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

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

PLAINTIFF'S RESPONSE AND REPLY TO DEFENDANT'S AND INTERVENOR-DEFENDANTS' CROSS-MOTIONS FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

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I.
INTRODUCTION

ACSI's Motion for Judgment on the Administrative Record ("MJAR") highlighted the absence of any documentation in the administrative record supporting the Department of Education's ("ED" or "Agency") corrective action. The record at that point consisted entirely of two filings with this Court announcing the Agency's corrective action plans: (i) an initial notice of corrective action filed on May 19, 2017; and (ii) an "amended" notice of corrective action filed on May 25, 2017. The latter filing expanded the corrective action to allow offerors to submit revised small business participation plans. ACSI's protest challenges that expansion as overly broad.

As it turns out, there is more to the story. One week after ACSI filed its MJAR, the Government "corrected" the administrative record by filing a detailed Corrective Action Memorandum to File prepared by the Contracting Officer on May 19, 2017. The memorandum analyzes the evaluation errors identified by the Government Accountability Office ("GAO") and explains ED's decision concerning the scope of the corrective action. It is hard to fathom how ED could have neglected to include this memorandum in the administrative record for a protest challenging the scope of ED's corrective action.

The Corrective Action Memo is damning to the Government's case. ***First***, the memorandum is the only record evidence explaining ED's corrective action decision, and it states that revisions to small business participation plans will *not* be permitted because GAO found no errors in ED's evaluation of Factor 3. The amended corrective action does exactly what ED found was not required. ***Second***, the memorandum directly contradicts one of the two justifications for the amended corrective action that the Department of Justice ("DOJ") provided this Court in its

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filing on May 25, 2017. Contrary to the Government's position here, the memorandum explicitly finds that the revisions to the Solicitation would have no material impact on offerors' small business participation plans. ***Third***, the memorandum expressly adopts and applies the standard of review that the Government now contends does not apply—*i.e.*, that an agency's corrective action must be targeted to a procurement defect.

Remarkably, neither the Government nor the Defendant-Intervenors even mentions the Corrective Action Memo in their MJARs. Their filings are entirely divorced from the facts. They argue that an agency's corrective action need only be reasonable under the circumstances, and that it is reasonable for ED to allow revisions to small business participation plans in this case because GAO sustained the consolidated protests, the Solicitation has been revised, and 16 months have passed since proposals were submitted.

But no one addresses the actual, contemporaneous record in this case, which provides no support for—and in many respects, directly contradicts—the Agency's expanded corrective action. It is true that GAO sustained the consolidated protests and found numerous errors in ED's evaluation. But GAO denied all challenges to ED's evaluation under Factor 3, and found no errors in ED's evaluation of small business participation plans. It is also true that ED revised the Solicitation as part of its corrective action. But after careful consideration, ED concluded that these revisions were minor and would have no material impact on small business participation plans. And it is true that 16 months have passed since proposals were originally submitted. But ED specifically considered the impact of the passage of time on offerors' proposals before announcing its initial corrective action, and found that no updates to small business participation plans were required.

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At bottom, the administrative record provides no support for ED's decision to expand the corrective action to allow revisions to small business participation plans. In fact, the record conclusively demonstrates that no such revisions are needed. No matter the standard of review that is applied, ED's expanded corrective action is irrational. It is not necessary to address a procurement defect and it is not reasonable under the circumstances. Thus, ED's overly broad corrective action must be enjoined.

II.
SUPPLEMENTAL STATEMENT OF FACTS

The newly-produced Corrective Action Memorandum to File, dated May 19, 2017, explains ED's initial corrective action decision. *See* AR Tab 29. It was prepared before the corrective action was expanded to allow revisions to small business participation plans, and thus provides no explanation for that decision. As it stands, however, the memorandum is the only evidence in the administrative record explaining the basis of the corrective action. It does not support the decision to reopen Factor 3. In fact, the memorandum significantly undercuts that decision.

