
**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST**

**Number 11-420C
Judge Eric G. Bruggink**

MED TRENDS, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

MICROTECHNOLOGIES, LLC,

Intervenor.

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

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REDACTED VERSION

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv-vii

QUESTIONS INVOLVED 1-2

I. WAS PLAINTIFF MED TRENDS’ RESPONSE TO THE UNDERSTANDING OF THE REQUIREMENTS SUB-FACTOR IN MED TRENDS’ TECHNICAL VOLUME UNLAWFULLY ADVERSELY RATED BY DEFENDANT DOL’S TECHNICAL EVALUATORS BECAUSE “HELP DESK LOE [LEVEL OF EFFORT] IS LIKELY UNDERESTIMATED”? 1

II. WAS PLAINTIFF MED TRENDS’ RESPONSE TO THE CORPORATE EXPERIENCE SUB-FACTOR IN MED TRENDS’ TECHNICAL VOLUME DISPARATELY RATED BY DEFENDANT DOL’S TECHNICAL EVALUATORS? 1

III. WAS IT LAWFUL TO RATE AGAINST AN UNANNOUNCED AND SIGNIFICANTLY DIFFERENT EVALUATION SUB-FACTOR THE RESPONSES BY PLAINTIFF MED TRENDS AND BY INTERVENOR MICROTECHNOLOGIES, LLC (MICRO TECH)? 1

IV. WAS THE PRICE ANALYSIS CONDUCTED BY THE DOL CONTRACT SPECIALIST NOT ARBITRARY OR CAPRICIOUS AND IN LAWFUL COMPLIANCE WITH THE FEDERAL ACQUISITION REGULATION (FAR)? 1

V. WAS THE DOL CONTRACTING OFFICER’S BEST VALUE TRADEOFF NOT ARBITRARY OR CAPRICIOUS AND IN LAWFUL COMPLIANCE WITH THE FAR? 1

VI. WERE DEFENDANT DOL’S EVALUATION AND RATING OF THE QUOTATIONS, AND DEFENDANT DOL’S PRICE ANALYSIS AND SUPPOSED BEST VALUE TRADEOFF, BREACHES OF THE IMPLIED CONTRACT OF GOOD FAITH, FAIR DEALING, AND HONEST CONSIDERATION? 2

STATEMENT OF THE CASE.....2-27

ARGUMENT.....27-48

I. THE RATING OF PLAINTIFF MED TRENDS’ RESPONSE TO THE UNDERSTANDING OF THE REQUIREMENTS SUB-FACTOR IS ARBITRARY OR CAPRICIOUS BECAUSE THIS RATING RUNS COUNTER TO THE ADMINISTRATIVE RECORD AND BECAUSE THIS RATING IS ENTIRELY IMPLAUSIBLE.....27-31

II. PLAINTIFF MED TRENDS’ RESPONSE TO THE CORPORATE EXPERIENCE SUB-FACTOR WAS DISPARATELY RATED BY DEFENDANT DOL’S TECHNICAL EVALUATORS.....32-33

III. PLAINTIFF MED TRENDS’ RESPONSE TO THE KEY PERSONNEL SUB-FACTOR IS UNLAWFULLY RATED AGAINST AN UNANNOUNCED AND SIGNIFICANTLY DIFFERENT SUB-FACTOR.....34-36

IV. THE PRICE ANALYSIS IS WHOLLY IMPLAUSIBLE AND IN VIOLATION OF THE FAR, AND THE PRICE ANALYSIS IS THEREFORE ARBITRARY OR CAPRICIOUS AND MUST BE SET ASIDE.....36-41

V. THE BEST VALUE TRADEOFF IS WHOLLY IMPLAUSIBLE AND IN VIOLATION OF THE FAR, AND THE BEST VALUE TRADEOFF IS THEREFORE ARBITRARY OR CAPRICIOUS AND MUST BE SET ASIDE.....41-43

VI. DEFENDANT DOL’S CONDUCT OF THIS TASK ORDER COMPETITION IS A BREACH OF THE IMPLIED CONTRACT OF GOOD FAITH, FAIR DEALING, AND HONEST CONSIDERATION.....43-45

VII. ANY DELAY OR DISRUPTION OCCASIONED BY A REMAND TO DEFENDANT DOL WITH DIRECTION TO MAKE A NEW AWARD DECISION RESULTS FROM DEFENDANT DOL’S SELF-MADE FOLLY.....46-48

CONCLUSION.....48-49

CERTIFICATE OF SERVICE.....50

TABLE OF AUTHORITIES

STATUTES

5 U.S.C. §§ 706(2)(A), 2(D)..... 31, 40

10 U.S.C. § 101..... 3

15 U.S.C. § 657f..... 2, 4

28 U.S.C. § 451..... 3

28 U.S.C. § 1491(b)(1)..... 3, 43, 45

28 U.S.C. § 1491(b)(2)..... 46

28 U.S.C. § 1491(b)(4)..... 31

41 U.S.C. § 4106(d)..... 22, 23, 34, 36, 40

41 U.S.C. § 4106(d)(5)..... 25

REGULATIONS

Federal Acquisition Regulation 1.102(b)(3)..... 43

Federal Acquisition Regulation 1.102-2(c)(3)..... 43

Federal Acquisition Regulation 1.602-2(b)..... 43

Federal Acquisition Regulation 15.404-1(b)(2)..... 12-13, 36

Federal Acquisition Regulation 15.404-1(b)(2)(i)..... 13

Federal Acquisition Regulation 15.404-1(b)(2)(ii)..... 7, 13, 20, 36

Federal Acquisition Regulation 15.404-1(b)(2)(ii)(A).....13, 23, 36, 39

Federal Acquisition Regulation 15.404-1(b)(2)(ii)(B)..... 13, 23, 36, 39

Federal Acquisition Regulation 15.404-1(b)(3)..... 13

Federal Acquisition Regulation Subpart 16.2..... 6

Federal Acquisition Regulation 16.202-1.....6, 27, 38, 39

Federal Acquisition Regulation 16.505(b)(1)(iv)(C)..... 22, 34-35

Federal Acquisition Regulation 16.505(b)(1)(iv)(D)..... 23, 40-41

Federal Acquisition Regulation 16.505(b)(4)(ii)..... 25

Federal Acquisition Regulation 16.505(b)(5)(i).....23, 41, 42

CASES

Arch Chemicals, Inc. v. United States,
64 Fed. Cl. 380 (2005)..... 42

Bilfinger Berger AG Sede Secondaria Italiana v. United States,
97 Fed. Cl. 96 (2010)..... 43

Banknote Corporation of America, Inc. v. United States,
56 Fed. Cl. 377 (2003).....34

Bona Fide Conglomerate, Inc. v. United States,
96 Fed. Cl. 233 (2010)..... 48

Castle-Rose, Inc. v. United States,
Fed. Cl. No. 11-163C, June 23rd, 2011,
2011 U.S. Claims LEXIS 1162..... 43-44, 45

CACI Field Services, Inc. v. United States,
13 Cl. Ct. 718 (1987).....35

Crassociates, Inc. v. United States,
95 Fed. Cl. 357 (2010).....32, 47

Doty v. United States,
53 F.3d 1244 (Fed. Cir. 1995)..... 33

EREH Phase I LLC v. United States,
95 Fed. Cl. 108 (2010).....29-30

FFTF Restoration Co., LLC v. United States,
86 Fed. Cl. 226 (2009)..... 43-44

Hydro Engineering, Inc. v. United States,
37 Fed. Cl. 448 (1997).....34-35

Impresa Costruzioni Geom. Domenico Garufi v. United States,
283 F.3d 1324 (Fed. Cir. 2001)..... 40

Information Sciences Corp. v. United States,
85 Fed. Cl. 195 (2008)..... 43

Lampe v. Secretary of Health & Human Services,
219 F.3d 1357 (Fed. Cir. 2000).....39

Motor Vehicle Manufacturers Assoc. v. United States,
463 U.S. 29 (1983)..... 28-29

PGBA, LLC. v. United States,
389 F.3d 1219 (Fed. Cir.2004)..... 46

Turner Construction Company, Inc. v. United States,
94 Fed. Cl. 561 (2010)..... 46

Technology Concepts & Design, Inc.,
B-403949.2, B-403949.3, March 25th, 2011,
2011 U.S. Comp. Gen. LEXIS 58..... 31

**PLAINTIFF'S BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD**

QUESTIONS INVOLVED

I. Was Plaintiff MED Trends' response to the Understanding of the Requirements Sub-Factor in MED Trends' Technical Volume unlawfully adversely rated by Defendant DOL's technical evaluators because "Help Desk LOE is likely underestimated"?

