IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

HANFORD TANK DISPOSITION ALLIANCE, LLC, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	**FINAL REDACTED VERSION** Case No. _____ [redacted]

SEALED COMPLAINT

Plaintiff, Hanford Tank Disposition Alliance, LLC ("HTDA"), through its undersigned counsel, states and alleges as follows:

NATURE OF THE ACTION

1. This is a post-award bid protest seeking declaratory judgment and permanent injunctive relief against the United States, acting through the Department of Energy ("DOE").[1]

2. This bid protest challenges the DOE's award of the Hanford Integrated Tank Disposition Contract ("ITDC") to Hanford Tank Waste Operations & Closure, LLC ("H2C") under Request for Proposal No. DE-SOL-89303321REM000084 ("RFP" or "Solicitation"). ITDC is an Indefinite Delivery Indefinite Quantity contract ("IDIQ") with a maximum value of $45 billion over a 10-year ordering period. The goal of this contract is to complete the safe cleanup of the

[1] On March 20, 2024, the Department of Justice confirmed that the DOE would voluntarily stay the start of contract transition until September 1, 2024. Accordingly, HTDA is not moving the Court for a Temporary Restraining Order or Preliminary Injunction at this time.

[redacted]

radioactive waste left behind after decades of nuclear weapons production at the Hanford Site in southeastern Washington State. The ITDC effort is anticipated to include operation of tank farm facilities, including single-shell tank waste retrieval and closure, and operation of the Waste Treatment and Immobilization Plant. The contract will also include core functions such as project management; environment, safety, health, and quality; security and emergency services; and business performance requirements.

3. Only two offerors competed for this contract: HTDA and H2C. Despite concluding that [redacted] and that HTDA had the lower Total Evaluated Price ("TEP"), the DOE concluded H2C's proposal presented the best value to the government. That conclusion, however, was based on material and prejudicial evaluation errors that skewed the best value source selection decision in H2C's favor.

4. First, the DOE deviated from the Solicitation by evaluating cost realism [redacted]

5. Second, H2C is ineligible for award because it allowed its System for Award Management ("SAM") registration to lapse, in violation of the mandatory requirements of FAR

[redacted]

52.204-7, which requires offerors to remain continuously registered in SAM as a condition of award. H2C's failure to maintain its SAM registration is incurable and renders its proposal ineligible for award.

6. Third, during corrective action the DOE amended the Solicitation to improperly replace FAR 52.204-7 with a new class deviation, FAR 52.204-7 System of Award Management (AUG 2023) (Deviation), that permits award to offerors that fail to maintain an active SAM registration. The DOE's amendment is improper because (1) the sole purpose of the amendment is to rehabilitate H2C's incurably ineligible proposal following the Court of Federal Claims' decision that H2C was ineligible for award, (2) federal law requires the deviation to pass through ordinary notice-and-comment rulemaking before the DOE can begin inserting it into solicitations, and (3) the deviation is impermissibly retroactive. The Federal Circuit has held a plaintiff does not waive the opportunity for post-award litigation of a pre-award challenge to the terms of a solicitation if the protester filed a timely pre-award protest of those terms with the procuring agency itself or the U.S. Government Accountability Office ("GAO"). *Harmonia Holdings Group, LLC v. United States,* 20 F.4th 759, 767 (Fed. Cir. 2021). HTDA raised this protest ground in a timely agency-level protest on October 10, 2023; therefore, this protest ground is timely raised again here.[2]

7. Finally, the DOE conducted a flawed best value tradeoff, irrationally concluding that H2C's proposal offered the best value based on an unreasonable evaluation and comparison of the H2C and HTDA proposals.

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[2] HTDA timely raised the same pre-award protest ground before the GAO. The GAO dismissed the protest because H2C's appeal before the Federal Circuit could render any decision issued by its Office academic. *Hanford Tank Disposition Alliance, LLC*, B-422170.1, 2023 CPD ¶ __, 2023 WL __(Comp. Gen. Dec. 21, 2023.

[redacted]

8. These errors, individually and together, competitively prejudiced HTDA and resulted in the DOE's arbitrary and capricious award of the ITDC to H2C.

PARTIES

9. Plaintiff HTDA is a Delaware limited liability company comprised of Atkins Nuclear Secured, LLC, Jacobs Technology, Inc., and Westinghouse Government Services LLC. Plaintiff's headquarters and principal place of business is 545 Oak Ridge Turnpike, Oak Ridge, Tennessee, 37830.

10. Defendant is the United States, acting through the Environmental Management Consolidated Business Center, U.S. Department of Energy. Defendant has offices at 550 Main Street, Room 7-010, Cincinnati, Ohio, 54202.

11. The awardee is H2C of Lynchburg, Virginia. According to public announcements, H2C is a joint venture of BWXT Technical Services Group, Inc. ("BWXT"), Amentum Environment & Energy, Inc. ("Amentum"), and Fluor Federal Services, Inc. ("Fluor").

JURISDICTION

12. This Court has jurisdiction over this action pursuant to the Tucker Act, 28 U.S.C. § 1491(b), because it is "an action by an interested party objecting … 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."

13. HTDA has standing as an interested party because it is an actual offeror that submitted a timely proposal for the subject procurement, and the award of the ITDC to H2C affects HTDA's direct economic interests. But for the errors in the DOE's procurement process, HTDA would have had a substantial chance of award.

[redacted]

FACTUAL BACKGROUND

14. The ITDC is an IDIQ Contract with a $45 billion maximum value over its 10-year ordering period. Through the contract, DOE will obtain solutions for the safe, accelerated clean-up of high-risk waste to reduce environmental liabilities and protect human health and the environment. The ITDC contemplates the award of both Cost Reimbursement and Fixed Price task orders.

I. Evaluation Criteria

15. The RFP called for a best-value source selection based on "a comparative assessment of proposals against all evaluation factors in the solicitation," with award to the offeror "whose proposal is determined to be the best value to the Government."

16. The RFP identified four evaluation factors: (1) Key Personnel, (2) Past Performance, (3) Management Approach, and (4) Cost and Fee/Profit. Factor 1, Key Personnel, was more important than Factor 2, Past Performance, and Factor 3, Management Approach. Factors 2 and 3 were considered equal in importance. Factors 1-3, when combined, were significantly more important than the total evaluated price.

