

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

**EKAGRA PARTNERS, LLC,**

*Plaintiff,*

v.

**UNITED STATES,**

*Defendant.*

Case No. \_\_\_\_\_

Judge \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**COMPLAINT**

For its bid protest complaint against the United States of America, Plaintiff Ekagra Partners, LLC (“Ekagra”) shows the Court as follows:

**Nature of the Action**

1. The United States Customs and Border Protection (“CBP” or the “Agency”) notified Ekagra that it was not selected for one of the multiple Blanket Purchase Agreement (“BPA”) awards under its Enterprise Small Business Solicitation No. 70B04C23QOITESB2 for the Emerging Technology, Data Transformation, Development and Maintenance Support (Track 2) (the “Solicitation”). Ekagra challenges the Agency’s evaluation and award decision under the Solicitation.

**The Parties**

2. Ekagra is a limited liability company headquartered in Leesburg, VA.

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3. The United States of America, for all purposes relevant hereto, acted by and through CBP.

### **Jurisdiction and Standing**

4. The Court has subject-matter jurisdiction over this bid protest under the Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996. 28 U.S.C. § 1491(b)(1).

5. Ekagra is an “interested party” because it is an actual bidder and, absent the errors alleged in this complaint, had a substantial chance of receiving an award under the Solicitation.

6. Ekagra suffered competitive prejudice because, but for the Agency’s evaluation errors and award decision, it had a substantial chance of receiving one the BPA awards – Ekagra is also within the zone of active consideration for award.

7. Indeed, and separately, Ekagra also suffered competitive prejudice because it had a substantial chance at receiving award because the Solicitation contemplated multiple awards. Specifically, while the Solicitation said the Agency would award up to eight (8) awards for each BPA requirement, the Agency awarded only six BPA contracts. (Solicitation, p. 66; Notice of Unsuccessful Quote.) Thus, absent the errors in the Agency’s evaluation and selection decision – as demonstrated below – Ekagra would have been awarded one of the remaining BPA contract slots that the Solicitation contemplated.

### **The Applicable Pleading Standard**

8. The *Twombly / Iqbal* federal pleading standard applies at the U.S. Court of Federal Claims. See *Vanquish Worldwide, LLC v. United States*, 147 Fed. Cl. 390, 399 (2020). However, as (now) Chief Judge Kaplan noted, “a party need only plead ‘facts to state a claim to

relief that is plausible on its face,’ and the alleged facts must be sufficient to nudge ‘claims across the line from conceivable to plausible.’” *Id.* (quoting *TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1380 (Fed. Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007))). Chief Judge Kaplan also explained that the Federal Circuit approves “information and belief” allegations where ‘when essential information lies uniquely within another party’s control,’ at least ‘if the pleading sets forth the specific facts upon which the belief is reasonably based.’” *Id.* (quoting *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1330 (Fed. Cir. 2009)).

9. This is a FAR Subpart 8.4 procurement, which eliminates any debriefing requirement in favor of a brief explanation. In its brief explanation, the Agency provided Ekagra with only limited information related to its evaluation and provided no information regarding the evaluations of the six awardees: Tarkik Solutions Inc., NIYAMIT Inc. Novilo Technology Solutions LLC, INDEV LLC, Centrifuge LLC, or CAN Softtech Inc.

10. In the Agency’s view, Ekagra’s “quote was not eligible for award because the following required RREP’s were not similar in scope and complexity:”

Task 1, RREP 2 - Although Ekagra does have some digital transformation experience through the usage of their scanning technologies for code as well as migration to the cloud. However, it does not appear that they have proven experience with software development (writing code, developing algorithms, designing UI, etc.). A scanning tool with “eyes on code” capability does not equate to actual code development. Scanning tool to examine the code for mistakes is different than actual coding.

Task 3, RREP 2 - The vendor did not address the following requirement in the scope for Task 3:

- Developing an approach to labeling, annotation, and ontology development to support application of AI.

- Applying labeling ontology and annotate data of varying types from various sources according to the ontology.
- Establishing and managing a centralized library of annotated data for use across the organization for AI model training.
- Managing and execution of security and accreditation and Authority to Test (ATT) processes and Authority to Operate (ATO) processes for AI/ML technologies, including coordination with security teams, identification of any Plan of Action and Milestones (POA&Ms), and support to address them, as needed.

(Brief Explanation.)

11. In establishing BPAs, FAR 8.405-3(b)(3) requires the Agency to give Ekagra a basis for award. After describing the issues with Ekagra's RREPs, the Agency did not provide any further details on its basis for award.

12. Because the Agency provided Ekagra with very little information regarding the evaluation of its quote and provided no information on the evaluations of the awardees' quotes and source selection decision, "essential information lies uniquely within" the Agency's control. Accordingly, Ekagra bases its allegations below on its own knowledge and, where appropriate, on information and belief. Under the applicable pleading standard, Ekagra's allegations are more than sufficient to state a claim. *Exergen Corp.*, 575 F.3d at 1330.

## **Factual Background**

### **The Solicitation**

13. The Agency issued the Solicitation to small business concerns that hold a General Services Administration ("GSA") Multiple Award Schedule ("MAS") for Information

Technology Professional Services.<sup>1</sup> (Solicitation, p. 5.) The Solicitation listed GSA MAS IT Professional Services SIN 54151S. (Solicitation, p. 7.)

14. The Solicitation stated that the Agency would establish multiple BPA awards to provide CBP with a wide range of enterprise business management support services and business disciplines, which has been divided into two requirements: (1) Professional Services; and (2) Emerging Technology, Data Transformation, Development and Maintenance Support. (Solicitation, p. 5.) The Solicitation stated that the Agency estimates, but did not guarantee, that each BPA would hold a ceiling of approximately \$450 million over the five (5) year ordering period. (Solicitation, p. 5.)

### **The Work Requirements**

15. The Solicitation provided a scope of work (“SOW”), which set forth the work requirements under the Emerging Technology, Data Transformation, Development and Maintenance Support track. For the scope of services, the SOW stated that “CBP has requirements for support services in several key mission critical areas as listed below. CBP is updating its business model to exploit technologies that are more flexible, responsive, scalable, reliable, secure, and affordable. (SOW, p. 2.)

