No. 26-_____

In the Supreme Court of the United States

ANDERS CONSTRUCTION, INC.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

ANDERS CONSTRUCTION, INC.,
Plaintiff-Appellee

v.

UNITED STATES,
Defendant-Appellant

2024-2247

Appeal from the United States Court of Federal Claims in No. 1:23-cv-00759-LAS, Senior Judge Loren A. Smith.

Decided: May 12, 2026

JONATHAN S. FORESTER, Riess LeMieux, LLC, New Or-leans, LA, argued for plaintiff-appellee. Also represented by CHRISTOPHER K. LEMIEUX.

BRENDAN DAVID JORDAN, Commercial Litigation Branch, Civil Division, United States Department of

Jus-tice, Washington, DC, argued for defendant-appellant. Also represented by PATRICIA M. MCCARTHY, DOUGLAS K. MICKLE, YAAKOV ROTH.

Before DYK, CHEN, and STARK, *Circuit Judges*.

DYK, *Circuit Judge*.

The government appeals a judgment of the Court of Federal Claims ("Claims Court") in a pre-award bid protest filed by Anders Construction, Inc. ("Anders"). The Claims Court enjoined the United States Army Corps of Engineers ("Army Corps") from awarding a diving-services contract to anyone but Anders because the Claims Court found that the government arbitrarily determined that Anders's proposal was technically unacceptable. We *reverse* the judgment of the Claims Court, *vacate* the injunction, and *remand* for further proceedings consistent with this opinion.

BACKGROUND

The Army Corps issued a solicitation on July 30, 2021, for diving services related to maintaining waterway infra-structure in Louisiana. The solicitation stated that "[f]or a proposal to result in an awardable contract, the proposal must meet all Performance Work Statement (PWS) requirements, must include all required information re-quested in Section L [Instructions, Conditions, and Notice to Offerors or Respondents], and must conform to all re-quired terms and conditions." App'x 4786.[1] The solicitation further stated that

[1] Citations to "App'x" refer to the Appendix filed by the government in this case. Dkt. No. 21

"[s]ubjective judgment is implicit throughout" the evaluation of the "acceptability standards for non-cost factors." *Id.* Anders and two other companies submitted bids. The Army Corps initially determined that Anders had submitted a technically acceptable bid and that the two other bidders had not. On January 11, 2022, one of the other bidders, Specialty Diving of Louisiana, Inc. ("Specialty"), asked the Army Corps to reconsider

Specialty's proposal, arguing that it met the technical acceptability criteria.

In response, the Army Corps re-evaluated both Anders's and Specialty's proposals. On its second look, the Army Corps again concluded that Specialty's proposal was not technically acceptable. The Army Corps found that, contrary to its earlier decision, Anders's proposal was also not technically acceptable because, among other things, Anders's proposal failed to include three required technical elements: a sample completion report from a previous con-tract documenting the results and findings of a dive, a lost-diver plan, and an adequate outline of administrative and record-keeping procedures, the latter two elements being required components of a "Safe Practices Manual." Additionally, the Army Corps notified Anders that it was concerned that Anders's pricing proposal exceeded independent government estimates. App'x 6784.

On March 3, 2022, Anders filed a protest with the Army Corps, arguing that the agency should have deemed its proposal technically acceptable. On March 21, 2022, the Army Corps contracting officer notified Anders

that the agency determined it would take corrective action by reissuing the solicitation to clarify and remove several solicitation requirements, including some of the technical elements contested by Anders, and allowing all offerors to submit revised proposals. On April 19, 2022, the Army Corps issued Amendment 7, replacing the original solicitation with a revised version that did not require an offeror to submit a Safe Practices Manual until after it had been selected as an awardee.

On May 23, 2023, Anders filed a pre-award bid-protest complaint at the Claims Court, challenging the Army Corps's determination that Anders's original bid was technically unacceptable, seeking a declaration that Amendment 7 was an improper corrective action, and seeking "an order directing the [Army Corps] to award the contract pursuant to the Solicitation prior to the issuance of Amendment #7." App'x 59. Anders also alleged that the Army Corps violated two provisions of the Federal Acquisition Regulations ("FAR") by failing to provide the results of an independent review and by inviting proposals to the Amendment 7 revised solicitation from previously disqualified bidders.

Anders filed a motion for judgment on the administrative record, and the government filed a cross-motion. On May 22, 2024, the Claims Court granted Anders's motion in relevant part and denied the government's cross-motion, finding that Anders had

included a compliant completion report, lost-diver plan, and record-keeping outline, and that the Army Corps's rejection of Anders's proposal for technical insufficiency was arbitrary.[2] On June 17, 2024, the Claims Court permanently enjoined the Army Corps "from proceeding with performance of the contract with any entity other than plaintiff" and from "conducting the corrective actions described in Solicitation Amendment 7." App'x 16.

The government timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION I

We first consider whether the Claims Court erred in deciding that it was arbitrary for the Army Corps to conclude that Anders's proposal was not technically

[2] The Claims Court found that the Army Corps's determinations on five solicitation requirements were arbitrary. In addition to the three technical issues involved in this appeal, the Claims Court also determined that the Army Corps arbitrarily rejected Anders's proposal on the grounds that Anders failed to submit a "sample repetitive dive worksheet" and that Anders did not sufficiently document the qualifications of a diving supervisor. App'x 8–12. The government does not appeal the Claims Court's conclusions as to the dive worksheets or the diving supervisor.

acceptable and that Anders should have been awarded the contract.

The solicitation stated that the Army Corps would "award [a contract] to the lowest priced offer" that it "deemed to be technically acceptable." App'x 4787. We may set aside the agency's determination only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Oak Grove Techs., LLC v. United States*, 116 F.4th 1364, 1374 (Fed. Cir. 2024) (quoting 5 U.S.C. § 706(2)(A)). However, "[e]ffective contracting demands broad discretion." *Lockheed Missiles & Space Co. v. Bentsen*, 4 F.3d 955, 958–59 (Fed. Cir. 1993); *accord DynCorp Int'l, LLC v. United States*, 10 F.4th 1300, 1315 (Fed. Cir. 2021). The solicitation expressly indicated that technical acceptability implicitly requires subjective judgment. A reviewing court may not "second guess" the "discretionary determinations of procurement officials" with respect to technical evaluations. *E.W. Bliss Co. v. United States*, 77 F.3d 445, 449 (Fed. Cir. 1996). A disappointed bidder bears a "heavy burden" of showing that a procuring agency's decision on technical features lacked a rational basis. *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004) (citation omitted). We review the Claims Court's judgment on the administrative record without deference and thus apply the same standard of review as the Claims Court. *Barnick v. United States*, 591 F.3d 1372, 1377 (Fed. Cir. 2010).

We conclude that the Claims Court erred in concluding the Army Corps's technical noncompliance determinations with respect to the lost-diver plan and the administrative and record-keeping outline were arbitrary, so we need not address the Claims Court's determination regarding the sample completion report.

The solicitation required each offeror to submit a copy of its "Safe Practices Manual . . . includ[ing] the requirements stated in Section 30.A.15, items a-k" of the Army Corp's Safety and Health Requirements Manual.[3] App'x 4784. Item d.5 of this section required "specific procedures for: . . . Lost diver plan (SCUBA Operations only)." Addendum 1 (emphasis in original).[4] Anders submitted a "Severance of Complete Umbilical" plan (a plan listing steps to follow if a diver's umbilical tether becomes severed) that it contends is a lost-diver plan, App'x 6859, though it concedes that "Anders

[3] Amendment 7 removes the Safe Practices Manual as a proposal requirement. But neither party suggests that Amendment 7 moots this bid protest concerning Anders's proposal submitted prior to the issuance of Amendment 7.