17. Factors 1-3 were to be adjectivally rated. The RFP did not provide the adjectival ratings or their definitions. Factor 4, Cost and Fee/Profit, was only to be considered in the overall evaluation of proposals in determining the best value to the Government. The DOE did not intend to provide a rating or score for Factor 4.

Factor 1: Key Personnel

18. Factor 1, Key Personnel, evaluated the "proposed required Program Manager and Operations Manager (required key personnel) and up to three additional non-required key personnel" as well as the "Offeror's rational for selecting the proposed non-required key personnel

[redacted]

and why the positions are essential to the successful performance of the entire master IDIQ [Performance Work Statement ("PWS")]." The Program Manager and Operations Manager individually were considered more important than the non-required key personnel individually.

19. The DOE was to evaluate the individuals proposed as key personnel to determine the "degree to which they are qualified and suitable for the proposed position in relation to the work for which they are proposed to perform and areas of responsibility." The qualifications and suitability of the individual key personnel were to be evaluated on the following:

> (1) Experience. The key personnel individually will be evaluated on their DOE, commercial, and/or other Government experience in performing work similar to the work to be performed in their proposed position, including leadership and other accomplishments, with emphasis on production operations type work.
>
> (2) Education. The key personnel individually will be evaluated on their education, specialized training, certifications, and licenses that support the suitability for the proposed position.
>
> (3) References. DOE may contact any or all of the references and other sources of information not provided by the Offeror, to verify the accuracy of the information contained in the resume and to further assess the qualifications and suitability proposed key personnel.

20. The DOE also was to conduct oral interviews with each key personnel to evaluate the individual's qualifications, suitability, and leadership capability.

Factor 2: Past Performance

21. Under Factor 2, Past Performance, the DOE was to evaluate "relevant and recent past performance information obtained for the Offeror [(to include all members of a teaming arrangement)] performing work similar in scope, size and complexity to the portion of the Master IDIQ PWS that each entity is proposed to perform."

22. The RFP defined similar scope, size, and complexity as follows:

[redacted]

> Scope – type of work (e.g., work as identified in the Master IDIQ PWS, including similar work of a non-nuclear nature and/or similar non-DOE work such as operating facilities with significant chemical/industrial hazards comparable to typical commercial chemical industry facilities regulated by the Occupational Safety and Health Administration and in some cases using the Occupational Safety and Health Administration's Process Safety Management Framework);
>
> Size – dollar value (approximate average annual value in relation to the proposed work; annual contract value of approximately $400M for evaluation purposes);
>
> Complexity – Performance challenges (e.g., operating a first of a kind facility; operating Hazard Category 2 or 3 facilities; overcoming barriers to maintaining operating production levels; overcoming issues related to maintenance and obsolescence; subcontractor management; management of large complex contracts in highly regulated industries; management of complex Contractor Human Resource Management (CHRM) requirements; and successful partnership with the Government, Client, and Regulators.

23. The DOE was to evaluate recent past performance information for contracts currently being performed or with a period of performance end date within the last four years from the original solicitation date. The DOE indicated more recent past performance information may be given greater consideration.

24. Teaming Subcontractors were to be similarly evaluated on the assessment of the past performance information for work similar in scope, size, and complexity to that proposed to be performed by the Teaming Subcontractor.

25. For newly formed entities and predecessor companies, the RFP permitted the evaluation of past performance to be based on the past performance of its "parent organization(s), member organizations in a joint venture, limited liability company, or other similar or affiliated companies," so long as the proposal demonstrates the resources of the parent, member, or affiliate will be provided or relied upon in contract performance.

[redacted]

26. The RFP informed offerors that they may be evaluated on "safety statistics (OSHA, Days Away, Restricted or Transferred (DART) and Total Recordable Case (TRC)) and DOE enforcement actions and/or worker safety and health, nuclear safety, and/or classified information security incidents or notifications posted to the DOE Office of Enterprise Assessments website [] and corrective actions taken to resolve those problems."

27. The DOE also reserved the right to consider past performance information from sources other than those provided by an offeror, including commercial and government clients, government records, regulatory agencies, and government databases.

Factor 3: Management Approach

28. Under Factor 3, Management Approach, the DOE was to evaluate the Offeror's Contract Transition Approach, Management Approach, and Small Business Participation.

29. With respect to the Contract Transition Approach, the DOE was to evaluate the Offeror's "approach to achieve the Contract Transition Task Order requirements, including Contractor Human Resource Management (CHRM) requirements in Section H, for the safe, effective, and efficient transfer of responsibility for execution of the Master IDIQ Contract with little or no disruption to ongoing operations."

30. With respect to the Management Approach, the DOE was to evaluate the Offeror's management approach to "effectively negotiate, manage, implement and execute multiple simultaneously performed Task Orders," "integrate and enhance OSHA safety culture of comparable typical commercial chemical industry with the existing nuclear facility ISMS," "integrate tank farm and WTP operations," identify solutions for the disposition of tank waste, interface with other site contractors, and partner with the Agency and regulators.

[redacted]

31. For Small Business Participation, the DOE was to evaluate the offeror's approach to "meet or exceed the small business subcontracting goal of 18 percent of the cumulative value of Task orders, including subcontracting of meaningful work scope."

Factor 4: Cost and Fee/Profit

32. Under Factor 4, Cost and Fee/Profit, the DOE was to evaluate the Cost and Fee/Profit Proposal for cost realism and price reasonableness in accordance with FAR 15.404-1 and FAR 15.402(a). The DOE did not intend to rate or score the offeror's Cost and Fee/Profit proposal.

33. The Solicitation warned that a "Cost realism analysis will be performed on the Offeror's proposed Transition Task Order costs."

34. The Solicitation further stated, "Price reasonableness will be performed on both the proposed fully burdened labor rates (excluding fee) for the period February 1, 2023 through January 31, 2024 applied to the DOE provided Estimated Direct Productive Labor Hours and of the proposed key personnel costs."

