at 1357* (quoting *Infro. Tech. & Applications Corp. v. United States, 316 F.3d 1312, 1319 (Fed. Cir. 2003)*; *see Kiewit Infrastructure West Co. v. United States, 147 Fed. Cl. 700, 707 (2020)* (requiring a showing of prejudice in challenge to cancellation decision).

In some cases, a statute or regulation may provide a substantive yardstick against which an agency's exercise of discretion may be measured or impose a related procedural requirement. For **[**70]** example, as noted above, in the context of a sealed bid procurement, *FAR 14.404-1* ("Cancellation of invitations after opening") provides that "after bids have been opened, *award must be made* to that responsible bidder who submitted the lowest responsive bid, *unless there is a compelling reason* to reject all bids and cancel the invitation." *FAR 14.404-1(a)(1)* (emphasis added). The FAR further defines what constitutes a "compelling reason" in *FAR 14.404-1(c)* and imposes a procedural requirement that "the agency head determine[] in writing" that such a reason exists. *See, e.g., Veterans Contracting Grp., 920 F.3d at 806-07* (framing the issue as "whether the contracting officer's decision to cancel the . . . solicitation lacked any rational basis," citing *Parcel 49C Ltd. P'ship, 31 F.3d 1153-54*, for the proposition that "the

government cannot cancel a solicitation solely to satisfy an agency's whim, we held that the cancellation was arbitrary and capricious[,]" and holding that the contracting officer "had a compelling reason to request cancellation"); *Nat'l Forge Co. v. United States, 779 F.2d 665, 668 (Fed. Cir. 1985)* (explaining, in a pre-ADRA case, that "[t]he Claims Court correctly restricted its legal review to whether the contracting officer's interpretation of, and later decision to cancel, the solicitation was unreasonable or an abuse of discretion under the **[**71]** requirements for cancellation set forth in *48 C.F.R. § 14.404-1(c)*").

Here, the 13F and JFOC Solicitations were issued as FAR Part 8, FSS procurements, which, as the government correctly notes, Def. Supp. Br. at 1-5, do not contain any provisions providing substantive considerations for, or constraints on, cancellation decisions, similar to those contained in *FAR 14.404-1* regarding sealed bidding.

While the government in its initial briefs conceded that the agency's cancellation decision nevertheless should be reviewed pursuant to the standard APA **[*108]** rational basis test, Def. MJAR at 15-17, 25; Def. Resp. at 1, 5, the government takes the position in its supplemental brief that the agency action should only be reviewed for "bad faith" because the procurements were solicited pursuant to FAR Part 8, which does not contain any substantive yardstick for limiting an agency decision to cancel a procurement. Def. Supp. Br. at 9-10. *HN29*[] While a finding of bad faith may be sufficient, it is not necessary for the Court to determine that an agency decision is arbitrary and capricious. *Croman Corp. v. United States, 724 F.3d 1357, 1365 (Fed. Cir. 2013)* (holding that "Croman has failed to show that the partial cancellation of the 2011 Solicitation was in bad faith *or lacking in rational basis*" (emphasis **[**72]** added)); *see also Prineville Sawmill Co., 859 F.2d at 911*. In this case, even though FAR Part 8 does not specify substantive cancellation considerations, the Tucker Act, as amended by ADRA, "explicitly imports the APA standard of review into the Court of Federal Claims' review of agency [procurement-related] decisions." *RAMCOR, 185 F.3d at 1290*; *cf. Strategic Tech. Inst., Inc., B-408005.2, 2013 Comp. Gen. Proc. Dec. ¶ 229, 2013 WL 5754966, *3 (Oct. 21, 2013)* ("Under FAR subpart 8.4 procedures, an agency need only advance a reasonable basis to cancel a solicitation.").[51] Moreover, as explained above, *see supra* Section II, *FAR 1.602-2(b)* permits this Court to conduct an APA review, while *10 U.S.C. § 2305(b)(2)* supplies a procedural requirement and a substantive yardstick, against which we may evaluate the agency's decisions here.

IV. The Court Grants Plaintiffs' Motions For Judgment On The Administrative Record And Denies The Government's Cross-Motion For Judgment On The Administrative Record

Plaintiffs' motions for judgment on the Administrative Record present two primary arguments: (1) the agency acted in an irrational and unreasonable manner when it cancelled the 13F and JFOC Solicitations due, in part, to the

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[51] TTGI counters that because the cancellation decision arose in the context of a corrective action, the Court should apply a more demanding review to determine whether the corrective action was "'rationally related' to an *alleged procurement defect*." TTGI MJAR at 13-14 (emphasis added) (citing *Dell Fed Sys., L.P. v. United States, 906 F.3d 982, 995 (Fed. Cir. 2018)*). In either event, whether the cancellation decision is reviewed on its own merits or as part of a corrective action, this Court ultimately reviews the agency's decision for "reasonableness."

agency's plan to resolicit the requirements under the TMS MAIDIQ; and (2) the agency violated the "Rule of Two" (*see* **[**73]** FAR 19.502-2(b)) and FAR 19.502-9 when cancelling the solicitations for the purpose of recompeting the requirements under the TMS MAIDIQ. *See* TTGI MJAR at 13-22; PTP MJAR at 21-24. The government, in its cross-motion for judgment on the Administrative Record, contends that (1) the agency decision to cancel the 13F and JFOC Solicitations for the purpose of transferring the procurements to the TMS MAIDIQ was rational, and (2) the "Rule of Two" does not apply to the facts of this case. ECF No. 30 at 17.

For the reasons explained below, the Court agrees with Plaintiffs.

A. The Agency Failed To Provide A Reasonable Explanation For The Cancellation Of The Solicitations

HN30[↑] In determining whether the agency adequately explained the reasoning behind its decision to cancel the 13F and JFOC Solicitations, we turn to the explanation provided by the agency at the time of its decision-making. *See* WHR Group, Inc. v. United States, 115 Fed. Cl. 386, 399 (2014) (noting that the agency decision must be supported by the reasoned basis the agency actually provided). The Court notes that in this case there is no formal cancellation decision or memorandum regarding the 13F and JFOC Solicitations; rather, the only document that proports to show the agency's rationale behind its decision to cancel those solicitations is CO Abraham's **[**74]** August 10 MFR. ECF No. 25 at 617-20 (AR 613-16). In that four-page memorandum, CO Abraham describes the GSA MAS solicitations' requirements and history at length, and outlined the features of the TMS MAIDIQ that the agency could use as a replacement. *Id.* In discussing the previous solicitations, the memo explained:

> **[*109]** After extensive use of the GSA OASIS MAIDIQ and GSA Multiple Award Schedule, *it was determined the contract vehicles did not meet FCoE mission needs as world events unfolded*. Events included emerging worldwide requirements due to short notice missions, [Training Resource Arbitration Panels] requirements, and lack of capability to provide the subject matter expertise. . . . As conveyed above, GSA OASIS MAIDIQs and Multiple Award Schedules did not provide the support required by FCoE to support emerging and known requirements."

Id. at 617-18 (AR 613-14) (emphasis added). But, concluding that the prior MAIDIQ and GSA MAS vehicles were not sufficient for the entire breadth of work contemplated by the new TMS MAIDIQ is not the same thing as concluding that the latter vehicle is somehow superior to the GSA MAS vehicles *for the purposes of the statements of work at issue*. In that regard, following additional **[**75]** historical details about the awarding of the GSA MAS, the August 10 MFR concluded with what is the only excerpt of any agency memoranda in the Administrative Record that reasonably might be characterized as representing the agency's rationale for planning to cancel the 13F and JFOC Solicitations:

> Based on the above information, I believe the Government's best interest ***can be met*** by competing the JFO, 13F and KMS requirements under the MICC-Fort Eustis recently awarded TMS MAIDIQ. Both time and money can be saved by the Government in pursuit of this avenue. Time and money are expended on soliciting and awarding interim short term contract actions to support on-going requirements. Contract periods can be

> adjusted to support a Base and Four Option periods on most requirements thus saving manpower and costs tied to phase-in and certification of new contractor employees. Longer periods of performance also support the Government's ability to successfully recruit and retain qualified personnel on existing requirements, thereby ensuring continuity of the training mission.

Id. at 620 (AR 616) (emphasis added).

In sum, the agency justified the cancellation on the basis of the assertion that by transitioning the procurements **[**76]** at issue to the TMS MAIDIQ, the agency would get a more flexible and longer term of performance while saving time and money. This explanation, however, without more information — and in the absence of any supporting citations in the underlying record — does not satisfy the agency's burden. *HN31*[] Although the Court is mindful that the APA rational basis standard of review is "highly deferential" and "the court should not substitute its judgment for that of the agency," *CW Government Travel, Inc. v. United States, 110 Fed. Cl. 462, 479 (2013)*, that "does not mean that this [Court's] review is 'toothless.'" *Orchard Hill Bldg. Co. v. United States Army Corps of Engineers, 893 F.3d 1017, 1024 (7th Cir. 2018)* (quoting *Pioneer Trail Wind Farm, LLC v. FERC, 798 F.3d 603, 608 (7th Cir. 2015))*. More specifically, courts are authorized to set aside agency action where the record fails to articulate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983))*; *see Starry Assocs., Inc. v. United States, 127 Fed. Cl. 539, 548-49 (2016)* ("Where the agency fails to undertake a review or fails to document such review, we must conclude that it acted irrationally.").

Here, the August 10 MFR is bereft of any specific context or factual details that would support its generalized assertions and naked conclusions about the GSA MAS solicitations not meeting agency needs or how the agency would be better served by transferring the solicitations from the GSA MAS to the TMS MAIDIQ. *See, e.g., Patterson v. Comm'r of Soc. Sec. Admin., 846 F.3d 656, 663 (4th Cir. 2017)* ("[T]he dispute here **[**77]** arises from a problem that has become all too common among administrative decisions challenged in court — a problem decision makers could avoid by following the admonition they have no doubt heard since their grade-school math class: Show your work."); *Highway J Citizens Grp., U.A. v. Dep't of Trans., 2010 U.S. Dist. LEXIS 27297, 2010 WL 1170572, *2 (E.D. Wis. Mar. 23, 2010)* ("Defendants cannot simply list cursory comments or other information and then **[*110]** assert a conclusion; rather, they must demonstrate the path of their reasoning from whatever data they rely on to their conclusion . . . .").

Take, for example, the August 10 MFR's first assertion as to the inefficiency of the GSA MAS to meet the agency's needs "as world events unfolded." ECF No. 25 at 617 (AR 613). While this conceivably could be a legitimate concern with the GSA MAS solicitations justifying cancellation,[52] without factual support for this contention, this Court cannot evaluate whether there is a rational basis for the assertion. *See Kirwa v. Dep't of Defense, 285 F. Supp. 3d 257, 270 (D.D.C. 2018)* ("APA review may be limited, but it involves more than a court rubberstamping

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[52] *See, e.g., Tien Walker, B-414623.2, 2017 Comp. Gen. Proc. Dec. ¶ 218, 2017 WL 2954445, *2 (July 10, 2017)* ("A reasonable basis to cancel exists when, for example, an agency concludes that a solicitation does not accurately reflect its needs.")

action based on bare declarations from the agency amounting to "trust us, we had good . . . reasons for what we did."). Again, even if the GSA MAS *generally* is insufficient to meet the agency's needs in some long-term, strategic sense **[**78]** — as compared to the breadth of the new TMS MAIDIQ — that says nothing about the suitability of the GSA MAS to meet the agency's current needs with respect to the 13F and JFOC procurements at issue.

Moreover, consider the August 10 MFR's naked assertion that "time and money can be saved by the Government in pursuit of this avenue." ECF No. 25 at 620 (AR 616). If the Court were to accept this rationale at face value without asking for supporting details, the government could always include this attractive catch-all at the end of its decision document to justify almost any solicitation cancellation. *HN32*[↑] Meaningful judicial review requires more than just accepting such a bald assertion. *See* *Bagdonas v. Dep't of Treasury, 93 F.3d 422, 426 (7th Cir. 1996)* ("The statement of reason need not include detailed findings of fact but must inform the court and the petitioner of the grounds of decision and the essential *facts* upon which the administrative decision was based." (emphasis added)). In this case, the agency does not explain how the TMS MAIDIQ will save the agency "time and money" in comparison with finalizing procurements that were all but completed, nor is there any support in the record for that conclusion beyond the statement **[**79]** itself.

The government, in its cross-motion for judgment on the Administrative Record, argues that the "supporting materials to the August 10 memorandum documented multiple benefits that the TMS MAIDIQ was designed to provide" and "the fact that the current acquisition strategy did not provide those benefits." Def. MJAR at 12, 22. But those putative "benefits" reflect the long-term strategic advantages of the TMS MAIDIQ overall; the government cannot simply point to its general justification for that MAIDIQ, without more, to support the proposition that it will better meet the agency's needs with respect to the precise statements of work at issue. Moreover, although the agency asserts that the TMS MAIDIQ will provide a longer period of performance than the present "short term contract actions," ECF No. 25 at 620 (AR 616), nowhere does the agency address the possibility of extending the duration of those contracts beyond the originally planned 12-month period of performance or why that would be more difficult than utilizing the TMS MAIDIQ.

The government also points the Court to the following examples of the agency's "key finding[s]":

- The agency "necessitates the use of an IDIQ to meet **[**80]** contract execution in a timely manner due to MICC staffing shortfalls."
- "Using other contract mechanism as opposed to a FCoE IDIQ will add a minimum of 120 days to the procurement timeline, potentially eliminate the ability for an expedited contract action for unforecasted organizational needs, and put existing requirements at increased risk for gaps on contracted services."
- "Costs for the use of non-IDIQ contract mechanism will increase significantly."

- "FCoE's ability to support short term, emerging training requirements to **[*111]** meet Army demands will be greatly reduced."
- "FCoE's ability to rapidly provide training, experimentation, analytic, and simulation support will be reduced. Fires-led experiments and the TRADOC Campaign of Learning will be interrupted and/or degraded."

Id. at 12-13, 22-23 (quoting ECF No. 25 at 675 (AR 671)).

These generalized conclusions, however, do little to provide actual *factual* support for the agency's cancellation decisions at issue here. Rather than engaging in a factual contrast between the cancelled procurements at issue and the TMS MAIDIQ, the supporting material's conclusory assertions fail to provide a meaningful factual roadmap for the agency's decision.[53] For example, **[**81]** although the Court has no basis to question the agency's conclusion that it generally requires a MAIDIQ due to staffing shortfalls, there is zero record evidence indicating that any such shortfall would impact the agency's proceeding with the 13F and JFOC procurements or that moving such work to the TMS MAIDIQ would improve any putative staffing difficulties for the work at issue. The timeline comparison also is not specific to the already-completed (albeit protested) 13F and JFOC procurements; nowhere in the Administrative Record does it appear that the agency compared the timeline of continuing with those procurements as opposed to starting from scratch under the MAIDIQ. The agency's concern about increased costs for a non-MAIDIQ procurement seems plausible, in general, but CO Abraham never compares the cost of proceeding with the cancelled procurements, as opposed to starting a new task order procurement under the preferred TMS MAIDIQ. And the final two conclusions above regarding the ability of the FCoE to support Army needs has nothing whatsoever to do with the 13F and JFOC procurements. To be clear, CO Abraham does *not* conclude in any way that the proceeding with those procurements **[**82]** would jeopardize the FCoE's mission or abilities. Rather, the point is that the materials upon which she relies merely demonstrates the agency's general interest in utilizing the TMS MAIDIQ.

Although there is no universal test for what constitutes an agency's failure to provide a sufficient justification for its actions and no one factor is dispositive, *see* Sierra Nevada v. United States, 107 Fed Cl. 735, 751 (2012), a cursory review of relevant caselaw from this Court is illustrative. *Compare* FMS Investment Corp. v. United States, 139 Fed. Cl. 221, 223-25 (2018) (finding that the Department of Education acted unreasonably when it cancelled solicitation for student loan debt collection services because, in part, the cancellation notice relied on a brief Administrative Record and failed to contain detailed information to support important assertions made in that notice), and Applied

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[53] The government also asserts that "[a]n additional benefit of the TMS MAIDIQ is that the issues that continued to snag the GSA MAS solicitations and send them into bid protests are eliminated as an issue. . . . This ensured that the TMS MAIDIQ was not subject to a protest and automatic stay at GAO . . . *and it would also provide some comfort that a protest direct to this Court was not likely* . . . ." Def. MJAR at 24 (emphasis added, internal citations omitted). Rather than "provid[ing] some comfort," this Court is quite troubled by the government's assertion that the agency's decision-making was influenced by a desire to avoid bid protest litigation. *See* ECF No. 37 at 22-24 ("Hearing Transcript") (raising this concern with the government); *see also* California Indus. Facilities Resources, Inc. v. United States, 100 Fed. Cl. 404, 412 (2011) (holding that government conduct taken to "avoid possible bid protests was arbitrary and capricious"). Notwithstanding the government's troubling assertion, it is a "foundational principle of administrative law" that this Court's role in this context is limited to reviewing "the grounds that the agency invoked when it took the action." Oracle America, Inc. v. United States, 975 F.3d 1279, 1290 (Fed. Cir. 2020) (quoting Michigan v. EPA, 576 U.S. 743, 758, 135 S. Ct. 2699, 192 L. Ed. 2d 674 (2015)). Here, the agency in its August 10 MFR does not mention this rationale. Rather, the first mention of this rationale is in the government's brief in this case. Def. MJAR at 24. Accordingly, this rationale does not play a role in this Court's determination that the Army acted unreasonably.

Business Mgmt. Solutions v. United States, 117 Fed Cl. 589, 605-06 (2014) (holding, in part, that GSA's conclusory assertions about "budgetary concerns" and "need to reduce personnel" failed to provide a rational basis for cancellation decision), *with* *Inverness Technologies, Inc. v. United* ***[*112]*** *States, 141 Fed. Cl. 243, 248, 251-53 (2019)* (emphasizing that Department of Labor's cancellation of solicitation for veterans job transition program services was reasonable because the agency's memorandum was **[**83]** "comprehensive, well-considered and logical" and "outlined, in chart form, key differences between the solicitation and the new requirements"). Some decisions from the GAO also have found that an agency acts unreasonably when it fails to provide sufficient documentation of its decision-making. *See, e.g.,* *Walker Development & Trading Grp., Inc., B-413924, 2017 Comp. Gen. Proc. Dec. ¶ 21, 2017 WL 134346, *4-*5 (Jan. 12, 2017)* ("We find that the agency failed to produce agency report that coherently addressed the agency's rationale for the cancellation of the solicitation."); *Pro-Fab, Inc., B-243607, 91-2 Comp. Gen. Proc. Dec. ¶ 128, 1991 WL 162538, *3 (Aug. 5, 1991)* ("The agency's speculation that increased competition or cost savings will result from [the cancellation and] solicitation of the identical requirements is not supported by the record[.]").

In sum, this Court concludes that although it is not irrational *per se* for an agency to prefer one contractual vehicle over another or even for the TMS MAIDIQ to be more suitable for the Army's needs in this case, the government here did not provide a sufficiently documented rationale or meaningful analysis for cancelling the original 13F and JFOC Solicitations for the purpose of transitioning the work to the TMS MAIDIQ.

B. The Agency's Cancellation Decision Violates The [**84] Law

Plaintiffs argue that the TMS MAIDIQ cannot be leveraged for the work at issue because doing so would violate the Rule of Two. As explained *supra*, see Section II.B., whether we view Plaintiffs' argument as merely addressing the rationality of the cancellation decision or whether we view the agency's cancellation as representing an independent decision with respect to its putative set-aside obligations (as the government appears to do), the result is the same: the central rationale for the agency's cancellation of the solicitations at issue depends upon whether the agency may leverage the TMS MAIDIQ to meet the agency's needs. In either case, the Court agrees with Plaintiffs that the agency's failure to conduct a Rule of Two analysis vitiates the cancellation decision.

1. The Agency Improperly Failed To Comply With The Rule Of Two, Which Applies To The Work At Issue

HN33[↑] The Rule of Two — as the Court already has explained — is straightforward, and provides that "[t]he contracting officer ***shall*** set aside ***any acquisition*** over the simplified acquisition threshold for small business participation when there is a reasonable expectation that — (1) Offers will be obtained from ***at least two responsible [**85] small business concerns***; and (2) Award will be made at fair market prices." *FAR 19.502-2(b)* ("Total small business set-asides") (emphasis added). The government's decision to procure the services at issue is itself part of an acquisition[54] — the cancelled solicitations constitute part of that acquisition — and the agency's

[54] ***FAR 2.101*** ("Acquisition begins at the point when agency needs are established").

continued decision to procure those services is part of an acquisition (whether viewed as a continuation of the same acquisition, under a newly proposed strategy, or whether viewed as an entirely new acquisition).[55] Nor does **[*113]** the government dispute that, in light of the acquisition history thus far, there are at least two responsible business concerns capable of performing the work at fair market prices,[56] or that, in general, the Rule of Two is mandatory. *Mgmt. & Training Corp. v. United States, 115 Fed. Cl. 26, 44 n.13 (2014)* ("this court has consistently held that the Rule of Two is mandatory" (citing cases)); *Analytical Graphics, Inc. v. United States, 135 Fed. Cl. 378, 411 (2017)*.[57]

Notably, in *Analytical Graphics*, the government argued at length that while "[t]here are many competition statutes and regulations, . . . they are structured in such a way to give priority **[**86]** to the application of the small business

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[55] Although the Court hesitates to further belabor the jurisdictional question, the Federal Circuit's decision in *Distributed Solutions* is worth another brief discussion here. In that case, this Court had granted the government's motion to dismiss, but the Federal Circuit reversed, concluding that two agencies had "initiated 'the process for determining a need,'" *Distributed Solutions, 539 F.3d at 1346*, in that an RFI "was a market survey to gather data to determine an acquisition strategy, and the beginning of a procurement process, within the procurement protest jurisdiction granted to the Court of Federal Claims by the Tucker Act." *Distributed Sols., Inc. v. United States, 104 Fed. Cl. 368, 375 (2012)* (on remand). The Federal Circuit reasoned that the plaintiffs in that case, "as potential competitors under a direct procurement," *id.*, with the government — an acquisition strategy the agencies sought to avoid — were objecting to "alleged violation[s] of statute[s] or regulation[s] *in connection with a procurement or a proposed procurement*." *28 U.S.C. § 1491(b)(1)* (emphasis added). The Federal Circuit previously had concluded that the phrase "'in connection with a procurement or a proposed procurement'" is "'very sweeping in scope.'" *539 F.3d at 1345* (quoting *RAMCOR, 185 F.3d at 1289*). Because a "procurement includes all stages of the process of acquiring property or services, *beginning with the process of determining a need* for property or services and ending with contract completion and closeout," *id.* (emphasis in original) (internal quotation marks omitted), the Federal Circuit concluded that "plaintiffs' grievances [regarding the RFI and planned acquisition strategy] fell in that continuum." *104 Fed. Cl. at 375*; *see 41 U.S.C. § 111* (defining "procurement"). Accordingly, "[w]hile the government ultimately decided not to procure software itself from the vendors, but rather to add that work to [an] existing contract ..., the statute does not require an actual procurement." *539 F.3d at 1346*. Instead, "[t]he statute explicitly contemplates the ability to protest these kinds of pre-procurement decisions by vesting jurisdiction in the Court of Federal Claims over 'proposed procurements.'" *Id.* Summarized, "[p]laintiffs possessed jurisdictional standing because they: (1) were prospective bidders; (2) had a direct and significant economic interest in the proposed direct procurement that was eliminated; and (3) alleged a number of statutory and regulatory violations in the decision to forego a direct procurement." *104 Fed. Cl. at 375*. Plaintiffs in this case are similarly situated to those in *Distributed Solutions*, and the central allegations here are similar to those at issue in that case, as well.

[56] PTP Resp. at 9 ("The Agency does not dispute that multiple small businesses (SDVOSBs) stand ready and willing to submit offers to perform the 13F and JFOC requirements at fair market prices.").

[57] In *Analytical Graphics, 135 Fed. Cl. at 411*, the Court quoted *Proxtronics Dosimetry, LLC v. United States, 128 Fed. Cl. 656, 680 (2016)* (quoting *48 C.F.R. § 19.501(c)*): "As noted by another Judge of the United States Court of Federal Claims, '[C]ontracting officers are required to 'review acquisitions to determine if they can be set aside for small business,' and must 'perform market research' before concluding that an acquisition should not be set aside for a small business.'" *See FAR 19.203(e)* ("Small business set-asides have priority over acquisitions using full and open competition.").

set-aside[,]" and thus "[o]ther competition regulations may be applied to the subsequent competition between small businesses." Defendant's Cross-Motion for Judgment on the Administrative Record, 2017 WL 2722839 (March 7, 2017) (*filed in* Case No. 116CV01453, *Analytical Graphics, Inc. v. United States, 135 Fed. Cl. 378 (2017)*). Indeed, the government in that case argued that "[t]he expedited procedures associated with a Rule of Two determination further confirm the intention to make the set-aside determination at the very start of procurement decision-making." *Id.* (explaining that "the mandatory term 'shall' . . . requires the Government to set-aside acquisitions when the Rule of Two is satisfied" and noting that Supreme Court's decision in *Kingdomware Technologies, 136 S. Ct. at 1976-77* (interpreting the term "shall" in the context of a different small business preference)).[58]

This Court agrees with the government's position in *Analytical Graphics*, and the government does not really make an effort to contend otherwise here. Rather the government argues only that "the 2010 statutory and regulatory changes . . . are fatal to [Plaintiffs'] attempt to challenge the ability to issue task orders under the TMS MAIDIQ."[59] **[*114]** Def. MJAR at 26. According to the government, pursuant to those changes "as implemented in the FAR and the Small Business Act, contracting **[**87]** officers have the discretion to make use of a multi-award contract without first conducting a rule of two analysis to determine whether the task order should be set aside for small business." *Id.* at 28; *see id.* at 26-30 (relying upon *15 U.S.C. § 644(r)*, *FAR 19.502-4*, and *FAR 16.505(b)(2)(i)(F)*).

The Court rejects the government's interpretation of the provisions upon which it relies. First, as PTP correctly notes, "[t]he Rule of Two unambiguously applies to 'any' 'acquisition,' *FAR 19.502-2*, without any loophole for MAIDIQ task orders . . . ." PTP Resp. at 9. Second, the government misreads the statutory and FAR provisions.

We begin, once again, with the statutory language. ***HN34***[↑] *Section 644(r) of Title 15* of the United States Code mandates the issuance of regulations to provide agencies "at their discretion" to take several actions. The government focuses on the word "discretion," but then conspicuously only summarizes the remaining statutory language. Def. MJAR at 26-27 (ECF No. 30 at 30-31). The actual statutory words, however, demonstrate the government's summary is wrong; we must be precise about what "discretion" agencies gained. Pursuant to *15 U.S.C. § 644(r)*, agencies may:

> (1) set aside part or parts of a multiple award contract for small business concerns . . . ;

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[58] In *Kingdomware*, the Supreme Court addressed a similar Rule of Two contained in The Veterans Benefits, Health Care, and Information Technology Act of 2006, requiring the Secretary of Veterans Affairs to set annual goals for contracting with service-disabled and other veteran-owned small businesses. ***38 U.S.C. § 8127***. In finalizing the regulations to implement the Act, the Department indicated in a preamble that ***§ 8127***s procedures "do not apply to [Federal Supply Schedule] task or delivery orders." *VA Acquisition Regulation, 74 Fed. Reg. 64624 (Dec. 8, 2009)* (quoted in *Kingdomware, 136 S. Ct. at 1974*). Nevertheless, because of the mandatory nature of the statute, the Court rejected the government's argument that "the mandatory provision does not apply to 'orders' under 'pre-existing FSS contracts.'" *136 S. Ct. at 1978* (quoting the government's brief).

[59] The government also challenges our jurisdiction to decide any Rule of Two issue here, *see* Def. MJAR at 26, but the Court rejected that argument, *supra, see* Section II.B.

> (2) notwithstanding the **[**88]** fair opportunity requirements under *section 2304c(b) of title 10* and *section 4106(c) of title 41*, set aside orders placed against multiple award contracts for small business concerns. . .; and
>
> (3) reserve 1 or more contract awards for small business concerns under full and open multiple award procurements . . . .

