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

GOVWAVE, LLC, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. _____ Judge: _____ [redacted]

COMPLAINT

NOW COMES Plaintiff, GovWave, LLC ("GovWave"), by and through its undersigned counsel, and alleges the following for its Complaint seeking permanent injunctive relief: [1]

NATURE OF THE CASE

1. The U.S. Department of the Army, Army Contracting Command – Rock Island Division ("Army" or "Agency") eliminated GovWave, a small business joint venture, from further consideration under the Agency's ten-year, $10 billion Information Technology Enterprise Solutions 4 Hardware ("ITES-4H") procurement because, after its initial review of GovWave's proposal, the Agency is unsure whether GovWave has any adverse past performance.

[1] Prior to the filing of this complaint, counsel for GovWave conferred with counsel for the United States, who represented that the Agency agrees not to make a final award of the contract during the pendency of this bid protest assuming that the bid protest is decided by the fall of 2024. While the Agency will continue to conduct its evaluations during this time, counsel for the United States represented that the conduct of those evaluations would not be used to argue that the Court should not issue a permanent injunction should GovWave succeed on the merits of its protest. Accordingly, GovWave is not seeking a preliminary injunction in this case but reserves its rights to do so should circumstances change.

[redacted]

2. The Army made this decision even though Solicitation No. W52P1J20R0082 ("Solicitation")[2] required offerors with adverse past performance to identify such contracts in their proposal and provide various details and documents about their adverse past performance, and GovWave's proposal includes none of this information because it does not have any adverse past performance to address.

3. The Army also made this decision despite several statements in GovWave's proposal that, like the absence of any identified contracts or further details about adverse past performance, confirm it does not have adverse past performance. For example, GovWave's proposal states [redacted].

4. The Army believes it is justified in removing GovWave from the competition (and the opportunity to provide ITES hardware for the next ten years) before conducting a full evaluation of its proposal because the Army claims the Solicitation contained a so-called "strict compliance requirement" mandating that GovWave use specific language to state that it does not have any adverse past performance. Yet, the Solicitation did not include "magic language" that offerors had to use if they do not have adverse past performance and, moreover, the Solicitation did not identify this instruction as a strict compliance requirement. The operative strict compliance requirement in the Solicitation only applied to the identification of recent and relevant contracts that encountered performance problems, which, again, GovWave does not have.

5. There are other flaws in the Agency's decision, insofar as it indicates the Agency used an unstated evaluation criterion and that it abused its discretion in not seeking clarification of

[2] The Agency amended the Solicitation thirty one times. Unless otherwise noted, all references to the Solicitation in this protest refer to Amendment 31. See generally Exhibit ("Ex.") A.

[redacted]

the perceived ambiguity or waiving an obvious and minor informality in GovWave's proposal. Indeed, this matter could be easily and quickly resolved through clarification in a one-sentence email or a brief phone call through which GovWave would confirm what it believes is already clear from its proposal: namely, that it does not have any recent and relevant contracts that encountered performance problems. Such a clarification would not require a revision to GovWave's proposal, would not delay the procurement any longer than it takes the Agency to ask, "please confirm you have no adverse past performance," and would ensure the Agency has the benefit of GovWave's strong proposal in the competition for the Solicitation.

6. Yet, the Agency has rebuffed GovWave's attempts to resolve this amicably before filing the Complaint and apparently prefers to embark on what will likely be costly and time-consuming litigation to try to uphold its elimination of GovWave's proposal at this early stage of the evaluation for a perceived shortcoming that does not exist and, at worst, is a minor informality that could be readily clarified or waived. Hanging in the balance is GovWave's proposal, for which it has [redacted], and its opportunity to compete for and win a spot on this very valuable and important contract. We respectfully submit that, like with the merits of its challenges, the balancing of the harms is decidedly in GovWave's favor in this case.

7. Accordingly, the Court should enjoin the Agency, grant the relief requested herein, and restore GovWave to the competition.

PARTIES

8. The Plaintiff is GovWave, LLC, a Virginia limited liability company and unpopulated joint venture comprised of three members: Govplace, Inc., V3Gate, LLC, and Intelligent Waves, LLC. GovWave's headquarters are located at 1111 Sunset Hills Road, Ste. 200, Reston, VA 20190.

[redacted]

9. Defendant is the United States of America, acting through the Agency.

JURISDICTION AND STANDING

10. GovWave is an "interested party" to file this action under 28 U.S.C. § 1491(b)(1) because it: (1) is an actual offeror, which submitted a timely and compliant proposal in response to the Solicitation; and (2) possesses the requisite direct economic interest. IAP Worldwide Servs., Inc. v. United States, 159 Fed. Cl. 265, 285 (2022).

11. GovWave has standing to bring this action because it has "sufficiently alleged facts that, if proven based on the administrative record, demonstrate the requisite prejudice." Id. at 286. The record will show the Agency acted arbitrarily and capriciously and abused its discretion in evaluating GovWave's proposal and declining to engage in exchanges with GovWave after the receipt of proposals to the extent there was any doubt as to its contents. Alternatively, the record will show the Solicitation was latently ambiguous with respect to the Solicitation instruction at issue here, which prevented GovWave from competing intelligently.

12. In any permutation of the events that transpired, the Agency's unlawful actions competitively prejudiced GovWave and prevented it from advancing to the next step of the evaluation process and continuing to compete for an award it possessed a "substantial chance" of obtaining. DigiFlight, Inc. v. United States, No. 22-1521 C, 2023 WL 3001241, at *3 (Fed. Cl. Mar. 31, 2023) (quoting Info. Tech. & Applications Corp. v. United States, 316 F.3d 1312, 1319 (Fed. Cir. 2003)).

[redacted]

STATEMENT OF FACTS

A. Solicitation

1. History

13. On August 25, 2021, the Agency issued the initial solicitation ("Initial Solicitation"), formally beginning a multi-year effort by industry to compete for a spot on this $10 billion, multi-award, indefinite-delivery indefinite-quantity ("IDIQ") contract. See Ex. B, Initial Solicitation at 1.

14. Through the Solicitation, the Agency sought to procure innovative, world-class technology equipment and solutions to support the Army enterprise infrastructure and its associated goals. See Ex. A at 3.

15. The Solicitation contemplates the award of at least seventeen IDIQ contracts to eligible contractors, with up to seven awards reserved for small businesses, provided that seven small businesses are in the competitive range. See id.

16. As contemplated by the Solicitation, the ceiling value for all ITES-4H contracts may not exceed $10 billion over a 10-year period of performance, which consists of a 5-year base period and one 5-year option period. See id.

17. As relevant here, the Initial Solicitation included Attachment 14, "Compliance Requirements for the Request for Proposal," which provided certain requirements that offerors had to meet to be eligible for award. Ex. C, Attachment 14. These compliance requirements were as follows:

> 1. If the government has not received the offeror's complete proposal by the due date and time, the proposal will be considered incomplete and will not be further considered for award.

