In the United States Court of Federal Claims

BID PROTEST
No. 12-561C
(Filed Under Seal: November 29, 2012)
(Reissued for Publication: December 7, 2012)*
TO BE PUBLISHED

MANAGEMENT & TRAINING CORPORATION, Plaintiff, v. THE UNITED STATES, Defendant.	Pre-Award Bid Protest; Small-Business Set Aside; Contract to Operate Dayton Job Corps Center; Workforce Investment Act of 1998; Selection of Operators "On a Competitive Basis"; 29 U.S.C. § 2887(a); Competition in Contracting Act of 1984; "Full and Open Competition"; 41 U.S.C. § 3301; 41 U.S.C. § 3303(b); "Rule of Two"; Reasonable Expectation That At Least Two Responsible Small-Business Concerns Capable of Performing the Contract Will Submit Offers at Fair Market Prices; FAR 19.502-2(b); Preliminary Injunction Sought by Large-Business Incumbent Contractor to Stop Issuance of RFP for Follow-On Contract; Loss of Long-Time Personnel and Community Relations; Preliminary Injunction Denied.

G. Lindsay Simmons, Jackson Kelly PLLC, Washington, D.C., for plaintiff. Hopewell H. Darneille III, Jeffrey R. Cook, Katie Calogero, Jackson Kelly PLLC, Washington, D.C., of counsel.

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* This Opinion and Order was originally filed under seal on November 29, 2012 (docket entry 39) pursuant to the protective order entered on September 13, 2012 (docket entry 14). The parties were given an opportunity to advise the Court of their views with respect to what information, if any, should be redacted under the terms of the protective order. The parties filed a Joint Status Report ("JSR") on December 7, 2012 (docket entry 40). In the parties' JSR, defendant proposed two redactions, both of which plaintiff opposed. The Court has reviewed defendant's proposed redactions and concluded that both should be accepted. Accordingly, the Court is reissuing its Opinion and Order dated November 29, 2012, with redactions indicated by three consecutive asterisks within brackets ([***]).

OPINION AND ORDER

GEORGE W. MILLER, Judge

On September 4, 2012, plaintiff, Management & Training Corporation ("MTC"), filed a complaint (docket entry 1) in this court and applied pursuant to Rule 65 of the Rules of the Court of Federal Claims ("RCFC") for a temporary restraining order and alternatively or in addition moved for a preliminary injunction (docket entry 2). *See* Compl. for TRO & Prelim. & Perm. Injunctive Relief & Decl'tory J. ("Compl."); Pl.'s Mem. of P. & A. in Supp. of Appl. for TRO & Mot. for Prelim. Inj. ("Mot.") (docket entry 3, Sept. 4, 2012). Defendant filed its response to plaintiff's motion, *see* Def.'s Opp'n to Pl.'s Mot. for Prelim. Inj. ("Opp'n") (docket entry 20), along with the initial installment of the administrative record ("AR") on October 12, 2012. On November 7, 2012, the Court granted the parties' joint motion to supplement the AR (docket entry 26). Plaintiff submitted its reply in support of its motion (docket entry 27) on November 9, 2012. *See* Pl.'s Reply to Opp'n to Mot. for Prelim. Inj. & Memo. in Supp. of Mot. J. on [A]R. ("Reply"). Along with its reply, plaintiff also filed a motion for judgment on the administrative record, in which it renewed its request for a permanent injunction. The Court heard oral argument on plaintiff's motion for a preliminary injunction on November 19, 2012.[1] *See* Tr. of Nov. 19, 2012 Hr'g ("Hr'g Tr.") (docket entry 38, Nov. 29, 2012).

I. Background

A. Facts[2]

Job Corps is a national residential training and employment program administered by the Employment Training Administration ("ETA") of the United States Department of Labor ("DOL"). AR Tab 1, at 2. Job Corps centers throughout the United States provide technical-skills training to disadvantaged and at-risk youth to prepare them for employment, further education, or the armed forces. AR Tab 1, at 2. The operator of each center is expected to provide "a full range of services, including basic and advanced academic education, career technical (vocational) training, counseling, recreation, behavior management, food services, health services, and transition placement services." Compl. ¶ 13.

MTC operates eighteen Job Corps centers and is a subcontractor on three other Job Corps center contracts. Compl. ¶ 13. It has operated the Dayton Job Corps center (the "Dayton Center") since March 1, 1993, and it will continue to operate the Dayton Center

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[1] This Opinion resolves plaintiff's motion for a preliminary injunction. Plaintiff's motion for judgment on the administrative record remains pending.

[2] This recitation of facts sets forth certain of the Court's findings of fact in accord with RCFC 52(a)(2). Other findings of fact and rulings on mixed questions of fact and law are set out in the analysis.

under its current contract until April 30, 2013.[3] Compl. ¶ 3. Plaintiff alleges that its "outstanding performance of the past 19+ years . . . has effected a stunning change" by lifting the Dayton Center's ranking from ninety-third out of 105 centers in 1992 to third-best in the country in 2010. Compl. ¶ 3. MTC is categorized as a large business by the applicable North American Industry Classification System code. Compl. ¶ 3.

DOL posted a Request for Information ("RFI") on FedBizOpps titled "Sources Sought Notice for Request for Information (RFI) No. DOL121RI20536" on June 27, 2012. AR Tab 1, at 1–4. The RFI required respondents to address their abilities to provide services in twelve "capability areas" listed in the RFI. AR Tab 1, at 2–3. DOL received seven responses, of which one was submitted by a large business and six were submitted by small businesses. AR Tab 10, at 72. Upon receiving the seven responses, the contracting officer prepared a memorandum analyzing each respondent's capability to meet the contract requirements. AR Tab 10, at 71–73. Of the seven respondents, the contracting officer found two small businesses to be "capable." AR Tab 10, at 72.

On August 23, 2012, DOL posted a presolicitation notice on FedBizOpps announcing that the solicitation of proposals for the continued operation of the Dayton Center would be conducted as a small-business set aside. AR Tab 12, at 97–99. This notice also stated that DOL would issue a Request for Proposal ("RFP") on September 6, 2012. AR Tab 12, at 97. On September 4, 2012, MTC filed its complaint seeking declaratory and injunctive relief, as well as its motion for a preliminary injunction. *See* Compl.; Mot. Specifically, plaintiff requests that the Court issue a preliminary injunction: "(i) to maintain the *status quo*, (ii) to stop ETA from issuing the RFP, . . . and (iii) to stop ETA from opening and evaluating proposals, and making an award under the RFP, pending the Court's resolution of this pre-award protest." Mot. 1. During a telephonic status conference with the Court on September 5, 2012, DOL voluntarily agreed to stay issuance of the RFP until November 30, 2012. *See* Opp'n 7. Defendant also agreed not to award a contract under the RFP until this bid protest is resolved. Opp'n 7. The following day, the Court issued an Order (docket entry 11, Sept. 6, 2012) memorializing DOL's agreement and setting a briefing schedule to resolve plaintiff's motion for a preliminary injunction.

