REDACTED VERSION

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

MAXIMUS FEDERAL SERVICES, INC.,	)
Plaintiff,	) Case No. ________________
v.	)
UNITED STATES,	)
Defendant.	)

BID PROTEST COMPLAINT

Plaintiff Maximus Federal Services, Inc. ("Maximus"), by undersigned counsel, submits this pre-award bid protest Complaint challenging the decision of the Department of Health and Human Services ("HHS"), Centers for Medicare and Medicaid Services ("CMS" or the "Agency") to include in Solicitation No. 75FCMC24R0010 (the "Solicitation" or "RFP") requirements that inject CMS into labor relations of those seeking to do business with CMS and put a heavy thumb on the scale in favor of labor unions that do not represent—but want to represent—the offeror/contractor's workforce. The challenged terms also provide an unearned competitive advantage to companies that already have a unionized workforce or which have entered into a so-called labor harmony agreement. These requirements are unprecedented, unlawful, unduly restrictive of competition, and mandated without a rational basis.

I. INTRODUCTION

1. CMS solicits contact center operations ("CCO") support through a contractor-operated, nationwide contact center, to handle customer inquiries about healthcare coverage under CMS programs such as 1-800-MEDICARE and the Health Insurance Marketplace.

2. Maximus is one of the nation's largest providers of contact center services to the federal government, with decades of experience working with federal, state, and local government agencies. For over a decade, Maximus has provided uninterrupted, high-quality customer support services to CMS as the CCO contractor, including meeting the recruiting, retention, and Service Contract Labor Standard requirements governing this federal services contract.

3. Less than two years ago, after a protracted (nearly three year) full and open competition, CMS determined that Maximus presented the best value to the government—"a superior proposal [from] which the Government will greatly benefit"—and awarded the CCO contract again to Maximus. (GAO Protest Ex. G, Maximus 2022 Debriefing at 2.)[1]

4. At no time over the decade that Maximus has supported the CCO contract has Maximus ever experienced a service interruption from any source: the pandemic, weather events, or demonstrations by a labor union.

5. All performance records, including Maximus's award fees, Contractor Performance Assessment Reports ("CPARs"), and CCO contract metrics that CMS maintains, document the high-quality service Maximus and its Customer Service Representatives ("CSRs") provide to CMS and the Medicare and Marketplace constituents that the contact center supports. In a May 13, 2024 letter, the CMS Administrator noted: "Customer service is integral to the call centers and historically [Maximus has] had some of the highest customer satisfaction scores with the federal government (95% satisfaction in Medicare and 92% in Marketplace). These high scores would

[1] The citations to the documents that are not attached as exhibits to this Complaint are to the protest document and the Agency records that were produced in the protest to the Government Accountability Office ("GAO") that Maximus previously filed also challenging this Solicitation. *Maximus Fed. Servs., Inc.*, B-422676, Sept. 16, 2024, 2024 CPD ¶ 222. Appendix C to the Court's rules provides that these records shall be a part of the Administrative Record in this case. RCFC App. C, ¶ 22.

not be possible without the contribution of the [Maximus] call center representatives." (AR Tab 14, Brooks-LaSure May 13, 2024 Letters to Members of Congress at *passim*.)

6. Despite historically high customer service ratings and wholly uninterrupted performance by Maximus, CMS is re-soliciting this substantial contract early, in the second of nine one-year option periods.

7. The sole purpose of the re-solicitation is to add a so-called Labor Harmony Agreement ("LHA") clause in the solicitation instructions and contractual clause, which will require the apparent successful offeror and contractor (and significant subcontractors) to execute, within 120 days, an agreement with any union that seeks to represent the offeror/contractor's employees as a condition of award or contract performance.

8. Since 2022, a third-party labor union seeking to represent the Maximus call center workforce has staged a few sparsely attended demonstrations involving CCO personnel. All agree (as CMS's own records confirm) that these demonstrations have caused no service disruption to the CCO contract. Nevertheless, within a few days of a rally by the union outside of the HHS Washington D.C. headquarters, the HHS Secretary announced that CMS would be recompeting the CCO contract, and then, approximately six months later, CMS issued the Solicitation with the challenged LHA requirements. (AR Tab 7, Dec. 15, 2023 Statement of Recompetition.)

9. In the challenged LHA provisions, CMS requires the offeror/contractor (and significant subcontractor) to execute a LHA with any union that "demonstrates an intent" to represent the offeror/contractor's CCO workforce, and mandates that the LHA prohibit the union and its members "from engaging in any picketing, work stoppage, boycott, or other economic interference" with the offeror/contractor's operations under the solicited contract. (RFP Am. 2 at 67, Sec. H.16, attached as Exhibit A.)

10. Failure to comply with the so-called "Labor Harmony Agreement" requirements may render the offeror ineligible for award or subject the contractor to a default termination, among other penalties for noncompliance with the LHA requirements in the Solicitation and solicited contract terms. (*Id*. at 68, Sec. H.16(f).)

11. LHA requirements thus dictate how an otherwise responsible and best value offeror must manage labor organizing activities targeting the CCO workforce both to be eligible for award and also to remain in compliance with the contract once awarded.

12. The LHA requirements that CMS imposes in the Solicitation gives unions both unilateral control over the trigger for the awardee/contractor's LHA obligations and extraordinary and illegal negotiation leverage. In return for the union's limited promise not to interfere intentionally with the apparent successful offeror/contractor's operations, the unions will demand—and will have the leverage to secure—many concessions that trample the employer's and employees' rights under the National Labor Relations Act ("NLRA"), including: (1) giving the union access to and space in the contractor's workspace; (2) giving the union employees' names and personal contact information; (3) preventing the employer from providing employees information contrary to the union's interests; (4) allowing the union to determine the scope of the bargaining unit; (5) substituting a union-led "card check" process for the employees' right to a traditional election process; (6) requiring the employer to waive its right to file an election petition with the National Labor Relations Board ("NLRB" or "Board") and waiver of both parties' right to file unfair labor charges; and (7) requiring "interest arbitration" whereby any failure to agree to any collective bargaining terms within a specified period would go to a single arbitrator for resolution. That last term—interest arbitration—is particularly significant and potentially detrimental to performance under the CCO contract as it will vest the sole authority in a third-party

arbitrator, with almost certainly no experience delivering these complex services, to decide material operational, cost, and performance terms.

13. The apparent successful offeror/contractor that wishes to obtain the award and not risk default will be forced to accept the union's demands. (*See, e.g.*, AR Tab 5C, Comm. On Educ. & Workforce RFI Response at 2 ("Common concessions in labor harmony agreements that ease the path to unionization include card check agreements and employer neutrality during the organizing process.").)

14. It is well known that LHAs (sometimes referred to as "labor peace" or "neutrality" agreements) ease the path to unionization by including various employer concessions like neutrality during the organizing process, access to the employer's facilities for organizing activities, provision of the names and contact information of company employees, and substituting a union-led "card check" process for the employee-favored secret ballot election process.

15. Before a previous challenge at GAO, arguments made by CMS acknowledged that the mandatory LHA requirements serve the third-party union's interest, making the union's efforts to organize (i.e., unionize) the offeror/contractor's CCO workforce easier. (CMS Mem. of Law ("MOL") at 8.)

16. CMS lacks authority to impose the LHA requirements as condition of award or contract compliance and has acted arbitrarily in mandating such requirements in the instant procurement.

17. The Federal Acquisition Regulation ("FAR") requires federal procuring agencies to remain impartial and not to interfere in labor relations between contractors and labor organizations. FAR 22.101-1(b), (d). The LHA requirements do the exact opposite, placing

CMS's thumb on the scale and mandating an agreement to provide a guide path to unionization and interjecting the CMS contracting officer into disagreements about the LHA terms.

18. FAR 1.102(d) only permits procuring agencies to select procurement strategies within the bounds of the law: "In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority."

19. The mandatory LHA requirements violate FAR Part 22. FAR 22.101-1(d) authorizes, at most, an agency suggesting a "voluntary agreement" should a labor-management dispute actually threaten a government program, but only if such a suggestion would not "involve the agency in the merits of the dispute" and the acquisition agency first consulted with the Federal Mediation and Conciliation Service ("FMCS"), an independent federal government agency with national, regional, and local offices staffed by experienced mediators trained to help parties reach agreement and avoid strikes through mediation and other dispute resolution techniques. 29 U.S.C. § 202. The Solicitation's LHA requirements fail all three prongs.

20. Next, the concessions (or "things of value" to the union) the offeror/contractor will have to give in order to comply with the CMS-imposed LHA requirements risk subjecting the CCO offerors/contractors to potential criminal liability under Section 302(a)(2) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 1986(a)(2) and 1986(d), and unfair labor practices under Section 8 of the NLRA. 29 U.S.C. § 128. A solicitation clause that makes an offeror choose between compliance with CMS's terms and compliance with federal law is by

definition arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A), (D); 28 U.S.C. § 1491(b)(4).

21. The challenged LHA requirements are also preempted by the NLRA.

22. The NLRA regulates the process of determining whether employees want to be represented by a union for purposes of collective bargaining based on majority rule. Selecting a union representative of their own choosing—or selecting no union representative—is at the core of employees' right to self-determination under the NLRA. *See* 29 U.S.C. § 157. To effectuate this right, the NLRB administers a secret ballot election process that is designed to determine, "under conditions as nearly ideal as possible," the "uninhibited desires" of the employees. *General Shoe Corp.*, 77 NLRB 124, 126-27 (1948). The secret ballot election process (like our national election process) is the "most satisfactory—indeed the preferred—method of ascertaining whether the union has majority support." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602-03 (1969).

23. Moreover, rooted in the First Amendment and to ensure employees receive all relevant information when effectuating their rights under the NLRA, employers have the right to communicate information and "any views, argument, or opinion" about union representation, if the speech "contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). This provision of the NLRA reflects a policy judgment "favoring uninhibited, robust, and wide-open debate in labor disputes." *Chamber of Com. v. Brown*, 554 U.S. 60, 68 (2008) (quoting *Letter Carriers v. Austin*, 418 U.S. 264, 272-273 (1974)). The Supreme Court has held that the use of government funds cannot be conditioned on an employer's waiver of its free speech rights under the NLRA. Such a condition "chills one side of 'the robust debate which has been protected under the NLRA.'" *Id.* at 73 (quoting *Letter Carriers*, 418 U.S. at 275).

24. This process that Congress established the NLRA balances the delicate (and often conflicting) relationship between employers and unions. Government actions, whether federal, state, or local, that upset this balance—like CMS's mandated LHA requirements—are preempted. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111 (1989) (NLRA "creates a free zone from which all regulation, whether federal or State, is excluded").

25. The LHA requirements exclude otherwise responsible best value contractors from award unless they agree to support unionization of the CCO workforce through reaching an LHA with one or more labor unions. This limitation on competition violates the Competition in Contracting Act ("CICA"), 41 U.S.C. § 3301(a)(1). CMS's own market research demonstrated that the LHA requirements would severely curtain competition both for the underlying prime contract and small business subcontracting requirements. (AR Tab 5B, RFI Response Summary at 3-4 (documenting that "a Labor Harmony Agreement would limit competition, impact small business participation, and increase contract costs.").) None of the exceptions for limiting competition apply here.

26. The LHA requirements are not technical terms or specifications tailored to satisfy CMS's needs as contemplated by 41 U.S.C. § 3306(a). Unlike a technical requirement or specification, which focuses on the substance of the solicited work, the LHA requirements have nothing to do with the contact center services the CCO contractor will provide. Rather, the LHA requirements reflect CMS's broader effort to regulate labor relations on the CCO contract by facilitating unionization. That is the only way to reconcile why the Secretary of the Department of Labor ("DOL") would have reached out to the Secretary of HHS with interest about the CCO contract and its terms.

27. Even if LHA requirements are the type of restrictive technical requirement or specification that CICA Section 3306 contemplates, the LHA requirements would still violate CICA because they restrict competition based on factually unsupported concerns that the LHA requirement is not rationally tailored or necessary to address. *Am. Safety Council, Inc. v. United State*s, 122 Fed. Cl. 426 (2015) (technical data rights clauses in solicitation were unduly restrictive in violation of CICA given that requirement did not properly reflect the agency's needs and was already addressed by less restrictive means in the solicitation). CMS has imposed these mandatory LHA requirements grounded in the presumption that the mere fact of past organizing activity—however inconsequential—necessarily will result in service disruptions or the appearance of one, contrary to all available evidence. At most the "harmony" achieved through the LHA is with the unrecognized union, which lacks any authority under the NLRA to waive the rights of the employees to stop work or organize other labor disruptions. There is nothing in the LHA requirements that would prevent employees on the CCO Contract from engaging in strike activities or otherwise causing disruptions. Nor could it under the NLRA. Instead, the CMS procurement documents that challenged Solicitation creates more of threat to the CCO operations than any labor activity. (AR Tab 12, Acquisition Plan CCO at 22 ("[redacted] "); *id*. (estimating [redacted] ").)

28. Accordingly, the Court should declare the Solicitation's LHA requirements to be unlawful, as well as arbitrary, capricious, and an abuse of discretion, and the Court should direct CMS to amend the Solicitation to remove the LHA requirements and the related experience criterion.

II. PARTIES

29. Maximus has served federal, state, and local government customers for more than 40 years, implementing and managing large contact centers and solutions. (GAO Protest Ex. B, Decl. of [REDACTED] ("[REDACTED]") ¶ 3.) [REDACTED] (*See id.*) Maximus does not have a unionized workforce.

30. CMS provides health insurance through various federal programs including Medicare and the Health Insurance Marketplace. (AR Tab 2E, Statement of Work ("SOW") at C-4.) To provide information that help individuals evaluate their health plan options, CMS operates—through a contractor (currently Maximus)—a toll-free, nation-wide, 24/7 contact center with multiple sites to provide customer service and address inquiries regarding Medicare and the Marketplace. (*Id.*)

III. JURISDICTION AND VENUE

31. This Court has jurisdiction over this action objecting to a solicitation pursuant to 28 U.S.C. § 1491(b), which gives this Court exclusive jurisdiction over "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). *See Sys. Application & Techs., Inc. v. United States*, 691 F.3d 1374, 1380-81 (Fed. Cir. 2012) (affirming § 1491(b)'s "broad grant of jurisdiction over objections to the procurement process" including over "objections to a solicitation"); *Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1244 (Fed. Cir. 2010) (explaining that "procurement or proposed procurement" as used in § 1491(b) "includes all stages of the process of acquiring goods or services") (citation omitted).

[REDACTED]

32. Venue is proper in this Court pursuant to 28 U.S.C. § 1491(b).

IV. STANDING

33. Maximus is an interested party with standing to bring this protest. *See* 28 U.S.C. § 1491(b)(1).

34. Although the Tucker Act does not define "interested party," the Federal Circuit has defined that term as an actual or prospective bidder or offeror with a direct economic interest in the procurement or the proposed procurement. *CACI, Inc.-Fed. v. United States*, 67 F.4th 1145, 1151 (Fed. Cir. 2023); *Myers Investigative & Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1370 (Fed. Cir. 2002) (citations omitted).

35. In a pre-award protest, the Federal Circuit has explained that a plaintiff can establish a direct economic interest by showing a "non-trivial competitive injury which can be addressed by judicial relief." *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1362 (Fed. Cir. 2009).

36. Maximus is an actual offeror in the CCO competition and has a direct economic interest in the procurement because the unlawful and unduly restrictive LHA requirements undermine Maximus's ability to compete fairly under the Solicitation and to manage labor relations of its own workforce. The challenged Solicitation terms thus cause nontrivial injuries that the Court can remedy by declaring those provisions improper and enjoining the Agency from making an award under the Solicitation until the Agency amends the Solicitation remove the unlawful and arbitrary provisions.

V. TIMELINESS

37. Maximus timely files this pre-award protest. On May 16, 2024, the Agency issued the Solicitation, and amended it once on June 14, 2024. (AR Tab 3, Solicitation Am. 1.) Phase 1

proposals were due on June 28, 2024. On June 20, 2024, prior to the proposal submission deadline, Maximus filed a pre-award protest with the GAO, challenging the LHA and related clauses as contrary to the law, unduly restrictive of competition, and ambiguous. Maximus subsequently submitted its Phase 1 proposal prior to the deadline.