[4] Citations to the "Addendum" refer to the excerpt of the Army Corps EM 385-1-1 Safety and Health Requirements Manual (Nov. 30, 2014) filed as an addendum to the Appellant's Opening Brief. Dkt. No. 12 at 66–67.

Construction [did] not have a page individually titled 'Lost SCUBA Diver Plan,'" App'x 6859.

The Army Corps Source Selection Evaluation Board ("SSEB") concluded there was no lost-diver plan in Anders's proposal, noting that he "[did]n't see [it] in the proposal." App'x 2150. The contracting officer also determined that Anders had failed to submit a lost-diver plan. App'x 2154 ("Item 'd.5' . . . [was] not identifiable in Anders'[s] Volume 1, Technical Evaluation Documentation, Management Plan proposal.").

On review, the Claims Court determined that Anders's proposal complied with the lost-diver-plan requirement and that Anders was not required to use any particular label where none was required by the solicitation. App'x 10.

The Claims Court erred in its conclusion. "[T]he bur-den is on the offeror to submit a well-written proposal with adequately detailed information that allows for a meaningful review by the procuring agency." *See*

Mission1st Grp., Inc. v. United States, 144 Fed. Cl. 200, 213 (2019) (internal quotation marks omitted) (collecting cases). Anders's proposal did not make any reference to a lost-diver plan. In-deed, it did not even use the key word "lost" in the severed-umbilical plan, which appeared only on page 465 of a proposal having more than 1,000 pages, of which over 800 pages were identified as the Safe Practices Manual. Under these circumstances, the Army Corps cannot be faulted for not treating the severed-umbilical plan as a lost-diver plan.

Anders also did not establish that a severed-umbilical plan was equivalent to a lost-diver plan.

Nor did the Army Corps apply an unstated evaluation criterion. "Where an evaluation is challenged, we will ex-amine the agency's evaluation to ensure that it was reason-able and consistent with the evaluation criteria " *Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004) (internal quotation omitted). It is reasonable and consistent with the explicit lost-diver plan requirement for the Army Corps to expect an offeror to explicitly indicate what portions of its proposal it intended to be responsive to the lost-diver-plan requirement.

We conclude therefore it was not arbitrary and capricious for the Army Corps contracting officer to find that Anders's proposal lacked the required lost-diver plan.

As to the "outline of administrative and record-keeping procedures," the solicitation required each offeror's Safe Practices Manual to include such an outline. App'x 4784; Addendum 2. The solicitation also gave the following specific requirements for record-keeping:

> 14. Record Keeping[:] A record of all dives must be kept. An electronic copy of all dive logs, time logs, Job Hazard Analyses (JHA) or Job Safety Analyses (JSA) forms, a pre-dive safety meeting form, and a post-dive safety meeting form

> must be submitted to the [Contracting Officer's Representative] and the District Dive Coordinator within 24 hours after the completion of each day's dive.

App'x 4766. In this respect, Anders's proposal stated, "Ad-ministrative & Record-keeping Procedures[:] The diving supervisor shall upkeep daily logs, activity logs, dive logs, and other [required] paperwork. All team members must sign in an[d] verify dives and daily logs." App'x 5979.

The SSEB did not record that Anders had submitted a compliant outline but remarked that "[f]orms and documents submitted under other requirements satisfy my confidence that this company has organized administrative and record keeping procedures." App'x 2151. But the contracting officer determined that "Ander[s]'s technical proposal should be more comprehensive for their 'outline of administrative and record-keeping procedures.'" App'x 2154 (citing Addendum 2).

The Claims Court determined that "Anders includ[ed] this [administrative and record-keeping] information in its proposal." App'x 11. The court concluded that the Army Corps failed to "substantiate[]" its rejection of Anders's proposal on this ground and that the Army Corps's requirement for a more "comprehensive" outline was an undisclosed evaluation criterion. App'x 11.

We do not think it was arbitrary to conclude that Anders's skeletal recitation of the record-keeping requirements was an inadequate outline. The only portion of Anders's proposal explicitly discussing record-keeping procedures did little more than repeat the solicitation's requirements to keep dive logs and time logs in addition to unspecified "activity logs" and "other [required] paperwork." Stating that a "diving supervisor" will "upkeep" such documents does not amount to an outline. Nor does requiring the outline to be more comprehensive apply an unstated evaluation criterion. It is reasonable and consistent with the explicit requirement for an "outline of ad-ministrative and record-keeping procedures" to require Anders to propose comprehensive procedures. Addendum 2; *see Galen*, 369 F.3d at 1330. An agency must have the latitude to apply its technical expertise in making "discretionary determinations" without explicitly previewing every possible ground for technical insufficiency. *See E.W. Bliss*, 77 F.3d at 449; *see also Lockheed Missiles*, 4 F.3d at 958–59 ("Effective contracting demands broad discretion.").

Anders argues that the contracting officer should have deferred to the SSEB, which was "the board with the technical expertise." Appellee's Br. 26–27. The contracting officer overruled the SSEB to determine that Anders's proposal failed to submit an adequate record-keeping outline. We see no justification for treating contracting officers, who have the responsibility to determine technical compliance, as lacking sufficient technical expertise to differ with the SSEB.

We conclude that it was not arbitrary and capricious for the Army Corps to determine that Anders's proposal lacked the required outline of administrative and record-keeping procedures and that the Claims Court erred in its contrary determination.

Because we determine that two grounds support the Army Corps's evaluation of Anders's proposal as technically unacceptable, and even one such deficiency would mean the Claims Court erred, we do not reach the third ground relating to the lack of a sample "completion report."

Quite apart from the issue of technical compliance, it was improper for the Claims Court to direct an award to Anders without the Army Corps having determined that Anders's proposed prices were "fair and reasonable" as re-quired by the solicitation. App'x 4789. The Claims Court concluded that the prices were fair and reasonable because the Army Corps had been willing to pay similar prices in previous contracts. In the context of appeals from agency decisions, a "'reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'" *CACI, Inc.-Fed. v. United States*, 67 F.4th 1145, 1154 (Fed. Cir. 2023) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). It was error for the Claims Court to make a price-reasonability determination when the Army Corps had made no such determination.

II

Having concluded that the Army Corps properly determined Anders's proposal to be technically unacceptable, we turn to Anders's two arguments before the Claims Court that the government violated the FAR. First, Anders alleged that the Army Corps failed to provide a substantive and independent review when it denied Anders's agency-level protest, violating FAR § 33.103(d)(4). Second, Anders alleged that the government's issuance of Amendment 7 to the solicitation violated FAR § 15.206(c) by including previously rejected bidders and violated § 15.206(g)(5) by failing to adequately describe the changes implemented by the amendment.

The Claims Court declined to address these arguments in its opinion granting judgment on the administrative record because of its conclusion that Anders's proposal was technically acceptable. App'x 8 n.2. The government argues that we should not reach the merits of these arguments. Reply Br. 3 n.1. Anders urges us to reach the alleged FAR violations or, in the alternative, to direct the Claims Court to address them. Oral argument at 37:34–38:10.

Though we question whether the allegations of FAR violations, even if substantiated, would independently sustain any relief sought by Anders,[5] we decline to

[5] In particular, we do not see how any error in the issuance of Amendment 7 could benefit Anders since its

address the alleged FAR violations in the first instance and remand for the Claims Court's consideration. If the Claims Court determines that neither alleged violation prejudiced Anders in light of our holding that Anders's proposal was not technically acceptable, the Claims Court should grant judgment on the administrative record to the government.

CONCLUSION

We conclude that the Army Corps did not act arbitrarily or capriciously when it evaluated Anders's proposal to be technically unacceptable. We reverse the judgment of the Claims Court, vacate the permanent injunction, and remand for the Claims Court to consider Anders's arguments regarding alleged FAR violations.