B. Applicable Statutes and Regulations

The Workforce Investment Act ("WIA"), Pub. L. No. 105-220, § 147, 112 Stat. 936, 1010 (1998), governs the selection of Job Corps center operators. Section 147, codified at 29 U.S.C. § 2887, reads in relevant part:

> Except as provided in subsections (a) to (c) of section 3304 of Title 41,[4] the Secretary shall select on a competitive basis an entity to operate a Job Corps

[3] DOL has an option to extend the current contract for six months until October 31, 2013. Compl. ¶ 15.

[4] Section 3304 of Title 41 delineates situations in which an agency may use noncompetitive procurement procedures. *See* 41 U.S.C. § 3304(a)–(c) (Supp. V 2011). This bid protest action does not involve the use of procedures authorized by § 3304.

> center . . . . In developing a solicitation for an operator or service provider, the Secretary shall consult with the Governor of the State in which the center is located, the industry council for the Job Corps center (if established), and the applicable local board regarding the contents of such solicitation, including elements that will promote the consistency of the activities carried out through the center with the objectives set forth in the State plan or in a local plan.

29 U.S.C. § 2887(a)(2)(A) (Supp. V 2011).

Congress enacted WIA in 1998 in an effort to reform a system of federal job-training programs that had become "a complex patchwork of numerous rules, regulations, requirements, and overlapping bureaucratic responsibilities." S. Rep. No. 105-109, at 2 (1997). The Senate Labor and Human Resources Committee Report also recognized that "frustration and confusion [was] widespread," and because of Congress's "inability to enact reform, States and localities have begun the task of creating their own comprehensive systems which meet the unique needs of their communities. But, they have been frustrated by Federal laws and regulations which prevent them from developing more responsive and effective workforce investment systems." *Id.* at 2–3. WIA was Congress's answer to an ineffective, complicated body of law governing Job Corps centers (and Job Corp center operator procurements) throughout the United States. *See id.* at 1–4.

Section 2887 refers to one part of the Competition in Contracting Act ("CICA"), which provides guidelines for competition required in federal procurements. *See* 41 U.S.C. §§ 3301–3311 (Supp. V 2011). CICA generally requires that procurements be conducted using "full and open competition," subject to certain important exceptions:

> Except as provided in sections 3303, 3304(a), and 3305 of this title and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services shall--
>
> > (1) obtain full and open competition through the use of competitive procedures in accordance with the requirements of [Division C of Subtitle I of Title 41] and the Federal Acquisition Regulation; and
> >
> > (2) use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

41 U.S.C. § 3301(a). One such exception, § 3303(b), provides that an "executive agency may provide for the procurement of property or services covered by section 3301 of this title using competitive procedures, but excluding other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638, 644)." 41 U.S.C. § 3303(b). Section 644 of Title 15 provides:

> To effectuate the purposes of this chapter, small-business concerns within the meaning of this chapter shall receive any award or contract or any part

> thereof . . . as to which it is determined by the [Small Business] Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, . . . [or] (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business concerns . . . . These determinations may be made for individual awards or contracts or for classes of awards or contracts. . . . A contract may not be awarded under this subsection if the award of the contract would result in a cost to the awarding agency which exceeds a fair market price.

15 U.S.C. § 644(a) (2006).

WIA states that the "Secretary may . . . prescribe rules and regulations to carry out this chapter only to the extent necessary to administer and ensure compliance with the requirements of this chapter." 29 U.S.C. § 2939(a) (2006). DOL has since issued regulations providing that the Federal Acquisition Regulation ("FAR") and Department of Labor Acquisition Regulation ("DOLAR") apply to Job Corps center procurements. 20 C.F.R. §§ 670.310(a), 670.320(a).

FAR and DOLAR contain provisions mandating small-business set asides under certain conditions. FAR 19.502-2(b), known as the "Rule of Two," provides:

> Before setting aside an acquisition under this paragraph, refer to [FAR] 19.203(c). The contracting officer shall set aside any acquisition over $150,000 for small business participation when there is a reasonable expectation that:
>
>> (1) Offers will be obtained from at least two responsible small business concerns . . . ; and
>>
>> (2) Award will be made at fair market prices. Total small business set-asides shall not be made unless such a reasonable expectation exists . . . . Although past acquisition history of an item or similar items is always important, it is not the only factor to be considered in determining whether a reasonable expectation exists.

48 C.F.R. § 19.502-2(b). DOL's own regulation is substantially identical.[5] *See* 48 C.F.R. § 2919.502.

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[5] DOLAR 2919.502 states, "Contracting officers will conduct market surveys specifically to determine whether procurements should be conducted . . . as small business set-asides. If a reasonable expectation exists that at least two responsible small businesses may submit offers at fair market prices . . . , then the procurement will be set aside for small business. Market surveys will be documented in all procurement actions not reserved for small businesses." 48 C.F.R. § 2919.502.

Indeed, DOL's primary justification for its decision to set aside the Dayton Center contract for small business concerns is based on FAR 19.502-2. Thus, Contracting Officer Jillian Matz states in her set-aside memo:

> In accordance with FAR Subpart 19.502-2, total small business set-asides, as Contracting Officer (CO), I determine that this procurement should be conducted as a total small business set-aside. FAR Subpart 19.502-2(b) says that the CO shall set aside any acquisition over $150,000 for small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns and award will be made at fair market prices.

AR Tab 10, at 72 (citing 48 C.F.R § 19.502-2(b)).