38. On September 16, 2024, GAO issued a protected decision, which became public on September 24, 2024, granting the protest in part on the ground that the Solicitation was ambiguous as to the length of time the apparent successful offeror will have to negotiate an LHA in order to keep the award. *Maximus Fed. Servs., Inc.*, B-422676, Sept. 16, 2024, 2024 CPD ¶ 222.

39. On October 11, 2024, the Agency issued Solicitation Amendment 2 in response to Maximus's pre-award protest and the GAO decision. (RFP Am. 2, Ex. A.) The amendment extends the submission deadline for the Phase 2 proposals to November 27, 2024.

40. [redacted]

41. Maximus files this pre-award protest within 17 days of the Agency amending the Solicitation following the GAO protest and 30 days prior to the submission deadline for the Phase 2 proposals. *CGI Fed. Inc. v. United States*, 779 F.3d 1346, 1349-50 (Fed. Cir. 2015).

42. The Agency has not yet made an award decision, and pursuant to Amendment 2, does not anticipate award until August 1, 2025. (RFP Am. 2 at 106 (§ L.7), Ex. A.) CMS, however, currently anticipates notifying the apparent successful offeror on or about March 15, 2025. (*See id.*)

VI. FACTUAL ALLEGATIONS

A. Maximus Has A Longstanding Record Of High Quality, Uninterrupted Service Under the CCO Contract.

43. The CCO contractor handles over 40 million customer inquiries a year, such as telephone, mail, teletype, fax, and web chat, enabling multi-channel access and 24/7 customer service, offering Medicare and Marketplace consumers information about the programs and coverage. (AR Tab 4A, Sources Sought Notice at 2.)

44. Since Maximus began performing the Contract in 2013, initially as a subcontractor and since 2018 as the prime contractor, Maximus has consistently received excellent customer feedback and strong performance ratings, praising its seamless operations, lack of staffing or scheduling disruptions, and successful contract management—both during the busy open enrollment period ("OEP") and otherwise. (GAO Protest Ex. B, [redacted] Decl. ¶ 5.)

45. Maximus has exceeded performance metrics even when confronted by challenges posed by COVID-19 (*see, e.g.*, AR Tab 10, June 2022 CPAR at 2 (noting "the contractor exceeded the CCO requirements during this timeframe [June 2021-May 2022], as the COVID-19 pandemic required a sustained and continued amount of flexibility and ingenuity by the team" and that "MAXIMUS worked diligently to ensure staffing, facilities, as well as other program requirements were met within the designated time frames"); *see also id.*, May 2021 CPAR at 2-3 ("seamless customer service" in "unprecedented times"); *id*, November 17, 2023 CPAR (stating that "[d]uring the Open Enrollment Periods, the contractor provided a high level of service so that the program did not have to rely on contingency levels to mitigate an overflow of call volume. The contractor was able to more than adequately staff and ensure low levels of attrition and absenteeism")), and most recently with challenges posed by Hurricane Milton.

46. On August 31, 2022, after a nearly three-year full and open acquisition process, CMS re-awarded the contract to Maximus. In doing so, CMS determined Maximus "provided the best value to the government," observing that Maximus had "received the highest rating available in all evaluation criteria," and would continue to perform and manage the workload requirements with "minimal to no risk to the Government." (GAO Protest Ex. G, Maximus 2022 Debriefing at 2 (summary of award).)

47. When awarding the current CCO contract only two years ago, evaluators found Maximus customer service representatives ("CSRs") [redacted] (GAO Protest Ex. H, Summary of Strengths at 2.)

48. The Agency praised Maximus for flexible staffing that is "not widely available in other contact centers [and] will potentially make Maximus an employer of choice." (*Id.* at 5.) The Agency further found that Maximus's "[redacted]" which results in "a very low risk approach." (*Id.* at 10.)

49. The most recent 2022 CCO contract award to Maximus included a short transition period from August 31, 2022 until September 10, 2022, and nine one year options, with the final option concluding on September 10, 2031. (GAO Protest Ex. I, Aug. 2022 Contract Excerpt at 4.) The estimated total cost of this cost-plus-award-fee contract (including all option years) is $6,601,074,760. (*Id.*)

50. Maximus performed the second option period, which ran from September 11, 2023 to September 10, 2024, and is currently performing the third option period from September 11, 2024 to September 10, 2025. (*Id.*)

51. Under this contract (just as the predecessor contract), Maximus operates a national, multi-site contact center. [REDACTED]. (GAO Protest Ex. B, [REDACTED] Decl. ¶ 9(a).)

52. Maximus's [REDACTED] (*Id.* ¶ 9(a), (c).)

53. In terms of staffing, "Maximus has a proven track record of rapidly adjusting staffing levels to address immediate inquiry volume surges. [REDACTED]." (*Id.* ¶ 10(a); *see also* AR Tab 11A.2 Sept. 11, 2023 – Jan. 31, 2024 Award Fee Evaluation at 5 (CMS stating that despite compressed ramp up period, "both the Medicare and Marketplace program regularly exceeded [REDACTED] targets").)

54. Maximus continues to receive high ratings under the current CCO contract. (AR Tab 10, Nov. 17, 2023 CPAR at 2 (noting "Marketplace and Medicare [Open Enrollment Periods ('OEPs')] were overall considered a success [REDACTED]

[REDACTED]

[REDACTED]").)

55. In May 2024, the CMS Administrator praised the high-quality work of Maximus's CSRs: "Customer service is integral to the call centers and historically they have had some of the highest customer satisfaction scores within the federal government (95% satisfaction in Medicare and 92% in Marketplace). These high scores would not be possible without the contribution of the call center representatives . . . ." (AR Tab 14, Brooks La-Sure May 13, 2024 Letters to Members of Congress, May 13, 2024 at *passim*.)

B. The CCO Contract Suffered No Disruptions Or Performance Impact During a Handful of Union-Sponsored Demonstrations.

56. Maximus has never—ever—experienced any work stoppage, boycott, or other labor related event that interfered with Maximus's ability to performance its contracts, including the CCO contract. (GAO Protest Ex. B, [REDACTED] Decl. ¶ 17; *see also* AR Tab 1, Contracting Officer Statement at 7 ¶ 20 (acknowledging no service disruption occurred on CCO Contract as a result of labor activity).)

57. To date, there have been a few sparsely attended demonstrations involving CCO personnel, three on the predecessor contract and five on the current contract.[2] (GAO Protest Ex. B, [REDACTED] Decl. ¶¶ 17 19.) These demonstrations have been short events, lasting at most a few hours, typically including free food, music, and visiting speakers, and each were orchestrated by a labor organization to generate publicity. (GAO Protest Ex. B, [REDACTED] Decl. ¶¶ 19-20; *see also* AR Tab 8A, Mar. 23, 2022 Protest Update – 4 PM (Maximus update re: protest to CMS, stating

[2] None of the demonstrations were a "strike," which federal law defines as "a strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees." 29 U.S.C. § 142(2).

[REDACTED]

that labor union is filming a town hall with event participants).) The labor organization has even paid participants to attend some of these events, apparently to exaggerate the appearance of employee support. (GAO Protest Ex. B, [REDACTED] Decl. ¶¶ 23, 25; *see also* AR Tab 8H, Nov. 9, 2023 Protest Report – 11AM (reporting payment a $190 "strike pay" for contact service representative); AR Tab 8H, Nov. 9, 2023 Protest Report – 12 AM (reporting live music and food being served at site); AR Tab 8C, June 17, 2022 CWA DC Event (re: labor organization offering up to 50 Maximus employees a free trip to Washington, D.C. to "wine and dine" them with the organization's executives).)

58. No disruption of service under the CCO contract has ever resulted from these minor events. (GAO Protest Ex. B, [REDACTED] Decl. ¶ 27.; *see also* AR Tab 1, Contracting Officer Statement of Facts at 7 ¶ 20.) Only a negligible percentage of Maximus employees have ever participated in any of these short demonstrations. (GAO Protest Ex. B, [REDACTED] Decl. ¶ 28.) [REDACTED] Some even signed the demonstration forms the union gave them but also worked their full shift. (*Id.* ¶¶ 22-25; *see, e.g.*, AR Tab 8Bm May 23, 2022 Protest Update – 1 PM (stating that of 91 CCO Contract employees who signed a strike petition, just 55 who were scheduled to work on date of the labor demonstration did not show up to work).) In fact, CMS has an attendance target of less than or equal to [REDACTED] unplanned absenteeism, and Maximus met this target on each demonstration day (and routinely meets it on all other days). (*Id.* ¶ 27.)

59. CMS records of Maximus' performance also show that Maximus met or exceeded the key performance metrics on the day of each brief demonstration, reflecting that the demonstration had no impact on operations or quality of service.

60. CMS's contemporaneous communications with Maximus on the dates of the foregoing demonstration do not reflect any concern by CMS that the demonstrations would cause service disruptions. (*See, e.g.*, AR Tab 8h, November 9, 2023 Protest Update – 11 AM (CMS noting re: November 9 event—the largest demonstration—that, "I feel like the participants listed . . . aren't participating?" and Maximus responding: "100% accurate. I have to wait until all the numbers are final but my/our takeaway is another non-event)").)

61. The limited effectiveness of these union organizing activities is reflected in high satisfaction ratings by Maximus employees. A 2024 Global Employee Engagement Survey reflects 87% of employees "intend to stay with the Company for at least another 12 months," and 84% report their supervisor/manager cares about their growth and development. (GAO Protest Ex. L, Employee Engagement Excerpt.)

C. CMS Recompetes The CCO Requirements Shortly After The Latest CCO Award In Order To Impose The LHA And Related Experience Requirements

1. CMS First Seeks Contract Modification To Require An LHA With Any Interested Labor Organizations

62. In late September 2022, soon after executing the August 2022 Contract, CMS sought a bilateral contract modification imposing an entirely new requirement—an LHA. (GAO Protest Ex. B, [redacted] Decl. ¶ 14.)

63. From early October 2022 through January 2023, Maximus and CMS exchanged information regarding the proposed modification. CMS acknowledged that the "labor harmony agreement" terms are not in other CMS contracts, and that CMS did not have "any specific concerns about [Maximus's] continuity of service." (AR Tab 15C, Oct. 2022 Q&A With CMS at 2.) Instead, CMS sought to impose the clause "to avoid potential future disruptions and the appearance of disruption caused by strikes which may impact Medicare beneficiary and

Marketplace consumer confidence in the availability of service." (*Id.*) CMS clarified that it was concerned about "any social media, press or other communications to the public which would imply that there may be service disruption at the call center, especially on key days where outreach and other communication drive users to the call center." (*Id.*)

64. Internal CMS communications from late 2022 reflect interest in the status of the exchanges and the LHA requirement from senior Executive Branch officials outside of CMS. For instance, on December 19, 2022, the CMS Deputy Director for Operations of the Office of Communications, wrote to the CMS Deputy Chief Operating Officer, that "CBL asked for an update on the Labor peace clause by the end of the day. Apparently the labor Secretary reached out to Sec Becerra so HHS is looking for status." (AR Tab 15C, Labor Call Center Update for HHS at 3.) The CMS Deputy Chief Operating Officer replied on the same day, stating she heard "that there may be renewed interest coming from the Department of Labor on this issue." (*Id.* at 2.)

65. Ultimately, however, no modification to the contract occurred. (*Id.*)

2. Pre-Solicitation Feedback from Industry

66. In June 2023, ten months into performance of the current CCO contract, CMS issued a Request for Information ("RFI") "seeking information from the contact center industry on operational insights related to managing a large, distributed workforce." (AR Tab 5A, RFI at 1.) CMS also sought "feedback on the inclusion of a Labor Harmony clause to be considered in future contracts as well as operational recommendations on ensuring ongoing engagement and quality of remote workers." (*Id.*)

67. CMS received 16 responses to the RFI, including a response from Maximus. CMS's own summary of the responses reflects that "[i]ndustry feedback cited concerns that a Labor

Harmony Agreement would limit competition, impact small business participation, and increase contract costs. (AR Tab 5B, RFI Summary at 3.); GAO AR Tab5C, Maximus RFI Response (

); *see also* AR Tab 5C, RFI Response (describing why (i) the LHA requirements creates unnecessary confusion and contradictory obligations that potentially violate the National Labor Relations Act, including by infringing on employees' rights to refrain from union activity; (ii) LHAs are inefficient and could undermine CCO Contract objectives, thus creating additional costs for tax payers; (iii) the LHA requirements creates heightened litigation risks stemming from preferential treatment of unions; and (iv) the "remedies" provisions of the proposed LHA clause raised due process, preemption, and separation of powers issues).)

68. The Agency catalogued numerous concerns and confusion raised in responses to its RFI but ultimately ignored them. In the Agency's own summary, it noted that, with the exception of one potentially eligible vendor, "[a]ll other respondents stated they would not pursue work where a Labor Harmony Clause was a requirement of the contract." (AR Tab 5B, RFI Response Summary at 4; *see also id.* at 6 (describing "a chilling impact on small business participation").)

69. The Agency noted: "All respondents indicated that a Labor Harmony would increase costs." (*Id.* at 3.) CMS further observed that in addition to increased labor costs "other areas that would require additional funding would be ongoing training and oversight of management teams when working with union organizations." (*Id.*) Most respondents indicated that unionization of their workforce would carry additional costs and burdens because "guaranteed work requirements required in most collective bargaining agreements (i.e., limiting a vendor's ability to ramp up and ramp down to support our annual Open Enrollment Period) and increased

wages would ultimately decrease the flexibility a vendor would require to support the peak volumes associated with the current workload . . ." (*Id*. at 3-4.)

70. As CMS recognized, "[t]he lack of clarity of what would be agreed to as part of the Labor Harmony agreement, also prevented a number of respondents from providing specific timeframes and costs associated with implementation." (*Id*. at 4.)

71. CMS also noted concerns raised by the [redacted], the world's largest business federation, expressing that "adding this clause will reduce the pool of offerors, thereby limiting competition and increasing overall costs to the program" and that "the way in which the clause is set up inherently conflicts with an employee's right to not join a union and thereby does not comply with the National Labor Relations Act," as well as "serious concerns over the remedies outlined in the clause." (*Id.* at 7.)

72. The Agency received a letter of concern from members of Congress about the concessions the LHA requirements would force the offeror/contractor to make, noting "labor harmony agreements generally include concessions from employers that tilt the organizing process heavily in favor of unions. Common concessions in labor harmony agreements that ease the path to unionization include card check agreements and employer neutrality during the organizing process." (AR Tab 5C, Comm. On Educ. & Workforce RFI Response at 2 (quoting Representative Virginia Foxx, Chairwoman, Committee on Education and the Workforce).) Referring to the policy of requiring contractors to negotiate LHAs as "misguided," the Congressional members further observed that:

> [L]abor harmony agreements are contracts between an employer and a union on which employees never voted. Employees are never given a say in the content of the agreement, which can strip them of their right to a secret ballot election and prevent them from hearing about potential downsides of union representation.

> Ultimately, labor unions benefit from labor harmony agreements at the expense of employers and employees.

(*Id.*)

73. The Professional Services Council ("PSC"), an industry association with more than 400 members companies, also submitted an RFI response. (AR Tab 5C, PSC RFI Response). Reflecting feedback from its member companies with experience in the contact center industry and/or with labor harmony clauses, PSC echoed other respondents' concerns that inclusion of an LHA "would likely result in requests for employment conditions that would make it difficult for any contractor to fulfill the stated performance goals of the CCO contract." (*Id*. at 2.) PSC also raised concerns that the LHA clause would "create unneeded and unworkable Government interference with private sector contractual agreements; discriminate against contractors based upon labor affiliation; and impose costs on workers who may not receive any benefit." (*Id*. at 4.) PSC observed that the practical effect of an LHA "is the creation of jobs exclusively for unionized call centers through forced union representation or compulsory union members, payment of union dues, forced contributions to union pension and benefit plans, and a host of other requirements on employees that have the right but have decided freely not to join a union." (*Id.*) PSC suggested that the most effective way for CMS to ensure greater pay and benefits for CCO workers under this Service Contract Act covered contract was through government-initiated increases in the DOL wage determinations for the solicited jobs. (*Id*. at 3.)