16. In that regard, the SOW stated that the selected contractors “shall furnish all the necessary services, qualified personnel, material, equipment, and facilities not otherwise provided by the Government as needed to perform all services delineated in, and in accordance

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<sup>1</sup> The Solicitation was amended several times. All citations to the Solicitation, unless otherwise noted, are to Amendment 0008.

with BPA TO requirements within the scope referenced in Section 3.0.” (SOW, p. 4.) The SOW also stated that contractor were to provide “expert advice and assistance in support of CBP’s mission-oriented business functions within the scope of the applicable SINs.” (*Id.*)

17. The SOW included the following examples of types of integrated consulting services under the BPA:

- Management or strategy consulting, including research, change management, communication plans, evaluations, studies, analyses, scenarios/simulations, reports, business policy and regulation development assistance, strategy formulation on issues related to organization, operations, and business technology
- Facilitation and related decision support services
- Survey services, using a variety of methodologies, including survey planning, design, and development; survey administration; data validation and analysis; reporting, and stakeholder briefings
- Advisory and assistance services in accordance with FAR 37.203
- Mission-oriented business projects or programs and the achievement of mission performance goals.

(SOW, p. 4.)

18. The SOW included as performance requirements the following six task areas: Task 1 – Digital Transformation and Software Development Support (PSC DA01); Task 2 – Operational Maintenance Support Service (PSC DF01); Task 3 – Artificial Intelligence/Machine Learning (AI/ML) Support Services (PSC DA01); Task 4 – Robotic Process Automation (RPA) Support Services (PSC DA01); Task 5 – Security and Privacy Support (PSC DJ10); and Task 6 - Emerging Technology Monitoring Program (PSC DF01). (SOW, pp. 4-9.)

### Instructions to Offerors and Evaluation Criteria

19. The Solicitation stated that quoters were to provide quote submissions in three volumes: Volume I – General Requirements; Volume II – Technical; and Volume III – Price. (Solicitation, pp. 62-66.)

20. For Volume I, the Solicitation stated that quoters were to provide customary government contracting information with its quote, including a cover letter with point of contact, GSA Schedule number, contractor teaming arrangements, and a statement acknowledging amendments, among other things. (Solicitation, p. 63.)

21. Relevant here, and for Volume II, the Solicitation included three sections: Section 1 – Self-scoring and Document Verification Worksheet; Section 2 – RREPs; and Section 3 – Contractor Performance Assessment Reporting System (“CPARS”) evaluation report submission or Attachment 2, Contractor Performance Report (“CPR”). (Solicitation, pp. 63-64.)

22. For the self-scoring, the Solicitation stated that quoters were required to provide complete CPARS evaluation report or complete the Attachment 2, CPR. (Solicitation, p. 64.) In other words, where the CPARS does not exist, quoters were to complete the CPR form. (*Id.*) The Solicitation stated that the “overall CPARS or CPR rating is the only rating that will be considered for evaluation.” (Solicitation, p. 64.)

23. For the RREPs, the Solicitation stated that quoters were to submit at least two but not more than seven recent and relevant experience projects (“RREP”), with a minimum value of \$1 million, for each task area under the Solicitation. (Solicitation, p. 64.) The RREPs were required to be similar scope and complexity as identified in the SOW. (*Id.*) The Solicitation also

said that a minimum of one RREP (in each task area) must come from the prime contractor. (*Id.*) The Solicitation also stated that recency meant that RREPs were to be “recent and occurring within the last three (3) years from the date of the RFQ (December 21, 2022).” (*Id.*)

24. The Solicitation also stated that “[q]uoters will use their RREPs to self-score Section 2 of Attachment 1 worksheet. If the Quoter wishes to submit additional RREPs per Task, no more than five (5) additional RREPs per Task can be submitted so long as the RREP meets all required criteria as stated above. Minimum two (2) and up to five (5) additional RREPs – seven (7) total per task.” (Solicitation, p. 65.)

25. For Volume III, Price, quoters were to complete Attachment 4, Contractor Labor Rates Worksheet. (Solicitation, p. 66.)

26. For the evaluation methodology, the Solicitation stated that the Agency intended on issuing up to eight (8) BPA awards for each requirement to the “highest technically rated quotations with fair and reasonable pricing.” (Solicitation, p. 66.) The Solicitation also said that “[i]n the event of a tie, the Government will use the quoters’ total points in the self-scoring worksheet Section 4 as a tiebreaker. If there remains a tie, the Government will use the quoters’ total points in the self-scoring Section 4 and Section 3 as a tiebreaker. If there remains a tie, the Government will use the quoters’ total points in the self-scoring Section 4, Section 3, and Section 5 as a tiebreaker.” (*Id.*)

27. As noted above, the Solicitation called for a self-scoring methodology and that quotes would be accepted from small businesses with GSA SIN 54151S. (Solicitation, p. 67.) The Solicitation stated that the “highest ranked quoters will be evaluated for relevancy on the two (2) required RREPs submitted for each task areas. The RREPS will be evaluated for



similarity in scope and complexity to the task areas identified in the ESB BPA scope of work. If the Government determines any of the required two (2) RREPs are not similar in scope and complexity, the quotation will be ineligible for award and will not be further evaluated.” (Solicitation, p. 67.)

28. The Solicitation further stated that “[a]ny additional RREP submissions will not be substituted by the Government for any RREP submissions that are deemed not relevant. Once the Government has evaluated a Quoter’s Attachment 1 Section 2 for relevancy, the Government will then continue to review and validate the remaining sections of Attachment 1. If the Government deems irrelevant and subsequently eliminates any of the additional RREP submissions from Section 2, the Government will also eliminate its corresponding points associated with that RREP from all other self-scoring sections.” (Solicitation, p. 67.)

