IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

AMAZON WEB SERVICES, INC., Plaintiff, v. UNITED STATES OF AMERICA, by and through the U.S. Department of Defense, Defendant, and MICROSOFT CORPORATION, Defendant-Intervenor.	Case No. 19-cv-01796 Judge Campbell-Smith

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION FOR VOLUNTARY REMAND

Amazon Web Services, Inc. ("AWS") submits this Opposition to the Motion for Voluntary Remand ("Motion") filed by Defendant, the United States. Defendant's Motion asks the Court to remand this case to the Department of Defense ("DoD") for 120 days to reconsider certain aspects of its Joint Enterprise Defense Infrastructure ("JEDI") award decision. Def. Mot. Vol. Remand, ECF No. 177 ("Mot."). Defendant explains DoD intends to take corrective action in response to the Court's February 13, 2020 decision granting AWS's Motion for Preliminary Injunction that held, among other things, DoD likely erred in evaluating Microsoft's deficient proposal under Price Scenario 6. *Id.* at 2.

The corrective action DoD proposes fails the tests of rationality and fairness, violates the broad discretion afforded an agency for addressing a procurement impropriety, and suggests that DoD seeks to take whatever corrective action is necessary to reaffirm its prior award to Microsoft despite the material defects the Court identified and DoD has now acknowledged. This Court's decision granting AWS's Motion for Preliminary Injunction makes clear that Microsoft is likely ineligible for the JEDI award. Contrary to the letter and spirit of that decision, DoD's proposed corrective action – *i.e.*, amending the RFP's Price Scenario 6 requirements, permitting only limited proposal revisions in response to the amended requirements, and re-evaluating the revised proposals – would enable Microsoft to resurrect its eligibility while depriving AWS of a reasonable opportunity to revise its proposal in response to changed requirements. Moreover, despite a passing nod in the right direction, DoD does not meaningfully commit to reconsider the other evaluation errors identified in the protest that produced the flawed award to Microsoft.

The Government should not be permitted to gerrymander the corrective action to preserve the illusion that Microsoft offered the lowest price while simultaneously perpetuating competitive impediments for AWS, the only offeror that submitted a compliant proposal eligible for award. Accordingly, AWS requests the Court deny Defendant's Motion and require DoD to revise its corrective action to reasonably and fairly reconsider the JEDI award decision by (1) removing the constraint on the offerors' ability to revise their pricing, and (2) re-evaluating proposals with respect to all of the errors identified by the protest.

DISCUSSION

Defendant's Motion states that DoD intends to (1) issue an RFP amendment, (2) solicit "limited proposal revisions addressing the offerors' technical approach" to Price Scenario 6, and (3) reconsider DoD's evaluation of Price Scenario 6 under Factor 5 and Factor 9. *Id.* at 2.

Defendant acknowledges that DoD's specific intent is to "constrain" proposal revisions on remand "by [maintaining] the storage solutions and unit prices contained in offerors' final proposal revisions (*i.e.* offerors would not be permitted to add storage solutions not contained in their final proposal revisions, but may be permitted to adjust which previously-proposed solutions would be utilized to address Price Scenario 6)." *Id.* DoD's proposed corrective action appears specifically designed to preserve the status quo by allowing Microsoft to remedy the error this Court identified as defective, and would not ensure a rational and fair reconsideration of proposals for the JEDI award.

Corrective action regarding a government contract award "requires a rational basis for its implementation." *Dell Federal Sys., v. United States*, 906 F.3d 982, 991-92 (2018). The rational basis test considers "whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion." *Id*. at 992 (quoting *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004)). In evaluating proposed corrective action, a court must be satisfied that the corrective action is "reasonable under the circumstances," *DGS Contract Serv., Inc. v. United States*, 43 Fed. Cl. 227, 238 (1999), and "appropriate to remedy the impropriety," *Mantech Telcoms. & Info. Sys. Corp. v. United States*, 49 Fed. Cl. 57, 65 (2001). "In order to make these assessments, the court, per force, must review the improprieties – whether alleged or actual – that gave rise to the proposed corrective action under review." *Mantech*, 49 Fed. Cl. at 65. Corrective action is not reasonable if it does not meaningfully address the flaws identified in the evaluation, or if it is designed merely to conform the solicitation to the awardee's proposal. *See Centerra Group, LLC v. United States*, 138 Fed. Cl. 407, 416-17 (2018); *Professional Service Industries, Inc. v. United States*, 129 Fed. Cl. 190, 206 (2016). As explained below, DoD's proposed corrective action fails the rationality test for at least two reasons.

