

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

**FINDINGS AND RECOMMENDATIONS**

**Matter:           Protest of Information Systems & Networks Corporation**

**Under Solicitation No. DTFA01-98-R-16125**

**Docket No.:       98-ODRA-00095**

*Appearances:*

For Protester, Information Systems & Networks Corporation: Norman H. Singer, Esq.,

For the Agency Product Team: Sybil Horowitz, Esq.

**I.       Introduction**

**Information Systems & Networks Corporation (“ISN”) filed the subject protest pursuant to § 3.9.3.2.1 of the Federal Aviation Administration (“FAA”) Acquisition Management System (“AMS”) against the award of the Aeronautical Data Link (“ADL”) Support Services contract to Universal Systems & Technology Inc. (“UNITECH”). ISN’s protest alleges that the ADL Product Team (“Product Team”) improperly excluded it from competition on the basis of a past performance cost evaluation. Specifically, ISN asserts that the decision of the Contracting Officer was arbitrary and capricious because: (1) the evaluation was not conducted in accordance with the stated evaluation criteria; (2) the Contracting Officer failed to conduct meaningful discussions regarding those issues cited as the reason for ISN’s removal from the competitive range; and (3) the rationale underlying the determination that ISN is not eligible for award creates a de facto debarment**

**against ISN for FAA procurements. For the reasons set forth herein, the Office of Dispute Resolution for Acquisition (“ODRA”) recommends that ISN’s protest be sustained on the basis that the past performance evaluation team failed to follow the stated evaluation criteria. Because the ODRA is sustaining the protest on the basis of the first issue, the ODRA need not reach the second and third issues raised by ISN. In considering the appropriate remedy for this case, the ODRA carefully considered the nature of the procurement as a task order contract, the criticality of the services, the fairness of the evaluation process, the availability of a meaningful remedy, and the integrity of the FAA's procurement system.**

## **II. Findings of Fact**

1. The Federal Aviation Administration (“FAA”) issued a Screening Information Request (“SIR”) on April 24, 1998 for technical, engineering, and management assistance services in support of the ADL Product Team. Agency Report, October 7, 1998 (“AR”), Tab 5. The ADL Product Team is responsible for development and implementation of a digital data link communication system that will be the catalyst for transmission of Air Traffic Control (“ATC”) information, weather, flight service data, navigation and surveillance, and aeronautical information and services between aircraft and ground systems using data link technology. Generally, the objective is to make all data link services consistent and complementary throughout airport, terminal, domestic, and oceanic/remote non-radar domains to allow a seamless transition of aircraft from one domain to another. The modernization of the National Airspace System (“NAS”) requires the development of ADL capabilities to help improve safety and efficiency in the management of airspace and aircraft operations. AR, Tab 1 and Tab 5, pages 16 - 17.
2. The SIR provided for a base period of performance of three years and for Government options for up to four additional 12-month periods. AR, Tab 5, Section F.1, page 31.

3. Section B.1 of the SIR provided for the placement of delivery orders to perform tasks pursuant to Section C, the Statement of Work. Under those orders, labor hours were to be established on a time and materials basis, with fixed labor rates. The contractor was to be reimbursed for all allowable and allocable costs for materials and travel. Each order was to state a ceiling price and include estimated labor hours (by labor mix), fixed rate per hour for the applicable labor category, and the estimated material and travel costs. AR, Tab 6, page 1. Under the ADL Contract, delivery orders are to be issued after agreement with the contractor is reached regarding such issues as the technical approach for performing the work, the estimated number of hours to complete the task, and the personnel and equipment required. AR, Tab 6, page 47.
  
4. The labor rates proposed for the three base years and four option years were to be fully burdened with overhead, general and administrative costs (“G&A”), profit/fee and any appropriate escalation charges. Offerors were not required to propose any costs for Other Direct Cost (“ODC”) items under the SIR. Rather, the SIR specifies the use of yearly Not-To Exceed (“NTE”) figures of \$500,000 for materials and \$500,000 for travel. AR, Tab 6, Section B.1.1, pages 1 - 14.
  
5. Section G.8 of the SIR states that invoices for payment must provide a detailed breakdown of incurred costs by cost element, and that the contractor must maintain daily work records. This section further requires the contractor to segregate all costs according to delivery order and to establish separate job order cost accounts and numbers for each delivery order issued, recording and reporting all incurred costs in the appropriate job order account. AR, Tab 5, Section G.8, page 36.

6. Section G.10 of the SIR further states:

(c) Total cost. It is estimated that the total cost to the FAA for the performance of this contract shall not exceed the ceiling price set forth in the "Schedule" and the Contractor agrees to use its best efforts to perform the work specified in the "Schedule" and all obligations under this contract within such ceiling price. If at any time the Contractor has reason to believe that the hourly rate payments and material costs that will accrue in performing this contract in the next succeeding 30 days, if added to all other payments and costs previously accrued, will exceed 85 percent of the ceiling price in the "Schedule", the Contractor shall notify the Contracting Officer giving a revised estimate of the total price to the FAA for performing this contract with supporting reasons and documentation. If at any time during performing this contract, the Contractor has reason to believe that the total price to the FAA for performing this contract will be substantially greater or less than the then stated ceiling price, the Contractor shall so notify the Contracting Officer, giving a revised estimate of the total price for performing this contract, with supporting reasons and documentation. If at any time during performing this contract, the FAA has reason to believe that the work to be required in performing this contract will be substantially greater or less than the stated ceiling price, the Contracting Officer will so advise the Contractor, giving the then revised estimate of the total amount of effort to be required under the contract.

(d) Ceiling price. The FAA shall not be obligated to pay the Contractor any amount in excess of the ceiling price in the "Schedule," and the Contractor shall not be obligated to continue performance if to do so would exceed the ceiling price set forth in the "Schedule", unless and until the Contracting Officer shall have notified the Contractor in writing that the ceiling price has been increased and shall have specified in the notice a revised ceiling that shall constitute the ceiling price for performance under this contract. When and to the extent that the ceiling price set forth in the "Schedule" has been increased, any hours expended and material costs incurred by the Contractor in excess of the ceiling price before the increase shall be allowable to the same extent as if the hours expended and material costs had been incurred after the increase in the ceiling price.

7. Section L.19 sets forth proposal instructions to offerors regarding their past performance. Specifically, it states "[t]he Offeror shall cite, and briefly describe at least three (3) contracts over \$5,000,000 that they have performed on, within the past 3 years, that are of a similar technical nature and complexity to the ADL Support

Services effort.” This section further states “[f]or the contracts cited, Offerors shall also provide a cost/price management history; cost overruns and underruns, and cost incentive history, if applicable.” AR, Tab 5, pages 82 and 84.

8. Section M.3 provides that source selection will be made on the basis of technical capability, management capability, past performance, and cost/price evaluation. AR, Tab 6, page 2 (Bates stamp 100228). Specifically with regard to past performance, this section states:

The past performance factor is based on the written responses to the Past Performance Questionnaire (Attachment J-3). The criteria to be evaluated are outlined in Section M.5, subparagraph C. These criteria are of equal weight. The Past Performance factor will be evaluated on a Pass/Fail basis. An offeror must satisfy all three criteria in order to pass. The Past Performance Factor is equal in weight to the Technical Capability and Management Capability factors and is significantly greater than the Cost/Price factor.

AR, Tab 6, Section M.3.c., page 3 (Bates stamp 100229).

9. Section M.5.C identifies the three areas of equal weight for evaluating past performance. These areas are technical performance, schedule performance, and cost performance. The criteria for evaluating these areas are as follows:
  - (a) Technical Performance – Considers the offeror’s compliance with technical requirements and performance standards, for previous and present work. The offeror’s compliance with process requirements and performance requirements as well as the quality of the service or support will be considered. The offeror’s performance on interim work and deliverables such as system designs, prototype hardware, and technical reports will be considered. The initiative of the offeror in identifying and resolving unforeseen technical problems will also be evaluated.

- (b) Schedule Performance – Considers how well the offeror has met completion dates. This includes any interim deliverables or milestones and completion of valid customer direction.
  
- (c) [Cost Performance –] Considers cost increases and cost savings such as overruns and underruns experienced on previous and current contracts. Only those increases or savings within the responsibility of the offeror under the terms of the particular contracts are considered. However, customer directed efforts and “descopings” to mitigate costs increases will be considered in assessing cost performance

AR, Tab 6, Section M.5.C.c, page 7 (Bates stamp 100233).

