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No. 17-1115C
(Judge Griggsby)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

CLINCOMP INTERNATIONAL INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

CERNER CORPORATION,

Defendant-Intervenor.

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND, IN THE ALTERNATIVE, CROSS-MOTION FOR JUDGMENT UPON THE ADMINISTRATIVE RECORD

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DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND, IN THE ALTERNATIVE, CROSS-MOTION FOR JUDGMENT UPON THE ADMINISTRATIVE RECORD

Defendant, the United States, respectfully replies to the response of plaintiff, CliniComp International, Inc. (CliniComp), to our motion to dismiss and cross-motion for judgment on the administrative record.

First, CliniComp has still not demonstrated that it possesses standing to challenge the decision of the Secretary of the Department of Veterans Affairs (VA), David J. Shulkin, M.D., to authorize a sole source contract award to Cerner Corporation (Cerner) for a new enterprise-wide comprehensive electronic health record (EHR) system for the VA. Specifically, CliniComp has not demonstrated that it is a qualified bidder for the procurement it seeks to compete in. CliniComp has not presented any evidence that it has ever provided a *comprehensive* electronic health record system (including inpatient and outpatient) to any organization, let alone one as

large and complex as the entire VA health system. Nor has CliniComp demonstrated that it is capable of performing a *multi-billion dollar contract*, like the one the VA intends to award. Rather, the evidence in the Court's record suggests that CliniComp is a minor player in the electronic health record industry that has never performed a contract anywhere near the magnitude of the contract at issue in this case.[1] Accordingly, the Court should dismiss CliniComp's complaint for lack of standing.

Second, even if the Court were to find that CliniComp has standing, CliniComp has failed to demonstrate that the Secretary's decision to invoke the public interest exception was unjustified or otherwise illegal. CliniComp's primary argument does nothing more than second guess the Secretary's determination that establishing a single common electronic health record system with the Department of Defense (DoD), based upon Cerner's software, is necessary to advance the public interest of providing seamless, high-quality healthcare to veterans, particularly those transitioning from active duty. CliniComp also continues to allege a number of violations of law, none of which have any merit. Indeed, in our cross-motion, we demonstrated that several of CliniComp's allegations are directly and persuasively rebutted by the Government Accountability Office (GAO) decision in *Sikorsky Aircraft Corp.*, 2010 CPD ¶ -271, 2010 U.S. Comp. Gen. LEXIS 310 (Comp. Gen. 2010). In response, like in its opening brief, CliniComp ignores *Sikorsky*. The Court should grant the Government judgment on the administrative record.

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[1] The "Court's record" refers to the administrative record and other evidence that the parties have presented to the Court to support their positions on non-merits issues such as jurisdiction and the injunctive relief factors. *See, e.g., Planetspace, Inc. v. United States*, 90 Fed. Cl. 1, 5 (2009); *Reilly v. United States*, 104 Fed. Cl. 69, 71 (2012). We will file a separate response addressing why CliniComp's motion to strike should be denied.

ARGUMENT

I. CliniComp Failed To Demonstrate Standing

In our opening brief, we demonstrated that CliniComp had not provided specific facts that prove that it was qualified to bid on a multi-billion dollar contract to provide the VA with an enterprise-wide comprehensive electronic health record system. Def. Mot. 21-23; *see also* Int. Mot. 43-47.[2] In response, CliniComp provides no new evidence and fails to rebut any of the evidence in the Court's record that suggests that CliniComp is too small and inexperienced to perform the contract at issue. Accordingly, CliniComp's complaint should be dismissed for lack of standing.

A. Test For Standing

As an initial matter, CliniComp argues that the Court should apply the "non-trivial competitive injury" test from *Weeks Marine, Inc. v. United States*, 575 F.3d 1352 (Fed. Cir. 2009), rather than the "substantial chance" test, to determine whether CliniComp has demonstrated standing. *See* Pl. Resp. 7. In the context of a challenge to a sole source decision, however, these tests should be substantively the same.