15 U.S.C. § 644(r)(1) — (3). This language is straightforward. The first subparagraph means that an agency, when awarding a multiple award contract, may designate particular portions of the scope of work to be performed only by small business. The second paragraph means that even though, normally, every multiple award contract holder must be permitted — pursuant to "fair opportunity requirements" — to compete for every task order, agencies may set aside particular task orders for which only small business multiple award contract holders may compete. And the final paragraph means that, of the multiple awards to be made in a multiple award contract procurement, some contact award slots may be set aside for small business concerns, even though the overall procurement is generally full and open. *HN35*[↑] *FAR 19.502-4* supports our reading given that it covers "Partial set-asides of multiple-award contracts" and specifically provides that "contracting officers **[**89]** may, at their discretion, set aside a portion or portions of a multiple-award contract" under certain circumstances.[60]

Accordingly, that statute only tells an agency *how* a multiple award contract may be structured or *how* a task order competition under a multiple award contract may be competed. In contrast, none of those provisions answers the question, one way or the other, of whether an agency — when deciding the foundational, prerequisite question of what type of procurement vehicle to use for a planned acquisition (*i.e.*, to satisfy a particular **[*115]** agency need) — may avoid the Rule of Two merely because a MAIDIQ already has been awarded and the agency prefers to use that vehicle. Again, the fact that an **[**90]** agency has the discretion to partially set-aside "a portion" of a multiple award contract for small business does not lead to the ineluctable conclusion that having decided *not* to engage in a partial set-aside, an agency may thereafter dispense with the Rule of Two. The latter does not follow from the former. *HN36*[↑] To the contrary, the grant of discretion applies even where the Rule of Two does *not* require a set-aside, but the grant of discretion does not somehow, by negative implication, eliminate the Rule of Two requirement.

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[60] Further support for this understanding can be found in a Proposed Rule notice issued by the SBA:

> [T]he Jobs Act amended the *Small Business Act* (Act) to permit Federal agencies to:
>
> • Set-aside part or parts of multiple award contracts for small business concerns . . . ;
>
> • Set-aside orders placed against multiple award contract (notwithstanding the fair opportunity requirements set forth in *10 U.S.C. 2304c* and 41 U.S.C. 253j) for small business concerns . . .; and
>
> • Reserve one or more contract awards for small business concerns under full and open competition, where the agency intends to make multiple awards . . . .

Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation, 77 Fed. Reg. 29130-01 (May 16, 2012).

In sum, what the government really seems to be arguing is that the agency, having awarded its preferred TMS MAIDIQ without any set-aside component, is now exempt from applying the Rule of Two to any proposed procurement (or acquisition) of services that might be obtained using the TMS MAIDIQ. Put yet differently, the government asserts that, having exercised its discretion *not* to set-aside *any* portion of the TMS MAIDIQ scope or *any* of the TMS MAIDIQ's contract awards for small business, the agency can utilize the TMS MAIDIQ for any acquisition — and avoid the Rule of Two — so long as the contemplated scope of work is within the TMS MAIDIQ's scope. No statutory or regulatory **[**91]** language, however, supports such a sweeping inference.

PTP, for its part, argues that "19.502-4 plainly does not relieve agencies from applying the Rule of Two, as the first of five conditions stated in *FAR 19.502-4* is that: 'Market research indicates that a total set-aside is not appropriate [pursuant to the Rule of Two].'" PTP Resp. at 10 (quoting *FAR 19.502-4(a)(1)*). In that regard, PTP asserts that, pursuant to that subparagraph's "plain language, the discretion to set aside **orders** described does not apply unless the Agency has first engaged in market research and confirmed that the Rule of Two does not mandate total set aside." PTP Resp. at 11 (underline in original, bold text added). On that point, however, the Court parts ways with PTP, as well. Although PTP reads *FAR 19.502-4(a)(1)* as applying to "orders," the regulation — as demonstrated above — only addresses how and when an agency may "set aside a portion or portions of a multiple-award contract." Thus, all *FAR 19.502-4(a)(1)* provides is that, with respect to a scope of work, the agency cannot create a multiple award contract with only a partial set aside "portion" where that overall scope of work should be entirely set-aside (*i.e.*, at "total set-aside") pursuant to the Rule of Two. Again, **[**92]** however, that does not answer the question of whether the agency has any obligation to apply the Rule of Two to a particular scope of work that is covered by the scope of an already-issued multiple-award contract.[61]

Nor does *FAR 16.505(b)(2)(i)(F)* advance the interpretive ball. That provision is simply one of many "[e]xceptions to the fair opportunity process" under an IDIQ contract. *FAR 16.505(b)(2)*. *HN37*[↑] In the absence of an applicable exception, "[t]he contracting officer shall give every *awardee* a fair opportunity to be considered for a delivery-order or task-order exceeding $3,500...." *FAR 16.505(b)(2)(i)* (emphasis added). In other words, "contracting officers may, at their discretion, set aside orders" under an IDIQ without violating the fair opportunity to compete requirement that normally applies. *FAR 16.505(b)(2)(i)(F)*. But that, too, tells us nothing about whether a procuring agency must apply the Rule of Two to a scope of work *before* deciding whether to leverage an existing multiple award contract.

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[61] *FAR 19.504* covers "Orders under multiple-award contracts" but also does not deal with this case. Rather, *FAR 19.504* presumes a multiple-award contract for which a partial set-aside of scope has been made already, or where small businesses hold an unrestricted contract slot. *See* *FAR 19.504(a)(1)* ("The contracting officer shall state in the solicitation and resulting contract whether order set-asides will be discretionary or mandatory when the conditions in 19.502-2 are met at the time of order set-aside . . . ."); *see also* *FAR 19.504(b)* ("Orders under partial set-aside contracts."). If, under a particular multiple award contract, there is no small business contractor, the agency cannot set aside a task order. *See* PTP Resp. at 11 ("discretionary authority 'obviously works only if there are small business awardees on the multiple award contract'" (quoting *78 Fed. Reg. 61123 (Oct. 2, 2013)))*.

[*116] In sum, none of the updates to the various small business set-aside provisions resolve the question before this Court: whether the agency must apply the Rule of Two to a discrete scope of work *before* deciding to use an existing MAIDIQ. This Court answers **[**93]** that question in the affirmative, once again following the same reasoning as the GAO in *LBM, Inc.* In that case, LBM, Inc., a small business concern, protested the Army's decision to acquire transportation motor pool services under the LOGJAMSS contracts. *LBM, Inc., B-290682 at *1*. The GAO found that the "Army violated *FAR § 19.502-2(b)* when the agency did not consider continuing to acquire the Fort Polk motor pool services under a total small business set-aside, and . . . sustain[ed] LBM's protest on this basis."). *Id. at *8*. The GAO reasoned as follows:

> text>Acquisition is defined by the FAR to mean:
>
> > the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. *HN38*[↑] Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the **[**94]** process of fulfilling agency needs by contract.
>
> *FAR § 2.101*. Under this broad definition, the agency's purchasing the Fort Polk motor pool services by contract with appropriated funds is an "acquisition," subject to *FAR § 19.502-2(b)*, regardless of the fact that the agency anticipated acquiring those services through their transfer to the LOGJAMSS scope of work. . . . Had the agency complied with the requirements of *FAR § 19.502-2(b)*, it might have concluded that the LOGJAMSS contracts were not the appropriate vehicle for this acquisition. Whatever the outcome of the *FAR § 19.502-2(b)* analysis, though, the agency's intent to use a task order under LOGJAMSS as the contract vehicle did not eliminate the legal requirement that the agency undertake that analysis.

*Id. at *7*. Notably, the GAO reached that conclusion notwithstanding that there were "four small business concerns that [held] LOGJAMSS contracts." *Id. at *8 n.7*. Indeed, the agency thereafter asked the GAO to modify its recommendation so that the agency could compete the work at issue amongst only the small business LOGJAMSS contractors. The GAO rejected the agency's request, explaining:

> The Army apparently now concedes that under *FAR § 19.502-2(b)* these services should be set aside for exclusive small business competition. As discussed **[**95]** above, any such competition must be a full and open competition among the eligible small businesses; there is no legal authority in such circumstances to limit this competition to certain designated small businesses.

*Dep't of the Army--Request for Modification of Recommendation, B-290682.2, 2003 Comp. Gen. Proc. Dec. ¶ 23, 2003 WL 103408, *5-*6 (Jan. 9, 2003)* ("[W]hat the Army has requested is not consistent with the statutory and

regulatory scheme applicable to small business set-asides. The Army is essentially asking us to waive statutory requirements for what the Army views as strong policy reasons.").[62]

[*117] The bottom line from this Court's perspective is that the cancelled solicitations at issue here are themselves acquisitions. The government's identification of a need — of a scope of work — that it must procure itself begins an acquisition. Accordingly, we view the identification of the continued need for 13F and JFOC requirements as either part of in-process acquisition or a new acquisition. *HN39*[] Either way — no matter how the acquisition is viewed — PTP is correct that the "Rule of Two unambiguously applies" to "any acquisition," *FAR 19.502-2*, "and just because the Agency may have satisfied its small business set aside obligations **[**96]** with respect to the TMS MAIDIQ acquisition in 2018 does not mean the Agency has also satisfied its set aside obligations with respect to the separate acquisitions of the 13F and JFOC requirements in 2020." PTP Resp. at 12. Nothing in the updated small-business regulations provides otherwise.[63]

Moreover, where the FAR intends to make the Rule of Two entirely inapplicable to the selection of a particular procurement vehicle, the FAR knows how to do so. *See* *FAR 8.404(a)* ("Use of Federal Supply Schedules")

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[62] Although the GAO "agreed to hear LBM's contention despite the (then in-place) limitation on [GAO's] jurisdiction to hear protests involving the placement of task and delivery orders" it did so because the GAO "treated LBM's complaint as a timely solicitation challenge to the LOGJAMSS contract." *Delex Sys., Inc., B-400403, 2008 Comp. Gen. Proc. Dec. ¶ 181, 2008 WL 4570635, *7 (Oct. 8, 2008)* (discussing *LBM, B-290682 at *5-*6*). In contrast, we view jurisdiction as proper in this case either as a challenge to the cancellation of a solicitation or as a violation of the Rule of Two; either way, this Court properly considers Plaintiffs' claims under the last prong of *28 U.S.C. § 1491*, as explained *supra, see* Section II, and not as a challenge to the TMS MAIDIQ. Even if we were to consider Plaintiffs' claims as a challenge to the TMS MAIDIQ, however, we would follow *LBM*s approach to the task order protest bar, and not apply it here. *LBM, B-290682 at *3* ("Contrary to the Army's arguments, LBM is not challenging the proposed issuance of a task order for these services, but is raising the question of whether work that had been previously set aside exclusively for small businesses could be transferred to LOGJAMSS, without regard to the Federal Acquisition Regulation (FAR) *§ 19.502-2(b)* requirements pertaining to small business set-asides.").

[63] Later GAO decisions are not to the contrary. In *Delex Systems, Inc.*, B-400403, the GAO merely "concluded that the set-aside provisions of *FAR §19.502-2(b)* applied to competitions for task and delivery orders issued *under* multiple-award contracts" (emphasis added); and, in *Aldevra*, the GAO explained that it had "subsequently found that [its] holding in *Delex* had been superseded by the passage of section 1331 of the Jobs Act." *Aldevra, B-411752, 2015 Comp. Gen. Proc. Dec. ¶ 339, 2015 WL 6723876 n.4 (Oct. 16, 2015)* (citing *Edmond Scientific Co., B-410179, 2014 Comp. Gen. Proc. Dec. ¶336, 2014 WL 6199127, *8 n.10 (Nov. 12, 2014)*). None of those decisions address the precise question at issue in this case. For example, in *Edmond*, the protestor simply "allege[d] that the agency was required to use the Rule of Two to decide whether to set aside [a] task order" — that is, "whether the Army abused its discretion in not reserving this task order for small business participation" *under* a particular multiple award contract. B-410179 at *3, *5. The GAO reached the same conclusion this Court did, above: the applicable FAR provisions "grant discretion to a contracting officer about whether to set aside for small business participation task orders placed under multiple-award contract." *Id. *5* (discussing *FAR §§19.502-4*, ***16.505(b)(2)(i)(F)***). In short, none of those GAO cases, except *LBM*, addresses the precise issue of an agency moving work currently performed by a small business to a MAIDIQ where the incumbents are ineligible to compete for an award.

(providing that FAR "Parts 13 (except 13.303-2(c)(3)), 14, 15, and 19 (except for the requirements at 19.102(b)(3) and 19.202-1(e)(1)(iii)) do not apply to BPAs or orders placed against Federal Supply Schedules contracts (but see 8.405-5)"). Accordingly, there is no requirement for an agency to apply the Rule of Two *prior* to an agency's electing to use a FAR Part 8 FSS procurement, although the agency has the discretion to set-aside such procurements after deciding to utilize FAR Part 8, just as the Army did here with respect to the 13F and JFOC Solicitations. *See* FAR 8.405-5(a) ("Although the preference programs of part 19 are not mandatory **[**97]** in this subpart, in accordance with section 1331 of Public Law 111-240 (15 U.S.C. 644(r)) - (1) Ordering activity contracting officers may, at their discretion - (i) Set aside orders for any of the small business concerns identified in 19.000(a)(3)").

In contrast, no provision similar to FAR 8.404(a) — exempting the selection of an FSS procurement from FAR Part 19 — exists in FAR part 16, generally, or FAR 16.5, in particular.[64]

[*118] To the extent the agency argues that Plaintiffs' claims with regard to the Rule of Two are nothing more than untimely challenges to the TMS MAIDIQ solicitation, the Court rejects that contention. The Court, instead, once again, agrees with PTP: "Had [Plaintiffs] protested the TMS MAIDIQ Solicitation on the basis that the Agency might one day issue task orders for 13F and JFOC work (not even specified in the TMS MAIDIQ), the Agency would have challenged the action as unripe (speculative as to whether the task orders would issue and whether the MAIDIQ would include small business contractors)." PTP Resp. at 14; *see also* LBM, B-290682 at *3-*5 (rejecting solicitation protest timeliness argument). Given that there is no evidence that the incumbent Plaintiffs had reason to believe that the work would be consolidated into **[**98]** the TMS MAIDIQ *at the time the TMS MAIDIQ solicitation was issued*, the Court will not apply waiver. *Cf.* Boeing Co. v. United States, 968 F.3d 1371, 1382 (Fed. Cir. 2020).

In sum, the government's failure to apply the Rule of Two prior to deciding to cancel the solicitations at issue is fatal to that decision, whether because that failure undermines the central rationale of the cancellation decision or whether because the decision to move the work to the TMS MAIDIQ prior to conducting a Rule of Two analysis constitutes an independent violation of law.

2. Additional Violations Of Law

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[64] If FAR Subpart 16.5 contained a provision similar to FAR 8.404(a), perhaps this Court would reach a different conclusion. *See* FAR 16.000 ("This part describes types of contracts that may be used in acquisitions. It prescribes policies and procedures and provides guidance for selecting a contract type appropriate to the circumstances of the acquisition."); FAR 16.5 ("Indefinite-Delivery Contracts"). Indeed, FAR 16.500(e) instructs its readers to "[s]ee subpart 19.5 for procedures [1] to set aside part or parts of multiple-award contracts for small businesses; [2] to reserve one or more awards for small business on multiple-award contracts; and [3] to set aside orders for small businesses under multiple-award contracts." Notably, this Court interpreted the various provisions discussed above (*e.g.*, 15 U.S.C. § 644(r), FAR 19.502-4, FAR 19.504, and ***FAR 16.505(b)(2)(i)(F)***) as governing precisely the actions specified in FAR 16.500(e). None of those procedures, however, answer the preliminary, more basic question of whether the Rule of Two must be applied in an acquisition *before* deciding whether a particular MAIDIQ may be used at all.

The Court further concludes that the agency violated FAR 19.502-9 ("Withdrawing or modifying small business set-asides"). HN40[↑] That provision permits a contracting officer to "withdraw [a] small business set-aside" only where "before award of a contract involving a total or partial small business set-aside, the contracting officer considers that award would be detrimental to the public interest (e.g., payment of more than a fair market price)[.]" FAR 19.502-9.[65] Where such a decision is made, "[t]he contracting officer *shall initiate a withdrawal* of an individual total or partial small business set-aside, *by giving written notice to the agency small business specialist and the SBA PCR* . . . stating the **[**99]** reasons." *Id.* (emphasis added).[66] The Court holds that the agency's decision to cancel the solicitations at issue and move the scopes of work to the TMS MAIDIQ constitutes a withdrawal of a set-aside. Nutech Laundry & Textile, Inc. v. United States, 56 Fed. Cl. 588, 592 (2003); Aviation Enterprises, Inc. v. United States, 8 Cl. Ct. 1, 27 (1985) ("After the solicitation was cancelled and the Air Force opted to utilize aircraft under an existing lease, such actions can arguably be considered a withdrawal of the unilateral set-aside.").

This unexplained violation of law independently justifies judgment for Plaintiffs.[67] Had the agency complied with the above-quoted FAR 19.502-9 and related procedures, the agency may not have cancelled the solicitations in favor of the TMS MAIDIQ. *See, e.g.,* Gear Wizzard, Inc. v. United States, 99 Fed. Cl. 266, 275 (2011) (noting the government's explanation that "one of the reasons the contracting officer sought a new procurement was because of [the agency's] failure to properly withdraw the set-aside requirement in **[*119]** accordance with FAR 19.506[,]" the prior version of FAR 19.502-9); *id. at 276* ("According to defendant, 'Based on these and other errors, the contracting officer determined it was necessary to start over with a new procurement.'").[68]

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[65] Although this FAR provision applies "before award of a contract," the Court finds it applicable, as the solicitation cancellations were, in fact, "before award of a contract." Since the agency had cancelled the contracts, the 13F and JFOC Solicitations were pending at the time of cancellation, the agency was in receipt of responsive proposals, and the agency could have made a new award as part of its corrective action. The fact that one set of awards had been made and cancelled does not make this FAR requirement in applicable. In any event, the agency cannot be permitted to evade FAR 19.502-9 merely by awarding a contract, cancelling it, and then cancelling the solicitation.

[66] SBA PCR is short for Small Business Administration Procurement Center Representatives, "who are generally located at Federal agencies and buying activities which have major contracting programs" and "may review any acquisition to determine whether a set aside or sole-source award to a small business under one of SBA's program is appropriate." 13 C.F.R. § 125.2; *see* FAR 19.402.

[67] The government does not address this issue at all in its briefs. Any further response is therefore waived. *See* SmithKline Beecham Corp. v. Apotex Corp., 439 F.3d 1312, 1320 (Fed. Cir. 2006) ("'When a party includes no developed argumentation on a point . . . we treat the argument as waived under our sell established rule.'" (quoting Anderson v. City of Boston, 375 F.3d 71, 91 (1st Cir. 2004))).

[68] In *Aviation Enterprises, Inc.*, the plaintiff asserted that the government "failed to comply with the notice provisions of section 19.506[,]" the predecessor provision to FAR 19.502-9. 8 Cl. Ct. at 29. Although just as here, "[i]t [was] uncontradicted that neither the contracting officer nor any [ ] procuring official ever notified a SBA representative of the decision to utilize existing" leases. *Id.* The Claims Court concluded that "[t]hough this failure to give notice may have been a minor technical violation of the

The Court also concludes that the agency violated *10 U.S.C. § 2305(b)(2)*, which provides that "competitive proposals **[**100]** received in response to a solicitation may be rejected if the head of the agency determines that such action is in the public interest." Based on the Administrative Record, the Court was unable to find the involvement of the agency head in a cancellation decision, any delegation of authority by the head of agency to the contracting officer to make a cancellation decision, or that the contracting officer is delegated such authority under the applicable regulations governing a FAR Part 8 procurement seeking competitive proposals pursuant to an RFP. *See* AFARS Appendix GG (Delegations). Moreover, nowhere does the agency conclude that the cancellation of the 13F and JFOC Solicitations is in the "public interest."[69]

V. The Court Grants Plaintiffs' Request For Injunctive Relief

HN41[↑] The Tucker Act vests this Court to award "any relief that the court considers proper, including . . . injunctive relief." *28 U.S.C. § 1491(b)(2)*; *see RCFC 65*. In evaluating whether permanent injunctive relief is warranted in a particular case, a court must consider (1) whether the plaintiff has succeeded on the merits; (2) whether the plaintiff has shown irreparable harm without the issuance of **[**101]** the injunction; (3) whether the balance of the harms favors the award of injunctive relief; and (4) whether the injunction serves the public interest. *PGBA v. United States, 389 F.3d 1219, 1228-29 (Fed. Cir. 2004)*; *see Kiewit Infrastructure West Co., 147 Fed. Cl. at 712* (applying these four factors to an agency cancellation decision).

As this Court explained at length above, Plaintiffs have succeeded on the merits.

In evaluating irreparable harm, "[t]he relevant inquiry . . . is whether plaintiff has an adequate remedy in the absence of an injunction." *Magellan Corp. v. United States, 27 Fed. Cl. 446, 447 (1993)*. Moreover, in the bid protest context, "the loss of the opportunity to fairly compete for future government contracts constitutes irreparable harm." *ViroMed Laboratories, Inc. v. United States, 87 Fed. Cl. 493, 503 (2009)*. Here, with regard to TTGI, the agency cancelled TTGI's 13F contract award and then, instead of reevaluating proposals or re-soliciting the requirement with an amended solicitation, the agency cancelled the 13F Solicitation for the purpose of moving the work to the MAIDIQ, under which TTGI is not a contract holder and therefore is ineligible to bid on any task order procurement. TTGI's loss of anticipated profits from the 13F contract award, in addition to its inability to compete for

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regulation, assuming the regulation to be applicable, the court finds that such a minor violation does not warrant injunctive relief" because "[n]ot every violation of a regulation mandates a right to relief." *Id.* (citing *Keco Indus., Inc. v. United States, 203 Ct. Cl. 566, 573-74, 492 F.2d 1200, 1203-4 (Ct. Cl. 1974))*. The undersigned respectively disagrees with *Aviation Enterprises*, particularly given its reliance on a pre-ADRA case. *See Impresa Construzioni, 238 F.3d at 1333* ("cases such as *Keco* . . . are based on the implied contract theory of recovery and do not govern APA review of contracting officer decisions").

[69] The closest that the agency comes to making such a conclusion is CO Abraham's assertion that "the ***Government's best interest can be met*** by competing the JFO, 13F and KMS requirements under the MICC-Fort Eustis recently awarded TMS MAIDIQ." ECF No. 25 at 620 (AR 616) (emphasis added). That the TMS MAIDIQ "*can meet*" the "government's" "best interest" may simply mean that the TMS MAIDIQ is one option to meet the agency's needs, and, in any event, is not the same as a determination that a solicitation cancellation *is* in the *public*'s interest.

that work on the MAIDIQ, establishes the immediate and irreparable harm that TTGI would suffer in the absence of an **[**102]** injunction. Turning to PTP, following the agency's cancellation **[*120]** of the 13F and JFOC contract awards, PTP, the prior incumbent on both contracts — having successfully induced corrective action following GAO protests — once again stood to have an opportunity to have its proposal considered for award or to submit a proposal on an amended solicitation. Instead, PTP's protests resulted in its losing the opportunity to compete. HN42[↑] While PTP's harm is arguably more speculative than that of TTGI (insofar as PTP had not been awarded the now-cancelled contracts and solicitations), nonetheless, "it is well-established that the potential profits that are lost to offerors when arbitrary procurement actions would deprive them of the opportunity to compete for a contract will normally be sufficient to constitute irreparable injury." *MORI Assocs., Inc., 102 Fed. Cl. at 553*. As PTP also is not a contract holder on the TMS MAIDIQ, PTP faces similar irreparable harm should the procurement be solicited on the TMS MAIDIQ without the agency first conducting a Rule of Two analysis, the results of which may permit PTP to bid on the work at issue. For these reasons, this Court finds Plaintiffs meet the second factor for equitable relief.

In balancing **[**103]** the harms, the agency has not shown that the continued use of the GSA MAS contracts will be onerous. While the government asserts that "the primary harm to the Government" is its inability to "finally use a long-planned IDIQ designed for these requirements, and to leave behind the ill-fitting stop-gaps of the GSA MAS task orders, as it always intended to do," Def. MJAR at 36, this Court, as discussed above, is unable ascertain the factual basis for the agency's decision that the GSA MAS contracts were "ill-fitting" and, as such, cannot conclude that the harm to the government would outweigh the clear harm to Plaintiffs. The government's further contention that "delay will also harm the FCoE, as it threatens to leave it with an inability to secure the necessary training for artillery personnel," *id.*, suffers from the same defect. In addition, crediting the government's assertion here would be tantamount to punishing PTP, in particular, for having filed a GAO protest, the effect of which was to secure corrective action. The agency should not be permitted to conduct a procurement, inducing would-be contractors to expend time and money preparing and submitting proposals, only to have the **[**104]** rug pulled out from underneath them when an offeror points out putative flaws in the agency's process. This is not a case where the agency has shown that its substantive needs have changed, and a different vehicle is more capable of meeting those changed needs. Moreover, the Court's decision here does not even preclude the agency from proceeding, *per se*, with an alternative procurement vehicle that better meets the agency's needs. Rather, the injunctive relief ordered here merely reinstates the status quo prior to the cancellation decisions and requires the agency to follow the law consistent with this decision.

HN43[↑] The public interest also favors this Court's granting an injunction, as "the public always has an interest in the integrity of the federal procurement system." *Starry Assocs., 127 Fed. Cl. at 550* (citing *Hosp. Klean of Tex, Inc. v. United States, 65 Fed. Cl. 618, 624 (2005)*; *MVM, Inc. v. United States, 46 Fed. Cl. 137, 143 (2000)* ("Many cases have recognized that the public interest is served when there is integrity in the public procurement system."). This is particularly applicable to the present case where the agency's cancellation and planned movement of work to the TMS MAIDIQ violated statutory and regulatory requirements.

CONCLUSION

The Court **GRANTS** Plaintiffs' respective motions for judgment on the Administrative Record and **DENIES [**105]** the government's cross-motion for judgment. The Court further **GRANTS** Plaintiffs' request for equitable relief and orders as follows:

1. To the extent formal cancellations of Solicitation Nos. W9124L-20-R-0016 and W9124L-20-R-0020 have not been issued already, the agency is enjoined from cancelling them in the absence of a new cancellation decision.

2. To the extent the agency already has cancelled those solicitations, the cancellation decisions hereby are set-aside as unlawful, and the agency is instructed to reinstate the solicitations.

[*121] 3. The agency is enjoined from transitioning the 13F and JFOC requirements to the TMS MAIDIQ (or any other procurement vehicle) without complying, at a minimum, with *FAR 19.502-2*, *FAR 19.502-9*, and *10 U.S.C. § 2305(b)(2)*.

4. Should the agency determine, however, that a change in acquisition vehicle is still warranted, the agency shall issue new cancellation decisions not inconsistent with this opinion and order.

If Plaintiffs believe they are also entitled to proposal preparation costs under the facts of this case, *see, e.g.*, TTGI Am. Compl. at 11 (¶ F), they shall file a motion for such on or before December 14, 2020. *See CNA Corp. v. United States, 83 Fed. Cl. 1, 8-12 (2008)*, *aff'd*, *332 Fed. Appx. 638 (Fed. Cir. 2009)*.

IT IS SO ORDERED.

/s/ Matthew H. Solomson

Matthew H. Solomson **[**106]**

Judge

End of Document

2020 U.S. Comp. Gen. LEXIS 405; 2020 Comp. Gen. Proc. Dec. P412;

Comptroller General of the United States

December 23, 2020

B-419167

Reporter

2020 U.S. Comp. Gen. LEXIS 405 *; 2020 Comp. Gen. Proc. Dec. P412;

Matter of: ITility, LLC

Subsequent History:

Related proceeding at *In re Consulting, 2021 U.S. Comp. Gen. LEXIS 316 (Comp. Gen., Mar. 4, 2021)*

Prior History:

Savantage Fin. Servs. v. United States, 150 Fed. Cl. 307, 2020 U.S. Claims LEXIS 2090 (Oct. 16, 2020)

Core Terms

small business, protest, procurement, contracts, multiple-award, orders, set-aside, acquisition, unrestricted, mandatory, regulations, issuance, solicitation, agencies, Jobs Act, challenging, delivery, contract holder, anticipated, notice, fair opportunity, market research, agency's decision, discretionary, decisions, implement regulations, financial management, Additionally, contractor, forecasted

Contract

[*1] RFQ No. 70RDAD20Q00000133

Headnotes

Protest alleging that a procuring agency was required to set aside a procurement for small businesses, instead of issuing its requirements as a task order on an unrestricted basis under a multiple-award contract, is denied where the procuring agency used its discretion pursuant to Federal Acquisition Regulation *sections 16.505* and *19.504*, as well as *13 C.F.R. § 125.2(e)(6)(ii)*, not to set aside for small businesses a task order issued under a multiple-award contract.