10. With regard to the evaluation of past performance, Section M.5.C states:

The Past Performance factor is Pass/Fail. In order to pass, the offeror must satisfy all three criteria. The offeror’s record of past performance must show *no deficiencies in performance within the last three years that would increase the risk of failure in performance of the ADL Support Services contract*. The FAA will not hold the offeror responsible for failures or deficiencies that were beyond the offeror’s control. Past performance is evaluated from the information requested in Section L together with information that may be provided on the past performance questionnaire (Attachment J-3), available within the FAA, from other Government agencies, and from non-government organizations. The Government reserves the right to make inquiries as to the prospective offeror’s past performance on any existing or previous contracts, regardless of whether or not they are included in the proposal submission. (emphasis added).

11. The subject procurement was governed by an evaluation plan that described the process and procedures for evaluating and rating/scoring technical proposals. AR, Tab 8, page 6 (Bates stamp 100257). The past performance evaluation team would be a sub-part of the technical evaluation team. The past performance evaluation team

was to be headed by a group leader, who would have the responsibility for ensuring that all procedural and administrative activities of the evaluation group are carried out in accordance with the procedures detailed in the evaluation plan. Among other responsibilities, the group leader was to (a) coordinate the evaluations of the technical proposals; (b) read the proposals, but not participate in the individual rating/scoring of proposals; (c) ensure that members in the group have a common understanding of the requirement and proposed solution for each evaluated item; (d) ensure that each evaluator prepares and submits the necessary and proper documentation to substantiate his or her findings on each proposal evaluated; (e) review the individual rating/scoring data of the technical evaluators; (f) determine the overall rating/score based upon the individual evaluators rating/score sheets; and (g) prepare and submit to the Project Lead a Group Report Summary Sheet and supporting documentation. The Project Lead would then incorporate the Group Report into one formal written Technical Evaluation Report to the SSO. AR, Tab 8, pages 11 - 12, 16 (Bates stamp 100262 – 100263, 100267).

12. The past performance evaluation team (“Team”) members were responsible for, among other things, (a) evaluating each proposal in accordance with the evaluation plan and maintaining a record of all notes including comments on strengths, weaknesses, deficiencies and ambiguities; (b) rating/scoring the proposal based on an independent face value reading (prior to any discussion with other group members); (c) preparing and submitting to the Group Leader technical evaluation sheets and providing an overall rating/score for each evaluation area; (d) participating in group meetings to arrive at a common understanding of the requirements and the proposed solution for each evaluation item; and (e) assisting the Group Leader in preparing the reports. The plan provides that the evaluators will independently evaluate and rate each proposal, without comparison to the evaluations of other evaluators. The ratings assigned by Team member were to be tentative. As a part of their evaluation, the Team evaluators were required to document the significant strengths, weaknesses and deficiencies of each proposal. Upon completion of all individual evaluation item

rating score sheets, the Group Leader would assign one rating/score that was to best represent the overall rating/score by each of the individual evaluators and to update the corresponding line item on the Group Report Summary. AR, Tab 8, pages 13 – 16, 18 (Bates stamp 100265 – 100267, 100269).

13. ISN submitted its proposal on June 5, 1998. AR, Tabs 9 - 13. As part of its proposal, ISN responded to the SIR's Past Performance Questionnaire in part by describing its experience under its FAA Communications Technical Assistance Contract ("COMTAC"), a cost-plus-fixed-fee ("CPFF") task order contract. In that response, ISN stated that, under that contract:

[o]f the 115 task orders issued to date, 105 have been completed. The remaining 10 are currently active. All completed tasks were concluded on time with full and careful adherence to task milestones. Of the 105 completed tasks, 103 were completed below the cost estimated in the Task Plan. The two tasks that exceeded the estimated cost, exceeded that cost by less than 5%. In both cases, the additional costs were associated with extensions to the award dates of the government procurements supported by ISN.

AR, Tab 12, page 4 (Bates stamp 100816).

14. ISN identified two other projects to demonstrate its past performance, one with the United States Air Force's "AMMOTE" support contract,<sup>1[1]</sup> and the other with the FAA's "Big Safari Program." Under neither of these projects did ISN indicate any adverse cost/price management history. AR, Tab 12, pages 14 – 26a and Questionnaires (Bates stamp 100826 – 100839, 100846 - 100869).

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<sup>1[1]</sup> AMMOTE stands for Acquisition Management, Management Operations, and Test and Evaluation.

15. As for the proposal's supporting cost information, ISN states: "The Team is able to offer the Federal Aviation Administration a special and highly competitive overhead cost estimate due to the Team's comparable contract experience base . . . . The offered rates of the Prime are BELOW approved provisional rates and have been previously determined Fair and Reasonable by FAA."
  
16. On June 12, 1998, the Contracting Officer requested the assistance of the Defense Contract Audit Agency ("DCAA") in performing an audit of ISN's proposal under the SIR. AR, Tab 14 (Bates stamp 101006).
  
17. On June 23, 1998, Evaluator A, one of the past performance evaluators, completed her cost performance evaluation form for ISN. She gave ISN a "pass" rating but noted that the rating was based on little available information. Product Team's Reply, dated November 12, 1998, Attachment E, Technical Evaluator Form for Evaluator A.
  
18. On July 21, 1998, Evaluator B, a second past performance evaluator, completed her cost performance evaluation form for ISN. She gave ISN a "fail" rating citing, among other things, low rates that resulted in cost overruns, a judgment for failing to pay increases to employees after receiving a wage increase, a trend towards cost overruns, adverse judgment for failure to pay increased wages, and problems with timekeeping. Product Team Reply, Attachment E, Technical Evaluator Form for Evaluator B.

19. On July 27, 1998, the DCAA provided to the Contracting Officer an “Agreed Upon Procedures Report” in which the DCAA reviewed the reasonableness of the direct labor and indirect expense rates contained in ISN’s cost proposal. The Report found that ISN “had proposed their direct labor rates based upon the company’s newly created compensation manual and selected key employees. However, ... [the DCAA] was unable to determine the reasonableness or the adequacy of the ISN compensation manual. [The DCAA] ... found in several cases the ISN compensation manual was significantly higher than the current category averages of actual employees currently employed at ISN.” As for the indirect rates, the DCAA indicated that the indirect rates were based on ISN’s actual unaudited indirect rates. DCAA also indicated that it was unable to evaluate ISN’s forecasted indirect rates because ISN would not release its FY 1998 budgetary data to the DCAA. AR, Tab 15, pages 2 - 3 (Bates stamp 101015 - 101016).

20. On July 30, 1998, the Contracting Officer, by letter, identified negative past performance information gathered pursuant to the evaluation and afforded ISN “the opportunity to provide any mitigating circumstances or facts that the evaluation team can consider.” The letter asked ISN to submit its response by August 7, 1998. AR, Tab 16 (Bates stamp 101021). The following information was set forth in an enclosure to the letter:

1. Under Contract No. DTFA01-93-C-00010, COMTAC, there was “unsatisfactory cost control.” The letter notes that “[a] ceiling rate negotiation was required during the performance of the contract”<sup>2[2]</sup> and “retention of key personnel has been a problem.”

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<sup>2[2]</sup> The ceiling rate negotiation refers to a bilateral contract modification executed on May 1, 1997, which settled a \$2,086,737 claim by ISN in the amount of \$1,639,665 for unrecovered costs incurred and billed during 1993 through 1996. The modification settled all “indirect and general and administrative costs incurred, and associated issues pertaining to indirect and general and administrative costs incurred by ISN” in performance of the contract. The modification additionally incorporates a “ceiling price”

2. Under Contract No. G33657-95-D-0219, there were “difficulties with funding the pension plan and with portability of pension plan as intended by the contract.”
3. The enclosure cited to civil complaint IP94-875-C as evidence of “unsatisfactory cost control” as it involved issues of false claims, breach of contract and unjust enrichment. The letter further notes that ISN settled these issues by paying the United States \$1,350,000.<sup>3[3]</sup>
4. The enclosure cited to an Armed Services Board of Contract Appeals (“ASBCA”) matter in which the ASBCA found that the compensation paid to ISN’s executives during the period of 1985 through 1991 was inconsistent with FAR 31.205-6.4<sup>4</sup>
5. The enclosure identified protracted correction of timekeeping system practices as evidence of unsatisfactory cost control. <sup>5[5]</sup>

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provision for the period of FY 1997 through contract close out, allowing ISN to recover increased indirect and general and administrative costs up to the ceiling rates. AR, Tab 24 (Bates stamp 101092 – 101096).

