APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2018-1409

VETERANS CONTRACTING GROUP, INC.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims in No. 1:17-cv-01015C, Judge Charles F. Lettow.

Decided: April 2, 2019

OPINION

Before LOURIE, DYK, and HUGHES, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* HUGHES.

Dissenting opinion filed by *Circuit Judge* DYK.

HUGHES, *Circuit Judge*:

Veterans Contracting Group, Inc., appeals from a decision of the United States Court of Federal Claims holding that the Department of Veterans Affairs did not act arbitrarily or capriciously when it cancelled a roof replacement solicitation set aside for service-disabled veteran-owned small businesses. Because the contracting officer acted rationally in requesting cancellation based on the record before him, we affirm.

I

A.

The government sets aside certain contracting opportunities for service-disabled veteran-owned small businesses (SDVOSBs). *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1973 (2016). Two agencies are responsible for managing procurements on SDVOSB set-aside contracts: the Department of Veterans Affairs (VA) and the Small Business Administration (SBA). The VA regulates its own procurements, while the SBA regulates the procurements of all other agencies. Although the VA and the SBA systems overlap in many respects, they are governed by different statutory provisions. *See* 38 U.S.C. § 8127 (VA); 15 U.S.C. § 657f (SBA). This appeal concerns the system run by the VA.

Under VA regulations, a business may only compete for SDVOSB set-aside contracts if it has registered with the VA's Center for Verification and Evaluation. *See* 38 U.S.C. §§ 8127(e)–(f); 38 C.F.R. §§ 74.11, 74.20. If the Center determines that a business qualifies as an SDVOSB, it adds that business to a centralized database called VetBiz. *See* 38 U.S.C. §§ 8127(e)–(f); 48 C.F.R. § 804.1102; 38 C.F.R. §§ 74.11, 74.20. During procurement, contracting officers can only consider bids submitted by businesses listed on VetBiz. *See* 38 U.S.C. § 8127(e); 48 C.F.R. § 804.1102. If the business is not in the database when bidding closes, the contracting officer cannot consider its bid. *See* 38 U.S.C. § 8127(e); 48 C.F.R. § 804.1102.

A business is eligible to compete for SDVOSB contracts if one or more veterans "unconditionally" own a majority interest in the company. *See* 38 C.F.R. § 74.2(a) (VA); *see also* 13 C.F.R. § 125.12 (SBA). In

2017, the VA and the SBA applied different definitions of "unconditional" ownership.[1] According to the VA, ownership was unconditional if it was free from "arrangements causing or potentially causing ownership benefits to go to another." *See* 38 C.F.R. § 74.3(b) (2017). The VA exempted arrangements conditioned "after death or incapacity" from this limitation. *See id.* The SBA, on the other hand, disallowed any limitations on a veteran's ownership interest—including those premised on death or incapacity. *See Matter of The Wexford Grp., Int'l, Inc.*, SBA No. SDV-105, 2006 WL 4726737, at *6, *9–10 (June 29, 2006).

Even after the Center makes the initial determination that a business qualifies as an SDVOSB, eligibility continues to remain relevant. Verified businesses have an ongoing obligation to maintain their status, and the Center may remove any business which fails to comply with this obligation. *See* 38 C.F.R. §§ 74.15(b), (e). Generally, a business is entitled to notice and an opportunity to respond before the Center effects removal. *See id.* § 74.22. The regulations existing in 2017, however, provided for one narrow circumstance under which the VA had to *immediately* remove a business from VetBiz: upon notice from the SBA that it has found the business ineligible to compete in its system. *See id.* § 74.2(e) (2017). The regulation provided the Center with no discretion with respect to removal in this scenario. *See id.*

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[1] The VA and SBA recently aligned their regulations regarding unconditional ownership. *See* Ownership and Control of Service-Disabled Veteran-Owned Small Business Concerns, 83 Fed. Reg. 48,908 (Oct. 1, 2018) (codified at 13 C.F.R. § 125).

B.

Ronald Montano, a service-disabled veteran, owns 51% of Veterans Contracting Group, Inc. (VCG). His ownership interest is subject to limitations in the event of his death or incapacity. In 2013, the Center determined that VCG qualified as an SDVOSB under the VA system and added VCG to VetBiz. The Center reaffirmed VCG's status each year until 2017.

On January 5, 2017, VCG learned that it was the lowest bidder on an SDVOSB set-aside contract issued by an agency working with the SBA. The second lowest bidder filed a bid protest challenging VCG's eligibility to compete for the contract. The SBA ultimately determined that, because of the limitations on his ownership interest in the event of his death or incapacity, Mr. Montano did not "unconditionally" own his interest in VCG. As a result, VCG did not qualify as an SDVOSB under the SBA system. The SBA informed the VA of its decision on July 18, 2017. Because VA regulations required the Center to remove any business found ineligible in an SBA proceeding, *see* 38 C.F.R. § 74.2(e) (2017), the VA removed VCG from VetBiz on July 21, 2017.

Before VCG's removal from VetBiz, the VA had issued solicitations for bids in two SDVOSB set-aside contracts, one for a roof replacement and one for a relocation effort. The application deadline for the roof replacement solicitation was July 28, 2017. The application deadline for the relocation contract was August 2, 2017.[2] Realizing that bidding might close on these solicitations before it finished litigating its status as an SDVOSB, VCG sent the VA a letter on July 26, 2017,

[2] The government later extended this deadline because of VCG's bid protest.

expressing its intent to seek a preliminary injunction. Although VCG's letter repeatedly referenced the relocation solicitation, it failed to mention the roof replacement solicitation.[3]

On July 28, 2017, hours before the 9:00 am deadline on the roof replacement solicitation, VCG filed a bid protest in the Court of Federal Claims. VCG did not request a temporary restraining order or injunctive relief in its complaint.

That same day, the contracting officer opened bids for the roof replacement solicitation. The lowest responsive bidder had proposed a cost 30% higher than the government's estimate. VCG had submitted a bid closer to the government's projected cost, but the contracting officer could not consider its bid because VCG was not listed in the VetBiz database on the day bidding closed. *See* 38 U.S.C. § 8127(e). Given the absence of any reasonable bids, the contracting officer drafted an email on August 1, 2017, recommending cancellation and reposting of the solicitation.

On August 5, 2017, five days after the contracting officer sought cancellation, VCG moved for a preliminary injunction on the roof replacement solicitation. On August 11, 2017, the VA informed the Court of Federal Claims of its intent to cancel the solicitation pursuant to 48 C.F.R. § 14.404-1(c)(6), which permits cancellation when "[a]ll otherwise acceptable bids received are at unreasonable prices." The VA finalized cancellation on August 22, 2017. Hours later, the Court of Federal Claims granted VCG a preliminary injunction restoring

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[3] Because VCG misspelled the email address of the bid protest division of the Department of Justice, the government disputes receipt of this letter. *See* Resp. Br. 5.

it to VetBiz.[4] *See Veterans Contracting Grp., Inc., v. United States*, 133 Fed. Cl. 613, 624 (2017) (*VCG I*). In its decision, the court specifically declined to address relief related to the roof replacement solicitation "[b]ecause the government has stated that the roofing solicitation is in the process of being cancelled and reissued," thereby rendering VCG's "claim with respect to that solicitation … moot." *Id.* at 624 n.11.

The Court of Federal Claims ultimately made the injunction permanent. *See Veterans Contracting Grp., Inc., v. United States*, 135 Fed. Cl. 610, 619 (2017) (*VCG II*). The court reasoned that, because the SBA and VA regulations had differed at that time on whether contingencies for death or incapacity would disqualify a business from SDVOSB status, the VA had acted arbitrarily and capriciously when it applied 38 C.F.R. § 74.2(e) in a mechanical manner. *See id.* at 618–19. The court, however, rejected VCG's claim that the contracting officer had acted arbitrarily and capriciously in cancelling the roof replacement solicitation.[5] *See id.* at 619–20. It noted that the contracting officer had followed normal procurement procedures. *Id.* at 619. Based on the information available to him at the time, he rationally determined that the government had not received any reasonable bids. *Id.* Because he could not have known that the Center had improperly removed VCG from VetBiz, the court held that the contracting

[4] The preliminary injunction only restored VCG to VetBiz prospectively. Restoration thus did not change VCG's eligibility as of the July 28 application deadline for the roof replacement solicitation.

[5] Following cancellation of the roof replacement solicitation, VCG amended its complaint to challenge that decision.

officer's decision to cancel the solicitation was not arbitrary or capricious. *See id.* at 619–20.

VCG appeals the denial of its claim that the cancellation of the roof replacement solicitation was arbitrary and capricious. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

II

We review the legal determinations of the Court of Federal Claims de novo and any underlying factual findings for clear error. *Palladian Partners, Inc. v. United States*, 783 F.3d 1243, 1252 (Fed. Cir. 2015). In a bid protest, we follow Administrative Procedure Act § 706 and set aside agency action "if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* A procurement decision fails under § 706 if "(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." *Id.* (internal quotation marks omitted) (quoting *Savantage Fin. Servs. v. United States*, 595 F.3d 1282, 1285–86 (Fed. Cir. 2010)).

A.

We first address whether the contracting officer's decision to cancel the roof replacement solicitation lacked any rational basis.[6] VCG contends that the VA should have held the solicitation open pending resolution of its suit because it was the lowest bidder. It ar-

[6] VCG also argues that the contracting officer violated procurement procedures when he requested cancellation. The only support it offers, however, is that the contracting officer "*should never have opened the bids in the first place*." Pet. Br. 14–15 (emphasis in original). Because VCG has waived the bid opening issue on appeal, *see infra* Part II B., we do not address this challenge.

gues that cancellation was irrational and subverted the government's statutory duty to award contracts to SDVOSBs. In response, the government asserts that the contracting officer rationally cancelled the solicitation based on the compelling reason that he had received no reasonable responsive and responsible bids.

The government has a duty to conduct fair procurements. *See Parcel 49C Ltd. P'ship v. United States*, 31 F.3d 1147, 1152 (Fed. Cir. 1994). An agency violates this duty "if its consideration of offers is found to be 'arbitrary and capricious toward the bidder-claimant.'" *Cent. Ark. Maint., Inc. v. United States*, 68 F.3d 1338, 1341 (Fed. Cir. 1995) (quoting *Keco Indus., Inc. v. United States*, 492 F.2d 1200, 1203 (Ct. Cl. 1974)). A bidder-claimant carries the burden of demonstrating that an agency acted arbitrarily and capriciously during procurement. *See Parcel 49C*, 31 F.3d at 1153. To meet this burden, a bidder-claimant generally must show that the procurement decision lacked a "proper legal basis." *See id.* at 1154.

In *Parcel 49C*, for example, Parcel 49C met its burden of proof by showing that the government had "no rational basis" for cancelling a solicitation. *Id.* at 1153. It introduced overwhelming evidence that the rationale offered by the agency for cancellation was "merely a pretext for accommodating FCC's displeasure with the selection of Parcel 49C." *Id.* at 1151. The record showed that the agency's actual motivation was the hope of avoiding "a move to the less desirable southwest quadrant of Washington, D.C." *Id.* at 1153. Because the government cannot cancel a solicitation solely to satisfy an agency's whim, we held that the cancellation was arbitrary and capricious. *Id.* at 1153–54.