Counsel

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Christine Fontenelle, Esq., and Pavan Mehrotra, Esq., Department of Homeland Security; John W. Klein, Esq., and Sam Q. Le, Esq., Small Business Administration, for the agencies.

Opinion By:

Evan D. Wesser, Esq.; Edward Goldstein, Esq.

Opinion

[EDITOR'S NOTE: PAGE NUMBERS APPEARING IN BOLD BRACKETS, [CPD 1], REFLECT THE OFFICIAL PAGINATION OF THE U.S. COMPTROLLER GENERAL PROCUREMENT DECISIONS.]

[CPD 1] DECISION

ITility, LLC, a small business of Chantilly, Virginia, protests the issuance of a task order to Enterprise Information Services, **[*2]** LLC (EIS), of Vienna, Virginia, under request for quotations (RFQ) No. 70RDAD20Q00000133, issued by the Department of Homeland Security (DHS), for program management and information technology support for the DHS Financial Systems Modernization (FSM) Joint Program Management Office (JPMO). ITility alleges that DHS conducted inadequate market research to determine whether the procurement should have been set aside for small business concerns, and otherwise failed to comply with other applicable acquisition planning requirements.

We deny the protest.

[CPD 2] BACKGROUND

DHS was officially created in January 2003, merging 22 formerly independent agencies into one cabinet-level department. DHS currently includes 14 component operational and support organizations. When DHS was first established, there were 13 separate core financial systems across its components, operating under legacy policies and disparate business processes. In accordance with a September 2011 memorandum issued by the DHS Under Secretary for Management, DHS established the FSM Program to plan and execute key financial management

requirements, minimize investment in duplicative systems, meet federal guidance, and deliver financial [*3] management information to leadership to support the DHS mission. The FSM Program is coordinated by the DHS Office of the Chief Financial Officer through the JPMO. Agency Report (AR), Tab 13, RFQ No. 70RDAD19Q00000101 at 1-2. [1] DHS intends to transition DHS headquarters and its components to standard financial, procurement, and asset management business processes using as few separate solutions as is practicable and in a cost-effective manner. AR, Tab 2, Contracting Officer's Statement (COS) at 2.

The JPMO is responsible for: (i) identifying, implementing, and overseeing modern and compliant financial management systems and business processes across DHS; (ii) providing standardized business processes to align with statutory mandates; (iii) providing change and program management services; (iv) leading and managing DHS business integration, financial management process standardization, functional requirements management, and the people side of change; (v) preparing cost estimates and budget requests; (vi) managing available funds, program schedule, [*4] risks, and personnel; (vii) managing the execution of contracts and agreements; and (viii) ensuring that project plans are implemented on schedule, within scope, and within budget. AR, Tab 9, Task Order No. 70RDAD18FR0000032, at 12.

On October 23, 2018, DHS awarded service-disabled veteran-owned small business (SDVOSB) set-aside task order No. 70RDAD18FR0000032 to ITility under the DHS Program Management, Administrative, Operations, and Technical Services II (PACTS) multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contract. Under the task order, ITility performs program and technical support services for the JPMO and DHS's travel management programs. The task order originally had a 10-month base period, and four 1-year option periods. *Id.* at 32. DHS, however, subsequently amended the base period of performance to 11 months. AR, Tab 9, Task Order No. 70RDAD18FR0000032, mod. No. 1, at 1. At the completion of the base period, DHS exercised the first option period, extending performance through September 22, 2020. COS at 2.

[CPD 3]At the time of ITility's task order award, PMO had four branches: (1) FSM Program Management; (2) Project and Financial Management; (3) Information Technology (IT) Management; [*5] and (4) Business Transformation. AR, Tab 9, Task Order No. 70RDAD18FR0000032 at 13. ITility's task order was structured to support these specific branches. *See, e.g., id.* at 15-18 (delineating tasks in support of the Project and Financial Management Branch), 18-25 (same, with respect to the IT Management Branch). In June 2020, during the first option year, the JPMO was reorganized to include two additional branches.

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[1] References herein to page numbers for agency report exhibits are to the electronic page numbering of the exhibits as submitted by the agency.

As part of the reorganization, DHS decided that it was preferable to restructure the support services to align with the agency's functional needs, as opposed to the organizational branches as they were currently structured. In reaching this decision, DHS noted that while organizational structures change over time, core program management functions remain constant. As a result, DHS concluded that a functionally-based approach would provide the agency with the flexibility to effectively support functional requirements spanning across branches, or in the event of organizational change or realignment. *See, e.g.*, AR, Tab 6, Procurement Strategy Roadmap at 4; COS at 2.

Additionally, DHS decided that more IT-centric technical support services were needed due to evolving requirements. Specifically, the JPMO is currently supporting **[*6]** FSM implementation activities for the Countering of Weapons of Mass Destruction Office, the Transportation Security Administration, and the U.S. Coast Guard. Additionally, the JPMO is anticipated to support additional upcoming, concurrent FSM efforts, including for Immigration and Customs Enforcement and the Federal Emergency Management Agency. *See, e.g.*, AR, Tab 5, Market Research Rep., at 1; Tab 6, Procurement Strategy Roadmap at 4. Considering these and other impending requirements, the JPMO concluded that ITility's current task order did not provide sufficient levels of expertise and support capacity to adequately support JPMO's projected requirements.

Specifically, DHS reached the following conclusion:

> The FSM program is projected to continue to grow exponentially when the current Enterprise Financial System Integrator (EFSI) and Enterprise Financial Management Software (EFiMS) awards are made, requiring the JPMO to coordinate and manage several concurrent FSM implementations for DHS Headquarters and Components in Fiscal Year 2021 and 2022. The current and projected JPMO program management and Information Technology support requirements are beyond the capabilities of current JPMO contractor support, which has experienced challenges in adapting **[*7]** to the evolving mission needs of the JPMO FSM program. The new FSM program management team has determined a more technically oriented, IT centric contract mechanism with contractor support staff that possess skills and expertise in the areas of coordinating multiple concurrent financial, procurement and asset management system **[CPD 4]** implementations is vital to the success of the FSM Program, and necessary to achieve JPMO mission needs.

AR, Tab 6, Procurement Strategy Roadmap at 5-6.

To meet the agency's anticipated IT support needs, DHS concluded that several additional labor categories that were not included on ITility's task order, will be needed, including: network and computer systems administrator; software quality assurance engineer and tester; information technology program manager; database architect; and computer systems engineer/architect. [2] COS at 8.

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[2] We note that ITility initially argued that the scope of work of its PACTS II contract was essentially the same as the challenged RFQ's scope, other than containing "a better delineation of tasks and subtasks." Protest at 4. In its comments, ITility, while still

As a precursor to fulfilling its changed requirements, DHS undertook market research to inform its acquisition approach. DHS effectively limited its review to six multiple-award IDIQ contracts. *See* AR, Tab 5, Market Research at 4-5; Tab 6, Procurement Strategy Roadmap at 7-8. DHS believed that this approach was necessitated by DHS policy, which generally directs agency contracting officials to procure agency requirements using strategic sourcing contract vehicles. *See* AR, Tab 12, Development and Use of Strategic Sourcing Contract Vehicles, DHS Directive No. 060-01 (Aug. 24, 2012) at 4 (mandating the use of strategic sourcing contract vehicles absent an applicable exception). For each of the six multiple-award contracts, DHS considered the vendors holding the contracts, the periods of performance, the available labor categories, and the scope of available **[*9]** services. AR, Tab 6, Procurement Strategy Roadmap at 7.

First, DHS considered the General Services Administration's (GSA) One Acquisition Solution for Integrated Services contract. DHS found that the contract did not best suit its anticipated requirements because DHS did not believe the contract would provide sufficient competition. Specifically, DHS noted that five recent procurements for office of chief financial officer services resulted in one-bid responses. *Id.* at 7. Next, DHS considered the National Institute of Health's Chief Information Officer -- Solutions and Partners 3 contract. DHS, however, rejected use of that contract because the contract's duration of services fell short of what was needed for the JPMO. *Id.* The third contract considered by DHS was DHS's Services for Enabling Agile Delivery contract. DHS concluded that the nine contract holders did not have experience with providing professional support services including technical and information technology expertise **[CPD 5]** with large financial, procurement, and asset management system implementation efforts. *Id.*

DHS also considered GSA's Veterans Technology Services 2 (VETS 2) contract. The VETS 2 contract is set aside for SDVOSBs and has a vendor pool of 69 firms. **[*10]** *See* "VETS 2 Industry Partners," *https://www.gsa.gov/technology/technology-purchasing-programs/governmentwide-acquisition-contracts/vets-2-sdvosb/vets-2-industry-partners* (last visited Dec. 23, 2020). While the contract's scope is IT centric--involving technical expertise in data management, information and communications technology, IT operations and maintenance, IT security, software development, and systems design--DHS concluded that it did not offer sufficient expertise in the required program management areas. AR, Tab 6, Procurement Strategy Roadmap at 8.

DHS additionally considered GSA's 8(a) STARS II contract. The 8(a) STARS II contract is set aside for small disadvantaged businesses and has more than 700 industry partners. *See* "8(a) STARS II Industry Partners,"

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maintaining that the scopes of work are functionally equivalent, now recognizes that DHS requires a higher level of expertise **[*8]** and more personnel than currently included under ITility's current task order. *See* ITility Comments at 12 (arguing that DHS could satisfy its changed needs by either modifying the existing task order or awarding another task order under the PACTS II contract vehicle). Thus, while the parties contest the extent and nature of the change in DHS's requirements, there is no dispute that in fact DHS's needs have changed.

https://www.gsa.gov/technology/technology-purchasing-programs/governmentwide-acquisition-contracts/8a-stars-ii/8a-stars-ii-industry-partners (last visited Dec. 23, 2020). DHS found that the contract did not have a period of performance or functional area of expertise that would align with JPMO's requirements. In this regard, the contract's disciplines are primarily focused on custom computing programming services, computer systems design, computer facilities **[*11]** management services, and ancillary IT equipment and services related functions. DHS found that these disciplines were insufficient to support the JPMO requirements for expertise assisting in daily oversight, coordination, and management of multiple cross-functional teams engaged in the deployment and systems integration of financial, procurement, and asset management software platforms. AR, Tab 6, Procurement Strategy Roadmap at 8.

Lastly, DHS considered, and ultimately selected GSA's Alliant 2 contract. DHS selected the Alliant 2 contract because it believed the contract provided both the depth and breadth of program management and information technology services needed by JPMO, a suitable performance period, and a wide vendor pool with experience in large implementation efforts. *Id.* DHS also considered whether it could set aside the task order under the Alliant 2 contract, but found that it was not possible because the Alliant 2 small business contract awards had been vacated following a bid protest filed before the United States Court of Federal Claims, and the resulting corrective action was ongoing. *Id.* at 5-6.

On June 24, DHS released the RFQ only to Alliant 2 contract holders. *See* COS at 10. As a result, ITility, which does **[*12]** not hold an Alliant 2 contract, had no access to, or knowledge of, the RFQ. On September 11, DHS issued the task order to EIS; the total **[CPD 6]** anticipated contract value is $ 59,677,286. *See* Protest, exh. E, beta.SAM.gov Award Notice. On September 21, ITility filed this protest with our Office. [3]

DISCUSSION

ITility protests the issuance of the unrestricted task order to EIS, arguing that, pursuant to 15 U.S.C. § 644(a) and FAR 19.502-2, the agency was required to set aside the requirement for small business concerns. ITility argues that reasonable market research would have shown that numerous small business concerns, such as ITility, are capable of and interested in performing this requirement at reasonable prices. DHS answered that it conducted a reasonable analysis with respect to whether the procurement should be set aside for small business concerns, and complied with statutory and regulatory set-aside requirements. During the development **[*13]** of the protest, our Office requested that the parties address whether in fact DHS was required to conduct such a set-aside analysis

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Based on the approximately $ 60M value of the task order, the protest falls within our statutory grant of jurisdiction to hear protests in connection with task and delivery orders valued in excess of $ 10 million issued under civilian agency multiple-award IDIQ contracts. 41 U.S.C. § 4106(f).

prior to issuing the task order RFQ. Specifically, we asked the parties to address whether a set-aside analysis was mandatory or discretionary in light of the statutory provisions of *15 U.S.C. § 644(r)*, its implementing regulations, and our prior decisions interpreting those authorities.

In light of the issues presented, our Office also invited the Small Business Administration (SBA) to provide its views on these issues, pursuant to *4 C.F.R. § 21.3(j)*. ITility and SBA maintain that the small business set-aside requirements are mandatory and must be applied prior to placing the work under a multiple-award contract and proceeding with an unrestricted task order. In contrast, DHS argues that this analysis is discretionary under these circumstances. For the reasons that follow, we find that DHS has the discretion, as opposed to the obligation, to set aside the task order at issue. Therefore, we deny the protest. [4]

Timeliness

Before turning to the merits of the protest, we first address why we declined the agency's and intervenor's requests to dismiss this protest as untimely. [5] DHS and EIS **[CPD 7]** both argue that ITility's post-award protest of the agency's decision not to set aside this task order procurement for small businesses constitutes an untimely challenge to the terms of the RFQ. DHS and the intervenor argue that the protester should be charged as having

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ITility raises other collateral arguments. Although our decision does not specifically address every one of the protester's arguments, we have carefully reviewed them and find **[*14]** that none provides a basis on which to sustain the protest.

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EIS also argues that ITility is not an interested party because it did not sufficiently establish that it is capable of performing the current requirements. *See, e.g.*, Intervenor Comments & Req. for Dismissal; Intervenor Resp. to Supp. Briefing Req. The intervenor's arguments are without merit. Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues **[*15]** raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. *Latvian Connection, LLC, B-410947, Mar. 31, 2015, 2015 Comp. Gen. Proc. Dec. P 117 at 3*. Here, we find that ITility has sufficiently established its status as an interested party.

For example, as addressed above, DHS considered using the VETS 2 contract, a SDVOSB set-aside IDIQ held by 70 vendors, including ITility. In its comments, ITility argues that the VETS 2 contract includes the same labor categories required by the current task order and as included on the Alliant 2 contract, and, therefore, DHS should have procured its requirement under the VETS 2 contract. *See* ITility Comments at 6-7; *see also id.* at 8 n.4 ("Critically, while the Agency asserts that ITility's *current task order* under PACTS II does not meet the Agency's changed needs, nothing in the record establishes that *ITility* itself is unable to meet the Agency's purportedly changed needs. . . . ITility would be able to provide the same labor categories sought under the RFQ through its VETS 2 contract, and it could also provide those same capable and qualified personnel through other contract vehicles or on the open market.") (emphasis in original). **[*16]** As this and other examples demonstrate, we find that ITility sufficiently demonstrated that it is an interested party that could compete for the requirements if we sustained its protest.

constructive notice of DHS's decision to procure its new requirements on an unrestricted basis, based both on DHS's decision not to exercise the option on ITility's incumbent task order and on information posted to a DHS acquisition forecasting website. We disagree.

Generally, a protest based on alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial quotations, including a challenge to an agency's decision not to set aside a procurement for small businesses, must be filed prior to the closing date for the receipt of quotations. *4 C.F.R. § 21.2(a)(1)*; *Candor Solutions, LLC, B-418682.2, Sept. 15, 2020, 2020 Comp. Gen. Proc. Dec. P 297 at 6 n.3*. When, however, an agency's actions preclude the possibility of filing a timely challenge to the terms of a solicitation, our Office has stated that the timeliness rule of *4 C.F.R. § 21.2(a)(1)* does not apply; instead, the 10-day rule of *4 C.F.R. § 21.2(a)(2)* applies. [6] *Latvian **[CPD 8]** Connection, LLC, B-411489, Aug. 11, 2015, 2015 Comp. Gen. Proc. Dec. P 251 at 5*; *Morrison Knudsen Corp., B-247160, Jan. 7, 1992, 92-1 Comp. Gen. Proc. Dec. P 35 at 2*.

Here, the record reflects that DHS issued the solicitation for its requirements solely to the holders of the Alliant 2 contract. Because ITility is not an Alliant 2 contract holder, it did not have access to the solicitation and thus did not know that DHS was procuring the FMS Program requirements under the Alliant 2 contract vehicle. Nonetheless, DHS and EIS argue that we should dismiss ITility's protest as untimely because the protester failed to undertake reasonable due diligence once DHS indicated that it was not exercising ITility's option on its incumbent order. Again, we disagree.

The record here reflects that ITility and DHS engaged in a long series of discussions and exchanges between February and June 2020 regarding the agency's changing requirements, and whether ITility could support the anticipated changes through a modification to its task order. Throughout the course of those discussions, and once they ended, **[*18]** ITility sought guidance from DHS with respect to its anticipated acquisition approach and needs. We have seen nothing in the record suggesting that DHS clearly articulated its decision to pursue its subsequent requirements on an unrestricted basis during those exchanges with ITility. Thus, far from being the result of a lack of reasonable due diligence, it is apparent that ITility's inability to ascertain the status of DHS's follow-on acquisition approach was the direct result of DHS's decisions to (1) decline to respond to the protester's inquiries, and (2) distribute the RFQ via a mechanism that precluded non-Alliant 2 contract holders from accessing the RFQ.

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In relevant part, *4 C.F.R. § 21.2(a)(2)* provides that protests "other than those covered by [*4 C.F.R. § 21.2(a)(1)*] shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier)." **[*17]** Neither DHS nor EIS contest that ITility's protest was filed within 10 days of the public posting of the notice of award, the first time ITility reasonably knew or should have known of the agency's decision to acquire these requirements under the Alliant 2 contract.

Next, DHS and EIS argue that ITility had constructive notice of the agency's intent not to set aside the JPMO procurement for small businesses because of DHS's posting of its forecasted procurement on the agency's Acquisition Planning Forecast System (APFS). This argument fails for at least two critical reasons. First, DHS's APFS is not the government-wide point of entry (GPE) designated for the publication of solicitations. Instead, *https://beta.sam.gov* has been designated as the GPE--that is, the single point where government **[*19]** business opportunities greater than $ 25,000 (such as the RFP here) are published, including synopses of proposed contract actions, solicitations, and associated information that can be accessed electronically by the public. [7] *FAR 2.101*, *5.101*, *5.102*, *5.201*. While offerors are charged with constructive notice of procurement actions published on the GPE, ITility did not have constructive notice in this instance because the APFS is not the GPE. *Latvian Connections, LLC, 2015 Comp. Gen. Proc. Dec. P 251, supra*.

Second, the notice posted to DHS's APFS was a forecasted procurement action--not the issuance of an unrestricted solicitation. In this regard, the APFS system makes clear that the information posted to the site is tentative forecasting of the agency's **[CPD 9]** procurement needs, and does not present a firm intent to commence a procurement action. [8] *See* "About This Website," *https://apfs-cloud.dhs.gov/about/* **[*20]** (last visited Dec. 23, 2020) ("All projected procurements are subject to revision or cancellation. . . . The forecast data is for planning purposes, does not represent a pre-solicitation synopsis, does not constitute an invitation for bid or request for proposal, and is not a commitment by the Government to purchase the desired products and services."). We have repeatedly explained that a protest challenging an agency's mere stated intention not to set aside a procurement, without the issuance of an unrestricted solicitation, is premature. [9] *See, e.g., Glen/Mar Constr., Inc., B-298355, Aug. 3, 2006,*

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We have recognized that the FAR designates *www.fbo.gov* as the GPE, but that the single, GPE has since migrated to *https://beta.sam.gov*. *See Virtual Medical Grp., LLC, B-418386, Mar. 25, 2020, 2020 Comp. Gen. Proc. Dec. P 113 at 1 n.1*; *MCI Diagnostic Center, LLC, B-418330, Mar. 11, 2020, 2020 Comp. Gen. Proc. Dec. P 103 at 1 n.1*.

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We also note that the APFS notice does not provide meaningful information (*e.g.*, a draft performance work statement) regarding the forecasted procurement that ITility reasonably could have used to evaluate whether the scope of the proposed task order reasonably should have been set aside for small businesses. In this regard, the notice only provides a title ("Joint Program Management **[*21]** Office (JPMO)") and limited description of the intended scope of work ("The Contractor shall provide expert support services for information technology and program management support services."). *See* DHS Req. for Dismissal, exh. C, APFS JPMO PMO IT Services APFS Notice, at 1.

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This case is readily distinguishable from our decision in *Cygnus Corp., B-406350, B-406350.2, Apr. 11, 2012, 2012 Comp. Gen. Proc. Dec. P 152*, on which the intervenor bases its arguments for dismissal. Here, unlike the facts in *Cygnus*, the agency did not publish a solicitation on the GPE.

2006 Comp. Gen. Proc. Dec. P 117 at 2-3; *Ystueta, Inc., B-296628.4, Feb. 27, 2006, 2006 Comp. Gen. Proc. Dec. P 46 at 2-3*; *York Int'l Corp., B-244748, Sept. 30, 1991, 91-2 Comp. Gen. Proc. Dec. P 282 at 2*.

Thus, we find no merit to the arguments of DHS and EIS that ITility could have known DHS's intention to move forward with an unrestricted procurement from the limited information available to the protester prior to DHS posting the notice of award to EIS on the GPE. The arguments reflect a fundamental misunderstanding of our protest timeliness rules, and effectively promote the filing of defensive protests based merely on inferences of the government's ultimate intent. Therefore, we find that the protest was timely filed within 10 days of when ITility knew or reasonably should have known of the agency's decision to procure its requirements **[*22]** under the Alliant 2 contract. [10]

[CPD 10] Additional Background Regarding the "Rule of Two" and *15 U.S.C. § 644(r)*

Having concluded that ITility is an interested part to maintain this protest, we find it necessary to set forth and review the procurement principles regarding the "Rule of Two"--the applicable legal framework governing small business set-aside requirements. The "Rule of Two" describes a long-standing **[*23]** regulatory policy intended to implement provisions in the Small Business Act, *15 U.S.C. § 644(a)*, requiring that small businesses receive a "fair proportion of the total purchases and contracts for property and services for the Government." *49 Fed. Reg. 40,135 (Oct. 3, 1984)*. Accordingly, the Rule of Two requires agencies to set aside certain procurements for small businesses. First, each acquisition with an anticipated dollar value above the micro-purchase threshold (currently $ 10,000), but not over the simplified acquisition threshold (currently $ 250,000), shall be set aside for small businesses unless the contracting officer determines that there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of fair market prices, quality, and delivery. *15 U.S.C. § 644(j)*; *FAR 2.101*; *FAR 19.502-2(a)*. For acquisitions exceeding the simplified acquisition threshold, a contracting officer shall set aside the acquisition for small businesses if there is a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns, and (2) award will be made at fair market prices. *FAR 19.502-2(b)*.

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We also asked the parties to separately address whether the protest was effectively an untimely challenge to the terms of the Alliant 2 contract pursuant to our decision in *Datamaxx Group, Inc., B-400582, 2008 U.S. Comp. Gen. LEXIS 216, Dec. 18, 2008, 2008 WL 5397147*. In *Datamaxx*, we dismissed as untimely a challenge by a small business contractor that failed to timely challenge the terms of a subsequently issued IDIQ contract that clearly included within its scope the protester's incumbent set-aside work. Here, however, ITility's set-aside incumbent task order was issued after the issuance of the Alliant 2 solicitation. Thus, it would not be reasonable to have expected ITility to challenge Alliant 2's apparent inclusion of set-aside requirements that post-dated Alliant 2's issuance. Therefore, we also decline to dismiss the protest on this basis.

Prior to 2010, neither the Small Business Act nor its implementing regulations expressly **[*24]** addressed whether the issuance of task or delivery orders under multiple-award contracts were subject to, or otherwise exempt from, the mandatory set-aside requirements. In *Delex Systems, Inc., B-400403, Oct. 8, 2008, 2008 Comp. Gen. Proc. Dec. P 181*, our Office concluded that the set-aside provisions of *FAR 19.502-2(b)* applied to competitions for task and delivery orders issued under multiple-award contracts. Specifically, we explained that the Rule of Two applied to "any acquisition," and we construed the term acquisition to encompass task and delivery orders. *Id.* at 8.

On September 27, 2010, Congress passed the Small Business Jobs Act, amending the Small Business Act to address the question of setting aside for small businesses task or delivery orders that are issued under multiple-award contracts. Small Business Jobs Act of 2010, Pub. L. No. 111-240, Sept. 27, 2010, 124 Stat 2504. The Jobs Act amended the Small Business Act in relevant part as follows:

> *Section 15 of the Small Business Act (15 U.S.C. 644)*, as amended by this Act, is amended by adding at the end the following:
>
> (r) MULTIPLE AWARD CONTRACTS.--Not later than 1 year after the date of enactment of this subsection, the Administrator for Federal Procurement Policy and **[*25]** the Administrator [of the SBA], in consultation with the Administrator of General Services, shall, by regulation, *establish guidance under which Federal agencies may, at their discretion--*
>
> * * * *
>
> **[CPD 11]**(2) notwithstanding the fair opportunity requirements under *section 2304c(b) of title 10, United States Code*, and *section 303J(b) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. § [4106(c)]*) [11], set aside orders placed against multiple award contracts for small business concerns, including the subcategories of small business concerns identified in *subsection (g)(2)*. . . ."

124 Stat. 2504, 2541 (emphasis added).

On November 2, 2011, an interim rule was published **[*26]** in the Federal Register allowing federal agencies to begin taking advantage of the authorities set forth in *15 U.S.C. § 644(r)* while SBA developed its regulations. *76*

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For task and delivery orders issued under civilian agency multiple-award IDIQ contracts, "all contractors awarded the contracts shall be provided a fair opportunity to be considered, pursuant to the procedures set forth in the contracts, for each task order in excess of the micro-purchase threshold," absent certain enumerated exceptions not relevant here. *41 US.C. § 4106(c)*. The companion provision located at *10 U.S.C. § 2304c(b)* imposes the same fair opportunity requirements for multiple-award contracts issued by defense agencies and the National Aeronautics and Space Administration. *See also* ***FAR 16.505(b)*** (implementing the fair opportunity requirements).

Fed. Reg. 68032 (Nov. 2, 2011). Relevant here, the interim rule added a new provision at FAR 19.502-4, Multiple-award contracts and small business set-asides. Id. at 68035. The new provision provided that:

> In accordance with section 1331 of Public Law 111-240 (15 U.S.C. 644(r)) contracting officers *may, at their discretion*--
>
> (c) Set aside orders placed under multiple-award contracts for any of the small business concerns identified in 19.000(a)(3).

FAR 19.502-4(c) (emphasis added). Additionally, the interim rule similarly amended FAR subpart 16.5's ordering provisions to state that agencies "may, at their discretion," set aside orders for small business concerns. [12] *FAR 16.505(b)(2)(i)(F)*.

On October 2, 2013, SBA promulgated its own regulations to implement 15 U.S.C. § 644(r). These regulations include two relevant provisions. First, SBA's regulations state that: "The contracting officer *in his or her discretion may . . . set aside, or preserve the right to set* **[*27]** *aside, orders against a Multiple Award Contract* that was not itself set **[CPD 12]**aside for small business. The ultimate decision of whether to use any of the above-mentioned tools in any given procurement *is a decision of the contracting agency*." 13 C.F.R. § 125.2(e)(1)(ii) (emphasis added). Additionally, the regulations state: "Notwithstanding the fair opportunity requirements set forth in 10 U.S.C. 2304c and 41 U.S.C. 4106(c), a contracting officer *may* set aside orders for small businesses . . . against full and open Multiple Award Contracts." *Id.* at (e)(6)(i) (emphasis added).

Our Office was first confronted with interpreting the Jobs Act and the above-described regulatory implementation in Edmond Scientific Co., B-410179, B-410179.2, Nov. 12, 2014, 2014 Comp. Gen. Proc. Dec. P 336. In that case, the Department of the Army issued a task order on an unrestricted basis under a multiple-award IDIQ contract that included both small and large business contract holders. The protester, a small business contract holder, filed a protest challenging the Army's decision not to set aside the task order for the small business contract holders. The protester, joined by SBA, argued that the Army was required to conduct a Rule of Two analysis prior to proceeding **[*28]** with an unrestricted task order.

After reviewing 15 U.S.C. § 644(r) and the above-described regulatory implementation, we denied the protest. Specifically, we explained that "these regulations, by their plain language, grant discretion to a contracting officer about whether to set aside for small business participation task orders placed under multiple-award contracts."