<sup>3[3]</sup> On December 1, 1997, the United States District Court for the Southern District of Indiana issued an order granting the United States’ motion for summary judgment on the issue of liability. In that action, the United States contended that (1) in 1988 ISN represented that an increase in wages was needed in order to comply with DoL requirements; and (2) when those increases were granted, ISN failed to pay its workers the increased wages. ISN responded that it did not make false representations regarding the need for an increase and believed that the United States should have known a wage increase was not required for all workers. In the end, the court found that ISN’s actions constituted a knowing action of presenting false or fraudulent claims for payment by the government, and stated that

ISN billed the Navy for higher wages than it actually paid its workers. Regardless of how the workers were classified, ISN knowingly billed the government at one rate and then failed to pay workers that rate. ISN was not open with the government about this practice, and even if the government knew that certain categories of workers were exempt, it did not know that ISN was not paying the workers the wages it represented to the Navy through its invoicing.

AR, Tab 26, page 25 (Bates stamp 101188).

<sup>4[4]</sup> See *Information Systems & Networks Corporation*, ASBCA No. 47849, 97-2 BCA ¶ 29,132 (July 7, 1997).

<sup>5[5]</sup> The record in this case shows that, by letter dated April 24, 1997, the Defense Logistics Agency (“DLA”) advised ISN’s president of adverse findings of Audit report number 6311-97A103100364, which reviewed ISN’s timekeeping system. AR, Tab 23

6. The enclosure noted as evidence of unsatisfactory cost control a “unilateral determination” by an Administrative Contracting Officer denying the inclusion of state tax in ISN’s overhead rates.<sup>6[6]</sup>
7. The enclosure identified as evidence of unsatisfactory cost control “numerous reports of ISN failing to pay subcontractors or to not pay subcontractors in a timely manner” and cites five examples.
8. The enclosure identified “serious concerns” of the Department of Labor (“DoL”) with the contractor’s defined benefit plan. It noted that the matter is currently under investigation and that DoL had previously pursued concerns with ISN’s 401k plan and successfully recovered lost interest.
9. The enclosure identified delinquent accounts payable as evidence of unsatisfactory cost control, citing as a source the executive summary from a Dunn and Bradstreet report which indicates delays with payment of bills.
10. The enclosure identified contract F33657-95-D-2019 and stated “monthly certificates of service not received or were not accurate for

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(Bates stamp 101090 – 101091). The letter identifies eight areas of deficiencies with ISN’s timekeeping system. The letter states that:

responses were requested by letters from DCAA 27 September 94 [sic], 25 April 95, 27 September 95, and most recently 20 November 96. In addition there has been no response to my letter of 31 October 95. You are requested to provide a specific response identifying corrective actions and milestone dates for accomplishing the corrections no later than 27 May 97. The timekeeping system is considered significant to the Government because a significant portion of ISN’s work for the Government is labor and service oriented. You are cautioned that failure to respond to this request will result in full distribution of my letter to all Procuring Contracting Officers that do business with ISN, to include civilian agencies and potential contracting officers seeking past performance information on your company.

AR, Tab 23 (Bates stamp 101090 – 101091). The DCAA advised ISN by letter dated December 18, 1998 of five areas of what it considered to be “material” deficiencies in ISN’s timekeeping system (similar to the deficiencies identified in the DLA’s April 24, 1997 letter). The Administrative Record also shows that ISN responded to the DCAA’s December 18 letter on January 19, 1998, describing the corrective action taken for each area. AR, Tab 28 (Bates stamp 101200 – 101202).

<sup>6[6]</sup> On April 16, 1998, the DLA issued a final decision asserting a consolidated claim against ISN for \$262,515 for unallowable, unallocable and unreasonable claimed costs that were reimbursed by the Government during 1985 and 1986.

extended periods of time even after follow-up on the part of the customer.”

11. The enclosure concluded with the statement “numerous references commented on difficulty dealing with ISN management.”

AR, Tab 16 (Bates stamp 101022 – 101023).

21. On July 31, 1998, the Contracting Officer, by letter requested additional assistance from DCAA to perform an audit of ISN’s proposal. The letter identified as an issue whether ISN corrected deficiencies relative to its compensation system (noting that a 1996 review by DCAA still showed a failure to take corrective action on any of the stated deficiencies that went back to December of 1985). Finally, the July 31, 1998 letter identified inadequacies in ISN’s timekeeping system (1997 Audit Report 6311-97A10310364). AR, Tab 18 (Bates stamp 101025 – 101026).

22. On August 6, 1998, by letter, ISN responded to each item of negative past performance information set forth in the Contracting Officer’s July 30, 1998 letter as follows:

*Contract DTFA01-93-C-0010 (COMTAC)*

“Unsatisfactory cost control. ISN assumes this concern refers to the DCAA-directed rate adjustment to the indirect cost rate structure. The total impact of this directed adjustment on this seven year, \$45 million contract has been a cost increase of approximately only two percent (2%). ISN has voluntarily agreed to fixed indirect rate ceilings for FY 97, FY 98 and FY 99, within this 2% adjustment, and has executed a full release for all past and future claims arising from or related to the DCAA rate adjustment, as reflected in Modification No. 0025 to the subject contract.

These voluntary ceilings are unprecedented by a contractor and were offered to facilitate cost management in the final years of the contract.

Retention of key personnel. The key personnel identified on this contract are the Program Manager, Deputy Program Manager and the Division Managers. The appointment of all key personnel has routinely been coordinated with the FAA pursuant to the terms of the contract. In addition, ISN has structured its COMTAC management organizational structure (*i.e.*, key personnel) to parallel that of the FAA programs supported under the contract. Thus, while changes in the COMTAC management organizational structure may have been made during the performance period of the contract to reflect organizational program changes made within the FAA, there had been no inability to retain key personnel and, until recently, no reduction in key personnel. Any reductions in key personnel positions or contract resources solely correspond to the reduced level of effort required under the contract. Such changes are not indicative of any retention problems.”

*Contract F33657-95-D-0219*

“ISN is not aware of any pension plan issues with regard to the cited contract nor does ISN have any record of performing a contract with this number. ISN does have knowledge of such allegations being raised with regard to Contract No. F08635-89-D-0219. With regard to the allegations being raised to this contract, ISN states that it identified and provided for its employees a pension benefits plan that complied with the requirements of the contract, was fully disclosed at the time of contract award, and was deemed acceptable by the Air Force contracting personnel. The pension benefits plan instituted prior to contract award remained in effect throughout the entire contract performance period, and continues to remain in effect at the present time. At no time has the government provided ISN with any statement or determination that ISN’s pension benefits plan did not comply with the contract. In fact, it is ISN’s understanding that the Air Force Audit Agency conducted an investigation of ISN’s pension benefits plan and determined that ISN’s plan was compliant with the contractual requirements.”

*Civil Complaint IP94-875-C*

“ISN did enter into a Settlement Agreement with the United States which released ISN of all liability under Civil Complaint No. IP 94-875-C - without any admission of fault. The underlying civil complaint involved a Navy contract that was completed approximately eight years ago. The Government alleged that ISN was required to pay Service Contract Act (SCA) wages to certain labor categories regardless of whether they were classified as exempt or nonexempt employees. ISN disagreed with this determination (which was never adjudicated by the cognizant SCA authority at the Department of Labor) and relied on the advice of its attorneys as to how to pay employees under the contract. The Government filed the subject Complaint against ISN after it learned that ISN had not paid SCA wages to all of its employees under the contract, regardless of their status. ISN claimed that it did not intentionally or negligently violate any laws or make any misrepresentations to the Government because it followed the advice of its attorneys. ISN further asserted that there was a mutual misunderstanding regarding the applicability of the SCA and the relevant Department of Labor regulations. To prevent the reoccurrence of even the appearance of impropriety in the future, ISN has implemented a company-wide Ethics Compliance Program.”

*ASBCA Case No. 47849 (Executive Compensation)*

“The issue involved in the ASBCA executive compensation case involved solely the amount of executive compensation that could be included in ISN’s overhead/indirect rate pools to determine the overall indirect rate structure. ISN’s incurred cost submissions for fiscal years (FYs) 1996 through 1998 include only that amount of total executive compensation allowed by the DCAA for inclusion in the indirect rate cost pools. Adjustments are presently being done for FY 92 through FY 95. ISN states for the record moreover that, because it used DCAA-directed provisional billing rates, which are substantially lower than ISN’s actual rates, for the affected fiscal years, there has been no impact or recoveries by the Government as a result of the executive compensation reduction.”