[redacted]

2. In Volumes I and III, pages that go over the page limit will not be considered. Additional pages over the maximum allowed will be removed or not read and will not be evaluated by the Government. I.E. if Volume I contains 30 pages, the Government will not evaluate pages 26-30.

3. No zipped files will be accepted, evaluated, or considered for award.

4. Page limitations for Volume I are based on the document being opened in print layout view in the applicable MS WORD 2013 or newer program.

5. If the SF 1449 and any amendments are not signed and returned to ACC-RI by the date and time due, the offeror will be considered non-responsive and the proposal will not be further evaluated and will not be further considered for award.

6. If the small business-subcontracting plan is not submitted with the proposal, the proposal will not be further evaluated and will not be considered for award.

7. Offerors that take exception to the terms and conditions of the RFP will be excluded from further consideration for award.

8. Offeror shall ensure that the data content for the entire proposal is easily readable. Corrupted and or damaged files are not acceptable and will not be included as part of the evaluation.

Ex. C.

18. The compliance requirements in Attachment 14 did not mention or include any provision related to an offeror's past performance submission.

19. Subsequently, the Agency issued twenty-eight Solicitation Amendments over approximately seventeen months and did not deviate from the requirements in Attachment 14 or introduce a compliance requirement related to past performance.

20. On August 16, 2023, the Agency issued Amendment 29 to the Solicitation, removing Attachment 14. In lieu of the list of eight compliance requirements that had been included in Attachment 14, the Agency now sprinkled the terms "STRICT COMPLIANCE

[redacted]

REQUIREMENT" and "STRICT COMPLIANCE REQUIREMENTS" throughout the Solicitation instructions. See Ex. D, Solicitation Amd. 29 at 2.

21. The Agency subsequently released Amendment 30 on September 14, 2023, and Amendment 31—the most recent version of the Solicitation—on September 28, 2023.

2. Step 1 Evaluation of Strict Compliance Requirements

22. The Solicitation states that the Agency will evaluate proposals in three steps to make best value awards. See Ex. A at 107. The Agency has not advanced past Step 1 (and, in fact, has not completed Step 1 evaluations for all offerors).[3]

23. Step 1 of the evaluation is limited to the Agency's review of each offeror's compliance with the strict compliance requirements added to the Solicitation via Amendment 29. See id. The Solicitation explained that "[p]roposals will be reviewed to determine if all compliance requirements set forth in the Instructions to Offerors are satisfied" and that "[f]ailure to provide proposals in compliance with the instructions specified as STRICT COMPLIANCE REQUIREMENTS in the Instructions to Offerors of this RFP shall render the Offerors proposal non-compliant." Id. The Solicitation further explained that a proposal deemed "non-compliant" after Step 1 would not be evaluated nor further considered for award. Id.

24. When the Agency introduced the strict compliance requirements in Amendment 29, it provided the following explanation:

> All volumes and files have strict compliance requirements and strict compliance to those requirements will be evaluated. Any items identified as a STRICT COMPLIANCE REQUIREMENT will be evaluated for compliance prior to any further evaluation of the

[3] In conversations with counsel for the United States prior to the filing of this Complaint, counsel represented that the Agency would be completing those evaluations over the coming months. GovWave does not believe that the Agency's incomplete Step 1 evaluation impacts the timeliness of this protest, i.e., renders it premature, as the Agency made a final decision to exclude GovWave after completing its Step 1 evaluation of GovWave's proposal.

[redacted]

> Offerors [sic] proposal. Failure to abide by the strict compliance requirements for any of these factors will deem the Offerors [sic] proposal non-compliant and will eliminate it from further consideration. Factors and subfactors with strict compliance requirements are clearly identified throughout these instructions.

Ex. A at 101.

25. Eight of the strict compliance requirements are preceded by the term "STRICT COMPLIANCE REQUIREMENT" in the singular form and describe a single compliance requirement as well as the consequence of not complying, as follows:

- STRICT COMPLIANCE REQUIREMENT: Offerors that provide .exe or .zip files will be deemed non-compliant and will not be further considered for award. Id. at 101.

- STRICT COMPLIANCE REQUIREMENT: If the Offeror's proposal fails to meet the terms and conditions of the RFP or takes exception to any of the terms and conditions of the RFP, it will render the Offeror's proposal unacceptable and will not be further considered for award. Id. at 102.

- STRICT COMPLIANCE REQUIREMENT: Failure to provide the most current versions of the RFP Attachments 0002, 0004, 0006, 0007 and 0013 shall render the Offerors [sic] proposal non-compliant and will not be further considered for award. Id.

- STRICT COMPLIANCE REQUIREMENT: ANY cells marked for Contractor Fill-In on the Equipment List that are left blank or are unintelligible as to the product the Offeror is proposing shall render the Offerors [sic] proposal non-compliant and will not be further considered for award. Id. at 102.

- STRICT COMPLIANCE REQUIREMENT: Cells that contain linked content are non-compliant. Id.

- STRICT COMPLIANCE REQUIREMENT: All cells contain an appropriate value. Id. at 104.

- STRICT COMPLIANCE REQUIREMENT: The Offeror must submit a completed ITES-4H PPQ POC List (Attachment 0013) of all the POCs who received a questionnaire with the submission of the proposal. Id. at 105.

[redacted]

> - STRICT COMPLIANCE REQUIREMENT: Failure to submit Attachment 0006 will render the Offeror's proposal non-compliant.

Id. at 106.

26. In notable contrast to the eight singular strict compliance requirements noted above, the Solicitation included one instance of the term "STRICT COMPLIANCE REQUIREMENTS" in the plural form, which was followed by three sentences, each with separate instructions to offerors and warnings of the consequences of not complying with each instruction:

> - STRICT COMPLIANCE REQUIREMENTS: Failure to provide the most current version of the RFP Attachment 0002 shall render the Offerors [sic] proposal non-compliant and will not be further considered for award. Unauthorized modifications to the Equipment List are not permitted and will render an Offerors [sic] proposal non-compliant and not further considered for evaluation. Linked inputs are not permissible and will render a proposal non-compliant.

Id. at 103 (emphasis added).

27. The operative strict compliance requirement for this protest is found in Solicitation Section L.5.3.2.b. Section L.5.3.2.b starts with the heading "Adverse Contract Performance." Id. at 105. Immediately following "Adverse Contract Performance," Section L.5.3.2.b includes the term "STRICT COMPLIANCE REQUIREMENT" in the singular form and states as follows:

> b. Adverse Contract Performance: STRICT COMPLIANCE REQUIREMENT: In addition to the contract references, the Offeror shall identify any recent and relevant Government contract(s) it was awarded that encountered any performance problems related to deliverables; services, security violations (i.e. data, physical, virtual, etc.), Environmental Protection Agency (EPA) violations, and every contract that was terminated (termination for default or termination for cause only), in whole or in part from 25 October 2019 through 16 October 2023.

