

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

HyperNet Solutions, Incorporated) Docket No. 07-ODRA-00416
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Under Solicitation No. DTFAAC-07-R-02224)

**FINDINGS AND RECOMMENDATIONS ON
REQUEST FOR RECONSIDERATION**

I. INTRODUCTION

CNI Aviation, LLC (“CNI”) requests reconsideration of the Findings and Recommendations (“F&R”) of the Federal Aviation Administration’s (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) in a bid protest (“Protest”) filed at the ODRA on November 19, 2007 by HyperNet Solutions, Incorporated (“HyperNet”). *See Protest of HyperNet, 07-ODRA-00416.* HyperNet’s Protest challenged the FAA Mike Monroney Aeronautical Center’s (“Center”) award of a contract to CNI Aviation, LLC (“CNI”) for the provision of administrative services. Following the development of the administrative record, the ODRA found that the Center’s award of the contract lacked a rational basis and recommended that CNI’s contract award be terminated and a new contract awarded to HyperNet. In a Final Order (“Final Order”) dated November 21, 2007, the FAA Administrator’s Delegee adopted the ODRA’s F&R and directed the Center to terminate the CNI contract award and issue a new contract for the required services to HyperNet within 45 calendar days.¹

On November 22, 2007, the ODRA provided copies of the Final Order and the F&R to all counsel admitted to the previously issued Protective Order, including CNI’s counsel. On December 5, 2007, the ODRA issued a public version (“Public Version”) of the F&R,

¹ The Final Order permitted the specified 45-day timeframe to be extended if necessary to avoid disruption of these services to the Center. *See* FAA Order No. ODRA-07-434 dated November 21, 2007 at 1.

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incorporating each counsel's suggested protected material redactions.² On December 17, 2007, CNI filed this Request for Reconsideration ("RR") of the F&R.³ On January 7, 2008, HyperNet filed a detailed opposition ("Opposition") to the CNI reconsideration request. CNI filed its reply ("Reply") to the HyperNet Opposition on January 12, 2008.

CNI requests reconsideration based on allegations that the F&R is "replete with errors of fact and law." *RR* at 4. According to CNI, the ODRA: (1) misinterpreted and misapplied the Solicitation's evaluation factors; (2) misinterpreted and overlooked several relevant portions of the administrative record; and (3) improperly determined that CNI's proposal failed to comply with one of the Solicitation's mandatory personnel requirements. CNI also contends that the remedy recommended by the ODRA and adopted in the Final Order—a directed award to HyperNet—"lack[s] a rational basis." *RR* at 12.

As is discussed below, the ODRA finds no basis for substantively modifying⁴ or reversing the F&R, and does not recommend reconsideration of the Final Order.

II. DISCUSSION

A. THE STANDARD FOR RECONSIDERATION

The standard employed by the ODRA where parties seek reconsideration has been addressed in several cases. *See Protest of Maximus, Inc.*, 04-TSA-009, *Decision Denying Maximus Inc.'s Motion for Reconsideration* dated November 29, 2004; *Protest of Raytheon Technical Services Company*, ODRA Docket No. 02-ODRA-00210, *Findings*

² Pursuant to the ODRA Protective Order, complete copies of the F&R and Final Order were provided to both HyperNet's and CNI's Counsel on November 22, 2007. In the cover letter accompanying the Protected Version of the F&R, the ODRA directed each counsel to prepare and submit a redacted Public Version of the F&R. As issued, the Public Version of the F&R reflects each counsel's redactions of protected competition-sensitive and source selection details and information.

³ CNI also filed a "protest of [the] award of a contract . . . to HyperNet." *See RR* at 1. The CNI Protest has been docketed as 07-ODRA-00428, and will be addressed separately.

⁴ The ODRA has deleted one inadvertently used word in one sentence in the F&R. *See* n.9 at 17, *infra*.

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and Recommendations on Motion for Reconsideration dated April 10, 2002; *Protest of Consecutive Weather*, 99-ODRA-00112, *Recommendation Regarding Reconsideration Request* dated July 13, 1999; *Consolidated Protests of Camber Corporation and Information Systems and Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080, *Motion for Reconsideration* dated July 23, 1999. To prevail in a request for reconsideration, the requesting party must demonstrate: (1) clear errors of fact or law in the underlying F&R; or (2) previously unavailable information that would warrant reversal or modification. See *Protest of Maximus, Inc., supra*. To that end—consistent with its charge to implement an efficient dispute resolution process—the ODRA “will not entertain [reconsideration] requests as a routine matter,” and will not “consider requests demonstrating mere disagreement with a decision or restatement of a previous argument.” *Id.* An attempt to either re-litigate previously adjudicated issues or to introduce new legal arguments based on the original administrative record does not constitute grounds for reconsideration. See *Protest of Raytheon Technical Services Company*, 02-ODRA-00210, *Findings and Recommendations on Request for Consideration of the Merits and for Clarification* dated April 22, 2002.

In the instant case, CNI asserts that the F&R was based on “material errors” of fact and law. See *RR* at 3. As a result, CNI’s Request will be reviewed by the ODRA to determine whether the alleged errors mandate a modification or reversal of the F&R. See *Protest of Maximus Inc., Decision Denying Motion for Reconsideration, supra*. Notably, despite CNI’s objections to the F&R, the Center has not joined in the Request for Reconsideration and on January 7, 2008 reported that it is implementing the remedy as directed in the Final Order.

