

PUBLIC VERSION

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

FINDINGS AND RECOMMENDATION

Matter: Protest of Optical Scientific, Inc.
Pursuant to Solicitation No. DTFAAC-05-R-02321
Docket No.: 06-ODRA-00374

Appearances:

For the Protester: Donald A. Williams

For the Agency: Linda M. Modestino, Esq.
Counsel for the FAA's Mike Monroney Aeronautical Center

For the Intervenor: Vaisala, Inc. Steve J. Callahan

I. INTRODUCTION

On July 6, 2006, Optical Scientific Inc. ("OSI") filed the above-captioned bid protest ("Current Protest") at the Federal Aviation Administration's ("FAA") Office of Dispute Resolution for Acquisition ("ODRA"). The Current Protest challenges the Mike Monroney Aeronautical Center's ("Center") selection of Vaisala Inc. ("Vaisala") to supply between 60 and 208 Automated Weather Observation (AWOS) Visibility Sensors pursuant to a 1-year contract. The Current Protest is the second filed by OSI involving this requirement. The first Protest ("Original Protest") challenged the Center's best value analysis, including the underlying technical and price evaluations. In a decision issued on May 4, 2006, the ODRA sustained OSI's Original Protest and directed the Center to perform a reevaluation of the proposals, and to report the outcome to the ODRA. *See Protest of Optical Scientific, Inc.*, 06-ODRA-00365 at 24-25.

In a Report that was submitted to the ODRA on June 20, 2006, the Center advised the ODRA that it had completed the reevaluation effort, which had again resulted in the

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selection of Vaisala for contract award. By letter dated June 22, 2006, the ODRA asked the Center to: (1) advise whether the parties had been notified of the reevaluation outcome; (2) explain its interpretation of the Buy American Act relative to this procurement; (3) explain a “discrepancy” in the Center’s submitted award documentation—which was confirmed by the Center to be a transcription error; and (4) provide a copy of the technical scores that were assigned to OSI’s proposal. On June 28, 2006, the Center submitted a Supplemental Report which responded to the ODRA’s questions, and included copies of the Center’s “Technical Evaluation Summary Report” and its “Award Decision” document. *See Center Supplemental Summary Report, Enclosure Nos. 2 and 3.*

In the Current Protest, OSI challenges several of the Center’s reevaluation conclusions and its best value analysis. OSI also contends that the selection of Vaisala for contract award violates the Buy American Act (“the Act”)—which generally requires that only American or “domestic” articles, materials and supplies be purchased by federal agencies. 41 U.S.C. § 10a *et seq.* In this regard, it is undisputed that Vaisala’s proposed sensor is a foreign product which originates in Finland.¹

On July 19, 2006, at the direction of the ODRA, the Center filed a brief and response (“Center Response”) in which it responded primarily to OSI’s allegation that the Center’s selection of Vaisala’s offer violated the Act.² In its June 28, 2006 Supplemental Report, the Center had initially asserted that it was not required to calculate and apply a price reasonableness differential to justify its selection of Vaisala’s proposed foreign sensor because the Acquisition Management System (“AMS”) Toolbox Procurement Guidance (“Toolbox Guidance”) does not require this determination unless the price of a competing domestic offer exceeds the price of the low foreign offer. *See Center Supplemental Report, Enclosure No. 3.* Notwithstanding this position, the subsequently filed Center

¹ Under the Act, as implemented by Executive Order 10582, any offered article, material, supply or end-product that is either manufactured outside the United States, or which is manufactured in the United States but contains foreign components comprising 50 percent or more of the total cost is considered to be of “foreign” origin. *Id.* The Executive Order is set forth at 19 Fed. Reg. 8,723 (Dec. 17, 1954); *see also Description of Executive Order 10582*, 20 C.F.R. § 654.12,

² The Center subsequently clarified that the Center Response also was intended to be its substantive Agency Response to the merits of the Protest.

