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a competitive advantage to Midwest, and also resulted in a flawed evaluation of both price and risk. *Supplemental Protest* at 2, 8-9.

For the reasons stated more fully below, the ODRA finds that substantial evidence in the record does not show that different CBA rates were provided to Midwest and IBEX. The ODRA further finds that minor discrepancies in Midwest's proposal that used lower Health & Welfare ("H&W") rates rather than the rates stated in applicable wage determinations did not prejudicially affect the price or risk evaluation.

The ODRA, therefore, recommends that the Protests be denied in their entirety.

II. Findings of Fact

A. The Solicitation as Amended

1. The Solicitation was issued on May 3, 2012. *Agency Response* ("AR") Tab 1 at § A.
2. The Solicitation was amended four times. AR Tabs 2 to 5.
3. As amended,¹ the Solicitation explained the purpose of the procurement as:

1.1 Objective. The objective of this contract is to acquire the services of weather observer personnel who will provide augmentation and/or back up to the Automated Observing Systems, and to [sic] take manual observations as necessary.

AR Tab 3 at § C.1.1.

4. As amended, Section B of the Solicitation contained fixed-price tables for 17 separate "groups." AR Tab 5 § B.² Each "group" contained several contract line item numbers ("CLINs"), with each CLIN corresponding to services for a specific geographical location within the group's regional boundaries. *Id.* Each CLIN was priced using

¹ All findings of fact herein that discuss the Solicitation refer and cite to the last amendment applicable to the Solicitation section discussed.

² Group 6 was eliminated as a separate group by Amendment 00004. AR Tab 5 § B.

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monthly fixed-prices, and included an extended price for the year. *Id.* Each group had tables for a base year (of ten months) and four option years (each for twelve months). *Id.* At issue in this Protest is the award for Group 16, and the base year of ten months for that group is set forth below:

B.2 BASE YEAR

CLIN#	Airport Location	Site ID	Year	Quantity	Unit	Unit Price	Total Price
01601	Cordova Merle K. Smith Mudhole Arpt. Cordova, AK	CDV	1	10	Mo.	-\$	-\$
01602	Gulkana Arpt., Gulkana, AK	GKN	1	10	Mo.	-\$	-\$
01603	Juneau Int'l., Juneau, AK	JNU	1	10	Mo.	-\$	-\$
01604	Petersburg James A. Johnson Arpt., Petersburg, AK	PSG	1	10	Mo.	-\$	-\$
01605	Sitka Rocky Gutierrez Arpt., Sitka, AK	SIT	1	10	Mo.	-\$	-\$
01606	Valdez Pioneer Field Arpt., Valdez, AK	VDZ	1	10	Mo.	-\$	-\$
01607	Wrangell Arpt., Wrangell, AK	PTK	1	10	Mo.	-\$	-\$
	TOTAL						

AR Tab 5 at Group 16, § B.2.

5. Section B for each group also explained (and emphasized by a border around the text):

B.1.1 FULLY BURDENED FIXED PRICE COSTS:

The proposed fixed priced costs in “Section B” are fully burdened. Other than the annual economic adjustments, the government will not recognize any additional costs which are not made a part of the contractor’s proposed firm-fixed price amount.

For example, the Prime and subcontractor proposed fixed price amount should be fully burdened and include all costs associated with necessary desk-top computer equipment, micro-computers, computer usage, telephones, reproduction services, and any other costs associated with running a successful company in the business of performing contract weather observation. The fixed price amount must also include the profit.

AR Tab 5 at Groups 1 to 18, § B.1.1.

