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competitive advantage to Vero, 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 Vero and IBEX. The ODRA further finds that IBEX was not prejudicially affected by the alleged errors in the 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 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.*

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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At issue in this Protest are the awards for Groups 2 and 8. The pricing tables, showing a base of ten months for each of those groups, are set forth below:

B.2 BASE YEAR

CLIN#	Airport Location	Site ID	Year	Quantity	Unit	Unit Price	Total Price
00201	B. Hartsfield Int'l. Arpt., Atlanta, GA	ATL	1	10	Mo.	\$ -	\$ -
00202	Birmingham Int'l., Birmingham, AL	BHM	1	10	Mo.	\$ -	\$ -
00203	Columbia Metropolitan Arpt., Columbia, SC	CAE	1	10	Mo.	\$ -	\$ -
00204	Charleston AFB/Int'l. Arpt., Charleston, SC	CHS	1	10	Mo.	\$ -	\$ -
00205	Huntsville Int'l, Huntsville, AL (HSV)	HSV	1	10	Mo.	\$ -	\$ -
00206	Jackson Int'l Arpt., Jackson, MS (JAN)	JAN	1	10	Mo.	\$ -	\$ -
00207	Mobile Regional Arpt., Mobile, AL	MOB	1	10	Mo.	\$ -	\$ -
00208	Savannah Barbara Municipal Arpt., Savannah, GA	SAV	1	10	Mo.	\$ -	\$ -
	TOTAL						

AR Tab 5 at Group 2, § B.2.

B.2 BASE YEAR

CLIN#	Airport Location	Site ID	Year	Quantity	Unit	Unit Price	Total Price
00801	Albuquerque Int'l Sunport Arpt., Albuquerque, NM	ABQ	1	10	Mo.	-\$	-\$
00802	Wichita Mid-Continent Arpt., Wichita, KS	ICT	1	10	Mo.	-\$	-\$
00803	Adams Field Arpt., Little Rock, AR	LIT	1	10	Mo.	-\$	-\$
00804	Louis Armstrong New Orleans Int'l, New Orleans, LA	MSY	1	10	Mo.	-\$	-\$
00805	Will Rogers World, Oklahoma City, OK	OKC	1	10	Mo.	-\$	-\$
00806	Shreveport Regional Arpt., Shreveport, LA	SHV	1	10	Mo.	-\$	-\$
00807	Tulsa Int'l, Tulsa, Oklahoma	TUL	1	10	Mo.	-\$	-\$
	TOTAL						

AR Tab 5 at Group 8, § 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.

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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
(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:

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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.

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.*

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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.

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.

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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.

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.

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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. The Solicitation provided offerors with the format and basic calculation methods that they were to use to develop prices for the base period and the option years. AR Tab 1, Attachment L-1.

12. 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:

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.

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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. 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.

13. 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.

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14. 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.

15. 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.

16. 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 Vero

17. Both IBEX and Vero submitted offers on Groups 2 and 8. *AR* Tab 33 at spreadsheet "Revised Bid Sheet."

18. Both IBEX and Vero used nearly identical wage and H&W rates in their proposals for the sites in Group 2. A comparison of their proposals shows:

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Group 2						
Location	Proper CBA/WD Rate		Rates in Proposals			Both Wrong
	Rate Type	Rate	AR Tab	Vero	IBEX	
201 - ATL						
WO	\$ 27.15	51.a at 9	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
SWO	34.90		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
H&W	6.00		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
202 - BHM						
WO	20.80	31 at 2w	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
SWO	23.10		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
H&W	3.71	31 at 2HW	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
203 - CAE						
WO	21.35	51.e at appendix	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
SWO	23.60		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
H&W	3.75		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
204 - CHS						
WO	23.45	31 at 2w	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
SWO	26.15		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
H&W	3.70	31 at 2HW	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
205 - HSV						
WO	24.60	51.b at 9	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
SWO	26.80		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
H&W	3.90		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
206 - JAN						
WO	21.92	31 at 2w	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
SWO	23.21		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
H&W	3.71	31 at 2HW	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
207 - MOB						
WO	23.85	51.c. at appendix	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
SWO	26.15		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
H&W	4.00		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
208 - SAV						
WO	22.25	51.d. at appendix	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
SWO	25.50		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
H&W	4.00		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Compare AR Tab 46 (IBEX price proposal excerpts) with Tab 49 (Vero price proposal excerpts). As shown above only at the [REDACTED] site (i.e., “[REDACTED]”) did IBEX use all of the correct CBA rates and Vero use all the older rates. See also AR Tab 52.c. at 9 (showing the older rates with no change to H&W). Notably, IBEX’s H&W rate of \$[REDACTED] per hour at [REDACTED], shown above, is not the rate stated in the applicable CBA.