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Response further advised that the Center had voluntarily implemented corrective action in response to the Current Protest's identified Buy American Act compliance concerns by performing the previously omitted price reasonableness determination. In light of this action, during a status conference with the parties the ODRA confirmed that, in its view, this Buy American Act ground of OSI's Protest had been rendered moot by the Center's decision to voluntarily perform the required price differential analysis. *See Status Conference Memorandum* dated July 22, 2006.

With respect to the remainder of OSI's Protest grounds, for the reasons set forth herein, the ODRA finds that: (1) the Protester has failed to meet its burden of establishing that the Program Office's reevaluation and selection of Vaisala, Inc. for contract award lacked a rational basis, was arbitrary and capricious or otherwise constituted an abuse of discretion; and (2) several of OSI's allegations are untimely. The ODRA therefore recommends that the Current Protest be dismissed part and denied in part.

II. FINDINGS OF FACT

1. As an initial matter, to avoid unnecessary repetition the ODRA hereby incorporates the Findings of Fact set forth in the May 4, 2006 Decision on the Original Protest ("Original Protest Decision"). *See Protest of Optical Scientific, Inc.*, 06-ODRA-00365, *Findings of Fact Nos. 1-65*, at pp. 2 – 18.
2. The underlying SIR required offerors to propose a "commercial-the-shelf (COTS) or non-developmental item (NDI)" sensor comprised of "commercially available components," and contemplated the award of this requirement to the "best value" proposal, with "technical" merit being of "paramount importance" to the SIR's "price/cost and past performance factors." *See Original Protest Decision, supra, Findings of Fact No. 3* and 5 at 2-3.
3. There were sixteen mandatory "technical requirements" identified in the SIR that were to "be used for the procurement of the AWOS Visibility Sensor(s)."

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Id., Finding of Fact No. 6 at 4. The SIR also directed each offeror to submit a “Specification Compliance Matrix” identifying how its proposed visibility sensor met the SIR’s “Critical Specifications” including the following sensor requirements:

- A visibility range of “50 feet or less up to greater than 10 miles”
- Accuracy: +/- 15% over the entire visibility range
- Present Weather Capable: rain, drizzle, snow, hail, ice pellets, mix of rain and snow, fog, mist, haze, and clear detection.

Id., Finding of Fact No. 7 at 5.

4. The SIR also instructed offerors that:

[T]he technical proposal must be sufficiently detailed to enable technically oriented personnel to make a thorough evaluation and to arrive at a sound determination as to whether the proposed supplies/services meet the requirements [t]he technical proposal must be specific, detailed, and complete to clearly and fully demonstrate that the offeror has a thorough understanding of the requirements for, and the technical problems inherent in, providing supplies/services of the scope outlined in the AWOS Visibility Sensor Product Description/Specifications.

Id., Finding of Fact No. 9 at 6.

5. As indicated above, the ODRA sustained OSI’s Original Protest and directed the Center to reevaluate the OSI and Vaisala proposals. *Original Protest Decision* at 25. The Center Response reports that it fully complied with the ODRA’s instructions, and advises that:

[t]hat is exactly what was done, using different evaluators, different [Contracting Officer], and much more scrutiny by both the [Center’s] program office and the contract management officials.

See Center Response, Legal Brief at 6.

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6. The following table summarizes the total number of evaluation points that were available for each of the SIR’s specified technical factors and subfactors, and also shows the scores that the reevaluation team assigned to the OSI and Vaisala technical proposals. *See Center Supplemental Report, Enclosure No. 4, Technical Evaluation Summary Report at 1.*

