



consistent with the needs of the FAA. Given this remedy, Arctic's size protest should be deemed moot and dismissed.

## **I. Findings of Fact**

### **A. The Solicitation**

1. The Product Team posted the SIR as a commercial, simplified purchase on September 19, 2012. *Agency Record* ("AR") Tab 3. The acquisition was set aside for small businesses. *Id.*
2. The North American Industrial Classification (NAIC) codes that the Product Team intended to identify were 333921 (Elevator and Moving Stairway Manufacturing) and 238290 (Other Building Equipment Contractors). *AR*, at *Contracting Officer's Decl.* ¶ 4. The code mistakenly stated in the SIR, however, was 338921. *Id.*; *see also AR*, Tab 3, at 1.
3. The SIR, styled as a "request for offers,"<sup>1</sup> sought offers to provide maintenance services for six elevators and one chairlift (collectively "elevators" unless otherwise noted) spread over four locations. *AR* Tab 2, at Section B. Offerors were to set their prices at a monthly rate for each elevator and the chairlift. *Id.* The SIR provided for one base year, and four option years. *Id.*
4. Section C of the SIR described the requisite qualifications of the contractor:

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<sup>1</sup> *AR* Tab 3. The FAA Acquisition Management System describes a "request for offer" as:

A request for offer is a request for an offeror to formally commit to provide the products or services required by the acquisition under stated terms and conditions. The response to the request for offer is a *binding offer*, which is intended to become a binding contract if/when it is signed by the CO. The request for offer may take the form of a SIR, a proposed contract, or a purchase order.

*AMS Policy* 3.2.2.3.1.2.1.

### CONTRACTOR QUALIFICATIONS

The contractor shall be regularly engaged in the business of servicing and maintaining elevators of the types and models concerned. Further, the Contractor's employees shall have serviced and maintained elevators of the types and models concerned for a period of at least one year. Offers will be considered only from offer[or]s who are regularly established in the business of elevator maintenance and who, in the judgment of the Government, are financially responsible and able to verify their reliability, ability, experience, and availability of equipment.

*AR Tab 2, at 7.*

5. The SIR specified the maintenance requirements and repairs to be performed by the successful offeror. In general terms, the SIR summarized the contractor's obligation as:

The Contractor shall make examinations as specified by ANSI standards A1 7.1 and A1 7.2 and adjustments to maintain the efficiency, safety, speed, and operating characteristics as originally designed and installed by the manufacturers of the equipment, including acceleration, deceleration, contact speed with or without full load, floor to floor time, door opening and closing time, and leveling accuracy.

The Contractors [sic] shall make minor repairs to or replace the small operating parts of the elevator system at no addition[al] cost to the Government.

*AR Tab 2, at 7.*

6. The Product Team amended the SIR twice. Amendment 0001 changed Section B to add detailed descriptions of each elevator to be serviced. The details included the manufacturer's name, the year built, the model number, passenger and weight capacities, and number of floors. *AR Tab 5.*

7. Amendment 0002 inserted clause H-1, which states:

#### **H-1 Performing Work**

The Contractor (you) must perform, using your own organization, work equivalent to at least 25 percent of the total amount of work under the contract on the site. The CO may modify this contract to reduce this percentage if you request a reduction and the CO determines that it would be to the Government's advantage to do so.

(End of clause)

AR Tab 7, at 2. The Contracting Officer inserted H.1 into the contract to address a question from ASE regarding “limitations on subcontracting or partnering with a large business.” AR, *Contracting Officer’s Decl.* ¶ 9. Amendment 0002 also extended the closing date to close of business, October 4, 2012. AR Tab 7, at 1.