*Timekeeping System Practices*

“ISN is unable to address this issue because there is no statement of what timekeeping system practices require correction. As explanation, however, ISN uses a standard timesheets [sic] developed by our Accounting Department, copies of which have been regularly reviewed by the Defense Contract Audit Agency for purposes of recording employee hours. The DCAA has accepted such timesheets without exception for purposes of recording labor hours performed on contracts and for determination of allowable costs to be included in overhead and indirect cost rate pools. If there is information that ISN has not properly maintained its timekeeping system, or such system is inadequate for Government cost accounting, ISN has not been so advised.”

#### *Allowability of State Tax*

“In this instance, the DCAA determined that ISN, a Subchapter S Corporation, could not include any state income or franchise taxes paid by ISN’s sole shareholder on behalf of the corporation in its indirect cost rate pools. The ACO recently adopted this determination asserting that its position is primarily a “form over substance” argument. The ACO has acknowledged that, if ISN were a Subchapter C Corporation, the state taxes paid would be an allowable cost. Neither the DCAA nor the ACO have been able to cite to any provision of the Federal Acquisition Regulation (FAR) or applicable cost accounting regulations which supports such a dichotomous treatment of expenses otherwise allowable under the FAR and other applicable agency regulations. ISN intends to file an action in the U.S. Court of Federal Claims in the near future to resolve this issue. ISN further asserts that the various state tax liabilities would not have been incurred and paid but for the revenues generated by ISN’s business activities (primarily federal government contracts) within the states.”

#### *Failure to Pay Subcontractors*

“The reports regarding these incidents are incomplete, inaccurate and misleading....”

[ISN addressed each of the cited examples in detail].

### *Pension - Defined Benefit Plan*

“The use of the term “serious concerns” as it relates to ISN’s defined benefit plan and the current Department of Labor (DoL) investigation is extremely misleading. As represented to ISN by the DoL investigator, the primary issue is whether contributions were made to the defined benefit plan in a timely manner .... Relying on the representations of outside pension plan accountants and auditors, and the DIGNA Group which administered the pension plan, ISN was informed that due to employee terminations, offsets to the pension plan exceeded the required contributions such that no payment was required. ISN has since learned that this is not true and has made the required contributions to the benefit plan. Because of the lack of other controls, including the commingling of pension plan funds and 401K plan contributions, ISN terminated its relationship with CIGNA and has retained Principal Financial Group for administration of the defined pension benefit plan, and the 401 K plan. The Principal Group is updated and revising the incorrect information and records turned over to it by CIGNA. ISN has fully cooperated with the DoL investigator in this matter. ISN is confident that there will be no significant ramifications when the results of the investigation are complete because ISN has identified and corrected the issues which instigated the investigation, primarily the lack of control over the actions of the prior Plan Administrator.

With regard to the issues about ISN’s 401K plan and the successful recovery of lost interest, this statement also misrepresents the true facts and resolution of this alleged problem. The basis for the DoL’s assertion to recover lost interest is based on the definition of what the PWBA determined to be a “reasonable time” to deposit the employee 401K contributions into the plan through July 31, 1996. Although ISN disagreed with the unilateral assessment of “reasonableness” by the PWBA, ISN entered into a settlement agreement with the DoL to resolve the issue for the protection of its employees and to avoid protracted litigation. Since August 1996, ISN has been fully compliant with the ERISA provisions regarding timely submittal of employee contributions to the 401 K Plan. ISN further states that no civil penalties were assessed and that the total “recovery” for the lost interest was less than \$25,000.00.”

### *Delinquent Accounts Payable*

“ISN is unable to respond to this allegation without additional details, except as previously stated in the specific items referenced above.”

### *Contract F33657-95-D-0219 (Monthly Certificates of Service)*

“ISN provided the required cost information pursuant to its normal billing/invoice methods, including its standard certification for payment. The Air Force imposed an additional administrative requirement that ISN submit a separate report, identified as an AIR Force Certificate of Service, using a specified format. ISN is bringing itself into compliance with this administrative requirement and is training an accounting clerk in the preparation of the monthly certificates, in order to remedy this problem in an expeditious manner. ISN’s reported overall performance on this contract has been satisfactory. ISN is not aware of any issues regarding the alleged “inaccuracy” of the certificates of service submitted to the agency.”

### *Difficulty of Dealing with ISN Management*

“ISN has been performing contracts for the federal government for over eighteen years. During that time, ISN has successfully completed several hundred contracts and has performed contracts numerous [sic] federal agencies. ISN management, at all levels, has consistently provided personal attention to its customers, and has received hundreds of letters and awards recognizing its commitment to teamwork and contract performance. The allegation that unnamed entities have “difficulty dealing with ISN management” is not supported by the objective facts and the evaluations received by ISN from its numerous customers. Moreover, ISN considers it highly irresponsible of the FAA to include unsupported comments propounded by unidentified sources as part of the past performance evaluation for this procurement.

ISN management is dedicated to providing its customers with professional support and courteous service while, at the same time, ensuring that neither the company's interests nor the rights of its employees are exploited. If the attainment of these objectives causes these unidentified sources to comment that there is "difficulty dealing with ISN management" then ISN considers the term "difficult" to be a compliment of its management style."

AR, Tab 16 (Bates stamp 101029 - 101037).

23. On August 7, 1998, the Group Leader completed the Group Leader Form, Attachment D, summarizing the scores for ISN's past performance. Despite the fact that not all evaluators had completed their forms, she indicated a failing score for ISN's cost performance. Product Team Reply, Attachment D, Group Leader Form.7[7]

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7[7] ISN views this fact as evidence that the FAA had preordained that ISN would fail, namely that the non-voting group leader was the sole person to make the decision to fail ISN. *See* ISN letter to the ODRA, dated November 16, 1998. In response, the Group Leader explained that she viewed this form simply to be an administrative matter that needed to be completed and that this fail rating was no more than her own initial evaluation of the overall research as of that date. The Group Leader states that she considered this form to be her own working paper and notes that the overall rating for past performance was left blank and was not used until it was submitted along with the Group Report to the Project Lead. Declaration of the Group Leader, dated November 18, 1998. The approach employed by the Group Leader lacks a rational basis and is contrary to the evaluation plan. The fact that the overall rating was left blank is meaningless, given the pass-fail nature of the cost performance factor. Moreover, under the plan, the Group Leader has no vote on the past cost performance issue. Even so, the ODRA does not view the early completion of this form to have been prejudicial in light of the contents of the evaluator's individual forms which were directly incorporated into the final group report approved by all the evaluators. However, if the facts had shown that this form had prejudicially impacted the Team's decision to exclude ISN from the competition, the ODRA would have drawn an adverse inference from the completion date of the form, as well as the Product Team's initial failure to produce the document in discovery. There is no suggestion that the withholding of the form was intentional or that Counsel for the Product Team was involved in any way in the non-production of the form.

24. All three evaluators reviewed the rebuttal information presented by ISN in its August 6, 1998 letter. Deposition of Evaluator C (“Evaluator C”) at page 24; Deposition of Evaluator B (“Evaluator B”) at page 34; and Deposition of Evaluator A (“Evaluator A”) at pages 30 - 31. On August 13, 1998, Evaluator B annotated her July 23, 1998 failure rating for ISN with the comment “[t]his offeror’s response to additional FAA inquiry into their past performance was considered in reviewer’s determination.” Evaluator B at page 34; Product Team Reply, Attachment E, Technical Evaluation Form for Evaluator B. Evaluator B explained that she identified problems with cost overruns, failure to pay workers an increased wage after ISN was granted a wage increase, poor cost performance, poor cost management and timekeeping problems. Evaluator B at 33.
25. ISN’s response also was shared by the FAA with the Department of Labor and the Defense Contract Management Command, but did not cause those agencies to change their negative past performance comments. AR, Declaration of Barbara Doherty, pages 9 - 10 and Declaration of the Group Leader, pages 5 – 6.
26. On August 11, 1998, Evaluator C completed his cost performance evaluation form for ISN. He gave ISN a “fail” rating, citing, among other things, an “almost \$3 million overrun” under COMTAC and “the unusually high number of claims.” Product Team Reply, Attachment E, Technical Evaluator Form for Evaluator C.
27. In explaining his rating, Evaluator C also stated he was concerned that ISN had not maintained proper oversight of its pension plan administrator. Evaluator C at page 42. He also believed that the pension plan administration issue could affect ISN’s G&A rates and that ISN appeared to have internal financial problems. Evaluator C at page 42. Evaluator C further stated that he recognized ISN’s right to file suit with

regard to the executive compensation issue, but the fact that these costs directly affect the overhead and G&A rates made it a cost concern. Evaluator C at page 39.