In *Myers Investigative & Security Services, Inc. v. United States*, the United States Court of Appeals for the Federal Circuit explained that, in the context of a challenge to a sole source decision, in order to demonstrate the required "substantial chance" of award, a plaintiff "need only establish that it 'could compete for the contract' if the bid process were made competitive,"

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[2] "Def. Mot. __" refers to our combined motion to dismiss and cross-motion for judgment on the administrative record, filed on September 18, 2017. "Int. Mot. __" refers to Cerner's combined motion to dismiss and cross-motion for judgment on the administrative record, filed on September 18, 2017. "Pl. Resp. __" refers to CliniComp's response-reply brief, filed on September 22, 2017. "Pl. MJAR __" refers to CliniComp's motion for judgment on the administrative record, filed on September 11, 2017.

275 F.3d 1366, 1370 (Fed. Cir. 2002) (citation omitted). This requires that plaintiff demonstrate that it is a "qualified bidder" for the procurement it seeks to compete in. *Id.* at 1370-71.

Accordingly, like in *Weeks Marine*, where the Federal Circuit relaxed the direct economic interest test for certain pre-award protests, *Myers* contains a relaxed test for challenges to sole source decisions. The *Myers* and *Weeks Marine* standards, while worded differently, are consistent substantively. A plaintiff cannot possibly have suffered a "non-trivial competitive injury" if it cannot "compete for the contract" it seeks, as a "qualified bidder." *Cf. Weeks Marine*, 575 F.3d at 1360 (noting that the Government acknowledged that the plaintiff was "capable of doing the dredging work contemplated by the contracts.").

Here, the VA is conducting a procurement for a multi-billion dollar comprehensive enterprise-wide electronic health record system contract. *See* AR 5, 2136. CliniComp does not question the breadth of the proposed contract. Rather, CliniComp simply argues that the contract should be subject to competition. Accordingly, if CliniComp could not "compete for the contract" at issue as a "qualified bidder" if a competition were held, then the Secretary's sole source decision could not possibly have caused CliniComp any "competitive injury."[3]

B. <u>CliniComp Has Not Demonstrated That It Is A Qualified Bidder</u>

CliniComp has still not provided any evidence that demonstrates that it is capable of performing a multi-billion contract to provide a comprehensive enterprise-wide electronic health

[3] Citing to *Allied Technology Group, Inc. v. United States*, 94 Fed. Cl. 16, 37 (2010), *aff'd*, 649 F.3d 1320 (Fed. Cir. 2011), CliniComp notes that "this Court has found standing even when the protestor's proposal was found to be technically unacceptable." Pl. Resp. 9. This is true, but irrelevant. A finding of technical unacceptability does not necessarily mean that the plaintiff did not have a substantial chance of award where, like in *Allied*, there were only two offerors and the plaintiff was challenging the eligibility of the awardee, because technical flaws in a plaintiff's proposal could have been fixed in a recompetition. *See Allied*, 94 Fed. Cl. at 37. In contrast, if the plaintiff is not qualified to perform the work, then it cannot be awarded the contract. *See Myers*, 275 F.3d at 1370-71.

record system to the VA. In our motion to dismiss, we noted that CliniComp had not provided any evidence that it has ever provided a *comprehensive* electronic health record system to any organization, let alone an organization approaching the size and complexity of the entire VA health system. Def. Mot. 22. We also noted that CliniComp had not submitted any evidence that it had ever performed contracts of a magnitude anywhere near the contract at issue in this case, which the VA estimates will cost more than $[redacted] *billion* over 10 years. *Id.* Moreover, we demonstrated that CliniComp is not a major player in the electronic health industry, as shown by the responses to the VA's requests for information (RFIs). Def. Mot. 22-23[4]; *see also* Int. Mot. Exh. 2, p. 7 (CliniComp not included in list of 23 companies with market share for electronic health records in United States acute care hospitals).

In its response, CliniComp relies upon a statement in an earlier declaration by its Chief Executive Officer that CliniComp operates in "60 DoD medical treatment facilities and clinics, 42 VA medical centers, and commercial hospitals spread over seven countries and three continents." Pl. Resp. 6 (quoting AR 2189). But CliniComp neglects to mention whether any of the contracts for these facilities were for *comprehensive* electronic health records systems, including outpatient. Moreover, CliniComp neglects to mention the dollar value of these contracts. In contrast, Cerner presented unrebutted evidence that, in the last decade, CliniComp had not performed Government contracts worth more than $48 million *total* for any given year, *i.e.*, less than four percent of the estimated annual value of the VA's next-generation electronic health record contract. Int. Mot. Exh. 1, Att. D.