Id.

[redacted]

28. Following the strict compliance requirement excerpted above, Section L.5.3.2.b included several other instructions to offerors, explaining:

> If there are no contracts that meet the description above, the Offeror shall state as such and include a statement in the Volume III of the proposal. The number of contract references provided in response to this paragraph is unlimited. Submission of Adverse Contract Performance information shall not count as part of the page count for Past Performance.
>
> For any contract falling under the Adverse Contract Performance description above, provide all the information listed as follows:
>
> 1. Contract number and Order number.
>
> 2. Define the performance problem and/or Type of Termination or Breach.
>
> 3. Describe the performance problem that caused the adverse action, termination, and/or breach.
>
> 4. Describe the corrective actions taken to resolve issues; and provide date(s) of issue/resolution.
>
> 5. Provide a copy of any Letter of Concern, cure notice, or show cause letters received.
>
> 6. Identify reasons for any Terminations for Default or Terminations for Cause.
>
> 7. Describe in detail any performance problems that include internal/external customer complaints and/or Contract Deficiency Reports (CDRs), EPA violations.
>
> 8. Provide points of contact who can confirm the success of the corrective measures to include email address and a valid telephone number.
>
> The Government is under no obligation to search for additional past performance references for any Offeror as the Government intends to evaluate an Offerors [sic] past performance based on the information submitted as part of an Offerors proposal. However, the Government reserves the right to use data provided in the Offeror's proposal and data obtained from other sources. To ensure inclusion of all references in the evaluation process, the Offeror is encouraged

[redacted]

> to provide the Government with the most current data on each reference.
>
> Offerors shall not provide references on classified contracts or contracts to foreign entities.

Id.

29. None of the instructions in Section L.5.3.2.b that follow the singular strict compliance requirement state that failure to comply with the instruction will render the proposal non-compliant.

3. GovWave's Final Proposal

30. On October 16, 2023, GovWave submitted its final proposal, which satisfies all of the strict compliance requirements and otherwise complies with all of the Solicitation instructions and would surely be one of the best values to the Agency in line for a contract award. See Ex. E, Final Proposal.

31. With respect to the strict compliance requirement in Section L.5.3.2.b, GovWave does not have "recent and relevant Government contract(s) it was awarded that encountered any performance problems" as described in that requirement. Ex. A at 105. As such, GovWave did not identify any such contracts or provide any of the enumerated information or documents sought in Section L.5.3.2.b when an offeror has adverse contract performance. See generally Ex. E, Vol. III.

32. GovWave's proposal explained that [redacted]

33. GovWave additionally noted [redacted].

34. GovWave further explained [redacted]

[redacted]

35. GovWave also highlighted that [redacted]

36. GovWave further noted that [redacted]

4. The Agency's Exclusion of GovWave from the Competition

37. On January 16, 2024, the Agency notified GovWave that its proposal was deemed "non-compliant" and was removed from consideration for award because:

> FINDING 1 – No Statement Acknowledging Adverse Performance: It is critical to the evaluation process that an Offeror provide a statement regarding whether any adverse past performance has occurred or not occurred. Acknowledgement of this requirement is important so that the USG may gather information about an Offeror's past performance in an efficient manner that allows for the evaluation of a proposal to reflect the Offeror's past performance record. When an Offeror's proposal is silent about whether it has any adverse past performance, that silence effectively creates ambiguity and does not equate to a clear statement that the Offeror has none. If Offeror has no history of adverse contract performance, offeror must provide a statement as such.

Ex. F, Exclusion Letter at 3. The January 16th notice constituted GovWave's pre-award debriefing, but the Agency gave GovWave the opportunity to submit questions within one business day.

38. GovWave timely submitted several questions and urged the Agency to reconsider its decision. On January 19, 2024, the Agency responded to GovWave's questions and maintained its decision to eliminate its proposal from the competition. See Ex. G. The Agency's answers to GovWave's questions confirm the Agency applied an unstated evaluation criterion, unreasonably evaluated GovWave's proposal and elevated form over substance, and abused its discretion in not seeking clarification or waiving the minor informality to the extent one existed.

[redacted]

39. This Complaint follows.

COUNT I

The Agency's Interpretation of the Strict Compliance Requirement for Adverse Contract Performance Is Contrary to the Solicitation and Constitutes Use of an Unstated Evaluation Criterion

40. GovWave realleges and incorporates the allegations of the preceding paragraphs by reference as if fully set forth herein.

41. The Agency's decision to eliminate GovWave's proposal from the competition at Step 1 was based on an erroneous interpretation of the Solicitation and application of an unstated evaluation criterion. This was arbitrary and capricious, for it is fundamental that "proposal evaluations be performed 'in accordance with the evaluation criteria presented in the'" solicitation. Huntsville Times Co. Inc. v. United States, 98 Fed. Cl. 100, 111 (2011).

42. When, as here, a party challenges an agency's evaluation, this Court will review the administrative record "to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations," Mortg. Contracting Services, LLC v. United States, 153 Fed. Cl. 89, 125 (2021), and that "'the contracting agency provided a coherent and reasonable explanation of its exercise of discretion.'" AM Gen., LLC v. United States, 115 Fed. Cl. 653, 676 (2014) (quoting Impresa Construzioni v. United States, 238 F.3d at 1332–33 (Fed. Cir. 2001)).

43. Consistent with these fundamental principles, this Court has repeatedly held that an agency must follow the terms of a solicitation when evaluating offerors. See Ernst & Young, LLP v. United States, 136 Fed. Cl. 475, 512 (2018) (citing Elec. Data Sys., LLC v. United States, 93 Fed. Cl. 416, 430 (2010) ("[A]n agency shall evaluate proposals and assess their qualities solely based on the factors and subfactors specified in the solicitation.")). Likewise, "an agency shall

[redacted]

evaluate competitive proposals and assess their qualities solely on the factors and subfactors specified in the solicitation," and "the government may not rely upon undisclosed evaluation criteria in evaluating proposals," such as by using criteria that goes beyond what would be reasonably expected by offerors. Banknote Corp. of Am. v. United States, 56 Fed. Cl. 377, 386 (2003); see, e.g., Acra, Inc. v. United States, 44 Fed. Cl. 288, 293 (1999).

44. The Agency claims that it was warranted in eliminating GovWave from the competition at Step 1 because its proposal was allegedly "silent about whether it has any adverse past performance [and] that silence effectively creates ambiguity and does not equate to a clear statement that the Offeror has none." Ex. F at 3 In the Agency's view, "[i]t is critical to the evaluation process that an Offeror provide a statement regarding whether any adverse past performance has occurred or not occurred." Id.