II. Was Plaintiff MED Trends' response to the Corporate Experience Sub-Factor in Plaintiff MED Trends' Technical Volume disparately rated by Defendant DOL's technical evaluators?

III. Was it lawful to rate against an unannounced and significantly different evaluation Sub-Factor the responses by Plaintiff MED Trends and by Intervenor Micro Tech?

IV. Was the Price Analysis conducted by the DOL Contract Specialist not arbitrary or capricious and in lawful compliance with the FAR?

V. Was the DOL Contracting Officer's Best Value Tradeoff not arbitrary or capricious and in lawful compliance with the FAR?

Redacted Version

VI. Were Defendant DOL's evaluation and rating of the Quotations, and Defendant DOL's Price Analysis and supposed Best Value Tradeoff, breaches of the implied-in-fact Contract of good faith, fair dealing, and honest consideration?

STATEMENT OF THE CASE

PARTIES

PLAINTIFF

MED Trends is a closely-held for-profit Maryland Corporation, and a qualifying Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC), 15 U.S.C. § 657f. (<http://medtrends.net/>, last visited July 7th, 2011). MED Trends is an experienced small business information technology (IT) support services Contractor which is already providing support services to the United States Department of Labor's (DOL's) Office of the Assistant Secretary for Administration and Management (OASAM); to the United States Department of Veterans Affairs; and, through its proposed teaming partner CNSI, a large business IT support services Contractor headquartered in Gaithersburg, Maryland (<http://www.cns-inc.com/about/index.cfm>, last visited July 7th, 2011), to the DOL Mine Safety and Health Administration's (MSHA's) Standardized Information System (MSIS). MED Trends is a Contractor, Contract Number GS-06F-0542Z, under a competitively-awarded

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Government-Wide Acquisition Contract (GWAC) issued by the United States General Services Administration, a multiple-award indefinite-delivery/indefinite quantity Contract, the Veterans Technology Services (VETS) GWAC. The VETS GWAC was competed as an exclusive small business set-aside for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs). The VETS GWAC became effective on February 2nd, 2007 and is in force through February 1st 2012. (<http://www.gsa.gov/portal/content/104996>, last visited July 8th, 2011). Statement of Facts, Number 1.

DEFENDANT

Defendant's DOL is an Executive Department of the United States, 5 U.S.C. § 101; and Defendant's DOL and the United States General Services Administration are instrumentalities of the United States. Defendant's DOL is an "Agency" just as this term is defined in 28 U.S.C. § 451, and thus Defendant's DOL is also a "Federal agency" as is required by 28 U.S.C. § 1491(b)(1). Statement of Facts, Number 2.

INTERVENOR

Micro Tech (ECF Document 27, filed June 27th, 2011), is also a qualifying SDVO SBC, 15 U.S.C. § 657f. (<http://microtech.net/index.htm>, last visited July 8th, 2011). Micro Tech's teaming partners for this Acquisition include [REDACTED]

Redacted Version

[REDACTED]

[REDACTED] last visited July 9th, 2011). Micro Tech is a Contractor, Contract Number GS-06F-0539Z, under the VETS GWAC. Idea Integration Group is not a VETS GWAC Contractor and therefore ineligible to compete for this Acquisition as the prime Contractor. Statement of Facts, Number 3.

THE SOLICITATION

ACQUISITION PLAN AND ESTIMATE

Defendant's DOL has a requirement for Operations and Maintenance support services, these for its Occupational Safety and Health Administration (OSHA). With assistance from an IT support services prime Contractor, Idea Integration Group, OSHA redesigned and is now deploying its OSHA Information System (OIS), the sole repository of information derived from regulatory inspections of work sites. The Operation and Maintenance support services here required to be delivered for the redesigned and newly-deploying OSHA OIS are commonly available in the commercial marketplace. Because this is a redesigned and newly-deploying IT system without an established Help Desk and still undeveloped Training routines, Defendant's DOL must here obtain support services from IT Contractors with knowledge and expertise in Help Desk and Training operations, and in production support of IT systems. Statement of Facts, Number 4.

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Defendant DOL's OASAM has planned for, competed, and in dispute here, has put in place a firm-fixed price Task Order Contract placing all of the price risk on Micro Tech, i.e., Micro Tech is required to achieve the level of support services demanded in this Task Order Contract, and is not required to deliver any particular number of hours, at an agreed-upon Task Order Contract firm fixed-price—if Micro Tech overestimates the price required to achieve this level of support, then Micro Tech receives a windfall; if Micro Tech underestimates the price required to achieve this level of support, then Micro Tech is required by this now contested Task Order Contract to bring on more support staff than Micro Tech planned. Competitively-driven fully-loaded labor hour ceiling rates are established in the VETS GWAC, and must be used by the VETS GWAC Contractors to price the proposed firm fixed-price Task Order Contract here being competed for Operation and Maintenance support services required to be delivered for the redesigned and newly-deploying OSHA OIS. Statement of Facts Number 5.

The VETS GWAC Contract provides that Task Orders issued under the VETS GWAC on a firm fixed-price basis are subject to FAR Subpart 16.2—Fixed-Price Contracts. FAR 16.202-1 provides:

A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss. It provides maximum incentive for the contractor to control costs and perform effectively and imposes a minimum administrative burden upon the contracting parties. . . .

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Statement of Facts Number 6.

Defendant's DOL is proceeding with an Independent Government Estimate (IGCE) which is premised on an estimated need for [REDACTED] Full Time Equivalent (FTE) support staff in the Base Year of the Task Order Contract, an estimated need for [REDACTED] FTE support staff in the first Option Year, an estimated need for [REDACTED] FTE support staff in the second Option Year, and an estimated need for [REDACTED] FTE support staff in the third and fourth Option Years. No rationale has been provided for these reductions in estimated need for support staff in the four Option Years of this proposed firm fixed-price Task Order Contract. Nonetheless, these reductions reflect the circumstance that the OSHA OIS is a redesigned and newly-deploying IT system, and thus that support service needs will diminish over time as this software system matures. This IGCE includes an estimated need for [REDACTED] FTE support staff in the Base Year for the required off-site Help Desk which is to be established, and an estimated need for [REDACTED] FTE support staff in each of the Option Years for the required off-site Help Desk. The total estimated Operation and Maintenance price for five years, including labor, infrastructure, and training, is \$ [REDACTED]. Statement of Facts, Number 7.

The labor rates in this IGCE are loaded hourly labor rates, just as are those loaded hourly ceiling labor rates established in the VETS GWAC. The IGCE is based [REDACTED] [REDACTED] (Emphasis Added). The IGCE is

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developed by the Activity within DOL to which these Operation and Maintenance support services will be delivered. Save for the fact of the reductions in estimated need for support staff in the four Option Years of this proposed Task Order Contract, there has yet to be any analysis of the magnitude or materiality of the difference in the Level of Effort that *was required* to redesign the OSHA OIS, and the Level of Effort that *will be required* to continue to deploy the redesigned OSHA OIS and to operate and maintain it as a production IT system for five years. This analysis, and any necessary adjustments, is required by FAR 15.404-1(b)(2)(ii). Statement of Facts, Number 8.

The Acquisition Plan explains that VETS GWAC Contractors' Technical volumes are to be analyzed and evaluated "by a team of Government advisors in accordance with the [stated] evaluation criteria" A [REDACTED] DOL team evaluated and rated the Technical volumes on an [REDACTED], basis. The VETS GWAC Contractors' Past Performance volumes were analyzed by [REDACTED]. The Price Analysis was conducted by [REDACTED]. [REDACTED]. The Best Value Tradeoff is signed by both the Contract Specialist and the Contracting Officer. MED Trends' written Post-Award Debriefing is signed by the Contracting Officer. Statement of Facts, Number 9.