[4] On page 22 of our motion to dismiss, we mistakenly cited to AR 1407. This citation should have been to AR 1530-31.

The bottom line is that CliniComp has not even attempted to meet its threshold burden to demonstrate the ability and capacity to perform a multi-billion contract for a comprehensive VA-wide electronic health record system. Accordingly, its complaint should be dismissed for lack of standing.

III. Secretary Shulkin's Determination And Findings (D&F) Complies With The Requirements Of FAR § 1.704

Turning to the merits, CliniComp's response does not demonstrate a violation of FAR § 1.704. Rather, the Secretary's D&F provides ample facts and circumstances to clearly and convincingly justify his determination that a sole source contract to Cerner to establish a single common electronic health record system with DoD will advance the undisputed public interest of "providing seamless, high-quality, integrated care and benefits, and improving patient safety" and "faciltat[ing] the transition of active duty military members to VA and improv[ing] their timely access to the highest quality of care in a way never before experienced." *See* AR 1-4. CliniComp's response second guesses the judgment of Secretary Shulkin and raises questions that we have already answered.

A. Standard Of Review

As an initial matter, CliniComp erroneously argues that the United States has a "heavy burden to establish 'clear and convincing' justification." Pl. Resp. 4. The requirement to "set forth enough facts and circumstances to clearly and convincingly justify" the public interest determination comes from regulations, FAR §§ 1.704, 6.302-7(c)(1), and it is always plaintiff's burden to establish a "clear" violation of a regulation in a bid protest. *See, e.g., Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1086 (Fed. Cir. 2001) ("the disappointed bidder must show a clear and prejudicial violation of applicable statutes or regulations."). Accordingly, it is plaintiff's burden to clearly demonstrate that the D&F did not

sufficiently justify the determination that the sole source contract advances the public interest. *See* Def. Mot. 17-18. The Court should reject CliniComp's attempt to rewrite the law.

Moreover, because the decision to invoke the public interest exception is a discretionary one, the Secretary's determination that he had enough facts and circumstances to justify his determination that a sole source contract to Cerner is in the public interest is entitled to deference. *See Varicon Int'l v. Office of Personnel Mgmt.*, 934 F. Supp. 440, 445 (D.D.C. 1996); *cf. Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1381-82 (Fed. Cir. 2009) (holding that, although the plaintiff was alleging a violation of a regulation, the trial court erred by not reviewing the contracting officer's discretionary determination pursuant to that regulation using the deferential arbitrary and capricious standard). The Court may not second guess the Secretary's determination that a sole source contract to Cerner is in the public interest. *See Sikorsky*, 2010 U.S. Comp. Gen. LEXIS 310, *10 ("We will not . . . sustain a protest based on the protester's mere disagreement with the conclusions set forth in the D&F.").

Moreover, to the extent CliniComp is arguing that the public interest exception is only permissible where it is "ultimately used to promote competition," Pl. Resp. 3, its argument is meritless. Nowhere in the statute or regulations does it state or suggest that the public interest exception cannot be used if the sole source decision "eliminates competition."

B. The D&F Clearly And Convincingly Demonstrates That The VA And DoD Sharing A Single Common Electronic Health Record System Will Advance The Public Interest Of Improving Healthcare For Veterans

In our opening brief, we demonstrated that the facts and circumstances the Secretary relied upon clearly and convincingly justify his determination that a sole source contract to Cerner to establish a single common electronic health record system with DoD will advance the public interest of providing seamless, high-quality health care to veterans, particularly those

transitioning from active duty. *See* Def. Mot. 24-28. We noted many benefits of sharing a single common system with DoD, based upon Cerner's Millennium software, *see id.*, none of which CliniComp disputes. Instead, CliniComp asserts that we have failed to answer various questions that we specifically addressed in our cross-motion.