29. For pricing, the Solicitation stated that the Agency would evaluate a quoter’s labor categories and labor rates for each task area for reasonableness and that the proposed ceiling rates must be at or below the quoter’s published GSA MAS rates. (Solicitation, p. 67.) The Agency also requested discounted rates. (*Id.*)

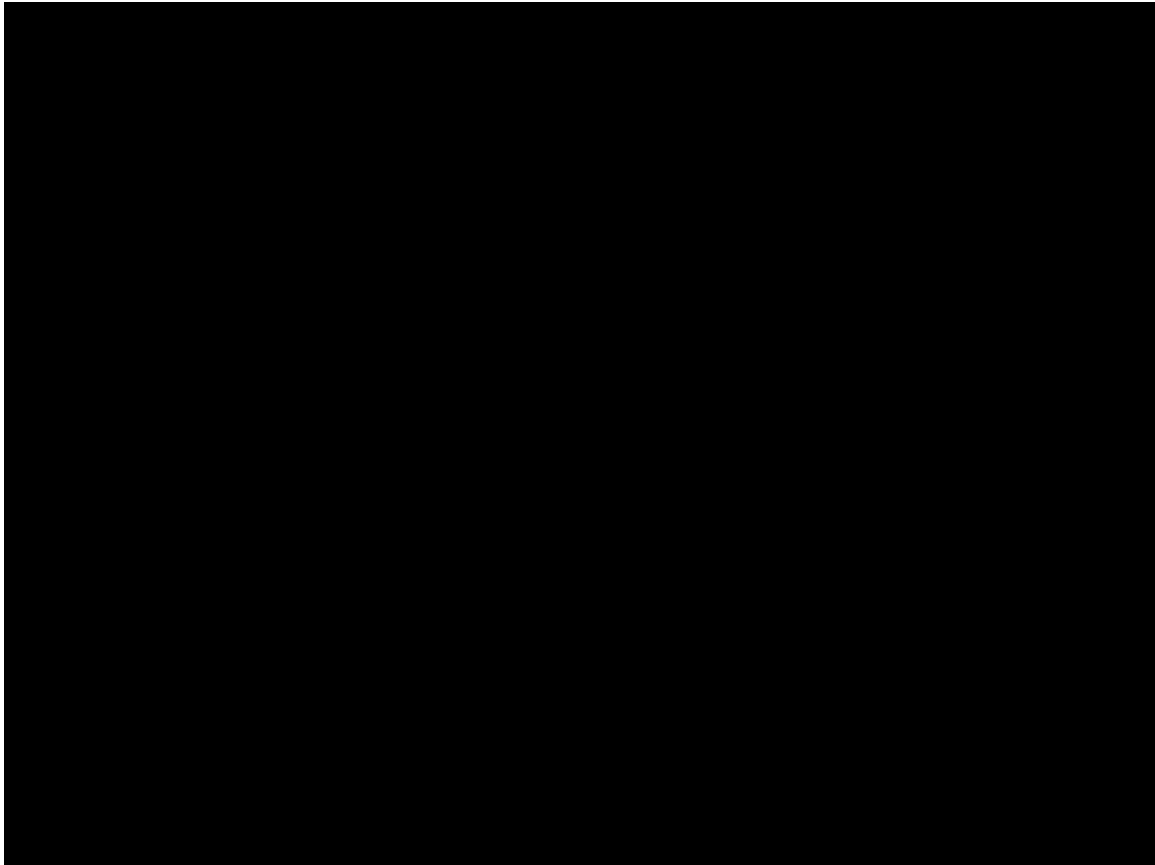
30. On April 20, 2023, Ekagra timely submitted a compliant, responsive, and awardable quote.

### **Contract Award and Brief Explanation**

31. On September 1, 2023, the Agency notified Ekagra that it was not selected for an award under the Emerging Technology, Data Transformation, Development and Maintenance Support (Track 2) BPA. The Agency stated that it awarded six BPA’s to the following

companies: Tarkik Solutions Inc., NIYAMIT Inc. Novilo Technology Solutions LLC, INDEV LLC, Centrifuge LLC, and CAN Softtech Inc. (Notice of Unsuccessful Quote.) In addition to notifying Ekagra that it was not selected for award, the notification also stated that Ekagra could request a brief explanation for the basis of the Agency’s award decision. (*Id.*) Ekagra did so.

32. On September 7, 2023, the Agency provided Ekagra with its brief explanation. (Brief Explanation.) The brief explanation stated that, in the Agency’s view, Ekagra’s “quote was not eligible for award because the following required RREP’s were not similar in scope and complexity:”



(Brief Explanation.)

33. The brief explanation provided no details on the six awardees and it provided no details on the Agency’s selection decision.