REVERSED AND REMANDED

COSTS

Costs to the United States.

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claim was that it should have been awarded the contract under the original solicitation.

In the United States Court of Federal Claims

No. 23-759
Filed: June 17, 2024

ANDERS CONSTRUCTION, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

INJUNCTION ORDER

Consistent with the Court's opinion and the attached reasoning, the United States Army Corps of Engineers, its officers, agents, employees, and representatives are hereby:

1. **PERMANENTLY ENJOINED AND RESTRAINED** from conducting the corrective actions described in Solicitation Amendment 7, *see* Administrative Record 2258–2400, ECF Nos. 19–21 [hereinafter AR], and from implementing Solicitation

Amendments 8, 9, 10, 11, 12, 13 and 14, *see* AR 2410, 3868–69, 4118–69, 4170–71, 4172–88, 4196–97, 4202–04.

2. **PERMANENTLY ENJOINED AND RESTRAINED** from proceeding with performance of the contract with any entity other than plaintiff, absent a lawful reason to do so, as it stood prior to the issuance of Solicitation Amendment 7, pursuant to plaintiff's timely proposal submitted on or before September 8, 2021, *see* AR 241–1353.

3. None of the injunctive relief shall take effect either until seventy days after this order or until any and all appeals have been exhausted, whichever is later.

The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

s/ *Loren A. Smith*
Loren A. Smith,
Senior Judge

Corrected

In the United States Court of Federal Claims

No. 23-759
Filed: June 17, 2024

ANDERS CONSTRUCTION, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

MEMORANDUM OF LAW

On May 6, 2024, the Court issued its opinion in this case, where the Court held, in part, that the United States Army Corps of Engineers ("USACE") abused its discretion when it reversed the technical acceptability evaluation of plaintiff, Anders Construction, Inc.'s, proposal submitted in response to Solicitation No. W912P8-21-R-0042. *See* Sealed Opinion and Order at 8–13, ECF No. 33; *see also* Reported Opinion Reissuing Sealed Opinion and Order, ECF No. 35

[hereinafter Reported Opinion]. Because plaintiff succeeded on the merits and satisfied the other permanent injunctive relief factors, the Court granted plaintiff's injunctive request and asked plaintiff to submit a proposed injunction within ten days of the sealed opinion and gave defendant ten days to respond to the proposed injunction. *See* Reported Opinion at 13, 15.

On May 15, 2024, plaintiff submitted its proposed injunction. *See generally* Motion for Permanent Injunction Order, ECF No. 34. On May 28, 2024, defendant both opposed the injunction order—as it claims the Court's equitable powers cannot direct USACE to award the contract to plaintiff, the only remaining offeror, over other theoretical offerors—and suggested revisions to plaintiff's proposed injunction. *See generally* Response to Motion for Permanent Injunction Order, ECF No. 36 [hereinafter Response]. On June 4, 2024, Plaintiff replied to defendant's opposition in support of its proposed injunction. *See generally* Reply to Defendant's Response to Motion for Permanent Injunction Order, ECF No. 37.

After carefully reviewing both the plaintiff's proposal and the government's suggested revisions, the Court now issues the injunction using its "broad equitable powers to fashion an appropriate remedy" under 28 U.S.C. § 1491 to "resolve this dispute." *See SAGAM Securite Senegal v. United States*, No. 2021-2279, 2023 WL 6632915 (Fed. Cir. Oct. 12, 2023)

(quoting *Turner Constr. Co. v. United States*, 645 F.3d 1377, 1388 (Fed. Cir. 2011)); *Gemveto Jewelry Co. v. Jeff Cooper Inc.*, 800 F.2d 256, 259 (Fed. Cir. 1986) ("injunctive relief should be narrowly tailored to fit the [case's] specific legal violations.").

The Court's broad equitable injunctive authority, although used "sparingly," is not to be enfeebled. *See Yachts Am., Inc. v. United States*, 3 Cl. Ct. 447, 449 (1983). Rather, when an injunction is appropriate, "the Court of Federal Claims has broad equitable powers to fashion an appropriate remedy," *see Turner Constr. Co.*, 645 F.3d at 1388, to choose whether "to set aside an arbitrary, capricious, or otherwise unlawful" contracting decision. *See PGBA, LLC v. United States*, 389 F.3d 1219, 1226 (Fed. Cir. 2004) (finding "the language of 28 U.S.C. § 1491(b)(2). . . provides . . . [this] discretion" to the Court). Even at the pre-award stage, the Court "may award *any relief* that [it] considers proper" within the factual realties of the current case. 28 U.S.C. § 1491(b)(2) (emphasis added); *see also Nat'l Forge Co. v. United States*, 779 F.2d 665, 667 (Fed. Cir. 1985) ("The equitable jurisdiction . . . can be invoked, in the pre-award stage"). This power includes "correct[ing the] contracting officer's irrational and unreasonable decision" to augment the technical acceptability determination by permanently enjoining USACE as well as its officers, agents, employees, and representatives from not "awarding the contract to any [offeror] other than" plaintiff. *See PCI/RCI v. United States*, 36 Fed.

Cl. 761, 766 (1996); *see also Bean Dredging Corp. v. United States*, 19 Cl. Ct. 561, 583 (1990) (same injunction wording). The injunction in this case does just that: The Court directs USACE return to when plaintiff was the only available technically acceptable offeror, thus resulting in only one remaining lawful contract awardee option, *i.e.*, plaintiff, that USACE is directed to award the contract, absent a lawful reason otherwise.

Plaintiff successfully argued for this permanent injunction when the Court was considering the merits. *See generally* Reported Opinion. While defendant opposes this outcome, *see generally* Response, precedent states: "a court may order such an award where 'it is clear that, but for the behavior of the agency, the contract would have been awarded to the party asking the court to order the award.'" *See Seattle Sec. Servs., Inc. v. United States*, 45 Fed. Cl. 560, 572 n.20 (2000) (quoting *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 204 (D.C. Cir. 1984)). Indeed, there are several examples of this Court (and its predecessor) directly awarding contracts to specific plaintiffs in both pre-award and post-award contexts. This injunction is in line with this long precedential history.

In the United States Court of Federal Claims

No. 23-759
(Filed Under Seal: May 5, 2024)
Reissued: May 22, 2024

ANDERS CONSTRUCTION, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

OPINION AND ORDER

This case is before the Court on the parties' Cross-Motions for Judgment on the Administrative Record and on defendant the United States of America's Partial Motion to Dismiss. Plaintiff Anders Construction, Inc. ("Anders") challenges the United States Army Corps of Engineers' ("USACE") Solicitation No. W912P8-21-R-0042 (the "Solicitation"), which *seeks professional diving services in Louisiana. See generally Complaint, ECF No. 1* [hereinafter Compl.*]; see Administrative Record 7, ECF Nos. 19–21 [hereinafter*

AR]. Specifically, plaintiff challenges the pre-award "corrective action" by USACE, issued in Solicitation Amendment 7 ("Amendment 7"), that required all offerors, regardless of previous agency determinations, to resubmit their respective proposals for reevaluation based on amended *metrics. See generally* Compl.*; see also ge*nerally Plaintiff's Motion for Judgment on the Administrative Record at 1, ECF No. 22 [hereinafter Pl.'s MJAR].

To Anders, this case is a product of administrative bait-and-switch. Its original proposal was deemed technically compliant; but after it was required to resubmit its proposal under Amendment 7, USACE reevaluation reversed this determination, finding the resubmitted *proposal as technically noncompliant. See Pl.'s* MJAR at 2–4. This reversal, according to Anders, resulted in three categories of Federal Acquition Regulation ("FAR") violations; each category lacking a rational basis for their respective regulatory de*parture. See id.; Plaintiff's* Response to Defendant's Partial Motion to Dismiss and Cross-Motion for Judgment on the Administrative Record and Reply in Support of Plaintiff's Motion for Judgment on the Administrative Record at 6, ECF No. 26 [hereinafter Pl.'s Reply].'