8. The SIR did not include AMS Clause 3.6.1-7, “Limitations on Subcontracting (October 2011).” AR Tabs 2, 5, and 7, *passim*. The associated prescription makes the clause mandatory “if any portion of the requirement will be set aside for small businesses.” *AMS Clause 3.6.1-7*, at prescription.
9. The Contracting Officer explained the absence of AMS Clause 3.6.1-7 and her use of H.1 as follows:

I looked through AMS clauses, but did not find anything on that specific issue. I even used contract writing to create a document, but interestingly, it did not bring up AMS [Clause] 3.6.1-7, so I did not know it existed. I then discussed the matter [with another employee], who used to be the small business coordinator for Alaska and participated in the drafting of the AMS. She was not aware of any limitations either, but suggested I use a clause that has been used in a number of other solicitations, and provided [H.1] to me.

AR, *Contracting Officer Decl.* ¶ 9.

10. Section L of the SIR did not provide unique instructions for preparing offers. It incorporated by reference or stated in full the following provisions from the Acquisition Management System (“AMS”):

- 3.2.2.3-1 False Statements in Offers (July 2004)
- 3.2.2.3-11 Unnecessarily Elaborate Submittals (July 2004)
- 3.2.2.3-12 Amendments to Screening Information Requests (July 2004)
- 3.2.2.3-13 Submission of Information/Documentation/Offer (July 2004)
- 3.2.2.3-16 Restricting, Disclosing and Using Data (July 2004)
- 3.2.2.3-17 Preparing Offers (July 2004)
- 3.2.2.3-18 Prospective Offeror’s Requests for Explanations (March 2009)
- 3.2.2.3-19 Contract Award (July 2004)

- 3.13-4 Contractor Identification Number - Data Universal Numbering System (DUNS) Number (August 2012)
- 3.2.2.3-20 Electronic Offers (July 2004)
- 3.9.1-3 Protest (October 2011)

AR Tab 2, at Section L. Block 15 of SF-1447, FAA Template No. 6 (8/87) instructed offerors to complete the Section B pricing pages (pages 1 to 6) and the following standard certifications or representations:

- Page 20, AMS Provision 3.2.2.3-10, Type of Business Organization (July 2004).
- Page 21, AMS Provision 3.2.2.3-70, Taxpayer Identification (July 2004)
- Page 22, AMS Provision 3.2.2.7-7, Certification Regarding Responsibility Matters (July 2010)
- Page 23, AMS Provision 3.3.1-15, Certification of Registration in System for Award Management (August 2012)
- Page 24, AMS Provisions 3.6.2-5, Certification of Nonsegregated Facilities (March 2009); 3.6.2-6 Previous Contracts and Compliance Reports (May 1997); and 3.6.2-8 Affirmative Action Compliance (April 1996)
- Page 29, FAA Business Declaration (FAA Template No. 61 (rev. 10/08)).

AR Tab 2, as stated *infra*.

11. Section M of the SIR, "Evaluation Factors for Award," stated without any additional text, "Awards [sic] will be evaluated based upon the lowest price technically acceptable." AR Tab 2, at 28.

## **B. Offers**

12. Both Arctic and ASE submitted timely offers. AR Tabs 9 and 10, respectively.
13. Arctic's offer included all certifications, forms, and pricing sheets required by the SIR. AR Tab 9. Arctic also submitted with the offer a cover sheet containing a "Statement of Qualifications (SOQ)." The SOQ identified equipment that Arctic maintains by listing the manufacturers, including all manufacturers identified in Section B of the SIR. *Id.* Arctic did not include a detailed statement regarding its experience servicing the particular "types and models" listed in the SIR. *Id.*

14. ASE's offer consisted of all pages of the SIR, with the necessary certifications, forms, and pricing sheets completed as required. AR Tab 10. ASE's "Managing Member" who forwarded the electronic offer included in the email the following statement:

[DELETED]

AR Tab 11.

15. ASE's offer was lower than Arctic's offer over the full five years of possible performance. Compare AR Tab 9 with 10. Both offers were well-below \$10 million, which is the dollar limit for final decision authority delegated to the ODRA Director from the FAA Administrator.