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THE STATEMENT OF WORK

The Statement of Work reflects that the OSHA OIS is a redesigned and newly-deploying IT system. OSHA OIS currently includes four program area modules, and additional program area modules will be added. There are six objectives in the Scope of Work: (1) Program Management Support, (2) Systems Development and Integration, (3) Classroom and Virtual Training, (4) post-deployment Help Desk implementation and operation, (5) Infrastructure and Operations and Maintenance Support, and (6) Production Support. All hardware and software required to administer, monitor, and manage production, development, integration, and user acceptance test environments for the OSHA OIS will be provided by Defendant DOL. All hardware, software, and an off-site facility for the new Help Desk are required to be provided by the Task Order Contractor. The Statement of Work designates nine Key Persons from whom services are to be delivered under the proposed Task Order Contract. Minimum experience requirements are set out for each one of these Key Persons. Nowhere is there a requirement for explicit OSHA OIS key person development experiences. The Statement of Work sets out a series of reports to be delivered under the proposed Task Order Contract; there is no requirement for delivery of particular quantities or categories of support service hours. Statement of Facts, Number 10.

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THE REQUEST FOR QUOTATIONS

The Request for Quotations explains that the proposed Task Order Contract here being competed is for a Base Year of twelve months, with four twelve-month Option Years. This is the Basis for Award as announced to VETS GWAC Contractors eligible to compete for this Acquisition:

Award of this order will be made on a competitive "Best Value" tradeoff basis. The Government will award a contract resulting from this RFP to the responsible offeror whose offer conforming to the RFP is most advantageous to the Government based on the overall proposal that is determined to be the most beneficial to the Government, with appropriate consideration given to the three evaluation factors: Technical Capability, Past Performance, and Price. Factor I, Technical Capability is significantly more important than Factor II, Past Performance. Factor II Past Performance is significantly more important than Factor III, Price. The Contracting Officer shall also conduct a price analysis in accordance with techniques in FAR 15.404-1(b)(2). The non-Price factors combined are significantly more important than Factor III, Price. However, price will become significantly more important as non-price factors approach equality. The Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. Evaluation of options will not obligate the Government to exercise the options. Offerors are cautioned that the award may not necessarily be made to the lowest price offered. The Government is more concerned with obtaining superior technical features than with making an award at the lowest overall price to the Government. However, the Government will not make an award at a significantly higher overall price to the Government to achieve slightly superior technical features. To receive consideration for award, a rating of no less than "Good" must be achieved for Factor I, and its associated sub-factors (Understanding of the Requirement, Key Personnel, Corporate Experience, and Start-Up Plan-Phase-Out Plan). The Government intends to evaluate offers and award a contract without discussions with offerors. Therefore, the offeror's initial offer should contain the offeror's best terms from a price and technical standpoint. However, the Government reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary. The Govern-

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ment may reject any or all offers if such action is in the public interest; accept other than the lowest offer; and waive informalities and minor irregularities in offers received.

Statement of Facts, Number 11.

The Request for Quotations provides for adjectival ratings of the Technical Capability and Past Performance Factors. These adjectival ratings for the Technical Capability Factor are “Excellent,” “Good,” “Marginal,” and “Unsatisfactory.” There is little substantive difference between the first two of these four adjectival ratings. An “Excellent” adjectival rating is a Quotation which satisfies all of the Government’s requirements with *extensive* detail and an *overall low degree of risk*. A “Good” adjectival rating is a Quotation which satisfies all of the Government’s requirements with *adequate* detail and an *overall low to moderate degree of risk*. A “Marginal” adjectival rating is a Quotation which satisfies all of the Government’s requirements with *minimum* detail and an *overall high degree of risk*. While the announced adjectival ratings for the Technical Capability Factor would have it otherwise, risk is directly rated to future VETS GWAC Contractor performance under the proposed Task Order Contract, and not to Defendant DOL’s assessments of the quality of the detail in the Quotations from VETS GWAC Contractors competing for this proposed Task Order Contract. Those VETS GWAC Contractors which have overestimated the Level of Effort required to continue the deployment of the redesigned OSHA OIS and to operate and maintain OSHA OIS as a production

Redacted Version

IT system will succeed even though they receive a windfall under the firm fixed-price Task Order Contract. Statement of Facts, Number 12.

The adjectival ratings for the Past Performance Factor are “Low Risk,” “Moderate Risk,” “High Risk,” and “Unknown Risk.” These adjectival ratings are to be based on the competing VETS GWAC Contractors’ past performance records, and for the first three of these four adjectival ratings, range from *little doubt*, to *some doubt*, and then to *significant doubt*. Statement of Facts, Number 13.

Quotations are to be submitted electronically in three separate volumes: Technical, Past Performance, and Price. The Technical volume is limited to sixty pages. The Past Performance volume is limited to fifteen pages. And the Price volume is not limited as to number of pages. Each page of these three volumes is limited to fifty-five lines of text. Additional lines of text on each page, or pages in excess of the maximum page count for the Technical and Past Performance volumes, are not to be evaluated. Statement of Facts Number 14.

The Request for Quotations provides that the Contracting Officer will conduct a Price Analysis in accordance with FAR 15.404-1(b)(2). FAR 15.404-1(b)(2) provides:

(2) The Government may use various price analysis techniques and procedures to ensure a fair and reasonable price. Examples of such techniques include, but are not limited to, the following:

(i) Comparison of proposed prices received in response to the solicitation. Normally, adequate price competition establishes a fair and reasonable price (see 15.403-1-(c)(1)).

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(ii) *Comparison of the proposed prices to historical prices paid, whether by the Government or other than the Government, for the same or similar items. This method may be used for commercial items including those “of a type” or requiring minor modifications.*

(A) *The prior price must be a valid basis for comparison. If there has been a significant time lapse between the last acquisition and the present one, if the terms and conditions of the acquisition are significantly different, or if the reasonableness of the prior price is uncertain, then the prior price may not be a valid basis for comparison.*

(B) *The prior price must be adjusted to account for materially differing terms and conditions, quantities and market and economic factors. For similar items, the contracting officer must also adjust the prior price to account for material differences between the similar item and the item being procured.*

(C) Expert technical advice should be obtained when analyzing similar items, or commercial items that are “of a type” or requiring minor modifications, to ascertain the magnitude of changes required and to assist in pricing the required changes

(iii) Use of parametric estimating methods/application of rough yardsticks (such as dollars per pound or per horsepower, or other units) to highlight significant inconsistencies that warrant additional pricing inquiry.

(iv) Comparison with competitive published price lists, published market prices of commodities, similar indexes, and discount or rebate arrangements.

(v) Comparison of proposed prices with independent Government cost estimates.

(vi) Comparison of proposed prices with prices obtained through market research for the same or similar items.

(vii) Analysis of data other than certified cost or pricing data (as defined at 2.101) provided by the offeror.

(Emphasis added). FAR 15.404-1(b)(3) provides, *inter alia*, that the first two price analysis techniques, FAR 15.404-1(b)(2)(i) and FAR 15.404-1(b)(2)(ii), are the preferred techniques. FAR 15.404-1(b)(2)(ii) has, as mandatory requirements, that comparisons to prior prices paid cannot be valid if the terms of the Acquisition being competed are significantly different, 15.404-1(b)(2)(ii)(A), and

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that prior prices paid must be adjusted for price comparison purposes “to account for materially different terms and conditions, quantities and market and economic factors.” 15.404-1(b)(2)(ii)(B).
Statement of Facts, Number 15.

Defendant DOL has published Questions and Answers to be used by the VETS GWAC Contractors submitting firm fixed-price Quotations for the proposed Task Order Contract. These published Questions and Answers include the following exchanges:

1. Is there an incumbent supporting now or is this new work? If there is an incumbent, who is the incumbent and are they in good standing with OSHA?

Answer: The system was developed by Idea Integration Corp., 1 Independent Drive, STE 2201, Jacksonville, FL 32202-5039.

....

10. Will OSHA provide to Bidders a statement of staffing levels for current support and development activities outlined in the SOW [Statement of Work]?

Answer: No.

....

15. How many contracted help desk support staff support current operations? What applications supported?

Answer: The current contract is Firm Fixed Price so the contractor provides whatever number of staff is required to meet the requirements of the contract. The only application supported is OIS.

Redacted Version

....

26. Will there be a transition period with the current OIS vendor?

Answer: No. Bidders should plan for a ramp-up period.

....

88. Does the government have high-level of effort estimates for development work? Are strategic requirements defined? If not, on what basis would the government like us to estimate level of effort for the development work?