According to the Corrective Action Memo, ED "reviewed GAO's recommendations and conducted its own analysis," and concluded that while there were errors in the evaluation of the Past Performance and Management Approach factors, "[t]here were no errors in the evaluation of the Small Business Participation plans." AR Tab 29 at AR 1049. Recognizing that "[a]n agency's corrective action may not be broader than is necessary to correct an identified defect," *id.* (citing *Amazon Web Services, Inc. v. United States*, 113 Fed. Cl. 102 (2013)), ED decided that only a "limited submission of revised proposal[s]" was necessary. *Id.* at AR 1054. Specifically, ED concluded that:

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> Only the Past Performance and proposed Management Approach will be re-evaluated. The reevaluation will correct all errors identified [in the GAO decision]. As there were no errors in the evaluation of Small Business Participation plans, no re-evaluation of that factor will take place. The scores and findings from the Factor 3 evaluation (without revision) will be considered in the new selection decision.

Id. at AR 1053. ED also revised the Solicitation to clarify instructions relating to the Management Plans and the submission of key personnel resumes. *Id.* at AR 1054-1055.

The Corrective Action Memo shows that ED specifically considered whether these Solicitation revisions would require ED to obtain updated small business participation plans. ED concluded that it was not necessary. Specifically, ED found that the Solicitation "revisions are minor and in the nature of clarifications rather than substantive changes. The Department does not believe that either change will impact other sections of the offerors' proposals. . . . Nor are the changes being made to the solicitation such that there would be any material impact to the small business participation evaluation." *Id.* at AR 1055.

The Government still has not produced any record evidence explaining ED's decision to allow revisions to small business participation plans. The only "evidence" supporting this decision is the amended notice of corrective action that DOJ filed with this Court on May 25, 2017. *See* AR Tab 27. As noted previously, unlike the initial notice of corrective action filed on May 19, 2017, the amended notice of corrective action is not supported by a declaration from an ED contracting official explaining the basis for ED's decision. *See* ACSI MJAR at 9.

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III.
ARGUMENT

A. ACSI Has Standing Because It Will Suffer a Non-Trivial Competitive Injury If It Is Forced to Recompete Against Offerors Whose Proposals Were Rightly Rejected.

The Government first argues that ACSI does not have standing to bring this protest. *See* Gov't MJAR at 12. [1] According to the Government, ED's decision to allow offerors to submit revised small business participation plans does not "put [ACSI] into a position where its ability to compete has been adversely affected." *Id.* at 16. To the contrary, ACSI's ability to compete has been adversely affected by ED's corrective action because it must recompete for award against more than a dozen offerors whose proposals were rightly rejected during the initial competition.

The Government and ACSI agree that in this pre-award protest the question of standing turns on whether ED's corrective action has resulted in "a non-trivial competitive injury" to ACSI. Gov't MJAR at 15. The Government attempts, however, to fashion a new, higher threshold for standing in a corrective action protest: the Government argues that only previous awardees or offerors that have lost the opportunity to compete at all have standing to challenge an agency's corrective action. *See id.* at 15-16. That is not the test for standing. The relevant question is whether the offeror is competitively harmed, not whether the offeror was an awardee or has lost the ability to compete altogether. In this case, ED's overly broad corrective action would force ACSI to compete against offerors whose proposals were correctly rejected during the original evaluation, including several offerors that were evaluated favorably under Factors 1 and 2.

[1] The Defendant-Intervenors similarly argue that ACSI is not prejudiced by the corrective action. *See* ACT MJAR at 22-23; Pioneer MJAR at 29; Conserve MJAR at 21. As prejudice must be considered in a standing inquiry, *Myers Investigative & Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1370 (Fed. Cir. 2002) (holding that "prejudice (or injury) is a necessary element of standing"), ACSI addresses all of these arguments here in the context of standing.

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Because allowing them back into the competition for the reevaluation is likely to affect ACSI's competitive position, ACSI has suffered a non-trivial competitive injury.