B. ALLEGED MISTAKES OF FACT AND LAW

1. CNI Contends That the ODRA Misinterpreted and Misapplied the Solicitation’s Evaluation Instructions for the Three Non-Price Evaluation Factors

a. Background

As discussed in the F&R, the underlying Solicitation specified that each offeror’s proposal would be evaluated according to the following factors and sub-factors:

FACTOR No. 1: BUSINESS APPROACH/STRATEGY

- Subfactor No. 1: Program Management
- Subfactor No. 2: Supervision Plan
- Subfactor No. 3: Recruit/Retainment Plan
- Subfactor No. 4: Orientation Phase-In Plan/
Transition Phase-Out Plan
- Subfactor No. 5: Quality Control Plan

FACTOR No. 2: PAST PERFORMANCE

- Sub-factor No. 1: Contractor Experience
- Sub-factor No. 2: Key Personnel &
Qualifications

FACTOR No. 3: COST/PRICE

FACTOR No. 4: PROPOSAL RISK

See F&R at 6.

According to the Solicitation’s evaluation clause (“Evaluation Clause”), the three non-price evaluation factors—Business Approach/Strategy, Past Performance, and Proposal Risk—were “equal in importance,” *see Solicitation, ¶ M002(a), Evaluation Factors and Sub-factors and Order of Importance*, and were “significantly more important than

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“Cost/Price”—although the Solicitation further specified that “Cost/Price” would “contribute substantially to the award decision.” *See F&R, Finding of Fact Number (“FF No.”) 7 at 6.*

The Center’s evaluation of each offeror’s proposed technical approach and technical merit was based on two non-price evaluation factors: (1) Business Approach/Strategy; and (2) Proposal Risk. The purpose of the Business Approach/Strategy evaluation was to “provid[e] an assessment of the Offeror’s capability to satisfy the Government’s Requirement.” *See Solicitation, ¶ M002(b), Business Approach/Strategy at 76.* The Proposal Risk evaluation contemplated “an assessment of the potential for disruption of schedule, increased cost, degradation of performance, and the need for increased Government oversight, as well as the likelihood of unsuccessful contract performance.” *Id., ¶ M002(c), Proposal Risk Factor 4 at 79.* Pursuant to these two evaluation factors, CNI received a technical score of [DELETED] points and HyperNet received a technical score of [DELETED] points. *See F&R, FF Nos. 31 and 37 at 14 and 16.*

The purpose of the third non-price evaluation factor—Past Performance—was to “asses[s] the degree of confidence the Government has in an Offeror’s ability to supply products and services that meet users’ needs, including cost and schedule, based on a demonstrated record of performance.” *See Solicitation, ¶ M002(d), Past Performance Factor 2 at 79.* As noted in the F&R, the past performance evaluation was based on assessments of Contract Performance Recency, Contract Performance Relevancy and Contract Performance Quality. *Id.* 79-82; *F&R, FF Nos. 55-59 at 23-24.* For the past performance evaluation, HyperNet received a past performance score of [DELETED] points while CNI was awarded [DELETED] points. *F&R, FF No. 82 at 34.*

To complete the non-price factor evaluation, the Center added each offeror’s technical evaluation score to its past performance score to arrive at a “composite” score for each offeror. *See Center Legal Brief dated September 17, 2007 (“Legal Brief”) at 10.* As a result, CNI received a total composite score of [DELETED] points and HyperNet received a composite score of [DELETED] points. *See F&R, FF No. 83 at 34.*

As discussed in the F&R, the ODRA concluded that the Center’s technical evaluation—under the Business Approach/Strategy and Proposal Risk evaluation factors—was rationally based. *See F&R* at 51-52. However, with respect to the Center’s past performance evaluation, the ODRA found no rational basis for the scores awarded to either HyperNet or CNI. *Id.* at 52-56.

b. CNI’s Assertions

On reconsideration CNI claims that the “ODRA erred” in its review of the Center’s evaluation of the non-price factors. *RR* at 18. According to CNI, in contravention of the Solicitation’s Evaluation Clause,⁵ the ODRA “rolled up the sub-factor points” to “asses[s] an overall rating for the offerors” and then based its review of the Center’s evaluation “only on those ratings.” *Id.* CNI maintains that the “numerical point system” used by the Center “was simply a tool for assessing the ratings within each of the factors.” *RR* at 16. Since the ODRA’s review focused on the point scores awarded to HyperNet and CNI, CNI asserts that the ODRA improperly “fail[ed] to accord equal weight to the three non-price factors” as required by the Solicitation. *RR* at 16. In CNI’s view, the Center’s numerical system was not supposed to be the primary factor in rating the offerors, “but rather was to be utilized to develop relative comparison points between evaluators within an evaluation factor.” *Id.*

c. Discussion

CNI’s challenges are meritless. First, as noted in the Center’s Award Decision Document (“ADD”) and the underlying evaluation reports, *see Center Response, Exhibit No.* (“Exh. No.”) 21, the Center—and not the ODRA—established the numerical weights to be assigned to each of the three non-price evaluation factors. Similarly, the Center—and not the ODRA—also calculated each offeror’s technical and “composite score.” *See Legal*

⁵ The Solicitation stated that “[s]ub-factor ratings shall not be rolled up into an overall rating for the Business Approach/Strategy and Proposal Risk factors.” *See Solicitation*, ¶ M002(c), *supra*.