6. Section H of the Solicitation explained: (1) the Service Contract Act applied to weather services under the contract; (2) collective bargaining agreements (“CBA”) may apply; and (3) how applicable CBAs may be obtained. Specifically, the Solicitation stated:

H.12 SCA MINIMUM WAGES AND FRINGE BENEFITS

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(Applicable to Successor Contract Pursuant to Predecessor Contractor Collective Bargaining Agreements (CBA))

This clause is incorporated in full text as follows

SERVICE CONTRACT ACT (SCA) MINIMUM WAGES AND FRINGE BENEFITS

An SCA wage determination applicable to this work has been requested from the U.S. Department of Labor. If an SCA wage determination is not incorporated herein, the offerors shall consider the economic terms of the collective bargaining agreement (CBA) between the incumbent contractor and the union (See Section J for the sites that have CBA). If the economic terms of the collective bargaining agreement or the collective bargaining agreement itself is not attached to the solicitation, copies can be obtained from the Contracting Officer. Pursuant to Department of Labor Regulation, 29 CFR 4.1b and paragraph (g) of the clause "Service Contract Act of 1965, As Amended," the economic terms of that agreement will apply to the contract resulting from this Screening Information Request (SIR), notwithstanding the absence of a wage determination reflecting such terms, unless it is determined that the agreement was not the result of arm's length negotiations or that after a hearing pursuant to section 4(c) of the Act, the economic terms of the agreement are substantially at variance with the wages prevailing in the area.

AR Tab 2 at § H.12.

7. Section H further explained how the fixed prices would be adjusted for future wage determinations by the Department of Labor:

H.13 WAGE RATE DETERMINATION

H.13.1 The wage determination issued under the Service Contract Act of 1965 by the Department of Labor (DOL) for Occupation Code 30621, Weather Observer, Upper Air and Surface shall apply to this contract. Any and all wage determinations that are applicable to weather observation services are attached and made a part of hereof and must be adhered-to by the contractor and/or subcontractor(s). However, this provision must not relieve the contractor or any subcontractor of any obligation under any State minimum wage law which may require the payment of a higher wage. THE WAGE RATES INCORPORATED UNDER CONTRACT FOR OR DURING A FISCAL YEAR WILL BE THE SAME WAGE RATES, APPLICABLE (FOR ALL COUNTIES UNDER THAT WAGE DETERMINATION) FOR THE ENTIRE FISCAL YEAR.

H.13.2 The contractor MUST NOT pay its employees less than the established DOL minimum wage rate or the applicable rate in the CBA incorporated under contract for the performance year.

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H.13.3 Wage rate adjustments will be allowed under this contract under the following circumstances:

At the beginning of each fiscal year, DOL wage rate determinations will be established under this contract for the period October 1 through September 30. If the DOL minimum wage rate or the CBA rate exceeds the established rate indicated in Attachment J-2 for an option period, the FAA will make an upward price adjustment to meet the DOL minimum wage rate requirement. Any such adjustment will be limited to increases in wages or fringe benefits as described above, and the concomitant increase in social security and unemployment taxes and workmen's compensation insurance, but will not otherwise include any amount for general and administrative costs, overhead, or profits. The FAA will not make any adjustments if the DOL wage rate or CBA rate is lower than the contractor's rate. In this instance, the contractor shall pay its employees the higher of the two rates.

H.13.4 When incorporated under this contract, Wage Determinations will be provided under Section J, Attachment 2.

AR Tab 2 at § H.12.

8. The Solicitation also incorporated by reference Acquisition Management System ("AMS") Clause 3.2.4-4, "Fixed-Price Contracts with Economic Price Adjustment-Labor and Material (APR 1996)." AR Tab 1 at § I.

9. Section L. described how proposals would be evaluated:

L.11 SOURCE SELECTION PROCESS

During the evaluation process, the FAA will evaluate each offeror's proposal, using information submitted to the FAA, presented in written form by each offeror, to determine who meets the minimum qualifications as addressed in Paragraph L.10. The FAA will evaluate each offeror's capability to perform the effort required by Section C of this SIR, as evaluated by the following:

- (a) Evaluation of the "Offer and Other Documents" submission,
- (b) Evaluation of the offeror's Technical proposal,
- (c) Evaluation of the offeror's Past Performance/Relevant Experience,
- (d) Evaluation of the Price proposal, and
- (e) An assessment of the risks inherent in each offeror's proposal that would accrue to the FAA should that offeror be selected for award.