Final Reevaluation Scores

Factors	Description	Available	OSI	Vaisala
1	Critical Specifications	[Deleted]	[Del.]	[Deleted]
2	Visibility Sensor Engineering	[Deleted]	[Del.]	[Deleted]
	Sensor Specifications	[Deleted]	[Del.]	[Deleted]
	Risk Management	[Deleted]	[Del.]	[Deleted]
	Reliability and Maintainability	[Deleted]	[Del.]	[Deleted]
	Human Factors	[Deleted]	[Del.]	[Deleted]
	Servicing and Maintenance	[Deleted]	[Del.]	[Deleted]
3	Visibility Sensor Configuration	[Deleted]	[Del.]	[Deleted]
	Mounting Hardware	[Deleted]	[Del.]	[Deleted]
	Present Weather Requirement	[Deleted]	[Del.]	[Deleted]
	Sensor Power Requirement	[Deleted]	[Del.]	[Deleted]
	Sensor Weight and Space Requirement	[Deleted]	[Del.]	[Deleted]
4	Visibility Sensor Performance	[Deleted]	[Del.]	[Deleted]
5	Visibility Sensor Documentation	[Deleted]	[Del.]	[Deleted]
6	Program Management	[Deleted]	[Del.]	[Deleted]
7	Configuration Management	[Deleted]	[Del.]	[Deleted]
8	Integrated Logistics Support	[Deleted]	[Del.]	[Deleted]
	TOTAL SCORE		[Del.]	[Deleted]

7. In comparison to the evaluation that was the subject of the Original Protest (“Original Evaluation,” *see Original Protest Decision, Finding No. 39 at 17*), the record shows that the reevaluation team awarded [DELETED] scores to OSI’s proposal for the SIR’s first two technical factors (Critical Specifications and Visibility Sensor Engineering), [DELETED] score under the Visibility Sensor Documentation technical factor, and [DELETED] scores for the

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remaining five technical factors. *Compare Finding No. 39, Decision on Original Protest at 9 with Center Supplemental Report, Enclosure No. 4, Technical Evaluation Summary Report at 1.* OSI's final technical score following the reevaluation was [DELETED] points [DELETED] the score awarded by the Original Evaluation. *Id.* This final point score of [DELETED] translated to a [DELETED] technical rating for the OSI proposal. *Id.*

8. A comparison of the Vaisala Original Evaluation results with those of the reevaluation above shows that the reevaluation team awarded the Vaisala proposal [DELETED] point scores for two technical evaluation factors (Visibility Sensor Documentation and Configuration Management), and [DELETED] point scores for the remaining six technical evaluation factors. Following reevaluation, Vaisala's total number of awarded points decreased to [DELETED]. *Id.* This final awarded score of [DELETED] points translated to [DELETED] technical rating for Vaisala's proposal.³
9. The Center reevaluation team found the following technical weakness in OSI's proposal. First, while the solicitation had specified that "the visibility sensor accuracy shall be \pm 15 percent or better *over the entire range*," (emphasis added), the reevaluation team determined that [DELETED]
[DELETED] *Id.*, at 2.
10. The reevaluation team also determined that OSI's proposed technical approach was less desirable than the Vaisala approach because [DELETED]." *Id.* In addition, the reevaluation team concluded that [DELETED]." *See Center Supplemental Report, Enclosure No. 2, Technical Evaluation Summary Report* dated June 15, 2006, at 2.
11. OSI's technical proposal was [DELETED]
[DELETED]. *Id.*

³ The SIR's technical ratings are set forth at *Finding No. 13* of the Original Protest Decision. *See Original Protest Decision* at 8.

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12. In addition, the reevaluation team downgraded OSI under the SIR’s preventive maintenance technical factor because of [DELETED]

[DELETED]

Id. While one statement in the OSI proposal advised that its sensor was designed to [DELETED] another section specified that [DELETED]. *Id.* In reporting this particular weakness, the team noted that had OSI submitted a [DELETED] *Id.* However, even if clearly presented, the reevaluation team advised that [DELETED]—an approach not contemplated by OSI’s proposal. *Id.*

13. The reevaluation team also found OSI’s description of the sensor’s [DELETED].” *Id.*

14. Finally, although OSI’s proposal claimed that its offered sensor was equipped with [DELETED] the reevaluation team found “no supporting evidence” in OSI’s proposal for this feature. Specifically, while OSI’s proposal demonstrated that its [DELETED]

In this regard, the relevant section of OSI’s proposal advised:

[DELETED]

Id., at 4.

This reference, combined with the [DELETED] for the current sensor caused the reevaluation team to conclude that [DELETED]. *Id.* at 4 and 5.