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Brief at 9-13. In short, this procurement’s scoring scheme was formulated and implemented solely by the Center—not the ODRA. Thus, contrary to CNI’s assumptions underlying this reconsideration argument, the ODRA did not separately score or substitute its own judgment for this portion of the Center’s evaluation. As explained in the F&R, the ODRA’s review was focused solely on ascertaining whether or not the Center’s evaluation adhered to the requirements set forth in the Evaluation Clause and was otherwise rationally based. *See F&R* at 51.

Notwithstanding that CNI’s arguments provide no basis for reconsideration, the ODRA notes that the scoring approach used by the Center to evaluate each offeror’s technical approach and technical merit was not based on a prohibited “roll-up.” As a preliminary matter, one of the two technical evaluation factors, Proposal Risk, did not have any sub—factors. As a result, no roll-up could occur as part of that evaluation. Moreover, the record demonstrates that the score awarded to each offeror’s proposal under the other technical evaluation factor, Business Approach/Strategy, was computed by adding that factor’s five sub-factor point scores to a sixth point score awarded solely for the factor itself. As a result, HyperNet’s technical score of [DELETED] points was based on the [DELETED] points it received following the Proposal Risk evaluation plus the [DELETED] points that were awarded following the Center’s evaluation of the Business Approach/Strategy Factor and sub-factors, as follows:

<u>FACTOR 1</u>	<u>Sub-factor 1</u>	<u>Sub-factor 2</u>	<u>Sub-factor 3</u>	<u>Sub-factor 4</u>	<u>Sub-factor 5</u>
Business Approach /Strategy	Program Mgmt. Plan	Supervisory Plan	Recruit/ Retention Plan	Transition Plan	Quality Control Plan
[DEL.] points	[DEL.] points	[DEL.] points	[DEL.] points	[DEL.] points	[DEL.] points

See F&R, FF No. 37.

During the adjudication, the Center’s scoring and evaluation approaches were clearly briefed in the Center Response, *see e.g., Legal Brief, ADD and Technical Evaluation Report (“TER”)* at Exh. No. 7, and were also fully addressed in HyperNet’s Protest and

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Comments. In the adjudication, CNI failed to challenge the Center's scoring of either its or HyperNet's past performance. Rather, its Comments merely emphasized that its higher composite score offered the best value to the Center. *See CNI Comments* at 6. CNI's current objection to the Center's evaluation and scoring of HyperNet provides no basis for reconsideration since it constitutes an impermissible attempt to re-litigate the Center's evaluation of the two non-price technical factors. *See Protest of Raytheon Technical Services, Reconsideration F&R* dated April 22, 2002, *supra*.

2. CNI Contends That the ODRA's Review of the Center's Past Performance Evaluation Is Fundamentally Flawed.

a. Background

As discussed in the F&R, the ODRA found that the Center's past performance evaluations of both HyperNet and CNI were not rationally based. *See F&R* at 52-56. More specifically, the ODRA found that: (1) because the information provided in HyperNet's past performance questionnaires did not match the results reported by the Center, the past performance score was not justified; and (2) the record did not provide a sufficient explanation for CNI's past performance score.

b. CNI's Assertions

On reconsideration, CNI contends that the ODRA's analysis of the Center's past performance evaluation "completely missed . . . highly material facts" that could have been ascertained had the ODRA read Volume IV of the HyperNet proposal. *See RR* at 20. CNI speculates that "it strongly appears that the [ODRA] completely fail[ed] to take into account Volume IV of HyperNet's Proposal," which CNI maintains explained the rational basis for the past performance evaluation team's ("PPET") [DELETED] past performance rating of HyperNet. *Id.* CNI further maintains that the ODRA "misread" the HyperNet past performance questionnaires—and as a result, the ODRA's determination that the Center had provided an inaccurate depiction of HyperNet's past performance was unsupported. CNI also contends that the ODRA "provided an

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inaccurate representation of the PPET synopsis,” *RR* at 27. Finally, CNI argues that contrary to the ODRA’s finding, the PPET had in fact properly justified CNI’s [DELETED] past performance rating—which was [DELETED] points higher than the past performance score HyperNet received. *RR* at 29.

c. Discussion

As a preliminary matter, notwithstanding CNI’s speculative contention that the ODRA ignored HyperNet’s Volume IV, the ODRA carefully reviewed and considered each volume of the HyperNet and CNI proposals. *See e.g. F&R* FF No. 50 at 21. During the course of that review, the ODRA discovered that several sections of HyperNet’s proposal—including Volume IV—had not been included in the documents provided by the Center in its Agency Response to the Protest. The ODRA promptly directed both HyperNet and the Center to provide full copies of all volumes of HyperNet’s proposal. *See ODRA Letter of October 3, 2007.*

With respect to the substance of CNI’s present contentions concerning HyperNet’s Volume IV, there is no evidence that the PPET findings regarding HyperNet’s past performance were based on HyperNet’s Volume IV. Moreover, even though this ground of CNI’s reconsideration request is presented as an allegation that the ODRA ignored HyperNet’s Volume IV, CNI’s argument is actually attempting to re-litigate the past performance issue based on previously available evidence. The Center’s past performance evaluation of HyperNet was squarely challenged by HyperNet’s Protest, fully briefed by the Center, and then readdressed in both the HyperNet and CNI Comments. CNI’s belated attempt to re-litigate the issue of HyperNet’s past performance cannot provide a basis for reconsideration.⁶ *See Protest of Consecutive Weather, Request for Reconsideration, supra.*

⁶The ODRA issued a Protective Order in this matter on September 7, 2007. CNI did not avail itself of the opportunity under the ODRA Procedural Regulations to have outside counsel seek access to protected information in the administrative record until October 17, 2007, *i.e.*, after CNI’s Comments on the Center Response had been filed. Following the October 18, 2007 admission of CNI’s Counsel to the Protective Order, the ODRA directed the parties to provide CNI Counsel with copies of the full administrative record. *See ODRA Status Conference Memorandum* dated October 24, 2007.