### **C. Initial Evaluation and Award**

16. The record before the ODRA contains only two contemporaneous records from the time between the submission of offers and the notice of award. The first is an email request from the Contracting Officer to ASE asking for "information to show Alaska Stairlift & Elevator's qualifications that are listed in the first section, Contractor Qualifications, of the Scope of Work on page 7." AR Tab 12; see also FF 4, *infra* (quoting the "Contractor Qualifications" requirement). In response, ASE provided [DELETED]. AR Tab 13, at 2. The sheet did not include a statement regarding at least a year of servicing the particular "types and models" listed in the SIR. *Id.* The sheet also did not provide any information about the experience of employees from the proposed subcontractor, [DELETED]. *Id.* ASE merely stated [DELETED]. *Id.*
17. The Agency Record does not contain any contemporaneous documentation of the rationale the Product Team used to determine that either offeror submitted a technically acceptable proposal. AR, *passim*.

18. On October 24, 2012, the Contracting Officer sent emails to both ASE and Arctic informing them that the Product Team would be making the award to ASE. AR Tabs 14 and 15.

**D. Protest to the Contracting Officer**

19. On October 25, 2012, representatives of Arctic sent an email to the Contracting Officer raising several questions about the training of ASE's employees, ASE's experience with the makes and models of the elevators identified in the SIR, and the role of subcontractors. AR Tab 16.

20. The Contracting Officer requested additional information from ASE, and quoted the Contractor Qualification requirements stated in the SIR. AR Tab 17 (reiterating the text contained in *FF 3, supra*). The Contracting Officer emphasized the second sentence of the quoted paragraph that required the contractor's employees to have "serviced and maintained the elevators of the types and models concerned for a period of at least one year." *Id.*

21. ASE responded with general statements of experience but did not address the particular "types and models" specified in the SIR. AR Tab 18, at 1. The response [DELETED] *Id.* The response also [DELETED]. *Id.*

22. The Contracting Officer also requested information from a government agency regarding ASE's performance on a contract that involved 18 elevators. AR Tab 19 at 2. The response was very favorable. *Id.*, at 1. ASE revealed, however, that its own personnel only performed the maintenance work on 2 of the 18 elevators in question, leaving the rest to an undisclosed subcontractor. AR Tab 18, at 1. Again, the correspondence did not indicate the "type and model" of the equipment that ASE maintained. AR Tabs 18 and 19.

23. The Contracting Officer informed Arctic of the results of her further investigation, but she took no action to rescind the award decision. AR Tab 20. Arctic thereafter expressed its intent to file a protest but was unsure as to whether a debriefing was a prerequisite to filing a protest with the ODRA. AR Tabs 21 and 23. The Contracting Officer properly cited to the Protest provision of the SIR to answer the question regarding the protest process. AR Tab 22. The Contracting Officer also offered to conduct a debriefing on Thursday, November 8, 2012 and noted that Monday, November 12, 2012 was a Federal Holiday. AR Tab 23.

24. A telephonic debriefing was held on Thursday, November 8, 2012. AR Tab 24; *Contracting Officer's Decl.* ¶ 16.

#### **E. Protest Filing at the ODRA and Subsequent Execution of the Contract**

25. Arctic sent its Protest to the ODRA via facsimile transmission on Thursday, November 15, 2012, after close of business for the ODRA. *Protest Case File*, ODRA Tab 1. The ODRA stamped the Protest as received and filed on Friday, November 16, 2012.

26. On November 19, 2012, a more senior Contracting Officer accepted and signed ASE's offer. AR Tab 27.

27. On November 26, 2012, the Contracting Officer informed ASE of the Protest and its right to intervene. AR Tab 28.

28. Although the parties attempted to resolve the Protest using mediation, they were unable to reach agreement, and the Protest proceeded to adjudication. *Protest Case File*, ODRA Tabs 5 and 6.

29. The Product Team filed its Agency Response on February 11, 2013. The last paragraph in the Contracting Officer's Declaration, attached to the Agency Response, states:

An Agency employee with elevator maintenance expertise is now reviewing our SOW [Statement of Work] and the qualifications we should require. Once his review is complete, the Agency may terminate the current contract and resolicit using a different SOW.

*AR, Contracting Officer's Decl.* ¶ 21.