The Government attempts to create an artificial distinction between the status of awardees and non-awardees following a successful protest. Under the Government's test for standing, an awardee who the Court or GAO found had received a contract because of agency error would have standing to protest the agency's corrective action.[2] But a non-awardee like ACSI, whose protest was sustained—and thus, by definition, demonstrated that it had a substantial chance at receiving the contract but for the agency's errors—would *not* have standing to challenge the corrective action. That outcome is illogical. There is no rational basis for distinguishing between these two offerors. In fact, if either offeror is likely to suffer competitive injury as a result of the corrective action, it is the latter offeror—which GAO found should have received an award.

Nor is the Government's standing test dictated by *Square One*. In *Square One*, the court found that a non-awardee protester did not have standing to challenge the corrective action because the protester would benefit from the corrective action. In that case, the protester had been found technically unacceptable and, as a result of the corrective action, would have the opportunity to fix its proposal and recompete for award. *See Square One Armoring Serv., Inc. v. United States*, 123 Fed. Cl. 309, 327 (2015). In this case, ED's decision to expand the corrective action by allowing offerors to revise their small business participation plans would *not* benefit ACSI. Rather, it will

[2] In this case, for example, GAO found that several of the awardees should have been deemed ineligible for award due to their failure to inform the Agency of changes in their key personnel after proposal submission. *See* AR Tab 22 at AR 955-956.

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improperly benefit the offerors who previously submitted unacceptable plans, to the competitive detriment of ACSI.[3]

Contrary to the Government's argument, the fact that ED will make multiple IDIQ contract awards does not mean that ACSI is not harmed by the amended corrective action. *See* Gov't MJAR at 16-17. It is true that there is no minimum or maximum number of awardees. Rather, looking at the pool of offerors, ED will determine which are the most advantageous. But ED will have to draw the line somewhere; it will not make awards to all 47 offerors. *See* AR Tab 29 at AR 1053 ("Upon re-evaluation, the array of scores may lead to a different selection of the most advantageous proposals, including potentially a selection of a smaller number of awardees."). As a result, any action that could impact ACSI's competitive standing—*i.e.*, where it is ranked in comparison to the other offerors—could cost ACSI an award. The Agency's amended corrective action allows more than a dozen offerors who submitted unacceptable small business participation plans another shot at an award. If those offerors are evaluated more favorably than ACSI, they could displace ACSI as an awardee. That is the very definition of non-trivial competitive injury.

ACSI does not dispute that awardees and offerors denied the opportunity to compete by corrective action have standing to protest. But they are not the *only* parties that have standing to challenge corrective action, and the cases cited by the Government do not stand for such a proposition. In *Systems Application*, the court found that the awardee had standing because it was being forced to recompete for an award it had rightfully won. *See Sys. Appl. & Techs. v. United*

[3] Moreover, unlike the corrective action here, the corrective action in *Square One* did not follow a sustained protest. *Square One,* 123 Fed. Cl. at 318. Here, GAO found that ACSI had a substantial chance at award but for the evaluation errors made by ED. ACSI is thus in an elevated competitive standing, and more akin to an awardee.

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States, 691 F.3d 1374, 1382 (Fed. Cir. 2012). The court did not hold that a non-awardee would not have standing if it were forced to recompete for an award it should have won. Likewise, in *Distributed Solutions*, although the court found that the offerors had standing because they were deprived of the opportunity to compete, the court did not hold that only offerors with no ability to compete have standing. *See Distributed Sols., Inc. v. United States*, 539 F.3d 1340, 1345 (Fed. Cir. 2008).