74. Potential offerors and subcontractors shared many of the concerns expressed by the various industry groups. For instance, [REDACTED] expressed: "If industry was compelled to negotiate [an LHA] post award, it would significantly and arbitrarily impact each individual company's proposal response, impacting the management and technical responses and having a significant impact on the proposal pricing." (AR Tab 5C, [REDACTED] RFI Response at 2.) [REDACTED]

[REDACTED]

further noted: "[redacted]

[redacted]

[redacted]

[redacted]" (*Id.*) Another subcontractor on the incumbent effort, [redacted]

[redacted], similarly stated: "Briefly stated, our stance is that in our industry Labor Harmony Agreements are unnecessary, would greatly disrupt operations with negative impacts to customers and contract workforce, and increase overall program costs for all parties." (AR Tab 5C, [redacted] RFI Response at 2.)

75. On December 12, 2023, CWA orchestrated a short "rally" outside of the HHS Headquarters building in DC. (AR Tab 8I, CWA Press Release) Internal CMS documents show that the rally—as CMS expected— had no impact on the contact center operations. (AR Tab 8I, Dec. 12, 2023 11:45 AM Protest Update (CMS stating to Maximus that "[s]o far no impacts to the call center (as expected).")

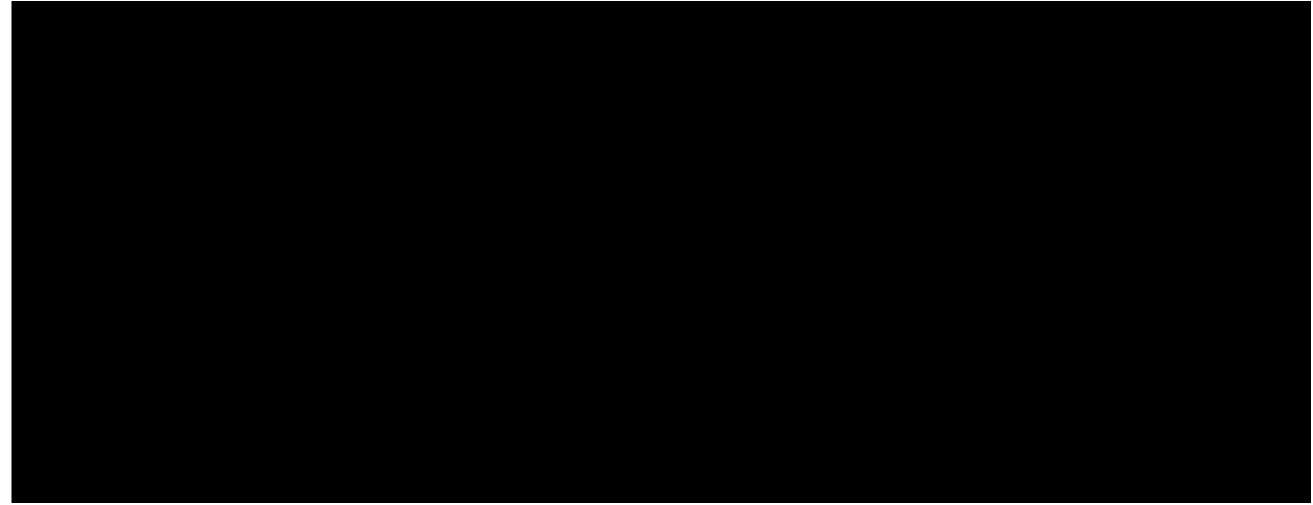
76. On December 15, 2023, the HHS Secretary announced that CMS would be resoliciting the CCO contract to include a labor harmony requirement. (AR Tab 7, Statement from Secretary Becerra.)

77. In March 2024, the Agency issued a Sources Sought Notice describing the "requirements" generally as those currently performed by Maximus with the single exception of the LHA, a requirement to "[m]aintain in a current status throughout the life of the contract the labor harmony agreement entered into prior to the award of the contract." (AR Tab 4A, Sources Sought Notice at 4.)

78. Correspondingly, the Sources Sought Notice required each respondent to describe its "ability to negotiate and execute a Labor Harmony Agreement." (*Id.* at 5.)

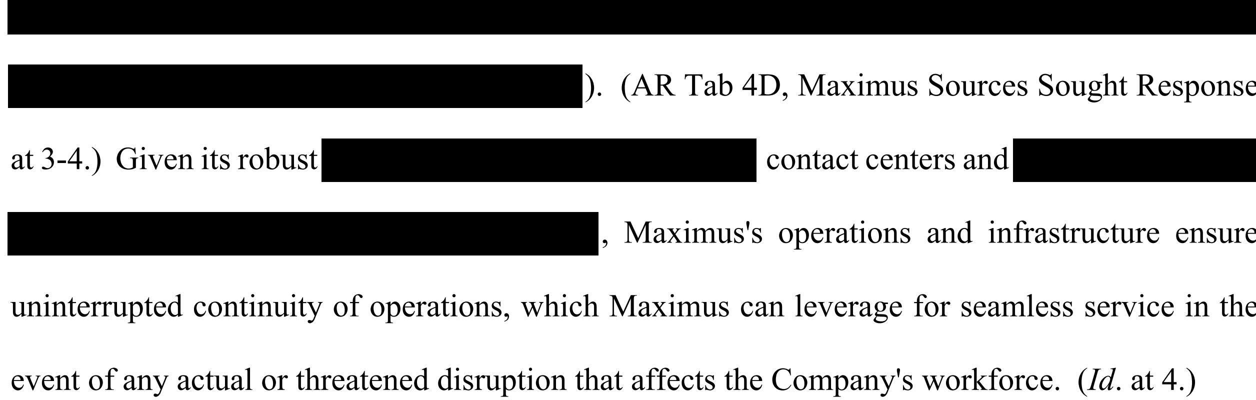
[redacted]

79. On April 1, 2024, Maximus timely responded to the Sources Sought Notice, describing how during the decade it has supported the CCO, no labor demonstration had disrupted site operations nor Maximus's ability to meet and exceed the various service related performance metrics. (AR Tab 4D, Maximus Sources Sought Response at 9.) Instead, Maximus demonstrated—with its data reports under the CCO contract—that its work both before and after the August 2022 award consistently exceeds the metrics for inquiry resolution across all outreach types and its customer satisfaction rates:



(*Id*. at 3.) During the most recent OEP, Maximus achieved a 96.4% CSAT rating for Medicare, the highest OEP CSAT rating in Maximus's history of running the CCO program. (GAO Protest Ex. B, [redacted] Decl. ¶ 13; *see also* AR Tab11A.2, Maximus Award Fee Performance Eval. (September 11, 2023 to January 31, 2024) at 2-3 (CMS acknowledges that the CCO executed a successful Open Enrollment for both the Medicare and Marketplace programs with overall strong attendance, retention, and high customer satisfaction scores).)

80. Maximus's response also detailed how its [redacted] manages its scalable solution and is designed to handle fluctuating volumes and spikes as well as any problem that may arise at a particular site or even the unlikely event of an issue may simultaneously impact more than one site [redacted]



). (AR Tab 4D, Maximus Sources Sought Response at 3-4.) Given its robust contact centers and , Maximus's operations and infrastructure ensure uninterrupted continuity of operations, which Maximus can leverage for seamless service in the event of any actual or threatened disruption that affects the Company's workforce. (*Id*. at 4.)

81. In addition, Maximus offers flexible work schedules, allowing CSRs to manage their needs better, "resulting in less stress and enhancing overall personal and professional satisfaction." (*Id*. at 5.) Maximus noted that a "flexible work schedule fosters a more dynamic, adaptable, and productive work environment," which in turn creates a positive work culture, higher productivity levels, and improved CSAT scores. (*Id*.)

82. Maximus also surveys employee satisfaction through an independent auditor and shared this information with CMS, detailing how a considerable majority of CCO project employees expressed satisfaction with their work and management. (*Id*.)

83. With regard to the LHA, Maximus explained its view that LHAs will not create a stable workforce, and noted that during its extensive experience as a federal contractor, including as an incumbent on the CCO contract, an LHA has been neither necessary nor appropriate. (*Id*. at 9.) Maximus expressed various concerns regarding the LHA requirement, including:

- Interest arbitration provisions, a typical LHA term, could significantly impact service under the contract, because it would place the decision as to what terms and conditions will ultimately be in the parties' collective-bargaining agreement into the hands of a third party arbitrator, typically a retired attorney, who lacks experience delivering on a contract of this size, scope, magnitude and complexity. (*Id.*) "Terms which are likely to include: wage rates, benefits, scheduling, bonus structures, job responsibilities, training, etc. It is therefore entirely possible, if not likely, that the terms of a resulting union contract would significantly impede the delivery of service, possibly to the point of halting effective and efficient contract performance." (*Id*.)

- The LHA requirement will impose the need of the contractor to balance CMS's customer service goals with the demands of a third party labor organization and could reduce the contractor's flexibility in managing its workforce, directly impacting key performance objectives, including customer service quality and response time, contact center operations and work assignment efficiency, flexible agent scheduling, and customer satisfaction objectives. (*Id.* at 10.)

- The LHA requirement reduces competition as potential prime offerors that do not wish to enter into such an agreement with one or more unions—unions that do not represent their employees but "demonstrate an intent to"—will not compete, and this new burden will make it even more difficult to find subcontracting partners. (*Id.* at 10-11.) This restrictive term also undermines and conflicts with other contract terms and procurement policies including the goals of increasing participation by § 8(a), service-disabled veteran-owned small businesses, HUBZone small businesses, small disadvantaged businesses, veteran-owned small businesses, and women-owned small businesses—which may choose not to participate in the CCO contract to avoid having a unionized workforce. (*Id.* at 11.)

- The requirement is ambiguous and fails to provide sufficient information for offerors to prepare their proposals intelligently or to compete on an equal basis. (*Id.*)

- The LHA requirement violates the NLRA, FAR Part 22, and Federal Procurement Policy. (*Id.* at 11-12.)

84. Other respondents also expressed concerns in connection with the LHA requirement. [REDACTED] expressed that "our market based observations suggest introducing an LHA clause can create challenges, including complexity, cost, and access to labor. This, in turn, could hinder CMS from achieving the flexibility and availability to best respond to its customers by not allowing a vendor the ability to manage its workforce in the most optimal fashion to meet CMS's requirements." (AR Tab 4D, [REDACTED] Sources Sought Response at 11.) [REDACTED] "recommends CMS consider other methods to secure operational continuity and/or hold vendors contractually accountable for workforce management and performance capabilities." (*Id.*) CMS did not consider any such "other methods."

85. In summarizing the responses to its Sources Sought Notice, the Agency noted that most prospective offerors do not have experience or expertise in negotiating an LHA:

> The majority of vendors, both small and large, do not have experience or expertise with negotiating and executing a Labor Harmony agreement. Most vendors indicate that due to their employee engagement activities and values placed on labor relations and employees, there has been no need for unionization of their employees. Several indicate that such an agreement would be difficult for small businesses to achieve. Additionally, while many indicate that they do not have a problem complying with such an agreement, there are also legal concerns raised as well as concerns of limiting the flexibility of the vendors.

(AR Tab 4B, Sources Sought Summary at 9.)

86. The Sources Sought responses showed no need for unionization; difficulty of an LHA for small businesses; legal concerns over authority to require an LHA; and limitations on vendor flexibility. Yet the Agency marched on. (AR Tab 4B, Sources Sought Summary at 6 (noting that "[a]reas that are significantly lacking include demonstrated experience" with negotiating and executing a labor harmony agreement.)

3. The Acquisition Strategy

87. CMS developed an Acquisition Plan for the new procurement in or around May 2024. (AR Tab 12, Acquisition Plan.)

88. The Acquisition Plan reflects no documented need for the LHA requirements, nor documented analysis of the benefits or risks of the LHA requirements.

89. The Statement of Need in its Acquisition Plan does not mention any claimed concerns of potential future service disruptions and how an LHA may avoid them. (AR Tab 12, Acquisition Plan at 1.) The Statement of Need describes the acquisition of continued support of CCO operations. (*Id.*)

90. Notably, in the acquisition plan, CMS details the costs and risks of procurement,

(*Id*. at 22.) The Acquisition Plan additionally reflects CMS's belief that the re-procurement

(*Id*. at 22.)

91. The only mention of the LHA is a "Special Clauses" section of the Acquisition plan which states: " Due to organizing actions on the current call center contract, the Agency has cause to believe that there is a possibility of labor disruptions on this projected acquisition because of organizing activity among unrepresented employees. Therefore, CMS, with assistance from the Office of General Counsel, has developed a Labor Harmony term & condition which will be used to protect the Agency's interests in contract performance." (*Id*. at 23.)

92. The Acquisition Plan does not reference or document any analysis of the organizing activities on the current call center contract, whether the standard contract terms will address the possibility of labor disruption, or how the Labor Harmony term and condition address any legitimate agency need.

4. The 2024 CCO Solicitation

93. Ignoring the varied concerns documented in the market research about the legality, practicality, and necessity of an LHA from respondents and CMS's own data showing that any organizing efforts have not impacted performance and do not pose a threat to operations, CMS issued the Solicitation on May 16, 2024, seeking to re-procure the same CCO services Maximus is currently successfully performing for the sole purpose of adding the LHA provisions.

94. The solicited Statement of Work parrots the current contract requirements, imposing a high degree of contractor transparency with CMS about performance, in addition to the performance goals and metrics discussed previously. (AR Tab 2E, SOW at C-6, C-9, C-13.) This enables CMS and the contractor to identify and address, in real time, any potential or forthcoming service disruption risks. For instance, the contractor must "maintain communication with CMS and/or CMS-designated contractors to ensure that CMS maintains a high level of visibility into operations, particularly in the areas of queue times, average handle times, customer service quality, or other operational areas." (*Id*. at C-6.)

95. The contractor also must proactively notify "CMS of any developing situation that may impact operations, service to callers, or any other contractual issue." (*Id*.) The SOW not only requires the contractor to inform CMS in advance, when possible, of any potential problem that may develop, but in the case of "known impending" issues, requires the contractor to "be forthcoming with CMS to address the risks and to identify mitigation strategies." (*Id*.)

96. Per the SOW, CMS receives weekly status reports about volume, average handle times, quality, headcount, referral trends, top ten topics and other trend analysis. (*Id*. at C-7.) Additionally, the contractor must "regularly provide overtime (OT) and authorized time off (ATO) reports (as necessary) that include OT/ATO projections and OT/ATO hours booked and realized, as well as any additional metrics as requested." (*Id.* at C-17.)

97. The SOW also advises that "[b]ecause of the highly visible nature of the CCO services, and the politically sensitive nature of providing excellent customer service, CMS requires a high level of insight and communication into the day-to-day (or hour-to-hour) operations of all CCO locations." (*Id*. at C-46.)

98. For this reason, the SOW requires the contractor to proactively notify "CMS of any situation that may impact operations or service to callers even if it involves a limited time," including if the performance target for Average Speed of Answer ("ASA") "is not met for any half hour period of time," or "CSR attendance is lower than forecasted," or "[a]ny situation that may warrant calls to be rerouted to avoid disruption in service or quality." (*Id*. at C-46, C-55.)

99. With regard to personnel, the CCO SOW requires the contractor to provide CMS, and continuously update, a CSR recruitment and retention plan to prevent attrition issues, and to report "CSR hiring, attrition, absenteeism and other staffing metrics…." (*Id*. at C-15.)

100. The SOW warns offerors that "[u]nforeseen events, such as new legislation, media coverage of issues or activities by interest groups, may spike inquiry volumes unexpectedly with little warning," and requires the contractor to develop a contingency plan to mitigate the impacts associated with volume fluctuations. (*Id*.)

101. Just like the SOW, the Solicitation largely repeats verbatim the terms, instructions, and evaluation criteria under which Maximus most recently presented the best value solution with a few notable exceptions challenged herein.

102. The original contract clause in Section H.16 requires that the apparent successful offeror/contractor will negotiate and finalize, within 120 days, an LHA with any labor organization that demonstrates an intent to represent the contractor's employees, or risk liability for breach of contract.