Unlike the plaintiff in *Parcel 49C*, VCG has not shown that the contracting officer lacked any rational basis for cancelling the roof replacement solicitation. First, the record discloses a reasonable motivation for cancellation. While cancellation after bids have been opened is generally disfavored, a solicitation may be cancelled if "there is a compelling reason to reject all bids and cancel the invitation." 48 C.F.R. § 14.404-1(a)(1). A compelling reason may exist when "[a]ll otherwise acceptable bids received are at unreasonable prices." *Id.* § 14.404-1(c)(6). VCG's bid was not acceptable because VCG was not listed in the VetBiz database when bidding closed. *See* 38 U.S.C. § 8127(e). The only two acceptable bids proposed costs significantly higher than the government's estimate for the project. Thus, the contracting officer rationally determined that these prices were unreasonable. Under the circumstances, he had a compelling reason to request cancellation.

Second, there is no indication that this reason was a mere pretext to cover an improper motivation. Although VCG alleges that the contracting officer intended to subvert the government's statutory duties to SDVOSBs, it has offered no evidence that the contracting officer knew the Center had wrongfully removed VCG from VetBiz when he requested cancellation of the solicitation. VCG's July 26 letter to the VA only referred to the relocation solicitation and did not mention the roof replacement solicitation. It thus could not provide notice of VCG's intent to seek injunctive relief with respect to roof replacement solicitation. While the act of filing a bid protest on July 28 may have given the contracting officer some indication that VCG disputed its status, VCG's initial complaint requested no form of injunctive relief. VCG only moved for a preliminary injunction on August 5—eight days after bidding on the

solicitation had closed and four days after the contracting officer had first requested cancellation. In other words, when the contracting officer requested cancellation, he had no reason to expect the court would impose any limitations on his exercise of discretion. Moreover, because the Court of Federal Claims did not grant VCG's motion until after the solicitation had been fully cancelled, *see VCG I*, 133 Fed. Cl. at 624, nothing prevented the contracting officer from continuing to pursue cancellation once VCG moved for a preliminary injunction.

We also find it significant that, until the Court of Federal Claims granted judgment on the administrative record on December 15, 2017, the government had not conceded that the Center had acted arbitrarily and capriciously in removing VCG from VetBiz. Instead, it maintained that the Center had acted rationally given applicable regulatory guidelines. *See* 38 C.F.R. § 74.2(e) (2017). A contracting officer must act in consideration of circumstances as they exist at the time of his decision. *See Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (explaining that "[t]he agency must articulate a 'rational connection *between the facts found and the choice made*'" (emphasis added) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962))). At the time of his decision, the contracting officer was bound by the government's position on this issue and had to presume the Center had acted lawfully. That the Court of Federal Claims determined four months after cancellation that the Center had not acted lawfully thus does not retroactively render his actions irrational.[7]

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[7] The dissent contends that accounting for whether the contracting officer knew the Center had unlawfully excluded VCG

In sum, we find that the contracting officer had a rational basis to cancel the roof replacement solicitation. *See Palladian*, 783 F.3d at 1252. We therefore conclude that the contracting officer's decision to cancel the roof replacement solicitation was not arbitrary or capricious.

B.

We next consider whether the contracting officer's decision to open bids on the roof replacement solicitation was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. VCG contends that the VA should never open bids once it receives a pre-award protest because such an action is

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from the database "effectively limits our review to whether the contracting officer acted in bad faith." Dissent at 3. We disagree. Rather than broadly holding that any agency action "based on an earlier, unlawful act is rational unless the agency official making the decision knew the earlier action was unlawful," Dissent at 3, our decision simply acknowledges that a contracting officer can only act within the scope of his authority and that, here, the contracting officer had no authority to consider VCG's bid. *See* 38 U.S.C. § 8127(e) (prohibiting the contracting officer from considering bids submitted by businesses not listed on VetBiz); *Liberty Ammunition, Inc. v. United States*, 835 F.3d 1388, 1401–02 (Fed. Cir. 2016) (noting that "[a] Government agent must have actual authority to bind the Government to a contract" and that a contracting officer "has only that authority actually conferred upon him by statute or regulation" (internal quotation marks omitted) (quoting *CACI, Inc. v. Stone*, 990 F.2d 1233, 1236 (Fed. Cir. 1993))). While we can say in hindsight that the "VA would likely have awarded the contract to VCG had it not erroneously removed VCG from the database," *see* Dissent at 5, it does not change the fact that, at the time the contracting officer cancelled the solicitation, VCG was not listed on VetBiz. It would run contrary to precedent and fairness to find that subsequent, unanticipated circumstances retroactively rendered cancellation irrational when the contracting officer had no authority to consider VCG's bid, let alone award the contract to VCG, at the time he acted.

contrary to procurement policy. VCG has failed to establish, however, that it raised the issue of bid opening before the Court of Federal Claims. It has accordingly waived this challenge on appeal. *See Nacchio v. United States*, 824 F.3d 1370, 1382 (Fed. Cir. 2016) ("We generally do not consider issues that were not clearly raised in the proceeding below.").

Even if VCG had preserved this argument, we still would find it meritless. VCG did not request injunctive relief until well after bids were opened. Because the contracting officer had no notice of any reason to postpone opening bids for the roof replacement solicitation, his decision to open bids on July 28, 2017, was not arbitrary or capricious.

III

We have considered the parties' remaining arguments and find them unpersuasive. We conclude that the contracting officer's decision to cancel the roof replacement solicitation was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. For these reasons, we affirm the decision of the Court of Federal Claims.

AFFIRMED

No costs.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2018-1409

VETERANS CONTRACTING GROUP, INC.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims in No. 1:17-cv-01015C, Judge Charles F. Lettow.

DYK, *Circuit Judge*, dissenting.

I

In my view this is a simple case. Veterans Contracting Group, Inc. ("VCG") bid on a Department of Veterans Affairs ("VA") contract. As the government now concedes, VCG was improperly excluded from the database of eligible bidders. The VA contracting officer, acting pursuant to 38 U.S.C. § 8127(e), refused to award the contract to VCG, which had submitted an otherwise responsive (and lowest) bid, because VCG was not listed in the database. The majority agrees that the contract would likely have been awarded to VCG but for the VA's error in removing VCG from the database.

Nonetheless, the majority affirms. That result, denying a contract to a preference-eligible contractor, can only be achieved by treating the contracting officer and the preparer of the database as though they were

separate entities. They were not. Both were part of the VA and acted as agents of the VA. *See* 38 U.S.C. § 8127(d) (providing that "a contracting officer of the Department shall award contracts" to small business concerns owned and controlled by veterans (emphasis added)); *id.* § 8127(f)(1) (providing that "the Secretary shall maintain a database of small business concerns owned and controlled by veterans"); *see also Liberty Ammunition, Inc. v. United States*, 835 F.3d 1388, 1401–02 (Fed. Cir. 2016) ("It is a well recognized principle of procurement law that the contracting officer, as agent of the executive department, has only that authority actually conferred upon him by statute or regulation." (quoting *CACI, Inc. v. Stone*, 990 F.2d 1233, 1236 (Fed. Cir. 1993))).

According to the majority, whether the VA's rejection of VCG's bid was arbitrary depends on who within the VA is responsible for the error: the contracting officer or the preparer of the database. If VCG had been in the database and the contracting officer rejected VCG's bid by ignoring its listing in the database, rejecting VCG's bid presumably would have been arbitrary. But here, since the contracting officer did not prepare the database, rejecting the bid was not arbitrary—even though the result is precisely the same. It should make no difference which individual within the VA committed the error.

The majority reasons that the contracting officer's decision to reject VCG's bid and cancel the solicitation was rational because there is "no evidence that the contracting officer knew the [VA] had wrongfully removed VCG from [the database] when he requested cancellation." Majority Op. at 9. "At the time of his decision, the contracting officer was bound by the government's position … and had to presume [the VA] had acted law-

fully" in removing VCG from the database. *Id.* at 10. In other words, the majority holds that an agency's decision based on an earlier, unlawful action is rational unless the agency official making the decision knew the earlier action was unlawful. Under this approach, any agency decision based on an unlawful regulation would presumably be lawful, if, at the time, the agency official was unaware of the illegality. There is no support for the majority's approach, which would insulate much agency action from effective review.

By holding that the VA's actions were lawful because the contracting officer did not know of the unlawful error and thus lacked any "improper motivation," Majority Op. at 9, the majority effectively limits our review to whether the contracting officer acted in bad faith. But we have previously explained that "the APA standard of review … is not limited to fraud or bad faith by the contracting officer." *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1333 (Fed. Cir. 2001). The VA rejected VCG's bid only because it wrongfully removed VCG from the database. That the contracting officer had no knowledge of that error or acted in good faith does not excuse the error.

The majority responds that "a contracting officer can only act within the scope of his authority" and that "[i]t would run contrary to precedent and fairness to find that subsequent, unanticipated circumstances retroactively rendered cancellation irrational." Majority Op. at 10–11 n.2. But VCG's erroneous removal was not a subsequent, unanticipated circumstance. The Claims Court's decision is not what made VCG's removal unlawful; it was unlawful from the beginning. The Claims Court's decision merely recognized the illegality. We have ordered a remedy for unlawful action

even where the agency lacked knowledge of the illegality at the time. For example, in *Dodson v. United States Government*, 988 F.2d 1199 (Fed. Cir. 1993), the Promotion Selection Board concluded that an Army staff sergeant should be discharged and barred from reenlisting due in part to low scores on his annual enlisted evaluation reports. *See id.* at 1201–03. Among those evaluations was an incorrect, low score that a substitute rater had mistakenly placed in the sergeant's personnel file for Board review. *See id.* at 1201. We held that the Army acted unlawfully in discharging the sergeant and barring him from reenlistment. *See id.* at 1205–06. That was so even though the Board that made the decision did not place the erroneous score in his file, and the incorrect score was invalidated and deleted from the sergeant's file only *after* the Board decision. *See id.*

II

When an agency acts arbitrarily, as the VA did here by excluding VCG from the database, the agency's resulting action—rejecting the bid—must be set aside. *See Parcel 49C Ltd. P'ship v. United States*, 31 F.3d 1147, 1154 (Fed. Cir. 1994) (affirming an injunction that "restore[d] the posture of the Government and [the bidder] before the illegal cancellation" because it would "remove the taint of illegality from this procurement process"); *CACI, Inc.–Fed. v. United States*, 719 F.2d 1567, 1575 (Fed. Cir. 1983) (noting that where a bidder has been deprived of "the opportunity to have its bid considered solely on its merits," "[a]n injunction barring the award would correct this alleged injury since it would require the government … to repeat the bidding process under circumstances that would eliminate the alleged taint of the prior proceedings"); *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 203 (D.C. Cir. 1984)

(holding that because the FBI unlawfully awarded a contract, the disappointed bidder had a right to require the FBI to reselect a contractor based on the best final offers previously submitted, even though "[c]onsiderable performance ha[d] already taken place under the [] contract"). Thus, where the agency commits an error that denies a bidder the opportunity to have its bid considered solely on the merits, the appropriate remedy must give the bidder that opportunity, placing it in the position it would have occupied but for the agency's error.

Our decision in *Marshall v. Department of Health and Human Services*, 587 F.3d 1310 (Fed. Cir. 2009), is also instructive. There, the Department of Health and Human Services admitted that it acted unlawfully when it hired a non-veteran instead of the plaintiff and conceded "that it would have selected [the plaintiff] for the position had it not erroneously removed his name from the list of candidates." *Id.* at 1311. On appeal, the question concerned the proper remedy. We held that "the appropriate remedy is for [the plaintiff] to be awarded this position. The fact that the agency filled the position with another employee in violation of the [Veterans Employment Opportunities Act] preferences is not an adequate reason to force the aggrieved veteran into a different position." *Id.* at 1317.

The underlying logic of these cases applies here: The VA would likely have awarded the contract to VCG had it not erroneously removed VCG from the database. The appropriate remedy is to place VCG in the situation it would have occupied had the VA not acted improperly.

I respectfully dissent.