First, Anders argues that USACE's reversal of Anders' proposal evaluation from technically acceptable to unacceptable lacks a rational basis because:

1) Anders' proposal complied with the Solicitation's "Record Keeping" requirements;

2) Anders' proposal complied with the Solicitation's "lost divers plan" requirements;

3) Anders' proposal complied with the Solicitation's "sample repetitive dive worksheet" requirements;

4) Anders' proposal complied with the Solicitation's "administrative and record-keeping" requirements; and

5) Anders' proposal complied with the Solicitation's employee—specifically, Mr. Jeffrey Sikut's—documentation requirements.

See Pl.'s Reply at 9–15. Second, Anders alleges that USACE's corrective action violated the FAR by providing no description of Amendment 7's Solicitation revisions. Id. at 17. Third, Anders contends that USACE violated the FAR when its refused Anders' request for an independent review of USACE's correction actions. Id. For all three reasons, independently and collectively, Anders requests permanent injunctive relief requiring defendant to award plaintiff *the contract pursuant to defendant's Solicitation. See* Compl. at 34–35. Alternatively, Anders requests that the Court—in order to reinstate "fair competition"

back into the bidding war—"should declare and require [USACE] to mandate payment of prevailing wages" to Anders' *divers when traveling to and from USACE's site. See Oral Argument at 5:8–18, ECF No. 30* [hereinafter Oral Arg.].

Defendant counters that USACE's reversal of Anders' proposal for lack of technical acceptability was rational, and that USACE's corrective action was also rational and enhanced *the competitive process. See Defendant's Partial Motion to Dismiss and Cross-Motion for* Judgment on the Administrative Record and Opposition to Plaintiff's Motion for Judgment on the Administrative Record at 17–27, ECF No. 24 [hereinafter Def.'s CMJAR.]. Accordingly, defendant argues that a permanent injunction is unwarranted because Anders fails on the merits and, in the alternative, because Anders was neither prejudicially harmed nor do the balance of public interest and government hardship weigh in Anders' favor. Id. at 27–32. Similarly, defendant seeks dismissal of Anders' alternative claim—that the Court order USACE to "mandate payment of prevailing wages"—because the Court lacks jurisdiction over Declaratory Judgment Act claims. Id. at 14–17.

For the below reasons, Anders' Motion for Judgment on the Administrative Record is granted in part and denied in part and defendant's Cross-Motion for Judgment on the Administrative Record is denied.

Also, defendant's Partial Motion to Dismiss—which pertains only to Anders' alternative declaratory claim—is granted.

I. Background

A. USACE's Solicitation

On July 30, 2021, USACE issued the Solicitation for professional diving services. AR 31. The Solicitation's performance period was one twelve-month base period, and four twelvemonth option periods, with a total capacity of five years of service or $5,000,000, whichever occurred first. AR 32. USACE evaluated every proposal using three evaluation factors: the offeror's Past Performance; the offeror's Technical Evaluation, composing of both the offeror's Personnel Qualifications and Experience and Management Plan; and the offeror's Price. AR 84–85. The Technical Evaluation Factor—crucial for the present dispute—required offerors to submit a Management Plan that would include the following: mobilization location; an expedited mobilization plan; an after-hours mobilization plan; a dive operations plan; an activity hazard analysis; an emergency management plan; a record of exposure and accident experience; a safe practices manual; and a statement confirming that the offeror possesses all normal and special diving equipment necessary. AR 81–83. Specifically, USACE required that the safe practices manual comply with

its Safe and Health Requirements Engineer Manual Section 30.A.015, items a-k, of EM 385-1-1. AR 63, 82. USACE informed offerors that this information **"MUST be submitted in the offeror's proposal in order to be considered for award,**" and that it would evaluate this Factor on a Pass or Fail basis. AR *81 (emphasis in original), 86; see also* Def.'s CMJAR at 4.

Between the Solicitation's issuance and this protest, USACE amended the Solicitation fourteen times, mostly to respond to offerors' concerns and questions. AR 178, 195–240, 2250, 2258–2400, 2410, 4118, 4172, 4196, 4198, 4202, 4539, 4541, 4593. Specifically, Amendments 1 through 4 detailed information about solicited diving services obligations and requirements, including addressing questions from potential offerors about that information. AR 178, 195–236. Amendments 5 and 6 extended the initial proposal deadline due to inclement weather. AR 237–240. After initial proposals were received, Amendment 7 was released, which replaced the initial solicitation and all six previous amendments with a revised solicitation. AR 2258–2400. Amendments 8 through 12 extended the deadline for resubmitted proposals based on Amendment 7's terms, as well as correcting some typographic errors. AR 2410, 4118, 4172, 4196, 4198, 4539, 4541, 4593. Amendment 13 suspended proposal revelations due to a pre-award protest. AR 4196. award protest. AR 4196. Finally, Amendment

14 added information on divers' wage concerns and continued the suspension of deadlines originally imposed by Amendment 13. AR 4202. Of the fourteen amendments, only Amendments 7, 8, 10, and 14 are at issue.

B. USACE's Three Offerors

Around September 8, 2021, USACE received three offerors' initial proposals in response to the Solicitation: Anders; Lotus USA, Inc. ("Lotus"); and Specialty Diving of Louisiana, Inc. ("Specialty"). AR 1693–97. The Source Selection Evaluation Board (the "Board") evaluated each offeror's proposal for technical acceptability—but found only Anders' proposal to be technically acceptable. AR 1694–95. In contrast, both Lotus and Specialty failed this evaluation—particularly Lotus, whose proposal was "severally deficient and fail[ing*] nearly all the technical acceptability criteria."* *See* Def.'s CMJAR at 5 (citing AR 1695–97). On December 2, 2021, USACE's Contracting Officer adopted these findings and eliminated both Lotus and Specialty from the competition. AR 1716, 1718, 1720.

While Anders' initial proposal met all required criteria, USACE disapproved of Anders' price, and decided, after seeking to clarify the contract price with Anders, to communicate with all three offerors regarding potential remedial efforts. AR 87, 2080–2102, 2203–04, 2249–51. On December 6, 2021, Specialty

requested a debriefing under FAR section 15.505, seeking information on its technical noncompliance ruling. AR 1740. On December 13, 2021, USACE again informed Specificity that its proposal was technically deficient. On January 11, 2022, Specialty informed USACE that it would protest the decision unless USACE reevaluated its proposal for technical compliance. AR 1747, 1792–94. USACE ordered reevaluation of all three offerors' proposals; and after the offerors resubmitted the proposals, on February 4, 2022, the Board issued its reevaluations. AR 2072–79. Based on the Board's review, USACE's Contracting Officer made the following determinations: Lotus' *proposal still failed, see AR 2091–93; Specialty's proposal was still technically deficient, see AR 2102–03; and Anders' proposal was now technically deficient, see AR 2080–82. Specifically, USACE concluded that Anders failed to comply with the Solicitation's (1) "Record Keeping" requirements; (2) "lost divers plan" requirements; (3) "sample repetitive dive worksheet" requirements; (4) "administrative and record-keeping" requirements; and (5) employee documentation requirements as to one employee, Mr. Jeffrey Sikut. AR 2081–82. Because of these errors, each offeror was allowed to amend and resubmit their respective proposals to USACE by March 9, 2022. AR 2080–2102.*

C. Anders Protests USACE's Reevaluation

On March 3, 2022, Anders sent a letter to USACE that its proposal was not deficient and, being the only technically acceptable proposal, Anders should be awarded the contract. AR 2114–15. That same day, Anders filed an agency-level protest, arguing that USACE incorrectly determined that its proposal was technically deficient. AR 2118–20. On March 9, 2022, Anders supplemented this protest with further support that its proposal is technical acceptable. AR 2151.