15. The Center reports that Vaisala’s proposal was “determined to be the most advantageous offer . . . represent[ing] the best value to the FAA based on the following: (1) “Vaisala’s technical rating of [DELETED] to a rating of [DELETED] . . . and OSI’s technical score [DELETED];” (2) “Vaisala’s past performance rating was [DELETED] OSI’s was [DELETED];” (3) “Vaisala’s

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offer was [DELETED].” *See Center Supplemental Report, Enclosure No. 2, Technical Evaluation Report* at 4.

16. Following the Current Protest, the Center internally reviewed its price evaluation and selection decision and reported the results of this analysis to the ODRA. *See Center Response, Legal Brief* at 3-5. After applying a Buy American Act price premium of twelve percent to Vaisala’s [DELETED] price, the Center concluded that Vaisala’s superior technical merit warrants its [DELETED]—and that OSI’s [DELETED] rated technical proposal does not change its selection of Vaisala to perform this requirement. *Id.*

III. DISCUSSION

A. The Buy American Act Issue⁴

The Buy American Act was enacted in 1933, during the Great Depression, and was intended to foster and protect American industry, workers and capital through the establishment of its statutory preference for American or “domestic” materials and goods.⁵ *See* 41 U.S.C. §§ 10a, 10b, 10c and 10d. Where competing domestic and foreign offers are received in response to a solicitation, the Act—as implemented by the Executive Order—generally bars the procuring agency from selecting a foreign offer. *See John C. Grimberg Co., Inc. v. United States*, 869 F.2d 1475 (1989). However, there are two statutory exceptions specified in the Act which authorize the purchase of items or products of foreign origin. *Id.* The first statutory exception can be invoked by an agency head where it is determined that waiver of the domestic preference is in the public interest. *See* 41 U.S.C. § 10a; *see also Executive Order No. 10582, supra*, § 2(b). The second statutory exception—which is the subject of the Protest—is permitted where the agency head determines that the cost or price of the low domestic item or product is

⁴ Although, as noted above, the Buy American Act issue of the Protest has been rendered moot by voluntary corrective action, in the interest of clarifying the AMS guidance on the subject, the ODRA briefly discusses the issue in this section.

⁵The Act only applies to federal supply and construction procurements. 10 U.S.C. §§ 10a-10b.

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unreasonable in cost. *See* 41 U.S.C. § 10a; *see also* *Executive Order No. 10582*, *supra*, § 2(c).⁶

In this case, the record shows—and the Center readily admits—that it did not perform the price reasonableness determination required by Executive Order No. 10582 in its reevaluation. The Center has explained that it did not initially perform this analysis because the plain language of the current Toolbox Guidance does not require the Center to “determine the offered price of a domestic product to be unreasonable unless the lowest acceptable domestic offer exceeds the lowest acceptable foreign offer” by a minimum mandatory percentage of “more than 6 percent” where the domestic offer is from a large business, or “more than 12 percent” if the domestic offer is from a small business. *See Toolbox Guidance, Foreign Acquisition*, § T.3.6.4, ¶ 1(d)(1). The Center also reports that based on the same section of the Toolbox Guidance, it concluded that the instructions therein only applied to procurements with similar competitive rankings and evaluations. *See Center Response, Legal Brief* at 3. In short, the Center advises that based on the terms set forth in the Toolbox Guidance, it was not apparent to the Center until after the Current Protest adjudication had begun that it was required to perform the price differential analysis regardless of whether the price of the tendered foreign product was higher than the domestic offer price.

The “Buy American Act—Supply” section of the Toolbox Guidance which the Center relied upon provides in relevant part:

Evaluating Offers.

- (1) The CO *may determine* the offered price of a domestic product to be *unreasonable when the lowest acceptable domestic offer exceeds the lowest acceptable foreign offer*, inclusive of duty, by:
 - (a) More than 6 percent, if the domestic offer is from a large business; or

⁶ The Act also exempts a procurement from the Act where the end product or component is not reasonably available in commercial quantities and of satisfactory quality. *See* 41 U.S.C. § 10a.

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- (b) More than 12 percent, if the domestic offer is from a small business concern.