The relevant inquiry for this Court is whether ACSI will suffer a non-trivial competitive injury from the amended corrective action. It clearly will. As a result of ED's decision to expand its corrective action to allow revised small business participation plans, ACSI will be forced to recompete for an award it should have received the first time against more than a dozen offerors whose proposals were rightly rejected. This detrimentally impacts ACSI's competitive standing and its chances for award during the reevaluation, and unquestionably constitutes a non-trivial competitive injury. *See Dell Fed. Sys., L.P. v. United States*, No. 17-465C, 2017 WL 2981811, at *10 (Fed. Cl. July 3, 2017) ("Here, the Army's overbroad corrective action constitutes a non-trivial competitive injury because it substantially decreases the chance each of the Protesters otherwise has of receiving an award."); *see also Prof'l Serv. Indus., Inc. v. United States*, 129 Fed. Cl. 190, 201 (2016) (finding standing where the corrective action "caused PSI a non-trivial competitive injury because it requires PSI to re-compete for an award that it had a substantial chance of winning but for what it alleges was an improper corrective action").[4]

[4] And, if the over-broad corrective action were to result in an award to ACSI and offerors whose proposals should have been rejected for submitting unacceptable small business participation plans, the increased competition for work during contract performance is a further non-trivial competitive injury. *See Nat'l Air Cargo Grp., Inc. v. United States*, 126 Fed. Cl. 281, 295 (2016).

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B. Corrective Action Must Be Targeted to a Procurement Defect.

The Defendants and ACSI agree that while an agency has broad discretion to take corrective action, the corrective action must be "reasonable under the circumstances." *DGS Contract Serv., Inc. v. United States*, 43 Fed. Cl. 227, 238 (1999); ACSI MJAR at 11; Gov't MJAR at 23. The Defendants, however, argue that, contrary to this Court's precedent, the corrective action need not be targeted to a procurement defect to be reasonable.[5] *See* Gov't MJAR at 23; ACT MJAR at 14-15; Conserve MJAR at 13. As this Court has recently reaffirmed, in order for corrective action to be reasonable under the circumstances, it must be targeted to a defect. *See Dell*, 2017 WL 2981811 at *8-*10. After soliciting proposals, conducting an evaluation, and making an award decision, an agency's discretion is more constrained than at the beginning of the procurement process. If there are not errors to correct, an agency does not have the discretion to essentially restart the entire procurement process under the guise of corrective action. *Sheridan Corp. v. United States*, 95 Fed. Cl. 141, 151 (2010); *see also WHR Grp., Inc. v. United States*, 115 Fed. Cl. 386, 400 (2014).

Indeed, ED explicitly endorsed and applied this standard in formulating its corrective action. In the Corrective Action Memo, ED acknowledged this Court's precedent holding that "corrective action may not be broader than is necessary to correct an identified defect":

> The case law recognizes that where GAO finds evaluation errors, the agency's corrective action must be reasonable in light of those procurement defects. *See Systems Application & Technologies, Inc. v. U.S.,* 691 F.3d 1374, 1382 (Fed. Cir. 2012); *Sheridan Corp. v. United States,* 95 Fed. Cl. 141 (2010). ***An agency's corrective action may not be broader than is necessary to correct an identified***

[5] It appears that Pioneer may agree with ACSI's standard of review; Pioneer acknowledges that the "proposed corrective action must be rationally related to the defect that will be cured." Pioneer MJAR at 17 (citing *MCII Generator & Elec., Inc. v. United States*, Case No. 1:02-cv-00085, 2002 WL 32126244, *1 (Fed. Cl. Mar. 18, 2002)).

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> ***defect***, *Amazon Web Services, Inc. v. United States,* 113 Fed. Cl. 102 (2013), nor so narrow that it denies offerors the fair opportunity to compete, *Power Connector, Inc.,* B-404916.2, 2011 CPD ¶ 186 (Comp. Gen. Aug. 15, 2011).

AR Tab 29 at AR 1049 (emphasis added). Based on that standard, ED correctly concluded that its corrective action must be targeted to address the evaluation errors under Factors 1 and 2:

> Having reviewed GAO's recommendations and conducted its own analysis, ED concurs that there were errors in the evaluation of proposals. Notably, those errors occurred only in the Past Performance and Management factors. There were no errors in the evaluation of the Small Business Participation [P]lans (Evaluation Factor 3).

Id. ED's subsequent decision to expand the corrective action to Factor 3 does not meet this Court's standard because it does not address an identified defect. Indeed, to this day the Government does not contend that any errors were made in the evaluation of Factor 3.