APPENDIX B

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 17-1015 C
December 17, 2017

VETERANS CONTRACTING GROUP, INC.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

RULE 54(b) JUDGMENT

Pursuant to the court's Opinion and Order, filed December 15, 2017, granting-in-part and denying-in-part plaintiff's motion for judgment on the administrative record and granting-in-part and denying-in-part defendant's cross-motion for judgment on the administrative record, and directing the entry of judgment pursuant to Rule 54(b), there being no just reason for delay,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that this court's preliminary injunction dated August 22, 2017, which set aside CVE's decision removing Veterans from the VetBiz VIP database, is hereby made permanent. Veterans' year-long eligibility in the VIP database shall be extended by 34 days to account for the period during which it was wrongfully excluded from competing on VA procurement set-asides. Although Veterans is denied retroac-

tive injunctive relief for the cancellation of the roofing solicitation, it shall recover its reasonable bid preparation and proposal costs regarding that solicitation.

Lisa L. Reyes
Clerk of Court

December 18, 2017 By: s/ Anthony Curry

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of *all plaintiffs*. Filing fee is $505.00.

APPENDIX C

UNITED STATES COURT OF FEDERAL CLAIMS

No. 17-1015C
(Filed Under Seal: December 15, 2017)
(Reissued: December 21, 2017)

VETERANS CONTRACTING GROUP, INC.
Plaintiff,

v.

UNITED STATES
Defendant.

Pre-award bid protest; restoration of SDVOSB to the VA's VetBiz VIP database; cancellation of one solicitation; prospective, not retroactive, restoration of SDVOSB to the VetBiz VIP database, award of bid preparation and proposal costs

OPINION AND ORDER[1]

LETTOW, Judge:

This pre-award bid protest returns to this court after the issuance of a preliminary injunction,[2] action by

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

[2] *See Veterans Contracting Grp. Inc. v. United States*, 133 Fed. Cl. 613 (2017) (granting a preliminary injunction setting aside the agency's decision to remove the protester from the VetBiz

the agency to substantially recast the two solicitations at issue, and the filing of a first and then a second amended complaint by the protester. Plaintiff, Veterans Contracting Group ("Veterans"), was initially verified by the United States Department of Veterans Affairs ("VA") as a service-disabled veteran-owned small business ("SDVOSB"). While Veterans was preparing to submit bids on two VA solicitations set aside for SDVOSBs, the Small Business Administration ("SBA") issued a decision in a protest before it, disqualifying Veterans as an SDVOSB. Shortly thereafter, VA informed Veterans that, due to that adverse decision, it was being removed from the VA database for SDVOSBs eligible to compete for VA procurement set-asides.[3] Veterans then filed this bid protest and sought a preliminary injunction with respect to the two SDVOSB procurements it had been preparing to pursue. Veterans alleged that it was a qualified SDVOSB eligible for an award in those procurements and should not have been removed from the VA database.

This court granted Veterans' motion for preliminary injunction in part, ordering VA to restore Veter-

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VIP database of approved SDVOSB entities and restoring the protester to the list).

[3] SBA's decision was rendered by its Office of Hearings and Appeals ("OHA"), and came in a procurement by the Corps of Engineers. Veterans was the low bidder in that procurement and had been awarded the contract by the Corps, but a competing offeror protested the award and triggered the proceedings that ultimately resulted in OHA's decision to disqualify Veterans from the award by the Corps. Veterans protested that disqualification in a separate, related post-award bid protest, but the court denied relief and upheld the disqualification based on SBA's regulations that diverge materially from those adopted by VA. *See Veterans Contracting Grp. Inc. v. United States*, ___ Fed. Cl. ___, 2017 WL 6505208, No. 17-1188C (Dec. 11, 2017).

ans to the procurement database and rendering it eligible to compete for SDVOSB set-asides. This Veterans was able to do with regard to one of the solicitations, but VA canceled the other. As the circumstances evolved, Veterans sought and was granted leave to amend its complaint on two occasions to protest that cancellation, and the administrative record was supplemented to account for the new developments.

Veterans then moved for judgment on the administrative record, seeking both declaratory and injunctive relief. First, Veterans requests a declaration that Veterans' removal from the VA database was arbitrary, capricious, a violation of VA's regulations, and an abridgment of Veterans' due process rights, rendering permanent the relief ordered by the court's preliminary injunction. Second, Veterans seeks an injunction barring VA from cancelling the second solicitation and ordering it to consider Veterans retroactively eligible for an award of a contract based upon that solicitation. The government has responded with a cross-motion for judgment on the administrative record.

STATUTORY AND REGULATORY FRAMEWORK

"In an effort to encourage small businesses, Congress has mandated that federal agencies restrict competition for some federal contracts." *Kingdomware Techs., Inc. v. United States*, __ U.S. __, __, 136 S. Ct. 1969, 1973 (2016). The task of promulgating regulations "set[ting] forth procedures … to set aside contracts for" SDVOSBs has been assigned to two distinct agencies, VA and SBA. *See Kingdomware Techs.*, 136 S. Ct. at 1973 (internal quotation marks omitted); *see also* 15 U.S.C. § 657f (SBA); 38 U.S.C. § 8127(a), (e) (VA). VA and SBA have established separate but overlapping

regulatory frameworks for these set-asides. *Compare* 38 C.F.R. Part 74 (VA), *with* 13 C.F.R. Part 125 (SBA).

Congress authorized VA to set aside certain contracts for "small business concerns owned and controlled by veterans with service-connected disabilities" through the Veterans Benefits, Health Care, and Information Technology Act of 2006 ("Veterans Benefits Act"), Pub. L. No. 109-461, tit. V, 120 Stat. 3403, 3425 (codified as amended in relevant part at 38 U.S.C. §§ 8127-28). *See* 38 U.S.C. § 8127(a), (e). The Act and, *a fortiori*, the regulations it authorizes apply only to VA procurements. *See Angelica Textile Servs., Inc. v. United States*, 95 Fed. Cl. 208, 222 (2010) ("The [VA] is responsible for implementing the Veterans Benefits Act; indeed, it is the only federal department or agency to which the Act's requirements apply."); *see also* 48 C.F.R. § 819.7002 (explaining that the VA's implementing regulations apply only to "VA contracting activities and to its prime contractors" and "to any government entity that has a contract … or other arrangement with VA to acquire goods and services *for VA*") (emphasis added).

VA implemented the Veterans Benefits Act through the "Veterans First Contracting Program," established in 2007. *See AmBuild Co. v. United States*, 119 Fed. Cl. 10, 19 (2014). "At the Program's commencement, SDVOSB … entities were permitted to self-certify … for registration in the VetBiz VIP database." *Id.* But the authorizing statute was subsequently amended to require the Secretary of Veterans Affairs to maintain the database and certify contracting entities through the VA's Center for Verification and Evaluation ("CVE"). *Id.* (citing 38 U.S.C. § 8127(e), (f)); *see also* 48 C.F.R. § 804.1102. A business must be included on the VA's VetBiz VIP database to qualify as

an eligible SDVOSB for a contract award. *See* 38 U.S.C. § 8127(e), (f); 48 C.F.R. § 804.1102. CVE now certifies participating entities and maintains such certification by performing examinations that "review … a[t] a minimum … all documents supporting the application, as described in [38 C.F.R.] § 74.12." *See* 38 C.F.R. § 74.20(b). These "examination[s] may be conducted on a random, unannounced basis, or upon receipt of specific and credible information alleging that a participant no longer meets eligibility requirements." *Id.* § 74.20(a).

"When CVE believes that a participant's verified status should be cancelled prior to the expiration of its eligibility term," CVE notifies the small business and allows 30 days for it to respond. *See* 38 C.F.R. § 74.22(a)-(b). Upon a determination that cancellation is warranted, the director of the CVE will issue a reasoned notice of cancellation, and the business will be removed from the VetBiz VIP database. *See id.* § 74.22(c)-(d). The business then has a right to appeal the determination to the Office of Small and Disadvantaged Business Utilization and Center for Veterans Enterprise "within 30 days of receipt of [the] cancellation decision" or to "re-apply after it has met all eligibility criteria." *Id.* § 74.22(c), (e).

38 C.F.R. § 74.22 does not provide the only process for removing a participant from the VIP database. VA adopted 38 C.F.R. § 74.2(e) in 2010,[4] and, with this single provision, protest decisions by SBA, presumably applying SBA's own regulations, could potentially displace VA's cancellation and removal process without accounting for the differences between the two agen-

[4] See Veteran-Owned Small Business Guidelines, 75 Fed. Reg. 422, 378 (Feb. 8, 2010) (codified at 38 C.F.R. § 74.2(e)).

cies' underlying regulatory eligibility criteria. Subsection 74.2(e) states:

> Any firm registered in the VetBiz VIP database that is found to be ineligible due to an SBA protest decision or other negative finding will be immediately removed from the VetBiz VIP database. Until such time as CVE receives official notification that the firm has proven that it has successfully overcome the grounds for the determination or that the SBA decision is overturned on appeal, the firm will not be eligible to participate in the [Veterans First Contracting P]rogram.

38 C.F.R. § 74.2(e). This provision is not remarkable in isolation but, due to the differences in the VA and SBA regulations, addressed *infra*, it can create anomalous results. It was just this kind of anomalous outcome that was set aside by the preliminary injunction issued in this case. *See Veterans Contracting Grp.*, 133 Fed. Cl. 613.

To qualify for CVE certification as an SDVOSB, "[a] small business concern must be *unconditionally owned* and controlled by one or more eligible … service-disabled veterans." 38 C.F.R. 74.2(a) (emphasis added). When the small business concern is a corporation, "at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding must be unconditionally owned by one or more … service-disabled veterans." *Id.* § 74.3(b)(3). VA has defined unconditional ownership in commercially customary terms:

> *Ownership must not be subject to* conditions precedent, conditions subsequent, *executory agreements*, voting trusts, restrictions on as-

> signments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow *normal commercial practices* and the owner retains control absent violations of the terms.

Id. § 74.3(b) (emphasis added).

This court previously interpreted and applied these regulations in *Miles Constr., LLC, v. United States*, 108 Fed. Cl. 792 (2013), and *AmBuild*, 119 Fed. Cl. 10. In *Miles*, the VA had removed Miles Construction from the VetBiz VIP database because there was a restriction on the service-disabled veteran's ownership interest, allegedly rendering his ownership conditional. 108 Fed. Cl. at 800-01. The company's Operating Agreement granted a right of first refusal to "the company, or the remaining members of the company if the company declines, … to purchase a member's shares, should he or she decide to sell." *Id.* at 801. The government asserted that that provision of the Operating Agreement was an executory agreement that violated 38 C.F.R. § 74.3(b) "because it prevent[ed the] owner from acting [unilaterally] upon his ownership interest." *Id.* This court disagreed because the right-of-first-refusal provision was "not presently executory" as it had not been triggered by the veteran "choos[ing] to sell some of his … stake" and because it was "a standard provision used in normal commercial dealings." *Id.* at 803 (relying on 38 C.F.R. § 74.3(b)).

In *AmBuild*, the question was, *inter alia*, whether a provision of an Operating Agreement that permits the company to purchase the veteran-owner's ownership interest in cases of "bankruptcy, receivership, and transfer by court order or operation of law" rendered ownership conditional in violation of 38 C.F.R. § 74.3(b). 119 Fed. Cl. at 16, 23-24. The government argued that it did because "personal bankruptcy does not ordinarily result in the divesture of ownership." *Id.* at 24. But this court disagreed, noting that "the property of every business owner is automatically placed in custody of the court upon bankruptcy," and determining that the operating agreement reflected "a standard commercial arrangement in compliance with 38 C.F.R. § 74.3(b)." *Id.* at 25.