Evaluator C further indicated that ISN lost credibility with him because, on the COMTAC response, it inferred that DCAA directed its rate adjustment and thus caused the cost increase on the contract. Evaluator C at page 30. Evaluator C found that “ISN has shown questionable judgment with its own finances which raises doubt whether their support in fiscal matters would be with the highest level of integrity that the Government must operate under and also demonstrates questionable management judgment.” Evaluator C at page 44. He stated “[i]t was the preponderance of evidence that made me feel that ISN failed past performance. Had I only seen one [problem], I may have felt otherwise, but I evaluated all that I was given, and my recommendation was to fail.” Evaluator C at page 58.

28. The Group Leader incorporated the individual comments of the evaluators into the Group report and discussed its contents with at least two of the evaluators. Evaluator A at pages 50 – 52; Evaluator B at page 37 - 38. All three evaluators read, commented on and accepted the Group Report. Evaluator C at pages 45, 59; Evaluator B at page 40; and Evaluator A at page 40.

29. According to the Team Leader, the FAA identified the following areas of cost performance during the last 3 years that resulted in ISN’s receipt of a failing score for past performance: (1) Contract DTFA01-93-C-00010 (COMTAC); (2) the Pension (401K) issue; and (3) the State tax issue. These areas were said to represent “relevant, current and quantified risk areas in accordance with the SIR.” In addition, according to the Team Leader, the FAA gathered significant negative past performance in other areas that are “indicative of a systemic problem” with ISN’s business practices. The FAA found that ISN’s August 6, 1998 response did not provide convincing evidence to overcome the concerns that the FAA had identified in

its July 30, 1998 letter, and that in the cost performance area, there was a “pattern or a significant track record of an environment indicating the need for close monitoring, tighter cost controls and high risk of greater cost and performance risk.” AR, Declaration of the Team Leader, pages 5 - 13.

30. The specific rationale for the decision to exclude ISN from the competition is set forth in the Group Report for past performance (attached to the Product Team Reply) and in the Declaration of the Team Leader (attached to the AR).

*Contract DTA01-93-C-00010 (COMTAC)*

31. Based on information from three contracting officers who had managed the COMTAC contract, the evaluation team found that the contract experienced a cost increase due to a significant difference in the G&A rate. This increase was considered to be the responsibility of ISN. It resulted in a claim against the FAA and subsequent contract modification providing for payment to ISN of \$1,639,665. The evaluation team found that the cause of this increase was that ISN’s best and final offer (“BAFO”) for COMTAC included a reduction in its G&A rate from 11% to 5.7%. AR, Tab 20. The evaluation team further found that, after award, ISN was not able to substantiate this rate and submitted a claim to “get well on its underbidding practice” thus recovering the difference in G&A. Declaration of the Team Leader, pages 6 - 8; ISN claim documentation (Bates stamp 101098 - 101130), (attached to the AR); Group Report - Past Performance, page 5 (attached to Product Team Reply).

32. The evaluation team regarded ISN's COMTAC claim for G&A as relevant to the subject ADL Contract, because, for the ADL Contract, G&A is applied to ODC Contract Line Items ("CLINs"), which are cost reimbursable line items. AR, Declaration of the Team Leader, pages 8 - 10.

*Pension (401K) Issue*

33. The evaluation team learned that DoL investigated ISN's employee contribution pension plan in 1995. Due to the delinquent plan contributions, the DoL was able to obtain recovery for the employees, in the form of interest in the approximate amount of \$25,000. 8[8] ISN was also assessed civil penalties totaling \$4,825.00. 9[9] The team found this information to be relevant because

- (1) additional penalties may be assessed if ISN fails to satisfactorily implement corrective measures;
  - (2) additional FAA resources would be required to manage and oversee this area;
  - (3) mismanagement of the pension fund could cause employees (including key employees) to seek employment elsewhere;
  - (4) DoL could remove the present fiduciary, ISN's president, or the IRS could revoke the plan if such practices continue;
- (5) open and unresolved issues relating to employee contributions dating back to 1995 are unacceptable to the FAA.

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8[8] ISN, in its Comments to the AR, provided a copy of an unsigned ISN letter, dated January 28, 1998, to DoL confirming the payment of \$24,122.83 in full resolution of the matter. ISN Comments, dated October 19, 1998, Exhibit 2.

9[9] See AR, Tab 44.

AR, October 7, 1998, Declaration of the Team Leader, pages 10 – 11; *see also* Product Team Reply, Group Report - Past Performance, page 6.

*State Tax Issue*

34. The evaluation team considered the state tax issue to be relevant to the ADL Contract because the Administrative Contracting Officer's letter, dated April 16, 1998, demanding payment of \$262,515 for 1985 and 1986 is "relatively current." Moreover, the state tax dispute is the subject of a lawsuit currently being pursued in the U.S. Court of Federal Claims.<sup>10[10]</sup> The team felt that the inclusion of state tax charges in the G&A rate inappropriately increases the rate billed to the Government and affects, at a minimum, the ODC charges under the ADL Support Services contract, as G&A is applied to those costs. The evaluation team further noted that the contract ceiling for ODCs is reached faster, potentially impacting the FAA's ability to do the necessary work, because of the incurrence of unallowable G&A costs. AR, dated October 7, 1998, Declaration of the Team Leader, pages 11 – 12.
35. In addition, the evaluation team found that the information it had received on ISN "presented an environment of concern in the cost management area dating back years and involving numerous litigations [sic] with decisions/rulings/agreements in favor of the Government" and "a need to address and/or implement cost control measures." Product Team Reply, Attachment 1, Group Report, page 6. In addition to the three areas identified above, the team cited (a) Civil Complaint IP94-875-C; (b) ASBCA

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<sup>10[10]</sup> ISN filed an action in the U.S. Court of Federal Claims regarding the state tax issue on August 17, 1998. ISN Comments, dated October 19, 1998, Exhibit 3.

Case No. 47849 (Executive Compensation); (c) Delays in payment; and (d) Timekeeping system practices. The team found that “[a]ll of these areas present an environment indicative of the need for closer monitoring, tighter cost controls and definitely one that is of higher risk of greater cost to the Government” and “forms the backdrop for the areas resulting in the cost performance ‘fail’ rating.” Product Team Reply, Attachment 1, Group Report, page 7.

36. By letter dated August 25, 1998, the DCAA advised the Contracting Officer that it was canceling the requested audit of ISN. The letter indicated that DCAA was unable to obtain the data from ISN to develop forecasted indirect rates and to verify the direct labor rates. The letter also indicates that ISN’s Controller had contacted DCAA on August 21, 1998, stating that he was working on the FY 1998 budgets and awaiting direct labor input from several departments. DCAA further noted that ISN’s Controller indicated that he was unaware of the compensation manual issue and would have to gain a better understanding of DCAA’s problem with the use of the compensation manual before he could get someone to look into this issue. AR, Tab 34 (Bates stamp 101241).

37. On August 31, 1998, the Source Selection Official approved the technical evaluation report submitted by the technical evaluation team. AR, Tab 35 (Bates stamp 101242).

The report states:

Each evaluator individually scored each factor. The evaluators then [sic] met to discuss their scores, paying particular attention to any sets of scores that had over a four point differential. The evaluators had the option of reaching consensus and changing the scores or leaving the scores as they were and providing an explanation for any; sets of scores with a four points or more differential. The group leader determined the final scores by averaging the score sets.

AR, Tab 35 (Bates stamp 101248).

38. Specifically, with regard to evaluation of past performance, which was scored on a pass/fail basis, the technical evaluation report states:

[t]he information required by the SIR was either submitted to the FAA by the offeror, or submitted directly to the FAA by the office providing the reference. The evaluation team initially reviewed those references submitted in response to the SIR. The evaluation team then expanded its review to include other inquiries. The extent of inquiries pursued was based on whether concerns had been gathered about performance that merited a broader evaluation to ensure an appropriate number of references were sampled.

Low ratings without comments were followed up with the references for an explanation. Low ratings and comments were considered in context.

AR, Tab 35 (Bates stamp 101263).

39. As for ISN's past performance, the technical evaluation report states that the team gathered significant negative past performance information and provided this information to ISN for comment. The report states that ISN's response was received on August 7, 1998 and was considered. The report further notes that any negative information received was verified to:

- (1) screen out prejudicial evaluations;
- (2) acknowledge the fact that contractors do have a right to pursue administrative remedies;
- (3) note currency of the information;

- (4) note the relevancy of the information; and
- (5) note whether the area of concern represents an isolated incident or is part of a pattern.

AR, Tab 35 (Bates stamp 101264).