Answer: Vendors are expected to estimate the level of effort based on their experiences with similar projects and expertise in the IT field. It is up to vendors to review the SOW and propose what they estimate the level of effort would be for their company to performance [sic] of the services.

....

Statement of Facts, Number 16.

Quotations were required to be submitted electronically no later than 12:00 p.m. Eastern Standard Time, on Friday, April 1st, 2011, April Fool's Day. Three firm fixed-price Quotations from VETS GWAC Contractors were timely received. Statement of Facts, Number 17.

THE QUOTATIONS

MICRO TECH'S QUOTATION

Micro Tech's response to the Understanding of the Requirement Sub-Factor in its Technical volume is set-out in thirty-two pages, only one of which is focused on the experience of Micro

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Tech's proposed team member, [REDACTED]. Statement of Facts, Number 18.

The resumes submitted by Micro Tech in response to the Key Personnel Sub-Factor in Micro Tech's Technical volume focus on explicit OSHA OIS development experience and on explicit OSHA OIS key person development experience. Nowhere is there a requirement in the Statement of Work for explicit OSHA OIS key person development experience or for explicit OSHA OIS development experience. Statement of Facts, Number 19.

Micro Tech's response to the Corporate Experience Sub-Factor in its Technical volume is set out in nine pages. Nowhere in these nine pages is there anything which ties into Micro Tech's experiences as a prime Contractor delivering OSHA OIS development support services, this because Micro Tech has no such experiences as a prime Contractor delivering OSHA OIS development support services. Statement of Facts, Number 20.

MED TRENDS' QUOTATION

MED Trends' response to the Understanding of the Requirement Sub-Factor in MED Trends' Technical volume is set-out in forty-six pages, and builds on MED Trends' experiences, through its teaming partner, in delivering support services while deploying a similar, but smaller scale, IT

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system, DOL MSHA's MSIS; and on MED Trends' experiences, as a prime Contractor, delivering support services to DOL's OASAM. Statement of Facts, Number 21.

The resumes submitted by MED Trends in response to the Key Personnel Sub-Factor in MED Trends' Technical volume focus on experience generally, including OASAM experiences, and on explicit MSHA MSIS experience. MED Trends does offer resumes from persons with OSHA OIS development experiences, but not from persons with OSHA OIS key person development experiences. Nowhere are there requirements in the Statement of Work for explicit OSHA OIS key person development experience or for explicit OSHA OIS development experience. Statement of Facts, Number 22.

MED Trends' firm fixed-price Quotation offers a significant discount from the fully-loaded labor hour ceiling rates established in MED Trends' VETS GWAC. MED Trends' firm fixed-price Price Quotation is premised on delivering support services from 6 FTE support staff in the Base Year for the new off-site Help Desk; from 5 FTE support staff for the first Option Year; and from 4 FTE support staff in the second through fourth Option Years. Statement of Facts, Number 23.

Redacted Version

THE AWARD

TECHNICAL CAPABILITY EVALUATIONS

MED Trends' response to the Understanding of the Requirement Sub-Factor in MED Trends' Technical Volume is adversely rated by the DOL technical evaluators because "Help desk LOE is likely underestimated" The IGCE includes an estimated need in the Base Year for [REDACTED] FTE support staff for the new off-site Help Desk and an estimated need in each of the four Option Years for [REDACTED] FTE support staff for the off-site Help Desk. MED Trends' firm fixed-price Quotation is premised on delivering support services from 6 FTE support staff in the Base Year for the new off-site Help Desk; from 5 FTE support staff for the first Option Year; and from 4 FTE support staff in the second through fourth Option Years. MED Trends' proposed LOE for the Help Desk is [REDACTED]

[REDACTED] Statement of Facts, Number 24.

MED Trends' response to the Corporate Experience Sub-Factor in MED Trends' Technical volume is rated solely on the basis of MED Trends' Quotation, a Quotation whose content is limited to a particular number of lines per page, and to a maximum page count, and MED Trends' response is not also rated with reference to DOL's knowledges of MED Trends' experiences at DOL delivering IT support services to DOL's OASAM, or to DOL's MSHA's MSIS. Contrariwise, Micro Tech's responses to the Understanding of the Requirement Sub-Factor and to the Corporate Experience Sub-

Redacted Version

Factor in Micro Tech's Technical volume are rated with references to DOL's knowledges of Micro Tech's teaming partner, [REDACTED] experiences at DOL [REDACTED] [REDACTED], and are not rated solely on the basis of Micro Tech's Quotation and the Technical volume submitted with that Quotation. Statement of Facts, Number 25.

MED Trends' response to the Key Personnel Sub-Factor in MED Trends' Technical Volume is rated against an evaluation Sub-Factor, explicit OSHA OIS key person development experiences, which is not an announced evaluation Sub-Factor for the Statement of Work. Micro Tech's response to the Key Personnel Sub-Factor in Micro Techs' Technical Volume is likewise rated against an evaluation Sub-Factor, explicit OSHA OIS key person development experiences, which is not an announced evaluation Sub-Factor for the Statement of Work. Statement of Facts, Number 26.

PRICE ANALYSIS

The firm fixed-prices proposed in these three Quotations from VETS GWAC Contractors are simply tabulated, and not studied, in the Price Analysis. Nowhere are these firm fixed-prices as quoted by the VETS GWAC Contractors analyzed in relation to the ratings for Technical Capability and for Past Performance save that MED Trends' ratings for Technical Capability are wrongly adversely rated because MED Trends has supposedly underestimated the Level of Effort

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required for the new Help Desk. The firm fixed-prices proposed in these three Quotations are analyzed only in relation to the IGCE, and not in relation from one VETS GWAC Contractor's Quotation to another VETS GWAC Contractor's Quotation. Never has there been any consideration whether or not the IGCE, [REDACTED] [REDACTED] is a valid basis for price analysis, or whether [REDACTED] [REDACTED] must be adjusted for price analysis purposes as a result of the magnitude and materiality of the difference between the Level of Effort that *was required* to redesign the OSHA OIS, and the Level of Effort that *will be required* for continued deployment of the redesigned OSHA OIS and then to operate and maintain the OSHA OIS as a production IT system for a five-year period, themselves fundamentally different activities. This analysis, and any necessary adjustments, is required by FAR 15.404-1(b)(2)(ii). Statement of Facts, Number 27.

Never has there been any consideration, save for MED Trends' written Post-Award Debriefing, of the effect of the firm fixed-price basis for the proposed Task Order Contract and the resulting transfer of performance risk to the VETS GWAC Task Order Contractor, and not to Defendant DOL, should one of the VETS GWAC Contractors have underestimated the required Level of Effort. Nowhere does Defendant DOL analyze, as was promised in the published Answer to Question Number 88, the quality of the VETS GWAC Contractors' estimates of the Level of Effort required to

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achieve final deployment of the redesigned OSHA OIS and to maintain and operate OSHA OIS as a production IT system for a period of five years. No one has analyzed whether or not one or more of the VETS GWAC Contractors has overestimated the Level of Effort required and thus will receive a windfall from the firm fixed-price Task Order. Statement of Facts, Number 28.

THE SUPPOSED BEST VALUE TRADEOFF

The DOL Contracting Officer's documentation of the supposed Best Value tradeoff for this VETS GWAC Contractor Task Order competition is set out on a single page, and is preceded on that page only by a comparison of the VETS GWAC Contractors' price Quotations as against the IGCE. There is no analysis of the ratings of the VETS GWAC Contractors for Technical Capability or for Past Performance on a preceding page of this two-page "Award Decision Memorandum" and no tradeoff, save that there the Micro Tech Quotation is determined to be the Best Value solely on the basis of the ratings for Technical Capability, and this without consideration of quoted Prices. There is no analysis, as was promised in the published Answer to Question Number 88, of the quality of the VETS GWAC Contractors' estimates of the Level of Effort which will be required to continue deployment of the redesigned OSHA OIS and to maintain OSHA OIS as a production IT system for five years. Statement of Facts, Number 29.

Here is the DOL Contracting Officer's supposed Best Value Tradeoff:

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MED Trends, Inc.'s offer is [REDACTED] less than the Government estimate, [REDACTED] offer is [REDACTED] less than the Government estimate, and MicroTech, Inc.'s offer is [REDACTED] more than the Government estimate. Based on the IGCE, [REDACTED], [REDACTED], MicroTech, Inc.'s price proposal is more in line with the level and scope of work required. [REDACTED] and MED Trends, Inc. price proposals are so much less than [sic] the IGCE it is possible that both vendors underestimated the depth of work required. Accepting [REDACTED] or MED Trends, Inc.'s price proposal would expose the Government to a high level of risk. Based on the above and all other factors considered, MicroTech, Inc.'s price proposal in the amount of \$39,886,717.88 is considered to be fair and reasonable.