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Moreover, notwithstanding CNI's argument, the F&R noted that the Solicitation required a two-part past performance questionnaire be submitted for each contract referenced in each offeror's proposal. *See F&R*, FF Nos. 51-54 at 22. As noted by CNI in its reconsideration request, the first part of the past performance questionnaire ("Part 1") was to be completed and submitted by the offeror; *RR* at 20; *see also Solicitation, Attachment No. 8, Past Performance Package ("Past Performance Package")* at 2. To that end, Part 1 directed each offeror to identify the contracts it had performed along with a description of the work, the contract's acquisition value, and a contracting point of reference. *Id.* at 5. Unlike Part 1, the second part of the past performance questionnaire ("Part 2") was to be completed and submitted by the references identified in Part 1. *Id.* Part 2 was also to be submitted directly to the Center—without copying the offeror. *Id.* In addition to requesting a contract description and acquisition value, Part 2 requested that each reference complete an evaluation matrix assessing the offeror's contract performance as "excellent, very good, satisfactory, marginal, unsatisfactory or not satisfactory." *Id.* In addition to the matrix, Part 2 asked each reference to respond to seven additional questions about the offeror's performance. *Id.* at 6-7.

As noted in the F&R, the ODRA's review of the Center's past performance evaluation revealed discrepancies and inaccuracies between the information provided in HyperNet's past performance questionnaires and the Center's analysis of that information. *See F&R* at 54-56. To explain its evaluation of HyperNet's and CNI's past performance questionnaires, the Center Response—specifically, its Legal Brief—provided a synopsis directly drawn from—but more detailed than—the PPET's Report. *Compare Legal Brief* at 17-18 *with PPET Report*. Despite the additional detail in the Legal Brief's synopsis of each offeror's evaluated past performance, no specifics—beyond a general description of the contract's skill category—was provided to support the PPET findings. *See HyperNet Opposition* at 10. Notably and consistent with the ODRA's findings, HyperNet's Opposition emphasizes that many of the contract descriptions in the Center's synopsis "mischaracteriz[ed]" or misidentified the relevant contract. *Id.*, *see also F&R* at 55-57.

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As discussed in the F&R, the Center’s Legal Brief advised that the PPET had reported that the HyperNet past performance questionnaires yielded the following information:

	<u>Dollar Value</u>	<u>Skill Category</u>	<u>Description</u>
1.	[DELETED]	[DELETED]	[DELETED]
2.	[DELETED]	[DELETED]	[DELETED]
3.	[DELETED]	[DELETED]	[DELETED]
4.	[DELETED]	[DELETED]	[DELETED]

See F&R at 54.

The Center further advised that the following information had been submitted regarding HyperNet’s proposed subcontract:

The Protester’s sub-contractor, ATSA, provided past performance questionnaires that reflected 6 contracts, including:

1.	[DELETED]	[DELETED]	[DELETED]
2.			[DELETED]
3.	[DELETED]	[DELETED]	[DELETED]
4.			[DELETED]
5.			[DELETED]
6.	[DELETED]	[DELETED]	[DELETED]

Id.

After comparing the Center’s past performance report with the HyperNet past performance questionnaires, the ODRA concluded that the above past performance results reported by the Center were “misleading and inaccurate.” *Id.* To illustrate the perceived deficiencies in the Center’s past performance evaluation of HyperNet, the ODRA extrapolated information from the past performance questionnaires and published the following table (“Table”) of explanation in the F&R:

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HyperNet’s Actual Prime Contractor Experience (as shown in questionnaires submitted to the Center)		
Dollar Value	Skill Category	Description
[DELETED]	[DELETED]	[DELETED]

See F&R at 55.

On reconsideration, CNI first contends that the ODRA’s Table has “grossly misrepresented” the actual contract descriptions used in the PPET Report. RR at 26-27. Notwithstanding this allegation, there were no substantive differences between the descriptions used by the ODRA and those used by the Center. For example, the [DELETED] was identified by the Center as [DELETED]. See ADD, PPET Report. The fact remains, however, that regardless of which contract description is utilized, neither the PPET Report’s sparse entries nor the Center’s slightly more detailed synopsis accurately captures the results of the HyperNet past performance questionnaires. See F&R at 54-55. As HyperNet’s Opposition correctly points out, the “general contract depiction[s]” provided in the PPET Report and the “general contract description[s]” provided in the Synopsis presented in the Center’s Legal Brief fail to “remove the problems” with the past performance evaluation that were “identified by the ODRA” in the F&R. See HyperNet Opposition at 10.