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19. Both IBEX and Vero also used nearly identical wage and H&W rates in their proposals for the sites in Group 8. A comparison of their proposals shows:

Group 8						
Location	Proper CBA/WD Rate		Rates in Proposals			Both Wrong
	Rate	AR Tab	Vero	IBEX	Delta	
801 - ABQ						
WO	\$ 21.75	31 at 8w	\$(REDACTED)	\$(REDACTED)	\$(REDACTED)	[REDACTED]
SWO	24.17		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
H&W	3.71	31 at 8HW	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
802 - ICT						
WO	22.50	52.e. at appendix	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
SWO	25.00		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
H&W	4.00		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
803 - LIT						
WO	23.50	52.e. at 9	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
SWO	26.00		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
H&W	3.90		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
804 - MSY						
WO	24.80	52.b. at 9	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
SWO	27.65		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
H&W	3.90		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
805 - OKC						
WO	25.20	52.c. at 9	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
SWO	28.00		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
H&W	4.00		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
806 - SHV						
WO	22.00	31 at 8w	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
SWO	24.44		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
H&W	3.71	31 at 8HW	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
807 - TUL						
WO	24.65	52.d at 9	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
SWO	27.55		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
H&W	3.90		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Compare AR Tab 46 (IBEX price proposal excerpts) with Tab 49 (Vero price proposal excerpts). As shown above, only at the [REDACTED] site (i.e., “[REDACTED]”) did IBEX use all the correct CBA rates and Vero use all the older rates. See AR Tab 51.a. at 9 (showing the older rate).

20. As shown below, Vero’s proposed price for both groups, over the base year and four option years, was lower than IBEX’s price:

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	Group 2	Group 8
IBEX	[\$REDACTED]	[\$REDACTED]
Vero	11,192,919.00	11,143,658.00
Difference	[\$REDACTED]	[\$REDACTED]

AR Tab 33 at spreadsheet “Revised Bid Sheet.”

C. Evaluation and Awards

21. Both IBEX and Vero 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 68 (Vero as offeror “Y”).
22. Vero’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 68. This rating reflected consideration of the finding that Vero did not discuss transition to “Limited Aviation Weather Reporting Station” (“LAWRS”) service. *Id.* The transition function was similar to another transition described by Vero, and mitigation of any resulting risk was possible. *Id.*
23. 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.*
24. By letter dated December 18, 2012, IBEX and the other offerors were informed of the award decisions, including the award of Groups 2 and 8 to Vero. *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.*
25. Although IBEX requested a debriefing shortly after receiving the notice letter of December 18, 2012, a series of correspondence from the Contracting Officer repeatedly

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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

26. Electing not to wait for the repeatedly postponed debriefing, IBEX filed the Initial Protest on March 13, 2013. *Protest*, at 1. The Protest included an allegation that the Product Team gave other offerors older CBAs than those given to IBEX. *Id.* at 13.
27. The Product Team and IBEX executed an Alternative Dispute Resolution (“ADR”) agreement on March 22, 2013.
28. 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.
29. On June 14, 2013, IBEX filed its Supplemental Protest. *Supplemental Protest* at 1.
30. 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 awards to Vero. *Id.*
31. 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 Vero. *Id.* at 2-10.
32. 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 Vero. *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, and the Product Team. Briefing on the

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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.*

33. 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.*

34. The Product Team filed its “Vero Supplemental Agency Response” (“AR (Vero)”), with supporting documents, on September 9, 2013. IBEX filed its Comments on September 20, 2013. Vero did not file Comments.