35. For best value purposes, the total evaluated price was to be the total of the proposed fee/profit for a one-year period, proposed costs for key personnel, ***proposed costs for the fiscal year 2023 fully burdened labor rates*** (excluding fee), ***and realistic costs for the Transition Task Order period***. In other words, the DOE's cost realism evaluation was to be limited to the Transition Task Order costs.

Best Value Tradeoff

36. In making its best value determination, the DOE stated that it was "more concerned with obtaining a superior Technical and Management Proposal than making an award at the lowest evaluated price." However, the DOE would not make award at a price premium "disproportionate

[redacted]

to the benefits associated with the evaluated superiority of one Offeror's Technical and Management Proposal over another."

II. Initial Award and Protest

37. On April 13, 2023, the DOE notified HTDA that the Agency had awarded the ITDC to H2C. Following a required debriefing, HTDA filed a post-award bid protest with the United States Court of Federal Claims ("COFC"), challenging the award to H2C. One of HTDA's multiple objections to the award decision was the fact that H2C did not appear to be registered in the System for Award Management ("SAM"), as required by FAR 52.204-7.

38. Initially, the Agency elected to defend the award decision. However, once it was established that H2C had violated the SAM requirements by allowing its registration to lapse during the procurement, the Government acknowledged the award was unlawful and should be vacated by the Court. On June 30, 2023, after briefing by the parties, the Court specifically noted H2C's admission that for a period of more than five months, including at the time it submitted its best and final offer, H2C failed to maintain the mandatory SAM registration. Court Order (ECF No. 60) at 4 in *Hanford Tank Disposition Alliance, LLC v. United States*, No. 23-683C (Fed. Cl. 2023). The Court also noted H2C's admission that, at the time of its final proposal submission on January 10, 2023, H2C had expressly informed DOE that its SAM registration was no longer active. The Court noted no extenuating circumstances and no explanation for why H2C violated this mandatory Solicitation requirement. Nor did the Court note any explanation for why DOE awarded to H2C despite the fact that H2C itself alerted DOE, prior to award, of its noncompliance with FAR 52.204-7.

39. Accordingly, the Court sustained HTDA's protest and enjoined the award to H2C, finding:

[redacted]

> [H2C's] proposal did not comply with FAR 52.204-7(b)(1), which was a mandatory requirement in the procurement at issue in this protest. Therefore, the award to [H2C] was improper and the award is set aside, and performance of the contract is enjoined.

Court Order (ECF No. 60) at 4.

40. On August 8, 2023, H2C appealed the COFC decision to the Federal Circuit. That appeal is pending.

III. Corrective Action and GAO Pre-Award Protest

41. The DOE took corrective action and issued Solicitation Amendment 0006, which replaced FAR 52.204-7 with a new class deviation, FAR 52.204-7 System of Award Management (AUG 2023) (Deviation), that permits award to offerors that fail to maintain an active SAM registration.

42. The deviation contains the following changes to FAR 52.204-7(b)(1) (indicated in bold and strikethrough text):

> (1) An Offeror is required to be registered in SAM when submitting an offer or quotation, ~~***and shall continue to be registered until***~~ ***at the*** time of award, during performance, and through final payment of any contract, basic agreement, basic ordering agreement, or blanket purchasing agreement resulting from this solicitation. ***A failure to register in SAM or a lapse in SAMs*** [*sic*] ***registration may be treated by the Contracting Officer as a correctable matter of responsibility.***

43. On October 10, 2023, HTDA filed a timely agency-level protest with DOE, objecting to Amendment 0006. On October 23, 2023, DOE proceeded to accept final proposal revisions, notwithstanding the pendency of HTDA's agency-level protest.

44. Accordingly, HTDA filed a timely pre-award protest before the U.S. Government Accountability Office ("GAO") challenging the class deviation.

[redacted]

45. On December 21, 2023, the GAO dismissed the protest in a public decision because H2C's pending appeal at the Federal Circuit "could render any decision by our Office academic because a favorable decision from the Federal Circuit could allow the agency to simply abandon the deviation."

IV. New Award and Evaluation Results

46. On February 29, 2024, the DOE notified HTDA that the Agency had once again awarded the ITDC to H2C.

47. HTDA timely requested a debriefing, which the DOE provided on March 12, 2024. The DOE provided the following summary of HTDA's evaluation as compared to H2C's evaluation:

	HTDA	H2C
Factor 1: Key Personnel	[redacted]	Outstanding
Factor 2: Past Performance		Good
Factor 3: Management Approach		Good
Total Evaluated price		$629,863,486

Factor 1 Evaluation

48. The DOE rated HTDA [redacted] under Factor 1, Key Personnel [redacted]. The Selection Evaluation Board ("SEB") evaluated the required Program Manager and Operations Manager [redacted]. The DOE assessed the following ratings for HTDA's proposed Key Personnel:

[redacted]

[redacted]

49. Overall, the SEB concluded that HTDA's proposed key personnel [redacted]

Factor 2 Evaluation

50. Under Factor 2, Past Performance, the SEB assessed HTDA [redacted].

51. Of the past performance references [redacted].

52. Overall, the SEB found [redacted]

Factor 3 Evaluation

53. Under Factor 3, Management Approach, the SEB assessed HTDA [redacted]

54. In evaluating HTDA's Contract Transition Approach, Management Approach, and Small Business Participation, the SEB identified [redacted]

[redacted]

55. The SEB [redacted]

56. The SEB [redacted]

57. The SEB [redacted]

58. The SEB concluded [redacted]

Factor 4 Evaluation

59. In evaluating HTDA's Cost and Fee/Profit Proposal under Factor 4, the SEB determined [redacted]

[redacted]

60. [redacted]

Best Value Determination

61. Although [redacted]

62. For Factor 1, Key Personnel, the SSA found that [redacted]

63. [redacted]

64. For Factor 3, Management Approach, the SSA determined that [redacted]

65. The SSA concluded, [redacted]

COUNT ONE
Improper Cost Realism Assessment [redacted]

66. HTDA incorporates the preceding paragraphs of the Complaint as if fully set forth herein.

[redacted]

67. The DOE determined [redacted] The DOE's cost realism evaluation, however, was contrary to the RFP and unreasonable.

68. Section M.5 of the RFP states:

> The Cost and Fee/Profit Proposal will be evaluated for cost realism and price reasonableness in accordance with FAR 15.404-1 and FAR 15.402(a). ***Cost realism analysis will be performed on the Offeror's proposed Transition Task Order costs.*** This analysis will be used to determine whether the proposed cost elements are realistic for the work to be performed and reflect a clear understanding of the transition requirements. The transition cost proposal will be compared to the Volume II proposal for consistency and understanding of the requirements. ***Price reasonableness will be performed on both the proposed fully burdened labor rates (excluding fee) for the period February 1, 2023 through January 31, 2024 applied to the DOE provided Estimated Direct Productive Labor Hours and of the proposed key personnel costs.*** Key personnel compensation is capped at $568,000 for each designated key person, as established by Section 702 of the Bipartisan Budget Act of 2013.