Congress has also authorized SBA to designate SDVOSB set-asides, creating the Service-Disabled Veteran-Owned Small Business Concern ("SDVOSBC") program.[5] Unlike the VA's regulatory approach, "SBA's program … has no required verification program, relying instead on [annual self-certification via] the System for Award Management." *Veterans Contracting Grp., Inc.*, SBA No. VET-265, 2017 WL 4124865 at *9 (Aug. 31, 2017); *see also* 13 C.F.R. § 125.33. In place of CVE-type oversight, SBA permits other bidders on specific solicitations to protest the status or the ownership and control of the competing small business concern. *See* 13 C.F.R. § 125.29

[5] The SBA's SDVOSBC program was authorized by the Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233 (codified as amended at 15 U.S.C. §§ 657b-57c), and the Veterans Benefits Act of 2003, Pub. L. No. 108-183, 117 Stat. 2651 (codified as amended at 15 U.S.C. § 657f and 38 U.S.C. §§ 1821, 4113, 5109B, 7112), and implemented via SBA regulations codified at 13 C.F.R. §§ 125.11 to 125.33.

("What are the grounds for filing an SDVOSBC protest?"). When challenging on ownership or control grounds, the protestor must "present[] credible evidence that the concern is not 51% owned and controlled by one or more service-disabled veterans." *Id.* § 125.29(b). Such protests are handled first by an SBA area field office and then are appealable to OHA. *See id.* §§ 125.30-25.31; *see also generally id.* Part 134 ("Rules of Procedure Governing Cases Before the Office of Hearings and Appeals").

Eligibility in SBA's SDVOSBC program requires the small business concerns to be "at least 51% unconditionally and directly owned by one or more service-disabled veterans." 13 C.F.R. § 125.12. The SDVOSBC program, in contradistinction to the VA set-aside program, does not include a definition of unconditional ownership. *See* 13 C.F.R. § 125.11 (specifying definitions important to the SDVOSB program, but omitting a definition of "unconditional ownership"). Instead, SBA uses an interpretation by OHA of what is now 13 C.F.R. § 125.12, as set forth in *The Wexford Group Int'l, Inc.*, SBA No. SDV-105, 2006 WL 4726737 (June 29, 2006). There OHA determined "the plain and ordinary meaning of the word" "unconditional" by looking to a dictionary. *Wexford*, 2006 WL 4726737, at *6 & n.2. From the dictionary definition, OHA determined that "in the context of 13 C.F.R. § 125.[12],"

> unconditional necessarily means there are no conditions or limitations upon an individual's present or immediate right to exercise full control and ownership of the concern. Nor can there be any impediment to the exercise of the full range of ownership rights. Thus, a service-disabled veteran: (1) Must immediately and fully own the company (or stock) without hav-

> ing to wait for future events; (2) Must be able to convey or transfer interest in his ownership interest or stock whenever and to whomever they choose; and (3) Upon departure, resignation, retirement, or death, still own their stock and do with it as they choose. In sum, service-disabled veterans must immediately have an absolute right to do anything they want with their ownership interest or stock, whenever they want.

Id. This absolutist interpretation is a sharp departure from the definitions promulgated via regulation in SBA's other small business programs. *See* 13 C.F.R. §§ 124.3 (defining "unconditional ownership" for the 8(a) program for small disadvantaged businesses), 127.201 (defining "unconditional ownership" for the Women-Owned Small Business program). The definitions in those programs build in nuances virtually identical in effect to VA's definition, particularly the allowance to "follow normal commercial practices" common to each of them. *See* 38 C.F.R. § 74.3; 13 C.F.R. §§ 124.3, 127.201. For SBA, however, service-disabled veterans must have "an absolute right to do anything they want with their ownership interest or stock, whenever they want." *See Wexford*, 2006 WL 4726737 at *6.

FACTS[6]

Veterans is a corporation organized under the laws of the State of New York. Compl. ¶ 24.[7] Ronald Montano, a service-disabled veteran, owns 51 percent of the company and Greg Masone owns the remaining 49 percent. Compl. ¶¶ 22, 24. On July 17, 2013, VA, acting through the CVE, verified Veterans as a qualified SDVOSB on its VIP database. *Veterans Contracting*, 133 Fed. Cl. at 616. The VA carried out subsequent annual site visits between 2014 and 2016, evaluating and reaffirming Veterans' eligibility to remain in the database as an SDVOSB. *Id.* at 617.

On January 5, 2017, Veterans learned that it was the lowest-priced bidder on an SDVOSB set-aside, solicitation number W912DS-16-B-0017, issued by the United States Army Corps of Engineers "for the removal of hazardous materials and demolition of buildings at the St. Albans Community Living Center in Jamaica, New York." Compl. ¶¶ 7-8, 10. On January 11, Williams Building Company ("Williams"), second-place bidder on the solicitation, filed a protest with the contracting officer, challenging both Veterans' size and status as an SDVOSB. *See* Compl. ¶ 11; AR 16-126 to

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

[7] Although Veterans filed amended complaints, the basic allegations of fact were set out in the original complaint, and that complaint will be cited for background in this opinion.

39.[8] The contracting officer referred the protest to SBA, *see* AR Tabs 14-15, pursuant to SBA regulations, *see* 13 C.F.R. §§ 125.2, 125.14(b).

An SBA area office issued a size determination on February 2, 2017, concluding that Veterans was a small business. AR 12-104. Later that month, the area office also issued its status determination, concluding that Veterans "met the [SDVOSB] eligibility requirements at the time of its [bid]." AR 13-112 to 17. Williams appealed the status determination to SBA's OHA on February 28, 2017. *See* AR Tab 11. Before OHA rendered a decision on Williams' appeal, SBA requested that the SBA area office's determination be remanded "for further review and investigation." AR 9-76 to 78. OHA granted that remand on April 3. AR 8-69 to 73. On remand, the SBA area office reversed itself, determining that Veterans was ineligible to bid as an SDVOSB, and therefore sustained Williams' protest. *See* AR 2-3 to 12. The SBA area office explained that, in light of Veteran's shareholder agreement, Mr. Montano did not unconditionally own Veterans because that agreement restricted his heirs' ability to convey or transfer Veterans stock. *See Veterans Contracting*, 133 Fed. Cl. at 617.

On July 21, 2017, three days after the SBA area office determination, "VA informed Veterans that it was being removed from the VA VIP database in accordance with 38 C.F.R. § 74.2(e) based on the SBA area

[8] Citations to the administrative record refer to the record as filed on August 9, 2017, as corrected on August 16, 2017, and as supplemented on September 20, 2017. The record is divided into tabs and paginated sequentially. In citing to the record, the court will first designate the tab, followed by the page number. For example, AR 16-126 refers to tab 16, page 126 of the administrative record.

office determination that Veterans did not qualify as a SDVOSB." *Veterans Contracting*, 133 Fed. Cl. at 617 (internal brackets and quotations marks omitted). Veterans filed this bid protest on July 28, challenging the VA's decision to remove it from the VIP database and the underlying determination by SBA. *See generally* Compl. Veterans alleged that the government's actions precluded it from competing for two upcoming "VA SDVOSB set-aside procurements." Compl. ¶ 1. The first solicitation, number VA242-17-B- 0713, was a relocation contract regarding the "SPS Castle Point Campus VA Hudson Valley Health Care System" in Wappingers Falls, New York ("relocation solicitation"). *See* Compl., Ex. 2. The second solicitation, number VA242-17-B-0723, was a roof replacement contract at the Northport VA Medical Center in Northport, New York ("roofing solicitation"). *See* Compl., Ex. 1. Veterans moved for a preliminary injunction, specifically requesting "that the court set aside CVE's decision to decertify Veterans as a SDVOSB, order the VA to reinstate Veterans into the VIP database, and enable Veterans to compete for the SDVOSB set-aside roofing and relocation solicitations." *Veterans Contracting*, 133 Fed. Cl. at 618. On August 22, this court granted in part Veterans' motion for a preliminary injunction, ordering VA to "restore Veterans to the VIP database of approved SDVOSB entities." *Id.* at 624.

The preliminary injunction explicitly "allowed [Veterans] to compete for the relocation solicitation," *id.*, because the government had not proceeded with the solicitation process, instead "extend[ing] the proposal deadline," *Veterans Contracting*, 133 Fed. Cl. at 618, before suspending it pending the resolution of Veterans' motion for a preliminary injunction, *see* Hr'g Tr.

7:12-24 (Nov. 21, 2017).[9] After being restored to the VetBiz VIP database, Veterans submitted a bid for the relocation solicitation; no award has as yet been made. Hr'g Tr. 28:5-17. Contrastingly, the court did not explicitly address the effects of the preliminary injunction on the roofing solicitation because, although Veterans had timely submitted its bid, "the government [indicated] that the contracting officer ha[d] started the process of cancelling the solicitation and plan[ned] to reissue it." *See Veterans Contracting*, 133 Fed. Cl. at 618 (internal quotation marks omitted).

VA received four bids for the roofing solicitation but only two were responsive, *i.e.*, they met "the terms and conditions set forth in the solicitation," and only responsive bids may be considered for the contract award. *See* AR 96-924. Veterans was one of the bids that was "deemed unresponsive" and was "removed from consideration due to a lack of [V]et[B]iz certification" as of the application deadline, July 28, 2017. *See id.* The two responsive bidders' proposals were [***] and [***] for a project with an independent "[g]overnment estimate [("IGE")] of $3.6 million." *Id.* The two unresponsive bidders, Veterans and [***] had offered to do the work for [***] and [***] respectively. AR 88-901; 86-887. Because the responsive bids were more than "[***] higher than the IGE," the contracting officer determined that the bids were "not fair and reasonable" and sought "to cancel the solicitation." AR 94-922. The VA ultimately cancelled the roofing solicitation on August 22, 2017, "due to [the] bids being much higher than [the] government could deem reasonable."

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[9] The date will be omitted from later citations to the transcript of the hearing on the merits conducted on November 21, 2017.

AR 99-930. VA indicated that it "plan[ned] to issue a new solicitation for the [roofing solicitation]." *Id.*

Veterans sought and was granted leave to supplement its pleadings to protest the cancellation of the roofing solicitation. *See* Order Granting in Part and Den. in Part Mot. to Suppl. Pleadings, ECF No. 34; Order Granting Mot. to Suppl. Pleadings, ECF No. 37; Order Granting Pl.'s Mot. for Leave to File a Second Suppl. Compl., ECF No. 46. It alleges that the cancellation was pretextual because its unresponsive bid was within the solicitation's "scope of construction." *See* Am. Suppl. Compl. for Declaratory and Inj. Relief ("Suppl. Compl.") ¶ 19, ECF No. 44-1. Veterans requests a declaratory judgment that "the VA acted unreasonably … when it cancelled the solicitation … under pretext," and "when it removed [Veterans] from the [V]et[B]iz database without first providing [n]otice and an opportunity to respond." Suppl. Compl. at 11. Veterans seeks "a permanent injunction ordering the VA to reverse its determination to cancel [the roofing] solicitation … or [refrain from making] any further changes to the procurement until this court has fully adjudicated [Veterans'] SDVOSB status" and "to restore [Veterans] to the [V]et[B]iz database[,] retroactively effective no later than July 21, 2017." Suppl. Compl. at 11. Finally, it also seeks an award of "attorneys' fees and expenses; and … such other and further relief as is equitable and just." Suppl. Compl. at 11; *see generally* Pl.'s Mot. for Judgment on the Admin. Record ("Pl.'s Mot."), ECF No. 49. The government opposed Veterans' motion, filing a cross-motion for judgment on the administrative record. *See generally* Def.'s Cross-Mot. for Judgment on the Admin. Record and Resp. to Pl.'s Mot. for Judgment on the Admin. Record ("Def.'s Cross-Mot."), ECF No. 50.