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At any point during the evaluation of Offers, the FAA may determine, based on information submitted by an offeror, that the offeror does not have a reasonable chance of receiving an award and that offeror will be rendered no longer eligible for award and will be eliminated from further consideration. Any offeror eliminated from further consideration will be officially notified in writing.

AR Tab 4 at § L.11.

10. Provision L.21 described the expectations for the Price Proposal. It states:

L.21 VOLUME IV – PRICE PROPOSAL

L.21.1 General

L.21.1.1 The Price Proposal must be in a separate, sealed container marked “PRICE PROPOSAL.”

L.21.1.2 The proposed annual price should reflect all estimated costs. Each month, the FAA will pay the contractor one-twelfth of the annual prices listed in Section B of the contract. The FAA will not reimburse the contractor for any additional costs. Any adjustments to the prices in Section B will result solely from wage determinations and collective bargaining agreements.

L.21.1.3 The Technical Proposal (Volume II) must not include any price information.

L.21.1.4 Unrealistically low proposed prices may indicate that the offeror does not understand the government’s requirement and, consequently, may be grounds for eliminating a proposal from the competition.

L.21.1.5 The contractors are responsible for providing insurance in accordance with Section H.17 of this contract.

L.21.2 Required Tables.

L.21.2.1 In Volume I, Offer and Other Documents, the offeror must complete Section B by entering proposed annual fixed prices by site. In Volume IV, Price Proposal, the offeror and each of its proposed subcontractors must complete Tables A through C. The purpose of these tables is to establish the baseline for future adjustments of prices resulting from DOL wage determinations and collective bargaining agreements. Formats for Tables A through C are in Attachment L-1. The offeror or subcontractor must enter in the heading of each table the applicable group number and contract year.

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L.21.2.2 Table A is a breakdown by element of cost of the annual prices for each site. The proposed total price should reflect all estimated costs. The offeror or subcontractor may modify the format as appropriate. Each proposed subcontractor must submit Table A, and the totals must match the subcontract amounts in the offeror's Table A.

L.21.2.3 Table B is a breakdown of the direct labor costs. The totals must match the amounts on the direct labor line of Table A. Direct labor hours are hours worked. They exclude paid absence such as vacation and holiday leave. Weather observers regularly scheduled to work on a recognized holiday receive pay or compensation in accordance with F.9.

L.21.2.4 Table C shows the details of fringe benefits. Although the offeror or subcontractor may propose an overhead rate that includes fringe benefits, rather than a separate fringe benefit rate, it must list the fringe benefit components in sufficient detail to permit the determination of costs subject to adjustment for wage determinations or collective bargaining agreements.

L.21.2.5 Additional tables for sites subject to conversion from full-time to part-time: H.24 confers to the government the right to convert some of the Contract Weather Observer sites from full-time to part-time. Attachment J-9 identifies these sites and lists the anticipated part-time hours of operation of each. If the offeror is proposing for a group that includes one or more of these sites, then it must submit additional Tables A, B, and C. These additional tables must take into account the hours of operation in Attachment J-9. They are required only for those sites listed in that attachment.

L.21.3 In accordance with paragraph L.5, the offeror must be able to cover 90 days of contract expenses. The offeror must demonstrate that it has funds and/or a line of credit from a financial institution equal to one-quarter of the combined base year price of the two highest-priced groups being proposed; or if only one group is proposed, for that group. The offeror shall, if necessary, include in Volume IV a letter from a financial institution documenting that the offeror has satisfied this requirement. Lines of credit from credit cards for personal use may not be applied toward the satisfaction of this requirement.

AR Tab 4 at § L.21.

11. Section M of the Solicitation addresses the evaluation process for award. *AR* Tab 2 at § M. Given the nature of the current Protest, a detailed discussion of the award factors is not necessary. Relevant language, however, included provision M.1.1, which stated in part:

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M.1.1. AWARD SELECTION: Award will be made to the technically acceptable offeror(s) whose proposal conforms to all requirements of the SIR, has acceptable Past Performance and Relevant Experience, and offers the lowest evaluated reasonable price to the government. Technically acceptable is defined as proposals that meets all requirements of the SIR and demonstrate the technical ability to perform requirements of the Statement of Work.