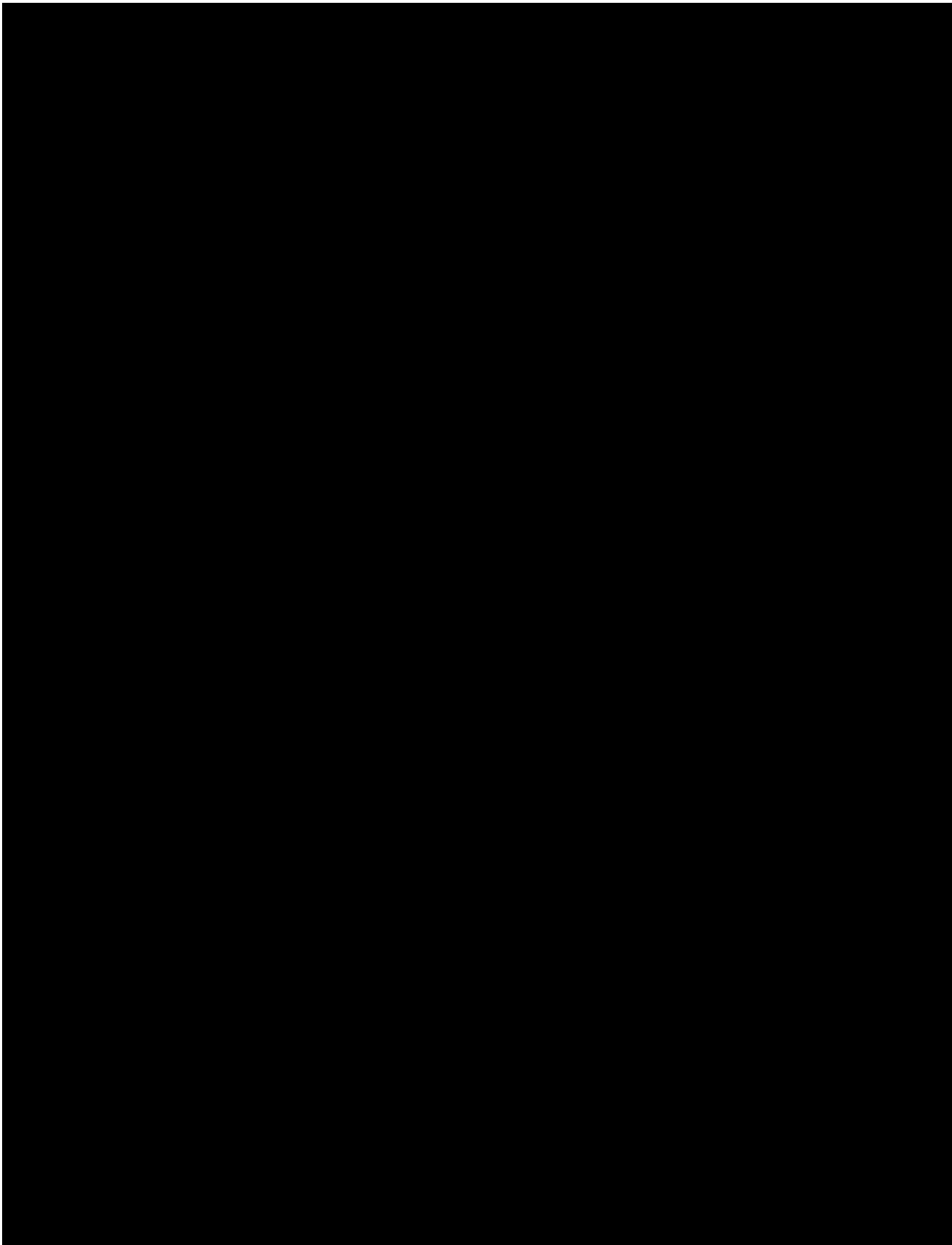


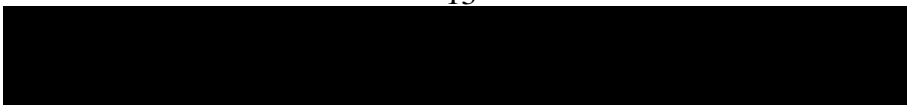
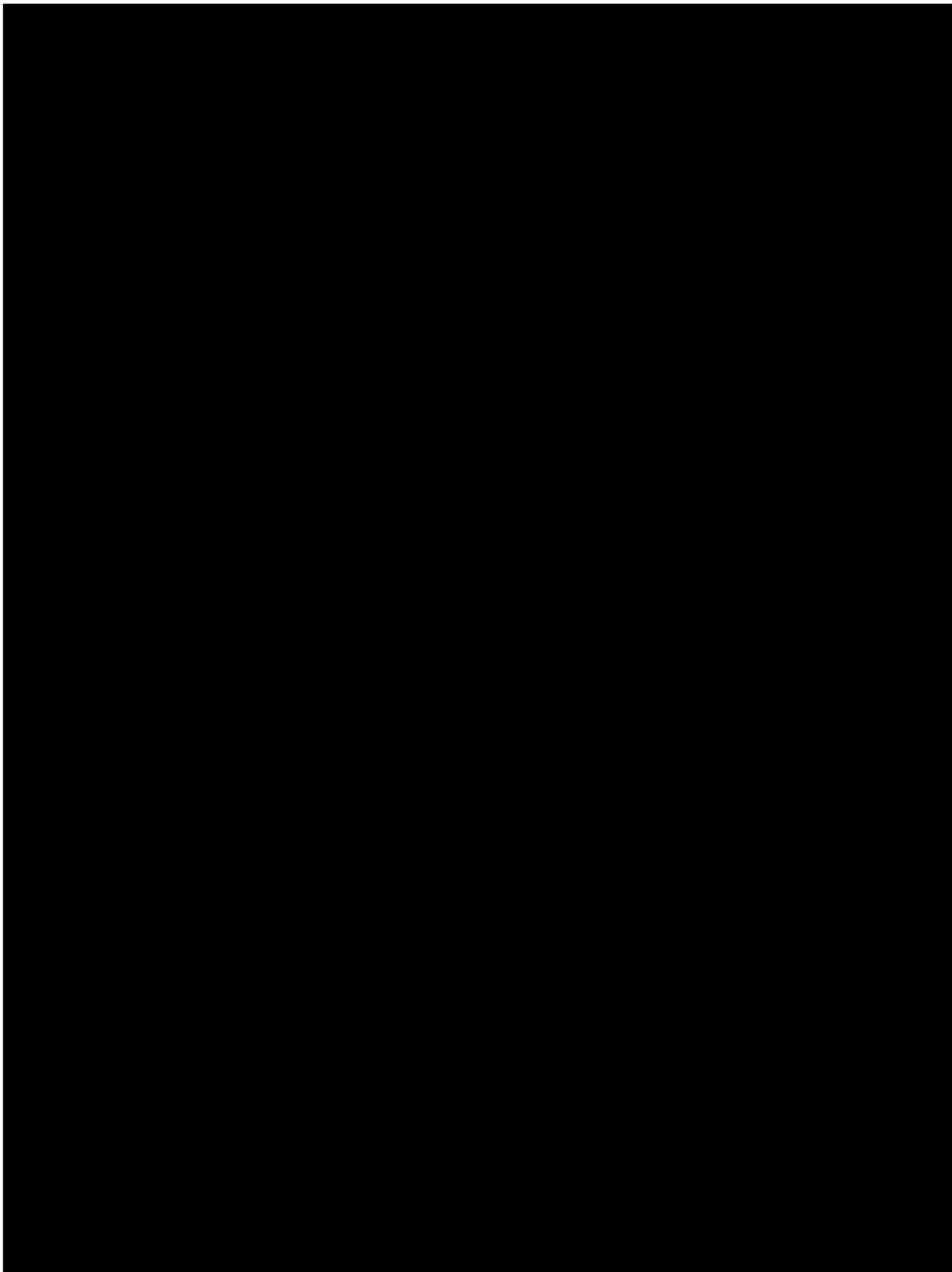
**COUNT ONE**  
**THE AGENCY’S EVALUATION OF VOLUME II (RREPs) WAS ARBITRARY,  
IRRATIONAL, AND CONTRARY TO LAW**