On reconsideration, CNI also contends that “[c]ontrary to the ODRA’s stated belief, the data [identified] in the [ODRA’s] Table is drawn not from the [Part 2] references, but from the information HyperNet supplied” in Part 1 of its past performance questionnaires. RR at 24. CNI appears to argue that because some of the information

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cited in the ODRA's Table came from descriptions prepared by HyperNet, the ODRA's reliance on Part 1 of the past performance questionnaires is misplaced.

As a preliminary matter, the record shows that HyperNet's identified contracting references had e-mailed or faxed a copy of the complete past performance questionnaire—that is, Part 1 and Part 2—to the Center. *See e.g., Center Response*, Exh. No. 8, *Past Performance Questionnaires*: (1) [DELETED] PDF-mail; (2) [DELETED] Facsimile Transmission; (3) HyperNet Cover Letter to Second [DELETED] Reference; (4) [DELETED] PDF E-mail; and (5) Contracting Reference's Annotations in Part 1 of Aero Net past performance questionnaire. *See Center Response*, Exh. No. 8. As a result, in the event—as CNI speculates—that HyperNet misreported any detail of its past performance in Part 1 of the questionnaire, the reference for that contract certainly could have clarified or corrected the erroneous information in its Part 2 submission. Notably, none of the Part 2 information submitted by HyperNet's contracting references contradicts the information submitted by HyperNet in Part 1. In fact, when read as a whole, it reasonably appears that the references' Part 2 submissions supplement and elaborate on HyperNet's Part 1 submission. Moreover, as explained below, there is simply no basis to support CNI's contention that the ODRA's Table was inaccurate.

To bolster its challenge against the ODRA's Table, CNI contends that the [DELETED] description used by the ODRA therein to describe the first HyperNet contract is inaccurate because the description was adopted from Part 1 of HyperNet's past performance questionnaire. CNI apparently neglected to review the contract description offered by the [DELETED] Program Manager in Part 2 of that same past performance questionnaire—which describes “support services” provided by HyperNet on an advanced technology [DELETED]⁷ *See Past Performance Questionnaire*, ¶ I and ¶ III at 6.

⁷ [DELETED]

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CNI alternatively contends that the GIS IT contract support should not be credited to HyperNet given the [DELETED] Program Manager's report that HyperNet's role was limited to managing services provided by incumbent personnel. Notwithstanding CNI's contention, it is long-established that a contractor may rely on the experience of its employees to demonstrate its past performance capability. *See Protest of J. A. Jones Management Services*, 99-ODRA-00140. Moreover, in this case, the record shows that the Solicitation required each offeror to "provid[e] a detailed plan to retain skilled personnel to reduce turnover and retraining." See ¶ M002, Business Approach/Strategy, Sub-factor 2, Recruit Retainment Plan at 78, Consistent with this requirement, both the HyperNet and CNI proposals emphasized retaining and hiring the incumbent personnel currently performing the required administrative services under another contractor's management. See F&R, FF Nos. 18 and 34; CNI Proposal, Volume II at 6 and Volume III at 41.⁸ Notably, the record also shows that the Center rated both HyperNet's and CNI's proposed incumbent personnel as [DELETED]. *See F&R* at 33.

In addition, while CNI maintains that this particular contract required HyperNet to provide purely IT technical support—and not administrative services—the [DELETED] Program Manager's description of the work in Part 2 clearly states that the contract required "general familiarity with IT staffing" and the provision of "suitably [sic] [Human Resources] and payroll (backroom) support for the on-site staff." *See [DELETED] Past Performance Questionnaire Submission*, ¶ 11 at 7. Notably, the Solicitation at issue in the Protest defines the required "administrative support services" according to the detailed descriptions provided for each of the Solicitation's required labor categories. *See Solicitation, Attachment No. 3 to Performance Work Statement, LABOR CATEGORY/DEFINITIONS of SKILLS* ("Attachment No. 3"). Several of the identified position descriptions focus on performing purely administrative assistance. For example, the first three Administrative Assistant position descriptions specify office-manager duties, call-desk work, and document management, *see Attachment No. 3*, at 1-2. However, the majority of the remaining labor categories and positions specify descriptions that require a mix of administrative support services and "subject matter

⁸ HyperNet was scored [DELETED] than CNI under this sub-factor. *See TER*.

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expertise.” *Id.* at 3-6. For example, the Training Program Assistant I position requires telephone, typing, and filing skills, the preparation of “MS Exce[l] spreadsheets and MS Access skills,” as well as “participation in the further development and operation of various . . . databases.” *Id.* at 4. Given the broad mix of required administrative and technical skills and expertise outlined in the descriptions accompanying the Solicitation’s required labor categories and positions, CNI’s contention that HyperNet’s [DELETED] support service work does not constitute administrative support services within the context of this requirement is unpersuasive.

Finally, CNI contends that the ODRA made a material mistake of fact by concluding that the Center improperly identified HyperNet’s [DELETED] contract as a [DELETED] contract. The record shows that both parts of the submitted past performance questionnaire clearly identified the referenced work as a [DELETED] contract. First, the fax coversheet that accompanied this questionnaire clearly showed that the sender was [DELETED] and that this acquisition was an “IT, System Design, Custom Programming, and Administrative Support Support Services” contract. *See Center Response*, Exh. No. 8, [DELETED] *Submission*. Moreover, Volume IV of HyperNet’s proposal clearly explained that while the required contract work was being performed in [DELETED], the contract was awarded and administered by [DELETED]. *See HyperNet Proposal, Volume IV* at 4 and 6.