40. The overall technical scores for the proposals received were as follows:

	<b>Company A</b>	<b>ISN</b>	<b>Company C</b>
<b>Technical Capability</b>	29	28	26
<b>Management Capability</b>	27	32	33
<b>Past Performance</b>	30	0	30
<b>Total Score</b>	86	60	89

41. Because of ISN’s “marginally acceptable technical rating” resulting from its failure of the past performance factor, the evaluation team recommended that ISN be removed from the competition as it had no reasonable chance for award. AR, Tab 35 (Bates stamp 101265).11[11]

42. On August 31, 1998, the Contracting Officer informed ISN that its proposal had no reasonable chance for award and was eliminated from the competition. AR, Tab 36 (Bates stamp 101266).

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11[11] Notably, excluding the past performance factor, ISN had the highest combined score of 60 for the technical capability and management factors (in contrast to Company A’s score of 56 and Company C’s score of 59. See Finding 40.

43. The Source Selection Decision, dated September 9, 1998, provides that “[t]he basis for the down select was ISN’s failure to meet the requirements of cost performance under the past performance factor. ISN was provided an opportunity to rebut the findings of the past performance evaluation, but the rebuttal was not sufficient to allay the concerns of the team and myself regarding the high risk involved with accepting the past performance findings.” AR, Tab 36 (Bates stamp 101275).
44. Pursuant to ISN’s request, the FAA conducted a debriefing on September 10, 1998. During the debriefing, the Contracting Officer informed ISN as to the information relied upon by the FAA to “down select” ISN and provided documentation, including documents relative to the DCAA’s audit of ISN’s proposal. AR, Declaration of Barbara Doherty, page 11. The Contracting Officer also asserts that at the debriefing, ISN had notice that it was not in line for award because ISN was advised that the FAA could not evaluate its cost proposal. AR, Declaration of Barbara Doherty, page 11.12[12]
45. ISN filed the subject protest on September 17, 1998.

### **III. Discussion**

In making recommendations concerning substantive protest issues, the ODRA will apply the same standard of review applicable under the Administrative Procedure Act, 5 U.S.C. § 706. Thus, agency actions will generally be upheld, so long as they have a rational

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12[12] This fact was the basis for a Motion to Dismiss ISN’s protest by the Product Team. The record shows, however, that the sole basis for eliminating ISN from the competition on August 31, 1998 was its past cost performance. Any assertion to the effect that had ISN remained in the competition it would have been eliminated because its costs were un-auditable would be speculative. ISN is not required to protest a hypothetical basis for rejection and for that reason, the Product Team’s Motion to Dismiss was denied. *See ODRA Conference Memorandum*, dated November 3, 1998.

basis, are neither arbitrary, capricious, nor an abuse of discretion, and are supported by substantial evidence. *See Protests of Camber Corporation and Information Systems & Networks, Inc.*, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated), citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).<sup>13</sup>[13] For the reasons set forth below, the ODRA recommends that the protest be sustained on the ground that the evaluation team failed to comply with the stated evaluation criteria contained in the SIR. Accordingly, we do not reach the issues of whether the Contracting Officer conducted “meaningful discussions” or whether the rationale underlying the determination that ISN is not eligible for award create a *de facto* debarment against ISN for FAA procurements.<sup>14</sup>[14]

At the outset we note that the evaluation of past performance is a matter within the discretion of the contracting authority, and the ODRA will not substitute its judgment for

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<sup>13</sup>[13] The criteria for determining whether the Government’s conduct was arbitrary and capricious include:

- (1) subjective bad faith on the part of the procuring officials, depriving a bidder of the fair and honest consideration of his proposal, normally warrants recovery of bid preparation costs, (2) proof that there was “no reasonable basis” for the administrative decision will suffice in many instances, (3) the degree of proof of error necessary for recovery is ordinarily related to the amount of discretion entrusted to the procurement officials by applicable statutes and regulations, and (4) proven violation of pertinent statutes or regulations can, but need not necessarily, be a ground for recovery. *Keco Industries, Inc. v. United States*, 203 Ct. Cl. 566, 492 F.2d 1200 (Ct. Cl. 1974).

<sup>14</sup>[14] While the evaluation team may have legitimate concerns about ISN’s business practices and integrity, such concerns are ordinarily addressed in the context of contractor responsibility determinations or debarment proceedings. *See AR*, pages 6 – 7. The FAA Procurement Toolbox Guidance, T3.2.2.7 Contractor Qualifications (debarment), in Sub-section 3.a provides in this latter regard that:

“[c]ontractors that exhibit behavior that is not in the public interest and does not protect the Government’s interest could be considered for debarment. The IPT/procurement teams should consider the seriousness of the contractor’s acts and any mitigating factors in initiating a debarment proposal.”

a reasonably based past performance rating. *See Camber, supra.* However, we are required to and will examine the evaluation to ensure that the evaluation was reasonable and consistent within the stated evaluation criteria. This treatment is consistent with that given by the Comptroller General. *Cf. HLC Industries, Inc., B-274374, December 6, 1996, 96-2 CPD ¶ 214.* In the ODRA's view, only one of the multiple bases underlying the Product Team's disqualification of ISN fits within the plain language of the SIR's stated evaluation criteria for past cost performance.

AMS § 3.2.2.3.1.2.3 provides that the evaluation of submittals must be done in accordance with the stated evaluation criteria set forth in the SIR and in the evaluation plan. AMS § 3.2.2.3.1.3 likewise provides that "[t]he selection decision *shall* be based on the stated evaluation criteria." (emphasis added.) The SIR for this procurement states the following as the evaluation criteria governing all three components of past performance, including past cost performance:

"[t]he offeror's record of past performance must show no deficiencies in performance within the last three years that would increase the risk of failure in performance of the ADL Support Services contract. The FAA will not hold the offeror responsible for failures or deficiencies that were beyond the offeror's control."

AR, Tab 6, Section M.5.C, page 7 (Bates stamp 100233). This SIR language requires that, to be considered acceptable in terms of past cost performance, an offeror's past performance record must be devoid of past cost performance "deficiencies." However, "deficiencies" to be considered are only those that occurred within the preceding three-year period. In other words, the inquiry into the occurrence of "deficiencies" is limited to a defined period of time. Furthermore, the type of performance "deficiencies" to be considered and given weight in the past cost performance evaluation would be limited to those past "deficiencies" that would "increase the risk of failure *in performance of the ADL Support Services contract.*" Finally, failures or deficiencies "beyond the offeror's control" are not to be considered.

Although the SIR, in discussing the evaluation of past cost performance, speaks about “cost increases and cost savings,” neither the SIR nor the Evaluation Plan, which provides the process and procedures to be followed by the evaluation team in evaluating and scoring the proposals, provides specific guidance as to what facts constitute a “deficiency” in terms of past cost performance. AR, Tab 8. The absence of specific SIR criteria or Evaluation Plan guidance for evaluating past cost performance was reflected in Evaluator B’s deposition testimony. When asked to describe how she went about determining and rating past cost performance, Evaluator B could only state that she would

“look at the document that was provided by the offeror and look at whether in the past situations they had experienced cost overruns or underruns [and] look at any criteria that would be specifically related to cost problems, *or whatever, that might cause us pause, I guess.*”

*See* Evaluator B at 22 – 23. (Emphasis added.).

Also lacking in the Evaluation Plan is any guidance on what type of past cost performance information was to be considered *relevant to the ADL Contract*. FAA’s Procurement Toolbox Guidance, under “Past Performance” at page T3.2.2-6, subsection 3.b.1 , under “Instructions for Using Past Performance in Screening Information Request (SIR),” makes plain that past performance information having no connection with (nexus) or bearing upon the specific type of contract being contemplated should not be included or considered in any evaluation of an offeror's past performance:

Key to the successful use of past performance, and any factor, in the screening process is the establishment of a clear relationship between the statement of work (SOW), the instructions to offerors, and the evaluation criteria. Past performance information that is not important to the current acquisition should not be included. Therefore, the factors chosen for evaluation should be *directly related to the requirements in the SOW*. They should be reasonable, logical, and coherent. For instance there would be no point in considering poor subcontract management if there were no subcontract management needed on the contract. (emphasis added).

## **A. Nature of the ADL Contract**

The ADL Contract is a Time and Materials (“T&M”) contract. A T&M contract acquires “services on the basis of direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and materials at cost.” *See* Findings 3 – 6; AMS Procurement Toolbox, T.3.2.4. A T&M contract is a hybrid of two contract types -- predominantly fixed price in terms of labor hours, with a small cost-reimbursement component with regard to material costs. Under the subject SIR, offerors bid fully burdened labor rates based on Government estimates, but did not provide any specific G&A to be applied to Other Direct Costs (“ODCs”). Rather, ODCs were subject to the lump sum “Not-to-Exceed” figures provided by the SIR. Finding 4. The contractor was to be compensated for actual ODC costs, based on submitted invoices, plus a mark-up for actual G&A costs derived based on the contractor’s “usual accounting practices.” AR, Tab 5, page 38, Section G.10(b)(1).