(Emphasis added.) *See Toolbox Guidance*, § T.3.6.4 at ¶ 1(d)(1).

It is undisputed by the parties that both the Act—and its implementing Executive Order—apply to this procurement. In this regard, the AMS expressly states that “the FAA will follow” the Act, *see AMS* § 3.6.4, and the Toolbox Guidance similarly specifies that the FAA “is subject to” both the Act and Executive Order No. 10582. *See Toolbox Guidance*, § T.3.6.4.

Consistent with the Act’s underlying purpose, Executive Order No. 10582 was issued to revise, “supply definition,” and “prescribe uniform procedures” to implement the otherwise undefined requirements of the Buy American Act. The Order sets forth more precise definitions and criteria that were designed to facilitate and ensure the Act’s uniform implementation and administration by executive agencies. *See Allis-Chalmers Corporation v. Friedkin*, 481 F. Supp. 1256 (1980).

With respect to the Act’s second statutory exception at issue in the Current Protest, the Executive Order established two “pricing formulas” for calculating a “fixe[d] percent differential” that must be used by the contracting agency as the “criterion for determining unreasonable cost—unless the agency head has established a third “greater” differential. *See John C. Grimberg Co. v. United States, supra*. In this regard, even though the price differential is to be used by a contracting agency to determine whether a procurement qualifies for the second statutory “exception” to the Act’s Buy American restrictions, it is well established that the Act’s price differential calculation and price reasonableness analysis are mandatory precursors to any further proposal consideration or evaluation — and that this precursor is automatically triggered whenever a foreign offer and a domestic offer are submitted for a competitive federal contract. *Id; Allis-Chalmers Corporation, supra*.

This point was first emphasized in *Bell Helicopter Textron*, 59 Comp. Gen. 158 (1979), in which the Comptroller General of the United States first offered an “analysis” of the

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Act in order to assist the procurement community with applying the Act's price differential requirement. See *Allis Chalmers Corp. v. Friedkin*, 481 F.Supp. 1256 (1980).⁷ As explained in *Bell Helicopter*, "the reasonableness of a domestic product cost" is to be "determined by comparing it with the foreign product after the addition of a differential" to the foreign offer price; where price and technical merit are to be evaluated, the Act's differential must be added "to the price portion" of the foreign offer so that the "the total proposal" can be evaluated "on the basis of the price as thus adjusted." Affirmed in *Textron, Inc., Bell Helicopter Textron Division*, 493 F.Supp. 824 (1980). The application of the Act's required price differential as a supplemental pricing variable that must be added to the foreign offer's total price, has best been described as being akin to a "super tariff imposed on foreign manufacturers seeking to do business with the American government." *John C. Grimberg Co., Inc., supra*. Thus, unless no competing foreign offer is submitted, the Act's price differential calculation and price reasonableness analysis are mandatory in the absence of an applicable statutory exception.

Under AMS § 3.9.4, the ODRA is vested with discretion to recommend changes to the FAA acquisition system "based on matters brought before the office." For the reasons discussed above, the ODRA agrees with the Center's conclusion that the current version of the Toolbox Guidance's "*Buy American Act—Supply*" Section is unclear in that it fails to advise that the Act's price differential calculation and price reasonableness determination are mandatory in circumstances such as these where foreign and domestic offer are submitted for a competitive procurement. The ODRA recommends that the Acquisition Systems Advisory Group initiate a change to the AMS Toolbox Guidance to clarify this point. See *Standard Operating Procedures for AMS Change Management* at <http://fast.faa.gov>.

B. The Center's Reevaluation Process and Award Decision

⁷ While not binding on the federal courts or the ODRA, case law on the Buy American Act has long recognized that "a degree of deference should be given to the GAO . . . in light of its expertise" in this procurement area. See *Textron Inc., Bell Helicopter Division of Textron, supra*; *Allis-Chalmers Corporation, supra*.