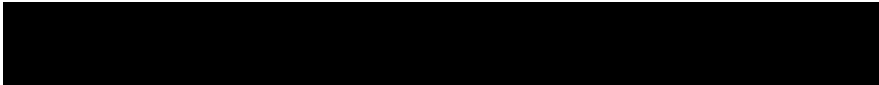
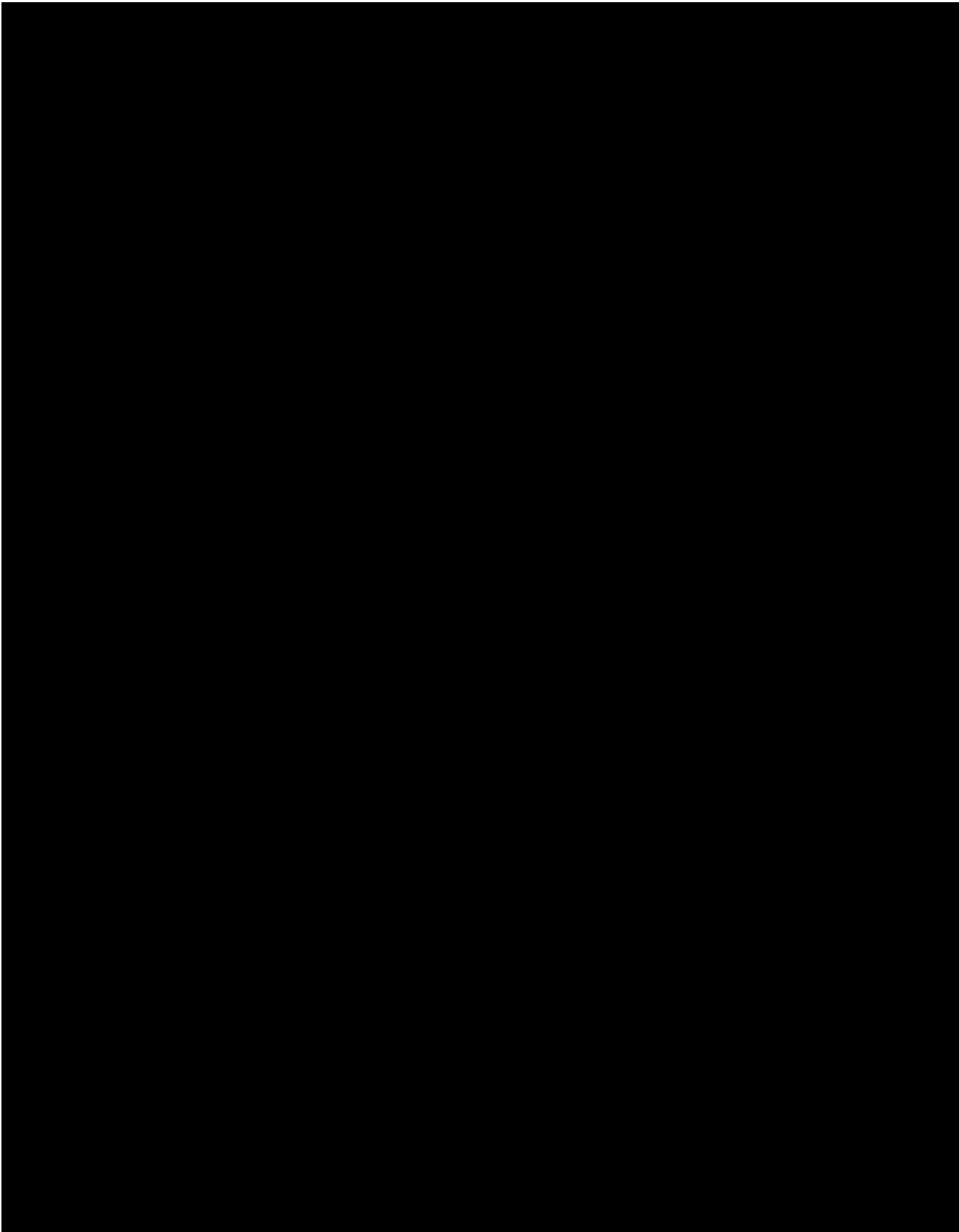
34. Ekagra realleges and incorporates the allegations of the preceding paragraphs by reference as if fully set forth herein.