While the Defendants would prefer a rule under which an agency can take any corrective action it desires, this Court's precedent does not provide agencies a blank check on corrective action. Their actions must be targeted to address an identified defect. And like all agency action, corrective action must have a rational basis. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). As explained below, in this case the administrative record does not provide a rational basis for ED's amended corrective action. In fact, it conclusively demonstrates that the amended corrective action is irrational.

C. The Corrected Administrative Record Confirms That the Amended Corrective Action Is Irrational.

ED's decision to expand the corrective action to allow revised small business participation plans is irrational because (i) the amended corrective action remedies a nonexistent procurement defect, and (ii) the only evidence in the administrative record documenting ED's decision-making directly contradicts the Government's stated rationale for the amended corrective action.

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

As explained above, "[t]o be reasonable, the agency's corrective action must be rationally related to the defect to be corrected." *Sheridan*, 95 Fed. Cl. at 151; *see also Macaulay-Brown, Inc. v. United States*, 125 Fed. Cl. 591, 605 (2016). According to the Corrective Action Memo, ED agrees with GAO that "[t]here were no errors in the evaluation of the Small Business Participation [P]lans (Factor 3)." AR Tab 29 at AR 1049. The Government did not cite errors in the evaluation of Factor 3 as a justification for its decision to expand the corrective action, *see* AR Tab 28, nor did it argue in its MJAR that the amended corrective action addresses a procurement defect. Since the Government concedes the amended corrective action is not targeted to a defect, it is by definition irrational under this Court's precedent.

The Defendant-Intervenors argue that the amended corrective action was nonetheless reasonable under the circumstances because GAO identified defects in other aspects of ED's evaluation. ACT and Pioneer argue that because GAO found flaws in the evaluation of proposals, ED's decision to allow revisions to *all* aspects of proposals was reasonable. According to ACT, "the flaws articulated clearly by GAO and used to support the Agency's corrective action relate not only to the Agency's evaluation of proposals but also identified issues with the terms of the Solicitation as well as deficiencies in the original proposals submitted. Thus, the corrective action is reasonable under the circumstances." ACT MJAR at 17. Similarly, Pioneer contends that because the procurement defects "permeated every aspect of the [A]gency's evaluation," it was reasonable for ED to solicit revised small business participation plans. Pioneer MJAR at 19. In short, ACT and Pioneer contend that an error in one aspect of an agency's evaluation grants the agency license to take any corrective action it wants.

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That standard does not comport with this Court's precedent. An agency must tailor *each* aspect of the corrective action to a procurement defect. Otherwise, it is over-broad. *See Amazon Web Servs., Inc. v. United States*, 113 Fed. Cl. 102, 115-16 (2013) (agency could not "use [one defect] as an opportunity to amend other aspects of the solicitation"); *see also Dell*, 20117 WL 2981811 at *8 (agency could not open discussions with all offerors and solicit wholesale proposal revisions even where two evaluation defects had been rationally identified). Here, GAO held that there were no errors in the evaluation of small business participation plans, and the Agency agreed with that finding. AR Tab 29 at AR 1053. Because there was no error, the corrective action should not include the submission of revised small business participation plans.

Conserve and Pioneer argue that there *was* a procurement defect that ED needed to remedy. Conserve argues that its protest "specifically identified an error related to the evaluation of Participation Plans," and that this error "led to ED's decision to take corrective action." Conserve MJAR at 15. Pioneer likewise argues that its protest alleged errors in the evaluation of its subcontracting plan. *See* Pioneer MJAR at 25. Of course, there is no evidence that ED agrees with Conserve and/or Pioneer, or that the amended corrective action was designed to fix errors alleged in their protests. To the contrary, the record shows that ED continues to believe it properly evaluated their proposals in those areas. *See* AR Tab 29 at AR 1054 ("The Department maintains that its decision [regarding the evaluation of Conserve and Pioneer] was consistent with law.").