45. There are several flaws in the Agency's rationale. To begin, there is nothing in the Solicitation that required GovWave's proposal to contain "a statement regarding whether any adverse past performance has occurred or not occurred." Id. If an offeror has adverse past performance, the "Adverse Contract Performance" section instructs offerors to provide much more than just a statement that adverse contract performance has occurred. When an offeror has adverse past performance, Section L.5.3.2.b requires the offeror to identify the contracts and then instructs the offeror to provide information and documents responsive to eight enumerated items. See Ex. A at 105. Thus, the Agency was wrong to suggest that the Solicitation requires merely "a statement regarding whether any adverse past performance has occurred."

46. The Agency was also wrong to find that GovWave's "silence about adverse past performance" rendered its proposal non-compliant at Step 1. Any offeror like GovWave that does not have adverse past performance would be "silent" about adverse past performance in its

[redacted]

proposal. And such silence is telling, for, as noted, the Solicitation requires identification of contracts and seeks responses to eight enumerated requests for information and documents related to any adverse past performance identified. Consequently, the absence of this information from a proposal indicates there is no such information for the offeror to provide—i.e., "silence" about adverse past performance means the offeror does not have any.

47. Indeed, the requirement here was not simply to provide a single statement as to "whether adverse past performance has occurred or not occurred," the omission of which would render the Agency unable to determine if an offeror had adverse past performance or not. To the contrary, offerors with adverse past performance information were to address numerous items in their proposal and include additional documents. Id. As such, the absence of the information and documents regarding adverse past performance from GovWave's proposal was a sufficient basis upon which the Agency could and should have found that GovWave does not have adverse past performance.

48. Moreover, in its limited evaluation of GovWave, the Agency wrongly used multiple strict compliance requirements for adverse contract performance when the Solicitation only identifies one. When the Agency intended to identify multiple strict compliance requirements in the Solicitation, it used the plural "STRICT COMPLIANCE REQUIREMENTS" before the requirements, and it included warnings about the consequences of non-compliance in each separate requirement. Id. at 103. By contrast, Section L.5.3.2.b uses the singular "STRICT COMPLIANCE REQUIREMENT" before the sentence requiring the identification of adverse contract performance. Id. at 105. And, as the name of this section conveys, the focus of the single strict compliance requirement in Section L.5.3.2.b is on the identification of adverse contract performance. Id.

[redacted]

49. Following the sentence labeled as a strict compliance requirement for the identification of adverse contract performance, the next sentence in Section L.5.3.2.b states: "If there are no contracts that meet the description above, the Offeror shall state as such and include a statement in the Volume III of the proposal." Id. Notably, this sentence is not immediately preceded by the term "STRICT COMPLIANCE REQUIREMENT" nor is there any warning about the consequences of not "stat[ing] as such." See id. Therefore, it was arbitrary and capricious for the Agency to treat this sentence as a second strict compliant requirement in Section L.5.3.2.b and find that GovWave's alleged non-compliance with this sentence warranted its removal from the competition at Step 1.

50. Furthermore, the instruction asking offerors with no adverse past performance to "state as such" did not serve a substantive purpose, which underscores that it was not a strict compliance requirement. As discussed, the Solicitation expressly required offerors to identify adverse contract performance and provide supporting information and documents. An offeror without adverse past performance information obviously would not provide any information or documents related to adverse past performance. This means the instruction to "state as such" was superfluous because it would already be clear that the offeror does not have adverse past performance based on the absence from its proposal of any identified adverse past performance as well as the accompanying information and documents requested in Section L.5.3.2.b.

51. In sum, the Agency's evaluation did not adhere to the Solicitation when it removed GovWave's proposal from the competition for purportedly failing to satisfy a strict compliance requirement. Contrary to the Agency's evaluation, the Solicitation did not require GovWave to "provide a statement regarding whether any adverse past performance has occurred or not occurred." Ex. F at 3. The singular strict compliance requirement in Section L.5.3.2.b was to

[redacted]

"identify any recent and relevant Government contract[s]" on which the offeror encountered certain performance problems, Ex. A at 105, not to "provide a statement regarding whether any adverse past performance has occurred or not occurred" as the Agency claims. Ex. F at 3. Thus, the Agency used an unstated evaluation criterion to evaluate GovWave by introducing a new "strict compliance requirement" that demanded offerors "provide a statement regarding whether any adverse past performance has occurred or not occurred" lest they be eliminated from the competition.

52. That arbitrary and capricious evaluation conclusion undoubtedly resulted in competitive prejudice to GovWave, which submitted a proposal that materially complied with the Solicitation's instructions and satisfied all the strict compliance requirements such that it should have advanced to Step 2 (and would have a substantial chance of receiving the award).

COUNT II

The Agency's Finding that GovWave's Proposal Does Not Comply with the Instructions for Adverse Contract Performance Is Arbitrary and Capricious

53. GovWave realleges and incorporates the allegations of the preceding paragraphs by reference as if fully set forth herein.

54. The Agency's decision to eliminate GovWave's proposal from the competition based on its perceived non-compliance with a superfluous instruction that was not labeled as a strict compliance requirement is further marred by the Agency's apparent interpretation that the Solicitation required specific language in the proposal to confirm GovWave's lack of adverse past performance. As discussed in Count I, the Solicitation clearly did not require offerors to "provide a statement regarding whether any adverse past performance has occurred or not occurred," as the Agency claims. Ex. F at 3. Moreover, the Solicitation did not require that offerors use specific

[redacted]

wording in the superfluous instruction that offerors without adverse past performance should "state as such." Ex. A at 105.

55. GovWave's proposal materially complied with all the Solicitation instructions and satisfied all of the Solicitation's "strict compliance requirements." As relevant here, GovWave's proposal complied with the strict compliance requirement for adverse contract performance because it has none, so its proposal did not identify adverse past performance or include any of the accompanying information and documents for adverse past performance. Additionally, GovWave complied with the instruction to "state as such" regarding its lack of adverse past performance [redacted].

56. It is blackletter law that an agency cannot properly downgrade an offeror simply because it misreads the offeror's proposal or overlooks pertinent information contained in the proposal. See, e.g., DZSP 21, LLC v. United States, 139 Fed. Cl. 110, 118 n.9 (2018) (although procuring agencies are afforded broad discretion in evaluating bids, "when those determinations are contradicted by the record, no amount of deference can save them from being overturned as arbitrary and an abuse of discretion").

57. Indeed, GovWave's proposal complied with the Solicitation's instructions and the Agency's conclusion to the contrary is an unreasonable elevation of form over substance. See Ceres Env't Servs., Inc. v. United States, 97 Fed. Cl. 277, 301–02 (2011) ("The Court will find agency action arbitrary and capricious when the agency entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

[redacted]

58. GovWave has no "recent and relevant Government contract[s] it was awarded that encountered any performance problems" identified in Section L.5.3.2.b. Ex. A at 105. As such, GovWave did not identify any such contracts in its proposal. See generally Ex. E, Vol. III.