35. 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 Vero 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 Vero, to provide lower prices than IBEX. *Id.; Supplemental Protest at 2, 6-7*. IBEX also asserts that the

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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.

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 Vero, the record shows only two locations (i.e., [REDACTED] and [REDACTED]) out of fifteen wherein IBEX used all the newer rates and Vero used all the older rates. *FFs* 18 and 19. Standing alone, this circumstantial evidence is insufficient for the ODRA to infer that the cause was disparate treatment between the offerors, especially when the flip-side of the record shows that IBEX and Vero used identical rates in [REDACTED] out of 24 rates for the eight sites in Group 2. *FF* 18. Similarly, these two offerors used the same rates for [REDACTED] out of 21 rates for the seven sites in Group 8. *FF* 19. Moreover, the tables found in the findings of fact demonstrate that the IBEX was nearly as prone to using the wrong rate as was Vero. Specifically, Vero and IBEX used identically incorrect rates [REDACTED] different times. *FFs* 18 and 19. In one instance, i.e. the H&W rate for CAE, they used different rates but both were incorrect. *FF* 18. A theory of disparate treatment does not explain these specific errors, and the ODRA will not embrace IBEX’s speculative theory that the few instances where IBEX was correct and Vero was wrong proves that disparate treatment occurred. Accordingly, IBEX fails to meet its burden of proof (*see supra* Part II), and the ODRA recommends that this ground be denied.

B. Flawed Evaluation of Rates and Risk

The Product Team admits that it failed to recognize that both IBEX and Vero used outdated rates for some of the sites awarded under Groups 2 and 8. *AR (Vero)* at 3. It relies instead on a post-protest analysis of the proposals to argue that IBEX has not been prejudiced by the mistake. *Id.* The methodology of the analysis, which was conducted by the Contracting Officer, is a straight-forward substitution of the incorrect labor and H&W rates contained in the proposals’

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spreadsheets with the correct rates. AR Tabs 47 (IBEX); 50 (Vero); and 53, *Contracting Officer's Declaration* at ¶¶ 5 and 7. According to this analysis, Vero's prices are still lower than IBEX's, and IBEX would not have been recommended for award. AR Tab 53, *Contracting Officer's Declaration* at ¶ 9.

IBEX criticizes the Product Team's analysis on many levels. It first argues that the Product Team cannot make the fundamental assumption that only the labor rates and H&W rates should be changed. *IBEX Comments of September 20, 2013*, at 6. IBEX asserts that this approach is speculative, and that IBEX is entitled to the benefit of the doubt as to what other changes to G&A, OH, profit, etc. that IBEX or Vero might have made had they used the correct rates. *Id.* at 6-8. IBEX also notes that the Product Team only corrected the rates in the base year, yet prices were evaluated for the base year and all four options years. *Id.* at 9. According to IBEX, the Product Team's analysis fails to correct for the accumulation of the errors over the years, which is magnified considering that Vero had more erroneous rates than IBEX. *Id.*

The ODRA agrees that the Product Team's analysis is flawed in execution, but it is not flawed to such an extent that IBEX has established prejudice. The errors include, for example, failing to adjust the Vero's erroneous H&W rates at the BHM and JAN sites. *See* AR Tab 50, Group 2, "Table C" at cell H30 and "Table C2" at cell H30. The Product Team's analysis also substituted figures in certain calculated cells that, in their original form, used cross-references to rates found in the upper sections of Vero's spreadsheets. *Compare e.g.*, AR Tab 49, Vero Group 2, "Table 2" cell D39 (referencing rate in cell D1) *with* Tab 50, Revised Vero Group 2, "Table B" cells D39 and D1. Such mathematical or formulaic errors are easily remedied; and corrections to the rates (*see* FFs 18 and 19) for both Vero and IBEX that also respect the internal formulas and cross references in the spreadsheets show that the relative price difference between IBEX and Vero changes very little. As originally proposed, in both Volumes I and IV of their proposals, IBEX and Vero had the following prices for the base years:

