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For the reasons set forth in the discussion below, the Office of Dispute Resolution for Acquisition (“ODRA”) recommends that the Protest be denied.

I. Findings of Fact

A. Market Surveys and the Draft Solicitation

1. The NTEP “manages the modernization, distribution, calibration, and inventory of functional test equipment required to perform preventive and corrective maintenance in support of numerous National Airspace System (“NAS”) systems.” *Agency Response (“AR”)* Tab 28 at § C.1.1.
2. On May 8, 2013, the Product Team issued a market survey, DTFAWA-13-D-00002-0002 (“May Market Survey”), “to determine the capability, estimated cost, and interest of vendors to satisfy an ongoing requirement for National Test Equipment Support Contract.” *AR* Tab 4 at Abstract ¶ 2. The May Market Survey was amended twice. *Id.* at 1.
3. Three vendors, including the incumbent contractor, responded to the May Market Survey. *AR* Tabs 6-9; *AR* Tab 32, *Contracting Officer’s Decl.*, at ¶¶ 2 and 4.
4. After analyzing the responses, the Product Team determined the number of participants in the May Market Survey was insufficient and decided to conduct a second market survey. *AR* Tab 32, *Contracting Officer’s Decl.*, at ¶ 5. *See also AR* Tab 9.
5. On July 31, 2013, the Product Team issued the second market survey, DTFAWA-13-R-00001-0001 (“July Market Survey”), and included a draft of the solicitation (“Draft Solicitation”). *AR* Tab 10. The Product Team issued an amendment on October 21, 2013, and required that comments on the Draft Solicitation be submitted by November 4, 2013. *Id.* Comments were to be submitted using a spreadsheet called the “NTES Draft SIR Comment Review Matrix,” which provided columns to explicitly identify clauses and paragraphs that any comments would address. *Id.*

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6. The Draft Solicitation explained that the awardee-contractor would be allowed a 30-day transition period before commencing performance under the contract. AR Tab 10 at § H.3(a). Specifically, the Draft Solicitation provided:

H.3 TRANSITION REQUIREMENTS

(a) Immediately prior to commencement of performance for the contract base year, a 30-day period will be allowed for the transition from one contractor to another to be accomplished in a well-planned, orderly, and efficient manner. This transition period will be the time for initial orientation for contract administration and will provide a time for detailed operational orientation for contract supervisory personnel. It will include a time for transition of administrative processes from present contract to the new contract.

Id. (emphasis added). Inconsistent with this transition period, however, clause F.2 in the Draft Solicitation required performance to begin seven days afterward:

F.2 DELIVERABLES

(a) The Contractor must begin providing scheduled calibration services no later than 7 days after contract award in accordance with the FAA-approved schedule.

Id. at § F.2 (emphasis added).

7. The thirty-day transition, according to the Product Team's Program Manager, is a holdover from past procurements for the same type of services. AR Tab 33, *Program Manager's Decl.*, ¶ 7. Asserting that the transition period "is not a random invention" and certainly not crafted to benefit the incumbent," he explained:

To date there are over 500 FAA sites (located within and outside of the continental U.S.) and approximately 65,000 pieces of test equipment requiring calibration, the vast majority of which have a calibration interval of one year per the recommendation of the original equipment manufacturer (OEM). In other words, there is very little slack time to complete serving the over 65,000 items at 520 different FAA staging areas located in CONUS or OCONUS. In that light, an FAA order addresses this calibration topic by requiring that "[t]est equipment shall be calibrated according to the manufacturer's specifications." FAA Order 6200.4G § 11(f). Therefore, to comply with OEM documentation and, therefore, FAA requirements, I determined that a thirty-day transition period and a static yet aggressive mobile calibration schedule was the only way to successfully complete the task within the given period required by the FAA Order and OEM recommendations.

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Id.