To the extent CNI’s reconsideration request also takes issue with the ODRA’s reliance on the wording of the past performance synopsis set forth in the Center’s Legal Brief rather than on the exact terms used in the PPET report, the ODRA finds this argument meritless. First, as noted above, the Legal Brief expressly offered a somewhat more detailed past performance synopsis (“Synopsis”) that summarized and reportedly was based on the PPET Report. *See Legal Brief* at 18-19. In contrast to the Center’s explanation and Synopsis of its past performance questionnaire analysis, the PPET Report failed to report the dollar value of the referenced contracts and excluded the second [DELETED] contract. *See ADD PPET Report*. In addition, for reasons that were discussed in the F&R, the PPET Report failed to explain the past performance relevancy scoring set forth

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therein. *See F&R* at 56. Notably, notwithstanding the Legal Brief's obvious reference and nexus to the PPET findings, CNI does not take issue with the Legal Brief's Synopsis, description or analysis. As noted in the F&R, the ODRA's determination, that the Center's assignment of a [DELETED] past performance rating to CNI was defective, stemmed from the PPET Report that was included in the Center's ADD. In that report, the PPET inexplicably justified the CNI [DELETED] rating using the Solicitation's definition for the lower [DELETED] rating. *See F&R* at 33. No explanation for the rating beyond the Solicitation's definition was provided by the Center.

On reconsideration, CNI contends that FF No. 81 of the F&R set forth "a highly material factual error," *see RR* at 28, because one the PPET's evaluation scoring sheets ("PPET Scoring Sheet") shows that CNI was assessed with a [DELETED] rating using the correct Solicitation description. *See Center Response*, Exh. No.10. CNI's argument is baseless. First, the PPET Report proffered by the Center was set forth as an Attachment to the ADD—which was prepared by the Contracting Officer, who also served as the Source Selection Official, and which was offered to the ODRA as the Center's formal and final analysis and justification for the award. Notably, the record shows that the Center instructed the personnel involved in this procurement that "the ADD should be a stand-alone document," and suggested "[e]nhancing the ADD for such a high profile/large\$/complex [sic] award [to] assist [with] any future reviews, audits." *See Center Response*, Exh. No. 20 at 6. In the first paragraph of the ADD, the Contracting Officer refers to this report as the "document [that] contains the written justification and rationale for basis of award." *See ADD* at 1.

In any event, even if the PPET Scoring Sheet is viewed as more reliable as a final evaluation document, the [DELETED] evaluation of CNI is still without a rational basis because neither the PPET Report nor the Scoring Sheet provide an explanation for CNI's score. *See F&R* at 53-56. Instead, the only explanation offered was the rating itself, and the Solicitation's corresponding generic definition for that rating. *Id.* It is well established that all agency procurement decisions—including the above-referenced past performance evaluation of CNI—must be supported by substantial evidence in the record.

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See Protest of Optical Scientific, Inc., 06-ODRA-00365; *Protest of Mid Eastern Builders, Inc.*, 04-ODRA-00330.

During the HyperNet Protest adjudication, the Center’s past performance evaluation was squarely challenged by HyperNet, briefed by the Center, and addressed in separate Comments by both HyperNet and CNI. This ground of CNI’s reconsideration request is simply a thinly disguised attempt to re-litigate the original past performance protest challenge.⁹ As such, the argument does not satisfy the standard required for reconsideration in that it neither demonstrates a clear error of fact or law, nor is it based on previously unavailable evidence. *See Reconsideration F&R, Protest of Raytheon Technical Services* dated April 10, 2002, *supra*.

3. CNI Contends That The ODRA Erroneously Determined That CNI’s Proposed Pricing Schedule Failed To Comply With A Material Solicitation Requirement.

a. Background

The Solicitation required that a Task Supervisor I and a Task Supervisor II be provided to perform full-time positions, for at least forty hours per week. *See F&R* at 58. Because CNI proposed [DELETED] hours for the Task I Supervisor position in its Proposal’s Pricing Schedule, HyperNet’s Protest contended that the CNI Proposal failed to comply with a material Solicitation Requirement. *See F&R* at 57. The ODRA concluded that because CNI’s Pricing Schedule had improperly reduced the Center’s [DELETED] hour estimate for this position to [DELETED] CNI had “nullified [its] obligation to fill the

⁹On reconsideration, CNI initially identified one alleged misstatement in the ODRA’s summary of one of the Center’s legal arguments. *RR* at 28. The sentence in question—which does not impact the ODRA’s analysis—stated that the Center had reported that CNI and HyperNet received “equal” past performance ratings and similar PPET comments. *See F&R* at 53. The ODRA’s statement was based on the Center’s assertion that “[r]eview and analysis of these [offerors’] Past Performance Questionnaires and their evaluations [*see Center Response*, Exh. No. 10] disclosed contract performance of a similar nature, a similar dollar value, and a similar number of contract personnel as the contract anticipated by this SIR.” *Legal Brief* at 19. Even though the record otherwise clearly established the difference between the two offerors’ past performance treatment by the Center and CNI has since treated this sentence as an accurate representation, *see CNI Reply* at 5, the ODRA nevertheless has clarified the F&R by amending the language to remove the inadvertently used word “equal” from the sentence. *See Attached, Modified F&R*, page 53.