H.16 LABOR HARMONY AGREEMENT

(a) *Definitions*. As used in this term and condition-

Demonstrates intent to represent means when a labor organization takes action that the Contractor knows, or reasonably should know, displays an intent to represent service employees performing work under this contract. Such actions

include, but are not limited to, the distribution of flyers, picketing, strikes, use of local media, and direct notification of the Contractor.

Labor organization means a labor organization as defined in 29 U.S.C. 152(5).

Labor harmony agreement means a written agreement between a Contractor with a labor organization that represents, or demonstrates intent to represent, service employees that contains, at a minimum, a provision prohibiting the labor organization and its members from engaging in any picketing, work stoppage, boycott, or other economic interference with the service Contractor's operations under this contract for the duration of this contract.

Service Employee means any person engaged in the performance of this contract other than any person employed in a bona fide executive, administrative, or professional capacity, as these terms are defined in Part 541 of Title 29, Code of Federal Regulations, as revised.

(b) The Contractor shall maintain in a current status throughout the life of the contract the labor harmony agreement entered into prior to the award of this contract in accordance with solicitation provision Notice of Requirement for Labor Harmony Agreement.

(c) If at any point after contract performance begins a labor organization demonstrates intent to represent service employees performing work under this contract, within 5 days of that demonstration, the Contractor shall notify the Contracting Officer that it will commence to negotiate a labor harmony agreement with the labor organization. The executed labor harmony agreement shall be provided to the Contracting Officer within 120 days of the demonstration of intent.

(d) Remedies. If the Contracting Officer determines that the Contractor has not complied with the requirements of this term and condition, the Government may pursue all remedies as may be permitted by law or this contract in order to protect the interests of the United States.

(e) This provision will be applicable to any Contractor irrespective of whether the Contractor considers itself "unionized" or "nonunionized."

(f) This term and condition is applicable to any Contractor as well as any subcontractor to which one or more labor organizations demonstrate intent to represent service employees performing work under this contract. Any such subcontractor should enter into its own labor harmony agreement in accordance with the terms of this contract (including time frames) and provide copies to the Contractor who shall, in turn, provide copies to the contracting officer. The Labor Harmony requirements shall be flowed down to all subcontracts entered into in performance of this contract.

(AR Tab 2A, Original RFP at 64-65; *see also id.* at 7-8 (Section F.3 requiring LHA as a "deliverable" under the CCO contract).)

5. Proposal Instructions and Evaluation Criteria

103. The Solicitation establishes a two-phase process for submission and evaluation of proposals. For Phase 1, the Solicitation sets the proposal deadline of June 28, 2024, and instructs offerors to submit Volume I, wherein they "shall demonstrate" experience with contact centers of "similar size, scope, and complexity to that of the CCO requirement," either by the prime contractor or a significant subcontractor. (*Id*. at 100, 105.)

104. More specifically, as relevant to Maximus's challenges, CMS requires each offeror to "demonstrate" under Volume I experience in five discrete areas, including "[w]orking with labor organizations and/or negotiating Labor Harmony Agreements and/or Collective Bargaining Agreements to support a geographically dispersed labor population." (*Id*. at 105-106.) The Solicitation gives no guidance on what it means by "working with labor organizations" and how this experience will be evaluated.

105. Following Phase 1 submissions, CMS commits to evaluate the Volume I (Corporate Experience) proposal "to determine the extent to which it is related to a call center similar in size, scope, and complexity to that of the CCO requirement." and assign a technical rating. (*Id*. at 123, 124.) The Agency will evaluate the offerors experience in the five areas called out in Section L, including, as especially relevant here, "[e]xperience working with labor organizations and/or negotiating Labor Harmony Agreements and/or Collective Bargaining Agreements to support a geographically dispersed labor population." (*Id*. at 124; *see also id.* at 105.) The Corporate Experience criterion is the most heavily weighted criterion, but the Solicitation does not define the ratings or standard CMS will use to evaluate this criterion. (*Id*. at 123.)

106. Upon completion of the Phase 1 evaluation, CMS will make "an advisory notification to each respondent of CMS's recommendation of whether the respondent is likely to be successful overall and should participate in Phase 2." (*Id*. at 123.) In other words, less experience in any of the five directed areas, including negotiating agreements with labor organizations, will negatively impact the offeror's chances of award.

107. The Solicitation, as revised, instructs qualified offerors to submit their Phase 2 proposals by November 27, 2024 in four discrete volumes: Volume II (Technical Proposal); Volume III (Business Proposal); Volume IV (Conflict of Interest); and Volume V (Section 508 Compliance). (*Id*. at 100, 103; RFP Am. 2 at 106, Ex. A.)

108. The Solicitation directs CMS to award the CCO contract to the offeror representing the best value: "The Government will conduct a comprehensive evaluation utilizing the 'tradeoff' process to determine which proposal represents the Best Value to the Government." (AR Tab 2A, Original RFP at 121.) According to the Solicitation "[p]rimary consideration will be given to the technical quality of the proposals in the evaluation process." (*Id.*) To that end, "all evaluation factors other than cost or price, when combined, are significantly more important than cost or price." (*Id*.)

109. The non-cost criteria in descending order of importance are: (i) Corporate Experience (submitted in Phase 1);(ii) Contact Center Operations; (iii) Small Business Utilization; (iv) Program Management; (v) Transition; and (vi) Past performance. (*Id.* at 123.)

6. Solicitation Amendment 1

110. By the Solicitation's deadline of May 31, 2024, Maximus and other offerors submitted questions to CMS regarding the ambiguous and unclear Solicitation terms, particularly the new LHA clause.

111. On June 14, 2024, CMS amended the Solicitation and provided answers to bidders' questions. (AR Tab 3A, RFP Am. 1.) Notably, Amendment 1 maintained, with limited revisions in a few respects, the LHA requirement of Section H.16, and the labor related corporate experience criterion.

112. With respect to the flow-down requirements of Section H.16, CMS revised the obligation to apply only to "significant subcontractors," which the clause defines as: "a subcontractor performing at least 25% of the labor hours associated with any one of the functional requirements in Section 4 of the SOW." (*Id*. at 64.) Amendment 1 clarifies that "(f) This term and condition is applicable to any Contractor as well as any 'significant subcontractor'" and "[t]he Labor Harmony requirements shall be flowed down to all significant subcontracts entered into in performance of this contract." (*Id*. at 65.)[3] Additionally, CMS revised Section H.16 to remove the reference to the non-existent provision and to provide instead: "(b) The Contractor shall maintain in a current status throughout the life of the contract any the labor harmony agreement entered into prior to the award of this contract (as applicable)." (*Id*.) CMS also substituted the term "provision" for the phrase "term and condition" in paragraph (e): "(e) This term and condition will be applicable to any Contractor irrespective of whether the Contractor considers itself 'unionized' or 'nonunionized.'" (*Id*. at 65.)

113. Amendment 1 also revises Section L to clarify that no requirement exists to provide an LHA with the proposal, but "the apparent successful offeror will be asked to negotiate and provide a copy of an LHA prior to an award being formalized if there has been demonstrated intent to represent its employees prior to contract award." (*Id*. at 118.) To that end, Amendment 1 revises Section M to add a new provision:

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[3] The underline shows revisions CMS made to the original Solicitation language.

> M.8: LABOR HARMONY AGREEMENT (APPARENT SUCCESSFUL OFFEROR ONLY)
>
> The Government will review the apparent successful offeror's Labor Harmony Agreement (if applicable) for adherence to the requirements of agency specific term and condition at H.16, Labor Harmony Agreement. This review will not result in a score/rating as it is only applicable to the apparent successful Offeror.

(*Id.* at 128.)

114. Solicitation Amendment 1 also revises Section M.4 Criteria A: Corporate Experience to add: "A lack of experience in any one area would not automatically exclude an offeror from further consideration." (*Id.* at 124.)

115. CMS also offered brief responses to hundreds of offerors questions, many of which raised concerns about the labor related corporate experience and LHA requirements. (*See* AR Tab 3C, Am. 1 Questions and Answers ("Q&A").)

116. For instance, CMS confirmed that no LHA or CBA exists under the current contract. (*Id*. at 11 (Q.90, Q.91).) For Corporate Experience, CMS received questions expressing concern that at the conclusion of Phase I, CMS could penalize contractors without corporate experience working with labor organizations because "there are few, if any, federal call center contracts in the services sector where offerors might acquire the experience" and "CMS could unfairly conclude that the offeror has no interest in working with a labor union." (*Id*. at 14 (Q.104); *id*. at 16 (Q.111).) CMS responded: "Corporate experience is evaluated in its totality. This is not a pass/fail criteria." (*Id*. at 14 (Q.104); *id*. at 16 (Q.111).); *see also id.* at 23-23 (Q.172-Q.174).)

117. With regard to the timing of the LHA requirement, CMS responded:

> There is no solicitation requirement to submit [an LHA] during the competition. Once an apparent awardee is selected, if a labor organization has demonstrated intent to represent the employees of the apparent awardee, then it will be expected that the apparent awardee enter into a Labor Harmony Agreement prior to contract award. If there has been no demonstrated intent to represent the employees prior to contract award, then the contractor would be expected to comply with H.16 once

> it becomes aware of demonstrated intent to represent its employees. See revised Proposal Instructions.

(*Id*. at Q.93.) CMS, however, noted that with regard to the current contract, there "have previously been demonstrations of intent at limited locations," yet offered no explanation for how such a statement aligns with the Solicitation's definition of "demonstration of intent." (*Id*. at 13 (Q.99).) Nor did CMS explain how the Solicitation would retroactively apply to any purported prior demonstrations of intent.

118. CMS provided no threshold showing necessary to trigger a "demonstration of intent," but clarified that employee interest is not part of the definition. (*Id*. at 20 (Q.137.))

119. As for CMS's intent and the legal basis for an LHA, the Agency replied that it is "acting in its proprietary interest to ensure the contract is performed without interruption." (*Id*. at 19 (Q.130).)

120. CMS's responses evidence a vagueness about compliance with Section H.16 and how it will work in practice; for the following questions, CMS stated that it "would have to evaluate such a situation on a case-by-case basis," including:

- The ramifications if the labor organization refuses to sign the LHA within the clause's required time frame (*id.* at 11 (Q.87); *id.* at 17 (Q.116));
- Whether CMS would approve requests for additional funding resulting from any newly negotiated LHA (*id.* at 11 (Q.89));
- Whether the contractor must execute an LHA with a labor organization requiring unreasonable terms (*id*. at 20 (Q.132); *id*. at 22 (Q.156);
- Whether the Contracting Officer has discretion to extend the deadline for submitting the executed LHA (*id.* at 22 (Q.157)).

D. GAO Protest

121. On June 20, 2024, prior to the closing date for Phase 1 proposals, Maximus filed a pre-award protest at GAO challenging the Solicitation's inclusion of LHA requirements as contrary the law, unduly restrictive of competition, and patently ambiguous.

122. On September 16, 2024, GAO issued a protected decision that sustained the protest on the narrow finding that one aspect of the LHA requirement was ambiguous —specifically, "that the RFP does not provide clarity as to how long the apparent successful offeror will have to negotiate a pre-award LHA." *Maximus Fed. Servs., Inc.*, B-422676, Sept. 16, 2024, 2024 CPD ¶ 222. GAO denied or declined to opine on the remainder of the protest arguments.

E. Solicitation Amendment 2 and Phase 1 Evaluation

123. On October 11, 2024, the Agency issued Solicitation Amendment 2 in response to the GAO decision. (RFP Am. 2, Ex. A.)

124. In this amendment, CMS extended the submission deadline for receipt of Phase 2 proposals to November 27, 2024 and anticipated apparent awardee notification to March 16, 2025, and moved the anticipated award date to August 1, 2025. (*Id*. at 106.)

125. The Agency revised the LHA clause at Section H.16 to confirm that the LHA mandate may trigger before award or during contract performance or both, that although the obligation is on the contractor to know when the obligation is triggered, the contracting officer may direct the contractor to execute such an agreement, and that the LHA requirement is "material". (*Id*. at 67-68.) The revised H.16 language states:

H.16 LABOR HARMONY AGREEMENT

(a) *Definitions*. As used in this term and condition-

Demonstrates intent to represent means when a labor organization takes action that the Contractor knows, or reasonably should know, displays an intent to represent service employees performing work under this contract. Such actions

include, but are not limited to, the distribution of flyers, picketing, strikes, use of local media, and direct notification of the Contractor.

Labor organization means a labor organization as defined in 29 U. S.C. 152(5).

Labor harmony agreement means a written agreement between a Contractor and a labor organization that represents, or demonstrates intent to represent, service employees that contains, at a minimum, a provision prohibiting the labor organization and its members from engaging in any picketing, work stoppage, boycott, or other economic interference with the service Contractor's operations under this contract for the duration of this contract.

Service Employee means any person engaged in the performance of this contract other than any person employed in a bona fide executive, administrative, or professional capacity, as these terms are defined in Part 541 of Title 29, Code of Federal Regulations, as revised.

Significant Subcontract – For purposes of this contract, a significant subcontractor is defined as a subcontractor performing at least 25% of the labor hours associated with any one of the functional requirements in Section 4 of the SOW.

(b) The Contractor shall maintain in a current status throughout the life of the contract any labor harmony agreement entered into prior to the award of or during the performance of this contract (as applicable).

(c) If at any point after contract performance begins a labor organization demonstrates intent to represent service employees performing work under this contract, within 5 days of that demonstration, the Contractor shall notify the Contracting Officer that it will commence to negotiate a labor harmony agreement with the labor organization. The executed labor harmony agreement shall be provided to the Contracting Officer within 120 days of the demonstration of intent.

(d) The decision as to whether a labor organization demonstrates an intent to represent service employees performing work under the contract is the responsibility of the contractor, except that if the Contracting Officer is otherwise made aware that a labor organization is demonstrating an intent to represent the service employees performing work under the contract, then the Contracting Officer shall direct the contractor to enter into an LHA with such labor organization. If the Contracting Officer directs a contractor to enter into an LHA with such a labor organization, the contractor shall provide the executed labor harmony agreement to the Contracting Officer within 120 calendar days of receiving the directive.

> (e) If an offeror is determined to be the apparent successful offeror, it will be required to adhere to LHA pre-award requirements as stated in Solicitation Section L.15.9 and Section M.8.
>
> (f) *Remedies*. This is a material requirement of the contract. If the Contracting Officer determines that the Contractor has not complied with the requirements of this term and condition, the Government may pursue all remedies as may be permitted by law or this contract in order to protect the interests of the United States. including terminating the contractor for default.
>
> (g) This term and condition will be applicable to any Contractor irrespective of whether the Contractor considers itself "unionized" or "nonunionized."
>
> (h) This term and condition is applicable to any Contractor as well as any "significant subcontractor" to which one or more labor organizations demonstrate intent to represent service employees performing work under this contract. Any such subcontractor should enter into its own labor harmony agreement in accordance with the terms of this contract (including time frames) and provide copies to the Contractor who shall, in turn, provide copies to the contracting officer. The Labor Harmony requirements shall be flowed down to all significant subcontracts entered into in performance of this contract.

(*Id.*)

126. The Agency also significantly expanded the Section L.15.9 directions about the pre-award obligation to execute an LHA:

> (a) There is no requirement to provide a labor harmony agreement with your Phase 2 proposal. However, if a labor organization has demonstrated an intent to represent the apparent successful offeror or significant subcontractor's employees, prior to award of the contract, then the apparent successful offeror and any "significant subcontractor" will be required to negotiate and provide a copy of an LHA prior to an award being formalized. if there has been demonstrated intent to represent its employees prior to contract award.
>
> (b) Definitions. "Demonstrate intent," "labor organization," "labor harmony agreement," "service employee" and "significant subcontractor" as used in this provision, are defined in the term and condition at H.16 of this solicitation entitled Labor Harmony Agreement. References to "Contractor" in H.16 means "apparent successful offeror" for the purpose of this provision.
>
> (c) Following notification of its selection as the apparent successful offeror, the apparent successful offeror and any significant subcontractor will have 120 calendar days from the date of notification to negotiate and enter into an LHA with any labor organization that has previously demonstrated or is currently demonstrating intent to represent the firm's service employees under this contract.