Statement of Facts, Number 30.

FAR 16.505(b)(1)(iv)(C) requires that in order that the "fair opportunity" as required by 41 U.S.C. § 4106(d) is provided in Task Order Contract Competitions exceeding \$5,000,000, there must be "[d]isclosure of the significant factors and subfactors, including cost or price, that the agency expects to consider in evaluating proposals, and their relative importance." Here Defendant DOL has announced that Technical Capability and Past Performance combined are "significantly more important" than Price, yet the DOL Contracting Officer has either, on page one of her two-page "Award Decision Memorandum" considered only Technical Capability and Past Performance and not Price in her Best Value Tradeoff, else on page two of her "Award Decision Memorandum" has considered in her Best Value Tradeoff only Price, and not the significantly more important Technical Capability and Past Performance Factors. Statement of Facts, Number 31.

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FAR 16.505(b)(1)(iv)(D) requires that in order that the “fair opportunity” as required by 41 U.S.C. § 4106(d) is provided in Task Order Contract Competitions exceeding \$5,000,000, “[w]here award is made on a best value basis, [there must be] a written statement documenting the basis for award and the relative importance of quality and price or cost factors.” FAR 16.505(b)(5)(i) requires that in order that the “fair opportunity” as required by 41 U.S.C. § 4106(d) is provided in Task Order Contract Competitions, “[t]he contracting officer shall document in the contract file the rationale for placement and price of each order, including the basis for award and the rationale for any tradeoffs among cost or price and non-cost considerations in making the award decision” Here there has not been, as promised, any tradeoffs between non-price Factors (Technical Capability and Past Performance) and Price, and nowhere does Defendant DOL analyze, as was promised in the published Answer to Question Number 88, the quality of the VETS GWAC Contractors’ estimates of the Level of Effort which will be required to now deploy the redesigned OSHA OIS and to operate and maintain OSHA OIS as a production IT system for a period of five calendar years. Statement of Facts, Number 32.

The DOL Contracting Officer’s rationale for awarding the proposed Task Order Contract to Intervenor Micro Tech at a Price premium more than double the price in Plaintiff MED Trends’ firm fixed-price Quotation is premised solely on the IGCE. The IGCE complies neither with FAR 15.404-

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1(b)(2)(ii)(A) or with FAR 15.404-1(b)(2)(ii)(B) because it lacks the required analysis, and any necessary adjustments, of prior prices paid, an analysis required as a result of the magnitude and materiality of the difference in the Levels of Effort between the Level of Effort that *was required* to redesign the OSHA OIS, and the Level of Effort that *will be required* to now continue deployment of the redesigned OSHA OIS and then to operate and maintain the OSHA OIS as a production IT system for a five-year period, themselves fundamentally different activities. No one has analyzed whether or not one or more of the VETS GWAC Contractors has overestimated the Level of Effort required and thus will receive a windfall from the firm fixed-price Task Order. Statement of Facts, Number 33.

THE MICRO TECH AWARD

On June 10th, 2011, Defendant DOL awarded Intervenor Micro Tech the proposed Task Order Contract, Task Order Number DOLF119F31889 under Contract Number GS-06F-0551Z. The period of performance of this Task Order Contract runs from June 10th, 2011 through June 9th, 2012. Defendant DOL has four one-year Options. This Task Order Contract is a firm fixed-price Task Order Contract. Only \$100,000 was available for payment as of June 10th, 2011. The firm fixed-price Task Order Contract is issued such that Intervenor Micro Tech will receive each month one-twelfth of the price Quoted by Intervenor Micro Tech for the Base Year; there is no requirement that Inter-

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venor Micro Tech deliver any particular number of hours of support services as required to continue deployment of the redesigned OSHA OIS and then to operate and maintain OSHA OIS as a production IT system. Statement of Facts, Number 34.

THE MED TRENDS DEBRIEFING

When Plaintiff MED Trends learned on June 10th, 2011 that Defendant DOL had awarded Intervenor Micro Tech the proposed Task Order Contract, Plaintiff MED Trends sought a Post-Award Debriefing as promised by 41 U.S.C. § 4106(d)(5) and FAR 16.505(b)(4)(ii). Plaintiff MED Trends received a written Post-Award Debriefing on June 20th, 2011. Statement of Facts, Number 35.

In this written Post-Award Debriefing provided to Plaintiff MED Trends on June 20th, 2011, there is no Best Value Tradeoff between Price and the announced Technical Capability and Past Performance Factors. Instead there is only a Price rationale, a comparison between the IGCE and MED Trends' price Quotation. The DOL Contracting Officer here concludes from this Price rationale that "MED Trends, Inc.'s price proposal underestimated the depth of work required." The DOL Contracting Officer asserts that "[a]ccepting MED Trends, Inc.'s price proposal for a Firm Fixed Price order would expose the Government to a high level of risk." Statement of Facts, Number 36.

The DOL Contracting Officer does not examine and thus nowhere considers that MED Trends' ratings for Technical Capability are wrongly adversely rated because MED Trends is supposed to

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have underestimated the Level of Effort required for the Help Desk. MED Trends' firm fixed-price Quotation is premised on delivering in the Base Year support services from 6 FTE support staff for the new off-site Help Desk; from 5 FTE support staff for the first Option Year; and from 4 FTE support staff in the second through fourth Option Years. MED Trends' proposed LOE for the Help Desk is [REDACTED] MED Trends did not underestimate the Level of Effort required for the Help Desk. Statement of Facts, Number 37.

The DOL Contracting Officer turns the precepts of FAR 16.202-1 on their heads when she supposes that the firm fixed-price basis of the proposed Task Order Contract *enhances* the performance risk assumed by Defendant DOL. Quite the contrary, the effect of the firm fixed-price basis of the proposed Task Order Contract and the resulting transfer of performance risk to the VETS GWAC Task Order Contractor, and not to Defendant DOL, should one of the VETS GWAC Contractors have underestimated the required Level of Effort, *diminishes* the performance risk assumed by Defendant DOL. Statement of Facts, Number 38.

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ARGUMENT

I. The Rating Of Plaintiff MED Trends' Response To The Understanding Of The Requirements Sub-Factor Is Arbitrary or Capricious Because This Rating Runs Counter To The Administrative Record and Because This Rating Is Entirely Implausible.

The IGCE includes an estimated need in the Base Year for [REDACTED] FTE support staff for the new off-site Help Desk and an estimated need in each of the four Option Years for [REDACTED] FTE support staff for the off-site Help Desk. MED Trends' firm fixed-price Quotation is premised on delivering support services from 6 FTE support staff in the Base Year for the new off-site Help Desk; from 5 FTE support staff for the first Option Year; and from 4 FTE support staff in the second through fourth Option Years. MED Trends' proposed Level of Effort for the new Help Desk is [REDACTED] [REDACTED]. MED Trends did not underestimate the Level of Effort required for the new off-site Help Desk. The off-site OSHA OIS Help Desk is new work, and there is no historical basis for a required Level of Effort. Not one person among the DOL technical evaluators or at DOL's OASAM has bothered to compare the Level of Effort for the new off-site OSHA OIS Help Desk used in the IGCE with the Level of Effort for the new off-site OSHA OIS Help Desk set out in the VETS GWAC Contractors' price Quotations.

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The DOL's Contracting Officer adopts the ratings from DOL's technical evaluators without any apparent analysis and then, relying solely on the IGCE, reasons that awarding the proposed Task Order Contract to Intervenor Micro Tech at a Price premium more than double the price in Plaintiff MED Trends' firm fixed-price Quotation is supposedly the Best Value. The DOL Contracting Officer does not examine and nowhere considers that MED Trends' ratings for Technical Capability are wrongly adversely addressed, a conclusion which would have been apparent from a simple comparison of the Level of Effort proposed by MED Trends and the Level of Effort used for the IGCE.