(emphasis added).

69. Section M.5 further states:

> For purposes of determining the best value, the evaluated price will be the total of the proposed fee/profit (all fee/profit proposed by Task Order type) ***for a 1-year period*** (not exceeding the identified fee limitations), ***proposed costs for Key Personnel (up to the compensation limits shown above), proposed costs for the FY 2023 fully burdened labor rates*** (excluding fee) applied to the DOE provided Estimated Direct Productive Labor Hours (Offeror's additional proposed direct labor categories included in L-6g shall not be used to compute the evaluated price for award purposes), and ***realistic costs for the Transition Task Order period***. Mathematical errors shall be corrected to compute the evaluated price. An Offeror that proposes a fee amount exceeding the maximum prescribed available award fee, target fee, and/or fixed fee amounts as specified in Section L may be considered unacceptable for award.

[redacted]

(emphasis added).

70. Thus, the RFP [redacted].

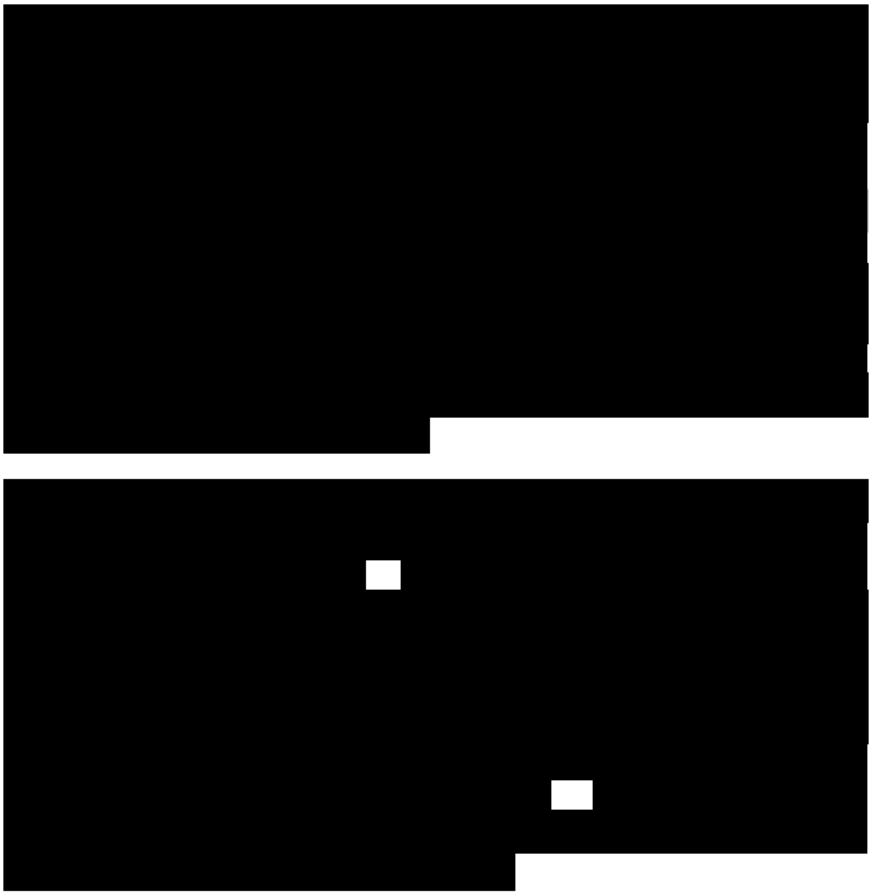
71. Nevertheless, the DOE [redacted].

72. Under a proper evaluation, the DOE would have adhered to the RFP [redacted].

73. In any event, [redacted].

[redacted]

74. [redacted]



(emphasis added).

75. [redacted]

76. [redacted]

[redacted]

[redacted]

77. [redacted]

[redacted]

78. For each of these reasons, [redacted]

[redacted]

[redacted]

[redacted]

COUNT TWO
H2C is Ineligible for Award

79. HTDA incorporates the preceding paragraphs of the Complaint as if fully set forth herein.

80. It is undisputed that H2C failed to comply with FAR 52.204-7, which was incorporated into the Solicitation, because H2C allowed its SAM registration to lapse for months during the pendency of the procurement. In multiple decisions in recent years, the COFC has held that FAR 52.204-7 is a mandatory, non-waivable requirement and that an offeror's noncompliance with that requirement renders it ineligible for award. Defendant has repeatedly endorsed that same position in prior litigation before this Court and correctly endorsed that same position in HTDA's prior protest. Def.'s Suppl. Brief (ECF No. 56) at 1 in *Hanford Tank Disposition Alliance, LLC v. United States*, No. 23-683C (Fed. Cl. 2023) ("Because H2C was not registered at all required times, its offer was not responsive to the solicitation."); *Id.* at 3 ("This SAM requirement is mandatory.") H2C's failure to maintain an active SAM registration throughout the procurement is an incurable defect that precluded award to H2C and is dispositive of this protest.

81. H2C raised various theories to avoid this inevitable conclusion in response to HTDA's prior protest. The Court found none of these theories meritorious.