59. Likewise, GovWave did not include any of the other information or documents the Solicitation requested "[f]or any contract falling under the Adverse Contract Performance description" in Section L.5.3.2.b, including "[d]escrib[ing] the performance problem and/or Type of Termination or Breach," "cop[ies] of any Letter of Concern, cure notice, or show cause letters received," or "the corrective actions take to resolve the issues," as no such information or documents exist. Ex. A at 105.

60. The Solicitation also included a non-material instruction—which was not preceded by the term "STRICT COMPLIANCE REQUIREMENT" and did not inform offerors that their proposals would be "non-compliant" for failing to abide by the instruction—directing offerors to "state as such" if they did not have any contracts that met the description of adverse contract performance. And GovWave's proposal materially complied with that instruction.

61. For example, GovWave's proposal explained [redacted]

62. GovWave additionally noted [redacted] Again, this statement materially provided the information requested by the instruction to "state as such" about the lack of adverse contract performance.

[redacted]

63. GovWave further explained that [redacted] further highlighting the absence of recent and relevant contracts with performance issues. Id. at 14.

64. GovWave also highlighted that [redacted] GovWave further noted that [redacted]

65. Those statements in GovWave's proposal plainly demonstrate what was already clear given the lack of any identified adverse past performance in GovWave's proposal—namely, that GovWave has no "recent and relevant Government contract(s) it was awarded that encountered any performance problems." Ex. A at 105. Therefore, GovWave materially complied with the Solicitation instruction to "state as such," particularly given this instruction was not preceded by the term "STRICT COMPLIANCE REQUIREMENT" and did not serve a substantive purpose given the strict compliance requirement to identify adverse past performance if it existed. Ex. A at 105.

66. Based on the foregoing, the Agency's determination that GovWave's proposal did not "provide a statement regarding whether any adverse past performance has occurred or not occurred" is incorrect, misinterprets the Solicitation, and arbitrarily elevates form over substance. Ex. F at 3. This evaluation conclusion likewise demonstrates the Agency applied unstated evaluation criteria and eliminated GovWave's proposal for not including certain magic words the Agency was apparently looking for but never disclosed to the offerors. See Banknote, 56 Fed. Cl. at 386.

[redacted]

67. The Agency's determination in this regard resulted in competitive prejudice to GovWave, which submitted a proposal that materially complied with the Solicitation's instructions and satisfied all the strict compliance requirements such that it should have advanced to Step 2 (and would have a substantial chance of receiving the award).

COUNT III

If the Agency Had Any Doubt About Whether GovWave Had Adverse Past Performance, It Should Have Sought Clarification of GovWave's Proposal

68. GovWave realleges and incorporates the allegations of the preceding paragraphs by reference as if fully set forth herein.

69. To the extent there was any doubt regarding GovWave's proposal based on what it contained (and did not contain) regarding adverse contract performance, the Agency should have engaged in clarifications with GovWave and its determination not to do so was arbitrary, capricious, and an abuse of discretion.

70. Clarification would have been quick and easy. The Agency simply needed to ask GovWave to confirm that it does not have any recent and relevant adverse contract performance as defined in Section L.5.3.2.b. GovWave would have readily confirmed that this is correct, it does not have any adverse contract performance as defined in Section L.5.3.2.b. This could be accomplished in a one-sentence email or a brief phone call. See Griffy's Landscape Maint. LLC v. United States, 46 Fed. Cl. 257, 258-59 (2000) ("a brief phone call would have remedied the error").

71. By unreasonably deciding to not engage in clarifications, the Agency arbitrarily eliminated GovWave from the competition, limited the number of remaining eligible small businesses, and forced GovWave to expend [redacted] to contest the arbitrary

[redacted]

and capricious decision through the protest process; procurement law (and better business practices) demand a different result.

72. FAR § 15.306, which the Solicitation contemplated the Agency utilizing, Solicitation at 106, permits offerors "to clarify certain aspects of proposals . . . or to resolve minor or clerical errors" without opening discussions. FAR 15.306(a). Notably, the FAR provides two examples of the type of information that may be properly addressed through clarifications: "the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond." FAR 15.306(a)(2).

73. This Court has explained that, as compared to discussions which contemplate material changes to an offeror's proposal, "'clarifications' are deemed information exchanges that do not alter the terms of the offer." Level 3 Commc'ns, LLC v. United States, 129 Fed. Cl. 487, 504 (2016). Here, there is no need for GovWave to revise its proposal to clarify that it does not have any adverse contract performance. As discussed above, the proposal does not contain any of the required information for adverse contract performance because GovWave does not have any. And the proposal includes several statements confirming as much.[4] Nevertheless, if the Agency was still unsure it could have clarified with GovWave that it does not have any adverse contract performance without the need for a revision to GovWave's proposal.[5]

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[4] As noted above, these statements are found in the past performance section of GovWave's proposal, Volume III, as well as in Volume I. See supra ¶¶ 61–64. In deciding to seek clarification, the Agency should have considered all of these statements because they confirm GovWave does not have adverse past performance. See Aspire Therapy Servs. & Consultants, Inc. v. United States, 166 Fed. Cl. 366, 382 (2023) ("the existence of information elsewhere in a proposal that could correct or clarify an error further supports a finding that the agency abused its discretion by not seeking clarification.") (citing BCPeabody Constr. Servs. v. United States, 112 Fed. Cl. 502, 512 (2013)).

[5] The Agency is incorrect if it believes a proposal revision is necessary to clarify that GovWave's proposal means that it has no adverse contract performance to identify. If that unreasonable

[redacted]

74. An agency may not unreasonably deny a contractor the right to resolve minor errors via clarifications, and agency officials may be found to have abused their discretion when they do not permit offerors "to clarify certain aspects of proposals . . . or to resolve minor or clerical errors" where the existence of the error is "clear." See Griffy's Landscape, 46 Fed. Cl. at 259 (where information "clearly indicate[d] a clerical mistake," the agency had "a duty to inquire"); see also Level 3 Commc'ns, 129 Fed. Cl. at 504 (finding the agency's failure to seek clarification concerning the omission of a particular solicitation requirement unreasonable where the omission did not make it impossible to evaluate protester's proposal); BCPeabody, 112 Fed. Cl. at 513 (agency improperly refused to seek clarification from protester regarding copying mistake in its proposal).

75. This is not a circumstance where the Agency would seek clarification of a material solicitation requirement, which the Court has found cannot be clarified. See DigiFlight, Inc. v. United States, 150 Fed. Cl. 650 (2020). The instruction at issue here—to "state as such" regarding the offeror's lack of adverse past performance—is not a strict compliance requirement or material.