The two contract types embodied in the SIR for the ADL Contract are distinct from one another in terms of (1) associated cost risks and (2) significance to the overall contract. The fixed price labor hour portion of the contract constitutes the overwhelming bulk of the contract requirements. The cost performance risk directly related to the labor hour portion of the ADL Contract is that the contractor will fail to perform designated tasks under the SOW within the labor hours estimated for the completion of a particular task, thereby increasing costs. Other performance risks directly relating to the labor hour requirements of the SOW, *e.g.*, technical capabilities and ability perform on schedule, were to have been addressed under the two other past performance sub-categories, namely “Technical Performance” and “Schedule Performance.” *See* Finding 10. ISN was not given a “fail” rating in either of those two past performance sub-categories.

The cost performance risk for the ODC cost-reimbursement component of the ADL Contract is strictly associated with issues of the reliability of a contractor’s “usual accounting practices” in the generation of its G&A rate. If a contractor’s accounting practices are deemed to be unreliable, then the G&A rate derived therefrom could be

determined to be a cost performance risk factor, *i.e.*, a risk that the contractor would attempt to recover additional unallowable G&A costs from the FAA.

Under the ADL Contract, the cost risk associated with the G&A rate is miniscule, when compared to the overall contract value. Of the ADL Contract's awarded price of approximately \$102 million, 93.1% consists of labor hour costs and only 6.9% consists of ODCs. The G&A associated with ODCs is a relatively small percentage of that 6.9%, and the amount of any G&A overrun for ODCs would likely be an even smaller figure.<sup>15</sup>[15] In the ODRA's view, any cost risks relating to unanticipated cost growth associated with an offeror's G&A expenses on the ADL contract would be so insignificant, given the nature of the ADL Contract, that they could not provide a rational basis, in and of themselves, for a "Fail" rating for past cost performance and rejection from the competition.<sup>16</sup>[16]

## **B. Analysis of the Factors Considered**

As noted above, the evaluation team highlighted three particular factors as having been sufficient, in the Team's view, to justify a "Fail" rating for ISN's past cost performance. Four other factors were lumped into a background category of factors creating a "pattern of high risk." These seven factors are analyzed in the following sections, using the evaluation criteria of the SIR. Thus, we will determine whether each of these factors relates to matters relevant to cost performance evaluation for the ADL Contract, *i.e.*, matters that: (1) have occurred within the last three years; (2) pertain to cost increases or decreases (3) relate to costs within the responsibility of the offeror; and (4) reflect

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<sup>15</sup>[15] G&A expense is a category of indirect expenses, consisting of costs associated with a company's general and executive offices; executive compensation; the costs of professional services such as legal, accounting, public relations, financial, and similar expenses; and other miscellaneous expenses related to the overall business. Armed Services Pricing Manual (ASPM) vol. 1, app. B.

<sup>16</sup>[16] In contrast, if the subject evaluation criteria was applied to a Cost-Plus-Fixed-Fee contract, such cost risks would pose a legitimate concern.

"deficiencies" in performance that are directly related to the requirements in the ADL Contract's SOW.

***1. COMTAC***

a. The Product Team's Position

With regard to the COMTAC claim and settlement, the Product Team asserts:

[The past performance Group Leader] found out that ISN had received award of the COMTAC contract based at least in part through offering FAA a "special" rate for G& A, which was not an allowable accounting practice (Group Leader Declaration, Par. 14). ISN apparently never intended to perform for the "special" rate on the COMTAC contract since it came in later for a claim which covered back to the inception of its contract performance (Group Leader Declaration, par. 14). ISN, in its proposal on the ADL effort, again offered FAA a "special" rate (ISN Cost Proposal, page 54). This rate was below DCAA approved rates, according to its own proposal (ISN Cost Proposal at p. 54). FAA questions whether ISN intended to perform for its "special" rate on the ADL effort, given its unwillingness to do so on the COMTAC contract.

Product Team Reply, page 8.

The Product Team further states:

Evaluator C was concerned that ISN, even in its rebuttal, blamed DCAA for the cost increase on COMTAC. (Evaluator C deposition, pages 27 and 30). ISN claimed in its rebuttal that DCAA "directed" it to adjust its rate. (Agency File, Tab 19) Evaluator C rejected this characterization of the issue. Evaluator C states that "I was very concerned that ISN characterized that DCAA directed a rate adjustment when it was my understanding that DCAA can only recommend rate adjustments and not direct." (Evaluator C Deposition at page 27.) Evaluator C also stated in his score sheet that he believed the actions of ISN on the COMTAC contract to constitute a high risk for the FAA. The Group Report on Past Performance also lists COMTAC as a risk. (Group Report, attached, at page 5.) All the evaluators agreed that ISN had used an inappropriate accounting practice since all read and accepted the Group Report. (Evaluator C Deposition at page 45; Evaluator B Deposition at page 40;

Evaluator A deposition at page 40). Thus, the evaluators found the ISN practices on COMTAC to be material and have a very real correlation as to how ISN would perform on ADL.

Since ISN did not perform with the “special” rate it bid on COMTAC, FAA fairly concluded there was a risk that ISN might not perform for the “special” rate on ADL. The performance risk is greater under ADL for ISN. While ISN could “get well” under COMTAC and keep personnel, it could not “get well” under ADL, because most of ADL consists of fully burdened labor rates with the exception of material and travel CLINS. Without the ability to “get well” on the fixed portion, FAA validly believed there was a significant performance risk.

Product Team Reply, page 4.

b. ISN’s Position

In its Comments, ISN notes that COMTAC was a CPFF contract and further notes that the \$1.6 million G&A adjustment amounted to approximately two percent of the total contract cost for the COMTAC contract.<sup>17</sup>[17] The claim settlement and resulting bilateral modification, ISN posits, would have no application or relevance to its prospective cost performance under the ADL Contract, a T&M contract. ISN states further that, under the instant ADL Contract, both the labor rates and those for material and travel cost items were to be agreed upon and fixed, as were the associated G & A rates.

c. ODRA’s Analysis

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<sup>17</sup>[17] ISN’s initial protest alleges that the settlement of its G&A billing rate claim on the COMTAC contract created “ill will” at the FAA towards ISN and resulted in a prejudicial attitude in the evaluation of its proposal. To the extent that ISN alleges bias or bad faith on the part of FAA officials, the record does not provide the “well nigh irrefragable proof” required to overcome the presumption that public officials act conscientiously and in good faith. See *Camber, supra*, citing *Protest of J. Schouten Construction, Inc.*, 98-ODRA-00064; *Protest of DCT, Inc.*, 96-ODRA-00015; *Protest of JO-JA Construction Limited*, 97-ODRA-00024; *Protest of NanTom Services, Incorporated*, 97-ODRA-00030; *Weather Data Services*, 96-ODRA-00010.

The COMTAC information was clearly derived from events that occurred within the last three years. The record in this case reflects that for COMTAC, ISN proposed a Division-based G&A rate, *i.e.*, one formulated for an ISN Division, as opposed to an ISN company-wide G&A rate. As indicated in ISN's COMTAC proposal, the Division rate represented a departure from ISN's standard treatment of G&A -- which was to use a single company-wide G&A rate. The Division rate -- touted as a "special" rate -- was substantially lower than ISN's company-wide rate and was derived by removing from the Division G&A cost pool a number of costs that ISN proposed to charge as direct costs on the COMTAC contract (rather than as indirect, G&A, costs). AR, Tab 20 (Bates Stamp 101038 – 101044). The documentation supporting ISN's December 10, 1996 COMTAC claim confirms that the claim arose from an accounting change to comply with a DCAA recommendation that ISN utilize its standard single (ISN company-wide) G&A rate. AR, Attachment 1 (Bates stamp 101106). The result of this change was that certain costs, which were bid under COMTAC as direct costs, were effectively *reclassified* as indirect costs, and were subject to a contract indirect cost ceiling, above which ISN could not be reimbursed. ISN therefore could only recover the costs through the vehicle of its claim.

The evaluation team's concern with COMTAC legitimately arose from issues concerning the reliability of its "usual accounting practices." As discussed above, the cost risk associated with this concern is that an improper G&A rate applied to ODCs could result in an attempt by ISN to recover additional unanticipated G&A costs, similar to the situation in COMTAC. Even so, when viewed in the context of the ADL Contract as a whole, the risk of increased costs due to an increase in the G&A rate is not significant. For this reason, this information does not provide a rational basis to fail ISN on past cost performance.