This could include one or more labor organizations that demonstrate intent to represent service employees performing work under this contract. A separate LHA would be required for each labor organization. Specifically, the process will be as follows:

1. The offeror receives notice from the Contracting Officer that they are the apparent successful offeror.

2. Within 5 days of that notification, the apparent successful offeror shall inform the Contracting Officer if a labor organization or organizations has/have previously demonstrated or is currently demonstrating intent to represent either themselves or any of their significant subcontractor's service employees.

3. If such demonstration of intent exists, the apparent successful offeror and any significant subcontractor(s) shall provide to the Contracting Officer within 120 calendar days from the date of notification by the Contracting Officer that they are the apparent successful offeror an executed LHA(s).

4. The decision as to whether a labor organization demonstrates an intent to represent service employees performing work under the contract is the responsibility of the apparent successful offeror, except that if the Contracting Officer is otherwise made aware that a labor organization is demonstrating an intent to represent the service employees who will be performing work under the contract, then the Contracting Officer shall take action as indicated under Clause M.8.

(d) This provision is applicable to any offeror as well as any "significant subcontractor" to which one or more labor organizations demonstrate intent to represent service employees performing work under this contract. Any such subcontractor should enter into its own labor harmony agreement in accordance with the terms of this contract (including time frames) and provide copies to the prime offeror who shall, in turn, provide copies to the Contracting Officer. The Labor Harmony requirements shall be flowed down to all significant subcontracts entered into in performance of this contract.

(e) This provision will be applicable irrespective of whether the apparent successful offeror considers itself "unionized" or "nonunionized."

(f) An LHA(s) must include at a minimum all required elements as that term is defined in the Labor Harmony Agreement term and condition at H.16 of this solicitation.

(*Id.* at 125-26.)

127. Finally, the Agency clarified with respect to Section M.8: "If the Contracting Officer determines that the apparent successful offeror or its significant subcontractor(s) has not complied with the requirements of the Labor Harmony Agreement Provision within the 120 days, the government reserves the right to assess the situation at that time to determine how to proceed. CMS reserves the right to find the prospective awardee to be unacceptable due to failure to comply with Clause L.15.9." (*Id.* at 136.)

128. [REDACTED] (Phase 1 Advisory Letter at 1, Ex. B.) Phase 2 proposals are due November 27, 2024. (*Id.*)

129. This matter is now ripe for the Court's disposition.

VII. HARM TO MAXIMUS AND THE PUBLIC INTEREST AND LACK OF HARM TO CMS.

130. The balance of harms and public interest favor the injunctive relief Maximus seeks.

131. Absent injunctive relief, Maximus will suffer will suffer the irreparable harm of being deprived of the opportunity to compete fairly for a contract, *see, e.g., Palantir USG, Inc. v. United States*, 129 Fed. Cl. 218, 291 (2016), *aff'd*, 904 F.3d 980 (Fed. Cir. 2018); *Magnum Opus Techs., Inc. v. United States,* 94 Fed. Cl. 512, 544 (2010), and Maximus will have to compete in procurement that transgresses applicable laws and regulations. *Weeks Marine v. United States*, 575 F.3d 1352, 1361-62 (Fed. Cir. 2009); *WinStar Commc'ns, Inc. v. U.S.*, 41 Fed. Cl. 748, 762-63 (1998).

132. The public interest also favors injunctive relief to remedy the procurement errors and violations of law identified herein and to prevent lack of public trust and confidence in the integrity of this procurement. *See e.g., Palantir USG*, 129 Fed. Cl. at 294-95 (citing *BINL, Inc. v. United States*, 106 Fed. Cl. 26, 49 (2012) ("With regard to the public interest, it is well-settled that

there is a public interest in remedying violations of law.")); *see also e.g., 2M Rsch. Servs., LLC v. United States*, 139 Fed. Cl. 471, 480-81 (2018) ("public interest is manifest in ensuring that the Government closely adhere to the requirements of the procurement regulations") (quoting *Scanwell Lab'ys, Inc. v. Shaffer*, 424 F.2d 859, 866-67 (D.C. Cir. 1970)).

133. The irreparable harm to Maximus and the public interest outweigh any harm that CMS may allege. For instance, any alleged procurement delay by CMS is a self-inflicted injury based on CMS's refusal to ensure that it conducted this significant procurement in accordance with the law. *See e.g., ARxIUM, Inc. v. United States*, 136 Fed. Cl. 188, (2018) (granting injunctive relief and stating, "much of the prospective harm identified by the government . . . is the result of the government's own delays and procurement errors, for which it cannot be credited."); *Cardinal Maint. Servs., Inc. v. United States*, 63 Fed. Cl. 98, 111 (2004) (noting in support of injunction that, when violation of law is remedied, government might receive a better offer).

134. Nor can CMS show that any delay would harm CMS. The record makes clear that Maximus is meeting or exceeding each of the CCO procurement metrics and CMS has admitted that the union organizing activities have had no impact on the CCO operations.

COUNT I
The LHA Requirements Exceed CMS's Procurement Authority And Violate FAR Part 22.

135. Maximus incorporates each of the forgoing paragraphs of the Complaint by reference.

136. This Court reviews bid protests under the APA standard of review, requiring this Court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D); 28 U.S.C. § 1491(b)(4).

137. This Court will grant relief to an offeror that demonstrates the agency's procurement conduct exceeds the agencies authority or violates applicable statutes or regulations. *See* 28 U.S.C. § 1491(b)(4); 5 U.S.C. § 706(2)(A), (D); *CGI Fed. Inc. v. United States*, 779 F.3d 1346, 1353 (Fed. Cir. 2015) (holding solicitation terms violated FAR Part 12); *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004) (explaining review of whether "the procurement procedure involved a violation of regulation or procedure"); *Palantir USG, Inc. v. United States*, 904 F.3d 980, 993 (Fed. Cir. 2018) (affirming decision in pre-award protest finding agency had not complied with statutory requirements); *Rotech Healthcare Inc. v. United States*, 118 Fed. Cl. 408, 420 (2014) (holding solicitation violated statutory rule).

138. This count involves the proper interpretation of FAR 22.101-1. The Supreme Court has made clear that in conducting judicial review of agency decisionmaking, it "remains the responsibility of the court to decide whether the law means what the agency says"—and the responsibility of the court alone. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024).

139. Considering CMS's arguments under the proper framework—arguments of a litigant afforded no special consideration, *see generally Perry v. Martin Marietta Corp.*, 47 F.3d 1134, 1137 (Fed. Cir. 1995) (recognizing that the Department of Defense ("DoD") interpretation of FAR 52.230 is not entitled to deference because the FAR is not a DoD regulation); *Defense Integrated Sols., LLC v. United States*, 165 Fed. Cl. 352, 370 (2023) (noting agency is only entitled to deference in interpretation of ambiguous statute when it is the "agency's interpretation of its own regulations"), the Court should find that the LHA requirements exceed CMS's procurement authority and violate FAR 22.101-1 which prohibits agencies from (i) interfering with contractor labor relations and (ii) mandating that the offeror/contractor make concessions to and enter an

agreement with one or more unions that seek to organize the offeror/contractor's employees as a condition of award or contract compliance.

140. The current Administration has indicated an intent to support the unionization of the federal workforce and recast the current acquisition regulations to further this policy goal.

141. In November 2019, before his election to President, then-candidate Biden pledged that, if elected, he would "ensure federal contracts only go to employers who sign neutrality agreements" with employers. (The Biden Plan For Strengthening Worker Organizing, Collective Bargaining, And Unions, joebiden.com/empowerworkers/ (from Nov. 27, 2019).)

142. On April 26, 2021, the President issued Executive Order 14025, Worker Organization and Empowerment, noting the "steady decline in union density in the United States," and declaring "it is the policy of my Administration to encourage worker organizing and collective bargaining." E.O. 14025, 86 Fed. Reg. 22829 (Apr. 26, 2021). Executive Order 14025 established a Task Force to identify executive branch policies, practices, and programs, which the order defines to include procurements that could be used to promote the Administration's policy. *Id*. at 22830.

143. As early as December 2022, the Secretary of the Department Labor reached out to the Secretary of HHS expressing "renewed interest" in and seeking an update about CMS's efforts to modify the incumbent CCO contract to add a "labor peace" clause. (AR Tab 15C, Jan. 4, 2023 Labor Call Center Update for HHS at 2-3.)

144. In early January 2023, shortly after expressing "renewed interest" in the CCO Contract, the Director of the Office of Management and Budget ("OMB") and the DOL Secretary issued a memo to all executive departments and agencies—including CMS—entitled

"Strengthening Support for Federal Contract Labor Practices." (AR Tab 9, OMB & DOL Memo M-23-08.)

145. The memorandum directs each Federal agency to designate "one or more labor advisors who are career employees" to advise agency officials on Federal contract labor matters, and advises that any such "designated labor advisor should have a working knowledge of contract labor laws (e.g., SCA, DBRA, DBA) and a general understanding of Federal acquisition." (*Id.* at 2.) The FAR contemplates labor advisors, defining an agency labor advisor in FAR 22.001 and directing Contracting Officers to consult with the labor advisor regarding the applicability of the Service Contract Act, *see e.g.*, FAR 22.1003-7, and when the Contracting Officer has concerns about the wage determination or an incumbent collective bargaining agreement. FAR 22.1013.

146. Nevertheless, the OMB & DOL Memo states that labor advisors should explore "labor peace agreements under the policy of FAR 22.101-1, where there is cause to believe that there is possibility of work stoppages on a projected acquisition because of organizing activities among unrepresented employees." (*Id.* at 3.) FAR Part 22 does not use the term "labor harmony" or "labor peace" agreement.

147. The OMB & DOL Memo also establishes a Contract Labor Advisory Group ("CLAG"), an "interagency working group of labor advisors and acquisition personnel to promote better understanding and implementation of contract labor laws and improved communication across agencies in support of a strengthened Federal contracting base." (*Id.* at 4.) The Memo states that the "[i]nitial areas of focus for the CLAG" will include:

> Exploring ways to promote labor peace using the policy of FAR 22.101-1 where the agency has cause to believe that there is a possibility of work stoppages on a projected acquisition because of organizing activity among unrepresented employees, for example by including language in solicitations requiring an agreement between the offeror and any labor organization seeking to organize its

> employees that would assure the uninterrupted delivery of services over the course of the contract[.]

(*Id*. at 4.)

148. FAR 22.101-1, however, does not specify a solicitation clause mandating an agreement between a federal contractor or offeror with any union expressing an interest to organize the contractor/offerors unrepresented (*i.e.*, non-unionized) workforce. Nor does FAR Part 22 authorize the contracting officer or labor advisor to craft such a clause.

149. Instead, FAR 22.101-1(b) sets a policy of non-intervention and impartiality in any dispute or controversy related to contractor labor relations, FAR 22.101-1(d) permits at most voluntary agreements under certain inapplicable circumstances, and the only solicitation or contract clause referenced (FAR 22.222-1) relates to providing notice of the dispute.

150. Specifically, FAR 22.101-1(e) authorizes the head of the contracting activity to designate a program or requirement for incorporate of clause in FAR 52.222-1 requiring the contractor to give notice to the Contracting Officer of any actual or potential labor dispute that is delaying or threatening to delay the timely performance of the contract. *See also* FAR 22.103-5(a). It does not authorize mandatory imposition of the LHA clauses challenged herein.

151. This OMB and DOL Guidance Memo promoting labor harmony provisions in federal solicitations departs from the plain language of FAR 22.101-1 and presents a "new procurement policy" that lacks any legal effect without publication and comment. 41 U.S.C. § 1707.

152. CMS nevertheless relies erroneous on FAR 22.101-1 as authority for imposing the LHA requirements despite admitting that the few organizing activities have not disrupted service and that other contractual provisions exist to prevent any service disruption. (AR Tab 1, COSF at 7, 10 ¶ 20.) Specifically, the CMS Contracting Officer has noted that the current CCO contract

clauses and structure (without an LHA) mitigate any risk of a disruption to service whether caused by a labor activity or other event, stating they "are aimed at ensuring continuity of operations when employees are not able to answer the calls (e.g., when potential labor disruptions have occurred)." (*Id.* at 13 ¶ 24.)

153. FAR 22.101-1 provides:

> (a) Agencies shall maintain sound relations with industry and labor to ensure (1) prompt receipt of information involving labor relations that may adversely affect the Government acquisition process and (2) that the Government obtains needed supplies and services without delay. All matters regarding labor relations shall be handled in accordance with agency procedures.
>
> (b) (1) Agencies shall remain impartial concerning any dispute between labor and contractor management and not undertake the conciliation, mediation, or arbitration of a labor dispute. To the extent practicable, agencies should ensure that the parties to the dispute use all available methods for resolving the dispute, including the services of the National Labor Relations Board, Federal Mediation and Conciliation Service, the National Mediation Board and other appropriate Federal, State, local, or private agencies.
>
> (2) For use of project labor agreements, see subpart 22.5.
>
> (c) Agencies should, when practicable, exchange information concerning labor matters with other affected agencies to ensure a uniform Government approach concerning a particular plant or labor-management dispute.
>
> (d) Agencies should take other actions concerning labor relations problems to the extent consistent with their acquisition responsibilities. For example, agencies should-
>
> (1) Notify the agency responsible for conciliation, mediation, arbitration, or other related action of the existence of any labor dispute affecting or threatening to affect agency acquisition programs;
>
> (2) Furnish to the parties to a dispute factual information pertinent to the dispute's potential or actual adverse impact on these programs, to the extent consistent with security regulations; and
>
> (3) Seek a voluntary agreement between management and labor, notwithstanding the continuance of the dispute, to permit uninterrupted acquisition of supplies and services. This shall only be done, however, if the attempt to obtain voluntary agreement does not involve the agency in the merits of the dispute and only after

> consultation with the agency responsible for conciliation, mediation, arbitration, or other related action.
>
> (e) The head of the contracting activity may designate programs or requirements for which it is necessary that contractors be required to notify the Government of actual or potential labor disputes that are delaying or threaten to delay the timely contract performance (see 22.103-5(a)).

154. Paragraphs (b) and (d) set the procurement policy of non-intervention in contractor labor relations. Paragraph (b) requires agencies to remain neutral in any disputes between labor and management.[4]

155. Paragraph (d) provides that a procuring agency may at most suggest a *voluntary* agreement between contractor management and labor if necessary to permit uninterrupted acquisition of supplies or services and only if such a request does not involve the agency in the merits of the dispute and only after consultation with FMCS.

156. Although the FAR neither defines labor relations nor labor disputes, the NLRA defines "labor dispute" broadly to include: "any controversy concerning terms, tenure or conditions of employment, or *concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee*." 29 U.S.C. § 152(9).

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[4] The regulatory history of the language in FAR 22.101-1(d), shows that it derives from Defense Acquisition Regulation 12-101, a precursor to the FAR. A Department of Army Procurement manual explains this "policy of nonintervention" and limited authority to seek a "voluntary agreement":

> This policy of nonintervention is necessary because of the very sensitive relations that often exist between labor and management. Attempts by persons unfamiliar with labor relations … can cause considerable bad will and perpetuate [a] work stoppage….

Dept. of Army Manual 27.153 (March 1983).

157. Based on this statutory language, federal courts find concerted union activities—even before the union represents the involved workforce—to fall within the definition of a "labor dispute." *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655,* 39 F.3d 191 (8th Cir. 1994) ("Where the union acts for some arguably job-related reason and not out of pure social or political concerns, a 'labor dispute' exists. We are persuaded the Union campaign publicizing Foodland's non-union status, wages and benefits paid to employees … involved 'terms' and 'conditions' of employment.") (citing *Hasbrouck v. Sheet Metal Workers Local 232*, 586 F.2d 691, 694 n.3 (9th Cir.1978)).

158. Labor organizations applying a public pressure campaign in an effort to organize an unrepresented workforce constitutes a "controversy concerning the association or representation of persons in … seeking to arrange terms or conditions of employment" where the "disputants"—the offeror/contractor and union seeking to represent the workforce do not "stand in the proximate relation of employer and employee," and thus fall within a dispute covered by FAR 22.101-1(b) and 22.101-1(d)(3). 29 U.S.C. § 152(9).