30. Arctic filed its Comments on February 15, 2013. *Protest Case File*, ODRA Tab 8.

31. The record closed on February 15, 2013. *Protest Case File*, ODRA Tab 9.

## **II. Burden and Standard of Proof on the Merits**

The Protester in this matter, Arctic, bears the burden of proof, and must demonstrate by substantial evidence (i.e., by the preponderance of the evidence), that the designated evaluation and source selection officials failed in a prejudicial manner to comply with the Acquisition Management System (“AMS”). 14 C.F.R. § 17.21(m) (2012); *Protest of Adsystech, Inc.*, 09-ODRA-00508. Under the AMS, source selection decisions must be supported by a “rational basis,” and may not be arbitrary, capricious, or an abuse of discretion. 14 C.F.R. § 17.21(m) (2012). The ODRA will not substitute its judgment for that of the “designated evaluation and source selection officials as long as the record demonstrates that their decisions had a rational basis, were consistent otherwise with the AMS, the evaluation plan, and the award criteria set forth in the underlying solicitation.” *Adsystech, supra* (citing *Protest of Ribeiro Construction Co., Inc.*, 08-TSA-031).

## **III. Discussion**

### **A. The Filing was Timely**

As an affirmative defense, the Product Team posits that the Protest was not timely filed in accordance with 14 C.F.R. § 17.15(a)(2) (2012). *AR* at 2. The cited ODRA Procedural Regulation requires protests to be filed within five business days after the date the Product Team holds a requested debriefing. 14 C.F.R. § 17.15(a)(2) (2012). Here, the Product Team calculates a six-day interval between the debriefing and the filing of the protest, i.e. November 8, 2012 to November 16, 2012. The Product Team evidently overlooks that Monday, November 12, 2012

was the observed day for the Veterans Day Holiday. 5 U.S.C.A. 6103 (West 2013); Exec. Order 11582, § 3(a), February 11, 1971; Office of Personnel Management notice at <<http://www.opm.gov/policy-data-oversight/snow-dismissal-procedures/federal-holidays/#url=2012>>, last viewed February 20, 2013; *FF* 23. Federal Holidays are not business days within the meaning of the ODRA Procedural Regulation, so Arctic's filing occurred on the fifth business day after the debriefing, thereby satisfying the filing deadline. Accordingly, the ODRA denies the product team's affirmative defense as meritless.

## **B. The Undocumented Technical Evaluation**

Arctic challenges the determination that ASE is technically qualified. *Protest* at 2. While Arctic expends significant energy affirmatively challenging ASE's representations regarding experience and certifications (*see* attachments to *Comments*), the narrow question before the ODRA is whether the Product Team had a rational basis for its determination that ASE was technically acceptable. *See e.g., Protest of Sentel Corp.*, 09-ODRA-00512. As discussed herein, the ODRA finds that the Product Team lacked an articulated rational basis for the determination that ASE was technically acceptable, and therefore recommends that the Protest be sustained.

### **1. Documenting Business Decisions in Simplified Purchasing**

The documentation requirements for simplified purchases, as stated in the AMS Policy, are not arduous:

#### 3.2.2.5.4.1: Documentation

The method of selection and rationale for awards, and a determination that the price is fair and reasonable should be documented. The extent of the documentation depends on the complexity and dollar value of the procurement action.

*AMS Policy* 3.2.2.5.4.1 (emphasis added). While the extent of documentation can vary depending on the complexity and value of the procurement, the quoted policy statement must be

interpreted in light of the “Fundamental Principles” of the FAA procurement system,<sup>2</sup> which include:

- Promote discretion, sound business judgment, and flexibility at the lowest levels while maintaining fairness and integrity;  
...
- Provide an internal process for resolving protests and disputes in a timely, cost-effective and flexible manner;  
...
- Require appropriate file documentation to support business decisions;
- Assure adequate checks and balances; and
- Ensure public trust.