82. H2C is plainly and incurably unawardable and must be excluded from the ITDC competition. That outcome may be harsh, but it is required under the law. *See McMaster Const., Inc. v. United States*, 23 Cl. Ct. 679, 686 (1991) (recognizing that excluding bidder from competition for an "oversight" would waste taxpayer funds, but finding the "admittedly draconian"

[redacted]

result was "inexorable in view of the regulatory requirement, a condition that was within the power of the Government to impose").

83. H2C allowed its SAM registration to lapse for many months after initial proposal submission, and it was not registered in SAM as of the date it submitted its revised final offer for this procurement. This violated FAR 52.204-7's requirement, which was incorporated into this Solicitation, that each offeror "is ***required*** to be registered in SAM ***when submitting an offer*** or quotation, ***and shall continue to be registered until time of award***, during performance, and through final payment of any contract, basic agreement, basic ordering agreement, or blanket purchasing agreement resulting from this solicitation." 48 C.F.R. § 52.204-7(b)(1) (emphasis added). There is no dispute that H2C failed to comply with this clause.

84. The Court has repeatedly addressed the mandatory and unwaivable nature of the FAR 52.204-7, and Defendant has correctly and successfully argued in prior cases that, if an offeror fails to comply with this clause, the procuring agency is ***obliged*** to disqualify it.

85. In *CGS-ASP Security JV, LLC v. United States*, for example, the procuring agency excluded the plaintiff from the competition because it did not have an active SAM registration at the time of the initial (and only) proposal submission, in violation of FAR 52.204-7. 162 Fed. Cl. 783, 794 (2022).[3] The plaintiff argued its exclusion was arbitrary and capricious and pled various excuses for why its noncompliance should be excused. *Id.* In response, Defendant argued the agency "was obliged to exclude plaintiff's submission because of plaintiff's failure to properly register in SAM." *Id.* (emphasis added) (quoting Def.'s Cross MJAR at 15); *see also id.* at 816 ("The government explains it was obliged to exclude plaintiff's submission because of plaintiff's

[3] This decision is currently on appeal before the Federal Circuit.

[redacted]

failure to properly register in SAM."). Judge Holte upheld the exclusion due to the noncompliance with FAR 52.204-7 and denied the noncompliant offeror's protest. *Id*. at 819.

86. Another, recent example is *Myriddian, LLC v. United States*, where an agency awarded a contract to a firm that allowed its SAM registration to lapse for seventeen days during the period between proposal submission and award. 165 Fed. Cl. 650, 655-56 (2023). Judge Tapp preliminarily enjoined the contract, holding the awardee's seventeen-day lapse in registration violated FAR 52.204-7's requirement for all offerors to remain continuously registered in SAM from initial proposal submission until contract award, and the procuring agency had no discretion to waive that requirement. *Id*. at 657. H2C's violation is, of course, far more egregious, as its registration lapse went on for months, including as of the date it submitted its final offer.

87. Yet another example is *G4S Secure Integration LLC v. United States*, where the procuring agency awarded a contract to a joint venture that was not registered in SAM at the time of initial proposal submission (although its joint venture members were independently registered). No. 21-1817C, 2022 WL 211023, at *6 (Fed. Cl. Jan. 24, 2022).[4] Judge Hertling held that the awardee violated FAR 52.204-7, which he determined was a mandatory and unwaivable requirement. *Id*. at *8. Judge Hertling nevertheless denied the protest because the protester itself violated the same SAM registration requirement, which meant the protester was unable to demonstrate competitive prejudice from the agency's unlawful failure to enforce FAR 52.204-7. *Id*.

[4] This protest is different from Judge Somers's case, *G4S Secure Integration LLC v. United States*, 161 Fed. Cl. 387 (2022). Judge Somers's case did "not turn on the meaning of FAR 52.204-7," but rather on whether an agency was permitted to issue a solicitation that purported to allow unincorporated joint ventures to forgo SAM registration, but later to withdraw that allowance after offerors had relied upon it and proposals had already been submitted. *Id*. at 399. Nothing similar has occurred here. For this reason, Judge Somers's decision has no bearing on the case at bar.

[redacted]

88. Still another recent example is *Thalle/Nicholson Joint Venture v. United States*, 164 Fed. Cl. 224 (2023). In that case, an agency excluded a joint venture offeror from a competition for failing to register in SAM, although its joint venture members were registered. 164 Fed. Cl. at 229-30. When the excluded offeror protested, the Government argued the exclusion was proper because the offeror's violation of FAR 52.204-7 meant its proposal "was incurably deficient and therefore could not have been accepted as a matter of law." *Id.* at 231 (emphasis added) (quoting Def.'s Mt. to Dismiss at 17). Judge Dietz found the exclusion was proper and rejected the plaintiff's argument that the agency should have raised this noncompliance during discussions so that the offeror might cure the defect. *Id.* at 234. The Court held that discussions would have been futile because ***there is no way for an offeror to cure a failure to be registered in SAM*** other than by demonstrating that the agency was factually mistaken about the offeror's failure to be registered. *Id.* Because the plaintiff could not go back in time and retroactively make itself compliant in the past, its noncompliance was incurable.

89. Judge Dietz also explained that "allowing the contracting officer to waive the requirements of FAR 52.204-7(b)(1) would disregard the 2018 amendment that removed any discretion by the contracting officer to determine the timing of SAM registration and 'would allow an agency to waive a FAR provision with mandatory language without pursuing the FAR's mandatory procedures when agencies seek to deviate from the FAR.'" *Id.* at 234 (citing *G4S*, 2022 WL 211023, at *7-*9).[5]

[5] Prior to 2018, contracting officers had some discretion as to when to require SAM registration. *See G4S*, 2022 WL 211023 at *5. The pre-October 2018 version of FAR 52.204-7 provided that "[i]f the Offeror does not become registered in the SAM database in the time prescribed by the Contracting Officer, the Contracting Officer will proceed to award to the next otherwise successful registered Offeror." *Id.* After the 2018 amendment, FAR 52.204-7, as described above, requires

[redacted]

90. The GAO has reached the same conclusion regarding the enforceability of FAR 52.204-7 in negotiated procurements like this one. Under the different regulations governing FAR Part 14 sealed bidding procedures, the GAO has held a firm's failure to have an active SAM registration at the time of bid submission is a "matter of responsibility" and may be characterized as a minor error that can be corrected after bid opening. *CGS-ASP Security JV LLC*, B-420497, 2022 CPD ¶ 39, 2022 WL 522877 at *2 (Comp. Gen. Feb. 18, 2022). In a negotiated procurement, by contrast, the GAO has held that "the question of when a firm is required to have an active SAM registration is governed by the terms of the solicitation itself, because the mandatory cure or waiver provisions governing sealed bidding acquisitions, FAR section 14.405, are inapplicable to negotiated acquisitions." *Id.*; *see Acon Traders LLC*, B-417558, 2019 CPD ¶ 226, 2019 WL 2635432 (Comp. Gen. June 26, 2019) (holding protester was ineligible for award under October 2018 version of FAR 52.204-7 because protester was not registered in SAM when it submitted its quotation as required by the solicitation).