For example, CliniComp notes that we acknowledged that policy disagreements between the VA and DoD have hindered their efforts to achieve interoperability, and then alleges that we failed to explain how adopting Cerner's electronic health record system will overcome these issues. *See* Pl. Resp. 2. On the contrary, we explained that the VA and DoD sharing a single common system will facilitate the adoption of "common workflows, cybersecurity architecture, order sets, and terminology based on national standards that results in seamless care," whereas, if the VA and DoD remain on separate systems, the default will remain separate standards and independent governance. Def. Mot. 28 (quoting AR 436).[5]

CliniComp also erroneously alleges that we failed to explain why CliniComp's electronic health record system cannot essentially operate as one with DoD's Cerner system, especially where Cerner's technology is allegedly "designed . . . to function independently of a specific EHR." Pl. Resp. 2 (quoting Cerner's RFI response, AR 1382) (emphasis omitted). First, we explained that the software DoD is using, Cerner Millennium, is not the software that was

[5] CliniComp also notes that the record does not contain a formal interagency agreement between the VA and DoD regarding sharing an electronic health record, but ignores the fact that the Secretary of DoD has made a "commitment to work with [the VA] closely," and DoD has "detailed over to [the VA] some of their key executives who have worked on their project" to assist the VA in its efforts to establish a single common electronic health record system with DoD. *See* AR 2172-73; *see also* AR 436 (Navy Captain John Windom executing memorandum for record supporting Secretary Shulkin's D&F). CliniComp provides no legal basis for expecting the VA and DoD to enter into formal interagency agreements regarding the operation of the planned electronic health record system before the VA even determines that it will acquire the system.

referenced in Cerner's RFI response. Def. Mot. 10 n.2. Second, we explained that if the VA obtained a different commercial electronic health record system than DoD, the VA would have to "develop and maintain an increasingly complex technical architecture" to ensure that the systems remain interoperable when DoD upgrades its system. *Id.* at 27 (quoting AR 3). Indeed, CliniComp acknowledges that, with "the constant adding of new data structures, interoperability will remain a never-ending challenge." Pl. MJAR 28. By sharing a single common system with DoD, however, with the same software at its core, "interoperability" should not be a "never-ending challenge," because the system will, at a minimum, essentially operate as one. *See* AR 436.

CliniComp also alleges that we have not answered the following question: "Why is it contrary to the public interest for the VA to obtain competition in this procurement?" Pl. Resp. 9-12. In reality, CliniComp just does not like the answer. To summarize, Secretary Shulkin determined that competition is not in the public interest because the VA will share a single common electronic health record system with DoD, and DoD is in the process of implementing an electronic health record system with Cerner's Millennium software at its core. *See* AR 1-5; Def. Mot. 24-28. The Secretary has determined that sharing a single common system with DoD will advance the VA's efforts to provide seamless, high-quality healthcare to veterans, particularly those transitioning from active duty. *See id.* And, absent a single common system with DoD, with the same Cerner Millennium software at its core, the VA and DoD will have to continue their never-ending struggle to make their systems more interoperable, without providing seamless care to veterans. *See id.* CliniComp obviously believes that a competitive procurement for an electronic health record system that can be made interoperable with DoD would be more

in the public interest, but its mere disagreement with the Secretary's decision is not a basis to sustain its protest. *See Sikorsky*, 2010 U.S. Comp. Gen. LEXIS 310, *10.[6]

C. The Secretary Obtained Sufficient Documentation To Support His Determination

In its response brief, CliniComp continues to argue that the Secretary was required to personally review every document that the VA relied upon to support the D&F and essentially write his D&F like a legal brief, with record citations. *See* Pl. Resp. 20-23. As we demonstrated in our cross-motion, neither of these arguments have merit. *See* Def. Mot. 29-30. CliniComp also continues to nitpick the administrative record, going so far as to argue that the Secretary's statement that he reviewed the "recent commission on care report" cannot refer to a June 2016 Commission on Care report in the record, because CliniComp does not consider June 2016 to be "recent." *See* Pl. Resp. 20-23. As we demonstrated, however, there is a strong presumption that the administrative record was compiled correctly, Def. Mot. 31, and CliniComp's attempt to parse various statements has done nothing to call the administrative record into question.