*AMS Policy 3.1.3.* Taken together, these principles dictate that business decisions need to be sufficiently documented so that adequate checks and balances – including the Administrator’s review through the ODRA’s protest process – can ensure the public’s trust in the fairness and integrity of the procurement process. *Id.*; *accord Resource Dimensions, LLC*, B-404536, Feb. 24, 2011, at 6-7 (“it is a fundamental principle of government accountability that an agency be able to produce a sufficient record to allow for a meaningful review,” even for simplified acquisitions).<sup>3</sup> Moreover, the Product Team has the burden to produce such documentation for the ODRA record. 14 C.F.R. § 17.19(d) (2012); *Protest of Adsystem, Inc.*, 09-ODRA-00508. Other explanatory materials can also be provided, the ODRA has elaborated:

As a general matter, when faced with *post hoc* justifications, the ODRA accords greater weight to contemporaneous evaluation and source selection material than to arguments and documentation prepared in response to protest contentions. *Protest of Enroute Computer Solutions*, 02-ODRA-00220. The ODRA, however, is not precluded from considering post-protest explanations that provide a detailed rationale for contemporaneous conclusions; as such explanations can simply fill in previously unrecorded details.

*Protest of Team Clean, Inc.*, 09-ODRA-00499.

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<sup>2</sup> “In rendering an interpretation of the AMS, the ODRA will favor interpretations that are consistent with applicable statutes, give meaning to all parts, and harmonize separate sections into a coherent policy statement.” *Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490.

<sup>3</sup> The ODRA is not bound by the decisions of the Government Accountability Office, but it may treat such decisions as persuasive when consistent with applicable policy, guidance, clauses, and case law under the FAA’s Acquisition Management System.

## 2. The Record does not Show a Rational Basis for the Technical Evaluation

No contemporaneous memorandum or other document describes the Product Team's rationale for concluding that ASE was technically acceptable. *FF* 16 and 17. The ODRA's review of the remaining record (*see* 5 U.S.C.A. § 556(e) (West 2013)) also does not demonstrate a rational basis for the technical evaluation.

Neither sections L nor M from the SIR provide a clear statement of the standard the Product Team would use to determine technical acceptability. *FFs* 10 and 11. Section C, however, described the requisite qualifications of the contractor:

### CONTRACTOR QUALIFICATIONS

The contractor shall be regularly engaged in the business of servicing and maintaining elevators of the types and models concerned. Further, the Contractor's employees shall have serviced and maintained elevators of the types and models concerned for a period of at least one year. Offers will be considered only from offer[or]s who are regularly established in the business of elevator maintenance and who, in the judgment of the Government, are financially responsible and able to verify their reliability, ability, experience, and availability of equipment.

*FF* 4 (citing *AR* Tab 2, at 7) (emphasis added). Correspondence in the record shows that the Product Team used the emphasized requirements as the key technical qualifications. *FF* 16 Specifically, the Contracting Officer requested that ASE "provide information to show ... qualifications that are listed in the first sections, Contractor Qualifications, of the Scope of Work on page 7" of the SIR. *FF* 16 (citing *AR* Tab 12). ASE's [DELETED] reply [DELETED] did not describe ASE's experience in maintaining the "types and models" of elevators listed in Section B of the SIR. *FF* 16 (citing *AR* tab 13). ASE also did not provide any evidence that actual employees, (1) "serviced and maintained," (2) these "types and models," (3) "for a period of at least one year," as required by Section C of the SIR. *Id.* The reply made no mention whatsoever of the experience of its proposed subcontractor, [DELETED], or the subcontractor's employees.<sup>4</sup> *Id.* Given the inadequacy of ASE's "Statement of Contractor Qualification," and lack of any other documentation describing the basis of the decision (*FF* 17), the preponderance of the evidence shows that the Contracting Officer did not have a rational basis to conclude that ASE was technically acceptable prior to issuing her notice of award.

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<sup>4</sup> The ODRA notes [DELETED]. *See FF* 12 ([DELETED]).