II. Analysis

The Court has jurisdiction over this bid protest action—including the authority to grant injunctive relief—under the Tucker Act,[6] as amended by the Administrative Dispute Resolution Act, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996). 28 U.S.C. § 1491(b)(1) (2006) (granting the Court of Federal Claims jurisdiction to "render judgment on 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 any alleged violation of a statute or regulation in connection with a procurement or a proposed procurement"). As the incumbent contractor and a prospective bidder, MTC is an "interested party" because its "direct economic interest would be affected by the award of the contract." *Am. Fed'n of Gov't Emps., ALF-CIO v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) (quoting 31 U.S.C. § 3551(2) (Supp. IV 1998)). Because plaintiff alleges that DOL's decision to conduct the Dayton Center procurement entirely as a small-business set aside constituted a violation of WIA, this Court has jurisdiction over plaintiff's action. *See* 28 U.S.C. § 1491(b).

In determining whether plaintiff is entitled to a preliminary injunction, the Court considers the following four factors: (1) likelihood of plaintiff's success on the merits, (2) irreparable harm to plaintiff if an injunction is not granted, (3) the balance of hardships, and (4) the public interest. *Sciele Pharma Inc. v. Lupin Ltd.*, 684 F.3d 1253, 1259 (Fed. Cir. 2012). The Court must weigh each factor against the other factors. *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001). Though none of the factors is dispositive in favor of an injunction, plaintiff must establish the first two—a reasonable likelihood of success on the merits and irreparable harm in the absence of an injunction—before it can be entitled to a preliminary injunction. *Altana Pharma AG v. Teva Pharm. USA, Inc.*, 566 F.3d 999, 1005 (Fed. Cir. 2009). Finally, "a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (quoting 11A Charles Alan Wright et al., *Federal Practice and*

[6] The Court's authority to grant monetary relief in bid protest cases, however, is limited to bid preparation and proposal costs. 28 U.S.C. § 1491(b)(2) (2006).

Procedure § 2948, at 129–30 (2d ed. 1995)). Therefore plaintiff must convince the Court that the factors *clearly* weigh in favor of a preliminary injunction before the Court will grant such an "extraordinary and drastic remedy." *See id.*

A. MTC Has Not Established a Reasonable Likelihood of Success on the Merits

The Court reviews pre-award agency procurement decisions only to determine that they have a rational basis and do not violate any applicable statute or regulation. *WRS Infrastructure & Env't, Inc. v. United States*, 85 Fed. Cl. 442, 444 (2009). Plaintiff is unlikely to succeed on the merits of its claim because plaintiff has not demonstrated that DOL committed a "clear and prejudicial" violation of applicable statutes or regulations nor met its "heavy burden" to show that DOL's Rule of Two analysis "had no rational basis." *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1333 (Fed. Cir. 2001) (quoting *Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 456 (D.C. Cir. 1994) (internal quotation marks omitted)).

1. DOL Did Not Violate Applicable Laws or Regulations

Plaintiff argues that DOL violated applicable law by setting aside the Dayton contract in violation of WIA. Mot. 20–25. In the alternative, plaintiff argues that, even if WIA permits small-business set asides, DOL violated applicable law and regulations by conducting a Rule of Two analysis without having first made what plaintiff describes as a required "predicate determination." Mot. 29–31. While plaintiff originally characterized the former argument as the "crux" of this bid protest, Mot. 4, at oral argument plaintiff shifted its focus to the latter argument. *See, e.g.*, Hr'g Tr. 12:9–14, 21:19–24, 24:23–25:2.

a. WIA Does Not Prohibit Small-Business Set Asides

The parties dispute the meaning of the phrase "competitive basis" in WIA. Section 2887 is titled "Job Corps centers" and describes certain procedural requirements the Department of Labor must follow when choosing an operator to run each center. 29 U.S.C. § 2887. In plaintiff's view, WIA precludes the use of small-business set asides in selecting a Job Corps center operator. Mot. 22–24. Defendant reads WIA to require only "competitive procedures," which CICA defines to allow the use of small-business set asides. Opp'n 9–10; *see also* 41 U.S.C. § 152 (2006 & Supp. V 2011). The language at issue in § 2887 reads: "Except as provided in subsections (a) to (c) of section 3304 of Title 41, the Secretary shall select on a competitive basis an entity to operate a Job Corps center . . . ." 29 U.S.C. § 2887(a)(2)(A). WIA does not specifically define the phrase "competitive basis."

Section 2887(a)(2)(A) references CICA. Subject to exceptions in sections 3303, 3304(a), and 3305, CICA requires agencies to conduct procurements to obtain "full and open competition." 41 U.S.C. § 3301(a)(1). In the absence of a specific definition of "competitive basis" in WIA, plaintiff assumes that "competitive basis" should have the same meaning as "full and open competition" in CICA. Mot. 8, 22. However, one of CICA's enumerated exceptions to the "full and open competition" requirement allows agencies to conduct procurements "using competitive procedures, but excluding other than small business concerns." 41 U.S.C. § 3303(b). Plaintiff readily admits that "[u]nder CICA, . . . and absent

any other statutory direction, ETA would have been well within its authority" to select operators for Jobs Corps centers through small business set asides. Mot. 22. Plaintiff claims, however, that WIA alters CICA's procurement rules in the context of selection of Job Corps center operators. Mot. 22. CICA's savings clause contemplates alternative "procurement procedures otherwise expressly authorized by statute." 41 U.S.C. § 3301(a).

According to plaintiff, by including only subsections (a) through (c) of § 3304 as exceptions to WIA's requirement that selection of Job Corps center operators be conducted "on a competitive basis," Congress intended to make § 3304 (noncompetitive procedures) the sole exception to the use of "full and open competition" when selecting a Job Corps center operator. Mot. 8 ("Congress thus expressly determined to exclude and prohibit the use of the CICA exceptions to full and open competition set forth in Sections 3303 and 3305 in Job Corps Center procurements."). Plaintiff argues that WIA's reference to § 3304 as an exception to selection "on a competitive basis" demonstrates "Congress'[s] express rejection and exclusion of the CICA exception for small business set-asides." Mot. 8.

Defendant responds that CICA's definition of "competitive procedures" should inform the definition of "competitive basis" in WIA, and CICA uses the word "competitive" to include small-business set aside procedures. Opp'n 9–10. According to defendant, selection "on a competitive basis" includes small-business set asides, so there was no need for Congress to list small-business set asides as an "exception" to selection "on a competitive basis." Opp'n 9–10. In light of the plain meaning of "competitive" and the definition of "competitive procedures" in CICA, the Court finds defendant's position more convincing.