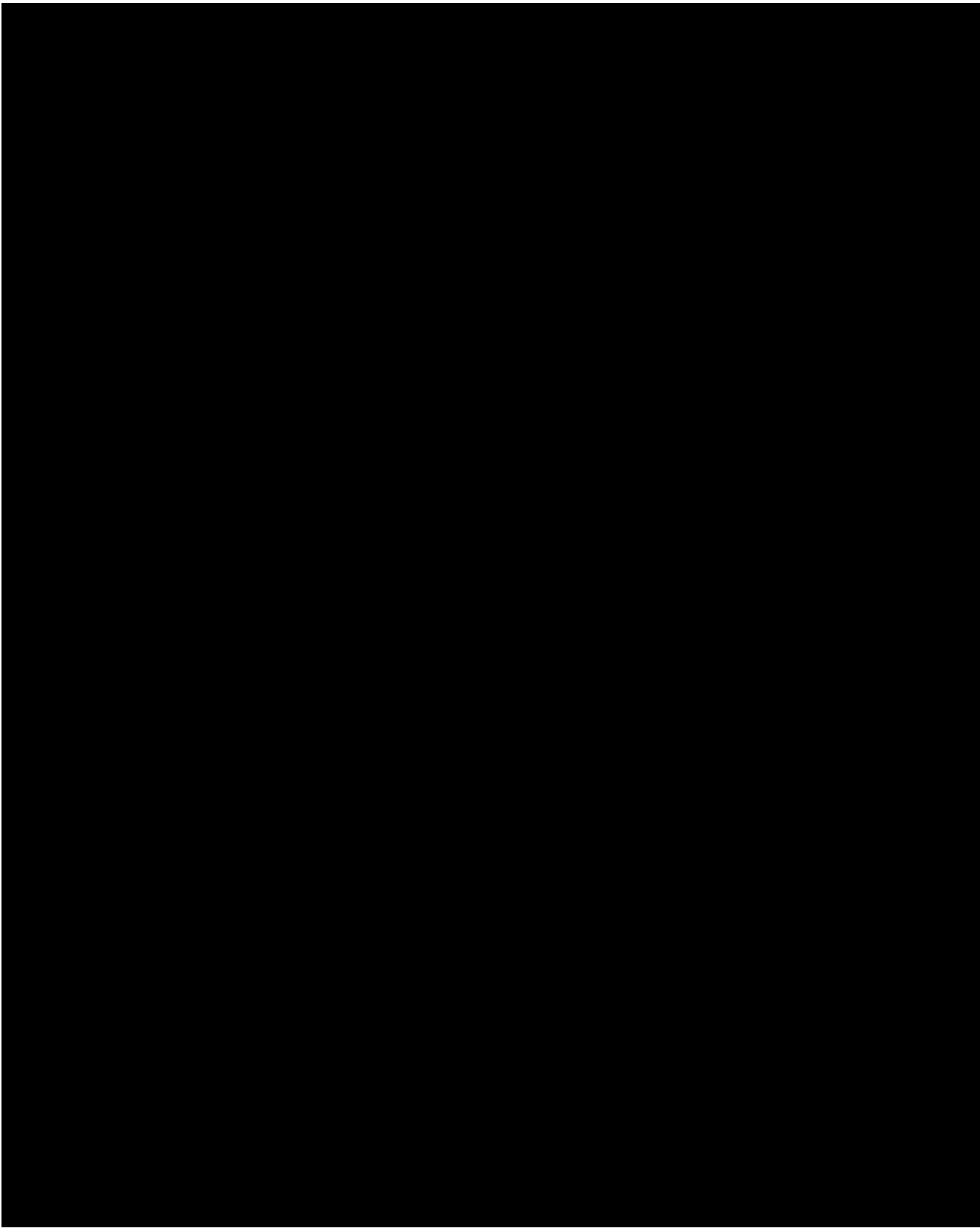
35. It is bedrock procurement law that an agency must follow the terms of a solicitation when evaluating offerors, else its evaluation lacks a rational basis. *See Ernst & Young, LLP v. United States*, 136 Fed. Cl. 475, 512 (2018) (citing *Elec. Data Sys., LLC v. United States*, 93 Fed. Cl. 416, 430 (Fed. Cl. 2010) (“[A]n agency shall evaluate proposals and assess their qualities solely based on the factors and subfactors specified in the solicitation.”); *see also CliniComp Int’l v. United States*, 117 Fed. Cl. 722, 741 (2014) (“[A]n ‘agency’s failure to follow the terms of its own Solicitation and selection of an offeror based upon different requirements than those imposed upon the only other offeror are quintessential examples of conduct which lacks a rational basis.”) (quoting *Hunt Bldg. Co. v. United States*, 61 Fed. Cl. 243, 273 (2004)). And although procuring agencies are afforded broad discretion in evaluating bids, “when those determinations are contradicted by the record, no amount of deference can save them from being overturned as arbitrary and an abuse of discretion.” *DZSP 21, LLC v. United States*, 139 Fed. Cl. 110, 118 n.9 (2018). Here, the Agency’s actions were arbitrary and capricious because the Agency evaluated Ekagra’s RREPs for Task 1 and Task 3 in a manner inconsistent or contrary to either the terms of the Solicitation or Ekagra’s quote, or both.

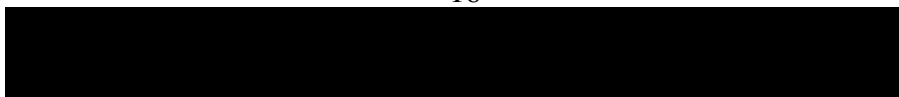
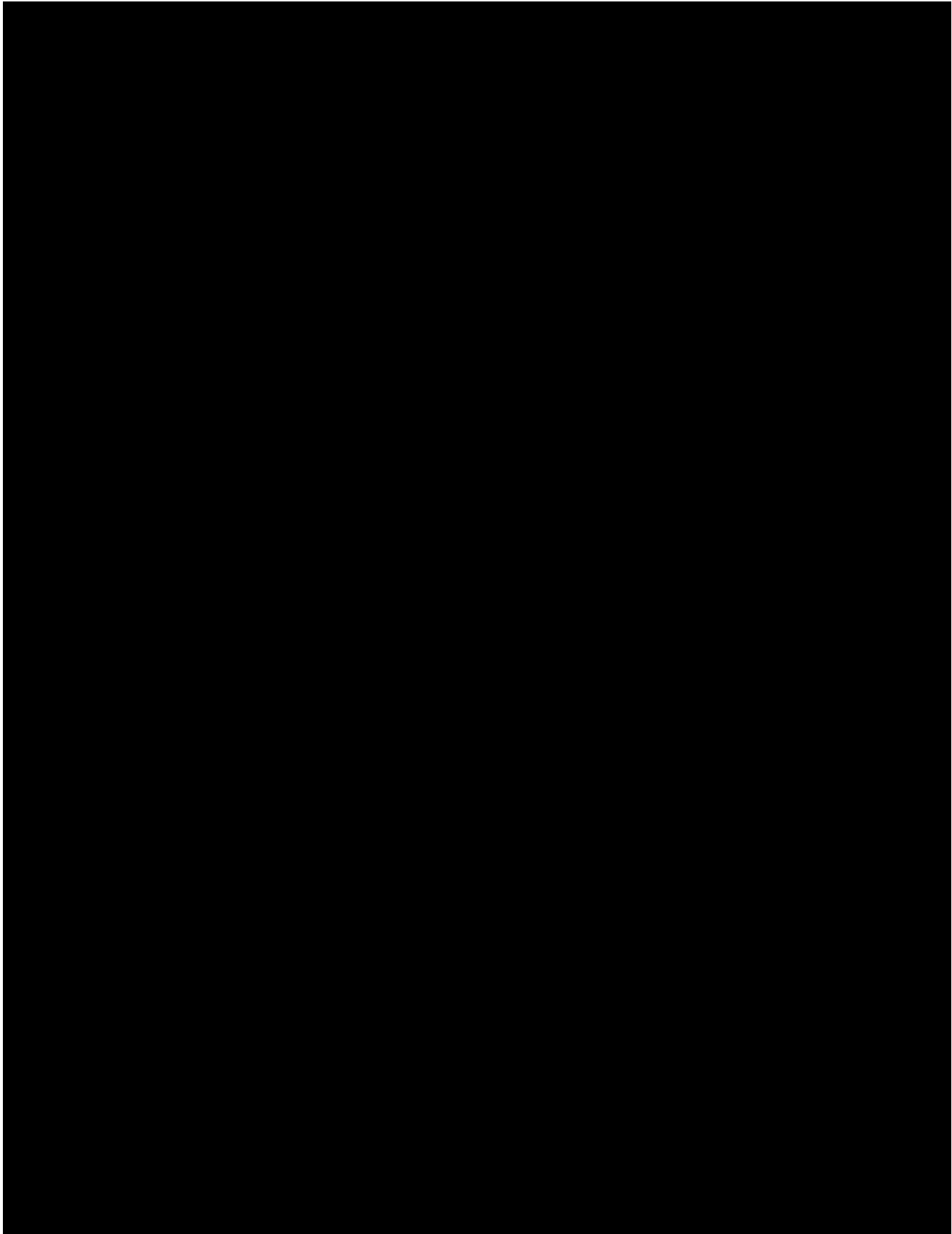
36. The Agency committed several grievous errors in evaluating Ekagra’s quote.