### **3. Results of Further Investigation did not Support the Award Decision**

Before actual execution of the contract with ASE, Arctic received notice that it would not receive the award and promptly raised objections with the Contracting Officer that included a series of questions challenging ASE's qualifications vis-à-vis Section C of the SIR. *FFs* 18 and 19. The Contracting Officer posed Arctic's questions to ASE and also took steps to learn about ASE's past performance. *FFs* 20 and 22. The responses from ASE again failed to show the requisite duration of experience with the specific equipment in question. *FF* 21. Further, the Contracting Officer learned that [DELETED]. *FFs* 21 and 22.

Remarkably, the information received did not dissuade the Product Team from processing the award to ASE. *FF* 26. More pointedly, the record does not reveal any subsequent effort to document a rational basis for the award decision. Instead, the Contracting Officer explained, "With this information I prepared a response to the questions from Arctic Elevator, and sent it on October 31, 2012." *AR, Contracting Officer Decl.* at ¶ 14.

### **4. Conclusion: The Technical Evaluation Lacked a Rational Basis**

The foregoing discussion shows that the Product Team has failed to proffer a rational basis – documented or otherwise – for its conclusion that ASE was a technically acceptable offeror. For this reason, the ODRA recommends that Arctic's Protest on this ground be sustained.

#### **C. Size Challenge based on Over-reliance on Subcontractor**

Arctic asserts that ASE will rely too heavily on its proposed subcontractor, Otis Elevator. As a *pro se* party, Arctic does not use legal jargon like "ostensible subcontractor" or cite to specific sections of the Code of Federal Regulations, but the overall theme is that Otis will be the real contractor performing this contract and ASE will not be able to satisfy the requirement found in clause H.1 mandating that the prime contractor perform at least 25% of the contract work. *Protest* at 1; *FF* 7 (clause H.1). Arctic asserts in particular that the [DELETED]. The ODRA and the Product Team recognize this as an issue of affiliation under 13 C.F.R. § 121.103. *See AR* at 4.

No further ODRA action on this issue is appropriate at this time because of the flawed technical evaluation discussed in Part III.B. *supra*, and resulting need to conduct a new competition and evaluation, as recommended in Part IV, *infra*. In particular, as a necessary part of the new evaluation, the Product Team should consider the size of the offerors and record its determination(s) to ensure that the resulting award is consistent with the SIR. This necessary step in the evaluation renders an ODRA decision at this time unnecessary. As the ODRA has previously explained (albeit in a different procedural posture):

The ODRA, however, exercises its protest jurisdiction based on the familiar principle that it will not substitute its judgment for the properly exercised judgment of authorized procurement officials.

...

The legally proper and better course of action is for the ODRA to review actual determinations regarding size and affiliation rendered by contracting officers during the evaluation process.

*Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490. Accordingly, this aspect of the Protest should be dismissed as moot.

#### **D. Prejudice**

Given that Arctic was the only other offeror, the ODRA finds that Arctic had a substantial chance of award and therefore was prejudiced by the defective evaluation described above. *See e.g., Protest of Optical Scientific Inc.*, 06-ODRA-00365; *Protest of Enroute Computer Solutions*, 02-ODRA-00220.

### **IV. Recommendation**

Arctic seeks a finding from the ODRA that it “was not only responsive but provides the best value and is in the best interest of the FAA.” *Protest* at 3. Fairly read, the ODRA interprets this as a request for a directed award. The record, however, does not support a directed award, but it does support expedited corrective action by the Product Team.

#### **A. Directed Award is not Appropriate**

The failure to document the technical evaluation of ASE applies equally to the evaluation of Arctic. Although page 3 of Arctic’s Comments represent that Arctic “maintained these very elevators for five years from 2006 to 2010,” Arctic’s offer does not contain this representation,

and it is not clear that Arctic satisfies the requirement that its own employees performed this work. *FF* 13. Since the record does not support a finding that Arctic is technically acceptable, the ODRA cannot recommend a directed award.