Also without merit is CliniComp's new argument that the administrative record does not support the Secretary's decision because the record does not contain any explicit recommendations to issue a sole source contract to Cerner in order to obtain a single common electronic health record system with DoD. *See* Pl. MJAR 19-20. What CliniComp misses is that the tortured history of the VA and DoD attempts to increase interoperability between their disparate systems, which is detailed extensively in the administrative record, fully supports the Secretary's decision. As we demonstrated in our opening brief, the VA and DoD have been

[6] Additionally, CliniComp's *post hoc* assertion in its agency-level protest that it can "seamlessly" "connect disparate systems," AR 2189, does not make the Secretary's decision irrational. *See Axiom*, 564 F.3d at 1383 ("a decision is not necessarily unreasonable simply because the disappointed bidder is able to find two witnesses who disagree with it.").

attempting to make their electronic health record systems more interoperable for nearly 20 years. Def. Mot. 5-9; *see also, e.g.*, AR 7-9, 24-40, 388-91. Congress has twice required the VA and DoD to meet certain interoperability requirements. National Defense Authorization Act for Fiscal Year 2014 (FY 2014 NDAA), Pl. 113-66, § 713, 127 Stat. 672, 794-99 (2013); National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1635, 122 Stat 3, 460-63 (2008). Indeed, in the FY 2014 NDAA, Congress expressed the view that the VA and DoD "have failed to implement a solution that allows for seamless electronic sharing of medical health care data" and "despite the significant amount of read-only information shared between the [DoD] and [VA], most of the information shared . . . is not standardized or available in real time to support all clinical decisions." § 713(a), 127 Stat. at 794.

The record reflects that, although significant progress has been made over the last nearly 20 years to improve interoperability, the process has been difficult and the results inadequate to support the type of high-quality healthcare that Secretary Shulkin expects from the VA. *See, e.g.*, AR 1-2, 389-90. For example, the June 2016 Commission on Care report described the Joint Legacy Viewer as a "positive step" toward improved interoperability, but also concluded that the VA's electronic health record issues continue to hinder interoperability between the VA and DoD. *See id.* at 819-20. The report noted that these interoperability issues "resulted in incomplete patient records with potentially substantial implications for veterans," including unnecessary clinical risk, a more complicated transition from DoD to VA care, and billing issues. *Id.* Accordingly, the commission recommended that the VA procure a comprehensive commercial electronic health record system to replace its legacy systems, like DoD did. *See id.* at 812-26. Although the commission did not expressly recommend a single common system with DoD, it would not be in the public interest for the VA to procure a new commercial

electronic health record system that is separate from DoD's system, as this would necessitate that the VA continue on the same track of trying to improve interoperability by patching together disparate systems, rather than simply sharing a single common system. *See id.* at 1-3, 656 (Congressman Jeff Miller stating in 2013 that "[p]revious attempts by the DoD and VA to use disparate computer systems to produce universal electronic health records have failed").

Furthermore, after the GAO's exhaustive reporting on the longstanding interoperability issues between the VA and DoD's separate electronic health record systems, *see, e.g., id.* at 15-59, 359, 368-79, a July 2016 GAO report questioned how the VA could justify continuing to maintain an electronic health record system that is separate from DoD. *Id.* at 380 ("VA's unsuccessful efforts over many years to modernize its [electronic health record] system raise concern about how the department can continue to justify the development and operation of an electronic health record system that is separate from DOD's system, even though the departments have common system needs."). While the GAO did not *explicitly* recommend a single common system, it certainly implied that the time has come for the VA and DoD to adopt a single common electronic health record system.

Accordingly, CliniComp's argument that Secretary Shulkin's D&F is not supported by the administrative record is meritless.

IV. The Rest Of CliniComp's Allegations Of Error Are Also Meritless

In its response brief, CliniComp continues to assert a number of other meritless allegations of error. Pl. Resp. 12-19, 23-29.[7] As demonstrated in our cross-motion and below, CliniComp's additional protest grounds should be denied.

[7] In its response brief, CliniComp does not address its previous argument that the Secretary's decision was irrational for failing to consider interoperability within the VA and

A. FAR § 6.302-7(b) Does Not Preclude The Secretary From Invoking The Public Interest Exception, Nor Is The D&F A "Defective Brand-Name Justification"

In our opening brief, we demonstrated that the permissively-worded FAR § 6.302-7(b) does not in any way limit the Secretary's discretion to invoke the public interest exception, even if the VA's sole source decision could have been justified under another exception to full and open competition. Def. Mot. 42-43. CliniComp's response does not rebut our position. *See* Pl. Resp. 13.

