

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

FINDINGS AND RECOMMENDATIONS

Matter: Protest of Advanced Sciences & Technologies, LLC

Under Solicitation No. DTFACT-09-R-00023

Docket No.: 10-ODRA-00536

Appearances:

For the Protester: Anthony Valenti, Esq. of Caplan, Valenti & Murray, PC

For the FAA William J. Hughes
Technical Center: James J. Drew, Esq.

For the Intervenor: Pamela J. Mazza, Esq., Jonathan T. Williams, Esq.,
and Kelly E. Buroker, Esq. of Piliero Mazza PLLC

I. Introduction

Advanced Sciences & Technologies, LLC (“AS&T”) filed a Protest with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) on July 23, 2010 (“Initial Protest”) and a Supplemental Protest on August 9, 2010 (“Supplemental Protest”). AS&T is challenging a contract award (“Contract”) made to Columbus Technologies and Services, Inc. (“Columbus”) after a re-evaluation mandated by FAA Administrator in Order Number ODRA-10-541 (“Administrator’s Order”). In sustaining a prior protest by Columbus, the Administrator directed the William J. Hughes Technical Center (“Center”) to take the remedial action of re-evaluating the proposals of AS&T and Columbus. *See Protest of Columbus Technologies*

and Services, Inc., 09-ODRA-00514 (“Columbus Protest”).¹ In pertinent part, the Center was directed to reinstate the results of its original technical evaluation for AS&T for Factors 1, 3 and 4, and to re-evaluate Factor 2. The Center’s re-evaluation resulted in a determination by the Center to award the Contract to Columbus and terminate AS&T’s Contract for the convenience of the Government.

In the Initial Protest, AS&T alleges that the new cost/technical tradeoff analysis and award to Columbus lacks a rational basis and is arbitrary, capricious, constitutes an abuse of discretion and/or is not supported by substantial evidence with respect to its original technical evaluation of Factor 3 – Key Personnel as “Good.” *Initial Protest* at 3. AS&T’s Supplemental Protest further asserts that the Center’s original scoring of Columbus’ proposal as “Excellent” for Factor 1 – Program Management Plan, which considered as a subfactor employee recruitment/retention, was arbitrary, capricious and lacked a rational basis, given the quality of the employee benefits package offered by Columbus. *Supplemental Protest* at 3-4. AS&T requests as a remedy that its Protest be sustained and that the Contract be re-awarded to AS&T, or alternatively that a new solicitation should be issued clarifying all ambiguities regarding the “Key Personnel” requirements, and that a new evaluation and best value determination be conducted. *Initial Protest* at 31-32.²

For the reasons set forth below, the ODRA recommends that AS&T’s Initial Protest be denied and its Supplemental Protest be dismissed. With respect to AS&T’s Initial Protest, the ODRA finds that the Center’s original technical evaluation of Factor 3 had a rational basis and is supported by substantial evidence; and is not arbitrary, capricious, or

¹ The Administrator sustained the Columbus Protest to the extent that the Center deviated from the stated evaluation criteria in evaluating Factor 3, Corporate Experience/Past Performance and its communications regarding technical factors lacked a rational basis and were contrary to the Acquisition Management System (“AMS”).

² AS&T also requests a hearing if the matter is resolved by adjudication. *Protest* at 32. In accordance with 14 C.F.R. §17.37(g), the ODRA specifically finds that a hearing is unnecessary in this case, as there are no complex factual or credibility issues that require a hearing for the evidentiary record to be adequately developed, and thus no party will be prejudiced by limiting the record in the adjudication to the parties’ written submissions.

an abuse of discretion. With respect to AS&T's Supplemental Protest, the ODRA finds that AS&T's challenge against the Center's original technical evaluation of Columbus' proposal with respect to Factor 1, Program Management Plan, is untimely.

II. Findings of Fact

A. Background

1. The parties' positions in the predecessor Columbus Protest, along with detailed findings of fact ("*FF*"), are set forth in the Findings and Recommendations ("*F&R*") adopted by the FAA Administrator in Order Number ODRA-10-541, and are incorporated herein. *See Columbus Protest*. Familiarity with the findings of fact in the *F&R* is presumed, however, those facts specifically relevant to the issues raised herein are repeated below for ease of reference.
2. On June 30, 2009, the Center issued Solicitation No. DTFAC-09-R-00023 for technical support services in the areas of "Computer Facilities Operations, Software Maintenance and Development Support, Library Services and Laboratory Scheduling" for the Center's Laboratory Services Group. *Columbus Protest, FF 1*.
3. Solicitation Section C.2 set forth the personnel requirements of the SIR. The personnel requirements included those of the Program Manager and Senior Systems Analyst ("*SSA*"), which are identified as Key Personnel. *Columbus Protest, FF 6*. Specifically, the qualifications requirement for the *SSA* states:

Position requires a minimum of a Bachelor's Degree in Computer Science or related field from an accredited institution and a minimum of five (5) years experience in systems analysis and design. Experience for Task 2 includes but is not limited to UNISYS 2200 Operating Systems, System Analysis and System Administration. Experience for Task 1 includes but is not limited to Windows Server 2000/2003, and LINUX operating systems.