All issues have been fully briefed and argued and are now ready for disposition.

STANDARDS OF REVIEW

Standards in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, govern the court's review of a challenge to an agency's decisions regarding contractual solicitations or awards. *See* 28 U.S.C. § 1491(b)(4) ("In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5."). Under the APA, courts may set aside agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), subject to the traditional balancing test applicable to a grant of equitable relief. *See PGBA, LLC v. United States*, 389 F.3d 1219, 1224-28 (Fed. Cir. 2004). Where an agency decision is so set aside, "the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs." 28 U.S.C. § 1491(b)(2). The question of whether the court would have applied the procurement regulations in a different manner than did the agency is irrelevant to this inquiry. *See Honeywell, Inc. v. United States*, 870 F.2d 644, 648 (Fed. Cir. 1989). The court may not "substitute its judgement for that of the agency." *Miles Constr.*, 108 Fed. Cl. at 798 (citing *Keeton Corrs., Inc. v. United States*, 59 Fed. Cl. 753, 755 (2004) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds as recognized in Califano v. Sanders*, 430 U.S. 99, 105 (1977))). The court may overturn an agency decision only "if '(1) the procurement official's decision lacked a rational basis; or (2) the procurement

procedure involved a violation of regulation or procedure.'" *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009) (quoting *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001)). In short, the court "look[s] to see whether the agency considered the relevant factors and made a rational determination." *Keeton Corrs.*, 59 Fed. Cl. at 755 (*citing Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1057-58 (Fed. Cir. 2000)).

ANALYSIS

A. Removal from and Restoration to the VetBiz VIP Database

Veterans claims that its removal from the VetBiz VIP database was "arbitrary, capricious, [and] contrary to established law" on two grounds. *See* Mem. … in Support of Pl.'s Appl. for TRO, Prelim. Inj., Permanent Inj., and Declaratory Judgment (Pl.'s Mem.) at 15, ECF No. 47. First, "CVE made the decision to remove [Veterans] from the … database without considering 38 C.F.R. § 74.22" in violation of "the APA[and Veteran's] constitutionally protected procedural due process rights." *Id.* Second, Veterans' removal was "unsupported by the facts" because "[t]here is no evidence in the record that CVE even reviewed the SBA's basis for issuing the adverse determination." *Id.* Notably, Veterans is not challenging 38 C.F.R. § 74.22 on constitutional grounds or otherwise. *See* Hr'g Tr. 10:1-2 (adverting that the government asserted that Veterans "is somehow challenging the regulation, [Subsection 74.22; Veterans] is not"); Pl.'s Mot. at 11. It is Veterans' view that Subsection 74.22 "establishes the procedural due process safeguards for removing an SDVOSB from the … database" and that it "makes no exceptions for nega-

tive SBA determinations" despite Subsection 74.2(e). *See* Pl.'s Mot. at 14. As such, argues Veterans, VA's denial of a 30-day notice and an opportunity to "explain[] why the proposed ground(s) [did] not justify cancellation" was a failure to follow its own regulations and thus necessarily was arbitrary and capricious. *See id.*; 38 C.F.R. § 74.22.

The government argues that the CVE did no more than act "in accordance with 38 C.F.R. § 74.2(e), which states that" CVE "will … immediately remove[]" the business adjudicated ineligible by SBA from the database. Def.'s Cross-Mot. at 18. Further, the government asserts, Subsections 74.22 and 74.2(e) "clearly apply to separate actions." *Id.* at 19. Subsection 74.22 only applies when *CVE* believes that "a participant's verified status should be cancelled," whereas Subsection 74.2(e) pertains to ineligibility due to *SBA's* determination. *See id.* at 19-20.

The court concurs with the government that the two regulations at issue do indeed govern separate actions. When the CVE believes that an SDVOSB has become ineligible, it follows the procedures set out in Subsection 74.22, including providing 30-days' notice and the opportunity to make an argument to the agency. In contrast, Subsection 74.2(e) provides the agency with a streamlined process, piggybacking off SBA's proceedings. *See* 38 C.F.R. § 74.2(e). Any argument by Veterans that it was denied due process in the context of regulatory protections is ultimately unconvincing in this case. Veterans was a party to the SBA proceeding and had an opportunity to be heard before the agency. Additionally, Subsection 74.2(e) has been in place since 2010; Veterans had notice that an adverse decision by the SBA could trigger its removal from the VIP database.

Even so, this court disagrees with the government that Subsection 74.2(e) relieves CVE from any obligation to look beyond the fact that SBA has issued an adverse determination before removing an SDVOSB from the VetBiz VIP database. As explained above, the eligibility requirements in the VA and SBA SDVOSB set-aside programs are similar in some respects but are materially divergent in others. The differences are insignificant if and when the SBA protest giving rise to removal from the VIP database treats an area in which the regulations are the same or similar, *e.g.*, size of the business; if SBA determines that an SDVOSB is not small then it would be justifiably disqualified from both programs. But, as in this case, an uncritical application of Subsection 74.2(e) would require an SDVOSB's immediate removal from the VetBiz VIP database if the business fails to meet the SBA's *Wexford* definition of "unconditional" despite meeting the VA's definition of the term as set out at 38 C.F.R. § 74.3(b).

It is unquestionably true that "an agency must abide by its own regulations," *AMS Assocs., Inc. v. United States*, 737 F.3d 1338, 1343 (Fed. Cir. 2013) (citing *Fort Stewart Sch. v. Federal Lab. Rel. Auth.*, 495 U.S. 641, 654 (1990), but it is equally true that it must apply them rationally. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Subsection 74.2(e) does not take account of the differences between these two programs, and it is arbitrary for VA to mechanistically apply Subsection 74.2(e) without examining the basis for SBA's ruling. In this case, VA's removal of Veterans from the database cost Veterans the opportunity to compete for a contract for which it was otherwise eligible. In light of the distinct definitions of "unconditional ownership" in the two programs, CVE must look beyond the fact of a

ruling by SBA, to determine whether it was based on grounds consistent with or contrary to VA's eligibility regulations. VA's letter notifying Mr. Montano of Veterans' removal stated only that the SBA "decision found that Veterans … was not owned and controlled by one or more [s]ervice-[d]isabled [v]eterans." AR. 4-14. There was no consideration of or finding that Veterans was ineligible due to an eligibility requirement consistent with VA's regulations. In sum, there was no "rational connection between the facts found and the choice made," thus rendering CVE's action arbitrary and capricious. *See State Farm*, 463 U.S. at 43 (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962), *superseded by statute on other grounds as recognized in New York Shipping Ass'n v. Federal Mar. Comm'n*, 854 F.2d, 1338 (D.C. Cir. 1988)).

Therefore, the preliminary injunction that restored Veterans to the VetBiz VIP database is hereby reaffirmed and made permanent.

B. The Relocation Solicitation

Both counsel for the government and counsel for Veterans have represented to the court that, with regard to the relocation solicitation, Veterans has not been prejudiced by its wrongful removal from the VetBiz VIP database. *See* Hr'g Tr. 7:12-17, 28:5-17. The VA voluntarily extended the deadlines for proposals responding to the relocation solicitation. Hr'g Tr. 28:6-11. Upon being restored to the database, Veterans submitted a bid and has been able to compete for the relocation solicitation. *Id.* In the absence of any prejudice, the court need not take any further action as to that pre-award procurement.

C. The Roofing Solicitation Cancellation

Veterans challenges the cancellation of the roofing solicitation as arbitrary and capricious, alleging that it was "pretextual" and that the agency lacked a "compelling reason." Pl.'s Mem. at 8-9 (citing *Overstreet Elec. Co., v. United States*, 47 Fed. Cl. 728, 732 (2000) ("[A]n award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation.") (internal quotation marks omitted)); *see also* Suppl. Compl. ¶ 19. Veterans argues that the government's rationale that "none of the responsive offers were reasonably priced" is "unreasonable on its face" because Veterans' bid was reasonable and "CVE illegally removed [Veterans] from the … database." Pl.'s Mem. at 9. As a remedy for this violation, Veterans asks the court to "retroactive[ly] render[Veterans] … eligible to compete for the [roofing] solicitation," effectively awarding Veterans the contract. *See* Pl.'s Mot. at 15 (heading).

The government disagrees, arguing that CVE had a compelling reason: "[T]he bids received were over the budget allocated for the project." Def.'s Cross-Mot. at 13. The government explains that while Veterans' bid was only [***] percent over the IGE, Veterans was not a responsive bidder because it was not in the VIP database "at the time it submitted its bid, which the solicitation required." *Id.* The solicitation states: "All prospective bidders must be … verified/visible/certified in VIP VetBiz … at the time of offer submission and before award of this procurement." AR 80-827. When the contracting officer checked the database on July 28, the application deadline, to verify Veterans' status, it was not there. *See* AR 92-918. The government also contends that even if Veterans is entitled to be re-

stored to the VIP database, there is no basis for a retroactive restoration. Def.'s Cross-Mot. at 22-25. Rather, the government asserts, the typical remedy for such wrongful removals is to "extend [the business'] year-long verified eligibility … to account for the days it was wrongfully excluded from the VIP database." *Id.* at 23 (citing *KWV, Inc. v. United States*, 111 Fed. Cl. 119, 128 (2013)).

The court concurs with the government. The court may overturn an agency decision only "if '(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure.'" *Centech Grp.*, 554 F.3d at 1037 (quoting *Impresa Construzioni*, 238 F.3d at 1332). The contracting officer looked only to the fact that CVE had removed Veterans from the VIP database and could not have known that CVE had acted arbitrarily. He followed the normal procedures for handling the procurement. Because Veterans did not meet the requirements of a solicitation, it was ineligible to compete for the contract. With Veterans disqualified, the remaining responsive bids were sufficiently above the IGE that the officer had discretion to cancel and resubmit the solicitation. He did so. In short, there was a rational connection between the facts as the contracting officer understood them and the choices he made. *See State Farm*, 463 U.S. at 43. By acting rationally and following the proper procurement procedures, he neither acted arbitrarily nor capriciously, and this court cannot overturn his decision.

Veterans argues that *Miles*, 108 Fed. Cl. 792, supports its request for retroactive restoration. Pl.'s Mot. at 15-16. *Miles* does not require that result. Unlike Veterans, Miles Construction was eligible under the requirements of the solicitation when it submitted its

bid. *See Miles*, 108 Fed. Cl. at 795-96. It was only after it had been determined to be the lowest bidder that its status was challenged and it was delisted. *Id.* When the court restored it to the database and ordered the agency to "consider Miles' apparent low bid in response to the [s]olicitation," it was with the understanding that it was "likely that [Miles Construction would] have received the award but for" the intervening agency decision. *Id.* at 798, 806-07. In contrast, at no time between the deadline for bid submission and the cancellation of the roofing solicitation was Veterans eligible to compete for the roofing contract. This court issued a preliminary injunction on August 22, 2017, setting aside the delisting of Veterans and restoring it to the VetBiz VIP database, and that date demarcates Veterans' eligibility to compete for VA SDVOSB set-asides.

That is hardly to say that Veterans was not prejudiced by the CVE's arbitrary application of VA's regulation as to the roofing solicitation or that no remedy is available. While the court does not believe the retroactive injunctive relief sought by the Veterans is proper, the court does award Veterans its reasonable bid preparation and proposal costs for the roofing solicitation.