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The relevant provision goes on to state that: "*When setting aside orders for small business concerns*, the specific small business program eligibility requirements identified in part 19 apply." ***FAR 16.505(b)(2)(i)(F)*** (emphasis added).

Edmond Scientific, supra at 7. We further explained our position that our prior decision in *Delex* was superseded by the passage of the *15 U.S.C. § 644(r)*. *Id. at 8 n.10*. We specifically found that the statutory grant of discretion does not require application of the Rule of Two prior to issuing an order, unless the multiple-award contract or task order solicitation expressly anticipated the use of the Rule of Two. *Id.; see also Technica Corp., B-416542, B-416542.2, Oct. 5, 2018, 2018 Comp. Gen. Proc. Dec. P 348 at 10* ("As our Office has explained, [*FAR 16.505(b)(2)(i)(F)*], along with the relevant provision in *15 U.S.C. § 644(r)*, make clear that agencies are not required to set aside an order for small businesses, absent specific contractual language obligating the agency to do so.").

We further expounded on our statutory interpretation of *Section 644(r)* in *Aldevra, B-411752, Oct. 16, 2015, 2015 Comp. Gen. Proc. Dec. P 339*. **[*29]** In *Aldevra*, the protester, supported by the SBA, argued that because a proposed Federal Supply Schedule (FSS) order had an anticipated value between the micropurchase and simplified acquisition thresholds, the agency was required to comply with small business set-aside requirements. [13] We **[CPD 13]** disagreed based on the discretionary language of *15 U.S.C. § 644(r)*. Specifically, we explained that:

> Given the language of the Jobs Act, as well as regulatory provisions implementing the Jobs Act, it is readily apparent that the general small business set-aside rule . . . implemented under *FAR § 19.502-2*, does not apply when placing orders under the FSS program. In this regard, the Jobs Act clearly provides for granting agency officials discretion in deciding whether to set aside orders under multiple-award contracts.

Aldevra, supra at 5-6.

In support of the protester's position, SBA additionally argued that our Office should interpret *15 U.S.C. § 644(r)* as merely providing contracting agencies with the discretion to place set aside orders against unrestricted multiple-award contracts as an exception to the statutory fair opportunity requirements. In this regard, SBA argued that we should not interpret the statutory grant of discretion as alleviating contracting agencies from complying with the Small Business Act's mandatory set-aside requirements when issuing orders under a multiple-award contract. SBA also argued that a contrary interpretation would effectively repeal the Small Business Act's mandatory set-aside requirements by implication. We disagreed because we found that the amendment to the Small Business Act under *15 U.S.C. 644(r)* established an express exception to the more general mandatory set-aside rules of 644(j) for

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We acknowledge that *Aldevra* involved a protest allegation that the procuring agency was required to set aside a FSS order that was valued between the micropurchase and the simplified acquisition thresholds, while this protest involves an allegation that an agency should have set aside a task order valued in excess of the simplified acquisition threshold under a multiple-award IDIQ contract. Notwithstanding **[*30]** these different facts, our analysis in *Aldevra* interpreting whether the grant of discretion afforded by *15 U.S.C. § 644(r)* is an exception to the Small Business Act's mandatory set-aside requirements is germane to our analysis here.

orders placed against multiple-award contracts. We found that this exception is rooted in the discretion granted **[*31]** to contracting agencies under 644(r) to decide whether to set aside orders. Specifically, we explained that:

> First, SBA's repeal by implication argument is misplaced since the application of *section 644(r)*, by its terms, and as implemented through the regulations noted above, is limited to multiple-award contracts and orders placed under such contracts. Thus, to the extent the set-aside requirement of *section 644(j)* is understood as not applying to orders under multiple-award contracts, *section 644(j)* would continue to have full application to all other types of contracts. Accordingly, just as the SBA would seek to harmonize the provisions at issue by interpreting *section 644(j)* as carving out an exception with respect to *section 644(r)*, an equivalent harmony can be achieved by changing the direction of the exception; that is, by properly understanding *section 644(r)* as having carved out a limited exception with respect to *section 644(j)* for orders under multiple-award contracts.
>
> Our interpretation in this regard is further bolstered by the second problem with SBA's position. That is, SBA's reading of the two provisions is at odds with the regulatory framework adopted to implement *section 644(r)*. As noted above, *FAR § 19.502-2* expressly provides that the small business provisions of the FAR, to include the **[*32]** provision implementing **[CPD 14]***section 644(j)*, are not mandatory. Accordingly, the regulations have essentially established *section 644(r)* as an exception to *section 644(j)* where orders under the FSS are concerned, thereby providing a harmonious application of the two sections. Third, we note that the interpretation set forth by SBA is at odds with its own regulations; specifically, *13 C.F.R. § 125.2(e)* . . . which establishes, without identifying any exception, that it is within a contracting officer's discretion whether to set aside an order against a multiple-award contract that was not itself set aside for small businesses.

Id. at 6-7.

Thus, our decisions in *Edmond Scientific* and *Aldevra* comprehensively established our interpretation of the import of *15 U.S.C. § 644(r)* and its implementing regulations, namely that set-aside determinations under multiple-award contracts are discretionary, not mandatory. Those decisions also addressed--and rejected--contrary interpretations that *15 U.S.C. § 644(r)* only authorized contracting officers to issue set-asides under multiple-award contracts as an exception to applicable fair opportunity requirements. As addressed above, absent exceptions not applicable here, agencies are generally required to provide all holders of a multiple-award IDIQ contract an **[*33]** opportunity to compete for resulting task orders. *41 US.C. § 4106(c)*. SBA previously argued that the discretion provided by the Jobs Act should be interpreted as effectively providing another enumerated exception to the fair opportunity rules (*i.e.*, to allow contracting agencies to set-aside orders for small businesses without violating its obligation to provide all IDIQ contract holders an opportunity to compete for the order), but did not relieve agencies from mandatory set-aside requirements when considering the placement of an order under a multiple-award IDIQ contract.

Subsequent to our decisions in *Edmond Scientific* and *Aldevra*, a proposed and final rule in FAR part 19 was issued to implement *15 U.S.C. § 644(r)* and the SBA's final regulations. [14] Relevant here, the FAR now provides that "[i]n accordance with *section 1331* of the Small Business Jobs Act of 2010 (*15 U.S.C. 644(r)(2)*), contracting officers *may, at their discretion*, set aside orders placed under multiple-award contracts" for small business concerns. *FAR 19.504(a)* (emphasis added).

SBA's and ITility's Arguments that the Rule of Two Applies Here

As an initial matter, we note that SBA's and ITility's submissions reflect their respective disagreement with our prior interpretation of the import of the changes implemented by **[CPD 15]***15 U.S.C. § 644(r)* and its implementing regulations. In this regard, both parties argue that the "discretion" afforded to agencies applied only to the fair opportunity requirements applicable to multiple-award contracts, and not the discretion to determine whether to set aside task or delivery orders if the requirements of the Rule of Two are met. *See, e.g.*, ITility Resp. to Supp. Briefing Req. at 13 ("GAO should interpret the Rule of Two, *Section 644(r)*, and its implementing regulations in a way that gives meaning to all provisions, does not repeal the Rule of Two by implication, and creates an exception only to the fair opportunity requirement as expressly intended by the Jobs Act."); SBA Comments at 1 ("The 2010 legislation applies to a specific situation in which an agency is choosing between restricting an order competition to small business and instead using the FAR's "fair opportunity" process."). Thus, this case presents at least the third time we have been **[*35]** presented with SBA's contrary interpretation as to the meaning and import of *section 644(r)* with respect to the applicability of the set-aside requirements when an agency places an order under a multiple-award contract. As addressed above, neither SBA nor ITility point to any change in the law that would cause us to reject our prior analysis.

Indeed, subsequent amendments to the FAR further support our prior analysis. As addressed above, the FAR amendments to part 19 to implement the 2010 Small Business Jobs Act and the SBA's final regulations emphasize the discretion afforded to contracting officers with respect to whether to set aside task orders under IDIQ contracts. Further, recent clarification of the FAR's issuance of the final rules implementing *15 U.S.C. § 644(r)* supports our interpretation of the discretion afforded to contracting officers with respect to whether to set aside task orders under multiple-award contracts.

Relevant here, the Federal Register notice implementing the final rules rejected public comments on the proposed rule suggesting that the set-aside requirements were mandatory when setting aside task or delivery orders under

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On December 6, 2016, the proposed rule implementing changes to the FAR based on SBA's issuance of its final rules was published in the *Federal Register. 81 Fed. Reg. 88072 (Dec. 6, 2016)*. On February 27, 2020, the final rule implementing the December 2016 proposed **[*34]** rule was published in the ***Federal Register. 85 Fed. Reg. 11746 (Feb. 27, 2020)***.

multiple-award IDIQ contracts. The notice emphasized that 15 U.S.C. § 644(r) makes set-aside **[*36]** decisions of task orders discretionary, not mandatory. Specifically, the Federal Register includes the following exchange:

> *Comment*: Several respondents stated that because the court in [Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 195 L. Ed. 2d 334 (2016)] held that a task order was a contract, "contract" as written in 15 U.S.C. 644(j) includes task orders issued from multiple-award contracts, making order set-asides on multiple-award contracts mandatory not discretionary when applying the "rule of two." . . .
>
> *Response*: The "rule of two" described in Kingdomware refers to the [Veterans Affairs (VA)] statute, *38 U.S.C. 8127*, not a requirement in the Small Business Act. The Kingdomware decision is silent on the construction of the Small Business Act. The VA statute and the Small Business Act are written differently, with the former statute applying only to acquisitions of the [VA]. The VA statute only speaks to contracts and is **[CPD 16]** silent on the handling of orders. Because of this silence, the Court concluded that the mandate applicable to contracts also applied to orders, since orders have the legal effect of contracts. *By contrast, the Small Business Act has separate and distinct provisions addressing contracts and orders and addresses each in a **[*37]** different manner*. Section 1331 of the Jobs Act (15 U.S.C. 644(r)) addresses order set-asides *and makes the application of the "rule of two" discretionary for orders placed under multiple-award contracts*. 15 U.S.C. 644(j) applies to contracts and mandates application of the "rule of two" for contracts valued at the simplified acquisition threshold or less.
>
> 15 U.S.C 644(r) is specific in that it only applies to multiple-award contracts. Legislative history demonstrates that prior to 15 U.S.C. 644(r), there was a mixed record of small business participation on multiple-award contracts. Congress was clear in section 1331 of the Jobs Act that under a multiple-award contract, *agencies may, at their discretion* . . . conduct a set-aside of orders under a multiple-award contract.

85 Fed. Reg. at 11746 (emphasis added). [15]

Thus, far from supporting the position espoused by SBA and ITility, new legal developments directly undercut their position. In this regard, we agree with the analysis in the Federal Register that Congress intended to clearly delineate a distinction between a procuring agency's mandatory set-aside obligations when establishing a contract, and an agency's discretion with respect to setting aside task or delivery orders under a multiple-award IDIQ

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The December 6, 2016 Federal Register notice implementing the proposed rules similarly rejected an argument requiring automatic set-asides for orders between the micropurchase and simplified acquisition thresholds. Specifically, the response explained that: "The proposed FAR rule implements the regulatory changes provided in SBA's final rule, including clarification of the procedures for setting aside task and delivery orders under multiple-award contracts. *SBA's rule does **[*38]** not require orders to be set aside*." *81 Fed. Reg. at 88073* (emphasis added).

contract. We also note that this dichotomy between the mandatory set-aside requirements at the contract level, and the discretion afforded to contracting officers at the task or delivery order level, appears to be facially consistent with the regime set forth in the SBA's own regulations.

Specifically, 13 C.F.R. § 125.2(e) itself highlights that the set-aside requirements are mandatory when establishing the multiple-award contract itself, but the regulation then shifts and uses discretionary language when discussing the placement of orders against a multiple-award contract that was not set aside for small businesses. In relevant part, the regulation states:

> **[CPD 17]**(i) The contracting officer *must* set-aside a Multiple **[*39]** Award Contract if the requirements for a set-aside are met. . . .
>
> (ii) The contracting officer *in his or her discretion may . . . set aside, or preserve the right to set aside, orders against a Multiple Award Contract* that was not itself set aside for small business. The ultimate decision of whether to use any of the above-mentioned tools in any given procurement *is a decision of the contracting agency*.

Id. at (e)(1) (emphasis added).

Therefore, we find no basis to depart from our Office's prior interpretation in *Edmond Scientific* that 15 US.C. § 644(r) creates an exception for orders placed under an IDIQ contract from mandatory small business set-aside requirements.

SBA and ITility also argue, however, that our foregoing interpretation of 15 U.S.C. § 644(r) and its implementing regulations is not controlling in this case. Specifically, SBA and ITility argue that *Edmond Scientific* only involved a discrete challenge whether to set aside an individual order under an IDIQ contract, while this protest challenges "whether the agency properly used a vehicle with no small business competition." SBA Comments at 10; *see also* ITility Resp. to Supp. Briefing Req. at 13 ("Critically, GAO was not presented with, and did not decide, the question of whether **[*40]** the agency was required to conduct a Rule of Two analysis prior to its decision to use the [specific IDIQ] contract, since the selection of that contract vehicle was not challenged.") (emphasis in original).

In support of its argument, the protester cites to a recent decision issued by the United States Court of Federal Claims (COFC), *The Tolliver Grp., Inc. v. United States, ___ Fed. Cl. ___, Nos. 20-1108C, 20-1290C, 2020 U.S. Claims LEXIS 2421, 2020 WL 7022493 (Nov. 30, 2020)*, to argue that this case can be distinguished from our decision in *Edmond Scientific* and should have a different result. In *Tolliver*, the court decided that it had jurisdiction to hear--and ultimately sustained--a protest challenging a procuring agency's failure to apply the Rule of Two prior to issuing an unrestricted task order. The court in *Tolliver* distinguished *Edmond Scientific* by noting that unlike the

protester in *Edmond Scientific*, which was a small business contractor under the relevant IDIQ contract, the protesters in *Tolliver* were challenging the agency's moving of work currently performed by small businesses "to a [multiple-award] IDIQ where the incumbents are ineligible to compete for an award." *Tolliver Grp., 2020 U.S. Claims LEXIS 2421, 2020 WL 7022493 at *36 n.63*.

Similar to the court in *Tolliver*, ITility and SBA attempt to draw a distinction between protests challenging **[*41]** an agency's decision not to set aside an order when they are filed by an IDIQ contract holder (a contractor that is "inside" the IDIQ), as was the case in *Edmond Scientific*, and a protester that is not a holder of the underlying IDIQ contract (a contractor "outside" the IDIQ). As addressed above, ITility and SBA both argue that under the facts in this case, because ITility is "outside" the Alliant 2 contract, DHS had no discretion with respect to performing a Rule of Two analysis before issuing the order **[CPD 18]**under the Alliant 2 contract, and is required to set aside the acquisition because there are at least two small businesses outside Alliant 2 capable of doing the work at reasonable prices. [16]

We are not persuaded by ITility's and the SBA's efforts to distinguish our decision in *Edmond Scientific* on the basis that the case turned on the fact that the protester was "inside" as opposed to "outside" the IDIQ contract. First, this dichotomy has no basis in the Small Business Act or the FAR. In this regard, this argument would require us to evaluate an agency's acquisition planning without regard to whether the acquisition is in connection with the issuance or proposed issuance of a task order, but, rather, whether the agency's acquisition planning preceding its

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The protester, SBA, and the court's decision in *Tolliver* support their position by relying on our decision in *LBM, Inc., B-290682, Sept. 18, 2002, 2002 Comp. Gen. Proc. Dec. P 157*, *recon. denied, Dep't of the Army Req. for Modification. of Recommendation, B-290682.2, Jan. 9, 2003, 2003 Comp. Gen. Proc. Dec. P 23*. *See, e.g., Tolliver Grp., 2020 U.S. Claims LEXIS 2421, 2020 WL 7022493 at *36 n.63* ("In short, none of those GAO cases, except *LBM*, addresses the precise issue of an agency moving work currently performed by a small business to a [multiple-award] **[*42]** IDIQ where the incumbents are ineligible to compete for an award."). Our decision in *LBM* can be distinguished from the case at hand in two important respects. In *LBM, Inc.*, the protester, a small business incumbent contractor, filed a protest challenging the agency's decision to acquire the identical follow-on requirements on an unrestricted basis under a request for task order proposal issued under an IDIQ contract that the protester did not hold. In *LBM*, we viewed the protest not as a challenge to the proposed task order, as is the case here, but, rather, as a challenge to the terms of the underlying IDIQ contract. *LBM, Inc., supra at 4*.

Here, however, as addressed above, while ITility argues that the requirements covered by the challenged task order are functionally equivalent to its current work, it does not materially contest that DHS's current requirements are different from ITility's current task order because DHS requires additional, more senior IT-centric labor categories and expertise. More importantly, *LBM* was issued eight years prior to the passage of the 2010 Jobs Act, which amended the Small Business Act to include the provisions of *15 U.S.C. § 644(r)* and the accompanying FAR provisions, all **[*43]** of which grant contracting agencies discretion when deciding whether to set aside orders under multiple-award contracts.

ultimate acquisition approach (*e.g.*, contract versus order) was reasonable. We do not, however, review inchoate acquisitions; rather, we only review specific procurement actions, such as the issuance of a solicitation or proposed award of a contract or order. *31 U.S.C. § 3551(1)*.

For example, as addressed above, we do not consider protests challenging an agency's stated intention to set aside a procurement prior to the issuance of an unrestricted solicitation. *See, e.g., Glen/Mar Constr., Inc., supra; Ystueta, Inc., supra; York Int'l* **[CPD 19]***Corp., supra*. We have further explained **[*44]** that an agency's acquisition planning, including compliance with moving work previously subject to small business set-aside restrictions to task orders not subject to those restrictions are necessarily made "in connection with" the proceeding task order procurements, and are not separate matters that we review "in a vacuum." *ServFed, Inc., B-417708, Sept. 18, 2019, 2019 Comp. Gen. Proc. Dec. P 326 at 4* (dismissing protest for lack of jurisdiction challenging procuring agency's decision to remove protester's incumbent requirements procured under the 8(a) program to an unrestricted task order with a value below the Federal Acquisition Streamlining Act's applicable jurisdictional threshold because where "the specific procurement involved in a protest is the issuance of a task order, and the requested remedy would involve termination of the task order, the protest is necessarily 'in connection with that task order.'") (citations omitted)); *see also Arch Sys., LLC, B-417567, B-417567.2, July 2, 2019, 2019 Comp. Gen. Proc. Dec. P 227* (same, with respect to protest challenging the removal of the protester's Historically Underutilized Business Zone (HUBZone) incumbent work to a non-HUBZone **[*45]** task order). Thus, since the procurement action challenged here is the award of a task order, we find that the discretion afforded contracting officers when ordering under multiple-award IDIQ contracts applies here, regardless of the proposed "inside" versus "outside" distinction.

Second, the argument suggests that a small business without an IDIQ contract would have a greater ability to challenge an agency decision to set aside an order than would a contractor that holds the contract under which the order itself it issued. We see no basis for such disparate treatment. The "inside" versus "outside" dichotomy is entirely artificial because the small businesses that hold IDIQ contracts legally exist outside of the IDIQ contract as well.

In this regard, the protester in *Edmond Scientific*, like the protester in this case, could have just as easily argued that the order at issue should be set aside outside the IDIQ contract pursuant to the Rule of Two. We are not inclined to view the different result as being due to a pleading error by the protester in *Edmond Scientific*. In fact, in *Aldevra*, where we applied the same analysis as that in *Edmond Scientific*, the protester made the more general **[*46]** argument that the agency was required to set aside the procurement pursuant to the Rule of Two because there were multiple small business contractors that were not holders of multiple-award contracts. *See Aldevra, supra at 2*.

Finally, if we adopted ITility's and SBA's interpretation that a Rule of Two analysis is required before an agency selects the IDIQ contract vehicle, it is not apparent how an agency can ever get "inside" the IDIQ and exercise the

discretion afforded by *15 U.S.C. § 644(r)* in connection with the issuance of an order. To this point, if the Rule of Two is satisfied, a contracting officer would be required to set aside the contract for small businesses. Alternatively, if the Rule of Two is not satisfied, the contracting officer would not need the discretion established by *§ 644(r)* and the FAR because there would not be two small businesses capable of performing the order. Thus, SBA's and ITility's arguments are not actually proposing a basis on which to distinguish *Edmond Scientific*, but, rather, would require us to overturn the decision and adopt the parties' position that the grant of discretion in the Jobs Act only provided an exception to the applicable fair opportunity **[CPD 20]**requirements (which we **[*47]** reject for the reasons set forth above). Therefore, for the reasons above, we reject SBA's and ITility's efforts to distinguish *Edmond Scientific*.

In sum, while we acknowledge SBA's important role in advocating and promoting the interests of small businesses in government contracting, and ITility's interest in competing for these specific DHS requirements under a set-aside procurement, our Office must recognize the broad grant of discretion afforded by Congress to agencies with respect to whether to set aside orders under multiple-award contracts. The arguments advanced by SBA and ITility, while pointing to the Small Business Act's general policy directing contracts to small businesses, do not reasonably account for Congress's subsequent clarification in the 2010 Jobs Act that the general policy was expressly made discretionary when ordering under a multiple award contract.

In this regard, the discretion afforded by the Jobs Act appears to be consistent with the broad discretion afforded to contracting officials when issuing orders against multiple-award IDIQ contracts. Specifically, with respect to ordering under multiple-award IDIQ contracts, the Federal Acquisition Streamlining Act's **[*48]** legislative history explained that "contracting officials will have wide latitude and will not be constrained by [the Competition In Contracting Act of 1984] requirements in defining the nature of the procedures that will be used in selecting the contractor to perform a particular task order," and "broad discretion as to the circumstances and ways for considering factors" for award. S. Rep. 103-258, 1994 U.S.C.C.A.N. 2561, 2576. Where Congress has enunciated a clear policy granting contracting officials discretion, and the Executive Branch's regulatory implementation similarly emphasizes the statutory grant of discretion, our Office cannot substitute the parties' or our own judgments on the matter.

Market Research

Next, ITility and SBA raise a number of challenges to DHS's market research, arguing that DHS failed to reasonably determine whether it was likely to receive quotations from two or more small businesses at fair market prices. However, as discussed above, agencies have the discretion to set aside task orders under a multiple-award IDIQ contract. *See FAR 19.504(a)*; *13 C.F.R. § 125.2(e)(1)(ii)*. Thus, even if our Office were to agree with ITility and SBA that DHS's market research was not reasonable, there would be no **[*49]** basis for our Office to recommend any corrective action because the agency would not be required to set aside the procurement. *See American Relocation Connections, LLC, B-416035, May 18, 2018, 2018 Comp. Gen. Proc. Dec. P 174 at 7* (agencies have the discretion to set aside procurements under the FSS, *FAR 8.405-5(a)(2)*; based on this discretion, an agency's refusal to set

aside an order under the FSS does not provide a basis to sustain a protest); *AeroSage, LLC, B-414640, B-414640.3, July 27, 2017, 2017 Comp. Gen. Proc. Dec. P 233 at 5* (same, with respect to an agency's decision not to seek a waiver of the nonmanufacturer rule, *FAR 19.102(f)(5)*). We therefore find that ITility's argument **[CPD 21]**fails to state adequate legal grounds of protest, and therefore dismiss it on that basis. [17] *See 4 C.F.R. § 21.5(f)*.

The protest is denied.

Thomas H. Armstrong
General Counsel

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For the same reason, we dismiss ITility's protest alleging that DHS violated the requirements of *FAR 19.202-1(e)(1)(i)*. Under *FAR 19.202-1(e)(1)(i)*, which implements the requirements of *13 C.F.R. § 125.2(c)(3)(iv)*, a contracting officer must coordinate with SBA if "[t]he proposed acquisition is for supplies or services currently being provided by a small business and the proposed acquisition is of a quantity or estimated dollar value, the magnitude of which makes it unlikely that small businesses **[*50]** can compete for the prime contract." Even assuming that this requirement would have applied here, a contention contested by DHS, we nevertheless can discern no competitive prejudice from DHS's failure to comply with the requirement here. Specifically, for the reasons set forth above, it was within DHS's discretion whether to set-aside the task order at issue. Thus, even if DHS should have conferred with SBA, there would be no basis for our Office to recommend any corrective action because the agency would not be required to set aside the procurement.

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Swift & Staley, Inc. v. United States

United States Court of Federal Claims

August 20, 2021, Filed under seal

No. 21-1279

Reporter

155 Fed. Cl. 630 *; 2021 U.S. Claims LEXIS 1763 **

SWIFT & STALEY, INC., Plaintiff, v. THE UNITED STATES, Defendant, and AKIMA INTRA-DATA, LLC, Defendant-Intervenor.

Subsequent History: Reissued for Publication: August 27, 2021[1] **[**1]** .

Core Terms

joint venture, receipts, Subparagraph, regulations, populated, proportionate share, affiliation, protest, self-certification, calculating, purposes, plain language, Solicitation, injunctive relief, small business, procurement, joint venture partner, ownership interest, unpopulated, eligible, parties, qualify, argues

Case Summary

Overview

HOLDINGS: [1]-In a protest against the SBA's decision affirming a determination that plaintiff was other than small for the purposes of its qualification for a small-business set-aside contract, claimant's motion for judgment on the administrative record was granted because the SBA decision was inconsistent with the plain language of 13 C.F.R. § 121.103(h). Further, the plain language of 13 C.F.R. § 121.404(g) did not support expanding its application to require claimant to treat the awardee as a joint venture under § 121.404(h) for the purpose of claimant's self-certification, when, at the time of claimant's self-certification, the awardee clearly did not meet the requirements of a joint venture under § 121.404(h).

Outcome

Plaintiff's motion for judgment on the administrative record granted.

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[1] This Opinion was originally filed under seal on August 20, 2021 to provide the parties an opportunity to propose appropriate redactions. ECF No. 38. On August 26, 2021, Plaintiff filed a joint status report with proposed redactions. ECF No. 39. The Court accepts the proposed redactions, and the redacted language is replaced as follows: "[XXX]."

LexisNexis® Headnotes

Banking Law > ... > Banking & Finance > Federal Acts > Small Business Act

Public Contracts Law > Bids & Formation > Competitive Proposals

Public Contracts Law > Business Aids & Assistance > Small Businesses

HN1[] **Federal Acts, Small Business Act**

Under the Small Business Act, the Small Business Administration (SBA) is responsible for promulgating detailed definitions or standards by which a business concern may be determined to be a small business concern. *15 U.S.C.S. § 632(a)(2)(A) (2018)*. In accordance with its statutory authority, the SBA sets size standards that determine if a business concern is eligible for government programs and preferences reserved for small business' concerns. *13 C.F.R. § 121.101 (2020)*. To bid on a contract, a concern must self-certify that it meets the size standard for the particular solicitation. *13 C.F.R. § 121.405(a) (2020)*. The size of a concern is determined as of the date when the concern submits a written self-certification. *13 C.F.R. § 121.404(a) (2020)*.

Business & Corporate Law > Joint Ventures > Formation

Business & Corporate Law > Joint Ventures > Management Duties & Liabilities

Business & Corporate Law > Agency Relationships > Agents Distinguished > Joint Venturers

HN2[] **Joint Ventures, Formation**

Part of a concern's size calculation involves a determination of its affiliations. *13 C.F.R. § 121.103 (2020)*. Under the General Principles of Affiliation, business concerns are considered affiliates when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. *§ 121.103(a)(1)*. In general, a concern must include the receipts of its affiliates when calculating its size. *13 C.F.R. § 121.104(d)(1) (2020)*. The SBA has promulgated specific regulations that govern affiliation based on joint ventures, which provide, among other things, how a joint venture and its partners calculate receipts when determining size. *§ 121.103(h)*; *§ 121.103(h)(5)*. *13 C.F.R. § 121.103(h)* defines the term joint venture and establishes requirements for a concern to qualify as a joint venture for the purposes of the provision.

Banking Law > ... > Banking & Finance > Federal Acts > Small Business Act

Business & Corporate Law > Joint Ventures > Formation

Public Contracts Law > Business Aids & Assistance > Small Businesses

Business & Corporate Law > Joint Ventures > Management Duties & Liabilities

HN3[] **Federal Acts, Small Business Act**

When determining the size of a joint venture for a particular solicitation, the partners to the joint venture are treated as affiliates and must aggregate their receipts in calculating the size of the joint venture. *13 C.F.R. § 121.103(h)(2)*. An exception to this regulation allows a joint venture to avoid aggregating the receipts of its partners and to qualify for a small business set-aside contract if each of its partners is considered small under the applicable size standard for that solicitation. *§ 121.103(h)(3)(i)*. For the purposes of its own size determination, a concern that is a partner to a joint venture must include in its receipts its proportionate share of joint venture receipts under *13 C.F.R. § 121.103(h)(5)*.