On April 19, 2022, in response to Anders' communications and protest, USACE issued Amendment 7 of the Solicitation, wherein USACE addressed issues with safe practices manual requirements and the proposal submission schedule, as well as included language regarding payments and overtime. AR 2258–2400. On April 27, 2022, USACE issued Amendment 8 to add clarity to the overtime payment system. AR 2410.

On April 25, 2022, Anders sent another letter to USACE stating that USACE's corrective action did not address Anders' concerns. AR 2404–06. Consequently, Anders filed a protest at the Government Accountability Office ("GAO"), alleging that USACE had manufactured deficiencies after finding Anders' initial proposal technically acceptable to justify taking corrective action that allowed all three parties to resubmit their respective proposals. AR 2411. Anders also

alleged that USACE should have granted Anders' request for an independent review of USACE's determinations pursuant to FAR 33.103. AR 2414. Based on these reasons, Anders requested that it be awarded the Solicitation's resulting contract or, alternatively, receive an independent review under FAR 33.103. Id. USACE opposed. AR 3870–71. On May 2, 2022, USACE suspended the revised proposal deadline pending the result of the GAO protest. AR 3868.

On July 20, 2022, the GAO dismissed Anders' protest, concluding that USACE had broad discretion to take corrective action under the circumstances and that the agency did not act in bad faith. AR 4116.

D. Anders' Second GAO Protest

On August 26, 2022, after Anders' first GAO protest was dismissed and USACE issued Amendment 10 of the Solicitation, Anders brought another agency protest to challenge the wage determination language in Amendment 10. AR 4118, 4189. In this protest, Anders argued that Amendment 10's requirement that "[p]revailing wage rates do not apply to mobilization and demobilization" violated federal law by preventing Anders from paying divers during their commute to dive sites. AR 4191–94. On September 16, 2022, after issuing many amendments to proposal submission deadlines, USACE issued Amendment 14, which sought to address Anders' Amendment 10

concerns by removing language that prevented payment to divers prior to their arriving at dive sites. AR 4198, 4202.

On October 10, 2022, Anders filed a second GAO protest that challenged USACE's corrective action reflected in Amendments 7, 8, 10, and 14 on the grounds that USACE did not clarify employment costs under the Solicitation nor comport with United States Department of Labor wage regulation. AR 4205–13. On January 17, 2023, the GAO dismissed Anders' second protest because USACE was not required to provide diver wage guidance and the responsibility rested solely with the Department of Labor. AR 4618.

E. Procedural History

On May 23, 2023, Anders filed its Complaint with this Court alleging that USACE committed the following FAR violations: (i) USACE's reversal of its technical acceptability rating for Anders' proposal lacks a rational basis; (ii) USACE's corrective action failed to provide a description of Amendment 7's Solicitation revisions; and (iii) USACE failed to *provide an independent review of Anders' proposal*. *See* Compl. at 6–33. Because of these errors, Anders seeks permanent injunctive relief. Id. at 34–35. Alternatively, the Court—in order to reinstate "fair competition" back into the bidding war—"should declare and require [USACE] to mandate payment of prevailing wages" to

Anders' divers when traveling to and *from USACE's site. See Oral Arg. At 5:8–18; see also* Compl. at 30–33.

On June 26, 2023, defendant filed the initial Administrative Record. See generally Initial Administrative Record, ECF Nos. 8–10. On July 24, 2023, defendant filed the corrected *Administrative Record. See generally AR. That same day, Anders filed its Motion for Judgment on the Administrative Record. See generally Pl.'s* MJAR. On August 14, 2023, defendant filed *its Response to Anders' Motion for Judgment on the Administrative Record and its Cross-Motion for Judgment on the Administrative Record and its Partial Motion to Dismiss. See* generally Def.'s CMJAR. On August 24, 2023, Anders filed its Response to the Cross-Motion and Motion to Dismiss, as well as its Reply in support of its Motion for Judgment on the Administrative *Record. See generally Pl.'s Reply. On September 5, 2023, defendant filed* itsReply *in support of its Motion on the Administrative Record. See generally Defendant's Reply* in Response to Motion for Judgment on the Administrative Record, ECF No. 27 [hereinafter Def.'s *Reply]. On November 11, 2023, the Court held Oral Argument. See generally Oral Arg.* During Oral Argument, the Court both encouraged settlement and ordered the parties to reappear before the Court in early December to discuss whether settlement had been reached. Id. On December 6, 2023, the Court held a status conference on potential settlement, where the parties informed the Court settlement was not

possible and the parties finished argument before the *Court. See generally Status Conference, ECF No. 31. With the respective motions fully briefed* and argued, the Court now issues its decision.

II. Standard of Review

A. Motion for Judgment on the Administrative Record in Bid Protests

The Court's jurisdictional touchstone is the Tucker Act, which grants jurisdiction over *bid protest actions. See 28 U.S.C. § 1491(b). The Court evaluates bid protests under the Administrative Procedure Act's ("APA") standard for agency actions. See 28 U.S.C. § 1491(b)(4) (citing 5 U.S.C. § 706(2)(A)); see also Bannum, Inc. v. United States, 404* F.3d 1346, 1351 (Fed. Cir. 2005) (citing Impresa Construzioni *Geom. Domenico Garufi v. United States,* 238 F.3d 1324, 1332 (Fed. Cir. 2001) ("Impresa")). The APA only allows agency actions to be set aside if the agency decisions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706 (incorporated in 28 U.S.C. § 1491(b)(4)).

For bid protests, this Court can only grant relief when "either: (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." Impresa, 238 F.3d at 1332–33 (citing Kentron Hawaii,

Ltd. v. Warner, 480 F.2d 1166, 1169 (D.C. Cir. 1973)). Any protester, like Anders, "'bears a heavy burden of showing that the award decision has no rational *basis.'" See Banknote Corp. of Am. v.* United States, 365 F.3d 1345, 1351 (Fed. Cir. 2004) (quoting Impresa, 238 F.3d at 1332–33) (emphasis added). Specifically, if "'the contracting agency provided a coherent and reasonable explanation of its exercise of discretion,'" then the agency's basis for its decision was rational. Id. (quoting Impresa, 238 F.3d *at 1332–33); e.g., DGS Contract Serv., Inc. v. United States, 43* Fed. Cl. 227, 238 (1999) (finding that agencies are given "broad discretion to take corrective action" if a coherent and reasonable explanation is provided). Likewise, when a challenge alleges a violation of a procurement regulation or procedure, the protester must show that the *alleged violation was "clear and prejudicial." See Impresa, 238* F.3d at 1333 (citing Kentron Hawaii, Ltd., 480 F.2d at 1169).

But a heavy burden is not insurmountable; an agency's decision will be overturned when an agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n *v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). "In conducting this* inquiry, the [C]ourt *will look to see whether the agency has*

'examin[ed] the relevant data and articulat[ed] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" Cybertech *Group, Inc. v. United States, 48 Fed. Cl. 638, 646 (2001) (quoting Rainbow Navigation, Inc. v.* Dep't of Navy, 783 F.2d 1072, 1080 (D.C. Cir. 1986)) (internal quotation marks omitted). Any evidence used in this inquiry is limited to the administrative record, with the Court determining whether the motioning party has met its heavy *factual burden. See R. Ct. Fed. Cl. 52.1; Bannum, 404* F.3d at 1354.