Id.

4. The Center issued five amendments to the SIR, three of which impacted the Senior System Analyst position. Amendment 3, issued on August 19, 2009, changed a reference in the SOW from “National Airspace Systems” and to state that “the experience required under the System Analyst and Sr. System Analyst positions may be either ‘National Airspace Systems’ (NAS) or Aviation Systems experience.” *Columbus Protest, FF 19*. Amendment 4, issued on August 25, 2009, deleted and replaced the qualification requirements for the positions of Program Manager, Senior System Analyst and Systems Analyst. *Columbus Protest, FF 20*. Specifically, with respect to the Senior System Analyst, it stated:

Under C.6.2.3 Senior Systems Analyst, delete the following paragraph:

Qualification Requirements: Position requires a minimum of a Bachelor’s Degree in Computer Science or related field from an accredited institution and a minimum of five (5) years experience in systems analysis and design of which three (3) years must be National Airspace Systems. Experience includes but is not limited to Windows Server 200/2003 operating systems. In the absence of the required undergraduate degree, a successful candidate for the position can substitute eight (8) years experience in addition to the five (5) years experience, for a total of 13 years experience.

All qualifications for the Senior Systems Analyst are as set forth in C.2.2.3.

Columbus Protest, FF 20.

5. Amendment 5, issued on August 26, 2009, amended the qualifications for the Senior Systems Analyst, stating “[i]n paragraph C.2.2.3, the words ‘of which 3 years must be in Aviation systems’ is hereby deleted.” *Columbus Protest, FF 21*. The final version of the Senior Systems Analyst qualifications read as follows:

Qualification Requirements: Position requires a minimum of a Bachelor’s Degree in Computer Science or related

field from an accredited institution and a minimum of five (5) years experience in systems analysis and design. Experience for Task 2 includes but System Analysis and System Administration.

In the absence of the required undergraduate degree, a successful candidate for the position can substitute eight (8) years experience in addition to the five (5) years experience, for a total of 13 years experience.

Columbus Protest, FF 21.

6. Section L.4 of the SIR provided instruction as to the submission of the Technical Proposal and identified the following technical evaluation factors:
 1. Program Management Plan
 2. Corporate Experience/ Past Performance
 3. Key Personnel
 4. Transition Plan

Columbus Protest, FF 8.

7. Factor 1, Program Management Plan, included among other subfactors the subfactor entitled “Employee/Subcontractor Recruitment/Retention,” which stated:

Offeror must document/demonstrate successful recruitment capabilities and competitive employee benefits in order to recruit and retain a highly educated and skilled workforce. Documentation may include, but not limited to recruitment plan, company health plan for individual and family, sick/annual leave benefits, 401K and life/health insurance.

Provide a narrative explaining past and planned approaches for recruiting personnel to meet the requirements in the SOW.

Columbus Protest FF 9.

8. Section M.3 of the SIR provided that Technical Factors 1, 2, and 3 would be graded in descending order of importance, with Factor 4 being graded as a pass or fail. *Columbus Protest, FFs 8 and 14.*
9. Section M of the SIR also provided scoring definitions for the purposes of the evaluation of proposals. In pertinent part, the definitions were as follows:

Strength: Any aspect of the proposal when judged against a stated evaluation criteria, which enhances the merit of the proposal or increases the probability of successful performance of the contract. A significant strength appreciably enhances the merit of a proposal or appreciably increases the probability of successful contract performance.

Weakness: A weakness is “a flaw that increases the risk of unsuccessful contract performance.” A significant weakness is “a flaw that appreciably increases the risk of unsuccessful contract performance.”

Columbus Protest, FF 15.

10. Section M of the SIR also provided adjectival descriptions and a grading scheme to be used to evaluate proposal responses to the Evaluation Factors 1, 2 and 3. These included the following specific definitions:

Excellent: A proposal that meets or exceeds all of the Governments requirements, contains extensive detail, demonstrates a thorough understanding of the requirements, is highly feasible (low risk) and offers numerous significant strengths which are not offset by weaknesses.

Good: A proposal that meets or exceeds all of the Governments requirements, contains at least adequate detail, demonstrates at least an understanding of the requirements, is at least feasible (low to moderate risk) and offers some significant strengths or numerous strengths which are not offset by weaknesses.

Columbus Protest, FF 16.