...

In the event that any Offeror is determined to be technically acceptable, has an acceptable past performance/relevant experience and offers the lowest evaluated reasonable price for more than two (2) groups the Government will award two groups to the offeror at its discretion[.]

The awards will be based on technically acceptable proposal, acceptable past performance and relevant experience and lowest evaluated reasonable price.

The FAA intends to make multiple awards resulting from this Screening Information Request (SIR). The FAA reserves the right not to make an award if such action is in its best interest.

The Technical sub factors will be rated either satisfactory or unsatisfactory. Price will be evaluated for reasonableness and will not be numerically scored, and Past Performance/Relevant Experience will be rated either Acceptable or Unacceptable.

Risk: During the course of the evaluation, potential risks to successful performance of SIR requirements by the offeror will be identified and reviewed by the evaluators. Based on the risk assessment evaluation, an overall adjectival rating describing the risk inherent in each offeror's proposal will be assigned. Risk will be adjectively rated as follows:

High Risk: Great potential exists for serious work performance problems including, but not limited to, work schedule disruptions, degradation of performance or quality problems, even with special emphasis and close monitoring.

Medium Risk: Some potential exists for work performance problems including, but not limited to, work schedule disruptions, degradation of performance or quality problems. However, with special emphasis and close monitoring by the Government, the Contractor will probably be able to overcome the difficulties.

Low Risk: Minimal or no potential exists for work performance problems, including, but not limited to, work schedule disruptions, quality problems.

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Any difficulties that may exist will be overcome with normal emphasis and monitoring.

Offerors are cautioned not to minimize the importance of a detailed, adequate response in any factor due to it not being numerically scored. The offeror who is deemed technically acceptable and has the lowest reasonable evaluated price will receive the award. However, risk assessment of high may render the proposal unacceptable and the offeror ineligible for contract award.

AR Tab 2 at § M.1.1.

12. The Solicitation also states:

M.1.2 ELIGIBILITY FOR AWARD: To be eligible for award, the Offeror must meet all the requirements of the SIR. However, the FAA reserves the right to reject any and all offers if it would be in the best interest of the FAA to do so.

AR Tab 2 at § M.1.2.

13. The price proposals were to be evaluated as follows:

M.2.4 A separate Price Evaluation Team will also evaluate the Offeror's price proposals against the evaluation criteria addressed in Section M.6. The evaluation process will include, but not be limited to, validating and verifying the price data calculations, verifying the Offeror's proposed wage determination minimum rates, and verifying the labor hours proposed for all the SIR CWO requirements.

AR Tab 2 at § M.2.4.

14. Provision M.6, stated:

M.6 PRICE EVALUATION

The FAA will determine the reasonableness of the offeror's proposed prices for the contract period. A price is reasonable if it does not exceed that which a prudent person would pay in the conduct of a competitive business. In determining reasonableness, the FAA reserves the right to compare the offeror's proposed prices to the competing offerors' proposed prices. **Price will not be scored in the evaluation of proposals.**

AR Tab 2 at § M.6.

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15. As finally amended, proposals were due on July 9, 2012, and performance was to start on December 1, 2012. AR Tab 4 at § L.1.

B. The Proposals from IBEX and Midwest

16. IBEX submitted an offer on Group 16. AR Tab 33 at spreadsheet “Revised Bid Sheet.” See also *IBEX Letter to the ODRA*, dated July 18, 2013, attaching Section B of IBEX’s Proposal; and *IBEX Letter to the ODRA*, dated July 21, 2013.

17. Midwest also submitted an offer on Group 16. AR Tabs 30, 31, 32, and 54.

18. For Group 16, IBEX and Midwest used identical labor rates. AR Tab 56, *Supplemental Decl. of the Contracting Officer*, at ¶¶ 3 and 4; *IBEX Comments of September 20, 2013*, at 4; Midwest Comments at ¶ 2.