More fatal to their arguments, however, is the fact that the alleged procurement "flaw" that Pioneer and Conserve identified in their protests does not relate to the evaluation of their small business participation plans. Rather, their protests concern ED's evaluation of their *subcontracting* plans. *See* Conserve MJAR at 10; Pioneer MJAR at 6-7. The corrective action allows offerors to

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revise their subcontracting plans, not their small business participation plans. AR Tab 6 at AR 215. Thus, Conserve and Pioneer will have the opportunity to remedy any perceived issues with their subcontracting plans in their revised proposals.

But that does not mean offerors must also be permitted to submit revised small business participation plans. Although the Solicitation requires an offeror's subcontracting plan to be consistent with its small business participation plan, an offeror does not have to revise *both* plans to make them consistent. Offerors can make the plans consistent by revising their subcontracting plans. There is no need to allow revisions to small business participation plans too.[6]

At bottom, the amended corrective action allows more than a dozen offerors a second chance at submitting a compliant small business participation plan when there was nothing wrong with ED's original finding that their proposals were unacceptable. Such corrective action is neither targeted to address a defect nor reasonable under the circumstances, and cannot stand. *See Dell*, 2017 WL 2981811 at *8 ("In sum, the Army opened discussions in which all remaining offerors, no matter how egregiously they had erred in their initial proposals, simply received a second chance at submitting compliant proposals under an unchanged solicitation.").

[6] As the Defendant-Intervenors have noted, ACSI is not challenging the aspect of the corrective action that permits offerors to revise their subcontracting plans. *See* Conserve MJAR at 17; Pioneer MJAR at 27; ACT MJAR at 16 n.6. This is because the subcontracting plan will be evaluated only as a matter of responsibility. AR Tab 5 at AR 187. The FAR allows an agency to negotiate with an apparently successful offeror to ensure that the awardee's subcontracting plan is acceptable. *See* FAR 19.702(a)(1), 19.705-4(c). Because ED can allow the apparently successful awardees to revise their subcontracting plans after award, there is nothing improper about allowing such revisions before award.

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2. The Agency's Stated Justifications for Permitting Revisions to the Small Business Participation Plans Are Directly Contradicted by the Administrative Record and Irrational.

The corrected administrative record confirms that the amended corrective action is arbitrary and capricious. While ACSI's MJAR emphasized the lack of record evidence justifying the decision to allow revised small business participation plans, the newly-produced Corrective Action Memo shows that there is indeed contemporaneous documentation of the Agency's thinking. But rather than supporting the Agency's decision, the Corrective Action Memo significantly undercuts the justifications provided in the amended corrective action notice. Looking at the complete record, ED's actions plainly "run[] counter to the evidence before [it]," and are thus arbitrary and capricious. *State Farm*, 463 U.S. at 43.

First, the record now confirms that there is no need for the Agency to "receive up-to-date small business participation plans that are consistent with the other elements of the revised proposals." AR Tab 28 at AR 1045. Contrary to the justification put forth in the amended corrective action notice, *see id.*, and the Government's MJAR, Gov't MJAR at 28, the record shows that ED specifically considered—and rejected—the possibility of inconsistencies between proposal sections. As set forth in the Corrective Action Memo, ED determined that no changes to the small business participation plans are required because the other revisions would not affect the small business participation plans:

> As noted above, these revisions are minor and in the nature of clarifications rather than substantive changes. ***The Department does not believe that either change will impact other sections of the offerors' proposals***. Notably, the pricing for the work is set by the Department and therefore there would be no need to seek a revised price proposal. ***Nor are the changes being made to the solicitation such that there would be any material impact to the small business participation evaluation***.

[redacted]

AR Tab 29 at 1055 (emphasis added).