One recent decision has interpreted the meaning of "on a competitive basis" in 28 U.S.C. § 2887(a)(2)(A). *See Res-Care, Inc. v. United States*, No. 12-251C, 2012 WL 5489958 (Fed. Cl. Nov. 6, 2012). Res-Care, Inc. ("Res-Care") is a large business and current operator of the Blue Ridge Job Corps Center ("Blue Ridge Center") in Marion, Virginia. *Id.* at *1. Res-Care's contract to run the Blue Ridge Center is set to end on March 31, 2013. *Id.* After learning that DOL intended to conduct a small-business set aside to find an operator for the Blue Ridge Center upon the expiration of Res-Care's contract, Res-Care filed a pre-award bid protest in this court requesting injunctive relief to stop any such set aside. *Id.* at *3. Res-Care claimed, as MTC does here, that WIA "preclude[s] small business set asides under section 3303 because WIA only exempts procedures under section 3304 [noncompetitive procedures] from its requirement that a selection be made on a 'competitive basis.'" *Id.* at *5. Res-Care's principal argument thus relied, according to the court, on the assumption that small-business set asides are not conducted on a competitive basis. *Id.* The court held that WIA does allow for small-business set asides because "'full and open competition' is not synonymous with 'competitive procedures' or 'competitive basis.'" *Id.* The court referred to CICA's definition of "competitive procedures" to inform its interpretation of "competitive basis," noting that CICA "specifically treats small business set asides as requiring competition." *Id.* at *6.

A plain-language reading of WIA supports the conclusion that Congress intended selection "on a competitive basis" to include small-business set asides. The definition of "competition" does not require unrestricted competition, but merely that at least two rivals vie for some opportunity. *Black's Law Dictionary* 322 (9th ed. 2009) (defining

"competition" as "[t]he effort or action of two or more commercial interests to obtain the same business from third parties"). Though only the *Res-Care* case has addressed the definition of WIA's statutory phrase "on a competitive basis," courts have acknowledged the use of the phrase "competitive basis" for procedures involving consideration of at least two bids (*i.e.*, procedures that are not "sole source"). *See, e.g.*, *Valley Forge Flag Co. v. Kleppe*, 506 F.2d 243, 244 (D.C. Cir. 1974) (acknowledging the Small Business Administration's representation that "if and when bids [to produce interment flags] are resolicited . . . they will be done so on a competitive basis among small businesses"); *Infiniti Info. Solutions, LLC v. United States*, 92 Fed. Cl. 347, 351 n.9 (2010) (describing a Department of Housing and Urban Development "delegation" allowing for a contract to be awarded "on either a sole source or competitive basis"); *Myers Investigative & Sec. Servs. v. United States*, 47 Fed. Cl. 605, 608 (2000) (describing a procurement set aside for socially or economically disadvantaged contractors under the Small Business Administration's 8(a) program as "awarded on a competitive basis"), *aff'd* 275 F.3d 1366 (Fed. Cir. 2002).

Interpreting the term "competitive basis" in WIA to include small-business set asides is consistent with the definition of a similar term in CICA. CICA defines "competitive procedures" to include small-business set asides. 41 U.S.C. § 152; *see also* 41 U.S.C. § 3303(b) (allowing procurements "using competitive procedures, but excluding other than small business concerns").[7] *Cf. Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2447 (2010) ("Where the text permits, congressional enactments should be construed to be consistent with one another."); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[T]he meaning of one statute may be affected by other Acts . . . ."); *Am. Fed'n Gov't Emps.*, 258 F.3d at 1302 (applying CICA's definition of "interested party" to interpret the same phrase in 28 U.S.C. § 1491(b)(1)).

Plaintiff argues that the Court should not look beyond the plain language of WIA to CICA's definition of "competitive basis" to facilitate the Court's interpretation of selection "on a competitive basis." Hr'g Tr. 16:22–17:9, 18:1–13. Plaintiff's own argument, however, would require the Court to borrow CICA's definition of "full and open competition" to define selection "on a competitive basis." *E.g.*, Mot. 21–23.[8]

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[7] Additionally, 41 U.S.C. § 3304 is titled "Use of noncompetitive procedures." If Congress had considered small-business set asides to be noncompetitive, it presumably would have included small-business set asides in § 3304 with the other noncompetitive procedures. Congress, however, listed small-business set asides in a separate section, § 3303(b). The logical explanation for this is that Congress did not include small-business set asides in § 3304 because it did not view small-business set asides as noncompetitive. If small-business set asides are not noncompetitive, it follows that they must be competitive procedures.

[8] In its motion for judgment on the administrative record, which also contains plaintiff's reply in support of this motion for a preliminary injunction, plaintiff recharacterized this argument. Plaintiff noted that § 2887(a)(1)(A) allows DOL to select Job Corps center operators from among government agencies, vocational schools, and private operators. Reply 18. Plaintiff argued that these "eligible entities" determine the boundaries of the

While plaintiff's briefs discuss at length why the phrase "competitive procedures" should not inform the definition of "competitive basis," plaintiff provides very little reasoning for the premise that "competitive basis" must have the same meaning as "full and open competition" in CICA. *See* Mot. 20–25; Reply 15–32. Plaintiff's primary argument is that, by specifically enumerating one "exception" to selection "on a competitive basis" in § 2887(a)(2)(A), Congress intended that no other exceptions apply. Mot. 22–23. But that argument only supports plaintiff's position if it is presumed that selection "on a competitive basis" requires "full and open competition." *See Res-Care*, 2012 WL 5489958, at *5 ("Plaintiff's argument only succeeds if small business set asides are noncompetitive.").

Plaintiff counters that interpreting "competitive basis" to include procurements set aside for small businesses proves too much, as it renders subsection (a)(2)(A) meaningless by producing the same result as if WIA had been silent on the matter and simply allowed CICA to control. Mot. 24 (citing *Wallace v. Jaffree*, 472 U.S. 38, 59 n.48 (1985)). But plaintiff's counterargument also proves too much, as it would have the Court favor contradictory meanings of overlapping statutes rather than reconciling the statutes. That result conflicts with the well-established rule of statutory construction that statutes should be interpreted to avoid conflict. *See J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143–44 (2001) ("Indeed, 'when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974))). Plaintiff is correct that courts favor interpretations of statutes that avoid surplusage. *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2043 (2012). But that canon of statutory interpretation is not violated by interpretations reconciling language of related statutes, even where those interpretations render some language unnecessary or redundant. *Conn. Nat'l Bank v. Germain*, 503 U.S.