11. On September 4, 2009, the Center received the initial proposals of Columbus and AS&T, among others. *Columbus Protest, FF 22.*

B. The Original Evaluation of AS&T

12. The Technical Evaluation Team (“TET”) Report from the original evaluation indicates that AS&T’s proposal received ratings of Excellent for Factors 1 and 2, and “no weaknesses [were] found.” AS&T received a rating of Good for Factor 3, however, with one weakness noted: “The Technical Evaluation Team has determined that the Senior System Analyst has not earned a BA or BS degree from an accredited college or university and has been in the job for less than a year. SSA resume is good in meeting the requirements as per the SOW.” The TET found AS&T’s proposed Program Manager to meet and exceed the government’s requirements stated in the SOW. AS&T received a rating of “Pass” for Factor 4. *Columbus Protest, FF26; Columbus Protest AR, Tab 3.*
13. As for AS&T’s weakness relative to the SSA position, the record indicates that several of the offerors proposed the same candidate who was employed in the SSA position at the time by the incumbent. *Columbus Protest, FF 43.* This particular candidate had been permitted to serve as a replacement for the SSA who left the position in February of 2008, despite her lack of a degree from an accredited college or university. The minimum requirements for the SSA position were relaxed pursuant to Amendments 3, 4 and 5; thereby allowing her to qualify for the position. *Columbus Protest, FF 43.*
14. The TET was instructed by the Contract Specialist to give offers proposing this particular candidate a score of “Good” and offerors being considered for award would have the opportunity to submit another candidate when submitting final offers. *Columbus Protest, FF 43.* Specifically, the administrative record in the Columbus Protest shows that:

During the original proposal evaluation, the TET questioned the qualifications of a candidate proposed for the SSA position under several of the proposals. Specifically, it was questionable whether the candidate proposed ... had the **requisite number of years of experience (13) sans Bachelors' degree.** ... The Contracting Officer and the COTR under the current contract had both given their "approval" for this individual to serve as a replacement for the SSA who left the position Because the government "accepted" this individual as a replacement for the SSA position under the current contract ... the TET was instructed ... **to give the proposed candidate a score of "good"** for all proposals for which she was proposed as the SSA.

Columbus Protest AR, Tab 7, page 2 (emphasis added).

C. The Original Evaluation of Columbus

15. In the original technical evaluation, the proposal of Columbus received ratings of "Excellent" for all 3 Factors and a rating of "Pass" for Factor 4. For every sub factor, the TET report stated "[n]o weaknesses found" and gave Columbus a "strength" for what it perceived to be an "extensive Employee Benefit Program" under Factor 1, Program Management Plan. *Columbus Protest, FF 2; Columbus Protest AR, Tab 3.* With respect to Factor 3, Key Personnel, the TET graded Columbus as "Excellent" noting as strengths the fact that (1) the Program Manager resume meets and exceeds the statement of work ("SOW") requirements and has 20 years of program management experience; and (2) the Senior Systems Analyst resume also meets and exceeds the SOW requirements, noting an MS in computer Science and 9 years in Systems Analysis and Design. *Id.*
16. In response to Factor 1, Program Management Plan, Columbus set forth its employee benefits in a chart which indicated with an "*" those items that were included as part of the Health and Welfare allowance. The chart also states: "SCA: \$3.35/hour allowance for Sick Administrative, Jury Duty and

Bereavement; 401K and Health Insurance.” Benefits available to SCA employees through Columbus included health, dental and vision insurance, life and short/long term disability insurance and 401K retirement savings. *Columbus Protest AR*, Tab 9, page 7.”

D. Corrective Action Pursuant to the FAA Administrator’s Order

17. As a result of the Columbus Protest, the Center was directed by the FAA Administrator to take the following corrective action in an Order No. ODRA-10-541, issued May 19, 2010:

(1) With respect to the technical proposal of AS&T, the Center should reinstate the results of its original technical evaluation for AS&T for Factors 1, 3 and 4, and re-evaluate Factor 2, Corporate Experience/Past Performance, in light of the findings herein, without considering the experience of Atlantic or its principals.

(2) The Center should prepare a New Post Negotiation Memorandum incorporating the results of the above re-evaluation of AS&T’s technical proposal.

(3) As part of that New Post Negotiation Memorandum, the Center should perform a new cost/technical tradeoff analysis with respect to AS&T and Columbus only.

(4) The above cost/technical tradeoff analysis will take into account the revised pricing submitted by AS&T and Columbus in response to the November 5, 2009 letter.

5) The Center should make a new award recommendation based on the information contained in the New Post Negotiation Memorandum.

18. The Administrator’s Order further instructed the Center that:

If the Center concludes that AS&T remains the best value, no further action is required. If, however, Columbus is determined to represent the best value, the ODRA further recommends: (1) that Columbus be awarded a contract under the Solicitation, subject to

the availability of funds and continuing need for services by the FAA; and (2) that the existing contract with AS&T be terminated for the convenience of the FAA within a reasonable period, allowing for transition of work from AS&T to Columbus without interruption of the services involved. The Center also should be directed to report to the Administrator through the ODRA every 60 days on the status of the implementation of the remedy.