B. Rule 12(b)(1) of the Rules of the Court of Federal Claims

Rule 12(b)(1) of the Rules of the Court of Federal Claims requires dismissal of a claim when subject-matter jurisdiction is absent. To determine whether jurisdiction is proper, the *Court refers to the Tucker Act, see 28 U.S.C. § 1491, wherein sovereign immunity is waived, thereby permitting claims against the United States, see United States v. Mitchell, 445 U.S. 535,* 538 (1980). The Court lacks jurisdiction to review claims and grant general declaratory relief *originating from the Declaratory Judgment Act. See United States v. King, 395 U.S. 1, 5 (1969); e.g., Medrano v. United States, 159 Fed. Cl. 537, 551 (2022) (dismissing a Declaratory Judgment* Act claim seeking a declaration to compensate alleged pre- and post-shift contractor actions).

III. Discussion

Straightforwardly communicated requirements aid both state and private actors in fulfilling their regulatory obligations. In contrast, murky commutation invites disputes—for arbitrary and unreasonable government actions fester in opaqueness—and, unfortunately, this Court finds the parties in these muddied waters. Consequently, the Court must find clarity in the regulatory miscommunication by deciding two interdependent issues. First, whether USACE acted unreasonably when it deemed Anders' proposal technically unacceptable during reevaluation after originally accepting Anders' proposal during the initial evaluation. Second, if the Court finds that USACE acted unreasonably, the Court must then decide whether to enter a permanent injunction requiring USACE to award Anders the contract. USACE, for the below reasons, acted unreasonably and, accordingly, a permanent injunction directing USACE to award the contract to Anders is proper. That said, this Court lacks jurisdiction to review claims and award relief under the Declaratory Judgment Act. Thus, dismissal is warranted for Anders' alternative claim concerning whether Anders' divers will be compensated by USACE when traveling to and from dive sites.

A. Plaintiff's MJAR is Granted because Defendant's Technical Compliance Analysis Was Arbitrary,

and a Permanent Injunction Directing USACE to Award the Contract to Anders is Warranted.

1. USACE's Technical Compliance Reversal was Arbitrary.

Was USACE's reversal of its evaluation of plaintiff's proposal—from technically acceptable to unacceptable—"arbitrary, capricious, an abuse of discretion, or otherwise not in *accordance with the law"*? *See 5 U.S.C. § 706 (incorporated in 28 U.S.C. § 1491(b)(4)). It was.* Plaintiff is correct that USACE's reversal, based on five interrelated factors, lacks a rational *basis and was thus arbitrary. See Pl.'s* MJAR at 13–19; Pl.'s Reply at 9–15. Anders, despite USACE's protestations overwise, did (1) comply with the Solicitation's "Record Keeping" requirements; did (2) comply with the Solicitation's "lost divers plan" requirements; did (3) comply with the Solicitation's "sample repetitive dive worksheet" requirements; did (4) comply with the Solicitation's "administrative and record-keeping" requirements; and did (5) comply with the Solicitation's employee—specifically, Mr. Jeffrey Sikut's—documentation requirements. AR 2081–82. Therefore, plaintiff's MJAR is successful for the five reasons below.

Solicitation Requirement One: "Record Keeping." Defendant's contention that a *"sample" completion report is necessary to fulfil the record*

keeping requirements, see Def.'s CMJAR at 18–20, belies the terms of the Solicitation which require the following:

[Screenshot Omitted]

AR 83. Notice the completion report's contents are cabined by the needs of paragraph 14's language, meaning the report is—neither more nor less—the following:

[Screenshot Omitted]

AR 64. Neither party disputes that Anders' proposal, in the section entitled "Completion Report," includes all the components—dive logs, time logs, Job Hazard Analyses, Job Safety Analyses, pre-dive safety meeting, post-dive safety meeting, and a condition report of all inspected items—required by the above paragraph. AR 1279; id. at 1280–94 (the contents of *Anders' completion report); see also* Def.'s CMJAR at 18–20; Pl.'s Reply at 9–10. Yet, defendant insists that, beyond the documentation already provided by Anders, paragraph 14 incorporates an unmentioned requirement for a "sample" completion report. Compare Pl.'s Reply at 9–10, with Def.'s CMJAR at 18–20.

Although USACE has "broad discretion . . . to evaluat*[e] . . . technical proposals," see Omega World Travel, Inc. v. United States, 54 Fed. Cl. 570, 578 (2002), "[*i]t is hornbook law that agencies must

evaluate proposals and make awards based on the criteria stated in the *solicitation," see Elec. Data Sys., LLC v. United States, 93 Fed. Cl. 416, 430 (2010) (explaining* "[t]his requirement is rooted in the Competition in Contracting Act . . . and the . . . FAR . . . , both of which indicate that an agency shall evaluate proposals and assess their qualities solely based on the factors and subfactors specified in the solicitation."). "It thus is beyond peradventure that the government may not rely upon undisclosed evaluation criteria in evaluating *proposals, Acra, Inc. v. United States, 44 Fed. Cl. 288, 293 (1999), and, where appropriate, must* disclose the factors' relative importance, Isratex*, Inc. v. United States, 25 Cl. Ct. 223, 230 (1992)." Banknote Corp. of Am. v. United States, 56 Fed. Cl. 377, 386 (2003) (citations in* original), aff'd, 365 F.3d 1345 (Fed. Cir. 2004). USACE asks the Court to nonetheless uphold its evaluation based upon an undisclosed criterion—that is, the so-called sample completion report. The Court will not impose a criterion belying paragraph 14's dictate.

Paragraph 14 only requires a sample report "be prepared following all inspection dives" and no later than "48 hours after the completion of the dive." Compare Def.'s CMJAR at 18–20, with AR 64. In other words, a completion report should only be prepared after a dive has *occurred, not prior to a dive nor at the procurement stage, as Anders correctly points out. See* AR 64; Pl.'s Reply at 9–10. Therefore, USACE's

technical acceptance reversal based on this *reason was arbitrarily misapplied to Anders. See Elec. Data Sys., LLC, 93 Fed. Cl. at 430 (citing* Banknote Corp. of Am., 56 Fed. Cl. at 386). If USACE wanted a sample completion report included in the proposal, a factor it clearly determined (at least post-hoc) important, it should have communicated this need up front. Id. Because it did not, the Court finds in Anders' favor.

Solicitation Requirement Two: "Lost Divers Plan." *The Solicitation requires a "lost divers plan" consisting of certain required documentation. See AR 63, 441, 608, 703–06. Those documents* are: *a lost diver plan for SCUBA operations; a sample of repetitive dive worksheets; and an outline of administrative and record-keeping procedures. See AR 2081–82;* Def.'s CMJAR *at 20. Puzzlingly, USACE rated Anders' proposal noncompliant for failing to provide these documents when Anders did provide them. See AR 2157–59. Sure, as Anders admits, these documents are not labeled "lost divers plan." See Pl.'s Reply at 11. But that fact is immaterial because neither the Solicitation nor the applicable regulations require* standardize *labeling, and defendant never cites to any authority to the contrary. See* Def.'s CMJAR at 20–22; Def.'s *Reply at 8–9; see also AR 441 (discussing the* regulatory obligations of 29 CFR 1910.422(i)*). Indeed, caselaw proscribes the opposite: when agencies do not list a requirement, it cannot adjudge a proposal based upon unstated evaluation criteria. See Elec. Data Sys., LLC,*

93 Fed. Cl. at 430 (stating that "an agency shall evaluate proposals and assess their qualities solely based on the factors and subfactors specified in the solicitation.").