We also demonstrated that, in any event, neither the unusual and compelling urgency exception nor the one responsible source exception (including the brand-name justification rules) apply to this procurement. Def. Mot. 32-35, 43. Again, CliniComp's arguments to the contrary are meritless.

Eschewing reliance upon the D&F itself, CliniComp rests its argument that the unusual and compelling urgency exception applies upon the Secretary's *post hoc* references to urgency. *See* Pl. Resp. 13-14. Although Secretary Shulkin undoubtedly believes that it is in the public interest to quickly solve the VA and DoD's interoperability issues, *see, e.g.*, AR 2166-67, that does not mean that he based his decision upon an "unusual and compelling urgency," pursuant to 41 U.S.C. § 3304(a)(2) and FAR § 6.302-2. Rather, the D&F makes clear that it is based upon the finding that a single common system with DoD will advance the public interest of providing a higher level of healthcare for veterans. *See* AR 1-5. Moreover, CliniComp's response ignores the fact that the VA is not entering into the type of short-term bridge contract to which the

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between the VA and private healthcare providers. In our cross-motion, we demonstrated that CliniComp's argument was incorrect, Def. Mot. 35-37, and we do not address it further here.

unusual and compelling urgency exception typically applies, but rather, the VA intends to enter into a 10-year contract. *See* 41 U.S.C. § 3304(c); 48 C.F.R. § 6.302-2(d); AR 2138.

With regard to the one responsible source exception, despite CliniComp's argument that there are multiple sources that can meet the VA's needs, *see* Pl. Resp. 1, CliniComp argues that the one responsible source exception "applies" because the VA asserts that Cerner is the only responsible source that can meet its needs. *See id.* at 14. CliniComp also argues that the D&F is really a "brand-name justification," *id.* at 17-19, which is covered by the one responsible source exception regulation. *See* 48 C.F.R. § 6.302-1(c). As we demonstrated in our cross-motion (pp. 33-34), however, CliniComp's arguments were effectively rejected by the GAO in *Sikorsky*, 2010 U.S. Comp. Gen. LEXIS 310, at *9 n.4, a decision CliniComp chooses to ignore in both its motion for judgment and response brief.

In *Sikorsky*, the GAO explained that the public interest exception is appropriately invoked where, like here, the decision to use a particular product is not based solely upon its performance characteristics, but rather, a broader set of policy concerns. *See id.* Secretary Shulkin's determination was driven by the public interest benefits of a single common electronic health record system with DoD, not the particular features of Cerner's software. *See* AR 1-4. Where, as here, there are likely multiple sources that can provide goods and services that fulfill the agency's *minimum* needs (*i.e.*, a comprehensive electronic health record system that is "interoperable" with DoD and private healthcare providers), but the Secretary makes a policy determination that the public interest demands something *more* than this minimum (*i.e.*, a single common system with DoD that will enable seamless healthcare for veterans), it is appropriate to invoke the public interest exception, rather than the one responsible source exception. *See Sikorsky*, 2010 U.S. Comp. Gen. LEXIS 310, at *9 n.4.

Accordingly, CliniComp's arguments that it was improper for the Secretary to invoke the public interest exception are meritless.

B. The Secretary's Sole Source Determination Was Not Based Upon A Lack Of Advance Planning

CliniComp's arguments that the VA's alleged lack of advance planning precludes a sole source contract to Cerner are also meritless.

First, CliniComp argues that the VA started planning for a procurement for a single common system with DoD too late. *See* Pl. Resp. 15-16. But it is irrelevant how long the agency planned for a sole source contract. Rather, the relevant question is whether the sole source decision was based upon an agency's failure to plan for a potential *competitive* procurement. *See* 41 U.S.C. § 3304(e)(5)(A)(i) (precluding agencies from entering into sole source contracts "*on the basis of* the lack of advance planning") (emphasis added); *Innovation Dev. Enters. of Am., Inc. v. United States*, 108 Fed. Cl. 711, 727 n.19 (2013) ("the only planning documents in the record show that the [agency] took steps to prepare for a sole-source award, not a competitive award."). The Secretary's determination was not based upon inadequate time to conduct a competitive procurement or discover other potential sources, but rather, it was based upon the public interest benefits of a single common system with DoD with Cerner's software at its core. *See* AR 1-4; *see also* Pl. MJAR 24 (conceding that "urgency" was "not directly mentioned in the D&F"). Moreover, even if it were relevant, CliniComp's argument that "the VA did not begin its procurement planning for a 'single common system' until . . . the day before the D&F was signed," Pl. Resp. 15, is contrary to the record. *See* AR 419 (noting "several exploratory meetings with DoD" regarding partnering with DoD on its electronic health record modernization effort), 2166 (Secretary Shulkin explaining some of the numerous actions he and the VA took in reaching the sole source decision).