Business & Corporate Law > Joint Ventures > Formation

Business & Corporate Law > Agency Relationships > Agents Distinguished > Joint Venturers

Business & Corporate Law > Joint Ventures > Management Duties & Liabilities

HN4[] **Joint Ventures, Formation**

A populated joint venture uses its own employees to perform the contract, whereas an unpopulated joint venture uses employees of the joint venture partners to perform the contract. *13 C.F.R. § 121.103(h)*.

Administrative Law > Sovereign Immunity

Governments > Federal Government > Claims By & Against

Public Contracts Law > Dispute Resolution > Jurisdiction

Governments > Courts > Courts of Claims

HN5[] **Administrative Law, Sovereign Immunity**

The Tucker Act grants the United States Court of Federal Claims authority to render judgment on an action by an interested party objecting to any alleged violation of statute or regulation in connection with a procurement. *28 U.S.C.S. § 1491(b)(1) (2018)*. The Tucker Act's waiver of sovereign immunity covers a broad range of potential disputes arising during the course of the procurement process. Challenges to decisions by the Office of Hearings

and Appeals fall within the scope of jurisdiction granted under the Tucker Act because such challenges are actions in connection with a proposed procurement.

Civil Procedure > ... > Justiciability > Standing > Personal Stake

Public Contracts Law > Dispute Resolution > Bid Protests

Governments > Courts > Courts of Claims

Public Contracts Law > Dispute Resolution > Jurisdiction

HN6[] **Standing, Personal Stake**

To maintain a bid protest in the United States Court of Federal Claims, the protestor must establish its standing as an interested party in the procurement. 13 C.F.R. § 1491(b)(1). A protestor is an interested party if it is an actual or prospective bidder whose direct economic interest would be affected by the award of the contract. A direct economic interest is shown if the protestor suffered a non-trivial competitive injury which can be redressed by judicial relief.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Public Contracts Law > Dispute Resolution > Bid Protests

Governments > Courts > Courts of Claims

HN7[] **Standards of Review, Arbitrary & Capricious Standard of Review**

The U.S. Court of Federal Claims reviews agency decisions in bid protests using the standard of review set forth in the Administrative Procedure Act (APA). *28 U.S.C.S. § 1491(b)(4)*. To succeed, the protestor must show that the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *5 U.S.C.S. § 706(2)(A) (2018)*. Under this deferential standard, the Court may set aside a procurement activity if either: (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Banking Law > ... > Banking & Finance > Federal Acts > Small Business Act

Public Contracts Law > Business Aids & Assistance > Small Businesses

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

HN8[] **Standards of Review, Deference to Agency Statutory Interpretation**

The U.S. Court of Federal Claims gives deference to an agency's interpretation of its own regulations if the regulation is silent or ambiguous. The Court affords special deference to decisions by the Office of Hearings and Appeals due to the Small Business Administration's quasi-technical administrative expertise and a familiarity with the situation acquired by long experience with the intricacies inherent in a comprehensive regulatory scheme. Deference, though, is inappropriate when the agency's interpretation is plainly erroneous or inconsistent with the regulation.

Governments > Legislation > Interpretation

HN9[] **Legislation, Interpretation**

The U.S. Court of Federal Claims construes a regulation in the same way as a statute. The Court's analysis of a regulation begins with the plain language of the regulation. As in all statutory construction cases, we begin with the language of the statute. If the regulatory language is clear and unambiguous, then the Court does not need to conduct any further inquiry. The Court considers the plain language of the regulation, the common meaning of the terms, and the text of the regulation both as a whole and in the context of its surrounding sections. When a regulation provides a definition, the Court must follow that definition, even if it varies from the term's customary meaning. Additionally, it is axiomatic that the statutory definition of the term excludes unstated meanings of that term.

Business & Corporate Law > Joint Ventures > Formation

Business & Corporate Law > Joint Ventures > Management Duties & Liabilities

HN10[] **Joint Ventures, Formation**

Consequently, a partner to a populated joint venture is not required to include in its receipts its proportionate share of joint venture receipts under Subparagraph (h)(5).

Governments > Legislation > Interpretation

HN11[] **Legislation, Interpretation**

A term appearing in several places in a statutory text is generally read the same way each time it appears.

Business & Corporate Law > Joint Ventures > Formation

Business & Corporate Law > Joint Ventures > Management Duties & Liabilities

HN12[] **Joint Ventures, Formation**

The referenced exception to affiliation for certain joint ventures is found in *13 C.F.R. § 121.103(h)(3)*, which provides three instances in which a joint venture is exempt from the general rule of affiliation between its partners for its size determination. *§ 121.103(h)(3)(i)-(iii)*.

Banking Law > ... > Banking & Finance > Federal Acts > Small Business Act

Public Contracts Law > Business Aids & Assistance > Small Businesses

HN13[] **Federal Acts, Small Business Act**

13 C.F.R. § 121.404(g) states that when a business concern is determined to be small at the time of its self-certification, the concern is generally considered to be a small business throughout the life of that contract. *13 C.F.R. § 121.404(g) (2020)*.

Banking Law > ... > Banking & Finance > Federal Acts > Small Business Act

Public Contracts Law > Business Aids & Assistance > Small Businesses

HN14[] **Federal Acts, Small Business Act**

Small Business Administration determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification. *13 C.F.R. § 121.404(a)*.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN15[] **Injunctions, Preliminary & Temporary Injunctions**

Injunctive relief is reserved for extraordinary circumstances.

Governments > Federal Government > Claims By & Against

Governments > Courts > Courts of Claims

HN16[] **Federal Government, Claims By & Against**

The United States Court of Federal Claims presumes that government officials act in good faith.

Headnotes/Summary

Headnotes

Bid Protest; Motion for Judgment on the Administrative Record; SBA Size Determination; Regulatory Interpretation

Counsel: Richard Paul Rector, DLA Piper US LLP, Washington, DC, counsel for Plaintiff.

Evan Wisser, U.S. Department of Justice, Civil Division, Washington, DC, counsel for Defendant.

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Judges: THOMPSON M. DIETZ, Judge.

Opinion by: THOMPSON M. DIETZ

Opinion

[*632] ORDER AND OPINION

DIETZ, Judge

Incumbent contractor, Swift & Staley, Inc. ("SSI"), protests a decision by the Office of Hearings and Appeals ("OHA") of the Small Business Administration ("SBA") affirming a determination by the SBA Area Office that SSI is "other than small" for the purposes of its qualification for a small-business set-aside contract. OHA affirmed the determination on the basis that SBA regulations require SSI to assume its proportionate share of receipts generated by a populated joint venture in which SSI has an ownership interest. Because the Court finds that the OHA decision is inconsistent with the plain language of the regulations, Plaintiff's motion for judgment on the administrative record is **GRANTED**, and **[**2]** Defendant's and Defendant-Intervenor's respective cross motions for judgment on the administrative record are **DENIED**. This protest is **REMANDED** to the OHA for further proceedings consistent with this opinion.

I. BACKGROUND

A. Regulatory Framework

HN1[] Under the Small Business Act, the SBA is responsible for promulgating "detailed definitions **[*633]** or standards by which a business concern may be determined to be a small business concern." *15 U.S.C. §*

632(a)(2)(A) (2018). In accordance with its statutory authority, the SBA sets "size standards" that determine if a business concern is eligible for "[g]overnment programs and preferences reserved for 'small business' concerns." *13 C.F.R. § 121.101 (2020)*.[2] To bid on a contract, a concern must self-certify that it meets the size standard for the particular solicitation. *13 C.F.R. § 121.405(a) (2020)*. The size of a concern is determined as of the date when the concern submits a written self-certification. *13 C.F.R. § 121.404(a) (2020)*.

HN2[↑] Part of a concern's size calculation involves a determination of its affiliations. *See 13 C.F.R. § 121.103 (2020)*. Under the "General Principles of Affiliation," business concerns are considered affiliates when "one controls or has the power to control the other, or a third party or parties controls or has the **[**3]** power to control both." *§ 121.103(a)(1)*. In general, a concern must include the receipts of its affiliates when calculating its size. *13 C.F.R. § 121.104(d)(1) (2020)*. The SBA has promulgated specific regulations that govern affiliation based on joint ventures, which provide, among other things, how a joint venture and its partners calculate receipts when determining size. *See § 121.103(h)*; *§ 121.103(h)(5)*. *Paragraph (h) of 13 C.F.R. § 121.103 ("Paragraph (h)")* defines the term "joint venture" and establishes requirements for a concern to qualify as a joint venture "[f]or the purposes of [the] provision."

HN3[↑] When determining the size of a joint venture for a particular solicitation, the partners to the joint venture are treated as affiliates and must aggregate their receipts in calculating the size of the joint venture. *§ 121.103(h)(2)*. An exception to this regulation allows a joint venture to avoid aggregating the receipts of its partners and to qualify for a small business set-aside contract if each of its partners is considered small under the applicable size standard for that solicitation. *§ 121.103(h)(3)(i)*. For the purposes of its own size determination, a concern that is a partner to a joint venture "must include in its receipts its proportionate share of joint venture receipts" under *13 C.F.R. § 121.103(h)(5)* ("*Subparagraph (h)(5)*").

This protest is rooted in a 2016 **[**4]** change to Paragraph (h) and the resultant impact on a concern's size determination under Subparagraph (h)(5). Prior to the 2016 change, populated joint ventures met the requirements of Paragraph (h), which stated that joint ventures "may (but need not) be populated[.]"[3] *See 13 C.F.R. § 121.103(h) (2015)*. After the 2016 change, *Paragraph (h)* required that joint ventures "may *not* be populated." *§ 121.103(h)* (emphasis added). As a result of this change, under the regulations in effect when SSI self-certified in 2020, populated joint ventures no longer met the requirements set forth in *Paragraph (h)*.

B. Factual Background

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[2] Except where stated otherwise, the Court cites to the SBA regulations in effect when SSI submitted its written self-certification on April 16, 2020. *See 13 C.F.R. §121.404(a)*. AR 78, 83, 3855; Pl.'s Mem. at 5.

[3] *HN4*[↑] A populated joint venture uses its own employees to perform the contract, whereas an unpopulated joint venture uses employees of the joint venture partners to perform the contract. *See § 121.103(h)*; *see also Senter, LLC v. United States, 138 Fed. Cl. 110, 112 (2018)*.

SSI is an employee-owned company headquartered in Paducah, Kentucky. Pl.'s Mem in Supp. Of Its Mot. for J. on the Administrative R. at 2, ECF No. 26 [hereinafter Pl.'s Mem.]; Compl. ¶ 13, ECF No. 1. SSI has performed recurring facility support service contracts at the Paducah gaseous diffusion plant since 2005. Pl.'s Mem. at 1; Decl. of C. Leon Owens ¶ 4, ECF No. 26-1. In 2015, SSI and another company, North Wind Solutions, LLC, formed Portsmouth Mission Alliance, LLC ("PMA"), a populated joint venture, for the sole purpose of performing infrastructure support services at the gaseous diffusion plant in Portsmouth, **[**5]** Ohio. *See* Compl. ¶ 21; AR 3741. PMA was awarded the support services contract for the Portsmouth plant in 2016, and, at the time of SSI's self-certification, PMA was performing under its contract. AR 3722-23; Pl.'s Mem. at 3. SSI holds a [XXX] ([XXX]%) minority ownership interest **[*634]** in PMA and represents [XXX] of [XXX] PMA board members.[4] AR 3713, 3775, 3826.

On February 3, 2020, the Department of Energy ("DOE") issued a solicitation for a new infrastructure support services contract (the "Solicitation") at the Paducah plant. AR 88. The Solicitation was set-aside for a small business concern that qualified under the applicable size standard, which has a $41.5 million size limit. AR 943. SSI, the incumbent contractor, submitted a proposal on April 16, 2020, which included a self-certification that SSI was below the size limit. AR 78, 83, 3855; Pl.'s Mem. at 5. DOE awarded the contract to SSI on December 10, 2020. AR 9.

C. Procedural History

Shortly after the award, Akima Intra-Data, LLC ("AID"), an eligible but unsuccessful offeror, filed a size protest with the SBA Area Office ("Area Office") challenging SSI's size. AR 3. AID argued that, when SSI's "receipts from its own business activity" **[**6]** are combined with its "significant ownership interest" in PMA, SSI exceeds the size standard for the Solicitation. AR 3784. SSI responded by explaining that PMA is a *populated* joint venture, which is "not allowable under SBA's current rules and therefore does not . . . require SSI to include its proportionate share of receipts from PMA as required for joint ventures [under Subparagraph (h)(5)]." AR 3785.

The Area Office found "that since PMA is a joint venture, actively generating revenues for its owners which include SSI, SSI is required to follow the regulations...[and] SSI's proportionate share of PMA's receipts must be included when calculating SSI's size in accordance with [Subparagraph (h)(5)]." AR 3789. The Area Office further noted "that even if SSI believes PMA is not considered a joint venture as of the date size is determined in the instant case and consequently SSI does not have to include a proportion of the receipts as required for joint ventures at [Subparagraph (h)(5)]; SSI's minority ownership, while not otherwise creating affiliation between SSI and PMA, still results in receipts from PMA which must be included in SSI's calculation of average annual receipts in accordance **[**7]** with *13 C.F.R. § 121.104(a)*." *Id.* The Area Office determined that SSI was required to assume a

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[4] The SBA Area Office stated in its size determination that SSI's minority ownership does not "otherwise creat[e] affiliation between SSI and PMA[.]" *See* AR 3789. SSI does not challenge the SBA Area Office on this point, and it is not at issue in this protest. *See* Pl.'s Mem. at 16 n.8.

[XXX] percent ([XXX]%) proportionate share of PMA's receipts based on SSI's ownership interest, and, as a result, exceeded the $41.5 million threshold. AR 3790.

SSI appealed the Area Office's size determination to the OHA arguing that the size determination was "based on clear errors of law" because the Area Office "fail[ed] to give proper weight to the fact that PMA is a *populated* [joint venture]."AR 3800 (emphasis in original). Finding no clear error in the Area Office's analysis, OHA affirmed the size determination. AR 3909. OHA concluded that the SBA regulations in place at the time of SSI's size determination "stipulate that 'a concern must include a proportionate share of joint venture receipts' without regard to whether the joint venture is populated or unpopulated, and irrespective of whether the joint venture meets all requirements for the joint venture partners to be excepted from affiliation." AR 3907. OHA further concluded that PMA "is still a 'joint venture' for purposes of calculating size of the joint venture's [partners]." *Id.*

SSI then filed this protest. *See* Compl. at 1. SSI argues that, by affirming **[**8]** the Area Office's determination, the OHA acted "arbitrarily and capriciously and rendered a decision not in accordance with the law." Pl.'s Mem. at 10. SSI specifically argues that OHA failed to recognize that joint venture partners "are not required to assume a proportionate share of the joint venture's receipts unless the joint venture is compliant with the requirements of [Paragraph (h)]." *Id.* Because PMA is a populated joint venture, SSI argues that PMA "is not compliant with the requirements of the current version of [Paragraph (h)]" and that, therefore, SSI is not required under Subparagraph (h)(5) to assume a proportionate share of PMA receipts **[*635]** for its size purposes.[5] *Id.*

II. JURISDICTION AND STANDING

HN5[↑] The Tucker Act grants this Court authority to render judgment on an action "by an interested party objecting to . . . any alleged violation of statute or regulation in connection with a procurement." 28 U.S.C. § 1491(b)(1) (2018). The Tucker Act's waiver of sovereign immunity "covers a broad range of potential disputes arising during the course of the procurement process." Sys. Application & Techs., Inc. v. United States, 691 F.3d 1374, 1380 (Fed. Cir. 2012). The Federal Circuit has held that challenges to decisions by the OHA fall "within the scope of jurisdiction granted under the **[**9]** Tucker Act" because such challenges "are actions 'in connection with a proposed procurement.'" Palladian Partners v. United States, 783 F.3d 1243, 1254 (Fed. Cir. 2015). Accordingly, SSI's challenge of OHA's affirmation of the Area Office's size determination falls within this Court's subject-matter jurisdiction.

HN6[↑] To maintain a bid protest in this Court, the protestor must establish its standing as an interested party in the procurement. § 1491(b)(1); *see* Info. Tech. & Applications Corp. v. United States, 316 F.3d 1312, 1319 (Fed.

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[5] SSI argues, in the alternative, that, if it is required to assume a proportionate share of PMA's receipts, OHA "committed clear errors of fact and law by adopting the narrow view that the appropriate 'proportionate share" of a joint venture's annual receipts . . . is solely tied to the respective ownership interests of the joint venture's small business members." Pl.'s Mem. at 17. Because the Court finds that SSI is not required to assume a proportionate share of PMA's receipts under Subparagraph (h)(5), the Court does not address this argument.

Cir. 2003). A protestor is an "interested party" if it is "an actual or prospective bidder whose direct economic interest would be affected by the award of the contract." Orion Tech., Inc. v. United States, 704 F.3d 1344, 1348 (Fed. Cir. 2013). A direct economic interest is shown if the protestor suffered "a non-trivial competitive injury which can be redressed by judicial relief." CGI Fed. Inc. v. United States, 779 F.3d 1346, 1351 (Fed. Cir. 2015) (quoting Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1361-62 (Fed. Cir. 2009)). SSI has a clear economic interest because it was the awardee under the Solicitation and would remain the awardee but for OHA's decision. SSI, therefore, is an interested party that has standing to bring this protest.

III. LEGAL STANDARDS

HN7[↑] This Court reviews agency decisions in bid protests using the standard of review set forth in the Administrative Procedure Act ("APA"). 28 U.S.C. § 1491(b)(4); Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001). To succeed, the protestor must show that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2018); Bannum, Inc. v. United States, 404 F.3d 1346, 1351 (Fed. Cir. 2005). Under this **[**10]** deferential standard, this Court may set aside a procurement activity 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, 238 F.3d at 1332.

HN8[↑] This Court gives deference to an agency's interpretation of its own regulations if the regulation is silent or ambiguous. Meeks v. West, 216 F.3d 1363, 1366 (Fed. Cir. 2000) (citing NationsBank v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256, 115 S. Ct. 810, 130 L. Ed. 2d 740 (1995)). This Court affords "special deference" to decisions by the OHA due to the SBA's "quasi-technical administrative expertise and a familiarity with the situation acquired by long experience with the intricacies inherent in a comprehensive regulatory scheme." Baird Corp. v. United States, 1 Cl. Ct. 662, 666 (1983); *see also,* Eagle Design & Mgmt., Inc. v. United States, 57 Fed. Cl. 271, 273 (2002). Deference, though, is inappropriate when the agency's interpretation is "plainly erroneous or inconsistent with the regulation." Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155, 132 S. Ct. 2156, 183 L. Ed. 2d 153 (2012) (quoting Auer v. Robbins, 519 U.S. 452, 453, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997)).

IV. DISCUSSION

The Court finds that the plain language of Paragraph (h) contradicts OHA's **[*636]** decision that SSI is required under Subparagraph (h)(5) to assume a proportionate share of PMA's receipts. Under the regulations in effect at the time of SSI's self-certification, PMA did not meet the requirement of Paragraph (h) that joint ventures "may not be populated," and, thus PMA did not qualify for treatment as a joint venture **[**11]** under Paragraph (h) and its subparagraphs.

HN9[↑] This Court construes a regulation in the same way as a statute. Tesoro Haw. Corp. v. United States, 405 F.3d 1339, 1346-47 (Fed. Cir. 2005) (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414-15, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945)). The Court's analysis of a regulation begins with the plain language of the regulation.

See Barnhart v. Sigmon Coal Co., 534 U.S. 438, 459, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002) ("As in all statutory construction cases, we begin with the language of the statute."). If the regulatory language is clear and unambiguous, then the Court does not need to conduct any further inquiry. Roberto v. Dep't of Navy, 440 F.3d 1341, 1350 (Fed. Cir. 2006). The Court considers "the plain language of the regulation, the common meaning of the terms, and the text of the regulation both as a whole and in the context of its surrounding sections." Aqua Prods., Inc. v. Matal, 872 F.3d 1290, 1316 (Fed. Cir. 2017). When a regulation provides a definition, the Court must follow that definition, even if it varies from the term's customary meaning. *See* Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767, 776, 200 L. Ed. 2d 15 (2018); Burgess v. United States, 553 U.S. 124, 129, 128 S. Ct. 1572, 170 L. Ed. 2d 478 (2008). Additionally, "[i]t is axiomatic that the statutory definition of the term excludes unstated meanings of that term." Meese v. Keene, 481 U.S. 465, 484, 107 S. Ct. 1862, 95 L. Ed. 2d 415 (1987).

The Court turns to the plain language of the relevant regulations in effect when SSI submitted its self-certification on April 16, 2020. *See* 13 C.F.R. § 121.404(a); AR 78. Section 121.103 provides in relevant part:

> (h) Affiliation based on joint ventures. A joint venture is an association of individuals and/or concerns with interests in any degree or proportion consorting **[**12]** to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. . . . *For purposes of this provision* and in order to facilitate tracking of the number of contract awards made to a joint venture, a joint venture: Must be in writing and must do business under its own name; must be identified as a joint venture in the System for Award Management (SAM); may be in the form of a formal or informal partnership or exist as a separate limited liability company or other separate legal entity; and, if it exists as a formal separate legal entity, *may not be populated* with individuals intended to perform contracts awarded to the joint venture (i.e., the joint venture may have its own separate employees to perform administrative functions, but may not have its own separate employees to perform contracts awarded to the joint venture).
>
> . . . .
>
> (5) For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts, and in its total number **[**13]** of employees its proportionate share of joint venture employees.

§ 121.103 (emphasis added).

By defining and setting forth the requirements of a joint venture "for the purposes of this provision," SBA refined the meaning of "joint venture" as it applies to Paragraph (h) and its subparagraphs. As structured, Paragraph (h) serves as a parent paragraph under which its subparagraphs operate in reliance on its terminology. It would be contrary to the plain language of a regulation for a paragraph and its subparagraphs to apply different meanings of the same term, especially when the parent paragraph itself establishes the meaning of that term. Thus, any use of the term "joint venture" within Paragraph (h) and its subparagraphs must refer *only* to a joint venture that meets the definition and requirements of Paragraph (h). Paragraph (h) specifically excludes populated **[*637]** joint ventures from the meaning of "joint venture" for the purposes of the provision, and, as such, populated joint ventures fall outside the

scope of the provision. HN10[] Consequently, a partner to a populated joint venture is not required to "include in its receipts its proportionate share of joint venture receipts" under Subparagraph (h)(5).

When SSI conducted **[**14]** its size calculation, it was required to analyze whether any of its business relationships resulted in affiliation and to account for the receipts of its affiliates. *See* § 121.103(a)(6). SSI's only relationship requiring analysis was its minority ownership in PMA. AR 3721 ("Swift & Staley Inc. does not hold any ownership interests in other firms besides PMA, nor does it manage any other firms."). PMA was created as a populated joint venture in 2015 and remained populated when SSI submitted its self-certification in 2020. AR 3722, 3741. Under Subparagraph (h)(5), SSI was required to include in its size calculation its proportionate share of joint venture receipts but only to the extent that the joint venture conformed to the definition and requirements under Paragraph (h). Because Paragraph (h) expressly excluded populated joint ventures, SSI was correct not to treat PMA as a joint venture under Paragraph (h). It follows that, since PMA did not qualify for treatment as a joint venture under Paragraph (h), SSI did not need to include in its size calculation its proportionate share of PMA's receipts as required by Subparagraph (h)(5).

In conflict with this plain reading, OHA concluded that the regulations **[**15]** "stipulate that 'a concern must include a proportionate share of joint venture receipts' without regard to whether the joint venture is populated or unpopulated, and irrespective of whether the joint venture meets all requirements for the joint venture partners to be excepted from affiliation." AR 3907. In so concluding, OHA applied the joint venture requirements of Paragraph (h) inconsistently to different subparagraphs. *See* Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co., 522 U.S. 479, 501, 118 S. Ct. 927, 140 L. Ed. 2d 1 (1998) (recognizing the "established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning"); Ratzlaf v. United States, 510 U.S. 135, 143, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994) (HN11[] "A term appearing in several places in a statutory text is generally read the same way each time it appears.").

OHA explained that the 2016 regulatory change "indicated . . . that the parties to a populated joint venture would no longer be eligible for an exception to the general rule that they are affiliated with each other with regard to the performance of that contract." AR 3907. HN12[] The referenced "[e]xception to affiliation for certain joint ventures" is found in subparagraph (h)(3) of 13 C.F.R. § 121.103 ("Subparagaph (h)(3)"), which provides three instances in which a joint venture is exempt from the general rule of affiliation between its partners for **[**16]** its size determination. *See* § 121.103(h)(3)(i)-(iii). OHA applied the requirement of Paragraph (h) that a joint venture "may not be populated" to the use of the term "joint venture" in Subparagraph (h)(3) to conclude that "a populated joint venture would no longer be eligible" for the exception in Subparagraph (h)(3).

Contradictorily, OHA then ruled that the joint venture requirements of Paragraph (h) did *not* apply to the use of the term "joint venture" in Subparagraph (h)(5), which OHA concluded applied to partners of populated and unpopulated joint ventures alike. Contrary to OHA's characterization, Paragraph (h) did not list "requirements for . . . joint venture partners to be excepted from affiliation," AR 3907; rather, Paragraph (h) listed requirements for a joint venture "for the purposes of this provision" in its entirety, including each of its subparagraphs. *See* § 121.103(h). The exception to affiliation in Subparagraph (h)(3) is only a single part of the provision covered by the umbrella of

Paragraph (h). Nothing in the regulatory text supports the application of a broader meaning of "joint venture" in Subparagraph (h)(5). In both Subparagraph (h)(3) and Subparagraph (h)(5), the term is used without any further qualification or clarification **[**17]** of its meaning, and OHA's determination would require reading into Subparagraph (h)(5) the terms "unpopulated" and "populated." Despite OHA's conclusion otherwise, there is, **[*638]** therefore, an "inconsistency between SBA's requirements, on the one hand, that only unpopulated joint ventures will be eligible for new set-aside contract awards, while, on the other hand, . . . instructing that all joint venture partners, including partners of 'populated joint ventures, must include their proportionate share of joint venture receipts." AR 3908. The inconsistency arises from selective application of the joint venture requirements in Paragraph (h) to Subparagraph (h)(3) and not to Subparagraph (h)(5).

OHA's conclusion that, following the 2016 regulatory change, PMA "is still a 'joint venture' for purposes of calculating size of the joint venture's members," AR 3907, similarly lacks a basis in the regulatory text. As more explicitly argued by Defendant, OHA seemingly drew this inference from the fact that "PMA could still continue to perform its existing contracts," *id.*, under *§ 121.404(g)*. *See* Def.'s Cross-Mot. for J. Upon the Administrative R. at 9, ECF No. 29 [hereinafter Def.'s Cross-MJAR]. ***HN13***[↑] *Section 121.404(g)* states that when **[**18]** a business concern is determined to be small at the time of its self-certification, the concern "is generally considered to be a small business throughout the life of that contract." *§ 121.404(g) (2020)*. Defendant argues that this regulation requires SSI to apply PMA's 2016 size determination, as a small business joint venture under the regulations existing prior to the 2016 change, to SSI's own size determination conducted in 2020. *See* Def.'s Cross-MJAR at 9.

However, ***HN14***[↑] "SBA determines the size status of a concern, *including its affiliates*, as of the date the concern submits a written self-certification . . . ." *§ 121.404(a)* (emphasis added). SSI, therefore, was required to evaluate its relationship to PMA under the regulations in place at the time of SSI's self-certification, not that of PMA's. At the time of SSI's self-certification, PMA did not meet the requirements of a joint venture under Paragraph (h) and, for the reasons explained above, SSI was not required to assume a proportionate share of PMA's receipts under Subparagraph (h)(5). While the 2016 regulatory change did not interfere with PMA's ability to continue performing its contract as a small business, PMA's status applies to PMA only for the **[**19]** purpose of its contract performance. The plain language of *Section 121.404(g)* does not support expanding its application to require SSI to treat PMA as a joint venture under *Paragraph (h)* for the purpose of SSI's self-certification—when, at the time of SSI's self-certification, PMA clearly did not meet the requirements of a joint venture under Paragraph (h).