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Center's need during the period of the Contract—and had prohibited the Center from ordering any Task Supervisor I services. *Id.* at 58-59.

b. CNI's Contentions

In its Reply to HyperNet's Opposition, CNI contends that this portion of the F&R constituted a material legal error because the F&R cited inapplicable federal precedents, and because CNI's proposal obligated it to provide Task Supervisor I services when requested by the Center. *See RR* at 34-39; *CNI Reply* at 10-12. CNI further contends that language in the Pricing Schedule Instructions permitted CNI to propose [DELETED] hours for Task Supervisor I services. *RR* at 32-33; *CNI Reply* at 10. Finally, CNI contends that notwithstanding the [DELETED] hours set forth in its Pricing Schedule, its proposal otherwise obligated it to provide Task Supervisor I services because it proposed a pricing rate for this position during the base year of performance. *RR* at 40. Alternatively, CNI maintains that:

because the "Task Supervisor I position is subsumed in the Task Supervisor II position, CNI Aviation's decision to [DELETED] Task Supervisor II [DELETED] would by definition also cover any requirements to provide a Task Supervisor I . . . "

See RR at 40-41.

Finally, CNI maintains that the ODRA's analysis of this issue is flawed because the ODRA did not find that HyperNet's proposed [DELETED] estimates for the Task Supervisor I position during the fourth and fifth option years of the contract constituted a fatal flaw in HyperNet's proposal. *See CNI Reply* at 12-14.

c. Discussion

CNI contends that the three cases cited by the ODRA in the F&R on this issue are distinguishable because, in contrast to this Requirements Contract, each of the cited cases ultimately held that the contractual instruments at issue were not requirements contracts. *See R&R* at 34-39. The cases cited were: (1) *Travel Centre v. Barram*, 236 F.3d 1316,

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1318 (Fed. Cir. 2001); (2) *J. Cooper & Associates, Inc. v. United States*, 53 Fed. Cl. 8 (2002); and (3) *International Data Corp. v. United States*, 64 Fed. Cl. 642.

CNI's argument misses the point for which these cases were cited in the F&R. While each case concluded that the contracts involved were *not* requirements contracts, each case specifically addressed the legal obligations of parties under a requirements contract. *See e.g., Travel Centre v. Barram, supra* at 1318-1319 (“[a] requirements contract requires the contracting entity to fill all of its actual requirements for supplies or services that are specified in the contract”); *Accord International Data Products Corp. v. United States, supra* at 648 (“[i]n a requirements contract, the purchaser agrees to buy all of its needs of a specified material from a particular supplier and the supplier agrees, in turn, to fill all the purchaser's needs during the period of the contract”); *J. Cooper v. United States, supra* at 16-19 (“a requirements contract requires the contracting government entity to fill all of its actual requirements for supplies or services that are specified in the contract, during the contract period, by purchases from the contract awardee.”). HyperNet's Opposition correctly points out and the F&R concluded that the Solicitation clearly required “offerors to propose [DELETED] Task Supervisor I hours.” *See HyperNet Opposition* at 7; *F&R* at 58-59. By proposing a firm [DELETED] hours for the Task Supervisor I position, CNI essentially redefined the legal rights of the parties. The Center could not require CNI to supply a Task Supervisor I since this category was not specified in CNI's proposal. *Id.*

CNI next maintains that a portion of the Pricing Schedule's instructions “Pricing Instructions”) permitted CNI to propose [DELETED] for the Task Supervisor I position. This

argument is based on the following language in the Pricing Schedule which for the base year and each option year states, in relevant part:

Contractors shall fill-in the estimated number of supervisory hours based on their own supervisory plan. Plans that do not provide realistic and adequate supervision may be determined unacceptable.

See Solicitation, Schedule B at 4, 7, 10, 13 and 16.

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While the Pricing Instructions permit an offeror to propose a different hourly estimate for the supervisory positions, they do not permit the unilateral [DELETED] category of supervision by CNI. In contrast to CNI’s proposal, the Pricing Instructions clearly permitted HyperNet to propose a lower number of Task Supervisor I hours for [DELETED] years of the contract. As a result, HyperNet’s proposed use of a [DELETED] estimate for the Task Supervisor I (and II) position during the contract’s [DELETED] is unobjectionable. Unlike CNI’s elimination of a supervisory category, HyperNet’s offer of a [DELETED] was expressly permitted by the Solicitation.

CNI’s contention, that its proposal otherwise obligated it to provide the required estimate of Task Supervisor I services because it included a price for these services, is unpersuasive. To that end, for the Task Supervisor 1 position, CNI proposed the following:

Labor Category	Estimated Annual Requirements	Unit Per HR	Labor Hour Rate \$	Total Estimated Amount \$	Overtime % 28.11%
Task Supervisor I	[DEL.]	[DEL.]	[DEL.]		[DEL.]

See CNI Proposal, Schedule B at 7.