First, DoD's corrective action, and particularly its limitation on price revisions in response to amendment of Price Scenario 6, is irrational because it ignores the impact of the RFP's Price Scenario requirements on an offeror's proposed unit prices and discounts. Mot. at 2. DoD has provided no details on the proposed amendment to address Factor 5 (Price Scenario 6) other than to say that DoD intends to prohibit offerors from revising the unit prices for services identified in their final proposals. *Id.* AWS understands that DoD also plans to prohibit offerors from revising their proposed discounts for the various services. Those restrictions are unreasonable both within Price Scenario 6 and – because they have effects throughout – across all of the Price Scenarios.

On remand, offerors would be able to change only the services they proposed for Price Scenario 6, and would not be allowed to adjust the unit prices and discounts for those services regardless of any increase or decrease in the volume of the service provided. For example, if the RFP amendment were to permit nearline storage for Price Scenario 6, AWS likely would propose an exclusively nearline storage solution, but would be unable to adjust its unit or discount pricing to account for the changes in DoD's projected needs regarding nearline and online storage.[1] AR Tab 342 at 151478 ("[The] scenarios included in Section L are based on the Government's projected needs…").

This limitation is unreasonable because it would hold static the offerors' unit and discount pricing for Price Scenario 6 while amending the requirements upon which that pricing depends. It also would directly and unreasonably benefit Microsoft, allowing it to retain the discounts specifically designed for its currently deficient approach, while preventing AWS from offering

[1] On the other hand, if the RFP amendment were merely to confirm the already unambiguous and clear requirement for online storage in Price Scenario 6, the amendment would have no purpose other than to allow Microsoft to cure its deficient storage solution, while preventing AWS from improving its competitive standing.

pricing and discounts based upon the changes to the Government's projected needs. Such a revision would violate the fundamental FAR requirement to treat offerors fairly and equally. *See Centerra Group*, 138 Fed. Cl. at 416-17 (agency's corrective action, which only permitted original awardee the opportunity to "revise and improve the competitiveness of its proposal," was "patently unfair" and "violated the fundamental fairness requirements of the FAR"). Similar to *Centerra Group*, DoD's proposed corrective action would be "a mockery of fundamental fairness and competitive principles" because it would permit only Microsoft to improve the competitiveness of its proposal. *Id.*

In addition, if DoD changes the requirements of even one Price Scenario, those changes would necessarily upset the foundation of an offeror's unified pricing strategy. Indeed, DoD's proposed limitation runs directly counter to the RFP's requirement that an offeror propose uniform unit prices and discounts across all of the Price Scenarios. AR Tab 342 at 151498 ("Offerors are prohibited from proposing unique discount, premium, and fee methodologies that are only applicable to a particular price scenario."); *see also id.* at 151500 ("All proposed pricing and methodologies for a price scenario shall be consistent with the proposed pricing for the ID/IQ, including discount, premium, and fee methodologies. Any inconsistencies between the proposed pricing for a price scenario that deviates from the proposed pricing for the ID/IQ may render the proposal unacceptable."). By prohibiting scenario-specific unit prices and discounts, the RFP required offerors to analyze the requirements of all of the Price Scenarios and then, based on that holistic analysis, determine a single pricing strategy for each service that could be applied across the board. That is precisely what AWS did in determining the pricing and discounts in its JEDI proposal. *See* AR Tab 375 at 154072, AWS Proposal, Vol. VI, A.1 (Customized Discount Strategy: "Our pricing discounts are based upon a comprehensive understanding of the current

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