The Defendants ignore the Corrective Action Memo entirely. Instead, they each point to the Solicitation's requirement that the small business commitments in the small business participation plan must be consistent with those in the subcontracting plan. *See* Gov't MJAR at 28; ACT MJAR at 21-22; Conserve MJAR at 20-21; Pioneer MJAR at 25-27. As explained *supra*, this does not require the submission of new small business participation plans. Offerors will have the opportunity to submit revised subcontracting plans; if necessary, they can make revisions to their subcontracting plans to ensure consistency with their original, unrevised small business participation plans.[7]

ACT further attempts to defend the Government's consistency justification by arguing that "[i]nformation in the small business participation plan is directly linked to information in Sections A, C, and D of the proposals." ACT MJAR at 21. Pointing to the Solicitation's instructions requiring a description of subcontractor management, ACT argues that revisions to those descriptions may impact the small business participation plans. *Id.* ED itself does not agree with this position, *see* AR Tab 29 at 1055, and it makes no sense in any event. In the small business participation plans, offerors were required to commit to subcontracting a certain percentage of the work to small businesses and identify the small businesses they planned to use. *See* AR Tab 3 at

[7] Contrary to Conserve's assertion, allowing offerors to revise their Factor 1 and 2 proposals but not their Factor 3 proposals does not make the ability to revise subcontracting plans "meaningless." Conserve MJAR at 17-18. To the extent that an offeror's proposal was rejected for inconsistency between the two plans, the offeror can update the subcontracting plan to make them consistent. If an update to the subcontracting plan will not resolve the issue, then the error was in the offeror's small business participation plan, and the offeror's proposal was rightly rejected for failing to meet the Solicitation's requirements for Factor 3.

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AR 158-159. Changes to an offeror's approach to subcontractor management would not impact the percentage of work contracted or the identity of the subcontractors. In sum, any argument that small business participation plans must be revised in order to ensure consistency with other proposal sections is contradicted by the record and irrational.

Second, there is no need to allow revisions to small business participation plans because of the passage of time. According to the Defendants, offerors must be allowed to revise their small business participation plans because "the status of the small businesses any offeror identified, and the type of work that small business[es] could perform, may have changed during the intervening 16 months." Gov't MJAR at 27; *see also* ACT MJAR at 20-21; Conserve MJAR at 20-21; Pioneer MJAR at 27-28. Once again, the Defendants' position has no anchor in the administrative record.

The passage of time justification is supported only by DOJ's notice of amended corrective action filed with this Court on May 25, 2017. There is no record evidence supporting DOJ's statements. Nor is there even a declaration by an ED contracting official supporting the filing, as there was with the original notice of corrective action.[8] In fact, the declaration supporting the initial announcement of corrective action is the only document in the record reflecting ED's consideration of the impact of the passage of time, and in it ED implicitly rejects that factor as a reason to allow revisions to small business participation plans:

> Because a significant amount of time has elapsed since February 2016, when offerors submitted their original proposals, [ED] intends to allow offerors, if they wish, the opportunity to submit new past performance proposals, and then will

[8] ACT argues that "this Court has rejected challenges to agency corrective action where the stated rationale for the corrective action is contained only in statements made to the court in response to a protest." ACT MJAR at 22 n. 10 (citing *PricewaterhouseCoopers Public Sector LLP v. United States*, 126 Fed. Cl. 328, 338 (2016). In *PricewaterhouseCoopers*, however, the agency submitted declarations to the court. *PricewaterhouseCoopers*, 126 Fed. Cl. at 338. Here, there is no declaration supporting the notice of amended corrective action.

[redacted]

> reevaluate all past performance proposals in accordance with the solicitation. . . . No revisions to any small business participation plan will be permitted.

AR Tab 26 at AR 1040 ¶ 8. By making it a point to stress the need to obtain revised past performance references due to the passage of time, while simultaneously deciding not to allow revisions to small business participation plans, the Agency implicitly acknowledged that the passage of time was not a reason to include Factor 3 within the scope of its corrective action. Thus, the record contradicts the passage of time justification.