91. These holdings reflect the plain language of the regulation and are consistent with the Government's own litigation position in multiple cases. They provide persuasive authority for the principle that an offeror that does not remain registered in SAM at all times from initial proposal submission until contract award, in a negotiated procurement that incorporates the current version of FAR 52.204-7, is incurably ineligible for award under that solicitation. This Court should adopt the well-reasoned holdings of these prior cases and determine that H2C's proposal is incurably unawardable and must be excluded from the ITDC competition.

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offerors to be registered in SAM whenever they submit an offer, and continuously prior to award, and provides the contracting officer with no discretion as to when to require SAM registration.

[redacted]

COUNT THREE
DOE's Solicitation Amendment Replacing FAR 52.204-7 with a New Class Deviation Is Improper

92. HTDA incorporates the preceding paragraphs of the Complaint as if fully set forth herein.

93. After the COFC sustained HTDA's first protest, DOE took corrective action and issued Amendment 0006, which improperly seeks to replace FAR 52.204-7 with a new class deviation that permits award to offerors that fail to maintain an active SAM registration. For the reasons outlined below, this amendment is improper.

94. HTDA raised this protest ground in a timely agency-level protest on October 10, 2023. HTDA timely raised the same protest ground a second time before the GAO. The GAO dismissed the protest because H2C's appeal before the Federal Circuit could render any decision issued by its Office academic. *Hanford Tank Disposition Alliance, LLC*, B-422170.1, 2023 CPD ¶ __, 2023 WL __(Comp. Gen. Dec. 21, 2023). Therefore, this protest ground is timely raised again here. *See Harmonia Holdings Group, LLC v. United States*, 20 F.4th 759, 767 (Fed. Cir. 2021) (holding that a plaintiff does not waive the opportunity for post-award litigation of a pre-award challenge to the terms of a solicitation if the protester filed a timely pre-award protest of those terms with the procuring agency itself or the GAO).

Deviating from a Mandatory FAR Provision to Rehabilitate an Unawardable, Noncompliant Proposal Violates the Agency's Duty to Conduct Impartial Competitions.

95. The sole purpose of Amendment 0006 is to rehabilitate H2C's incurably ineligible proposal following the COFC's decision that H2C was ineligible for award.

96. It is a bedrock principle of the American procurement system that "[a]ll contractors and prospective contractors shall be treated fairly and impartially," FAR 1.102-2(c)(3), and

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agencies must conduct Government business "with complete impartiality and with preferential treatment for none," FAR 3.101-1. Agencies have a fundamental duty to "[e]nsure that contractors receive impartial, fair, and equitable treatment." FAR 1.602-2(b).

97. Here, as the Government admitted and the COFC held, H2C's proposal failed to comply with a mandatory FAR provision that was a material term of the Solicitation. This was a material and non-waivable defect. It was, moreover, a defect entirely of H2C's own creation and with no extenuating circumstances. H2C's failure to comply with FAR 52.204-7 was not due to a failure in Government information technology, or unreasonably delayed Government processing times, or anything outside H2C's control. Nor was it a brief lapse. According to H2C itself, the lack of registration stretched "from about August 13, 2022, through January 24, 2023," and was even inactive at the time of H2C's final offer submission. Court Order (ECF No. 60) at 4.

98. The FAR's standard procurement processes provide no method for curing this type of noncompliance. In this regard, both the COFC and the Department of Justice have found that discussions and proposal revisions cannot rehabilitate a proposal that is noncompliant with FAR 52.204-7. As the Department of Justice cogently argued in *Thalle/Nicholson Joint Venture v. United States*, an offeror's violation of FAR 52.204-7 means its proposal "was ***incurably*** deficient and therefore could not have been accepted ***as a matter of law***." 164 Fed. Cl. 224, 231 (2023) (emphasis added) (quoting Def.'s Mt. to Dismiss at 17). The Court agreed and rejected the plaintiff's argument that the agency should have raised this noncompliance during discussions so that the offeror might cure the defect. *Id.* at 234. The Court held that discussions would have been futile because there is no way for an offeror to cure a failure to be registered in SAM other than by demonstrating that the agency was factually mistaken about the offeror's failure to be registered. *Id.* Because the plaintiff could not go back in time and retroactively make itself compliant,

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discussions would have been of no use to the noncompliant plaintiff. *See id.* DOE's attempted application of a FAR deviation to the Solicitation at this late stage is plainly aimed at circumventing the rules of this Solicitation and the ordinary rules of FAR-based procurements.

99. Agencies may deviate from the FAR only "when necessary to meet the specific needs and requirements of each agency." FAR 1.402. Nothing in DOE's class deviation explains why the deviation is needed, or why the standard FAR provision fails to meet the Agency's needs, other than a conclusory assertion that the deviation will "ensure the efficiency of the procurement system" by "alleviat[ing] any need to ensure compliance with the [regulatory] text stating, 'continue to be registered until award.'" *See* Class Deviation. The only "need" to be "alleviat[ed]" in this particular procurement is ***H2C's*** (not DOE's) need, given H2C's own failure to comply with the law. DOE has identified no "specific need[] and requirement[]" of DOE itself that the deviation, as applied to this procurement, serves.