In sum, to adopt OHA's interpretation of *Paragraph (h)* in this instance, the Court would need to disregard the plain language of the regulations. Paragraph (h) firmly establishes the meaning of the term "joint venture," and that meaning must be applied consistently to its subparagraphs. When the plain language is applied, SSI was not required to assume a proportionate share of PMA's receipts under Subparagraph (h)(5) when SSI self-certified in 2020 because, at that time, PMA did not qualify for treatment as a joint venture under Paragraph (h).

Nevertheless, SSI, as a minority owner of PMA, may still be required under SBA regulations to assume a share of PMA's receipts for its size determination purposes. For instance, the SBA Area Office noted other regulatory grounds—not addressed by the OHA decision—that may require SSI to assume a share of PMA's receipts. *See*

supra Section **[**20]** I.C. However, the Court's role in this protest is limited to reviewing the OHA's decision and does not include identifying other regulatory grounds that may require SSI to assume a share of PMA's receipts. This determination is appropriately directed to the SBA for further consideration.

V. REMAND AND INJUNCTIVE RELIEF

This protest shall be remanded to the OHA for further proceedings consistent with this opinion. The Court retains jurisdiction over this protest during the remand period.

SSI argues that it is entitled to permanent injunctive relief because SSI "has satisfied all of the injunction factors." Pl.'s Mem. at 24. The government responds that SSI's injunctive relief request is moot since "the status quo is that DOE awarded the contract to SSI but suspended issuing the **[*639]** notice to proceed pending final resolution of AID's size protest." Def.'s Cross-MJAR at 13.

The Court finds that injunctive relief is not warranted at this time. *HN15*[↑] Injunctive relief is reserved for extraordinary circumstances. *See* *Zenith Radio Corp. v. United States, 710 F.2d 806, 809 (Fed. Cir. 1983)*. In this instance, the government has stated on the record that "DOE has provided no indication that it intends to terminate SSI's award prior to final resolution of the size protest, which **[**21]** would include any remand." Def.'s Reply at 6. The government further represented during oral argument that the "DOE has maintained its position that it will hold its hand until there is some final resolution, whether that comes at this Court or[,] if it has to go back to SBA[,] at SBA." July 22, 2021 Oral Arg. Tr. at 100, ECF No. 36. As result, SSI's request for injunctive relief is speculative, as there is no impending irreparable harm.

HN16[↑] This Court presumes that government officials act in good faith. *See* *Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239 (Fed. Cir. 2002)*. Accordingly, the Court trusts that the DOE will not terminate SSI's contract or take other action adverse to SSI's status as the awardee until this protest, including the remand, is fully resolved. However, should the DOE take adverse action prior to resolution of this protest, SSI may renew its request for injunctive relief.

VI. CONCLUSION

For the reasons above, Plaintiff's motion for judgment on the administrative record is **GRANTED**. Defendant's and Defendant-Intervenor's respective cross-motions are **DENIED**. The OHA decision dated April 20, 2021 affirming the Area Office Size Determination for SSI is **VACATED** and **REMANDED** for a sixty (60) day period to the OHA at 409 3rd Street, S.W., **[**22]** Washington, D.C., 20416. *See RCFC 52.2(a)*.

Within ten (10) days of the OHA's decision on remand, the parties **SHALL FILE** notices with the Court in accordance with *Rule 52.2(e)* of the Rules of the Court of Federal Claims. This case is **STAYED** until further order of the Court. *See RCFC 52.2(b)(1)(C)*.

Some information contained in this Opinion may be considered protected information subject to the Protective Order entered on April 28, 2021. Accordingly, the Opinion is filed **UNDER SEAL**. The parties **SHALL CONFER** and **FILE** on or before **August 27, 2021** a joint status report that: identifies the information, if any, that the parties contend should be redacted; explains the basis for each proposed redaction; and includes an attachment of the proposed redactions for this Opinion.

IT IS SO ORDERED.

/s/ Thompson M. Dietz

THOMPSON M. DIETZ, Judge

End of Document

List of Subjects in 12 CFR Part 747

Civil monetary penalties, Credit unions.

By the National Credit Union Administration Board on December 30, 2021.

Melane Conyers-Ausbrooks,

Secretary of the Board.

For the reasons stated in the preamble, the Board amends 12 CFR part 747 as follows:

PART 747—ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS

■ 1. The authority for part 747 continues to read as follows:

Authority: 12 U.S.C. 1766, 1782, 1784, 1785, 1786, 1787, 1790a, 1790d; 15 U.S.C. 1639e; 42 U.S.C. 4012a; Pub. L. 101–410; Pub. L. 104–134; Pub. L. 109–351; Pub. L. 114–74.

■ 2. Revise § 747.1001 to read as follows:

§ 747.1001 Adjustment of civil monetary penalties by the rate of inflation.

(a) The NCUA is required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, 104 Stat. 890, as amended (28 U.S.C. 2461 note)), to adjust the maximum amount of each civil monetary penalty (CMP) within its jurisdiction by the rate of inflation. The following chart displays those adjusted amounts, as calculated pursuant to the statute:

U.S. Code citation	CMP description	New maximum amount
(1) 12 U.S.C. 1782(a)(3)	Inadvertent failure to submit a report or the inadvertent submission of a false or misleading report.	$4,404.
(2) 12 U.S.C. 1782(a)(3)	Non-inadvertent failure to submit a report or the non-inadvertent submission of a false or misleading report.	$44,043.
(3) 12 U.S.C. 1782(a)(3)	Failure to submit a report or the submission of a false or misleading report done knowingly or with reckless disregard.	$2,202,123 or 1 percent of the total assets of the credit union, whichever is less.
(4) 12 U.S.C. 1782(d)(2)(A)	Tier 1 CMP for inadvertent failure to submit certified statement of insured shares and charges due to the National Credit Union Share Insurance Fund (NCUSIF), or inadvertent submission of false or misleading statement.	$4,027.
(5) 12 U.S.C. 1782(d)(2)(B)	Tier 2 CMP for non-inadvertent failure to submit certified statement or submission of false or misleading statement.	$40,259.
(6) 12 U.S.C. 1782(d)(2)(C)	Tier 3 CMP for failure to submit a certified statement or the submission of a false or misleading statement done knowingly or with reckless disregard.	$2,013,008 or 1 percent of the total assets of the credit union, whichever is less.
(7) 12 U.S.C. 1785(a)(3)	Non-compliance with insurance logo requirements	$137.
(8) 12 U.S.C. 1785(e)(3)	Non-compliance with NCUA security requirements	$320.
(9) 12 U.S.C. 1786(k)(2)(A)	Tier 1 CMP for violations of law, regulation, and other orders or agreements.	$11,011.
(10) 12 U.S.C. 1786(k)(2)(B) ..	Tier 2 CMP for violations of law, regulation, and other orders or agreements and for recklessly engaging in unsafe or unsound practices or breaches of fiduciary duty.	$55,052.
(11) 12 U.S.C. 1786(k)(2)(C) ..	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (natural person).	$2,202,123.
(12) 12 U.S.C. 1786(k)(2)(C) ..	Tier 3 CMP for knowingly committing the violations under Tier 1 or 2 (insured credit union).	$2,202,123 or 1 percent of the total assets of the credit union, whichever is less.
(13) 12 U.S.C. 1786(w)(5)(A)(ii).	Non-compliance with senior examiner post-employment restrictions	$362,217.
(14) 15 U.S.C. 1639e(k)	Non-compliance with appraisal independence requirements	First violation: $12,647; Subsequent violations: $25,293.
(15) 42 U.S.C. 4012a(f)(5)	Non-compliance with flood insurance requirements	$2,392.

(b) The adjusted amounts displayed in paragraph (a) of this section apply to civil monetary penalties that are assessed after the date the increase takes effect, including those whose associated violation or violations pre-dated the increase and occurred on or after November 2, 2015.

[FR Doc. 2021–28555 Filed 1–4–22; 8:45 am]

BILLING CODE 7535–01–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245–AG94

Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments; Correction

AGENCY: U.S. Small Business Administration.

ACTION: Correcting amendment.

SUMMARY: The U.S. Small Business Administration (SBA) is correcting a final rule that was published in the **Federal Register** on October 16, 2020. The rule merged the 8(a) Business Development (BD) Mentor-Protégé Program and the All Small Mentor-Protégé Program to eliminate confusion and remove unnecessary duplication of functions within SBA. This document is making a correction to the final regulations.

DATES: Effective January 5, 2022.

FOR FURTHER INFORMATION CONTACT: Mark Hagedorn, U.S. Small Business Administration, Office of General Counsel, 409 Third Street SW, Washington, DC 20416; (202) 205–7625; *mark.hagedorn@sba.gov.*

SUPPLEMENTARY INFORMATION: On October 16, 2020, SBA published a final rule revising the regulations pertaining to the 8(a) BD and size programs in order to further reduce unnecessary or excessive burdens on small businesses and to more clearly delineate SBA's

intent in certain regulations (85 FR 66146). This is the fifth set of corrections. The first set of corrections was published in the **Federal Register** on November 16, 2020 (85 FR 72916). The second set of corrections was published in the **Federal Register** on January 14, 2021 (86 FR 2957). The third set of corrections was published in the **Federal Register** on February 23, 2021 (86 FR 10732). The fourth set of corrections was published in the **Federal Register** on July 22, 2021 (86 FR 38538). This document augments those corrections.

It is well established that business concerns are not affiliates of joint ventures of which they are members for size purposes. However, SBA regulations have long provided that when determining a concern's size SBA will consider all revenue in whatever form received or accrued from whatever source. Therefore, since 2004 SBA regulations have required a joint venture partner to include its proportionate share of joint venture receipts and employees in its own receipts and employee count, respectively. (69 FR 29192). The final rule of October 16, 2020, revised § 121.103(h) to clarify how a joint venture partner must calculate its proportionate share of joint venture receipts and employees for purposes of determining its own size status. Specifically, the final rule provided that the joint venture partner must include its percentage share of joint venture receipts and employees in its own receipts or employees. The appropriate percentage share is the same percentage figure as the percentage figure corresponding to the joint venture partner's share of work performed by the joint venture. For employee-based size standards, the appropriate way to apportion individuals employed by the joint venture is the same percentage of employees as the joint venture partner's percentage ownership share in the joint venture, after first subtracting any joint venture employee already accounted for in the employee count of one of the partners.

It has come to SBA's attention that some have misinterpreted the intent of the final rule. Specifically, because the regulations no longer allow joint ventures to be populated with individuals intended to perform small business set-aside contracts awarded to the joint venture, some have reasoned that a joint venture populated with its own separate contracting-performing employees does not qualify as a joint venture for all SBA program purposes. From this logic it ostensibly follows that a joint venture partner need not include in its own receipts its proportionate share of receipts and employees from populated joint ventures. This was not SBA's intent.

When SBA revised its regulations to 2016 to prohibit populated joint ventures on small business contracts, it did so in response to programmatic concerns that allowing populated joint ventures between a mentor and its protégé would not ensure that the protégé firm and its employees benefit by developing new expertise, experience, and past performance. (81 FR 48558). As SBA explained, if the individuals hired by the joint venture to perform the work under the contract did not come from the protégé firm, there is no guarantee that they would ultimately end up working for the protégé firm after the contract is completed. In such a case, the protégé firm would have gained nothing out of that contract. The protégé itself did not perform work under the contract and the individual employees who performed work did not at any point work for the protégé firm. Additionally, SBA believed that requiring joint ventures to be unpopulated ensures that the lead small business partner to the joint venture will meet its performance of work requirements and will actually benefit from the joint venture arrangement. This is especially important for joint ventures between a mentor and its protégé as well as joint ventures to perform socio-economic set-aside contracts, where the lead joint venture partner has the necessary size or socio-economic status and the non-lead partner does not. Nothing, however, in the final rule or the 2016 rulemaking signaled a change in policy concerning the treatment of receipts and employees from populated joint ventures for purposes of determining a joint venture partner's size. SBA never intended to change how revenues earned by a joint venture should be counted for size purposes. As noted above, a joint venture partner of any kind must include its proportionate share of joint venture receipts and employees in its own receipts and employee count to ensure that all its revenues and employees are properly considered in determining that partner's size. In this context it is irrelevant whether the joint venture partner's proportionate share of receipts and employees are from populated or unpopulated joint ventures. Thus, while populated joint ventures are no longer eligible to submit offers for small business contracts, receipts and employees from populated joint ventures are still attributable to the underlying joint venture partners for size purposes. This rule corrects the above misconception by clarifying that a concern must include in its receipts and employee count its proportionate share of joint venture receipts and joint venture employees, respectively, regardless of whether the joint venture is populated or unpopulated.

List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Small businesses.

Accordingly, 13 CFR part 121 is corrected by making the following correcting amendment:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(a)(36), 662, and 694a(9); Pub. L. 116–136, Section 1114.

■ 2. Amend § 121.103 by revising the paragraph heading and the first and second sentences of paragraph (h) introductory text to read as follows:

§ 121.103 How does SBA determine affiliation?

* * * * *

(h) *Receipts/employees attributable to joint venture partners.* For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts (whether that joint venture is populated or unpopulated), unless the proportionate share already is accounted for in receipts reflecting transactions between the concern and its joint ventures (*e.g.,* subcontracts from a joint venture entity to joint venture partners). In determining the number of employees, a concern must include in its total number of employees its proportionate share of joint venture employees (whether the joint venture is populated or unpopulated). * * *

* * * * *

Antonio Doss,

Deputy Associate Administrator, Office of Government Contracting and Business Development.

[FR Doc. 2021–28256 Filed 1–4–22; 8:45 am]

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A Century of Non-Partisan Fact-Based Work

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: InfoPoint LLC

File: B-419856

Date: August 27, 2021

Scott R. Williamson, Esq., and Daniel R. Williamson, Esq., Williamson Law Group, LLC, for the protester.
Colonel Patricia S. Wiegman-Lenz, Michael J. Farr, Esq., Siobhan K. Donahue, Esq., and Kevin P. Stiens, Esq., Department of the Air Force; and John W. Klein, Esq., and Mark R. Hagedorn, Esq., Small Business Administration, for the agencies.
Jonathan L. Kang, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging a solicitation requirement that a joint venture competing for the award, as opposed to the individual members of the joint venture, hold a top secret facility clearance is sustained where the requirement is prohibited by the National Defense Authorization Act for fiscal year 2020 as well as by regulations issued by the Small Business Administration.

DECISION

InfoPoint LLC, a small business of Livonia, Michigan, protests the terms of fair opportunity proposal request (FOPR) No. FA4890-21-R-0008, which was issued by the Department of the Air Force for command and control, intelligence, surveillance, and reconnaissance (C2ISR) support services. The protester argues that the solicitation's requirement that a joint venture competing for the award, as opposed to the members of the joint venture, must have a top secret facility clearance is inconsistent with statutory and regulatory provisions concerning the evaluation of the capabilities of the members of small business joint ventures.

We sustain the protest.

BACKGROUND

The Air Force issued the FOPR on April 22, 2021, seeking proposals to provide C2ISR support services for the Air Force Air Combat Command. FOPR at 1; Performance

Work Statement (PWS) at 2.[1] The solicitation was limited to firms[2] that hold one of the One Acquisition Solution for Integrated Services (OASIS)--small business pool of governmentwide multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contracts, which were awarded by the General Services Administration. FOPR at 1. The FOPR anticipates the issuance of a task order with fixed-price and cost-reimbursement contract line items, with a base period of 10 months and four 1-year options. *Id.* The solicitation advised that proposals will be evaluated based on three factors: (1) technical capability, (2) past performance, and (3) price. *Id.* at 2. For purposes of award, the technical capability factor will be evaluated on a pass/fail basis, and the past performance factor is "significantly more important" than price. *Id.*

As relevant here, the solicitation required that an offeror possess a top secret facility clearance at the time of proposal submission, as follows:

> 2.2 A Top Secret Facility Clearance is required. An Offeror without the requisite clearance will not be permitted as the prime contractor due to the required security classification. Offerors shall possess or acquire a facility clearance equal to the requirement on the DD254 (Attachment 2) without additional authorization (*i.e.* National Interest Determination (NID)) by the proposal due date. If an Offeror does not have the required clearance at the time of proposal submission, the proposal will not be evaluated and is not eligible for award. The Sensitive Compartmentalized Information (SCI) work will take place at a Government facility.

Id.

In response to questions from prospective offerors, the Air Force advised that an offeror comprised of two or more companies aligned to submit a proposal for this effort as a joint venture must itself satisfy the facility clearance requirement. The solicitation further advised that "[t]he individual partners to the [joint venture] having the [facility clearance] is not sufficient." Agency Request for Dismissal, attach. 3, Questions and Answers at 2. The agency stated that the requirement for a joint venture, as opposed to the partners comprising the joint venture, to have a facility clearance is based on guidance found in Department of Defense Manual (DoDM) 5220.22v2, Air Force Manual (AFMAN) 16-1406v2.[3] *Id*.

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[1] Citations to the FOPR are to attachment 2 to the agency's request for dismissal; citations to the PWS are to attachment 1 to the agency's request for dismissal.

[2] Although firms that compete for task orders under IDIQ contracts are generally referred to as "vendors," the record and the parties' briefings use this term as well as "offerors" interchangeably. Our decision uses the term offerors for the sake of consistency.

[3] This guidance is a single document referenced as DoDM 5220.22v2_AFMAN 16-1406v2. National Industrial Security Program: Industrial Security Procedures for

The agency also responded to a question concerning a regulation issued by the Small Business Administration (SBA), 13 C.F.R. § 121.103(h)(4), which, as discussed below, addresses the evaluation of facility clearances for small business joint ventures. *Id.* at 1. The agency advised that, notwithstanding the regulation, the FOPR provision was consistent with DoDM 5220.22v2_AFMAN 16-1406v2, and would therefore not be removed or modified. *Id.*

InfoPoint filed this protest on May 21, prior to the solicitation's closing date of May 24.[4] The protester argues that the FOPR provision requiring that a joint venture, as opposed to its members, hold a facility clearance at the time of proposal submission violates the Small Business Act and the SBA regulation at section 121.103. On June 1, the Air Force requested that we dismiss the protest, arguing that it failed to state a valid basis of protest because the statutory and regulatory provisions cited by the protester did not prohibit the solicitation's facility clearance provision. We denied the request on June 9, concluding that the protester's arguments concerning the reasonable interpretation of the relevant statutory and regulatory provisions set forth valid bases of protest. *See* 4 C.F.R. § 21.1(f). Because this protest raises questions concerning the interpretation of regulations promulgated by SBA, our Office invited SBA to provide its views on the merits of the protest, which the agency filed on June 22. InfoPoint and the Air Force filed comments on SBA's response on July 2.

DISCUSSION

InfoPoint argues that the FOPR improperly requires a small business joint venture offeror to hold a facility clearance, even where the individual joint venture members hold the required facility clearances. Protest at 7-8. The protester argues that the solicitation provision is inconsistent with the Small Business Act and the SBA regulation at section 121.103, and that the solicitation should be amended to permit small business joint ventures whose members each hold the required facility clearance to compete for the award. SBA joins the protester's argument, and further argues that the SBA regulation cited by the protester is consistent with a provision in the National Defense Authorization Act (NDAA) for fiscal year 2020, which it contends specifically prohibits the challenged facility clearance requirement in the FOPR. SBA Comments at 3-4.

Government Activities, static.e-publishing.af.mil/production/1/saf_aa/publication/dodm5220.22v2_afman16-1406v2/dodm5220. 22v2_afman16-1406v2.pdf (last visited Aug. 13, 2021).

[4] The Air Force represents that the anticipated value of the protested OASIS IDIQ contract task order exceeds $10 million. Agency Notice, Aug. 6, 2021, at 1. Accordingly, this protest is within our jurisdiction to hear protests of task orders placed under civilian agency IDIQ contracts. 41 U.S.C. § 4106(f)(1)(B).

The Air Force argues that none of the statutory or regulatory provisions cited by the protester or SBA prohibit the solicitation's facility clearance requirement, and that regulations issued by the Department of Defense (DOD) concerning security clearances should, in any event, take precedence over any regulations issued by SBA. Air Force Comments at 2-3. For the reasons discussed below, we agree with InfoPoint and SBA and sustain the protest.

There are two relevant statutory provisions, as well as implementing regulations, at issue here. For the first, section 644 of the Small Business Act provides:

> JOINT VENTURES.—When evaluating an offer of a joint venture of small business concerns, if the joint venture does not demonstrate sufficient capabilities or past performance to be considered for award of a contract opportunity, the head of the agency shall consider the capabilities and past performance of each member of the joint venture as the capabilities and past performance of the joint venture.

15 U.S.C. § 644(e)(4)(B)(ii).

With regard to the second statutory provision, the 2020 NDAA, which was enacted on December 20, 2019, contained a provision that directly addresses the requirement that a joint venture have a facility clearance:

> TERMINATION OF REQUIREMENT FOR DEPARTMENT OF DEFENSE FACILITY ACCESS CLEARANCES FOR JOINT VENTURES COMPOSED OF PREVIOUSLY-CLEARED ENTITIES. A clearance for access to a Department of Defense installation or facility may not be required for a joint venture if that joint venture is composed entirely of entities that are currently cleared for access to such installation or facility.

Pub. L. No. 116-92 § 1629; 133 Stat. 1198, 1741 (2019).

SBA issued a final rule on October 16, 2020, implementing the agency's interpretation of the Small Business Act and the 2020 NDAA. SBA Comments at 4; *see* 85 Fed. Reg. 66146, 66180 (Oct. 16, 2020). That regulation states as follows:

> Facility security clearances. A joint venture may be awarded a contract requiring a facility security clearance where either the joint venture itself or the individual partner(s) to the joint venture that will perform the necessary security work has (have) a facility security clearance.
>
> > (i) Where a facility security clearance is required to perform primary and vital requirements of a contract, the lead small business partner to the joint venture must possess the required facility security clearance.

> (ii) Where the security portion of the contract requiring a facility security clearance is ancillary to the principal purpose of the procurement, the partner to the joint venture that will perform that work must possess the required facility security clearance.

13 C.F.R. § 121.103(h)(4).

As this protest concerns interpretation of statutory and regulatory provisions, our analysis begins with the text of those provisions. *See Curtin Mar. Corp.*, B-417175.2, Mar. 29, 2019, 2019 CPD ¶ 117 at 9 (*quoting Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)). In construing a statute or regulation, "[t]he first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in this case.'" *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). In this regard, we "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009). If the statutory or regulatory language is clear and unambiguous, the inquiry ends with the plain meaning of the language. *ASRC Fed. Data Net. Techs., LLC*, B-418028, B-418028.2, Dec. 26, 2019, 2019 CPD ¶ 432 at 8 (*citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

Here, section 1629 of the NDAA specifically states, and the plain meaning of the statute leads us to conclude, that it unambiguously prohibits DOD from requiring that a joint venture hold a facility clearance if the members of the joint venture hold the required facility clearances. We do not find, and the Air Force has not demonstrated, that there is any other reasonable meaning to this statutory language. Section 644 of the Small Business Act is similarly clear in providing that where a small business joint venture does not itself demonstrate capabilities or past performance, the procuring agency must consider the capabilities and experience of the joint venture members.

Moreover, the relevant regulations also are consistent with the requirements of the 2020 NDAA and the Small Business Act. The SBA regulation at section 121.103 is consistent with the 2020 NDAA, where the regulation states that joint ventures may be awarded contracts requiring facility clearances where either the joint venture itself or the individual partners to the joint venture hold a facility clearance. The SBA regulation therefore provides how procuring agencies should evaluate whether small business joint ventures are eligible for the award of contracts that require facility security clearances. Under the regulations, the relevant inquiry is whether the joint venture itself, or the individual partners that make up the joint venture, hold a facility security clearance.

InfoPoint and SBA argue that section 644 of the Small Business Act requires that the capabilities of the individual members of the joint venture be considered as the capabilities of the joint venture itself. Protest at 7-8. InfoPoint and SBA both also argue that the FOPR requirement is unreasonable and inconsistent with the SBA regulation at section 121.103. SBA Comments at 2-3. SBA notes that section 644 requires agencies to evaluate each joint venture member's capabilities where the joint venture itself does

not demonstrate capabilities necessary to be considered for award, and contends that this general requirement extends to facility clearances. *Id.* at 3. SBA acknowledges that the Small Business Act "does not explicitly lay out facility clearance requirements for small business joint ventures," but nonetheless argues that the "regulations [at section 121.103] are a reasonable administrative implementation of § 644(e)(4)(B)(ii)." SBA Comments at 5.

In addition to the general authority of the Small Business Act, SBA argues that the 2020 NDAA specifically addressed this matter, and expressly provides that DOD "may not" require a joint venture itself to hold a facility clearance "if that joint venture is composed entirely of entities that are currently cleared for access to such installation or facility." SBA Comments at 3. SBA argues that the regulation at section 121.103 is consistent with the prohibition set forth in the 2020 NDAA.[5] *Id.* at 4.

Here, InfoPoint states that it is an unpopulated[6] mentor-protégé joint venture, organized under the provisions of 13 C.F.R. §§ 125.8 and 121.103(h)(3).[7] Protest at 4, 7-8. The protester further states that both members of the joint venture hold the top secret facility clearances required under the solicitation. Protester's Comments at 2. For these reasons, the protester contends that the FOPR requirement that the joint venture itself have a facility clearance is prohibited by the Small Business Act and SBA regulation.

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[5] SBA also notes that the regulations applicable to the small business mentor-protégé joint venture program require that joint ventures be unpopulated, that is, the firms that are members of the joint venture, rather than the joint venture itself, must employ the individuals who will perform the contract. 13 C.F.R. § 121.103(h). SBA contends that because a joint venture is intended to be limited in duration and scope, it is not appropriate to require the joint venture itself to have a facility clearance. SBA Comments at 3. In this regard, SBA argues that requiring a joint venture to have a facility clearance would prohibit newly formed joint ventures from being eligible for security-related contracts even though the joint venture itself will not perform any work and the individual partners that will perform the work have the required clearances. *Id.*

[6] As relevant here, a joint venture is "populated" where personnel who will perform work under a contract are employed by the joint venture itself; a joint venture is "unpopulated" where personnel who will perform work under a contract are employed by the firms that comprise the joint venture. *See* 13 C.F.R. § 121.103(h).

[7] SBA's small business mentor-protégé program allows small or large business firms to serve as mentors to small business protégé firms in order to provide "business development assistance" to the protégé firms and to "improve the protégé firms' ability to successfully compete for federal contracts." 13 C.F.R. § 125.9(a), (b). One benefit of the mentor-protégé program is that a protégé and mentor may form a joint venture. *Id.* § 125.9(d). If SBA approves a mentor-protégé joint venture, the joint venture is permitted to compete as a small business for "any government prime contract, subcontract or sale, provided the protégé qualifies as small for the procurement[.]" *Id.* § 125.9(d)(1); *see also* 13 C.F.R. §§ 121.103(b)(6), (h)(1)(ii).

The protester contends that the solicitation should be amended to permit joint ventures to be eligible for award where they are comprised of members that each hold the required facility clearance. As explained above, based on our review of the applicable statues and regulations, we agree that InfoPoint meets the requirements for holding a facility clearance because both members of the joint venture hold the top secret facility clearances required under the solicitation.

The Air Force makes four primary arguments in response to InfoPoint's protest and SBA's comments: (1) the 2020 NDAA does not apply to the solicitation because DOD has not yet issued regulations implementing that statute; (2) the provisions of the SBA regulation at section 121.103 are permissive, rather than mandatory; (3) our Office should give deference to the statutory delegation of authority to DOD concerning security clearances; and (4) implementation of the plain language of the 2020 NDAA would create challenges arising from conflicts with existing regulations and policies. We conclude that none of these arguments have merit and that none provides a basis to find the solicitation's facility clearance requirement is consistent with the statutes and regulations cited by InfoPoint and SBA.

The Air Force first argues that the 2020 NDAA does not prohibit the facility clearance provision in the solicitation because the agency has not yet issued regulations implementing this statute. Air Force Comments at 2-3; Air Force Response to GAO Questions at 4-5.

Where a statute has no effective date, absent a clear direction by Congress to the contrary, it takes effect on the date of its enactment. *Johnson v. U.S.*, 529 U.S. 694, 702 (2000) (*quoting Gozlon-Peretz v. U.S.*, 498 U.S. 395, 404 (1991)). In certain situations, such as those where a statute directs an agency to issue regulations to effectuate a statutory provision, our Office has concluded we have no basis to sustain a protest where the agency has not yet promulgated the required regulations. *See Trailboss Enters., Inc.*, B-415970 *et al.*, May 7, 2018, 2018 CPD ¶ 171 at 6. Here, however, the 2020 NDAA provision does not direct DOD to issue regulations or otherwise take any action to implement the provision. *See* Pub. L. No. 116-92 § 1629; 133 Stat. 1198, 1741 (2019).