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Original Bid Computations		
	Group 2	Group 8
IBEX	\$[REDACTED]	\$[REDACTED]
Vero	1,949,540.00	1,940,446.00
Difference	\$[REDACTED]	\$[REDACTED]
<i>Difference as % of Vero Bid</i>	[REDACTED]%	[REDACTED]%

AR Tabs 45 and 46 (IBEX); 48 and 49 (Vero) (subject to rounding the pennies upward). By comparison, the ODRA finds that applying the correct rates and using the original formulas yields:

As Corrected with Proper Labor and H&W Rates		
	Group 2	Group 8
IBEX	\$[REDACTED]	\$[REDACTED]
Vero	[REDACTED]	[REDACTED]
Difference	\$[REDACTED]	\$[REDACTED]
<i>Difference as % of Vero Bid</i>	[REDACTED]%	[REDACTED]%

As these tables show, making corrections for the rates causes no change in the relative standing of IBEX and Vero in their base-year estimates.

Beyond the need for the corrections above, IBEX’s other criticisms cannot win the day in light of the clear requirement that IBEX, as the protesting party, has the burden to show it was prejudiced by errors made during the award process. *See supra* Part III. Although IBEX objects to the Product Team’s assumption that other aspects of IBEX’s and Vero’s bid would not have changed, IBEX does not provide an affidavit or other evidence describing how its own bid would have changed if it had been given notice of its mistakes during the price evaluation.^{3, 4} Similarly, IBEX does not support its argument that analyzing the base-year fails to account for the accumulated effect during the four possible option years. The worksheets required in the

³ The ODRA rejects the suggestion that the Protective Order restricts proffering such evidence. *IBEX Comments of September 20, 2013*, at n2. The CBA with the applicable rates are available to IBEX. Its original bid, of course, is also in its possession. IBEX, therefore, is perfectly capable of accessing the information in its possession to demonstrate to the ODRA how it could have improved its position in the price evaluation.

⁴ Notably, the offerors were obligated to develop their proposals subject to the Service Contract Act of 1965 (codified at 41 U.S.C. § 351, et. seq.) and the requirement that all awardees would pay the rates established in the applicable wage determination or CBA. *FFs* 6-8. The result is that labor and H&W rates are mathematical constants for each site, whereas the variables in this competition are the mix of labor hours for weather observers and senior weather observers, profit, overhead, and general and administrative expenses. IBEX has not shown the ODRA how identical changes to the constants in the pricing equation would affect its bidding strategy.

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Solicitation use essentially the same calculations for base period and the option years. *FFs 10* (at §L.21.2.1) and 11. As a result, the relative differences in the proposed prices of IBEX and Vero replicate year-after-year during the option years. *Compare AR Tab 45 with Tab 48.* Mathematically, the correction of the base period rates, which results in no change to these offeror's relative standing, must also project year-after-year. IBEX, by contrast, has not provided evidence or otherwise shown that the natural progression of prices over the years would change, and thus, has not met its burden of proof.

Although IBEX cannot demonstrate prejudice based on the errors in the price evaluation, IBEX persists in its argument that “by awarding several Groups to contractors proposing to pay their SCA employees less than the legally-required wages and fringe benefits, the Product Team failed to rationally review performance risk in accordance with the requirements of the SIR.” *IBEX Comments of September 20, 2013*, at 7. IBEX, however, fails to acknowledge that it used nearly the same number of outdated rates as Vero. *FFs 18 and 19.* If risk were to be determined on these grounds, then the same risk would necessarily be applied to both IBEX and Vero, and would not alter their risk ratings relative to one-another. IBEX, accordingly, cannot establish prejudice.

V. CONCLUSION

Although the Product Team during the evaluation failed to verify that IBEX and Vero had used the correct labor and H&W rates when developing their proposals, IBEX has failed to show that it was prejudiced by this error in either the price evaluation or the risk evaluation. 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

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APPROVED:

-S-

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Director and Administrative Judge
FAA Office of Dispute Resolution for Acquisition