100. DOE's application of the class deviation to this procurement is improper because it is neither fair nor impartial. Rather, it is an unfair and partial move to retroactively exempt H2C from a reasonable and mandatory requirement, which continues to fully meet DOE's needs, simply because H2C has demonstrated its inability to meet that requirement. Such one-sided allowance for a single offeror is improper, particularly when it serves only to pardon that offeror for a material and uncorrected (and uncorrectable) defect that a Court has already found made award to that offeror unlawful. That is particularly so in a procurement such as this, with only two otherwise similarly evaluated proposals.

101. Analogously, the COFC has found that agencies may not retroactively extend proposal deadlines that have already passed to fix a late proposal's noncompliance with FAR 52.215–1(c)(3)(ii)(A) (the Late is Late Rule), even if the goal is to increase competition. *See Geo-*

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Seis Helicopters, Inc. v. United States, 77 Fed. Cl. 633, 645 (2007). The Court specifically found the agency's retroactive extension of a proposal due date for the benefit of the late awardee contravened "the public's interest in a fair procurement process." *Id.* at 650.

102. Or again, in *Professional Service Industries, Inc. v. United States*, the Court enjoined corrective action that consisted of amending a solicitation's requirements to aid an offeror that could not meet those requirements:

> The agency's corrective action, in other words, gives the appearance of securing a result that is precisely the opposite of what the procurement rules ordinarily require. For rather than ensuring that an offeror's proposal conform strictly to the requirements of the solicitation, the agency has changed the solicitation to conform to an offeror's proposal.

129 Fed. Cl. 190, 206 (2016). The Court pointedly observed that it was not assuming the agency's motives were improper or in bad faith. *Id.* Nevertheless, the Court found the agency's "decision to amend the solicitation to reduce the responsibilities [that the original awardee could not meet] and water down the experience and qualifications required for the PM position [which the original awardee could not attain] is arbitrary and capricious and must be set aside." *Id.* at 207.

103. The fact that the DOE has approved a class deviation prior to amending the Solicitation to assist H2C does not justify a different outcome here. Amendment 0006's application of the class deviation to this procurement for the sole benefit of H2C violates the fairness and impartiality requirements of FAR 1.102-2(c)(3), FAR 1.602-2(b), and FAR 3.101-1. This move is particularly troubling given the history of this procurement, where conflicts of interest involving two of H2C's joint venturers led to cancellation of the prior competition and a delay of more than two years. It is disappointing that, after the latest noncompliance by H2C,

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DOE is again going to extraordinary lengths to avoid awarding the contract to a compliant competitor with a similarly evaluated proposal and a fair and reasonable price.

The Agency May Not Apply the Class Deviation Until It Has Passed Through Notice-and-Comment Rulemaking and Has been Adjusted, If Necessary, to Address Comments Received.

104. Federal law requires a class deviation to pass through ordinary notice-and-comment rulemaking before the DOE can begin inserting it into solicitations.

105. The OFPP Act provides in relevant part:

> **(a) Covered policies, regulations, procedures, and forms.—**
>
> (1) **Required comment period.**—Except as provided in subsection (d), a procurement policy, regulation, procedure, or form (including an amendment or modification thereto) may not take effect until 60 days after it is published for public comment in the Federal Register pursuant to subsection (b) if it—
>
> (A) ***relates to the expenditure of appropriated funds***; and
>
> (B)(i) has ***a significant effect beyond the internal operating procedures of the agency*** issuing the policy, regulation, procedure, or form; ***or***
>
> (ii) has ***a significant cost or administrative impact on*** contractors or ***offerors***.
>
> (2) **Exception**.—A policy, regulation, procedure, or form may take effect earlier than 60 days after the publication date when there are compelling circumstances for the earlier effective date, but the effective date may not be less than 30 days after the publication date.
>
> **(b) Publication in Federal Register and comment period.—**
>
> Subject to subsection (c), the head of the agency shall have published in the Federal Register a notice of the proposed procurement policy, regulation, procedure, or form and provide for a public comment period for receiving and considering the views of all interested parties on the proposal. The length of the comment period may not be less than 30 days.

41 U.S.C. § 1707(a)-(b) (formerly codified at 41 U.S.C. § 418b) (emphasis added).

[redacted]

106. The Court of Federal Claims has found that significant class deviations may not be applied until they have undergone the ordinary notice-and-comment rulemaking required by the OFPP Act. In *Navajo Refining Co. v. United States*, the Court enjoined application of a class deviation permitting use of economic price adjustment clauses that were inconsistent with the FAR. 58 Fed. Cl. 200 (2003). The Court found that, although the OFPP Act did not specifically address class deviations, "a class deviation may fall within any of the various categories of procurement changes identified in the OFFP Act—in particular, changes in procurement policy, regulation, procedure or form that require publication in the Federal Register under the OFFP Act." *Id*. at 209. The Court also enjoined application of a similar class deviation that had not gone through notice-of-comment rulemaking in *La Gloria Oil & Gas Co. v. United States*, 56 Fed. Cl. 211 (2003).

107. The deviation here is a change in procurement policy/regulation for DOE procurements, and thus "relates to the expenditure of appropriated funds." 41 U.S.C. § 1707(a)(1)(A).

108. The deviation "has a significant effect beyond the internal operating procedures of [DOE]," as it will alter the conditions of offerors' eligibility for contract award and their ongoing compliance obligations during the pendency of proposals. 41 U.S.C. § 1707(a)(1)(B)(i). The fact that H2C's eligibility for award of a multi-billion-dollar contract hinges on this attempted change in procurement policy plainly shows the deviation's significant effect outside of DOE.

109. That same large cost and administrative impact on the contractor/offeror community satisfies the alternate prong of this disjunctive test, showing the deviation "has a significant cost or administrative impact on contractors or offerors." 41 U.S.C. § 1707(a)(1)(B)(ii).

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110. Therefore, pursuant to the OFPP Act, DOE must publish this deviation in the Federal Register and complete the statutory notice-and-comment rulemaking process before this class deviation can be applied to any procurement. To do otherwise would violate procurement law and deprive the public of its statutory right to comment on DOE's proposed change to the procurement policies and regulations that govern HTDA and other offerors in DOE procurements.