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As was noted in the May 4, 2006 Decision in OSI's Original Protest, where a contract award decision has a rational basis and is neither arbitrary, capricious, nor an abuse of discretion and is supported by substantial evidence, the ODRA will not recommend that the decision be overturned. *See Original Protest Decision, supra*, at 18. So long as the involved procurement officials and evaluation teams exercise reasonable judgments in "best value" procurements and make source selection decisions in consonance with the FAA's Acquisition Management System ("AMS") and the underlying solicitation's specified evaluation and award criteria, the ODRA will not substitute its judgment for theirs. *Id.* Where, as here, the results of a reevaluation are protested, the ODRA will not overturn the results of the reevaluation unless it lacks a rational basis or is inconsistent with the ODRA's Final Order in the Original Protest. *See Protest of Camber Corporation*, 98-ODRA-00102.

The Protester bears the burden of proof, and must demonstrate prejudice. *See Protest of Computer Associates International, Inc.*, 01-ODRA-00177. This means that in order to prevail in the Current Protest, OSI must show that but for the Center's alleged reevaluation errors, OSI's proposal would have had a substantial chance of being selected for award. *Protest of IBEX Group, Inc., supra*. Mere disagreement with the Center's judgment concerning the scoring of OSI's proposal is not sufficient to establish that the Center acted irrationally. *Id.* Moreover, it is a well established principle of procurement law that a presumption of regularity and good faith attaches to the actions of government officials, *see Protest of Maximus, Inc.*, 04-TSA-009, and retaliatory motives will not be attributed to a reevaluation effort like this one—or to the involved procurement officials—solely on the basis of inference or supposition. *See Protest of Camber Corporation*, 98-ODRA-00102.

OSI contends that the "large disparity" between the OSI and Vaisala technical reevaluation scores reflects an arbitrary and capricious review, especially since the actual technical scores awarded to OSI and Vaisala notably differ from the earlier technical evaluation results—which resulted in OSI and Vaisala being more closely scored in technical merit. According to OSI, "it is reasonable to expect the OSI technical score to increase when reevaluated;" [DELETED]—OSI posits that the reevaluation must been

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arbitrary. In addition, because the Center’s “reevaluation identified new perceived weaknesses” in OSI’s proposal which had not been previously identified during the first evaluation effort and were not communicated during the challenged reevaluation, OSI argues that the Center’s reevaluation findings lack a rational basis. *See Current Protest* at 3.

The reevaluation record is well documented and well briefed, and provides no support for any of OSI’s articulated technical challenges. The Center has advised the ODRA that consistent with the Original Protest Decision and the ODRA’s earlier call for “an independent re-evaluation of the technical proposals taking into account additional clarifying information included in the record”, the Center properly decided to convene a new team of evaluators to perform the reevaluation. *See Center Response* at 6. The ODRA’s review of the new team’s contemporaneous reevaluation record reveals detailed technical conclusions and findings that are consistent with a diligent and reasoned review—particularly as evidenced by the team’s 10-page single-spaced “Technical Evaluation Summary Report.” The Center’s separate 5-page “Award Decision Document” similarly provides a detailed, logical, and well-reasoned analysis—buttressed by four pages of detailed Attachments that set forth technical and pricing data—persuasively describing why Vaisala should be selected as the most advantageous and best value offer for this requirement.

In contrast to the well-documented reevaluation record, OSI has not offered any substantive basis, other than mere disagreement, to support its Current Protest against the reevaluation team’s well articulated technical findings. For example, while OSI’s proposed sensor was [DELETED], OSI’s only articulated basis for challenging this finding is based on the fact that the first evaluation teams apparently did not similarly question this feature of its proposal. *Current Protest* at 3.

As noted earlier, the SIR expressly directed offerors to submit “substantially detailed” proposals. *See Original Protest Decision, Finding of Fact No. 9* at 6. In addition, the SIR cautioned that “[c]lear evidence of supplies/services previously demonstrated and in place relating to the factors should be included in each evaluation area.” *See SIR* § L.3(c)(2) at 32. The SIR further emphasized that “[s]tatements that the [o]fferor . . . can

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or will comply with all . . . [s]pecifications and statements paraphrasing the requirements . . . are insufficient.” *Id.*,(c)(3) at 32. The SIR also warned that “[p]hrases such as ‘standard procedures will be employed,’ . . . will be considered insufficient.” *Id.*

As indicated by these solicitation instructions, each proposed technical feature of a proposed sensor was required to be well demonstrated in the corresponding technical proposal. Given the SIR’s clear warning that mere posturing or regurgitation of technical specifications would not be acceptable and the critical role of the sensors and their potential impact on the FAA’s safety mission, OSI should have recognized that [DELETED]. The ODRA finds no basis in the record for challenging this aspect of the reevaluation.