Mere semantic preferences are not reason enough to kick out a proposal when, as here, those preferences were never communicated to prospective offerors. See id.; Banknote Corp. of Am., 56 Fed. Cl. at 386; Acra, Inc., 44 Fed. Cl. at 293; e.g., Pl.'s Reply at 11 (". . . Section 30.A.15 *[which USACE relies upon] does not require that [the lost divers plan] be identified or labeled in any particular manner[.]"). Rational fairness dictates that agency actions must be based on some regulatory reasoning backing their decisions. See Impresa, 238* F.3d at 1335 *(rooting rationality of agency decisions in regulatory authority). In contrast, USACE's noncommunication—its gotcha silence—of requirements is never fair; it invites mercurial evaluation, in violation of the APA's prescription against "arbitrary" agency decisions, because the agency not only "failed to consider relevant information," i.e., the documents provided by Anders, it also "ignored" informing offerors of what it now considers "an important aspect of the procurement." See MORI Assocs., Inc. v. United States, 102 Fed. Cl. 503, 544 (2011) (emphasis* added); *Am. K-9 Detection Servs., LLC v. United States, 155 Fed. Cl. 248, 311 (2021) (holding an agency's decision "to be arbitrary and capricious for failing to consider all information related to" the*

proposal); see also 5 U.S.C. § 706; Banknote Corp. of Am., 365 F.3d *at 1351 (reasoning that agency reinterpretation cannot be without a rational basis). Like with Solicitation Requirement One, if USACE wanted the lost divers plan to be labeled, it should have communicated this need. See Elec. Data Sys., LLC, 93 Fed. Cl. at 430; Banknote Corp. of Am., 56 Fed. Cl. at 386; Acra, Inc., 44 Fed. Cl. at 293. To do otherwise, while also ignoring Anders' already supplied documentation, was an arbitrary act. See MORI Assocs., Inc., 102 Fed. Cl. at 544; Am. K-9 Detection Servs., LLC, 155 Fed. Cl. at 311. Therefore, Solicitation Requirement Two falls in Anders' favor as well.*

Solicitation Requirement Three: "Sample Repetitive Dive Worksheet." *USACE's analysis of Anders' proposal for compliance with this requirement was irrational for the same reasons explained in Solicitation Requirement Two. Id. The Solicitation only required that Anders' proposal include sample repetitive dive worksheets, and Anders included those worksheets under the header "Repetitive Dive Worksheet." See AR 955, 958. No more is necessary to be technically compliant; nor does defendant—beyond pointing to the arguments discussed in relation to Solicitation Requirement Two—really contest this fact. See* Def.'s CMJAR *at 21; see also Elec. Data Sys., LLC, 93 Fed. Cl. at 430; Banknote Corp. of Am., 56 Fed. Cl. at 386; Acra, Inc., 44 Fed. Cl. at 293. Accordingly, Solicitation Requirement Three falls in Anders' favor too.*

Solicitation Requirement Four: "Administrative and Record-Keeping." The Solicitation *required an outline and record-keeping procedures in line with USACE regulation, see AR 63 (outlining USACE regulations under Section* 30.A.15*, items a-k, of EM 385-1-1); AR 82, 1697; see also Pl.'s* MJAR at 15–16; Def.'s CMJAR *at 21–22, which Anders included in its proposal, see AR 1277 (stating, in the proposal, that "[t]he diving supervisor shall upkeep daily logs, activity logs, dive logs, and other required paperwork. All team members must sign in an[d] [sic] verify dives and daily logs.").*

Despite Anders including this information in its proposal, USACE claimed: "Ander's [*sic] technical proposal should be more comprehensive for their 'outline of administrative and record-keeping procedures.'" AR 2082. Now, did USACE ask for a "comprehensive" outline in its Solicitation? The Board—on both Anders' initial, see AR at 1697, and revaluated, see AR* at *2079, proposals—certainly did not believe so, as it determined that the limited information provided by Anders was sufficient. Of course, the agency is entitled to disagree, see EFW, Inc. v. United States, 148 Fed. Cl. 396, 411 (2020), but its decision must be substantiated, see Impresa, 238* F.3d at 1332–33. This requirement was not met. Instead, USACE's reversal inserted an "undisclosed evaluation criteri*[on]"—the comprehensiveness requirement—without fair warning to Anders*

to beef-up its proposal in this area; this reversal is thus, as a matter of law, a violation of our system's fair competition regime. See Banknote Corp. of Am., 56 Fed. Cl. at 386; Elec. Data Sys., LLC, 93 Fed. Cl. at 430; Acra, Inc., 44 Fed. Cl. at 293. Again, straightforward communication of agency needs, as stated in the Solicitation, controls evaluations of proposals. See Banknote Corp. of Am., 56 Fed. Cl. at 386. If USACE wanted a more comprehensive outline, it should have communicated this need. Id. It did not. That failure means this Solicitation Requirement falls in Anders' favor.

Solicitation Requirement Five: Employee Documentation. USACE believes Mr. Sikut required a fitness to dive certificate for two reasons.

First, USACE noted that Mr. Sikut "is listed as a Supervisor/Tender on page 29 [of] 1054, [the page where all prospective Anders employees and applicable roles are listed, but] is not listed as a Superiors on Page 161 [of] 1054," where all the supervisors who will participate in the Expedited Mobilization Plan are listed. See Def.'s *Mot at 22 (citing AR 2081–82). The Expedited Mobilization Plan describes "the process [as] to how it will be assured that the required dive team(s) and equipment will arrive at the specified dive location within five hours of notification"; but including a potential employee, like Mr. Sikut, was a voluntary act, as the Solicitation did not require all persons*

designated as supervisors be listed therein. See AR 82. Instead, Anders needed to only include an Expedited Mobilization Plan in its proposal. Id. Anders did so. See AR 401. If USACE wanted different information, it once again should have said so. See Elec. Data Sys., LLC, 93 Fed. Cl. at 430; Banknote Corp. of Am., 56 Fed. Cl. at 386; Acra, Inc., 44 Fed. Cl. at 293.

Second, because of the reporting discrepancy and because Anders included Mr. Sikut's diving school *transcript, USACE assumed that Mr. Sikut could be both a supervisor of divers and a diver himself. See* Def.'s Mot at 23 (citing AR 307). USACE is wrong. Plainly, Mr. Sikut is listed as a "Supervisor/ Tender," not a diver. There is no ambiguity as observed in Anders' proposal:

[Screenshot Omitted]

See AR 269. As the graphic shows, Mr. Sikut is not listed as a "Diver" unlike, for example, his colleagues John Anders, Micheal Stebbins, Brett Holyfield, and Shawn Brackett. See AR 82. Rather, Mr. Sikut is only listed as a "Supervisor/Tender." Id. This unambiguous chart resolves that Anders did not list Mr. Sikut as a diver, and therefore did not need to include a fitness to dive certificate. AR 82, 269. Therefore, Solicitation Requirement Five falls in Anders' favor.

At bottom, "[w]hat we've got here is a failure to communicate." COOL HAND LUKE (*Warner Brothers 1967). Understanding this deficiency, USACE only proffered the above reasons after initially evaluating Anders' proposal as technically acceptable. See AR 694–95. While USACE "is entitled to rethink [its] old" determinations, see Commc'n Workers of Am., Loc. 5008 v. N.L.R.B., 784* F.2d *847, 849 (7th Cir. 1986), its reinterpretation cannot be without a rational basis, see Impresa, 238* F.3d at 1332 ("if . . . the procurement official's decision lacked a rational basis[,]" it can be set aside). None of the above reasons provide such a basis, especially since they amount to a single point. That being, if USACE wanted different information—whether it be labeling or be *additional documentation—it should have clearly stated such requirements in the Solicitation. See Banknote Corp. of America, 365* F.3d *at 1351. Clarity controls our federal government contracts' system. Id. And in this case, as a matter of law, USACE went beyond the bounds of its discretion when it reversed the proposal's technical compliance determination. See Impresa, 238* F.3d *at 1332; e.g., Elec. Data Sys., LLC, 93 Fed. Cl. at 430 (describing that a proposal's rejection based on factors not within the agency's solicitation is not rational); Banknote Corp. of Am., 56 Fed. Cl. at 386 (same); Acra, Inc., 44 Fed. Cl. at 293 (same). Nor do any of the above reasons evince accepting the USACE's decision anyways because the "explanation for its decision . . . runs counter to the evidence" presented above. See Motor Vehicle*

Mfrs. Ass'n, 463 U.S. at 43. Accordingly, plaintiff's MJAR is granted as to the technical compliance claim.