Id.

19. The Contract Specialist reconvened the TET to re-evaluate Factor 2 in accordance with the Administrator’s Order and results of the re-evaluation are set forth in a Post-Negotiation Memorandum, dated July 1, 2010.

	Factor 1 Program Management	Factor 2 Corporate Experience	Factor 3 Key Personnel	Factor 4 Transition Plan	Price
Columbus	Excellent	Excellent	Excellent	Pass	[DELETED]
AS&T	Excellent	Excellent	Good	Pass	[DELETED]

Initial Protest AR, Tab 2.

20. The Center’s cost technical tradeoff analysis in this regard states:

As shown above, Columbus Technologies cost proposal is [DELETED] higher than AS&T’s proposed cost. This requirement is a best value procurement with technical being more important than price. It is the opinion of the Source Selection official that paying a [DELETED] premium to the company which received “excellent” scores across the board provides the government with the best value, in accordance with Section M of the SIR.

21. On July 14, 2010, by letter, the Center notified AS&T that as a result of the corrective action taken in response to the above, it would be awarding the contract to Columbus. Specifically, the Center explained:

[T]he Center appointed a new Source Selection Official to review the proposals of AS&T and Columbus. After thorough review, the Source Selection Official determined

Columbus Technologies and Services, Inc. to be the best value for the government.

As a result, the Center will not be issuing additional delivery orders to obligate funding for labor hours that have not already been funded under the above AS&T contract.

Center Letter, dated July 14, 2010.

22. Upon receipt of the contract award, Columbus offered to its employees benefits which were substantially the same as those that were stated in its proposal. *Supplemental AR* at 10 (citing Tab 6, McLaughlin Decl.). Specifically, SCA employees received a health and welfare allowance [DELETED]. *Supplemental Protest, Exhibit C*.

E. AS&T Challenges to the Result of the Corrective Action

23. AS&T filed the instant Protest following its receipt of the Center's July 14, 2010 letter challenging its original technical evaluation of Factor 3, Key Personnel as "Good," as well as the Source Selection Official's ("SSO") new cost/technical tradeoff analysis that resulted in the award of the Contract to Columbus.
24. On July 20, 2010, AS&T was debriefed and provided with a copy of the new Post-Negotiation Memorandum that, among other items, adopted the previous score of "Excellent" for Columbus' Factor 1. *Supplemental Product Team Agency Response* ("Supplemental AR") at 6.
25. AS&T subsequently filed its Supplemental Protest on August 9, 2010 challenging the Center's original scoring of Columbus' proposal as "Excellent" for Factor 1, Program Management Plan, specifically with respect to employee recruitment/retention sub factor, given the quality of the employee benefits package offered by Columbus in its proposal.

26. On August 13, 2010, the Center filed its Product Team Agency Response (“Initial Protest AR”).

27. The SSO provided a Declaration, which was attached to the Product Team Agency Response, in order to provide more complete documentation of the source selection decision. *Initial Protest AR*, Tab 3, *Spampinato Decl.* ¶ 16. The SSO states:

17. I decided that corrective action was required to fully document the decision I made that the Columbus proposal represented the best value to the Government consistent with SIR DTFAC-09-R-00023 and the Administrator’s Order, ODRA-10-5441.

18. I understood that the four evaluation factors were listed in decreasing order of importance, that the final factor, Transition Plan, was “Pass/Fail and that the least important of the scored factors was “Key Personnel.” Specifically, I understood that “Program Management Plan” was more important than “Corporate Experience/Past Performance’, and that “Corporate Experience/Past Performance” was more important than “Key Personnel.”

19. I understood that the significant difference between the two technical proposals was in the quality of the “Key Personnel” proposed for the contract.

20. I understood that the scores awarded to each offeror for this factor represented the Tech Team’s evaluation of both the “Program Manager” and the “Senior Systems Analyst” and that AS&T received a score of “Good” for this factor and Columbus received a score of “Excellent.”

21. I determined that the qualitative difference between the technical proposals of AS&T and Columbus, considered as a whole, and the specific qualitative differences between the key personnel offered by AS&T and Columbus, justified the additional cost of the technically superior proposal.

Id.

28. On August 18, 2010, Columbus submitted a Motion to Dismiss (“Motion”) as untimely the Supplemental Protest filed by AS&T on August 9, 2010. In the Motion, Columbus asserts that AS&T should have known of this ground of protest at the time of its post-award debriefing on July 20, 2010.
29. On August 20, AS&T and Columbus filed Comments on the Center’s Product Team Response (“Comments”).
30. The Center filed a Supplemental Product Team Agency Response on August 23, 2010, and AS&T and Columbus filed Supplemental Comments on August 30, 2010 (“Supplemental Comments”). Columbus’ Supplemental Comments assert that AS&T’s Supplemental Protest is untimely, reiterating the arguments made previously in its Motion to Dismiss. *Columbus Supplemental Comments* at 6.