CliniComp also incorrectly argues that if the VA had "engaged in reasonable advance planning over the past 17 years, the VA would have positioned itself to receive competitive offers for its next generation EHR system." Pl. Resp. 16. Relying upon *Filtration Development Co., LLC v. United States*, 60 Fed. Cl. 371, 381-82 (2004), we demonstrated that the fact that the VA's extensive efforts to improve interoperability with DoD's electronic health record systems over the last nearly 20 years have not been completely successful and mistake free does not equate to a lack of advance planning. Def. Mot. 40-41; *see also id.* at 4-8 (describing some of the attempts to improve interoperability). CliniComp ignores *Filtration Development*.

Accordingly, CliniComp has failed to demonstrate that the Secretary's sole source decision was based upon a lack of advance planning.

C. The Secretary Was Not Required To Consider Cost In Invoking The Public Interest Exception, But Rationally Noted Some Likely Cost Savings By Contracting With Cerner

As we demonstrated in our opening brief, the Secretary was not required to consider cost in invoking the public interest exception and, in any event, the D&F noted some potential cost savings of contracting with Cerner. Def. Mot. 37-40. As the GAO concluded in *Sikorsky*, the agency was not "required to have considered life-cycle costs of the Mi-17 as compared to other helicopters" when invoking the public interest exception. 2010 U.S. Comp. Gen. LEXIS 310, at *11 n.5. In response, CliniComp ignores *Sikorsky* and continues to rely upon irrelevant regulations and decisions. *See* Pl. Resp. 23-26.

For example, *Glotech, Inc.*, 2012 CPD ¶ 248, 2012 WL 4336248 (Comp. Gen. 2012), and *Cyberdata Technologies, Inc.*, 2012 CPD ¶ 230, 2012 WL 3574015 (Comp. Gen. 2012), both involved *competitions* for blanket purchase agreements where regulations, FAR § 8.405-3(a)(1)-(2), specifically required the agencies to consider cost.

Likewise, CliniComp's continued reliance upon FAR § 1.102-2(c)(1) is misplaced, Pl. Resp. 24, as we have already demonstrated that this regulation has no binding legal force. Def. Mot. 37-38. In response, CliniComp cites a few non-binding cases where the Court held that portions of FAR § 1.102-2 that CliniComp is *not* relying upon have binding force, while ignoring *Castle-Rose, Inc. v. United States*, 99 Fed. Cl. 517, 532 (2011). Pl. Resp. 24. But the Court's statement in *Castle-Rose* that "Sections 1.102 and 1.102–2 of the F.A.R. have no binding legal force" is on point and the Court should follow its persuasive reasoning. 99 Fed. Cl. at 532. In any event, as we also demonstrated in our cross-motion, FAR § 1.102-2(c)(1) does not require Secretaries to consider cost in invoking the public interest exception, Def. Mot. 38, a point CliniComp fails to refute in its response. *See* Pl. Resp. 24.

CliniComp's reliance upon *Agustawestland North America, Inc. v. United States*, 127 Fed. Cl. 793 (2016), is also misplaced. Unlike in this case, where the Secretary invoked the public interest exception, the sole source decision in *Agustawestland* was based, in part, upon another authority that permits certain sole source contracts based upon the determination that an award to a non-incumbent would likely cause "substantial duplication of cost to the Government that is not expected to be recovered through competition," *id.* at 812 (quoting 48 C.F.R. § 6.302-1(a)(ii)-(iii)), so cost was required to be considered to some degree in the *Agustawestland* decision. But *Agustawestland* provides no support for CliniComp's argument that agencies must always consider cost when justifying a sole source contract.[8]

[8] We also note that we have appealed the Court's judgment in *Agustawestland*, *see* Fed. Cir. No. 17-1082, and the appeal is pending.