The Defendants also insist that the identity of the small business subcontractors may change given the passage of time, and that this may impact the evaluation. Gov't MJAR at 19-20; ACT MJAR at 20-21; Conserve MJAR at 20; Pioneer MJAR at 27-28. But the record shows that ED is not evaluating the identity of the small business subcontractors. Rather, ED will evaluate only "[t]he extent to which [] Small Business firms are specifically identified in proposals." AR Tab 5 at AR 187. In other words, it is not important *which* small businesses offerors identify in their small business participation plans; it is only important *that* they indentify specific small businesses they may use during performance. The record before GAO confirms that ED did not evaluate specific small business subcontractors under Factor 3.

ED itself has confirmed that the identity of the subcontractors listed in an offeror's small business participation plan is not important to the Factor 3 evaluation. In response to a question prior to the submission of proposals, ED stated that offerors will be permitted to change their small business subcontractors after award:

> Q: Vendors are required under Section D [] to provide a list of all subcontractors. Page 18 of the PWS[] requires us to submit the list within 10 days of the date of the contract award. Given changes in awardees during this period of time, can we change subcontractors if subcontractor relationships change due to changes in circumstances?

[redacted]

A: Yes, after approval of the original subcontracting plan by the Contracting Officer.

AR Tab 3 at AR 174. If offerors will be permitted to change the identity of their small business subcontractors after award, their identity is not material to the Factor 3 evaluation, and there is no need to permit revisions to small business participation plans as part of the corrective action.

Finally, contrary to the Government's assertions, ACSI does not contend that the Government acted in bad faith when it expanded the corrective action to include Factor 3. *See* Gov't MJAR at 28-29. Absent any record evidence supporting the basis for the Agency's decision, however, the only logical conclusion that can be drawn from the amendment to the corrective action is that the Government was attempting to moot out the remaining protests before this Court. That is not bad faith. But it also is not a rational basis to take corrective action. And because there is no other rational basis for the decision to allow revisions to small business subcontracting plans as part of the corrective action, ACSI's protest should be sustained.

D. ACSI Is Entitled to Permanent Injunctive Relief.

ACSI is entitled to permanent injunctive relief because (1) ACSI has succeeded on the merits of the case, (2) ACSI will suffer immediate and irreparable injury if the court withholds equitable relief, (3) the balance of hardships is in favor of ACSI, and (4) the public interest would be served by an injunction. *See PGBA, LLC v. United States*, 389 F.3d 1219, 1228-29 (Fed. Cir. 2004).

(1) As established in ACSI's MJAR and this Response, ACSI has succeeded on the merits.

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(2) ACSI will suffer irreparable harm if ED accepts revised small business participation plans because it will be forced to recompete against more than a dozen offerors that were rightfully rejected for failing to submit an acceptable small business participation plans in the initial competition. During such a recompetition, ACSI's competitive standing vis-à-vis these offerors could be detrimentally impacted, and it could lose an award to one or more of the offerors whose proposals were correctly found unacceptable. Thus, the irreparable harm to ACSI counsels in favor of injunctive relief.

(3) The balance of the hardships factor weighs in favor of ACSI, as it risks losing its competitive position, while there is almost no hardship to ED from being precluded from considering revised small business participation plans as part of its reevaluation and new award decision. If the Court sustains this protest and enjoins ED from considering revised small business participation plans, there will be no delay in the procurement. ED will make award based on the previously-evaluated small business participation plans. Thus, the potential harms weigh in favor of granting injunctive relief.

(4) There is a strong public interest in "'preserving the integrity of the procurement process.'" *Sheridan*, 95 Fed. Cl. at 155 (quoting *Hospital Klean of Texas, Inc. v. United States*, 65 Fed. Cl. 618, 624 (2005)). "[A]llowing an agency to respond disproportionately to minor procurement errors harms the integrity of the procurement system because it introduces an unfair and unanticipated additional layer of competition to a procurement. Agencies have broad discretion to institute corrective action, but offerors should be secure in the knowledge that any corrective action an agency implements will narrowly target the procurement defects the agency

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has identified." *Dell*, 2017 WL 2981811 at *11. Thus, the public interest weighs in favor of granting injunctive relief.

For these reasons, injunctive relief should be granted.

IV.
CONCLUSION

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

Respectfully submitted,

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