III. Discussion

A. Standard of Review

As previously established, the ODRA reviews protest allegations in accordance with the ODRA Procedural Regulations, 14 C.F.R. Part 17, and the FAA’s Acquisition Management System (“AMS”). The ODRA will recommend that a post-award protest be sustained where a contract award decision lacks a rational basis, is arbitrary, capricious, or an abuse of discretion and is not supported by substantial evidence. *Protest of Columbus Technologies and Services, Inc.*, 09-ODRA-00514, citing *Protest of Enterprise Engineering Services, LLC*, 09-ODRA-00490. In “best value” procurements such as this one, the record must demonstrate that the award decision satisfies the above test, and is consistent with the AMS and the evaluation and award criteria set forth in the underlying SIR. *Id.* Mere disagreement with the Agency’s judgment concerning the evaluation of a proposal is not sufficient to establish that the Agency acted irrationally. *Id.* The Protester bears the burden of proof by substantial evidence that the award decision lacked a rational basis or was otherwise improper. 14 C.F.R. §17.37(j). In addition, the Protester

must demonstrate prejudice; specifically, AS&T must show that, but for the Center's improper actions that are alleged here, it would have had a substantial chance of receiving the award. *Id.*

B. Evaluation of Factor 3, Key Personnel

As to the re-evaluation of Factor 3 that was done pursuant to the corrective action ordered by the FAA Administrator, AS&T argues that:

[T]he determination to score "Key Personnel" as "good" with respect to any proposal where the incumbent Senior Systems Analyst was proposed was predicated upon the stated, but mistaken belief that the requirements for the position had not changed from the prior contract when in fact, as the ODRA had already noted in a related matter, the requirements for the position had been reduced and relaxed with respect to the current SIR.

Initial Protest at 4, 21 and 23.

AS&T further argues that the Center's determination to automatically "award a score of 'good' for factor 3 to any bidder who proposed the incumbent Senior Systems Analyst" was arbitrary because it failed to also consider the superior qualifications of AS&T's proposed Program Manager. *Initial Protest* at 4-5, 26-28. AS&T contends that the result of an automatic assignment of a score of "good" under these circumstances also improperly created unstated evaluation criteria. *Id.* at 28. As a consequence of this approach, AS&T argues that the Center "essentially added an arbitrary evaluation criteria of which offerors were not aware nor advised" while offerors "were left to reasonably conclude that proposing the incumbent Senior Systems Analyst who actually met the SIR requirements for the position as specified in subsequent amendments to the SIR and was previously accepted by the Tech Center for the position under the prior contract without waiver or other relaxation of specifications" would not adversely affect the evaluation of their proposals. *Id.* at 5. AS&T argues that, to the extent Columbus' rating of "excellent" for Factor 3 was "predicated upon the mistaken assumption that an undergraduate degree was required or at least not equated with relevant experience," it should have received a score no higher than AS&T for this factor. *Id.* AS&T contends

that the score it received for Factor 3 was based on the fact that its proposed Senior Systems Analyst (“SSA”) lacked a degree, however, she had the additional years of experience that under the SIR served as a substitute for and thus the equivalent of an undergraduate degree. *Id.* at 23.

The Center states that the best value decision of the SSO essentially was controlled by facts which were established in the Administrator’s Order of July 19, 2010 and that these facts have already been decided and should not be re-litigated. *Initial Protest AR at 6, citing Consolidated Contract Disputes of Huntleigh USA Corporation and the Transportation Security Administration, 04-TSA-008 and 06-TSA-025* (“[u]nder law of the case, then, a court will generally refuse to reopen or reconsider what has already been decided at an earlier stage of the litigation.”)

The purpose of the law of the case doctrine is to prevent relitigation of issues that have been decided in an earlier phase of the litigation, protect the settled expectations of the parties, and promote the orderly development of a case. *Contract Dispute of Huntleigh USA Corporation, 04-TSA- and 06-TSA-025* (Decision Denying Cross Motions for Summary Judgment, March 30, 2009) (citations omitted). This doctrine is not dispositive here, however, because the Protest of AS&T is a new matter which timely raises issues that were not specifically considered in the Columbus Protest. *See Discussion in Section D, infra.*

Columbus, in its Comments, argues that AS&T’s SSA candidate was properly credited for having met the minimum requirements but did not warrant a score higher than “Good”:

AS&T’s assertions about the Bachelor’s degree and its candidate’s years of experience overlook that these were minimum requirements for the SSA. See Columbus AR TAB 1, SIR at p. 6, § C.2.2.3. A proposal that does not meet a minimum requirement would be considered “Unsatisfactory” under the SIR’s grading scheme. *Id.* at p. 54. Therefore, while AS&T claims that the FAA did not recognize the years of experience offered by its SSA candidate, and focused only on her lack of a

Bachelor's degree, this is belied by the fact that the FAA assigned a "Good" rating to AS&T for its SSA candidate. Citations omitted.