76. In determining whether a solicitation provision is material, the Court looks to whether the provision: (1) is express in the solicitation; and (2) served a substantive purpose. ManTech Advanced Sys. Int'l, Inc. v. United States, 141 Fed. Cl. 493, 506 (2019). In DigiFlight, the Court found that the operative solicitation provision, which required the proposal to contain a

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position is correct, however, we note that DFARS 215.306 provides that contracting offices should have discussions for procurements like ITES-4H that exceed $100 million. See DFARS 215.306; see also Dell Fed. Sys., L.P. v. United States, 906 F.3d 982, 995 (Fed. Cir. 2018) ("Pursuant to DFARS 215.306(c)(1), '[f]or acquisitions with an estimated value of $100 million or more, contracting officers should conduct discussions.' Therefore, discussions normally are to take place in these types of acquisitions."); Oak Grove Techs., LLC v. United States, 155 Fed. Cl. 84, 110 (2021) ("the DFARS provision makes conducting discussions the default absent a justification to the contrary").

[redacted]

rationale for profit in excess of a stated amount, was material because it was clearly identified in the solicitation and served a substantive purpose related to the agency's determination of whether the offeror's price was fair and reasonable.

77. By marked contrast here, the instruction in Section L.5.3.2.b for offerors to "state as such" if they do not have adverse contract performance was not material. It was not express in the solicitation insofar as the instruction to "state as such" did not provide explicit, "magic language" offerors had to use and was not marked as a strict compliance requirement and did not contain a warning that the failure to comply would render the proposal non-compliant. More importantly, this instruction did not serve a substantive purpose because Section L.5.3.2.b required an offeror with adverse past performance to identify the contracts and provide further information and documents in response to several enumerated requests. See Ex. A at 105. Thus, a proposal from an offeror like GovWave that does not have adverse past performance would not identify any recent and relevant contracts on which the offeror experienced performance problems, and it would not address any of the eight enumerated requests for information and documents. Id. Accordingly, the instruction to "state as such" about the lack of adverse past performance was superfluous. The Agency already knew whether an offeror had adverse past performance or not based on whether it identified adverse past performance and provided the related information and documents in its proposal.

78. As discussed in Count I, the Agency misinterpreted the Solicitation by criticizing GovWave for not including "a statement regarding whether any adverse past performance has occurred or not occurred." See Ex. F at 3. But that is not what the Solicitation required. To reiterate, when an offeror has adverse past performance, the Solicitation requested much more than simply a statement to that effect. An offeror with adverse past performance had to identify the contracts

[redacted]

and provide supporting information and documents. Ex. A at 105. Consequently, the Agency could readily discern whether an offeror has adverse past performance or not based on whether the offeror identified and provided further information and documents about adverse past performance.[6]

79. For these reasons, the superfluous instruction for offerors without adverse past performance to "state as such" has no impact on the price, quantity, quality, or delivery of the services being procured. See Furniture by Thurston v. United States, 103 Fed. Cl. 505, 518 (2012) ("[a] solicitation term is 'material' if failure to comply with it would have a non-negligible effect on the price, quantity, quality, or delivery of the supply or service being procured"). Nor is the provision binding on the offeror. See ST Net, Inc. v. United States, 112 Fed. Cl. 99, 106–10 (2013) (finding a provision to serve a substantive purpose because it was binding on the offeror). What is binding on the offeror and material in Section L.5.3.2.b is the required identification of adverse past performance, if it exists. The additional instruction for the offeror to "state as such" if it does not have adverse past performance cannot also be material because it merely serves to confirm the offeror's response to the requirement to identify adverse past performance. As the Court found in Aspire Therapy:

> To hold otherwise would elevate a provision that in essence encouraged offerors to submit consistent and accurate proposals, something that should be implicit in every procurement, to a material term that would prevent the agency and offerors from resolving the very type of minor or clerical error that clarifications were meant to address. The Federal Circuit has counseled against such a "cramped conception of 'clarification,'" even in

[6] Not only did the Solicitation require specific identification and request details about any adverse past performance, but it also noted that "the Government reserves the right to use data provided in the Offeror's proposal and data obtained from other sources," see Ex. A at 105, and explained that the past performance evaluation would include "other past performance information retrieved from CPARS." Id. at 112.

[redacted]

> circumstances where clarification is necessary for further evaluation of the proposal.

166 Fed. Cl. at 380–81.

80. Simply put, the instruction to "state as such" if the offeror has no "recent and relevant Government contract(s) it was awarded that encountered any performance problems" was not material. Therefore, while it should have been clear from GovWave's proposal that it does not have any recent and relevant adverse past performance because it did not identify any, the Agency could—and should—have sought clarification from GovWave to confirm that the absence of any identified adverse past performance in its proposal means it has none. In choosing to eliminate GovWave's proposal at this early stage of the competition and to embark on what will likely be lengthy and costly litigation, instead of a quick email or phone call to clarify GovWave's lack of adverse past performance, the Agency has acted arbitrarily, capriciously, and abused its discretion. See BCPeabody, 112 Fed. Cl. at 513.

81. The Agency's actions resulted in competitive prejudice to GovWave because, if the Agency asked for clarification, GovWave would readily clarify that it does not have any recent and relevant adverse past performance. And with that clarification, its compliant proposal would advance to Step 2 of the evaluation and would have a substantial chance of receiving the award.

COUNT IV

In the Alternative, the Agency's Decision to Exclude GovWave's Proposal for an Obvious Informality or Minor Irregularity Is Arbitrary, Capricious, and an Abuse of Discretion

82. GovWave realleges and incorporates the allegations of the preceding paragraphs by reference as if fully set forth herein.

[redacted]

83. In the alternative, the Agency eliminated GovWave's proposal from the competition for an obvious informality or minor irregularity in its proposal that the Agency should have waived.

84. Again, GovWave's proposal complied with the singular strict compliance requirement in Section L.5.3.2.b. Because GovWave did not have "any recent and relevant Government contract(s) it was awarded that encountered any performance problems" to identify, its proposal did not include any such information. Ex. A at 105.

85. GovWave's proposal also materially complied with the non-strict compliance Solicitation instruction to "state as such" if the offeror does not have "recent and relevant Government contract(s) it was awarded that encountered any performance problems" through [redacted]

86. As noted, the Solicitation merely instructed offerors without adverse past performance to "state as such" and did not require that offerors use specific wording. Nevertheless, even if the Solicitation is interpreted to require offerors to include certain magic words, e.g., "the offeror does not have recent and relevant Government contract[s] on which it encountered any of the performance problems identified in Section L.5.3.2.b," the omission of that language from GovWave's proposal was an obvious informality or minor irregularity, which the Agency should have waived and, indeed, abused its discretion by not waiving.

87. FAR 52.212-1(g), which the Solicitation incorporates by reference, provides that an agency may "waive informalities and minor irregularities in offers received."