19. For Group 16, at sites [REDACTED] (“[REDACTED]”), [REDACTED] (“[REDACTED]”), and [REDACTED] (“[REDACTED]”), IBEX used an H&W rate of \$[REDACTED] per hour, while Midwest used \$[REDACTED] per hour. AR Tab 31, at spreadsheet page “16HW.”

20. The Product Team’s comparison of the prices for Group 16 reveal that IBEX’s bid of \$[REDACTED] exceeded Midwest’s bid of \$[REDACTED] by \$[REDACTED]. AR Tab 33, at spreadsheet page “Revised Bid Sheet,” (*compare* cell Q20 with cell Q18).

21. As required by the Solicitation, Midwest submitted a spreadsheet that contained the basis for its price. AR Tab 54. The spreadsheet, which retained the necessary formulas and formatting used for calculation of Midwest’s price, included the H&W rate of \$[REDACTED] per hour for the three sites referenced in the preceding finding of fact. *Id.* Adjusting the cells with an H&W rate from \$[REDACTED] per hour to \$[REDACTED] per hour increases the overall price over five years by \$[REDACTED].

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Id. This equates to one tenth of one percent (0.1%) of Midwest's total price for Group 16.

C. Evaluation and Awards

22. Both IBEX and Midwest received "low" risk ratings. *AR* Tab 33 at spreadsheet "Revised Bid Sheet" (listing letter designations); Tab 36 at 19 (Table A-17), 48 (IBEX as offeror "O"), and 52 (Midwest as offeror "Q").

23. Midwest's assessed risk of "low" was based on findings of "no deficiencies" and that the "proposal was technically satisfactory in accordance with the SIR requirements." Tab 36, at 52.

24. IBEX's assessed risk of "low" was given despite a finding that IBEX "omitted a site specific schedule for one site." *AR* Tab 36, at 48. The evaluators reasoned that this "was a simple omission." *Id.*

25. By letter dated December 18, 2012, IBEX and the other offerors were informed of the award decisions, including the award of Group 16 to Midwest. *Protest* at 11; *see also AR* Tab 8. IBEX did not receive a contract award. *Protest* at 11. Although IBEX requested a debriefing, one never has been provided. *Id.*

26. Although IBEX requested a debriefing shortly after receiving the notice letter of December 18, 2012, a series of correspondence from the Contracting Officer repeatedly postponed the date for the debriefing. *Protest* at 11-12. The last of these communications delayed the debriefing until "NLT March 31, 2013." *Id.* at 12.

D. Proceedings Before the ODRA

27. Electing not to wait for the repeatedly postponed debriefing, IBEX filed the Initial Protest on March 13, 2013. *Protest*, at 1 (ODRA date stamp). The Protest included an allegation that the Product Team gave other offerors older CBAs than those given to IBEX. *Id.* at 13.

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28. The Product Team and IBEX executed an Alternative Dispute Resolution (“ADR”) agreement on March 22, 2013.
29. By letter dated June 11, 2013, IBEX gave notice to the ODRA that it was terminating its mediation with the Product Team, and requested that the adjudication commence.
30. On June 14, 2013, IBEX filed its Supplemental Protest. *Supplemental Protest* at 1.
31. On July 8, 2013, the Product Team filed its Agency Response. *AR* at 1. In that response, the Agency anticipated that IBEX would argue that the Protest and Supplemental Protest encompassed the award of Group 16 to Midwest. *Id.*
32. On July 16, 2013, IBEX filed its Comments on the Agency Response. *IBEX Comments* at 1. IBEX argued that Protest and Supplemental Protest applied to the award to Midwest. *Id.* at 2-10.
33. In a letter to the parties, the ODRA found that the Initial Protest and Supplemental Protest broadly challenged the awards under the Solicitation, including the award to Midwest. *ODRA Letter of July 17, 2013*, at 2. The ODRA directed the parties to identify the groups that IBEX bid, and to notify the awardees for those groups of the protests so that they would have the opportunity to intervene. *Id.* at 2-3. On July 29, 2013, the ODRA conducted a conference call that included IBEX, the Product Team, and Midwest, and briefing on the CBA issue was delayed to give the parties an opportunity to narrow the issues or resolve the matter. *ODRA Conference Memorandum dated July 30, 2013*.
34. Ultimately, resolution was not possible, and during a Status Conference held on August 23, 2013, the ODRA established a briefing schedule to address the matters relating to this Protest. *ODRA Conference Memorandum dated August 23, 2013*.