8. The Product Team received six responses to July Market Survey. AR Tab 32, *Contracting Officer's Decl.*, at ¶ 4; AR Tab 19. The vendors that responded included the three that responded to the May Market Survey. *Id.* Five of these responses were submitted on or before November 4, 2013 deadline established by the July Market Survey, and they used the prescribed "NTES Draft SIR Comment Review Matrix." AR Tabs 11 – 15. Bionetic's response, however, did not use the matrix and by its own admission, was not a formal response. *Comments* at 5.
9. One of the responding vendors posed a question regarding provision L.12.4, a provision that addresses small business subcontracting plans. *See* AR Tab 10 at ¶ L.12.4. Specifically, the vendor asked:

How much time will be provided between contract award and first required service dates to allow calibration lab(s) to add required staff and equipment? Will accommodations be made to allow qualified, but smaller calibration labs opportunity to participate in portions of this service need.[sic] Large quantities of equipment such as those listed, unless such accommodations are made, will only allow the very few very large calibration contractors the ability to legitimately bid. Please comment on accommodations in time to allow the numerous good, but smaller labs to participate.

In a response published later with the Solicitation, the Product Team stated:

Clause F.2 on page F-1 contains the schedule of deliverables. The National Test Equipment Program has a requirement for mobile calibration due to the criticality of the equipment to the National Air Space.

AR Tab 22, Comment Review Matrix (CRM).

10. Bionetics also had questions, but the record does not demonstrate that it submitted comments using the "NTES Draft SIR Comment Review Matrix" specified in the July Market Survey. *See* AR Tab 16 (consisting of email correspondence only). Instead, the record of emails between a Bionetics representative and the Contracting Officer shows that Bionetics desired a conversation about six items, including item 3, "Transition." *Id.* The details of the conversation are not in the record, but the Contracting Officer believed

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he gave satisfactory answers and could consider the matter closed. *Id.* Bionetics did not offer in its Comments any evidence (probative or otherwise) that fleshed out its view of the communication found in AR Tab 16. *Comments* at 5.

11. Review of the submissions from the other responding vendors shows that none of their submissions using the “NTES Draft SIR Comment Review Matrix” raised concerns specifically regarding either clause F.2 or H.3. AR Tabs 11 - 15.
12. Based on his experience, the Contracting Officer viewed the “amount of interest in [this] market survey [as] more than sufficient for reasonable competition.” AR Tab 32, *Contracting Officer’s Decl.*, at ¶ 6. In a contemporaneous “Market Research Report,” the Contracting Officer and the Program Office summarized the information received from “four large businesses and two small business[es].” The Contracting Officer “was pleased to see the response from industry.” AR Tab 32, *Contracting Officer’s Decl.*, at ¶ 7. The Product Team determined that the number of responses was sufficient to allow for reasonable competition. AR Tab 19; AR Tab 32 *Contracting Officer’s Decl.*, at ¶ 6.
13. On November 26, 2013, the FAA awarded the single source Notice of Award to Tektronix, Inc. for an interim bridge contract. AR Tab 18. The notice explains:

Tektronix will provide services consistent with the current Statement of Work, and this “bridge” effort will permit the continuation of services until the award of the competitive follow-on contract. The base period of performance for this acquisition is seven (7) months beginning December 1, 2013, and ending June 30, 2014. Three (3) one-month option periods are available and will be exercised at the discretion of the Government. The total estimated value of this contract is \$6,000,152.86 (if all options are exercised).

Id.

14. On January 3, 2014, Bionetics sent a letter to the contracting officer requesting the transition period be extended to 120 days. AR Tab 20. According to the letter, extending the transition period was “required due to extended procurement lead-times associated

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with obtaining required calibration standards and trailers.” *Id.* The letter further explained:

Bionetics has contacted several original equipment manufacturers (Agilent, Fluke, TEGAM, Anritsu...). The lead-time to procure the calibration standards required to support the test equipment included in the draft SIR is between 5 and 14 weeks. Our discussions with trailer manufacturers indicate a similar lead-time to fabricate the number of custom trailers required for this effort.