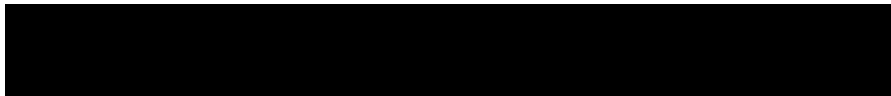
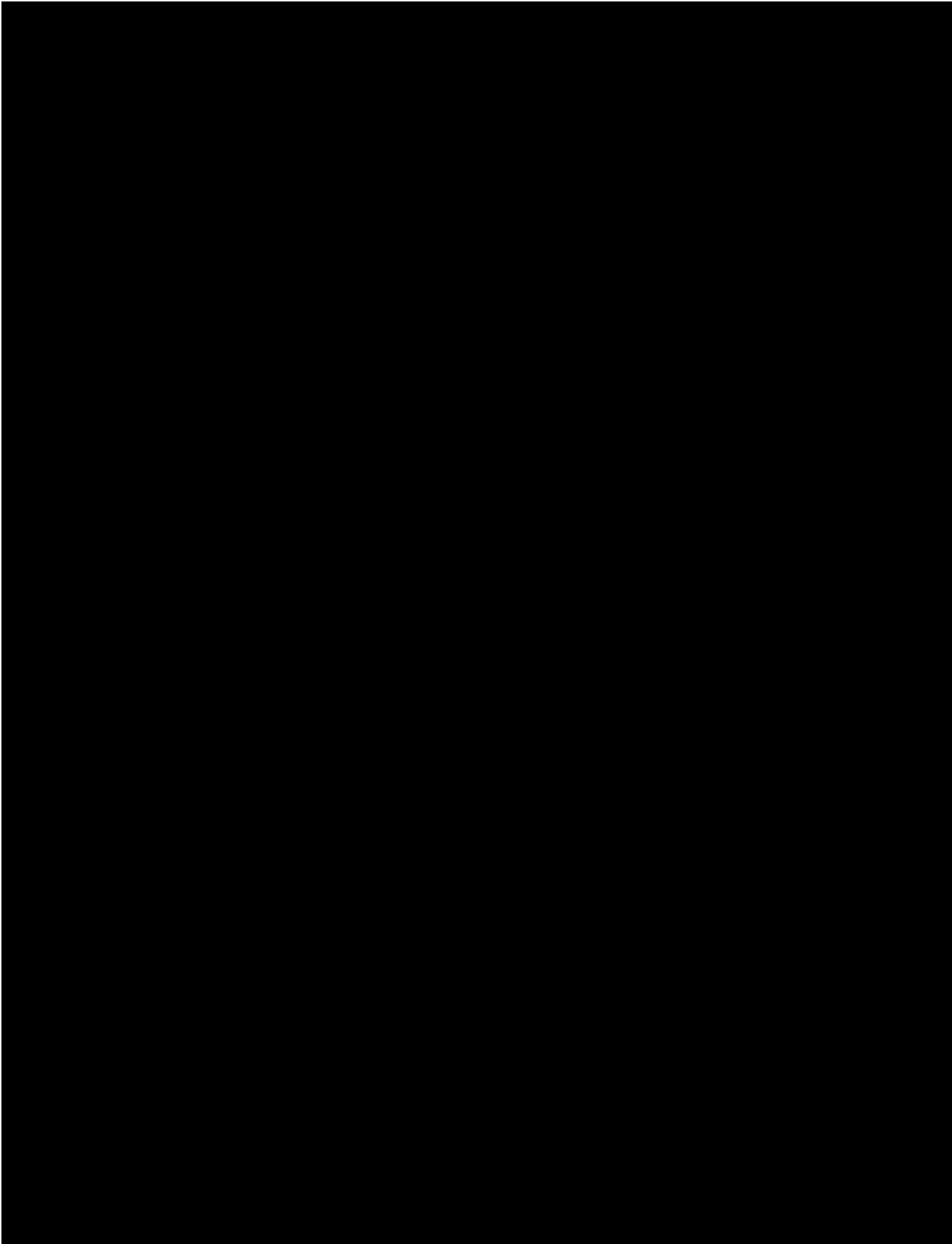