159. Over the last several decades unions have executed a "top-down" employer-focused rather than employee focused organizing strategy.[5]

160. Unions employ this strategy to obtain exactly what CMS has imposed on the CCO offeror/contractor: an LHA. In exchange for the union's agreement not to engage in picketing, work stoppage, or other labor disruptions, the union demands the employer make concessions benefitting the third-party union at the expense of the rights and interests of the offeror/contractor and its employees, including card check agreements, stripping employees of the right to secret

[5] *See* James J. Brudney, Collateral Conflict: Employer Claims of Rico Extortion Against Union Comprehensive Campaigns, 83 S. Cal. L. Rev. 731, 732 (2010) ("Over the past twenty-five years, unions have turned increasingly to strategies outside the traditional framework of [NLRA].").

ballot elections, and employer's pledges to refrain from making any statements in opposition to the union, thus preventing the flow of full information to employees.[6]

161. Public information and the responses to CMS's RFI make clear that the demands any union will make involve some or all of the following seven terms which all serve the union's interest but encroach on employee and employer rights under the NLRA:

- requiring the employer to give the non-employee union organizers a list of employee names, and personal contact information, including home addresses, email addresses and phone numbers;
- giving the union access to the employer's facilities and space within such facilities to allow the union to recruit and organize employees;
- prohibiting the employer from making any statements in opposition to the union;
- allowing the union to determine the scope of the bargaining unit;
- requiring a union-led "card-check" process instead of private ballot elections;
- waiving the employer's right to file an election petition and either party's right to file any unfair labor practice charges with the NLRB; and
- requiring "interest arbitration" whereby the employer agrees that a third-party arbitrator will unilaterally decide the terms of a CBA if the employer and unions cannot agree within a specified time period.[7]

(*See also, e.g.*, AR Tab 5C, Comm. on Educ. & Workforce RFI Response at 2 ("[L]abor harmony agreements generally include concessions from employers that tilt the organizing process heavily in favor of unions. Common concessions in labor harmony agreements that ease the path to

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[6] *See Airline Serv. Providers Ass'n v. L.A. World Airports*, 873 F.3d 1074, 1092 (9th Cir. 2017) (Tallman, J., concurring in part and dissenting in part) ("In typical LPAs [Labor Peace Agreements], in exchange for relinquishing their right to strike, unions gain concessions from employers to support unionization of the employer's employees. For example, LPAs often require an employer to remain neutral during union organizing drives. LPAs also often require employers to provide unions with employees' contact information and access to the employer's physical premises to assist with organizing efforts." (internal citations omitted)).

[7] Zev J. Eigen & David Sherwyn, *A Moral/contractual Approach to Labor Law Reform*, 63 Hastings L.J. 695, 721-22 (2012); Laura J. Cooper, *Privatizing Labor Law: Neutrality/card Check Agreements and the Role of the Arbitrator*, 83 Ind. L.J. 1589, 1590 (2008); Charles I. Cohen et. al., *Resisting Its Own Obsolescence-How the National Labor Relations Board Is Questioning the Existing Law of Neutrality Agreements*, 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 523 (2006); *Airline Serv. Providers Ass'n v. L.A. World Airports*, 873 F.3d 1074, 1092 (9th Cir. 2017) (Tallman, J., concurring in part and dissenting in part); *Mulhall*, 667 F.3d at 1213.

unionization include card check agreements and employer neutrality during the organizing process. . . . Employees are never given a say in the content of the agreement, which can strip them of their right to a secret ballot election and prevent them from hearing about potential downsides of union representation."); AR Tab 5C, Chamber RFI Response at 4.)

162. These one-sided concessions support unionization, not on the merit of the union's arguments, but because they enable the union to bypass the typical organizing environment which protects the employees' NLRA Section 7 rights to make their own informed choice of whether to join, or not to join, a union.[8]

163. By mandating in the challenged LHA provisions that the offeror/contractor bow to the public pressure campaign of the union and execute an LHA with all unions that show the slightest interest in representing the workforce within 120 days or risk loss of the contract award or default or worse, CMS impermissibly confers leverage and significant control over the contractor's eligibility for award and contract compliance to the union.

164. CMS has not only interjected itself into the controversy but also acted partially in the interest of the union (versus the interest of the offeror/contractor and its employees) and put its proverbial thumb on the scale in favor of the union.

165. By imposing the LHA requirements as a condition of award and contract compliance, CMS is stripping the offeror/contractor of the right to manage and address union organizing efforts and mandating instead that the offeror/contractor accede to the demands of any union that demonstrates the slightest intent to represent the CCO workforce. (AR Tab 5C, Comm.

[8] *See* Zev J. Eigen & David Sherwyn, *A Moral/contractual Approach to Labor Law Reform*, 63 Hastings L.J. 695, 722 (2012); Charles I. Cohen *et. al.*, *Resisting Its Own Obsolescence-How the National Labor Relations Board Is Questioning the Existing Law of Neutrality Agreements*, 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 523 (2006) ("Provisions such as [employer neutrality and card check recognition] significantly increase the chances that an organizing drive will be successful.").

on Educ. & Workforce RFI Response at 3 ("This policy would undermine employee free choice and unfairly tilt the organizing process in favor of unions.").)

166. CMS's responses to Solicitation questions, asking about whether the contractor must accept unreasonable or unlawful terms and whether the Contracting Officer may grant extensions of the 120-day time frame, further evidence that CMS has impermissibly interjected itself into the contractors' labor relations in violation of FAR 22.101-1(b). CMS repeatedly responded that the Contracting Officer will evaluate the "situation on a case-by-case basis." (*See, e.g.*, AR Tab 3C, Q&A at Q.132, Q.153, Q.156; AR Tab 1, COSF at 8 (asserting the Contracting Officer has "flexibility in how he/she can choose to administer the term and condition" and will "need to take into consideration the specifics of each situation".) Rather than showing impartiality, CMS places the Contracting Officer into disputes between a union and the offeror/contractor about the LHA terms or execution, and authorizes the Contracting Officer to take action against only the contractor.

167. If CMS does not intercede to address unreasonable or unlawful demands by the union, third party unions can refuse to execute the agreement within the required time frame, and control which contractor gets the award (or whether and when a contractor may be in breach of its contractual obligations).

168. Finally, to the extent CMS claims that the FAR permits Contracting Officer's to demand agreements to prevent even the threat of a work stoppage, despite the clear provisions of FAR 22.101-1, such a position runs counter to FR 22.101-2(b). This provision, like those in FAR 22.101-1, does not direct or authorize Contracting Officer to mandate agreements between a union and apparent successful offeror/contractor. Instead, FAR 22.101-2(b) directs Contracting Officers

"to impress upon contractors that each contractor shall be accountable for reasonably avoidable delays," including delays resulting form labor disputes:

> Labor disputes may cause work stoppages that delay the performance of Government contracts. Contracting officers shall impress upon contractors that each contractor shall be held accountable for reasonably avoidable delays. Standard contract clauses dealing with default, excusable delays, etc., do not relieve contractors or subcontractors from the responsibility for delays that are within the contractors' or their subcontractors' control. A delay caused by a strike that the contractor or subcontractor could not reasonably prevent can be excused; however, it cannot be excused beyond the point at which a reasonably diligent contractor or subcontractor could have acted to end the strike by actions such as-
>
> (1) Filing a charge with the National Labor Relations Board to permit the Board to seek injunctive relief in court;
>
> (2) Using other available Government procedures; and
>
> (3) Using private boards or organizations to settle disputes.

FAR 22.101-2(b). If Contracting Officers had authority to mandate that its contractors enter into agreements with labor unions to prevent even the threat of delay on a contract, this FAR provision would be superfluous.

169. Because the Solicitation's LHA provisions violate the violate the provisions of FAR 22.101-1 and conflict with FAR 22.101-2, the Court should (a) declare the challenged LHA provisions contrary to law and otherwise arbitrary, capricious, and an abuse of discretion, (b) preliminarily and permanently enjoin the Agency from enforcing those provisions and direct the Agency to revise the Solicitation to remove the unlawful and arbitrary LHA requirements.

COUNT II
CMS's Imposition Of The LHA Requirements Exceed CMS's Procurement Authority Under FAR 1.102(d) Because The LHA Requirements Are Unlawful Under Section 302 Of The LMRA And Section 8 Of The NLRA.

170. Maximus incorporates each of the forgoing paragraphs of the Complaint by reference.

171. This Court reviews bid protests under the APA standard of review, requiring this Court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D); 28 U.S.C. § 1491(b)(4).

172. This Court will grant relief for an offeror that demonstrates the agency's procurement conduct violates applicable statutes or regulations. *See* 28 U.S.C. § 1491(b)(4); *Palantir USG, Inc. v. United States.*, 904 F.3d 980 (Fed. Cir. 2018); *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004); 5 U.S.C. § 706(2)(A), (D);

173. Even if not expressly prohibited by FAR Part 22 (which it is), the LHA requirements still exceed CMS's procurement authority under FAR 1.102(d) and are unlawful because they are inconsistent with the offeror/contractor-employer's obligations under the Labor Management Relations Act ("LMRA") and the offeror/contractor-employer's rights and duties under the NLRA. The demands the union will require to execute any LHA also encroach on the employee's right to a secret ballot election under the NLRA.

174. FAR 1.102(d) only permits procuring agencies to select procurement strategies within the bounds of the law: "In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority."

175. LMRA Section 302 declares it unlawful for "any employer to pay, lend or deliver any … thing of value … to any labor organization." 29 U.S.C. § 1986. In enacting Section 302,

Congress wanted to "prohibit[] . . . the buying and selling of labor peace." S. Rep. No. 98-225 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3477.

176. The dominant purpose of § 302 is to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers." *Turner v. Local Union No. 302, Int'l Bhd. of Teamsters,* 604 F.2d 1219, 1227 (9th Cir. 1979).

177. The challenged Solicitation provisions mandate that the offeror/contractor execute an LHA with a union that seeks to represent the offeror/contractor's workforce within 120 days to be eligible for award or not in default of material contract requirements. To avoid these stark consequences, the contractor must get the union to agree to a provision "prohibiting the labor organization and its members from engaging in any picketing, work stoppage, boycott, or other economic interference with the service Contractor's operations under this contract for the duration of this contract." (RFP Am. 2 §§ H.6, L.15.9.)

178. This structure which tips all leverage to the union, enables a labor union to demand multiple "thing[s] of value" in exchange for the union's not to engage in picketing or other work disruptions, including e.g., including card check agreements, stripping employees of the right to secret ballot elections, and employer's pledges from making any statements in opposition to the union, thus preventing the flow of full information to employees.

179. Such concessions could be considered "thing[s] of value" under the plain language of Section 302. The heart of any labor union is its members, and "more members equals more dues, and union dues fuel the ability to organize more members." Mark A. Carter & Shawn P. Burton, *The Criminal Element of Neutrality Agreements*, 25 Hofstra Lab. & Emp. L.J. 173, 188 (2007). As such, things that make it easier for a union to grow its membership are valuable to the

union. Further, the value of these types of concessions is confirmed by organized labor's consistent demand for them.

180. But Congress criminalized union demands for, and employer granting of, any "thing of value" in Section 302(a)(2) of the LMAR. *See* 29 U.S.C. §§ 1986(a)(2); 1986(d); *Mulhall v. Unite Here Loc. 355*, 667 F.3d 1211, 1215 (11th Cir. 2012) (holding employer concessions were "thing[s] of value" that could constitute "illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer."); *see also id.* ("If employers offer organizing assistance with the intention of improperly influencing a union, then the policy concerns in § 302—curbing bribery and extortion—are implicated.").[9]

181. The LHA requirement may also expose offerors/contractors to unfair labor charges. Section 8(a)(2) of the NLRA declares it an "unfair labor practice" for employers to provide financial or other support to labor unions in organizing their unrepresented workforce. *See* 29 U.S.C. 158(a)(2). Under the prior administration, NLRB officials took the position that so-called "pre-recognition" neutrality agreements between employers and unions—like the LHAs CMS mandates in the challenged Solicitation—are unlawful under Section 8(a)(2) of the NLRA.

182. Specifically, in a now rescinded Memorandum GC 20-13 (Sept. 4, 2020), "Guidance Mem. on Employer Assistance in Union Organizing" (GAO Protest Ex. W), the NLRB General Counsel of the prior administration declared a "bright line rule" that any such agreements

[9] While two other circuit courts have held that labor neutrality agreements do not violate Section 302—*see Adcock v. Freightliner LLC*, 550 F.3d 369, 374 (4th Cir. 2008) (holding employer's promises to remain neutral and provide access to property for organizing are not "thing[s] of value" under Section 302); *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2004) (holding an employer's organizing assistance does not qualify as a payment, loan, or delivery under Section 302)—the Eleventh Circuit disagreed with these decisions in *Mulhall*, thus creating a circuit split on this issue. *See Mulhall*, 667 F.3d at 1214-16. Moreover, while the Supreme Court granted certiorari in *Mulhall*, received briefs, and heard oral argument, the Court ultimately denied certiorari as improvidently granted on procedural grounds. *See Unite Here Loc. 355 v. Mulhall*, 571 U.S. 83, 84 (2013). The circuit split thus remains.

that (a) provide the union with employee names and contact information, (b) allow the union to access the employer's premises during working hours for purposes of organizing, and/or (b) provide for "interest arbitration" to set the terms of CBAs, are unlawful under Section 8 (a)(2) of the NLRA.

183. The challenged LHA requirements effectively require offerors/contractors to agree to provide these types of concessions to labor unions, potentially exposing the offerors/contractors unfair labor practice charges. Offerors/contractors should not face the risk of such liability based on changes in administrations.

184. Therefore Court should (a) declare the challenged LHA provisions contrary to law and otherwise arbitrary, capricious, and an abuse of discretion, (b) preliminarily and permanently enjoin the Agency from enforcing those provisions and direct the Agency to revise the Solicitation to remove the unlawful and arbitrary LHA requirements.

COUNT III
CMS's Imposition Of The LHA Requirements Exceed CMS's Procurement Authority Under FAR 1.102(d) Because The LHA Requirements Are Preempted By The NLRA.

185. Maximus incorporates each of the forgoing paragraphs of the Complaint by reference.

186. This Court reviews bid protests under the APA standard of review, requiring this Court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D); 28 U.S.C. § 1491(b)(4).

187. Thus, a procurement action "may be set aside if either: (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." *Impresa Construzioni v. United States,* 238 F.3d 1324, 1332 (Fed. Cir. 2001).

188. FAR 1.102(d) only permits procuring agencies to select procurement strategies within the bounds of the law: "In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority."

189. The LHA requirements exceed CMS's procurement authority under FAR 1.102(d) because they are preempted by the NLRA. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111 (1989) (NLRA "creates a free zone from which all regulation, whether federal or State, is excluded").

190. While the NLRA "requires an employer and a union to bargain in good faith, . . . it does not require them to reach agreement." *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 616 (1986); *see also* 29 U.S.C. § 158(d) (duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession"); *N.L.R.B. v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 287 (1972) (employers and unions "are free from having contract provisions imposed upon them against their will"). The Solicitation here, however, compels the offeror/contractor to reach an agreement with a labor organization.

191. The LHA requirement also forces the offeror/contractor to grant significant concessions to the unions, thereby giving up various rights the offeror/contractor otherwise has under the NLRA—including the right to speak out against unionization and to demand a traditional, NLRB-supervised election process—all of which greatly increases the union's ability to organize employees. Because it is fundamentally conflicts with the NLRA, the LHA requirement is preempted.

192. The Supreme Court has crafted two types of NLRA preemption—government regulation of labor relations that the law arguably protects or prohibits (*Garmon* preemption), or leaves to the domain of market forces (*Machinists* preemption)—both of which apply here and render the LHA requirements mandated by CMS in the challenged Solicitation unlawful.

***Machinists* Preemption Bars the LHA Requirement.**

193. *Machinists* preemption bars the government from regulating areas that Congress intended to be "unregulated and to be controlled by the free play of economic forces." *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisc. Emp. Rels. Comm'n,* 427 U.S. 132, 144 (1976) ("*Machinists*"). "*Machinists* pre-emption is based on the premise that Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes." *Chamber of Com. of U.S. v. Brown*, 554 U.S. 60, 65 (2008). As a result, no "federal official or government entity can alter the delicate balance of bargaining and economic power that the NLRA establishes, whatever his or its purpose may be." *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996).