Id. To support this position, Bionetics included in its letter two quotes with extended lead times from equipment manufacturers. *Id.*

15. On the same day, the Contracting Officer forwarded Bionetic’s 120-day transition request to the NTEP Office. The NTEP Office wrote back on January 8, 2014 to reject the idea:

The NTEP Team discussed the request one of the potential bidders of our National Test Equipment Support Contract made to you. The contractor requested you consider extending the transition time to 4 months for the new calibration contract and that the FAA provide addition[al] materials for submission of their proposal. The NTEP does not consider this an acceptable option.

Two factors are taken into account. The first is the current bridge contract, as the extension is only for 2 months and we do not wish to extend or generate another bridge contract. The second factor speaks to capability as the vendor, the contractor's proposal. They should have all of the required materials by the time a proposal is submitted. How a vendor purposes to accomplish the transition in the time we require would be part of the evaluation of the contractors capability. A request to extend the transition time to 4 months is not acceptable to the NTEP.

AR Tab 21.

B. The Solicitation and the Post-Protest Amendment

16. The Product Team published the Solicitation as a Request for Offers, with unrestricted competition, on January 8, 2014. AR Tab 22. As amended, the Solicitation described the purpose of the procurement as:

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C.1.2 OBJECTIVE

The objective of the National Test Equipment Support Contract is to obtain a broad range of services required by the FAA to support the life cycle management of the [Test, Measurement, Diagnostic Equipment (“TMDE”)] required to maintain NAS systems, facilities, and services. The contract will allow the National Test Equipment Program Manager and other stakeholders to ensure TMDE calibration within the appropriate specified interval.

AR Tab 28 at § C.1.2.

17. The Solicitation, as amended, detailed the scope of services to be provided under the contract:

C.1.4 SCOPE OF SERVICES

The Contractor must furnish the necessary personnel, material, equipment, and facilities necessary to provide a full range of calibration services for all FAA-owned TMDE, calibrated and/or rejected as required by this Statement of Work. Attachments J-1 (FAA Calibration Sites (CONUS)) and J-2 (FAA Calibrations Sites (OCONUS)) are representative of the approximate mix and quantities of TMDE, but are not all-inclusive and are subject to changes as TMDE is replaced and/or disposed of.

AR Tab 28 at § C.1.4.

18. The transition period provided in the Solicitation differed from the transition period contained in the Draft Solicitation. *Compare* AR Tab 28 at § H.3(a) *with* Tab 10 at § H.3(a). Side-by-side quotes, with added emphasis, best demonstrates the difference:

Draft Solicitation (AR Tab 10 at § H.3(a).)	Solicitation (AR Tab 28 at § H.3(a).)
“ <u>Immediately prior</u> to commencement of performance for the contract base year, a 30-day period will be allowed for the transition from one contractor to another to be accomplished in a well-planned, orderly, and efficient manner.”	“ <u>At the beginning</u> of commencement of performance of the contract, a 30-day period will be allowed for the transition from one contractor to another to be accomplished in a well-planned, orderly, and efficient manner.”

19. When the Solicitation was first published, clause F.2 remained unchanged from the Draft Solicitation, stating:

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F.2 DELIVERABLES

(a) The Contractor must begin providing scheduled calibration services no later than 7 days after contract award in accordance with the FAA-approved schedule.

AR Tab 22 at § F.2.

20. On January 21, 2014, Bionetics e-mailed the Contracting Officer requesting clarification of the “amount of time between contract award and commencement of contract performance (transition)[.]” AR Tab 23.
21. The Contracting Officer responded on the same day that the winning bidder would need to be prepared to calibrate within 7 days of the award. AR Tab 24; AR Tab 26.
22. On January 28, 2014, Bionetics filed the initial Protest of Solicitation. *Protest* at 1.
23. On February 7, 2014, the Product Team amended the Solicitation, in part to resolve the previous confusion regarding the conflicting sections pertaining to the transition period and to clarify the 30-day transition period.¹ AR Tabs 28; AR Tab 33, *Program Manager’s Decl.*, ¶ 9. Section F.2 was amended to read:

F.2 DELIVERABLES

(a) The Contractor must submit the initial calibration schedule in accordance with DID-R 009 no later than seven (7) days after contract award. The calibration schedule must be coordinated with the FAA COR prior to submission.