For similar reasons, the ODRA also rejects OSI’s contention that its proposal was improperly downgraded due to the Center’s [DELETED] regarding the electronic components required for OSI’s proposed sensor. The plain terms of the “Visibility Sensor Engineering Factor” set forth in the SIR clearly stated and required offerors to demonstrate compliance with the “Risk Management” technical subfactor because it directed offerors to “[d]escribe known risks involved with this project,” to explain “how they can be mitigated,” and to “[a]ddress any known [DELETED] regarding components of this sensor.” *See SIR* § L.3(c)(1), *Factor 2* at 29.

While the Center determined that OSI’s proposal “adequately addresses the mechanical parts issue,” the reevaluation team found that OSI’s proposal did not adequately address [DELETED]. The team reported that this lack of detail was significant since OSI’s proposal showed it would be [DELETED] for its proposed sensor’s [DELETED]. *See Center Supplemental Report, Enclosure No. 4, Technical Evaluation Summary Report* at 4. Without any “risk mitigation plan/strategy” for the electronic components, the Center properly determined that this aspect of OSI’s approach [DELETED]. *Id.*

OSI’s Current Protest disagrees with these technical conclusions—and contends instead that the evaluation is irrational because OSI has [DELETED] for “decades.” However, without more, this contention does not offer a sufficient basis for reconsidering this aspect of the reevaluation. As indicated above, the SIR expressly warned against such

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cursory promises; and, in any event, OSI's mere disagreement presents no basis for further consideration by the ODRA. *See Protest of IBEX Group, Inc., supra.*

To the extent OSI's Current Protest takes issue with the Center's conclusion that its proposal did not clearly establish [DELETED] OSI has not proffered any substantive objection or otherwise referred to any evidence in the record or its proposal that would support this contention. In this regard, while OSI maintains the SIR's 30-page limitation precluded its submission of a technical manual—a feature which the reevaluation panel reported might have been helpful in evaluating this aspect of OSI's proposal—the record reveals that in “Questions and Answers” which accompanied the SIR, offerors were given express permission to submit “any supporting documentation”—such as “test reports” or a manual—provided the submission was electronically formatted to guarantee that the submission did “not have the potential for modification.” *See SIR, Q&A, Question No. 4 at 2.* Thus, there was no bar to OSI's submission of a technical manual.

Notably, the SIR also specified that “Contractors shall propose [the] use of existing commercial manuals to the maximum extent practicable.” *See SIR, Attachment 1, ¶ 3.01, Technical Manual.* This language clearly placed OSI on notice that the submission of a supplemental technical manual would be beneficial. In this regard, the ODRA's review of the record shows that OSI's proposal was downgraded for [DELETED] not because of [DELETED]. *See Summary Technical Evaluation Report at 5.*

In conclusion, the record shows that the Center's reevaluation team identified and reasonably described several other “Primary Weaknesses” in the OSI proposal which contributed to its lower technical score but are not challenged by the Current Protest. *See Center's Technical Evaluation Summary Report, dated June 15, 2006.* For example, OSI offers no disagreement with the Center's reported concern that the [DELETED] design of OSI's sensor head was “more susceptible to snow/ice buildup,” “blowing dirt, sand” and other “foreign particulates” that can cause damage to the sensor's optic lenses. *Id.* at 2.