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required competition "on a competitive basis." Reply 18 ("['On a competitive basis'] refers back to the § 2887(a)(1)(A) universe of entities eligible to run a Job Corps center."). At that time, plaintiff continued to argue that selection "on a competitive basis" means the same as "full and open competition" in CICA, which does not include small-business set asides. Reply 19–21. Plaintiff now appears to have abandoned its earlier argument that selection "on a competitive basis" does not allow for small-business set asides. Pl.'s Resp. to Def.'s Mot. for Leave to Notify Ct. of Supp. Authority 2 (docket entry 31, Nov. 19, 2012) (asserting that "MTC makes no such argument" that "'small business set asides are not a form of competition'" (quoting *Res-Care*, 2012 WL 5489958, at *5)).

Plaintiff admitted at oral argument that its current argument based on WIA's "eligib[le] entities" "was not within [plaintiff's] initial WIA argument in [plaintiff's] initial motion." Hr'g Tr. 19:9–20. Defendant has not thus far had an opportunity to respond to this new argument in its briefing. To the extent that plaintiff's new argument turns on the same question of whether selection "on a competitive basis" allows for small-business set asides, the above analysis applies. Otherwise, "[t]o the extent that plaintiff's reply brief could be considered to have brought forward new issues for the court to consider in its . . . analysis, those issues are waived because the government has had no opportunity to respond to them." *Data Computer Corp. of Am. v. United States*, 80 Fed. Cl. 606, 608 n.1 (2008).

249, 253 (1992) ("Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, *Wood v. United States*, [41 U.S. 342, 363] (1842), a court must give effect to both."). Neither party argues that the statutes are in conflict.

Neither does *Wallace v. Jaffree* support plaintiff's method of statutory interpretation. *Jaffree* was an Establishment Clause case in which the Supreme Court interpreted the Alabama legislature's purpose[9] in enacting a statute authorizing a moment of silence in Alabama's public schools "for meditation or voluntary prayer." 472 U.S. at 40. Alabama's existing statute authorized a moment of silence "for meditation." *Id.* The Court interpreted the additional words "or voluntary prayer" to create a state endorsement of prayer, but not to change the law in effect under the prior statute, as plaintiff urges the Court to do in this case. *Id.* at 60.

b. DOL Did Not Inappropriately Apply the Rule of Two Without a "Predicate" Determination

Plaintiff argues that DOL mistakenly applied the Rule of Two before finding one of the prerequisites listed in 15 U.S.C. § 644(a) to be present. Mot. 29–31. Specifically, plaintiff argues that DOL failed to determine that a small-business set aside would "be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business concerns." Mot. 30 (quoting 15 U.S.C. § 644(a)). Similar language is found in FAR 19.502-1(a), which requires the contracting officer to set aside a contract for small businesses if necessary to "[a]ssur[e] that a fair proportion of Government contracts in each industry category [are] placed with small business concerns." 48 C.F.R. § 19.502-1(a). Plaintiff alleges that DOL ignored these provisions. Mot. 30.

Defendant responds that plaintiff "greatly exaggerates the import of these two provisions," and ignores the additional method of satisfying those requirements—DOL may find granting the award or contract to a small business "to be in the interest of maintaining or mobilizing the Nation's full productive capacity." Opp'n 29–30; *see also* 48 C.F.R. § 19.502-1(a). According to defendant, MTC's own arguments demonstrate that DOL found the set aside to be in the interest of maintaining or mobilizing the nation's full productive capacity. Opp'n 30. Defendant's claim is that the strategy plaintiff attributes to DOL—maximizing the number of small businesses operating Job Corps centers—necessarily demonstrates that DOL considered the Nation's full productive capacity and determined small-business set asides to be in the interest of maintaining or mobilizing that capacity. Opp'n 30. Defendant cites Congress's policy that "[t]o the maximum extent practicable, procurement strategies used by the various agencies having contracting authority shall facilitate the maximum participation of small business concerns." Opp'n 30 (quoting 15 U.S.C. § 644(e)(1)). Defendant seems to read "the Nation's full productive capacity" in

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[9] Using the "*Lemon*" test, the Court analyzed whether the statute's purpose was secular separately from its consideration of whether the statute's effect advanced or inhibited religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

§ 644(a) to mean the Nation's *small-business* productive capacity. Defendant's interpretation would render meaningless the determination of whether a small-business set aside is in the interest of maximizing the nation's small-business productive capacity by always and necessarily producing an answer in the affirmative.

Nevertheless, there is no reason to believe that § 644(a) limits an agency's authority to set aside contracts for small businesses. Section 644(a) governs conditions under which "small-business concerns within the meaning of this chapter *shall* receive any award or contract." § 644(a) (emphasis added). It says nothing about the conditions under which a contract *shall not* be set aside.[10] One case has addressed the question whether a "fair proportion" determination is required before an agency may set aside a contract for small businesses. In *J.H. Rutter Rex Manufacturing Co. v. United States*, the Fifth Circuit found that an agency's determination—that the "fair proportion" requirement is a minimum below which the Rule of Two is mandatory, but not a maximum above which small-business set asides are necessarily inapplicable—was not unreasonable. *J.H. Rutter Rex*, 706 F.2d 702, 711 (5th Cir. 1983). If there were any doubt, FAR 19.502-6 specifies that the placement of a "large percentage of previous contracts . . . with small business concerns" is never "in itself, sufficient cause for not setting aside an acquisition." 48 C.F.R. § 19.502-6. Given that the "fair proportion" determination is not a prerequisite for a set aside, plaintiff has not shown that it is likely to prevail on this argument.

2. Plaintiff Has Not Shown a Likelihood That DOL's Rule of Two Analysis Lacked a Rational Basis

Plaintiff claims that DOL improperly conducted the Rule of Two analysis that led to DOL's decision to set aside the Dayton contract. Pursuant to 28 U.S.C. § 1491(b)(4), the Court reviews the contracting officer's analysis to determine whether it was arbitrary or capricious, which requires only that the action be supported by a rational basis. *See also* 5 U.S.C. § 706. "A contracting officer's determination under FAR § 19.502-2 'concerns a matter of business judgment within the contracting officer's discretion that . . . will not [be] disturb[ed] absent a showing that it was unreasonable.'" *Global Computer Enters., Inc. v. United States*, 88 Fed. Cl. 350, 445 (2009) (alteration in original) (quoting *In re Quality Hotel Westshore*, B-290046, 2002 WL 1162918, at *2 (Comp. Gen. May 31, 2002)). An agency's decision is reasonable if there is a "rational connection between the facts and the decision made." *MCS Mgmt., Inc. v. United States*, 48 Fed. Cl. 506, 516 (2000). The Rule of Two does not mandate any particular method for assessing the availability of small-business bidders. *Id.* at 511. "[P]rior procurement history, the nature of the contract, market surveys, and/or advice of the agency's small business specialist" are all approved bases for the decision. *Id.*