(b) The Contractor must begin providing scheduled calibration services no later than thirty (30) days after contract award in accordance with the FAA-approved schedule.

AR Tab 28 at § F.2 (emphasis added); *see also* AR Tab 29 (summary of the changes made to § F.2). A revision to section C.4.1.8 reiterated the 30-day transition period:

¹ The NTEP announcement on the FAA’s FAACO website was amended multiple times, but the Solicitation itself was only amended one time. AR Tab 32 at no. 8, *Declaration of Contracting Officer*.

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C.4.1.8 Service Schedule and Locations

The Contractor must provide a calibration schedule in accordance with **DID-R009** and upload it to the FAA's NTEP KSN site.

...

The initial submission of the schedule is due seven (7) days after contract award and must define the schedule of calibration of activities beginning thirty (30) days after contract award through the base year of the contract.

...

AR Tab 28 at § C.4.1.8.

C. The ODRA Adjudication Process

24. The ODRA conducted an initial scheduling conference on Monday, February 3, 2014. *ODRA Scheduling Conference Memorandum* dated February 3, 2014. Both parties expressed an interest in using alternative dispute resolution (“ADR”) methods to resolve the Protest. *Id.*
25. After several weeks, the parties informed the ODRA through the appointed neutral that ADR had not resolved the matter, and that adjudication should commence. *Neutral's Letter* dated February 18, 2014.
26. Given the pre-bid nature of the Protest, the ODRA established an accelerated adjudication schedule without objection from the parties. *ODRA Letter* dated February 19, 2014.
27. The Product Team filed its Agency Response on February 27, 2014, one day before bids were due under the Solicitation. *AR* at 1 (ODRA date stamp); *AR* Tab 28.
28. Bionetics filed its Comments (“Comments”) on March 5, 2014, and the record closed.

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II. Burdens of Proof and Persuasion

A protester bears the burden of proof, and must demonstrate by substantial evidence that the challenged decision lacked a rational basis, was arbitrary, capricious or an abuse of discretion, or otherwise failed in a prejudicial manner to comply with the Acquisition Management System ("AMS"). *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627 (citing *Protest of Adsystem, 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 supports the challenged Agency action. *Id.*

In cases alleging unduly restrictive requirements, such as the present Protest, the ODRA recognizes that the determination of a program office's needs and the best method for accommodating them are matters primarily entrusted to the product team. *Protest of Northrop Grumman Corporation*, 00-ODRA-00159. 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. 14 C.F.R. § 17.19(m) (2013); *Protest of Potter Electric Co.*, 13-ODRA-00657.

III. Discussion

Bionetics raises two succinct grounds to protest that the Solicitation is overly restrictive. The first ground posits that only the incumbent contractor can fulfill a requirement "to begin calibration 7-days after award." *Protest* at 5. The second ground asserts that only the incumbent can "comply with ... the short transition period of 30-days." *Id.* As discussed below, the ODRA finds that the first ground is moot and unsupported by the evidence because of the amendment to the Solicitation published shortly after the Protest was filed. The second ground is unsupported by substantial evidence. The ODRA, accordingly, recommends that the Protest be denied in its entirety.

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Ground I – The Seven-Day Schedule Requirement

The original SIR, as published on January 8, 2014, stated that the Contractor “must begin providing schedule calibration services no later than 7 days after contract award in accordance with the FAA-approved schedule.” *FF 6* (emphasis added). The FAA changed this language in an amendment on February 7, 2014 – after Bionetics filed the present protest – to read in relevant part:

F.2 DELIVERABLES

(a) The Contractor must submit the initial calibration schedule in accordance with DID-R 009 no later than seven (7) days after contract award. The calibration schedule must be coordinated with the FAA COR prior to submission.