The overwhelming conclusion evident from the ODRA's review of this record is that the technical evaluation and scoring of OSI's proposal was rationally based. The documented rationale for both technical evaluations and the subsequent selection of

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Vaisala for award reflected detailed and reasonable deliberations. While the Current Protest suggests that the Center should have first given OSI the opportunity to address any weaknesses in its proposal via discussions, the AMS policy regarding such communications is not aimed at affording an offeror a “second bite at the apple”—*i.e.*, the opportunity to provide needed detail that is absent from a proposal. *See Protest of Ibex Group, Inc., supra* at 10. The ODRA is persuaded that the [DELETED] “Primary Weaknesses” evaluated in OSI’s proposal would have required “substantial supplementation” or “rewrite” to address the evaluation team’s concerns. Under these circumstances, the Center was under no obligation to provide OSI with another opportunity to respond to any and all shortcomings in its proposal.

C. Untimely Protest Allegations

The ODRA finds that the remaining challenges presented in OSI’s Current Protest are untimely. The challenges arise from specifications and mandatory requirements that were clearly stated in the underlying SIR. In this regard, pursuant to the ODRA Procedural Regulations at 14 C.F.R. § 17.15(a), it is well established that a protest must be timely filed in order to be considered, and that the time limits for filing protests will be strictly enforced. *See Protest of Aviation Research Group/U.S., Inc., 99-ODRA-00141*. Where, as here, a protest ground arises from a solicitation specification that is apparent prior to the time set for receipt of initial proposals, a protest involving that specification can only be considered by the ODRA if the challenge is filed prior to the proposal due date.⁸ *See Protest of PCS, 01-ODRA-00184*.

The Protest’s challenges against the remaining evaluated weaknesses also do not meet the ODRA’s timeliness requirements. For example, although the SIR specified that “the visibility sensor accuracy shall be [DELETED]—the record shows that “there were no

⁸ For protests other than those related to alleged solicitation improprieties, the ODRA Procedural Regulations require a protest to be on the later of the following two dates: (1) seven business days after the Protester knew or should have known of the basis for protest; or (2) five business days after a requested post-award debriefing has been provided by the Agency. *See 17.15(a)(3); Protest of Galaxy Scientific Corporation, 01-ODRA-00193*.

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data” in OSI’s proposal or in “any follow-up responses from OSI” demonstrating [DELETED]. (Emphasis added.) *See Original Protest Decision, Finding of Fact No. 7* at 5.

While OSI argues that demonstrating [DELETED] “irrelevant to the Federal and non-Federal AWOS systems,” this requirement—along with the admonishment for the submitted technical proposal to be “clearly detailed”—were plainly apparent from the face of the underlying SIR. Under these circumstances, OSI should have known that it was required to [DELETED]. OSI chose not to timely protest this stated SIR requirement prior to award, and this ground of its Current Protest therefore must be dismissed. *See Protest of PCS, supra.*

For the same reason, OSI’s challenge against the Center’s reevaluation of its sensor’s [DELETED] is untimely. The SIR’s “Product Description/ Specification” for the sensor clearly advised that [DELETED] (Emphasis added). *See Original Protest Decision, Finding of Fact No. 7* at 5. Although OSI’s challenge against this reevaluation finding contends that the “intent” of this specification [DELETED], *Current Protest* at 5, the plain language of the identified specification clearly [DELETED]. OSI chose to disregard this clearly labeled preference, and it cannot now argue that its proposal was improperly downgraded for proposing a different type of [DELETED]. As indicated above, the AMS timeliness rules require challenges to SIR terms to be raised prior to the submission of proposals—and this specification clearly conveyed that offers of a preferred [DELETED] configuration would be ranked higher technically. OSI chose to respond to the solicitation without timely protesting this clearly stated preference for a [DELETED] and it cannot, after award, protest the terms of the SIR. *See Protest of Galaxy Scientific Corporation, supra.*

IV. CONCLUSION

For the reasons enumerated above, the ODRA finds that OSI has failed to demonstrate that the Center’s reevaluation and award decision lacked a rational basis, were arbitrary

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and capricious or reflected an abuse of discretion; and (2) the remaining grounds of the Protest are untimely or have been rendered moot. The ODRA therefore recommends that the untimely and moot grounds of the Protest be dismissed and that the remainder of the Protest be denied.

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Behn M. Kelly
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

APPROVED:

-S-

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