194. CMS's LHA requirements are barred by *Machinists* preemption because they upset the delicate balance set by the NLRA and intrude on areas that the NLRA left to be controlled by the free play of economic forces.

195. By the challenged Solicitation provisions, CMS mandates that the offeror/contractor obtain the union's agreement not to picket, etc. or risk ineligibility for contract award or contract default or worse. CMS's intrusion into any arms length bargaining effectively forces the offeror/contractor to grant significant concessions to the unions, thereby giving up various rights the offeror/contractor and its employees otherwise have under the NLRA.

196. For example, under the NLRA, employers are permitted to engage in free speech during a union organizing campaign, petition the NLRB to hold a secret ballot election, deny recognition and refuse to bargain with a union without proof of majority support among employees in an appropriate bargaining unit, and refuse to give unions access to its workplace facilities. *See* 29 U.S.C. § 158(c) (permitting noncoercive employer speech regarding unionization); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992) (upholding general rule that employer may not be compelled to allow nonemployee union organizers onto employer's property for distribution of union literature).

197. CMS's LHA requirements force the offeror/contractor to give up the "economic weapons of self-help" that Congress protected from any "additional restrictions" beyond those in the NLRA, *Golden State Transit*, 475 U.S. at 614, thereby "frustrat[ing] the congressional determination to leave [certain] weapon[s] of self-help available, and … upset[ting] the balance of power between labor and management expressed in our national labor policy." *Machinists*, 427 U.S. at 146; *see also Airline Serv. Providers Ass'n v. L.A. World Airports*, 873 F.3d 1074, 1088 (9th Cir. 2017) ("*LAX*") (Tallman, J., concurring in part and dissenting in part) ("By forcing unwilling service providers to negotiate and accept LPAs, [the local law] compels a result Congress deliberately left to the free play of economic forces.").

Garmon Preemption Bars the LHA Requirement.

198. *Garmon* preemption bars the government from regulating activities that the NLRA "arguably protects or prohibits." *Wisc. Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 286 (1986). "This rule of pre-emption is designed to prevent conflict" with "Congress' integrated scheme of regulation" of labor relations." *Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I.,* 507 U.S. 218, 224 (1993) ("*Boston Harbor*"). Where the NLRA

expressly (or even arguably) permits certain conduct, the government cannot prohibit that conduct and vice versa. *See Reich*, 74 F.3d at 1338 (*Garmon* preemption applies where regulation poses a "direct conflict with the NLRA").

199. The LHA requirements are also inconsistent with the NLRA and thus preempted under *Garmon*. The challenged Solicitation provisions compels the offeror/contractor to enter into an agreement with a labor organization, even though the NLRA gives all employers the right *not* to enter into such an agreement. 29 U.S.C. § 158(d); *N.L.R.B. v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 287 (1972) ("This bargaining freedom means both that parties need not make any concessions as a result of Government compulsion and that they are free from having contract provisions imposed upon them against their will.").

200. Further, the LHA requirements intrude on the employer's right to have "wide latitude" in negotiations with any labor union. *N.L.R.B. v. Ins. Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 488 (1960) ("Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences."). By conditioning a valuable contract on the offeror/contractor agreeing to that which, under the NLRA, it is entitled to refrain, CMS's LHA requirement directly clashes with federal labor law and is thus preempted under *Garmon*.

The Market Participant Exception Does Not Apply.

201. CMS cannot avoid preemption by claiming that it is merely acting as a market participant in imposing the LHA requirement on Maximus.

202. The market participant exception applies only when the government acts "in order to reduce the cost or increase the quality of … services [it procures] rather than to displace the

authority of the [NLRA]. " *Metro. Milwaukee Ass'n of Com. v. Milwaukee Cnty.,* 431 F.3d 277, 278-79 (7th Cir. 2005).

203. Key to this inquiry is efficiency and typicality: is the government acting "to reduce the cost or increase the quality of th[e] services" it has purchased and in a way that private parties would typically act? *Id. at* 278; *see also id* at 280 ("We must therefore consider whether the labor-peace agreements are a reasonable, good-faith measure for enabling [the government] to get a better quality service from its contractors.").

204. Here, the LHA requirements do not reflect an interest in reducing costs or increasing quality of service. Nor is there any record evidence that the Agency attempted to even consider much less determine any such effect.

205. Just the opposite, CMS's own Acquisition Plan observed that

206. Additionally, the market research revealed that the LHA requirements would increase vendors costs both to respond to the solicitation and during performance. (AR Tab 5B, RFI Response Summary at 3 ("All respondents indicated that a Labor Harmony would increase costs.").)

207. While CMS claimed during the prior protest at GAO that the intent behind the LHA requirement was to avoid potential future labor-related disruptions and "work stoppages", the record does not contain any analysis of the past labor actions on the CCO contract the labor events,

or whether the LHA requirement, as drafted, would safeguard against any potential future adverse impacts.

208. Instead, CMS acknowledged there have been no interruptions, nor realistic threat of disruptions, or "work stoppages" to date. (AR Tab 1, COSF at 2 ¶ 4 (Contracting Officer standing that the handful of labor demonstrations that occurred at Maximus contact centers "did not result in disruption to CMS CCO service . . .").) Indeed, on the days when demonstrations occurred, Maximus's performance improved or was consistent with days on which no demonstrations took place. (GAO Protest Ex. B, [REDACTED] Decl. ¶ 21; AR Tab 16, Daily Medicare Metric Report at Cells R239, R396, R 409, R612, R697, R773-74).)

209. As to costs, the reprocurement in year two of a valuable, ten-year contract is not efficient. CMS's own Acquisition Plan underscores this point by stating that [REDACTED]

[REDACTED]. (AR Tab 12, Acquisition Plan at 22.) Reprocurement of the contract just two years after award effectively eliminates those recognized efficiencies. The reprocurement process itself is likely to last several years and will force the government and offerors to incur substantial additional costs. Those costs and inefficiencies will only compound during transition, [REDACTED] (*Id.*)

210. Additionally, as explained by the [REDACTED] in response to the agency's RFI, the imposition of an LHA "will either detract from the contractor's ability to meet the substantial needs of the CMS [contract] or require expenditures in addition to its normal operating costs to implement the terms of the LHA." (AR Tab 5C, [REDACTED] at 6.)

"Requiring the contractor to negotiate terms that facilitate union organizing in the workplace will result in substantial administrative burdens for the contractor to ensure that its 24/7 operations remain uninterrupted, particularly during peak call periods." (*Id*. at 5; *see also id.* ("In a high-volume call center environment, ongoing union organizing can create disruptions to services that are comparable to the work stoppages and economic actions by unions that the LHA is allegedly designed to avoid.").) This is consistent with the Seventh Circuit's observation: "by making it easier for unions to organize," "a labor-peace agreement is as likely to *increase* as to decrease work stoppages, a consequence manifestly inconsistent with an employer's legitimate concern with avoiding stoppages." *Metro. Milwaukee*, 431 F.3d at 280 (emphasis added). One need only read the recent newspaper reports related to the Boeing and its failed efforts and reaching agreement with one of its largest unions. Niraj Chokshi, "Boeing Workers Resoundingly Reject New Contract and Extend Strike," New York Times (Oct. 23, 2024), https://www.nytimes.com/2024/10/23/business/boeing-union-vote-strike.html

211. "Employers know better how to keep their workers from striking than purchasers of the employers' services." *Metro. Milwaukee*, 431 F.3d at 280. CMS's LHA requirements are "not actually tailored to preventing work stoppages"; indeed, "by making it easier for unions to organize," "a labor-peace agreement is as likely to increase as to decrease work stoppages, a consequence manifestly inconsistent with an employer's legitimate concern with avoiding stoppages." *Id*. That makes the "inference … inescapable that," by imposing an LHA requirement, CMS is "trying to substitute its own labor-management philosophy for that of the [NLRA]," and thus is not acting as a market participant. *Id*. at 281; *see also LAX*, 873 F.3d at 1090 (Tallman, J., concurring in part and dissenting in part) ("[T]here is no evidence that a private [party] … would use LPAs as a means of ensuring labor peace").

212. The LHA requirement is a preempted exercise of regulatory power (indeed CMS twists the FAR to claim it has authority to impose the LHA requirements) and cannot be saved by the market-participant exception.

213. Therefore, the Court should (a) declare the challenged LHA provisions contrary to law and otherwise arbitrary, capricious, and an abuse of discretion, (b) preliminarily and permanently enjoin the Agency from enforcing those provisions and direct the Agency to revise the Solicitation to remove the unlawful and arbitrary LHA requirements.

COUNT IV
The Solicitation's LHA Requirements And Related Corporate Experience Requirements Violate CICA.

214. Maximus incorporates each of the forgoing paragraphs of the Complaint by reference.

215. This Court reviews bid protests under the APA standard of review, requiring this Court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise. not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D); 28 U.S.C. § 1491(b)(4). Thus, a procurement action "may be set aside if either: (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." *Impresa Construzioni*, 238 F.3d at 1332.

216. CICA requires the use of "full and open competition through the use of competitive procedures." 41 U.S.C. § 3301(a)(1). "Competitive Procedures," as used in Section 3301, refers to "procedures under which an executive agency enters into a contract pursuant to full and open competition." 41 U.S.C. § 152. CICA outlines the only circumstances under which an agency may avoid the requirement of full and open competition: In sections 3303 [exclusion of particular source or restriction of solicitation to small business concerns], 3304 [use of noncompetitive

procedures], and 3305 [simplified procedures for small purchases of CICA, and "except in the case of procurement procedures otherwise expressly authorized by statute . . ." 41 U.S.C. § 3301(a)(1); FAR 6.101(a, b).

217. While a contracting agency has discretion to determine its needs, that discretion must be exercised reasonably and lawfully, and is tempered by CICA's mandate that an agency "specify its needs in a manner designed to achieve full and open competition" and "include restrictive requirements only to the extent necessary to satisfy the agency's legitimate needs." 41 U.S.C. § 3306(a)(1), (2); FAR 11.002(a).

218. Where a protester challenges a solicitation provision as unduly restrictive, the agency bears the burden of establishing that it reasonably requires each restrictive requirement to meet a legitimate need. *See, e.g., Am. Safety Council, Inc. v. United States*, 122 Fed. Cl. 426, 436 (2015) ("[I]f a Court finds a solicitation's terms are unduly restrictive and serve no legitimate agency need, the Court will find the agency's decision to include those terms in the solicitation to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

219. The newly imposed LHA requirements do not permit for "full and open competition" and thus contravene CICA's express mandate for two separate reasons.

220. First, the LHA requirements violate CICA's mandate of full and open competition because they exclude otherwise responsible best value contractors from award unless they agree to support unionization of the CCO Contract workforce by reaching an LHA with one or more labor unions.

221. Solicitation Section M.8 is clear that offerors who in the contracting officer's discretion do not comply with the requirement to enter into a pre-award LHA with any labor organization expressing an intent to represent Contract employees may be deemed ineligible for

award. (RFP Am. 2 at 137, Ex. A.) By submitting a proposal, offerors must also agree to abide by the requirement of Solicitation Section H.16(c) to enter into an LHA with one or more labor organization that demonstrates an intent to represent Contract employees. (*Id*. at 67.)

222. Offerors who do not wish to enter into a forced LHA with one or more labor organizations and incur the substantial costs and administrative burdens associated with negotiating, entering into, and complying with such agreement, including the unionization of its workforce, are thus effectively precluded from competing for the procurement and receiving award.

223. Conversely, unionized offerors would not be similarly disadvantaged in the competition. Because the employees of such an offeror are already represented and operate under a CBA, the requirement to enter into an LHA—which by definition facilitates unionization and a CBA—will be inapplicable as to them. Such offerors likewise have an unearned advantage under the Corporate Experience factor, the most important factor for the selection decision.

224. CMS's own market research recognizes that the LHA requirements would significantly (and unnecessarily) curtail competition for the CCO solicitation ([redacted] [redacted]). CMS's market research noted by way of summary that "[i]ndustry feedback cites concerns that a Labor Harmony Agreement would limit competition, impact small business participation, and increase contract costs." (AR Tab 5B, RFI Response Summary at 3.) Most respondents to CMS's market research expressed particular concerns with the cost and administrative burdens of complying with the LHA requirements, with many respondents stating they would need to expend resources on training management teams to work with unions, and that having a unionized workforce would ultimately decrease flexibility to support peak volumes. (*Id*. at 3-4.) Recognizing the deleterious impacts the LHA requirement

would have on competition, CMS observed that nearly all respondents to its market research "stated they would not pursue work where Labor Harmony was a requirement of the Contract." (*Id*. at 4.)

225. But despite recognizing that the LHA requirements would severely limit, CMS did not invoke, or take the necessary steps to invoke, any of the exceptions to full and open competition in CICA or of the exceptions "expressly authorized by statute." 41 U.S.C. § 3301(a)(1). Nor do any of the statutory exceptions, by their express terms, apply to the instant procurement.

226. CICA Section 3306 provides that procuring agencies may include restrictive technical terms and specifications tailored to satisfy their needs. 41 U.S.C. § 3306(a). The challenged LHA requirements however are not comparable to the technical terms or experience requirements that Section 3306(a) contemplates. Unlike a technical requirement or specification, which focuses on the substance of the solicited work, the LHA requirements have nothing to with the contact center services the CCO contractor will provide. Rather, the LHA requirements reflect CMS's broader effort to regulate labor relations on the CCO contract by facilitating unionization.

227. The manner in which the LHA requirements restricts competition is entirely unlike the way narrowly tailored technical requirements or specifications exclude offerors, and, accordingly, the LHA requirements are not the "restrictive provisions or conditions . . . necessary to satisfy the needs" of the agency that CICA permits. *Nat. Gov. Servs., Inc. v. United States*, 923 F.3d 977, 986 (Fed. Cir. 2019) (finding that restriction based on CMS's policy of maintaining or increasing competition is unlike restrictive capability or experience requirements

228. By CMS's own acknowledgment, the LHA requirements will limit competition for the procurement and effectively preclude most if not all offerors from competing. CMS, however, did not ground its limitation of competition on any of the recognized statutory exceptions to

competition. The LHA requirements, accordingly, contravene the unambiguous statutory mandate under CICA to provide "full and open competition through the use of competitive procedures."

229. Second, even if LHA requirements were the type of restrictive technical requirement or specification that CICA Section 3306 contemplates, the LHA requirements would still violate CICA because they restrict competition based on factually unsupported concerns that the LHA requirement is not rationally tailored or necessary to address. 41 U.S.C. § 3301(a)(2) (requiring agency to include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law); *Am. Safety Council, Inc. v. United States*, 122 Fed. Cl. 426 (2015) (technical data rights clauses in solicitation were unduly restrictive in violation of CICA given that requirement did not properly reflect the agency's needs and was already addressed by less restrictive means in the solicitation).

230. Recognizing that "no actual disruption of service under the current contract has occurred to date," CMS nonetheless claimed before GAO that the LHA requirements satisfy a legitimate agency need by safeguarding against the *hypothetical future* risk that a future labor disruption will lead to service disruption or create a public perception of one. (CMS MOL at 25; AR Tab 1, Contracting Officer Statement of Facts at 7 ("Although these activities have not disrupted service, CMS has a reasonable bring that the ongoing organizing drive could cause disruption of services in the future.").)

231. CMS's undocumented concerns about future labor-related service disruptions due to organizing activity have no basis in fact and thus lack a rational basis. CMS's record does not evidence any labor activity that has or could have caused a labor disruption. Rather, CMS's record shows that the labor events to date—the last of which occurred in November 2023—were relatively short, lasting no more than a few hours, and in many instances involved no more than a

handful of actual CCO employees. (AR Tab 8F, May 23, 2023 CCO Strike Update 1200 PM Update (stating that no more than handful of active staff engaged in demonstration at each impacted site).) These events had no impact whatsoever on service continuity—even during the few, short demonstrations Maximus's performance remained within or above required contractual metrics (metrics CMS oversees) and at all times were as good if not better than days on which no event took place. In fact, even during the actual demonstrations, CMS appeared to recognize as a matter of course that no service disruptions would occur. (AR Tab 8I, Dec. 12, 2023 Protest Update ("So far no impacts to the call center (as expected)").)