(b) The Contractor must begin providing scheduled calibration services no later than thirty (30) days after contract award in accordance with the FAA-approved schedule.

FF 19 (emphasis added). Comparison of the emphasized language in the two versions of the clause demonstrates that the new language changed the seven-day requirement from actual “calibration services” to simply providing a “calibration schedule.” *Compare FF 6 with 19.*

Bionetics did not amend or revise its Protest to address this new language. In the absence of a protest revision, Bionetics’ ground relating to the seven-day requirement is moot inasmuch as the SIR no longer requires calibration to begin seven days after award. Likewise, the claim is unsupported by the evidence because the Solicitation no longer requires any future awardee to “begin calibration 7-days after award,” as charged on page five of the Protest. Regardless of the subtle differences between a moot ground and one that is unsupported by the evidence, the result is the same: the ODRA recommends that this ground be denied.

Ground II – The Thirty Day Requirement

Solicitation clause H.3 establishes a “30-day period ... for the transition from one contractor to another.” *FF 18.* According to the Protest, “Even if the awardee is permitted the full 30-day transition period before it is required to have fully outfitted facilities, the lead time for

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acquisition of equipment still does not allow for any contractor other than the incumbent to compete.” *Protest* at 5. While Bionetics alludes to inadequate procurement planning (*Protest* at 7; *Comments* at 5-6) as creating an overly restrictive transition period, procurement planning in the form of market surveys revealed that competition was possible regardless of the 30-day requirement.

The 30-day transition period was based on past experience and the need to maintain thousands of pieces of equipment on a yearly basis. *FF* 7. A similar requirement² was in the July Market Survey, but none of the five formal responses to the July Market Survey (containing the Draft Solicitation) called into question the early versions of clause H.3 or the more stringent version of clause F.2. *FF* 11. When Bionetics pressed for a longer period prior to publicizing the actual Solicitation, the Product Team rejected the idea because, in part, it did not want to be tied to extensions of the sole-source bridge contract that was then in effect. *FF* 14 and 15.

The fact that Biometrics – and arguably one other vendor³ – professed difficulty meeting the thirty-day transition period, does not provide a basis to sustain this Protest. A Product Team “is not required to structure [a] procurement in a manner that neutralizes a competitive advantage that one vendor may have over another so long as that advantage does not accrue from Government action.” *Protest of Northrop Grumman Corporation*, 00-ODRA-00159. While it may be true that relaxing the 30-day transition period might increase competition and facilitate Bionetics’ bid, the AMS Policy states:

The FAA provides reasonable access to competition for vendors interested in doing business with FAA. Competition among two or more sources is the preferred method of procurement.

² The July Market Survey used the phrase “immediately prior to commencement of performance for the contract base year” to establish that calibration services would start after the transition. *FF* 6. The amendments to the Solicitation that required calibration services to begin 30 days after award aligned the final version of the Solicitation with the thirty day transition period stated in the Draft Solicitation, albeit using different language. *Compare FF 6 with FFs 18 and 23.*

³ One of these firms raised a question about the time between award and the first service dates for calibration, but its concerns were raised in reference to the subcontracting provisions (L.12.4) of the Draft Solicitation rather than transition period stated in clause H.3. *FF* 9. The other firms did not raise similar issues. *FF* 11.

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AMS Policy 3.2.2.2. With more than two vendors responding without objection to the 30-day transition period, the July Market Survey process demonstrated “reasonable access to competition,” and thereby supported the decision to proceed with the competition that included the anticipated transition period. *FF 12.*

IV. Conclusion

Bionetics has not shown that either the seven-day requirement, as amended, or the thirty-day transition period is unduly restrictive. The ODRA, therefore, recommends that the Protest be denied.

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

APPROVED:

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