There is a four-part test for proof of arbitrary or capricious Agency action, a four part test set out in a 1983 Decision of the Supreme Court of the United States of America:

Normally, an agency [decision] would be arbitrary and capricious if the agency has [1] relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given

Motor Vehicles Manufacturers Assoc. v. State Farm Mutual, 463 U.S. 29, 43 (1983).

An example of application of elements (3) and (4) of this four-part test for arbitrary or capricious Agency action is *EREH Phase I LLC v. United States*, 95 Fed. Cl. 108 (2010). Here a Solicitation required that leased premises not be in a flood plain unless the Agency first determined "that

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there is no practicable alternative.” As it turned out, portions of the leased premises (parking spaces, vehicle security station, and portions of the access road and perimeter security fencing) along Arlington Boulevard in Northern Virginia were in a designated flood plain, and the Agency had not made the required determination.

The Agency attempted to excuse its failure to make this required determination by arguing from documents in the Administrative Record which included a submission from a consultant to the successful Offeror and from an electronic mail exchange between the Agency and the successful Offeror, an electronic mail exchange which consisted of a one-sentence question from the Agency, and less than an hour later, a one-word response from the successful Offeror.

As to element (3), the *EREH Phase I* Court held that the documents in the Administrative Record did not reflect any informed Agency analysis and that the submission on behalf of the successful Offeror could not have been “rational” because the hand drawing included with the submission was not to scale, and cited neither its authorship nor any information as to when or why it was rendered, and because the consultant’s submission was itself circular in its conclusion. *Id.*, 95 *Fed. Cl.*, at 116-117.

As to element (4), the *EREH Phase I* Court held that the electronic mail exchange demonstrated only that the Agency relied on the successful Offeror’s one word representation and that the

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Agency had made no determination of its own. The Court noted that Agency action which relies only on an Offeror's submissions is itself arbitrary or capricious. *Id.*, 95 Fed. Cl., at 116-117.

Here, Defendant DOL's Contracting Officer relies solely on the IGCE for her determination that awarding the proposed Task Order Contract to Intervenor Micro Tech at a Price premium more than double the price in Plaintiff MED Trends' firm fixed-price Quotation is supposedly the Best Value. Doing so, Defendant DOL's Contracting Officer likewise concludes, this time from the Technical Capability ratings by DOL's technical evaluators which she has adopted, that Plaintiff MED Trends has underestimated the Level of Effort required for the new OSHA OIS Help Desk. But this conclusion is counter to the IGCE, and Defendant DOL's Contracting Officer otherwise relies on the IGCE.

This is a classic example of Agency action which is to be here held unlawful and set aside, 28 U.S.C. § 1491(b)(4), when challenged Agency action is found to be arbitrary or capricious, 5 U.S.C. §§ 706(2)(A), (2)(D). There is no explanation in the Administrative Record for this inconsistency between the IGCE and the adverse rating of MED Trends' Technical Capability, an adverse assessment for MED Trends' supposed underestimate of the Level of Effort required for the new off-site Help Desk. *Technology Concepts & Design, Inc.*, B-403949.2, B-403949.3, March 25th, 2011, 2011 U.S. Comp. Gen LEXIS 58, *22-*24 (Post-Award Protest granted based on lack of an explanation, in a

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Task Order Competition for IT support services, of the inconsistency between a weaknesses assigned under one evaluation Factor, and a strength assigned in a Sub-Factor under that same evaluation Factor).

II. Plaintiff MED Trends' Response To The Corporate Experience Sub-Factor Was Disparately Rated By Defendant DOL's Technical Evaluators.

MED Trends' response to the Corporate Experience Sub-Factor in MED Trends' Technical volume is rated solely on the basis of MED Trends' Quotation, a Quotation whose content is limited to a particular number of lines per page, and to a maximum page count, and MED Trends' response is not also rated with reference to DOL's knowledges of MED Trends' experiences at DOL delivering IT support services to DOL's OASAM, or to DOL's MSHA's MSIS. Contrariwise, Micro Tech's responses to the Understanding of the Requirement Sub-Factor and to the Corporate Experience Sub-Factor in Micro Tech's Technical volume are rated with references to DOL's knowledges of Micro Tech's teaming partner, [REDACTED] experiences at DOL [REDACTED], and are not rated solely on the basis of Micro Tech's Quotation and its included Technical volume.

One of the fundamental axioms of Federal procurement is that Agencies may not evaluate Proposals or Quotations in a different manner, and where this sort of unequal treatment is found, the resulting ratings are arbitrary or capricious. *Crassociates, Inc. v. United States*, 95 Fed. Cl. 357, 384-

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385 (2010) (Proposals for leased space were evaluated disparately where one Proposal was assessed negatively due to excess space but a competing Proposal, which also offered excess space, was not). Unequal treatment “goes against the standard of equality and fair-play that is a necessary underpinning of the federal government’s procurement process” *Doty v. United States*, 53 F.3d 1244, 1251 (Fed. Cir. 1995); *PGBA, LLC v. United States*, 60 Fed. Cl. 196, 207 (2004), *aff’d*, 389 F.3d 1219 (Fed. Cir. 2004).

DOL has knowledges of MED Trends’ experiences at DOL delivering IT support services to DOL’s OASAM, and DOL has knowledges of MED Trends’ proposed teaming partner, CNSI, delivering IT support services to DOL’s MSHA MSIS. DOL has knowledges only of Micro Tech’s proposed teaming partner, [REDACTED], delivering [REDACTED]. [REDACTED]. But these DOL technical evaluators rated MED Trends’ response to the Corporate Experience Sub-Factor solely on the basis of MED Trends’ Quotation, a content-limited Quotation, and did not, as they did with Micro Tech’s Technical volume, rate also on DOL’s knowledges outside that content-limited Technical volume, there on DOL’s knowledges of [REDACTED] [REDACTED] delivery of [REDACTED]. This was disparate and unequal treatment. This disparate and unequal treatment was arbitrary or capricious and in violation of a fundamental precept of Federal procurement.

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III. Plaintiff MED Trends' Response To The Key Personnel Sub-Factor Is Unlawfully Rated Against An Unannounced And Significantly Different Evaluation Sub-Factor.

MED Trends' response to the Key Personnel Sub-Factor in MED Trends' Technical Volume is rated against an evaluation Sub-Factor, explicit OSHA OIS key person development experiences, which is not an announced evaluation Sub-Factor for the Statement of Work. Micro Tech's response to the Key Personnel Sub-Factor in Micro Techs' Technical Volume is likewise rated against an evaluation Sub-Factor, explicit OSHA OIS key person development experiences, which is not an announced evaluation Sub-Factor for the Statement of Work.

FAR 16.505(b)(1)(iv)(C) requires that in order that the "fair opportunity" as required by 41 U.S.C. § 4106(d) is provided in Task Order Contract Competitions, as this one, which exceed \$5,000,000, there must be "[d]isclosure of the significant factors and subfactors, including cost or price, that the agency expects to consider in evaluating proposals, and their relative importance."

This is another fundamental axiom of Federal procurement—Agencies must evaluate Proposals and Quotations and then assess their relative qualities solely on the announced Factors and Sub-Factors. *Banknote Corporation of America, Inc. v. United States*, 56 Fed. Cl. 377, 386 (2003), *aff'd* 365 F.3d 1345 (Fed. Cir. 2004). ("It is hornbook law that agencies must evaluate proposals and make awards solely on the factors and subfactors specified . . ."). Agencies may not assess the relative

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qualities of Proposals or Quotations on a basis which is *significantly different* from the announced Factors and Sub-Factors. *Hydro Engineering, Inc. v. United States*, 37 Fed. Cl. 448, 471 (1997). Ratings on unannounced Factors and Sub-Factors are significantly different when these unannounced evaluation Factors and Sub-Factors are different in terms of content or relative importance. *CACI Field Services, Inc. v. United States*, 13 Cl. Ct. 718, 728 (1987), *aff'd* 854 F.2d 464 (Fed. Cir. 1988).

The ratings challenged here as unannounced Sub-Factors are significantly different from the announced Sub-Factors, not because this rating scheme on unannounced Sub-Factors was disparately applied (it wasn't) but instead because, had the rating scheme on unannounced Sub-Factors been lawfully announced with the Statement of Work, the VETS GWAC Contractors may well have proposed different key persons, these with the precise OSHA OIS key person development experiences used for assessment purposes, that is, persons who had delivered [REDACTED] [REDACTED]. And the VETS GWAC Contractors may well have shifted the emphasis in their content-limited Technical volumes from an emphasis on OSHA OIS development experiences to an emphasis on OSHA OIS key person development experiences. Simply put, if the VETS GWAC Contractors had understood before they submitted their Quotations that assessments would focus on which VETS GWAC Con-

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tractor could deliver more key persons from the [REDACTED], there would be no ground for compliant.