## 2. *401(k) Pension Issue*

### a. The Product Team's Position

The Product Team provides the following rationale for considering information on the 401(k) pension issue as sufficient to justify a “Fail” rating for past cost performance:

ISN cannot claim ignorance of the fact that it has experienced problems within the last three years fully funding its pension (Group Leader Declaration, pars. 18 - 20). Retention of Key personnel is FAA’s concern. Group Leader declaration, par. 19. No employee wants to work for a company who is not fully funding the pension fund. Problems with ISN’s pension fund are ongoing. According to the DOL letter of September 21, 1998 to the Group Leader, “This office is investigating the activities of the fiduciaries of the Pension Plan. Several allegations, including the plan sponsor’s failure to make mandatory employer contributions, are under review.” . . . . The Group Leader lists a number of reasons that give FAA cause for concern, including the prospect that additional penalties may be assessed if corrective measures are not satisfactorily implemented, DOL might have to remove the present fiduciary who is ISN’s president and that IRS could intervene and revoke the plan if the inappropriate practices continue (Group Leader Declaration at par. 19).

AR, pages 8 – 9.

b. ISN’s Position

With regard to the 401(k) Pension information, ISN claims that the FAA irrationally considered the payment of \$24,000 pursuant to a settlement agreement with DoL; and that such a payment would not cause any cost increases or overruns to any current or previous contracts within the stated three year evaluation period. ISN also asserts that this issue concerns ISN employee money rather than government money.

ISN further argues that the FAA fails to understand the issues underlying ISN’s dispute with the DoL. Specifically, ISN explains that the dispute involved a claim for interest on delinquent payments to employee 401(k) plans; not that ISN failed to make contributions to the employee 401(k) plans. ISN asserts that its failure to pay the required rate of interest on delinquent employee contributions would not impact its ability to retain key

personnel. As a factual matter, ISN argues that during DoL’s audit of the 401(k) Plan, ISN received exemplary performance reviews on the COMTAC contract and no key personnel were lost; nor did any personnel leave over the “pension fund problem.” Comments, pages 12 and 13. This contention is not disputed by the Product Team.

c. ODRA’s Analysis

The information regarding ISN's 401(k) Pension funding delinquency is derived from events that occurred within the last three years. Finding 33. However, this information is not relevant in terms of the stated evaluation criteria, since it has no relationship to past cost performance that would increase the risk on the ADL Contract. There is no evidence that costs increased under any ISN contract as a result of the 401(k) issue. If ISN is required to pay additional penalties as a result of the DoL investigation, there is no evidence that such penalties would significantly increase costs under the ADL Contract. Furthermore, there is no evidence that DoL is actually considering removing ISN’s present fiduciary; nor is there any evidence that the IRS is actually considering revoking its approval of the ISN 401(k) plan based on this prior instance of funding delinquency. There is no substantial evidence that would support concerns regarding cost performance risk to the ADL Contract. For these reasons, the ODRA believes that the evaluation team’s use of the 401(k) pension information did not comply with the stated criteria for past cost performance evaluation.

**3. *State Tax Issue***

ISN alleges that the FAA irrationally considered as part of the past cost performance evaluation a determination by the DCAA to “disallow” and exclude certain state income taxes from ISN’s G&A cost pool. That determination was made more than 10 years ago and is currently under litigation. ISN claims that the Product Team has failed to establish

a nexus between ISN's treatment of state taxes in its G&A pool and the evaluation of "past cost performance" for purposes of the instant procurement. Comments, page 22.

Although the state tax matter culminated in a final decision dated April 16, 1998, it specifically relates to contract performance during 1985 and 1986. Nevertheless, the evaluation team maintains that this information would still qualify for consideration under the SIR's past cost performance criteria because it believes that ISN's practice of including state tax in its overhead has not changed as of 1995, *i.e.* within the SIR's three year timeframe. Declaration of the Group Leader, page 11 – 12. In the ODRA's view, even if ISN still includes state income tax payments as part of its G&A cost pool and even if such inclusion were ultimately held improper, for the same reasons set forth above in the discussion of G&A costs relating to COMTAC, this information about state taxes does not provide a rational basis to fail ISN on past cost performance in the context of the instant procurement.

#### **4. Secondary Factors: The "Environment of Concern"**

Finally, the evaluation report cites a group of background past cost performance items that in the Team's view created an "environment of concern." These items include:

- The False Claims Act Case;
- ASBCA Case No. 47849 (Executive Compensation);
- Delays in payment; and
- Timekeeping system practices.

The False Claims Act case and Executive Compensation case both involve performance deficiencies outside the specified 3 year period and thus cannot, under the express terms

of the SIR, be considered. The False Claims Act deficiencies occurred in 1988; while the ASBCA case involved the disallowance from overhead excess compensation paid to ISN's executives during the period of 1985 through 1991.<sup>18[18]</sup> The delays in payment do not reflect a deficiency in performance that poses a cost performance risk to the ADL Contract.

The fourth of these secondary "background" factors does seem to meet all of the requirements of the SIR criteria for cost performance evaluation. More specifically, the ISN timekeeping system deficiency (1) occurred within the last three years; (2) pertains to a risk of potential cost increase under the ADL Contract; (3) relates to costs within the responsibility of the ISN; and (4) reflects potential deficiencies in performance which *directly relate* to requirements of the SOW, *i.e.*, whether ISN will be able to perform tasks within the hours estimated for those task. The ADL Contract SOW requires the contractor to maintain daily work records. These records are used to monitor contractor performance and to provide a basis for payment. *See* AR, Tab 5, Section G.8, page 36. Thus, any past performance deficiencies concerning the manner in which ISN maintains its work records can be properly considered in performing a past cost performance evaluation under the terms of the SIR.

There is insufficient evidence in the present record to allow the ODRA to determine whether the timekeeping system deficiency, standing alone, is a deficiency that increases the risk of failure in performance of the ADL Support Services contract such that the evaluation team would have failed ISN on past cost performance, disqualifying it from the competition. We note that ISN claims to have corrected the timekeeping problem, AR, Tab 16 (Bates stamp 101029 – 101037); Tab 28 (Bates stamp 101200 – 101202), and the Product Team has provided no refutation of that claim.

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<sup>18[18]</sup> Moreover, to the extent that the evaluation team believes that such practices continue to the present, this information pertains to the reliability of ISN's "usual accounting practices." For the reasons stated in the earlier discussion herein related to G&A as applied to ODCs, this concern does not pose a significant cost risk with respect to the ADL Contract as a whole.

#### **IV. The Appropriate Remedy**

The AMS 3.9.3.2.3.4 conveys to the ODRA “broad discretion” to recommend remedies for both protests and contract disputes:

The Dispute Resolution Officer or Special Master, where applicable, has broad discretion to recommend a remedy for a successful protest or contract dispute, that is consistent with the FAA’s Acquisition Management System and applicable statutes. The Administrator has final authority to impose a remedy.

The ODRA recommends that the evaluation team be directed to reconsider promptly its past cost performance evaluation, in light of these findings and recommendation. In deciding this question, the evaluation team should determine (1) whether the timekeeping system deficiency has been adequately corrected to the Team’s satisfaction, and (2) whether or not corrected,<sup>19[19]</sup> such a deficiency continues to pose a “risk of performance failure” within the meaning of the SIR evaluation criteria for past cost performance for the ADL Contract. The result of this limited re-evaluation would be reported back to the ODRA for consideration of any necessary further proceedings or remedy.

Inasmuch as the possibility remains that the current contract with UNITECH could be terminated for convenience, depending on the final outcome of the disputes related to the ADL procurement, the ODRA recommends to the Product Team that the voluntary suspension be continued.

#### **V. CONCLUSION AND RECOMMENDATION**

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<sup>19[19]</sup> The ODRA does not intend to suggest that any such correction vitiates the past cost performance deficiency or proscribes consideration of it by the evaluation team.

For the reasons set forth above, the ODRA finds merit in the protest allegation that the evaluation was not conducted in accordance with the stated evaluation criteria. On that basis, the ODRA recommends that the Administrator sustain the protest and direct the Product Team to reconvene the evaluation team for the purpose of re-evaluating past cost performance, in accordance with the guidance outlined above.

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Marie A. Collins

Dispute Resolution Officer

For the Office of Dispute Resolution for Acquisition

APPROVED:

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Anthony N. Palladino

Associate Chief Counsel and Director,

Office of Dispute Resolution for Acquisition

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