CONCLUSION

For the reasons stated, Veterans' motion for judgment on the administrative record is GRANTED IN PART and DENIED IN PART, the government's cross-motion for judgement on the administrative record is GRANTED IN PART and DENIED IN PART.[10] This court's preliminary injunction dated Au-

[10] Veterans' motions for a second preliminary injunction, ECF Nos. 31 and 47, have been consolidated with the merits in accord with RCFC 65(a)(2) and thus are moot. The government's

gust 22, 2017, which set aside CVE's decision removing Veterans from the VetBiz VIP database, is hereby made permanent. Veterans' year-long eligibility in the VIP database shall be extended by 34 days to account for the period during which it was wrongfully excluded from competing on VA procurement set-asides. Although Veterans is denied retroactive injunctive relief for the cancellation of the roofing solicitation, it shall recover its reasonable bid preparation and proposal costs regarding that solicitation.

There being no just reason for delay, the clerk shall enter judgment under RCFC 54(b) on Veterans' claims addressed by this opinion and order.

Insofar as bid preparation and proposed costs are concerned, Veterans shall submit a reckoning of its bid preparation and proposal costs on or before January 17, 2018. The government shall respond to Veterans' submission of such costs by January 31, 2018.

It is so **ORDERED**.

s/ Charles F. Lettow
Charles F. Lettow
Judge

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motions to partially dismiss for lack of subject matter jurisdiction, for failure to state a claim, and to strike, filed with its response to Veterans' motions for preliminary injunction, ECF No. 48, are likewise superseded and thus are moot.

APPENDIX D

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 17-1015C
(Filed Under Seal: August 22, 2017)
(Reissued: August 29, 2017)

VETERANS CONTRACTING GROUP, INC.,
Plaintiff,

v.

UNITED STATES,
Defendant.

Pre-award bid protest; motion for a preliminary injunction; protester's qualification as a service-disabled veteran-owned small business; jurisdiction; standing; differences between VA's and SBA's regulations; likelihood of success on the merits; equitable factors

OPINION AND ORDER[1]

LETTOW, Judge.

This pre-award bid protest is before the court on plaintiff's motion for a preliminary injunction and the government's motion to dismiss. Plaintiff, Veterans

[1] Because this opinion and order might have contained confidential or proprietary information within the meaning of Rule 26(c)(1)(G) of the Rules of the United States Court of Federal Claims ("RCFC") and the protective order entered in this case, it was initially filed under seal. The parties were requested to review this decision and provide proposed redactions of any confidential or proprietary information. After the court held a hearing on proposed redactions, no redactions were allowed.

Contracting Group ("Veterans"), previously was verified by the United States Department of Veterans Affairs ("VA") as a service-disabled veteran-owned small business ("SDVOSB"). It has a history of bidding on and securing awards of contracts from the VA that are set aside for competition among firms qualifying as SDVOSBs. It planned to submit offers on two such solicitations announced by VA, but very recently it was disqualified as a SDVOSB as a result of a dispute that arose after Veterans received a contract award in January 2017 that was set aside for SDVOSBs. After another bidder protested the award, an area office of the Small Business Administration ("SBA") determined in July 2017 that Veterans did not qualify as a SDVOSB and was therefore ineligible for the award. Shortly thereafter, the VA informed Veterans that it was being removed from the VA database for qualified SDVOSBs. Veterans then filed this bid protest with respect to the two SDVOSB procurements that have not yet been awarded, alleging that it is a qualified SDVOSB eligible for an award in those procurements and it should not have been removed from the VA database.

In seeking a preliminary injunction, Veterans requests that the court set aside the VA's decision to decertify Veterans as a SDVOSB, order the VA to reinstate Veterans into the SDVOSB database, and bar the VA from acting on the solicitations for awarding the two proposed contracts if and to the extent that Veterans is precluded from participating in the competition for those contracts. The government has opposed that motion and moved to dismiss Veterans' complaint. For the reasons stated, Veterans' motion is granted in part and the government's motion is denied.

FACTS[2]

A. Veterans' Inclusion in the SDVOSB Database

Veterans is a corporation organized under the laws of New York. Compl. ¶ 24. Ronald Montano, a service-disabled veteran, owns 51 percent of the company and Greg Masone owns the remaining 49 percent. Compl. ¶¶ 22, 24. On July 17, 2013, the VA, acting through the Center for Veterans Enterprise (now known as the Center for Verification and Evaluation) ("CVE"), verified Veterans as a qualified SDVOSB on its Vendor Information Pages ("VIP") database. *See* Pl.'s Mem. of Points and Authorities in Support of Pl.'s Appl. for TRO, Prelim. Inj., Permanent Inj. and Declaratory Judgment ("Pl.'s Mem."), Ex. W (Letter from Andrea M. Gardner-Ince, Director, CVE, to Mr. Ronald Montano (July 17, 2013)), ECF No. 12-3. A business must be included on the VA's VIP database to qualify as an eligible SDVOSB for a contract award. *See* 38 U.S.C. § 8127(e), (f); 48 C.F.R. § 804.1102. The VA subsequently performed site visits and reaffirmed Veterans' eligibility in 2014, 2015, and 2016. *See* Pl.'s Mem. at 9, ECF No. 12-2. The VA explained that Veterans satisfied the eligibility requirements in 38 C.F.R. Part 74, *see*, *e.g.*, Pl.'s Mem., Ex. EE (Letter from CVE (Aug. 26, 2016)), which are distinct from the SDVOSB-eligibility requirements set forth in the SBA regulations, as discussed *infra*.

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

B. SBA's Decision Regarding Veterans' SDVOSB-Eligibility

On January 5, 2017, Veterans learned that it was the lowest-priced bidder on an Invitation for Bids, solicitation number W912DS-16-B-0017, issued by the United States Army Corps of Engineers "for the removal of hazardous materials and demolition of buildings at the St. Albans Community Living Center in Jamaica, New York." Compl. ¶¶ 7, 10. The award was set aside for SDVOSBs, and Veterans certified itself as such in making its bid. Compl. ¶¶ 8-9. On January 11, 2017, Williams Building Company ("Williams"), another bidder that was second in line for the award, filed a protest with the contracting officer. *See* AR 16-126 to -127.[3] Williams asserted that Veterans was ineligible because it did not meet the size requirements for the procurement or qualify as a SDVOSB. *Id.* The contracting officer referred the protest to SBA, *see* AR Tabs 14-15, which was an option under the SBA's and VA's regulations, *see* 13 C.F.R. §§ 125.2, 125.14(b); 38 C.F.R. § 74.2(e).

Veterans thereafter provided additional information to SBA, including its shareholder agreement. AR Tabs 41-42; *see also* AR Tabs 43-60. An SBA area office determined that Veterans was eligible for the award in February 2017. AR Tab 13. Williams appealed that decision to the Office of Hearings and Appeals ("OHA"), AR Tab 11, and submitted supplemental briefing regarding Veterans' status as a SDVOSB, specifically focusing on the company's share-

[3] Citations to the administrative record refer to the record as filed on August 9, 2017 and corrected on August 16, 2017. The record is divided into tabs and paginated sequentially. In citing to the record, the court will first designate the tab, followed by the page number. For example, AR 16-126 refers to tab 16, page 126 of the administrative record.

holder agreement, AR Tab 10. Before OHA addressed that appeal, however, SBA requested a remand in March 2017 to "reconsider the issues raised on [a]ppeal." AR 9-76 to -78. OHA granted that request. AR 8-73.

On July 18, 2017, the SBA area office determined that Veterans did not satisfy the SDVOSB eligibility requirements for the procurement and therefore sustained Williams' protest. AR 2-3. The SBA office explained that Mr. Montano, a service-disabled veteran, did not "unconditionally" own at least 51% of Veterans, as required by 13 C.F.R. § 125.12. AR 2-7 to -8. SBA specifically examined Veterans' shareholder agreement and found that "upon shareholder death, incompetency, or insolvency, all of his or her shares must be purchased by the corporation at the Certificate of Value price." AR 2-7; *see also* AR 48-450. According to SBA, that language restricted Mr. Montano's and his heirs' ability "to convey or transfer their [Veterans'] stock," thus placing "impermissible conditions" on Mr. Montano's ownership interest. AR 2-7 (relying upon *International Logistics Grp., LLC*, SBA No. VET-162, 2009 WL 5942359 (Oct. 1, 2009); *Wexford Group Int'l, Inc.*, SBA No. SDV-105, 2006 WL 4726737 (June 29, 2006)). Additionally, SBA found that Veterans' shareholder agreement prevented Mr. Montano from controlling the corporation, as required by 13 C.F.R. § 125.13. *See* AR 2-8 to -10. Veterans has stated that it appealed SBA's decision on August 1, 2017. Pl.'s Mem. at 8 n.2.[4]

[4] On July 25, 2017, before filing its OHA appeal, Veterans submitted an amended and restated shareholder agreement to SBA and requested reinstatement as a SDVOSB. Pl.'s Mem., Ex. S (E-mail from Ron Montano to Amy Kim, SBA (July 25, 2017)). SBA informed Veterans that it could either request a re-examination and forgo the OHA appeal, or file an OHA appeal and

C. The VA's Removal of Veterans from the VIP Database

On July 21, 2017, the VA informed Veterans that it was "being removed from the VA [VIP] database in accordance with 38 C.F.R. § 74.2(e) based on [the SBA area office determination that Veterans did not qualify as a SDVOSB]." AR 4-14; see also AR Tab 1. Under 38 C.F.R. § 74.2(e), "[a]ny firm registered in the VetBiz VIP database that is found to be ineligible due to an SBA protest decision or other negative finding will be immediately removed from the VetBiz VIP database." Further, "[u]ntil such time as CVE receives official notification that the firm has proven that it has successfully overcome the grounds for the determination or that the SBA decision is overturned on appeal, the firm will not be eligible to participate in the [SDVOSB] program." *Id.*

D. Veterans' Current Bid Protest

Veterans filed this bid protest on July 28, 2017, challenging the VA's decision to remove it from the VIP database and the underlying determination by SBA that it is ineligible to compete as a SDVOSB. Compl. ¶ 1. Veterans alleges that the government's actions have precluded it from competing for two upcoming "VA SDVOSB set-aside procurements." Compl. ¶¶ 1-2. The first solicitation, number VA242-17-B-0723, is a roof replacement contract at the Northport VA Medical Center in Northport, New York ("roofing solicitation"). *See* Compl., Ex. 1; Def.'s Resp. to Pl.'s Mot. for a Prelim. Inj. and TRO and Def.'s Mot. to Dismiss ("Def.'s Resp.") at 6, ECF No. 17. Veterans submitted its bid on the roofing solicitation before the deadline of July 28, 2017, *see* Pl.'s

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request a re-examination after OHA's decision. Pl.'s Mem., Ex. T (E-mail from Amy Kim, SBA to Joseph Whitcomb (July 28, 2017)). Veterans chose to file the OHA appeal.

Mem. at 2, but the government now represents that "the contracting officer has started the process of cancelling" the solicitation and plans to reissue it, Def.'s Resp. at 11 n.4.[5] The second solicitation, number VA242-17-B-0713, is a relocation contract regarding the "SPS Castle Point Campus VA Hudson Valley Healthcare System" in Castle Point, New York ("relocation solicitation"). *See* Compl., Ex. 2; Def.'s Resp. at 6. The government has extended the proposal deadline for the relocation solicitation from August 2, 2017 to August 23, 2017 at 1:30 p.m. *See* Def.'s Notice of Revised Solicitation Deadline, ECF No. 7.

On August 5, 2017, Veterans moved for a preliminary injunction. *See generally* Pl.'s Mot. for Prelim. Inj. ("Pl.'s Mot."), ECF No. 12.[6] It specifically requests that the court set aside CVE's decision to decertify Veterans as a SDVOSB, order the VA to reinstate Veterans into the VIP database, and enable Veterans to compete for the SDVOSB set-aside roofing and relocation solicitations. *See id.* On August 11, 2017, the government opposed that motion and moved to dismiss the complaint. *See generally* Def.'s Resp. Veterans' motion for a preliminary injunction and the government's motion to dismiss were addressed at a hearing held on August 16, 2017.