The Air Force does not reasonably explain why the 2020 NDAA provision was not effective upon enactment on December 20, 2019, nor why it is ineffective pending regulatory implementation by DOD. Although the agency generally cites the requirement that an agency's "procurement policy, regulation, procedure, or form" must be published for public comment in the Federal Register prior to taking effect, the statutory command in the 2020 NDAA is not a policy, regulation, procedure, or form issued by an agency. *See* Air Force Response to GAO Questions at 3 (*citing* 41 U.S.C. § 1707). Rather, it is an unambiguous command by Congress through a statute that DOD not require joint ventures to hold a facility clearance where the members of the joint venture hold the required facility clearances. We therefore find no basis to conclude that the 2020 NDAA provision is ineffective until DOD decides how, or whether, to issue a regulation implementing it.

Next, the Air Force argues that the SBA regulation at section 121.103 contains permissive, rather than mandatory language, because it states that a joint venture "may" be awarded a contract where either the joint venture itself or the individual partners that comprise the joint venture have a facility security clearance. Air Force Comments at 4; 13 C.F.R. § 121.103(h)(4). The Air Force contends that the term "may" grants procuring agencies discretion to choose whether to require the joint venture, or the individual joint venture members, to hold the required facility clearances. Air Force Comments at 4.

SBA responds that the "may" language in section 121.103 is reasonably understood to refer to the eligibility of a joint venture to receive award when the joint venture partner that will perform the classified work holds the appropriate facility clearance. SBA Comments at 5. SBA argues that, as a necessary corollary, procuring agencies are not permitted to exclude small business joint ventures from award when this condition is met. *Id.* Therefore, SBA contends, the regulation's use of the term "may" does not confer onto an agency the discretion to ignore the regulation's definition of eligibility. *Id.*

Our Office gives deference to SBA in the interpretation of the regulations it promulgates pursuant to its statutory authority under the Small Business Act. *TechAnax, LLC; Rigil Corp.*, B-408685.22, B-408685.25, Aug. 16, 2019, 2019 CPD ¶ 294 at 4. We think that SBA reasonably interprets section 121.103 as defining the eligibility of joint ventures to receive awards where the joint venture members hold the required facility clearances, rather than stating that procuring agencies have the discretion to withhold awards from joint ventures where the members of the joint venture hold the required facility clearances. We also agree, that as applied, section 121.103 establishes that the solicitation provision at issue here unreasonably requires that the joint venture itself hold the required facility clearance, regardless of whether the members of the joint venture offeror hold the required facility clearances.[8]

Next, the Air Force Argues that even if the 2020 NDAA has immediate effect and the SBA regulation is not permissive, our Office should grant deference to DOD's view that

[8] The Air Force also argues that the SBA regulation at section 121.103 is inconsistent with the 2020 NDAA in that the NDAA states that a facility clearance "may not be required for a joint venture if that joint venture is composed entirely of entities that are currently cleared for access to such installation or facility." The SBA regulation states more broadly that a contract may be awarded where "*either* the joint venture itself *or* the individual partner(s) to the joint venture that will perform the necessary security work has (have) a facility security clearance." Air Force Response to GAO Questions at 4-5 (emphasis added). As discussed above, InfoPoint states that it is a mentor-protégé joint venture comprised of two members that each hold the required facility clearance. Protester's Comments at 2. As a result, since InfoPoint satisfies both the 2020 NDAA statutory and SBA regulatory provisions, we need not address at this time whether the SBA regulation at section 121.103 is inconsistent with the 2020 NDAA with regard to whether all members of the joint venture must have facility clearances.

other statutory authorities concerning national security and security clearances render the solicitation's facility clearance provision reasonable. Air Force Comments at 4-14. The Air Force notes that Congress delegated to the Executive Branch the authority to establish procedures and standards regarding security clearances through the National Industrial Security Program (NISP). *Id.* at 5-7 (*citing* 50 U.S.C. §§ 3161, 3341). As relevant here, DOD formalized the National Industrial Security Program Operating Manual (NISPOM) into the Code of Federal Regulations (CFR), effective February 24 2021.[9] 85 Fed. Reg. 83300 (Dec. 21, 2020); 32 C.F.R. part 117. This incorporation included the agency guidance that was cited by the Air Force in the solicitation questions and answers as the basis for requiring that a joint venture hold a facility clearance. *Id.* at 83312; 32 C.F.R. § 117.1(a). For these reasons, the Air Force contends that Congress's delegation of authority in the area of security clearances, and the formalization of the NISPOM in the CFR, means that deference should be given to DOD, rather than SBA, in interpreting the 2020 NDAA provision.

When a statute is silent or ambiguous with respect to the specific issue, courts may under certain circumstances grant deference to an agency's interpretation of a regulation it has promulgated. *See Chevron U.S.A. Inc.*, *supra*, at 843-45; *see also United States v. Mead Corp.*, 533 U.S. 218, 227-38 (2001). Our Office similarly accords deference to agencies in the interpretation of regulations it has issued concerning matters where a statute is silent or ambiguous. *See Caddell Constr. Co., Inc.*, B-298949.2, June 15, 2007, 2007 CPD ¶ 119 at 10; *ASRC Fed. Data Net. Techs., LLC*, *supra*.

However, as the Air Force acknowledges, DOD has not issued regulations or otherwise interpreted the 2020 NDAA provision through the issuance of regulations. Air Force Comments at 2-3; Air Force Response to GAO Questions at 4-5. In this regard, while the agency contends that the CFR provisions that now encompass the NISPOM state that a joint venture, as distinct from its members, must hold a facility clearance, the agency does not contend that this incorporation of the NISPOM into the CFR constitutes DOD's promulgation of regulations implementing the 2020 NDAA. *See id.*

Moreover, as discussed above, we find that the plain language of the 2020 NDAA states that DOD "may not" require that a joint venture hold a facility clearance where the members of the joint venture hold the required facility clearances. Thus, even if the regulation at 32 C.F.R. § 117.1(a) was DOD's regulatory implementation of the 2020 NDAA, the regulation would clearly be contrary to the plain language of the 2020 NDAA. Under such circumstances, our agency will recommend that the procuring agency follow the unambiguous language of the applicable statute, rather than a regulation that on its face conflicts with the statutory language. See *Small Business Administration--Recon.*, B-401057.2, July 6, 2009, 2009 CPD ¶ 148 at 5.

[9] The NISPOM "establishes requirements for the protection of classified information disclosed to or developed by contractors, licensees, grantees, or certificate holders (hereinafter referred to as contractors) to prevent unauthorized disclosure." 85 Fed. Reg. 83300.

On this record, we find no basis to conclude that DOD has issued regulations interpreting the 2020 NDAA that must be given deference; we therefore need not resolve whether to grant deference to an SBA regulation instead of a DOD regulation in connection with the 2020 NDAA. Further, we find that none of the existing regulations cited by the Air Force provide a basis to conclude that the plain language of the 2020 NDAA should not apply to this solicitation.

Finally, the Air Force identifies two areas where it contends that application of the plain language of the 2020 NDAA provision would create conflicts with existing regulations or policies. First, the Air Force argues that non-DOD agencies are not affected by the 2020 NDAA and therefore can still require a joint venture to hold a facility clearance. Air Force Response to GAO Questions at 5. While our Office acknowledges that the scenario described by the Air Force could give rise to practical difficulties, we see no basis to conclude that these concerns require us to ignore the plain language of the 2020 NDAA in interpreting a solicitation issued by the Air Force.

Second, the Air Force contends that the NISPOM requires that the "entity" that receives the contract have certain security positions filled by employees who are eligible for clearance to fill certain roles. Air Force Comments at 11 n.4, 14-15 (*citing* 32 C.F.R. §§ 117.9(a)(5), (c)(5)). The agency states that because the entity that holds the facility clearance must have the employees that satisfy requirements of the NISPOM, this in turn demonstrates that the joint venture itself must have a facility clearance. *See id.* at 15.

The agency's argument, however, ignores the clear and unambiguous command by Congress that DOD may not require a joint venture to hold a facility clearance where the joint venture members hold the required facility clearances. The fact that the statute conflicts with what the agency contends are existing regulations does not provide a basis to avoid the requirement to follow the plain language of the statute.

CONCLUSION AND RECOMMENDATION

We conclude that the 2020 NDAA clearly and unambiguously prohibits DOD agencies, like the Air Force here, from issuing solicitations that require a joint venture, rather than the members of the joint venture, hold the required facility clearance. We also agree with InfoPoint and SBA that the SBA regulation at section 121.103 is consistent with the 2020 NDAA with regard to the protester's argument that the FOPR here unreasonably requires that a small business joint venture hold the required facility clearance at the time of proposal submission, regardless of whether the individual joint venture members hold the required facility clearances.[10] We therefore recommend that the Air Force

[10] We note that InfoPoint's initial protest did not cite the 2020 NDAA and instead based its argument on SBA regulation at section 121.103. As discussed above, however, we agree with SBA that the regulation at section 121.103 is consistent with the 2020 NDAA

remove from the solicitation the requirement that a joint venture itself hold a top secret facility clearance.[11]

We also recommend that the agency reimburse the protester's costs of filing and pursuing its protest, including reasonable attorneys' fees. The protester should submit its certified claim for costs directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Edda Emmanuelli Perez
General Counsel

with regard to the issue raised by the protester--whether DOD may require a joint venture to hold a facility clearance even where the members of the joint venture individually hold the required facility clearances. We therefore conclude that the protester's arguments concerning the regulation at section 121.103 are sufficient to merit sustaining the protest.

[11] Although this protest challenges a solicitation set aside for small business, we note that the 2020 NDAA does not, on its face, limit its application to small business joint ventures.

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441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Innovate Now, LLC

File: B-419546

Date: April 26, 2021

John R. Prairie, Esq., Cara L. Lasley, Esq., and Adam R. Briscoe, Esq., Wiley Rein LLP, for the protester.
Colonel Patricia S. Wiegman-Lenz, Michael J. Farr, Esq., Captain David J. Ely, and Edward S. Fisher, Esq., Department of the Air Force, for the agency.
Meagan K. Guerzon, Esq., for the Small Business Administration.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging solicitation requirement that protégé members of a mentor-protégé joint venture have the same level of experience as other offerors is sustained; the requirement violates an express prohibition contained in a Small Business Administration regulation.

2. Protest alleging that solicitation is ambiguous because it requires offerors to demonstrate the staffing used on a prior contract at "a single point in time" is sustained because the solicitation does not define the "single point in time" requirement, and offerors will be unable to compete on a common basis.

DECISION

Innovate Now, LLC, of Beavercreek, Ohio, protests the terms of request for proposals (RFP) No. FA8622-21-R-8335, issued by the Department of the Air Force for engineering, professional and administrative support services at the Air Force Material Command headquarters at Wright-Patterson Air Force Base, Ohio. Innovate argues that the RFP violates the requirements of the Small Business Administration's (SBA) regulations pertaining to small-business mentor-protégé offerors, and also is otherwise unduly restrictive of competition.

We sustain the protest.

The RFP contemplates the issuance of a cost-plus-fixed-fee type task order for a base year and four 1-year options using a unique source selection method that the Air Force

calls “the highest two technically capable offerors with realistic, balanced and reasonable pricing source selection methodology.”[1] Agency Report (AR) exh. 28, RFP Evaluation Criteria, amend. No. 0001, at 2. Innovate’s protest concerns three requirements contained in the RFP’s evaluation criteria. We discuss each of Innovate’s allegations in detail below.

DISCUSSION

Requirements for Protégé Members of Mentor-Protégé Joint Ventures

Innovate argues first that the RFP improperly requires the protégé member of any mentor-protégé joint venture offeror to meet the same experience requirements as all other offerors, in violation of SBA regulations.[2] The RFP specifies that, for joint venture offerors, a minimum of at least one work sample must be submitted for each member of the joint venture that meets the following requirements: (1) the work sample must have been a contract (or task order) performed for the federal government; (2) the work sample must have been performed by the entity as a prime contractor; (3) the work sample must have been performed on a non-fixed price basis; (4) the work sample must have been performed for at least six months within the last five years; and (5) the most recent past performance or contractor performance assessment reporting system (CPARS) report for the work sample must reflect a satisfactory or above rating in the categories of quality, schedule, cost control, and management. AR, exh. 28, RFP Evaluation Criteria, amend. No. 0001, at 4-6. Innovate argues that, because the protégé member of any joint venture is required to meet the same requirements applicable to all other offerors, this RFP requirement violates SBA’s regulations.

The agency responds that the RFP does not violate the requirements of SBA’s regulations because joint venture offerors are not restricted to submitting work samples performed only by the joint venture entity, and are instead permitted to submit work samples performed by each member of the joint venture. The agency also argues that the RFP reflects its minimum requirements and therefore is reasonable, notwithstanding that a protégé member of a joint venture may not be able to meet those requirements. Finally, the agency notes that the RFP contemplates evaluation of the joint venture work samples in the aggregate.

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[1] The task order is being issued under the General Services Administration’s One Acquisition Solution for Integrated Services small business multiple award indefinite-delivery, indefinite-quantity contract program. The estimated value of the solicited task order is in excess of $50 million. Because the value of the task order is more than $10 million, our Office has jurisdiction to consider the protest. 41 U.S.C. § 4106(f).

[2] SBA regulations provide for the establishment of joint ventures between a mentor firm (which can be either a small or large business) and a small business protégé firm for purposes of providing assistance to the protégé firm to improve its ability to successfully compete for federal government contracts. *See* 13 C.F.R. § 125.9.

We sustain this aspect of Innovate's protest. The applicable SBA regulation provides:

> When evaluating the capabilities, past performance, experience, business systems and certifications of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section [which includes mentor-protégé joint ventures], a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. *A procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally.* The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.

13 C.F.R. § 125.8(e) (emphasis supplied).

The plain language of the regulation is clear; a procuring agency may not require a protégé firm to individually meet the same evaluation requirements as those imposed on other offerors. Here, the RFP violates this express prohibition. All offerors--including the protégé member of a mentor-protégé joint venture--must meet exactly the same evaluation requirements. Each firm--including the protégé firm--must submit at least one work sample demonstrating that they have previously performed a cost-reimbursement type federal government contract as the prime contractor for a period of at least six months during the last five years, and the firm must have been rated at least satisfactory under the enumerated areas of consideration.

Our conclusion is reinforced by SBA's comments that accompanied publication of the regulation. Those comments provide:

> SBA understands the concern that some procuring activities have required unreasonable requirements of protégé small business partners to mentor-protégé joint ventures. SBA's rules require a small business protégé to have some experience in the type of work to be performed under the contract. *However, it is unreasonable to require the protégé concern itself to have the same level of past performance and experience (either in dollar value or number of previous contracts performed, years of performance, or otherwise) as its large business mentor. The reason that any small business joint ventures with another business entity . . . is because it cannot meet all performance requirements by itself and seeks to gain experience through the help of its joint venture partner.*
>
> * * * *
>
> The joint venture should be a tool to enable it [the protégé firm] to win and perform a contract in an area that it has some experience but that it could not have won on its own.

85 Fed. Reg. 66146, 66167-68 (Oct. 16, 2020, emphasis supplied). These comments show that SBA intended to prohibit precisely what is being imposed on the protégé member of a mentor-protégé joint venture under the terms of the RFP.

We also solicited the views of SBA during the development of the record in this case. SBA agrees with the view advanced by the protester, namely, that the RFP improperly requires that which is prohibited under the regulation. SBA concludes:

> SBA regulations at 13 C.F.R. § 125.8(e) prohibit an agency from applying the same experience requirements to protégés as other offerors generally. This requirement does not mandate a particular level or type of experience and provides agencies with the flexibility to determine the appropriate criteria*, with the understanding that protégés must be held to a different experience standard from mentors and other offerors*.

SBA Response to the Agency Report at 4-5 (emphasis supplied).

As a final matter, as set forth below, the arguments advanced by the agency either raise matters not material to the requirement, or are based on an incorrect reading of the regulation. First, the fact that the joint venture can meet the RFP's experience requirements with examples performed by the constituent members of the joint venture is immaterial to the question whether the protégé member of the joint venture must meet the same requirements as other offerors generally. This merely satisfies the first sentence of the regulation, which requires agencies to consider the separate experience of the joint venture members in determining whether the joint venture meets the solicitation's requirements. *See Amaze Technologies, LLC*, B-418949, B-418949.2, Oct. 16, 2020, 2020 CPD ¶ 347.

Second, the fact that the agency deems the specified requirements to be its minimum needs, and therefore reasonable, is similarly immaterial to the question whether the RFP meets the requirements of SBA's regulations. The regulation imposes an unqualified requirement; protégé firms may not be held to the same evaluation standards as other offerors. Whether the agency's requirements are reasonable does not address whether those requirements must be applied to a protégé member of a joint venture.

Third, the fact that the agency will consider the experience of the joint venture members in the aggregate does not mean that the protégé firm is not still required to individually meet the same evaluation requirements as those imposed on all other offerors. Regardless of whether the agency aggregates the experience examples during its evaluation, that fact does not eliminate the central problem, namely, that under the

terms of the RFP, protégé firms must meet the same experience requirements as all other oferors. In light of these considerations, we sustain this aspect of the protest.[3]

The "Single Point in Time" Requirement

Innovate also protests a requirement relating to determining whether the offerors have provided work samples that demonstrate their ability to adequately staff the task order. The RFP requires offerors to demonstrate through their submitted work samples that they have previously been able to staff a prior contract or task order adequately. To that end, the RFP requires offerors to demonstrate that the "position count" on the prior contract or task order reflects the number of personnel working on the submitted sample at "a single point in time." AR, exh. 28, RFP Evaluation Criteria, amend. No. 0001, at 6.

More specifically, the RFP requires offerors to populate a staffing "self-scoring matrix" with various information.[4] AR, exh. 29, Self-Scoring Matrix. The matrix requires offerors to identify the work sample (contract or task order) being referenced; the name of each employee and labor category being identified; the "evaluation criterion" for which the position or positions are being identified; and the start and end date for each employee.[5] *Id.* Separately, offerors are required to identify a "point in time" for each of the evaluation criterion that will be used to measure the "position count" for that aspect of contract performance. *Id.*

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[3] The agency also suggests that because the regulation uses the word "generally," it does not express an absolute prohibition against imposing the same experience requirements on protégé firms. The word "generally" is not used to denote an exception to the requirements of the regulation and its application to a protégé member of a joint venture. Instead, its placement at the end of the sentence is intended to convey that requirements applied to "other offerors generally" are not to be applied to the protégé member of a joint venture.

[4] As noted, this acquisition uses the Air Force's "highest two technically capable offerors with realistic, balanced and reasonable pricing source selection methodology." Under this methodology, offerors "self-score" their proposals using the RFP's self-scoring matrix. This matrix delineates the evaluation criteria and identifies the number of points and weights to be applied under each evaluation criterion. A maximum score of 36,000 points is available. AR, exh. 29, Self-Scoring Matrix. Once the offeror self-scores its work samples, the agency performs a "validation" exercise using "substantiating evidence" provided by the offeror.

[5] The RFP identifies 12 specific "evaluation criteria" and offerors are required to identify the number of employees performing the tasks or subtasks associated with each criterion in the work samples provided to demonstrate their experience. AR, exh. 28, RFP Evaluation Criteria, amend. No. 0001, at 7-12. For example, under evaluation criterion 3.1.1.3, offerors are required to identify personnel that performed logistics support; under evaluation criterion 3.1.2.1, offerors are required to identify personnel that performed contracting business support; and so on. *Id.* at 8-9.

Innovate argues that the RFP is ambiguous because it does not define what the agency means by "a single point in time," and also because there is no underlying rationale for the requirement. According to the protester, the phrase "a single point in time" could mean many possible alternatives, including work performed simultaneously during a specific minute on a specific day; work performed during one or more hours during a single day; or work performed during some other unspecified interval such as an entire day, a week, a month, or a year. Innovate argues that, in the absence of a clear definition of the term, offerors will be unable to compete intelligently and on a relatively equal and common basis.

Innovate also points out that the substantiating documentation called for under the RFP is not likely to provide information that would actually enable the agency to validate the claimed "position count" for the work samples submitted because such documentation will not show when specific tasks were performed by particular employees, or even how many employees may have worked on a contract at "a single point in time." For example, the RFP requires submission of past performance questionnaires and CPARS reports for the work samples submitted. AR, exh. 28, RFP Evaluation Criteria, amend. No. 0001, at 3, 4, 5, 6, 13. Innovate therefore maintains that this further demonstrates the arbitrary nature of this requirement. Finally, Innovate argues that the requirement itself is unnecessary to meet any logical agency requirement.

We sustain this aspect of Innovate's protest. Agencies are required to draft solicitations in a manner that enables offerors to compete intelligently and on a relatively equal and common basis. *Global Technical Systems*, B-411230.2, Sept. 9, 2015, 2015 CPD ¶ 335 at 19. Here, we agree with the protester that the term "a single point in time" is ambiguous, and fails to allow offerors to compete intelligently and on a relatively equal and common basis.

In responding to this aspect of the protest, the agency has not offered any clarifying explanation regarding what is meant by the phrase "a single point in time" other than to assert that the phrase has a commonly understood meaning, and to direct our attention to the definition of the word "point" found in Merriam-Webster's Dictionary. Agency Legal Memorandum at 10. The agency also suggests that the self-scoring matrix is self-explanatory because it calls for offerors to insert a date in the boxes calling for identification of the single point in time to be used for measuring whether the offeror has experience demonstrating its ability to perform in accordance with the various evaluation criteria.

We find the agency's explanation unconvincing. First, contrary to the agency's position, the self-scoring matrix is not self-explanatory and does not include any definition or instructions regarding what information offerors are required to provide to identify the "single point in time." Instead, the self-scoring matrix includes only the following statement: "Enter in the Single Point in Time that will be used for each specific Criteria. If the work sample does not address one of the Criteria, enter N/A for the Date in Time." AR, exh. 29, Self-Scoring Matrix, at 1.

The limited language in the self-scoring matrix quoted above does not define the term "single point in time" or otherwise instruct offerors about what interval to use to establish that a requirement was performed at "a single point in time." In addition, the phrase "date in time" does not resolve the question of what interval offerors should use to establish that a requirement was performed at a "single point in time"; both phrases are used in the same sentence, and neither is defined. As noted by the protester, the phrase "a single point in time" could be interpreted to mean many different possible intervals, including a particular moment, or an interval of one or more hours, or an interval of days or weeks, and use of the phrase "date in time" provides no further clarification.

In addition, beyond the language from the self-scoring matrix quoted above, there is no other explanation or definition of the phrase "a single point in time" anywhere else in the RFP. The phrase appears only one other time in the RFP's evaluation factors, but is not defined or otherwise explained. AR, exh. 28, RFP Evaluation Criteria, amend. No. 0001, at 6. In sum, the phrase "a single point in time" is not defined in the RFP in a manner that establishes unambiguously the interval of time intended by the agency.

Second, whatever interval the agency may intend by its use of the phrase "a single point in time" the agency has offered differing rationales for the requirement that do not withstand logical scrutiny. The agency's legal memorandum states that the requirement is necessary to allow the agency to assess the offeror's ability to employ and manage multiple positions simultaneously so that contract performance under the solicited requirement can function at maximum capacity. Agency Legal Memorandum at 12.

The contracting officer, on the other hand, states that the requirement is necessary in order to ensure that the offeror is capable of hiring a specific number of employees with demonstrated capability to perform the requisite tasks at the same time without significant turnover or vacancies in the required positions, and also to assess the offeror's ability to hire and retain a qualified and stable workforce. Contracting Officer's Statement of Facts at 12, 13.

While it may be true that the solicited information could shed light on the offeror's ability to manage multiple positions simultaneously as the agency contends in its memorandum of law, it is not apparent how the solicited information could shed light on an offeror's ability to hire and retain a stable workforce over time, as suggested by the contracting officer. In any event, the agency has not adequately explained its rationale for the requirement, and the contracting officer and agency counsel have advanced differing rationales for the requirement.

Third, we also agree with the protester that the substantiating documentation that the agency has solicited in order to allow it to validate the offerors' self-scoring matrix claims is unlikely to allow the agency actually to perform its validating exercise. Past performance questionnaires and CPARS reports do not typically include granular, moment-by-moment (or hour-by-hour, or day-by-day, or week-by week) detailed information about the precise staffing, or identity of the personnel, used to perform a

contract. In addition, even if that information might arguably be provided to the agency, it still would not provide the agency any insight to the offeror's ability to hire and retain a stable workforce over time.

Finally, and at the most basic level, the agency has offered no explanation for its refusal to provide offerors a common definition of what the Air Force means by the phrase "a single point in time." As noted by Innovate, the phrase is susceptible to many possible interpretations. The agency has not explained why providing a common definition would somehow detract from its ability to conduct a competitive acquisition, or otherwise deprive it of some particular insight into an offeror's ability to perform the solicited requirement. Nor has the agency explained why providing a common definition of the phrase would not actually promote full and open competition by ensuring that all offerors compete intelligently and on an equal basis, with a common understanding of the agency's intended basis for evaluating proposals. In light of the foregoing, we sustain this aspect of the protest.

Requirement for Cost-Reimbursement Type Work Samples

Finally, Innovate argues that the RFP unreasonably requires each member of the joint venture to submit at least one work sample that has been performed on a cost-reimbursement basis. The protester asserts that this requirement is unduly restrictive of competition because many small business offerors do not have prior contract experience performing a prime federal government contract on a cost-reimbursable basis. Innovate notes by way of example that, although it has experience performing as a subcontractor on a cost-reimbursable basis, it does not have experience performing as a prime contractor on a cost-reimbursable basis.

We dismiss this aspect of Innovate's protest as premature at this juncture. We recommend below that the agency revise the RFP's requirements relating to the submission of work samples for the protégé member of a mentor-protégé offeror. Because the agency's implementation of this recommendation could render this aspect of the protest academic, we decline to resolve the issue at this time. *Career Quest, a division of Syllan Careers, Inc.* B-293435.2, B-293435.3, Aug. 2, 2004, 2004 CPD ¶ 152 at 5-6. In light of the foregoing discussion, we sustain Innovate's protest.

RECOMMENDATION

We recommend that the agency amend the RFP to revise the work sample experience requirements as they relate to the protégé member of any mentor-protégé offeror, as discussed in detail above. We leave it to the discretion of the agency to determine which of its requirements to revise. We also recommend that the agency clarify the phrase "single point in time" so that offerors have a common understanding of the agency's requirements. Finally, we recommend that Innovate be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys' fees.

Innovate should submit its certified claim for such costs, detailing the time spent and the costs incurred, directly to the agency within 60 days of receiving this decision.

The protest is sustained.

Thomas H. Armstrong
General Counsel

by 1,000,000 cartons), an amount insufficient to cover the Committee's anticipated expenditures of $43,900. By increasing the assessment rate by $0.04, assessment income would be approximately $50,000 ($0.05 multiplied by 1,000,000 cartons). This amount should provide sufficient funds to meet 2021–22 anticipated expenses.

Prior to arriving at this budget and assessment rate, the Committee considered maintaining the current assessment rate of $0.01. However, leaving the assessment unchanged would not generate sufficient revenue to meet the Committee's expenses for the 2021–22 budget of $43,900 and would diminish reserves. Therefore, the alternative was rejected.

A review of historical information and preliminary information pertaining to the upcoming fiscal period indicates that the producer price for 2021–22 should be approximately $5.42 per 7/10-bushel carton or equivalent of oranges and grapefruit. Therefore, the estimated assessment revenue for the 2021–22 fiscal period as a percentage of total producer revenue would be approximately 0.9 percent ($50,000 divided by $5.42 × 1,000,000 cartons).

This action would increase the assessment obligation imposed on handlers. While assessments impose additional costs on handlers, costs are minimal and uniform on all handlers, and some portion of additional costs may be passed through to producers. However, these costs are expected to be offset by benefits derived by the operation of the Order.

The Committee's meeting was widely publicized throughout the Texas citrus industry. All interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the July 14, 2021, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this proposed rule, including the regulatory and informational impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by the OMB and assigned OMB No. 0581–0189 Fruit Crops. No changes in these requirements would be necessary as a result of this proposed rule. Should any changes become necessary, they would be submitted to OMB for approval.