[10] FAR 19.502-1 similarly only explains when the contracting officer shall set aside an award, but not under what conditions the officer may not set aside an award. *See* 48 C.F.R. § 19.502-1.

a. DOL Did Not Improperly Fail to Consider the Criteria Set Forth in 29 U.S.C. § 2887(a)(2)(B)(i) in Its Rule of Two Analysis

Plaintiff argues that "ETA's failure to meaningfully consider and apply" the criteria set forth in 29 U.S.C. § 2887(a)(2)(B)(i) renders DOL's set-aside decision without a reasonable basis. Mot. 25. Section 2887(a)(2)(B)(i) reads:

> In selecting an entity to operate a Job Corps center, the Secretary shall consider—
>
> > (I) the ability of the entity to coordinate the activities carried out through the Job Corps center with activities carried out under the appropriate State plan and local plans;
> >
> > (II) the degree to which the vocational training that the entity proposes for the center reflects local employment opportunities in the local areas in which enrollees at the center intend to seek employment;
> >
> > (III) the degree to which the entity is familiar with the surrounding communities, applicable one-stop centers, and the State and region in which the center is located; and
> >
> > (IV) the past performance of the entity, if any, relating to operating or providing activities described in this subchapter to a Job Corps center.

29 U.S.C. § 2887(a)(2)(B)(i).

The parties dispute whether Congress requires or merely recommends that agencies consider the criteria described above. Mot. 25–28; Opp'n 24–27.[11] Section 2887(a)(2)(B) references consideration of the criteria when "selecting an entity to operate a Job Corps center," but it makes no mention of any requirement that the Secretary must also consider the selection criteria at the set-aside determination phase. Plaintiff asserts that failure to consider

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[11] Defendant notes that § 2887(a)(2)(B) is titled "Recommendations and considerations," and argues that the selection criteria are therefore properly understood not as mandatory but rather as "recommendations" for topics DOL may consider during the operator selection process. Opp'n 24. No court has yet had the occasion to speak to whether the selection criteria are mandatory. The title "Recommendations and considerations" creates some uncertainty regarding whether consideration of the selection criteria is mandatory. Nevertheless, the text reads, "In selecting an entity to operate a Job Corps center, the Secretary [DOL] *shall* consider . . . ." § 2887(a)(2)(B)(i) (emphasis added). The word "shall" denotes mandatory obligations, and it is unlikely that Congress would have used that word if it intended the selection criteria to be only recommendations for consideration. *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) ("The word 'shall' is ordinarily 'the language of command.'" (quoting *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947))).

these factors from the outset nevertheless "undermine[s] the credibility and validity of the resulting [Rule of Two] determination." Mot. 27.

The parties appear to agree that DOL only considered whether respondents have experience operating job-training programs that reflect local conditions at the locations of those programs, but not the respondents' experience with the specific conditions and systems in Dayton. Mot. 27–28; Opp'n 25. The question is whether considering bidders' experience with "local" conditions and systems not specific to Dayton is sufficient to support DOL's Rule of Two determination, or whether § 2887(a)(2)(B)(i) requires DOL to consider respondents' experience with conditions and systems specific to Dayton, even at the early stage of the Rule of Two determination.

The Rule of Two requires the contracting officer to have a "reasonable expectation" that the agency will receive qualifying offers from two small business concerns before the procurement may be set aside. 48 C.F.R. § 19.502-2(b). The contracting officer is not required to analyze the substance of those two offers with the same level of detail as when awarding a contract. *See McKing Consulting Corp. v. United States*, 78 Fed. Cl. 715, 726 (2007) ("The actual merits of the individual bids are not dispositive on the issue of the reasonableness of the contracting officer's expectations."); *see also Admiral Towing & Barge Co.*, B-291849, 2003 WL 22309106, at *3 (Comp. Gen. Mar. 6, 2003) ("In making [the set-aside] determination, the contracting officer need not make determinations tantamount to affirmative determinations of responsibility, but rather need only make an informed business judgment that there is a reasonable expectation of receiving acceptably priced offers from small business concerns that are capable of performing the contract."). Plaintiff has not shown that the contracting officer's consideration of local factors not specific to Dayton prevented her from establishing a reasonable expectation of receiving two qualifying offers.

b. DOL Did Not Improperly Divest the Contracting Officer of Discretion

Plaintiff argues that "ETA separately violated FAR 19.502-2(b) and DOLAR 2919.502 by improperly divesting the cognizant ETA contracting officer of the authority to make the set-aside decision, first by dictating a top-down decision to set-aside, and secondly by ceding the ultimate decisionmaking authority to ETA's [Office of Small and Disadvantaged Business Utilization ("OSDBU")]." Mot. 31. Plaintiff claims that "FAR Subpart 19.5 explicitly states that the person charged to make the set-aside decision is the cognizant agency contracting officer." Mot. 31; *see* 48 C.F.R § 19.502-2(b) ("The contracting officer shall review acquisitions to determine if they can be set aside for small business, giving due consideration to the recommendations of agency personnel having cognizance of the agency's small business programs."). Defendant does not appear to contest plaintiff's assertion that FAR 19.502-2(b) and DOLAR 2919.502 require the contracting officer to exercise his or her independent judgment. *Cf.* 48 C.F.R § 19.501(e) ("To the extent practicable, unilateral determinations initiated by a contracting officer shall be used as the basis for small business set-asides rather than joint determinations by an SBA procurement center representative and a contracting officer.").