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[5] On August 22, 2017, the government filed a notice advising that "DVA intends to cancel the solicitation in its entirety today due to the bids received being over the budget allocated for the project, and a new solicitation will be posted." Def.'s Notice of Solicitation Cancellation, ECF No. 21.

[6] Veterans also concurrently submitted an application for a temporary restraining order, *see* Pl.'s Appl. for TRO, ECF No. 12-1, but that application is superseded by the motion for a preliminary injunction.

JURISDICTION

A. Subject-Matter Jurisdiction

The Tucker Act, as amended, provides this court with jurisdiction to "render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1), added by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874; *see also Systems Application & Techs., Inc. v. United States*, 691 F.3d 1374, 1380-81 (Fed. Cir. 2012). The court accordingly has jurisdiction over three types of bid protests: (1) a pre-award protest, (2) a post-award protest, and (3) "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1); *see also OTI Am., Inc. v. United States*, 68 Fed. Cl. 108, 113 (2005) (describing and ruling on the parameters of 28 U.S.C. § 1491(b)).

Veterans challenges the VA's decision to remove it from the VIP database, as well as the underlying SBA ineligibility determination that led to the VA's decision, on the grounds that those decisions were arbitrary, capricious, and contrary to law. *See* Compl. ¶¶ 1-2; Pl.'s Mem. At 13-14. Because Veterans has been declared to be ineligible to compete for the SDVOSB solicitations at issue in this case, Compl. ¶¶ 1-2, Veterans' allegations fall within this court's jurisdiction under the third prong of Paragraph 1491(b)(1), *see, e.g., RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999) (explaining that Subsection 1491(b) of the Tucker Act "does not require an objection to the

actual contract procurement. ... As long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction"); *KWV, Inc. v. United States*, 108 Fed. Cl. 448, 453 (2013) (finding jurisdiction where a bid protester alleged that the "VA contravened its regulations governing [veteran-owned small business] eligibility through an unreasonable and inconsistent application of 48 C.F.R. § 819.307 ... and 38 C.F.R. Part 74") (citing cases).

B. Standing

To have standing in a bid protest, the party bringing suit must be an "interested party." *See* 28 U.S.C. § 1491(b)(1); *Systems Application & Techs.*, 691 F.3d at 1382. A protester is an interested party if it can show that "(1) it was an actual or prospective bidder or offeror, and (2) it had a direct economic interest in the procurement or proposed procurement." *Distributed Sols., Inc. v. United States*, 539 F.3d 1340, 1344 (Fed. Cir. 2008) (citing *Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1307 (Fed. Cir. 2006)). In a pre-award protest, the protester must establish that it has a direct economic interest by demonstrating "a non-trivial competitive injury which can be addressed by judicial relief." *Systems Application & Techs.*, 691 F.3d at 1382 (quoting *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1362 (Fed. Cir. 2009)).

Regarding the first prong, Veterans has submitted a bid on the roofing solicitation and is preparing a bid for the relocation solicitation. *See* Pl.'s Mem. at 2; Compl. ¶¶ 1-2.[7] Thus, Veterans' protest is in a pre-

[7] Although the deadline for bids on the roofing solicitation has passed, the government has not yet made an award for that contract, and it now states it is in the process of cancelling and reis-

award posture regarding both of the solicitations and it has satisfied the first prong as a prospective bidder.

Regarding the second prong, the government argues that Veterans has failed to show a direct economic interest because it is not a qualified SDVOSB. Def.'s Resp. at 9-14. According to the government, Veterans cannot claim any direct economic interest because it was de-listed from the VIP database and is thus ineligible for the SDVOSB procurements at issue in this case. *See id.* As this court previously explained, however, the government's "logic is circular and would preclude any qualified concern from ever seeking a judicial remedy in response to an adverse decision by [the VA]." *Miles Constr., LLC v. United States*, 108 Fed. Cl. 792, 798 (2013) (finding standing where a bid protester challenged the VA's determination that the protester did not qualify as a SDVOSB). The VA's alleged error itself has prevented Veterans from competing for the solicitations. Thus, "[t]his is not a pre-award case where the alleged violation is immaterial." *Weeks Marine*, 575 F.3d at 1362 (finding standing where the protester had a "definite economic stake in the solicitation being carried out in accordance with applicable laws and regulations") (citing *CACI Field Servs., Inc. v. United States*, 854 F.2d 464, 466 (Fed. Cir. 1988)). Rather, the VA's alleged error has deprived Veterans of its "opportunity to compete" for the roofing and relocation solicitations, and such deprivation presents "sufficient economic harm to demonstrate prejudice for purposes of standing." *Magnum Opus Techs., Inc. v. United States*, 94 Fed. Cl. 512, 533 (2010) (citing *Distributed*

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suing the solicitation. Def.'s Resp. at 11 n.4; Def.'s Notice of Solicitation Cancellation.

Sols., 539 F.3d at 1345; *LABAT-Anderson, Inc. v. United States*, 65 Fed. Cl. 570, 575-76 (2005)).[8]

Additionally, the government asserts that the court lacks jurisdiction over SBA's ineligibility decision because Veterans appealed that decision to OHA and the appeal remains pending. Def.'s Resp. at 7-9. The government primarily relies on *Palladian Partners, Inc. v. United States*, 783 F.3d 1243 (Fed. Cir. 2015), where a protester filed a pre-award bid protest after a decision by an SBA area office affected the solicitation at issue, but did so while an OHA appeal of that decision filed by another interested party was still pending. *Id.* at 1250, 1261. The Federal Circuit held that dismissal was required because appellant failed "to participate in the pending OHA appeal" and therefore did not exhaust its administrative remedies. *See id.* at 1254-61. The government's reliance on *Palladian* is misplaced. Unlike in *Palladian*, where the protester did not participate in the appeal of a determination by an SBA area office pursued by a different interested party, *id.* at 1246, Veterans has challenged the VA's decision to remove it

[8] For its position on standing, the government relies on *CS-360, LLC v. United States*, 94 Fed. Cl. 488 (2010), where a protester submitted a bid for a SDVOSB set-aside procurement but was rejected by the contracting officer because it was not listed in the VA's VIP database. *Id.* at 493. The protester filed its bid protest to enjoin the VA from awarding the contract or proceeding with contract performance, but the court concluded that the protester lacked standing, reasoning that the protester did not have a substantial chance of receiving the contract award because it was not a qualified SDVOSB. *Id.* at 493-94, 500. Here, in contrast, Veterans has challenged the VA's decision to remove it from the VIP database on the ground that such actions have effectively prevented it from competing for awards under the solicitations directly at issue as well as other such solicitations. *See, e.g.*, Compl. ¶¶ 1-2. These allegations sufficiently present a non-trivial injury that can be addressed through judicial relief.

from the VIP database, *see*, *e.g.*, Pl.'s Mem. at 9-10. And, Veterans' protest is not based upon its January 2017 contract award that was considered by SBA and is currently on appeal to OHA, but rather is based upon the final action of the VA and the two pre-award solicitations that are unrelated to the contract award currently pending before OHA. This court has jurisdiction over Veterans' allegations under the Tucker Act, as discussed *supra*. Further, because the VA relied upon the July decision by an SBA area office in removing Veterans from the database, *see* AR 4-14, the reasoning underlying SBA's ineligibility determination is embedded within the VA's decision and therefore falls within the court's jurisdiction as well.

In sum, the court has jurisdiction over Veterans' bid protest.

ANALYSIS

A. Statutory and Regulatory Framework

To increase procurement opportunities for "small business concerns owned and controlled by veterans with service-connected disabilities," Congress authorized the VA to set aside certain contracts for SDVOSBs through the Veterans Benefits, Health Care, and Information Technology Act of 2006 ("Veterans Benefits Act"), Pub. L. No. 109-461, Title V, 120 Stat. 3403, 3425 (codified at 38 U.S.C. §§ 8127-28). *See* 38 U.S.C. § 8127(a), (e). To qualify as an eligible SDVOSB, the business must be verified by CVE and included on the VA's VIP database. *See* 38 U.S.C. § 8127(e), (f); 48 C.F.R. § 804.1102.

Under 38 C.F.R. § 74.3, "[a]n applicant or participant must be at least 51 percent unconditionally and directly owned by one or more ... service-disabled vet-

erans" to receive a SDVOSB certification from the VA. With respect to unconditional ownership, Section 74.3 further states:

> Ownership must not be subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

38 C.F.R. § 74.3(b).

Correlatively, SBA also has regulations that address qualifications for SDVOSBs, albeit in different terms. Under 13 C.F.R. § 125.12, a SDVOSB "must be at least 51% unconditionally and directly owned by one or more service-disabled veterans. Section 125.12 of the SBA's regulations itself does not elaborate on the definition of "unconditional." *See Miles Constr.*, 108 Fed. Cl. at 802 (explaining that the VA's regulation at 38 C.F.R. § 74.3 includes "an extended definition of unconditional ownership" as compared to the SBA's regulation at 13 C.F.R. § 125.9, subsequently renumbered to 13 C.F.R. § 125.12, which does not). Even so, a related SBA regulation, 13 C.F.R. § 124.105, provides a reasonably detailed definition of unconditional ownership with respect to certain "socially and economically disadvantaged individuals." Under that regulation, "[a]n applicant or [p]articipant must be at least 51 percent uncon-

ditionally and directly owned by one or more socially and economically disadvantaged individuals" to qualify for a particular business development program. *See* 13 C.F.R. § 124.105. That regulation contemplates that "unconditional" refers to the effect of current executory arrangements, not everything that might happen in the future. For example, with respect to "[s]tock options' effect on ownership," the regulation explains that "[i]n determining unconditional ownership, SBA will disregard any unexercised stock options or similar agreements held by disadvantaged individuals." 13 C.F.R. § 124.105(e).

If SBA determines that a VA-certified SDVOSB does not satisfy SBA's eligibility requirements, 38 C.F.R. § 74.2(e) requires the VA to remove the entity from the VIP database.

B. Standards for Preliminary Injunction

In a bid protest, the court may award any relief that it considers proper, including injunctive relief. 28 U.S.C. § 1491(b)(2). When determining whether to grant a preliminary injunction, the court must consider: (1) whether the movant is likely to succeed on the merits; (2) whether the movant will suffer from irreparable harm if an injunction is not granted; (3) whether the balance of hardships to the parties tips in the movant's favor; and (4) whether the public interest favors injunctive relief. *Sciele Pharma Inc. v. Lupin Ltd.*, 684 F.3d 1253, 1259 (Fed. Cir. 2012) (citing *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001)); *see also FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993). "Although the factors are not applied mechanically, a movant must establish the existence of both of the first two factors to be entitled to a preliminary injunction." *Altana Pharma AG v. Teva Pharm. USA,*

Inc., 566 F.3d 999, 1005 (Fed. Cir. 2009) (citing *Amazon.com*, 239 F.3d at 1350). With that caveat regarding a preliminary injunction, "[n]o one factor, taken individually, is necessarily dispositive. ... [T]he weakness of the showing regarding one factor may be overborne by the strength of the others." *FMC Corp.*, 3 F.3d at 427. A preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis omitted) (citation omitted).

1. Likelihood of success on the merits.

To qualify for a preliminary injunction, Veterans must show that it is "more likely than not" to succeed on the merits of its claim. *See Revision Military, Inc. v. Balboa Mfg. Co.*, 700 F.3d 524, 525-26 (Fed. Cir. 2012) (explaining that the standard in the context of a preliminary injunction is "more likely than not," rather than "clear or substantial likelihood," for matters unique to the Federal Circuit). On the merits, Veterans will need to show that the government's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *See also* 28 U.S.C. § 1491(b)(4) ("In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in [S]ection 706 of [T]itle 5.").[9]

Here, Veterans argues that SBA improperly relied on "erroneous" facts and law when it found that Mr.