[redacted]

88. This Court has held that an agency should not reject a proposal for an informality or minor irregularity, i.e., clerical error, when all material information required by the solicitation is present in the proposal. See, e.g., DMS All-Star Joint Venture v. United States, 90 Fed. Cl. 653, 666 n.16 (2010). Under such circumstances, an agency may waive the irregularity or minor informality or unilaterally correct it. See Galen Med. Assocs., Inc. v. United States, 369 F.3d 1324, 1333 (Fed. Cir. 2004) (agency's unilateral decision to fix obvious error in proposal was proper). Indeed, an agency's decision not to waive an irregularity or minor informality in an offer can be an abuse of discretion where such information is obvious elsewhere in the proposal or otherwise known to the agency through the evaluation process. See BCPeabody, 112 Fed. Cl. at 511.

89. As explained above, the Solicitation included one strict compliance requirement in Section L.5.3.2.b, which required an offeror to identify "any recent and relevant Government contract(s) it was awarded that encountered any performance problems." Ex. A at 105. GovWave has no "recent and relevant Government contract(s) it was awarded that encountered any performance problems." Id. Thus, GovWave did not identify any such contracts in its proposal and did not provide any of the other information the Solicitation requested in connection with such contracts, including "[d]escrib[ing] the performance problem and/or Type of Termination or Breach" or "the corrective actions take to resolve the issues" as no such information exists. Id.

90. The Solicitation also included a non-material instruction—which was not preceded by the term "STRICT COMPLIANCE REQUIREMENT" and did not inform offerors that their proposals would be "non-compliant" for failing to abide by the instruction—directing offerors to "state as such" if the offeror did not have contracts meeting the description of adverse contract performance. Id. As also explained above, GovWave's proposal materially complied with that non-material instruction by, [redacted]

[redacted]

[redacted] i.e., did not have "recent and relevant Government contract[s]" on which they encountered performance problems. [redacted] Certainly, those statements—when coupled with GovWave's proposal not identifying recent and relevant Government contracts with performance problems or describing performance problems encountered on the same—make it clear that GovWave does not have "recent and relevant Government contract[s] it was awarded that encountered any performance problems."

91. To the extent the Agency was looking for magic words in Volume III of GovWave's proposal, the omission of precise wording from GovWave's proposal (or from Volume III of GovWave's proposal) was plainly an informality or minor irregularity that the Agency should have waived. Indeed, the wealth of information GovWave provided in its proposal—both in Volume III and elsewhere—regarding its long history of "satisfactory-or-better" past performance coupled with GovWave not providing the salient information the Solicitation instructed each offeror to include if it had identified "recent and relevant Government contract[s] it was awarded that encountered any performance problems" make the omission so minor and the answer so obvious that the Agency's determination to not waive the informality can only be viewed as arbitrary, capricious, and an abuse of discretion.

92. The Agency's determination resulted in competitive prejudice to GovWave, which submitted a proposal that materially complied with the Solicitation's instructions and satisfied all the strict compliance requirements such that it should have advanced to Step 2 (and would have a substantial chance of receiving the award).

[redacted]

COUNT V

Alternatively, the Solicitation Contained a Latent Ambiguity

93. GovWave realleges and incorporates the allegations of the preceding paragraphs by reference as if fully set forth herein.

94. To the extent that the Court determines GovWave failed to comply with a material Solicitation provision—i.e., the instruction that was not preceded by the term "STRICT COMPLIANCE REQUIREMENT," did not inform offerors their proposals would be "non-compliant" for failing to adhere to the instruction, and simply asked each offeror to "state as such" if they had no adverse past performance—and that the failure could not be resolved through clarifications or waived, the Court should still enjoin the Agency and grant the relief requested herein because the Solicitation was latently ambiguous regarding which instructions were strict compliance requirements.

95. Due to the latent ambiguity, GovWave could not compete on an intelligent basis and was eliminated from the competition, and the Court should direct the Agency to clarify its requirements in an amended solicitation and resolicit revised proposals.

96. This Court recognizes that "[a]s a general rule, 'offerors must be given sufficient detail in an RFP to allow them to compete intelligently and on a relatively equal basis.'" Glenn Def. Marine (Asia) PTE Ltd. v. United States, 97 Fed. Cl. 568, 578 (2011) (quoting Interface Flooring Sys., Inc., B-225439 (Mar. 4, 1987)).

97. Relevant here, "[a]n ambiguity in a solicitation arises where the solicitation is susceptible to more than one reasonable interpretation." Coastal Env't Grp., Inc. v. United States, No. 22-868C, 2023 WL 1794581 at * 11 (Fed. Cl. Jan. 19, 2023) (citing Blue Tech Inc. v. United States, 155 Fed. Cl. 229, 237 (2021)).

[redacted]

98. There are two types of ambiguities: patent and latent. See id.

99. The Court defines a latent ambiguity as a "hidden or concealed defect which is not apparent on the face of the document, could not be discovered by reasonable or customary care, and is not so patent and glaring as to impose an affirmative duty on plaintiff to seek clarification." Premier Off. Complex of Parma, LLC v. United States, 134 Fed. Cl. 83, 89 (Sept. 22, 2017), aff'd, 916 F.3d 1006 (Fed. Cir. 2019).

100. "If an ambiguity is latent, such that the ambiguity was not obvious on the face of the solicitation and reliance is shown, the ambiguity will be construed against the Government as the drafter." Coastal Env't Grp., Inc., No. 22-868C, 2023 WL 1794581 at *11 (quoting Blue Tech Inc., 155 Fed. Cl. at 238 (internal quotations omitted)); see also W. Bay Builders, Inc. v. United States, 85 Fed. Cl. 1, 16 (2008) (stating "the doctrine of contra proferentem 'places the risk of latent ambiguity, lack of clarity, or absence of proper warning on the drafting party'" (quoting Burchick Const. Co. v. United States, 83 Fed. Cl. 12, 20 (Aug. 6, 2008)).

101. "Thus, '[i]f the ambiguity . . . is latent, and plaintiff's interpretation is reasonable, plaintiff will prevail over an equally reasonable interpretation by defendant.'" Shaw v. United States, 131 Fed. Cl. 181, 193–194 (2017), aff'd, 900 F.3d 1379 (Fed. Cir. 2018) (quoting Diggins Equip. Corp. v. United States, 17 Cl. Ct. 358, 360 (1989)); see also Turner Const. Co. v. United States, 367 F.3d 1319 (Fed. Cir. 2004) (stating that "[w]hen a dispute arises as to the interpretation of a contract and the contractor's interpretation of the contract is reasonable, we apply the rule of contra proferentem, which requires that ambiguous or unclear terms that are subject to more than one reasonable interpretation be construed against the party who drafted the document").

102. To the extent it finds the Agency did not unreasonably evaluate GovWave's proposal or abuse its discretion in not waiving or clarifying the obvious informality or minor

[redacted]

irregularity in the same, the Court should hold that the Solicitation was latently ambiguous with respect to which instructions were strict compliance requirements that could render a proposal ineligible for award.