D. The VA Did Not Violate FAR § 34.005-1

In our opening brief, we demonstrated that the VA did not violate FAR § 34.005-1 because Secretary Shulkin properly invoked the public interest exception to full and open competition. Def. Mot. 44-45. Accordingly, Secretary Shulkin has necessarily determined that competition is not "practicable."

In response, CliniComp erroneously argues that our reading of the regulations renders FAR § 34.005-1 ineffectual. *See* Pl. Resp. 27. Major systems are sometimes acquired through multiple sequential contracts, such as design contracts, followed by development contracts, followed by production contracts. *See Lockheed Martin Corporation v. United States*, 124 Fed. Cl. 709, 712-13 (2016). FAR § 34.005-1(a) directs that each contract phase should provide for competition, as long as it is "economically beneficial and practicable to do so," rather than only having competition for a single design contract and proceeding with sole source awards to that contractor for later phases. Accordingly, FAR § 34.005-1 provides particular guidance to a particular type of acquisition process.

Nothing in FAR Part 34 supports CliniComp's novel theory that the statutory exceptions to full and open competition are insufficient to justify sole source contracts for major systems.

E. CliniComp's Argument That The VA Failed To Comply With The Statutory Requirement To Notify Congress Of The Award To Cerner No Less Than 30 Days Prior To Award Is Meritless

In our opening brief, we demonstrated that the VA could not have violated the statutory requirement to notify Congress of the decision to invoke the public interest exception 30 days prior to contract award because the VA has not yet awarded the contract. Def. Mot 45. In response, CliniComp has not demonstrated (or even argued) that the contract has been awarded, so this protest ground should be denied.

CliniComp also misunderstands our reliance upon the Congressional committee reports that demonstrate that Congress is well aware of the Secretary's sole source decision. *See* Pl. Resp. 28-29. Our point was that, even if the VA had technically failed to comply with the statutory notice requirement, which it has not, CliniComp was not prejudiced because compliance with the notice requirement would not have improved CliniComp's chances of securing the VA's next generation electronic health record system contract. *See* Def. Mot. 46. Congress has been well aware of the Secretary's sole source decision for months, and two Congressional committees are enthusiastic about the decision. *See* H.R. Rep. 115-188, at 18 (2017); S. Rep. 115-125, at 171 (2017). There is no reason to believe that any failure to comply with 41 U.S.C. § 3304(a)(7)(B) has prejudiced CliniComp in any way.

IV. CliniComp Is Not Entitled To Injunctive Relief

In our opening brief, we demonstrated that CliniComp had failed to prove the irreparable harm necessary for injunctive relief because it has failed to demonstrate that it would be a viable competitor if the VA were to hold a competition for its next generation electronic health record system. Def. Mot. 47-48. In its response, CliniComp provides no additional evidence. Accordingly, the Court should deny CliniComp's request for injunctive relief, even if CliniComp were to succeed on the merits, which it should not.

Also, although CliniComp agrees that its initial request for injunctive relief was overbroad, it requests that the Court "find that the VA may not properly invoke the 'public interest' exception and . . . enjoin the VA from proceeding [with] a future procurement based upon that exception." Pl. Resp. 29. As we demonstrated in our cross-motion, however, it is the Court's role to review an agency's procurement action based upon the rationale provided, not to determine whether the agency may ever justify that action. *See* Def. Mot. 49. Any injunction

that precludes the VA from awarding a sole source contract to Cerner based upon a *new* D&F would be overbroad.

CONCLUSION

In sum, the VA Secretary determined that it is in the best interest of veterans, and the public, that the VA and DoD share a single common electronic health record system that fosters high-quality medical care and a seamless transition from active duty for veterans. CliniComp disagrees, but has not demonstrated any legal error by the Secretary and has not even demonstrated that it could provide a comprehensive VA-wide electronic health record system. Accordingly, the Court should dismiss CliniComp's complaint for lack of standing or grant the Government judgment on the administrative record.

Respectfully submitted,

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