[9] Ultimately, Veterans must also demonstrate that it was prejudiced by the government's arbitrary or unlawful conduct. *See Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1353 (Fed. Cir. 2004). Such prejudice is discussed *infra* in the context of irreparable harm.

Montano did not unconditionally own 51 percent of Veterans. Pl.'s Mem. at 14. Veterans challenges both the VA's decision to remove it from the VIP database and the underlying ineligibility findings of the SBA area office, arguing that such decisions were arbitrary, capricious, and contrary to law. *Id.* at 13-14. The government, in contrast, focuses solely on the VA's decision, contending that CVE properly followed 38 C.F.R. § 74.2(e) when it removed Veterans from the VIP database after the SBA area office's ineligibility determination in July 2017. Def.'s Resp. at 19-20 . The government's argument is misguided. Although CVE applied 38 C.F.R. § 74.2(e) in decertifying Veterans, the VA's decision was based upon conclusions reached by the SBA area office. *See* AR 4-14. Thus, as the court explained *supra*, the rationale underlying SBA's ineligibility determination is embedded within the VA's decision. The court accordingly must look not only at the VA's removal of Veterans from the VIP database, but also at the SBA findings underlying that removal.

In concluding that Mr. Montano did not unconditionally own at least 51 percent of Veterans pursuant to 13 C.F.R. § 125.12, the SBA area office examined Articles 9.01 to 9.03 of Veterans' shareholder agreement. AR 2-7; *see also* AR 48-450. Those Articles provide that if a shareholder dies, is found to be incompetent, or becomes insolvent, that shareholder "shall be deemed to have offered all the [s]hares of the [c]orporation owned by such [s]hareholder at the time of occurrence of any of the events specified above to the [c]orporation and the [c]orporation shall purchase such [s]hares at the Certificate Value and upon the terms and conditions hereinafter set forth." AR 48-450. Relying upon a dictionary definition of "unconditional" that formed the basis for two previous SBA decisions, *International*

Logistics Grp., 2009 WL 5942359, and *Wexford*, 2006 WL 4726737, the SBA area office stated that Articles 9.01 to 9.03 placed "impermissible conditions" on Mr. Montano's ownership interest in Veterans, AR 2-7.

In essence, the shareholder agreement provision cited by SBA is a clause that provides the company with the first opportunity to purchase the shareholder's shares when death, incompetency, or insolvency arises. This court previously examined a clause calling for an optional buy-out in the event of an involuntary withdrawal in the context of 38 C.F.R. § 74.3. In *AmBuild Co., LLC v. United States*, 119 Fed. Cl. 10 (2014), the court held that particular clauses within a company's operating agreement, including a clause calling for involuntary withdrawal in the event of bankruptcy and another providing for transfer of ownership by operation of law, did not affect the unconditional nature of ownership under 38 C.F.R. § 74.3. *Id.* at 23-26 (concluding that [the VA's Office of Small and Disadvantaged Business Utilization's ("OSDBU")] decision to decertify AmBuild and remove it from the VetBiz VIP Database was arbitrary and capricious and not in accord with VA's regulations"). Correlatively, in Miles Construction, the court addressed a clause providing a right of first refusal on the part of a minority shareholder that would arise when a service-disabled veteran owner had a *bona fide* offer to sell shares. *Miles Constr.*, 108 Fed. Cl. at 803. The court noted that the right was not presently executory and was a customary business provision that did not fall afoul of 38 C.F.R. § 74.3:

> In sum, the right of first refusal provision in Article XI is not presently executory, is a standard provision used in normal commercial dealings, and does not burden the veteran's ownership interest unless he or she chooses to

> sell some of his or her stake. As a result, Article XI, Paragraph 11.01 does not affect the veteran's unconditional ownership with regard to C.F.R. § 74.3(b). The decision by OSDBU to the contrary, i.e., that Articles X, XI, and XII of the operating agreement rendered Miles ineligible for the VIP database, was arbitrary and capricious and contrary to law.

Id. at 803.

Although SBA's decision here was based upon its regulation, 13 C.F.R. § 125.12, not those of VA, the rationale underlying the *Miles Construction* and *AmBuild* decisions applies to this case as well. Significantly, the court in *Miles Construction* specifically considered *International Logistics Grp.* and *Wexford*, the two SBA decisions relied upon by SBA in this case, and disapproved them in context. *See Miles Constr.*, 108 Fed. Cl. at 801-02. The court rejected the government's reliance on those decisions and instead determined that the right-of-first refusal clause was not executory at that time, thus concluding that the clause did not affect unconditional ownership. *See id.* at 801-03; *see also AmBuild Co.*, 119 Fed. Cl. at 25 (relying on *Miles Constr.*, 108 Fed. Cl. at 803)). SBA did not address or discuss such findings in reaching its decision with respect to Veterans' eligibility. *See generally* AR Tab 2.

Additionally, the definition of "unconditional" set forth in *Wexford*, 2006 WL 4726737, at *6, and adopted by the SBA area office in its decision addressing Veterans' eligibility, see AR 2-7, is based upon a dictionary definition of "unconditional," *see Wexford*, 2006 WL 4726737, at *6; *see also International Logistics Grp.*, 2009 WL 5942359, at *4-5 (quoting *Wexford*, 2006 WL 4726737, at *6). Resort to a dictionary definition of

"unconditional" is both unnecessary and inappropriate. SBA regulations expressly define unconditional ownership in the context of "socially and economically disadvantaged individuals." 13 C.F.R. § 124.105. Such regulatory guidance relates to eligibility for a business development program, and it provides insight into the scope of unconditional ownership for SDVOSB-eligibility. Notably, 13 C.F.R. § 124.105(e) states that "SBA will disregard any unexercised stock options or similar agreements held by disadvantaged individuals" in determining whether an applicant unconditionally owns the company at issue. This provision, which was not addressed by the SBA area office, directly bears on Veterans' shareholder agreement and its status as a SDVOSB.

In sum, based upon the foregoing analysis, the SBA area office's findings underlying the VA's decision to remove Veterans from the VIP database fail to provide "a coherent and reasonable explanation" for SBA's exercise of discretion, *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1333 (Fed. Cir. 2001) (citation omitted), or articulate a "rational connection between the facts found and the choice made," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). The court therefore finds that Veterans is more likely than not to succeed in proving that the government's actions were arbitrary and capricious or not in accordance with law.

2. Irreparable harm.

Veterans asserts that if it is not granted injunctive relief, it will suffer irreparable harm because it will be deprived of the opportunity to compete for SDVOSB

procurements. *See* Pl.'s Mem. at 14-15. Upon removal of Veterans from the VIP database, it will be unable to compete for the roofing and relocation solicitations at issue in this case, as well as any future SDVOSB solicitations respecting which it would otherwise be an eligible competitor. *Id.* Further, as a small business, Veterans represents that its inability to obtain work as a SDVOSB could threaten its viability. *See id.* at 15.

The "[d]enial of the opportunity to compete for a contract can constitute irreparable harm." *Miles Constr.*, 108 Fed. Cl. at 806 (citing *Electronic On-Ramp, Inc. v. United States*, 104 Fed. Cl. 151, 169 (2012); *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 530 (2011), *aff'd*, 473 Fed. Appx. 902 (Fed. Cir. 2012)); *see also United Int'l Investigative Servs., Inc. v. United States*, 41 Fed. Cl. 312, 323 (1998) ("[T]he opportunity to compete for a contract and secure any resulting profits has been recognized to constitute significant harm.") (citing cases). Providing the injunctive relief contemplated here, *i.e.*, setting aside the CVE's removal of Veterans from the VIP database and reinstating Veterans as a qualified SDVOSB, would circumvent the potential harm to Veterans by allowing it to compete for the SDVOSB setaside procurements at issue. Thus, the court finds that Veterans will suffer irreparable harm if injunctive relief is not provided.

3. Balance of hardships.

The government argues that it will be harmed if the relocation solicitation is indefinitely stayed. Def.'s Resp. at 21-22. Reinstating Veterans into the VIP database, however, would render Veterans eligible for the relocation solicitation without further delay of that contract. Given Veterans' likelihood of success on the merits of its claim and the irreparable harm it will suffer if

injunctive relief is not provided, the court finds that the balance of hardships weighs in favor of granting Veterans' preliminary injunction and temporarily reinstating Veterans into the VIP database as a qualified SDVOSB.

4. Public interest.

Finally, the government contends that the public interest does not weigh in favor of injunctive relief because the upcoming SDVOSB solicitations at issue here have "operate[d] within the bounds of the law." Def.'s Resp. at 22 (citation omitted). Such an argument is misplaced. If the government has wrongfully prevented Veterans from competing for a contract award that it should be eligible to receive, as Veterans claims, the integrity of that procurement is compromised. "The public has a strong interest in preserving the integrity of the procurement process." *KWV*, 108 Fed. Cl. at 458 (citing *Bona Fide Conglomerate, Inc. v. United States*, 96 Fed. Cl. 233, 242-43 (2010); *SAI Indus. Corp. v. United States*, 60 Fed. Cl. 731, 747 (2004)); *see also PGBA, LLC v. United States*, 60 Fed. Cl. 196, 221 (2004), *aff'd*, 389 F.3d 1219 (Fed. Cir. 2004). Thus, the court finds that the public interest will be served by ensuring that Veterans has the opportunity to fairly compete for the SDVOSB procurements.

CONCLUSION

For the reasons stated, Veterans' motion for a preliminary injunction is GRANTED IN PART and the government's motion to dismiss is DENIED.[10] CVE's decision dated July 21, 2017, rendering Veterans ineli-

[10] Veterans' application for a temporary restraining order is superseded and thus DENIED as moot.

gible for contracts awarded to SDVOSBs, is set aside. The VA shall restore Veterans to the VIP database of approved SDVOSB entities. Accordingly, Veterans shall be allowed to compete for the relocation solicitation.[11] The court's grant of preliminary relief will remain in effect until the court resolves Veterans' claim for permanent relief. Because this preliminary relief is structured to ameliorate harm that might arise from delays in the VA's procurement activities, Veterans is required to provide security. Pursuant to RCFC 65(e), Veterans shall give security in the amount of $150,000 to pay costs and damages sustained by the VA if it is found to have been wrongfully enjoined. Veterans shall provide such security on or before August 25, 2017.[12]

The parties are requested to file a joint status report on or before August 31, 2017, addressing proposals for further proceedings in this case.

It is so **ORDERED**.

s/ Charles F. Lettow
Charles F. Lettow
Judge

[11] Because the government has stated that the roofing solicitation is in the process of being cancelled and reissued, Def.'s Resp. at 11 n.4; Def.'s Notice of Solicitation Cancellation, Veterans' claim with respect to that solicitation is moot and the court need not address it in granting relief.

[12] A generally applicable form of security bond for a preliminary injunction can be found at Form 11 of the court's rules. For terms and provisions of a satisfactory security, plaintiff is encouraged to contact the Clerk of Court.

APPENDIX E

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2018-1409
July 9, 2019

VETERANS CONTRACTING GROUP, INC.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims in No. 1:17-cv-01015-CFL, Judge Charles F. Lettow.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

O R D E R

Appellant Veterans Contracting Group, Inc. filed a combined petition for panel rehearing and rehearing en banc. A response to the petition was invited by the court and filed by Appellee United States. The petition was referred to the panel that heard the appeal, and

thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on July 16, 2019.

FOR THE COURT

July 9, 2019
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court