This proposed rule would not impose any additional reporting or recordkeeping requirements on either small or large Texas orange and grapefruit handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, promoting the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 30-day comment period is provided to allow interested persons to respond to this proposed rule. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 906

Grapefruit, Marketing agreements, Oranges, Reporting and recordkeeping requirements.

For reasons set forth in the preamble, 7 CFR part 906 is proposed to be amended as follows:

PART 906—ORANGES AND GRAPEFRUIT GROWN IN LOWER RIO GRANDE VALLEY IN TEXAS

■ 1. The authority citation for 7 CFR part 906 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 906.235 is revised to read as follows:

§ 906.235 Assessment rate.

On and after August 1, 2021, an assessment rate of $0.05 per 7/10-bushel carton or equivalent is established for oranges and grapefruit grown in the Lower Rio Grande Valley in Texas.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2021–25116 Filed 11–17–21; 8:45 am]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 125

RIN 3245–AH71

Past Performance Ratings for Small Business Joint Venture Members and Small Business First-Tier Subcontractors

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The Small Business Administration is proposing to amend its regulations to implement new provisions of the National Defense Authorization Act (NDAA) Fiscal Year 2021 (FY 2021). The proposed rule would provide new methods for small business government contractors to obtain past performance ratings to be used with offers on prime contracts with the Federal Government. A small business contractor may use a past performance rating for work performed as a member of a joint venture or for work performed as a first-tier subcontractor. This proposed rule updates the requirements for small business subcontracting plans to add a requirement for prime contractors to report past performance to a first-tier, small business subcontractor when requested by the small business that was a first-tier subcontractor.

DATES: Comments must be received on or before January 18, 2022.

ADDRESSES: You may submit comments, identified by RIN: 3245–AH71, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email:* Donna Fudge, Procurement Analyst, Office of Policy Planning and Liaison, Small Business Administration, at *Donna.Fudge@sba.gov.*

SBA will post all comments on *https://www.regulations.gov.* If you wish to submit confidential business information (CBI), as defined in the User Notice at *https://www.regulations.gov,* please submit the information to Donna Fudge, Small Business Administration at *Donna.Fudge@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Donna Fudge, Procurement Analyst, Office of Policy Planning and Liaison, Small Business Administration, at *Donna.Fudge@sba.gov,* (202) 205–6363.

SUPPLEMENTARY INFORMATION:

I. Background Information

Section 868 of NDAA FY21, Public Law 116–283, addresses a common obstacle that small businesses may face when competing for prime Federal Government contracts: Possessing qualifying past performance. The proposed rule implements section 868 by providing small businesses with two new methods for obtaining qualifying past performance. First, a small business may use the past performance of a joint venture of which it is a member, provided that the small business worked on the joint venture's contract or contracts. Second, a small business may use past performance it obtained as a first-tier subcontractor on a prime contract with a subcontracting plan. For this latter method, section 868 authorizes the small business to seek a past performance rating from the prime contractor and submit the rating with the small business' offer on a new prime contract.

Section 868 added a new section 15(e)(5) to the Small Business Act, 15 U.S.C. 644(e)(5), to address past performance ratings of joint ventures for small business concerns. A small business concern that previously participated in a joint venture with another business concern (whether or not the other concern was small) may use the past performance of the joint venture with the small business' offer on a prime contract. Section 15(e)(5) directs SBA to establish regulations to allow the small business to elect to use the joint venture's past performance if the small business has no relevant past performance of its own. The small business must: (i) Identify to the contracting officer the joint venture of which the small business was a member; (ii) the contract(s) of the joint venture the small business elects to use; and (iii) inform the contracting officer what duties and responsibilities the small business carried out as part of the joint venture. In turn, the contracting officer shall consider the past performance of the joint venture when evaluating the past performance of the small business concern, giving due consideration to the information submitted about the duties and responsibilities that the small business carried out.

To address first-tier small business subcontractors, section 868 amended section 8(d)(17) of the Small Business Act, 15 U.S.C. 637(d)(17), which previously discussed a pilot program to provide past performance ratings for other small business subcontractors. Under the section 868 program, small business concerns may obtain past performance ratings for performance as a first-tier subcontractor on a prime contract that included a subcontracting plan. The proposed rule would require the prime contractor on the prime contract to provide a rating of the small business's past performance with respect to that prime contract to the small business within 15 days of the request. If the small business elects to use the past performance rating, the contracting officer shall consider the past performance rating when evaluating the small business's offer on a prime contract.

Because section 868 replaced the prior pilot program in section 8(d)(17), SBA will no longer pursue the pilot program as described in 83 FR 17583. This proposed rule creates a separate mechanism for first-tier subcontractors to obtain past performance ratings. The Federal Acquisition Regulation (FAR) rule implementing this requirement will account for the information collection, and clearance for the information collection will be obtained by the FAR Council.

SBA requests comments on whether small business subcontractors have been negatively impacted in competing for prime contracts due to not having a past performance rating(s).

SBA also seeks comment on whether to prescribe a time frame within which the subcontractor must make a request to the prime contractor for a rating under this proposed rule. If the prime contractor is currently in the period of performance for its contract, the prime contractor would be bound by its subcontracting plan to respond to the subcontractor's request. After the period of performance, however, the prime contractor would not necessarily be required to respond, because the contract would have ended. SBA seeks comment on whether to recommend that a subcontractor submit its request for a rating within the period of performance of the prime contractor's contract. If there might be a reasonable period of time after the physical completion of the prime contractor's contract in which the subcontractor should or must submit its request, SBA seeks comment on how to implement that time period into the prime contractor's Federal contract and what the time period might be. SBA also seeks comment on if the prime contractor and subcontractor might negotiate time periods and procedures by which the subcontractor can request a rating, and, if so, how to recognize that ability to negotiate in this regulatory prescription. In particular, should SBA recommend that the subcontractor negotiate the procedures for submitting a request and the time frames?

II. Section-by-Section Analysis

13 CFR 125.3

This proposed rule would add a requirement to prime contractors' subcontracting plans. The subcontracting plan will require the prime contractor to provide a rating of a first-tier subcontractor's past performance within 15 days of the first-tier subcontractor's request. The requested rating would be prepared to include, at a minimum, the following evaluation factors in the requested rating: (a) Technical (quality of product or service); (b) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements); (c) Schedule/timeliness; (d) Management or business relations; and (e) Other (as applicable).

13 CFR 125.11

This proposed rule renumbers 13 CFR 125.11 and subsequent sections to create a new § 125.11. New § 125.11(a) provides general guidance to require agencies to consider the past performance of certain small business offerors that have been members of joint ventures or first-tier subcontractors. The remainder of this proposed rule addresses the two scenarios from NDAA 2021.

First, a small business concern may receive past performance consideration for the past performance of a joint venture of which the small business was a member. To receive past performance consideration, where the small business does not independently demonstrate past performance necessary for award, the small business may elect to use the joint venture's past performance and the contracting officer shall consider the joint venture past performance that the small business has elected to use. In its offer for a prime contract, the small business must identify: (i) The joint venture; (ii) the contract(s) of the joint venture that the small business elects to use; and (iii) describe to the agency what duties or responsibilities the small business carried out as a joint venture member. The small business cannot, however, claim past performance credit for work performed exclusively by other partners to the joint venture.

As required by NDAA 2021, the contracting officer shall consider the information that the small business provided about its duties and responsibilities carried out as part of the joint venture. Where the small business does not independently demonstrate past performance necessary for award,

agencies shall consider a small business' successful rating of past performance through a joint venture. For example, a solicitation might require three past performance examples. This proposed rule would authorize the small business offeror to submit two examples from performance in its own name and one example from performance of a joint venture of which it was a member if the small business cannot independently provide the third example of past performance on its own. This proposed rule provides that the joint venture's past performance may supplement the relevant past performance of the small business when the small business cannot independently demonstrate the past performance on its own.

Second, a small business concern may receive past performance consideration for performance as a first-tier subcontractor. NDAA FY21 directs that this mechanism is limited to small businesses that performed as first-tier subcontractors on contracts that include subcontracting plans. The small business may request a rating of its subcontractor past performance from the prime contractor. Under the proposed rule, the prime contractor must provide a rating to the requesting small business withinwith 15 days of the request.

Under this proposed rule, the requested rating would be prepared to include, at a minimum, the following evaluation factors in the requested rating: (a) Technical (quality of product or service); (b) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements); (c) Schedule/timeliness; (d) Management or business relations; and (e) Other (as applicable). The proposed rule clarifies that one scenario where this applies is where the small business lacks a rating in the Contractor Performance Assessment Reporting System (CPARS). In that case, the agency shall consider the small business's subcontractor past performance rating as being equivalent to a CPARS rating.

This proposed rule clarifies that a joint venture composed of small businesses may receive past performance consideration for work that the joint venture performed as a first-tier subcontractor. A small business member of the joint venture subcontractor may request a past performance rating from the prime contractor for a contract that included a subcontracting plan. The prime contractor must provide the requested rating to the joint venture member within 15 days of the request. The requested rating would be prepared to include, at a minimum, the following evaluation factors in the requested record: (a) Technical (quality of product or service); (b) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements); (c) Schedule/timeliness; (d) Management or business relations; (e) Other (as applicable). The small business could then use that rating to establish its past performance in accordance with the prior provision on submitting joint venture past performance.

13 CFR 125.28

SBA is proposing to change the reference from § 125.15(a) to § 125.18(a) everywhere it appears in this section due to renumbering of sections. Section 125.18(a) provides the requirements for representation of service-disabled veteran-owned (SDVO) small business status.

13 CFR 125.29

SBA is proposed to change the reference from § 125.8 to § 125.12 everywhere it appears in this section due to renumbering of sections. Section 125.12 provides the definitions that are important in the Service-Disabled Veteran-Owned (SDVO) Small Business Concern (SBC) program.

13 CFR 125.30

SBA is proposing to change the reference from § 125.8 to § 125.12 everywhere it appears in this section due to renumbering of sections. Section 125.12 provides the definitions that are important in the SDVO SBC program.

III. Compliance With Executive Orders 12866, 12988, 13132, 13175, 13563, the Paperwork Reduction Act (44 U.S.C., Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is a significant regulatory action for the purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis.

1. Regulatory Impact Analysis: *Is there a need for the regulatory action?*

This rule is necessary to satisfy statutory requirements to implement section 868 of National Defense Authorization Act of Fiscal Year 2021 (NDAA FY21). Section 868 (e) requires the Administrator to issue rules to carry out the section.

Absence of past performance has been a limitation for small businesses when pursuing procurement opportunities that evaluate past performance. Small businesses often have past performance through work performed as a joint venture partner or as a subcontractor, but this experience and past performance is often not acknowledged or credited to the relevant small business in the evaluation process. This proposed rule is necessary to address that shortcoming in the evaluation of past performance and experience.

The FAR states that ''past performance, except as set forth in paragraph (c)(3)(iii) of this section, shall be evaluated in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold.'' See FAR 15.304(c)(3). Past performance is ''one indicator of an offeror's ability to perform the contract successfully.'' See FAR 15.305(a)(2). FAR 15.302(a)(2)(iv) provides that, in the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance. Because past performance may be considered a responsibility factor or because past performance affects an offeror's evaluation as compared to other offerors, the ability of small businesses that have been first-tier subcontractors or participated in joint ventures to demonstrate past performance increases their competitiveness in Federal contracting.

2. *What is the baseline, and the incremental benefits and costs of this regulatory action?*

OMB directs agencies to establish an appropriate baseline to evaluate any benefits, costs, or transfer impacts of regulatory actions and alternative approaches considered. The baseline should represent the agency's best assessment of what the world would look like absent the regulatory action. For a regulatory action that modifies or replaces an existing regulation, a baseline assuming no change to the regulation generally provides an appropriate benchmark for evaluating benefits, costs, or transfer impacts of proposed regulatory changes and their alternatives. This proposed rule would implement the changes, by modifying and expanding, the rating procedures of the unimplemented pilot program in 8(d)(17) of the Small Business Act (15 U.S.C. 637(d)(17)), which was added by section 1822 of the National Defense Authorization Act of 2017.

NDAA FY21 amended Section 8(d)(17) of the Act to allow small businesses that performed as first tier subcontractors to request a past performance rating from the prime contractor. The prime contractor must provide a rating of the small business past performance with respect to that prime contract to the small business

within 15 days of the request. The requested rating would be prepared to include, at a minimum, the following evaluation factors in the requested rating: (a) Technical (quality of product or service); (b) Cost control (not applicable for firm-fixed price or fixed-price with economic price adjustment arrangements); (c) Schedule/timeliness; (d) Management or business relations; (e) Other (as applicable). This proposed rule would modify the pilot program, in which a small business that had not performed as a prime contractor could request a past performance rating in the Contractor Performance Assessment Reporting System (CPARS), if the small business is a first tier subcontractor under a covered Federal Government contract requiring a subcontracting plan. Section 868(a) amends Section 15(e) of the Small Business Act to direct the establishment of regulations that allow the use of past performance in joint ventures in Federal contracting offers. This amendment expands the opportunities for past performance consideration by including consideration of the past performance of a joint venture of which the small business was a member.

The baseline is that which exists without implementation of the pilot program in section 8(d)(17) of the Small Business Act. In this environment, when a Federal agency creates a procurement opportunity requiring an offeror to provide examples of past performance, a newer small business concern may forego the opportunity because it individually lacks the required number of examples and then opt to join an established prime contractor's team as a subcontractor.

The most significant benefit of this proposed rule to small businesses is that it would enhance of the small businesses' ability to compete in Federal contracting opportunities. The FAR states that ''past performance, except as set forth in paragraph (c)(3)(iii) of this section, shall be evaluated in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold.'' See FAR 15.304(c)(3)(i). FAR 15.302(a)(2)(iv) provides that, in the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance. Nevertheless, small businesses without past experience as prime contractors may forego seeking some Federal contracting opportunities. This enhancement of Federal contracting opportunities is consistent with the amendment of the Small Business Act, which states that ''procurement strategies used by a Federal department or agency having contract authority shall facilitate the maximum participation of small business concerns as prime contractors, subcontractors, and suppliers.'' 15 U.S.C. 644(e)(1).

With more small businesses able to demonstrate past performance, agencies will have a larger pool of small businesses competing for contracting opportunities. This added competition may result in lower prices to the Government. SBA cannot quantify this impact before proposal of applicable FAR rules.

Costs of this proposed rule to the private sector include the prime contractor's provision, upon request to provide a past performance rating. The time burden of this requirement to the prime contractor is similar to that of the pilot program's past performance rating requirement. SBA estimates the fulfillment of a past performance request to require about 30 minutes of time. Assuming that a compilation of a rating of past performance involves 30 minutes of work by an employee of the prime contractor and valuing the time at $93.44 per hour,[1] SBA estimates that each rating request costs a prime contractor $46.72 in labor plus de minimis costs of transmission of the rating. There were approximately 34,000 individual subcontracting plans with 24,000 at the prime contract level in fiscal year 2015 (81 FR 94249), but it is not known how many small businesses were involved in these subcontracting plans or how many small businesses were involved in multiple subcontracting plans. SBA notes that 1,461 small businesses have active SBA-approved Mentor-Protégé agreements.[2] SBA also notes that in FY2019, the Electronic Subcontracting Reporting System (eSRS) listed 2,082 commercial plans with small businesses.

Assuming that half, or 731, of the small businesses with active agreements in the Mentor-Protégé program request a rating of past performance each year, the annual cost to the private sector of fulfilling these requests for past performance ratings would be $34,152 plus de minimis costs. Assuming that small businesses with 10 percent of 24,000 subcontracting plans at the prime contract level, in addition to those in the Mentor-Protégé program, request a rating of past performance each year, the annual cost to the private sector of fulfilling these requests is $112,128. Assuming each of the 2,082 commercial plans has two to four subcontracts, and half of the total subcontracts represents small business that would request a past performance rating each year, then the annual cost to the private sector of fulfilling these requests would be $145,907 plus de minimis costs. With these assumptions, total annual costs to the private sector of fulfilling requests is $292,187 plus de minimis costs.

The requirement of small business offerors that have been members of joint ventures to identify the joint venture, identify the contract(s) of the joint venture, and describe duties or responsibilities as a joint venture member in order to receive consideration of past performance involves a resource cost to the small business offerors that compile the specified information. SBA notes that this cost would be voluntarily incurred by small businesses that assess the enhancement of Federal contracting opportunities from consideration of past performance to be of greater value than the incremental costs incurred.

If more small businesses meet past performance standards and then submit proposals to contracting agencies, administrative costs to the Government may increase when a contracting agency reviews an increased number of proposals and past performance ratings. SBA cannot quantify these costs and notes that increased competition may offset these costs to the Government.

The ability of more small businesses to demonstrate past performance may redistribute some Federal contracts from businesses that can demonstrate past performance in the baseline scenario that exists with no implementation of the pilot program. This redistribution would not affect overall economic activity. This proposed rule and its effects do not change the amount of dollars in all available Federal contracts. SBA cannot quantify the actual outcome of the gains and losses from the redistribution of contracts among different groups of small businesses that would result from an increased number of small businesses with the ability to demonstrate their experience and past performance, but it expects that competition from small businesses with newly established past performance

[1] The median hourly wage for construction managers is $46.72, according to 2020 Bureau of Labor Statistics (BLS) data, and the hourly rate of $93.44 includes 100 percent more for benefits and overhead. Source for hourly rate: *https://www.bls.gov/ooh/management/construction-managers.htm.* Retrieved June 8, 2021.

[2] One of the goals of the SBA's Mentor-Protégé program is to promote the ability of small protégé businesses to successfully compete for government contracting opportunities. Protégé small businesses often form joint ventures with their mentors to pursue specific procurement requirements in order to gain experience and be able independently perform similar requirements in the future.

ratings may displace some small businesses that had established ratings in Federal contracting opportunities. A partial offset of this transfer impact among small businesses may occur with increased numbers of contracts set aside for small businesses through the Rule of Two, which states there is a reasonable expectation that the contracting officer will obtain offers from at least two small businesses and award will be made at fair market price.

3. *What are the alternatives to this rule?*

This proposed rule would implement specific statutory provisions in Section 868 of the NDAA FY21. There are no alternatives that would meet the statutory requirements.

Executive Order 12988

This proposed rule meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

This proposed rule does not have federalism implications as defined in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the Executive order. As such it does not warrant the preparation of a Federalism Assessment.

Executive Order 13175

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Executive Order 13563

This Executive order directs agencies to, among other things: (a) Afford the public a meaningful opportunity to comment through the internet on proposed regulations, with a comment period that should generally consist of not less than 60 days; (b) provide for an ''open exchange'' of information among government officials, experts, stakeholders, and the public; and (c) seek the views of those who are likely to be affected by the rulemaking, even before issuing a notice of proposed rulemaking. As far as practicable or relevant, SBA considers these requirements in developing this rule, as discussed below.

1. Did the agency use the best available techniques to quantify anticipated present and future costs when responding to E.O. 12866 (*e.g.,* identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes)?

To the extent possible the agency utilized the most recent data available in the Federal Procurement Data System-Next Generation, System for Award Management, and Electronic Subcontracting Reporting System.

2. Public participation: Did the agency: (a) Afford the public a meaningful opportunity to comment through the internet on any proposed regulation, with a comment period that should generally consist of not less than 60 days; (b) provide for an ''open exchange'' of information among Government officials, experts, stakeholders, and the public; (c) provide timely online access to the rulemaking docket on *Regulations.gov*; and (d) seek the views of those who are likely to be affected by rulemaking, even before issuing a notice of proposed rulemaking?

The proposed rule will have a 60-day comment period and will be posted on *www.regulations.gov* to allow the public to comment meaningfully on its provisions.

3. Flexibility: Did the agency identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public?

Yes, the proposed rule implements statutory provisions that provide new methods for small business government contractors to obtain past performance ratings to be used with offers on prime contracts with the Federal Government. The proposed rule would update the requirements for small business subcontracting plans to add a requirement for prime contractors to report past performance to a small business, first-tier subcontractor when requested by the small business first-tier subcontractor. The proposed rule will enhance the small business' ability to compete for Federal Government prime contracting opportunities.

Paperwork Reduction Act

This rule, if adopted in final form, would update the requirements for small business subcontracting plans to add a requirement for prime contractors to report past performance to a small business, first-tier subcontractor when requested by the small business first-tier subcontractor. The FAR rule implementing this requirement will account for this information collection, and clearance for the information collection will be obtained by the FAR Council.

In this proposed rule, SBA also proposes that a small business concern may receive past performance consideration for the past performance of a joint venture of which the small business was a member. This does not require a new information collection because the Government contracting officer rates the joint venture entity.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small nonprofit enterprises, and small local governments. Pursuant to the RFA, when an agency issues a rulemaking, the agency must prepare a regulatory flexibility analysis which describes the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines ''small entity'' to include ''small businesses,'' ''small organization,'' and ''small governmental jurisdictions.''

This proposed rule provides new methods for small business contractors to obtain past performance ratings to be used with offers on prime contracts, as such the rule relates to small business concerns but would not affect ''small organizations'' or ''small governmental jurisdictions'' because those programs generally apply only to ''business concerns'' as defined by SBA regulations, in other words, to small businesses organized for profit. ''Small organizations'' or ''small governmental jurisdictions'' are non-profits or governmental entities and do not generally qualify as ''business concerns'' within the meaning of SBA's regulations.

There are approximately 1,431 active SBA-approved Mentor-Protégé agreements and SBA estimates that half, or 731, small businesses with active agreements would request a past performance rating from its prime contractor in a year. Of the 24,000 subcontracting plans at the prime contract level in fiscal year 2015, SBA assumes for this analysis that up to 2,400 that are not in the Mentor-Protégé program may request a past performance rating each year. Additionally, in FY2019 there were 2,082 commercial

plans with small businesses. Assuming two to four subcontracts for each commercial plan, and half of them request a past performance rating, SBA estimates that up to 3,123 small businesses involved in commercial plans may request a past performance rating each year. The proposed changes allow small business contractors to request a past performance rating from a prime contractor for whom they performed work as a first-tier subcontractor or as a member of a joint venture. In addition, the proposed rule updates the requirements for small business subcontracting plans to add a responsibility for prime contractors to report past performance of the first-tier when requested by that first-tier subcontractor.

As a result, SBA does not believe the proposed rule would have a disparate impact on small businesses or would impose any additional significant costs. For the reasons discussed, SBA certifies that this proposed rule would not have a significant economic impact on a substantial number of small business concerns.

List of Subjects in 13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Small business subcontracting.

For the reasons stated in the preamble, SBA proposes to amend 13 CFR part 125 as follows:

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 1. The authority citation for part 125 continues to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657f, 657q, 657r, and 657s; 38 U.S.C. 501 and 8127.

■ 2. Amend § 125.3 by:
■ a. Removing the word ''and'' at the ends of pargarphs (c)(1)(ix) and (x);
■ b. Removing the period at the end of paragraph (c)(1)(xi) and adding ''; and'' in its place; and
■ c. Adding paragraph (c)(1)(xii).

The addition reads as follows:

§ 125.3 What types of subcontracting assistance are available to small businesses?

* * * * *

(c) * * *

(1) * * *

(xii)(A) The prime contractor, upon request from a first-tier small business subcontractor, shall provide the subcontractor with a rating of the subcontractor's past performance. The prime contractor must provide the small business subcontractor the requested rating within 15 days of the request. If the subcontractor will use the rating for an offer on a prime contract it must include, at a minimum, the following evaluation factors in the requested rating:

(*1*) Technical (quality of product or service);

(*2*) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements);

(*3*) Schedule/timeliness;

(*4*) Management or business relations; and

(*5*) Other (as applicable).

(B) The requirement in paragraph (c)(1)(xii)(A) of this section is not subject to the flowdown in paragraph (c)(1)(x) of this section.

* * * * *

§ § 125.11 through 125.14 [Redesignated as §§ 125.12 through 125.15]

■ 3. Redesignate §§ 125.11 through 125.14 as §§ 125.12 through 125.15.4. Add new § 125.11 before subpart A to read as follows:

§ 125.11 Past performance ratings for certain small business concerns.

(a) *General.* In accordance with sections 15(e)(5) and 8(d)(17) of the Small Business Act, agencies are required to consider the past performance of certain small business offerors that have been members of joint ventures or have been first-tier subcontractors. The agencies shall consider the small business' past performance for the completion of the performance of the evaluated contract or order.

(b) *Small business concerns that have been members of joint ventures*—(1) *Joint venture past performance.* (i) When submitting an offer for a prime contract, a small business concern that has been a member of a joint venture may elect to use the experience and past performance of the joint venture (whether or not the other joint venture partners were small business concerns) where the small business does not independently demonstrate past performance necessary for award. The small business concern, when making such an election, shall:

(A) Identify to the contracting officer the joint venture of which the small business concern is or was a member;

(B) Identify the contract or contracts of the joint venture that the small business elects to use for its experience and past performance for the prime contract offer; and,

(C) Inform the contracting officer what duties and responsibilities the concern carried out or is carrying out as part of the joint venture.

(ii) A small business cannot identify and use as its own experience and past performance work that was performed exclusively by other partners to the joint venture.

(2) *Evaluation.* When evaluating the past performance of a small business concern that has submitted an offer on a prime contract, the contracting officer shall consider the joint venture past performance that the concern elected to use under paragraph (b)(1) of this section, giving due consideration to the information provided under paragraph (b)(1)(i)(C) of this section for the performance of the evaluated contract or order. This includes where the small business concern lacks a past performance rating as a prime contractor in the Contractor Performance Assessment Reporting System, or successor system used by the Federal Government to monitor or rate contractor past performance.

(c) *Small business concerns that have performed as first-tier subcontractors*—(1) *Responsibility of prime contractors.* A small business concern may request a rating of its subcontractor past performance from the prime contractor for a contract on which the concern was a first-tier subcontractor and which included a subcontracting plan. The prime contractor shall provide the rating to the small business concern within 15 days of the request. The prime contractor must include, at a minimum, the following evaluation factors in the requested rating:

(i) Technical (quality of product or service);

(ii) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements);

(iii) Schedule/timeliness;

(iv) Management or business relations; and

(v) Other (as applicable).

(2) *Joint ventures that performed as first-tier subcontractors.* A small business member of a joint venture may request a past performance rating under pararaph (c)(1) of this section, where a joint venture performed as a first-tier subcontractor. The joint venture member may then submit the subcontractor past performance rating to a procuring agency in accordance with paragraph (b) of this section.

(3) *Evaluation.* When evaluating the past performance of a small business concern that elected to use a rating for its offer on a prime contract, a contracting officer shall consider the concern's experience and rating of past performance as a first-tier subcontractor

and that is within three years (six for construction and architect-engineering) of the completion of performance of the evaluated contract or order. This includes where the small business concern lacks a past performance rating as a prime contractor in the Contractor Performance Assessment Reporting System, or successor system used by the Federal Government to monitor or rate contractor past performance.

§ 125.28 [Amended]

■ 5. Amend § 125.28(a) by removing ''§ 125.15(a)'' and adding ''§ 125.18(a)'' in its place.

§§ 125.29 and 125.30 [Amended]

■ 6. In addition to the amendments set forth above, in 13 CFR part 125, remove ''§ 125.8'' and add ''§ 125.12'' in its place in the following places:
■ a. § 125.29(a); and
■ b. § 125.30(g)(4).

Isabella Casillas Guzman,

Administrator.

[FR Doc. 2021–25002 Filed 11–17–21; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–1006; Project Identifier MCAI–2021–00700–T]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2019–26–01, which applies to certain Airbus SAS Model A350–941 and –1041 airplanes. AD 2019–26–01 requires repetitive detailed inspections, and applicable corrective actions, and provides an optional modification that would terminate the inspections. Since the FAA issued AD 2019–26–01, a determination was made that a related production modification was not properly installed on certain airplanes. This proposed AD would retain the requirements of AD 2019–26–01, and, for certain airplanes, would add a one-time detailed inspection of the modification for proper installation, and applicable corrective actions if necessary, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by January 3, 2022.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For the material that will be incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu*; internet *www.easa.europa.eu*. You may view this IBR material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–1006.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–1006; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3225; email *dan.rodina@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2021–1006; Project Identifier MCAI–2021–00700–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend the proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this proposed AD.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Dan Rodina, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3225; email *dan.rodina@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2019–26–01, Amendment 39–21023 (85 FR 4199, January 24, 2020) (AD 2019–26–01), which applies to certain Airbus SAS Model A350–941 and –1041 airplanes. AD 2019–26–01 requires repetitive detailed inspections, and applicable corrective actions, and provides an optional modification that would terminate the inspections. The FAA issued AD 2019–26–01 to address possible water ingress due to sealant bead damage, which could result in