111. Defendant recognized the importance of notice and comment rulemaking in HTDA's previous protest, stating:

> This SAM requirement is mandatory. After the FAR Council ***amended FAR 204-7 through notice and comment rulemaking*** procedures in 2018, it made clear that FAR 204-7 "requires all offerors (except as provided [for inapplicable enumerated exceptions] at FAR 4.1102) to be registered in SAM at the time of submission of an offer or quotation, consistent with the requirements of FAR clause 52.204-8." *Federal Acquisition Regulation: System for Award Management Registration*, 83 Fed. Reg. 48,691 (DOD, GSA, NASA Sep. 26, 2018).

Def.'s Suppl. Brief (ECF No. 56) at 3 in *Hanford Tank Disposition Alliance, LLC v. United States*, No. 23-683C (Fed. Cl. 2023).

The Deviation Is Impermissibly Retroactive.

112. The Supreme Court has repeatedly held there is a deeply rooted legal presumption against statutory or regulatory retroactivity. *See Wildflower Int'l, Ltd. v. United States*, 105 Fed. Cl. 362, 375 (2012) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974)). As a result, procurements generally are governed by the regulations in effect on the date a solicitation is issued. *See, e.g., Yang Enters., Inc.*, B-418922.4, B-418922.6, 2021 CPD ¶ 209, 2021 WL 2315409 at *11-12 (Comp. Gen. May 20, 2021) (sustaining protest and holding that procurement was subject to regulations in effect on the solicitation's issuance date, not on regulations that came into effect during the pendency of

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proposals). This is to be expected, as the Supreme Court has stressed that "[t]he largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights." *Landgraf*, 511 U.S. at 271. If courts generally will not apply the dictates of Congress to existing contractual rights, there is even less basis for applying regulatory changes and deviations to those rights.

113. The class deviation at issue here is a significant change in the FAR's standard regulatory requirements and, as applied to this procurement, alters H2C's and HTDA's competing rights in an active procurement, with respect to proposals that were submitted and originally evaluated subject to the standard FAR regulation in effect on the date of the Solicitation's issuance. It has long been held that offerors' rights to a fair competition are not only statutory and regulatory rights, but also contractual rights. *Heyer Prods. Co. v. United States*, 140 F. Supp. 409, 413 (Ct. Cl. 1956) (holding that agencies have an implied-in-fact contract with bidders to fairly consider their bids); *see also Safeguard Base Operations, LLC v. United States*, 989 F.3d 1326, 1342-43 (Fed. Cir. 2021) (continuing to consider the right to fair treatment of submitted proposals as contractual rights).

114. DOE's attempt to remove a regulatory requirement applicable to this procurement, for the purpose of re-qualifying under new rules a proposal that was properly disqualified under the regulations against which both offerors were competing, is a breach of HTDA's contractual rights, as well as a violation of the Agency's regulatory obligations of impartiality and fairness. This kind of retroactive rules-changing is inimical to fair competition and a textbook example of the contractual rights the Supreme Court generally finds that even statutes cannot alter after the fact. *See Landgraf*, 511 U.S. at 271. Even if there are hypothetical situations where DOE might take such an extraordinary action to remedy Government-created registration problems in the

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interest of fairness, this is not such a situation; H2C's failure to remain registered was purely its own fault.

115. Retroactive application of a deviation is especially improper here, where the Agency's own requirements are the same today as they were when it released the Solicitation back in 2021. The only thing that has changed is that a Court has found one proposal was ineligible for award under the regulations that govern the procurement and, therefore, DOE has moved the goalpost after the fact to reflect the place where H2C's football has already landed. But for that goalpost-moving, H2C's proposal would remain ineligible for award and HTDA's own highly-rated and reasonably-priced proposal would be selected for award.

116. In its briefing of another recent SAM registration case, the Department of Justice argued before the Court that, although FAR 1.403 permits agencies to deviate from mandatory FAR procedures under certain circumstances, "the proper way to deviate from FAR 52.204-7 is to seek an individual deviation pursuant to FAR 1.403 ***before the solicitation is released***." Gov't MJAR at 17, *CGS-ASP Security JV, LLC, v. United States*, 162 Fed. Cl. 783 (2022) (emphasis added) (citing *G4S Secure Integration LLC v. United States*, No. 21-1817C, 2022 WL 211023, at *7 (Fed. Cl. Jan. 24, 2022)). HTDA does not dispute DOE's regulatory authority to issue some version of the class deviation, reflecting any necessary adjustments identified as a result of notice-and-comment rulemaking. But, as the Government correctly argued in *CGS-ASP Security*, it is improper for DOE to attempt to apply this deviation to an active solicitation such as this one—particularly given the procurement's procedural history. This is a third and independent basis for sustaining the protest on this Count alone.

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COUNT FOUR
Arbitrary and Capricious Best Value Decision

117. HTDA incorporates the preceding paragraphs of the Complaint as if fully set forth herein.

118. DOE's best value source selection decision is flawed because of the numerous prejudicial errors described above and evident in DOE's evaluation materials.

119. In particular, had the Agency rationally evaluated cost realism in accordance with the Solicitation, [redacted] the identical evaluation ratings assigned to the offerors, HTDA would have had a substantial likelihood of contract award as the offeror presenting the best value to the Government.

PRAYER FOR RELIEF

WHEREFORE, HTDA requests that the Court enter judgment for Plaintiff and further requests that the Court:

A. Declare the Agency's award of the contract to H2C arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law;

B. Permanently enjoin performance of the awarded contract;

C. Direct the Agency to re-evaluate proposals in accordance with the terms of the RFP; and

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

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Dated: March 21, 2024

Respectfully submitted,

By: 

Kevin P. Mullen
Morrison & Foerster LLP
2100 L St. NW
Washington, DC 20037
Telephone: 202.887.1560
Facsimile: 202.887.0763
KMullen@mofo.com

Attorney of Record for Plaintiff
Hanford Tank Disposition Alliance, LLC

Of Counsel:

Sandeep N. Nandivada
James A. Tucker
Caitlin C. Crujido
Victoria Dalcourt Angle
Markus G. Speidel
Morrison & Foerster LLP
2100 L St. NW
Washington, DC 20037

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