Defendant responds that the set-aside memorandum demonstrates that the contracting officer's discretion was not constrained. Opp'n 34. The set-aside memo was written and signed by the contracting officer, Jillian Matz. AR Tab 10, at 71–73. According to the memorandum, the set-aside decision was a result of the contracting officer's analysis. AR Tab 10, at 72 ("I've determined that both requirements of FAR Subpart 19.502–2(b) are met . . . ."). Against that evidence, plaintiff cites only its own allegation that DOL "has stated that, ultimately, the set-aside decision is that, not of the cognizant DOL contracting officer, but rather DOL's [OSDBU]." Compl. ¶ 90. However, plaintiff has offered no support for that allegation. As noted above, the record in this case shows that the contracting officer acted independently. Thus plaintiff is unlikely to succeed on this argument.

c. DOL's Application of the Rule of Two Was Not Arbitrary or Capricious

Plaintiff argues that the contracting officer incorrectly analyzed the Rule of Two by failing to consider pertinent factors, thus rendering the set-aside decision arbitrary, capricious, and an abuse of discretion. Mot. 32–34. According to plaintiff, DOL deleted four criteria from its Job Corps center RFIs that are relevant to the responsibility and pricing determinations required by the Rule of Two. Mot. 33. The four criteria plaintiff alleges were present in earlier RFIs but not in the Dayton Center RFI include:

> (i) the respondent's experience and past performance over the prior three years with similar requirements,
>
> (ii) the respondent's capacity and capability to handle two or more Centers at the same time,
>
> (iii) the respondent's indirect cost rates, and
>
> (iv) the respondent's ability to responsibly manage a large cost-reimbursement contract with a federally approved purchasing system and procurement policies.

Reply 37. Plaintiff claims that DOL deleted these considerations in an effort to rig the determination in favor of a set aside. Mot. 33; Reply 38. Plaintiff alleges that, by no longer considering the above four factors, DOL improperly fails to consider important information relevant to costs and benefits. Mot. 33; Reply 38. In particular, plaintiff argues that small businesses incur substantially higher indirect costs of operating Job Corps centers than large businesses, resulting in higher prices, poorer services, or both. Mot. 34; Reply 40–41.

Defendant emphasizes that the Rule of Two requires the contracting officer to possess a "reasonable expectation" that fair-market priced offers will be received from two small business concerns. Opp'n 36. Prior RFI criteria from past solicitations, defendant argues, are irrelevant to the set-aside decision in this case. Opp'n 36 ("The purpose of limiting review to the record actually before the agency is to guard against courts using new evidence to 'convert the "arbitrary and capricious" standard effectively into de novo review.'" (quoting *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009))). Defendant also notes that the contracting officer need not find that the two small business

concerns would submit bids at the lowest possible prices, but only that the contracting officer reasonably expected the two bids to be "within the range of a fair market price." Opp'n 38.

The record supports defendant's assertion that the contracting officer established a reasonable expectation of two bids from small businesses at fair market prices. The contracting officer found that [***] and [***] were likely to submit bids at fair market prices. AR Tab 10, at 71–73, 79–80. The contracting officer relied on the fact that both of these small businesses operate three other Job Corps centers to determine that each is likely to submit a bid for the Dayton Center contract at a fair market price. AR Tab 10, at 72. FAR 19.502-2 characterizes past acquisition history as "always important," but clarifies that the contracting officer's reasonable expectation that the award will be made at a fair market price must be based on something more. 48 C.F.R. § 19.502-2(b)(2). In satisfaction of that requirement, the contracting officer also stated that, because two businesses responded and were deemed capable, "one can anticipate that proposals will be submitted in a competitive environment." AR Tab 10, at 72; *see also McKing*, 78 Fed. Cl. at 724 (finding a reasonable expectation of two qualified small-business bidders based on procurement history and acquisition planning and market research).

The contracting officer's method of determining that a reasonable expectation existed was within her discretion. *Cf. MCM*, 48 Fed. Cl. at 515 ("The determination to use one particular method over another in assessing whether a reasonable expectation exists that at least two small business concerns will submit offers is within the contracting officer's discretion."). The fact that DOL requested different information in past RFIs does not imply that it is required to consider that information in this case. *See SDS Int'l v. United States*, 48 Fed. Cl. 759, 772 (2001) ("[E]ach procurement stands alone, and a selection decision made during another procurement does not govern the selection under a different procurement." (quoting *Renic Corp., Gov't Sys. Div.*, 1992 WL 189192, at *3 (Comp. Gen. July 29, 1992))).[12]

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[12] Plaintiff cites Government Accountability Office ("GAO") decisions finding contracting officers' decisions unreasonable. *See DNO Inc.*, B-406256, 2012 WL 1183913 (Comp. Gen. Mar. 22, 2012); *Delex Sys., Inc.*, B-400403, 2008 WL 4570635 (Comp. Gen. Oct. 8, 2008); *Info. Ventures, Inc.*, B-294267, 2004 WL 2283189 (Comp. Gen. Oct. 8, 2004); *McSwain & Assocs., Inc.*, B-271071 *et al.*, 1996 WL 264626 (Comp. Gen. May 20, 1996). In all of these cases, GAO found that the contracting officers' determinations *not to set aside* the contracts for small businesses were unreasonable. *DNO*, 2012 WL 1183913, at *5; *Delex*, 2008 WL 4570635, at *9; *Info. Ventures*, 2004 WL 2283189, at *2; *McSwain*, 1996 WL 264626, at *2. Moreover, the contracting officers in these cases failed to conduct the analysis Ms. Matz conducted in this case.

In *DNO*, "little, if any, of the agency's acquisition planning related to consideration of small business participation," and nothing in the record reflected "any analysis or market research." 2012 WL 1183913, at *5. DOL, however, analyzed the responses to its Dayton Center RFI to determine whether each small-business respondent was capable of submitting a bid at a fair market price. AR Tab 10, at 71–80. *Delex* turned on the Navy's improper exclusion of Delex, a small business, from its Rule of Two analysis based on Delex's failure to submit

Plaintiff's argument based on indirect costs is similar to Res-Care's argument that small businesses operating Job Corps centers cost more and achieve less, and therefore the requirements of the Rule of Two could not have been satisfied. *See Res-Care*, 2012 WL 5489958, at *7. The *Res-Care* court found that DOL's set-aside decision in that case was not arbitrary or capricious because DOL's reasonable expectation that two small businesses could bid at fair market prices was supported by the information before the contracting officer. *Id.* Moreover, plaintiff's contention is aimed at disputing DOL's (or Congress's) policy in favor of small business, not the contracting officer's determination in this case. *Cf. id.* (finding that a knowledge that "*in general*, small businesses have underperformed in the past . . . . would only have informed a policy judgment . . . . [n]ot draw[n] into question the particular determination made here"). The facts the contracting officer examined are rationally connected to her decision to set aside the award for small businesses. Thus, plaintiff is unlikely to succeed on the argument that DOL's set-aside decision lacked a rational basis.