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35. The Product Team filed its “Midwest Supplemental Agency Response,” with supporting documents, on September 9, 2013. Midwest filed its Comments on September 19, 2013, and IBEX filed its Comments on September 20, 2013.

36. The record closed on September 24, 2013.

III. Burden of Proof

The protester bears the burden of proof, and must demonstrate by substantial evidence that the challenged decision failed in a prejudicial manner to comply with the Acquisition Management System ("AMS"). *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627 (citing *Protest of Adsytech, Inc.*, 09-ODRA-00508). Consistent with the Administrative Procedure Act, 5 U.S.C. §§ 554 and 556, which applies to ODRA adjudications, the phrase “substantial evidence” means that the ODRA weighs whether the preponderance of the evidence shows that the challenged Agency action lacks a rational basis. *Id.* Under the AMS, source selection decisions must be supported by a “rational basis.” *Id.* (citing *AMS Policy* § 3.2.2.3.1.2.5). Where the record demonstrates that a decision has a rational basis and is not arbitrary, capricious or an abuse of discretion, and is consistent with the AMS and the underlying solicitation, the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials. *Id.*

IV. Discussion

IBEX challenges the proposal process by alleging that Midwest was given outdated CBAs showing lower hourly labor rates for weather observers than the updated CBAs given to IBEX. *Protest* at 12. This disparate treatment, according to IBEX, allowed other offerors like Midwest, to provide lower prices than IBEX. *Id.*; *Supplemental Protest* at 2, 6-7. IBEX also asserts that the evaluation process was fatally flawed because the Product Team did not verify the rates that the awardees used to develop their bids, and that the Product Team failed to assess a performance risk for failing to pay the “SCA-mandated wages.” *Id.* at 8-9.

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A. Disparate Treatment.

The ODRA recommends denying IBEX's protest ground relating to disparate treatment. Although the Product Team failed to produce correspondence regarding the CBAs delivered to Midwest, the record shows – and IBEX concedes – that both offerors used the same labor rates for their proposals for Group 16. *FF 18; IBEX Comments of September 20, 2013*, at 4. IBEX, therefore, has not established by the preponderance of the evidence that disparate treatment occurred, and further, it has not established prejudice stemming from any such alleged disparate treatment.

B. Flawed Evaluation

Although the wage rates that both offerors used were the same, there were three differences in the rates the offerors used for health and welfare (“H&W”) benefits at three airports in Alaska, i.e. Cordova (“CDV”), Sitka (“SIT”), and Valdez (“VDZ”). *IBEX Comments of September 20, 2013*, at 4. IBEX charges that the evaluators failed to identify that Midwest's H&W rate of \$[REDACTED] per hour was less than the revised wage determination rates of \$3.71, as reflected in revised wage determinations referenced in Amendment 0003, at p. J-34. *Id.* at 4. According to IBEX, this means that the evaluation under provision M. 2.4. was flawed, and that Midwest should have been eliminated from the competition for failure to adhere to the wage determination H&W rate. *Id.* at 5, n.2.

Midwest anticipated in its Comments that IBEX would raise concerns over the Midwest's H&W rate.³ *Midwest Comments* at 2. Midwest first argues that no prejudice accrues under the erroneous rates because IBEX's offer was approximately \$[REDACTED] higher than Midwest's, but the lower H&W rate accounted for “less than \$[REDACTED] over the five year period.” *Id.* Midwest further posits that neither the Solicitation nor ODRA precedent mandate disqualification for use of incorrect H&W rates. *Id.*

³ Neither the Product Team nor Midwest question whether the Protest and Supplemental Protest sufficiently articulate a challenge to the evaluation of H&W rates found in wage determinations rather than in CBAs.