### **B. A New Procurement must be Conducted**

Even though a directed award is not appropriate, the ODRA has “broad discretion” regarding remedies. 14 C.F.R. § 17.23(a) (2012). In fashioning a remedy in this Protest, the ODRA is mindful that:

- (1) Simplified acquisition procedures were used for this procurement (*FF* 1);
- (2) The initial evaluation process lasted only twenty calendar days (*FFs* 7, 12, and 18);
- (3) The current offerors are already familiar with the requirement; and
- (4) The Contracting Officer has represented that the Product Team is reviewing the SIR considering termination of the Contract and resolicitation using a different statement of work (*FF* 29).

Further, the Product Team acknowledges two known defects in the SIR. The first relates to the misstatement of the appropriate NAIC Codes. *FF* 2. The second relates to issues surrounding Clause H.1. Although the Product Team asserts that these issues are not the subject of a timely, pre-bid protest (*see AR* at 3), the undisputed facts show that clause H.1 served as an unauthorized and *de facto* substitution for the mandatory AMS Clause 3.6.1-7, “Limitations on Subcontracting (October 2011).” *FFs* 7 to 9. The primary difference between these clauses is that the mandatory clause requires the prime contractor to perform 50% of the work, whereas H.1 reduces the requirement to a mere 25%. Although the Product Team explained the inability to find the mandatory clause<sup>5</sup> and the decision to use Clause H.1, it is clear that the Product Team did not: (1) document the rational basis for deviating from the mandatory use of the AMS clause; (2) obtain prior approval of the rational basis from the Chief Counsel’s office and the Chief of the Contracting Office per *AMS Policy* 3.13.2.1; and (3) did not receive approval of the actual deviation from the Acquisition Executive in accordance with *AMS Statement regarding Policy*

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<sup>5</sup> *FF* 9. Notably, the AMS Clause 3.6.1-7, “Limitations on Subcontracting (October 2011)” is listed in the AMS Clause Matrix (August 2012 and October 2012), for service contracts, as mandatory “in SIRs and contracts if any portion of the requirement will be set aside for small business ... .”

vs. *Guidance* § 2.<sup>6</sup> Given these facts, and as stated in *Adsystemtech, supra*, “Without a doubt, the remedial actions arising out of this Protest must conform to the requirements of the AMS, and the best interests of the FAA will not be served by perpetuating the unauthorized deviation from the AMS.”

The ODRA, accordingly, recommends that Product Team promptly take the following corrective action:

- (A) Terminate the ASE contract for convenience of the Government, effective no later than **60 days of service of the Final Order in this Protest**;
- (B) Based on the needs and resources of the FAA, conduct a new competition under a new solicitation that includes the appropriate NAIC standards, and all mandatory clauses and provisions unless deviations are obtained in strict accordance with the AMS and the ODRA’s ruling herein; and,
- (C) 75 days from the date of service of the Final Order in this Protest, file a publicly releasable report with the ODRA and Arctic regarding the status of its corrective action.

## V. Conclusion

The ODRA finds that Arctic has proven by substantial evidence that the Product Team failed to articulate a rational basis supporting its technical evaluation and best value decision under the SIR. The Protest should be sustained, and the Product Team should be ordered to take

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<sup>6</sup> The Administrator’s Order in *Protest of Adsystemtech, Inc.*, 09-ODRA-00508, at *Findings and Recommendation* n.16 (incorporated into FAA Order Number ODRA-10-545), held that deviations from mandatory clauses require approval from the Acquisition Executive. After issuance of that Order, a change to *AMS Policy* 3.13.2.1 injected the intermediate requirement that contracting officers obtain prior approval from the Chief Counsel and the Chief of the Contracting Office of the “*rational basis determination*,” but approval of the *actual deviation* still remained vested with the Acquisition Executive. *AMS Statement regarding Policy vs. Guidance* § 2. The ODRA, therefore, finds no reason to revisit the binding legal precedent (5 U.S.C.A. § 552(a)(2)(E) (West 2013)) established by the Administrator’s Order in *Adsystemtech*.

appropriate corrective action consistent with these Findings and Recommendations. Arctic's size protest should be dismissed as moot.

-S-

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