B. Any Irreparable Harm Is Speculative and of the Type Common to All Unsuccessful Incumbents

In support for its contention that it will be irreparably harmed in the absence of an injunction, plaintiff makes three main arguments. First, plaintiff would suffer harm if "'excluded from the bidding process, perhaps solely because of the government's improper conduct.'" Mot. 35 (quoting *Global Computer*, 88 Fed. Cl. at 452). Second, plaintiff asserts it will lose future profits if plaintiff does not succeed in renewing its current Dayton Center contract. Loss of future profits without the opportunity to compete, says plaintiff, is irreparable harm because "such lost profits cannot be recovered from the Government." Mot. 35 (citations omitted). Third and finally, plaintiff states that once the RFP is issued, plaintiff will be irreparably injured because it will lose long-time personnel and community relations in which it has substantially invested. Mot. 36.

Defendant notes that DOL has voluntarily agreed to refrain from awarding a new contract until after this bid protest action is resolved. Opp'n 41. Therefore, defendant argues, MTC's operation of the Dayton Center will likely continue uninterrupted through the time preliminary injunctive relief would control, and plaintiff will not suffer irreparable harm

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bids in response to past unrestricted solicitations. 2008 WL 4570635, at *9. The contracting officer in *Information Ventures* failed to consider small businesses that had responded to the presolicitation notice. 2004 WL 2283189, at *4. Unlike plaintiff's allegations in this case—that the contracting officer selectively ignored pieces of information—the *Information Ventures* contracting officer disregarded the small-business bidders altogether. *Id.* Likewise, in *McSwain*, the GAO found the contracting officer's determination unreasonable based on incomplete information, but that contracting officer failed even to contact the relevant small businesses. 1996 WL 264626, at *2. Plaintiff cites no precedent for finding a contracting officer's "reasonable expectation" of two responsible small-business offers to be unreasonable where the contracting officer conducted the kind of analysis Ms. Matz conducted in this case.

due to loss of the contract during the pendency of the bid-protest litigation. Opp'n 41. Finally, defendant's response to plaintiff's allegation of loss of employees is that the harm is speculative until DOL awards a new contract, Opp'n 41–42, and, in any case, any loss of employees is common to all incumbent contractors losing successor contracts. Opp'n 42 (citing *PGBA, LLC v. United States*, 60 Fed. Cl. 196, 221 (2004)).

Furthermore, it is unclear that a preliminary injunction would prevent plaintiff from losing employees. MTC's employees are likely aware that DOL intends to set the contract aside for a small business, and therefore may already be leaving regardless of whether the Court enjoins the solicitation. *See* Supp. Decl. of John Pedersen ("Pedersen Supp. Decl.") ¶ 4 (docket entry 28-2, Nov. 9, 2012) ("MTC's injuries flow from ETA's announced set-aside decision. . . . Moreover, the Presolicitation Notice notifies the world . . . , including MTC's employees . . . [, that MTC, as a large business, is precluded from competing]."). Even if the Court were to enjoin DOL from issuing the solicitation, were the Court to later find for defendant on the merits, the procurement would then move forward as a set aside, and MTC would presumably lose employees anyway. An injunction would only affect that subset of MTC's employees basing their employment decisions on whether DOL is allowed to issue its solicitation, and only in the case that plaintiff succeeds on the merits of this bid protest.

Moreover, harm to plaintiff from lost employees, however significant, is common to any incumbent contractor that faces losing a successor contract. *PGBA, LLC*, 60 Fed. Cl. at 221. Plaintiff disagrees, arguing that the harm it faces "is "not remotely the same" as what happens when an incumbent loses the follow-on contract." Hr'g Tr. 66:7–12. Plaintiff is unclear, however, regarding the distinction between the two—in both cases employees would attempt to transfer to another center operated by their current employer or move to a different employer. *Compare* Hr'g Tr. 66:13–18 ("When an incumbent loses the follow-on contract, ... it either takes those employees elsewhere if it has someplace else to use them or some [sic] or often many of the incumbent employees transition to a new operator."), *with* Pedersen Supp. Decl. ¶ 12 ("MTC's Dayton [Center] employees will immediately begin looking for new jobs, either within MTC – if they and their families are willing to move – or with another employer.").

C. The Balance of Harms Does Not Weigh in Favor of an Injunction

The harm to plaintiff if its motion for a preliminary injunction is denied is likely to be minimal—losing employees whose employment choices turn on DOL's issuance of a solicitation. *Cf.* Decl. of Lyle J. Parry ¶ 15 (docket entry 4, Sept. 4, 2012) (citing loss of employees and community relations if MTC *loses the contract*). The government asserts that, if an injunction is entered, it will be harmed by delay and frustration of Congress's intent "to promote the use of small business in Federal procurements." Opp'n 43 n.14 (quoting 15 U.S.C. § 631). Each party argues that the harms asserted by the other are minimal, but expend less effort explaining why the harms it faces are significant. Plaintiff has not shown that the harm to it in the absence of an injunction would exceed the harm to the government if the preliminary injunction were granted. Thus, the balance of harms, although close, weighs slightly in favor of defendant.

D. The Public Interest Does Not Favor an Injunction

Both parties cite the public interest in lawfully conducting procurements. *See* Mot. 38–39; Opp'n 43–44. Plaintiff also argues an injunction would be in the interest of small businesses that would otherwise expend resources responding to DOL's improper solicitation. Mot. 37–38. Defendant responds that third parties will be capable of making their own determinations about whether to expend resources in order to submit an offer. Opp'n 43. The Court finds none of the public interest concerns significant enough to affect the Court's conclusion that plaintiff is not entitled to a preliminary injunction.

CONCLUSION

Plaintiff has not shown that it is likely to succeed on the merits. Its allegations of harm resulting from DOL's issuance of the RFP are speculative. Additionally, the balance of harms and public interest factors do not weigh in favor of a preliminary injunction. Therefore, plaintiff has not met its burden to show that the four factors taken together warrant an injunction. Accordingly, the Court **DENIES** plaintiff's motion for a preliminary injunction.

Some information contained herein may be considered protected information subject to the protective order (docket entry 14, Sept. 13, 2012) entered in this action. This Opinion and Order shall therefore be filed under seal. The parties shall review the Opinion and Order to determine whether, in their view, any information should be redacted prior to publication in accordance with the terms of the protective order. The Court **ORDERS** the parties to file a joint status report by **Friday, December 7, 2012**, identifying the information, if any, they contend should be redacted, together with an explanation of the basis for each proposed redaction.

IT IS SO ORDERED.

s/ George W. Miller
GEORGE W. MILLER
Judge