103. Setting aside the instruction at issue in this protest, the Solicitation included eight instructions that were preceded by the term "STRICT COMPLIANCE REQUIREMENT" in the singular form, a colon, and then a one-sentence requirement, which would render an offeror's proposal non-compliant if not followed. See Ex. A at 101–06. Conversely, in the section of the Solicitation that included more than one strict compliance requirement following the colon, the Solicitation informed offerors by using the plural form, "STRICT COMPLIANCE REQUIREMENTS" and explicitly noting in each sentence following that which succeeded the colon that failure to comply would render the proposal non-compliant. Id. at 103 (emphasis added).

104. Section L.5.3.2.b., includes the term "STRICT COMPLIANCE REQUIREMENT" in the singular, a colon, and a one-sentence requirement that follows. Id. at 105.

105. Consistent with the other strict compliance requirements in the instructions, GovWave reasonably interpreted the Solicitation to mean that the singular "STRICT COMPLIANCE REQUIREMENT" in Section L.5.3.2.b. was to "identify any recent and relevant Government contract(s) it was awarded that encountered any performance problems." Id.

106. That interpretation is unquestionably reasonable given the Solicitation's structure and other uses of the term, i.e., that each of the other strict compliance requirements preceded by the singular use of the term end after the sentence that follows the colon.

107. GovWave's interpretation is also reasonable considering that, unlike the other strict compliance requirements, the next sentence of the instructions—instructing offerors to "state as

[redacted]

such" if no adverse past performance exists—does not inform offerors that failure to include such a statement would render the proposal "non-compliant." Compare id. with id. at 103.

108. If that too was a strict compliance requirement, Section L.3.5.2.b should have started with the term "STRICT COMPLIANCE REQUIREMENTS" in the plural form and the sentence requiring the statement of no adverse past performance should have informed offerors that failure to include the statement will render the proposal non-compliant.

109. It did not.

110. Accordingly, GovWave's interpretation of the Solicitation is reasonable.

111. On the other hand, the Agency's interpretation is unreasonable.

112. According to the Exclusion Notice, the Agency believes the strict compliance requirement applies to the entire paragraph following the term "STRICT COMPLIANCE REQUIREMENT" in the singular form:

> In addition to the contract references, the Offeror shall identify any recent and relevant Government contract(s) it was awarded that encountered any performance problems related to deliverables; services, security violations (i.e. data, physical, virtual, etc.), Environmental Protection Agency (EPA) violations, and every contract that was terminated (termination for default or termination for cause only), in whole or in part from 25 October 2019 through 16 October 2023. If there are no contracts that meet the description above, the Offeror shall state as such and include a statement in the Volume III of the proposal. The number of contract references provided in response to this paragraph is unlimited. Submission of Adverse Contract Performance information shall not count as part of the page count for Past Performance.

Ex. F at 2–3 (identifying entire paragraph as strict compliance requirement).

113. That interpretation, however, makes little sense as the final two sentences of the paragraph cannot be considered requirements in any sense of the word; it is unreasonable.

[redacted]

114. The Agency's interpretation of the Solicitation is unreasonable but, at best, presents a second reasonable interpretation of the requirement, rendering the Solicitation latently ambiguous and necessitating an injunction for the Agency to clarify its requirements and permit offerors to submit revised proposals in response to the same.

115. The latent ambiguity in the Solicitation, to the extent characterized as such, resulted in competitive prejudice to GovWave, which submitted a proposal that materially complied with the Solicitation's instructions and satisfied all the strict compliance requirements as reasonably interpreted such that it should have advanced to Step 2 (and would have a substantial chance of receiving the award).

GOVWAVE IS ENTITLED TO INJUNCTIVE RELIEF

116. GovWave realleges and incorporates the allegations of the preceding paragraphs by reference as if fully set forth herein.

117. GovWave is entitled to permanent injunctive relief because it is likely to succeed on the merits of its challenge to the Agency's elimination of its proposal from the competition, which was arbitrary, capricious, and contrary to law as addressed above.

118. GovWave will suffer irreparable harm if the Court does not issue the injunctive relief requested herein. Ex. H, Declaration of [redacted] ¶ 4. An irreparable injury is one for which there is no adequate legal remedy and includes loss of potential work and profits from a government contract. GovWave has [redacted] in developing its proposal for the Solicitation. Id. ¶ 5. The Solicitation has a maximum ceiling amount of $10 billion and, therefore, presents a significant business opportunity for GovWave that will be lost if it is not restored to the competition to be fully evaluated for award. Id. ¶ 6. This, in turn, will mean

[redacted]

lost profits and the loss of significant past performance and experience for GovWave and its members, all of whom are small businesses. Id. ¶ 7

119. GovWave's harm substantially outweighs any potential harm to the Government such that injunctive relief is appropriate here. If the Court does not order injunctive relief, GovWave will lose its opportunity to be considered for award of one of the very valuable contracts under the Solicitation and all of the time and resources it invested in its proposal effort will be for naught. Id. ¶¶ 4–8. Comparatively, the Government will suffer minimal or no harm if an injunction is entered requiring the Agency to restore GovWave to the competition. The Agency has not completed its evaluation of all offerors under Step 1 and does not anticipate making awards until January 2025. And the Agency will be advantaged, rather than harmed, by having GovWave's strong proposal in the best value competition—especially as it seeks to award at least seven contracts to small businesses. Additionally, any harm to the Agency is caused by its own actions, which are contrary to law, and which could have avoided this litigation and any resultant delay through a quick phone call to clarify any question it had.

120. Finally, GovWave is entitled to the injunctive relief it is requesting because the public interest favors ensuring the Agency properly follows applicable statutes, including those intended to further fair and equitable competition in government contracting, to ensure a compliant proposal like the one from GovWave is not deemed non-complaint because of irrational and erroneous interpretations of the Solicitation and the contents of the proposal.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that, upon review of this Complaint, this Honorable Court:

1. Take jurisdiction over this action;

[redacted]

2. Sustain this protest and declare the Agency's evaluation of GovWave's proposal arbitrary, capricious, and contrary to law;

3. Issue a Temporary Restraining Order, and Preliminary and Permanent Injunctive relief, upon appropriate motion by GovWave, requiring the Agency to rescind its elimination of GovWave's exclusion from the competition and reinstate GovWave into Step 2 of the evaluation process;

4. Alternatively, require the Agency to clarify its requirements in an amended Solicitation, resolicit revised proposals, and evaluate proposals in accordance with the law;

5. Award GovWave its fees and costs incurred in pursuing this action and its expenses incurred in responding to the Solicitation to the extent permitted under law; and

6. Grant GovWave any other relief that this Honorable Court considers just and proper.

Respectfully submitted,

Dated: February 2, 2024

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