2. Permanent Injunctive Relief is Granted.

Anders, if it succeeds on the merits, seeks permanent injunctive relief. See Compl. at 34–35; Pl's MJAR *at 36–39. Defendant opposes. See* Def.'s CMJAR at 30–33. For the below reasons, plaintiff's permanent injunction is granted.

A permanent injunction is warranted when: plaintiff has succeeded on the merits, see PGBA*, LLC v. United States, 389* F.3d *1219, 1228 (Fed. Cir. 2004); plaintiff will suffer irreparable harm by USACE's actions if the Court withholds injunctive relief, see* Ash-Britt*, Inc. v. United States, 87 Fed. Cl. 344, 378 (2009); and plaintiff's harm and the public interest outweighs any resulting government inconvenience, see GEO Group, Inc. v. United States, 100 Fed. Cl. 223, 229 (2011) (government inconvenience discussed); Progressive Indus., Inc. v. United States, 129 Fed. Cl. 457, 486 (2016) (public interests discussed). Anders has succeeded on the merits, so the Court turns to the other factors. See* PGBA, LLC, 389 F.3d at 1219.

Irreparable Harm. This Court has "repeatedly held that a protester suffers irreparable harm if it is deprived of the opportunity to compete fairly for a contract*[.]" See CW Gov't Travel, Inc. v. United States,*

110 Fed. Cl. 462, 494 (2013) (collecting cases). Anders clearly meets this standard because its proposal was irrationally stripped of its technical acceptability designation, preventing Anders from competing for the contract. See AshBritt, Inc., 87 Fed. Cl. at 378–79 (reasoning "a lost opportunity to compete on a level playing field has been found sufficient to constitute irreparable harm"); CW Gov't Travel, Inc., 110 Fed. Cl. at 495 (same).

Plaintiff's Hardship, the Public Interest, and Government Inconvenience. The balance of the hardships—and crucially the public interest—favors Anders, not defendant, because plaintiff was "originally determined to be the lowest priced, technically acceptable *bidder." See Oral Arg. at 11:10–11. Defendant does not contest the reasonability of Anders' pricing. Compare Pl.'s Reply at 21–22 (pointing out that defendant "deflect[s] by arguing that even if Anders' pricing was reasonable, award to Anders was* precluded due to the alleged technical unacceptability of the proposal."), with Def.'s Motion at 28–29. Nor could defendant contest the pricing's reasonability, for, as plaintiff mentions, the government has "paid [Anders] . . . similar prices [listed in the proposal at issue] *. . . multiple times." See Oral Arg. at 11:12–13. As USACE concedes Anders' proposal is* fairly priced*, it is difficult—perhaps unreasonable—to determine a governmental inconvenience, let alone harm, exists here. See GEO Grp., Inc., 100 Fed. Cl. at 229.*

Seemingly, this fact explains why defendant insists—without proof—that Anders has inflicted delay, "tremendous strain[,] and burden on USACE contracting *personel* and granting an injunction would only prolong this" situation. See Def.'s CMJAR at 32. But "only in an exceptional case would [such delay] alone warrant a denial of injunctive relief," a fact this Court has often stressed to defendant. See Reilly's Wholesale Produce v. United States, 73 Fed. Cl. 705, 715–16 (2006). Unsurprisingly, this case is not an exceptional matter when "particularly it appears that some of the problems encountered here are, at least in part, of defendant's own making." Id. at 716. This quality is further evident when "the contracting officer's initial determination that plaintiff's proposal constituted the best value to the government[.]" *See Bilfinger Berger AG Sede Secondaria Italiana v. United States, 94 Fed. Cl. 389, 393 (2010). Accordingly, the public interest is served here by enjoining* defendant's *arbitrary actions. See id.*

On balance, the factors favor injunction. *See Progressive Indus., Inc., 129 Fed. Cl. at 486* (" . . . the public's interest in ensuring the integrity and fairness of the procurement process outweighs the public's interest in permitting the [the agency] to conduct its source selection with prejudicial errors and evidence of unequal treatment of the offerors."). Accordingly,

plaintiff's requested permeant injunction is granted; USACE is to award the contract to Anders.

B. Defendant's Motion to Dismiss on Plaintiff's Alternative Claim is Granted Because this Court Lacks Jurisdiction under the Declaratory Judgment Act.

While Anders succeeds on the above grounds, the Court dismisses its alternative Declaratory Judgment Act claim—declaring that Anders' divers be compensated by USACE when traveling to and from USACE's site—for violating subject-matter jurisdiction requirements under Rule 12(b)(1) of the Rules of the Court of Federal Claims. Jurisdictionally proper subject matter, complying with Rule 12(b)(1), originates from an expressed waiver of sovereign immunity, see *Mitchell*, 445 U.S. at 538; *King*, 395 U.S. at 5, which are "found[in] either . . . the Constitution, or any Act of Congress, or any regulation of an executive department, or . . . any express or implied contract with the United States, or [in] liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). Waiver thus equals judiciable rights; there is no exception. *See Mitchell, 445 U.S. at 538 (*in "absence of clear congressional consent . . . there is no jurisdiction in the Court of [Federal] Claims.") (internal quotation marks omitted); *King*, 395 U.S. at 5 (holding same).

Congress's waiver does not cover Declaratory Judgment Act claims. See King, 395 U.S. at 5 ("There is not a single indication in the Declaratory Judgment Act or its history that Congress, in passing that Act, intended to give the Court of [Federal] Claims an expanded jurisdiction[.]"). Indeed, this Court has applied this principle to a virtually identical request as Anders'. See e.g., Medrano, 159 Fed. Cl. at 551 ("Defendant is correct: This Court lacks authority to issue declaratory judgments [clarifying that a failure to pay for alleged pre- and -post shift activates is unlawful] under the Declaratory Judgment Act, . . . so any claims or requests for relief Plaintiffs seek under that statute must be dismissed for lack of jurisdiction under RCFC 12(b)(1).") (citation omitted).3

Dismissal of Anders' Declaratory Judgment Act claim is therefore mandatory. See id.; King, 395 U.S. at 5. Accordingly, Defendant's Partial Motion to Dismiss is granted.

IV. Conclusion

For the reasons set forth above, plaintiff's MOTION for Judgment on the Administrative Record is hereby **GRANTED IN PART AND DENIED IN PART**. Defendant's CROSS-MOTION for Judgment on the Administrative Record is hereby **DENIED**. Defendant's Partial Motion to Dismiss is **GRANTED**, for this Court lacks jurisdiction under the Declaratory Judgment Act.

COSTS SHALL be awarded to plaintiff.

Plaintiff **SHALL** also submit a draft injunction order consistent with this opinion by or before 10 DAYS of this order. Defendant MAY file any opposition to the injunction's wording by or before 10 DAYS after plaintiff submits its draft injunction. No opposition to granting the injunction will be considered.

IT IS SO ORDERED.

s/ *Loren A. Smith*

Loren A. Smith,
Senior Judge

§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Respectfully submitted,

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