Columbus Comments at 2, 15. Columbus argues further that "the final evaluation conclusions do not mention the SSA's lack of a Bachelor's degree" but instead raise "concerns about the extent of the candidate's experience." *Columbus Comments* at 16, citing *Columbus Protest AR Tab 7*, p. 2.

In "best value" procurements, the FAA Product Teams must make source selection decisions in consonance with the AMS and specified Solicitation evaluation and award criteria. *Protest of Northrop Grumman Systems Corporation*, 06-ODRA-00384. It is also well established that in performing an evaluation, the procuring agency may take into account specific, albeit not expressly identified matters that are logically encompassed by the stated evaluation criteria. *Id.* Technical evaluators have considerable latitude in assigning ratings, which reflect their subjective judgments of a proposal's relative merits. *Protest of Universal Systems & Technology, Inc.*, 01-ODRA-00179. The ODRA will not substitute its judgment for that of the technical evaluators, where their ratings and findings are properly supported, rationally based, and consistent with the Solicitation and the AMS. *Id.* It is well established that the evaluation of technical proposals is a matter within the contracting agency's soundly-exercised discretion, since the agency is responsible for defining its needs and the best method of accommodating them. *Id.*

The record shows that the TET's evaluation of Factor 3 was consistent with the evaluation and award criteria, which was based on best value. *Columbus Protest FF 13*. The solicitation contained specific qualification requirements for the position of SSA which provided that, in the absence of the required undergraduate degree in Computer Science or a related field, the SSA candidate alternatively could have a total of 13 years experience to qualify for the position. *FF 5*. Moreover, the stated evaluation criteria for Factor 3 did not operate so as to automatically assign the highest score for simply meeting the minimum qualifications. To the contrary, the evaluation criteria contemplated that once the minimum requirements were met, the proposed resumes

would be evaluated for enhanced merit and likelihood of successful contract performance. *FF* 9. Thus, it follows that a proposal could meet the minimum requirements but still present a risk of unsuccessful performance. *Id.* Consistent with this approach, the adjectival description of “Excellent” in Section M is defined as meeting or exceeding all the requirements, presenting low risks and significant strengths not offset by weaknesses, while the definition of “Good” also contemplates meeting or exceeding all the requirements, but also presenting low to moderate risk and “some significant strengths or numerous strengths” which are not offset by weaknesses. *FF* 10.

Moreover, consideration of the number of years experience possessed by AS&T’s SSA candidate was logically considered by the TET. Given the TET’s questions as to whether AS&T’s SSA candidate had the requisite experience and her lack of a degree, they properly scored her resume as “Good.” *FF* 14. There is no evidence that the Center automatically assigned a “Good” rating for Factor 3 based on AS&T’s SSA candidate; nor is there any evidence that the TET overlooked the qualifications of its Program Manager. *FF* 12. To the contrary, the record confirms that AS&T’s “Good” rating for Factor 3 accounted for both its Program Manager and SSA candidates when they are considered together, particularly when one considers Columbus’ SSA candidate, who exceeded the education requirements with an MS in Computer Science and the 5 year experience requirement by 3 years. *FF* 15. Thus, the TET’s assignment for Factor 3 of a “Good” rating to AS&T and an “Excellent” rating to Columbus is rational given the qualifications of the individuals they proposed and the express terms of the solicitation and evaluation criteria.

AS&T’s objection to the TET’s evaluation conclusions in this regard amounts to nothing more than mere disagreement—which is not sufficient to invalidate the TET’s findings. *See, e.g., Protest of Global Systems Technologies, Inc., 04-ODRA-00307; Protest of Raytheon Technical Services Company, 02-ODRA-0021, citing Protest of Universal Systems & Technology, Inc, supra.*

C. Cost Technical Tradeoff Analysis

AS&T also asserts that the cost/technical tradeoff analysis was flawed given the “substantially lower price proposed by AS&T,” the “Good” rating for Factor 3 was based on a single resume and Factor 3 was the least important factor. *Initial Protest* at 6. Noting the order of importance of each evaluation factor as set forth in the SIR, AS&T argues that the SSO failed to consider the importance of each factor in balancing price versus technical merit. *Id.* at 30. AS&T asserts that “the difference between ‘good’ and ‘excellent’ in the least important of the adjectival rated technical factors” was predicated solely on the resumes of the SSAs and there is no indication in the record that the SSO specifically considered their qualifications in determining to pay a premium by awarding the contract to Columbus. *Id.* at 31.