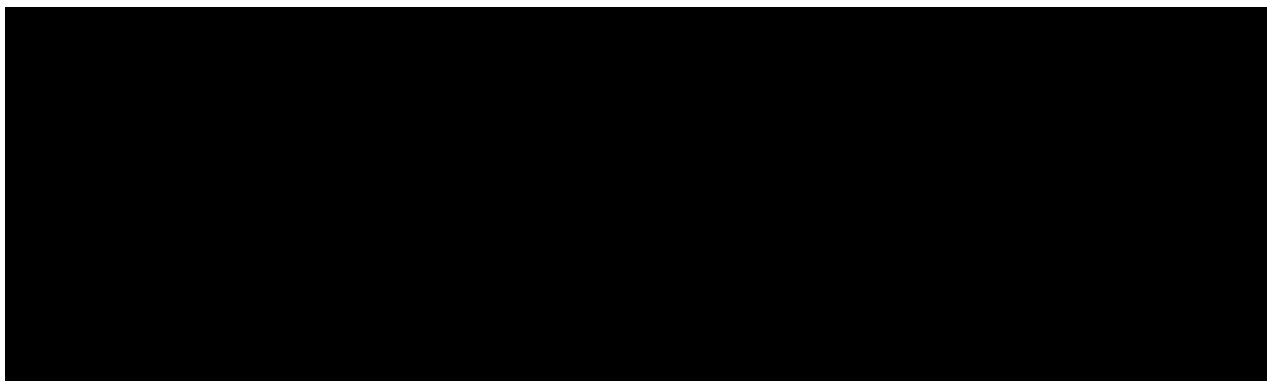








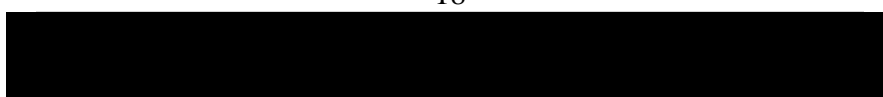
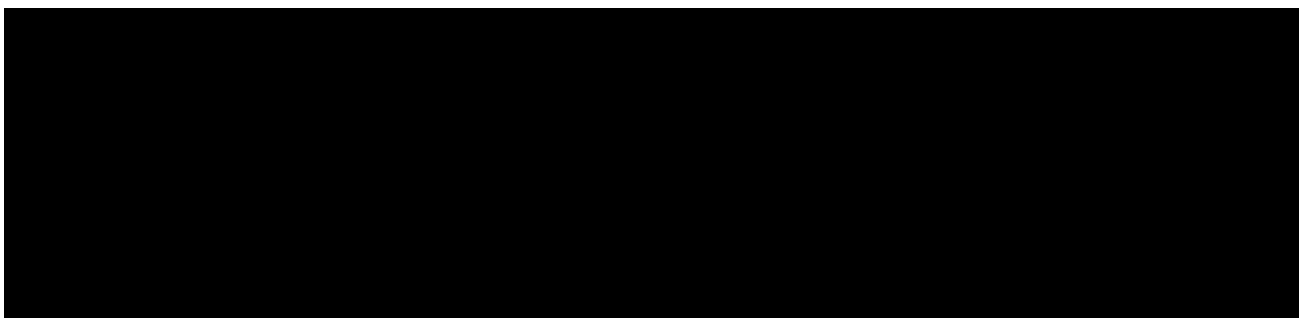


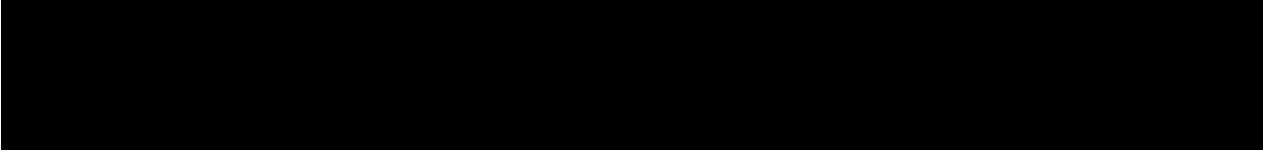


54. Ekagra was prejudiced. Ekagra's RREPs for Task 1 and Task 3 met and were similar to the Solicitation's requirements for scope and complexity. Had the Agency not deviated from the terms of the Solicitations or conducted an evaluation that was contrary to Ekagra's quote, Ekagra's quote would have been eligible for award. In other words, had the Agency properly evaluated Ekagra's quote, Ekagra would have had high technical scores for these two RREPs, and coupled with its competitive, fair, and reasonable pricing, Ekagra stood a substantial chance at receiving one of the multiple BPA awards.

**COUNT TWO**  
**THE AGENCY'S SOURCE SELECTION DECISION WAS ARBITRARY,  
IRRATONAL, AND CONTRARY TO LAW**

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





57. Ekagra was prejudiced. Ekagra’s proposed RREPs that met the Solicitation requirements for scope and complexity, and Ekagra provided competitive, fair, and reasonable labor category pricing. The Agency’s evaluation was arbitrary and irrational and it deviated from the Solicitation terms and Ekagra’s quote, which caused Ekagra’s RREPs to be improperly downgraded as being “not similar in scope and complexity,” and thus not eligible for award. Without the Agency’s improper evaluation, Ekagra’s RREPs would have been deemed similar in scope and complexity and they would have been evaluated more favorably. Thus, with its competitive, fair, and reasonable labor category pricing and higher scores related to its RREPs (including for Task 1 and Task 3), Ekagra stood a substantial chance of receiving one of the multiple BPA awards under the Solicitation.

58. Ekagra also stood a substantial chance at receiving award because the Solicitation contemplated up to eight (8) awards but the Agency only awarded six (6) BPAs. A proper evaluation would have also resulted in an award because there were open BPA slots, as the Agency awarded fewer than eight BPAs.

### **PRAYER FOR RELIEF**

WHEREFORE, Ekagra requests that this Court:

- A. Enter a preliminary injunction prohibiting the performance of the BPAs – and any resulting Call Orders – that were issued to the six awardees;
- B. Declare that the Agency’s decision-making process was arbitrary, irrational, and contrary to law;

- C. Permanently enjoin the performance of the BPAs – and any resulting Call Orders – were was issued to the six awardees;
- D. Require the Agency to perform a proper evaluation as required by law; and
- E. Award Ekagra such other and further relief as the Court may deem just and proper, including, without limitation, bid and proposal costs.

Dated: September 19, 2023

Respectfully submitted,

/s/ Jon D. Levin

Jon D. Levin

*Attorney for Plaintiff Ekagra Partners, LLC*

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**Certificate of Service**

I hereby certify that on September 19, 2023, I caused copies of the foregoing to be served by electronic mail upon the following:

U.S. Department of Justice  
Commercial Litigation Branch  
National Courts Section  
P.O. Box 480  
Ben Franklin Station  
Washington, D.C. 20044

/s/ Jon D. Levin  
Of Counsel