But this did not happen. Instead, the Quotations and included Technical volumes were assessed on a basis significantly different from the basis which was announced in the Statement of Work and in the published Questions and Answers. This is a violation of FAR 16.505(b)(1)(iv)(C), and a violation of the statutory duty, under 41 U.S.C § 4106(d), to provide a “fair opportunity” to compete for Task Order work under the multiple award indefinite-delivery/indefinite quantity VETS GWAC. It is manifestly unfair to invite content-limited Technical volumes on one basis, and then to evaluate the responses in these content-limited Technical volumes on a significantly different basis.

The DOL technical evaluators preferred the Quotation from that small-business VETS GWAC Contractor they deemed best-positioned to deliver the key personnel from the large-business IT development support services Contractor which had redesigned OSHA OIS. But this is not what Defendant DOL asked for in the Statement of Work and in the published Questions and Answers.

IV. The Price Analysis Is Wholly Implausible And In Violation Of The FAR, And The Price Analysis Is Therefore Arbitrary Or Capricious And Must Be Set Aside.

The Request for Quotations provides that the DOL Contracting Officer will conduct a Price Analysis in accordance with FAR 15.404-1(b)(2). FAR 15.404-1(b)(2)(ii) has, as mandatory requirements, that comparisons to prior prices paid cannot be valid if the terms of the Acquisition being

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competed are significantly different, 15.404-1(b)(2)(ii)(A), and that prior prices paid must be adjusted for price comparison purposes “to account for materially different terms and conditions, quantities and market and economic factors.” 15.404-1(b)(2)(ii)(B).

The foundation of the Price Analysis is the IGCE, and Defendant DOL already acknowledges that the IGCE [REDACTED] the proposed Task Order Contract competed among the VETS GWAC Contractors. Save for the fact of the reductions in estimated need for support staff in the four Option Years of this proposed Task Order Contract, there has yet to be any analysis of the magnitude or materiality of the difference in the Level of Effort that *was required* to redesign the OSHA OIS, and the Level of Effort that *will be required* to continue to deploy the redesigned OSHA OIS and to operate and maintain it as a production IT system for five years.

The firm fixed-prices proposed in these three Quotations from VETS GWAC Contractors are simply tabulated, and not studied, in the Price Analysis. The firm fixed-prices proposed in these three Quotations are analyzed only in relation to the IGCE, and not in relation from one VETS GWAC Contractor’s Quotation to another VETS GWAC Contractor’s Quotation.

Never has there been any consideration, save for MED Trends’ written Post-Award Debriefing, of the effect of the firm fixed-price basis for the proposed Task Order Contract and the resulting

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transfer of performance risk to the VETS GWAC Task Order Contractor, and not to Defendant DOL, should one of the VETS GWAC Contractors have underestimated the required Level of Effort. Nowhere does Defendant DOL analyze, as was promised in the published Answer to Question Number 88, the quality of the VETS GWAC Contractors' estimates of the Level of Effort required to achieve final deployment of the redesigned OSHA OIS and to maintain and operate OSHA OIS as a production IT system for a period of five years. No one has analyzed whether or not one or more of the VETS GWAC Contractors has overestimated the Level of Effort required and thus will receive a windfall from the firm fixed-price Task Order.

The VETS GWAC provides that Task Orders issued under the VETS GWAC on a firm fixed-price basis, just as the Task Order Contract challenged here, are subject to FAR 16.202-1 which provides, *inter alia*, that firm fixed-price Contracts provide "maximum incentive for the contractor to control costs and perform effectively and imposes a minimum administrative burden on the contracting parties" The DOL Contracting Officer's incomprehension of these regulatory precepts is made apparent in her written Debriefing of Plaintiff MED Trends.

Here the DOL Contracting Officer turns the precepts of FAR 16.202-1 on their heads when she supposes that the firm fixed-price basis of the proposed Task Order Contract *enhances* the performance risk assumed by Defendant DOL. Quite the contrary, the effect of the firm fixed-price basis of

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the proposed Task Order Contract and the resulting transfer of performance risk to the VETS GWAC Task Order Contractor, and not to Defendant DOL, should one of the VETS GWAC Contractors have underestimated the required Level of Effort, *diminishes* the performance risk assumed by Defendant DOL.

This lack of understanding of basic FAR precepts places Defendant DOL in line to pay a windfall to the selected VETS GWAC Task Order Contractor. And those VETS GWAC Contractors which have overestimated the Level of Effort required to continue the deployment of the redesigned OSHA OIS and to operate and maintain OSHA OIS as a production IT system for five years will succeed even though they receive a windfall under the firm fixed-price Task Order Contract.

The IGCE complies neither with FAR 15.404-1(b)(2)(ii)(A) or with FAR 15.404-1(b)(2)(ii)(B), and the DOL Contracting Officer has no understanding of FAR 16.202-1.

Arbitrary or capricious conduct is Agency conduct which is wholly implausible. *Lampe v. Secretary of Health & Human Services*, 219 F.3d 1357, 1363 (Fed. Cir. 2000). It simply cannot be, over the five-year period which is the subject of the Price Analysis, that the Level of Effort that *was required* to redesign the OSHA OIS, and the Level of Effort that *will be required* to continue to deploy the redesigned OSHA OIS and to operate and maintain it as a production IT system for five years will not be significantly or materially different. And it simply cannot be, as the DOL Contracting Officer

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supposes when she adopts the DOL Contract Specialist's Price Analysis, that the firm fixed-price basis of the proposed Task Order Contract *enhances* the performance risk assumed by Defendant DOL. Just the contrary is true, and these implausible conclusions set forth by the DOL Contracting Officer cannot be credited to a difference in view or Agency expertise. Simply put, if an Agency is only willing to throw away enough money, then that Agency will surely select a Contractor who will succeed, and the Price Analysis here insures just this result.

Agency procurement actions are to be set aside when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or when Agency procurement actions are undertaken "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (2)(D); *Impresa Construzioni Geom. Domenico Garufi v. United States*, 283 F.3d 1324, 1332 n.5 (Fed. Cir. 2001). This Price Analysis, and the IGCE which is this Price Analysis' only foundation, are both wholly implausible and both are undertaken in violation of the precepts of the FAR. They can only be set aside.

V. The Best Value Tradeoff Is Wholly Implausible And In Violation Of The FAR, And The Best Value Tradeoff Is Therefore Arbitrary Or Capricious And Must Be Set Aside.

FAR 16.505(b)(1)(iv)(D) requires that in order that the "fair opportunity" as required by 41 U.S.C. § 4106(d) is provided in Task Order Contract Competitions exceeding \$5,000,000, "[w]here award is made on a best value basis, [there must be] a written statement documenting the basis for

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award and the relative importance of quality and price or cost factors.” FAR 16.505(b)(5)(i) requires that in order that the “fair opportunity” as required by 41 U.S.C. § 4106(d) is provided in Task Order Contract Competitions, “[t]he contracting officer shall document in the contract file the rationale for placement and price of each order, including the basis for award and the rationale for any tradeoffs among cost or price and non-cost considerations in making the award decision”

Here there have not been, as promised, any tradeoffs between non-price Factors (Technical Capability and Past Performance) and Price, and nowhere does Defendant DOL analyze, as was promised in the published Answer to Question Number 88, the quality of the VETS GWAC Contractors’ estimates of the Level of Effort which will be required to now deploy the redesigned OSHA OIS and to operate and maintain OSHA OIS as a production IT system for a period of five calendar years. The DOL Contracting Officer’s rationale for awarding the proposed Task Order Contract to Intervenor Micro Tech at a Price premium more than double the price in Plaintiff MED Trends’ firm fixed-price Quotation is not a Best Value Tradeoff between Technical Capability and Past Performance and Price; instead the DOL Contracting Officer’s supposed Best Value Tradeoff is premised solely on the IGCE, is a tradeoff based on the Price Quotations and nothing else.