The record shows that the SSO adopted the views of the TET with respect to the Factors 1, 3 and 4, and took into consideration these ratings as the basis for his recommendation that Columbus be selected for award. *FF* 19. The record further shows that the SSO considered the importance of each factor in balancing price versus technical merit. *FF* 20 and 27. Moreover, he specifically considered the resumes of the SSAs and their qualifications in his determination to select the higher priced proposal of Columbus. In a sworn declaration that is consistent with the contemporaneous evaluation and source selection materials in the record, he explains that he understood that the significant difference between the two technical proposals was due to the quality of the “Key Personnel” as evaluated by the TET. *FF* 27.³ He further “determined that the qualitative difference between the technical proposals of AS&T and Columbus, considered as a whole, and the specific qualitative differences between the key personnel offered by AS&T and Columbus, justified the additional cost of the technically superior proposal.”

³ The ODRA is not precluded from considering post-protest explanations that provide a detailed rationale for contemporaneous conclusions. Such explanations can simply fill in previously unrecorded details, and can be considered in the ODRA’s review of the rationality of selection decisions, so long as those explanations are credible and consistent with the contemporaneous record. *See Protest of Enroute Computer Solutions*, 02-ODRA-00220, at FN8 (citations omitted).

Id. Based on the above, the ODRA finds that the SSO's cost/technical tradeoff analysis and award decision was not irrational, arbitrary, capricious, or an abuse of discretion.

D. Protest of Factor 3 Evaluation is Timely

Columbus' Comments argue that AS&T's contentions regarding the evaluation of Factor 3 are untimely. *Columbus Comments* at 2. According to Columbus, AS&T's time for filing a protest against its evaluation of Factor 3 began running when the F&R was released on May 19, 2010, setting forth the corrective action to be taken that included reinstatement of its "Good" score for Factor 3. *Columbus Comments* at 14 – 15.

The ODRA finds that AS&T grounds of protest with respect to its "Good" score for Factor 3 are timely, as they were filed within five business days of the Center's debriefing. *Initial Protest* at 6; *Protest of Camber Corporation and Information Systems & Network Corporation*, 98-ODRA-00079 and 98-ODRA-00080 (Decision on Motion to Dismiss) (submission of pre-award protest is of no value if protester receives contract award). Requiring AS&T to protest its score of "Good" prior to the completion of the corrective action would have been speculative and premature. AS&T remained in contention for the award until the corrective action was complete and thus could not have made the required showing of prejudice until after the award was made. *Protest of Accenture*, 08-TSA-045 (Decision on Motion to Dismiss).

E. Supplemental Protest of Columbus Factor 1 Evaluation is Untimely

The Motion to Dismiss filed by Columbus contends that AS&T's Supplemental Protest allegation that the FAA improperly rated Columbus as "Excellent" for Factor 1 based in part on a "strength" given to Columbus for its "extensive Employee Benefit Program," *Supplemental Protest* at 3, is untimely. Columbus argues that AS&T should have known of this ground of protest at the time of its post-award debriefing on July 20, 2010, when it received Columbus' rating information, which incorporated this particular strength previously assigned by the TET in its original evaluation. *Motion* at 2. Moreover, Columbus argues, this information was provided initially to AS&T's counsel on March 8,

2010 by the Center in the Protest of Columbus adjudicative proceedings. *Id.* Columbus further argues that “while AS&T claims that it received a summary of Columbus’ actual benefits for the first time on August 1st or 2nd, this information is neither part of Columbus’ proposal nor the FAA evaluation challenged in the Supplemental Protest.” *Id.*

Columbus argues that the Supplemental Protest challenges aspects of the FAA’s evaluation under Factor 1 that have not changed from Columbus’ prior protest to the subsequent reevaluation and award to Columbus. *Id.* As such, the FAA’s evaluation of Columbus under Factor 1 was ripe for protest by AS&T as of the July 20 debriefing.” *Id. citing* 14 C.F.R. 17.15(a)(3)(i)-(ii).

The Center, in its Supplemental Agency Response, joins Columbus in its Motion to Dismiss filed on August 9, 2010, arguing that:

Although one could argue that AS&T could not have raised this alleged error as an intervenor in the Columbus protest, it certainly could have raised it, *and was required to raise it* when it filed its own protest on July 23. It chose instead to focus on what it claimed was a flawed evaluation of the qualifications of its proposed Senior System Analyst, one of two key personnel identified in the SIR.

Supplemental AR at 6 (emphasis in original).

With respect to the timeliness of the allegation of its Supplemental Protest, AS&T asserts that “Columbus’ proposal was unclear as to what SCA employees are provided” and AS&T was unaware of the true benefits being provided or the cost thereof until complaints were made by its own employees and AS&T was provided Columbus’ Summary of Benefits on August 1, 2010. *Supplemental Protest* at 5.