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As to Midwest's first point, the ODRA finds that use of the correct wage determination rate for H&W of \$3.71 per hour would have resulted in a *de minimis* increase in Midwest's price. Whereas Midwest vaguely represents that the increase "would likely be less than \$[REDACTED] over the 5 year period of performance,"⁴ the ODRA's own analysis shows an increase of \$[REDACTED]. *FF* 21. Thus, use of the incorrect rate itself did not have a prejudicial effect on the relative standing between IBEX and Midwest in determining the award. Put another way, IBEX cannot show prejudice resulting from this *de minimis*⁵ error inasmuch as correction would not give IBEX a substantial chance of receiving an award.

Midwest is also correct that the Solicitation does not mandate that it be disqualified for using an incorrect H&W rate. Provision M.2.4, cited by IBEX, describes the evaluation that the Product Team intended to conduct, but it does not expressly or impliedly require disqualification of an offeror that used incorrect wage determination rates. *FF* 13. IBEX attempts to bolster its argument by relying on a set of "Questions and Answers" ("Q&As") included as Exhibit A to its Supplemental Protest. This set of Q&As was not part of the final Solicitation, but as IBEX explains, was released in relationship to a draft solicitation previously released. *Supplemental Protest* at 4. As such, it cannot be the basis for disqualifying Midwest because draft solicitations and associated Q&As are "part of the market research process ... separate and apart from the Final SIR, which [is] the basis for the competition and controlling as to bidding instructions and application of the evaluation criteria." *Protest of Systems Research and Applications Corporation*, 10-ODRA-00562.

C. Risk Assessment

Finally, IBEX's Supplemental Protest alleges that the Product Team should have assessed a greater risk against Midwest or "any offeror proposing to pay less than the SCA-mandated

⁴ Midwest did not explain how it calculated its approximated sum, nor did it give citations to the documents it relied upon.

⁵ "*De minimis*" is an appropriate characterization, especially in light of AMS Clause 3.2.4-4, "Fixed-Price Contracts with Economic Price Adjustment-Labor and Material (APR 1996)." This clause, which is found in the contract (*FF* 8), provides for a price adjustment when the net effect of "labor (including fringe benefits)" rate changes causes the total contract price to change by at least three percent. *AMS Clause* 3.2.4-4, at ¶ (c) (3). That threshold for adjustment is thirty times the net effect of 0.1 percent found in *FF* 21.

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wages, because such a proposal carries extraordinarily high risks of strikes, legal action, Department of Labor intervention, and other severe disruptions to the work. *Supplemental Protest* at 9. Although IBEX did not press this ground in its Comments of September 20, 2013, the ODRA nevertheless notes that the premise is incorrect. Regardless of the rate it used to calculate its prices, Midwest remains obligated to pay the appropriate compensation to its employees as required by the Service Contract Act of 1965 (codified at 41 U.S.C. 351, et. seq.) and the wage determination. *FFs* 6-8. Midwest's use of one incorrect rate does not evince any intent to disregard the Service Contract Act, nor does it foretell the speculative calamities that IBEX describes. Moreover, the record demonstrates that the Product Team applied the risk factors leniently for a "minor omission." *FF* 24 (IBEX judged "low" risk despite a minor omission). Midwest is entitled to similar treatment, and a higher risk rating would not be appropriate for a minor omission of failing to use [REDACTED] cents (*FF* 19) more in its H&W rate for a portion of sites in Group 16.

V. CONCLUSION

For the reasons discussed above, the ODRA recommends that the Protests be denied in their entirety.

-s-

John A. Dietrich
Dispute Resolution Officer and Administrative Judge
FAA Office of Dispute Resolution for Acquisition

APPROVED:

-s-

Anthony N. Palladino
Director and Administrative Judge
FAA Office of Dispute Resolution for Acquisition