CNI’s inclusion of the [DELETED] labor rate does not alter the fact that CNI [DELETED] the Agency’s [DELETED] hour estimate for the Task I Supervisor Position. Where, as here, an offeror modifies the terms of the obligations and services in the Solicitation and submits a proposal that fails to address every mandatory Solicitation requirement, it does so at its own risk. *See Protest of Royalea’L Aviation Consultants, 04-ODRA-00304C.*

To the extent CNI suggests that remand to the Center is required so that discussions can be conducted to confirm CNI’s intent with respect to the Task Supervisor I position, it is well established that under the Acquisition Management System (“AMS”), the offeror

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bears the risk of, and is responsible for, its failure to provide critical and accurate information in its proposal. *See Protest of New Bedford Panoramax Corporation*, 07-ODRA-00414. Moreover, the AMS policy favoring discussions is not aimed at providing an offeror with a second bite at the apple—*i.e.*, the opportunity to provide needed detail that is missing from a proposal. *Id.* *See Protest of IBEX Group, Inc.*, 03-ODRA-00275.

Moreover, the issue of CNI's proposed [DELETED] Task Supervisor I Services was squarely raised and briefed by all the parties—including CNI. *See CNI Comments* at 3. The fact that HyperNet had proposed [DELETED] Task Supervisor I estimates for the [DELETED] of the Contract was also evident from the record—which included HyperNet's proposal. Since this argument's underlying facts were clearly available to CNI during the adjudication, CNI cannot now attempt to introduce this argument on reconsideration. Relevant or potentially relevant facts known by, or available to a party during pendency of an adjudication, but not brought forward, may not support a reconsideration request. *See Request for Reconsideration of Protest of Consecutive Weather, supra* (and cases cited therein). Under these circumstances, this basis of CNI's reconsideration request is untimely, not supportable and otherwise constitutes mere disagreement with the outcome of the adjudication.

4. CNI Contends That The Directed Award Was Not Justified

a. Background

The ODRA concluded based on the record that the award to CNI lacked a rational basis and that HyperNet had won the competition. Thus, the ODRA recommended and the Final Order directed that the CNI contract be terminated for convenience and that a new contract for the required services be awarded to HyperNet.

b. CNI's Objection To The Directed Award Remedy

On reconsideration, CNI challenges the directed award to HyperNet on the ground that the ODRA has, in other cases, “declined to direct contract award in cases with facts

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similar to this one, particularly where there is no certainty as to who the successful offeror would be.” *RR* at 51.

Notwithstanding this assertion, as noted in the F&R, the ODRA has broad discretion to recommend remedies for a successful protest—and may choose to recommend a remedy appropriate to the Agency’s needs. *See* 14 C.F.R. § 17.21; *Consolidated Protests of Camber Corporation and Information Systems and Networks, supra*. Moreover, the ODRA has recommended a directed award where the situation warranted it. *See Protest of Frequentis*, 02-ODRA-00231. The ODRA cases CNI advances here, *e.g.*, *Protest of Danka Office Imaging Company*, 98-ODRA-00099, involved situations where the record was “far from clear as to which offeror would have been the best value.” Here, the record unequivocally shows that but for the Center’s evaluation errors, HyperNet represented the best value. The record showed, and the ODRA found that:

- HyperNet’s past performance had been improperly downgraded, and there was no justification in the record for CNI’s [DELETED] score;
- HyperNet’s technical score was [DELETED] than CNI’s score—and exceeded the other offerors’ technical scores by a substantial margin;
- HyperNet submitted the lowest-priced proposal of all the offerors and that its price was almost [DELETED] lower than the price offered by CNI.

When each offeror’s past performance scores were added to their technical scores, CNI was ranked [DELETED] than HyperNet. Despite the proximity of the scores, the Center determined—without explanation—that CNI’s [DELETED] advantage warranted an almost [DELETED] higher price premium. As noted in the F&R, the written justification for this “best value” analysis references CNI’s superior past performance. However, for the reasons discussed above, the ODRA concluded that neither offeror’s past performance score was rationally based; that is, the record did not reflect the

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[DELETED] past performance score received by CNI nor did the record provide any rational basis for HyperNet's [DELETED] past performance ranking. *See F&R* at 63. Moreover, as noted above, there was no rational basis for the Center's stated preference for CNI on technical grounds given that the Center itself had rated HyperNet [DELETED] than CNI on technical merit. In that regard, in its debriefing letter to HyperNet, the Center paradoxically stated both that HyperNet's "proposal received the **highest overall technical evaluation** ([DELETED] out of [DELETED] points)" and that "the extra value to the agency derived from [CNI's] **technical superior merit** (demonstrated by its superior technical proposal) is considered to warrant the relatively modest evaluated price premium required to award to CNI Aviation." *See Center Debriefing Letter to HyperNet* dated July 26, 2007 at 1-2 (emphasis added).

Under these circumstances, where the record clearly showed that: (1) the difference between the CNI and HyperNet non-price category ratings were minimal; (2) there was no rational basis for the past performance evaluation or rating of either offeror; and (3) the best value analysis proffered to support the selection of CNI's almost [DELETED] percent higher price lacked a rational basis, the ODRA exercised its broad discretion under the AMS to recommend that the Protest be sustained and the contract be awarded to HyperNet. *See Protest of Frequentis*, 02-ODRA-00321. CNI's disagreement with the remedy, while understandable, does not constitute a basis for reconsidering the remedy. *See Raytheon Technical Services Company, supra*.

III. CONCLUSION

For the reasons stated herein, the ODRA will not recommend reconsideration of the Final Order in this case.

_____/S/
Behn M. Kelly
Dispute Resolution Officer
Office of Dispute Resolution for Acquisition

APPROVED:

_____/S/
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