AS&T states that in Columbus’ technical proposal, its employee benefits were set forth in a chart which indicated that the benefits identified with an “ * ” were included in the Health and Welfare allowance. *Supplemental Protest* at 8. AS&T also acknowledges that the chart elsewhere states “SCA: \$3.35/hour allowance for Sick Administrative, Jury Duty and Bereavement; 401K and Health Insurance”, thus indicating that SCA

employees would not receive health benefits. *Id.* In this regard, AS&T argues that the manner in which Columbus presented its employee benefits misled the TET into giving it a “strength” based on the erroneous conclusion that its Employee Benefit Program was “extensive.” *Id.* at 12. AS&T explains that except for the two “Key Personnel,” all the employees were Service Contract Act (“SCA”) employees and in fact were not covered by an “extensive Employee Benefit Program.” *Id.* at 11-13.

AS&T argues with respect to the timeliness of its Supplemental Protest that:

The timely filing of the initial protest itself renders the Supplemental Protest timely. Indeed, in arguing that the Supplemental Protest is untimely, Columbus and the Tech Center seem to assume that the time calculations set forth in 14 CFR § 17.15 apply to individual arguments. AS&T disagrees and submits that a supplemental submission or filing that simply raises an additional argument for the challenge to the same underlying award decision (the post Columbus protest award to Columbus) should be judged for timeliness based upon the timeliness of an already pending protest for which the record and submission schedule had yet closed.

AS&T Supplemental Comments at 5.

In its technical proposal, Columbus sets forth its employee benefits in a chart which indicated with an “ * ” those items that were included as part of the Health and Welfare allowance. *FF* 16 and 22. The chart also states: “SCA: \$3.35/hour allowance for Sick Administrative, Jury Duty and Bereavement; 401K and Health Insurance” which was meant to convey the fact that SCA employees would pay out-of-pocket any benefit costs [DELETED]. *FF* 22. Even so, benefits available to SCA employees through Columbus included health, dental and vision insurance, life and short/long term disability insurance and 401K retirement savings and were found by the TET to constitute an “extensive employee benefit program.” *FF* 15. The ODRA finds no evidence in the record that the Columbus proposal misrepresented the information in its technical proposal regarding employee benefits; and the benefits stated in Columbus’ proposal were substantially the same benefits it gave employees. *FF* 22.

The record shows that on July 20, 2010 AS&T was debriefed and provided with a copy of the new Post-Negotiation Memorandum that adopted the previous score of “Excellent” for Columbus’ Factor 1. *FF 19*. Prior to that time, AS&T had received the complete administrative record developed in the Protest of Columbus which included Columbus’ technical proposal as well as the evaluation score sheets and summaries relative to the original scoring of Factor 1. As such, it was incumbent on AS&T to file within 5 days of its debriefing any challenge against the assignment of an “Excellent” rating for Factor 1 and the “strength” ascribed to Columbus for what the TET perceived to be an “extensive Employee Benefits Program.”

A general challenge to an award decision does not permit a protester to subsequently raise specific evaluation defects of protests at any time during the protest proceedings. Rather, where a protester raises supplemental protest grounds, each new ground must independently satisfy the timeliness requirements. *See Health and Human Services Group*, B-402139.2, 2010 WL 3523740 (Comp.Gen.).⁴ The timeliness deadlines applicable to each new protest ground are set forth in the ODRA Procedural Regulations at 14 C.F.R. Section 17.15(a), which provides:

(3) For protests other than those related to alleged to solicitation improprieties, the protest must be filed on the later of the following two dates:

- (i) Not later than 7 business days after the protester knew or should have known of the grounds for the protest; or
- (ii) If the protester has requested a post-award debriefing from the FAA Product Team, not later than 5 business days after the date on which the Product Team holds that debriefing.

⁴ Decisions of the General Accountability Office may be viewed by the ODRA as persuasive authority where such precedent is consistent with the FAA’s AMS and ODRA caselaw. *Protest of Northrop Grumman Corporation*, 00-ODRA-00159 at F.N. 3.

It is well established in ODRA caselaw and regulation that protests must be timely filed in order to be considered by the ODRA and that the time limits for the filing of protests will be strictly enforced. *See, e.g., Protest of Galaxy Scientific Corporation*, 01-ODRA-00193; *Protest of Boca Systems, Inc.*, 00-ODRA-00158; *Protest of Raisbeck Commercial Air Group, Inc.*, 99-ODRA-00123; *Protest of Aviation Research Group/US, Inc.*, 99-ODRA-00141. As we noted in the *Protest of Boca Systems, Inc., supra*, “the ODRA Procedural Regulation does not provide the ODRA with discretion to extend the stated time limits for the filing of bid protests.” Here AS&T knew or should have known of the ground of its Supplemental Protest no later than the date of its debriefing, *i.e.*, July 20, 2010. Inasmuch as the Supplemental Protest was not filed until August 9, 2010, the Supplemental Protest is not timely and must be dismissed.

IV. CONCLUSION

For the reasons discussed above, the ODRA recommends that AS&T’s Initial Protest be denied in its entirety and that its Supplemental Protest be dismissed as untimely.

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APPROVED:

-S-

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