232. CMS's acquisition planning documents are similarly silent on any concerns of future service disruptions. The acquisition record is notably bereft of any evidence that CMS determined labor disruptions would or even could create a service disruption much less that they would result in any actual or perceived service disruptions. Instead, the acquisition plan evidence significant CMS concern about reprocurment (including transition risks and increased), making service disruption more likely, stating that [REDACTED]

(AR Tab 12, Acquisition Plan at 22.)

233. CMS's speculative concerns of service disruptions or the appearance of one thus lack any rational factual basis and are instead grounded in the presumption that the mere fact of past organizing activity—however inconsequential—necessarily will result in future disruptions, contrary to all available evidence. CMS's undocumented concern lack a rational basis and do not justify the considerable burdens the LHA requirements place on competition.

234. Yet even if CMS's concern about a future performance disruption or the perception of one were reasonable under circumstances, the LHA requirements still lack a rational basis because they bear no rational relationship to those objectives.

235. None of the materials in CMS's procurement record discuss, analyze, or attempt to establish a nexus between the LHA requirements and CMS's speculative concerns. Even CMS's acquisition plan does not specify how the LHA requirements will address CMS's concerns despite the requirement under FAR 7.105(a)(4) for acquisition plans to "[s]pecify the required capabilities or performance characteristics of the supplies or the performance stabdards of the services being acquired and state how they are related to need."

236. Nor is any rational nexus between the LHA requirements and CMS's expressed concerns apparent on the face of the relevant Solicitation clauses. Solicitation H.16's requirement for the CCO Contractor to enter into an LHA that contains a promise by the union not to interfere with the contractor's operations binds only the union, not any unrepresented employees. At most the "harmony" achieved through the LHA is with the unrecognized union, which lacks any authority under the NLRA to waive the rights of the employees to stop work or organize other labor disruptions. There is nothing in the LHA requirements that would prevent employees on the CCO Contract from engaging in strike activities or otherwise causing disruptions.

237. Further, the LHA that Sections H and L require would notably only prevent a union from itself engaging in strike activity; the clause places no limitation on the union from encouraging others to engage in such actions.

238. CMS's requirements to negotiate LHAs with as many labor unions as demonstrate an intent and the mandatory timeframes for entering into an agreement only make it more likely that multiple unions will encourage employees to engage in labor actions as a negotiating tactic.

(AR Tab 3C, Am. 1 Q&A Q. 152 (responding to the question of how many labor organizations must the contractor negotiate an LHA: "All Labor Organizations that demonstrate intent to represent under the definition in H.16(a)"); AR Tab 5C, Chamber RFI Response at 8 (observing that by virtue of the LHA requirement a contractor could end up with multiple unions where the terms are more favorable to one union than another).)

239. The practical effects of the clause will divert offeror/contractor resources to complying with LHA requirements, all wanting the employees contact information, space in the contractor's facilities, the opportunity to convince the employee to join their respective union, etc. Thus, the risk of union-encouraged disruptions—whether or not they rise to a service disruption—would remain high even after an LHA is signed, such as when the union is pressing for a collective bargaining agreement or complaining of unfair labor practices. *Metro. Milwauke*, 431 F.3d at 281 (stating that labor peace agreements will result in increased risk of strikes when the union is pressing for a collective bargaining agreement or complaining of unfair labor practices).

240. In fact, several RFI respondents raised concerns that the practical effect of the LHA requirements would interfere with the CCO Contractor's ability to dynamically adjust to any evolving CMS needs. (AR Tab 5C, [REDACTED] RFI Response at 5.) Far from preventing work disruptions, the clause's requirements would only make their occurrence more likely as the offeror/contractor will be forced to maneuver between potentially competing demands by different labor organizations. (*Id.* at 6, 8.)

241. CMS also expressed concern with avoiding the public perception of a disruption, "which may impact Medicare beneficiary and Marketplace consumer confidence in the ability of service." (AR Tab 1, Contracting Officer Statement of Facts at 9.) Section H.16, however, only purports to limit a union and its members from engaging in labor disruptions; the clause says

nothing about preventing a union from publicly threatening to engage in a disruption or creating the perception of disruption. There is no reason to think the LHA requirement would avoid public perception of a disruption. If anything, the incredibly low bar to entering into negotiations would only invite more labor organizations to attempt to organize contract employees—which unions would surely publicize.

242. Far from resolving any public communication concerns, the requirement to swiftly negotiate and enter into an LHAs would have the perverse effect of rewarding the labor organization that attempted to cause the disruption not only with an LHA, but also with substantial leverage in negotiating one. Such an unfair outcome is entirely unjustified, particularly where the restrictive requirements at issue do nothing to address or resolve CMS's purported concerns.

243. In other words, the LHA requirements bear no logical connection to CMS's expressed concerns: a union can attempt to disrupt the contract or create the perception of a disruption with or without an LHA.

244. In a similar vein, there is no reason to believe that the corporate experience requirements under Section L.13 to demonstrate experience working with a labor union or executing agreements with them would lessen the risk of labor disputes. Even if an offeror has experience working with such entities, there is no reason to believe that such experience was successful or would otherwise aid in averting future labor-related disputes.

245. Finally, even if CMS had a legitimate, documented concern about future service disruptions, and even if the LHA requirements had any discernible connection to such concern, CMS still would not be able to justify LHA requirements' restriction on competition because the Contract and the FAR provide more effective, far less restrictive means to address any future concern of a labor-related service disruption or the appearance of one. FAR 22.101-2 (directing

Contracting Officer to enforce contractual levers and impress upon contractors that each contractor shall be held accountable for any reasonably avoidable delays).

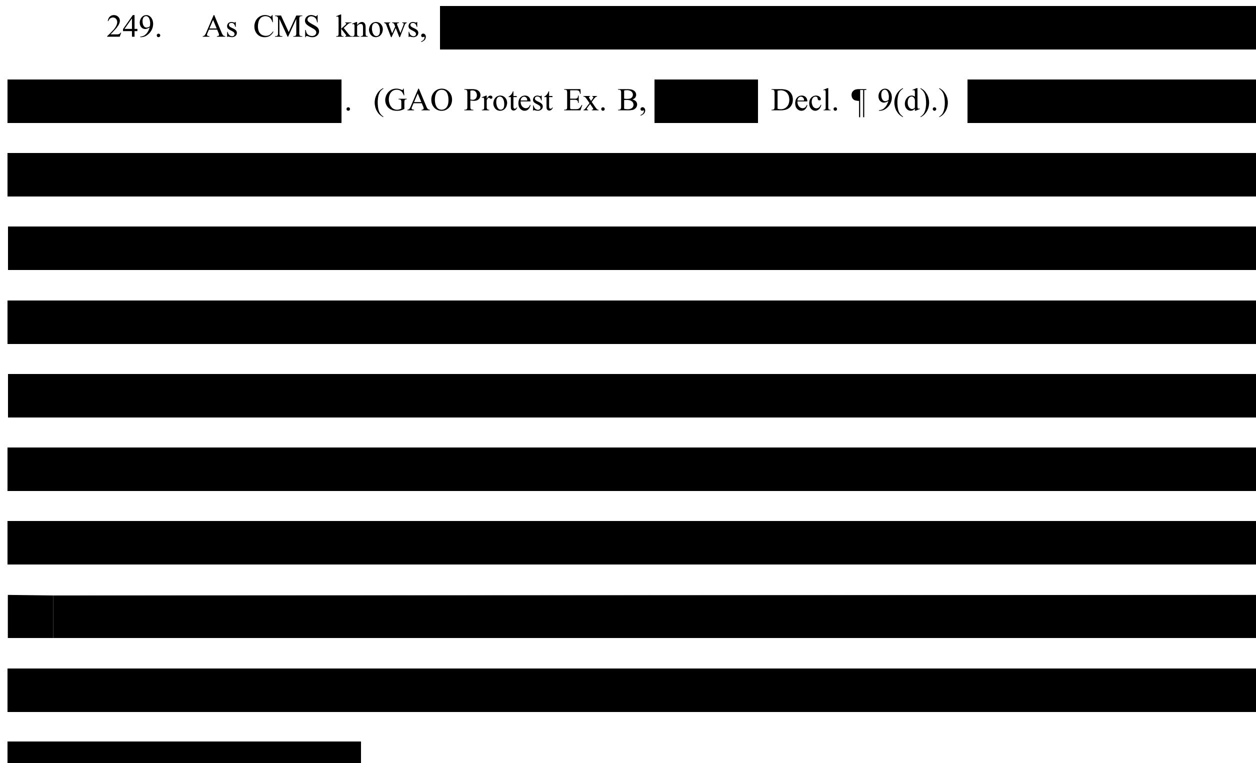
246. The Solicitation already requires extensive reporting and communication between the contractor and CMS which prevents any risk of a disruption to service. "CMS requires a high level of insight and communication into the day-to-day (or hour-to-hour) operations of all CCO locations," and the contractor must report when "[t]he performance target for ASA is not met for any half hour period of time" or "CSR attendance is lower than forecasted and call handling is affected," as well as "[a]ny situation that may warrant calls to be rerouted to avoid disruption in service or quality." (AR Tab 2E, SOW at C-46.) The contractor's Program Manager must provide "CMS with real-time alerts on any negative impacts to operations," including a "deviation from key performance metrics such as ASA, [average handle times], or Service Level." (*Id.*) The contractor also must proactively notify "CMS of any developing situation that may impact operations." (*Id.* at C-6.)

247. In terms of staffing, the SOW requires the contractor to "use best practices for CSR recruitment and retention to ensure high quality service and efficiency of operations," and to "determine the appropriate staffing levels to handle peak and off-peak hours of operation." (*Id.* at C-15.)

248. The Solicitation expressly recognizes "unforeseen events" may arise with little to no warning, and that offerors must therefore develop contingency plans to mitigate adverse impacts associated with these events. (*Id.* at C-17.) As especially relevant in the event of any labor-related dispute, the Solicitation already requires the contractor to "staff accordingly <u>to account for both attrition and absenteeism</u> to ensure that the planned staffing levels are achieved." (*Id.*) To that end, the Solicitation requires contractors to develop and implement a business

continuity plan to prevent any disruptions to services in emergency situations, including by "[p]roviding a method by which operations will not be disrupted in the event of a work stoppage, pandemic, or other natural disaster." (*Id.* at C-39.)

249. As CMS knows,



. (GAO Protest Ex. B, Decl. ¶ 9(d).)

250. These proven procedures and requirements provide significant protection and minimize risk in the event of contingencies, including any potential absenteeism. In fact, even CMS recognized this to be the case, conceding before GAO that the Solicitation's existing requirements "are aimed at ensuring continuity of operations when employees are not able to answer the calls" even if the potential cause is a labor disruption. (AR Tab 1, COSF at 13 ¶ 24.) The LHA requirement is unnecessary to prevent a *service* disruption.

251. Moreover, if CMS was truly concerned with the public perception of a service disruption, CMS could far more effectively address those concerns through far less restrictive means. For example, CMS could refute any disruption through its own social media outlets,

issuing press releases, or sending email updates to impacted populations. CMS has a dedicated page on its website, titled "Newsroom," where it puts forth news releases for the public.[10] CMS's website also allows users to sign up to receive email updates about a range of topics. Should any "implication" of a disruption arise, CMS could far more effectively put such implication to rest relying on its robust public outreach capabilities. CMS could also simply require the contractor to monitor any efforts to create a public impression of a disruption, and to proactively communicate the availability of services to relevant stakeholders.

252. Accordingly, the LHA requirements place an arbitrary limit on competition that breaks from the statutory mandate of CICA to ensure "full and open competition through the use of competitive procedures." Court should (a) declare the challenged LHA provisions contrary to law and otherwise arbitrary, capricious, and an abuse of discretion, and (b) preliminarily and permanently enjoin the Agency from enforcing those provisions and direct the Agency to revise the Solicitation to remove the unlawful and arbitrary LHA requirements.

COUNT V
The Agency's Decision To Impose The LHA Requirements Lacks A Rational Basis And Contravenes Procurement Law.

253. Maximus incorporates each of the foregoing paragraphs of the Complaint by reference.

254. This Court reviews bid protests under the APA standard of review, requiring this Court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D); 28 U.S.C. § 1491(b)(4). Thus, a procurement action "may be set aside if either: (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure

[10] https://www.cms.gov/about-cms/contact/newsroom (last visited October 26, 2024).

involved a violation of regulation or procedure." *Impresa Construzioni*, 238 F.3d at 1332.

255. Agency action is arbitrary and capricious where, as here, the "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 [the decision] is so implausible that it could not be ascribed to a difference in its view or the product of agency expertise.'" *Ala. Aircraft Indus., Inc.-Birmingham v. United States*, 586 F.3d 1372, 1375 (Fed. Cir. 2009) (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (alteration in original).

256. The market research CMS performed before resoliciting to impose the LHA requirements on the offerors/contractor showed that the LHA requirements were not necessary to prevent service disruptions and that the requirements would severely impair several common government procurement interests, specifically full and open competition, small business participation, and being a faithful steward of taxpayer funds. (AR Tab 5B, RFI Response Summary at 3 ("Industry feedback cited concerns that a Labor Harmony Agreement would limit competition, impact small business participation, and increase contract costs").)

257. CMS's Acquisition Strategy for this very procurement showed that an early reprocurement contravened other CMS interests [redacted]

[redacted] (AR Tab 12, Acquisition Strategy at 22.)

258. In issuing the Solicitation, CMS ignored all of the information it collected about the risks of the LHA requirements.

259. In issuing the Solicitation, CMS also ignored all of the incumbent contract performance metrics showing the organizing activities on the contract have had no impact on service. None of these activities has come close to causing any service disruption or otherwise had any impact on the stellar quality of Maximus's performance, nor is there any reasonable basis to believe they would. This is reflected by objective performance metrics, such as ASA and customer satisfaction metrics, many of which *improved* on the days that the demonstrations took place. (GAO Protest at 71-72; *see also* AR Tab 16, Daily Call Metrics.) Call volumes and inquires received at contact centers on days in which a labor event took place were likewise consistent with forecasted volumes, showing that the small non-events did not create the perception of a service disruption among program consumers. (GAO Protest at 76.)

260. Absent from the record is any evidence that CMS analyzed the labor actions or any consideration whether they are likely to continue or escalate in future to the point where CCO service could be threatened.

261. In a similar vein, the procurement record includes no documented explanation or analysis to show that the LHA requirement or corporate experience requirements will reduce the threat of service disruptions, rather than create such a threat.

262. The procurement record likewise contains no evidence that CMS considered whether any existing requirements or less restrictive means are adequate to address its hypothetical concerns of service disruptions, much less documenting a reasonable rationale for why less restrictive means were not adequate.

263. In short, the procurement record contains no analysis of the labor actions to date; no attempt to assess their actual threat to service continuity or balance that threat against a severely

limited competition; and no consideration whether the chosen means—that is, the LHA requirements—would safeguard against any adverse impact.

264. "The reasoned explanation requirement of administrative law ... is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise." *Dep't of Com. v. New York*, 588 U.S. 752, 785 (2019).

265. CMS's decision to impose the challenged LHA requirements fails woefully short of a reasoned decisionmaking.

266. Therefore, the Court should (a) declare the challenged LHA provisions arbitrary, capricious, and an abuse of discretion, (b) preliminarily and permanently enjoin the Agency from enforcing those provisions and direct the Agency to revise the Solicitation to remove the unlawful and arbitrary LHA requirements.

VIII. PRAYER FOR RELIEF

Maximus, accordingly, respectfully requests that this Court:

A. Declare the Solicitation's LHA requirement to be not in accordance with law and otherwise arbitrary, capricious, and an abuse of discretion;

B. Preliminarily and permanently enjoin the Agency from enforcing the LHA requirement;

C. Direct the Agency to amend the Solicitation to remove the LHA requirement and the experience criterion related to labor organizations; and

D. Provide such other and further relief as the Court deems just and proper.

Dated: October 28, 2024

Respectfully Submitted,

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