This supposed Best Value Tradeoff based solely on the Price Quotations is wholly implausible. The point of a Best Value Tradeoff is a reasoned balancing of Technical Capability, Past Perform-

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mance, and Price. It is not the highest Price on the table which determines which Quotation is the best suited to satisfy Agency requirements. Indeed, the point of any Federal Competition for IT support services is to see which of the competitors will outdo the others by offering the most advantageous combination of cheaper or better services. *Arch Chemicals, Inc. v. United States*, 64 Fed. Cl. 380, 400 n. 42 (2005). When there is no Tradeoff of low Price against perceived quality, a Best Value Tradeoff cannot be rational. *Id.*, 64 Fed. Cl., at 402.

A supposed Best Value Tradeoff based solely on Price Quotations violates FAR 16.505(b)(5)(i) because there is no rationale for tradeoffs among price and non-cost considerations. An Agency may not simply commit itself to a Price premium more than double the price in lower-priced Quotations without better articulating just how such an Award is the most advantageous to the pocketbooks of American taxpayers. Agencies are charged with avoiding windfalls to Contractors, and not with guaranteeing that such windfalls will be realized whatever the quality of the IT support services which will be delivered.

VI. Defendant DOL's Conduct Of This Task Order Competition Is A Breach Of The Implied-In-Fact Contract Of Good Faith, Fair Dealing, And Honest Consideration.

FAR 1.102(b)(3) *requires Agencies* to act with "integrity, fairness, and openness" in conducting Acquisitions, and FAR 1.102-2(c)(3) *requires Agencies* to "use sound business judgment," to "comply with applicable laws and regulations in dealing with . . . prospective contractors," and to treat

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prospective Contractors “fairly and impartially.” FAR 1.602-2(b) *demands that Contracting Officers* shall “[e]nsure that contractors receive impartial, fair, and equitable treatment” These procurement Regulations thus define the reach and scope of the implied-in-fact Contract of fair and honest consideration, an implied Contract claim which is here imposed on Defendant DOL by 28 U.S.C. § 1491(b)(1), the statutory authority for this Post-Award Procurement Protest. *Bilfinger Berger AG Sede Secondaria Italiana v. United States*, 97 Fed. Cl. 96, 151-52 (2010).

Whether or not FAR 1.102(b)(3) and FAR 1.102-2(c)(3) are merely precatory, not mandatory (*compare Information Sciences Corp. v. United States*, 85 Fed. Cl. 195, 202 (2008) *with FFTF Restoration Company, LLC v. United States*, 86 Fed. Cl. 226, 237-38 (2009)), FAR 1.602-2(b) is a *command to Contracting Officers*, and may not be ignored as *simple directions to Agencies* or as *guiding Agency principles* imposing no specific substantive obligations. *Castle-Rose, Inc. v. United States*, Fed. Cl. No. 11-163C, June 23rd, 2011, 2011 U.S. Claims LEXIS 1162, *44-*46.

A Contracting Officer does not ensure “impartial, fair, and equitable treatment” when she neither questions nor bothers to analyze: (1) an IGCE [REDACTED], and (2) the ratings based on this IGCE. Likewise, a Contracting Officer does not ensure “impartial, fair, and equitable treatment” when she allows her technical evaluators to evaluate Quotations in a different and unequal manner. And a

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Contracting Officer does not ensure “impartial, fair, and equitable treatment” when, relying solely on an IGCE [REDACTED], awards without any analyses of this IGCE the proposed firm fixed-price Task Order Contract at a Price premium more than double the price in another’s firm fixed-price Quotation for those same services.

This Contracting Officer’s Price Analysis and this Contracting Officer’s Best Value Tradeoff are arbitrary or capricious actions: (1) the Price Analysis is wholly implausible because (a) the Price Analysis does not consider whether or not the Level of Effort *which will be required* to continue to deploy the redesigned OSHA OIS and to operate and maintain OSHA OIS as a production IT system for five years will be significantly and materially different from the OSHA OIS development effort which preceded it and (b) because of the Contracting Officer’s incomprehension of the risks imposed on contracting parties under a firm fixed-price obligation, this revealed in a written Debriefing; and (2) the Best Value Tradeoff is wholly implausible (a) because there have not been, as promised, any tradeoffs between non-price Factors (Technical Capability and Past Performance) and Price and (b) instead of a reasoned balancing of Technical Capability, Past, Performance, and Price, here it is just which VETS GWAC Contractor puts the highest Price on the table which has determined which Quotation was the best suited to satisfy Agency requirements.

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These arbitrary or capricious actions of the DOL Contracting Officer have prejudiced Plaintiff MED Trends' ability to receive the proposed Task Order Contract, *Castle-Rose, 2011 U.S. Claims LEXIS 1162, at *46*. These are breaches of the implied-in-fact Contract of fair and honest consideration by the DOL Contracting Officer which are properly adjudicated under 28 U.S.C. § 1491(b)(1), and these breaches now demand correction.

VII. Any Delay Or Disruption Occasioned By A Remand To Defendant DOL With Direction To Make A New Award Decision Results From Defendant DOL's Self-Made Folly.

There are three factors to be considered in deciding whether or not these demonstrated arbitrary or capricious Agency findings and determinations, and these demonstrated Agency violations of procurement Statute and Regulation, all of which have denied Plaintiff MED Trends the Task Order Contract awarded to Intervenor Micro Tech, are appropriate for injunctive or declaratory judicial relief. These three factors are: (1) whether Plaintiff MED Trends will suffer irreparable harm without such relief, (2) the balance of the hardships on the respective parties, and (3) the public interest. *PGBA, LLC v. United States*, 389 F.3d 1219, 1228-29 (Fed. Cir. 2004).

Assessment of the irreparable harm factor turns on the lack of an adequate remedy at law in the absence of injunctive or declaratory judicial relief. In this Post-Award Procurement Protest, 28 U.S.C. § 1491(b)(2) forecloses a recovery of money damages other than the bid or proposal preparation costs which Plaintiff MED Trends has expended. Money damages alone are inadequate because

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they cannot compensate Plaintiff MED Trends for the loss of the benefit Plaintiff MED Trends would have received from performance of the Task Order Contract which has been unlawfully awarded to Intervenor Micro Tech. *Turner Construction Company, Inc. v. United States*, 94 Fed. Cl. 561, 585 (2010).

The balance of hardships factor likewise is in Plaintiff MED Trends' favor—any delay and administrative burdens which might result from Defendant DOL's compliance with a Remand to make a new Award Decision are delays and administrative burdens of Defendant DOL's own making, *Crassociates*, 95 Fed. Cl. at 391, and these delays and administrative burdens likewise result from Defendant DOL's breaches of the implied-in-fact Contract of fair and honest consideration, breaches which can be here remedied with a Remand to the breaching Party.

Declaratory and injunctive judicial relief is here appropriate: (1) this Post-Award Procurement Protest was filed on Friday, June 24th, 2011, just four calendar days after Defendant DOL provided its written Post-Award Debriefing to Plaintiff MED Trends on Monday, June 20th, 2011; (2) Intervenor Micro Tech, an SDVO SBC, is not the incumbent; (3) the incumbent, Idea Integration Group, is a large business ineligible to compete for this Task Order Contract; (4) as of June 10th, 2011 only \$100,000 was available for payment under the Task Order Contract awarded to Intervenor Micro Tech; and (5) as is explained in published Question and Answer Number 26, this will be a simple

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ramp-up, not an involved transition period from the incumbent, and now ineligible, large business Contractor which developed the redesigned OSHA OIS.

As for the public interest factor, here there is “an overriding public interest in preserving the integrity of the procurement process by requiring the Government to follow its procurement regulations.” *Bona Fide Conglomerate, Inc. v. United States*, 96 Fed. Cl. 233, 242-43 (2010).

CONCLUSION

For all of the reasons set forth in the foregoing Brief in Support of Plaintiff MED Trends’ Motion for Judgment on the Administrative Record, Plaintiff MED Trends respectfully requests that the Court enter Judgment for Plaintiff MED Trends on this Administrative Record, RCFC 52.1(c)(1).

Respectfully submitted,

/s/ Cyrus E. Phillips IV

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Virginia State Bar Number 03135

July 18th, 2011

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that on Monday, July 18th, 2011 a true and complete copy of this Plaintiff's Brief in Support of Plaintiff's Motion for Judgment on the Administrative Record was filed electronically via the Court's Electronic Case Filing System, through which notice of this filing will be sent to:

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